SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3485-13T1
A-5407-13T1

RARITAN BAYKEEPER, INC.
d/b/a NY/NJ BAYKEEPER,

Appellant,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

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RARITAN BAYKEEPER, INC.
d/b/a NY/NJ BAYKEEPER,

Appellant,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent,

and

SOIL SAFE, INC.,

Intervenor-Respondent.

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Argued October 17, 2017 – Decided December 20, 2017

Before Judges Yannotti, Leone and Mawla.

On appeal from the Department of Environmental Protection.

Michele D. Langa argued the cause for appellant (Michele D. Langa, attorney; Andrea Leshak, on the briefs).

Lisa J. Morelli, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Lisa J. Morelli, on the brief).

Christopher R. Gibson argued the cause for intervenor-respondent (Archer & Greiner, PC, attorneys; Christopher R. Gibson, of counsel; Patrick M. Flynn, on the brief).

PER CURIAM

Rahway Arch Properties, LLC (Rahway Arch) submitted an application to the New Jersey Department of Environmental Protection (DEP) for a Flood Hazard Area Individual Permit and associated hardship exception required to implement a remedial action work plan (RAWP) on its property. In addition, Soil Safe, Inc. (Soil Safe) submitted a related application to the DEP for a Class B Recycling Center General Approval Permit for the facility where it intends to process alternative fill for use in Rahway Arch's RAWP. The DEP granted both applications.

In A-3485-13, Raritan Baykeeper, Inc. d/b/a NY/NJ Baykeeper (Baykeeper) challenges the DEP's issuance of the Flood Hazard Area

Individual Permit and hardship exception to Rahway Arch. In A-5407-13, Baykeeper challenges the DEP's issuance of the Class B Recycling Center General Approval Permit to Soil Safe. We address both appeals in this opinion. For the reasons that follow, we affirm.

I.

Rahway Arch is the owner of approximately 125 acres of land on the banks of the Rahway River in Carteret, New Jersey. American Cyanamid Company, later Cytec Industries, Inc. (Cytec), used the site from the 1930s to the 1970s for the disposal of approximately two million tons of sludge consisting of alum, yellow prussiate of soda (sodium ferrocyanide), and other hazardous materials. The sludge was the product of a manufacturing process at the Warner chemical plant, which Cytec owned and operated from 1917 to 1998. The sludge was deposited in six, manmade, unlined lagoons, which cover about eighty-five acres of the property.

Previously, Cytec had attempted to remediate the site. Cytec constructed containment berms around the lagoons, and covered the sludge with undocumented fill material to maintain the berms and stabilize the surface of some of the lagoons. Cytec placed composted sewage on some of the lagoons, built roads using debris from the Warner plant and other undocumented fill, and brought additional undocumented fill to the site to repair and maintain

the berms, roads, and lagoons. In September 2002, the DEP determined that no further action was required for remediation of the site.

In 2010, Rahway Arch purchased the property. Thereafter, Rahway Arch retained EastStar Environmental Group, Inc. (EastStar) to conduct an environmental assessment of the site. EastStar determined that the property was heavily contaminated with levels of hazardous materials that exceeded the DEP's standards for non-residential remediation. Among other things, EastStar found that the prior owner's remedial actions were no longer sufficient to protect the public health and the environment.

In November 2011, EastStar informed the DEP of its findings. It advised the agency that Rahway Arch had decided to begin its own remediation program, pursuant to the Site Remediation Reform Act of 2009 (SRRA), N.J.S.A. 58:10C-1 to -29. Under the SRRA, primary responsibility for supervising site remediation was transferred from the DEP to a designated Licensed Site Remediation Professional (LSRP). N.J.S.A. 58:10B-1.3(b). Rahway Arch retained EastStar as its LSRP. Rahway Arch also retained Soil Safe to implement the remediation plan.

In March 2012, Soil Safe submitted an application to the DEP for a permit to operate temporarily a Class B Recycling Center on the Rahway Arch property. In the application, Soil Safe indicated

that the facility would receive Class B recyclable materials, including petroleum-contaminated soil from various other locations. Soil Safe would process the soil at the facility so it could be used as fill for remediation of the property.

In August 2012, EastStar issued a preliminary environmental assessment of the Rahway Arch site. It identified fourteen areas of concern, nine of which were in need of remediation. Among other things, EastStar found that the sludge lagoons were unsafe for foot or wildlife traffic, the property was susceptible to flooding and the collection of standing water, and the soil and groundwater were contaminated.

In November 2012, following a six-month investigation, EastStar produced a report, which confirmed that the prior owners of the property had placed undocumented fill on the site, the existing lagoons were contaminated, the conditions on the property were affecting the groundwater, and contaminated material was able to flow freely from the lagoons into the Rahway River. EastStar determined that the site was unusable and posed a safety hazard to the public.

In its report, EastStar stated that capping the site with engineered fill would eliminate unsafe conditions, rehabilitate the site, and allow for possible future development. EastStar prepared a preliminary RAWP, which was submitted to the DEP. The

DEP's Site Remediation Program thereafter conducted a nine-month review of the preliminary RAWP.

In July 2013, EastStar issued a final RAWP. The RAWP provided for: placement of an engineered fill cap on the berms and lagoons to prevent direct contact of the contaminated sludge with surface water; management of storm water to minimize infiltration of water through the cap and into the sludge; periodic monitoring of the groundwater for contamination; and further investigation of the potential impact to the surrounding wetlands and surface waters during construction of the cap.

The RAWP indicated that the cap would consist of an engineered soil product produced at Soil Safe's temporary Class B recycling facility, the Metro 12 facility, which would be located on the property. Petroleum-contaminated soil from other sites would be transported to the facility, to be mixed with crushed concrete, asphalt, brick, and block (CABB). These materials would be combined with additives that would form a solid soil-cement matrix when mixed with water. The engineered soil cap would minimize percolation and generate a high percentage of storm water run-off.

In November 2012, Rahway Arch submitted an application to the DEP for various permits required to implement the RAWP, including a Flood Hazard Area Individual Permit, pursuant to the Flood Hazard Area Control Act (FHACA), N.J.S.A. 58:16A-50 to -101, and a

hardship exception to certain rules that the DEP promulgated pursuant to the FHACA.

On May 24, 2013, the DEP conditionally approved the application. The DEP later modified its approval and published notice that it had issued the conditional permit, thereby beginning a thirty-day public comment period. Rahway Arch subsequently satisfied the permit conditions. Rahway Arch and Soil Safe also provided additional documentation and analysis to support the application.

The DEP thereafter determined that Rahway Arch had satisfied the criteria for a hardship exception and on February 24, 2014, issued a modified final Flood Hazard Area Individual Permit and hardship exception to Rahway Arch. In addition, on June 2, 2014, the DEP granted the Class B Recycling Center General Approval Permit to Soil Safe for the Metro 12 facility. Baykeeper's appeals followed.

II.

We turn first to Baykeeper's appeal from the DEP's decision to grant Rahway Arch the Flood Hazard Area Individual Permit and hardship exception. Baykeeper's arguments are primarily focused upon the hardship exception.

A.

As noted previously, Rahway Arch applied for hardship exceptions or a finding that exceptions are not needed with regard to three FHACA regulations. It sought exceptions from N.J.A.C. 7:13-11.16, which governs the storage of unsecured materials; N.J.A.C. 7:13-11.17, which pertains to the storage, processing, and placement of hazardous substances; and N.J.A.C. 7:13-11.18, which applies to the storage, processing, and placement of solid waste.[1]

Entities that cannot meet the requirements of the FHACA regulations may seek a hardship exception pursuant to N.J.A.C. 7:13-9.8. An exception may be granted if the applicant satisfies one or more of the requirements in N.J.S.A. 7:13-9.8(a), and the applicant satisfies all of the requirements in N.J.A.C. 7:13-9.8(b).

Under N.J.A.C. 7:13-9.8(a), the applicant must establish that:

> (1) [the DEP has determined] that there is no feasible and prudent alternative to the proposed project, including not pursuing the project, which would avoid or substantially reduce the anticipated adverse effects of the

[1] Effective June 20, 2016, the DEP amended the FHACA rules. See 48 N.J.R. 1067(a) (June 20, 2016). In this opinion, we refer to the FHACA rules that were in effect on February 24, 2014, when the DEP issued the final Flood Hazard Area Individual Permit.

> project, and that granting the hardship exception would not compromise the reasonable requirements of public health, safety and welfare, or the environment;
>
> (2) [the DEP has determined] that the cost of compliance with the requirements . . . is unreasonably high in relation to the environmental benefits that would be achieved by compliance; and/or
>
> (3) [the DEP] and applicant [have agreed] to one or more alternative requirements that, in the judgment of [the DEP], provide equal or better protection to public health, safety and welfare and the environment.
>
> [N.J.A.C. 7:13-9.8(a).]

To meet the requirements in N.J.A.C. 7:13-9.8(b), the applicant must show that:

> (1) Due to an extraordinary situation of the applicant or site condition, compliance . . . would result in an exceptional and/or undue hardship for the applicant;
>
> (2) The proposed activities will not adversely affect the use of contiguous or nearby property;
>
> (3) The proposed activities will not pose a threat to the environment, or to public health, safety and welfare; and
>
> (4) The hardship was not created by any action or inaction of the applicant or its agents.
>
> [N.J.A.C. 7:13-9.8(b).][2]

[2] We note that the DEP eliminated the fourth requirement of N.J.A.C. 7:13-9.8(b) when it amended the FHACA rules. 48 N.J.R. 1067(a) (June 20, 2016). The DEP does not argue that the fourth requirement does not apply in this matter.

B.

On February 14, 2014, Susan Dietrick, Chief of the DEP's Office of Dredging and Sediment Technology, issued detailed findings on Rahway Arch's application. Dietrick found that exceptions from the requirements in N.J.A.C. 7:13-11.18 for the storage, processing, and placement of solid waste, and in N.J.A.C. 7:13-11.16 for storage of unsecured material are not required. Dietrick determined that the petroleum-contaminated soil and the CABB to be processed at Soil Safe's facility are not solid waste because they are subject to the DEP's recycling regulations.

Dietrick noted that the recycled fill to be used in the RAWP meets residential standards for all parameters except for six polynuclear aromatic hydrocarbons (PAHs). Those PAHs currently exist on the site, and the concentrations of these six PAHs in the fill will be less than the concentrations presently on the site. Moreover, the incidental amount of the CABB will be crushed, blended, and used on site. It will comprise less than ten percent of the total weight of material processed at the Soil Safe facility.

Dietrick also found that a hardship exception from the requirements of N.J.A.C. 7:13-11.16 was not required because unsecured materials are not going to be stored in a regulated area. Dietrick determined, however, that an exception from the

requirements in N.J.A.C. 7:13-11.17 for the storage, processing, and placement of hazardous substances is required because the petroleum-contaminated soil is a hazardous substance.

Dietrick found that Rahway Arch had satisfied each of the criteria in N.J.A.C. 7:13-9.8(a). Dietrick noted that the DEP had considered six alternatives to the proposed project: (1) taking no remedial action; (2) excavation of the sludge lagoons and surrounding berms and placement of clean fill on the site; (3) in-situ stabilization and filling with clean fill; (4) filling the sludge lagoons with unprocessed alternative fill from outside sources; (5) filling the sludge lagoons with alternative fill and covering the fill with a geomembrane cap; and (6) use of processed dredge material as alternative fill.

Dietrick considered these alternatives in light of the remediation objectives of the RAWP, which are: elimination of direct contact with the contaminated surface materials and sludge; prevention of water from coming into contact with the contaminated materials as well as the discharge of groundwater or surface water; promoting the run off and "evapotranspiration" of water rather than allowing the water to infiltrate into the lagoons; ensuring the long-term integrity of the berms; elimination of site-safety hazards posed by soft soils, sludge, and ponded water in the

lagoons; and allowing passive use and possible future development of the site.

Dietrick made detailed findings on each of the alternatives and found that they did not achieve the remediation objectives of the RAWP and/or were not feasible. Dietrick further found that the cost of certain alternatives was unreasonably high when considered in light of the environmental benefits to be achieved. She also found that Rahway Arch's proposal provided equal or better protection to the public health, safety and welfare, and the environment than the alternatives.

Dietrick further found that Rahway Arch's proposal met the criteria in N.J.A.C. 7:13-9.8(b). Dietrick found that: (1) due to the extraordinary situation presented, compliance with the FHACA regulations would result in an exceptional and undue hardship for the applicant; (2) the proposed plan would not adversely affect the use of contiguous or nearby property; (3) implementation of the plan will not pose a threat to the environment, or to public health, safety, and welfare; and (4) the hardship was not created by Rahway Arch's actions or those of its agents.

III.

We turn to the arguments presented by Baykeeper in its challenge to the DEP's decision to grant Rahway Arch the permit and hardship exception. We note that the scope of our review in

an appeal from a final decision of an administrative agency is limited. Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9 (2009).

We "will not overturn an administrative action 'in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence.'" Animal Prot. League of N.J. v. N.J. Dep't of Envtl. Prot., 423 N.J. Super. 549, 558 (App. Div. 2011) (quoting In re Carter, 191 N.J. 474, 482 (2007)). When reviewing an agency's action, we consider the following:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Thurber v. City of Burlington, 191 N.J. 487, 501 (2007) (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

Moreover, an administrative agency's action is granted a "strong presumption of reasonableness." Newark v. Nat. Res. Council in Dep't of Envtl. Prot., 82 N.J. 530, 539 (1980). Furthermore, a reviewing court must "extend substantial deference

to an agency's interpretation and application of its own regulations, particularly on technical matters within

The agency's special expertise." Pinelands Pres. All. v. N.J. Dep't of Envtl. Prot., 436 N.J. Super. 510, 524 (App. Div. 2014).

A.

Baykeeper argues that the DEP improperly disregarded the views of its technical staff members when it granted Rahway Arch's exception application. We disagree.

Here, the DEP's technical staff initially determined that Rahway Arch did not meet the hardship-exception criteria in N.J.A.C. 7:13-9.8. However, Rahway Arch and EastStar thereafter provided the DEP with further documentation and analysis to support the application. Dietrick then reconsidered the DEP's staff's initial findings and, as noted previously, found that Rahway Arch had satisfied the criteria for the exception.

We reject Baykeeper's contention that Dietrick was bound by the earlier findings of the DEP's technical staff. We are convinced that it was not arbitrary or capricious for the DEP to reach a different conclusion on the exception application, based on the additional documentation and analysis that Rahway Arch and EastStar provided. We therefore conclude that the DEP did not improperly disregard the initial findings of its technical staff.

B.

Baykeeper argues that Rahway Arch failed to establish the criteria for a hardship exception in N.J.A.C. 7:13-9.8(b)(1). According to Baykeeper, there is no evidence that Rahway Arch faces an extraordinary situation that requires it to remediate the site in the manner proposed.

Baykeeper contends that Rahway Arch failed to show that the proposed RAWP is the only feasible remedy for the site. Baykeeper asserts the DEP should have found that at least one alternative, capping the site with fill and a geomembrane, is feasible, even though it would cost more than Rahway's proposed plan.

In her decision, Dietrick specifically addressed the feasibility and cost of the geomembrane alternative. She found that the fill material would settle and cause the geomembrane to experience tensile stress, thereby allowing water to infiltrate into the underlying material.

Dietrick pointed out that because the membrane must be covered by a layer of soil, a membrane failure might not be detected for a considerable period of time. This would reduce the long-term effectiveness of this alternative. Dietrick added that this alternative would not address the need to stabilize the existing berms. She also noted that the use of a geomembrane could limit

future development of the site because a developer would not be able to construct footings and foundations over the membrane.

We find no merit in Baykeeper's contention that the DEP erroneously rejected this alternative. Dietrick provided sound reasons for rejecting this alternative, and her findings are supported by substantial credible evidence in the record. We conclude the DEP's determination that Rahway Arch's proposal is the preferred alternative is not arbitrary, capricious, or unreasonable.

C.

Next, Baykeeper argues that the DEP erred by finding that the Rahway Arch plan satisfied the requirements of N.J.S.A. 7:13-9.8(b)(3). Baykeeper contends the plan will pose a threat to the environment and the public's health, safety, and welfare. In support of this contention, Baykeeper asserts that the DEP erred by finding that Rahway Arch met the requirements of N.J.A.C. 7:26E-5.2(b). The regulation allows the use of alternative fill from an off-site source in a remediation if certain conditions are met. Ibid.

One of those conditions is the so-called "like-on-like" requirement, which precludes the placement of contaminants not

already found in an "area of concern." N.J.A.C. 7:26E-5.2(b)(1).[3] Another requirement is that the "[t]he maximum contaminant concentration in the alternative fill imported [must be] less than the [seventy-fifth] percentile of the contaminant concentrations at the receiving area of concern." N.J.A.C. 7:26E-5.2(b)(2).

Here, the DEP found that failure to implement a remediation plan for the Rahway Arch property would allow the continuation of a threat to the environment and the public health, safety, and welfare. In her decision, Dietrick noted that the engineered fill that will be used to cap the site will meet residential standards except for the presence of six PAH compounds. Those compounds presently exist on the site in concentrations that exceed residential standards.

Dietrick found that the PAH concentrations in the engineered fill "will be less than half of the existing concentrations, before even taking into account the treatment of the engineered fill product through the solidification/stabilization process." She noted that the United States Environmental Protection Agency considers the solidification/stabilization process to be appropriate for the treatment of soils.

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[3] An "area of concern" includes a location where hazardous substances are known to have been discharged or disposed. N.J.A.C. 7:26E-1.8.

Dietrick also noted that Rahway Arch's LSRP had determined that the engineered fill is "fully protective" and "the only viable option to protect human health and the environment at this site." She stated the capping plan is intended to meet all of the remediation objectives for the site.

In addition, Dietrick noted that the storm water on the property will be collected and managed and not allowed to percolate into the contaminated sludge. Moreover, the berms will be stabilized to prevent failure and release of the sludge. She found that the remediation plan will have no impact on flooding in the area.

Baykeeper claims, however, that the calculations that the LSRP provided to the DEP indicate that the engineered fill will have levels of contaminants that greatly exceed those existing on the site. Baykeeper disputes the LSRP's assertion that the PAH concentrations in the engineered fill will be less than half that of the existing concentrations.

Baykeeper argues that the DEP erred by accepting the LSRP's analysis. It contends Soil Safe will be importing engineered fill that could have concentrations of contaminants that exceed the seventy-fifth percentile of the contaminant concentrations on the site.

The record shows, however, that the LSRP based its analysis upon its review of 1565 batches of soil from Soil Safe's historical database. Each batch consisted of 1000 cubic yards of soil. The LSRP determined that the concentrations of PAHs in about seventy-five percent of the batches had PAH concentrations below the seventy-fifth percentile of the existing contaminate on the site.

We reject Baykeeper's contention that the DEP erred by accepting the LSRP's data and analysis. There is sufficient credible evidence in the record to support the DEP's finding that engineered fill will comply with the agency's technical rules and the use of the engineered fill will not pose a threat to the environment, or the public health, safety, or welfare.

D.

Baykeeper further argues that the DEP failed to consider the potential for release of unprocessed petroleum-contaminated soil during a flood event. Baykeeper contends such a release would pose a threat to the environment and the public health. The DEP found no basis for Bay keeper's concern because all unprocessed fill material will be stored and processed at Soil Safe's Metro 12 recycling facility on the site.

The record shows that the facility is located above the Advisory Base Flood Elevation (ABFE) levels that the Federal Emergency Management Agency (FEMA) established after Superstorm

Sandy. Thus, the unprocessed material will not be stored in a flood hazard area, as defined in the DEP's regulations.

Moreover, the Metro 12 facility has been designed to prevent the release of any petroleum hydrocarbons. All runoff from this area of the property will be directed to detention basins, which have been designed to accommodate runoff in excess of the runoff that could result from a one-hundred-year storm event.

Accordingly, we reject Baykeeper's contention that the DEP failed to consider the potential for the release of unprocessed fill material into a flood hazard area. There is sufficient credible evidence in the record to support the DEP's finding that the Metro 12 recycling facility has been located and designed to prevent release of petroleum hydrocarbons.

E.

Baykeeper also argues that Rahway Arch failed to show that it did not create the hardship that would result if it must comply with the FHACA rules, as required by N.J.A.C. 7:13-9.8(b)(4). Baykeeper asserts that Rahway Arch purchased property that is subject to FHACA rules. According to Baykeeper, any hardship resulting from the need to comply with those rules was self-created.

Even assuming that a purchaser of an already-contaminated property can be viewed as creating the hardship under some

circumstances, that is not the situation here. When Rahway Arch purchased the already-contaminated property in 2010, it was not aware of the remediation that would be required. A complete environmental evaluation was needed. Furthermore, after Rahway Arch purchased the property, FEMA revised the ABFE levels for the site, which placed a large portion of the property in a flood hazard area.

The record therefore shows that Rahway Arch did not purchase the property subject to FHACA rules and then seek to avoid complying with those rules by obtaining a hardship exception. We are convinced that there is sufficient credible evidence in the record to support the DEP's finding that Rahway Arch did not create the hardship resulting from the need to comply with the FHACA rules.

F.

Baykeeper contends the DEP erred by finding that Rahway Arch did not require an exception to the requirements in N.J.A.C. 7:13-11.18, which pertains to the placement, storage, or processing of solid waste. Here, Dietrick found that a hardship exception was not required because the petroleum-contaminated soil and the CABB are not considered solid waste under N.J.A.C. 7:26-1.6(a)(3).

Dietrick noted that the petroleum-contaminated soil and CABB will be regulated under the DEP's recycling regulations. She noted

that the petroleum-contaminated soil will be treated to appropriate standards, which will allow the soil to be used beneficially in the remediation of the property.

Baykeeper argues that the DEP erroneously found that the hardship exception was not required. It contends that Rahway Arch failed to satisfy the general criteria for a solid-waste-facility permitted in N.J.S.A. 7:26-1.7(c). Baykeeper further argues that Rahway Arch failed to meet the specific criteria for exempting beneficial use projects in N.J.A.C. 7:26-1.7(g) and N.J.A.C. 7:26-1.1.

We are not persuaded by these contentions. As noted, the DEP found that the contaminated soil and CABB to be processed and placed on the site are not solid waste under N.J.A.C. 7:26-1.6. These materials will be regulated under the DEP's recycling regulations. Thus, Baykeeper's reliance upon the solid waste regulations is misplaced.

Furthermore, Rahway Arch satisfied the criteria for a hardship exception to the requirements for the placement, storage, or processing of solid waste. Thus, if a hardship exception was required for the solid waste regulations, Rahway Arch met the criteria for the exception.

G.

Baykeeper argues the DEP erred by failing to consider Soil Safe's alleged record of regulatory non-compliance. According to Baykeeper, Soil Safe previously failed to test soils properly before treatment, and it also disregarded certain significant permit conditions. Baykeeper cites Soil Safe's alleged violations at two facilities, one in Salem City and one in Logan Township.

Baykeeper further asserts that Soil Safe has had significant financial issues and financial-reporting irregularities, which the DEP failed to consider. Baykeeper notes that a permit applicant who chooses to self-guarantee performance must provide information to the DEP demonstrating a financial ability to complete the remediation.

We note, however, that Baykeeper's arguments are based only on its unsupported allegations in an unverified letter that Baykeeper submitted to the DEP in October 2012. The DEP nevertheless asserts that Soil Safe is in compliance with its permits at the Logan Township facility, and Soil Safe had nothing to do with problems experienced in the Salem City landfill. Thus, the record does not support Baykeeper's contention that the DEP ignored Soil Safe's alleged record of regulatory non-compliance.

Moreover, there is nothing in the record to support Baykeeper's assertion that Soil Safe has certain significant

financial "issues." In any event, Soil Safe is not the site owner and Rahway Arch is the party ultimately responsible for the remediation. Thus, the requirements in N.J.A.C. 7:26C-5.8, which pertain to the entities that choose to self-guarantee performance do not apply here. Soil Safe is not providing any self-guarantee with respect to the remediation of the Rahway Arch property.

Furthermore, as part of its approval of Soil Safe's Class B recycling center, the DEP required Soil Safe to provide financial assurance in the form of a letter of credit or performance bond to ensure the proper removal, transportation, and disposition of materials used at the Metro 12 site. The DEP also required Soil Safe to maintain appropriate liability insurance, naming the agency as an additional insured under the policy. Thus, the record shows that the DEP reasonably considered Soil Safe's compliance history and financial obligations when making its decision on Rahway Arch's permit. The record also shows that the DEP required Soil Safe to provide financial assurance for its role in the remediation plan. Accordingly, we affirm the grant of the Flood Hazard Area Individual permit and hardship exception to Rahway Arch.

IV.

We turn to Baykeeper's challenge to the DEP's decision to issue the Class B Recycling Center General Approval Permit to Soil

Safe for the Metro 12 facility. As stated previously, we must affirm the DEP's action unless it is arbitrary, capricious or unreasonable, or lacks "fair support in the evidence." Animal Prot. League, 423 N.J. Super. at 558 (quoting In re Carter, 191 N.J. at 482).

A.

Baykeeper argues that the materials Soil Safe will process at the Metro 12 facility are solid waste, subject to the Solid Waste Management Act (SWMA), N.J.S.A. 13:1E-1 to -48, and the DEP's solid waste regulations, N.J.A.C. 7:26-1 to 17.26. Baykeeper contends the DEP erred by determining that the materials are recyclable materials subject to the New Jersey Recycling Act (Recycling Act), N.J.S.A. 13:1E-99.11 to -99.32, and the agency's recycling rules, N.J.A.C. 7:26A-1 to -13.12.

The SWMA defines "solid waste" to include "garbage, refuse, and other discarded materials from industrial, commercial and agricultural operations, and from domestic and community activities, and shall include all other waste materials including liquids, except for source separated recyclable materials." N.J.S.A. 13:1E-3 (emphasis added). The regulations pertaining to solid waste facilities do not apply to recycling operations or recycling centers approved and operated in accordance with the recycling rules. N.J.A.C. 7:26-1.1(a)(8).

Moreover, the Recycling Act defines the term "recycling center" as "any facility designed and operated solely for receiving, storing, processing or transferring source separated recyclable materials." N.J.S.A. 13:1E-99.12. Petroleum-contaminated soil and CABB can be source-separated recyclable materials. Materials at recycling centers are "materials which would otherwise become solid waste," and are returned to the "economic mainstream in the form of raw materials or products." N.J.A.C. 7:26A-1.3.

We reject Baykeeper's contention that the engineered soil is solid waste because it is permanently placed on the Rahway Arch property. The record supports the DEP's view that materials processed at the Metro 12 facility, which would otherwise be treated as solid waste, will be "returned to the economic mainstream in the form of raw materials or product[s]." N.J.A.C. 7:26-1.4.

As noted, the petroleum-contaminated soil will be processed into alternative fill materials or products that will be used to cap the Rahway Arch site. The DEP reasonably found that placement of the alternative fill on the site represents the return of the materials or product to the economic mainstream, even though its placement on the site may be permanent.

Baykeeper further argues that the DEP improperly granted Soil Safe a "beneficial use" exemption from the solid waste permitting rules. The DEP did not, however, grant Soil Safe such an exemption for the Metro 12 facility. As the DEP determined, the facility is a recycling center. Therefore, the solid waste rules applicable to "beneficial use" materials do not apply.

B.

Baykeeper contends that the petroleum-contaminated soil to be processed at the Metro 12 facility is hazardous waste because it may contain a particular PAH, specifically benzo(a)pyrene. Baykeeper asserts that benzo(a)pyrene is a hazardous waste under the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 to 6992k, and the RCRA regulations, specifically 40 C.F.R. § 261.33. Baykeeper argues that only non-hazardous solid waste can qualify as a recyclable material.

We reject this argument for the following reasons. The State's hazardous waste regulations incorporate by reference certain federal hazardous-waste regulations. N.J.A.C. 7:26G-1.4. The soils processed at the Metro 12 facility must first be classified as solid waste before they can be considered hazardous waste. 40 C.F.R. § 261.3(a). Furthermore, 40 C.F.R. § 261.33 sets forth the so-called "P-list" which designates pure and commercial grades of certain unused chemicals as hazardous waste. Any benzo(a)pyrene

in the petroleum-contaminated soils to be processed at the Metro 12 facility would not be considered hazardous waste under the federal regulation because it is not an unused chemical product.

Baykeeper also argues that the petroleum oil and certain PAH compounds that may be found in the contaminated soil are considered to be "hazardous substances" under the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11 to -23.24. Baykeeper contends the petroleum-contaminated soil does not qualify for an exemption from the definition of solid waste because it does not meet the criteria in N.J.A.C. 7:26-1.6(d) for wastes that are "not also hazardous for purposes of the DEP's hazardous waste regulations." However, N.J.A.C. 7:26-1.6(d) only pertains to solid waste and, as noted previously, the source-separated, petroleum-contaminated soil is a Class B recyclable material, not solid waste.

We have considered Baykeeper's other arguments on this issue and find them to be of insufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

C.

Baykeeper contends the engineered soil product will not comply with the DEP's technical requirements for site remediation, which allow the use of "alternative fill" in site remediation. N.J.A.C. 7:26E-5.2(b). Baykeeper raised the same argument in its

challenge to the Flood Hazard Area Individual permit granted to Rahway Arch. We reject these arguments for the reasons stated previously.

D.

Baykeeper also argues that: (1) the DEP did not consider Soil Safe's failure to comply with DEP regulations at other sites; (2) the agency disregarded the environmentally-sensitive nature of the site; (3) the agency improperly disregarded the findings of its own staff and engineers; (4) the DEP's findings are not based on sufficient credible evidence in the record; and (5) the agency's action is arbitrary, capricious, or unreasonable.

We have addressed many of these same arguments in addressing Baykeeper's appeal challenging the issuance of the Flood Hazard Area Individual Permit and the hardship exemption to Rahway Arch. Baykeeper's remaining arguments are without sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

We therefore affirm the DEP's action granting Soil Safe the Class B Recycling Center General Approval Permit.

Affirmed in A-3485-13 and A-5407-13.