SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4177-14T1

R&K ASSOCIATES, LLC,

Petitioner-Respondent/
Cross-Appellant,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent-Respondent,

and

DES CHAMPS LABORATORIES, INC.,

Intervenor-Appellant/
Cross-Respondent.

Argued March 6, 2017 – Decided April 10, 2017

Before Judges Sabatino, Nugent and Haas.

On appeal from the New Jersey Department of Environmental Protection, Docket No. LSR-120001-G000042636.

Daniel L. Schmutter argued the cause for appellant/cross-respondent (Hartman & Winnicki, P.C. and Greenbaum, Rowe, Smith & Davis, LLP, attorneys; Mr. Schmutter and Jack Fersko, of counsel and on the briefs; Steven B. Gladis, on the briefs).

John M. Scagnelli argued the cause for respondent/cross-appellant (Scarinci & Hollenbeck, LLC, attorneys; Mr. Scagnelli, of counsel and on the briefs; William A. Baker, on the briefs).

Kimberly A. Hahn, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Ms. Hahn, on the brief).

PER CURIAM

This is the third appeal stemming from the efforts of Des Champs Laboratories, Inc. ("Des Champs") to obtain from the Department of Environmental Protection (the "DEP") under the Industrial Site Recovery Act ("ISRA"), N.J.S.A. 13:1K-6 to -14, a De Minimis Quantity Exception ("DQE") for property that Des Champs formerly owned and occupied in Livingston Township. The property has been identified as a source of contamination in the local water supply.

In its most recent final agency decision of April 6, 2015, the DEP denied Des Champs the requested DQE. It did so following a three-day hearing before an administrative law judge ("ALJ"). Among other things, the DEP Commissioner determined that Des Champs was not entitled to the exemption because (1) it lacked standing to obtain a DQE after selling the subject property, and (2) it waived its legal ability to pursue a DQE because of its environmental consultant's decision to pursue different avenues

of regulatory relief in 1996 and 1997. The Commissioner rejected Des Champs' request for DQE on these legal grounds, despite the fact that the ALJ had factually determined that Des Champs otherwise would be entitled to a DQE, and despite the fact that the DEP at one point in the chronology had granted the DQE to Des Champs in 2012 before the second remand by this court in 2013.

For the reasons that follow, we reverse the Commissioner's most recent final agency decision and are constrained to remand this once matter again for further consideration. Specifically, we reverse the Commissioner's legal rulings concerning lack-of-standing and waiver. We further direct that the matter be referred back to the ALJ a second time to reconsider the matter. Such a remand is necessary because the ALJ misallocated the burden of proof at the hearing to an objector, Des Champs' successor in title at the site, instead of appropriately placing the burden on Des Champs itself as the DQE applicant.

I.

We shall not repeat this case's extensive factual and procedural history, much of which is detailed at length in this court's published opinion issued five years ago in Des Champs Laboratories, Inc. v. Martin, 427 N.J. Super. 84 (App. Div. 2012) ("Des Champs I") and our subsequent unpublished opinion in R&K Associates, LLC v. New Jersey Department of Environmental

Protection, No. A-0413-12 (App. Div. May 16, 2013) ("Des Champs II"). We fully incorporate those prior opinions here by reference. The following brief chronology will suffice for our present purposes.

For many years through 1990, Des Champs operated the subject property on Okner Parkway in Livingston to manufacture heat recovery ventilators for industrial and residential uses. Des Champs also utilized a nearby second facility in East Hanover, known as the "Farinella" site. The company's operations essentially involved cutting and folding sheets of metal. The machines used to perform the operation were lubricated with hydraulic oil. For a short period of time, Des Champs had a "spray-painting" booth on the site, a process that also involved the use of chemicals.

In 1990, Des Champs mostly ceased its operations at the site. It used the premises thereafter for a limited period of time for storage. It also leased the premises temporarily to a realty company to store furniture and signs.

In 1996, Des Champs retained a consultant, Joseph Pilewski, who prepared a Preliminary Assessment Report ("PAR") that was submitted to the DEP. See Des Champs I, supra, 427 N.J. Super. at 89. His report attested that Des Champs had not used or stored any significant quantities of hazardous substances. In response,

the DEP told Pilewski that no further investigation was warranted at that time, and that Des Champs only needed to file a Negative Declaration Affidavit ("NDA") to close the case. Pilewski accordingly filed an NDA with the DEP on behalf of Des Champs in January 1997. The DEP then issued a "no further action" letter ("NFA").

Several months later, in September 1997, intervenor R&K Associates, Inc. ("R&K") bought the site from Des Champs. R&K intended to use the property as a storage facility for its retail stationery business.

Several years later, beginning in October 2005, contaminated ground water was detected in Livingston Township drinking wells. Investigation revealed that the former Des Champs site was the source of the contamination. The DEP thereupon revoked the NFA approval it had previously granted to Des Champs in 2008.

The DEP's revocation prompted Des Champs to submit a DQE certification to the DEP in 2009. This time, Des Champs acknowledged that it had used various hazardous substances, but in quantities less than amounts that would disqualify it for a DQE.

The DEP initially rejected the DQE application in 2009 because Des Champs had not certified that the property currently was environmentally "clean." On appeal, we reversed that agency

decision in Des Champs I, holding the DEP had no authority under the ISRA statute to impose a requirement of showing a presently contamination-free site as a condition of DQE approval. Id. at 104-08. We accordingly remanded the matter to the DEP for further proceedings. Id. at 108.

In a footnote of our opinion in Des Champs I, we expressly indicated that we were not reaching various other arguments raised on appeal by intervenor R&K. Id. at 108 n.15. Among other things, those arguments included claims by R&K that Des Champs, as a former owner of the property, lacked standing to obtain a DQE. Ibid. We further indicated that we were not addressing R&K's separate unresolved claims of waiver, estoppel, and laches, and instead referred these issues for consideration in the first instance by the DEP. Ibid.

After our initial remand, the DEP granted a DQE in August 2012, but without allowing R&K to participate in the remand process. That omission led to our second opinion remanding the matter again because of the procedural error. See Des Champs II, supra, slip op. at 8. We directed that the DEP reconsider the matter, this time with intervenor R&K's participation. Id., slip op. at 19-20.

Because of persisting factual disputes in the second remand, the DEP referred the matter to an ALJ for a hearing. The ALJ

heard testimony from seven witnesses, and considered various exhibits. Upon considering these proofs, the ALJ factually determined that Des Champs' usage and storage of the hazardous materials on the site was minimal and under the regulatory thresholds, and thus it would have been entitled to a DQE if it had timely applied for one.

The ALJ also found that R&K, as the challenger of Des Champs' request, bore the burden of disproving the company's entitlement to a DQE. The ALJ recognized that burden was substantial because of the passage of more than fifteen years since the time that Des Champs had closed the site. Nevertheless, the ALJ recommended that the DQE be denied because she found that Des Champs lacked standing under ISRA to obtain a DQE as a former owner of the property.

On further administrative review, the DEP Commissioner adopted the ALJ's reasoning in part and modified it in part. The Commissioner recognized that former owners of property at times might have standing to obtain a DQE. Even so, the Commissioner concluded that — under the "unique facts" of this case involving a very long passage of time — Des Champs should not be allowed to obtain a DQE. The Commissioner noted that relevant records that could be germane to the regulatory analysis apparently do not exist. Additionally, the Commissioner found that Des Champs had

waived its chance to seek a DQE years earlier, when its consultant Pilewski did not pursue such an application.

The Commissioner did not address or overturn the ALJ's factual findings. However, he did accept the ALJ's assignment of the burden of proof to R&K at the hearing as the application's challenger.

Des Champs now appeals the agency's most recent denial of the DQE. In particular, Des Champs primarily contests the Commissioner's rulings as to its alleged lack of standing and its supposed waiver of its right to apply for a DQE.

R&K provisionally cross-appeals, arguing that if we hypothetically overturn the Commissioner's rulings on standing and waiver, we nonetheless should not adopt the ALJ's factual findings. R&K urges that we not do so because the ALJ and the DEP improperly misallocated to R&K the burden of proof at the hearing.

II.

We first address what has been described in this case, perhaps imprecisely, as the issue of Des Champs' "standing" to apply for a DQE after selling the property. This is a question of law, as to which the DEP is not entitled to any special deference and one which we review on appeal de novo. See Russo v. Bd. of Trs., Police & Fireman's Ret. Sys., 206 N.J. 14, 27 (2011).

As a threshold matter, we reject Des Champs' procedural claim that our remand in Des Champs I disallowed the agency's consideration of the unresolved question of its standing to pursue a DQE as the site's former owner. Des Champs misreads footnote 15 of our opinion in Des Champs I, which treated its alleged lack of standing as an open issue that remained to be addressed. Des Champs I, supra, 427 N.J. Super. at 108 n.15. We did not restrict the first remand to exclude the standing issue, nor was such a restriction intended.

Turning to the substantive issues, we recognize that there is some textual support within ISRA, the statute that authorizes the DEP to approve DQE applications, for the position that the DQE application process is generally intended for current owners of property rather than former owners. N.J.S.A. 13:1K-8, ISRA's definitional provision, specifies that an "owner" is "any person who owns the real property of an industrial establishment or who owns the industrial establishment." (Emphasis added). The Legislature's use of the present tense for the word "own" provides some indicia of an intent to limit the definition of "owner" to only current owners of the property. See In re A.D., 441 N.J. Super. 403, 410 (App. Div. 2015) ("It is axiomatic that the statutory definition of [a] term excludes unstated meanings of that term."), aff'd ___ N.J. ___ (2017).

We are likewise mindful that, although ISRA does not specifically define "previous owner," that phrase appears in N.J.S.A. 13:1K-9.2, which provides that the "acquiring of title to an industrial establishment by a municipality pursuant to a foreclosure action . . . shall not relieve the previous owner or operator of the industrial establishment of his duty to remediate the industrial establishment." (Emphasis added). Thus, the use of the modifier "previous" before the defined term "owner" in N.J.S.A. 13:1K-9.2 arguably buttresses the claim of the DEP and R&K that the legislative intent was to define "owner" as only a "current owner" of the property.

In addition, N.J.S.A. 13:1K-9 — which sets forth the methods to achieve ISRA compliance in conjunction with a company's close of operation or transfer of business — as well as N.J.S.A. 13:1K-9.7, which sets forth the DQE as an alternative to ISRA compliance, both employ the term "owner." Pursuant to N.J.S.A. 13:1K-9(c), "[t]he owner or operator of an industrial establishment shall . . . submit to the [DEP] for approval a proposed negative declaration, proposed remedial action workplan, or a remedial action workplan certified by a licensed site remediation professional." (emphasis added). Additionally, N.J.S.A. 13:1K-9.7 states that "[t]he owner or operator of an industrial establishment may . . . transfer ownership" "without complying"

with N.J.S.A. 13:1K-9 if "the total quantity of hazardous substances and hazardous wastes . . . at any one time during" the period of ownership "does not exceed 500 pounds or 55 gallons" or "if, in the aggregate, hydraulic or lubricating oil, does not exceed 220 gallons."

As we recognized in Des Champs I, as a policy matter the Legislature sought "to improve upon [the prior statutory scheme] by streamlining the regulatory process," N.J.S.A. 13:1K-7 (emphasis added), and "promote certainty" in that process. Des Champs I, supra, 427 N.J. Super. at 96 (citation omitted). The Legislature specifically enacted the DQE provision, N.J.S.A. 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." Id. at 94; see also Fed. Pac. Elec. Co. v. N.J. Dep't of Envtl. Prot., 334 N.J. Super. 323, 333-34 (App. Div. 2000) (stating ISRA was adopted "in response to criticism that the [DEP's] complicated program [under pre-ISRA law] had stagnated the transfer of contaminated property and had created other problems.").

Even so, there 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.[1] 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. In light of that possibility, having essentially

[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 Envtl. Prot. Div. of Hazardous Waste Mgmt., 237 N.J. Super. 359, 367 (App. Div. 1989).

retrospective aspects, the definition of "owner", as it appears in N.J.S.A. 13:1K-9 and N.J.S.A. 13:1K-9.7, logically should be read to include former owners. See Simpkins v. Saiani, 356 N.J. Super. 26, 31 (App. Div. 2002) (explaining courts must be "mindful that in some instances literal wording must give way to clearly stated legislative intent").

For example, Simpkins concerned the interpretation of N.J.S.A. 2A:17:-56.23b, a statutory provision providing that docketed child support judgments will be considered liens against the net proceeds of any recovery from a civil claim. Id. at 28. That statute defined "net proceeds" as "any amount of money in excess of $2,000, payable to the prevailing party or beneficiary after . . . 'litigation costs." Ibid. (quoting N.J.S.A. 2A:17-56.23b(a)). The term "net proceeds" appeared throughout N.J.S.A. 2A:17-56.23b. Id. at 32. On appeal, the Administrative Office of the Courts ("AOC") argued that the statutory definition of net proceeds should be applied in N.J.S.A. 2A:17-56.23b(b)(2), but sought to have this court "ignore the definition of 'net proceeds' contained within the statute" in defining the term "in many other passages." Ibid.; see N.J.S.A. 2A:17-56.23b(a)-(f).

In rejecting the argument in Simpkins that in certain subsections of N.J.S.A. 2A:17-56.23(b) the term "net proceeds" should include the "entire proceeds available to the prevailing

party after deduction of litigation costs," we reasoned that, under such an interpretation, "a recovering party entitled to $2,001 after deduction of litigation expenses [would] be obligated to pay that entire amount towards child support arrearages, while a party entitled to $2,000 [would] pay nothing." Id. at 35-36. We held that the restrictive proffered interpretation undermined the "presump[tion that] the Legislature intended to achieve a reasonable result," and the requirement that a court "should use common sense" to "avoid absurd results" while interpreting statutory language. Ibid.

The present case is analogous in several respects to Simpkins. Here, in her initial decision, the ALJ ruled that "ISRA does not provide a legal avenue by which Des Champs, a past owner or operator, can claim an exemption from ISRA years after the fact." The ALJ reached that conclusion because "[t]here is simply nothing in the ISRA mandates and options that permit ISRA compliance after such a triggering event," and "the terms 'owners' and 'operators' must be understood within the context of the entire ISRA statutory scheme which is strictly founded upon the imposition of a 'condition precedent to closing.'"

Nevertheless, in the DEP's final decision, the Commissioner did not fully endorse the ALJ's reasoning on the standing issue. Instead, he modified the ALJ's finding of lack of standing to "the

unique facts of this case," explaining in a footnote that the DEP would "not specifically address nor determine whether this legal conclusion necessarily applies in all cases [] as each ISRA case has unique facts which must be individually analyzed by the [DEP]." In this regard, the Commissioner observed that (1) due to "a lapse of nearly 20 years" since Des Champs' original application for a negative declaration, (2) "there is little or no documentation as to actual hazardous substance usage/storage," and (3) because the DEP's rescission letter "was abundantly clear about the next steps that needed to be taken by Des Champs, none of which included an option to file for a DQE," Des Champs lacked "standing" to apply for a DQE.

Just as in Simpkins, where defining the term "net proceeds" differently in different sub-sections of the same statute would lead to an unfair or illogical result, see Simpkins, supra, 356 N.J. Super. at 35-36, allowing the DEP here to adhere to a restrictive definition of "owner" for standing purposes would be fundamentally unfair. Adopting such a narrow interpretation would also detract from the stated and well recognized objectives of the ISRA statute, i.e., to avoid imposing heavy regulatory burdens on parties that only historically stored or generated minimal quantities of hazardous substance at a particular site. See Des Champs I, supra, 427 N.J. Super. at 103-04.

The Commissioner seemingly acknowledged those concerns by attempting to limit his lack-of-standing ruling to the specific facts of this case. But endorsing such a "one-time-only" exception in this particular case would result in an uneven and arbitrary application of the statute.

Like the government generally, administrative agencies must not act arbitrarily or capriciously. See, e.g., Berk Cohen Assocs. at Rustic Vill., LLC v. Borough of Clayton, 199 N.J. 432, 441 (2009). 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.[2]

We are mindful that Des Champs' delay in applying for a DQE has possibly resulted in the absence of documentary evidence[3] and

[2] Indeed, when the DEP approved a DQE for Des Champs after the first remand, it did not apparently question Des Champs' ability as a former owner to obtain such relief.

[3] Des Champs contends that the absence of certain records concerning the site can be explained, not by the passage of time, but rather because records documenting exactly which amounts of chemicals were used at the Livingston site never existed in the first place. For instance, it points out that some purchased chemicals were used at both the Livingston and Farinella sites,

failed memories of witnesses. 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.

For these many reasons, we reverse the Commissioner's legal ruling that Des Champs lacks standing to obtain a DQE.

III.

We reach a similar conclusion with respect to the Commissioner's determination that Des Champs "waived" its ability to seek a DQE because its consultant Pilewski did not seek one in the mid-1990s and instead pursued alternative regulatory avenues with the DEP at that time.

It is well established that waiver is a "voluntary relinquishment of a known right" evidenced by a clear, unequivocal and decisive act from which an intention to relinquish the right can be based. Sroczynski v. Milek, 197 N.J. 36, 63-64 (2008) (quoting Knorr v. Smeal, 178 N.J. 169, 177 (2003)). Waiver "implies an election by the party to dispense with something of value, or to forego some advantage which [that party] might [sic]

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and that purchase orders did not reflect how the quantity was allocated. The DEP and R&K dispute that account and point to what they contend are conflicting assertions in Des Champs' owner's testimony. We need not resolve that contention here.

have demanded or insisted on." Clarke v. Clarke ex rel. Constine, 359 N.J. Super. 562, 571 (App. Div. 2003) (quoting W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958)). A party must have full knowledge of its legal rights and an intent to waive those rights for the waiver to be effective. Sroczynski, supra, 197 N.J. at 63-64

"A waiver cannot be divined but, instead, must be the product of objective proofs: 'The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference.'" Ibid. (alteration in original) (citation omitted) (requiring a party to "have full knowledge of his legal rights and inten[d] to surrender those rights"). Thus, a party with "a full knowledge of the right," County of Morris v. Fauver, 153 N.J. 80, 104-05 (1998), will be not found to have waived the right unless it did "so clearly, unequivocally, and decisively." Knorr, supra, 178 N.J. at 177.

Here, in her initial decision, the ALJ found that Des Champs "did not waive some legal right to seek the DQE" because the ALJ "had difficulty characterizing the Negative Declaration or the DQE as 'rights' when they are more appropriately viewed as regulatory options or alternatives." The ALJ explained that the objector, R&K, failed to provide a basis of law or fact for its argument

that "choosing one pathway to satisfy[] ISRA necessarily means that a party has waived any other pathway."

In overriding the ALJ's recommended decision on this point regarding waiver, the Commissioner determined that "[c]ontrary to the ALJ's conclusion . . . , the DQE . . . is more properly viewed as a statutory, legal right available to current owners or operators who meet the stringent criteria for a DQE, as opposed to a 'regulatory option[] or alternative[].'" The Commissioner reasoned that "[o]nce a party chooses not to pursue a DQE, for whatever reason, it is reasonable, without any evidence to the contrary, to conclude that the party has voluntarily waived its right to pursue that statutory right."

Specifically on this point, the Commissioner assumed that Des Champs must have "concluded that the DQE was not a viable path forward in 1996." Hence, according to the Commissioner, it was reasonable to conclude that "Des Champs had, at the very least, imputed knowledge of the DQE in 1996, and voluntarily waived its statutory right to pursue a DQE when it made a legally crucial decision in 1996 to pursue ISRA compliance through traditional (and considerably more expensive) means." The Commissioner stated that "[t]here is no reason that a party as sophisticated as Des Champs should get a nunc pro tunc 'do-over' here."

With all due deference to the Commissioner as the agency head, the factual record developed before the ALJ here is insufficient to support these findings of waiver. Des Champs' owner and CEO testified at the hearing that he "didn't know about the De Minimis Quantity Exemption in 1996." He further agreed that "[n]obody told" him that the company might qualify for a DQE. Moreover, Des Champs' expert Pilewski testified that he "did not know" why he chose not to submit a DQE on behalf of Des Champs, or whether he had "formed an opinion" at the time as to whether Des Champs was entitled to a DQE. Pilewski did attest that "if [he had] determined that they [sic] were entitled to a [DQE], [Des Champs'] wouldn't have filed [a PAR]," although he was unable to elaborate on that point on cross-examination.

Given this testimony, which was unrefuted by any other witnesses, as well as the stakes and equities involved, we conclude there are insufficient grounds to hold that Des Champs "voluntarily relinquished" its right to apply for a DQE in the mid-1990s. There was no "clear, unequivocal and decisive act" committed by Des Champs or its agent demonstrative of such relinquishment.[4]

[4] Again, there 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.

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.

The statutory scheme does not make a DQE mutually exclusive with other regulatory remedies such as an NFA. In addition, Des Champs and its expert had no reason to presume in the mid-1990s that its accepted NDA would be retroactively nullified by the DEP nearly a decade later. We accordingly reverse the finding of waiver.

IV.

As we have already noted, the ALJ imposed on R&K, as the objecting party at the administrative hearing, the burden to <u>disprove</u> that Des Champs was entitled to a DQE. The Commissioner, without legal analysis, accepted that allocation of the burden in his final agency decision. We respectfully conclude that the burden was pointed by the ALJ and the Commissioner in the wrong direction.

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.

Here, the ALJ shifted the evidential burden from Des Champs, the DQE applicant, to R&K, the objector, largely because of the idiosyncratic history of this case. Many years have elapsed, during which the dispute has progressed back and forth between the administrative agency and this court.

We recognized that history in Des Champs I, where we noted the streamlined and largely self-executing notice filing obligations of a DQE applicant, and the DEP's responsibility to evaluate whether the information submitted by the applicant was sufficient, complete, and accurate. Des Champs I, supra, 427 N.J. Super. at 98-101. 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. Indeed, the Commissioner appreciated the "tall task" that the ALJ had imposed on R&K as an objector by requiring it, "a company with no real knowledge of Des Champs' previous operations to prove its ineligibility [approximately] 20 years later[.]"

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.

In light of this fundamental error of burden allocation, we are constrained to remand the matter so that the ALJ now can consider the proofs in a manner that appropriately requires Des Champs to show its entitlement to a DQE by a preponderance of the evidence. We accordingly remand the matter to the DEP to make such a referral to the ALJ. The ALJ shall have the discretion to reopen the record as she may see fit in order to address more fully the pertinent issues. Counsel promptly shall provide courtesy copies of their appellate briefs and appendices to assist her in that endeavor. Following the remand, any aggrieved

party(ies) may seek further review by the Commissioner, and, beyond that, through an appeal in this court.

A final word. We are cognizant that this matter has been appealed three times and now has been remanded three times, albeit on different and independent legal grounds in each instance. The DEP has twice rejected Des Champs' request for a DQE and has once approved it. We are likewise mindful of the costs and resources that have been and will continue to be devoted to the litigation. In light of this, we urge the agency and the parties to explore whether an amicable resolution of the "global" issues persisting here might be achieved, including the respective clean-up liabilities, if any, of this contaminated site's former and present owners, Des Champs and R&K.[5]

Reversed and remanded. We do not retain jurisdiction.

[5] Putting aside ISRA compliance issues, we offer no opinion — advisory or otherwise — as to whether and to what extent Des Champs and R&K may be separately liable for clean-up costs or remedial action under the Spill Act, N.J.S.A. 58:10-23.11 to -23.11z; see also Des Champs I, supra, 427 N.J. Super. at 92 n.7 (likewise declining to resolve Spill Act liability issues concerning this site). Counsel did advise us at oral argument that a Spill Act directive has been issued for the site.