State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, RADIATION PROTECTION PROGRAM,

Petitioner,

v.

RADIATION DATA,

Respondent.

OAL DKT. NOS. EER 15235-16, 15238-16, 08632-17, 08636-17, 15236-16, 15237-16, 08623-17, 08629-17
AGENCY DKT. NOS. PEA160001-439481, PEA160002-439481, PEA170001-439481, PEA160004-439481, PEA160002-332995, PEA160003-332995, PEA160004-332995, PEA170001-332995

(CONSOLIDATED)

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

David J. Singer, Esq. and **Lisa M. Leili,** Esq., for respondent (Vella, Singer & Martinez, P.C., attorneys)

Record Closed: May 7, 2018 Decided: June 21, 2018

BEFORE **JACOB S. GERTSMAN,** ALJ t/a:

STATEMENT OF THE CASE

Respondent Radiation Data (Company or RD), appeals Notices of Violation, and Administrative Orders and Notices of Suspension, relating to both the Company's radon

measurement and mitigation businesses, issued by petitioner, Department of Environmental Protection (DEP or Department). The Department charged each business three times for failure to pay the assessed Program Administration Fees (PAF), and subsequently imposed three thirty-day suspensions for each business, pursuant to N.J.S.A. 26:2D-1 et seq., N.J.A.C. 7:28-27.25(b)6, N.J.A.C. 7:28-27.30(d) and N.J.A.C. 7:28-27.30(e).

PROCEDURAL HISTORY

Matters EER 15236-16 and 15237-16 were transmitted on October 5, 2016, and matters EER 08623-17 and 08629-17, concerning the Company's radon measurement business (collectively the "Measurement Cases"), were transmitted on June 19, 2017, respectively, to the Office of Administrative Law (OAL), for determination as contested cases, pursuant to N.J.A.C. 10:120A et seq. Matters EER 15235-16 and 15238-16, were transmitted on October 5, 2016, and matters EER 08632-17, and 08636-17, concerning the Company's radon mitigation business (collectively the "Mitigation Cases"), were transmitted on June 19, 2017, respectively, to the Office of Administrative Law (OAL), for determination as contested cases, pursuant to N.J.A.C. 10:120A et seq. Following adjournments requested by the parties, and the reassignment of these matters to the undersigned, the parties notified the undersigned that they consented to the separate consolidations of both the Measurement and Mitigation Cases. By separate orders dated October 12, 2017, the undersigned consolidated the Measurement and Mitigation Cases because the facts and legal issues affecting each case were similar and involved common questions of law and fact.

The hearings for both consolidated matters were held separately on November 13, 2017.[1] The parties submitted post-hearing briefs on January 10, 2018, and reply briefs on January 17, 2018. On a February 1, 2018 conference call, the undersigned informed the parties that the complete post-hearing and reply briefs were not received. The parties

[1] At the hearing for the consolidated measurement case, respondent determined that there was an error in exhibit (R-3) and that exhibits R-3, R-4 and R-5 inadvertently included residential addresses. Respondent submitted revised exhibits R-3, R-4 and R-5 on December 1, 2017

resubmitted the post-hearing and reply briefs on February 5, 2018, and the record closed. An order of extension was entered to extend the time for filing the initial decision in this matter. On a May 2, 2018, conference call, the undersigned notified the parties that the joint stipulations were incorrectly submitted. The October 7, 2017, joint stipulation submitted by the parties combined facts and exhibits for both consolidated cases. The parties resubmitted separate joint stipulations for the consolidated radon Measurement and Mitigation Cases on May 7, 2018, and the record closed. By order dated June 21, 2018, the measurement and Mitigation Cases were consolidated by the undersigned for case management purposes, in order for both matters to be decided in one initial decision.

STIPULATED FACTS

Radon Measurement

1. During the relevant time frame, December 2015 to March 2017, RD was certified by the DEP as a radon measurement business.

2. Pursuant to N.J.A.C. 7:28-27.30(d) of the Radon Regulations, "[A] program administration fee (PAF) shall be submitted to the Department by a certified radon measurement business in accordance with Fee Schedule B below." Fee Schedule B imposes fees based on the "number of measurement devices employed [i.e., 'deployed'] each semi-annual period."

3. Most measurement devices were deployed by certified measurement technicians who were employees of businesses other than RD.

4. On December 9, 2015, the Department assessed RD's radon measurement business $12,210 in PAFs for radon tests, including tests which were deployed by non-RD employees, from January 1, 2015 to June 30, 2015.

5. On February 23, 2016, the Department issued a Notice of Violation to RD for failure to pay $12,210 in PAFs for its radon measurement business (hereinafter "Measurement/Mitigation Notice 1") (J-1, J-2.).[2]

6. On May 12, 2016, the Department issued an Administrative Order to RD for non-payment of those PAFs for its radon measurement business (hereinafter "Measurement Order 1"). RD filed a timely hearing request, and the matter was transmitted to the OAL as a contested case (OAL Docket No. EER 15236-2016). (J-2.)

7. On July 6, 2016, the DEP issued a second Administrative Order to RD for non-payment of PAFs for its radon measurement business, imposing a thirty-day suspension (hereinafter "Measurement Order 2") RD filed a timely hearing request, and the matter was transmitted to the OAL as a contested case (OAL Docket No. EER 15237-2016). (J-3.)

8. On August 31, 2016, the DEP issued a third Administrative Order to RD for non-payment of PAFs for its radon measurement business, imposing a second thirty-day suspension (hereinafter "Measurement Order 3"). RD filed a timely hearing request, and the matter was transmitted to the OAL as a contested case (OAL Docket No. EER 8623-2017). (J-4.)

9. On March 23, 2017, the Department issued a fourth Administrative Order to RD for non-payment of PAFs for its radon measurement business, imposing a third thirty-day suspension (hereinafter "Measurement Order 4"). RD filed a timely hearing request, and the matter was transmitted to the OAL as a contested case (OAL Docket No. EER 8629-2017). (J-5.)

10. As of April 2017, the total amount of assessed and unpaid fees for RDs radon measurement business was $48,840.

[2] Exhibit J-1 contained the initial assessed PAFs for both RD's measurement and mitigation businesses.

Consolidated Radon Mitigation

1. During the relevant time frame, RD was certified by the Department as a radon mitigation business.

2. Pursuant to N.J.A.C. 7:28-27.30(e) of the radon regulations, "[A] program administrative fee shall be submitted to the Department by a certified radon measurement business in accordance with Fee Schedule C below." Fee Schedule C imposes fees based on the "number of buildings mitigated each semi-annual period."

3. In December 2015, the DEP billed RD's radon mitigation business $5,713 in program administration fees from January 1, 2015 to June 30, 2015.

4. In February 2016, the DEP issued a Notice of Violation to RD for failure to pay $5,713 in program administration fees for its radon mitigation business. ("Measurement/Mitigation Notice 1"). (J-1.)

5. In May 2016, the DEP issued an Administrative Order to RD for non-payment of program administration fees for its radon mitigation business (hereinafter "Mitigation Order 1"). RD filed a timely hearing request, and the matter was transmitted to the OAL as a contested case (OAL Docket No. EER 15235-2016). (J-6.)

6. In July 2016, the DEP issued a second Administrative Order to RD for non-payment of program administration fees for its radon mitigation business, imposing a thirty-day suspension (hereinafter "Mitigation Order 2"). RD filed a timely hearing request and the matter was transmitted to the OAL as a contested case (OAL Docket No. EER 15238-2016). (J-7.)

7. In August 2016, the DEP issued a third Administrative Order to RD for non-payment of program administration fees for its radon mitigation business, imposing a second thirty-day suspension (hereinafter "Mitigation Order 3"). RD filed a timely hearing request, and the matter was transmitted to the OAL as a contested case (OAL Docket No. EER 8636-2017). (J-8.)

8. In March 2017, the DEP issued a fourth Administrative Order to RD for non-payment of program administration fees for its radon mitigation business, imposing a third thirty-day suspension (hereinafter "Mitigation Order 4"). RD filed a timely hearing request, and the matter was transmitted to the OAL as a contested case (OAL Docket No. EER 8632-2017). (J-9.)

9. As of March 2017, the total amount of assessed and unpaid fees for RD's radon mitigation business is $22,852.

FACTUAL DISCUSSION AND FINDINGS

Radon Mitigation

Anita Kopera (Kopera) testified on behalf of the DEP. She has been employed by the DEP for thirty years, spent twenty years as a supervisor, and currently has oversight of radon certification, outreach, and education. Kopera described radon as an odorless, colorless, and harmful gas that is the leading cause of lung cancer among non-smokers and second among smokers. The most common way to measure radon is by a charcoal canister and all businesses performing this test must be certified by the DEP.

The DEP regulations at issue in this matter impose PAFs on regulated businesses for certification, program administration, inspection, and examination. N.J.A.C. 7:28-27.30 (d) Fee Schedule B of the regulations states that the fees are determined by the number of measuring devices employed in a semi-annual period and allows the Department to adjust

fees in accordance with an inflation factor based on federal statistical data. The $12,210 full fee assessment was last adjusted in 2010.[3]

Kopera stated that every time a device is employed or deployed in the field, a test is considered conducted, therefore, the certified radon measurement business is required to pay the PAF assessed by the department. A certified measuring business is the only entity able to report these tests,

The purpose of the PAFs is to fund the program which was created by the Legislature. The Company was in business when the statutory framework and regulations were adopted in November 1990, and there is no record of any challenge to the rules. The Company paid the PAF until two years ago and then ceased making the payments without explanation.

A suspension, while authorized under the rules, had not previously been imposed on a certified business for failure to pay the PAF.[4] However, the Department did not believe that the issuance of an Administrative Order to a company that does not pay the PAF would act as a deterrent. The determination to suspend RD was made in consultation with counsel.

On cross-examination, Kopera stated that while the Company sells, but does not employ, the majority of the tests,[5] the regulations state that certified businesses are responsible for all tests reported, as they are the only entity that can report the tests to the DEP. She conceded that the terms “conducted,” “processed” or “reported” are not in the regulations.

Regarding the Department’s internal standard operating procedures (SOP) for the enforcement of the regulations (R-2), Kopera stated that if there is no action by the certified

[3] Schedule B sets tiers of PAFs to be assessed based on the numbers of measurement devices employed each semi-annual period: 0; 1-49; 50-99; 100-199; 200-299; 300-499; 500-999; 1000-1999; 2000-5000; and greater than 5000.

[4] Another company, Radon Scientific, has subsequently been suspended for a similar violation.

[5] An internal DEP email stated that a total of 161 tests were performed by RD employees for the semi-annual period from January 1, 2015 through June 30, 2015. (R-1.)

business following the Administrative Order, the Administrative Order/Notice of Suspension is issued. When a certified business does not comply with the PAF regulations, the Department moves on to successive violations rather than initiating a new matter, as happened here with Measurement Order 2 (J-3). Additionally, the issuance of the Measurement Order 2, during the Company's appeal of the Measurement Order 1 (J-2) was permitted as the DEP is authorized to impose sanctions if a certified company is not in compliance with the regulations.

Kopera stated that even if a homeowner pays another business for the test, the certified measurement business remains responsible for the PAF. Tests "reported" are considered tests "employed" and duplicate or blank tests are not part of the calculation. When asked if the placement of a device would be considered reporting, she stated that pursuant to the regulations, measurement businesses retain the responsibility for tests deployed in that manner.

Kopera reiterated on redirect that there are no fees on home inspectors, radon technicians, or radon specialists, since only certified measurement businesses can report the tests.

Kyle Baicker-McKee (Baicker-McKee), an employee of the Company, testified on behalf of RD. He has an educational background in environmental sciences and has worked for the Company for four years, assisting with regulatory compliance, the measurement and mitigation businesses, and business development. He is familiar with the rules regarding the PAFs for radon measurement and has employed devices hundreds of times. He has also installed or directed over 100 mitigation systems

Baicker-McKee stated that the employment and analysis of tests are different and the Company is being assessed for tests it has not employed, or is getting paid to employ, including those tests used by home inspectors. He stated that employing a test device would consist of setting and retrieving the device at a test location. The Company

contracts with the home owner or the agent to perform these tests and does not contract with third parties and home inspectors are paid for devices they use, not RD.

He disputed the number of tests calculated by the DEP in Measurement Order 1 (J-2), and stated that the accurate number should reflect the tests conducted by certified employees during the first six months of 2015 (R-1 and R-3).[6] Baicker-McKee stated that during the relevant period, RD had four employees certified to employ the measurement devices.

RD did not receive a Notice of Violation for the second half of 2015 as the Department proceeded directly to Measurement Order 3 (J-4). The number of devices alleged to be employed was not specified and they were only made aware of the amount of the fee, not the exact number of tests. (J-4.) The Company believes that the accurate number should reflect the tests conducted by certified employees during the second half of 2015. (R-4.)[7]

The invoice indicating the number of tests performed was not attached to Measurement Order 4 (J-5), and there was no backup information for how the DEP arrived at the number of tests performed for the first half of 2016. He disputed that over 500 tests were performed in this period (R-5),[8] and added that the Administrative Order/Notice of Suspension did not indicate the devices employed by home inspectors, for which they were not compensated.

When asked why the Company discontinued paying the fees that it was assessed, Baicker-McKee testified that: "[I]t's clear to us that the regulations don't specify for us to pay the fees for these home inspectors and we simply cannot afford to pay them. We can't stay in business if we're assessed all these fees for devices we do not employ." He added

[6] R-3 is a report prepared by RD indicating that certified employees performed approximately 103 tests during the semi-annual period from January 1, 2015 through June 30, 2015. (J-1.)

[7] R-4 is a report prepared by RD indicating that certified employees performed approximately 100 tests during the semi-annual period from July 1, 2015 through December 31, 2015.

[8] R-5 is a report prepared by RD indicating that certified employees performed approximately ninety-one tests during the semi-annual period from January 1, 2016 through June 30, 2016.

that there were over 300 similar businesses at the time these rules were promulgated, and only fourteen remain.

On cross-examination, Baicker-McKee confirmed that RD paid the PAF for more than twenty-five years and that while RD deployed an estimated 200 tests in 2017, between 40,000 and 50,000 were reported. Approximately 40,000 were reported in 2015 and a slightly higher number were reported in 2016, and it was not disputed that well over 5,000 tests were reported in 2015 and 2016. He additionally conceded that a homeowner is not certified and therefore is not required to have to pay the PAF and that home inspectors are not specifically mentioned in the regulations at issue.

Having considered the testimony and documentary evidence comprising the record in this matter, I **FIND** as **FACT:**

1. The number of radon tests reported by RD to the DEP during the relevant time frame, were accurately reflected in Measurement/Mitigation Notice 1 (J-1), Measurement Order 1 (J-2), Measurement Order 2 (J-3), Measurement Order 3 (J-4), and Measurement Order 4. (J-5.)

2. RD reported over 5,000 radon tests in the semi-annual period from January 1, 2015, through June 30, 2015, over the limit for the assessment of the maximum PAF permitted pursuant to N.J.A.C. 7:28-27.30(d). (J-1, J-2, J-3.)

3. RD reported over 5,000 radon tests in the semi-annual period from July 1, 2015, through December 31, 2015, over the limit for the assessment of the maximum PAF permitted pursuant to N.J.A.C. 7:28-27.30(d). (J-4.)

4. RD reported over 5,000 radon tests in the semi-annual period from January 1, 2016, through June 30, 2016, over the limit for the assessment of the maximum PAF permitted pursuant to N.J.A.C. 7:28-27.30(d). (J-5.)

5. To-date, RD has not paid the $48,840 in PAFs, accurately assessed pursuant to N.J.A.C. 7:28-27.30(d).

6. RD paid the assessed PAF for more than twenty years, and has not challenged the rules since their enactment in 1990.

Radon Mitigation

Kopera again testified on behalf of the DEP. She stated that radon levels in a home can be reduced through mitigation. The EPA has set the action level for radon mitigation as four picocuries per liter and Kopera added that while there is no safe level of radon, the ideal situation is to bring the radon concentration as low as possible.

She described a radon mitigation system in a home as the drilling of a hole either in the slab on grade foundation or the basement followed by the placing of a PVC pipe in the hole and the removal of gravel from the hole. The PVC pipe then extends either outside through the basement wall and up the side of the house, a fan is installed right outside of the house and the PVC continues up above the roof line. Other times, though not as commonly, the pipe is installed so that it runs up through the closets in a home, essentially hidden, so that it can go into the attic where the pipe is cut, a fan is installed, and then out through the roof. This process takes the radon from beneath the foundation before it has a chance to come into the house. The encased electrical fan pulls the radon out from beneath the foundation so that it can draw the soil gas up through the pipe and then exiting above the roof so that it is not harmful to anyone in the home.

The radon industry is regulated through the DEP's certification program. Three types of mitigation certifications exist under the DEP's rules: a radon mitigation business, a mitigation technician; and a mitigation specialist. The radon mitigation business maintains the overall responsibility for the installation of a radon mitigation system and the individuals that are certified, the specialist, and technicians.

Kopera stated that the PAF is based on the number of buildings mitigated for a semi-annual period and are assessed on the mitigation business for the purpose of funding the certification program. N.J.A.C. 7:28-27.30 (e) The steps or systems of steps to achieve this include the installation of a fan on a passive system or the installation of a complete radon mitigation system. RD was in business when the rules were adopted in 1990, has never challenged the rules, and paid the PAFs for over twenty years until 2015.

Measurement/Mitigation Notice 1 was issued for the failure to pay the assessed PAF of $5,713, calculated pursuant to N.J.A.C. 7:28-27.30(e) Fee Schedule C[9]. (J-1.) This was based on greater than 200 buildings being mitigated, the maximum amount, for the semi-annual period of January 1, 2015, through June 30, 2015.

Kopera stated that the thirty-day suspensions in contained in Mitigation Orders 2, 3 and 4 (J-7, J-8, J-9) are authorized pursuant to N.J.A.C. 7:28-27.25 (b)(6). A suspension, while authorized under the rules, had not previously been imposed on a certified business for failure to pay the PAF.[10] However, the Department did not believe that the issuance of an Administrative Order to a company that does not pay the PAF would act as a deterrent. The determination to suspend RD was made in consultation with counsel.

In addition to the thirty-day suspensions, Mitigation Orders 3 and 4 (J-8 and J-9), assessed PAFs for the semi-annual periods of July 1, 2015 through December 31, 2015, and January 1, 2016 through June 30, 2016, respectively. The total amount that RD currently owes for the assessed PAF is $22,852.

On cross-examination, Kopera conceded that she is not a certified mitigation technician or specialist, does not hold a certification in mitigation, and has no mitigation experience in the field.

[9] Fee Schedule C sets tiers of PAFs to be assessed based on the numbers of buildings mitigated each semi-annual period: 0; 1-10; 11-24; 25-49; 50-74; 75-99; 100-124; 125-149; 150-174; 175-200; and greater than 5,000.

When a radon mitigation system is installed from finish to end, the installation of the piping is included in the mitigation. For a home where it is installed when a builder is building a home, it is clearly under the purview of the Department of Community Affairs and it is not considered mitigation of a home. Only certified radon mitigators can conduct mitigation and that would be the installation of the fan or the complete system. Home builders are not certified by the DEP. She stated that a business has never disagreed with the DEP's calculation of the PAFs, however, the recourse for such a challenge would be to file a hearing request.

Regarding the DEP's Standard Operating Procedure (SOP) (R-1), Kopera stated that the process used for radon mitigation is the same as used for radon measurement. While the SOP does not explicitly state that the DEP can go directly to Administrative Notice/Notice of Suspension for a subsequent period, given the previous order, the DEP looks at this as the next step even if the previous hearing has not been fully adjudicated. Finally, she conceded that RD is not seeking to avoid paying all of the assessed PAFs; rather, they are disputing the amount of fees charged for the relevant time period.

On redirect, Kopera stated that the rules exempt new home builders who use radon reduction. Additionally, she reiterated that RD was assessed the PAF pursuant to Fee Schedule C of the regulation for having mitigated more than 200 buildings in each semi-annual period at issue, as the Company reported those mitigations on their monthly reports.

Baicker-McKee again testified on behalf of RD on the mitigation aspects of the business. He stated that the Company installs both complete and partial mitigation systems and does not agree with the DEP's interpretation of the regulations. There are multiple steps to installing a mitigation system including: installing a vapor barrier under the floor prior to pouring the slab; sealing cracks; and designing and installing piping. He added that there is an exemption in the regulations for radon resistant new construction techniques, but that

[10] Another company, Radon Scientific, has subsequently been suspended for a similar violation.

exemption states that mitigation systems must be installed by a certified individual. These systems are currently being installed by non-certified individuals.

There is no dispute that RD owes the assessed PAF, only that they are solely responsible, particularly for the mitigation systems where the majority of the work has been done by another company. He added that the Company is not always confident in the DEP's numbers.

Baicker-McKee stated that there was no invoice included with Measurement/Mitigation Notice 1 (J-1), and there was no description or evidence on how the DEP arrived at the number of mitigations systems leading to a charge of $5,713 for the first half of 2015. The Company does not dispute this number, only how it was calculated. RD does not agree with the calculation of 261 mitigations systems for the second half of 2015, which also included no substantiation for the numbers. (J-6.) He stated that there are no full system installations in this time period and 90 percent of the work was done by others. The assessment of the PAFs in this manner increases the burden on RD, and the program could be funded by invoicing other companies. There was no invoice or back-up documentation for the PAFs for Mitigation Order 4. (J-9.) Builders and installers were not invoiced, and he stated that the Company would owe less in PAFs if the DEP adopted a new standard of calculations.

He added that the report prepared by RD accurately reflects the data for activations and mitigation systems installed in all of 2016 and the first half of 2016. The Company completed: 215 full installations and forty-eight activations, for a total of 268, for the semi-annual period from January 1, 2015 through June 30, 2015; 240 full installations and fifty-four activations for a total of 294, for the semi-annual period from July 1, 2015 through December 31, 2015; and 177 full installations and forty-five activations, for a total of 222, for the semi-annual period from January 1, 2016 through June 30, 2016. (R-2.)[11]

The current method of calculation, where RD pays fees for installations that it argues it does not conduct, has had a negative impact on its business. Baicker-McKee

stated that both the mitigation and measurement businesses operated by RD could "potentially go out of business because of these fees."

On cross-examination, Baicker-McKee stated that RD should pay a prorated portion of a PAF if only a fan is installed. He stated that activation includes the installation of a fan, where an existing radon system does not have a fan. The activation would also include the installation of an outlet and manometer but not include the replacement of an existing defective mitigation system, which would then be a full installation.

He added that the companies installing these systems are acting as radon mitigation businesses when they are performing radon mitigation activities, and therefore, should be regulated as radon mitigation businesses and subject to PAFs.

On redirect, Baicker-McKee stated that builders, or those they hire, are conducting mitigation as they are applying materials and installing systems that are meant to reduce radon concentration or prevent radon entry. Further, the builders have taken a series of steps to actively reduce the radon levels in the building.

Having considered the testimony and documentary evidence comprising the record in this matter, I **FIND** as **FACT:**

1. The number of radon mitigations reported by RD to the DEP during the relevant time frame, were accurately reflected in Measurement/Mitigation Notice 1 (J-1), Mitigation Order 1 (J-6), Mitigation Order 2 (J-7), Mitigation Order 3 (J-8) and Mitigation Order 4. (J-9)

2. RD reported radon mitigations in more than 200 buildings in the semi-annual period from January 1, 2015, through June 30, 2015, over the limit

[11] The report was prepared by Baicker-McKee and RD employee Joseph Battaglia.

for the assessment of the maximum PAF permitted pursuant to N.J.A.C. 7:28-27.30(e). (J-1, J-6, J-7)

3. RD reported radon mitigations in more than 200 buildings in the semi-annual period from July 1, 2015, through December 31, 2015, over the limit for the assessment of maximum PAF permitted pursuant to N.J.A.C. 7:28-27.30(3). (J-8.)

4. RD reported mitigations in more than 200 buildings in the semi-annual period from January 1, 2016, through June 30, 2016, over the limit for the assessment of the maximum PAF permitted pursuant to N.J.A.C. 7:28-27.30(e). (J-9.)

5. It is not in dispute that in the semi-annual periods from January 1, 2015 through June 30, 2015 and from July 1, 2015 through December 31, 2015, the Company performed "full" radon mitigations, as described by RD, in more than 200 buildings. (R-2.)

6. To-date, RD has not paid the $22,852 in PAFs, accurately assessed pursuant to N.J.A.C. 7:28-27.30(e).

7. RD paid the assessed Program Administration Fees for more than twenty years, and has not challenged the rules since their enactment in 1990.

POSITIONS OF THE PARTIES

Petitioner

The DEP argues in both consolidated cases that RD is challenging the Department's assessment of PAF on its radon measurement business, which is effectively a challenge of the regulation itself. However, agency regulations are presumptively valid and reasonable. Newark v. Natural Resources Council, 82 N.J. 530, 539-40 (1980). The burden is on the challenger to overcome those presumptions. Bergen Pines County Hospital v. NJ Dep't of

Human Services, 96 N.J. 456, 477 (1984). [Post Hearing Brief of Ray Lamboy, DAG, Radon Measurement Consolidated Case (Lamboy Measurement Brief), at p. 6.]; [Post Hearing Brief of Ray Lamboy, DAG, Radon Mitigation Consolidated Case (Lamboy Mitigation Brief), at p. 6].

Further, the Radiation Protection Act, N.J.S.A. 26:2D-1 et seq., must be construed liberally to carry out its beneficent purpose in protecting the public from indoor air pollution. In re Vulcan Materials Co., N.J. Super. 212, 220 (App. Div. 1988) (citations omitted) (holding that statutes which protect the public through the control of pollution are entitled to liberal construction.). The Department' s authority under the Radiation Protection Act must also be construed liberally. New Jersey Guild of Hearing Aid Dispensers v. Div. of Consumer Affairs, 75 N.J. 544, 562 (1978) (holding that the delegation of authority to an administrative agency must be construed liberally when the agency is concerned with protection of health and welfare of the public). The Legislature amended the Radiation Protection Act to establish a radon certification program to protect the public from incompetent radon-related services, and directed the Department to establish a fee schedule to cover the costs of the program. Thus, the Department' s assessment of fees must be construed liberally. (Lamboy Measurement Brief at p. 6-7; Lamboy Mitigation Brief at p. 6-7.)

The Department argues that its interpretation of a regulation it is required to enforce is entitled to substantial weight. Dep't of Envtl. Prot. v. Alden Leeds, Inc., 153 N.J. 272, 285 (1998). The regulation at issue, N.J.A.C. 7:28-27.30, was adopted in 1990, and there is no record of RD having appealed the adoption of the regulation. Bergen Pines County Hosp. v. New Jersey Dep' t of Human Serv., 96 N.J. 456, 474 (1984) (holding that a party should not be permitted to take advantage of its negligence during the rule-making stage to challenge a rule afterwards). The regulation is over twenty years old, and the Company paid the PAFs for over twenty years. Automatic Merchandising Council v. Glaser, 127 N.J. Super 413, 420 (App. Div. 1974) (holding that the practical administrative construction of a statute over a period of years without interference by the Legislature is evidence of its conformity with the legislative intent and should be given great weight). (Lamboy Measurement Brief at p. 7-8; Lamboy Mitigation Brief at p. 7-8.)

The Department states that RD has no defense in both the Measurement and Mitigation Cases for failure to pay the assessed PAFs.

In the Measurement Case, the regulation itself does not distinguish between employees and non-employees, and the Department argues that it does not matter who employed the test device for purposes of assessing program administration fees. (Lamboy Measurement Brief at p.10.)

In the Mitigation Case, Baicker-McKee distinguished between full mitigation system installations and "activations," i.e., the installation of a fan and manometer and possibly an electrical outlet. The radon regulations do not make any such distinction. Moreover, Baicker-McKee readily acknowledged that installing a fan was a mitigation-related activity. (Lamboy Mitigation Brief at 9-10.) The Department's interpretation of the fee regulation is reasonable, consistent, and presumptively valid. RD and its principals have not satisfied the burden of overcoming that presumption. Their interpretation of the regulation is self-serving, arbitrary, and entitled to no weight. Accordingly, since there is no dispute that RD did not pay program administration fees, the Company is in violation of N.J.A.C. 7:28-27.3 (e). (Id. at 10.)

Further, RD's argument that non-certified individuals and businesses, such as homebuilders, who apply radon-resistant construction techniques, should have to pay fees as well is fallacious for three reasons. First, the regulation at issue imposes program administration fees only on certified radon mitigation businesses, and the Department cannot assess those fees on anyone else. See, 37 N.J. Practice, Administrative Law and Practice S3.20 (an agency must comply with its own rule and is not free to disregard it). Second, homebuilders and others that comply with the State Uniform Construction Code Act's radon hazard subcode, N.J.A.C. 5:23-10.1 et seq., are expressly exempt from the radon regulations. N.J.A.C. 7:28-27.31(a)2. Third, assuming strictly for the sake of argument that homebuilders and others were not exempt, that would not relieve RD of its obligation as a certified mitigation business to pay the fees it owes for mitigating buildings. Finally, respondent's brief erroneously states that the radon regulations "predate" the radon

hazard subcode. In fact, the radon regulations were adopted in November 1990, including N.J.A.C. 7:28-27.31, which expressly exempted persons incorporating construction techniques outlined in N.J.A.C. 5:23-10 (i.e., the radon hazard subcode). See, 22 N.J.R. 3543 (November 19, 1990). [Reply Brief of Ray Lamboy, DAG, Radon Mitigation Consolidated Cases (Lamboy Mitigation Reply Brief), at p. 4.]

The Department argues that there are no mitigating factors in either consolidated case that would justify reduced suspensions of the Company's measurement business certification and mitigation business certification, and a minimum suspension of thirty days for each period that RD allows to elapse without paying its fees is reasonable, appropriate, and would help to deter RD and others from withholding payment. (Lamboy Measurement Brief at p.13; Lamboy Mitigation Brief at p.12.)

The Company's arguments regarding the DEP's alleged failure to follow the SOP in both consolidated cases have no merit. The Department's standard operating procedure (R-2) does not provide for a Notice of Violation as a preliminary step before a suspension can issue for nonpayment of fees but does provide for an Administrative Order, followed by an Administrative Order and Notice of Suspension, with a four-month suspension, if payment is not received within thirty days. RD's failure to pay the PAFs assessed in Measurement Order 1 and Mitigation Order 1, led to the issuance of Measurement Order 2 and Mitigation Order 2. After Radiation Data continued to withhold payment of fees, there was no need to issue another Notice of Violation or Administrative Order to warn that a thirty-day suspension would follow as the Company was already at the "suspension level" of enforcement. (Lamboy Measurement Reply Brief at p. 6-8; Lamboy Mitigation Reply Brief, at p. 5-7.)

Respondent

Respondent argues that in both consolidated cases, the payment of the PAFs in the past is not indicative, nor an admission that these fees were correct. [Reply Brief of David J. Singer, Esq., and Lisa M. Leili, Esq., Radon Measurement Consolidated Case (Singer/Leili

Measurement Reply Brief), at p. 2-3.]; [Reply Brief of David J. Singer, Esq., and Lisa M. Leili, Esq., Radon Mitigation Consolidated Case (Singer/Leili Mitigation Reply Brief), at p. 3.]

In the consolidated Measurement Case, respondent argues that the record establishes that the regulations do not permit for assessment of a PAF for reporting test results, and that the reporting of a test does not mean that the same person or entity employed that test. A PAF should only be assessed for tests employed by RD. (Singer/Leili Measurement Brief at p. 2.)

RD did not employ a majority of the devices subject to the PAF, but rather, merely processed tests through its independent laboratory that does not fall under the jurisdiction of the DEP. Respondent argues that if it only processed a test in its lab, which is not subject to regulation by the DEP, then the Company did not employ a test within the meaning and definition set forth in the regulation, and the DEP would not be authorized to issue a PAF to RD for those particular tests. The regulation does not permit assessment of a PAF for the number of measurement device tests processed, or reported, but rather for the number of tests employed and that the Department's claims that the Company employed greater than 5,000 measurement devices for each of the three-time periods at issue in this matter is not supported by the record. (Singer/Leili Measurement Brief at p. 3-4.) [12]

In the consolidated Mitigation Case, respondent argues that the DEP improperly assessed fees against RD for mitigation systems that RD did not install, or that RD only installed a portion of. [Post Hearing Brief of David J. Singer, Esq., and Lisa M. Leili, Esq., Consolidated Mitigation Case (Singer/Leili Mitigation Brief), at p. 2.]

The regulations do not distinguish between "passive" and "active" systems, but rather, subject all materials and steps to reduce radon to a PAF. The DEP's contention that it cannot assess fees against such companies is false as the DEP has the ability to, and in fact the

[12] RD argues that it employed 103 measurement devices during the time period between January 1, 2015 and June 30, 2015 (R-3); employed seventy-six measurement devices during the time period between July 1, 2015 and December 31, 2015 (R-4); and employed ninety-two measurement devices during the time period between January 1, 2016, and June 30, 2016 (R-5). (Singer/Leili Measurement Brief at p. 5.)

regulations require, that all businesses engaged in radon mitigation activities be certified, and therefore subject to assessment of PAFs. (Singer/Leili Mitigation Brief at p. 4-5.)

RD did not engage in installation of piping; sealing; and designing for at least forty-five systems during the period between January 1, 2016 and June 30, 2016, for which it was assessed a PAF at a higher rate. (R-2; J-9.) Despite the clear language in the regulations that piping, sealing and design are steps in installing a mitigation system, these forty-five systems were installed by builders who are non-certified and therefore, the DEP contends, did not have to pay a PAF. The DEP contends that these systems, although the same as what RD would install, are subject to the "radon hazard subcode." The radon regulations which set forth the requirements for building mitigation however, predate the subcode. As a result, Schedule A of the radon regulations did not contemplate passive radon systems being built by non-certified individuals, because the subcode allowing for this was enacted after-the-fact. (Singer/Leili Mitigation Brief at p. 5-6.)

Respondent argues that because the DEP failed to present any evidence as to the number of buildings allegedly mitigated by RD, the Administrative Orders in J-6; J-7; J-8; and J-9 should be dismissed. To the extent found otherwise, at a minimum the PAF with respect to J-9 should be revised. (Singer/Leili Mitigation Brief at p. 6.)

Respondent argues that the Department failed to follow its own standard operating procedures (SOPs) in both consolidated cases by issuing Notices of Certification Suspension despite multiple Administrative Hearing Requests being submitted by RD in violation of its right to dispute the amount of the PAF through the administrative process. Respondent argues that the DEP therefore lacked the authority to issue the Administrative Orders and Notices of Certification Suspension at issue and the violations asserted in Measurement Orders 3 and 4 (J-4 and J-5) Mitigation Orders 2, 3 and 4 (J-8 and J-9) and those orders should therefore be dismissed. (Singer/Leili Measurement Brief at p. 7; Singer/Leili Mitigation Brief at p. 6-7.)

The DEP's contention that the radon regulations should be construed liberally, flies in the face of its enforcement actions in both consolidated cases. In the consolidated radon Measurement Case, the Department refuses to assess PAFs against companies and persons who "employ" the language stated in the regulation. Instead, the Department

chose to change the meaning and intent of the Legislature by assessing fees against RD for devices it "reports." (Singer/Leili Measurement Reply Brief at p. 3.) In the consolidated radon Mitigation Case, the Department refuses to assess PAFs against companies who perform radon mitigation, including installation of piping, sealing, and designing of the mitigation system itself. These are all activities for which the Department is assessing a PAF against RD for, when they did not perform these radon mitigation activities. (Singer/Leili Mitigation Reply Brief at p. 2-3.)

Respondent argues that in these consolidated cases, the DEP is not correct that its interpretations are entitled to unfettered deference, while the interpretation of Certified Measurement and Mitigation Specialists are not entitled to any weight at all.

RD argues that it was clearly the intent of the Legislature that all businesses and persons engaged in radon measurement activities as defined by the regulation be certified, and therefore subject to assessment of PAFs. (Singer/Leili Reply Measurement Brief at p. 6.) Further, the Legislature intended to protect all citizens of New Jersey regardless of whether they are in a new or pre-existing home by requiring that persons and businesses that perform radon-related work and services were certified. It was clearly the intent of the Legislature that all businesses and persons engaged in radon mitigation activities as defined by the regulation be certified, and therefore subject to assessment of PAFs. The DEP is not permitted to simply assess PAFs against RD for work that it did not perform, and which was performed by non-certified individuals and businesses which the DEP chooses not to require certification despite the regulations which provide for it. (Singer/Leili Mitigation Reply Brief, at p. 4-5)

LEGAL ANALYSIS AND CONCLUSIONS

In the consolidated radon Measurement Case, respondent's challenge to the $48,840 in assessed by the DEP, and the three thirty-day suspensions (J-1, through J-5), relies on its argument that the DEP has exceeded its statutory authority by expanding the scope of the statute to assess PAFs for reporting test results, rather than only for those

performed by an employee of RD. The Company argues that the DEP did not provide evidence for each of measurement device employed by RD for the three periods at issue, therefore the Measurement Orders 1, 2, 3 and 4 should be invalidated.

In the in the consolidated radon Mitigation Case, respondent's challenge to the $22,852 in PAFs assessed by the DEP, and the three thirty-day suspensions, relies on its argument that the DEP has improperly assessed the PAFs on RD by not assessing fees on other entities that performs integral parts of the mitigation work, and that it has statutory authority to do so. The Company argues that the DEP did not provide evidence for each mitigation performed by RD for the three periods at issue, therefore the Mitigation Orders 1, 2, 3 and 4 should be invalidated.

For the reasons set forth below, I find these arguments unpersuasive.

In the consolidated radon Measurement Case, RD has reported in excess of 5,000 radon tests to the DEP in the semi-annual periods from January 1, 2015, through June 30, 2015 (J-1, J-2.); July 1, 2015, through December 31, 2015 (J-4.); and January 1, 2016, through June 30, 2016. (J-5.) RD argues that: the regulations do not permit for the assessment of a PAF solely for reporting test results; the reporting of a test does not mean that the same person or entity employed that test; and a PAF should only be assessed for tests employed by RD. This argument is not supported by the plain language of the rule.

N.J.A.C. 7:28-27.30(d) states that "a program administration fee shall be submitted to the Department by a certified radon measurement business in accordance with Fee Schedule B below." The fee schedule determines the PAF owed to the DEP based upon the number of "devices employed in each semi-annual period" by the certified measurement business, the purpose of the PAF is to cover the cost of the Department's implementation of the certification provisions, N.J.A.C. 7:28-27.30(g), and a certified measurement business must report the results of a radon test pursuant to N.J.A.C. 7:28-

27.28(b).[13] Irrespective of the language in the fee schedule referring to "devices employed," the plain language of N.J.A.C. 7:28-27.30(d) leaves no doubt that the PAF should be submitted to the DEP by the certified radon measurement business.

The Company argues that the scope of the rules should be expanded to certify home inspectors, who the parties agree perform a substantial amount of the measurement tests. Respondent cites no case law to support the claim that the DEP has either the legislative authority to expand the universe of certified measurement businesses to include home inspectors, or, if that authority existed, that this expansion could be done outside of the rulemaking process, pursuant to the Administrative Procedure Act (APA) N.J.S.A. 52:14B-1 et seq.

While RD asserts that the past payments should not be construed as an acceptance of the validity of the DEP's right to impose those PAFs, the record does not reflect any challenges to the DEP's statutory authority to impose them, dating back to the original promulgation of the rule in 1990. The DEP argues that "that the practical administrative construction of a statute over a period of years without interference by the Legislature is evidence of its conformity with the legislative intent and should be given great weight." Automatic Merchandising Council v. Glaser, 127 N.J. Super 413, 420 (App. Div. 1974). I agree.

The record reflects that there have been no challenges to the validity of the rules at issue, including from RD, who has paid the PAFs for well over twenty years. RD's argument suggesting that the DEP has been calculating the PAFs incorrectly, for all of this time, is unsupported. Further, Baicker-McKee's testimony that RD would have difficulty remaining in business if they were required to pay the PAFs as calculated by the DEP highlights the deficiency of RD's argument. Put simply, petitioner's ability to pay the PAFs bears no relation to the DEP's authority to impose them pursuant to N.J.A.C. 7:28-27.30(d).

[13] "Certified radon measurement business" means a commercial business enterprise certified pursuant to this subchapter to sell devices or test for radon and/or radon progeny. N.J.A.C. 7:28-27.2. Requirements for certified radon measurement business are set forth in N.J.A.C. 7:28-27.5

The rule language is clear, and its uncontested enforcement for over twenty years by the DEP leaves no doubt as to its meaning. I therefore **CONCLUDE** that, pursuant to N.J.A.C. 7:28-27.30(d), the PAF should be assessed on a certified measurement business.

RD reported over 5,000 tests in both 2015 and 2016, well over 5,000 tests required for the highest level of PAF assessed pursuant to N.J.A.C. 7:28-27.30(d) for each semi-annual period. Accordingly, I **CONCLUDE** that the DEPs calculation of the PAFs owed by RD for certification periods of January 1, 2015 through June 30, 2015 (J-1); July 1, 2015 through December 31, 2015 (J-4); and January 1, 2016 through June 30, 2016 (J-5) were correctly assessed.

RD's argument in the consolidated radon Mitigation Case, that the PAFs should be assessed both on "full" mitigations and "activations," fails as it is not supported by the language of the rule. N.J.A.C. 7:28-27.28(e) states that "a program administrative fee shall be submitted to the Department by a certified radon mitigation business in accordance with Fee Schedule C below." The Fee Schedule determines the PAF owed to the DEP based upon the number of "buildings mitigated each semi-annual period" by the certified mitigation business. The purpose of the PAF is to cover the cost of the Department's implementation of the certification provisions, N.J.A.C. 7:28-27.30(g), and a certified mitigation business must submit a monthly report on all mitigation work performed during the second previous month pursuant to N.J.A.C. 7:28-27.28(e)[14] Here, the plain language of the rule does not provide for the distinction between "full" mitigations and "activations," leaving no doubt that N.J.A.C. 7:28-27.28(e) applies to certified radon mitigation businesses.

[14] "Mitigate" means to apply materials and/or install systems and materials to reduce radon concentrations in indoor atmosphere or prevent entry of radon into the indoor atmosphere. "Mitigation system" means a step or series of steps employed to actively reduce radon levels in buildings including, but not limited to, sealing techniques, natural and forced air ventilation techniques and soil ventilation techniques. N.J.A.C. 7:28-27.2. Requirements for certified radon measurement business are set forth in N.J.A.C. 7:28-27.7.

The Company's argument that the scope of the rules should be expanded to require the DEP to certify homebuilders as a radon mitigation business making them subject to the PAF and to prorate charges for the performance of "activations," also fails as homebuilders are expressly exempt from the radon regulations pursuant to N.J.A.C. 7:28-27.31(a)2. Further, respondent cites no case law to support the claim that the DEP has either the legislative authority to expand the universe of certified mitigation businesses to include homebuilders, or, if that authority existed, that this expansion could be done outside of the rulemaking process, pursuant to the Administrative Procedure Act (APA) N.J.S.A. 52:14B-1 et seq.

As in the consolidated radon Measurement Case, RD asserts that the past payments should not be construed as an acceptance of the validity of the DEP's right to impose those PAFs. In the consolidated radon Mitigation Case, the record also does not reflect any challenges to the DEP's statutory authority to impose the PAFs, dating back to the original promulgation of the rule in 1990, including from RD, who has paid the PAFs for well over twenty years. In this case, RD's argument suggesting that the DEP has been calculating the PAFs incorrectly, for all of this time, is once again unsupported. Further, RD's claim, as in the consolidated Measurement Case, that payment of the PAFs will endanger its business, is not relevant to the issue at hand. Put simply, petitioner's ability to pay the PAFs bears no relation to the DEP's authority to impose them pursuant to N.J.A.C. 7:28-27.30(e).

The rule language is clear, and its uncontested enforcement for over twenty years by the DEP leaves no doubt as to its meaning. I therefore **CONCLUDE** that pursuant to N.J.A.C. 7:28-27.30(e), the PAF should be assessed on a certified mitigation business.

According to the Company's own exhibit, RD conducted 215 "full" installations and forty-eight "activations" in the first half of 2015, a total of 263 mitigations; and 240 "full" installations and fifty-four "activations" in the second half of 2015, a total of 294 mitigations. (R-2.) In addition, RD reported over 200 mitigations for the semi-annual reporting periods of January 1, 2015 through June 30, 2015 (J-1, J-6) and July 1, 2015 through December 31,

2015 (J-8). I therefore **CONCLUDE** that the PAFs for these reporting periods were correctly assessed. Further, the Company's exhibit indicates that RD conducted 177 "full" installations and forty-five "activations" in the first half of 2016, a total of 222 mitigations. (R-2) As no distinction exists in the rules to allow for a lesser or prorated PAF for an "activation," I **CONCLUDE** that the Company has reported a total of 222 mitigations in the semi-annual period from January 1, 2016 through June 30, 2016. I therefore **CONCLUDE** that the DEPs calculation of the PAFs owed by RD for the certification periods of January 1, 2016 through June 30, 2016 (J-9) was correctly assessed.

Regarding respondent's assertion in both consolidated cases that the DEP did not follow its SOP, RD elected to withhold payment and pursue administrative appeals while it continued to operate, as was its right. However, The DEP argues that the Company does not have a right to use the administrative appeal process to avoid suspensions authorized by regulation. I agree. The DEP has outlined the steps it took in this matter, including that RD was fully aware that the PAFs were due and it had moved into the "suspension level" of enforcement. Further, respondent does not cite to any case law, or make any legal argument, to support its apparent claim that the DEP's SOP would in any way supersede its statutory and regulatory authority to assess a PAF pursuant to N.J.A.C. 7:28-27.30(d) and N.J.A.C. 7:28-27.30(e) or suspend a certified measurement or mitigation companies for failure to pay applicable fees pursuant to N.J.A.C. 7:28-27.25 (b)(6). I therefore **CONCLUDE** that the DEP's SOPs were not violated, and respondent's argument that the violations asserted in Measurement Orders 2 through 4 (J-3 through J-5) and Mitigation Orders 2 through 4 (J-7 through J-9) should be dismissed is meritless.

In both consolidated matters, RD has failed to pay the correctly assessed PAFs for its radon measurement and mitigation businesses pursuant to N.J.A.C. 7:28-27.30(d) and N.J.A.C. 7:28-27.30(e) respectively. N.J.A.C. 7:28-27.25 (b)6 permits the Department to suspend a certification "for one or all techniques or devices for which a person is certified by reason of amendments to the Act or adoption of rules promulgated pursuant to the Act, or if the person does not pay the applicable fees." Accordingly, I **CONCLUDE** that the Department's was authorized to impose the three thirty-day

suspensions set forth in Measurement Orders 2 through 4 (J-3 through J-5) and Mitigation Orders 2 through 4 (J-7 through J-9).

In the consolidated Measurement Case, RD contends that the DEP is not assessing PAFs against the individuals and companies who are actually getting paid to employ the tests, which, by definition, should be the act that is subject to a PAF. To the contrary, the Company contends that the DEP is seeking to assess the PAFs against RD for processing tests, for which the Company argues is not subject to assessment of a PAF.

In the consolidated Mitigation Case, RD contends that homebuilders and installers are conducting mitigation, as they are applying materials and installing systems that are meant to reduce radon concentration or prevent radon entry, and have taken a series of steps to actively reduce the radon levels in the building. Builders and installers were not invoiced and the Company argues that it would owe less in PAFs if the DEP adopted a new standard of calculations. Respondent argues that the DEP is mandated by the regulation to certify all businesses engaged in radon mitigation activities, and therefore subject to assessment of PAFs.

These arguments lend credence to petitioner's argument that this matter is, in effect, a challenge to policy choices made by the Legislature and implemented by the Department, which should be rejected. New Jersey Healthcare Coalition v. New Jersey Dep't of Banking and Insurance, 440 N.J. Super. 129, 136 (App. Div. 2015) (citations omitted) (holding that challenges of policies expressed in enabling statutes and implementing regulations should be rejected). Further, the Company and its principals are not free to follow their own judgment on how the radon industry should be regulated. New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 5441 562-63 (1978) (holding that a court is not free to substitute its judgment as to the wisdom of an agency rule).

Respondent cites the New Jersey Supreme Court ruling that "an administrative agency may not under the guise of interpretation extend a statute to include persons not intended, nor may it give the statute any greater effect than its language allows." N.J.

Dept. of Envir. Protection v. Alden Leeds, 153 N.J. 272, 295 (1998) (Garibaldi, J., dissenting in part, concurring in part), citing, Kingsley v. Hawthorne Fabrics, Inc., 41 N.J. 521, 528 (1964).

However, the Supreme Court has also held that "administrative regulations are accorded a presumption of validity." N.J. State League of Municipalities v. Dept. of Community Affairs, 158 N.J. 211, *211, 729 A. 2d (quoting In re Township of Warren, 132 N.J. 1, 26, 622 A 2d 1257; Medical Society v. New Jersey Department of Law and Public Safety, 120 N.J. 18, 25, 575 A.2d 1348 (1990). Further, "the Appellate Division, and not the OAL, is the proper forum in which to challenge the facial validity of an administrative regulation specifically where the matter as here, is purely a question of law." Wendling v. New Jersey Racing Commission, 279 N.J. Super 477, 484; 653 A.2d 582 [quoting Christian Bros. Inst. v. No. N.J. Interschol. League, 86 N.J. 409, 416, 432 A.2d 26 (1981)]. The Company's right to challenge the facial validity of the administrative regulations at issues in both consolidated cases, or whether the DEP is seeking to expand the interpretation of the statute in relation to the PAF assessed for both radon measurement and radon mitigation, are purely a question of law and should be addressed by the Appellate Division. I therefore **CONCLUDE** that the OAL is not the proper forum for the consideration of those issues.

ORDER

For the reasons set forth above, in the consolidated radon Measurement Case, I **ORDER** that the Notice of Violation, Administrative Orders and Notices of Suspension (J-1 through J-5) are hereby **AFFIRMED.** I further **ORDER** that respondent is liable for the $48,840 in unpaid Program Administration Fees and is subject to a suspension for not less than ninety-days of its radon measurement certification, and until all fees are paid.

For the reasons set forth above, in the consolidated radon Mitigation Case, I **ORDER** that the Notice of Violation, Administrative Orders and Notices of Suspension (J-1 and J-6 through J-9) are hereby **AFFIRMED.** I further **ORDER** that respondent is liable for

the $22,852 in unpaid Program Administration Fees and is subject to a suspension for not less than ninety-days of its radon measurement certification, and until all fees are paid.

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.

June 21, 2018 _____
DATE

JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency: _____

Date Mailed to Parties: _____

nd

APPENDIX

WITNESSES

For Petitioner:

Anita Kopera

For Respondent:

Kyle Baicker-McKee

EXHIBITS

RADON MEASUREMENT

Joint Exhibits:

J-1 State of New Jersey, DEP, Division of Energy, Security and Sustainability, Bureau of Environmental Radiation, Notice of Violation to Radiation Data for failure to pay program administration fees for its radon measurement business and radon mitigation business, dated February 23, 2016

J-2 State of New Jersey, DEP, Division of Energy, Security and Sustainability, Bureau of Environmental Radiation, Administrative Order, dated May 12, 2016

J-3 State of New Jersey, DEP, Division of Energy, Security and Sustainability, Bureau of Environmental Radiation, Administrative Order and Notice of Certification Suspension, dated July 6, 2016

J-4 State of New Jersey, DEP, Division of Energy, Security and Sustainability, Bureau of Environmental Radiation, Administrative Order and Notice of Certification Suspension, dated August 31, 2016

J-5 State of New Jersey, DEP, Division of Energy, Security and Sustainability, Bureau of Environmental Radiation, Administrative Order and Notice of Certification Suspension, dated March 23, 2017

For Petitioner:

None

For Respondent:

R-1 Internal DEP Email from Paul Orlando to Herbert Roy and Ray Lamboy. Anita Kopera and Charles Renaud, copied. February 26, 2016

R-2 Standard Operating Procedure, State of New Jersey, DEP, Division of Energy, Security and Sustainability, Bureau of Environmental Radiation, Radon Section, dated July 27, 2016

R-3 Chart prepared by Radiation Data, detailing tests performed by Radiation Data employees from January 2015 through June 2015

R-5 Chart prepared by Radiation Data, detailing tests performed by Radiation Data employees from July 2015 through December 2015

R-6 Chart prepared by Radiation Data, detailing tests performed by Radiation Data employees from January 2016 through June 2016

RADON MITIGATION

Joint Exhibits:

J-1 State of New Jersey, DEP, Division of Energy, Security and Sustainability, Bureau of Environmental Radiation, Notice of Violation, dated February 23, 2016

J-6 State of New Jersey, DEP, Division of Energy, Security and Sustainability, Bureau of Environmental Radiation, Administrative Order, and Supporting Documents, dated May 12, 2016

J-7 State of New Jersey, DEP, Division of Energy, Security and Sustainability, Bureau of Environmental Radiation, Administrative Order and Notice of Certification Suspension, dated July 6, 2016

J-8 State of New Jersey, DEP, Division of Energy, Security and Sustainability, Bureau of Environmental Radiation, Administrative Order and Notice of Certification Suspension, dated August 31, 2016

J-9 State of New Jersey, DEP, Division of Energy, Security and Sustainability, Bureau of Environmental Radiation, Administrative Order and Notice of Certification Suspension, dated March 23, 2017

J-10 Lexis Nexis®, N.J.A.C. 7:28-27.30

For Petitioner:

None

For Respondent:

R-1 Standard Operating Procedure, State of New Jersey, DEP, Division of Energy, Security and Sustainability, Bureau of Environmental Radiation, Radon Section, dated July 27, 2016

R-2 Chart prepared by Radiation Data indicating full mitigations and activations for the semi-annual periods of January 1, 2015 through June 30, 2015; July 1, 2015 through December 31, 2015; and January 1, 2016 through June 30, 2016