

**To: New Jersey Law Revision Commission**  
**From: Wendy Llewellyn**  
**Re: De Minimis Quantity Exemption - R & K Assoc., LLC v. N.J. Dep't of Env'tl. Prot., and N.J.S. 13:1K-8, N.J.S. 13:1K-9, and N.J.S. 13:1K-9.7**  
**Date: July 9, 2018**

## MEMORANDUM

### Executive Summary

In *R & K Associates*,<sup>1</sup> the Appellate Division considered whether the former owner of a property is permitted to apply for a De Minimis Quantity Exemption (DQE) from the Industrial Site Recovery Act of 1993 (ISRA), N.J.S. 13:1K-6 to -14, even though the language in the statute refers in the present tense to “the owner,” indicating that it is meant to apply only to current owners.<sup>2</sup>

The court determined that “the definition of ‘owner,’ as it appears in N.J.S.[] 13:1K-9 and N.J.S.[] 13:1K-9.7, logically should be read to include former owners,”<sup>3</sup> and that appellant/cross-respondent Des Champs Laboratories (Des Champs) therefore had standing to obtain a DQE.<sup>4</sup>

### Background

For some time through 1990, Des Champs owned and operated a site at which it used chemicals, including hydraulic oil and spray paint.<sup>5</sup> After 1990, Des Champs ceased operations and used the site for storage, and also leased the site for a time to a realty company for storage of furniture and signs.<sup>6</sup> Before selling the site to plaintiff R & K Associates, Inc. (R & K) in 1997, Des Champs hired a consultant to prepare a Preliminary Assessment Report (PAR) to submit to the Department of Environmental Protection (DEP).<sup>7</sup> The DEP responded that no further investigation was necessary at the time, and directed Des Champs to file a Negative Declaration Affidavit (NDA) to close the case.<sup>8</sup> Des Champs filed the NDA in January of 1997, after which it received a “no further action” letter (NFA).<sup>9</sup>

Several years after the September 1997 sale of the property from Des Champs to R & K, in October of 2005, it was discovered that contamination from the property was the source of

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<sup>1</sup> *R & K Associates, LLC v. New Jersey Dep't of Env'tl. Prot.*, A-4177-14T1, 2017 WL 1316169 (N.J. Super. Ct. App. Div. Apr. 10, 2017).

<sup>2</sup> *Id.* at \*1, \*3.

<sup>3</sup> *Id.* at \*4 (citing *Simpkins v. Saiani*, 365 N.J. Super. 26, 31 (App. Div. 2002)).

<sup>4</sup> *Id.* at \*6.

<sup>5</sup> *Id.* at \*1.

<sup>6</sup> *Id.* at \*2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

contaminated ground water in Livingston Township drinking wells, and, as a result, in 2008 the DEP revoked the NFA approval it had previously granted Des Champs.<sup>10</sup>

Des Champs then submitted a DQE certification to the DEP, asserting that while it had used various hazardous substances while operating on the site, it was not in quantities that would disqualify it for a DQE.<sup>11</sup> After two rulings and two remands, the DEP referred the matter to an ALJ, who factually determined that Des Champs' use and storage of hazardous materials on the site was minimal and under the regulatory thresholds, and that Des Champs would have qualified for a DQE if it had timely applied for one.<sup>12</sup> The DEP Commissioner, however, while recognizing that former owners of property might have standing to obtain a DQE, decided that Des Champs was not entitled to a DQE due to the "unique facts" of this case, namely the long period of time that had passed and a lack of relevant records that could be central to the regulatory analysis.<sup>13</sup> The Commissioner also found that Des Champs had waived its chance to seek a DQE by not pursuing it earlier.<sup>14</sup>

Among other issues, the Appellate Division addressed and reversed the Commissioner's legal ruling that Des Champs lacked standing to obtain a DQE under N.J.S. 13:1K-9.7.<sup>15</sup> In analyzing the relevant statute, the Appellate Division considered whether the legislative intent was to define "owner" as only the current owner of the property, as was asserted by the DEP and plaintiff R & K, or whether the term was meant to include previous owners.<sup>16</sup>

The relevant portion of the statute states the following:

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) does not exceed 500 pounds or 55 gallons;
- (b) 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

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at \*3.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*6.

<sup>16</sup> *Id.* at \*3-\*4.

(c) if, in the aggregate, hydraulic or lubricating oil, does not exceed 220 gallons.<sup>17</sup>

The Appellate Division acknowledged there was some “textual support” that ISRA, the statute authorizing the DEP to approve DQE applications, applies to current owners only, in that the definition of “owner” under N.J.S. 13:1K-8 means any person who *owns* the property or who *owns* the establishment, and that use of the present-tense “owns” is an indication that any references to “owner” within the statutory scheme do not apply to previous owners.<sup>18</sup> The Appellate Division also noted that the phrase “previous owner” in N.J.S. 13:1K-9.2<sup>19</sup> would lend some support to the idea that references to “owner” in other sections that do not include the word “previous” are meant to refer only to current owners.<sup>20</sup>

The Appellate Division went on to consider that the Legislature, as a policy matter, was seeking to streamline and provide certainty in the regulatory process<sup>21</sup> and “specifically enacted the DQE provision, N.J.S. 13:1K-9.7, to avoid the ‘strict enforcement’ of existing ‘obligations upon owners and operators that handled or stored only ‘de minimis’ quantities of hazardous substances ... [because its burden] was too onerous, and [because] such onerous measures thwarted the efficient transfer of title and the cessation of business operations.’”<sup>22</sup>

The Appellate Division also noted that there is no language in the statute “explicitly prohibiting” a previous owner from applying for a DQE after the property has been sold, nor anything in the legislative history, “given the policy objective to streamline the process for sites with de minimis quantities of hazardous materials,” that restricts DQEs only to present owners.<sup>23</sup>

Finally, the Appellate Division determined that because the statutory scheme as a whole is retroactive in situations where the DEP rescinds previously-granted NFA letters when an applicant is no longer in compliance, thereby necessitating an applicant to “once again adhere to the ISRA requirements set forth in N.J.S.[ ] 13:1K-9,” the definition of “owner” in N.J.S. 13:1K-9 and N.J.S.[ ] 13:1K-9.7 should be read to include former owners.<sup>24</sup> The Appellate Division found that

allowing the DEP [ ] to adhere to a restrictive definition of ‘owner’ for standing purposes would be fundamentally unfair ... [and] [i]t would be inequitable to construe the statutory scheme to deprive former owners of contaminated sites,

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<sup>17</sup> N.J.S. 13:1K-9.7.

<sup>18</sup> *R & K*, 2017 WL 1316169 at \*3.

<sup>19</sup> (providing that foreclosure shall not relieve the previous owner or operator of his duty to remediate).

<sup>20</sup> *Id.* at \*4.

<sup>21</sup> *Id.* (citing *Des Champs Laboratories, Inc. v. Martin*, 427 N.J. Super. 84, 96 (App. Div. 2012); N.J.S. 13:1K-7.).

<sup>22</sup> *Id.* (quoting *Des Champs*, 427 N.J. Super. at 94).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

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.<sup>25</sup>

Since the Appellate Division did note that there was textual support to interpret N.J.S. 13:1K-9 and N.J.S. 13:1K-9.7 as referring only to current owners and not previous owners, but determined that it would be inequitable and unfair to restrict these provisions to current owners only, it seems that the statute may benefit from some language indicating that N.J.S. 13:1K-9 and N.J.S. 13:1K-9.7 may apply to previous owners.

### **Conclusion**

Staff seeks authorization to engage in further research and outreach in order to determine whether adding “previous owners” to the definition of “owners” in N.J.S. 13:1K-8, as well as to N.J.S. 13:1K-9, N.J.S. 13:1K-9.7, along with any other statutes related to DQEs, would be useful and provide clarity in line with this Appellate Division decision.

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<sup>25</sup> *Id.*