State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BOB MARTIN
Commissioner

R&K ASSOCIATES, LLC, Petitioner, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent, and DES CHAMPS LABORATORIES, INC., Intervenor.	)	ADMINISTRATIVE ACTION FINAL DECISION OAL DKT NO.: ESR-11666-13 AGENCY REF. NO.: LSR 120001-G000042636

This matter is before me for review of a November 19, 2014 Initial Decision by Administrative Law Judge Gail M. Cookson (ALJ), which: (i) granted the petition of R&K Associates, LLC (Petitioner or R&K) to object to the filing of intervenor Des Champs Laboratories, Inc. (Des Champs or Intervenor) for a De Minimis Quantity Exemption (DQE) under the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq. (ISRA), and (ii) reversed the respondent New Jersey Department of Environmental Protection's (DEP) approval of Des Champs' application for a DQE. Having reviewed the record before me, taking into consideration the unique facts of this matter and the applicable legal authority,

in this Final Decision I modify the Initial Decision to limit the ALJ's conclusions on standing to the unique facts of this case; reject the Initial Decision as to Des Champs' compliance with ISRA in 1996, and the applicability of the Doctrine of Waiver; and adopt the remainder of the Initial Decision, reversing the DEP's August 8, 2012 approval of the application of Des Champs for a DQE.

PROCEDURAL AND FACTUAL BACKGROUND

This matter is the result of a lengthy regulatory and appellate history which is recited in more detail in two decisions of the Superior Court, Appellate Division: Des Champs Laboratories v. Martin, 427 N.J. Super. 84 (App. Div. 2012) (Des Champs I), and R&K Associates, LLC v. NJDEP and Des Champs Laboratories, Inc., 2013 N.J. Super. Unpubl. LEXIS 1172 (App. Div. 2013) (Des Champs II). I provide an overview of the procedural and factual background below.

Des Champs operated an industrial establishment located at 66 Okner Parkway, Livingston, Essex County (Okner Facility) from approximately 1982 until 1996 which was engaged in the light assembly of heat recovery ventilators. The Okner Facility, classified as an industrial establishment,[1] was owned by Nicholas and Rebecca Des Champs during this period. In 1990 Des Champs moved the majority of its operations at the Okner Facility to a

[1] An "industrial establishment" is defined under ISRA as "any place of business engaged in operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances or hazardous wastes on-site, above or below ground, having a Standard Industrial Classification number within 22-39 inclusive, 46-49 inclusive, 51 or 76 as designated in the Standard Industrial Classifications Manual prepared by the Office of Management and Budget in the Executive Office of the President of the United States. . ." N.J.S.A. 13:1K-8. An "industrial establishment" is defined under the ISRA regulations as "any place of business or real property at which such business is conducted, having the North American Industry Classification System (NAICS) codes listed in chapter Appendix C, incorporated herein by reference, dated and published in 2002 by the Executive Office of the President of the United States, Office of Management and Budget, ISBN 0-934213-87-9 NTIS PB2002-502024, subject to the specified exceptions and limitations and engaged in operations on or after December 31, 1983, which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes on-site, above or below ground unless otherwise provided at N.J.A.C. 7:26B-2.1."

new facility in Virginia. In 1991, Des Champs sought and received a Letter of Non-Applicability under ISRA for the temporary cessation of operations at the Okner Facility while Des Champs considered producing a new product at the Okner Facility. Subsequently, in 1996, Des Champs decided to officially cease its operations permanently at the Okner Facility, triggering the application of ISRA. Des Champs I at 88-89. On January 9, 1997, Des Champs submitted an ISRA negative declaration affidavit to the DEP, seeking authorization for the cessation of operations and sale of the Okner Facility, and certifying that there had been no discharge of hazardous substances from the industrial establishment based upon a 1996 preliminary assessment report prepared by Des Champs' consultant, Joseph Pilewski of Enviro-Sciences, Inc.

On January 22, 1997, DEP issued a No Further Action (NFA) letter based upon Des Champs' negative declaration affidavit and 1996 preliminary assessment report. In September 1997, Des Champs sold the Okner Facility to R&K. Des Champs I at 89-90. In 2005, the DEP began investigating the source of groundwater contamination in drinking water wells in Livingston. The investigation revealed that the source of the contamination was located at the Okner Facility. As a result of this finding, the DEP issued a November 10, 2008 letter to Des Champs rescinding the January 22, 1997 NFA letter. Further, the DEP directed Des Champs to investigate the ground water contamination and submit a preliminary assessment and site investigation. Des Champs I, at 90-91.

Instead, contrary to DEP's instructions, in March of 2009 Des Champs submitted an application supported by an affidavit from its President, Nicholas Des Champs, for a DQE pursuant to N.J.S.A. 13:1K-9.7, which would exempt Des Champs from ISRA's requirement to remediate the industrial establishment (DQE Affidavit). On January 21,

2011, DEP denied Des Champs' DQE application due to the contaminated condition of the Okner Facility. Des Champs appealed the denial to the Appellate Division and R&K intervened in that action. Des Champs I, at 91-92. On July 6, 2012, the Appellate Division issued its published opinion in Des Champs I, in which it "reverse[d] the [DEP]'s denial of a DQE to [Des Champs] based upon the unauthorized condition of assuring that the [Okner Facility] is now free of contamination," and remanded the matter to DEP "for further consideration without . . . regard to the offending condition." Des Champs I, at 108.

Following the Des Champs I decision, the DEP reconsidered Des Champs' DQE application and, on August 8, 2012, DEP approved the DQE based upon the Des Champs' DQE Affidavit. The August 8, 2012 approval letter expressly noted that "[a]ny inaccuracies in the affidavit or subsequent changes in the facts as stated therein could alter the [DEP]'s decision." See R&K Ex. P-11. R&K thereafter filed an appeal in the Appellate Division (Des Champs II) on the issue of whether Des Champs' application for a DQE under ISRA should have been granted by DEP in 2012. On May 16, 2013, the Appellate Division, in the unpublished Des Champs II decision, reversed DEP's August 8, 2012 decision to issue the DQE to Des Champs and remanded the matter to the DEP so that R&K could be provided the opportunity, as current property owner and potentially responsible party, to challenge the issuance of the DQE, which opportunity DEP had not previously provided. The Appellate Division ordered DEP to accept a formal factual proffer from R&K as to whether disputed factual issues exist that rise to the level of a "contested case," warranting a hearing before the OAL.

R&K submitted its factual proffer on June 13, 2013, and supplemented its submission on June 28, 2013. On August 13, 2013, the DEP determined that material facts

were in dispute concerning Des Champs' eligibility for a DQE under ISRA. This matter was then transmitted to the Office of Administrative Law (OAL) on August 16, 2013. On December 6, 2013, the ALJ issued an Order determining that R&K bears the initial burden of proof on its objections to issuance of the DQE to Des Champs and on any equitable defenses in the first instance (Burden of Proof Order). Evidentiary hearings were held on June 2, 5 and August 11, 2014.

At the close of R&K's case on June 5, 2014, Des Champs moved for judgment dismissing all claims and defenses of R&K. The ALJ verbally denied Des Champs' motion as to its entitlement to a DQE as the ALJ concluded that genuine issues of material fact remained. The ALJ set an expedited briefing schedule as to the remaining issues under Des Champs' motion. On June 12, 2014, the ALJ heard oral argument on Des Champs' motion and rendered an oral decision, on the record, dismissing R&K's affirmative defense of laches (Oral Decision) and reserving decision on all other aspects of Des Champs motion until conclusion of the case so that a full evidentiary record could be developed. The evidentiary hearing concluded on August 11, 2014. Post-hearing briefs and replies were permitted and the record closed on November 6, 2014. The Initial Decision was issued on November 19, 2014.

INITIAL DECISION

The ALJ evaluated a variety of evidence, including the testimony of various witnesses, and reached several factual and legal conclusions in three core areas: 1) whether Des Champs has legal standing to pursue a DQE; 2) whether R&K can raise the affirmative

defenses of equitable estoppel and/or waiver to bar Des Champs from pursuing a DQE[2]; and 3) whether R&K can make a factual showing that Des Champs did not meet the statutory criteria for a DQE for its Okner Facility.

The ALJ determined, based on the preponderance of the evidence, that, while there is insufficient evidence to determine exact usage/storage of hazardous materials at the Okner Facility, and while many records have been lost and apparently are not recoverable because of the long passage of time between the 1997 NFA letter and the 2009 DQE Affidavit, the limited evidence produced indicates that the Okner Facility most likely maintained amounts of hazardous materials at any one time which were low enough such that the statutory criteria for a DQE could potentially be met.

However, the ALJ concluded that Des Champs did not have legal standing to pursue a DQE since the language of ISRA, which is written exclusively in the present tense, only permits current owners or operators of industrial establishments complying with ISRA for the first time to obtain a DQE. Des Champs was a former owner or operator at the time it submitted its DQE Affidavit and had already attempted to comply with ISRA in 1996 through alternative means and was, therefore, ineligible to obtain a DQE over 13 years later. Based upon the ALJ's findings related to standing, the DEP's August 8, 2012 approval of the application of Des Champs for a DQE was reversed. The ALJ also rejected R&K's assertion of the affirmative defense arguments of estoppel and waiver.

[2] R&K's affirmative defense of Laches had already been rejected by the ALJ pursuant to the July 12, 2014 Oral Decision on the record.

EXCEPTIONS TO THE INITIAL DECISION

On December 2, 2014, Petitioner filed exceptions to the: (1) November 19, 2014 Initial Decision, (2) December 6, 2013 Burden of Proof Order, and (3) June 12, 2014 Oral Decision dismissing R&K's affirmative defense of laches. Petitioner takes exception to:

- the determination that it had the initial burden of proof to show whether Des Champs' DQE Affidavit satisfied the regulatory criteria for approval. Petitioner argued that the ALJ should have concluded that the burden of proof shifted to Des Champs, based upon the numerous errors and deficiencies in Des Champs' DQE Affidavit.

- the ALJ's failure to find that Des Champs' DQE Affidavit was defective, erroneous and incomplete because it was based upon two flawed documents. R&K argued that Des Champs' witnesses lacked sufficient knowledge of the facility operations at critical times, and Des Champs produced no operating records or witnesses with sufficient knowledge to support the DQE Affidavit.

- the ALJ's findings that (i) a 55-gallon drum of mineral spirits was never present at the site; and (ii) the maximum volume of mineral spirits on hand at any one time was 15 gallons.

- the ALJ's finding that the maximum total volume of hazardous substances maintained at any one time was less than 55 gallons.

- the ALJ's Oral Decision granting Des Champs' motion to dismiss R&K's affirmative defense of laches as not applicable.

- the ALJ's Conclusion of Law that R&K did not establish a basis for asserting that Des Champs is equitably estopped from filing for a DQE in 2009.

- the ALJ's Conclusion of Law that Des Champs did not previously waive its legal right to seek a DQE in 2009.

- the ALJ's omission from the list of Petitioner's Exhibits in Evidence of Des Champs' responses to R&K discovery requests, including Requests for Admissions (1st – 3rd Sets) and Interrogatories (1st – 5th Sets) and Request for more Specific Responses to 2nd Set of Interrogatories.[3]

On December 2, 2014, Intervenor Des Champs filed exceptions to the November 19, 2014 Initial Decision, in which it objected to:

- the ALJ's conclusion on standing, stating it was inconsistent with the plain language of the statute and the Appellate Division's findings. Des Champs argued that the conclusions lead to absurd results, and are inconsistent with the Department's position and facts of the case.

- the ALJ's conclusions in Footnote 8 that found as an alternative basis for ruling that Des Champs' consultant Mr. Pilewski must have determined that Des Champs did not qualify for a DQE because he did not file for one in 1996. In that regard, Des Champs argues that:

    - the record contains no evidence that Des Champs did not qualify for a DQE.
    - it qualified for a DQE.

[3] Des Champs responses to R&K's Request for Admissions and Response to Interrogatories were admitted into evidence at the June 5, 2014 hearing date at 6/5 Tr. 72:13-19. An inadvertent numbering error regarding Petitioner's exhibits at the August 11, 2014 hearing date appears to have led to those exhibits being omitted from the Initial Decision's List of Petitioner's Exhibits in Evidence (Initial Decision, pp. 34-35). Des Champs consents to inclusion of these items on pgs. 42-43 of its December 9, 2014 Response to Exceptions. Therefore, to correct this error, the Initial Decision at p. 35 is MODIFIED to include Des Champs' responses to R&K's discovery requests as Petitioner's Exhibit P-26 (Des Champs' Responses to Requests for Admissions) and P-27 (Des Champs' Responses to Interrogatories).

- it did not mislead Mr. Pilewski or hide information from him at the time initial ISRA compliance discussions began.

On December 8, 2014, Petitioner filed a Reply to the Exceptions of Intervenor Des Champs. In its Reply, Petitioner argues that:

- Des Champs mischaracterized DEP's November 2008 letter rescinding the 1997 NFA approval because that letter explicitly and in no uncertain terms required Des Champs to undertake certain remediation tasks.
- the issue of standing was not decided by the Appellate Division and is within the scope of the Court's remand to DEP.
- contrary to Des Champs' arguments, ISRA does not provide a legal avenue for past owners or operators to claim an ISRA DQE years after the fact.
- the ALJ correctly found that Des Champs was not eligible for a DQE in 1996.
- Des Champs was complicit in the non-disclosure of information in 1996 regarding its prior site operations and past usage of hazardous substances, which led to an incomplete preliminary assessment.

On December 9, 2014 Intervenor Des Champs filed a Response to Petitioner's Exceptions. In its Response, Des Champs argues that:

- the ALJ correctly held that R&K bore the burden of proving its objections to Des Champs DQE application and R&K's objections to the DQE Affidavit do not change the conclusions reached by the ALJ.

- there is no evidence that Des Champs stored more than 3 gallons of mineral spirits at the Okner Facility at any one time or that Des Champs ever had more hazardous substances than those identified in the Initial Decision.
- the ALJ correctly dismissed R&K's laches, equitable estoppel, and waiver claims.
- Des Champs has no objection to R&K's request to amend the exhibit list.[4]

The Department neither took exception to the Initial Decision, nor responded to any of the exceptions filed by R&K and Des Champs.[5] Because I accept the ALJ's findings and conclusions as to standing, and conclude that Des Champs is not entitled to a DQE, I do not specifically address in detail the various exceptions and responses to exceptions filed by R&K and Des Champs.

DISCUSSION

Standard of Review

In reviewing the decision of an administrative law judge, the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. N.J.S.A. 52:14B-10(c). The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or not supported by sufficient, competent, and credible evidence in the record. N.J.A.C. 1:1-18 .6(c).

[4] See Footnote 3.
[5] The lack of any responsive filing from the Department is troubling. A more detailed legal analysis from the Department in response to the ALJ's findings and conclusions and the exceptions filed by the parties would have assisted in the consideration of the Initial Decision in this matter.

Background on ISRA Process

ISRA requires an owner or operator of an industrial establishment to notify the DEP in writing, no more than five days subsequent to closing operations or of its public release of its decision to close operations, whichever occurs first, or within five days after the execution of an agreement to transfer ownership or operations. N.J.S.A. 13:1K-9. Upon submittal of the notice to DEP, the owner or operator is required to either pursue an exemption from ISRA (such as a DQE), or remediate[6] the industrial establishment, which includes investigating and, if necessary, cleaning up the industrial establishment. Conducting a preliminary assessment is generally the first step in this process. In 1996, the ISRA process required an owner or operator to then submit a negative declaration, certifying that there has been no discharge or any discharge has been remediated. The DEP would then review and approve the negative declaration filing through issuance of a No Further Action letter.[7]

Des Champs' 1996 ISRA Process

When Des Champs decided to cease operations at its Okner Facility in the 1990s and submitted a negative declaration to the DEP, based upon its 1996 preliminary assessment report, certifying that there had been no discharge of hazardous substances or hazardous wastes at the Okner Facility, it had an obligation under ISRA, its implementing regulations, and the Technical Requirements for Site Remediation (as applicable to ISRA

[6] "Remediate" is defined in ISRA to include "all necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge of hazardous substances or hazardous wastes, including, as necessary, a preliminary assessment, site investigation, remedial investigation, and remedial action." N.J.S.A. 13:1K-8.

[7] Subsequent to enactment of the Site Remediation Reform Act of 2009, N.J.S.A. 58:10C-1 et seq., these procedures have been modified and amplified to include, among other things, special procedures for involving Licensed Site Remediation Professionals in the ISRA process; however, for the present purposes, the ISRA procedures in effect in 1996, which continue essentially unchanged, are most relevant.

pursuant to N.J.A.C. 7:26B-1.4) to diligently search and reveal all information in its, and all of its current and former employees', possession to support that course. The Technical Requirements for Site Remediation, N.J.A.C. 7:26E-3.1, demand that current and historical information be provided as part of a Preliminary Assessment. Specifically, the current regulations require:

> (c) The person responsible for conducting the remediation who is subject to (b) above[8] shall conduct a preliminary assessment, which shall include, at a minimum, the results of research conducted on the following topics:
>
> 1. A diligent search from the time the site was naturally vegetated to the present, including an investigation of all documents that are reasonably likely to contain information related to the site, which documents are in a person's possession, custody or control, or in the possession, custody or control of any other person from whom the person conducting the search has a legal right to obtain such documents;
>
> 2. *Inquiries of current and former employees and agents* whose duties include or included any responsibility for hazardous substances, hazardous wastes, or pollutants, and any other current and former employees or agents who may have knowledge or documents relevant to the inquiry;
>
> 3. An evaluation of site specific operational and environmental information, both current and historic collected pursuant to (c)1 and 2 above; and
>
> 4. A site inspection to verify the above findings.
>
> (d) If a potentially contaminated area of concern is identified during the preliminary assessment, the person responsible for conducting the remediation who is subject to (b) above shall conduct a site investigation pursuant to N.J.A.C. 7:26E-3.3 through 3.14. [N.J.A.C. 7:26E-3.1] Emphasis Added.

[8] "(b) above" states, in pertinent part, "The person responsible for conducting the remediation shall conduct a preliminary assessment when that person: is required to submit a completed Industrial Site Recovery Act General Information Notice to the Department pursuant to the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq., and its implementing rules at N.J.A.C. 7:26B."

Similarly, the technical regulations for site remediation that were in effect in 1996 required a "diligent inquiry" and evaluation of a host of items, including, but not limited to: site and industrial use history information; all raw materials, finished products, formulations and hazardous substances, hazardous wastes, hazardous constituents and pollutants that are or were present on the site; present and past production processes including ultimate and potential discharge and disposal points and how and where materials are or were received onsite, . . . See 25 N.J.R. 2449 (June 7, 1993), codified at former N.J.A.C. 7:26E-3.1.

A "diligent inquiry" under the regulations in effect in 1996 was defined to include a diligent search of *all documents* which are reasonably likely to contain information related to the object of the inquiry, as well as making *reasonable inquiries of current and former employees and agents* whose duties include or included any responsibility for hazardous substances, hazardous wastes, hazardous constituents, or pollutants, and any other current and former employees or agents who may have knowledge or documents relevant to the inquiry. See 25 N.J.R. 2442 (June 7, 1993), codified at former N.J.A.C. 7:26E-1.8, emphasis added.

As the above rules indicate, ISRA and its implementing regulations, along with the Technical Requirements for Site Remediation, require a diligent effort to comply by Des Champs as the owner or operator. A diligent inquiry should have been undertaken by Des Champs, in coordination with its consultant in 1996, and all available information should have been made known regarding the Okner Facility. Instead, Des Champs failed to identify various aspects of its Okner Facility operation including, for instance, mineral spirit

use, spray paint booth installation and use, actual contents of hazardous material cabinets, and press brake machines. See Initial Decision, pg. 5 -7.

Additionally, the Technical Requirements for Site Remediation expressly require inquiries of current and former employees as part of the preliminary assessment process, yet there is no evidence any current and former employees were interviewed as part of the 1996 preliminary assessment. See N.J.A.C. 7:26E-3.1. Des Champs' witness Michael Morrison, who was not employed by Des Champs during the key period the spray booth was operated (1988-1990), still knew that the spray booth had been located at the Okner Facility. See 8/11 Tr. 121:18-20, 147:10-11.[9] Surely, various other employees had additional information regarding the installation and usage of this industrial spray booth. Identifying these various operational elements of the Okner Facility go to the very core of the ISRA process and are too central to the integrity of a preliminary assessment report and negative declaration for the failure to disclose such information to be explained away as mere "mistake," "oversight" or "inadvertent omission." See Des Champs Proposed Findings of Fact and Conclusions of Law at ¶¶ 36, 69, 86, 92.

Des Champs claims that its consultant failed to request certain information during the 1996 preliminary assessment process. See Des Champs October 17, 2014 Response to R&K Post Hearing Brief, pg. 12-13, Des Champs Proposed Findings of Fact and Conclusions of Law at ¶40. However, Des Champs cannot be shielded by the fact that its consultant may not have specifically "asked" for certain information and/or did not interview the proper (or any) current and former employees during its 1996 preliminary

[9] As used in this Final Decision, 6/2 Tr., 6/5 Tr., and 8/11 Tr. refer to the transcripts which resulted from the 6/2/14, 6/5/14, and 8/11/14 hearing dates respectively.

assessment process. If such a "defense" existed, industrial facility owners would be incentivized to seek out the least competent, least thorough consultants they could find and then use the incomplete work product of such a consultant as a shield, knowing full well that additional documents were potentially never produced, current and former employees were never made available for interview, and entire manufacturing processes (for instance, spray paint booths and press brake machines) were never identified. See Initial Decision, pg. 5.

The fact that entire manufacturing operations and/or hazardous material usage/storage was never mentioned in any ISRA related filing raises concerns as to the validity of all of the submissions made by Des Champs throughout the original ISRA process. With respect to the 1991 Letter of Non-Applicability filed by Des Champs, Dr. Des Champs admitted in his testimony that he "probably did not have anything to reference for this – to fill out this form." 8/11 Tr. 255:11-15. Additionally, Des Champs' consultant conducted his site walk-through of the Okner Facility years after operations had ceased and materials and equipment had been removed from the site. See 6/2 Tr. 179:10-22; 8/11 Tr. 212:6-15. By the time Mr. Pilewski walked through the Okner Facility, the only entity that possessed the historical information he needed to complete his task was Des Champs. Des Champs had a legal obligation to comply with ISRA diligently. It appears that Des Champs fell well short of this obligation.

Whether or not Des Champs' consultant specifically asked for information about the Okner Facility is not material. As between the consultant and Des Champs, all available information regarding the facility and its prior uses should have been made available by Des Champs, current and former employees should have been made available for interview,

and accurate conclusions under ISRA reached ab initio. That did not occur here, and I must respectfully disagree with the ALJ's conclusion on page 22 of the Initial Decision that Des Champs properly complied with ISRA in 1996 through submission of its preliminary assessment report and negative declaration affidavit. It has been subsequently established that substantial portions of the Des Champs operation were not disclosed as part of that preliminary assessment report, rendering the 1996 preliminary assessment report insufficient for ISRA compliance from a legal and regulatory perspective.

The passage of time in this case has been viewed as a hindrance to obtaining true information as to the hazardous material storage/usage at the Okner Facility. However, the lack of documentation in 2014 cannot become an affirmative shield for a former owner or operator who submitted incomplete materials in support of its original ISRA filing (at a time when those records and various current and former employees would have been available for search and inquiry).

On the one hand, Des Champs suggests that its consultant accurately handled the original ISRA process on its behalf, yet also implies that its consultant was incompetent since he did not ask specifically for certain information and failed to even mention, let alone analyze, a straightforward exemption from the entire ISRA process, namely the DQE at issue here. In fact, Des Champs goes so far as to suggest that it did not know the DQE option existed in 1996.[10] See 8/11 Tr. 231:25-232:4, 233:13-18, Des Champs Proposed Findings of Fact and Conclusions of Law at ¶ 38. However, the ALJ deemed Mr. Pilewski a credible witness with substantial experience with both ISRA and its predecessor, the

[10] The DQE had been codified within ISRA prior to 1996 pursuant to P.L. 1993, c. 139, §9, effective June 16, 1993.

Environmental Cleanup Responsibility Act of 1983 (ECRA), and there is no evidence in the record to suggest that Mr. Pilewski was incompetent. Pursuant to N.J.A.C. 1:1-18.6(c), I am unable to reject or modify the ALJ's findings of fact as to issues of witness credibility except where such findings are arbitrary, capricious, or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record. Therefore, the ALJ's findings as to the competence and credibility of Mr. Pilewski's testimony are accepted.

Further, there seems to be no evidence to suggest that a competent consultant such as Mr. Pilewski diverged from typical practice and failed to follow the very simple decision tree he set forth in his testimony (simply stated, he looks at available exemptions and, if they are not available or applicable to a given case, makes a full ISRA filing). See, Pilewski testimony at 6/2 Tr. 169:15-170:4 and 208:16-17 ("Well, if I determined that they were entitled to a de minimis quantity exemption, we wouldn't have filed [a Negative Declaration].") The fact that Mr. Pilewski could not remember the process he employed in 1996 is not a compelling reason to believe he diverged from the typical decision tree he described in his testimony, particularly when one considers that nearly 20 years has passed since Mr. Pilewski worked on this case. [11]

Des Champs appears to bifurcate its view of Mr. Pilewski's work – using favorable portions of Mr. Pilewski's work as evidence the Okner Facility had only de minimis quantities of hazardous materials and at the same time casting Mr. Pilewski, at least partially, as incompetent in his handling of this ISRA process. Des Champs' contradictory

[11] Although there is no reason to fully address the ALJ's conclusion in footnote 8, since the denial of the DQE in this case on standing grounds is well supported in the Initial Decision, it is worthy of mention. It is particularly significant to the extent that Mr. Pilewski did not pursue the DQE in 1996, at a time when he apparently did not know that, among other things, an industrial spray booth operation and 120 gallon hazardous material cabinet may have been located on the property. See 6/2 Tr. 169:25-170:8, 178:21-25, 182:15-18, 183:12-23, 186:8-17, 194:17-21, 195:16-196:6, 219:2-12.

positions do not support its claims. The weight of evidence suggests that Mr. Pilewski was working with far less than a full universe of available information regarding the Okner Facility in 1996 and, as a result, his 1996 preliminary assessment report was deficient. See 6/2 Tr. 183:12-23, 186:8-13, 188:24-189:15, 190:7-193:14, 193:24-194:11, 195:10-196:6. In fact, Des Champs' various ISRA related filings provide a moving target of incomplete and unsupported hazardous materials storage and usage information. See Chart on page 3 of R&K Ex. P-12. For the foregoing reasons, I must reject the Initial Decision as to its finding that Des Champs properly complied with ISRA in 1996.

Des Champs' Legal Standing to Pursue a DQE

The fact remains that Des Champs did not choose the DQE route in 1996 when it was still a current owner or operator under ISRA and when information as to its hazardous material storage/usage was readily available to support that course. Instead, Des Champs filed a negative declaration affidavit seeking a No Further Action letter based upon the preliminary assessment report prepared by Mr. Pilewski. Various legal options were available in 1996, including the DQE, and Des Champs chose, for better or worse, the negative declaration course. As thoroughly analyzed by the ALJ, see Initial Decision, pp. 26 – 32, ISRA, at least as applied to this exceptional factual setting,[12] does not provide a legal avenue by which a former owner or operator, 13 years later, can nunc pro tunc return to the start and conduct itself as if it were the current owner or operator undertaking the ISRA process for the first time.[13] Such an approach defies logic, particularly where the

[12] Josh Gradwohl indicated in his testimony that he was unaware of any other persons having received an ISRA DQE approval after a prior DEP NFA letter had been terminated by the DEP and was unaware of any company pursuing a DQE more than 10 years after ceasing operations. See 6/2 Tr. 67:9-68:10.

[13] I do not specifically address nor determine whether this legal conclusion necessarily applies in all cases as

initial ISRA compliance process was flawed, it has been over a decade since Des Champs first triggered ISRA, and little or no documentation remains to support such an application for a DQE. Further, the DEP's November 2008 rescission letter[14], which rescinded the 1997 NFA after discovery of groundwater contamination at the Okner Facility,[15] was abundantly clear about the next steps that needed to be taken by Des Champs, none of which included an option to file for a DQE. See R&K Ex. P-5.

The Appellate Division's decision in Des Champs I noted that a key statutory objective of the DQE is to avoid undue governmental interference with a small subset of facilities that use very minimal amounts of hazardous materials. Des Champs I at 104. As determined by the Appellate Division in Des Champs I, the current statutory structure of ISRA does not require the owner or operator of such facilities to undertake the onerous task of certifying, to the best of its knowledge, that its property is not contaminated. Id. at 105-107.

The Appellate Division's decision in Des Champs I reversed and remanded the issue of Des Champs' eligibility for a DQE on the sole basis that DEP lacked the statutory

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each ISRA case has unique facts which must be individually analyzed by the Department. However, in this specific case, where there has been a lapse of nearly 20 years since the initial ISRA process was concluded and there is little or no documentation as to actual hazardous substance usage/storage, the ALJ's legal conclusion that "ISRA does not provide a legal avenue by which Des Champs, a past owner or operator, can claim an exemption from ISRA years after the fact" is accepted; however, I must modify the Initial Decision to limit the conclusions as to standing to the unique facts of this case. See Initial Decision, pg. 31.

[14] The November 2008 rescission letter noted that the DEP's "investigation into the current owner and operator of the [Okner Facility] [i.e. R&K] determined that the contaminants in [the] groundwater have never been used in [R&K's] operations[,] suggesting that the discharge occurred during or before the ownership of the [Okner Facility] by Des Champs Laboratories, Inc." See Des Champs II at 14-15.

[15] Although the types of contaminants in the groundwater beneath the Okner Facility are believed to be Trichloroethylene or Perchloroethylene (TCE/PCE), pursuant to N.J.S.A. 13:1K-13 the owner or operator of an industrial establishment who fails to properly comply with ISRA is rendered strictly liable, without regard to fault, for all remediation costs and for all direct and indirect damages resulting from the failure to implement a remedial action workplan. See 6/2 Tr. 49:13-17, 64:6-8. Cleanup of the groundwater contamination at the Okner Facility is expected to be resolved through the September 30, 2010 Spill Act directive issued by the DEP to both R&K and Des Champs. See Des Champs I, supra, 427 N.J.Super. at 92.

authority to require a DQE applicant to certify to the best of its knowledge that its properties are not contaminated. Id. at 107. However, the Court's decision in Des Champs I does not automatically mean that Des Champs is now eligible to pursue or obtain a DQE. Under the unusual circumstances here, the Appellate Division's concerns with undue governmental involvement are not nearly as acute (and, in fact, may not be relevant at all) and a specialized approach must be adopted to ensure "informed regulatory decision-making." See Des Champs II at 12.

The fact that the initial 1996 preliminary assessment report and negative declaration affidavit was so deficient and incomplete provides the Department with legal jurisdiction over Des Champs to rescind the 1997 NFA and impose remediation obligations on a former owner or operator, while, at the same time, not permitting Des Champs to pursue a DQE nearly 13 years later since such an option is only legally available to owners or operators complying with ISRA for the first time. This conclusion does not prejudice Des Champs as it had the legal right in 1996 to pursue a DQE and, for whatever reason, opted not to do so. This legal approach, further, is supported by the statutory language of ISRA as quoted by the ALJ, see Initial Decision, pp. 26 – 29, and is mandated by the very unusual facts of this case.[16]

For the foregoing reasons, particularly where there has been a lapse of nearly 20 years since the initial ISRA process was concluded and there is little or no documentation as to actual hazardous substance usage/storage, the ALJ's legal conclusion that "ISRA does

[16] See footnote 14 hereinabove noting that this legal approach is specific to the unique facts of this case and no determination is reached as to whether this approach should be applied in all cases. Each ISRA case presents unique facts and must be analyzed on its merits. I make no determination as to the exact timeframe upon which an owner/operator is no longer eligible to pursue a DQE; however, suffice it to say that 13 years is simply too long a lapse of time to permit an owner/operator to make a nunc pro tunc application for a DQE, particularly in the absence of any documentation to support the application.

not provide a legal avenue by which Des Champs, a past owner or operator, can claim an exemption from ISRA years after the fact" is accepted; however, I must modify the Initial Decision to limit the conclusions as to standing to the unique facts of this case.

Burden of Proof

While I do not reject the ALJ's determination that R&K bore the initial burden of proof in this matter,[17] and notwithstanding Des Champs' legal ineligibility for a DQE on standing grounds as found in the Initial Decision and affirmed herein, it must be considered that requiring a company with no real knowledge of Des Champs' prior operations to have the factual burden to prove something 20 years later when no documentation and few competent witnesses remain is a tall task to say the very least. The ALJ seemed to recognize this fact, noting that R&K's apparent failure to present adequate "'negative proofs' [was] predominantly the fault of the passage of a rare but significant period of time, which should not inure to the sole benefit of the past owner or operator of an industrial establishment." See Initial Decision, p. 35. This case presents very unusual and rare circumstances upon which a commonsense approach must prevail.

Des Champs' Hazardous Material Usage/Storage/Inventory

In Des Champs II, the Appellate Division specifically instructed the Department to take a "deeper exploration" of certain factual concerns raised by R&K related to Des Champs' eligibility for a DQE. See Des Champs II at 15. Although I accept the ALJ's conclusion that "R&K has not been able to establish by a preponderance of the credible evidence that Des Champs maintained over fifty-five (55) gallons of hazardous materials at

[17] R & K made the decision as part of its purchase of the Okner Facility to not conduct any independent environmental due diligence. To the extent that R & K is now challenging issuance of the DQE to Des Champs, it seems appropriate for R & K to have borne the initial burden of proof.

any given time," it must be noted that the ALJ's conclusion is specifically conditioned on the fact that "there are no records presently available to rebut the statements that the Property never had more than ten (10) gallons of paint or fifteen (15) gallons of mineral spirits at any one time." See Initial Decision, pg. 25, Emphasis added. Further, as noted above, the ALJ's findings of fact 3 and 5 state that "[t]here is insufficient evidence to discern the volume of mineral spirits which was used in the Des Champs manufacturing and how much was maintained as inventory at the Property" and "there is insufficient evidence to discern the purposes to which the hazardous materials storage cabinet was put and the volume of the materials stored therein." See Initial Decision, pg. 17 - 18.

Although there is no question that records of hazardous material storage/usage at the Okner Facility are now sparse given the "rare but significant" passage of time, there are significant uncertainties regarding Des Champs' actual hazardous material storage and usage at the Okner Facility. For instance, the estimates of Des Champs' apparently processing 12,000 pounds of sheet metal per month at the Okner Facility are difficult to reconcile with the portrayal of a "light assembly" facility creating heat exchangers or ventilators from "formed" or "prefabricated" parts. See Des Champs Answers to R&K's Fifth Set of Interrogatories at No. 2; R&K Ex. P-1, Attachment 2; R&K Ex. P-8 at p. 2, ¶ E.

Additionally, evidence that an industrial spray booth had been required at the Okner Facility, along with the possibility that two (2) 60 gallon hazardous materials storage cabinets[18] and a flammable rag storage container had been required at the site, also seem at odds with the concept of a "light assembly" facility of heat exchangers or ventilators from

[18] As noted above, the ALJ found that "there is insufficient evidence to discern the purposes to which the hazardous storage cabinet was put and the volume of materials stored therein." See Initial Decision, pg. 18.

"formed" or "prefabricated" parts and using de minimis quantities of hazardous materials. See 6/5 Tr. 7:7-12; 61:21-62:2, R&K Ex. P-12 at 6. Des Champs admitted in ¶ 7 of its Proposed Findings of Fact and Conclusions of Law that the Okner Facility was more than just an assembly facility, but was in fact "used as a manufacturing facility."

Nonetheless, Des Champs alleges, without any documentary support, that it only had approximately three gallons of mineral spirits on hand at any one time in inventory, amounting to essentially three one-gallon cans of mineral spirits.[19] See 8/11 Tr. 206:17-21; Des Champs Proposed Findings of Fact and Conclusions of Law at ¶¶ 14, 91. This low asserted volume of solvent inventory seems surprising for an industrial manufacturing facility that operated an industrial spray booth, had two (2) 60 gallon hazardous/flammable material storage cabinets, and processed 12,000 pounds of sheet metal per month.

Des Champs' vagueness on the crucial issue of its actual hazardous materials usage throughout the ISRA process is concerning. Des Champs has not been able to produce even one business or purchase record that would support or explain the remarkably low asserted volume of solvents in an industrial manufacturing facility. The explanation given by Des Champs related to the Okner Facility getting additional cans of mineral spirits from its facility in a neighboring town (the Farinella Drive facility) is also difficult to understand for a sophisticated facility[20] processing such a large quantity of sheet metal. See 8/11 Tr. 290:23-291:18. Des Champs' assertion that business or purchase records "never existed,"

[19] It is also relevant to note that Des Champs never mentioned mineral spirits, in any quantity, in any ISRA related filing. Specifically, mineral spirits were never mentioned in the 1991 Letter of Non-Applicability, 1996 preliminary assessment report, or the 2009 DQE Affidavit. See 8/11 Tr. 252:16-23, Chart on page 3 of R & K Ex. P-12.

[20] Des Champs was apparently "equivalent to a $20-some million dollar a year company today." See 8/11 Tr. 263:17-19.

simply because Des Champs ordered materials for all of its facilities together, is equally concerning. See Des Champs 12/9/14 Response to R&K Exceptions, pg. 13.

Notwithstanding the determination as to burden of proof in this matter, DEP has the authority to gain reasonable access to industrial establishments to inspect the premises, to demand that records be produced, and to take samples or measurements as it deems necessary to "verify the results of *any submission made to the [DEP]* and to verify the owner's or operator's compliance with the requirements of [ISRA]." N.J.S.A. 13:1K-10 Emphasis added. The "written submission" made for a DQE pursuant to N.J.S.A. 13:1K-9.7 is covered by this statutory authority.[21] Therefore, DEP has the discretionary authority to demand records from Des Champs to verify its compliance with the stringent requirements of the DQE.

Contrary to Des Champs' suggestion, see Des Champs 12/9/14 Response to R&K Exceptions, pg. 13, DEP has the statutory authority to require a DQE applicant to provide inventory records, purchase orders, or similar documentary evidence to support a DQE application. Requiring production of these sorts of basic inventory and purchase records to support a DQE application is far different from requiring an applicant to certify, to the best of its knowledge, a given property is free of contamination, which was the Appellate Division's sole concern in Des Champs I. The statutory authority of the DEP to inspect industrial establishments and demand that records be produced to verify submissions made

[21] Joshua Gradwohl confirmed in his testimony that DEP staff would "go do an inspection if there were questions about the quantities of hazardous materials on [a DQE] application." 6/2 Tr. 40:9-14. Mr. Gradwohl's testimony, along with the statutory language of ISRA at N.J.S.A. 13:1K-10 indicates, contrary to Des Champs' representations, that the DQE application process can involve more than a ministerial submission of unsupported applications/affidavits regarding hazardous material storage/usage. See Des Champs 10/17/14 Post-Hearing Brief at pg. 5, Des Champs Proposed Findings of Fact and Conclusions of Law at ¶ 107, Des Champs December 9, 2014 Response to Exceptions of R&K, pgs. 4, 6, 7, and 13.

to the DEP makes logical sense at the start of the ISRA process. Applying for a DQE 13 years later, when records and documents are gone and memories have faded, defeats DEP's ability to properly verify these submissions.

R&K's Equitable Defenses – Estoppel, Laches, and Waiver

Although I accept the ALJ's findings and conclusions that the equitable defenses of estoppel (pursuant to the Initial Decision) and laches (pursuant to the Oral Decision) are not available to R&K, I reject the ALJ's findings and conclusions as to the application of the doctrine of waiver. I find that waiver is a viable, alternative legal basis upon which to conclude that Des Champs no longer possesses a legal right to pursue a DQE almost 20 years after it first selected its method of compliance with ISRA.

Waiver is the voluntary and intentional relinquishment of a known right. W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958). An effective waiver requires a party to have full knowledge of its legal rights and intent to surrender those rights. Id. at 153. The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference. Merchants Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), aff'd, 37 N.J. 114 (1962).

Everyone is presumed to know the law and, in the absence of a statutory or constitutional requirement, an agency is not required to serve actual notice of a law on a regulated person or entity. Graham v. New Jersey Real Estate Comm'n, 217 N.J. Super. 130, 138 (App. Div. 1987); In re Krah, 130 N.J. Super. 366 (App. Div. 1974). A sophisticated party such as Des Champs is presumed to know and understand the law. In that sense, it is reasonable to impute to Des Champs an awareness of the DQE option in

1996. Contrary to the ALJ's conclusion at page 20 of the Initial Decision, the DQE codified at N.J.S.A. 13:1K-9.7 is more properly viewed as a statutory, legal right available to current owners or operators who meet the stringent criteria for a DQE, as opposed to a "regulatory option[] or alternative[]". The DQE was codified within ISRA pursuant to P.L. 1993, c. 139, § 9, effective June 16, 1993.

In the vast majority of cases, ISRA compliance will occur properly ab initio, and therefore will only occur once. At the moment of an ISRA triggering event, the hard data regarding an industrial establishment's usage of hazardous materials is a known or readily ascertainable quantity. Likewise, at that moment, the legal right to pursue a DQE is also a known right under the ISRA statute. Once a party chooses to not pursue a DQE, for whatever reason, it is reasonable, without any evidence to the contrary, to conclude that the party has voluntarily waived its right to pursue that statutory right.

Similarly, here, Des Champs, in coordination with its consultant, concluded that the DQE was not a viable path forward in 1996. There is far less reason, all these years later, to conclude that the DQE is a viable option now. As such, it is reasonable to conclude that Des Champs had, at the very least, imputed knowledge of the DQE in 1996, and voluntarily waived its statutory right to pursue a DQE when it made a legally crucial decision in 1996 to pursue ISRA compliance through traditional (and considerably more expensive) means. There is no reason to conclude that a party as sophisticated as Des Champs should get a *nunc pro tunc* "do-over" here. I conclude that Des Champs waived its right to pursue the DQE when it failed to do so in 1996 and, therefore, reject the Initial Decision as to the application of Waiver here.

CONCLUSION

For the foregoing reasons, and having reviewed the record before me, taking into consideration the unique facts of this matter and the applicable legal authority, I MODIFY the Initial Decision to limit the ALJ's conclusions on standing to the unique facts of this case, as well as to incorporate the corrections to the record of admitted exhibits as described in footnote 3 of this Final Decision; REJECT the Initial Decision as to: (i) Des Champs' compliance with ISRA in 1996, and (ii) the applicability of the Doctrine of Waiver; and ADOPT the remainder of the Initial Decision, reversing the DEP's August 8, 2012 approval of the application of Des Champs for a DQE.

IT IS SO ORDERED.

DATE: April 6, 2015

Bob Martin, Commissioner
New Jersey Department of Environmental Protection

R&K ASSOCIATES, LLC, PETITIONER, v.
NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, RESPONDENT, AND
DES CHAMPS LABORATORIES, INC., INTERVENOR

OAL DKT. NO. ESR-11666-13
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