State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

CONSOLIDATED

OAL DKT. NOS. ECE 05826-13, ECE 05827-13, ECE 05829-13, ECE 05833-13, ECE 05834-13, ECE 05835-13, ECE 08169-13, ECE 8170-13, ECE 09037-13, ECE 11115-13 and ECE 12451-13

AGENCY DKT. NOS.

PEA 130008-26889, 130007-28889, 130006-26889, 130005-26889, 130005-132518, 130004-26889, 130003-26889, 130002-26889, 120005-26889, 120003-26889 and 120002-26889

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

v.

STRATEGIC ENVIRONMENTAL PARTNERS, LLC, RICHARD BERNARDI, INDIVIDUALLY, MARILYN BERNARDI, INDIVIDUALLY,

Respondents.

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Robert J. Kinney, Deputy Attorney General, **Ray Lamboy**, Deputy Attorney General, **Elspeth Hans**, Deputy Attorney General, and **Matthew Orsini**, Deputy Attorney General, for petitioner (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Matthew M. Fredericks, Esq., for respondents

Record Closed: September 28, 2015 Decided: November 12, 2015

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

The New Jersey Department of Environmental Protection (DEP/Agency), through the Air Pollution Control Act (APCA), N.J.S.A. 26:2C-1, et seq., issued eleven Administrative Notice and Order of Civil Administrative Penalty Assessments (AONOCAPA) to respondents, Strategic Environmental Partners, LLC (SEP) and Richard and Marilyn Bernardi, charging that they violated the APCA and the regulations adopted to effectuate that legislation. More specifically, the DEP contended that the respondents violated the APCA at a site (named the Fenimore Landfill) in Roxbury Township, Morris County, and that the site generated about 2,500 odor complaints spanning a seven-month time frame, of which 167 complaints were verified by fourteen air inspectors.

SEP acquired the Fenimore Landfill in Roxbury Township with the purpose of redeveloping it into a solar farm. The DEP issued permits to the respondents in 2011, which authorized them to import regulated fill material in order to build up the surface areas for installation of a solar farm. Respondents agreed to use the "tipping fee" revenues from imported fill material to fund the closure, specifically agreeing to deposit the revenues into a closure fund escrow account. Richard Bernardi, allegedly SEP's "Managing Member," executed an Administrative Consent Order (ACO) on behalf of the respondents memorializing these requirements. The DEP then alleges that despite this, the respondents never deposited the fees into the escrow account; however, they

continued to accept fill material. It was later discovered that, despite representations to the contrary, Marilyn Bernardi was the sole corporate principal of respondent SEP.

Beginning in November 2012, the DEP began receiving complaints about a "rotten egg" odor in the area of the Fenimore Landfill. The odor was identified as hydrogen sulfide and its source was found to be the Fenimore Landfill.

The AONOCAPAs imposed a civil penalty of $775,000 for the violation of the APCA and $99,000 penalty for violations of the Solid Waste Management Act (SWMA), N.J.S.A. 13:1E-1 et seq. Respondents sought a hearing to challenge the findings and penalties by the DEP, determining to grant the hearing and considering the matter a contested case. The matters were transferred for a hearing to the Office of Administrative Law (OAL). An Order of Consolidation was entered on January 17, 2014, and the hearings were conducted on March 13, 23, and 30, 2015. Thereafter, the parties submitted briefs and closing arguments on or before September 28, 2015. Accordingly, the record closed on September 28, 2015.

In October 2013, the DEP propounded discovery on the respondents. I ordered on February 26, 2015, that the respondents must provide complete responses to the DEP's discovery requests by March 6, 2015. On March 6, 2015, one week prior to the scheduled hearing, the respondents asserted their Fifth Amendment right against self-incrimination and thus refused to respond to the served discovery. The raising of this Fifth Amendment right was not raised prior to this date.

On March 12, 2015, the DEP filed a motion to amend nine AONOCAPAs to include "Marilyn Bernardi" as a named respondent and to deem its Requests for Admissions admitted. On May 13, 2015, I entered an Order granting the DEP's motion to amend the AONOCAPAs and to deem the Request for Admission admitted.

At the hearings held on March 13, 23, and 30, 2015, the DEP presented testimony of eleven witnesses, including five residents from Roxbury who set forth the impact of the odors and the problems caused by the odors emanating from the

Fenimore Landfill. Respondents, on the other hand, presented no witnesses and failed to present any tangible evidence to rebut the DEP's evidence.

Standard

This case revolves around the applicability of the Solid Waste Management Act (SWMA) and the APCA. Both statutes are strict liability whereby the proscribed acts must be proven by the Agency. Dep't of Envtl. Prot. v. Harris, 214 N.J. Super. 140, 147-48 (App. Div. 1986); Dep't of Envtl. Prot. v. Leeds, 153 N.J. 272, 284 (1998). In addition, the standard of proof in this type of case is having the Agency submit a preponderance of credible evidence in support of its case. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

FINDING OF FACTS

Based upon a consideration of the testimonial and documentary evidence presented at the hearing and stipulated to by the parties and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. The Fenimore Landfill is located on approximately 101-acre parcel of land in the Township of Roxbury, New Jersey. The property is a former solid waste landfill.
2. Respondent, SEP, is the named owner of the landfill property.
3. SEP acquired the landfill property in 2011 for the purpose of redeveloping it into a solar farm.
4. Respondent, Richard Bernardi, executed a $950,000 mortgage agreement for the landfill property as the "Managing Member" of SEP.
5. SEP applied to DEP for approval of its landfill closure project.
6. Richard Bernardi presented DEP officials with business cards that identified him as the "Director" of SEP.
7. In conjunction with its application for approval of its landfill closure project, SEP submitted a financial plan to the DEP.

8. In October 2011, DEP issued a closure and post-closure plan approval to SEP.
9. In conjunction with the Closure Plan, SEP entered into an ACO with DEP in October 2011.
10. The ACO identified Richard Bernardi as the “Director and Managing Member” of SEP.
11. The ACO specifically provided that Richard Bernardi was individually liable for the first phase of the landfill closure.
12. Richard Bernardi signed the ACO in his individual capacity and as the “Director” of SEP.
13. Richard Bernardi was the person in charge of the day-to-day operations of SEP’s landfill closure project between December 2011 and June 2013.
14. The Closure Plan authorized SEP to accept approximately 360,000 cubic yards of fill materials at the landfill during the first phase of the closure project.
15. On May 20, 2012, counsel for the respondents filed a verified complaint against DEP in Superior Court, identifying Richard Bernardi as the “President” of SEP.
16. Between May 2012 and March 2013, Richard Bernardi submitted ten certifications to the Superior Court, certifying that he was the “Manager” of SEP.
17. Richard Bernardi has never been an employee, officer, member, independent contractor or consultant of SEP.
18. Richard Bernardi certified that he had no business, no job, no income, no real property, no personal property exceeding a value of $1,000 and no motor vehicle.
19. Respondent, Marilyn Bernardi, incorporated SEP and is the sole member and corporate officer of the company despite representations made previously by Richard Bernardi.
20. Marilyn Bernardi personally guaranteed the $950,000 mortgage on the Fenimore Landfill property.
21. Marilyn Bernardi authorized her spouse, Richard Bernardi, to act on behalf of SEP at all times since January 2011.
22. Marilyn Bernardi authorized Richard Bernardi to be the person in charge of the day-to-day operation of SEP’s landfill closure project between December 2011 and June 2013.

23. Marilyn Bernardi was aware that Richard Bernardi represented himself to the DEP as the “Director” of SEP.
24. Marilyn Bernardi was aware that Richard Bernardi certified to the Superior Court that he was the “Manager” of SEP.
25. Marilyn Bernardi knew the financial plan that SEP submitted to DEP failed to disclose debts that SEP owed to various parties.
26. Marilyn Bernardi knew the ACO and Closure Plan required SEP to establish an escrow account to fund the closure of the landfill.
27. Marilyn Bernardi knew the ACO and Closure Plan required SEP to deposit tipping fees into the escrow account.
28. On February 1, 2012, Marilyn Bernardi opened an escrow account by signing an escrow agreement with Wells Fargo as the “President” of SEP.
29. Marilyn Bernardi knew that SEP never made a deposit of any tipping fees to the escrow account.
30. Marilyn Bernardi concurred in the decision by Richard Bernardi, on behalf of SEP, not to make deposits of tipping fees into the escrow account.
31. Marilyn Bernardi received income as the sole member of SEP as a result of SEP’s operation at the landfill.
32. Marilyn Bernardi signed over one hundred checks on SEP’s checking account.
33. Marilyn Bernardi used SEP’s checking account to make a $275,000 contribution to her pension plan. This check written by Marilyn Bernardi was dated September 13, 2013.
34. Marilyn Bernardi knew that the Closure Plan required her company to control malodorous emissions from the Fenimore Landfill.
35. Marilyn Bernardi knew that the Fenimore Landfill was suspected of emitting hydrogen sulfide as early as mid-November 2012.
36. Marilyn Bernardi did not direct Richard Bernardi to take steps to control hydrogen sulfide emissions, or take any other effective steps to address violations from the landfill; upon learning that hydrogen sulfide was being emitted from the landfill.
37. Respondents’ Closure Plan was expressly governed by the Solid Waste Management Act (N.J.S.A. 13:1E-1 et seq.) and the corresponding regulations.

38. Leslie Bates (Bates), an environmental specialist in DEP's Bureau of Air Compliance and Enforcement with over thirteen years of experience, testified about the inspections she conducted on the landfill on June 27, 28, and 29 and July 6 and 10, 2012. Bates stated that on all these occasions, she observed trucks generating a considerable amount of dust as they entered and exited the landfill. Bates did not observe any measures being taken to control dust on any of these occasions.

39. Bates stated that she advised Richard Bernardi on June 27, 2012, that he needed to do something to address the dust. Despite this warning, the respondents failed to control the dust wafting off the Fenimore Landfill.

40. Bahram Salahi (Salahi), an inspector and interim supervisor for DEP's Bureau of Solid Waste Compliance and Enforcement with eleven years experience, testified that he conducted compliance inspections of the respondents' landfill operation in November 2012.

41. Salahi stated that, during an inspection on November 21, 2012, he observed trucks generating dust as they exited the landfill. He did not observe any measures being taken by SEP to control the dust.

42 Salahi asked Richard Bernardi about dust control measures at the landfill. Richard Bernardi replied that he used a water truck, but it was being winterized and was not on the landfill. When Salahi advised Richard Bernardi that dust control was a Closure Plan requirement, Richard Bernardi responded "So write me up."

43. Salahi also testified that he detected "rotten egg type" odors on the landfill near the office trailer. Salahi asked Richard Bernardi whether cover materials were being brought to the site. Richard Bernardi replied that he used contaminated soil for cover because clean soil was expensive.

44. Salahi testified that, during a follow-up inspection on November 23, 2012, he saw three trucks generating a "considerable amount of dust" as they left the Fenimore Landfill. The dust formed a plume approximately twenty feet high and migrated off the landfill toward residences along a neighboring road. Salahi did not see any dust-control measures being taken by the respondents.

45. Pursuant to paragraph 27 of the Closure Plan, DEP inspectors had the right to enter the landfill at any time and review all applicable records, which the respondents were required to furnish upon request.
46. Pursuant to paragraph 51 of the Closure plan, the respondents were required to maintain and make available for inspection various records related to the acceptance of approved fill materials.
47. DEP inspectors have the right to enter and inspect solid waste facilities and review records in order to ascertain compliance.
48. Rajendraku Gandhi (Gandhi), an inspector for DEP's Bureau of Solid Waste Compliance and Enforcement with thirteen years' experience, was assigned to conduct a compliance inspection of the respondents' landfill operation.
49. On December 11, 2012 Gandhi arrived at the Fenimore Landfill, introduced himself to Richard Bernardi and advised that he was conducting an inspection. After conducting a tour of the landfill, Gandhi asked Richard Bernardi for additional documentation related to approve materials. Richard Bernardi told Gandhi to leave the office. Gandhi reminded Richard Bernardi that he was obligated to cooperate with DEP and to maintain records at the facility; however, Richard Bernardi remained uncooperative and Gandhi was unable to review the documentation.
50. On December 17, 2012, Gandhi conducted a second inspection of the Fenimore Landfill, accompanied by DEP Scott Shrader (Shrader). Gandhi asked an employee of the respondents' engineering firm to provide additional documentation regarding a load of construction and demolition debris. The employee entered the trailer on the site and Richard Bernardi subsequently exited the trailer and ordered the inspectors to leave and threatened to call the police.
51. Pursuant to paragraph 12 of the Closure Plan, the respondents were required to control malodorous emissions from the landfill with cover soil applied on a daily basis.
52. Gina Lugo (Lugo), an inspector for DEP's Bureau of Solid Waste Compliance and Enforcement with eleven years of experience and the DEP's inspector with

primary responsibility for the Fenimore Landfill Facility conducted two specific inspections—one in November 2012 and one in January 2013.

53. Lugo conducted about 1,000 inspections of solid waste facilities and Lugo trains new Bureau employees and assists county health inspectors to investigate complaints of illegal dumping and other solid waste issues.

54. Lugo performed inspections and investigations at the Fenimore Landfill from late 2011 until mid-2013. During this time the respondents were accepting construction and demolition fines (C&D fines) and some other materials to cap the landfill. C&D fines are a powdery mixture of material from demolishing a home or building. The mixture is grey in color and contains bits and pieces of debris.

55. Lugo performed an inspection at the landfill on November 29, 2012, when she observed that most of the inbound trucks were loaded with C&D fines. On the landfill most of the C&D fines were not covered with soil and there was no stockpile of clean soil on site to cover the C&D fines.

56. Lugo conducted an inspection of the Fenimore Landfill on February 22, 2013, in response to odor complains verified by DEP's air investigators two days earlier. Lugo found a majority of the inbound trucks were loaded with C&D fines. Lugo smelled a "rotten egg" odor of such intensity that, if it was constant, Lugo would have wanted to get away from the smell. Lugo observed that a majority of the landfill was exposed and that the landfill side slopes were almost completely exposed. Lugo also observed that there was no soil stockpile on the site.

57. Lugo asked Richard Bernardi how SEP procured clean soil for use as daily cover at the landfill and he responded that when a job would become available, he would arrange for the soil to be delivered to the landfill. Richard Bernardi did not tell Lugo that he had a plan to make sure that soil was always available for daily cover at the Fenimore Landfill.

58. On February 19, 2013, Bates observed the north slope of the Fenimore Landfill from the road and saw that it was not covered with soil. Bates detected odors in the area. While taking a walking tour of the Fenimore Landfill on that date, Bates smelled a "rotten egg" odor emitting from the landfill. Bates observed that most of the landfill was not covered by soil.

59. In March 2013, the DEP issued an AONOCAPA to the respondents, assessing a total of $99,000 in administrative penalties for the dust control, odor control, and denial of access violations.

60. Thomas Farrell (Farrell), Chief of the DEP's Bureau of Solid Waste Compliance and Enforcement with seventeen years of experience confirmed the calculation of the penalty assessments in the Solid Waste AONOCAPA. Farrell found that the respondents were assessed a $3,000 penalty for dust control violations in November 2012. This penalty was calculated in accordance with N.J.A.C. 7:26-5.4, which provides for a daily penalty of $3,000 for failure to control dust. Farrell found that the respondents were assessed a $35,000 penalty for failing to control odors on November 29, 2012, as required by the Closure Plan. This penalty was calculated in accordance with the penalty matrix at N.J.A.C. 7:26-5.5. Farrell stated that the "seriousness" of the violation was determined to be "major" because the sulfur hydroxide odors had the potential to cause health problems; the "conduct" was determined to cause health problems; the "conduct" was determined to be "moderate."

61. Farrell stated that the respondents were assessed $45,000 in penalties for failure to control odors on January 29, February 19, and February 22, 2013. These penalties were calculated similarly to the $35,000 penalty for failing to control odors on November 29, 2012, except the "conduct" was increased to "major" based on the prior violation. Farrell further stated that the respondents were assessed $16,000 in penalties for denying access to the landfill on December 11 and 17, 2012. The denial of access on December 11, 2012, resulted in a total penalty of $6,000; a base penalty of $4,000, plus an additional 50% ($2,000) for prior violations (failure to control dust and odors). The denial of access on December 17, 2012 resulted in a total penalty of $10,000; a base penalty of $4,000, an additional 50% ($2,000) for the dust and odor control violations and an additional 100% ($4,000) for the prior denial of access violation.

62. Jeffrey Meyer (Meyer), a supervisor for DEP's Bureau of Air Compliance and Enforcement with twenty-six years of experience, testified about the procedure used by DEP air inspectors when investigating an odor complaint, including the use of the DEP's odor investigation guidelines.

63. Meyer personally investigated odor complaints involving the Fenimore Landfill and applied the odor investigation guidelines. Meyer was familiar with the activities of other DEP air inspectors involved in the investigation of the Fenimore Landfill and that he believed that they followed the odor investigation guidelines.
64. A "verified" complaint is a complaint of an odor on a complainant's property which has been independently verified by an air inspector. Such an inspection must confirm that an odor is present in a concentration that constitutes an "unreasonable interference with life or property" in order to verify a complaint. The DEP's inspectors independently identify the source of the odors.
65. Meyer first became aware of odor complaints from the Fenimore Landfill area at the end of October 2012 or beginning of November 2012.
66. Between November 2012 and June 2013, the DEP received approximately 2,500 odor complaints about the Fenimore Landfill, 167 of which were verified by air inspectors.
67. Meyer visited the Fenimore Landfill at least six times during the relevant period and on each occasion he discovered "rotten egg"-type odors associated with hydrogen sulfur emissions. Meyer further observed areas without cover soil at the Fenimore Landfill.
68. Shannon Caccavella (Caccavella) is a twelve-year resident of Roxbury Township who reported seven odor complaints, which were verified by DEP air inspectors which came from the Fenimore Landfill. She first noticed the "rotten egg" smell on Thanksgiving in 2012.
69. In addition, Caccavella called the DEP on the morning of January 2, 2013, reporting a "rotten egg" odor polluting her yard and home. The odor was so offensive that her children could not stand outside in the driveway to wait for the school bus and her dogs would not leave the house.
70. On the afternoon of February 15, 2013, Caccavella called the DEP in order to report a "rotten egg" odor. The odor was so overbearing that she could not sit on her porch or be outside.
71. On February 21, 2013, Caccavella called the DEP to report an odor. Her children told her their eyes were burning from the strong odor. The odor of hydrogen sulfide entered her house and she and her family were unable to eat at

home and they had to leave the house due to the strong smell inside the whole living area.

72. On the afternoon of March 21, 2013, Caccavella called the DEP to report a "rotten egg" odor. The odor was so powerful that it gave her a headache. Her husband was unable to remain outside to work on the car.

73. On the night of April 23, 2013, Caccavella called the DEP to report a "rotten egg" odor. The odor was so pervasive that it caused her to vomit.

74. On the afternoon of April 26, 2013, Caccavella called the DEP to report a "rotten egg" odor that was so pervasive that it gave her a headache. Due to the odor she was unable to do yard work and her family was unable to play outside.

75. On June 4, 2013, Caccavella called the DEP to report an odor. The odor was so pervasive that her children were unable to play in the yard or swim in the pool.

76. Caccavella called the DEP over forty-five times over a few months in order to complain about the odors from the Fenimore Landfill. Caccavella felt that she had lost the use of her home 100%. They could no longer use their yard, there were days they could not have breakfast in the house, and there were days that she had to remove her children during the night.

77. Caccavella estimated that she called the DEP over 400 times in total in order to complain about the odors from the Fenimore Landfill.

78. Kathleen Marino (Marino), a sixteen-year resident of Roxbury Township confirmed two complaints she made which were verified by DEP inspectors. She first began to experience the hydrogen sulfur odors in her home in November or December 2012.

79. Marino made a complaint to the DEP about a "rotten egg" odor in her home on April 8, 2013. Marino noticed the odors while she was cooking dinner and she had to close all the windows in her house. Marino's children came in from playing outside and refused to go back outside because the odor was so overpowering. The odor made her nauseous and upset her stomach and her symptoms lasted for hours.

80. Marino reported a "rotten egg" odor to DEP on May 3, 2013. Marino experienced the "rotten egg" odor when she was taking groceries from her car into her home. When she smelled the odors, she experienced a burning sensation in her throat

and became nauseous and sick to her stomach because the smell was so strong.

81. Marino called in to the DEP at least fifty complaints about the odor coming from the Fenimore Landfill.

82. Ronald Watson (Watson), a twenty-two year resident of Roxbury Township, made four odor complaints which were verified by DEP air inspectors. Watson first experienced "rotten egg" odors in his home during Thanksgiving in 2012 and the odors caused his guests to leave early.

83. On December 18, 2012, Watson experienced odors at his property which prevented him from going outside to play with his dog in the yard.

84. Watson stated that he was driven inside of his home by the odors on January 8, 2013, and was unable to take his dog for a walk. On February 15, 2013, Watson experienced a very heavy "rotten egg" odor at his home. Watson was sitting on his patio with his wife, daughter, and grandchild and the odor forced them all to go inside.

85. On May 9, 2013, Watson experienced a "rotten egg" odor as he entered his home and forced him to close all the windows in the house in order to escape the smell.

86. Lorraine Chipko (Chipko), a resident of Roxbury, made about seven odor complaints which were verified by DEP inspectors. Chipko found these odors to be a daily problem that caused her to cease enjoying her property inside or outside.

87. Chipko found that the "rotten egg" odor entered her home on March 23, 2013, and prevented her from using her family room on the lower level of the house where the odors were worse.

88. On May 15, 2013, Chipko's husband's birthday party was interrupted by the odors entering her home and they had to shut the windows.

89. On May 17, 2013, Chipko experienced a strong foul odor of "rotten eggs" had entered her home forcing her to close all twenty windows in the house.

90. On June 8, 2013, Chipko experienced a strong "rotten egg" odor in her home which disturbed her while her family was having dinner. In addition, on June 12,

2013, Chipko experienced a “rotten egg” odor both inside her home and outside her property.

91. On June 17, 2013, Chipko and her husband were grilling outside when a “rotten egg” odor caused them to go inside to finish their cooking. They had to close all the windows in their home and run the air conditioner to remove the smell from the house. Furthermore, on June 19, 2013, Chipko and her husband were grilling outside when they detected a strong, foul odor. They had to come inside because of the odor and it persisted for hours.

92. Mario Poliviou (Poliviou), a resident of Roxbury Township, made about seven odor complaints which were verified by the DEP inspectors. He works from home and that the odors frequently bothered him while he was working but that he did not have the option of calling in sick.

93. On December 20, 2012, Poliviou was unable to take his dog for a walk because of the strong “rotten egg” odors. His son ran from the bus stop to the house holding his face when he came home from school on that date.

94. Poliviou found odors had entered his home early in the morning on January 30, 2013, and woke him from a sound sleep. On February 23, 2013, Poliviou found that an odor woke him from a sound sleep and caused him to wake up with a headache that he had not had when he went to bed the night before. The odors kept him from playing basketball with his son in the driveway that day.

95. On the morning of April 8, 2013, Poliviou found a strong “rotten egg” odor which woke him up. On May 19, 2013, Poliviou found strong odors in the lower level of his home and it prevented him from painting his basement, which he planned on doing.

96. On May 29, 2013, Poliviou had to sit outside in his yard with the odors for over an hour in order to hand out uniforms for the town Little League teams and that he had a headache as a result.

The following **FACTS** are a result of the parties entering into a Joint Stipulation of Facts and Exhibits on March 23, 2015.

97. Each resident identified in each verified odor complaint shall be deemed to have testified that on the date of each complaint, the complainant detected a foul odor, called the DEP odor hotline and registered an odor complaint.

98. Each DEP air inspector is deemed to have testified that on the date of each verified odor complaint, the DEP air inspector responded to the residence of the complaining resident and listened to the resident's statement regarding the nature, duration and intensity of the alleged odor, and the alleged interference on the resident's enjoyment of life and/or property caused by the alleged odor.

99. Each DEP air inspector is deemed to have testified that while listening to the statement made by each complaining resident, he or she detected an odor similar to the odor alleged by the complaining resident. The inspector then determined the intensity of the odor by assigning a number as identified in each report, using the DEP's "1 to 5" odor-intensity number guide. The inspector then determined that the odor reported by the complaining resident and verified by the inspector was not injurious to human health or welfare, animal or plant life or property but did unreasonably interfere with the enjoyment of life or property.

100. Each DEP air inspector is deemed to have testified that on the date of each odor complaint, the inspector who verified the odor complaint performed a 360-degree survey and determined that the source of the odor complained of was the Fenimore Landfill.

101. In the Joint Stipulation, the parties stipulated to the admission into evidence of the following exhibits: investigation reports, verified odor complaints and supporting documentation (including compliance evaluation summaries, memoranda, odor investigation field data sheets, maps, weather reports, statements of complaint, etc.). All of these documents are now part of the record in this case.

102. Between February 9, 2013, and June 12, 2013, DEP Air Inspector Douglas Bannon (Bannon) verified twenty-one odor complaints from citizens regarding the Fenimore Landfill.

103. Between November 21, 2012, and June 12, 2013, DEP Air Inspector Leslie Bates (Bates) verified 27 odor complaints from citizens regarding the Fenimore Landfill.

104. Between February 15, 2013, and June 15, 2013, DEP Air Inspector Todd Boyer (Boyer) verified nine odor complaints from citizens about the Fenimore Landfill.
105. Between December 24, 2012, and June 16, 2013, DEP Air Inspector Mark Burghoffer (Burghoffer) verified ten odor complaints from citizens regarding the Fenimore Landfill.
106. Between December 26, 2012, and June 19, 2013, DEP Air Inspector Michael Cisek (Cisek) verified nine odor complaints from citizens about the Fenimore Landfill.
107. Between December 10, 2012, and June 6, 2013, DEP Air Inspector Robert Heil (Heil) verified nine odor complaints from citizens about the Fenimore Landfill.
108. On June 13, 2013, DEP Air Inspector Robin Jones (Jones) verified two odor complaints from citizens about the Fenimore Landfill.
109. Between May 7, 2013, and June 10, 2013, DEP Air Inspector Vicente Limbo (Limbo) verified two odor complaints from citizens about the Fenimore Landfill.
110. Between December 17, 2012, and April 18, 2013, DEP Air Inspector Jennifer McClain (McClain) verified three odor complaints from citizens about the Fenimore Landfill.
111. Between December 15, 2012, and December 27, 2012, DEP Air Inspector Scott Michenfelder (Michenfelder) verified four odor complaints from citizens about the Fenimore Landfill.
112. Between December 18, 2012, and May 28, 2013, DEP Air Inspector Hiram Oser (Oser) verified twenty-eight odor complaints from citizens about the Fenimore Landfill.
113. Between November 30, 2012, and June 17, 2013, DEP Air Inspector Patrick Sanders (Sanders) verified thirty-two odor complaints from citizens about the Fenimore Landfill.
114. On February 22, 2013, DEP Air Inspector Philip Savoie (Savoie) verified one odor complaint from a citizen about the Fenimore Landfill.
115. On June 13, 2013, Morris County Health Department Inspector Elizabeth Dorry (Dorry) verified one odor complaint from a citizen about the Fenimore Landfill.
116. Between December 2012 and July 2013, the DEP issued ten AONOCAPAs against the respondents for violations of the APCA, assessing a total of $775,000

in administrative penalties. The AONOCAPAs are listed as follows: PEA120002-26889 (issued December 6, 2012); PEA120003-26889 (Issued December 28, 2012); PEA 120005-26889 (issued January 4, 2013, amended March 14, 2013); PEA 130002-26889 (issued February 21, 2013); PEA 130003-26889 (issued March 4, 2013); PEA 130004-26889 (issued March 25, 2013); PEA 130005-26889 (issued April 18, 2013); PEA 130006-26889 (issued May 8, 2013); PEA 130007-26889 (issued June 3, 2013); PEA 130008-26889 (issued July 17, 2013).

117. In June 2013, the Roxbury Township Municipal Court issued a written decision, finding respondents SEP and Richard Bernardi guilty of twenty-six separate charges of violating Ordinance 22-2 of the Local Public Health Nuisance Code, which prohibits the escape of gases into the air causing injury or annoyance or endangering the comfort of local inhabitants.

118. In January 2015, the Roxbury Township Municipal Court issued a written decision, finding respondents SEP, Richard and Marilyn Bernardi guilty of sixteen separate charges of violating Ordinance 22-2 of the Local Public Health Nuisance Code, which prohibits the escape of gases into the air causing injury or annoyance or endangering the comfort of local inhabitants.

119. DEP Air Compliance and Enforcement Supervisor Jeffrey Meyer (Meyer), who had personally reviewed or completed hundreds of penalty assessments, set forth the assessment of the penalties in the ten AONOCAPAs issued for violations of the APCA. Meyer confirmed that each investigator used the civil administrative penalty schedule at N.J.A.C. 7:27A (Penalty Schedule) when determining the amount of the penalty to be assessed for each violation. The penalties for the violations of the APCA were assessed consistently with N.J.A.C. 7:27A-3.1 et seq.

120. In Air AONOCAPA 1, a total penalty of $1,000 was assessed for odor violations on November 21 and 30, 2012. For the violation on November 21, the Penalty Schedule's base penalty of $1,000 was reduced by 50% due to a lack of prior violations, for a total penalty of $500. The base penalty was also reduced by 50% for the November 30 violation with an addition of 10% of the base penalty ($1000 because there were multiple verified odor complaints on that date, giving a total of $600).

121. In Air AONOCAPA 2 a total penalty of $16,700 was assessed for odor violations on December 7, 9, 10, 15, 17, 18, 20, 23, 24, 26, and 27, 2012. The base penalty for the violations prior to December 20 was $1,000, the amount for a first violation. The base penalty was increased to $2,000, the amount for a second violation on December 20 because respondents had then received Air AONOCAPA 1. The penalty amounts for December 10, 15, 17, 24, and 27 were increased by 10% based on the total number of verified complaints on those dates.

122. In Air AONOCAPA 3, a total penalty of $4,200 was assessed for odor violations on December 29, 2012, and January 2, 2013. A base penalty of $2,000 was assessed for the violation on December 29, and a penalty of $2,200 (base penalty plus 10% increase for number of verified complaints) was assessed for the January 2 violation.

123. In Air AONOCAPA 4, the Department assessed a total penalty of $56,000 for odor violations on January 30 and February 7, 9, and 10, 2013. For the violation on January 30, the base penalty was $5,000, the base penalty for a third violation, because respondents had received Air AONOCAPAs 1 and 2. Starting on February 7, the base penalty amount increased to $15,000, the amount for fourth and subsequent violations, because respondents had then also received AONOCAPA 3. For the violations on February 7 and 9, a penalty of $17,500 was assessed ($15,000 base penalty plus 15%) because there were six verified complaints on each of those dates. An increase of 10% was applied to the base penalty of $15,000 (for a total penalty of $16,500) for the violation on February 10 because there were three verified complaints that day.

124. In Air AONOCAPA 5, the Department assessed a total penalty of $54,500 for odor violations on January 8, and February 14, 19, and 23, 2013. The base penalty for January 8 was $5,000 because only two AONOCAPAs had been received and the base penalty for the February violations was $15,000 because three AONOCAPAs had then been received. Based on the number of verified complaints each day, the base penalties on January 8 and February 14 were increased by 15% (for totals of $5,5750 and $17,500 respectively), while the penalty on February 23 was increased by 10% for a total penalty of $16,500.

The base penalty amount of $15,000 was assessed for the violation on February 19.

125. In Air AONOCAPA 6, the Department assessed a total penalty of $105,000 for odor violations on February 15, 21, 22, 26, and 27 and March 10 and 18, 2013. That penalty was based on the number of verified complaints each day, only the base penalty amount of $15,000 was assessed for each violation.

126. In Air AONOCAPA 7, the Department assessed a total penalty of $108,000 for violations on March 6, 14, and 21 and April 8, 11, 12, and 15, 2013 This penalty was based on the number of verified complaints each day, the base penalty amount of $15,000 was assessed for the violations on March 6, 14, and 21 and April 8, 2013, and the base penalty plus 10% (for a total of $16,500) was assessed for the violations on April 11, 12, and 15, 2013.

127. Respondents stipulated that the penalties in Air AONOCAPAs 8, 9, and 10 were assessed in accordance with the application of the penalty schedule at N.J.A.C. 7:27A. Air AONOCAPAs 8, 9, and 10 assessed total penalties of $46,400, $167,500 and $215,500 respectively.

LEGAL ANALYLSIS AND CONCLUSION

Respondents' Argument That Statute, APCA, is Unconstitutionally Vague

In their post-brief submission, the respondents argue that the statute, APCA, used by the Agency is unconstitutional because it is vague. It is further argued by the respondents that it thereby fails to give adequate notice of what conduct is proscribed and thus is void for vagueness. Respondents then argue, in some depth and broadness, legal arguments to support that position.

The first problem with the respondents' argument setting forth a constitutional attack against the statute APCA (and as set forth in the petitioner's responsive brief) is that the respondents' constitutional challenge has been raised in the wrong forum as it can only be brought in the Appellate Division. See R. 2:2-3(a); Wendling v. N.J. Racing Comm'n, 279 N.J. Super. 477, 485 (App. Div. 1995).

The second problem with the respondents' constitutional argument, is that there exists precedent that finds that the odor-pollution standard, as contained in the statute, is, in fact, constitutional as it provides a violator with proper notice. Dep't of Health, State of New Jersey v. Owens-Corning Fiberglass Corp., 100 N.J. Super. 366 (App. Div. 1968), aff'd, 53 N.J. 248 (1969). In the Owens-Corning Fiberglass case, the Appellate Division specifically held that the definition of "air pollution" as set forth in the ACPA provided a sufficient guide for the Agency in its enforcement actions and for proscribing emissions of substances that will result in air pollution. The Owens-Corning Fiberglass Court stated: "[t]here is a plain answer to defendant's claim that the Code lacked specificity in that it failed to inform it with particularity as to the nature of its offending activity. The activity was and remains air pollution." Id. at 385; see also Div. of Envtl. Quality v. Norel Plastics Corp., A-2755-87TS (App. Div. May 4, 1989) (slip op. at 9), where it was specifically found that the definition of air pollution as set forth in N.J.S.A. 26:2C-2 was not unconstitutionally vague.

None of the respondents' arguments or their legal cites are compelling and fail to bring me to a different conclusion. There was nothing in this record which would find that the DEP's investigators acted in a manner other than was unbiased, objective, and reasonable, given the surrounding circumstances. In addition, the evidence presented supports a clear finding that the Fenimore Landfill was emitting an odor of rotten eggs which without question was hydrogen sulphide (H_2S).

Respondents further argue that because there are hydrogen sulfide gas-measuring instruments, the statute should be found to be unconstitutionally vague because the definition of "air pollution" as set forth in the APCA could be subject to a "clear, predictable standard," which would eliminate the ambiguity of using "unreasonable interference" definition. As in the case Owens-Corning Fiberglass, it found that "[i]n proceedings before an administrative agency, it is only necessary to establish the truth of the charges by a preponderance of the believable evidence, and on appeal the factual determinations of the agency are generally sustained 'if they are supported by substantial evidence on the whole record." Atkinson v. Parsekian, 37 N.J.

143, 149 (1962). Our review of the record, summarized earlier in this opinion, convinces us that this test has been met." Owens-Corning Fiberglass, supra, 100 N.J. Super. at 393.

In this case, there is more than ample evidence to support the determination by the Agency and the penalties imposed pursuant to those determinations. See also Norel, supra, A-2755-87TS, where the Appellate Division stated:

> Air pollution exists when contaminants in the outdoor atmosphere unreasonably interfere with the enjoyment of life indoors or outdoors. Surely one is injured if exposed to noxious odors outside the Henley plant or by odors which enter through the windows, doors and air-conditioning vents; either causes injury to enjoyment of life. An argument to the contrary is a reduction to absurdity.

This quote can be used in this case as applied to the matter involving SEP and the Bernardis. In this case, the record is replete with evidence from the local residents as well as the DEP investigators to make such an argument by the respondents groundless and thus without merit.

Despite the respondents' argument to the contrary, it is not necessary to resort to mechanical measurement of H_2S concentrations in order to determine that a violation of the ACPA exits. As rightfully argued by the petitioner, by definition (Merriam Webster), an odor is a quality of something that stimulates the olfactory organ or a sensation resulting from adequate stimulation of the olfactory organ. Thus, an odor is detected by human senses and not by the measurements obtained by machines. See Norel, supra, A02755-87T8 (slip op. at 12). In this case, once again ample evidence was presented from local residents and DEP inspectors confirming the presence of H_2S and the impact on the lives of those residents. Although the respondents established in the record that there may be instruments to measure H_2S concentrations in the air, such instruments are not necessary in order to establish by the Agency a violation of the APCA.

Based on the above, I **CONCLUDE** there is no basis for this forum to accept the respondents' argument of unconstitutional vagueness (including the argument that the "unreasonable interference" definition is vague) and thus it is hereby rejected.

Respondents' Argument that the Solid Waste Violations were Harassment by the Agency as part of NJDEP's Litigation Strategy

Respondents further argue in their post-hearing submission that the violations for the failure to permit inspections are frivolous, which was the result of a "relentless wave of agents" to the Fenimore Landfill after SEP filed litigation against the State of New Jersey. Respondents claim that the SEP became a target of a "prolonged and aggressive campaign of harassing inspections and other agency action intended to frustrate and exhaust SEP." Simply stated, the facts in this case do not support this argument. Nowhere in the record is there any credible evidence showing a pattern or goal by the Agency of harassment against the respondents.

Many of the inspections by the Agency were a proper response to the numerous complaints from the residents who live in the homes surrounding the Fenimore Landfill. Furthermore, the respondents have not presented any evidence to support the claim that the document and information requests by the inspectors were retaliatory and unreasonable in nature. The responses by Richard Bernardi clearly illustrate his failure to comply with his responsibilities as an operator of a landfill. The Closure Plan requires the Respondents to keep extensive records regarding the fill material at the site and produce those records for inspection upon request. The request for such records is consistent with the Agency's protocol and responsibilities for site inspections of permitted facilities. N.J.A.C. 7:26-2.11(d).

I **CONCLUDE** that the inspectors had the legal right to request and review those records and their requests were reasonable under the circumstances and there is nothing in the record to find that the Agency was motivated by any of an alleged NJDEP's litigation strategy.

As can be gleaned from the above Findings of Facts, I **CONCLUDE** that it is clear that the petitioner has established the necessary proofs to show that the respondents have violated both the SWMA and the APCA. There is a wealth of evidence presented by the DEP which shows that the respondents emitted odors from the Fenimore Landfill on numerous occasions and thereby violated these statutes resulting in the referenced AONOCAPAs being issued and the assessed penalties being leveled.

Both the SWMA and the APCA are strict liability statutes, which mandate that only the proscribed acts must be proved. Dep't of Envtl. Prot. v. Harris, 214 N.J. Super. 140, 147-48 (App. Div. 1986); Dep't of Envtl. Prot. v. Leeds, 153 N.J. 272, 284 (1998). In addition, the standard of proof for the Agency in an administrative proceeding is a preponderance of the credible evidence. Parsekian, supra, 37 N.J. at 149.

The determination in this case is quite clear as the evidence presented by the petitioner agency was for all intense and purposes unchallenged by the respondent. Therefore there are little questions that the respondents violated the SWMA and the APCA on numerous occasions during the period of June 2012 to June 2013. Respondents offered no evidence to dispute such findings and in fact presented no witnesses during the hearing.

In addition, the Agency provided evidence showing that the respondents failed to comply with the regulations and the conditions of their Closure Plan, thereby justifying the penalties in the amount of $99,000 as set forth in the Solid Waste AONOCAPA. In October 2011, the Agency issued to SEP a Closure Plan, which, by its terms, was governed by the SWMA and the corresponding regulations. Pursuant to N.J.A.C. 7:26-2A.8(b)(29), Respondents were required to control dust on the Fenimore landfill by spraying water or spreading a DEP approved chemical. Respondents were also required to apply cover soil on the landfill on a daily basis in order to cover exposed materials and control malodorous emissions.

Furthermore, in accordance with paragraph 27 of the Closure Plan and N.J.A.C. 7:26-2.11(d) of the regulations, respondents were required to allow DEP inspectors access to the landfill and full review of their records. The testimony presented by the Agency at the hearing clearly showed that the respondents on numerous occasions failed to comply with those regulations and the conditions of the Closure Plan. Respondents presented no evidence to dispute such a filing.

Respondents were cited for eight dust-control violations and four odor-control violations between June 2012 and February 2013 and were cited twice for denying DEP Inspectors the right to access the landfill in order to conduct lawful inspections of the property in December 2012.

DEP Inspector Gandhi stated that he attempted to conduct an inspection of the property on December 11, 2012, and Mr. Bernardi told him to leave. In addition, one week later, during a follow-up inspection, Mr. Bernardi once again ordered Inspector Gandhi to leave the landfill. These facts are also basically unchallenged by the respondents.

DEP Inspector Lugo stated that she conducted an inspection of the Fenimore landfill on November 29, 2012, and observed regulated materials that were uncovered with soil and exposed in the working area of the landfill. Lugo further stated that she did not observe any stockpiles of cover soil. Inspector Lugo also stated that during an inspection on February 22, 2013, she observed that most of the working area of the Fenimore landfill was uncovered and exposed. When Lugo inquired of Mr. Bernardi about his obtaining cover soil, he responded that when a “soil job” became available, he would make arrangement for the cover soil to be delivered to the landfill. Mr. Bernandi also stated that he used “contaminated soil for cover because clean soil is expensive.” There is no dispute that that Closure Plan required the respondents to apply cover soil on a daily basis in order to attempt to control odors emanating from the landfill.

The evidence presented by the Agency was not disputed and must be accepted by me as fact. The respondents offered no evidence to contradict or challenge the

Agency's case. As such, I have no alternative but to **CONCLUDE** that the respondents violated the SWMA as set forth in the Solid Waste AONOCAPA.

Respondents further failed to prevent or abate noxious H_2S emissions from the Fenimore landfill over a seven month period which was set forth in ten air pollution AONOCAPAs, justifying an assessment of penalties in the amount of $775,000 by the Agency.

The DEP is responsible for implementing the APCA and thereby preventing and prohibiting air pollution across New Jersey. N.J.S.A. 26:2C-8(a). "Air pollution" is defined to include air contaminants that "unreasonably interfere with the enjoyment of life or property." N.J.S.A. 26:2C-2. Accordingly, an odor caused by the release of an air contaminant such as H_2S constitutes air pollution if the DEP determines that the odor interfered with the enjoyment of life or property. Pursuant to N.J.A.C. 7:27-5.2(a), no person shall cause, suffer, allow or permit air pollution.

Testimony was presented to me regarding the procedure used by DEP air inspectors when handling an odor complaint, including the use of the DEP's odor investigation guidelines. When an odor complaint is received, an air inspector will proceed to the complainant's location in order to verify that air pollution is present on the complainant's property. If the complaint is verified, the complainant is asked to complete an odor complaint form. The inspector will then attempt to determine the source of the pollution. In order to determine the source, an "upwind" or "360 degree" survey to isolate and locate the source and eliminate other potential sources is used.

Between November 2012 and June 2013, the numbers of complaints were overwhelming as the DEP received approximately 2,500 odor complaints about the Fenimore landfill, 167 of which were verified by the DEP. Respondents' counsel stipulated to the fact that these complaints were verified pursuant to the DEP odor investigation guidelines and the source was the Fenimore landfill.

Particularly compelling was the testimony of the residents living near the Fenimore landfill. Their testimony recounting the misery, going far beyond inconvenience, was very moving and placed a human face on the significant impact upon the families surrounding the landfill. Their experiences went far deeper that not being able to use their yards and included physical ailments. In fact many of the residents recounted the repulsive odors entering their homes, resulting in the inability to cook, eat, or live a normal life in their homes. Once again the respondents presented no evidence to challenge this evidence.

Based on the above, I further **CONCLUDE** that the Agency has proven by a preponderance of the evidence that the respondents violated the ACPA as set forth in each of the ten air pollution AONOCAPAs.

The Agency also presented clear, credible and unrefuted evidence that the penalties imposed by the Agency against the respondents were calculated in accordance with the regulations and the Agency's standard practice.

In March 2013, the Agency issued a Solid Waste AONOCAPA to the respondents, imposing a total penalty of $99,000 for dust control, odor control, and denial of access violations. The respondents were assessed a penalty of $3,000 for dust control violations on November 20, 21, and 23, 2012. The penalty was assessed in accordance with N.J.A.C. 7:26-5.4, which provides for a base penalty of $3,000 for failing to control dust in violation of N.J.A.C. 7:26-2A.8(b)(29). No grace period applied in this case because similar dust control violations had occurred in June and July of 2012. The Agency did exercise its discretion in assessing a single penalty of $3,000 for the three violation dates in November 2012.

The Solid Waste AONOCAPA also assessed penalties of $35,000 and $45,000 for failing to control odors as required by the Closure Plan on November 29, 2012, and on January 29, February 19, and February 22, 2013. These violations were determined to be "major" because the odors had the potential to cause health problems. The conduct for the November 29 violation was designated as "moderate" because it was

the first violation of its type, while the conduct for the later violations was assessed as "major." The Agency arrived at the penalty amounts on the penalty matrix at N.J.A.C. 7:26-5.5, which provides a penalty range of $30,000–$40,000 for a major-moderate violation and a range of $40,000–$50,000 for a major-major violation and directs the Agency to generally use the mid-point of the range.

Penalties of $6,000 and $10,000 were given to the respondents based on their denial of access to the Fenimore Landfill on December 11 and 17, 2012, to Inspector Gandhi. These penalties were assessed pursuant to N.J.A.C. 7:26-5.4 which provides for a base penalty of $4,000 for denial of access, with increases of 50% of the base penalty if the violator has had a previous violation in the past year and 100% for a denial of access violation in the past year.

The penalty calculations in the Solid Waste AONOCAPA were consistent with the Department's regulations and standard practices. Accordingly, I **CONCLUDE** that the penalty of $99,000 that was assessed by the Agency is reasonable and appropriate for the respondents' violations of the Solid Waste AONOCAPA.

In addition, the Agency issued ten air pollution AONOCAPAs to the respondents between December 2012 and July 2013, the penalties of which totaled $775,000. The Agency presented clear and unrefuted evidence through Supervisor Jeffrey Meyer's testimony that that the penalties were assessed pursuant to the APCA and thus I **CONCLUDE** that the penalties were fair and reasonable in this case. All of the penalties assessed were in conformance with the regulations and with the Agency's practice in assessing penalties for odor violations.

Individual Liability of Richard and Marilyn Bernardi

There is no doubt that the corporate entity, SEP, is strictly liable for the violations of the APCA and the SWMA. See Harris, supra, 214 N.J. Super. at 147-48; Leeds, supra, 153 N.J. at 284.

Richard Bernardi clearly actively participated in the Fenimore Landfill operation. Mr. Bernardi applied for the Closure Plan on SEP's behalf and often represented himself as the "Director," "Managing Member," "President," and "Manager" of SEP. Furthermore, Mr. Bernardi signed the ACO as "Director" of SEP and in his individual capacity, thereby agreeing to assume individual liability for the first phase of the closure project. Mr. Bernardi was personally involved in each of the solid waste violations and I did not hear from Mr. Bernardi in terms of direct testimony on this or any related issue. Mr. Bernardi's personal and individual involvement in the violations supports the finding of his personal liability. See Dep't of Envtl. Prot. v. Angel of the Sea Dev. Corp., 95 N.J.A.R.2d (EPE) 167, 183. I, therefore, **CONCLUDE** that Richard Bernardi is personally liable for all of the violations and penalties assessed by the Agency in this case.

Marilyn Bernardi worked in concert with her husband, Richard Bernardi in the operation of the Fenimore Landfill. Mrs. Bernardi connection to SEP and the Fenimore Landfill are both extensive and is long running. Mrs. Bernardi personally guaranteed the large mortgage on the property when SEP purchased the Fenimore property in 2011. Furthermore, Marilyn Bernardi authorized Richard Bernardi to act on behalf of SEP and permitted him to run the day-to-day operations of the landfill. There was no doubt that she was aware that Richard Bernardi misrepresented himself as a corporate officer of SEP and took no steps to correct those misrepresentations. Mrs. Bernardi was aware that the Closure Plan required SEP to deposit tipping fees into an escrow account to fund the closure of the landfill and she opened an escrow account by her signature on the escrow agreement and she blatantly failed to deposit any tipping fees into that account. Marilyn Bernardi also signed over one hundred checks on SEP's checking account, spending SEP's funds to her personal profit and gain. In fact, Mrs. Bernardi wrote one check, dated September 13, 2013, for $275,000, which was then paid into her personal pension plan.

Marilyn Bernardi also knew that the Closure Plan required SEP to control malodorous emissions from the landfill and she was aware that the landfill was emitting H_2S as early as November 2012. No steps were taken by Mrs. Bernardi to control or to

have others control these emissions. Mrs. Bernardi was the sole corporate principal of SEP and thus was responsible for that company and controlled the company that owned and operated the Fenimore Landfill. Yet, Marilyn Bernardi took absolutely no definitive steps to correct the conditions which led to the violations herein.

The first ten AONOCAPAs failed to name Marilyn Bernardi as an individual respondent and was only named in the last two AONOCAPAs because it was the Agency's belief that Richard Bernardi was the corporate officer of SEP. However, pursuant to the motion presented to me by the Agency's counsel, I permitted the amendment of the AONOCAPAs to add Marilyn Bernardi as a respondent. It is clear that the steps taken by Richard Bernardi directly lead the Agency to only naming him in the first ten AONOCAPAs. Marilyn Bernardi was fully aware of these misrepresentations and took no steps to correct same.

Based on the totality of evidence presented to me, I **CONCLUDE** that Marilyn Bernardi was an active participant in the Fenimore Landfill operation. Furthermore, Marilyn Bernardi is personally liable for the fines and penalties issued by the Agency due to the fact that she was SEP's President and sole member of the company pursuant to the "Responsible Corporate Officer (RCO) Doctrine". The RCO states that a corporate official can be held personally liable for an environment violation if that person was in control of the events that resulted in the violation. Dep't of Envtl. Prot. v. Standard Tank Cleaning Corp., 284 N.J. Super. 381, 403 (App. Div. 1995); and see Allen v. V & A Bros., 208 N.J. 114, 133 (2011) (which held that individual liability for regulatory violations rests on the language of the regulations and the actions undertaken by the individual defendant).

Liability for environmental violations under the RCO doctrine depends upon the definition of a "person" under the particular regulatory scheme. See Asdal Builders, LLC v. Dep't of Envtl. Prot., 426 N.J. Super. 564, 579 (App. Div. 2012) (which held that laws governing flood hazard areas and freshwater wetlands did not expressly define a "person" to include responsible corporate officials); Standard Tank, supra, 284 N.J.

Super. at 401 (which held that laws governing water pollution expressly define a "person" to include responsible corporate officials).

Pursuant to the SWMA's regulatory scheme, a "person" is defined to include individuals, corporations, and corporate officials. N.J.A.C. 7:26-1.4. Pursuant to the APCA's regulatory scheme, a "person" is defined to include individuals and corporations, but does not specifically include corporate officials. N.J.A.C. 7:27-1.4. The Appellate Division has imposed personal liability on corporate officials for violations of the SWMA, pursuant to the RCO doctrine. Dep't of Envtl. Prot. v. Pignataro, A-3740-01T3 (App. Div. April 7, 2003), http://njlaw.rutgers.edu/collections/courts (which held that a sole corporate official exercised exclusive control over the company's operation); Dep't of Envtl. Prot. v. Camden Asphalt and Concrete Co., A-6786-02T5 (App. Div. July 13, 2004), http://njlaw.rutgers.edu/collections/courts (which held that the sole corporate official controlled the events that resulted in the violation and took no steps to abate or remediate the situation).

In this case, Marilyn Bernardi was in control of the Fenimore Landfill (via SEP sole ownership) and she had the authority to delegate the day-to-day operation to Richard Bernardi and authorized him to act on behalf of SEP. It is clear from the evidence presented that Marilyn Bernardi had control over the Fenimore Landfill operation which resulted in the SWMA and the APCA violations.

Accordingly, I **CONCLUDE** that Marilyn Bernardi is personally liable for the SWMA violations and the $99,000 in penalties and for the APCA violations and the $775,000 in penalties as assessed by the Agency pursuant to the RCO doctrine.

Piercing the Corporate Veil of SEP

Generally a corporation is a separate legal entity and New Jersey Courts will not pierce the corporate veil in order to impose liability on the corporate principals except to defeat fraud or injustice. Lyon v. Barrett, 89 N.J. 294, 300 (1982). In those cases where the corporate veil is pierced, the courts look at officers who had a practical and

realistic opportunity to avoid the injurious consequences of corporate conduct in areas of public health and safety. Macysyn v. Hensler, 329 N.J. Super. 476, 496 (App. Div. 2000); See Dep't of Envtl. Prot. v. Lewis, 215 N.J. Super. 564, 572-73 (App. Div. 1987) (which held that the operation of an unlicensed commercial business for profit at the expense of the public's health and welfare was relevant to determining the appropriate penalty against the corporate principal). Personal liability for corporate principals who ran the corporation and made no efforts to stop its unlawful solid waste operation is a proper determination. In re Recycling and Salvage Corp., 246 N.J. Super. 79, 108-09 (App. Div. 1991).

It is an issue of addressing fundamental fairness when determining as to whether to pierce the corporate veil. Verni ex rel. Burlstrein v. Stevens, 387 N.J. Super. 160, 199 (App. Div. 2006). In this case, Marilyn and Richard Bernardi clearly abused the corporate form. Richard Bernardi actively and on multiple occasions misrepresented himself as a corporate officer of SEP and committed other acts of misrepresentation with reference to SEP and the Closure Plan. Marilyn Bernardi also committed acts of malfeasance by writing checks from the SEP checking account for personal gain without any tipping fees being deposited into that bank account.

Without question or dispute, Richard Bernardi directly ran the day-to-day operations of the Fenimore Landfill and Marilyn Bernardi handled the financial dealings of SEP. Although it cannot be said that Marilyn Bernardi was activing running the landfill, it further cannot be denied that she was aware of her husband's activities and took an active role in the financial dealings of SEP, much to her personal gain.

The purpose of piercing the corporate veil is to prevent a corporate entity from being used to evade the law or defeat justice. Such would be the case here, if the Bernardis were permitted to use SEP in order to avoid personal liability. A corporate entity is intended for "the conduct of lawful business" only and is always subject to the overriding interests of the State. N.J.S.A. 14A:1-1(3)(b). The SWMA and APCA are designed to prevent and deter individuals from polluting the environment and must be read broadly with that goal in mind. Lewis, supra, 215 N.J. Super. at 575.

Based on the evidence presented, I **CONCLUDE** that it is proper to disregard SEP's corporate form and thereby hold both Richard Bernardi and Marilyn Bernardi with joint and several personal liability for all of the penalties imposed for the numerous SWMA and APCA violations.

Based on the totality of the evidence submitted, both in terms of testimony and documents, and considering the arguments of counsel I **CONCLUDE** that there is more than enough evidence to support all of the allegations in the AONOCAPAs under the ACPA and SWMA and I **CONCLUDE** that the penalty assessments of $775,000 for APCA violations and $99,000 for SWMA violations against all respondents in this case are warranted by the facts of this case.

ORDER

Based upon the forgoing, I **ORDER** that the determination of the DEP in its Administrative Order and Notice of Civil Administrative Penalty Assessments against the respondents are hereby **AFFIRMED**. I further **ORDER** that petitioner's determination that the respondents violated the applicable law is **AFFIRMED** and the fine and penalties are **AFFIRMED** in its entirety. The penalty of $775,000 pursuant to the violations under the APCA and the penalty of $99,000 pursuant to the violations under the SWMA against the respondents are **AFFIRMED**.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this

recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, P.O. Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 12, 2015 _____

DATE **MICHAEL ANTONIEWICZ**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

APPENDIX

LIST OF WITNESSES

For Petitioner:

Jeffrey Meyer
Shannon Caccavella
Kathleen Marino
Ronald Watson
Lorraine Chipko
Mario Poliviou
Gina Maria Lugo
Leslie Bates
Rajendraku Gandhi
Baharam Salahi
Thomas E. Farrell

For Respondents:

None

LIST OF EXHIBITS

For Petitioner:

P-1 Guidelines
P-2 Photograph
P-3 Photograph
P-4 ACO/Closure Plan
P-5 Caccavella complaint January 2, 2013
P-6 Caccavella complaint February 15, 2013
P-7 Caccavella complaint February 21, 2013
P-8 Caccavella complaint March 21, 2013
P-9 Caccavella complaint April 23, 2013

P-10 Caccavella complaint April 26, 2013
P-11 Caccavella complaint June 4, 2013
P-12 Marino complaint April 8, 2013
P-13 Marino complaint May 3, 2013
P-14 Watson complaint December 18, 2012
P-15 Watson complaint January 8, 2013
P-16 Watson complaint February 15, 2013
P-17 Watson complaint May 9, 2013
P-18 Chipko complaint January 8, 2013
P-19 Chipko complaint May 14, 2013
P-20 Chipko complaint May 17, 2013
P-21 Chipko complaint June 8, 2013
P-22 Chipko complaint June 12, 2013
P-23 Chipko complaint June 17, 2013
P-24 Chipko complaint June 19, 2013
P-25 Poliviou complaint December 20, 2012
P-26 Poliviou complaint January 30, 2013
P-27 Poliviou complaint February 23, 2013
P-28 Poliviou complaint April 8, 2013
P-29 Poliviou complaint May 19, 2013
P-30 Poliviou complaint May 28, 2013
P-31 N.J.A.C. 7:27A
P-32 ANACAPA December 6, 2012
P-33 Penalty calculation forms
P-34 ANACAPA March 14, 2013
P-35 ANACAPA February 21, 2013
P-36 ANACAPA March 4, 2013
P-37 ANACAPA March 25, 2013
P-38 ANACAPA April 18, 2013
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P-40 ANACAPA June 3, 2013
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P-42 Certification of Marilyn Bernardi

P-43 SLF closure escrow account form

P-44 Mortgage

P-45 Certificate of formation

For Respondents:

R-1 Document