



# State of New Jersey

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

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NEW JERSEY DEPARTMENT OF	)	<u>ADMINISTRATIVE ACTION</u>
ENVIRONMENTAL	)	FINAL DECISION
PROTECTION/SOLID WASTE	)	
COMPLIANCE AND ENFORCEMENT,	)	OAL DKT NO.: ECE 19328-16
	)	AGENCY REF. NO.: PEA120003-U1441
Petitioner,	)	
	)	
v.	)	
	)	
NEW WEST DEVELOPERS, LLC, JOHN	)	
FERNANDEZ, AND PEDRO ORTIZ,	)	
INDIVIDUALLY AND AS OWNERS OF	)	
NEW WEST DEVELOPERS	)	
	)	
Respondents.	)	

This Order addresses the appeal by New West Developers, LLC (New West), John Fernandez (Fernandez), and Pedro Ortiz (Ortiz) (collectively Respondents) of an Administrative Order and Notice of Civil Administrative Penalty (AONOCAPA) issued on March 5, 2014, by the New Jersey Department of Environmental Protection (DEP). The AONOCAPA assessed a civil administrative penalty of \$350,000 against Respondents for repeated major violations of the Solid Waste Management Act (SWMA), N.J.S.A. 13:1E-1 et seq., and its implementing regulations at N.J.A.C. 7:26, arising from Respondents' operation of an unpermitted solid waste facility at a property owned by New West. Administrative Law Judge ("ALJ") Nanci G. Stokes issued an Initial Decision that DEP was entitled to summary decision as to the SWMA violations and a

\$350,000 penalty. For the reasons set forth below, I hereby ADOPT as MODIFIED the Initial Decision.

### **FACTUAL AND PROCEDURAL BACKGROUND**

I ADOPT the ALJ's recitation of the facts as amplified and modified below.

In 2003, Ortiz formed New West, which acquired two adjacent property tracts at the border of Newark and Irvington, covering nearly five acres. In 2004, New West mortgaged the property tracts, which Ortiz signed on behalf of New West as its Manager.

In 2008, an inspector with the DEP's Bureau of Solid Waste Compliance and Enforcement visited the New West site and spoke to Fernandez, an owner and stockholder of the company. Fernandez advised DEP's Inspector that New West imported "clean fill" and stockpiled "self-generated" crushed concrete.

In October 2010, the New Jersey Department of Treasury revoked New West's corporate charter. In December 2010, the same DEP inspector conducted a compliance investigation. As part of that investigation, the inspector reviewed the truck tickets that had been filed by transporters delivering to New West. The inspector additionally reviewed soil sampling results for these deliveries. Those soil sampling records showed deliveries to the New West site revealing that it accepted over 20 truckloads of soil, some of which was contaminated. These sampling results showed the truckloads were contaminated with benzo(a)anthracene, benzo(b)fluoranthene, benzo(a)pyrene, dibenzo(a,h)anthracene, naphthalene, or lead in excess of DEP's residential direct contact soil remediation standards at N.J.A.C. 7:26D-4.2. Both the contaminated soil as well as the "self-generated" concrete qualify as solid waste, N.J.A.C. 7:26-1.6, and New West did not have the necessary permit to operate a solid waste facility. N.J.A.C. 7:26-2.8(e), (f).



On January 11, 2011, the Department issued a notice of violation to Respondents New West and Fernandez alerting them to cease importing contaminated soil, to identify and segregate the contaminated soil, and to submit a plan for disposing of the contaminated soil. Two months later, inspectors from the Department collected five soil samples from the New West site for laboratory testing. The testing showed exceedances of applicable soil remediation standards for benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, or dieldrin.

Subsequent inspections of the New West site revealed that the company continued to import fill material constituting “solid waste” totaling nearly 100,000 cubic yards. Fifteen of seventeen soil samples obtained from 2010 to 2013 demonstrated contamination in excess of the soil remediation standards. Between March 2011 and December 2013, the Department issued six additional notices of violation concerning the New West site, including notices of violation in 2012 and 2013 after DEP observed construction and demolition waste at that site. The notices were issued to Respondents, as well as to Arthur Fletcher (Fletcher). In response to the notices of violation, Respondents took no corrective measures to address the contamination nor did they seek to obtain a certificate to operate a solid waste facility or cease their operations.

On March 5, 2014, the Department issued the AONOCAPA under appeal, assessing a \$50,000 administrative penalty for each of the seven notices of violation, for a total of \$350,000, against Respondents and Fletcher for failure to take any corrective action, and for their continuing improper operation despite multiple notices of violation. The AONOCAPA also ordered them to cease operating the unpermitted solid waste facility, seek any necessary approvals from the Department or, if obtaining a solid waste facility permit is not feasible, remove all solid wastes to



an appropriately permitted solid waste facility within 180 days. Respondents challenged the AONOCAPA and requested a hearing, but Fletcher did not.<sup>1</sup>

On December 22, 2016, the Department transmitted this case to the Office of Administrative Law (OAL) for a hearing. The Department filed its motion for summary decision on December 3, 2019, to which Respondents filed no opposition. On December 24, 2019, the ALJ closed the record. The ALJ issued the Initial Decision on January 10, 2020, granting the Department's motion for summary decision. The Department filed an exception to the Initial Decision on January 14, 2020. Respondents filed neither exceptions nor a reply to the Department's exception.

## **DISCUSSION**

### **Summary Decision Motion**

Under N.J.A.C. 1:1-12.5, a party is entitled to summary decision where the moving party shows that there is no genuine issue as to any material fact challenged and it should prevail as a matter of law. Contini v. Board of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995), certif. denied 145 N.J. 372 (1996). When a party moves for summary decision, the non-moving party must submit responding affidavit(s) setting forth specific facts to show that there is a genuine issue which can be determined only in an evidentiary hearing. N.J.A.C. 1:1-12.5(b); See Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) (to defeat a summary judgment motion, the non-moving party cannot simply "sit on his or her hands," but must present specific facts showing there is a genuine issue for trial). Like the standard for summary judgment under N.J. Court Rule 4:46-2, the standard on a motion for summary decision requires the court or agency to

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<sup>1</sup> Fletcher's failure to request a hearing meant that the AONOCAPA had become final as to him. N.J.S.A. 13:1E-9.



determine whether the evidence, when viewed in the light most favorable to the non-moving party, is “sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Contini, 286 N.J. Super. at 122 (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

Here, the respondents did not oppose DEP’s motion for summary decision and the ALJ found that the salient facts are clear and undisputed. Specifically, the ALJ concluded that the undisputed facts in the record demonstrate that respondents illegally operated a solid waste facility without a permit, disposing of construction and demolition debris as well as contaminated fill at the New West site; respondents Fernandez and Ortiz can be held individually liable; and the Department properly assessed the penalty in the AONOCAPA. I find that the ALJ was correct that the Respondents failed to raise any genuine issues of disputed fact as to the acts of noncompliance with the SWMA and the penalty assessed in the AONOCAPA. The ALJ correctly applied the standard for summary decision under N.J.A.C. 1:1-12, so I therefore ADOPT the ALJ’s conclusion that the Department is entitled to summary decision as a matter of law against Respondents.

#### Unpermitted Operation of a Solid Waste Facility

The “collection, disposal and utilization of solid waste is a matter of grave concern to all citizens and is an activity thoroughly affected with the public interest.” N.J.S.A. 13:1E-2. To protect the public, all persons who engage in the disposal of solid waste must first file an application for engineering design approval and obtain approval thereof from the Department. N.J.S.A. 13:1E-5(a).

The Department sets forth detailed regulations for solid waste facility permitting at N.J.A.C. 7:26-2.1 to -2.14. Before approving a permit, the Department reviews the proposed



facility's health and environmental impact, engineering design, and operational requirements. N.J.A.C. 7:26-2.3(a). Through the health and environmental assessment, the Department looks at extensive factors, including location, neighborhood setting, proximity to water bodies, endangered or threatened species, a listing of potential contaminants to be released from the solid waste facility, and possible health risks or impacts. N.J.A.C. 7:26-2.9. The Department's engineering analysis considers a geotechnical and soils report, and an operations manual, among other considerations. N.J.A.C. 7:26-2.10. The general operational requirements include, but are not limited to, daily cleaning of waste receiving areas, no overnight storage of waste, dust control, no air contaminants, and insect and rodent control. N.J.A.C. 7:26-2.11.

Relevant to this case, no person shall engage in the disposal of solid waste or operate a solid waste facility without having applied for and received approval from the Department. N.J.S.A. 13:1E-5; N.J.A.C. 7:26-2.8(e), (f). Solid waste is defined to include any "garbage, refuse, sludge, ... or any other waste material. . ." N.J.A.C. 7:26-1.6(a). "Any 'other waste material' is any solid . . . material . . . which: is discarded or intended to be discarded; or . . . is applied to the land or placed on the land or contained in a product that is applied to or placed on the land in a manner constituting disposal." N.J.A.C. 7:26-1.6(b)(1), (b)(4). Disposal includes the storage, treatment, utilization, processing or final disposition of solid waste. N.J.A.C. 7:26-1.4. A solid waste facility is defined to include any site used for the "storage, collection, processing, transfer . . . or disposal of solid waste . . ." Ibid.

Here, the undisputed evidence in the record establishes that Respondents were disposing of construction and demolition debris as well as contaminated soil at the New West site over a number of years without applying for or receiving a permit from the Department. It is uncontested that the disposal of materials occurred on Respondent New West's property and that Respondents



Ortiz and Fernandez participated in these activities as New West's manager (Ortiz) and owner/stockholder (Fernandez). It was not disputed that this material is solid waste and that the Respondents did not seek and were not granted approval from DEP to operate a solid waste facility. Additionally, these activities occurred despite multiple notices to Respondents demanding that the activities cease.

I therefore ADOPT the ALJ's legal conclusion that the Respondents operated an unpermitted solid waste facility in violation of N.J.A.C. 7:26-2.8(e) and (f)<sup>2</sup>.

#### Individual Liability

The ALJ correctly affirmed the Department's decision to hold Ortiz and Fernandez personally liable for violating the SWMA. The ALJ's finding of individual liability against Ortiz and Fernandez was proper because: (1) New West's corporate charter was revoked prior to the actions relevant to this case, thus invalidating the corporation's powers and protections; and (2) notwithstanding, the Department's authority to hold individuals liable for their action or their corporation's action is well-established under the SWMA and the responsible corporate officer (RCO) doctrine.

As discussed above, New West's corporate charter expired because it failed to file its annual report, meaning it has been dissolved as a corporate entity. N.J.S.A. 14A:5-5(5), 14A:12-1(1)(g). It must wind up its corporate affairs and satisfy its debts. N.J.S.A. 14A:12-9(1). Because

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<sup>2</sup> The underlying AONOCAPA also listed N.J.A.C. 7:26-1.7(g) as one of the regulations violated by Respondents' conduct. This regulation sets forth the criteria for the Department's exemption of beneficial use projects. It is unclear how this regulation could be violated when Respondents never applied for such an exemption. Moreover, it does not appear from the Department's underlying motion papers that it was pursuing this regulation as a component of its AONOCAPA. Therefore, I do not find that this regulation has been violated. That said, for the reasons set forth herein, Respondents' violations of N.J.A.C. 7:26-2.8(e) and (f) fully justify the penalty assessed under the AONOCAPA.



New West could not continue to operate as a corporation, the continued action by its manager and owner, Ortiz and Fernandez, makes them individually liable. N.J.S.A. 13:1E-5; Lancellotti v. Md. Cas. Co., 260 N.J. Super. 579, 583 (App. Div. 1992); See also, Noble Oil Company, Inc., v. Dep't. of Env'tl. Prot. and Energy, Division of Hazardous Waste Management, 94 N.J.A.R.2d (EPE) 72 (1994) (person carrying on the business operations of a corporation after expiration of its charter becomes personally liable). This is consistent with the long-recognized environmental law concept that the privilege of incorporation should not become a device for avoiding statutory responsibility. Dep't. of Env'tl. Prot. v. Ventron Corp., 94 N.J. 473, 502 (1983).

Even if New West's corporate status were reinstated, the Department's authority to hold individuals liable for their action or their corporation's action is well-established under the SWMA and the RCO doctrine. The RCO doctrine dictates that individual liability for corporate violations may be imposed on a corporate officer when the statute governing the violations allows corporate officer liability and when the corporate officer was either in control of the events leading to the violations, was in a position to prevent the violations, or to correct them after they occurred, and failed to act. See Dep't. of Env'tl. Prot. v. Standard Tank Cleaning Corp., 284 N.J. Super. 381, 401-03 (App. Div. 1995). Moreover, it is appropriate to hold a corporate officer liable where the officer stands "in responsible relation to a public danger" in recognition that "the only way in which a corporation can act is through the individuals who act on its behalf." United States v. Dotterweich, 320 U.S. 277, 281 (1943); Accord, In re Scioscia, 216 N.J. Super. 644, 657, certif. denied 107 N.J. 652 (1987) ("A corporation, as such, has no moral character. The moral responsibility of a corporation is one and the same with the moral responsibility of the individuals who give it direction") (quoting Trap Rock Industries, Inc. v. Kohl, 59 N.J. 471, 482 (1971)).





Here, the SWMA holds "any person" who violates the act liable for penalties. N.J.S.A. 13:1E-9f. In fact, the term "person" is used throughout the SWMA, see e.g., N.J.S.A. 13:1E-5, -9-12, but is not expressly defined therein. The Department's regulations, however, define person to include "an individual, trust, firm, joint stock company . . . corporation (including a government corporation), corporate official, partnership, [or] association . . ." N.J.A.C. 7:26-1.4. The SWMA grants the Department broad authority to regulate solid waste. N.J.S.A. 13:1E-14. "It is beyond cavil that an agency's authority encompasses all express and implied powers necessary to fulfill the legislative scheme that the agency has been entrusted to administer." In re N.J.A.C. 7:1B-1.1 et seq., 431 N.J. Super. 100, 126 (App. Div. 2013), certification denied, 216 N.J. 8 (2014). Therefore, a corporate official can be held liable as a "person" under the SWMA and its implementing regulations, including an official in a position to prevent a violation. See Dep't. of Env'tl. Prot. v. Tuckahoe Road Auto Sales, LLC, 2017 N.J. AGEN LEXIS 981, \*\*15-17 (August 08, 2017).

In this case, Ortiz and Fernandez, acting as corporate officials of New West, continued operating a solid waste facility for years after New West's corporate charter was revoked. They did so without a permit and without the protection of a corporate charter, accepting and disposing of construction and demolition debris as well as contaminated soil at the New West site even after DEP issued notices of violation, and took no corrective measures otherwise to address the numerous notices of violation issued by the Department for those activities.

I concur with the ALJ's determination to hold Fernandez and Ortiz each individually liable for violations charged in the AONOCAPA. I thus ACCEPT the ALJ's determination of liability for the violations cited and penalties assessed in the AONOCAPA against Fernandez, individually, and Ortiz, individually.



### Penalty

I further find that the Department properly assessed the penalty in the AONOCAPA. The SWMA imposes strict liability upon violators, who are subject to statutory fines and penalties regardless of their intent or moral culpability. See Dep't. of Env'tl. Prot. v. Lewis, 215 N.J. Super. 564 (App. Div. 1987). To prove a violation of the SWMA, only the proscribed act must be proven, not the intent to violate it. Id.; See also Dep't. of Env'tl. Prot. v. Harris, 214 N.J. Super. 140, 147 (App. Div. 1996); Dep't. of Env'tl. v. Zanetich, 94 N.J.A.R.2d (EPE) 138, 143 (1994). The SWMA does not require that willfulness or intent to violate be proven before a penalty is imposed. Harris, 214 N.J. Super. at 147. Imposing a penalty for any violation of the SWMA, or the rules promulgated thereunder, is mandatory, and a lack of intent is not a defense. Dep't. of Env'tl. Prot. v. Circle Carting, Inc. and Earl Henriquez-Gil, 2004 N.J. AGEN LEXIS 969, \*4 (May 15, 2004) (affirmed penalty for operating a solid waste facility without a permit in violation of N.J.A.C. 7:26-2.8(f)).

The SWMA authorizes a "civil administrative penalty of not more than \$50,000 for each violation provided that each day during which the violation continues shall constitute an additional, separate and distinct offense." N.J.S.A. 13:1E-9(e). The Department assesses penalties using the tables at N.J.A.C. 7:26-5.4(g) for violations of specific rules reflected in that provision. Under N.J.A.C. 7:26-5.4, the minimum mandatory penalty for each violation of N.J.A.C. 7:26-2.8(e) and (f) is \$4,500. That said, the Department can apply the "penalty matrix" found in N.J.A.C. 7:26-5.5 when the minimum mandatory penalty is deemed too low to provide a sufficient deterrent effect. Pursuant to N.J.A.C. 7:26-5.5(f)2, the Department shall assess civil administrative penalties based on the seriousness of the violation and the conduct of the violator, each being categorized



as major, moderate, or minor, and shall set the penalties at the mid-point of the ranges in the tables, unless adjusted under N.J.A.C. 7:26-5.5(i).

The classification of “[m]ajor seriousness shall apply to any violation which [h]as caused or has the potential to cause serious harm to human health or the environment.” N.J.A.C. 7:26-5.5(g). The classification of “[m]ajor conduct shall include any intentional, deliberate, purposeful, knowing or willful act or omission by the violator[.]” In accordance with the tables, a major seriousness/major conduct violation specifies a penalty range of \$40,000-\$50,000. The Department calculates the exact penalty amount from within the specified range in consideration of multiple enumerated factors such as the violator’s compliance history, mitigation efforts, and any additional or unusual burdens on the public or environment as a result of the violations. N.J.A.C. 7:26-5.5(i).

Here, the ALJ was correct to affirm the \$350,000 penalty against Respondents. The record shows that Respondents operated an illegal solid waste facility in one of the most densely populated areas in New Jersey for years without the necessary approvals. In addition, New West and its officers permitted the deposit and storage of at least 100,000 cubic yards of fill material, some of it contaminated. Moreover, there is no evidence in the record that the Respondents attempted to address the concerns identified by the Department’s inspectors in the Notices of Violation (NOVs) they issued.

Therefore, I find that the Department properly assessed the penalties using the required tables. Given Respondents’ actions and their failure to respond to multiple NOVs, the minimum penalty of \$4,500 would be too low to provide a sufficient deterrent effect. For the same reasons, both “seriousness” and “severity” were properly classified as major and the Department was correct to calculate the penalty at the top end of the range. In fact, New West’s operation was a



continuing violation on a daily basis between the issuance of the first NOV in 2010 and the last NOV in 2013. The Department could have penalized the Respondents for up to \$50,000 each and every day the solid waste was stored at the New West site. N.J.S.A. 13:1E-9(e); N.J.A.C. 7:26-5.4(a), (b); N.J.A.C. 7:26-5.5(b), (c). Instead, the Department limited its assessment to the seven days the inspector observed solid waste at the site.

For the foregoing reasons, I ADOPT the ALJ's conclusion that the Department reasonably assessed a \$50,000 maximum penalty for each of the seven NOV's and that Respondents are liable for the full penalty amount of \$350,000 as assessed in the AONOCAPA.

#### Exceptions

The Department filed an exception to the Initial Decision on January 14, 2020. In its filing, the Department asks that the ALJ's footnote in reference to Fletcher be modified. In footnote 1 of the Initial Decision, the ALJ observed that the Department submitted no documentation to evidence that Fletcher was a principal of New West, and the Department does not seek a penalty against him now. While true DEP did not present proofs against Fletcher, the DEP was under no obligation to include Fletcher in its filings before the OAL because Fletcher's failure to request a hearing rendered the AONOCAPA final as to him. N.J.S.A. 13:1E-9. The AONOCAPA as to Fletcher is thus final and the reference to him in the Initial Decision is hereby MODIFIED.

#### CONCLUSION

For the foregoing reasons, I conclude the ALJ properly granted summary decision in the Initial Decision in favor of the Department. I ACCEPT as MODIFIED the ALJ's findings of fact. Accordingly, I ADOPT the ALJ's determination that Respondents are each individually liable for the violations set forth in the AONOCAPA. Respondents are hereby ordered to comply with the



conditions of the AONOCAPA and are directed to pay the civil administrative penalties due under the AONOCAPA, totaling \$350,000, within thirty (30) days from the date of this Final Decision.

IT IS SO ORDERED.

Dated: August 31, 2021



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Shawn M. LaTourette, Commissioner  
NJ Department of Environmental Protection



NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION/SOLID WASTE COMPLIANCE  
AND ENFORCEMENT, Petitioner,

v.

NEW WEST DEVELOPERS, LLC, JOHN FERNANDEZ, AND PEDRO ORTIZ,  
INDIVIDUALLY AND AS OWNERS OF NEW WEST DEVELOPERS, Respondents.

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