



NEW JERSEY LAW REVISION COMMISSION

Final Report

Addressing the Ability of a Former Owner or Operator to Apply for a De Minimis Quantity Exemption Pursuant to N.J.S. 13:1K-9.7 After the Revocation of a “No Further Action” Letter.

December 19, 2019

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.
Please consult the New Jersey statutes in order to determine the law of the State.

Please send comments concerning this Report or direct any related inquiries, to:

New Jersey Law Revision Commission
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: njlrc@njlrc.org
Web site: <http://www.njlrc.org>

Executive Summary

In *R&K Associates, LLC v. N.J. Dep't of Env'tl. Prot.*, the Appellate Division held that former owners or operators of industrial establishments may, under certain circumstances, pursue a De Minimis Quantity Exemption (DQE).¹

The Commission recommends the addition of language to N.J.S. 13:1K-9.7 that permits a qualified, prior owner or operator of an industrial establishment to pursue a DQE after the revocation of a “no further action letter” by the Department of Environmental Protection (DEP).

Background²

Des Champs Laboratories owned and operated a facility in Livingston Township which manufactured heat recovery ventilators for industrial and residential uses.³ The process of creating these units involved using chemicals such as spray paint and hydraulic oil.⁴ In 1990, it ceased operations at this location and used the property for storage.⁵

In an effort to sell the property, Des Champs commissioned the work of a consultant who prepared a Preliminary Assessment Report (PAR) for submission to the Department of Environmental Protection (DEP).⁶ In this report, Des Champs affirmed that it “had not used or stored any significant quantities of hazardous substances” at the site.⁷ The DEP, after receiving the report, notified Des Champs that no further investigation was necessary and instructed the company to file a Negative Declaration Affidavit (NDA) to close the case.⁸ Once this filing was made, the DEP issued a “no further action” letter (NFA).⁹

R&K acquired the property in 1997 and used the site as a storage facility. In October 2005, the site was later found to be the source of groundwater contamination in Livingston Township.¹⁰

¹ *R & K Assocs., LLC v. N.J. Dep't of Env'tl. Prot.*, A-4177-14T1, 2017 WL 1316169, at *6 (App. Div. Apr. 10, 2017).

² This matter has been before the Appellate Division on four separate occasions: *Des Champs Labs, Inc. v. Martin*, 427 N.J. Super. 84 (App. Div. 2012) (vacating the DEP’s denial of a DQE holding that ISRA did not authorize the DEP to require a DQE applicant to certify that the property is free of contamination); *R & K Assocs., LLC v. N.J. Dep't of Env'tl. Prot.*, No. A-0413-12 (App. Div. May 16, 2013) (“Des Champs II”) (grant of the DQE reversed on procedural grounds to allow additional party participation in the proceedings); *R & K Assocs., LLC v. N.J. Dep't of Env'tl. Prot.*, A-4177-14 (App. Div. Apr. 10, 2017) (“Des Champs III”) (a former owner of a property may be eligible to obtain a DQE); and, *R & K Assocs., LLC v. N.J. Dep't of Env'tl. Prot.*, A-1475-18T1 (App. Div. Nov. 19, 2019) (“Des Champs IV”) (unlike the three previous appeals, the Court was only asked to review the strengths of the factual evidence contained in the record and not any legal issues that might impact this Report).

³ *Id.* at *1.

⁴ *Id.*

⁵ *Id.* at *2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

The DEP subsequently revoked its previously issued NFA and in response, Des Champs applied for a De Minimis Quantity Exemption (DQE).¹¹ In its application, Des Champs acknowledged it used hazardous substances during operation of the site but not in quantities that would disqualify it from obtaining a DQE.¹²

On referral by the DEP to an administrative law judge (ALJ), the ALJ denied the DQE and found Des Champs did not have standing under the Industrial Site Recovery Act (ISRA) since it was a former owner of the property.¹³ In a review of the ALJ's decision, the DEP Commissioner concluded that Des Champs could not obtain a DQE in light of the long passage of time and apparent waiver of the opportunity to claim the Exemption previously.¹⁴ Despite the adverse ruling, the DEP Commissioner did acknowledge there are times where a former owner of a property may have standing to satisfy DQE requirements.¹⁵

Analysis

Among other issues presented to the Appellate Division was whether former owners have standing to claim a DQE under the Industrial Site Recovery Act.¹⁶

The Court first acknowledged there was “some textual support” that ISRA's DQE provision only applied to current owners.¹⁷ For instance, “Owner” is defined in ISRA's definitions section as “any person who *owns* the real property of an industrial establishment or who *owns* the industrial establishment.”¹⁸ It observed that the Legislature's decision to use the present tense of ownership provides some indication that the statute was intended to only cover current owners of a subject property.¹⁹

In further support of this, the Court also discussed the manner in which other parts of ISRA explicitly mention previous owners of a property while N.J.S. 13:1K-9 simply refers to owners and operators.²⁰ This variation, in addition to other sections of the Act similarly employing the term “owners”, appears to lend support to the idea that when the term “owner” is used, it only refers to current owners.²¹

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at *3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* Quoting N.J.S. 13:1K-8.

¹⁹ *Id.*

²⁰ *Id.* Compare N.J.S. 13:1K-9.2 with N.J.S. 13:1K-9(c) and N.J.S. 13:1K-9.7.

²¹ *R & K Assocs., LLC v. N.J. Dep't of Env'tl. Prot.*, A-4177-14T1, 2017 WL 1316169, at *4 (App. Div. Apr. 10, 2017) (Citing N.J.S. 13:1K-7 & *Des Champs Laboratories, Inc. v. Martin* [*Des Champs IJ*], 427 N.J. Super. 84, 96 (App. Div. 2012)).

The Court also considered the legislative policies being advanced by ISRA. In referencing its previous decision in *Des Champs I*, it was noted that the Legislature decided, as a matter of policy, it wanted to “streamline the regulatory process” and “promote certainty.”²² N.J.S. 13:1K-9.7 accomplishes this by ensuring efficient transfers of land when strict enforcement of existing environment laws and regulations would hold up a sale.²³

Finally, the Court found the DEP has a right to rescind an NFA it previously issued whenever an applicant is no longer in compliance with ISRA.²⁴ In that case, the applicant is once again required to fulfill the requirements of N.J.S. 13:1K-9.²⁵ This indicated that a former owner could be considered an “owner” for purposes of the Act.²⁶

In light of the statutory text and the legislative history, the Appellate Division held that the term “owner” as was used in N.J.S. 13:1K-9 and -9.7 referred to both current and former owners.²⁷ Holding otherwise seemed unfair to former owners since they could be held retrospectively liable for contamination at their sites, but would be unable to seek DQEs.²⁸ The Court expressed that avenues for securing an exemption should “equitably and logically extend ...to qualif[ying] former owners [] as well.”²⁹

Outreach

In connection with this Report, Staff sought comments from several knowledgeable individuals and organizations. These stakeholders included: the New Jersey Department of Environmental Protection; the Office of the Attorney General – Enforcement (Environmental); the leadership of the New Jersey State Bar Association – Environmental Law Section; a well-known environmental remediation company; and, practitioners in the field of environmental law.

No objection was received to the proposed modifications included in this Report.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at fn. 1 (An administrative agency generally has “the inherent power to rehear and modify orders it has previously entered.” *In re Cadgene Family P’ship*, 286 N.J. Super. 270, 277 (App. Div. 1995). N.J.A.C. 7:26C–2.2 provides that “a person shall remediate a site in accordance with this chapter when ... [a] no further action letter is rescinded[.]” N.J.A.C. 7:26C–2.2(a)(5) (emphasis added); see also N.J.A.C. 7:26C–6.4(d) (“Upon the [DEP’s] rescission of a no further action letter ... the person responsible for conducting the remediation shall perform all additional remediation, according to expedited site specific remediation timeframes, as the [DEP] may require.”). Thus, pursuant to its legislative “mandate [the DEP] had a right to ... rescind its incorrect prior approval” of an applicant’s Negative Declaration. *Chemos Corp. v. N.J. Dep’t of Env’tl. Prot. Div. of Hazardous Waste Mgmt.*, 237 N.J. Super. 359, 367 (App. Div. 1989)).

²⁵ *Id.* at *4.

²⁶ *R & K Assocs., LLC v. N.J. Dep’t of Env’tl. Prot.*, A-4177-14T1, 2017 WL 1316169, at *4 (App. Div. Apr. 10, 2017).

²⁷ *Id.* at *5.

²⁸ *Id.*

²⁹ *Id.* at *6.

Legislative Action

In the current legislative session (2018-2019), a bill addressing the De Minimis Quantity Exemption has been introduced in the New Jersey Assembly.³⁰ The bill does address the issue raised in *R&K* and, if enacted, the bill would alter conditions under which a DQE is granted by the Department of Environmental Protection.³¹ Assembly Bill 3419 would require any owner or operator of an industrial establishment to certify they have no actual knowledge of site contamination which exceeds remediation standards.³²

After being introduced in the General Assembly in February 2018, the bill was referred to the Environment and Solid Waste Committee.³³ No further action has been taken on this bill to the date of this Report.³⁴ It is noted that three identical bills were introduced during prior consecutive legislative sessions without enactment.³⁵

Conclusion

In its current form, the Industrial Site Recovery Act does not clearly state whether former owners or operators of industrial establishments may apply for a De Minimis Quantity Exemption after a “No Further Action Letter” has been rescinded by the Department of Environmental Protection.

The Commission recommends the addition of language to N.J.S. 13:1K-9.7 that permits a qualified, prior owner or operator of an industrial establishment to pursue a DQE after the revocation of a “no further action letter” by the Department of Environmental Protection (DEP). The language in the proposed amendment is consistent with the holding of the Appellate Division in *R&K Associates, LLC v. N.J. Dep’t of Env’tl. Prot.*

³⁰ A3419, 2018 Leg., 218th Leg. (N.J. 2018).

³¹ *Id.*

³² *Id.*

³³ New Jersey State Legislature, Bills 2018-2019 available at <https://www.njleg.state.nj.us/bills/BillView.asp> (last visited Dec. 03, 2019).

³⁴ *Id.*

³⁵ See A1356, 2016 Leg., 217th Leg. (N.J. 2016); A1585, 2014 Leg., 216th Leg. (N.J. 2014); A3367, 2012 Leg., 215th Leg. (N.J. 2012).

Appendix

The proposed amendments to N.J.S. 13:1K-9.7 (shown with underlining and ~~striketrough~~), are as follows:

13:1K-9.7. Transfer of ownership or closing of operations absent compliance with remediation plan; conditions required; written notice

- a) The owner or operator of an industrial establishment may, upon submission of a written notice to the department, transfer ownership or operations or close operations without complying with the provisions of section 4 of P.L.1983, c. 330 (C. 13:1K-9) if the total quantity of hazardous substances and hazardous wastes generated, manufactured, refined, transported, treated, stored, handled, or disposed of at the industrial establishment at any one time during the owner's or operator's period of ownership or operations:
- (a) (i) does not exceed 500 pounds or 55 gallons;
 - (b) (ii) if a hazardous substance or hazardous waste is mixed with nonhazardous substances, the total quantity in the mixture does not exceed 500 pounds or 55 gallons; or
 - (c) (iii) if, in the aggregate, hydraulic or lubricating oil, does not exceed 220 gallons.
- b) In the event that a “no further action” letter issued pursuant to N.J.S. 13:1K-9 is revoked, a prior owner or operator of an industrial establishment to whom that letter was issued may, if that person meets the criteria, qualify for the exemption set forth in subsection (a) above for the time period during which that person was the owner or operator of the transferred or closed industrial establishment.

COMMENT

The proposed language is drafted to reflect the Appellate Division's holding in *R&K Associates, LLC v. N.J. Dep't of Envtl. Prot.*, A-417714T1, 2017 WL 1316169 (App. Div. 2017), where the Court found qualified former owners and operators retained the ability to apply for a De Minimis Quantity Exemption (DQE) after the industrial establishment had been sold or transferred.