



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	<u>ADMINISTRATIVE ACTION</u>
	)	FINAL DECISION
Petitioner,	)	OAL DKT NOS. ECE 9903-10, ECE
	)	9904-10, ECE 9905-10, ECE 9908-10,
v.	)	EER 8829-10, EER 8833-11, EER 1216-
	)	13, EER 15876-14, and EER 0798-15
RADIATION DATA,	)	
	)	AGENCY REF. NOS. PEA 100002-
Respondent.	)	439481, PEA 100002-332995, PEA
	)	100005-332995, PEA 100011-332995,
	)	PEA 090002-439481, PEA 090002-
	)	332995, PEA 110001-439481, PEA
	)	080001-11912, PEA 120002-332995, and
	)	PEA 140001-332995
	)	
	)	(CONSOLIDATED)
	)	
	)	RECORD (PORTIONS) SEALED ¹

This Order addresses the appeal of nine Administrative Orders and Notices of Prosecution (AO/NP) issued by the Department of Environmental Protection (Department) between August 26, 2009 and December 11, 2014, alleging that Radiation Data (Respondent) violated various requirements relating to the certification of radon testers and mitigators under the Radiation Protection Act (Act), N.J.S.A. 26:2D-1 et seq., and the relevant implementing regulations, N.J.A.C. 7:28-27.1 et seq.

¹ By order dated November 16, 2015, ALJ James-Beavers granted the Department's motion on consent to seal the record as to certain exhibits and related testimony to protect the confidentiality of non-public building owners and their addresses where radon testing or treatment occurred, as required by the Act, N.J.S.A. 26:2D-73 and -78.

The first six AO/NPs were issued between August 2009 and June 2010 and were the subject of a summary decision motion filed by the Department in January 2012, which was granted in part by Administrative Law Judge (ALJ) Joseph F. Martone on March 14, 2013. In the meantime, the Department issued three additional AO/NPs. Respondent's hearing requests on the latter three AO/NPs were granted and the matters transmitted to OAL, where they were consolidated with the initial six appeals. The consolidated matters were reassigned to ALJ Lisa James-Beavers, who denied the Department's request to sever the first six AO/NPs and convert ALJ Martone's partial summary decision into an initial decision. ALJ James-Beavers also denied Respondent's motion to re-open and reconsider ALJ Martone's partial summary decision.

The ALJ held seven days of hearings on October 27 and 28, 2015, November 2 and 23, 2015, January 5 and 27, 2016, and February 11, 2016, after which post-hearing briefs were submitted. The record was closed on May 26, 2016, and the ALJ issued her initial decision on June 28, 2017. The ALJ found that Radiation Data violated the various provisions of the Act and regulations as the Department alleged in the various AO/NPs, except for two allegations in the matter docketed as EER 07985-15 which were dismissed. Respondent filed exceptions on July 25, 2017, pursuant to an extension. On August 1, 2017, the Department timely replied to Respondent's exceptions.

For the reasons that follow, based on my review of the voluminous record and Respondent's lengthy exceptions and the Department's reply thereto, I AFFIRM as MODIFIED herein the Initial Decision. At its core, the radon certification program requires certified radon measurement and mitigation businesses to comply with their certification and quality assurance and quality control plans. The record amply supports the ALJ's findings that Respondent

repeatedly violated the regulatory requirements with which it must comply as part of its certification.

BACKGROUND

Radon is a colorless, odorless, radioactive gas that comes from the natural breakdown of uranium in soils. By moving through soils and cracks in rocks, radon can reach the surface and enter homes through the foundation and accumulate. Long-term exposure to elevated concentrations of radon gas poses a health risk by increasing the risk of developing lung cancer. The action level for radon as recommended by the United States Environmental Protection Agency (EPA) is 4 picocuries per liter (pCi/L). Therefore, if a radon measurement test shows a level at or above 4 pCi/L, mitigation is recommended.²

Statutory Background

The Radiation Protection Act, as amended and supplemented, requires the Department to establish a program for the certification of persons who test for, mitigate and safeguard buildings from the presence of radon gas and radon progeny. N.J.S.A. 26:2D-70 and -71. The Act prohibits any person who is not certified, “to test for, or mitigate or safeguard a building from, the presence of radon and radon progeny,” except if the person owns the building on which such activity is done or a person does so without remuneration.³ N.J.S.A. 26:2D-72. “The purpose of the certification program would be to insure that testers use procedures and equipment which

² Respondent takes exception to the ALJ’s finding that EPA “has established 4.0 pCi/L as the action level at which to consider litigation.” Exceptions at 4. I agree that this finding should be modified as stated here.

³ Respondent takes exception to the ALJ’s finding that radon measurement and mitigation businesses must seek certification from the Department. Exceptions at 4. As set forth, the statute requires the Department to establish a certification program for persons, which include businesses, who test for, mitigate and safeguard buildings from the presence of radon/radon progeny, and prohibited any uncertified person from doing such activities, under criminal penalty. The Department accordingly established the certification program. For these reasons, the ALJ’s finding was correct.

would provide scientifically accurate results.” Statement to Senate No. 1797, Senate Energy and Environment Committee (March 6, 1986). The Act authorizes the Department to promulgate rules and regulations to implement the provisions of the Act, N.J.S.A. 26:2D-76.

The Act also requires certified persons to disclose to the Department the address or location and owner’s name of the building where testing or mitigation services were provided, and the results of any tests performed. N.J.S.A. 26:2D-74. At the same time, the Act included a confidentiality provision, which prohibits the disclosure to any person, except to the Department or the Department of Health, the address or owner of a nonpublic building that the person tested or treated for the presence of radon/radon progeny, with some exceptions. N.J.S.A. 26:2D-73; see also N.J.S.A. 26:2D-78 (providing that data relating to radon contamination at specific properties gathered pursuant to the Act should not be deemed to be public records).

The Act imposes a criminal penalty for violations of the Act, underscoring the importance of the certification program due to the potential danger to the public health from exposure to radon. A person who violates the Act by a) testing for, mitigating or safeguarding a building from the presence of radon and radon progeny without being certified by the Department to do so, b) disclosing confidential information, or c) failing to report the required information regarding testing or mitigation services provided, is guilty of a crime of the third degree. N.J.S.A. 26:2D-77.

Regulatory Background

As mandated and authorized by the Act, as well as N.J.S.A. 13:1B-1 et seq. and N.J.S.A. 13:1D-1 et seq., the Department promulgated the radon certification rules at N.J.A.C. 7:28-27. Consistent with the Act, the rules mandate certification for any person who sells radon/radon

progeny devices, tests for radon/radon progeny or mitigates radon in buildings, and prohibit the sale of devices, testing, mitigation or safeguarding against the presence of radon unless the person is certified to do so or has been exempted from certification. N.J.A.C. 7:28-27.1. As relevant here, the certification requirements do not apply to persons who sell or offer for sale at a retail outlet radon measurement devices, provided certain criteria are met. N.J.A.C. 7:28-27.31.

The rules require that a certified person, which includes corporations and individuals, as defined at N.J.A.C. 7:28-27.2, must continuously remain in compliance with the Act and the rules. N.J.A.C. 7:28-27.3. A certification is valid for one year, and no radon measurement, mitigation, or safeguard activity shall be conducted after the term expiration unless an application for renewal certification is received by the Department 30 days prior to the expiration date and is pending approval. N.J.A.C. 7:28-27.22. A certified person may only do those activities for which the person is certified. N.J.A.C. 7:28-27.3(d). The certified business is responsible for obtaining the appropriate certificates, maintaining certified professionals in employment, developing required quality assurance/quality control (QA/QC) plans and radiological safety plans, and reporting results of all measurement and/or mitigation activity to the Department. N.J.A.C. 7:28-27.3(j).

The rules distinguish between those who sell devices or test for radon or radon progeny, generally referred to as radon measurement, and those who design and/or install systems to mitigate and safeguard against radon contamination, generally referred to as radon mitigation.

Radon Measurement

The Department has established certification requirements for a radon measurement business, a radon measurement specialist, and a radon measurement technician. A certified

radon measurement business is a commercial business duly certified to sell devices or test for radon/radon progeny. N.J.A.C. 7:28-27.2. Among other things, the application for certification as a radon measurement business must include an identification of the type of radon/radon progeny measurement equipment for which certification is sought, as defined in the authorized measurement protocols, as well as the certified measurement specialists and technicians employed or to be utilized and all instrumentation to be used in radon/radon progeny measurement. N.J.A.C. 7:28-27.6. “Authorized measurement protocols” is defined in N.J.A.C. 7:28-27.2 as EPA’s protocols for radon product measurement and screening and follow-up radon product measurements. The application must also include a copy of the quality assurance plan specified in N.J.A.C. 7:28-27.33, the radiological safety plan specified in N.J.A.C. 7:28-27.34, and all reporting forms used to report results to clients. N.J.A.C. 7:28-27.6.

The certified radon measurement business must at all times have, on staff or as a consultant, a certified radon measurement specialist, who is charged with directing the measurement activities of the business, signing and being responsible for required reports, and assessing QA/QC measures of the business. N.J.A.C. 7:28-27.5(a). A certified radon measurement specialist is a person certified to perform or evaluate radon/radon progeny measurements for a certified radon measurement business. N.J.A.C. 7:28-27.2. An applicant for certification as a radon measurement specialist must provide, among other things, “[a] list of all certified radon measurement businesses for which the applicant will be a certified radon measurement specialist.” N.J.A.C. 7:28-27.10(a)7. “If a certified radon measurement specialist wishes to function as a measurement business, he or she must be certified as a radon measurement business.” N.J.A.C. 7:28-27.9(c).

A certified radon measurement business must also have a certified radon measurement technician on staff at all times. N.J.A.C. 7:28-27.5(i). A certified radon measurement technician is a person certified to do the measurement activities. N.J.A.C. 7:28-27.2. Similar to the application for certification as a radon measurement specialist, the application for certification as a radon measurement technician must include, among other things, a list of all certified radon measurement businesses for which the applicant will be a certified radon measurement technician. N.J.A.C. 7:28-27.13(a)5.

As the Department explained when it adopted the rules, the responsibilities of a certified radon measurement technician are a subset of those of a certified radon measurement specialist. 22 N.J.R. 3516, 3519 (Nov. 19, 1990). Accordingly, certification as a radon measurement specialist qualifies a person as a certified radon measurement technician. N.J.A.C. 7:28-27.9(b). Radon or radon progeny testing may be done by certified radon measurement specialists or technicians. N.J.A.C. 7:28-27.5.

Additionally, the certified radon measurement business must develop and adhere to a QA/QC plan for each type of measurement equipment employed, to assure the reliability and validity of radon measurements. N.J.A.C. 7:28-27.5(c). The QA/QC plan must be submitted to the Department for approval, and must contain information specified in N.J.A.C. 7:28-27.33, including procedures used by the business to ensure that technicians understand and follow the sampling procedures for each type of measurement equipment for which certification is being sought. N.J.A.C. 7:28-27.33(a)4. The certified measurement business must also comply with record keeping requirements, set forth in N.J.A.C. 7:28-27.21, and reporting requirements for all radon and radon progeny measurements performed, set forth in N.J.A.C. 7:28-27.28.

Radon Mitigation

The Department has also established certification requirements for a radon mitigation business, a radon mitigation specialist, and a radon mitigation technician. A certified radon mitigation business is a business certified to design and/or install systems in buildings to mitigate and safeguard against radon contamination. N.J.A.C. 7:28-27.2. The business must have a certified radon mitigation specialist on staff or as a consultant. N.J.A.C. 7:28-27.7(a).

A certified radon mitigation specialist is a person certified to evaluate diagnostic tests, i.e., tests performed or procedures used to determine appropriate mitigation methods for a building, in order to determine appropriate radon mitigation and safeguard strategies for a building. N.J.A.C. 7:28-27.2. The certified radon mitigation specialist is responsible for evaluating diagnostic tests in buildings and designing mitigation systems for those buildings for the certified radon mitigation business. N.J.A.C. 7:28-27.7. The specialist shall perform a visual inspection and diagnostic tests, as appropriate, prior to system installation to determine the appropriate system to be installed. The specialist shall document observations and test results made during inspections. N.J.A.C. 7:28-27.7(d). Certification as a radon mitigation specialist qualifies the individual as a certified radon mitigation technician. N.J.A.C. 7:28-27.15(c). If a certified radon mitigation specialist wishes to function as a radon mitigation business, the specialist must be certified as a radon mitigation business. N.J.A.C. 7:28-27.15(b).

A certified radon mitigation business must assure that mitigation systems are installed under the direct supervision of a certified radon mitigation specialist or technician. N.J.A.C. 7:28-27.7(c). A certified radon mitigation technician is a person certified to install and/or supervise the installation of the radon mitigation or safeguard system in a building.⁴ N.J.A.C.

⁴ Radiation Data takes exception to the ALJ's finding that "[r]adon mitigation technicians' perform the physical

7:28-27.2. The certified mitigation business must also comply with record keeping requirements, set forth in N.J.A.C. 7:28-27.21, and reporting requirements for all mitigation work performed, as set forth in N.J.A.C. 7:28-27.28.

Factual Background

According to the facts stipulated by the parties, Radiation Data was, founded in 1986. ALJ James-Beavers found that Radiation Data is the largest radon measurement business in the State with its principal place of business in Skillman, Somerset County. As a certified radon measurement business, radon/radon progeny testing may only be done by certified radon measurement specialists or technicians. N.J.A.C. 7:28-27.5. Radiation Data is also a certified radon mitigation business.⁵ As such, Radiation Data is authorized to perform radon measurement activities in homes and public buildings, and to design and install mitigation systems to reduce indoor radon concentrations, in accordance with the requirements summarized above.

installation of mitigation systems.” Initial Decision at 8. Radiation Data cites the regulatory definition of “certified radon mitigation technician” to state that “a technician can perform or supervise an installation.” Exceptions at 5. The Initial Decision is modified to clarify that a certified radon mitigation technician may install and/or supervise the installation of a radon mitigation or safeguard system in a building. N.J.A.C. 7:28-27.2.

⁵ Radiation Data is also a certified radon laboratory, which analyzes samples for the presence of radon/radon progeny. N.J.A.C. 7:18-6.1 et seq. The issues raised here do not involve Radiation Data’s radon laboratory certification. Radiation Data takes exception to the ALJ’s finding that the company’s QA/QC plan “gives the procedures for the kind of devices the business uses, the procedures how to place it, retrieve it, and analyze it and how to handle it.” Initial Decision at 7. Radiation Data claims that its measurement business is not permitted to analyze charcoal canisters, and the ALJ’s finding reflects “a fundamental misunderstanding of how Radiation Data’s different businesses work (mitigation; measurement; laboratory; and retail).” Exceptions at 4. Exhibit A of the QA/QC plan, “AC [activated charcoal] Method” includes a section that “deals in detail with the laboratory procedures under which the canisters are assayed.” The QA/QC plan also includes “radon canister assay procedures.” Therefore, based on the record, I agree with the ALJ’s finding.

Radiation Data's approved QA/QC plan dated 2005⁶ is critical to understanding Radiation Data's obligations and the violations alleged in the various AO/NPs. As part of its certification, Radiation Data must develop and comply with its QA/QC plan for each type of measurement equipment employed to assure radon measurements are reliable and valid. N.J.A.C. 7:28-27.5(c). The plan must include the regulatory elements set forth in N.J.A.C. 7:28-27.33 and the requirements of the authorized measurement protocols. Pursuant to N.J.A.C. 7:28-27.33, among other things, a QA/QC plan must include a description of sampling procedures for each type of measurement equipment for which certification is being sought, including "[t]he procedures used by the firm to ensure that technicians understand and follow the procedures." N.J.A.C. 7:28-27.33(a)4. The plan must also include a description of the business's organization, a description of sampling tracking/chain of custody procedures, analytical procedures for portable instruments, a description of procedures to calibrate and maintain portable instruments, as well as a description of internal quality control procedures for those instruments, data reduction and reporting procedures, corrective action procedures, and a description of the quality assurance reports that will be submitted to the business's management. N.J.A.C. 7:28-27.33.

⁶ Respondent takes exception to the ALJ's finding that the QA/QC plan is "from Alpha Concepts, a branch office of Radiation Data in Hackettstown." Initial Decision at 7. Respondent claims that "MEB activities were not conducted in this branch office," and therefore the plan "obtained at that location cannot be construed to be the version used at the MEB operations." Exceptions at 5. (MEB refers to "measurement business.") It is unclear that by stating the plan is "from" Alpha Concepts, the ALJ meant that the plan was physically obtained from that branch office. Clearly, the plan is identified on the cover page as "QA/QC Plan," "Radiation Data, Inc./Alpha Concepts," dated March 19, 2005 and "prepared by Dr. J.A. Baicker." Moreover, the plan entered into evidence as J-10 is bates-stamped RD-0008 through RD-0065, and Mr. Baicker testified that it was the plan in effect. Therefore, Respondent's exception is without moment, as the critical fact is that the QA/QC plan in evidence as J-10 is Radiation Data's QA/QC plan in effect at the times relevant to this proceeding.

Radiation Data's quality assurance manager is J. Keith Baicker,⁷ who testified at the hearing. According to the QA/QC plan, Radiation Data received approval to use charcoal canisters, continuous radon monitors (CRMs), and E-Perms.⁸ To explain "[t]he procedures used by the firm to ensure that technicians understand and follow the [sampling] procedures," as required by N.J.A.C. 7:28-27.33(a)4, Radiation Data's QA/QC plan stated that its "affiliated measurement technicians are all licensed by NJ, and have received the standard 2-day course, plus annual continuous education." (QA/QC plan, J-10 at 3 (RD-0010)) Radiation Data's QA/QC plan further indicated that "[t]heir NJ licenses are maintained up to date, or their affiliation is terminated." Ibid.

Pursuant to Radiation Data's QA/QC plan, Radiation Data "will maintain records of the current licenses status of all home inspectors for whom the company reports radon tests to NJ DEP" because "it is company and NJ state policy for home inspectors to be licensed and to operate as agents of licensed Radon Measurement Businesses." (QA/QC plan, J-10 at A11 (RD-0029)) Radiation Data "will refuse to process any radon test kits submitted by a home inspector whose license has expired." Ibid.

Based on various inspections and compliance evaluations, the Department determined that Radiation Data was in violation of a number of the radon certification program rules and its QA/QC plan. Radiation Data sold radon measurement devices it was not authorized to sell; allowed on multiple occasions uncertified persons to test for radon/radon progeny; failed to

⁷ Mr. Baicker is referred to as "J. Keith Baicker," e.g., T5, which according to his certification at P-25 is the correct spelling of his name. He is also referred to as "Jay Keith Baicker," e.g., T6, and "Keith Baicker," e.g., T7. All of these references in the record are to the same individual. Contrary to the ALJ's finding that Mr. Baicker prepared the QA/QC plan, Initial Decision at 7, the 2005 plan was prepared by Dr. J.A. Baicker and the Initial Decision is modified accordingly.

⁸ Radiation Data takes exception to the ALJ's finding that the company "previously had authorization to sell E-PERM electrets." Initial Decision at 7; Exceptions at 5. Again, according to its QA/QC plan, Radiation Data "[a]t one time ... sometimes sold [E-PERMs] to home owners for private use...." (J10-RD0045). Therefore, the record supports the ALJ's finding.

properly maintain its radon measurement devices in accordance with its QA/QC plan to assure scientifically valid results; submitted incomplete and/or incorrect reports and data sheets; failed to keep records of the current license status of its affiliated radon measurement technicians; failed to submit all test results conducted by its certified radon measurement specialists and technicians; failed to comply with the calibration protocols set forth in its QA/QC plan; allowed a person who was not a certified mitigation specialist or technician to perform radon mitigation jobs; allowed a person who was not certified as a radon mitigation specialist to perform visual inspections and diagnostic tests for a proposed mitigation system; and violated the radiation safety training requirements. The Department issued nine separate AO/NPs to Radiation Data, dated August 26, 2009, January 6, 2010, April 20, 2010, June 17, 2010 (three issued on this date), February 24, 2011, June 20, 2013, and December 11, 2014, alleging these violations, which were appealed and are the subject of the partial summary decision by ALJ Martone dated March 14, 2013, and the Initial Decision by ALJ James-Beaver dated June 28, 2017.

Partial Summary Decision by ALJ Martone

ALJ Martone, in his March 2013 partial summary decision, found that Radiation Data did not assert any facts to dispute the allegations set forth in the six AO/NPs before him.⁹ Summary Decision at 17. Rather, its opposition was based on “a matter of principle,” with its arguments relying on its own “subjective interpretation of the regulations” as well as “its belief that the violations are for trivial errors and thus, not worthy of prosecution.” *Ibid.* Thus, based on the Department’s evidence, the ALJ granted the Department partial summary decision on the

⁹ The AO/NPs are docketed as EER 8829-11 dated August 2000 (J5); EER 8833-11 dated January 6, 2010 (J6), ECE 9903-10 dated April 2010 (J1), and three AOs dated June 2010, ECE 9904-10 (J2), ECE 9905-10 (J3) and ECE 9908-10 (J4).

majority of the violations alleged in the six AO/NPs. In doing so, the ALJ concluded the following. First, a radon mitigation specialist or technician must be physically present during mitigation system installation in order to “directly supervise” the installation as required by N.J.A.C. 7:28-27.7(c). Summary Decision at 4-6; 15-16. In finding that “direct supervision” means physically present, the ALJ rejected Radiation Data’s argument that a specialist or technician may “directly supervise” installation without being present at the site.

Second, a certified radon mitigation business must have a certified mitigation specialist visually inspect and perform any appropriate diagnostic tests to determine the appropriate mitigation system to be installed. N.J.A.C. 7:28-27.7(a) and (d); N.J.A.C. 7:28-27.2. Summary Decision at 6-7. In so finding, the ALJ rejected Radiation Data’s argument that someone other than a specialist could do the initial inspection and draw up installation plans, for review and approval by a specialist in the office.

Third, the ALJ found that Radiation Data sold alpha track testing devices even though such measurement devices were not included in its QA/QC plan and thus, not part of its certification. As such, Radiation Data extended its radon measurement business to activities outside the scope of its certification, in violation of N.J.A.C. 7:28-27.3(d). The ALJ rejected Radiation Data’s argument that it was authorized to sell these devices because it was part of the business’ “retail sale” arm and therefore, exempt from the certification requirement under N.J.A.C. 7:28-27.31(a)(4). Summary Decision at 7-9. The ALJ found that the exemption did not apply because Radiation Data was certified as a radon measurement and mitigation business and, accordingly, must be authorized for all radon-related services offered to the public.

Fourth, the ALJ found that Radiation Data did not follow the calibration and device reading protocols set forth in its QA/QC plan, as required by N.J.A.C. 7:28-27.5(a) and (c). Summary Decision at 9-10; 11-12.

Fifth, Radiation Data failed to accurately complete client reports and customer data sheets in accordance with its QA/QC plan, which failure indicated that Radiation Data did not have a certified radon measurement specialist oversee the measurement activities as required by N.J.A.C. 7:28-27.5(a)1. Radiation Data did not dispute these facts, arguing instead that such offenses were “trivial.” Summary Decision at 10-11. The ALJ disagreed and found that the improper reporting supported the Department’s charge.

Sixth, the ALJ found that Radiation Data sent persons with expired licenses to conduct radon testing, thus allowing uncertified persons to test for radon/radon progeny, in violation of N.J.A.C. 7:28-27.5(b). Summary Decision at 11, 16. Collectively, these uncertified persons conducted over 700 tests. The ALJ found that as a certified radon measurement business, Radiation Data is strictly liable for the violations of these persons, described by the ALJ as independent contractors. Ibid.

Finally, the ALJ found that Radiation Data failed to provide proof it was complying with its Radiation Safety Plan and therefore violated N.J.A.C. 7:28-27.34(a) and (c). Summary Decision at 14-15.

Initial Decision by ALJ James-Beaver

As previously noted, the Department issued three additional AO/NPs that were not part of the motion for summary decision before ALJ Martone.¹⁰ The allegations set forth in these

¹⁰ These AO/NPs are docketed as EER 1216-13 (J7), EER 15876-14 (J8), and EER 0798-15 (J9).

AO/NPs were addressed during the seven-day hearing held by ALJ James-Beaver, after which she issued her Initial Decision affirming the majority of the violations alleged.

First, the ALJ rejected Radiation Data's argument that "it is not responsible for the 500 measurement technicians that are 'affiliated' with its measurement business." Initial Decision at 52. Radiation Data characterized its affiliated measurement technicians as simply "affiliates" in an attempt to disavow any responsibility for their actions or inactions. However, as the ALJ explained, the Department's witnesses testified that "affiliates are simply certified measurement technicians who conduct radon testing through a certified measurement business." Ibid. Under N.J.A.C. 7:28-27.5(a) and (i), a certified radon measurement business must employ a certified radon measurement specialist and technician, and, according to N.J.A.C. 7:28-27.59b), radon/radon progeny testing "may only be performed by certified radon measurement specialists or certified radon measurement technicians." Initial Decision at 53, citing N.J.A.C. 7:28-27.5(b); N.J.A.C. 7:28-27.1; N.J.S.A. 26:2D-72. Moreover, the business is responsible for verifying whether a radon test was performed by a certified radon professional. N.J.A.C. 7:28-27.28(a)(9). Finally, Radiation Data's QA/QC plan itself requires that its "affiliated measurement technicians are all licensed." Initial Decision at 58. Thus, the business is responsible for ensuring that only certified measurement specialists or technicians tested for radon/radon progeny, and is liable for its failure to do so. Initial Decision at 54-55.

Second, as ALJ Martone did, ALJ James-Beaver found that the rules require a radon mitigation specialist to visually inspect buildings prior to installing mitigation systems. Initial Decision at 55-56. Radiation Data violated this rule when it sent a mitigation technician to provide estimates and draw up a proposed mitigation system, which then would be faxed to the office for review and approval by a mitigation specialist.

Third, again as ALJ Martone did, ALJ James-Beaver found that the retail outlet exemption did not apply to Radiation Data, and that it sold alpha track testing devices without approval, thereby violating the certification requirement. Initial Decision at 56-57.

Fourth, the ALJ found a number of violations of N.J.A.C. 7:28-27.5 due to Radiation Data's failure to adhere to the calibration protocols included in its approved QA/QC plan. As a factual matter, Radiation Data did not dispute that it used measurement devices that were not properly calibrated. Instead, Radiation Data argued it was not responsible for ensuring that its devices were calibrated in accordance with its QA/QC plan. Radiation Data also argued that although it sent results of tests using monitors that were out of calibration, the notices to the homeowners included a note so advising and that the results were an "estimate only," which it claims was a sufficient notice of invalidity. The ALJ rejected these arguments. "Radiation Data cannot ignore the measurement and calibration protocols in its own QA/QC plan when it relied on that QA/QC plan to get DEP to recertify it as a measurement business every year." Initial Decision at 58. Moreover, the ALJ found that if a test had been rejected as invalid because the monitor was out of calibration, the results never should have been reported to homeowners. The ALJ correctly identified the purpose of adhering to a QA/QC plan, which is to assure radon measurements are reliable and valid. Thus, the ALJ found that Radiation Data violated N.J.A.C. 7:28-27.5(c) by failing to adhere to the protocols required by its QA/QC plan. Initial Decision at 57-61.

Fifth, the ALJ found that Radiation Data violated N.J.A.C. 7:28-27.33 when it reported radon tests using forms different from those included in its QA/QC plan and/or based on incomplete data, in violation of its QA/QC plan. Initial Decision at 64.

Sixth, the ALJ found that Radiation Data failed to submit all results of radon tests on a monthly basis as required by N.J.A.C. 7:28-27.28. Initial Decision at 61-62.

Seventh, the ALJ found that Radiation Data failed to give initial and refresher radiation safety training in violation of N.J.A.C. 7:28-27.34. Here again, Radiation Data argued that it was not responsible for providing such training to its affiliated measurement specialists or technicians. However, the ALJ found that the Department acted within its authority by interpreting “employees or consultants” to include all specialists and technicians affiliated with its business. Initial Decision at 62-63.

Finally, the ALJ found that Radiation Data violated the recordkeeping requirement at N.J.A.C. 7:28-27.21(a)4 when the Department’s spot check of Radiation Data’s files showed that twenty certifications of affiliated radon measurement specialists and technicians were missing.

DISCUSSION

After careful review of the extensive record, as explained below, I agree with and adopt, as modified, the findings and conclusions made by ALJ Martone in his partial summary decision and by ALJ James-Beavers in her initial decision after hearing. The Department implements and enforces the radon certification program as statutorily required. The Legislature made it clear that only persons certified to perform radon measurement, mitigation, or safeguard activities may do so, under penalty of law. Certification is a stamp of imprimatur by the State which gives the public confidence in the work done by the certified business. Here, that work enables persons to evaluate the risk to their health due to exposure to indoor radon concentrations and to determine the type of mitigation service they may need to protect themselves against this cancer-causing, radioactive gas.

Clearly, the purpose of the certification rules is to protect the public by requiring persons who wish to test for radon and install mitigation systems to meet minimum performance standards before and while certified. A person may only be certified as a radon measurement business if proficiency tests are passed, the required QA/QC and radiological safety plans are in place, and the other requirements are met. N.J.A.C. 7:28-27.6. Once certified, the certified person must adhere to all certification requirements, to ensure that the public is protected and quality, reliable services are being offered.

It is axiomatic, then, that as a certified radon measurement business and a certified radon mitigation business, Radiation Data must comply with all applicable rules. These rules include developing and adhering to a QA/QC plan with all required elements, submitted to the Department for approval, “for each type of measurement equipment employed in order to assure the reliability and validity of radon measurements.” N.J.A.C. 7:28-27.5(c). Among other things, the plan must include device calibration and testing procedure protocols to assure data reliability. See NJDEP v. Parsippany-Troy Hills Township, 2008 WL 2941757 (N.J. Adm.) Final Decision (March 10, 2008) (a continuous emissions monitor system is not operable “without some form of quality control based on the function and purpose of that system.... Where the success or effectiveness of a monitoring system ... depends on the quality of the data it produces, the inability to produce verifiable or quality assured data is sufficient to establish that the equipment was not operable”).

Radiation Data attempts to deflect its own responsibility by accusing the Department of overreaching in requiring Radiation Data to adhere to its own QA/QC plan, which identifies and commits to certain actions related to its affiliated radon measurement technicians and specialists. By characterizing these technicians and specialists as “affiliates” and arguing that it does not

control them, Radiation Data attempts to disconnect these certified technicians and specialists from its own business and disavow any responsibility for their actions. That Radiation Data claims no responsibility for the actions of these individuals is the critical flaw in its position. Radiation Data decided to allow each specialist and technician to become affiliated with its business, included them in its QA/QC plan, and derives a benefit from their affiliation. By doing so, Radiation Data became responsible to ensure that the specialists and technicians acted in accordance with their certification. Radiation Data may not use the affiliation for its benefit and then disclaim the responsibility inherent in that relationship.

The radon certification program was created because the Legislature wanted to ensure that radon measurements in people's homes, workplaces, and other buildings are valid and reliable and that mitigation systems installed are effective. Radiation Data undermines this essential purpose when it violates its QA/QC plan, including the calibration and validation protocols and its responsibility for the actions of its affiliated certified measurement specialists and technicians. Cf. HouseInspect v. Department of Env'tl Prot., 2010 WL 9513229 (Commonwealth Court of Pennsylvania April 22, 2010) (finding an important element of the Pennsylvania DEP's radon testing program is the requirement that a radon tester maintain a quality assurance program to assure accurate measurements and that errors are controlled; the program shall insure testing devices are routinely and properly calibrated); Donia v. State Department of Health, 2001 WL 498421 (Ct. of Appeals Ohio, Fifth District, May 7, 2001) (finding the director is authorized to determine if an applicant's procedures are sufficient to assure accurate radon measurements and to assure effective radon mitigation and reversing trial court judgment that vacated order revoking the petitioner's radon mitigation specialist license for failing to have approved quality assurance and quality control procedures). "[D]ata cannot be

deemed ‘adequate and reliable’ unless backed up by appropriate mechanisms for monitoring and enforcing ... compliance.” George E. Warren Corp. v. USEPA, 159 F.3d 616, 625 (D.C. Cir. 1998).

In its 57 pages of exceptions, Radiation Data repeats a number of arguments that it claims ALJ James-Beavers failed to address. Exceptions at 2, 42-53. These general exceptions are addressed immediately below. As to the other “conclusions of law” to which Radiation Data takes exception (see Exceptions at 23-42, 53-56), to the extent Radiation Data argues that the ALJ’s factual findings were wrong, these exceptions are addressed next, organized by violation. To the extent Radiation Data’s arguments appear to challenge the ALJ’s interpretation of the rules, these are addressed as well.

General Exceptions

First, Radiation Data argues that the Department implemented what Radiation Data calls “an ‘affiliate program,’” which it argues imposes liability on a certified measurement business for the actions or inactions of “independent home inspectors who are employed by non-measurement businesses over whom they have no control, and that are permitted to conduct radon testing without obtaining the required certification as a measurement business.” Radiation Data additionally claims that the Department implemented this program without complying with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. These exceptions are rejected.

As explained above, the Department’s radon certification rules impose certification requirements on those who wish to test for (measure), mitigate, and safeguard against the presence of radon/radon progeny in buildings. All recordkeeping and reporting requirements, as well as QA/QC plan development, approval and compliance, are imposed on certified radon

measurement businesses. Moreover, a person applying to become certified as a radon measurement specialist or technician must provide the Department with “[a] list of all certified radon measurement businesses for which the applicant will be a certified radon measurement specialist.” N.J.A.C. 7:28-27.10(a)5 and 7. The regulatory framework thus centers on the certified business.

Hence, contrary to Radiation Data’s argument, by requiring measurement specialists and technicians to work with a measurement business, the Department is not allowing “hundreds of home inspection businesses to offer radon testing services” without complying with the certification requirements. Exceptions at 43. The opposite is true. Clearly, only those certified may test for the presence of radon/radon progeny in buildings, consistent with the statute and rules.

Radiation Data next argues that the Department impermissibly expanded the definition of employee to include affiliates and thereby violated the APA. Exceptions at 44-48. However, as explained before, the radon certification rules require a person applying for certification as a radon measurement specialist or technician to list “the certified radon measurement businesses for which the applicant will be a certified measurement” specialist or technician. N.J.A.C. 7:28-27.10(a)7 and -27.13(a)5. This rule does not specify the type of relationship, employment or otherwise, between the applicant and the business, merely stating that the applicant “will be” a specialist or technician for the identified business.

The rules place the burden on the measurement business to develop and adhere to a QA/QC plan, to submit records of test results, to ensure compliance with a radiological safety plan, and to maintain records, among other things. The measurement specialist or technician must work with or through a measurement business. The Department’s interpretation and

enforcement of the radon certification rules are consistent with those rules, which were adopted in compliance with the APA. Radiation Data's argument to the contrary is rejected.

Radiation Data also argues that the Supreme Court's decision in Hargrove v. Sleepy's, LLC, 220 N.J. 289 (2005), precludes the Department from holding it liable for actions or inactions of affiliated certified radon measurement specialists and technicians. Radiation Data's reliance on this decision is misplaced. In Hargrove, the Court considered which test a court should apply to determine an employee's status under state wage laws. The Court determined that the "'ABC' test ... governs whether a plaintiff is an employee or independent contractor for purposes of resolving a wage-payment or wage-and-hour claim." Id. at 295. Hargrove has no relevance to this proceeding, which does not involve state wage laws. Cf. Estate of Kotsovska v. Liebman, 221 N.J. 568, 592 n.6 (2015) (finding that the ABC test did not apply in a wrongful death action which raised a question under the Workers' Compensation Act).

In Joseph A. Baicker's certification, he certified that about 450 home inspectors licensed to offer radon testing have contractual relationships with Radiation Data. P24 at 1, ¶ 13. Although Radiation Data disclaimed any control over the means of completing the work by the specialist or technician, Radiation Data's QA/QC plan states otherwise. Under the rules, the QA/QC plan must include a description of sampling procedures for each type of measurement equipment for which certification is being sought. N.J.A.C. 7:28-27.33(a)4. The description must include deployment procedures, desired environmental conditions during the test period, equipment operation procedures, copies of instructions to clients if devices are mailed, test period, and "procedures used by the firm to ensure that technicians understand and follow the procedures." Ibid. Radiation Data's QA/QC plan acknowledges and takes responsibility for Radiation Data's affiliated measurement technicians. (J10 at RD-0010) According to its QA/QC

plan, Radiation Data's affiliated measurement technicians are "licensed by NJ" and their affiliation is terminated if their licenses are not maintained. Moreover, the radon test results are conveyed to homeowners on Radiation Data's form signed by its principals.

Radiation Data also argues that the Department violated the APA when it allegedly enforced guidance on what should be included in a QA/QC plan. Exceptions at 48-51. This argument too is rejected.

Pursuant to N.J.A.C. 7:28-27.5, among other requirements, to be certified, a radon measurement business must develop and comply with its QA/QC plan for each type of measurement equipment employed to assure radon measurements are reliable and valid. The plan must include the regulatory elements set forth in N.J.A.C. 7:28-27.33 and the requirements of the authorized measurement protocols. N.J.A.C. 7:28-27.5. "Authorized measurement protocols" are defined in N.J.A.C. 7:28-27.2 and refer to EPA protocols for radon measurement devices and measuring radon concentrations in residences. Thus, the Department's rules incorporate EPA's measurement protocols, and Radiation Data's argument to the contrary is rejected. Exceptions at 49-50.

N.J.A.C. 7:28-27.33 identifies the elements that must be included in the QA/QC plan for a person seeking certification as a radon measurement business. The plan must include a description of sampling procedures for each type of measurement equipment for which certification is being sought, including the procedures the business uses "to ensure that technicians understand and follow the procedures," a description of sampling tracking/chain of custody procedures, analytical procedures for portable instruments, a description of procedures to calibrate and maintain portable instruments, as well as a description of internal quality control procedures for those instruments, data reduction and reporting procedures, corrective action

procedures, and a description of the quality assurance reports that will be submitted to the business's management. N.J.A.C. 7:28-27.33.

To assist persons wishing to become certified as a radon measurement business, the Department created a QA/QC plan guidance document. Contrary to Radiation Data's argument, the guidance does not impose requirements not already contained in the regulations. The guidance simply provides further information as to the elements identified in N.J.A.C. 7:28-27.33. Moreover, the guidance did not supplant the Department's authority under the Act to independently review and approve QA/QC plans to determine if a business meets the criteria for certification. According to the testimony of Department witness Dr. Herbert Roy, a research scientist with twenty-six years of experience with the Department, a Bachelor's degree in physics, Master's degrees in physics and in biology, and a Doctorate in environmental science in radiation, the Department would look at a firm's proposed procedures to determine if they would result in reliable and accurate results, as required by N.J.A.C. 7:28-27.5(c) (requiring a certified radon measurement business to develop and adhere to a QA/QC plan for each type of measurement device employed "in order to assure the reliability and validity of radon measurements").

The Department's QA/QC plan guidance assists firms in developing QA/QC plans consistent with the regulatory requirements, and does not offend the APA and the rulemaking principles established in Metromedia, Inc. v. Division of Taxation, 97 N.J. 313 (1984). See SJC Builders, LLC v. NJDEP, 378 N.J. Super. 50, 56 (App. Div. 2005) (concluding that the Department's "working definition" of property was "a reasonable construction of its existing regulations" and that Metromedia principles were not implicated); American Cyanamid Co. v. NJDEP, 231 N.J. Super. 292, 307-308 (App. Div. 1989) (finding that the Department's

delineation methodology and hydraulic computer model used did not violate Metromedia, when evaluated qualitatively, finding among other things that “DEP’s existing regulations effectively establish a framework for the delineation process”); Radiological Society of New Jersey v. Department of Health, 208 N.J. Super. 548, 559 (App. Div. 1986) (finding that the Commission’s policy statement simply re-affirmed the requirements already stated in existing regulations); State v. Garthe, 145 N.J. 1, 7 (1996) (agency procedures to test breathalyzer machines do not create a legal standard that shapes public’s conduct; the standard is inferable from the enabling statutes and prior court opinion that machines be in proper working order). Radiation Data’s argument to the contrary is rejected.

Radiation Data also attacks the school testing section of the QA/QC plan guidance as an attempt to circumvent a ruling by the Council on Local Mandates finding that N.J.S.A. 18A:20-40, which required public schools to test for the presence of radon gas, violated the constitutional prohibition against new unfunded mandates.¹¹ Exceptions at 51. This argument is specious. The Department’s rules pertaining to QA/QC plans clearly apply to firms seeking certification as a radon measurement business, not to public schools, and otherwise impose no obligation on public schools to test for the presence of radon gas. Moreover, the ALJ dismissed the allegation related to school floor plans, to which the Department has not taken exception. Accordingly, the issue is not pertinent to this proceeding.

¹¹ Radiation Data did not identify or provide a copy of the decision on which its relies, but presumably is referring to In the Matter of Complaints Filed by the Monmouth-Ocean Educational Services Commission, the Rumson-Fair Haven Regional High School District and the Stafford Township Board of Education, Council on Local Mandates (Aug. 20, 2004), available at <http://nj.gov/localmandates/decisions/8-20-04monocean.html>.

Exceptions by Violation

In addition to the general exceptions addressed above, Radiation Data took exception to a number of factual findings and conclusions of law, based on which the ALJs found that Radiation Data violated various provisions of the radon protection rules, as the Department alleged. Many of these exceptions simply reiterate its arguments addressed above and as such, will not be repeated below. And again, because of overlapping issues among the various AO/NPs, rather than address each AO/NP in turn, I address the violations alleged and affirmed by the applicable rule.

First, however, I address Radiation Data's exceptions to ALJ James-Beaver's credibility findings. Exceptions at 5-10. In her initial decision, the ALJ identified the years of experience and educational background of the Department's witnesses, Charles Renaud, Dr. Herbert Roy, and Anita Kopera, and specifically found that each witness was credible, based on her observations as the hearing judge. Initial Decision at 9-10. Radiation Data attacks the credibility of the Department's witnesses because they did not agree with Radiation Data's interpretation of the regulatory requirements. Conversely, Radiation Data argues that the ALJ should have found its own witnesses credible because they testified in support of Radiation Data's interpretation.

The record supports the ALJ's findings with respect to the testimony of the Department's witnesses and that of Radiation Data's witnesses. Notably, she found that Keith Baicker's testimony was often contradictory, inconsistent and self-serving. Initial Decision at 12. She also noted the limited knowledge of Kyle Baicker-McKee, despite his role as director of operations and responsibility to assure that the QA/QC plan is updated and with compliance. Ibid. I find no reason in the record to reject or modify these findings. See N.J.S.A. 52:14B-10(c).

Second, I note that the ALJ dismissed certain charges alleged by the Department, and that the Department did not take exception to these dismissals. Initial Decision at 65. I further note that ALJ Martone denied summary decision to the Department on certain charges included in the matter docketed as EER 8833-11 (Summary Decision at 12-14, 19), which the Department then withdrew. Yet, Radiation Data took exception to “conclusions of law” (see Exceptions at 33-34) never made by ALJ Martone due to his findings that summary decision should not be granted for certain charges. Because these allegations are no longer at issue, they are not included in the discussion below.

Certification Requirement, General

A person may only do those activities for which the person is certified, N.J.A.C. 7:28-27.3(d)

N.J.A.C. 7:28-27.3(d) provides that a person may only do those measurement or mitigation activities for which the person is certified. N.J.A.C. 7:28-27.2 defines “certified radon measurement business” as a commercial business enterprise certified “to sell devices or test for radon and/or radon progeny.” In the AO/NP dated January 6, 2010 (matter docketed as EER8833-11, PEA090002-332995 (J6)), the Department alleged that Radiation Data was not certified to conduct alpha track testing, yet offered alpha track testing. Radiation Data sold alpha track devices from Landauer, Inc., to various customers, and had Alpha Track Monitor Registration forms showing who purchased these devices. When the Department found that despite its earlier AO/NP, Radiation Data continued to sell alpha track devices, the Department cited Radiation Data for the same violation in the AO/NP dated June 20, 2013 (matter docketed as EER15876-14, PEA120002-332995 (J8)).

Radiation Data does not dispute that it sold alpha track measurement devices or that its certification as a radon measurement business did not include these devices. Instead, Radiation Data argues that it was exempt from the certification requirement to sell alpha track measurement devices because it sold these devices as part of its retail business. Exceptions at 28-29.

N.J.A.C. 7:28-27.31(a)⁴ exempts from the certification requirements “persons who sell or offer for sale at a retail outlet radon measurement devices” if certain provisions are met. Both ALJ Martone and ALJ James-Beavers found that because Radiation Data is certified as a radon measurement business, Radiation Data must be authorized for all radon-related services it offers to the public. The retail outlet exemption applies only “to businesses that are not certified radon measurement businesses and that sell or offer for sale at a retail outlet radon measurement devices....” Therefore, the retail outlet exemption does not apply to Radiation Data. Summary Decision at 9; Initial Decision at 56-57. I agree. The certification requirement does not apply to persons who sell or offer for sale radon measurement devices at a retail outlet provided that, among other things, consultation on radon is provided only by a certified radon measurement business. The exemption does not extend to a certified radon measurement business, the definition of which includes the sale of devices, contrary to radiation Data’s argument that certification for a device is necessary only if the business processes or reports test results for such device. Exceptions at 12-13, 53-54.

Requirements for a Certified Radon Measurement Business

To be certified as a radon measurement business, among other things, radon or radon progeny testing may be done only by certified radon measurement specialists or technicians, N.J.A.C. 7:28-27.5(b)

N.J.A.C. 7:28-27.5 sets forth certification requirements for a radon measurement business. Pursuant to N.J.A.C. 7:28-27.5(b), radon or radon progeny testing may be done only by certified radon measurement specialists or technicians.

In four different AO/NPs, one of which is dated January 6, 2010, and three of which are dated June 17, 2010, the Department alleged that based on its review of monthly measurement reports submitted by Radiation Data, Radiation Data failed to have a certified radon measurement technician or specialist test for radon or radon progeny. On multiple and repeated occasions, persons whose certifications had lapsed tested for radon and Radiation Data processed these tests, in violation of N.J.A.C. 7:28-27.5.

In the AO/NP dated January 6, 2010 (matter docketed as EER8833-11, PEA090002-332995 (J6)), the Department alleged that Patrick Rodio's certification, MET12160, expired on June 10, 2007, yet Mr. Rodio conducted 262 radon tests after that date; Robert O'Rourke's certification MET10387 expired on September 4, 2008, yet Mr. O'Rourke conducted 254 radon tests after that date; and Thomas J. Sanford's certification expired on November 1, 2008, yet Mr. Sanford conducted 67 radon tests after that date.

In the first of three AO/NPs dated June 17, 2010 (matter docketed as ECE 9904-10, PEA100002-332995 (J2)), the Department alleged that Sean Turnquist's certification, MET10917, expired on October 29, 2009, and became recertified on February 18, 2010. During the lapsed certification period, Mr. Turnquist conducted 18 radon tests at various locations. In the second AO/NP dated June 17, 2010 (matter docketed as ECE 9905-10, PEA100005-332995 (J3)), the Department alleged that Marc Rocca's certification, MET10971, expired on August 9, 2009, and yet Mr. Rocca conducted 102 radon tests at various locations while its certification

was lapsed. In the third AO/NP dated June 17, 2010 (matter docketed as ECE 9908-10, PEA100011-332995 (J4)), the Department alleged that Douglas Hamilton's certification, MET12211, expired on August 23, 2009, and was renewed on March 5, 2010. During the period when his certification was lapsed, Mr. Hamilton conducted 10 radon tests at various locations.

The ALJ agreed with the Department's allegations based on the evidence showing the lapsed certifications and reports submitted. Radiation Data did not dispute the facts underlying these violations. Summary Decision at 11, 16.

Radiation Data takes exception to the findings and conclusions, repeating its argument that it, as a certified radon measurement business, is not accountable or responsible if its affiliated radon measurement technicians allow their certifications to expire yet continue to test for radon and those test results are submitted by Radiation Data to the Department, as required. Exceptions at 30-32, 39-42. As explained above, Radiation Data ignores its own QA/QC plan, which states that only certified measurement technicians are affiliated with its business and that it will refuse to process any radon test kits if the certification has expired. Moreover, the certification and exhibits provided by the Department in support of its motion for summary decision on these AO/NPs show that the Department sent current lists of certificated persons affiliated with Radiation Data to the company in response to its request. Thus, Radiation Data's attempt to shift the responsibility to the Department for allegedly failing to advise of expired certifications – even if proper, which it is not – fails based on the facts presented.

To be certified as a radon measurement business, among other things, a certified radon measurement specialist must direct the measurement activities of the business, N.J.A.C. 7:28-27.5(a)

N.J.A.C. 7:28-27.5(a)1 requires a certified radon measurement specialist to direct the measurement activities of the certified radon measurement business and to sign and be responsible for the review, approval and verification of the reports required in N.J.A.C. 7:28-27.28. Among other things, a measurement business must have a quality assurance/quality control (QA/QC) plan for radon testing services offered to the public. The QA/QC plan must include a description of programs to calibrate and maintain portable instruments.

In the AO/NP dated January 6, 2010 (matter docketed as EER8833-11, PEA090002-332995 (J6)), the Department alleged that Radiation Data failed to have a measurement specialist direct its measurement activities, specifically, to maintain its SPER-1 equipment, which is a voltage meter tool used to measure electret voltages. According to Radiation Data's QA/QC plan, the SPER-1 will be calibrated weekly using the manufacturer's reference cell usage logs. For the electret reader with serial number 1255, the log was completed through December 19, 2009, even though the inspection took place at the end of April 2009. The Department also alleged that Radiation Data submitted reports and data sheets with errors or missing information, which should have been caught by its measurement specialist.

The ALJ agreed with the Department based on the evidence presented. The record shows that test results had been pre-recorded, before thirteen scheduled test dates, and therefore concluded the specialist could not have overseen the calibration testing. As to the record keeping, the ALJ explained that a QA/QC plan must include chain of custody procedures and data tracking information. N.J.A.C. 7:28-27.33(a)6. A standard chain of custody form is a customer data sheet, which indicates which individuals had possession of the radon test device and the dates, times and conditions under which the test device was used. When electrets are

used, radon concentration cannot be calculated without a starting and end voltage value, so these values must be included on the customer data sheets.

In addition to customer data sheets, a radon measurement business must give client reports, which provide the results of the radon test, to customers, pursuant to N.J.A.C. 7:28-27.28(b). These reports must also be provided to the Department on a monthly basis. N.J.A.C. 7:28-27.28(a). Radiation Data failed to input starting and end voltages on customer data sheets for electret testing, failed to complete a customer data sheet for a client report in two instances, and in two instances, incorrectly stated the type of measurement device that produced the radon test results.

Notably, Radiation Data did not dispute the facts underlying the inaccurate recordkeeping charge. Summary Decision at 10-11. Instead, Radiation Data argued that the inaccuracies and omissions in the reporting were trivial. By so arguing, Radiation Data disparages the regulatory program, which was put in place pursuant to legislative mandate, to ensure the accuracy and validity of radon testing and mitigation activities. Moreover, Radiation Data argues that another entity was responsible for the weekly calibration. This argument again disregards Radiation Data's QA/QC plan, to which Radiation Data must adhere.

The appeal of this AO/NP was decided by ALJ Martone in his partial summary decision and therefore was not part of the hearing before ALJ James-Beavers. Yet, Radiation Data seeks to rely on testimony at the hearing in support of its exception to the ALJ's findings and conclusions. Exceptions at 30. As ALJ James-Beaver had denied Radiation Data's motion to reconsider the prior summary decision, and Radiation Data did not seek interlocutory review, this issue was not part of the hearing. Radiation Data improperly attempts to rely on hearing testimony to challenge ALJ Martone's finding. Radiation Data's exception therefore is rejected.

A certified radon measurement business must maintain copies of certification for certified radon measurement specialists and technicians employed by the business, N.J.A.C. 7:28-27.21(a)4

N.J.A.C. 7:28-27.21(a)4 requires a certified measurement business to maintain copies of certification for certified radon measurement specialists and technicians employed by the business for five years. In the AO/NP dated December 11, 2014 (matter docketed as EER 0798-15, PEA140001-332995 (J9)), the Department alleged that during an inspection, a check for 77 of the 416 certifications maintained by Radiation Data showed that the records for 20 certifications were missing. The ALJ agreed. Initial Decision at 64-65.

In its exceptions, Radiation Data argues that its affiliated technicians and specialists are not “employed by” the business and therefore the business was not obligated to maintain records of their certifications. Radiation Data also claims that the Department did not meet its burden of showing the certifications were missing because they might have been misfiled. Exceptions at 22. Radiation Data’s QA/QC plan provides that it will maintain records of the current licenses status of its affiliated measurement technicians. Thus, as part of its certification, Radiation Data is required to maintain these records for its affiliated technicians. It is not the Department’s burden to show that the certifications had not been misfiled.

A certified radon measurement business must submit monthly results of all radon measurements performed, N.J.A.C. 7:28-27.28(a)

N.J.A.C. 7:28-27.28(a) requires a certified measurement business to submit to the Department the results of all radon and radon progeny measurements performed on a monthly basis. The monthly results are due to the Department by the first day of the second following month, e.g., the results from May testing are to be submitted by July 1. In the AO/NP dated June 20, 2013 (ER15876-14, PEA120002-332995 (J8)), the Department alleged that between June 1,

2010, and January 31, 2011, fifty-nine radon tests conducted at various locations were not reported as required. The ALJ agreed, based on the testimony and evidence, that Radiation Data failed to report twenty-two test results from affiliates. Initial Decision at 61-62.

In its exceptions, Radiation Data again attempts to shift the burden to the Department to ask for the missing tests, and again attacks the credibility of Dr. Roy's testimony. Exceptions at 19-20. The record supports the ALJ's finding.

A certified radon measurement business must develop and adhere to a QA/QC plan, N.J.A.C. 7:28-27.5(c)

N.J.A.C. 7:28-27.5(c) requires a certified measurement business to develop and adhere to a QA/QC plan for each type of measurement equipment employed to assure the reliability and validity of measurements. The QA/QC plan must include the elements of N.J.A.C. 7:28-27.33, be submitted to and approved by the Department, and include the requirements of the authorized measurement protocols. "Authorized measurement protocols" is defined as EPA's protocols for radon product measurement and screening and follow-up radon product measurements. N.J.A.C. 7:28-27.2.

The Department alleged a number of violations of the QA/QC plan requirements in the rule. In the AO/NP dated January 6, 2010 (matter docketed as EER8833-11, PEA090002-332995 (J6)), the Department alleged that Radiation Data's approved QA/QC plan submitted with its 2005 certification renewal application stated that tests with electret voltages below 150 volts will be rejected. Seven radon tests were conducted with electrets where the final voltage was less than 150 volts, yet Radiation Data still accepted the tests.

In the AO/NP dated June 20, 2013 (matter docketed as EER15876-14, PEA120002-332995 (J8)), the Department alleged that Radiation Data failed to adhere to its QA/QC plan for

each type of measurement equipment employed by the business in order to assure the reliability and validity of radon measurements. According to Radiation Data's QA/QC plan, the SPER-1 will be calibrated weekly using the manufacturer's reference standards. If either standard reading differs by more than 2 volts from the standard value, the instrument will be checked against the second standard to determine if the error is in the SPER-1 or in the reference standard. However:

- For the electret reader with serial number 1225, the reference cell usage log for calendar year 2010 indicated the reference electrets associated with reader 1225 were not checked weekly between January 1, 2010, and December 21, 2010. According to the QA/QC plan, failure to check would invalidate any radon measurements determined while using this equipment. However, according to radon test result records submitted to the Department, the reader 1225 was used between June 1, 2010, and December 31, 2010, to determine electret voltages and the reference cell usage log indicates that the calibration was not checked with reference electrets for 14 weeks during this period.
- For the reader with serial number 398, records showed the reader was calibrated with certified reference cells 29 times from June 1 through Dec. 31, 2010. Each time, the log indicated that cell RE1450 had 253 volts, which differs by 7 volts from the certified value of 246 volts. The log for cell RE1460 had 253 volts, which differs by 3 volts from the certified value of 250 volts. The Department's database indicates 182 radon tests were processed with this reader during this time. There is no record that the instrument was checked per the QA/QC plan, despite the greater than 2 volt difference.
- For the reader with serial number D89-RE-153, no records were provided to show the reader was calibrated. Therefore, according to the QA/QC plan, any radon measurements done with the reader are invalid. The reader nevertheless was used to test for radon

during 41 weeks of calendar year 2010, according to radon test result and mitigation system installation records submitted to the Department.

- Ten continuous radon monitors (CRMs) were used to test for radon when the units were not calibrated annually per the QA/QC plan; therefore, the results of these tests are invalid and cannot be used. Results of the tests were nevertheless reported to the Department.
- Twenty-four radon tests were conducted with electrets where the final voltage was less than 150 volts. The QA/QC plan states that tests with electret voltages below 150 volts will be rejected. These test results were not invalidated but were reported to clients and the Department.

In the AO/NP dated December 11, 2014 (matter docketed as EER 0798-15, PEA140001-332995 (J9)), the Department alleged that Radiation Data failed to adhere to its QA/QC plan for each type of measurement equipment employed by the business, as follows:

- The customer data sheets for test results reported were not filled out completely or the customer data sheets used were not the forms provided in the QA/QC plan.
- Eight CRMS were used to test for radon when the units were not calibrated annually as specified in the QA/QC plan. The results should have been invalidated but were reported to clients and the Department.
- Eighteen radon tests were conducted with electrets where the final voltage was less than 150 volts. The results should have been invalidated but were reported to clients and the Department.

Radiation Data takes exception to the ALJ's findings with respect to these violations. Exceptions at 12-19, 32-33. Radiation Data essentially reiterates its argument that it has no

responsibility or control over its affiliates' actions or inactions and that the Department is attempting to enforce guidance. However, the required protocols are included in Radiation Data's QA/QC plan. Again, as a certified radon measurement business, Radiation Data must follow its QA/QC plan, including the equipment calibration and record keeping requirements. N.J.A.C. 7:28-27.33(a)9 requires a QA/QC plan to include a description of internal quality control procedures for portable instruments, such as electret ion chambers.¹² The plan must also include a description of calibration and maintenance procedures. N.J.A.C. 7:28-27.33(a)8. Radiation Data's QA/QC plan thus stated that the voltage reading instrument would be calibrated weekly using the manufacturer's reference standards and that "[i]f either standard reading differs by more than 2 volts from the standard value, the instrument will be checked against the second standard to determine if the error" lies with the instrument or the standard. J10 at RD-0046.

The ALJs' findings of violations are supported by the record and Radiation Data's arguments to the contrary are rejected.

Requirements for a Certified Radon Mitigation Business

Radon mitigation systems must be installed under direct supervision of a certified radon mitigation specialist or technician, N.J.A.C. 7:28-28.7(c)

N.J.A.C. 7:28-27.7 sets forth the certification requirements for a radon mitigation business. Pursuant to N.J.A.C. 7:28-27.7(c), a certified radon mitigation business must assure that radon mitigation system installations are performed under the direct supervision of a certified radon mitigation specialist or certified radon mitigation technician.

In the AO/NP dated August 26, 2009 (matter docketed as EER 8829-11, PEA090002-439481 (J5)), the Department alleged that, in 2008, partial or complete radon mitigation systems

¹² See N.J.A.C. 7:28-27.6(a)9ii for examples of portable instruments.

were installed at nine different homes on five different dates without the presence of a certified radon mitigation specialist or technician. ALJ Martone found that under N.J.A.C. 7:28-27.7(c), the specialist or technician must be physically present to directly supervise mitigation system installation as required by the rule. Summary Decision at 4-6. Because the evidence showed that Radiation Data sent Nick Wypych, who was not a certified mitigation specialist or technician, to perform nine mitigation jobs, the ALJ found that Radiation Data violated N.J.A.C. 7:28-27.7(c) as alleged.

In its exceptions, Radiation Data again improperly cites to testimony at the hearing, even though the violation was determined in ALJ Martone's partial summary decision. Exceptions at 23-24. Nevertheless, the testimony relied upon was testimony by Mr. Baicker of his interpretation of "direct supervision." ALJ James-Beaver generally found Mr. Baicker's testimony to be not credible, and in any event, his interpretation of the rules does not govern. As ALJ Martone found, the plain meaning of "direct supervision" means the specialist or technician must physically oversee the installation. This is consistent with the general statutory requirement that only certified persons may mitigate and safeguard against the presence of radon in buildings.

A certified radon mitigation specialist shall perform visual inspection and diagnostic tests, as appropriate, before a system is installed, and document observation and test results made during the inspection, N.J.A.C. 7:28-27.7(d)

N.J.A.C. 7:28-27.7(d) requires that a certified radon mitigation specialist must perform a visual inspection and diagnostic tests, as appropriate, prior to system installation to determine the appropriate mitigation system to be installed. The regulation requires that the specialist document "[o]bservations and test results made during inspections." "Diagnostic tests" are defined as "tests performed or procedures used to determine appropriate mitigation methods for a

building.” N.J.A.C. 7:28-27.2. Pursuant to N.J.A.C. 7:28-27.7(a), the certified specialist is responsible for evaluating diagnostic tests and designing mitigation systems for buildings.

The Department alleged repeated violations of this requirement in AO/NP dated August 26, 2009 (matter docketed as EER 8829-11, PEA090002-439481 (J5)) and in AO/NP dated February 24, 2011 (matter docketed as EER1216-13, PEA110001-439481 (J7)). Simply put, although the rules require a certified radon mitigation specialist to perform visual inspections and diagnostic tests, Radiation Data allowed a certified radon mitigation technician to do the initial home visual inspections and draw up plans for a proposed mitigation system. The plans were then faxed to the certified radon mitigation specialist, J. Keith Baicker, at the office, who reviewed and faxed a stamped system plan back to the technician, David Letcher.

ALJ Martone, as to the 2009 AO/NP, and ALJ James-Beaver, as to the 2011 AO/NP, both found that the rule required a specialist to visually survey the building prior to system installation to determine the appropriate mitigation system. In response to the Department’s motion for summary decision before ALJ Martone, Radiation Data did not dispute its practice and the underlying facts. Instead, Radiation Data argued then, as it does now, that the rule does not require a specialist to perform either a visual inspection or diagnostic tests. Rather, it is up to the specialist to determine whether either a visual inspection or any diagnostic test is appropriate to determine the mitigation system to be installed. Exceptions at 10-12, 25-27.

As both ALJs found, Radiation Data’s interpretation is flawed. The “as appropriate” language leaves to the discretion of the specialist what diagnostic tests are appropriate to determine the mitigation system that should be installed in the building. This does not leave to the specialist’s discretion the option of not doing any inspection at all.

A certified person shall conduct activities in accordance with the approved certification and the statutory and regulatory requirements, N.J.A.C. 7:28-27.3(e)

N.J.A.C. 7:28-27.3(e) requires that certified person shall conduct activities in accordance with the approved certification and the provisions of the Act, the radon certification program rules, and all other applicable regulations and codes. Under N.J.A.C. 7:28-27.2, a certified radon mitigation specialist means a person certified to evaluate diagnostic tests to determine appropriate radon mitigation and safeguard strategies for a building. As part of the certification requirements for a radon mitigation business such as Radiation Data, N.J.A.C. 7:28-27.7(d) requires that a certified radon mitigation specialist shall perform a visual inspection and diagnostic tests, as appropriate, before a system is installed to determine the appropriate mitigation system to be installed. This rule also requires that the specialist shall document observations and test results made during inspections. N.J.A.C. 7:28-27.7(d).

Following an investigation on January 11, 2010, the Department issued AO/NP dated April 20, 2010 (matter docketed as ECE 9903-10, PEA100002-439481 (J1)). The Department alleged that an initial on-site inspection by Radiation Data at a particular residential home was conducted by an uncertified individual, Jim Gibson. According to Anita Kopera's certification submitted in support of the Department's motion for summary decision, Ms. Kopera spoke with the homeowner who advised that Jim Gibson and "Nick" installed the mitigation system. The name "Nick" appeared on the mitigation system label near the monitor in the basement that was installed by Radiation Data. Moreover, a "Radon Go-Back Sheet," which is a document that records return visits to clients to address post-installation issues, listed "Nick 12/07" in the field labeled "Lead Man."

However, in 2007, when the work was done, according to the Department's database records, Radiation Data had no certified individual by the name of "Nick" affiliated with its business. In its opposition to the Department's motion for summary decision on this AO/NP, as ALJ Martone noted, Radiation Data did not dispute these facts. Instead, Radiation Data argued that Phil Coache, a certified radon mitigation technician, had supervised the installation; his name also appeared on the "go-back" sheet showing follow-up work on the system.

ALJ Martone found that during an initial inspection, a certified radon mitigation specialist must be present. As discussed above, I agree. The Department also alleged that in December 2009, Phil Coache, a certified radon measurement technician, visited the home and changed the mitigation system in response to the homeowner's complaints. In response, Radiation Data stated that Phil Coache was certified as a mitigation technician at the time. The record shows that in 2007 when the system was installed, Phil Coache was not a certified mitigation technician, but that, in December 2009, when he changed the system following complaints by the homeowner, he was certified as a radon mitigation technician. However, as the ALJ found, the rules require that a certified radon mitigation specialist conduct the inspection and any diagnostic tests and determine the appropriate mitigation system prior to installation. The record shows that these activities were not conducted by a certified mitigation specialist and the ALJ's findings are affirmed.

Radiological safety training requirements for certified radon measurement business and certified radon mitigation business, N.J.A.C. 7:28-27.34

A certified radon measurement or mitigation business is responsible for the radiological safety of all its employees. N.J.A.C. 7:28-27.34 sets forth the minimum requirements for radiological safety plans. All new employees or consultants of a certified measurement or

mitigation business who will be entering structures with unknown radon levels or radon levels above four picocuries per liter for purposes of measurement or mitigation must be instructed by the measurement or mitigation specialist of the business on proper radiation safety practices before entering such a structure, in accordance with the business' radiological safety plan. Each new employee must be required to take and pass a test on radiation safety developed by the certified measurement or mitigation specialist. Refresher radiation safety training of workers must be conducted at least once annually.

The Department alleged a number of violations of the training requirements. In the AO/NP dated January 6, 2010 (matter docketed as EER8833-11, PEA090002-332995 (J6)), the Department alleged that Radiation Data failed to demonstrate compliance with the training requirements. In the AO/NP dated June 20, 2013 (matter docketed as EER15876-14, PEA120002-332995 (J8)), as well as the AO/NP dated December 11, 2014 (matter docketed as EER 0798-15, PEA140001-332995 (J9)), the Department alleged that Radiation Data had about 50 new affiliated radon measurement professionals since the "last inspection" but failed to produce records showing that required instruction had been provided and that a test was administered and passed by these individuals. Radiation Data also failed to produce records showing that the more than 400 affiliated radon measurement professionals were given the annual refresher training required.

Again, both ALJs found in favor of the Department because it was undisputed that Radiation Data failed to produce the records. Again, in its exceptions, Radiation Data argues that it is required to provide training only to its "employees" and, again, attempts to shift the responsibility to the Department to disprove the existence of the records. Exceptions at 20-21. For reasons already explained, these arguments are rejected.

CONCLUSION

For the reasons set forth therein and above, I ADOPT as MODIFIED herein the Initial Decision by ALJ James-Beavers and the Partial Summary Decision by ALJ Martone, and find that Radiation Data is liable for violating the various requirements relating to the certification of radon testers and mitigators under the Radiation Protection Act (Act), N.J.S.A. 26:2D-1 et seq., and the relevant implementing regulations, N.J.A.C. 7:28-27.1 et seq.¹³

IT IS SO ORDERED.

DATE: 11/1/17

A handwritten signature in blue ink, appearing to read "Bob Martin", is written over a horizontal line.

Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

¹³ The Radiation Protection Act authorizes the Department to issue orders to implement and enforce its provisions. N.J.S.A. 26:2D-9(m). Pursuant to N.J.S.A. 26:2D-13, the Department may bring a civil action in Superior Court to prevent the violation of the Department's orders. Any person who violates provisions of the Act or any rule, regulation or order promulgated or issued pursuant to the Act is liable for a penalty to be collected in a civil action by a summary proceeding. N.J.S.A. 26:2D-13. Thus, penalties are not at issue in this proceeding.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION v.
RADIATION DATA

OAL DKT NOs. ECE 9903-10, ECE 9904-10, ECE 9905-10, ECE 9908-10, EER 8829-10, EER 8833-11, EER 1216-13, EER 15876-14, and EER 0798-15

AGENCY REF. NOs. PEA 100002-439481, PEA 100002-332995, PEA 100005-332995, PEA 100011-332995, PEA 090002-439481, PEA 090002-332995, PEA 110001-439481, PEA 080001-11912, PEA 120002-332995, and PEA 140001-332995 (CONSOLIDATED)

SERVICE LIST

Ray Lamboy, DAG
Division of Law
R. J. Hughes Justice Complex
P.O. Box 093
25 Market Street
Trenton, NJ 08625-0093
Email: Ray.Lamboy@law.njoag.gov

David J. Singer, Esq.
Vella, Singer and Martinez, P.C.
326 Main Street
Metuchen, NJ 08840
Email: dsinger@vellasinger.com