State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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Commissioner

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, BUREAU OF HAZARDOUS WASTE ENFORCEMENT, Petitioner, v. YATES FOIL USA, INC., CRAIG YATES, JOSEPH FEATHER AND THOMAS ASPINALL, Respondents.	ADMINISTRATIVE ACTION FINAL DECISION OAL DKT NO.: EHW 4724-07 AGENCY REF. NO.: PEA 050002-NJD002345247

This is the appeal of a Notice of Civil Administrative Penalty Assessment (NOCAPA) issued on February 8, 2006, by the Department of Environmental Protection (Department) against Yates Foil USA, Inc. (Yates Foil) as well as Craig Yates, Yates Foil's Director, Joseph Feather, its Chief Financial Officer, and Thomas Aspinall, its President (Respondents) in their corporate and individual capacities. The NOCAPA charged Respondents with four kinds of violations: failure to determine whether solid waste was hazardous, failure to clearly mark containers as "hazardous waste," failure to maintain or operate the facility so as to minimize possibilities of fire, explosion, or hazardous waste releases, and operating as a hazardous waste facility without a permit, in violation of the Solid Waste Management Act (SWMA), N.J.S.A. 13:1E-1 et seq., the Spill Compensation

and Control Act, N.J.S.A. 58:10-23.11 et seq., and Department regulations at N.J.A.C. 7:26G-1 et seq. The Department assessed total penalties of $180,000 for these four violations, $45,000 for each, finding all to be major in both seriousness and conduct.

The Department transferred Respondents' ensuing hearing request to the Office of Administrative Law where it was initially assigned to Administrative Law Judge (ALJ) Joseph Fiddler who retired, then to ALJ John Schuster, III. After the Department moved for summary decision, the case was reassigned to ALJ Solomon A. Metzger for disposition. ALJ Metzger granted the motion as to liability and the imposition of the penalty against the company, but denied the motion against Yates, Feather, and Aspinall in their individual capacities because the SWMA did not include responsible corporate officer in the definition of a responsible person. The Department filed timely exceptions on March 12, 2015. Respondents were granted an extension to file exceptions which they did by March 30, 2015. Both parties filed replies to the other's exceptions on April 7, 2015.

FACTUAL AND PROCEDURAL BACKGROUND

Yates Foil, a facility located on Route 130 in Bordentown Township, Burlington County, manufactured copper foil. As part of the manufacturing process, copper was dissolved in a copper sulfate solution which was then run over a surface to create copper foil. Tanks and piping at the facility stored copper sulfate solutions. The manufacturing process included the use of corrosive materials and generated hazardous waste. While Yates Foil was still operating, it disposed of its hazardous wastes using a manifest system for identifying, tracking, and transporting the wastes, as required by law. Yates Foil also operated a wastewater treatment plant (WWTP) on site under a New Jersey Pollutant

Discharge and Elimination System (NJPDES) permit to treat groundwater contaminated by metals.

Beginning around 1980, Yates Foil was a subsidiary of Square D Company until 1990 when Square D sold the company to Furukawa Electric Co. Ltd. but retained the land and buildings. Yates Foil then leased the property from Square D. Brothers Charles and Craig Yates purchased Yates Foil in 1996 and continued to operate the facility.

Before Yates Foil's lease was to expire in April 2000, Square D and Yates Foil unsuccessfully attempted to negotiate Yates Foil's continued lease or purchase of the property. Instead, Square D instituted eviction proceedings in the Superior Court of New Jersey in July 2000. Yates Foil ceased manufacturing copper foil in September 2001 after which a handful of Yates Foil employees remained on site, including Robert Miller, who served as environmental coordinator. Judge Cynthia Covie's order of September 14, 2001, granted Square D possession of the premises but stayed the judgment pending execution of a consent order.

A January 29, 2002 consent order granted Yates Foil unrestricted access to the property to decommission the facility in compliance with the law. Also, Yates Foil was allowed to remove undisputed property and equipment which it then sold. Yates Foil used the WWTP to treat process solutions to recover metals such as copper. The consent order left open the issue of when Yates Foil was to vacate for later resolution through the parties' agreement or court order. While Yates Foil disputed its compliance obligations under the New Jersey Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6 et seq., the company was required to continue the ISRA process.

A May 17, 2002 order amending the judgment of possession and consent order directed Yates Foil to complete the next steps in the ISRA process, to keep track of the costs of that process, and to decommission the plant by August 31, 2002. After the plant ceased operations in September 2001, hazardous substances remained on site. As stipulated, between September 2001 and November 25, 2002, Yates Foil had approximately 90,000 pounds and 35 cubic yards of hazardous wastes shipped offsite. Manifested shipments occurred in September and November 2001, and January, February, May, August, October, and November of 2002. After November 25, 2002, the Department received no hazardous waste manifest forms from Yates Foil, Yates Foil marked no containers or tanks as hazardous waste and made no determinations as to whether it had any hazardous wastes remaining at the site. Yates Foil had no permit to operate a hazardous waste facility. An October 2002 inspection report by Dan Raviv Associates for Square D indicated that Yates Foil had not completed the decommissioning of the facility. Several of the tanks and piping still contained metal solutions or crystallized copper sulfate. Piping was leaking and several 55-gallon drums of unknown materials were scattered throughout the facility.

A February 2003 letter from Robert Miller, writing on behalf of Yates Foil to the Department, stated, "[m]any manufacturing process chemicals have not yet been removed from the site" and "[a] substantial amount of electroplating process solutions remain stored in various storage tanks." In addition to chemicals such as arsenic acid and nitric acid, one of the items on Miller's "List of Chemicals Currently On-Site" was "hazardous waste." In April 2003, Miller submitted a remedial investigation work plan to the Department which

indicated that the process solutions still needed to be removed. Hazardous wastes were still present onsite.

Yates Foil maintained normal temperatures in the building from winter 2001 through August 2002 to prevent or minimize the rupture of pipes and tanks at the site. However, after September 6, 2002, the building was left unheated. Yates Foil knew the building was unheated during the winter of 2002 but was allegedly unable and unwilling to pay the utility bill because it claimed that Square D should pay. The lack of heat compromised the fire suppression sprinkler system. Around September 12, 2003, PSE&G discontinued electric and gas, which had been used to heat the building, and notified Yates Foil. The pipes burst in January 2004 after Respondents had vacated the site.

By order dated April 25, 2003, Judge Covie denied Square D's motion for summary judgment seeking a determination that the lease agreement allocated ISRA compliance responsibility to Yates Foil and granted Yates Foil's cross motion for an order that both parties bore responsibility for ISRA compliance; however, the court expressly stated that the order did not preclude the Department from making such a determination. In May 2003, Square D filed a petition requesting the Department's determination as to ISRA responsibility. In September 2003, the Department responded to the petition, placing primary responsibility for ISRA compliance on Yates Foil.[1]

The parties settled their litigation on December 31, 2003. Yates Foil agreed to pay Square D $1.5 million dollars and to vacate the facility by December 31, 2003, except for the wastewater treatment plant. "[A]ny equipment or items left . . . after [December 31,

[1] The Department's determination was referred to in correspondence from Square D's Director of Safety, Environment, and Real Estate, dated November 11, 2004, which was attached as an exhibit to the Department's motion for summary decision.

2003 would] be deemed abandoned," and Square D had the "right to dispose of them in any manner whatsoever." After December 31, 2003, Yates Foil's process materials remained at the site. While Yates Foil claims that the remaining solution in the process tanks was salable, it did not know the value of the materials left onsite, nor did it have any contracts to sell those materials. Also, Yates Foil failed to itemize documents left behind.

On four separate days in August 2004, Department inspectors Michael Gage and Jeffrey Salabritas visited the site. Gage observed a storage area containing approximately fifty containers, most of which were 55-gallon drums. The drums, as indicated by labeling in spray paint, contained nitric acid, phosphoric acid, arsenic acid, hydrogen peroxide, copper sulfate, and oil. Additional containers next to the storage area held nitric acid, copper sulfate crystals and sodium hydroxide. No containers were labeled as "hazardous waste" nor did they list accumulation start dates, an issue Gage brought to Square D's attention. Square D's contractor representatives reported to have found these containers in various buildings, consolidated them, and had them tested to identify their contents. Soon after Gage's visit, Salabritas's investigation of the site revealed that 45 of the 75 containers were now labeled as hazardous waste. According to Square D's contractor representative, when it entered the property in January 2004, it found various product tanks and piping that could not be sold for profit as well as these various unlabeled containers.

On January 20, 2004, Square D sent out a shipment of hazardous waste, the first from the site since November 25, 2002. By April 2005, Square D shipped out over one million pounds of hazardous waste from the site. According to the manifests, shipments continued through early 2005.

In May 2005, the Department issued a Notice of Violation to Yates Foil as a result of the noncompliance discovered during its August 2004 investigation. A February 8, 2006 NOCAPA listed the following violations for the time period between September 2001 and December 2003: 1) N.J.A.C. 7:26G-6.1(a) and 40 C.F.R. 262.11, failure as a generator of solid waste to determine if that waste was hazardous; 2) N.J.A.C. 7:26G-6.1(a) and 40 C.F.R. 262.34(a)(3), failure to clearly label accumulated waste as "hazardous"; 3) N.J.A.C. 7:26G-9.1(a) and 40 C.F.R. 265.31, failure to minimize the possibility of fire, explosion or release of hazardous waste into the environment; and 4) N.J.A.C. 7:26G-12.1(a) and 40 C.F.R. 270.10(e)-(f), operating a hazardous waste facility without a permit. The Department assessed a penalty of $45,000 for each violation for a total penalty of $180,000.

According to Michael Hastry, the Department's Chief of the Bureau of Hazardous Waste and UST Compliance and Enforcement, Yates Foil was a "large quantity generator" of hazardous waste. As the most highly regulated category of hazardous waste generators, Yates Foil was required to report on the amount of wastes generated and should have had a greater knowledge of hazardous waste management requirements. Instead, Yates Foil abandoned its hazardous waste.

Yates Foil's March 2006 hearing request stated it had no knowledge of events that occurred at the site after December 2003. As defenses, it contended that the site was no longer under its control at the time the violations occurred and that Square D was solely responsible. The Department first served discovery in June 2007. Yates Foil eventually responded to the discovery requests in October 2009. Respondents' response to interrogatories stated that they could locate no documents on whether the containers held

hazardous wastes. In January 2012, the Department moved for summary decision against Yates Foil and against the corporate officers in their official and individual capacities.

ALJ Metzger's initial decision granted the Department's motion against the corporation. ALJ Metzger noted that Respondents provided no certifications concerning whether the material found by the Square D contractors was hazardous waste or was brought onto the property by the contractors, nor did Yates Foil seek discovery on Gage's and Salabritas's investigation. Respondents provided no records demonstrating that hazardous materials left the property after November 2002, and after Square D entered the site, Square D "began disposing of considerable quantities of hazardous waste in January 2004." ALJ Metzger also found that it was "reckless to allow a power shutoff in buildings where piping contains hazardous materials" and that no court order "reliev[ed] Yates Foil of responsibility for heating the buildings." Respondents provided no documents or certifications to demonstrate that Yates Foil attempted to protect the pipes during the shutoff. However, ALJ Metzger declined to find the corporate officers liable under the responsible corporate officer doctrine based on the holding in Asdal Builders, LLC v. New Jersey Department of Environmental Protection, 426 N.J. Super. 564 (App. Div. 2012).

The Department's exceptions contend that the responsible corporate officer doctrine calls for imposing personal liability on Aspinall, Yates, and Feather under the SWMA. Respondents' exceptions argue that the ALJ incorrectly applied the standard for decisions on motions for summary decision, that the evidence upon which the ALJ relied was not competent, that Respondents should not have been held responsible for minimizing the risk of fire because that obligation rested entirely with Square D, and that the ALJ failed to

consider DEP's "languid approach" to enforcement. Furthermore, Respondents argued that a hearing should be afforded on whether any penalties should be imposed.

DISCUSSION

Summary decision motion

The grant of a motion for summary decision is appropriate "if the papers and discovery which 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). Thereafter, "an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). A genuine issue of material fact exists "when 'the competent evidential materials . . . are sufficient to permit a rational fact[-]finder to resolve the alleged disputed issue in favor of the non-moving party.'" E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010) (alteration in original) (quoting Piccone v. Stiles, 329 N.J. Super. 191, 194 (App. Div. 2000)). I find that Respondents have raised no genuine issues of disputed fact as to the acts of noncompliance and the penalty assessed in the NOCAPA, and I ADOPT the ALJ's conclusion that the Department is entitled to summary decision as a matter of law against Respondent Yates Foil. I REJECT the ALJ's legal conclusion that the Asdal holding precludes a finding of responsible corporate officer liability because the SWMA does not provide authority to impose liability against the three individual corporate respondents. I further find, however, that the Department did not establish by a

preponderance of the competent evidence that one or more of the three corporate officials of Yates was liable individually for penalties based on the corporate position held.

The ALJ correctly applied the standard for summary decision under N.J.A.C. 1:1-12.5 and accompanying case law. The ALJ noted that the relevant facts were either stipulated or undisputed and then proceeded to recount the relevant facts in the motion record. Respondents, citing D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109 (App. Div. 1997), contend that even in the absence of contrary evidence submitted by a party opposing the summary decision motion, an evidentiary hearing may still be required where witness credibility is in question. In D'Amato the issue was whether a fact-finder should determine the credibility of defendant witnesses who under power of attorney withdrew $10,000 from a dying relative's bank account and claimed that the relative, who passed away soon thereafter, had been holding the money for them. The plaintiff failed to provide any opposing evidence that the deceased relative had not been holding $10,000 for the defendants. Even in the absence of opposing affidavits, the court found defendants' evidence upon summary judgment "raised a sufficient credibility issue to require resolution by a trier of fact" because of contradictions and other suspicious circumstances on the record presented.

The current matter is not akin to D'Amato. There are no suspicious circumstances or contradictions present here to cast doubt on the truthfulness of Department inspectors Gage or Salabritas. The Department inspectors documented their findings contemporaneously with their inspections, took photographs showing unlabeled containers of hazardous waste and corroborated the lack of permits through examination of Department records. Despite their claim, Respondents' exceptions fail to specify which

material questions of fact raise credibility issues and how they do so. Respondents failed to submit any proofs whatsoever and failed to explain why the Department's proofs raise issues of credibility.

Respondents next claim that the ALJ improperly relied upon hearsay to determine that Yates Foil stored hazardous waste on the property—specifically, that Gage's knowledge that the containers held hazardous waste was based on hearsay. Gage obtained this information from Mike Mundros, an employee of contractor Arecon, Ltd., Square D's representative. The identification of contents was based upon Mundros's knowledge and testing by a contractor. According to Salabritas, Square D had tasked various contractors to segregate, classify, and dispose of waste accumulated at the site and demolish structures.

N.J.A.C. 1:1-15.1 permits an administrative law judge to consider and weigh hearsay evidence as long as competent evidence supports each ultimate finding of fact. Here, the record contains competent evidence that unidentified and unmarked hazardous wastes were stored on the property during the relevant time period.

Respondents stipulated that Yates Foil maintained hazardous wastes on the property from September 2001 to November 2002, more than a year after manufacturing ceased.[2] Respondents stipulated that, after November 26, 2002, Yates Foil did not mark any containers or tanks as hazardous waste. According to the stipulated facts, Yates Foil also provided a list of chemicals on site in February 2003. That list, which Robert Miller characterized as a "simple listing of chemicals known to be remaining on site," included arsenic acid, copper sulfate, fuel oil, gasoline, lubricating oils, nitric acid, phosphoric acid, sodium hydroxide, and "hazardous waste." Gage's report indicates that he observed

[2] See stipulated facts 8 through 13, and 26 through 30.

containers with nitric acid, phosphoric acid, arsenic acid, hydrogen peroxide, copper sulfate, oil, and sodium hydroxide. Hazardous materials remained at the site after December 31, 2003. Square D only entered the site in January 2004 and the records indicate that Square D began shipping out large amounts of hazardous waste that same month. In total, Square D shipped out over one million pounds of hazardous waste. These facts support the ALJ's finding that the drums Gage and Salabritas observed contained hazardous waste. Square D's contractor's report that it found hazardous waste on site in January 2004 corroborates this competent evidence. The record demonstrates that Yates Foil failed to determine and label hazardous waste and such a finding is simply bolstered by Square D's contractor's testing of and labeling of the drums. Thus, I find that the ALJ relied upon competent evidence because non-hearsay evidence in the record demonstrated that Respondents stored hazardous wastes on the property.

The building was unheated during the winter of 2002 and 2003, creating a risk of fire and release due to a compromised sprinkler system and the potential for burst pipes. Yates Foil and Square D's disagreement about who should pay the utilities bill does not absolve Yates Foil of responsibility to minimize the risk of fire and environmental damage from compromised pipes during the time that it still had employees at the site. The fact remains that Yates Foil did not vacate the site until December 2003. While Respondents informed Square D that the building was unheated, Respondents knew that the building remained unheated thereafter and took no steps to heat the building. Thus, they failed to minimize the risk of fire or release.

Respondents argue that the ALJ failed to consider that the Department's delay in inspecting the property and in issuing a notice of violation prejudiced their ability to defend

against the findings of violations. What Respondents fail to note is that they disregarded their obligation to notify the Department of the hazardous waste accumulation at the site and failed to take steps to comply with the Department's regulations. In the OAL, Respondents failed to propound any discovery, and thus deprived themselves of a primary means of defense. Prior to vacating the site, Respondents did not make a record of the materials they were leaving behind despite Yates Foil's status as a large-quantity generator of hazardous waste for many years. They understood the storage, handling, and tracking requirements for hazardous waste, and were aware that they would have to vacate the site. Failing to record and itemize the materials left on site was unwise as this was another means Respondents could have been proactive in defending themselves. Robert Miller served as Yates Foil's environmental coordinator and was on site long after manufacturing had ceased; however, respondents submitted no certifications from Miller. Respondents did not avail themselves of any of the available methods to protect themselves. They cannot now claim that their inability to inspect the property is a sufficient basis for overturning the ALJ's determination that Yates Foil violated the SWMA and hazardous waste regulations. The Department's certifications, photographs, and written submissions as well as the parties' stipulated facts and the undisputed facts demonstrate that there are no genuine issues of material fact for resolution. I thus find that the ALJ properly granted summary decision in favor of the Department as to liability of Yates Foil.

Reasonableness of penalties

The Department is authorized to assess a maximum civil administrative penalty of $50,000 for each violation under N.J.S.A. 13:1E-9(e) of the SWMA. Each day during

which a violation continues constitutes a separate and distinct offense. N.J.A.C. 7:26G-2.4 establishes base penalties for specific violations including those listed in the NOCAPA at issue. If, however, the Department determines based on the specific circumstances of the violation that the penalty amount would be too low to provide a sufficient deterrent, N.J.A.C. 7:26G-2.5 applies instead of N.J.A.C. 7:26G-2.4. See N.J.A.C. 7:26G-2.5(a)1. At the time the violations occurred and the Department issued the NOCAPA, N.J.A.C. 7:26G-2.5(f) authorized the Department to assess civil penalties based on conduct and seriousness of the violation, categorized as major, moderate, or minor, and to set the penalties at the mid-point of the ranges, unless adjusted under N.J.A.C. 7:26G-2.5(i).[3] Under N.J.A.C. 7:26G-2.5(g), a violation is major if it "[h]as caused or has the potential to cause serious harm to human health or the environment." Under N.J.A.C. 7:26G-2.5(h) "[m]ajor conduct shall include any intentional, deliberate, purposeful, knowing or willful act or omission by the violator." The Department may adjust the penalty amount based on certain mitigating or aggravating factors listed at N.J.A.C. 7:26G-2.5(i).

Yates Foil was a major generator of hazardous waste, failed to determine whether multiple containers of solid waste were hazardous and then abandoned multiple unlabeled containers of hazardous waste which were kept at the site for months without a permit. Higher penalties were warranted to serve as a deterrent, and the Department appropriately assessed penalties under N.J.A.C. 7:26G-2.5. The substances left unidentified and

[3] Effective June 2006, after the Department issued the NOCAPA, N.J.A.C. 7:26G-2.5(f) was split unto (f)1 and (f)2. N.J.A.C. 7:26G-2.5(f)1 establishes a $3,000 penalty if a violation is determined to be minor under the grace period criteria at N.J.A.C. 7:26G-2.10 as well as three specific criteria listed at (f), one of which is that the violation poses minimal risk to the public health, safety and natural resources. N.J.A.C. 7:26G-2.5(f)2 applies to violations that do not meet the criteria set forth in N.J.A.C. 7:26G-2.5(f)1. N.J.A.C. 7:26G-2.5(f)2 contains the same conduct and seriousness matrix as in the earlier promulgation of N.J.A.C. 7:26G-2.5(f) discussed above. Here, the grace period criteria and those listed at N.J.A.C. 7:26G-2.5(f)1 do not apply, and thus (f)2 is the controlling provision.

unmarked at the site were ignitable, corrosive, and acutely toxic hazardous wastes dangerous to the people who would clean up the site and to the environment. Yates Foil's failure to minimize the risk of fire on the site containing flammable and toxic substances also posed a serious risk. Finally, operating without the required permit meant that the necessary safety and operating protocols were not in place over a long period of time to manage a large quantity of hazardous waste. Yates Foil knew that these violations were occurring yet did nothing to address them. The Department set the penalties at the middle of the range, for major conduct and major seriousness, resulting in a base penalty of $45,000 for each of the four violations. The Department assessed penalties for only one day of violation for each separate offense for a total penalty of $180,000.

Respondents argue that the ALJ should have held a hearing on the appropriateness of the penalties. As noted above, the Department assessed penalties at the default mid-point under N.J.A.C. 7:26G-2.5(f). Respondents would need to have presented evidence of mitigating circumstances to lower the assessed penalties; however, Respondents failed to provide any proofs whatsoever. They complain that the Department assessed a far lower penalty for Square D. More specifically, Respondents argue that they are entitled to lower penalties because they instructed Square D to pay the utility bill. Instructing Square D to take on responsibility for heating did not mitigate the effects of the violation. The Department's handling of Square D's actions is not relevant to whether Respondents' circumstances meet any of the factors at N.J.A.C. 7:26G-2.5(i[4]). In light of the absence of

[4] The Department issued a NOCAPA (PEA 04002-NJD0002345247A) to Square D assessing a penalty of $4,500.

Respondents' proofs, the Department and the ALJ correctly assessed the penalties at the mid-point.

Responsible corporate officer doctrine

The Department took exception to the ALJ's conclusion that the responsible corporate officer (RCO) doctrine does not apply under the SWMA. The Department contends that the RCO doctrine should apply to violations of N.J.A.C. 7:26G because the rules incorporate by reference the regulations adopted pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., and federal courts have imposed the RCO doctrine in RCRA cases. The Department also argues that RCO liability is available under the SWMA rule at N.J.A.C. 7:26-1.4, which defines "person" to include "corporate officer." Respondents reply that the absence of the phrase "responsible corporate officer" in the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the implementing rules indicates that the RCO doctrine does not apply.

The responsible corporate officer (RCO) doctrine has been found to apply where the rules implementing a statute include that or similar terminology in the definition of person.[5] See Asdal Builders, supra, 426 N.J. Super. at 578-79. Asdal involved violations of the Flood Hazard Area Control Act (FHACA) that occurred both before and after the rules adopted under the FHACA were changed to add the term "corporate officer" to the definition of person. The Asdal panel explained that neither the FHACA nor the rules imposed individual liability on responsible corporate officers when the violations occurred

[5] Respondents agree with this reading of Asdal as stated in their reply to DEP's exceptions. See Respondents' Brief in Response to Petitioner's Exceptions, page 2.

on the property in that case. Asdal, supra, 426 N.J. Super. at 579. Thus the court vacated the "[i]ndividual assessment of penalties … for violations prior to [the change in the definition of person], predicated solely on Asdal's ownership … and his supervision of its activities." Ibid. The Court allowed those individual penalties for violations occurring after the rule amendment to remain. Ibid.

The SWMA, N.J.S.A. 13:1E-1 et seq., grants the Department broad authority to regulate solid and hazardous 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), certif. denied, 216 N.J. 8 (2014). The term "person" is used throughout the SWMA, see e.g., N.J.S.A. 13:1E-5, -9 -12, but the term is not expressly defined. From the time of the SWMA's enactment in 1970 until 1996, the Department regulated both solid and hazardous waste through a single set of rules. Those rules defined "person" to include corporate officials, individuals and corporations. N.J.A.C. 7:26-1.4. When the rules were amended in 1996, see 28 N.J.R. 1693(a), 28 N.J.R. 4606(a), to separate the regulation of solid waste from hazardous waste, see N.J.A.C. 7:26G, and to incorporate the federal RCRA standards for hazardous waste, the solid waste rules continued to define person to include corporate officials. The new hazardous waste rules did not separately define person but followed the federal rules.[6] The purpose of the incorporation by reference was to harmonize the State's hazardous waste rules with RCRA

[6] 42 U.S.C. § 6903(15) defines "person" as "individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States."

regulations and reduce duplication and cost, among other goals. 28 N.J.R. 1693(a), 1695 (April 1, 1996). The hazardous waste rules at N.J.A.C. 7:26G-1.1(b) provide, however, that "[t]he definitions, exemptions, exclusions and discussions of solid and hazardous waste in this chapter … do not provide any exemptions from the definition or regulation of solid waste found at N.J.A.C. 7:26." Thus, the definition of person found at N.J.A.C. 7:26-1.4 continues to apply to the hazardous waste rules.

Notably, while RCRA and the incorporated RCRA regulations do not explicitly define "person" to include "corporate officer," federal courts have interpreted RCRA and its regulations to impose liability on corporate officers who make corporate decisions and are involved in the handling and disposal of hazardous substances. United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 745 (8th Cir. 1986) (applying the RCO doctrine to RCRA in a criminal context); United States v. Conservation Chem. Co. of Ill., 733 F. Supp. 1215, 1221-222 (N.D. Ind. 1989) (applying the RCO doctrine to RCRA in a civil context).[7]

Because the SWMA authorizes regulation of both solid waste and hazardous waste and the Department's regulations have historically defined person to include corporate officials, I find that the RCO theory of liability applies to the NOCAPA issued here. However, while RCO liability is authorized as a matter of law under the SWMA and the solid waste and hazardous waste regulations, the record on summary decision does not support the assessment of penalties against Yates Foil's officers. Individuals are responsible corporate officers if they were "actual participants in the operations . . . that resulted in the violations or would have been in a position to prevent those violations."

[7] The RCO doctrine was first established in United States v. Dotterweich, 320 U.S. 277 (1943), a case involving the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301, et seq., and followed in United States v. Park, 421 U.S. 658 (1975).

N.J. Dep't of Envtl. Prot. v. Std. Tank Cleaning Corp., 284 N.J. Super. 381, 403 (App. Div. 1995). Evidence of each alleged violator's role in the operations that resulted in the violations must serve as the basis for determining the penalty assessments. Id. at 403-04. Here, the record does not contain sufficient competent evidence delineating the decision-making authority that each corporate officer possessed, what their separate responsibilities were vis-vis each other and the corporate structure, or how each of them was in a position to prevent the violations. As a result, the record does not support an assessment of penalties against one or more of the individual corporate respondents. Here, the Department has not identified sufficient competent evidence supporting the imposition of penalties under the RCO doctrine.

The Department's exceptions argue that Yates' officers were aware of the risk of fire, explosion, or releases and failed to prevent the risks associated with the improper handling of the hazardous waste and its later abandonment. In support of its argument that RCO liability attaches here, the Department relies on letters in the record on which all three officers were copied. One such letter referenced is dated July 21, 2003 from Yates Foil's counsel to Square D's counsel stating that PSE&G was threatening to turn off the electricity and advising Square D that Yates did not have the funds to pay the bills. Another letter dated December 6, 2002 from Joseph Feather to Peggy Fortuna of Square D states: "[o]ur only source of income is from selling scrap metal while we process the remaining solutions, and remove the dissolving tanks" and "[t]here is literally no heat in the plant, and we only use the lights where we are actually working." Based on this correspondence, the Department argues that Yates, Feather, and Aspinall's awareness of the risk of fire or release is sufficient to impose RCO liability on each of them.

The December 2002 letter, however, appears to have been sent after Joseph Feather last visited the site. Thus, as to Feather, the level of responsibility is not clear. Accepting that Feather, Yates, and Aspinall were aware of the increased risk of fire or release, the letters do not by themselves reveal who had the authority to prevent the increased risk or whether that authority was shared equally or proportionally by the three officers. Without a more in-depth exploration of the roles and responsibilities of each officer, the letters standing alone are not sufficiently competent evidence to impose individual liability on all three officers or on one in particular. Evidence sufficient to establish corporate officer liability must be greater than that which makes an inference that any of the three could have prevented the risk.

The stipulated facts, answers to interrogatories, and certifications do not establish by a preponderance of the evidence that Feather was directly involved in the shut-down operations or that he could authorize the release of funds to heat the building. The record also lacks specifics about Yates' and Aspinall's roles. The naming of the respondents and their individual job titles as President, Director and Chief Financial Officer in the stipulated facts does not indicate what their specific roles and responsibilities were. The stipulated facts refer most often to Yates Foil as a corporate entity rather than the individual officers. It is thus unclear which of the officers or whether all three had the power to prevent these violations based on the nature of their respective roles. Without more direct evidence, a finding cannot be made as to which respondent is responsible for some or all of the violations.[8] Stipulations or certifications as to the precise responsibilities and scopes of

[8] Where a corporation is owned and operated by a single corporate officer, New Jersey courts have readily found that the corporate officer's position and decision-making authority were sufficient for RCO liability.

authority either by the individual respondents or by one of their employees are necessary to demonstrate that the officers had the power to and failed to prevent these violations. Corporate by-laws delineating specific roles, corporate policy manuals or job descriptions would assist in establishing roles and responsibility where there are multiple officers potentially implicated.

Based on the lack of specificity in this record connecting any of Yates, Aspinall or Feather, or all of them equally, to the day-to-day decisions regarding the handling and storage of hazardous waste, and the long passage of time, I am unable to find the individuals liable as responsible corporate officers. Further, considering the passage of time between the violations, the Department's enforcement action and the OAL proceeding, a remand for additional fact finding to establish RCO liability in this case does not appear to be an effective use of the Department's resources.

CONCLUSION

Having reviewed the record, and considered the exceptions and the replies thereto, I ADOPT ALJ Metzger's conclusion that no factual dispute exists that Yates Foil violated the SWMA as set forth in the NOCAPA issued by the Department and that the ALJ properly granted summary decision in favor of the Department as to Yates Foil. Yates Foil is directed to pay the penalty of $180,000 within twenty (20) days of this Order as set forth in paragraph 14 of the NOCAPA and the invoice thereto.

See, e.g., N.J. Dep't of Envtl. Prot. v. Fiore, No. A-5387-10T4 (App. Div. April 23, 2012); N.J. Dep't of Envtl. Prot. v. Pignataro, No. A-3740-01T3 (App. Div. April 7, 2003).

I REJECT the ALJ's conclusion that the RCO doctrine does not apply under the SWMA, and MODIFY the Initial Decision to find that the SWMA and the solid and hazardous waste rules do authorize imposition of individual liability under the RCO doctrine as a matter of law but that, on the record in this matter, there is insufficient evidence to support a finding of individual liability as to Yates, Feather, and Aspinall.

IT IS SO ORDERED.

August 25, 2015
DATE

Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, BUREAU OF
HAZARDOUS WASTE ENFORCEMENT, v.
YATES FOIL USA, INC., CRAIG YATES,
JOSEPH FEATHER AND THOMAS ASPINALL

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