State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. ESR 13443-17
ESR 11666-13 (**ON REMAND**)
AGENCY DKT. NO. LSR120001-G000042636

R&K ASSOCIATES, LLC,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SITE REMEDIATION COMPLIANCE AND ENFORCEMENT,
Respondent.
and
DES CHAMPS LABORATORIES, INC.,
Intervenor.

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

Kimberly A. Hahn, Deputy Attorney General, for respondent Department of Environmental Protection (Gurbir S. Grewel, 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: January 22, 2018 Decided: July 30, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was originally 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]. (OAL Dkt. ESR 11666-13). 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).

After issuance of my Initial Decision on November 19, 2014, the NJDEP Commissioner adopted in part and modified in part that determination, which then was appealed by both R&K and Des Champs. The Final Decision of the Commissioner, dated April 6, 2015, held that Des Champs request for a DQE was denied on both standing and waiver grounds. This matter has now been remanded to the OAL for the second time as a result of a third opinion of the Appellate Division. R & K Associates, LLC v. NJDEP and Des Champs Laboratories, Inc., Dkt. No. A-4177-14T1 (April 10, 2017), 2017 N.J. Super. Unpubl. LEXIS 884 (Des Champs III). The court reversed the Commissioner on the standing and waiver bases for denying Des Champs a DQE. It

[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 the now three 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., Dkt. No. A-0413-12T3 (May 16, 2013), 2013 N.J. Super. Unpubl. LEXIS 1172 (Des Champs II).

also reversed me on shifting the burden of proof to R&K rather than leaving it on Des Champs as the applicant of an agency ISRA approval.

Upon receipt of the remand transmittal back to the OAL, I convened a telephonic conference call with the parties on October 11, 2017. At that time, it was agreed that the factual record did not need to be re-opened and supplemented; rather, the parties would all brief the issues in dispute as framed by Des Champs III. A briefing schedule was established. Upon receipt of all the submissions, I conducted oral argument on January 22, 2018, on which date the record closed.[2] It is fair to say that the position of the parties has not changed in the interim since my 2014 plenary decision.

APPELLATE DIVISION REMAND

The Appellate Division ruled, in pertinent part only, with respect to standing of a former owner to utilize the DQE option:

> [T]here is no language in the text of the statute explicitly prohibiting a former owner of property such as Des Champs from pursuing a DQE after it has sold its parcel. Nor is there a clear indication in the legislative history – given the policy objective to streamline the process for sites with *de minimis* quantities of hazardous materials – to allow a DQE to be obtained by only those applicants who were present owners seeking to comply with ISRA for the first time.
>
> In construing the overall statutory scheme, we must bear in mind that the DEP may rescind previously-granted NFA letters in the event an applicant is found to no longer be in compliance with ISRA. In such circumstances, the DEP requires the applicant to once again adhere to the ISRA requirements set forth in N.J.S.A. 13:1K-9.
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> [Des Champs III at 12.]

[2] In the interim, I had three complex decisions to issue; hence, the unfortunate delay in issuing this one.

And:

> It would be inequitable to construe the statutory scheme to deprive former owners of contaminated sites, who can be held liable retrospectively under ISRA for those conditions, of the opportunity to pursue DQEs or other exemptions that may be enjoyed by current owners. If liability under ISRA can extend to a former "owner" then the avenue for an exemption equitably and logically should extend reciprocally to qualified former owners, as well.
>
> [Id. at 16.]

With respect to which party bears the litigation risk caused by delay:

> By waiting so long, Des Champs bears the litigation risk of having a weaker case at a hearing so many years after the operative events. But that delay should not be construed to cause a total forfeiture of its ability to apply for a DQE.
>
> [Id at 17.]

And on the issue of waiver:

> [T]here is also some significance to the fact that the DEP did not reject Des Champs' applications for a DQE in the past on the basis of waiver, but instead considered them on their merits.
>
> [Id. at 20 n. 4.]

And on both waiver and delay:

> To be sure, it would have been far more preferable if Des Champs had pursued the DQE when it closed and sold the site almost two decades ago. But the gaps in evidence resulting from that delay can appropriately redound to Des Champs' detriment in assessing whether it now has met its burden of demonstrating entitlement to a DQE at a hearing, which is the next issue we will address.

[Id. at 21.]

On burden of proof:

> In general, an applicant for a benefit from the government normally bears the burden of establishing its entitlement to that benefit. See, e.g., Twp. of Monroe v. Gasko, 182 N.J. 613, 620 (2005); In re Vineland Chemical Co., 243 N.J. Super. 285, 315 (App. Div.), certif. denied, 127 N.J. 323 (1990); In re Application of Orange Sav. Bank, 172 N.J. Super. 275, 286 (App. Div.), dismissed as moot 84 N.J. 433 (1980). The applicant must present sufficient ("prima facie") grounds to demonstrate that it meets the regulatory requirements to obtain the sought-after approval. . . . .
>
> We also are mindful that in Des Champs II we anticipated that, on the second remand, R&K was to present a "proffer" of its grounds for objection. Des Champs II, supra, slip op. at 19. However, we did not intend to convey in our prior opinions that these aspects should result in shifting the ultimate burden of establishing entitlement to a DQE away from Des Champs as the applicant.
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> [Id. at 21-22.]

And:

> Improvidently shifting the burden at the hearing to R&K, the ALJ concluded from the rather scant and stale proofs tendered by Des Champs' witnesses that the evidence was sufficient to justify the issuance of a DQE, but for the legal impediments we have already discussed. We do not know from the ALJ's decision whether, if the burden had appropriately remained with Des Champs, she would have reached the same conclusions about the strength of the record.
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> [Id. at 23.]

REVIEW OF PRIOR FACTUAL RECORD

Insofar as the parties have agreed to rely upon the factual record developed during the plenary hearings several years ago for this remand proceeding, I shall review some of my findings and conclusions:

> 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.
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> [Initial Decision at 25.]
>
> 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.
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> 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.
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> [Initial Decision at 31-32.]
>
> 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.
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> 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.
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> [Initial Decision at 5-6.]

From this, it is clear and I **FIND** that the NJDEP would have inquired further of Des Champs concerning the DQE application but for these appeals. The loss or destruction of historical records by the Company has handicapped the agency's ability to evaluate its compliance with ISRA. This must inure to the detriment of Des Champs. As I did find in the Initial Decision, at 17: "1. Records and memories have been forever lost by the long passage of time between the 1997 NFA and the 2009 DQE."

The same must be said and I so **FIND** that the decision tree of Joseph Pilewski was truncated because Des Champs was not forthcoming in its disclosures to its own environmental consultant:

> 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.
>
> * * *
>
> 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.
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> [Initial Decision at 8.]

I was concerned during the hearings about the failure of Des Champs to fully inform Pilewski of its past manufacturing operations and use of potentially hazardous materials. As it now has the burden of proof, these failings also fall at its feet and was noted by me as an alternative basis for rejecting its application for a DQE.

> 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 from Enviro-Sciences 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.
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> [Initial Decision at 20 n.8.]

Similarly, the factual question of the historical presence of two fireproof storage cabinets, testified to by both Joshua Gradwohl and Chief Schilling, is problematic even without the issue of whether Pilewski knew about them when he provided environmental advice to Des Champs. I found: "[T]here is insufficient evidence to discern the purposes to which the hazardous materials storage cabinet was put and the volume of the materials stored therein." [Initial Decision at 18.] As set forth by R&K in its Post-Remand Brief, at 16:

> In addition, Dr. Des Champs' testimony regarding the alleged minimal volumes of hazardous substances present at the Des Champs Site is contradicted by the Livingston Fire Department's requirement in 1989 that Des Champs to install two fire-proof chemical storage cabinets with 60 gallon capacities to remedy Des Champs' open storage of hazardous materials at the facility. (See Ex. P-14.) The fact that not one, but two fire-proof storage cabinets were required by the Livingston Fire Department to house the quantities of hazardous materials present at the Des Champs Site clearly contradicts Des Champs' assertions regarding the minimal presence of hazardous substances there and supports the conclusion that there were more than 60 gallons of flammable and hazardous materials kept at the Des Champs Site. As Livingston Fire Chief Schilling testified:

> . . . we can't expect a person if they have a -- a small operation with a few little cans of flammable liquids around for various cleaning purposes and so forth, we wouldn't require a cabinet. The cabinet would be required when we got up into the larger storage – amounts up to like I say 60 gallons.

[2T61:21-62:2 (emphasis added.)]

CONCLUSIONS OF LAW

I must **CONCLUDE** that Des Champs has failed to prove that it is factually entitled to a DQE on the Property because records have been lost; the agency has been handicapped in its review role; and there are simply too many open-ended questions about the operations' use of hazardous materials during its heyday.

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 application of intervenor Des Champs Laboratories, Inc., for a *De Minimus* Quantity Exemption is and the same is hereby **DENIED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this

recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 30, 2018

DATE

Gail M. Cookson

GAIL M. COOKSON, ALJ

Date Received at Agency: 7/30/18

Date Mailed to Parties:

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