



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EHW 4724-07

AGENCY DKT. NO. PEA 050002-

NJD002345247

**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.

Scott Dubin, Deputy Attorney General, for petitioner (John J. Hoffman, Acting
Attorney General of New Jersey, attorney)

Robert J. Hagerty, Esq., for respondents (Robert Hagerty, PC, attorney)

Record Closed: January 14, 2015

Decided: February 26, 2015

BEFORE **SOLOMON A. METZGER**, ALJ t/a:

This matter arises out of a Notice of Civil Administrative Penalty Assessment (NOCAPA) issued by the Department of Environmental Protection in February 2006 alleging violations of the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and regulations promulgated thereunder. The NOCAPA asserts that Yates Foil failed to determine whether waste located in its facility was hazardous, failed to label hazardous-waste containers as such, did not minimize the potential for release of hazardous waste, and operated a hazardous-waste storage facility without appropriate permits. The Department seeks penalties in the sum of \$180,000 against the company and individually against “responsible corporate officers” Craig Yates, Joseph Feather and Thomas Aspinnall. Respondents requested a hearing and the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. The Department has filed a motion for summary decision. N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). The matter was assigned to the Honorable John Schuster III, and then reassigned to me on January 8, 2015, for disposition of the motion.

The relevant facts are either stipulated or undisputed. In 1990 Yates Foil rented an industrial site at 88 Route 130 in Bordentown from the Square D Co. The operating facility covered some twenty-three acres of a thirty-three-acre property. The manufacturing process involved dissolving copper into a copper-sulfate solution, which was then used to create copper foil. This material was rolled into large rolls and then cut to meet customer specifications. Copper-sulfate solutions were contained in tanks and piping throughout the site. Corrosive materials were used in the manufacturing process. During its years of operation Yates Foil transported the hazardous wastes it generated to disposal facilities under a manifest system.

Yates Foil also operated a waste-water treatment plant on site under a New Jersey Pollutant Discharge and Elimination System permit. The treatment plant cleaned groundwater contaminated by various metals and provided clean water for manufacturing.

In April 2000 the lease between Square D and Yates Foil came up for renewal. Yates Foil was experiencing a business slowdown and had reservations about committing

to a long-term lease extension. Negotiations ensued, but the parties were unable to reach an accommodation, and in July 2000 Square D instituted eviction proceedings. Production at the plant ceased in September 2001, but Yates Foil remained on site with a skeleton crew to conduct salvage operations. It continued to send hazardous wastes to disposal facilities via manifest until November 2002. From that point forward Yates Foil produced no manifests.

During the landlord/tenant proceedings Yates Foil was ordered to decommission the buildings and give notice to the Department that operations had ceased, pursuant to the Industrial Site Remediation Act (ISRA), N.J.S.A. 13:1K-1 et seq. The parties disputed their ISRA obligations and the Department determined that primary responsibility for remediation fell to Yates Foil. In September 2002 the Department undertook an ISRA review, which revealed numerous deficiencies. Dan Raviv Associates, a Square D consultant, undertook an inspection in October 2002 and found, among other problems, drums with unknown substances and some with crystallized copper sulfate, scattered throughout the plant. Robert Miller, the Yates Foil environmental manager, wrote to the Department in February 2003 listing the various process chemicals on site including hazardous waste. At this point, a substantial amount of copper-sulfate solution remained in various pipes and storage tanks. Mr. Miller submitted an ISRA clean-up work plan in April 2003 outlining the effort needed to remediate the site. This included eliminating certain process chemicals stored throughout the facility. He noted, however, that Yates Foil was without the resources to accomplish these tasks.

In September 2003, PSE&G discontinued gas and electric service to the property for non-payment of bills. On December 31, 2003, Square D and Yates Foil entered into a settlement agreement. The agreement called for Yates Foil to pay \$1,500,000 to resolve all differences and to vacate immediately. Equipment and fixtures remaining on site became the property of Square D. From that point forward Square D assumed responsibility for remediation. Yates Foil's conduct between September 2001 when manufacturing ceased, and December 31, 2003, when it departed the scene, are the subject of the NOCAPA.

Yates Foil had no permit to treat, store, or dispose of hazardous waste. After November 26, 2002, Yates Foil marked no tanks or containers with the words “hazardous waste.” Between November 26, 2002, and December 31, 2003, Yates Foil made no determination as to whether it had hazardous wastes on site.

On August 11, 2004, DEP inspector Michael Gage, of the Bureau of Solid Waste Management, was dispatched to investigate activity observed at the site. His report indicates that on arrival he spoke with the contractor’s representative, who explained that they had been hired by Square D to remove hazardous wastes from the property and ultimately to demolish most of the buildings. The contractor had identified and marked the chemical content of each container they found in spray paint. The crew was gathering drums into one location and placing contaminated piping and building debris into roll-off containers in preparation for transport to hazardous-waste facilities. Some shipments had already been made. Mr. Gage observed that the drums and roll-off containers did not have stickers affixed with the words “hazardous waste.” He informed the crew that this needed attention, and they proceeded to affix stickers in his presence.

On August 12, 17, and 24, 2004, DEP inspector Jeff Salabritas, of the Bureau of Hazardous Waste Management, conducted a more complete follow-up inspection. Mr. Salabritas was escorted through the buildings by representatives of the Square D contractor. Mr. Salabritas certifies that he observed some seventy-five containers that had been centralized in one of the buildings. They were in original containers and some forty-five of these were marked by the contractor as “hazardous waste.” The substances included “acute” hazardous waste such as arsenic and cyanide. Additionally, hazardous waste remained in process piping and tanks throughout the facility. Manifests in the Department’s files reflect that between January 2004 and April 2005 Square D shipped over one million pounds of hazardous waste to disposal facilities.

Michael Hastry is chief of the Bureau of Hazardous Waste Compliance and Enforcement. He submitted a certification in support of the penalty assessed. Mr. Hastry

attests that he reviews all hazardous-waste penalties to ensure consistency. He opined that respondents gave insufficient attention to the consequences of a power shutoff in their buildings. They failed to determine which containers held hazardous waste and did not mark these as hazardous waste. Respondents had no permit for the long-term storage of such wastes. Permits must be obtained when hazardous waste is to be stored for more than ninety days. Mr. Hastry points out that Yates Foil had been a “large-quantity generator” of hazardous waste, which is the most highly regulated of the generator categories. It also had been in business for many years and was presumed to understand tracking and disposal requirements. Using the penalty matrix at N.J.A.C. 7:26G-2.5, both the conduct and the seriousness of each violation were deemed “major” and the penalty was assessed at \$45,000, the mid-point of the range. Although the violations persisted over a lengthy period, Mr. Hastry observed that the penalty in each of the four categories was assessed based on one day of violation. Mr. Hastry noted also that the Department did not calculate the economic benefit to respondents of non-compliance with hazardous-waste rules. This is the substance of the motion record.

Respondents take the position that they knew of no remaining hazardous waste on site when they relinquished possession on December 31, 2003. Anything found by the Square D contractors thereafter may or may not have been hazardous waste, and if hazardous, may have been brought onto the property by the contractors. They feel disadvantaged by the fact that this material was removed long before they received a notice of violation. Respondents submitted no certifications concerning these points; rather, counsel offers the facts and appends documents largely created in the course of the Superior Court landlord/tenant litigation. Respondents believe that Square D bears at least some responsibility for any failures at the plant, and that the Department has inexplicably declined to see this broader context.

The parties to the Superior Court litigation had a long history together and, indeed, Yates Foil was at one time owned by Square D. Yet, an extended discussion of the circumstances under which they parted ways is tangential to our inquiry. The NOCAPA makes discreet allegations concerning acts and omissions by respondents from the time

they ceased production until they relinquished possession. During this period respondents controlled the site. Respondents disagree with conclusions drawn by inspectors Gage and Salabritas, but undertook no discovery to explore the basis for their opinions. They are poorly positioned to argue that the record is sparse and/or inconsistent. Under Brill, a fact dispute is not raised by supposition.

The Department has, at N.J.A.C. 7:26G-6.1, adopted the hazardous-waste regulations promulgated by the federal government under the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6901 et seq. The first violation involves the failure to determine whether the drums observed by Mr. Gage and Mr. Salabritas contained hazardous waste, 40 C.F.R. § 261.11 (2014). Yates Foil was asked in discovery whether it made this determination, and it answered simply that it could locate no documents on the point. 40 C.F.R. § 262.34 (2014) requires hazardous waste to be labeled as such, and many of the drums and pipes were ultimately determined to contain hazardous waste. The Department's motion with respect to these first two violations rests on the certifications, reports and photographs produced by inspectors Gage and Salabritas and on manifests for hazardous materials shipped by Square D to disposal facilities. The inspections occurred in August 2004 over the course of four days. If respondents believe that the inspectors were deceived by the Square D contractors, or otherwise incorrectly gauged the scene, then it was for them to inquire further through discovery. They argue instead that they did not learn of these inspections until many months later and thus had no independent opportunity to evaluate the drums and roll-off containers at issue. The argument has some merit, but only some; it does not excuse the failure to inquire. The inspectors, the contractors, the manifests, and the photographs were available.

Regulations demand that risks associated with hazardous waste be minimized, 40 C.F.R. § 265.31 (2014). It is reckless to allow a power shutoff in buildings where piping contains hazardous materials. Respondents are of the opinion that Square D, having been made aware of the issue, had some responsibility to mitigate potential damages by paying the electric bill. Though the parties were in litigation, no order of the court exists relieving Yates Foil of responsibility for heating these buildings. Further, there is no indication that

respondents took steps to protect the pipes in light of the shutoff. Finally, the suggestion that resources were insufficient to heat the buildings does not fully tally with settlement terms entered a few months later, in which Yates Foil agreed to pay Square D \$1,500,000 to resolve all claims. As it develops, pipes did burst, but the Department was unable to substantiate whether this occurred before or after Yates Foil departed the scene. Consequently, the NOCAPA asserts only that Yates Foil failed to minimize risk.

Hazardous-waste generators may store wastes used in process equipment for up to ninety days, 40 C.F.R. § 262.34(a) (2014). Thereafter a storage permit is required. The Department's ISRA investigation and reports by Robert Miller and by Dan Raviv Associates between fall 2002 and spring 2003 all reflect that much remained to be done to complete environmental cleanup at the site. The presence of hazardous wastes and process chemicals is specifically mentioned in these reports, among other deficiencies. Respondents have no records showing hazardous materials leaving the property after November 2002. Square D began disposing of considerable quantities of hazardous waste in January 2004. The inference that the wastes disposed of by Square D were those unaddressed by Yates Foil flows readily from this evidence. Of necessity, this waste had been on site under Yates Foil's control for longer than ninety days.

Respondents argue that summary decision on penalty is improper, as the circumstances must be evaluated. Moreover, Square D was lightly fined for the same violations, which suggests that something is awry. Fatal to almost any position respondents take in opposition to the motion is the absence of affidavits and other supporting proofs. Counsel poses many plausible fact questions, but argument is rigidly distinct from proof. The Department assessed penalties against Yates Foil at the midpoint, which is the default position. To establish a fact question respecting their conduct or the seriousness of the violations, it was for respondents to present mitigating considerations. The instant matter does not extend to violations committed by Square D, but the Department appears to have concluded that once in possession Square D moved purposefully to remediation.

The Department also seeks to utilize the “responsible-corporate-officer” doctrine to impose personal liability on Craig Yates, the owner and director of the Company, on Joseph Feather, chief financial officer, and on Thomas Aspinall, president. The argument rests primarily on Department of Environmental Protection v. Standard Tank Cleaning Corp., 284 N.J. Super. 381 (App. Div. 1995). That case involved violations of the Water Pollution Control Act, which defines “person” for purposes of establishing a violation to include responsible corporate officers, N.J.S.A. 58:10A-3. The court held that personal liability can be imposed upon a showing of culpable behavior, or unreasonable failure to prevent the violation. In Asdal Builders v. Department of Environmental Protection, 426 N.J. Super. 564 (App. Div. 2012), the court declined to impose personal liability and explained that the responsible-corporate-officer doctrine employed in Standard Tank was not a general principle available for environmental enforcement, but rather hinged upon specific statutory authorization. In construing the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-3, and the Flood Hazard Area Control Act, N.J.S.A. 58:16A-51, the court found no such authorization. In the instant matter, the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., does not mention the responsible-corporate-officer doctrine. Thus, the Act cannot be read as creating an exception to the longstanding tenet of limited liability, see, e.g., DEP v. Ventron Corp., 94 N.J. 473 (1983). To prevail, the Department would have to “pierce the corporate veil,” a difficult route the motion did not undertake.

Based on the foregoing, summary decision is **GRANTED** as against Yates Foil, both with respect to liability and in the sum of \$180,000.00. Personal liability against the corporate officers is **DENIED**.

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.



February 26, 2015

DATE

SOLOMON A. METZGER, ALJ t/a

Date Received at Agency:

Date Mailed to Parties:

mph