



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. ECE 19328-16

AGENCY DKT. NO. PEA120003-U1441

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

Petitioner,

v.

**NEW WEST DEVELOPERS, JOHN
FERNANDEZ AND PEDRO ORTIZ,
INDIVIDUALLY, AND AS OWNERS OF NEW
WEST DEVELOPERS,**

Respondents.

Ray Lamboy, Deputy Attorney General, for petitioner Department of Environmental Protection (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Jeffrey T. Kampf, Esq., for respondent New West Developers, et al (Javerbaum Wurgaft Hicks Kahn Wilkstrom & Sinins, P.C., attorneys)

Record Closed: December 24, 2019

Decided: January 10, 2020

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Respondent, New West Developers, LLC, (New West), through its principals, Pedro Ortiz (Ortiz), John Fernandez (Fernandez), and Arthur Fletcher, Jr. (Fletcher)¹ operated an unpermitted solid waste facility (SWF), stored contaminated materials there, and failed to remediate violations identified by petitioner, New Jersey Department of Environmental Protection (NJDEP). Is the maximum penalty the NJDEP assessed proper? Yes. If the violation is severe, the conduct is “major,” and the violator is non-compliant with remediation, NJDEP can assess the maximum penalty for each violation. N.J.A.C. 7:26-5.5 (f)-(i).

PROCEDURAL HISTORY

On March 5, 2014, the NJDEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) assessing \$350,000 in administrative penalties to New West, Fernandez, Ortiz, and Fletcher for their actions in operating an unpermitted SWF and importing contaminated materials to the New West property, located at the intersections of South Orange Avenue, Grove Street, and Whitney Street, on the border between Newark and Irvington, New Jersey. New West, Fernandez, and Ortiz challenged the penalty and requested a fair hearing, but Fletcher did not.

On December 22, 2016, the NJDEP transmitted this case to the Office of Administrative Law (OAL), as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to-15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to-13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

From March 2017 through April 2019, The Honorable Gail Cookson, ALJ conducted several pre-trial conferences, and placed the case on the inactive list from April 15, 2019, until October 11, 2019.

¹ Although Fletcher is included in the NJDEP penalty assessment as a principal of New West, NJDEP submits no documentation to evidence that Fletcher was, in fact, a principal of New West, and NJDEP does not seek a penalty against him now.

On October 29, 2019, following reassignment of this case, I conducted a pre-hearing conference during which the parties agreed that the material facts were undisputed, and no hearing was necessary to resolve the legal issue presented.

On December 3, 2019, the NJDEP filed its motion for summary decision; respondents filed no opposition; and on December 24, 2019, I closed the record.

FINDINGS OF FACT

Based on the documents the NJDEP submitted in support of the motion for summary decision, and viewing them in the light most favorable to respondents, I **FIND** the following as **FACT**:

In 2003, Ortiz formed New West, and New West acquired two adjacent, densely populated property tracts at the border of Newark and Irvington, totaling nearly five acres. In 2004, New West mortgaged the property tracts with a commercial loan agreement through Crown Bank. Ortiz signed the mortgage on behalf of New West under the title of "Manager."

On August 21, 2008, Bahram Salahi (Salahi), an inspector with the NJDEP's Bureau of Solid Waste Compliance and Enforcement, visited the New West site and spoke to Fernandez, who identified himself as an "owner" and "stockholder" of the company. Fernandez advised Salahi that New West imported "clean fill" and stockpiled "self-generated" crushed concrete to use as base material for the parking lot area of a planned strip mall.

In October 2010, the New Jersey Department of Treasury revoked New West's corporate charter.

On December 8, 2010, Salahi performed a compliance inspection of the New West site and reviewed truck tickets as well as soil sampling laboratory results revealing that New West recently imported over 20 truckloads consisting of 15 cubic yards of soil. These truckloads, however, were contaminated with benzo(a)anthracene, benzo(b)fluoranthene, benzo(a)pyrene, dibenzo(a,h)anthracene, naphthalene, or lead

in excess of the NJDEP's residential direct contact soil remediation standards (RDCSR standards) of N.J.A.C. 7:26D.

On January 11, 2011, NJDEP issued a notice of violation to respondents, directing the company to cease importing contaminated soil, to identify and segregate the contaminated soil, and to submit a proper plan disposing of the contaminated soil.

On March 2, 2011, NJDEP inspectors entered the New West site, and took five soil samples for certified laboratory testing, which still revealed contamination with at least one benzo[a]anthracene, benzo(a)pyrene, benzo(a)anthracene, benzo(b)fluoranthene, or dieldrin in excess of NJDEP's RDCSR standards.

Subsequent inspections of the New West site revealed that the company continued to import fill material constituting "solid waste" (construction and demolition debris consisting of bricks, broken concrete, and metal rebar of unknown origin) totaling nearly 100,000 cubic yards. In fact, fifteen of seventeen soil samples obtained from 2010 to 2013 demonstrated contamination in excess of NJDEP's RDCSR standards.

Because of failed inspections between March 2011 and December 2013, the NJDEP issued six additional notices of violation to respondents.

In response to the notices of violation, respondents took no corrective measures to address the contamination nor did it obtain a certificate to operate a SWF or ceased its operations.²

For respondents' failure to take any corrective action, and for their continuing improper operation in the face of notices of violation, on March 5, 2014, the NJDEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA), assessing the \$50,000 maximum administrative penalty for each of the seven notices of violation, for a total of \$350,000 against New West, Fernandez, Ortiz, and Fletcher.

² The permitting and certification for beneficial use processes ensure that a SWF implements environmental, safety, and operational protocols to minimize the negative impact of solid waste disposal. N.J.A.C. 7:26-1.7; N.J.A.C. 7:26- 2.3.

CONCLUSIONS OF LAW

I.

A party may move for summary decision upon any or all substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion for summary decision shall be served with briefs and may be served with supporting affidavits. Ibid. “The decision sought may be rendered if the papers and discovery that have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b).

To determine whether a "genuine issue" of material fact exists that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

In this case, the material facts are undisputed. Respondents did not obtain a permit to operate a SWF or receive a NJDEP exemption approval to operate a SWF and stored contaminated materials that tested in excess of NJDEP RDCSR standards. Respondents also took no corrective measures, despite seven violation notices resulting in the NJDEP’s assessment of the maximum penalty for each notice. Further, New West’s corporate charter has been revoked since 2010, and both Fernandez and Ortiz participated in the operation of New West. Since these facts are clear and undisputed, I **CONCLUDE** that this case is ripe for summary decision, and that the only issue presented is the propriety of the NJDEP’s penalty against the respondents.

II.

SWF Operation

The Solid Waste Management Act (SWMA) and corresponding regulations address the collection, transportation and disposal of solid waste. N.J.S.A. 13:IE-1 - 207; N.J.A.C. 7:26-1.1 et seq. Under the SWMA, NJDEP is authorized to regulate all solid waste facilities, and all persons or entities engaged in the collection or disposal of

solid waste must be registered and permitted or exempt. N.J.S.A. 13:1E-2(b)(6); N.J.S.A. 13:1E-4(a). The SWMA imposes strict liability upon violators, and the NJDEP only bears the burden of proving the statutory violation occurred to impose liability, regardless of the operator's intent to violate the SWMA. Dep't of Env'tl. Prot. v. Lewis, 215 N.J. Super. 564, 572-73 (App. Div. 1987).

Solid waste includes construction and demolition debris. N.J.A.C. 7:26-2.13(g)(1)iv. Under N.J.A.C. 7:26-2.8(e) and (f), no person may engage in the disposal of solid waste or operate a solid waste facility without applying for and receiving a permit from the NJDEP unless that operation is exempt. Exemptions include "beneficial use projects," which require prior approval from the NJDEP. N.J.A.C. 7:26-1.7(g).

From December 2010 through December 2013, respondents engaged in the operation of an unapproved SWF, importing and stockpiling approximately 100,000 cubic yards of fill material to the New West site, including contaminated soil in fifteen of seventeen soil samples, construction materials, and demolition debris. As New West had neither a solid waste facility permit, nor regulatory exemption qualification with NJDEP approval from December 2010 through December 2013, I **CONCLUDE** that such operation is a violation under the SWMA, and that NJDEP representatives observed and established violations by New West on seven occasions.

Personal Liability

Generally, a corporation is a separate legal entity, and courts will not "pierce the corporate veil" to impose liability on corporate officers except to defeat fraud or injustice. Lyon v. Barrett, 89 N.J. 294, 300 (1982). Such cases permitting personal liability involve corporate officials who had a practical and realistic opportunity to avoid the injurious consequences of corporate conduct affecting public health and safety. See Macysyn v. Hensler, 329 N.J. Super. 476, 486 (App. Div. 2000); see also In Re Recycling and Salvage Corp., 246 N.J. Super. 79, 108-09 (App. Div. 1991) (holding corporate principals personally liable as they did not attempt to halt the corporation's unlawful solid waste operation).

Meanwhile, courts will impose personal liability on corporate officials for violations of the SWMA under the responsible corporate officer (RCO) doctrine where the official(s) had actual responsibility for the condition resulting in the violation or were in a position to prevent the violation but failed to do so. See Dep't of Env'tl. Prot. v. Pignataro, No. A-3740-01T3 (App. Div. April 7, 2003) (where the sole corporate official exercised exclusive control over improper operation); see also Dep't of Env'tl. Prot. v. Camden Asphalt and Concrete Co., No. A-6786-02T5 (App. Div. July 13, 2004) (where the corporate official controlled the events that resulted in the violation and took no steps to abate or remediate the situation).

Under the RCO doctrine, liability for environmental violations depends on the definition of a "person" within the particular regulatory scheme, and the SWMA defines a "person" to include individuals, corporations, and corporate officials. N.J.A.C. 7:26-1.4.

In this case, "piercing the corporate veil" is unnecessary because Ortiz and Fernandez are named individually in the AONOCAPA, and the Department of the Treasury revoked New West's corporate charter nine years ago invalidating the corporation's powers and protections under N.J.S.A. 14A:4-5(5), including the protection of being named a party in an administrative proceeding under N.J.S.A. 14A:3-1(l)(b). More significantly, New West, through Ortiz and Fernandez acting as corporate officials, continued operating a SWF for years after its corporate charter was revoked, took no corrective measures to become permitted or approved by NJDEP, and failed to address the importation and storage of contaminated materials.

Therefore, I **CONCLUDE** that Ortiz and Fernandez are personally liable for participating in the unapproved operation of an SWF and disposing of contaminated waste material in violation of the SWMA under the RCO doctrine and should be penalized.

Penalty

The SWMA authorizes the Commissioner of the DEP to "assess 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); see also N.J.A.C. 7:26-5.4(a) and (b); N.J.A.C. 7:26-5.5(b).

N.J.A.C. 7:26-5.4(g) sets forth minimum penalties under the SWMA, including \$4,500 for disposing of waste without a permit under N.J.A.C. 7:26-2(e), and \$4,500 for constructing or operating a SWF without a permit under N.J.A.C. 7:26-2(f).

N.J.A.C. 7:26-5.4(g), however, does not include a penalty for the failure to obtain a Certificate of Authority to operate a SWF in violation of N.J.A.C. 7:26-1.7.

Nevertheless, the NJDEP maintains the minimum mandatory penalties are too low to provide a sufficient deterrent effect, or are not listed in N.J.A.C. 7:26-5.4, and call for a penalty.

In support of its argument, the NJDEP relies upon N.J.A.C. 7:26-5.5, which allows the NJDEP to apply an enhanced "penalty matrix" in those circumstances. Under N.J.A.C. 7:26-5.5(f), (g), and (h), the NJDEP must determine the "seriousness" of the violation as either "major," "moderate," or "minor"; the severity of the "conduct" in the same categories; and calculate the amount within the specified range for the category. "Major seriousness" shall apply to any violation that "has caused or has the potential to cause serious harm to human health or the environment" or "seriously deviates from the requirements of the [SWMA]." N.J.A.C. 7:26-5.5(g)(1). Further, "major conduct" shall include "any intentional, deliberate, purposeful, knowing or willful act, or omission by the violator." N.J.A.C. 7:26-5.5(h). A violation of "major seriousness" and involving "major conduct" carries a penalty at the mid-point of \$40,000 to \$50,000, unless adjusted. N.J.A.C. 7:26-5.5(f)(2); N.J.A.C. 7:26-5.5(i).

Under N.J.A.C. 7:26-5.5(i), the NJDEP can adjust the penalty to the lower penalty rate of \$40,000, or the higher penalty rate of \$50,000, depending on the corrective measures taken by the violator(s):

1. The compliance history of the violator;
2. The nature, timing and effectiveness of any measures taken by the violator to mitigate the effects of the violation for which the penalty is being assessed;
 - i. Immediate implementation of measures to effectively mitigate the effects of the violation will result in a reduction to the bottom of the range.
3. The nature, timing and effectiveness of any measures taken by the violator to prevent future similar violations;
 - i. Implementation of measures that can reasonably be expected to prevent a recurrence of the same type of violation will result in a reduction equal to the bottom of the range.
4. Any unusual or extraordinary costs or impacts directly or indirectly imposed on the public or the environment as a result of the violation; and/or
5. Other specific circumstances of the violator or the violation.

[Ibid.]

Here, the NJDEP considered the seriousness of the violations and the seriousness of the misconduct as “major” and identified the continued failure of New West and its officers to take corrective action as justifying the maximum penalty of \$50,000 for each of the seven notices of violation, or a total of \$350,000 under N.J.A.C. 7:26-5.5(i), because New West and its officers operated an illegal SWF in one of the most densely populated areas in New Jersey for at least three years without prior approval to ensure the SWF implements environmental, safety, and operational protocols to minimize the negative impact of solid waste disposal. In addition, New West and its officers permitted the deposit and storage of at least 100,000 cubic yards of fill material with soil contaminated in excess of RDCRS standards. Despite seven

notices of violation, Ortiz and Fernandez took no measures to remediate the contamination, made no attempt to become an approved SWF, and continued to operate. Each notice resulted from site inspections revealing improper operation and contaminated soil sampling, and NJDEP only assessed respondents for “one day” for each failed inspection despite clear and continuing violations. I wholeheartedly agree. Therefore, I **CONCLUDE** that NJDEP properly and reasonably assessed a \$50,000 maximum penalty for each of the seven notices of violation addressing serious deviations from SWMA requirements and knowing conduct without any attempt at corrective remediation, and that Ortiz and Fernandez are liable for the full amount of the penalties assessed in the AONOCAPA, or \$350,000.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the motion for summary decision is **GRANTED**, and that Ortiz and Fernandez be penalized \$50,000 for each of the seven notices of violation identified in the AONOCAPA, or \$350,000.

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, PO 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.

January 10, 2020

DATE

Date Received at Agency:

Date Mailed to Parties:

ljb



NANCI G. STOKES, ALJ

January 10, 2020
