State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ESR 11666-13
AGENCY DKT. NO. LSR120001-G000042636

R&K ASSOCIATES, LLC,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SITE REMEDIATION COMPLIANCE AND ENFORCEMENT,
Respondent.

John M. Scagnelli, Esq., and **William Baker**, Esq., for petitioner R&K Associates, LLC (Scarinci Hollenbeck, attorneys)

Kimberly A. Hahn, Deputy Attorney General, for respondent Department of Environmental Protection (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Daniel L. Schmutter, Esq., and **Steven Gladis**, Esq., for intervenor Des Champs Laboratories, Inc. (Greenbaum Rowe Smith & Davis, attorneys)

Record Closed: November 6, 2014 Decided: November 19, 2014

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on August 16, 2013, by the New Jersey Department of Environmental Protection (NJDEP) subsequent to a remand from the Appellate Division on the issue of whether intervenor Des Champs Laboratories, Inc.'s (Des Champs) application for a *De Minimus* Quantity Exemption (DQE) under the Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6 to -35, should have been granted by the NJDEP in 2012[1]. Petitioner R&K Associates, LLC (R&K) is the successor in interest to the property where Des Champs operated from 1982 through 1996: 66 Okner Parkway, Livingston, New Jersey (Property). In its second remand to the NJDEP, the Appellate Division ruled that R&K should have had the opportunity to challenge the issuance of that DQE which the NJDEP had not provided to it. It ordered the agency to determine whether there were contested issues at stake that would require transmittal to the OAL. This filing followed after the NJDEP reviewed the proffer of R&K, also required by the appellate remand, and determined there were some contested issues.

On September 18, 2013, I convened a case management conference telephonically and thereafter entered a Case Management Order dated September 19, 2013. Discovery and procedural issues were reviewed on a regular basis with counsel. By Order entered on December 6, 2013, I determined that R&K must carry the burden of proof on its objections and any equitable defenses in this first instance. Other orders were entered on discovery requests. The evidentiary hearings were held on June 2 and 5, and August 11, 2014.

At the close of petitioner's case, intervenor Des Champs moved for a judgment dismissing all claims and defenses of R&K. With the exception of the underlying issue

[1] There is a long regulatory and appellate history to the Des Champs DQE that started in 1996 and is laid out more completely in two decisions of the Superior Court, Appellate Division: Des Champs Laboratories v. Martin, 427 N.J. Super. 84 (App. Div. 2012), and R & K Associates, LLC v. NJDEP and Des Champs Laboratories, Inc., Dkt. No. A-0413-12T3 (May 16, 2013), 2013 N.J. Super. Unpubl. LEXIS 1172. I shall not reiterate that history herein.

of Des Champs entitlement to the DQE, which application I denied orally on June 5 on the basis that there were genuine issues of material fact, I set an expedited briefing schedule on the remaining points. Oral argument was held on the record on June 12, 2014, on what otherwise would have been a continuation of the hearing. At that time, I dismissed petitioner's equitable argument under the doctrine of laches but reserved on all other aspects of intervenor's motion until the close of the case. I ordered that the plenary hearings would continue so that the record could be fully developed. One additional day of hearings was held on August 11, 2014. Post-hearing briefs and replies were permitted and the record closed on November 6, 2014, with the receipt of the final submissions.[2]

FACTUAL DISCUSSION AND OVERVIEW OF TESTIMONY

Based upon due consideration of the testimonial and documentary evidence presented at or prior to the hearings, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Petitioner presented the testimony of Joshua Gradwohl. Gradwohl is the Supervisor of the Responsible Party Investigation Unit for the NJDEP. He had been a case manager under the prior ECRA statute. In 1994, he became a supervisor in the ISRA Initial Notice Unit and then transferred in 2010 to his current assignment. Gradwohl's responsibilities have included assigning files to case managers, assisting and supervising that staff, making decisions on sites that might require follow-up inspections, and reviewing the staff evaluations for DQEs or other applications. During the period of Des Champs' original Negative Declaration submission to the NJDEP, Gradwohl would have[3] reviewed the Preliminary Assessment submitted, noted that

[2] To the extent that any portion of the last submission by Des Champs constitutes a sur-reply not permitted by the undersigned, it has been disregarded.

[3] The long history of this matter meant that every witness to the earliest relevant events at the hearing was testifying about dates, places, observations and transactions that were by definition eighteen years old. I think it fair to say that 99% of the testimony was not based on present day recollection of past events but rather was based upon each witness' genuine belief that he would have most likely done x, y or z back then, or it was recollection refreshed through historic documents.

there were no environmental areas of concern, and then reviewed the case manager's draft response back to Des Champs.

Gradwohl explained the NJDEP's basis for rescinding Des Champs' 1997 NFA on November 10, 2008. It had been preliminarily determined by the Township of Livingston that its groundwater wells had been adversely impacted by trichloroethylene (TCE) or tetrachloroethylene (PCE), two forms of hazardous industrial solvents or degreasers. Soil samples and other investigations tentatively fixed the source of the contamination as under the middle of the Des Champs Property. That action was communicated to the attorney for Des Champs both orally and in writing. The company was informed that a Remediation Agreement would need to be submitted to which counsel requested some additional time. Rather than submit a Remediation Agreement, Des Champs submitted a DQE Affidavit under date of January 12, 2009.

The Des Champs DQE set forth that the transactional premise of the applications was the cessation of operations on December 1, 1996. It also listed the quantities of hazardous substances as limited to five (5) gallons of gasoline, and the quantities of mixtures containing hazardous substances as fifteen (15) cans of spray paint, three (3) cartridges of copy machine toner, and ten (10) gallons of oil based paints, or a total of 16.2 gallons of hazardous substances. Hydraulic oil and motor oil in the total amount of fifteen (15) gallons was also listed. The NJDEP denied the DQE on April 21, 2009, on the basis of its analysis of ISRA that an "industrial establishment, without regard to fault, should not qualify for a Deminimus [sic] Quantity Exemption when contamination is known to exist at the site." (P-9)

Gradwohl received and reviewed two subsequent letters from Des Champs seeking reconsideration by NJDEP of that DQE denial. He drafted for the Assistant Commissioner's signature a response letter dated January 21, 2011, reiterating the ISRA policy considerations behind the determination and requesting that Des Champs comply with the remediation requirements. Des Champs appealed from this last determination. On July 6, 2012, the Appellate Division reversed NJDEP on the legal

basis of the DQE denial. Des Champs Laboratories v. Martin, 427 N.J. Super. 84 (App. Div. 2012). Accordingly, Gradwohl explained at the hearing, the NJDEP under his signature granted Des Champs the DQE on August 8, 2012, from which an appeal was taken by R&K which ultimately led to the within matter being heard at the OAL. The grant of the DQE was based upon the DQE Affidavit, the 1997 Preliminary Assessment, and the Appellate Division decision.

Gradwohl could not identify any other industrial site that had ever gone through a similar rescission-approval history. He certainly could not bring to mind any other site that had received a DQE ten years after cessation of operations. His next contact with the site came only after R&K was provided the opportunity to make a proffer on remand from the second appellate decision. At that point, Gradwohl took it upon himself to engage in some research on the Property. He searched available public records from the Township of Livingston, including Right-to-Know forms that would have been filed by Des Champs, and fire inspection records. On November 7, 2013, Gradwohl summarized his findings for the file. Those were also the subject of some of his testimony at this hearing.

Gradwohl's interpretation of the records he reviewed indicated to him that Des Champs had had on its site in the 1980s two operations that were of potential concern under ISRA and that had never been referenced by Des Champs in either of its two filings with the NJDEP. One operation was a press brake room that would typically have been used for the bending of sheet metal into predetermined angles and that would typically require the use of some hydraulic fluids. The press brake room was mentioned in Livingston Fire Department inspection cards in or about 1987. Those fire inspection cards also referenced during 1989 the need by Des Champs to install an authorized spray paint booth with an appropriate suppression system and other fire or explosion controls. Further details were provided on the Livingston Fire Department records that Des Champs install a metal waste can for rags impregnated with finishing material and a chemical storage cabinet with a capacity of greater than 25 gallons but not more than 120 gallons of flammable liquids.

In contrast to the implications of these historic inspection cards, Gradwohl noted that Des Champs had only referenced consumer-type spray paint cans and gasoline for lawn mowers or snow blowers. As a result of these preliminary findings, Gradwohl itemized the apparent discrepancies that Des Champs should be required to reconcile or explain in a memorandum dated November 7, 2013. This was done in part because Gradwohl was changing positions at the NJDEP and wanted to document the file for other staff. Des Champs was never formally requested to respond because of the pendency of the within proceedings and prior appeals.

On cross-examination, Gradwohl's calculations and assumptions from the Right-to-Know and Fire Department records were challenged and probed. Several aspects of his quantity estimations were questioned as well as his general assumption that inventory equated to use of the substances identified on the form. For example, a company could have mineral spirits on hand but not use it daily or even often. Few Right-to-Know records were located for Des Champs (another casualty of the long history). Average daily and maximum inventory for benzene or mineral spirits were listed as ranging between 11 and 100 pounds, contained in a steel drum, and located in the assembly area. Gradwohl equated "inventory" with "use" and also assumed that a steel drum would typically hold fifty-five (55) gallons. Yet, the coding on Des Champs' record either mismatched the quantity and container or the drum referred to was smaller than fifty-five (55) gallons insofar as fifty-five (55) gallons of mineral spirits would have weighed in excess of the 11-100 pound range.[4]

Gradwohl acknowledged that the spray booth might have related to the ten (10) gallons of paint disclosed but that it was still an open question because his review was truncated by these proceedings.[5] The DQE application form itself only inquired into the

[4] While not explored on the record, the question was also raised as to whether the Right-to-Know form's codes had themselves changed over the relevant period.

[5] Upon my own questioning of Gradwohl, it became clear that none of the alleged discrepancies with the Des Champs ISRA filings had any bearing on and were not related to the TCE/PCE contamination of the Livingston groundwater.

quantities of relevant substances and did not provide an avenue for disclosing the locations or uses of those substances. Nevertheless, he continued to emphasize that Des Champs had been required to have a flammable storage cabinet, which by definition meant that greater than ten (10) gallons were being stored on the site.

Gradwohl readily conceded that even the grant of a NFA letter does not equate to a declaration that a site is "clean." Because many preliminary assessments do not result in a site investigation, it is a relatively common occurrence that latent contamination is disclosed only after a company has complied with ISRA. For the most part, ISRA filings are usually accepted on face value without the NJDEP requiring an inspection or reviewing Right-to-Know or other records. There are no allegations, claims, or proofs in this proceeding that Des Champs should have done a site investigation subsequent to its preliminary assessment because the latter did not warrant such based upon the criteria of the NJDEP technical requirements. If it had, there is no dispute that Des Champs would have been required to either propose a remediation workplan or enter into a remediation agreement with the NJDEP in order for the sale of the Property to have been authorized under ISRA.

Petitioner subpoenaed Joseph Pilewski to testify in this matter. Pilewski is a Senior Vice-President, officer and shareholder of Enviro-Sciences, an environmental consulting firm located in Lake Hopatcong, New Jersey. He earned a Bachelor of Science degree from Penn State University, with some credits toward a Masters over the years but no further degree. Pilewski has worked for Enviro-Sciences since 1975 in various fields, including industrial wastewater, air monitoring, permitting, and environmental impact studies. He worked with both ISRA and ECRA, the predecessor statutory scheme to ISRA, at both the field and compliance level. He predominantly works now on due diligence for corporate mergers and acquisitions.

Pilewski was the lead staff person on the preliminary assessment of Des Champs for ISRA compliance during the relevant period of 1996 and 1997. This site required only a non-invasive or non-testing level of regulatory compliance. Pilewski

described his typical approach to ISRA assignments. He would walk the site, preferably with the person most knowledgeable about it. He would make observations but also seek documentation about what is then presently on the site as well as what had previously been on the site. These would include a list of raw materials used in any of the company's processes and waste receipts. Pilewski explained that the first ISRA cut is to determine if a company needs to comply based upon its SIC code, and then to determine if any exemptions from ISRA would apply. By utilizing a Negative Declaration as ISRA compliance and a means to obtaining an NFA letter, according to Pilewski, it could be deduced logically that he had found that Des Champs had not qualified for an exemption from ISRA.

Pilewski was shown the historical ISRA documents relevant to Des Champs and asked if he could recall whether he received from the company representative any records relating to hazardous substances or waste. He could not recall getting any such documents and believed that there were no manufacturing operations taking place at the site at the time of his review. He recalled being under the impression that Weichert was a lessee on the site and seemed to be using it for storage, among other uses. When petitioner questioned him on the Livingston Fire Department inspection documents, Pilewski stated that he had never seen those documents prior to his deposition in this matter. He would have definitely inquired further into both a spray booth and fireproof storage cabinet if Des Champs had advised him that those had been used previously in the business. He would have listed both in the preliminary assessment and located them on the map if he had been aware of their historical use. It would have been listed as an area of concern and he would have conducted additional due diligence and records review to determine if either rose to the level of an environmental area of concern.

On cross-examination, Pilewski could not recall the Des Champs representative who escorted him through the facility but insisted that his customary process would have been to not simply rely upon the company guide but to make independent observations and review documents in order to expose any hidden industrial changes.

Typically, those documents would include Right-to-Know filings, site inspections, aerial photographs, etc. Due to the passage of approximately eighteen years, his file is no longer available.

Pilewski agreed that the use of mineral spirits and waste cans for those rags would not necessarily have risen to the level of an area of concern. Yet, the use of a paint spray booth in the manufacturing process would have raised questions that any environmental consultant would have had to explore including, but not limited to, its use, age, discharge location, and signs of over-spray. Pilewski could not recall if the applicability of a DQE ever came up during his preliminary assessment of the Property. On re-direct examination, he reiterated that the ability to rely upon an ISRA exemption would undermine the necessity of filing a Negative Declaration, and would have been the first level of decision to be made when fulfilling the law's requirements. As he stated during his deposition, one can assume, therefore, that the company filed a Negative Declaration because it could not qualify for an exemption from ISRA.

Petitioner also presented the testimony of Craig Dufford. Dufford retired as the Chief of the Livingston Fire Department in 2003. He had served as Chief since 1990, and had been a Fire Inspector for four years prior to that, and resumed that position again after his retirement as Chief. His testimony related to his inspection position during 1989. Referring to inspection cards and correspondence for the Property dating back to the relevant period, the Fire Department had advised Des Champs in March 1989 that "the newly installed spray booth is not approved nor is the area approved for this operation." [P-16.] In response to my own questioning, Dufford clarified that the term "newly" would just refer to an event occurring since the last previous inspection, or as long as eleven months and twenty-eight days earlier. These are the earliest references to a paint spray booth having been in operation at the Property, a potential aspect of its manufacturing processes which was not noted on any ISRA submission or environmental report of Des Champs.

Dufford explained that there are several safety concerns with an industrial spray booth, including, but not limited to, explosion and air quality. In order for the spray booth to achieve a permit, Des Champs was advised that it would need a properly contained booth with ventilation, sprinklers and filters. The Livingston Fire Department notes also indicated that Des Champs was required to utilize a metal waste can for rags "impregnated with finishing material" [P-14], and to close the side opening of the spray booth.

Charles W. Schilling was the Livingston Fire Department Chief prior to Dufford, having served in that position since 1954. He worked within the Fire Department in every capacity leading up to Chief between 1942 and 1954. Since his retirement, he has continued to serve in a part-time capacity as either the fire subcode official for the Building Department or a fire official for the Fire Department. Schilling confirmed that the inspection cards were records maintained during the relevant period in the ordinary course of the business of the Livingston Fire Department, as were notices of potential fire code violations.

Schilling testified from the historical documents presented that Des Champs had also been advised that it required a storage cabinet for the storage of an excess amount of flammable liquids, which cabinet would be permitted to hold up to sixty (60) gallons of Class A materials and a total of one hundred twenty (120) gallons of all materials. Class A could include flammable liquids such as gasoline, while a substance such as motor oil with a lower flash point could constitute the type of additional material stored but not labeled as Class A. The records also included a Fire Prevention Application Permit for the Property from January 1987 that contained a reference for permission to store up to fifteen (15) gallons of mineral spirits, and another annual permit from January 1988. On cross-examination, Schilling agreed that up to but no more than fifteen gallons of a flammable liquid such as mineral spirits would be allowed to be stored on the floor of a facility but that more than that amount would require a storage cabinet of the type referenced in the inspection cards.

Petitioner called as its last witness one of the principals of R&K, Arthur Rejaei, who serves as its Operational Manager. Rejaei described his involvement with the purchase of the Property from Des Champs as including looking at the Property with a real estate agent, negotiating the price, reviewing the terms, and attending the closing. The Agreement of Sale was entered into between Nicholas and Rebecca Des Champs and Paper Access Corporation, which was Rejaei's first company, with a provision that it could be closed by a "Limited Liability Company to be formed." [P-21] R&K was actually formed in order to buy the Property after the initial Agreement of Sale was executed.

During his direct examination, Rejaei reviewed the provisions in the Agreement regarding ISRA compliance. He recognized the 1997 NFA provided by the NJDEP to Des Champs and described it as "the letter from the state of New Jersey that the property is clean." [T3 23:22-23] He believed R&K received it during the summer prior to the September 1997 closing. Rejaei also identified an inspection report of Home Tech Engineering, Inc., that was obtained by R&K between the Agreement of Sale and the closing. Within that inspection report, there is reference to "Environmental Concerns" and a recommendation of the inspection firm that the purchaser obtain a Phase 1 environmental survey on the Property. He explained that his partnership decided not to follow that advice because of the letter "from the DEP saying the place is inspected and it's clean." [T3 27:6-7]

Rejaei was cross-examined by Des Champs[6] about several topics including the family members who made up R&K and the witnesses preparation for this hearing. Rejaei admitted that he probably read the contract prior to his sister executing it on behalf of the purchaser. He acknowledged that the sellers were Nicholas and Rebecca Des Champs although he did not really make a distinction between them as individuals

[6] It was acknowledged by the undersigned that Rejaei was also subpoenaed by Des Champs as a representative of R&K. Accordingly, latitude during cross-examination to incorporate questions of a more affirmative nature was allowed.

and Des Champs Laboratory for whom they would be the personal representatives. Rejaei was not really clear what type of business Des Champs had operated. At the time of their visit to the Property, it was empty and clean and its prior use was not relevant to their intended use in his mind.

While Rejaei did not have a specific recollection of speaking with Nicholas Des Champs in person, he was fairly certain that they communicated by phone and fax during the negotiations. He also was sure that his sister and brother had spoken with him based upon their family meetings discussing the purchase. Rejaei reiterated that the NFA and the Negative Declaration, which latter document he was uncertain as to whether R&K had received, meant that a government entity had declared the property "clean" and that was enough to proceed to a closing on the real property. He had no recollection of discussing the NFA and its implications with either their attorney or their environmental consultant. Paragraph 11 of the Agreement referring to the "as is, where as" terms and the lack of representations or warranties by Des Champs did not concern Rejaei at the time. Again, he was told by their attorney and by the government that the property was "ok."

When Rejaei was specifically asked on cross-examination why R&K did not follow through with Home Tech's recommendation to conduct a Phase I, he responded that the NJDEP letter trumped any private inspection. He was unclear then and now as to what Des Champs had to undertake in order to obtain the NFA. R&K wanted to move its warehouse from New York to New Jersey. That was his focus. He had a business to run.

At the close of petitioner's presentation of its witnesses, Des Champs renewed its application to dismiss the remaining equitable defenses; however, I took the matter under advisement in order to create a complete record on all issues and to give myself the benefit of post-hearing briefs. Accordingly, Des Champs was instructed to proceed with its testimonial witnesses.

Intervenor presented the testimony of Michael Morrison, a former employee of Des Champs. Morrison worked for Des Champs over two distinct periods: from 1980-1988, and then from 1990 through February 2014. In between, he lived in New Hampshire and worked for two different companies. He is now unemployed but when he left, he was the Manager of Safety and Training for Des Champs' successor company, Munters Corporation, which had purchased Des Champs approximately five years ago. Most of his second period of employment with the company was at its Buena Vista, Virginia location. During the first period of employment, he was the Manufacturing Manager for Des Champs at its Farinella Drive location in New Jersey.

Morrison described the Des Champs New Jersey operations during the 1980's as consisting of four locations and several product lines. The Supervisor of the Property at 88 Okner reported to him and he stated that he was familiar with the operations there, having inspected it and attended weekly manager meetings. Morrison stated that there were never any fifty-five (55) gallon drums at Okner. Mineral spirits were used to wipe down the exterior of small parts and remove china markers but a simple rag was doused with the product from a small rectangular shop can. Additional supplies of mineral spirits were maintained at Farinella Drive and did not need to be stored at Okner.

When Morrison was re-hired from his two-year relocation to New Hampshire, the first assignment he was given by Des Champs was to personally disassemble the spray paint booth at the Property so that it could be shipped to Virginia. Morrison described the booth as eight feet deep by eight feet wide by ten feet high. The side walls had openings that accommodated the conveyor belt moving product through the booth. An operator would have stood with his back to the framed opening. He found it to be in nearly new condition with no paint residue or overspray apparent on it. Morrison understood that it had been used to color some of the Easy-Vent 2 models that were about two times the size of a microwave oven. Once the paint booth was moved to Virginia, it was used more extensively and within three months was coated and caked with paint overspray, as was the floor.

On cross-examination, I allowed the questioning of Morrison to go into some detail concerning the actual manufacturing process of shaping sheet metal into the various air-to-air heat exchangers produced by Des Champs using shears and break machines. The machines were hydraulic and relied on some hydraulic oil contained within the machinery but Morrison recalled that it was a very minor amount of oil and rarely needed to be replaced as the hydraulic pistons were wholly enclosed.

Morrison reiterated that there was no painting that took place at the Property between 1980 and 1988. During that period, the new product coming off the manufacturing line was the EZ Vent II and they were left unpainted. He also described how the other larger commercial exchangers were assembled at Farinella and also left unpainted. If any large unit was custom ordered with interior corrosion protection, that special paint was applied at Farinella. He believed that some small units were left behind at the Property when he was packing up the facility for Virginia in 1990 in order to be able to fulfill orders in the Northeast. He loaded a container with sheet metal parts during this process but did not pack any liquid materials. After the move to Virginia, Morrison never returned to the Property. He was certain that neither Farinella nor Okner facilities ever utilized fifty-five gallon drums in the operations. He saw drums in the Virginia facility but only when the operations expanded in approximately 1995.

Morrison recalled that the sheet metal used at the Property was usually very clean and ready to be used without the need to degrease it. He also could recall no instance when the press break machine itself needed to be cleaned during his tenure in the 1980s. Of course, he was not working for Des Champs from 1988 to 1990 so he could not comment on the Fire Department inspection notes. Morrison was also not familiar with the use of any oil-based paints. While some spot welding took place at the Property, inventory supplies of the inert gas and other liquid materials was maintained at Farinella. Morrison was not responsible for Right-to-Know surveys or records retention policies for Des Champs.

Nicholas Des Champs (N. Des Champs) also testified on behalf of the Intervenor. He was the President and CEO of Des Champs Laboratories, Inc., which he started in 1974. N. Des Champs earned a Bachelor of Science degree in Mechanical Engineering from Virginia Polytechnic Institute in 1962 and thereafter earned a Ph.D. in that field with a specialty of Thermodynamics and Heat Transfer. In 1981, the company entered into a ten-year lease at Farinella followed by the purchase of the Okner Property in 1983. As previously established in this record, the Property was purchased by Nicholas and his wife personally. N. Des Champs generally explained the theory of air-to-air heat exchangers and the ability to make them smaller or larger for different applications.

N. Des Champs admitted that it is his signature on the Right-to-Know survey but could not independently recall completing it. He stated that the operations used small one-gallon cans of mineral spirits to clean hands or remove smudges prior to packing the small residential units into shipping crates. He denied that there were ever fifty-five (55) gallon drums of any liquid substance stored at the Property. N. Des Champs for some period of time personally cut the grass and they maintained some gasoline on the site for the lawn mower and the snow blower. He acknowledged that some liquids might have been inadvertently left off the Right-to-Know survey but he was sure that none of those items would have been flammable or of concern to the Fire Department.

With respect to the spray paint booth, N. Des Champs testified that retail spray cans were used just in order to paint the edge of rough-cut fiberglass insulation. Later, the company experimented with oil-based paints to potentially market the EZ Vent II for residential applications where they would be visible after installation. The oil-based paint was soon switched to a water-based paint with enamel filler in order to avoid the expense of additional requirements that would have otherwise been imposed by the Fire Department. N. Des Champs estimated that the oil-based paints were used for approximately three months only of the eight months the booth was installed at the Property prior to its relocation to Virginia.

By May 1990, Des Champs had established a fully operational facility in Virginia. There were a handful of sales and engineering employees at Farinella who preferred to stay in New Jersey so offices were built out for them at the Property. Between 1992 and 1996, the Property was leased to Weichert with Des Champs having only one salesperson and one part-time secretary at that location. The company prepared the necessary ISRA notices to the NJDEP upon its anticipated cessation of operations. As of 1996 when he was completing the ISRA documents, there was no assembly work continuing at the Property so the hydraulic oil and mineral spirits were omitted just because they were outside his then-focus.[7]

N. Des Champs believes that it was his attorney who hired Enviro-Science as he did not recall any direct contact with that consultant. He testified at the hearing that no one advised him in 1996 of the availability of a DQE for the Property. He was so advised only after the 2008 revocation when he hired Farer Fersko as environmental counsel. N. Des Champs personally completed the information required for the DQE. He mostly relied upon the previous lists of materials discussed above. Mineral spirits, therefore, was left off inadvertently because it had not been listed years earlier. N. Des Champs admitted that he did not think to include the hydraulic oil self-contained within the machinery but estimated that would have added at most thirty (30) gallons.

On cross-examination, N. Des Champs continued in his estimate that there were not a large number of units painted at the Property during the limited use of the spray paint booth. He revised the number from twenty to perhaps thirty units. The only multi-colored EZ Vent II would have been the one he personally painted for the brochure. All sold units were mono-colored. With respect to the Fire Department records, N. Des Champs did not recall ever having seen the Application Permits, which did not have his signature on them and which over-stated the volume of materials the company actually used. Because Farinella had larger supplies that were easily transported over to Okner, the latter Property never had to have back-up inventory. Between the passage of time

[7] Query whether Des Champs should have complied with ISRA in the 1990-1992 timeframe when it appears to have ceased industrial operations, an issue no party has raised herein.

and the number of corporate changes and moves, N. Des Champs stated that there were no longer any purchasing records for the relevant hazardous materials.

Based upon the above-recited summary of the testimony produced at the hearing, I **FIND** the following additional facts, with further discussion to be laid out below in the Legal Analysis section:

1. Records and memories have been forever lost by the long passage of time between the 1997 NFA and the 2009 DQE.

2. The spray paint booth was located at the Property for only several months from approximately 1989 through early 1990 when it was disassembled and moved to Virginia. While its use appears to have been light, there is some evidence that there was some small amount of painting taking place prior to the Fire Department's requirement to install a properly permitted spray paint booth.

3. There 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. The preponderance of the credible evidence is that the Farinella facility maintained sufficient inventory for both locations and delivered to Okner as needed and that the Property did not have fifty-five (55) gallon drums of any hazardous materials on site.

4. The preponderance of the credible evidence establishes that the Property maintained at most at any one time a supply of --

a. Fifteen (15) gallons of mineral spirits;
b. Ten (10) gallons of oil-based paint;
c. Five (5) gallons of gasoline;
d. Some quantity of inert gas for welding;

e. Fifteen (15) gallons of motor oil;

f. Thirty to forty-five (30-45) gallons of hydraulic oil self-contained in machinery; and

g. Three (3) toner cartridges.

5. Other than such, 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.

LEGAL ANALYSIS AND CONCLUSIONS

As I have previously concluded, the relatively simple regulatory requirements imposed on Des Champs under ISRA, N.J.S.A. 13:1K-9.7, N.J.A.C. 7:26B-5.9, informs me that Des Champs must be found to have already met its *prima facie* case on its application for a DQE even as the DQE application stands in abeyance pending this remand proceeding. Thus, while R&K is in the defensive mode, R&K is now being provided a full hearing to factually develop its opposition to the issuance of the DQE, including any equitable defenses of waiver, laches and estoppels. This is what makes the case "markedly different from a garden variety situation" because it is extremely rare for a former operator to apply for an ISRA exemption nunc pro tunc with the current property owner waiting in the wings for the chips to fall.

Accordingly, the several equitable defenses must first be discussed as a bar to Des Champs obtaining its DQE.

> Our courts have taken an expansive and flexible approach in the application of equitable defenses. See, e.g., Journeymen Barbers, Hairdressers & Cosmetologists' Int'l Union v. Pollino, 22 N.J. 389, 401 (1956); see also Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387-388, 64 S.Ct. 622, 625, 88 L.Ed. 814, 819 (1944). For example, in Untermann v. Untermann, 43 N.J. Super. 106, 109 (App. Div. 1956), certif. den. 23 N.J. 363 (1957), while the court stated that the doctrine of unclean hands may bar a cause of action for separate maintenance, it also observed that this

> defense was an aspect or application of the broader equitable principle that "he who seeks equity must do equity;" hence, the defendant in such an action could under certain circumstances be estopped to raise the defense. The Untermann court further noted that the "doctrines of unclean hands and estoppel . . . are somewhat akin. . . . They are flexible in their application, turning largely on the circumstances involved in the . . . 'total situation.' . . . They may turn, too, upon the relative innocence or culpability of the plaintiff and defendant, for the law may aid the one who is comparatively the more innocent." 43 N.J. Super. at 109 (citations omitted). We recently recognized this principle in Kazin v. Kazin, 81 N.J. 85, 94 (1979). Cf. Union Beach Bd. of Educ. v. New Jersey Educ. Ass'n, 96 N.J. Super. 371, 386-389 (Ch. Div. 1967) (doctrine of unclean hands was not available to defendants whose conduct was in violation of the Constitution and where the imposition of the doctrine would be contrary to public policy), aff'd 53 N.J. 29, 43 (1968) (Weintraub, C.J.) ("[T]he doctrine will not be invoked when to do so will injure the public.").
>
> [O'Keeffe v. Snyder, 83 N.J. 478, 516-17 (1980) (J. Handler, dissenting)]

Petitioner asserted the equitable doctrines of laches, waiver and estoppels. I rejected the laches argument on the record after oral argument on June 12, 2014. I now turn to the other defenses on which I permitted petitioner to develop the record.

Our courts have articulated the standard for assertion of the defense of "waiver" thusly --

> We have made clear, time and time again, that "[w]aiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177, 836 A.2d 794 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152, 141 A.2d 782 (1958)). See also Shotmeyer v. N.J. Realty Title Ins. Co., 195 N.J. 72, 89 [948 A.2d 600] (2008). It is beyond question that "[a]n effective waiver requires a party to have full knowledge of his legal rights and inten[d] to surrender those rights." Knorr, supra, 178 N.J. at 177 (citing W. Jersey Title & Guar. Co., supra, 27 N.J. at 153). A waiver cannot be divined but, instead, must be the product of objective proofs: "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." Ibid. (citing Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div.1961), aff'd, 37 N.J. 114 (1962)). That benchmark standard leaves little room for doubt, as "[t]he party waiving a known right must do so clearly, unequivocally, and decisively." Ibid. (citing Country Chevrolet, Inc. v. Twp. of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App.Div.1983)). See also Shotmeyer, supra, 195 N.J. at 89 (quoting Knorr, supra). Specifically, "waiver 'presupposes a full knowledge of the right and an intentional surrender; waiver cannot be predicated on consent given under a mistake of fact.'" County of Morris v. Fauver, 153 N.J. 80, 104-05 (1998) (quoting W. Jersey Title & Guar. Co., supra, 27 N.J. at 153).
>
> [Sroczynski v. Milek, 197 N.J. 36, 63-64, 961 A.2d 704 (2008) (Rivera-Soto , J., concurring in part and dissenting in part).]
>
> [Marino v. Marino, 200 N.J. 315, 339-40 (2009)]

Petitioner argues that Des Champs waived its right to file a DQE by not opting to do so at the time of the original ISRA compliance filing. First, I have difficulty characterizing the Negative Declaration or the DQE as "rights" when they are more appropriately viewed as regulatory options or alternatives. Second, R&K has not shown in law or fact that there is a regulatory election of remedies such that choosing one pathway to satisfying ISRA necessarily means that a party has waived any other pathway. Thus, I **CONCLUDE** that Des Champs did not waive some legal right to seek the DQE.[8]

[8] Separate and apart from the equitable argument on waiver of the DQE option, I would **CONCLUDE** that the testimony of Des Champs' environmental consultant is persuasive on the factual point that the company more likely than not was not eligible for a DQE exemption initially, and thus an NFA was sought. There is no reason to doubt the testimony of Pilewski that the normal decision-tree is to first explore ISRA exemptions. To the extent that Pilewski was not aware of potential areas of concerns such as the spray paint booth or hazardous storage cabinet, I must **CONCLUDE** that same was the result of selective information produced by Des Champs, the party who was the only one that could have provided information not obvious to any third-party observer. Because of the legal conclusion reached below, I need not rely upon these conclusions to reach my Initial Decision, but they are set forth herein as alternative bases for my ruling.

I **CONCLUDE** that R&K has also failed to establish the basis for asserting that Des Champs is equitably estopped from relying upon the DQE to the "disadvantage" of R&K. It makes no sense in the long and sorted history of these proceedings to argue that Des Champs in 1997 placed R&K in an inequitable predicament.

> Equitable estoppel is "the effect of the voluntary conduct of a party whereby the party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, as against another person, who has in good faith relied upon such conduct and has been led thereby to change his position for the worse." State v. Dopp, 268 N.J.Super. at 175-76, 632 A.2d 1270; see also W.V. Pangborne & Co. v. New Jersey Dep't of Transp., 116 N.J. 543, 553, 562 A.2d 222 (1989).
>
> [In re Cafra Permit No. 87-0959-5, 290 N.J. Super. 498, 510-11 (App. Div. 1996) (rev'd on other grounds)]

The party asserting the defense of equitable estoppel must prove misrepresentation or concealment of known material facts made by the other party, with the estopped party then relying upon and/or acting upon the limited information in such a manner as to change his position for the worse with the concealing party's intention of such happening. Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979). On the basis of those standards and the facts set forth above, I would agree with Des Champs' argument that R&K is not entitled to equitably estop the former from asserting ISRA compliance. Importantly, "[s]ubstantial detrimental reliance is not enough, only justified and reasonable reliance warrant the application of equitable estoppel." Gen. Acc. Ins. Co. v. N.Y. Mar. & Gen. Ins. Co., 320 N.J. Super. 546, 557 (App. Div. 1999) (internal quotation marks and citation omitted)).

In this case, it must be acknowledged that both private parties are equally sophisticated commercial enterprises that had the benefit of legal counsel and environmental consultants during this real estate transaction. First, if Des Champs had produced a DQE instead of an NFA prior to the closing, it would still have satisfied the contractual and legal requirements precedent to the sale. If R&K had known that the

NFA brought to the table would years later have been voided, then R&K could be presumed to own a crystal ball but that does not mean it was in an inferior position to Des Champs at the time. Nor did Des Champs or NJDEP own crystal balls. Moreover, Des Champs did not repudiate its NFA; history did. Why did Des Champs lose its NFA? Because by definition the NJDEP could not stand by the NFA once it knew of contamination originating from under the building. But no one – Des Champs, R&K, or the NJDEP knew or could have known of that contamination in 1997. Des Champs did not illegally obtain its NFA in 1997. Frankly, everyone relied upon the facts as they were back then. This matter certainly presents a case of would've, should've, could've.

Furthermore, there are other factors that should preclude R&K from relying upon an equitable estoppel defense; namely, that R&K made deliberate decisions prior to the closing to not avail itself of the opportunity to conduct environmental due diligence and to ignore its own environmental consultant's advice. R&K was wrong and perhaps foolish to assume that the NFA meant that "government" considered the Property to be "clean." Accordingly, I **CONCLUDE** that R&K is not entitled to assert this equitable defense as a means of undermining Des Champs' 2009 DQE filing.

This is not a situation where a party who initially failed to comply with ISRA shows up eighteen (18) years after the fact seeking a retroactive DQE. Rather, when it ceased operations in 1996, Des Champs Laboratories complied with ISRA by submitting a Preliminary Assessment Report and Negative Declaration and obtaining an NFA. That is the state of facts under which all parties—Des Champs Laboratories, R&K, and NJDEP—lived for twelve (12) years. Rather, NJDEP's rescission of the NFA in 2008 created changed circumstances that might – or might not – justify allowing Des Champs Laboratories to now seek a DQE. Yet even then, there are plenty of arguments pro and con. The "slippery slope" argument raised by R&K and deflected by Des Champs on grounds that it would be rarely utilized, cuts both ways. If rarely needed, it would also not cause great harm on a statewide basis if the opportunity was denied here. Beyond the "waiver" argument, a more fundamental legal question raised by R&K is whether Des Champs retained the option – that is, whether ISRA permits – of filing a nunc pro

tunc DQE having relied initially upon the Negative Declaration. Petitioner also raises the factual issue of whether Des Champs can assert exemption from ISRA through utilization of the DQE.

Turning to the substantive question as to whether Des Champs could qualify for a DQE, the regulation is the first source to turn to --

> (a) An owner or operator to whom the Department grants a *de minimis* quantity exemption is exempt from the substantive requirements of this chapter based on *de minimis* quantities of hazardous substances or hazardous waste generated, manufactured, refined, transported, treated, stored, handled or disposed of at an industrial establishment. Such an owner or operator is not exempt from any requirement in any other law or regulation to remediate a discharge.
>
> (b) An owner or operator can obtain a *de minimis* quantity exemption if the following criteria are satisfied:
>
> 1. The total quantity of hazardous substances or hazardous wastes generated, manufactured, refined, transported, treated, stored, handled or disposed of at the subject industrial establishment at any one time during the owner's or operator's period of ownership or operation, does not exceed 500 pounds or 55 gallons;
>
> 2. If the hazardous substances or hazardous wastes are mixed with nonhazardous substances, then the total quantity of hazardous substances or hazardous wastes in the mixture at any one time during the owner's or operator's period of ownership or operation, does not exceed 500 pounds or 55 gallons;
>
> 3. The total quantity of hydraulic or lubricating oil, in the aggregate, does not exceed 220 gallons at any one time during the owner's or operator's period of ownership or operation; and
>
> 4. The industrial establishment is not contaminated above

any standard set forth in the Remediation Standards, N.J.A.C. 7:26D.[9]

(c) The total quantity of hazardous substances or hazardous wastes at an industrial establishment may be a combination of both (b)1 and 2 above; however, in the aggregate, the total quantity shall not exceed 500 pounds or 55 gallons.

(d) The total quantity of hazardous substances at an industrial establishment having the NAICS number of 424210 or 446191 as qualified by the limitations noted in Appendix C shall not include any mixture containing hazardous substances if the mixture is in final product form for wholesale or retail distribution.

(e) The owner or operator of the subject industrial establishment that satisfies the criteria established in (b) above may apply for a *de minimis* quantity exemption by submitting:

1. A completed *de minimis* quantity exemption application form available from the Department on its website at www.nj.gov/dep/srp/srra/forms, certified in accordance with N.J.A.C. 7:26B-1.6, to the Department at the address provided on the form, that includes information that identifies the owner or operator and the industrial establishment, describes the quantities and nature of the hazardous substances or hazardous waste generated, manufactured, refined, transported, treated, stored, handled or disposed of at the industrial establishment, and includes a certification that, to the best of the owner or operator's knowledge, the industrial establishment is not contaminated above any standard set forth in the Remediation Standards, N.J.A.C. 7:26D; and

2. A fee of $ 300.00.

(f) The owner or operator:

1. May close operations or transfer ownership or operation of an industrial establishment upon receipt of the Department's written approval of the *de minimis* quantity exemption application; or

[9] This sub-paragraph was invalidated by the Appellate Division in this case as *ultra virus* of the ISRA enabling legislation.

> 2. Shall remediate the industrial establishment in accordance with this chapter and the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, or withdraw the general information notice pursuant to N.J.A.C. 7:26B-3.2(c), if the Department disapproves the application.
>
> [N.J.A.C. 7:26B-5.9]

While Des Champs argues that "[w]ith the DQE provision, the Legislature carved out a certain subset of industrial establishments—those where only *de minimis* quantities of hazardous substances were stored or handled—that fall outside of ISRA's scope, and, therefore, may be closed or transferred without complying with ISRA[,]" the policy of ISRA that successor owners or taxpayers should not be saddled with the remediation costs of prior industrial owners is certainly an equally strong public policy.[10]

Factually, I must **CONCLUDE** 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 any given time. While there was credible evidence that Des Champs failed to identify the spray paint booth or storage cabinet on its ISRA filing as historically present in its operations even if their use was limited, which failings might present different problems, 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. Even if there should be a margin of error recognized, it would be a considerable leap of faith and facts to conclude that it reached the fifty-five (55) gallon mark. As set forth above, I have already found that there is insufficient evidence from which one could conclude that the Property had a drum of mineral spirits on site. There certainly is no proof from which one could reasonably conclude that Des Champs maintained over two hundred and twenty (220) gallons of hydraulic or lubricating oils.

Nevertheless, I must **CONCLUDE** that Des Champs cannot rely upon the DQE provision of ISRA in order to come into compliance nunc pro tunc. I do so on the basis

[10] I note that permitting Des Champs Laboratories to seek a DQE does not mean that the Property does not get cleaned up. It only means that such remediation will have to be under the Spill Act, rather than

that I must respectfully disagree with the NJDEP and Des Champs that ISRA's use of the term "owners and operators" in only the present tense can nevertheless permit past owners or operators to file a DQE. The entire ISRA legislative scheme is geared to one broadly defined triggering event: the sale, transfer, or cessation of operations of an industrial establishment; and one very narrow defining regulatory moment: prior to that sale, transfer or cessation. Every provision of the law utilizes the grammatical tense that makes sense because its provisions require compliance before an industrial establishment is legally permitted to engage in the triggering event, that is to say, while the owner or operator is still the then-current owner or operator. I quote several of these provisions at length:

> (a) An owner or operator is authorized to transfer ownership or operations of an industrial establishment, or in the case of a cessation of operations authorize the cessation as it relates to ISRA compliance, without, or prior to the issuance of, a final remediation document in the following circumstances:
>
> 1. The owner's or operator's submission of a remediation certification pursuant to N.J.A.C. 7:26B-3.3(c);
>
> 2. The Department's approval of a regulated underground storage tank waiver application pursuant to N.J.A.C. 7:26B-5.3(e);
>
> 3. The Department's approval of a remediation in progress waiver application pursuant to N.J.A.C. 7:26B-5.4(d); and
>
> 4. The Department's approval of a *de minimis* quantity exemption pursuant to N.J.A.C. 7:26B-5.9.
>
> (b) The issuance of an authorization letter pursuant to (a) above may not relieve the owner or operator or any person responsible for conducting the remediation of the industrial establishment, of the obligations to remediate the industrial establishment pursuant to ISRA, this chapter and any other applicable law.

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under ISRA. The same would be true if Des Champs Laboratories had sought and obtained a DQE in 1996.

[N.J.A.C. 7:26B-1.8 (emphasis added)]

And:

"Change in ownership" means:

* * * * *

2. The sale or transfer of any of the real property on which the industrial establishment operates, including any of the block(s) and lot(s) upon which the operations of the industrial establishment are conducted and any contiguous block(s) and lot(s) controlled by the same owner or operator that are vacant land;

* * * * *

"No further action letter" means a written determination by the Department that, based upon an evaluation of the historical use of the industrial establishment, or of an area of concern or areas of concern, as applicable, and any other investigation or action the Department deems necessary, there are no discharged hazardous substances or hazardous wastes present at the industrial establishment or area(s) of concern, or any other property to which discharged hazardous substances or hazardous wastes originating at the industrial establishment have migrated, or that any discharged hazardous substances or hazardous wastes present at the industrial establishment or that have migrated from the industrial establishment have been remediated in accordance with applicable remediation regulations. The Department may issue a "no further action letter" if hazardous substances or hazardous wastes remain on the industrial establishment or any other property with appropriate engineering and institutional controls.

* * * * *

"Owner" means any person who owns the real property of an industrial establishment or who owns the industrial establishment.

[N.J.A.C. 7:26B-1.4 (emphasis added)]

And:

(a) An owner or operator planning to close operations or transfer ownership or operations of an industrial establishment shall submit a completed General Information Notice, in accordance with (b) below, within five calendar days after the occurrence of any of the events listed below:

* * * * *

(b) An owner or operator who is required to complete and submit a General Information Notice pursuant to (a) above shall use the form found on the Department's website at www.nj.gov/dep/srp/srra/forms, which is certified in accordance with N.J.A.C. 7:26B-1.6, to the Department at the address provided on the form,

* * * * *

(c) An owner or operator may withdraw the notice required pursuant to (a) above if the owner or operator determines that none of the transactional events listed in (a) above will occur; provided, however, that any such owner or operator may have statutory liability for conducting the remediation pursuant to other statutes, including, without limitation, the Site Remediation Reform Act, N.J.S.A. 58:10C-1 *et seq.* The withdrawal of the notice does not alter or affect any statutory liability of the owner or operator for conducting the remediation.

(d) An owner or operator submitting a general information notice shall notify the Department, in writing, of any changes, amendments or other necessary modifications to the information contained in the general information notice, within 30 calendar days of the person's discovery that the information provided to the Department in the person's original General Information Notice is incorrect, inaccurate or incomplete.

(e) An owner or operator that is closing operations shall amend the General Information Notice submitted in accordance with (b) above for any subsequent event listed in (a) above that occurs prior to the issuance of a final remediation document, or a licensed site remediation

> professional's certification of a remedial action workplan for the industrial establishment.
>
> [N.J.A.C. 7:26B-3.2 (emphasis added)]

And:

> In the event that any sale or transfer agreements or options have been executed prior to the approval of a negative declaration, remedial action workplan, no further action letter, or remediation agreement, or prior to the submission of a remediation certification or the filing of a response action outcome with the department, these documents, as relevant, shall be transmitted by the owner or operator, by certified mail, overnight delivery, or personal service, prior to the transfer of ownership or operations, to all parties to any transaction concerning the transfer of ownership or operations, including purchasers, bankruptcy trustees, mortgagees, sureties, and financiers.
>
> [N.J.S.A. 13:1K-9 (emphasis added)]

Petitioner argues that the terms "owners" and "operators" in ISRA negate Des Champs' "standing" to pursue a DQE after it is no longer acting in either of those capacities. NJDEP's only position in this action, in which it otherwise monitored the proceedings only, is to argue that there was legal standing by Des Champs to have utilized the DQE mechanism nunc pro tunc in 2009. Des Champs and the NJDEP argue that ISRA would make no sense if the obligations of "owners or operators" were restricted literally to the present tense. Yet, neither could point to any instance when the NJDEP allowed a former owner or operator who had either never complied with ISRA or whose ISRA compliance was later undermined by a departmental rescission to file a wholly different ISRA application, one that exempts the former owner or operator from the confines of ISRA compliance.

I start by noting that "standing" as a principle of jurisprudence does not truly apply in the within circumstances.[11] The question is more appropriately phrased as

[11] The constitutional prerequisites for standing require that "(1) the plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or

whether Des Champs comes within the definitional ambit of the law that provide the option to an "owner or operator" to file a DQE as a means of complying with or taking exception from ISRA. I **CONCLUDE** that the regulations speak only of a then-current "owner or operator" for the specific reason that the entire regulatory and statutory scheme is intended to mandate self-executing actions prior to the sale of property, closure of an industrial establishment or other triggering event. It is expressly a "precedent condition" to a lawful sale or closure of a New Jersey industrial establishment. ISRA and its predecessor ECRA were enacted in order to require[ ] inclusion of the cost of cleanup in an affected transaction." [In re Adoption of N. J. A. C. 7:26B, 128 N.J. 442, 456 (1992)].

> The Environmental Cleanup Responsibility Act (ECRA) (N.J.S.A. 13:1K-6 to -13), now known as the Industrial Site Recovery Act (ISRA), requires **owners and operators of industrial sites, as a condition precedent** to closing, sale or transfer, either to develop a cleanup plan for real property contaminated by hazardous waste or to certify in a "negative declaration" that remediation is unnecessary. In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 445, 608 A.2d 288 (1992). A negative declaration is a written statement submitted by the owner or operator, certifying that there has been no discharge of hazardous substances on the site, or that, if one has occurred, the property has been remediated in accordance with standards established by the DEP. N.J.S.A. 13:1K-8. If the owner or operator believes that the requirements of ECRA are not applicable, it may apply to the DEP for an applicability determination. N.J.A.C. 7:26B-1.9. Noncompliance with ECRA may result in voiding the sale of an industrial site and may make the owner or operator strictly liable, without regard to fault, for all remediation costs. N.J.S.A. 13:1K-13; In re Adoption of N.J.A.C. 7:26B, 128 N.J. at 449, 608 A.2d 288.
>
> [In re Cadgene Family Partnership, 286 N.J. Super. 270, 273-74 (App. Div. 1995) (emphasis added)]

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imminent, not conjectural or hypothetical; [and] (2) there must be a causal connection between the injury and the conduct complained of, . . . and it must be likely, not merely speculative, that the injury will be redressed by a favorable decision." Storino v. Borough of Point Pleasant Beach, 322 F.3d 293, 296 (3d Cir. 2003), quoting Society Hill Towers Owners Assoc. v. Rendell, 210 F.2d 168 (3d Cir. 2000).

Thus, the terms "owners" and "operators" must be understood within the context of the entire ISRA statutory scheme which is strictly founded upon the imposition of a "condition precedent to closing."

> To this end, the statute requires as a precondition to closure, sale, or transfer that the property of an "industrial establishment" be in an environmentally appropriate condition. Owners and operators can satisfy the precondition by submitting either a negative declaration or a cleanup plan. . . . Failure to comply with ECRA can result in the invalidation of the sale or transfer of the industrial establishment and in the imposition of liability for all cleanup and removal costs.
>
> [In re N.J.A.C. 7:26B, supra, 128 N.J. at 449]

There is simply nothing in the ISRA mandates and options that permit ISRA compliance after such a triggering event except in the sense that the NJDEP may provide compliance as the pathway to avoiding an AONOCAPA's final penalty order.

> Whenever the commissioner finds that a person has violated this act, or any rule or regulation adopted pursuant thereto, the commissioner may issue an order specifying the provision or provisions of this act, or the rule or regulation adopted pursuant thereto, of which the person is in violation, citing the action that constituted the violation, ordering abatement of the violation, and giving notice to the person of the person's right to a hearing on the matters contained in the order.
>
> [N.J.S.A. 13:1K-13.1(b)]

In this instance, and perhaps in few others, the NJDEP voided Des Champs' original ISRA compliant action and provided it the option of submitting a remediation plan. Without leave of the NJDEP, Des Champs submitted instead an exemption from ISRA as if such would have been applicable in 1997, specifically, the DQE which forms the present controversy. I **CONCLUDE** 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. This legal basis for denying Des Champs' DQE exemption is further

buttressed by the history of lost records and lost memories. To allow otherwise would be to potentially permit any past owner or operator filing an ISRA application nunc pro tunc knowing full well that no one will be able to prove otherwise years later.

Accordingly, while I have found that R&K did not factually prove Des Champs' lack of entitlement to a DQE in 1997, I must also **CONCLUDE** that such lack of "negative proofs" is 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. Moreover, I **CONCLUDE** that ISRA was never intended to allow a prior owner or operator such a do-over as to effectively pretend it would've, should've, or could've been entitled to an exemption in the first place.

ORDER

Accordingly, it is **ORDERED** that the petition of R&K Associates, LLC, to object to the filing of intervenor Des Champs Laboratories, Inc., for a *De Minimus* Quantity Exemption is **GRANTED**. It is further **ORDERED** that the approval by the respondent New Jersey Department of Environmental Protection, Bureau of Case Assignment and Initial Notice, of the application of intervenor Des Champs Laboratories, Inc., for a *De Minimus* Quantity Exemption is and the same is hereby **REVERSED**.

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.

November 19, 2014 Gail M. Cookson

DATE **GAIL M. COOKSON**, ALJ

Date Received at Agency: 11/19/14

Date Mailed to Parties:

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

Joshua Gradwohl

Joseph Pilewski

Craig D. Dufford

Charles W. Schilling

Arthur Rejaei

For Respondent:

None.

For Intervenor:

Michael Morrison

Nicholas Des Champs

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-1 November 20, 1996, Letter from Joseph Pilewski to Josh Gradwohl, General Information Notice, and Preliminary Assessment Report

P-2 December 17, 1996, Letter from Joshua Gradwohl to Joseph Pilewski

P-3 January 9, 1997, Letter from Joseph Pilewski to Joshua Gradwohl, Negative Declaration Affidavit

P-4 January 22, 1997, No Further Action Letter

P-5 November 10, 2008, Letter from Kirstin Hahn to Nicholas Des Champs

P-6 November 3, 2008, Josh Gradwohl Notes re: Telephone Conference with Nicholas Des Champs

P-7 December 2, 2008, Phone Log re: Conversation between Josh Gradwohl and Jay Jaffe, Esq.

P-8 January 12, 2009, *De Minimis* Quantity Exemption Affidavit

P-9 April 21, 2009, Letter from Joshua Gradwohl to Nicholas Des Champs

P-10 January 21, 2011, Letter from David Sweeney to Jay Jaffe, Esq.

P-11 August 8, 2012, Letter from Joshua Gradwohl to Nicholas Des Champs

P-12 November 7, 2013, Memo to File from Josh Gradwohl re: Des Champs

P-13 Livingston Fire Department Inspection Cards

P-14 July 3, 1989, Letter from Charles W. Schilling to Des Champs Labs

P-15 April 18, 1991, Letter from Deborah Laurano to NJDEP, Applicability Nonapplicability Affidavit

P-16 March 13, 1989, Letter from Craig Dufford

P-17 April 5, 1988, Community Right to Know Survey

P-18 January 7, 1987, Fire Prevention Application-Permit

P-19 January 7, 1988, Fire Prevention Application-Permit

P-20 Excerpts from 1987 BOCA Fire Code

P-21 Agreement of Sale between Nicholas and Rebecca M. Des Champs and Paper Access Corporation

P-22 September 5, 1997, Deed from Nicholas and Rebecca M. Des Champs to R&K Associates, LLC

P-23 July 30, 1997, Building Inspection Report by Home Tech Engineering, Inc.

P-24 [not in evidence]

P-25 E-Z-Vent II Brochure

For Respondent:

None.

For Intervenor:

I-1 through 2 [not used]

I-3 September 10, 1990, Letter from Deborah S. Laurano to Charles Bartelone re: Des Champs Laboratories Negative Declaration Affidavit

I-4 through 5 [not used]

I-6 Notice in Lieu of Trial Subpoena to R&K Associates, LLC, dated May 23, 2014

I-7 through 15 [not used]

I-16 March 27, 2009 E-mail from Joshua Gradwohl to Linda Grayson, Bill Hose, and Kirstin Pointin-Hahn