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Exemption Ruling's Impact on New Jersey Site Remediation

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Special to the Legal

Some observers have questioned whether a recent decision by the New Jersey Appellate Division suggests that New Jersey's traditionally stringent environmental cleanup requirements are becoming more business-friendly. Upon review, the July 6 decision alone represents only a narrow loosening of cleanup obligations in New Jersey. However, the case comes at a time of other major changes in New Jersey's site remediation regulatory framework that offer both new benefits as well as burdens for those owning contaminated property or conducting site remediations in the Garden State. As such, the court's observations on the legislative intent associated with changes in the program over time welcome closer scrutiny.

The case at issue, *Des Champs Laboratories v. New Jersey Department of Environmental Protection*, involved the validity of a condition imposed by the NJDEP on parties seeking to obtain a de minimis quantity exemption (DQE) from requirements imposed by the Industrial Site Recovery Act (ISRA). This statute mandates cleanup of "industrial establishments" in New Jersey at the time of certain triggering events, such as sale of the property or business or cessation of operations. To constitute an industrial establishment, a business must have a specified North American Industrial Classification System number, operated on or after December 31, 1983, and used or stored one or more listed hazardous substances. Industrial business and real property transactions in New Jersey frequently lead to complex ISRA compliance issues, which can be avoided if the business can show it did not use hazardous substances above specified de minimis levels.

Des Champs Laboratories operated an assembly plant on its property in Livingston, N.J., from 1982 to 1996. As part of shutting down operations at this site, Des Champs submitted a preliminary assessment report and negative declaration affidavit to the state DEP certifying that no discharges of hazardous substances or hazardous wastes had occurred from this industrial establishment. The DEP issued a no further action letter in early 1997, allowing the cessation of operations to occur in compliance with the ISRA. Des Champs sold the property to the current owner later that year.

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Eight years after Des Champs ceased operations in Livingston, the DEP began investigating groundwater contamination in the vicinity. In 2008, the agency identified the former Des Champs facility as the likely source. Consequently, the DEP rescinded its 1998 no further action letter and informed Des Champs that it no longer had the necessary authorization under the ISRA to sell the property in 1997. The agency instructed Des Champs to begin an investigation of groundwater contamination at the site, according to the opinion.

Rather than perform this investigation, Des Champs submitted a DQE affidavit to the DEP asserting that it had only handled a de minimis quantity of hazardous substances at the property and therefore qualified for an ISRA exemption. The DEP, however, denied Des Champs' DQE application and again stated that Des Champs had to conduct a groundwater investigation to comply with the ISRA. The agency supported this denial by stating that an industrial establishment, regardless of fault, is presumed not to qualify for a DQE if the site has known contamination. The DEP also issued a directive pursuant to the Spill Compensation and Control Act requiring Des Champs to retain a Licensed Site Remediation Professional (LSRP) under the DEP's new site remediation reforms (discussed further below), establish a remediation funding source as financial assurance to clean up the site, and perform investigation and remediation of the groundwater contamination.

Des Champs appealed the DEP's denial of the DQE application. The company argued that the DEP's conditioning of the DQE on a showing that the property is free from contamination was unsupported by the text of the ISRA and inconsistent with legislative policies underlying the statute. The DEP and the current property owner (which had intervened in the appeal, presumably to cause Des Champs to clean up its property) responded that such a condition is implicitly authorized by the ISRA and other applicable statutes and consistent with the overall policy goals of the statutory scheme.

The Appellate Division evaluated the issue by reviewing the statutory and regulatory framework as it evolved over three decades. The ISRA's predecessor statute, the Environmental Cleanup Responsibility Act (ECRA), was enacted in 1983. Through this law, the legislature intended to ensure that industrial sites were remediated at the time of sale, transfer or closing, thereby reducing the substantial time and money spent in determining fault and allocating liability for contamination. The ECRA lacked a statutory DQE, however, resulting in overly burdensome obligations on facilities undergoing shutdowns or property transfers that handled very small quantities of hazardous substances. Therefore, the DEP promulgated a DQE by regulation in 1987. This original DQE did not expressly require the site owner or operator to attest that no discharges had occurred or that the property was uncontaminated. Two years later, however, the DEP amended the DQE regulation to include such a condition.

Based on concerns that the ECRA program had unduly hindered contaminated property transfers, the legislature replaced the ECRA with the ISRA in 1993. The court cited the legislative policy goals enumerated in the new statute, including "creat[ing] a more efficient regulatory structure and ... allow[ing] greater privatization of that process ... without incurring unnecessary risks to the public health and environment." Furthering these objectives, the legislature designed the new statute to "streamlin[e] the regulatory process," "reduc[e] oversight of those industrial establishments where less extensive regulatory review will ensure the same degree of [environmental] protection," and

"minimize governmental involvement in certain business transactions."

Unlike the ECRA, for the ISRA the legislature included a DQE provision within the statute itself. Significantly, the court noted that this provision required only that the applicant attest that hazardous substances present on-site at any time during the applicant's period of ownership or operation did not exceed certain de minimis weight or volume thresholds; it did not require an affidavit asserting that no discharge had occurred or was remediated. Consistent with this language, the DEP issued new DQE regulations for the ISRA in 1997 that similarly focused only on the quantity of hazardous substances present at the facility, not on whether a discharge had occurred or been cleaned up.

The ISRA regulations in this form stayed in force until 2009, when the legislature enacted the Site Remediation Reform Act (SRRA). This law has ushered in a series of changes designed to make cleanup of New Jersey's contaminated sites faster and more efficient, most prominently creation of the LSRP program in which parties remediating a contaminated site must retain an LSRP — private environmental consultants, licensed by the state, who have assumed many of the remediation oversight roles previously performed by DEP staff. To implement the new statute, the legislature directed the DEP to adopt interim, followed by permanent, regulations, including amendments to rules under other related statutes, like the ISRA, to ensure consistency with the SRRA.

The DEP promulgated its interim regulations in November 2009. After a 12-year absence, this rulemaking re-established in the ISRA DQE provision a condition requiring the applicant to certify that the industrial establishment is not contaminated above an applicable remediation standard. The rule was permanently readopted in 2011 and remained in this form when comprehensive revisions to the site remediation program were finalized on May 7, 2012.

Against this legislative and regulatory backdrop, the Appellate Division evaluated the validity of the DEP's "contamination-free" DQE condition. The court recognized the typical deference paid to administrative agencies on matters within their expertise, and the presumption that agency regulations are supported by statutory authority. However, the court also noted that in analyzing whether a statute authorizes a given regulation, it may look not only to the statutory language, but also to the legislative policy behind the statute as a whole.

Taking this approach, the Appellate Division held that the DEP had acted arbitrarily and capriciously, and without statutory authorization, in denying Des Champs' DQE application and requiring investigation and remediation based on the lack of a certification that the site was uncontaminated. The court also invalidated the DQE regulatory language containing this condition. It found that the DEP had exceeded its delegated authority by adding this condition to the exemption when the legislature did not impose such a condition in the statutory DQE provision. Notably, the court determined that the addition of this condition contravened the legislative intent behind the ISRA and the SRRA to "'streamline the regulatory process'" and "'minimize governmental involvement in certain business transactions,'" at least where private parties have used only a de minimis amount of hazardous substances.

Despite the DEP's position to the contrary, the fact that the legislature did not impose a contamination-free condition while such a requirement was absent from the DQE regulation for more than 13 years suggested to the court that this condition is not fundamental to the statutory scheme. Further, while recognizing the DEP's argument that conditioning a DQE on an applicant's contamination-free certification advances a legitimate policy interest in accelerating site cleanups, the court could not reconcile that interest with the legislature's explicit intent in the ISRA to streamline the regulatory process and minimize government involvement in the sale or closure of industrial sites. Accordingly, the court "reserve[d] that policy debate for the elected branches of our state government." In the case at hand, Des Champs' DQE application was remanded to the DEP for consideration without regard to the contamination-free condition.

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Stepping back, the regulated community and environmental organizations have attempted to evaluate the significance of this decision on site cleanup obligations in New Jersey. On one level, the court itself emphasized the narrow scope of its ruling, explaining that even if the ISRA did not apply, the DEP may still be able to impose cleanup obligations on Des Champs and other DQE applicants pursuant to the Spill Act or other authorities if supported by the relevant facts.

From a broader perspective, however, the Appellate Division's holding coincides with several other major changes to the state cleanup framework. On May 7, the DEP published final rules that fully implement the LSRP program, which largely privatized site remediations in New Jersey. Many aspects of this rulemaking continue the trend of streamlining cleanups and reducing governmental involvement as reflected in the ISRA and especially the SRRA, as observed by the *Des Champs* court.

Among others, these changes include imposing an obligation to retain an LSRP for each site remediation case and proceed to remediate without the DEP's direction; eliminating most DEP pre-approval requirements (most notably the requirement to approve remedial actions in advance), with the expectation that cases will be able to move through the remediation process much more quickly; granting LSRPs the authority to make Response Action Outcome determinations to close-out cases (subject to the possibility of a future DEP audit); replacing many prescriptive remedial investigation requirements with performance-based goals to enhance cleanup flexibility; providing more options for remediating the many sites impacted by historic fill; and giving LSRPs more discretion in satisfying public notification requirements.

On the other hand, through the SRRA and this rulemaking, the DEP's enforcement tools have been strengthened to ensure that responsible parties address sites in a timely fashion and in compliance with the technical requirements. These changes include adding new regulatory and mandatory timeframes for completing the remedial investigation and remedial action phases, and developing a table of base penalties for violations of more than 250 separate provisions in the site remediation program regulations. For such violations, reliance on an LSRP's judgment will not be a permissible defense. The DEP also has been granted authority to place sites under its direct oversight, subjecting them to more onerous requirements than otherwise would be the case.

Taking these changes on the whole, New Jersey appears to continue to embrace a more streamlined and flexible privatized site cleanup program, but with robust controls to keep these cleanups moving forward promptly and within acceptable technical limits. Judicial recognition of this streamlined and flexible approach is perhaps the most important teaching of *Des Champs*. It will be noteworthy to see if other courts apply these perspectives when asked to interpret other aspects of this program. •