



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SPILL FUND ARBITRATION

DECISION

OAL DKT. NO. ESR-SF 7534-11

AGENCY DKT. NO. 24712

ROBERT JUROMSKI,

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
CONTRACT AND FUND MANAGEMENT,**

Respondent.

Janine Bauer, Esq., for petitioners (Szaferman, Lakind, Blumstein and Blader,
attorneys)

Mark D. Oshinksie, Deputy Attorney General, for respondent (Jeffrey S. Chiesa,
Attorney General of New Jersey, attorney)

Record Closed: April 2, 2013

Decided: May 10, 2013

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about December 23, 2008, the New Jersey Department of Environmental

Protection (DEP) served upon Robert Juromski and Mary Jane Juromski (“petitioners”) a Directive and Notice to Insurers (JUR-3, hereafter “Directive”), advising the Juromskis that the DEP “believes” them to be responsible under the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., for chlorinated compounds, including 1,1,1-trichloroethane and 1,1-dichloroethene, contamination above the Department’s Safe Drinking Water Maximum Contaminant Levels (MCLs) in the vicinity of 39 42nd Street, Readington Township, also known as Block 43, Lot 25 (Jur-3). The Directive further states that “[p]ursuant to N.J.S.A. 58:10-23.11g.c., Robert J. Juromski and Mary Jane Juromski are strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs.” (Directive, ¶15.) The Juromskis contest their liability under the Spill Act, and assert that they are not responsible for the cleanup and removal of any hazardous substances, and not responsible to reimburse the Spill Fund for any expenditures made by the Spill Fund to pay for treatment, sampling and maintenance and operation of wells in the 42nd Street area. The liability of Robert or Mary Jane Juromski for the alleged discharge that caused the contamination of the wells with 1,1,1-trichloroethane and 1,1-dichloroethene has not been determined, and will not be determined by this arbitration, nor has responsibility to clean up and remove the contamination been determined. See Exxon Corp. v. Mack, 237 N.J. Super. 16, 27–28 (App. Div. 1989).

This matter was initially assigned to Hon. Patricia Kerins, ALJ, and subsequently reassigned to Hon. Donald J. Stein, ALJ, and scheduled for hearing on February 19, and 20, 2013. Because Judge Stein was appointed to the Superior Court of New Jersey on February 11, 2013, and was no longer available to conduct this arbitration, I ruled on the Juromskis’ Notice of Motion for Stay or Adjournment Pending Outcome of a Superior Court Declaratory Judgment Action. After reviewing the submissions and based upon the guidance given in the case entitled In re Directive of N.J. Dep’t of Env’tl. Prot., 110 N.J. 69 (1988), I concluded that it was inappropriate to delay these proceedings in order to permit the Juromskis to seek pre-enforcement review of a Spill Act directive. Accordingly, I denied the Juromskis’ motion for a stay. However, with the consent of the parties, I adjourned and rescheduled the arbitration for March 1, and 11, 2013. I was then assigned to conduct the arbitration hearing, which was conducted on the above scheduled dates and was concluded.

N.J.A.C. 7:1J-9.16(a) requires that the arbitration decision be rendered within sixty days after the arbitrator takes the oath of office, unless the parties otherwise agree in writing to an extension. By written agreement executed in counterparts, the attorneys for the parties agreed that the time for rendering a decision be extended for ten days, from April 30, 2013, until May 10, 2013.

PRELIMINARY ISSUES

Prior to and at the commencement of the arbitration proceeding, attorney for the Juromskis made certain motions which are addressed as preliminary issues as follows. Attorney for the Juromskis requested a ruling with respect to the motion that there was a lack of jurisdiction to proceed with this matter. The basis of the motion was the contention that a written notice of a claim is jurisdictional and that the letter from the DEP to the Juromskis dated March 31, 2011, (DEP-6) only referred to one property and that it was otherwise lacking as a proper notification to give jurisdiction in this case. In addition, attorney for the Juromskis challenged the ability of the Office of Administrative Law to function as arbitrator in compliance with the requirements of N.J.S.A. 58:10-23.11n(a), which specifies that boards of arbitration shall be convened by the administrator of the Spill Fund to conduct the arbitration. I reserved decision on these issues at the hearing.

1. Whether written notice of a claim is a prerequisite for arbitration under the Spill Act.

Attorney for the Juromskis moved to dismiss the arbitration proceeding based on the contention that the DEP has failed to provide petitioners with a written notice of claim(s) explaining the nature of the claim(s), the claimants or the full amount(s) requested to be reimbursed. (Pet. Brief at 18.) I have determined that there is no authority for the proposition that “the OAL is without jurisdiction to proceed in this matter because DEP has still not provided Petitioners with a written notice of claim(s) explaining the nature of the claim(s), the claimants or the full amount(s) requested to be reimbursed.” (Ibid.)

Attorney for the Juromskis relies on Exxon v. Mack, 237 N.J. Super. 16 (App. Div. 1989), in support of this position. At issue in Exxon is whether a withdrawal by the DEP from the Spill Fund constitutes a “claim.” In that case, BP argued that even though no third parties had claimed damages from the Spill Fund to remediate damages, the withdrawals by the DEP constituted a “claim,” thus triggering their right to arbitration. However, the court found that the remedial rationale of the Act authorized the DEP to draw from the Fund, and did not constitute a “claim.” Thus, BP was not entitled to arbitration.

However, see, N.J.A.C. 7:1J-7.1(a), which provides that if the administrator determines that a person is a potentially responsible party in connection with a discharge that is the subject of a claim, the administrator shall provide such person with notice. Written notice is not a prerequisite for jurisdiction. There are three conditions that must exist before arbitration may occur: (1) there must be a demand for arbitration; (2) there must be a claim presented to the Fund for damage or cleanup and removal costs, and (3) someone must contest the validity or amount of the claim presented to the Fund. Exxon, supra, 237 N.J. Super. at 22. Further, N.J.S.A. 58:10-23.11n(a) articulates the mandatory conditions for the convening of a board of arbitration, and written notice is not one of the prerequisites:

[b]oards of arbitration shall be convened by the administrator when persons alleged to have caused the discharge, the administrator or other persons contest the validity or amount of damage claims or cleanup and removal costs presented to the fund for payment. If the source of discharge is not known, any person may contest such claims presented for payment to the fund.

[N.J.S.A. 58:10-23.11n(a).]

Finally, N.J.S.A. 58:10-23.11(k) governs claims, forms and procedures and notice. It states, in pertinent part, “[u]pon receipt of any claim, the administrator shall as soon as practicable inform all affected parties of the claim.” N.J.S.A. 58:10-23.11(k). Thus, a failure to give notice is a defect that can be cured.

There is no case law directly addressing this issue. However, based upon my interpretation of the above provisions, I **CONCLUDE** that there is jurisdiction for the conducting of this arbitration proceeding.

2. Whether it is proper for the OAL to function as a “board of arbitration.”

N.J.S.A. 58:10-23.11n(b) provides, “In the discretion of the administrator, a board of arbitration may consist of three persons or a single neutral person.” (Emphasis added.) Petitioner claim that it must first consent to a one-person arbitrator, or consent to the DEP’s referral of this matter to the OAL, before the OAL may acquire jurisdiction. This is an incorrect reading of the regulations. N.J.S.A. 58:10-23.11n(b) provides that if the administrator decides to use a three-person board, as opposed to a single neutral person, then the three-person panel shall consist of two arbitrators—one nominated by each party—and a third additional person whom both parties agree to serve as chairperson. In the event that the petitioner and respondent cannot agree to a third additional person, then they must submit to the American Arbitration Association. Ibid. In this matter, the administrator has opted to utilize a one-person neutral panel, i.e., an administrative law judge (ALJ) at the OAL. Therefore, the respondent need not consent to the OAL’s jurisdiction. Jurisdiction is proper.

ALJ’s at the OAL have issued arbitration decisions in many Spill Act cases. For instance, in Atlantic City Airport v. NJDEP, ESF 0979-95, Summary Decision, Spill Fund Arbitration, (October 6, 2000), <<http://njlaw.rutgers.edu/collections/oal/>>, the administrator of the Spill Fund transmitted the matter to the OAL for an arbitration proceeding by an ALJ sitting as a single-member board of arbitration pursuant to N.J.S.A. 58:10-23.11n. See also Corestates/New Jersey Nat’l Bank v. DEP, ESF 0611-97, Arbitration Decision (November 26, 1997), <<http://njlaw.rutgers.edu/collections/oal/>> (stating that the director of the OAL may appoint an ALJ to serve as sole arbitrator, pursuant to an agreement between the administrator and the director providing for the OAL to arbitrate Spill Fund claims); Exxon Co. v. DEP, ESF 6573-00, Arbitrator’s Decision (April 30, 2002), <<http://njlaw.rutgers.edu/collections/oal/>>.

Determinations by an ALJ arbitrator are final. N.J.S.A. 58:10-23.11n(g). Any action for judicial review shall be filed in the Appellate Division within thirty days of the filing of decision. Ibid.

For the above reasons, I **CONCLUDE** that I may properly function as the arbitrator in this arbitration proceeding.

3. What standards are applicable in this matter?

A. With respect to the individual claims or expenditures for which the respondent is seeking reimbursement, N.J.A.C. 7:1J-2.3 provides:

No claim shall be eligible for compensation from the Fund unless the claimant shows by a preponderance of the evidence that the claim satisfies all requirements for eligibility under the Act and this chapter, and that the amount of the claim correctly reflects and is reasonable in relation to the damages which the claimant has sustained.

In addition, N.J.A.C. 7:1J-9.16(e) provides that a claim may be denied by the arbitrator upon a finding that a particular claim is invalid for any reason.

During the arbitration proceeding, the Juromskis raised questions with respect to the decisions made by the Department in choosing the appropriate method to remediate the contamination of individual wells. Any determination of the reasonableness of the Department's choices involves a consideration of the obligations and responsibilities imposed on the Department by law.

In the preamble to the New Jersey Spill Compensation and Control Act ("the Spill Act"), the Legislature made detailed findings and a declaration of public policy to guide interpretation of the Act. Specifically, the Legislature declared that New Jersey's lands and waters are "a unique and delicately balanced resource," deserving of "protection and preservation" by the State as "trustee, for the benefit of its citizens," and that the discharge of hazardous substances constitutes a threat to the economy and environment of this State. NJDEP v. Exxon Mobil, 393 N.J. Super. 388, 399 (2007)

(citing N.J.S.A. 58:10-23.11a). The regulations enacted pursuant to the Spill Act are to be liberally construed to effect their beneficent objectives, which include protection of the public health, safety, and welfare. N.J.A.C. 7:1J-1.2; NJDEP v. Dimant, 212 N.J. 153, 161 (2012); NJDEP v. Palermo's Thriftway Market, EWR 0402-02, Initial Decision (April 12, 2006), adopted, Comm'r (May 26, 2006), <<http://njlaw.rutgers.edu/collections/oal/>>.

The Spill Act is quite comprehensive in its scope and vests the New Jersey Department of Environmental Protection with broad implied powers. Exxon Mobil, supra, 393 N.J. Super. at 400. Whenever the Department acts to clean up and remove a discharge, it is authorized to draw upon the money available in the New Jersey Spill Compensation Fund ("the Fund"). N.J.S.A. 58:10-23.11f. The Legislature intended that such money be used "to pay promptly for all cleanup and removal costs incurred by the department in cleaning up, in removing or in minimizing damage caused by such discharge." Ibid.; N.J.S.A. 58:10-123.11a. "Cleanup and removal costs" are defined as all costs associated with a discharge, incurred by the state in the taking of reasonable measures to prevent or mitigate damages to the public health, safety, or welfare." N.J.S.A. 58:10-23.11b. The scope of what constitute cleanup and removal costs is broad, and has been interpreted to include administrative oversight costs, the cost of legal services necessary to remediate an environmental harm, and the costs of natural resource physical restoration. Exxon, supra, 393 N.J. Super. at 403.

Safeguarding the public health, safety and welfare has long been considered an essential governmental function within the state police power, and environmental protection laws, given their purpose of protection of the public health, etc., should be liberally construed to bring about their beneficent purposes. Lom-Ran Corp. v. Dep't of Env'tl. Prot., 163 N.J. Super. 376, 384–85, 388 (App. Div. 1978) (citing Dep't of Health, State of N.J. v. Owens-Corning Fiberglass Corp., 100 N.J. Super. 366, 381–82 (App. Div. 1968); Borough of West Caldwell v. Caldwell, 26 N.J. 9, 30 (1965)); see also In re Vineland Chem. Co., 243 N.J. Super. 285, 303 (App. Div.) (citing In re Env'tl. Prot. Dep't, 177 N.J. Super. 304, 318 (App. Div. 1981)), certif. denied, 127 N.J. 323 (1990).

The grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities. N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978), quoted in In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 415, 431 (2004). As a result, it is well settled that, when the Legislature grants express power to regulate, it also grants incidental authority fairly and reasonably necessary or appropriate to make such regulation effective. Lane v. Holderman, 23 N.J. 304, 315 (1957) (citations omitted). Thus, administrative agencies acting within their area of expertise are accorded considerable deference. State v. State Supervisory Emps. Ass'n, 78 N.J. 54, 83 (1978).

B. In this case, both parties relied on expert opinion to support their respective positions. The New Jersey Rules of Evidence provide standards relative to admissibility and qualification of experts to testify.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

[N.J.R.E. 702.]

The court's responsibility includes determining the soundness of the expert's methodology and conclusion, but without substituting its opinion for that of the expert. Landrigan v. Celotex Corp., 127 N.J. 404, 421 (1992); Caterinicchio v. Pittsburgh Corning Corp., 127 N.J. Super. 428, 434 (1992). Determinations relative to the credibility and weight of an expert's opinion testimony rest with the trier of fact. And, unless contrary to common sense, common knowledge or recognized physical laws or based on primary facts absent from the record, the expert's testimony is to be evaluated by the jury or trier of fact like other testimony. Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 85–86 (App. Div. 1961).

SUMMARY OF HEARING TESTIMONY

Testimony of Donald Kakas

Donald Kakas, Section Chief with the Fund Management Unit of the New Jersey Department of Education, testified. He explained that with respect to the 42nd Street Readington the claims all relate to the installation of a point of entry treatment (POET) system on individual wells providing water to homes. Cindy Pinchuk who passed away approximately six years ago handled and evaluated all of these claims until her death. Because of her unavailability Mr. Kakas is testifying on behalf of the DEP.

Mr. Kakas explained that the claims involved expenditures for water sampling, installation of the treatment equipment, and ongoing operation and maintenance costs of the treatment systems on individual wells.

Mr. Kakas testified to the sequence of events that occurred in this matter. Water samples were taken from the existing water supply, in this case from the wells at the individual homes in the area. Testing of the samples showed contamination of the wells by volatile organics. This required a second sample in order to confirm this result and these second samples again showed contamination. In this case the contamination levels were above the safe drinking water standards. Such volatile organic contaminants were detected from 1989 to 1992 or 1993. The acceptable levels for 1,1,1-trichloroethane (TCA) is thirty parts per billion and for 1,1-dichloroethene (DCE) it is two parts per billion. The levels of contamination in the wells were in the hundreds of parts per billion for both volatile organic chemicals. They were in the range of three hundred to seven hundred parts per billion; thus they were significantly above the standard.

The contaminated wells and homes are shown on a Google Earth aerial photograph (DEP-1) which shows a number of homes in Readington Township in Hunterdon County involved in these claims. Contaminated wells which are involved in this Arbitration are shown at 33 42nd Second Street (Pajunas), 42 42nd Street (Adams), 35 42nd Street (Juromski rental), 37 42nd Street (Juromski residence), 39 42nd Street

(Juromski rental), and 29 42nd Street (Bianco residence). There is another residence which Mr. Kakas referred to as the Wessel property which is not on the map but had a contaminated well. He explained that the properties on this map filed claims with the Spill Fund but further clarified that Readington Township was involved with the POET systems installations and operation because of the widespread contamination of wells and drinking water from various sources found throughout Readington Township, and these claims were involved because they were part of a larger area. The claims were reviewed by the Department and determined to be valid. The Department decided to take action to correct the contamination problem in order to protect the public health, safety and welfare by installing point of entry treatment systems on individual wells at the 42nd Street contamination site.

Mr. Kakas was questioned concerning the Department's consideration of alternatives to dealing with the contamination of the drinking water at these and other sites. He identified a Memorandum from John Preczewski, Chief, Bureau of Water Supply, to David Mack, Administrator, Environmental Claims Administration, dated August 13, 1990, (DEP 2), and an Evaluation of Alternative Water Supply by Lawler, Matusky & Skelly, Engineers, conducted on behalf of the Bureau of Water Supply in July 1990 (DEP-3). The engineering study evaluating various alternative water supplies in Readington Township (DEP 3) was summarized in the subsequent August 1990 review and evaluation by the Bureau of Water Supply (DEP 2). It was determined that the installation of POETs was the best method of treating the contamination of the seven or eight properties which are the subject of this arbitration.

Mr. Kakas again identified the properties by the names of the individuals residing in each of the premises, Adams, Pajunas, Gonzalez, Wessel, Bianco, and the three Juromski properties that were ultimately rolled into two. He explained that the reason the three Juromski properties were rolled into two is that the two rental units are served by a single well. As a result of the review of the studies and as a result of a cost benefit analysis it was determined that the POETs would be installed at each of the wells at the properties. Most of these installations occurred and begin operation in the early 1990s, and a few of them remain in existence. Some twenty-three years later some of the wells are no longer contaminated, such as the Bianco property. In addition, as to the

Gonzalez property, the home was sold and the new owner is not participating. The rest of these remain open. However, the Wessel property will be closed because it is no longer contaminated as testing has shown it to be below the MCL.

The costs incurred by the Spill Fund included those for installation and sampling. First there was sampling of well water and then sampling of treated water a few times per year. Other costs include the maintenance of air strippers and the maintenance of granulated activated carbon (GAC) systems which polish the water to make certain there are no contaminants in the water used by the residents. The amounts paid out up to 2008 was approximately \$212,000.00, and approximately \$20,000.00 more was paid out after 2008.

Mr. Kakas identified the tabulation of these expenditures that was created by the consultant for the Juromskis and lists each of the expenditures by reference to the involved premises and type of expenditure (DEP-4). He testified that he has compared this tabulation with the invoices in the possession of the DEP and, for the most part, the numbers and descriptions are accurate. Mr. Kakas did testify that ten or fifteen of the invoices that are in DEP records are not included in this tabulation (DEP 4) and in other cases, invoices are included that are not in DEP records. The tabulation goes up to the year 2012 and their total is \$230,000.00 for all claims. This consists of \$212,000.00 in claims through 2008 and \$25,000.00 in claims between 2008 and 2012. He testified that a few water samples in the DEP data base are not in the tabulation (DEP 4). Also a few air stripper maintenance expenditures are not in the tabulation (DEP 4). However, the tabulation is 90 percent accurate.

Mr. Kakas acknowledged that in one case, the Wessel residence, contamination just above the standard for DCE showed on one occasion but has not been demonstrated since that time. Although a POET system was properly installed initially, subsequent samples revealed that the contamination had decreased and the POET system was no longer needed. The amount expended at Wessel is \$25,000.00 to \$27,000.00 over the course of time that it was installed. He compared this with a data base called the Spill Fund Tracker maintained by the Department. It was acknowledged that this data base was not provided by the Department to the Juromskis as part of

discovery. In response to discussions concerning the validity of the claims in the compilation the Deputy Attorney General stated his agreement that the compilation (DEP 4) is correct and comprehensive.

Mr. Kakas testified that the Juromskis were notified by letter dated March 31, 2011, of the Notice of Claim and the notice that they were determined to be the responsible party. He identified a letter notifying the Juromskis that the spill compensation fund determined that the Juromskis are the responsible party in connection with discharges of contamination at Readington Township, 42nd Street (DEP-6).

On cross-examination, Mr. Kakas testified that Cindy Pinchuk was a claims manager and she determined the validity of all claims. His personal review occurred over the last two years as the claims manager. The claims manager is obligated to compare invoices to water test results to determine if there is still a problem justifying the continued payment for operation and maintenance. If the first sample is above the maximum contaminant level then it is necessary to do a second sample to confirm. He acknowledged he did not see in the files a second sample for the Wessel property when the POET system was installed.

Ms. Kakas clarified that the engineering study (DEP 3) included other areas of contamination that are not related to those which he labeled the "42nd Street Contamination" site. He also acknowledged that with respect to the Bianco site the DEP Spill Fund vendor invoice data shows no contaminants whatsoever at the Bianco residence from 1989 through the present date (DEP-4 at 3 & 4 of 39). When questioned about the Wessel residence, he reviewed the compilation DEP 4) and confirmed there were no entries for Wessel. As a result he was requested to review copies of a vendor invoice data set for the Wessel residence supplied by the Juromskis (JUR-1). He testified that this data showed only one exceedance of the MCL for the Wessel residence. This was the result of a sample taken on June 26, 1989, which showed an exceedance of 2.1 for DCE, the MCL being 2.0. POET was installed based on the 2.1 in 1989 but no second sample is reported. Subsequent to that date there were no detects (ND) meaning that no contaminants were found. However, Mr. Kakas

was confused by the fact that the June 1989 sample was taken from the effluent which implies that it was at a point in the water system after treatment, although the records indicate that there was no installation of a dual carbon filtration system until March 12, 1990. He indicated that it appears there was some type of treatment on the well on prior to the system installed in 1990. There have been no detects from 1990 to the present.

Mr. Kakas was questioned concerning the March 31, 2011, letter from the Department to Mr. and Mrs. Juromski. (DEP-6.) He testified that it was a notification as to all eight claims but he agrees that it does not show individual claims and does not provide the names of the claimants, their addresses, their claim numbers or the amounts of the claims. He acknowledged that the Juromskis did file an arbitration request in response to the March 2011 letter.

Mr. Kakas testified that if the Bianco expenditures are eliminated that would amount to a little over \$11,000.00 (\$11,514.00). If the Wessel expenditures were eliminated that would amount to approximately \$31,000.00 (\$31,151.00). This is based on the two exhibits he reviewed (DEP 4 and JUR 1).

Testimony of Robert Juromski

Robert Juromski testified that he resides at 37 42nd Street, Whitehouse Station, Readington, N.J. He identified his place of residence on the aerial photograph (J-2). He also owns 35 and 39 42nd Street; 35, 37 and 39 all have their own wells. He testified that the water at his residence at 37 42nd Street was tested and contamination was not detected, there was never any contamination and therefore there was no POET system ever installed. The water at nos. 35 and 39 42nd Street showed an exceedance and POET was installed at these locations. However, this included the installation of air strippers. They constantly had problems with the air strippers at 35 and 39 42nd Street and the air stripper were turned off in the early 1990's because of the constant problems. Following their being turned off, no exceedance of water standards or quality was ever found.

Mr. Juromski identified the March 31, 2011, letter from the Department of Environment Protection (DEP 6). Upon receipt of this letter they consulted with an attorney. However, the letter provides no notice of what claims they are being notified of. It was addressed to 39 42nd Street. He testified that they never submitted a claim for 37 42nd Street, although they submitted claims for 35 and 39 42nd Street to DEP. Between 1989 and the date of the letter, he paid for nothing. He believed that the Spill Fund were his friends. Two gentlemen, Greg Bateman and Nicholas Sodano, often sought and met with him and he was never led to believe that it would be his responsibility to pay for these expenditures.

Mr. Juromski testified that pursuant to the notification received from the DEP, he entered into a settlement with the Adams family and took over the costs. Also, at 35 and 39 he took over the costs. Any installation at these sites was at his residence or the other two sites were at his own cost.

Testimony of Mary Jane Juromski

Mary Jane Juromski also testified that she resides at 37 42nd Street and has lived there for twenty-six years. She was never notified that the water at 37 42nd Street was contaminated. At the other two rental properties they eventually took out the air strippers and the water tests consistently came back fine.

Testimony of Craig A. Kunz

Craig A. Kunz testified for the Juromskis. He is a licensed professional engineer in New Jersey and has been so for fifteen years. He is a licensed site remediation professional and holds a New Jersey waste water treatment license. He has been involved in environmental engineering since 1987. He has experience with contaminated well fields and their remediation. Over the years he has managed between six to ten different sites for a company named LandTech Remedial. His testimony was that in implementing remediation at these contaminated sites, in every case he used granular activated carbon (GAC) which is a carbon filter. He explained that the carbon has pores which retain organic molecules and absorbs them which

results in finished water. In each of these cases, remediation was overseen by DEP case managers. He was involved from 1992 to 1997 with LandTech. He then worked at Geologic Services from 1997 through 2010. He has testified previously in court and other proceedings. He was offered as an expert in well contamination and treatment and was accepted as such.

Mr. Kunz testified that in his position he is required to be familiar with the cost of installing and maintaining the treatment of contaminated wells. He identified the test results for the Juromski residence at 37 42nd Street (JUR-7). This is page 28 of 39 of the compilation of claims (DEP-4). The compilation reflects the cost of sampling, installation of POET and maintenance. He is employed at Ransome and the compilation (DEP-4) was prepared under his supervision.

With respect to the invoices for 37 42nd Street (JUR-7), Mr. Kunz spoke to Mr. Juromski and learned that no treatment system was installed at that location. With respect to this document (JUR-7), it stops at 2003 and it is an incomplete data set. The testing does not fit the frequency of other claims. There is a total of approximately \$4,000 in expenditures (\$4,548 in DEP-4 at 27), but he was unable to validate these charges. He issued a report and tried to validate the technical basis for these costs, but was unable to do so and does not know if the charges were appropriate for the treatment. There was no installation of air stripper or air aeration unit. He explained that these units, an air stripper or air aeration unit functions by having contaminated water pumped into the stripper or sprayed into the stripper through a countercurrent of air and the air strips off the volatile organics so that water comes out of the aeration unit stripped of volatile organics. Because they are volatile organic chemicals, they can volatilize or vaporize and the vapor or gases are captured and taken away. The result is that the contaminants are no longer part of the water.

Mr. Kunz testified that in all of the other cases that he worked on, there was DEP oversight and air strippers were never installed. Carbon filters were the treatment of first choice and in every case they were sufficient. Carbon does have a carrying capacity and gets full of chemicals up to a point so it is necessary to change the carbon filter. The determination when to change the carbon filter is determined by taking

samples on the treated side of the carbon and when organics begin to “break through” the first of two carbon units, then the changing of the carbon is to take place. He further stated that if the concentration of contaminants in the water is higher or if there were more throughput of water, more carbon in the filter may be needed.

Mr. Kunz testified that based on his experience from 1990 to 1997, a carbon filter system or GAC was generally sufficient for treatment of volatile organic chemicals, especially for private homes, but also used at restaurants and strip malls where throughput is much higher. In addition, air strippers are mechanical devices that might fail when minerals precipitate out and gunk up the system or where there is not a constant flow such as in homes

Mr. Kunz testified to the procedures to be used to determine whether the size of the carbon filters was adequate. The initial size determination is based on throughput and the concentration of contaminants, followed by samples to determine whether breakthrough of the contaminants was occurring. Mr. Kunz testified that he made the determination that air strippers were not needed and that carbon filtration was sufficient. The carbon has a carrying capacity and the way to measure its effectiveness is to take samples of effluent. If there are high concentrations and high throughput it will need to be sampled more frequently and it is necessary to look for that point where volatile organics to begin to pass through the first carbon filter. When there is a breakthrough, that is when it is necessary to change the filters. The wells at 42nd Street had two carbon units and so that the sampling was done at midfluent or between the two carbon units to determine if there was a breakthrough in the first carbon unit. In response to questions, he explained that the influent is the raw water coming into the carbon units, the midfluent is the sample taken after the first carbon adsorption unit and the effluent is the finished water that is going into the house. If there is an air stripper in front of the carbon unit, the influent would have to be measured in front of the air stripper in order to determine the amount of volatile organics in the well water coming into the system.

Mr. Kunz testified that he did not see any technical justification for air strippers for the 42nd Street wells, that is, in terms of a throughput concentration and flow rate. In all of the documents that he reviewed pursuant to the Juromskis’ request for production of

documents, no technical basis was provided for the use of air strippers based on concentration, throughput or anything else. The Bianco well did not have an air stripper associated with it and also has non-detect throughout its history. For the Wessel residence, there was a \$6,500 line item, but it did not specify that it was for an air stripper, but he assumed that it was since that was the same amount expended for the installation of air strippers in the other wells. His testimony is that lacking a technical basis that there was a certain throughput that demanded air stripping or that could demonstrate that carbon would not be sufficient for protecting human health, he saw no basis for the installation of air stripping units and does not think the costs are valid. The total amount for the installation of air strippers is approximately \$6,512 per residence.

Mr. Kunz was then asked to discuss the change out of filters of the GAC units and the maintenance of air strippers to determine whether the costs were reasonable. He referred to a report he prepared (JUR-8) dated April 2012. He also had two letters that supplemented his report; one dated February 15, 2013 (JUR-9), and the other February 22, 2013 (JUR-8). In his report, he testified that \$32,000 for the purchase and installation of air strippers is not technically justified and \$20,000 for subsequent maintenance of the air strippers was not justified for a total of \$53,580. To the end of 2008, his opinion is that is \$53,580 for these air strippers was not technically justified by anything in the file and it is not justified according to his professional experience or according to any DEP protocol or guideline or regulation that he was aware of in 1990 through 1997, including up to today.

Mr. Kunz testified with respect to changeouts of the GAC units, that the records indicate there were changeouts when breakthrough of volatile organic chemicals was not detected. He explained that breakthrough is physical contamination getting through a filter. If the breakthrough is through the second unit, the drinking water is not safe because the contaminants are getting through to the tap water. In this case, when he talks about breakthrough, he is referring to the sample that was taken at the midfluent point. He stated that GAC units were changed prior to a breakthrough or the detection of a contaminant that is half of the drinking water standard. He testified that in his experience he could calculate a throughput and could then do some calculations to determine when you thought breakthrough might occur and set a sample frequency for

that or mandate a certain frequency for changeout. You would arrive at that frequency on a technical basis by looking at throughput, flow rate, concentration and size of carbon beds and retention time. The last approach is to simply set up a change every six months or every year or whatever. In this case, there were ninety-five instances when there were carbon changeouts with no supporting analytical data to demonstrate breakthrough. This was maintenance probably across seven wells. For instance, Bianco and Wessel had frequent changeouts even though there was no detection of contaminants. Based on his experience, the cost of a changeout varied between \$300 to \$350. Using \$350 as the cost for the ninety-five change outs he saw, the total is \$33,250 for the too frequent GAC changeouts through the end of 2008. In each case, that is based on his actual review of the water samples associated with the invoices for the changeout where a breakthrough is not detected at midfluent as summarized in the compilation.

Based on his 2012 reports with costs through 2008, the bottom line number which he opined was technically justifiable after deducting too frequent changeouts of GAC filters, the unneeded installation of air strippers, the amount that he thought might be technically justifiable and for which the Juromskis might be held liable was \$125,920.

Because of additional information received after the initial report was issued, Mr. Kunz came up with a second or different approach with respect to how to determine the costs on a general basis. The alternate method was to look at each residence, determine if it had an air stripper or not, assign the cost of the installation of the air stripper, use the maintenance cost for air stripper maintenance per year, and then assume, with an air stripper, two carbon changeouts per year would be conservative, meaning more protective of health. This was an alternate way to try and arrive at what might be reasonable for the treatment of these wells. He called this a treatment-based cost methodology. His bottom line figure is a number that he has technical justification for. His bottom line in the 2012 report for the 2008 data, 1989 to 2008 is \$125,920 and the total expenditures at that point in time that he had reviewed based on the actual invoices was \$212,750. The treatment-based cost method in the February 22, 2013, letter was \$134,929. He made it clear that it was an alternative way to calculate the bottom line figure, which he called the actual cost method.

With respect to the Adams and Pajunas residences, it did not seem appropriate that the treatment costs incurred after the dates were justified when the data showed influent water quality above the standard.

Mr. Kunz was questioned concerning Section 4 of his expert report (JUR-8). This section sets forth the information that was not contained in any of the NJDEP files. He indicated that the number of ninety-five changeouts that were not technically justified was probably more. His opinion with respect to the too frequent carbon filter changeouts is held to a reasonable degree of engineering certainty. And he holds the opinion with respect to their being no technical justification for installation of air strippers to a reasonable degree of engineering certainty with respect to well contamination and treatment as applied to the wells in question.

Mr. Kunz was questioned about his February 15, 2013, letter (JUR-9). In that letter he pointed out that no water quality exceedances were documented at the Adams's residence after October 2012, at the Pajunas' residence after July 2009 and at the Gonzalez's residence after 2002. He further testified that the amount for sampling that occurred after those dates where no exceedances were found, cumulative, was \$69,993. To simplify this, he used the last date where there was an exceedance and stopped costs after that. With respect to the Wessel residence, \$27,101 was unjustified as having been spent after no exceedances were found. The total expenditures of all invoices for all claims between 2009 and 2011 add up to \$20,030 and the total of all invoices until 2008 totaled somewhere around \$212,000. He testified that the treatment-based cost method analysis resulted in a range of somewhere between \$111,000 to \$140,000 and this justifies his original May 2000 report of \$125,000 based on the actual cost method.

Mr. Kunz identified the Department's Granular Activated Carbon Point of Entry Treatment System Minimum Specifications (JUR-12). This 2009 specification required a changeout when there is a breakthrough at half of the MCL.

Mr. Kunz also identified proposals from Portasoft Company, dated June 27,

1989; from Aquatronics Corporation, dated August 10, 1989; from Bennett Technologies dated July 7, 1989; and from Rain Soft Treatment Systems dated June 22, 1989, addressed to Mr. Lawrence M. Layden, Township of Readington Board of Health containing proposals for treatment systems for wells in the 42nd Street well contamination area (JUR-13). These proposals provided only for carbon filtrations systems with no air scrubbers. It was Mr. Kunz's testimony that in the 1989 to 1990 period, carbon absorbance units or GAC units was the treatment method that was the industry standard for a situation like that at 42nd Street. This supported Mr. Kunz's April 12, 2012, opinion that carbon is the technology applied to potable wells for treatment of volatile organic compounds if properly managed.

On cross-examination Mr. Kunz testified that twenty-three years of experience dealing with water well contamination has validated and verified what the design companies were doing in 1990. With respect to the levels of contamination at the 42nd Street site, one or two of them exceeded 500 parts per billion and it may have been as high as 1,000 parts per billion, but most of the other wells were below 500 parts per billion. There were some fifties and some non-detects. He acknowledged a POET system needs to have capacity to deal with aggregated contamination of a series of volatile organic chemicals. Therefore, an expert analyzing what is an appropriate treatment system needs to consider that there may be an aggregate of contamination. Mr. Kunz acknowledged that if there were 500 units of contamination it can be treated solely with a GAC unit or a GAC can be used in combination with an air stripper and if the air stripper is working properly it would lessen the load on the GAC unit. He also acknowledged that if you put less mass load on the carbon it should have a longer life span, and this is a design basis justification for using an air stripper which is frequently done. He acknowledged that typically he was dealing with levels of contamination lower than those seen at 42nd Street in Readington Township. He said that unless there is a residence that has an abnormal flow rate, an air stripper may be appropriate, but he has not seen data to be able to verify what the mass loading was at 42nd Street. He testified that there is a data gap and he was not able to validate the appropriateness of the DEP's treatment approach whether air strippers were used and how often carbon units were changed because he did not know the flow rates at any of the houses on which those units were installed and operated. Mr. Kunz testified that in his professional

experience it would not make more sense to employ a conservative approach and to use the air strippers and the GACs in tandem in the absence of more information. In response to the question whether he would want to be maximally protective in designing water treatment systems that serve residential homes, he testified that as an engineer he would want to have a hard technical basis for the design that he could defend as adequate and appropriate for the residence. He did testify that air strippers may have maintenance issues unless there is continuous water feeding through them. As an LSRP, he recommends the level of protection that he feels is protective of public health. He acknowledged that because contamination is not detected at a residence, the residence may have a need to have water treated because of the possible return of contamination.

With respect to Mr. Kunz' testimony that a GAC unit alone can be safe if it is properly managed, he testified that by proper management he means looking at the data, looking at the history of the data and making decisions that are appropriate based on the full set of data for managing the system and a timely review of results. Therefore, proper management is staying on the top of the data. He testified on redirect examination that frequent changeouts of the carbon filters should not be necessary if an air stripper is used. Air strippers reduce the mass to the carbon and the life of the carbon will be extended. However, carbon can be replaced fairly cheaply so the capital cost of the stripper may not be justified in the long term. The cost of air strippers was more than twice per home than the cost of the carbon alone based on information in the State's files.

Testimony of Andrew Sites

Andrew Sites testified as an expert witness for the respondent. Mr. Sites testified that he is the manager of the Immediate Concern Unit and the Site Remediation Program at the New Jersey DEP. He has been manager of that unit for two years. Prior to that he was the project manager for immediate environmental concern cases where contamination is impacting people. He has worked on those types of projects for twenty-five years involving primarily contaminated drinking water problems. He has managed over thirty-eight contaminant well field problems involving installing point of

entry treatment systems at these locations. He has managed several hundred installations of treatment systems. His current job duties are similar to those duties he has performed for the past twenty-five years. In 1988, he participated in developing what is called the POET program to install treatment systems in residential homes. He has been involved with that since its inception and remains involved with it providing technical assistance to the environmental claims administration for treatment technologies and administration. His role in helping out the Spill Fund is to develop treatment systems, implementation of program and making sure that the systems are protective of human health to assure that people are no longer exposed to contamination in their wells. With the Spill Fund, he reviews the treatment technologies and the types of systems that can be installed to deal with various types of contamination.

Mr. Sites testified that he has a BS degree in engineering from Lehigh University and an MBA from Rider University. He is a licensed professional engineer (PE) in Pennsylvania. He need not be New Jersey PE to perform his job function because there is no job requirement that a PE sign off on the design of a POET system. There is no requirement for a PE to sign off on the work that he does so there is no need for him to have a PE in New Jersey. He identified his curriculum vitae (DEP-7). He was offered as an expert in the treatment of contaminated ground well water that is used for residential water supplies.

On voir dire by attorney for petitioner, Mr. Sites testified to his prior work experience in designing and installing the POET system in well fields, as well as in residential homes and businesses. Mr. Sites was questioned concerning his area of expertise, and concerning his designing of the POET system for the removal of chemicals. He testified to a study that he is presently conducting to remove perchlorate, a relatively new contaminant that the DEP is dealing with in New Jersey and he told about his conducting a study in Saddle River. He described this as a full study in the field evaluating different treatment methods. This was for the purpose of developing and designing a point of entry treatment system that is being used in homes now impacted today.

While Mr. Sites testified that he has done alternative evaluations for the regular potable well contamination cases in the past, this was specifically for the design of a POET system. In conducting this study, Mr. Sites installed various types of media and began, placed them in a location which has contamination and started running them. In this case he used a residential home with a pool house and installed the various treatment equipment in that pool house and simply began running the contaminated water through the treatment systems twenty-four hours a day and sampled each one weekly to determine when break through occurred. For example, if the sample showed that break through occurred for a particular type of media within one week, that media would not be a good choice. On the other hand if another type of media lasted six months without a break through it would be a much better choice. The media could be anything from ion exchange resins to carbon, and he explained that there are many choices of media out there. He explained that this is a research study to try to determine what works best, so it is trial and error. There might be up to ten media to see what works.

In Saddle River there were eight media that he used, which were various kinds of resins. The home with the pool house had high levels of contamination and he conducted a small scale test after determining which bench test media would be best. Eventually, through this method of testing he determined that S-I-R 110 manufactured by Sybron was the best media and lasted six months and costs a couple of thousand dollars to replace. He did testify that the resin he eventually began using has not broken through in six years and is still going. So it is very effective to treat perchlorate.

With respect to TCA and DCE with levels of anywhere from three to five or six hundred parts per billion, there is already quite a bit of information out on removal and these are not new compounds. The manufacturers of the units put out charts to give information of when to expect a breakthrough of various types of volatile organic chemicals. He did testify that the break through charts are based upon ionized laboratory water and further explained that well water has other contaminants and that carbon absorbs many of these other contaminants so that the charts issued by the manufacturers are "inaccurate" and the other levels of contaminants in the actual water to be treated must be considered so that the break through may occur more quickly

because the carbon may not last as long. He did testify that he has worked on projects where he used both air strippers and GAC's combined. He does not design air strippers and that there are companies that do that. There are two air stripper companies who make systems that can be installed in a home and they are small and specifically made to go in homes. One is Northeast Environmental Products and the other is Lowry Aeration Systems. In determining whether to have both an air stripper and a GAC unit in the home if he had a case with high level contamination, he would call the manufacturer of the air stripper and tell them his flow rate and ask what percentage of contamination would be removed. For example, if the manufacturer tells him ninety percent and he has a thousand parts per billion coming in, the result he would have would be a hundred parts per billion coming out which is still above the maximum contaminant levels. This would mean that he would now have to do secondary treatment which would be carbon so that he would be able to get the contaminant level down to non-detect so that it would be below the MCL standards.

Mr. Sites testified that if you are dealing with a very high level of contamination you need to knock that level down before it goes into the carbon filters, so you look at different alternatives and one of them is an air stripper. You work with a manufacturer to figure out what needs to be done. So he would make the decision to put an air stripper unit on first before it goes to the carbon unit and then he asks the manufacturer what the specifications are and what it will get knocked down to in order to have it polished by the GAC unit. He makes the decision to evaluate variable alternatives which are available and an air stripper unit is one of the various treatment systems that would be evaluated, including whether to use only carbon. The vast majority of cases he has worked on are at relatively low levels of contamination and in those cases carbon only would work. However when there are higher levels of contamination it will go through the carbon faster and you have to look at other alternatives to just using carbon, and it comes down to being reliable, protective and cost efficient. For volatile organic contamination you basically have carbon and air strippers. In order to reject air strippers as a component, there must be low levels of contamination. There was a rule of thumb that if there were less than three hundred parts per billion, GAC only would be used and carbon works very well in those cases. With higher levels of contamination, you have to look into what would work and it is not necessarily just the level of

contamination but how much water is being used.

Mr. Sites was offered as an expert in the treatment of contaminated ground water that is used for residential water supplies and I ruled that based upon his educational background, experience and position as manager of the Immediate Concern Unit of the Site Remediation Program of the DEP as well as his responses to voir dire that he has the expertise to qualify as an expert witness in the area.

Mr. Sites was then questioned about his involvement with the Readington Township contamination from volatile organic chemicals on 42 Street. He testified that approximately six months ago a report was received from Mr. Kunz disputing the work that was done and he was asked to review it for his opinion whether the work there was protective of the public health and whether it was appropriate. He also testified that in 1990 he was one of a group who worked on these projects and on the evaluation of treatment technologies to be implemented. He gave his opinions to his supervisors how to manage the site. He stated that he would classify it as being a very high level of contamination and that the type of contamination was from chemicals that are cancer causing which is serious in any drinking water supply. He testified that the levels of contamination found were substantially higher than drinking water standards. He confirmed that the MCL for DCE is 2 parts per billion and for TCE is 30 parts per billion. The steps taken to select the best approach was to do additional sampling to determine the extent of the contamination and then to determine what alternatives are available to give people clean water. LMS Engineering was hired to perform this analysis in what is called an alternatives analysis (DEP-3). The Department then reviewed the report and a memo was issued summarizing the report (DEP 2). In the report the Department identified the use of air strippers together with GAC units as being the most reliable and cost effective alternative. An air stripper blows air through water and works on the principle that contaminants have a lower vapor pressure and they evaporate much quicker than water. Typically over ninety percent of volatile organic chemical (VOC) contaminations are removed by air strippers. The Department's goal is to get the level of contamination in the water down to non-detect, so the carbon filters after the air strippers were to do that. The air stripper does the vast majority of the work and it prevents carbon filter from being loaded up with contamination.

Mr. Sites explained that the major change in 1990 was that they came out with the new MCL that really started the Department dealing with these ground water contamination cases. The MCL in January 1989 were considerably higher. He explained that for reliability, when you are talking about high levels of contamination, air strippers are much more reliable because ninety plus percent of the contamination is removed with an air stripper and then with the secondary treatment by carbon filters there is less contamination with the result of less likelihood of break through. Because the Department was dealing with cancer causing chemicals in drinking water the Department took a conservative approach with regard to the treatment of the contamination. As a result it was concluded that the most cost effective system identified by the Department was the long term use of an air stripper followed by the carbon treatment.

Mr. Sites also testified that in any kind of engineering there is always a redundancy which is a safety factor that is built into all designs. With high levels of contamination the air strippers are going to be the primary treatment and the carbon is going to do the polishing and it is also a redundant system if something should go wrong with the air stripper. The redundancy is there because the ultimate goal is to be protective of the health and safety of the occupants of the residence. In setting up a sampling protocol you have to also be protective. It is technically known how much contamination the carbon should remove but there are many other unknown factors such as how much water the occupants of the residence are going to use, are they going to fill their pool, how many children do they have. The characteristics of the contamination also could get worse. There was none of that information in this case so since those factors are unknown you have to set up more frequent carbon changes. One of the Department's recommendations is that raw water be sampled every year to see if the level of contamination is going up or down. There have been cases where the levels have increased and more treatment became necessary.

Mr. Sites testified that the Department had specifications which laid out the basic GAC system and also had recommendations for monitoring and maintenance. To sample twice a year, sampling between the tanks twice a year, changing the carbon

every year even if there is no break through because there was loading of the carbon and there were other concerns at the time about bacteria building up on the carbon. All of this was in the specifications which were part of the seminar in 1990.

In these cases the change outs were roughly done in accordance with the specifications and there may have been other reasons that the GAC were changed more frequently. For example the carbon may get plugged which means that there is iron sediment coming through which gets into the carbon and plugs it up, resulting in water pressure drops. Also certain residents have water softeners which was their responsibility to maintain and if they did not do so, iron and manganese would go into the GAC system and plug it up requiring additional changes. Also bacteria does build up in the carbon which is one of the reasons they called for a change out every year to minimize bacteria growth in the carbon. Those specifications and requirements have been updated after looking through twenty years worth of data. He testified that back at the time of the installation, a carbon change out was \$350 and they are just about that range at the present date. He also testified that if a GAC system was designed for these wells without an air stripper you would use more carbon and the carbon is going to be taking ten times the loads that you put on the carbon if it is used in connection with the air stripper. It is the higher contamination that you may have that would cause more frequent break through and you would have to increase your monitoring schedule. He said that in the MLS report they looked at a study from New York State and that said based on six hundred parts per billion of TCA you expect to see carbon breakthrough in three months, and on top of that DCE contamination resulting in breakthrough in less than three months. So that would require more carbon changes but with an air stripper you have higher capital costs, less sampling, less maintenance but with a carbon system there would be a lower capital cost, higher maintenance and higher sampling. For a long-term project of twenty years the operation and maintenance would increase the cost, and the cost analysis showed that it was less expensive to have an air stripper with a GAC than to strictly use carbon. He has also seen gas-station-type cases where only carbon is used on high levels of contamination and they have break through every single month because the contamination overwhelms the carbon system. He stated that the Department was more conservative with sampling and more conservative with carbon changes. He did testify that one of the difficulties with these systems is that

there is no professional licensed operator to maintain and check the system. The Department's first experience with POET was to hire an engineering consulting company but they found out it was extremely expensive paying for a professional's time. That approach was scrapped and the Department went with water treatment vendors who do the work on a daily basis and the monitoring and maintenance was increased with the result that the fees for a professional engineer on site was dramatically cut.

In response to the question whether the DEP should have treated water at the Bianco and Wessel residences, he responded that Bianco should not have had a system based on the data. However, Wessel did have contamination and the Department installed a system and maintenance was done. However, in this case the policy is that if the raw water tests clean after three years of consecutive testing, the Department will drop the operation and maintenance, and it should have been dropped in this case. So there is sampling and maintenance for Wessel that should not have been paid for by the Department. However he expressed the opinion that the installation of the units to begin with were appropriate at the Wessel site.

With respect to Mr. Juromski testimony that he put a treatment system on his own water system even though it showed no contamination, he indicated that is a personal decision and it is a matter of risk and there are many people whose wells test clean but who are right in the middle of a high level of contamination who want to protect their family and install a system.

Mr. Sites testified that the DEP is no longer managing these treatment systems and the Juromskis have been doing so since 2011. Or he thinks they took over management of the systems in 2012. This take over was under protest and the attorney for the petitioners made it clear that there should be no inference that it was taken over by them as an acknowledgement that they are the responsible party.

Mr. Sites identified his written response to the report of Mr. Kunz. (DEP-9.) It summarizes the opinions he expressed as a witness and the facts he conveyed at the hearing. He expressed the opinion that the treatment system and maintenance of that system was appropriate and they were protective and they did remove the

contamination. The analysis that was had at the time showed that they would be the most cost effective way of approaching the contamination and that this was an appropriate use of the treatment systems.

Mr. Sites was cross-examined by attorney for petitioners. He was questioned concerning his testimony that air strippers were appropriate because if only GAC units are used the operation and maintenance of the system will be more costly in the long run. Mr. Sites testified that he did the math to determine the most cost effective method of treating the water. The math is a comparison between strippers and GAC units and GAC units standing alone. In response to the question that if you add up the capital costs with aeration it is \$70,772.00 and that with air strippers, the maintenance cost is \$560,000.00. He disagreed with some of the assumptions that were taken in the report. He also agreed that capital costs without aeration with just the GAC units is \$54,249, which is less than \$70,000. For just the GAC units without aeration, the maintenance costs over twenty years is \$395,720.00 but he has an issue with one of their assumptions. He agreed that \$395,000.00 is less than \$560,000.00. He does not recall whether the LMS Report made a recommendation as to air strippers. He was then referred to the August 13, 1990, Memorandum evaluating the alternatives (DEP-2). He acknowledged that the study showed POETs units for twenty-one homes which included both aeration units and the GAT filters. This was the case even though aeration units for the homes would have covered homes that did not show more than three hundred parts per billion of either contamination, TCE, or DCE. His interpretation of the study was that there was a proposal for aeration units and GAC units for all of the covered homes. He agreed that there were not eight homes in the 42nd Street area that had contamination over three hundred parts per billion.

Mr. Sites testified that the specifications for point-of-entry treatment is in the seminar materials (DEP-8). He acknowledged that it looks like there was maintenance that was done and paid for by the spill fund that should not have been done. However, he does not know what was done by the ECA unit because he does not work with that group. There are no individual specifications for air strippers because they are very site specific and they are basically designed for the location. There was a policy that at VOC contamination of about three hundred parts per billion it would be wise to start

looking into the application of an air stripper, but the levels in this case were much higher so it made sense to look into the application of an air stripper. He explained that if there is a situation where POETs must be used as long term solution for over twenty years, monitoring and maintenance costs are going to be much more substantial and it is critical to determine the cost. In the 42nd Street area there were wells that had a combined TCE and DCE of a thousand parts per billion. He stated that the current policy and the policy going back to the time in question was that a first sample and a confirmatory sample was required before the spill fund would reimburse. If the homeowner wanted to put the system in they were able to do so but two samples were required before it would be paid for. However, a confirmatory sample would not be needed if there was an exceedance after a long history of non-detects.

Mr. Sites was shown a letter to Mr. Lawrence Laden from John Prajewski dated May 31, 1989 (JUR-14). This letter does not include minimum specifications which are for GAC units and no air strippers because this was very early on in the case. There was also a requirement that the filter should be replaced every 6 months or at the time of breakthrough, whichever occurs first.

Mr. Sites was questioned concerning the response to the Kunz Report (DEP-9). He acknowledged that the Department only had specifications for GAC units and never had specifications for air strippers because essentially they are one of a kind and you design each one to fit into a home. He acknowledged that the Spill Fund made it clear that it will reimburse claimants according to the most cost-effective, technically sound contract proposal and that it determined what was the technically sound proposal based on the letter from Prajewski to Mack. He acknowledged that his opinion was that the GAC unit alone could have handled the level of pollution and that it devolved to a question of which was more cost effective and more reliable over the long term. His determination was that because of change outs, the operation and maintenance would be more expensive. It is feasible to use carbon only but the cost would be higher and reliability may be lower because of break through. The LMS Report did not make a recommendation but just evaluated the cost. He testified that the basis of the DEP's long term cost analysis to decide which treatment system was more cost effective was reliability and protection of the public. The DEP determined that based on bacteria at

the time there needed to be a change out once a year regardless whether there was a break through. He acknowledged that the material provided in discovery allegedly demonstrated an air stripper would be economical at each residence due to the resulting reduction and frequency of carbon change outs.

Mr. Sites again acknowledged that at the Bianco residence the unit was unnecessary but at the Wessel residence it was justified because they did have an exceedance of 2.1 parts per billion, which exceeded the MCL of 2.0 parts per billion. He explained that rounding of the sample result is only used for public water systems but for residential systems, if the testing shows an MCL of 2.0 that would be at or above the standard so as to require a confirmatory sample and treatment. When questioned whether a single sample was sufficient for Wessel, Mr. Sites explained that if the first sample was paid for by the homeowner, the Spill Fund would not pay for that but would pay for the second sample if it is above the standard. He indicated it was probable that there was a homeowner test that was not paid for by the Spill Fund that is not shown in the expenditures. He acknowledged that the ECA's policy was that at some point if the well starts testing clean, that is below the standard for three years in a row, there would be no further need for monitoring. In the case of Wessel, monitoring should have been removed in 1992 after it started to test clean in 1990, 1991 and 1992.

Mr. Sites testified that the specification for GAC change out in 1990 was once a year. That was the minimum specification, but if there were an additional breakthrough it could be changed. If there was an aeration unit with a GAC back-up system the specification would remain at one change out per year because there would still be loading of the carbon and some bacteria problems were also happening. Once a year change out of the GAC units was the policy.

Mr. Sites was shown a cost calculation which he performed (JUR-15). Based upon the assumptions set forth in his general cost comparison he estimated an annual cost for an air stripper with GAC POET to be \$970.00. The annual cost for a GAC POET system with no air stripper would be \$1,975.00 because of the need to change filters four times per year because the air stripper would not reduce the volatile organic chemicals reaching the carbon filters, and five water samples per year to determine any

break through. By adding together the capital cost and the present value of the annual cost, the present value for an air stripper and GAC is \$21,836.00. The present value for GAC only is \$30,276.00 (JUR-15). Mr. Sites testified that this is a very general version of the second approach used by Mr. Kunz which is the treatment-based cost method. He restated that the yearly cost for an air stripper with GAC is a total of \$970.00 and the annual cost for GAC only is \$1,975.00 and the primary cost is the number of rebeds or carbon filter changes of four per year. The actual number of monitoring samples depends on the sample results. For example, in gas stations they sample every month because they are dealing with higher level contamination so that four would be a real minimum. He made the point that there will be less carbon changes and less sampling if there is an air stripper and those are all present value numbers based on the assumptions he made. He further testified that the fact that the level of contamination is under 300 parts per billion so there would be no use of air strippers is not set in stone. For example, if there is a home that is just under three hundred next to a home that has one thousand there would be a likelihood that the contamination in the first home can go up. The critical thing is to be protective of the residents. The cost analysis in the memorandum from Prajewski to Mack showed that air strippers were most cost efficient and air strippers were placed in residences that did not have more than three hundred parts per billion samples.

Rebuttal Testimony of Craig Kunz

Craig Kunz was called as a rebuttal witness. Mr. Kunz was shown two exhibits, the February 15 letter (JUR-9) and the February 22 letter (JUR-10). He testified that based on three hundred as the influent concentration, out of the six homes, the Adams home and the Juromski/35 and Juromski/39 properties exceeded 300 one or more times. For these three homes the GAC change out assumption was once per year. In his February 22nd report (JUR-10) he concluded that the treatment based cost would be \$134,929.00 based on the assumptions that he just stated.

Mr. Kunz identified a summary of costs for twenty-one homes in the Willocks Court area (JUR-16). He testified that using the LMS cost analysis, the total cost for individual home treatment units without air strippers was estimated at \$34,613.00 per

home, and the total cost for individual home treatment units consisting of air strippers and GAC units was \$78,846.00 per home.

Mr. Kunz acknowledged that in the memo (DEP-2) the DEP took some of the numbers from the LMS report to do its own comparison of the alternatives. On page 2 of the cover memo the POET unit for twenty-one homes according to this memo has a cost per home of \$25,597 and the cost per aeration unit for the twenty-one homes is \$20,427. He further acknowledged in the evaluation of water supply alternatives after the cover memo, the figures are the same figures as seen in the LMS report (DEP-3). In the LMS report the GAC-only, without air strippers, after it is divided by thirteen homes, comes to half the cost of the air stripper with GAC. On page 5 of this evaluation (DEP-2) the DEP created an operation and maintenance cost aeration for twenty years and GAC for twenty years and came up with a figure for GAC that was more than the figure for aeration. The aeration operation and maintenance costs for twenty years totaled 1.2 million dollars and the cost for GAC operation and maintenance was 1.5 million dollars and that reflects the figures shown in the LMS report. The LMS report was talking about sixty homes, twenty-three of which would require aeration and thirty-seven of which would require GAC only. If the 1.2 million dollars is divided by twenty-three homes, the per home cost is \$53,820 and the 1.5 million dollars divided by thirty-seven homes is \$41,547. Mr. Kunz acknowledged that \$41,547 is less than \$53,820 and that if he did not need an air stripper it is more cost effective to have the GAC unit as long as it is appropriately sized based on the assumptions in the LMS report. However, the DEP assumed that all homes in the impacted area may need aeration units and the effluent sample would be tested every six months and the carbon filter would be replaced every year. In preparing his estimate, he based his cost for operation and maintenance for the air stripper on actual costs that were pulled from invoices.

Mr. Kunz was shown a compilation of Vendor Invoices (JUR-17). This differs from the earlier compilation (DEP-4) in that it only includes invoices as opposed to those in DEP-4 which contains tables of analytical results for each residence. The witness was referred to pages 3 thru 6 of 27 of the compilation relating to the Pajunis residence (JUR-17). The total of all invoices for the Pajunis residence is \$37,445 (Id. at 6). Of

this, \$10,265 represent invoices for midfluent analysis where the data did not justify a carbon change. This resulted in a net amount of \$26,480 supported by a break through.

Mr. Kunz was then referred to page 15 of 27 relating to the Juromski residence at 35 42nd Street (JUR-17). The total costs of all invoices was \$35,528 and there was no data or justification provided for carbon changes totaling \$7,280 resulting in a net cost of \$27,548 supported by break through.

On cross examination, Mr. Kunz testified that the shaded change outs in the exhibit (JUR-17) are claims that are inappropriate and not justifiable because no breakthrough was detected. Samples were done once per year and the assumptions in the LMS report was that either with air strippers or without, GACs would be changed four times per year so that whether there is a breakthrough number or not, the number of GAC change outs would be the same. In addition, with samplings, both tables assume similar sampling rates and frequency intervals. In response to the question whether homes that are equipped with air strippers sample at the same frequency as those that are GAC only, Mr. Kunz response was that he thinks not based on the two tables.

Mr. Kunz was asked to return to the compilation of Vendor Invoices (JUR-17) and asked whether, other than breakthrough, if he knew why the change outs might have been done when they were, and was given examples of bacteria control, physical clogging or other reasons. He responded by indicating that he was specifically looking for maintenance data that would provide a basis for the changeouts but the data was not there and those records were apparently not available.

In response to questions by attorney for petitioner, Mr. Kunz testified that in his experience with POETs rarely included air strippers in the 1990s. They have carbon removal efficiencies as high as 90% with DCA and TCE, so there was a lot of data in the 1980s as to carbon use and efficiencies.

Analysis

There are four main areas of disagreement between the parties. The first is the contention by the Juromskis that the installation of air strippers on all of the wells was unreasonable and not technically justified by the Department. Related to this first contention is the Juromskis' legal argument that requiring the installation of air strippers where levels of contamination are either high or reach levels of 300 parts per billion is invalid rulemaking and invalidates any claims for their installation and maintenance. The Juromskis therefore take the position that any expenditures made in connection with the purchase, installation and maintenance of the air strippers should be disallowed. The third is the contention by the Juromskis that too frequent changeouts of the GAC units where there was no breakthrough of contaminants should be disallowed. The fourth area involves the contention by the Juromskis that certain installations and operations and maintenance at residences where there was no contamination should be disallowed. I will deal with these in the sections which follow, and will set forth my findings and conclusions in the **FINDINGS OF FACT** section.

1. Whether the installation of air strippers on all of the wells was unreasonable and not technically justified by the Department.

The testimony of Mr. Kunz, the Juromskis' expert, was that he has extensive experience with contaminated well fields and their remediation. Over the years he has managed between six to ten different sites, and that in implementing remediation at these contaminated sites, in every case he used only granular activated carbon (GAC), which is a carbon filter. In each of these cases, remediation was overseen by DEP case managers. He did not see any technical justification for the installation of air strippers for the 42nd Street residential wells in terms of a throughput concentration, flow rate or any other reason. Based on his professional experience and the lack of any DEP protocol or guideline or regulation that he was aware of, the installation and maintenance of air strippers was not technically justified so that \$32,000.00 for the purchase and installation of air strippers and \$20,000.00 for the subsequent maintenance of the air strippers for a total of \$53,580.00 is not justified.

Mr. Kunz acknowledged that one or two of the residences exceeded five hundred

parts per billion and may have been as high as one thousand parts per billion but most of the others were below five hundred parts per billion.

Mr. Andrew Sites testified as an expert for the DEP. He stated that if there is a very high level of contamination that level must be reduced before it goes to the carbon filters. When there are higher levels of contamination it will go through the carbon filter units faster and it is necessary to seek alternatives to just using carbon. One alternative to accomplish this is an air stripper. It comes down to being reliable, protective, and cost efficient. In order to reject air strippers as a component, there must be low levels of contamination, the rule of thumb being that if the contamination is less than three hundred parts per billion, GAC only would be used and carbon works very well in those cases. With higher levels of contamination it must be determined what would work. It is also not necessarily just the level of contamination but how much water is being used.

In 1990 Mr. Sites was one of the group who worked on these projects and on the evaluation of treatment technologies to be implemented. He stated that he would classify this as being a very high level of contamination and that the type of contamination involved chemicals that are cancer causing which is serious in any drinking water supply. Mr. Sites stated that the levels of contamination found were substantially higher than drinking water standards. The maximum contamination level for DCE is two parts per billion and for TCE is thirty parts per billion. In its report the Department identified the use of air strippers together with GAC units as being the most reliable and cost effective alternatives (DEP-2). The Department's goal was to get the level of contamination in the water down to non-detect, so the air strippers and the carbon filters were designed to do that. The air stripper does the majority of the work and it prevents carbon filter from being loaded up with contamination. Mr. Sites also stated that when there are high levels of contamination air strippers are much more reliable because ninety percent or more of the contamination is removed with an air stripper and then the secondary treatment by carbon filters involves less contamination with the result that there is less likelihood of break-through.

Mr. Sites explained that because the Department was dealing with cancer-causing chemicals in drinking water the Department took a conservative approach with

regard to the treatment of the contamination with the result that it was concluded that the most cost effective system identified by the Department was the long-term use of an air stripper followed by carbon treatment. As further support for this approach, Mr. Sites testified that there is always a redundancy or safety factor built into all designs. With high levels of contamination the air strippers are the primary treatment and the carbon does the polishing. This is also a redundant system so that if something should go wrong with the air stripper there is still the protection of the health and safety of the occupants of the residents resulting from the use of the carbon filters.

After considering the Department's rationale for installing air strippers, and given the broad powers vested in the Department by the Spill Act, I would have been hard-pressed to determine that the installation of air strippers in tandem with GAC filters was unjustified. However, in view of the conclusions I reached in the section which follows, it is not necessary for me to decide this issue.

2. Whether the DEP's determination that air strippers would be required when the levels of VOC's reached 300 parts per billion is invalid as agency rulemaking.

I have previously addressed the Department's rationale for requiring the installation of air strippers in cases of very high levels of contamination, or in excess of 300 parts per billion. The Juromskis contend that the DEP's determination to impose this requirement amounts to an invalid attempt at rulemaking. This issue is of importance because N.J.A.C. 7:1J-9.16 provides that a claim may be denied by the arbitrator upon a finding that a particular claim is invalid for any reason.

N.J.S.A. 52:14B-2(e) defines an "Administrative rule" or "rule," as meaning, ". . . each agency statement of general applicability and continuing effect that implements or interprets law or policy * * *." In Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 329 (1984), it was stated that an agency determination that is intended to be applied as a general standard and with widespread coverage and continuing effect can also be considered an administrative rule if it is not otherwise expressly authorized by or obviously inferable from the specific language of the enabling statute.

Metromedia identified six factors to be considered when evaluating whether an agency determination to be valid, must comply with the requirements for promulgating administrative rules. The Court stated:

. . . an agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication. [Id. at 331-32]

In this case, it is clear that the Department's enunciation of this requirement is rulemaking since it is intended to have wide coverage encompassing the regulated or general public; is intended to be applied generally and uniformly to all similarly situated persons; is designed to operate only in future cases, that is, prospectively; it prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; it reflects an administrative policy that was not previously expressed in any official and explicit agency determination, adjudication or rule, or constitutes a material and significant change from a clear, past agency position on the identical subject matter; and reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Therefore, I **CONCLUDE** that the DEP's determination that air strippers would be required when the levels of VOCs reach either 300 parts per billion or other high levels of contamination is invalid as agency rulemaking. Based on this, I further **CONCLUDE** that any claim involving the cost of installation air strippers or involving their maintenance or operation shall be disallowed as invalid.

3. Whether the costs for too frequent changeouts of the GAC units when there was no breakthrough of contaminants should be disallowed.

Mr. Kunz testified that the records of claims indicate there were a significant number of changeouts of the carbon filters when break-through of volatile organic chemicals were not detected. He explained that a break-through is physical contamination getting through a filter and that if the break-through gets through the first and second units of the filter, drinking water is not safe because contaminants are getting through to the tap water. When he talks about break-through he is referring to the sample that was taken at the "mid-fluent" point or the point between the two filters. Based on his experience the cost of a change out varied between \$300.00 to \$350.00 and using \$350.00 as the cost for the ninety-five change outs he saw in the compilation (DEP-4), the total is \$33,250.00 for too frequent GAC change outs to the end of 2008.

Mr. Sites testimony with respect to the sampling protocol and to the change outs of the carbon filters was that because there were so many unknown factors such as how many people live in each home, how much water the occupants of each home may use, whether water would be used to fill the pool, and also characteristics of the contamination such as whether it could get worse in subsequent years, and whether the carbon filters are being loaded up with other contaminants or minerals. Because of these unknowns the Department determined that the water should be sampled every year to see if the level of contamination is going up or down and to require changing the carbon filters every year even if there is no breakthrough because of the above concerns as well as concerns at that time about bacteria building up on the carbon.

As was stated infra., the Spill Act is quite comprehensive in its scope and vests the DEP with broad implied powers. Exxon Mobil, supra, 393 N.J. Super. at 400.

Whenever the Department acts to clean up and remove a discharge, it is authorized to draw upon the money available in the New Jersey Spill Compensation Fund to pay for “cleanup and removal costs.” These are defined as all costs associated with a discharge, incurred by the state in the taking of reasonable measures to prevent or mitigate damages to the public health, safety, or welfare.” N.J.S.A. 58:10-23.11b. The scope of what constitute cleanup and removal costs has been broadly interpreted. Exxon, supra, 393 N.J. Super. at 403.

Safeguarding the public health, safety and welfare has long been considered an essential governmental function within the state police power, and environmental protection laws, given their purpose of protection of the public health, should be liberally construed to bring about their beneficent purposes. The grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities. Thus, administrative agencies acting within their area of expertise are accorded considerable deference.

After considering the Department’s rationale for requiring annual changeouts of GAC filters and given the broad powers vested in the Department by the Spill Act, and after according due deference to the Department’s expertise, I **CONCLUDE** that the DEP’s requirement for annual changeouts of the GAC units is reasonable and valid.

4. Whether certain installations and operations and maintenance at residences where there was no contamination should be disallowed.

Mr. Kunz testified that based on test sample results, no water quality exceedances were documented at the Adams residence after October 2002, at the Pajunas residence after July 2009, and at the Gonzalez’ residence after 2002. He testified that the amount for sampling that occurred after those dates where no exceedances were found cumulative was \$69,993.00. In addition with respect to the Wessel residence, \$27,101.00 was unjustified as having been spent after no exceedances were found.

Mr. Sites acknowledged that the Bianco residence should not have had a system

installed based on the data. Mr. Sites stated that Wessel did have contamination and the department installed the system and maintenance was done. However, the sampling and maintenance for Wessel should not have been paid for by the department because the water tested clean after three years of consecutive testing.

Mr. Sites testified that at the Bianco residence the unit was unnecessary. Mr. Sites testified that at the Wessel residence the installation of the system was justified because there was an exceedance of 2.1 parts per billion which exceeded the MCL of 2.0 parts per billion.

Mr. Sites testified that the ECA's policy was that at some point if a well starts testing clean that is below the standard for three years in a row there would be no further need for monitoring. In the case of Wessel monitoring should have been removed in 1992 after it tested clean in 1990, 1991, and 1992.

The compilation of claims (DEP-4) includes vendor invoices for the Juromski residence at 37, 42nd Street. The residence is set back from the road and is located on a flag lot. Mr. Juromski confirmed to Mr. Kunz that no treatment system was installed at that location. Mr. Kunz testimony was that there was a total of \$4,548.00 expended but Mr. Kunz was unable to validate these charges or validate the technical basis for the costs or the appropriateness of the treatment and other charges. The testimony of Mr. Kunz was undisputed.

FINDINGS OF FACT

1. Robert Juromski is the owner of 35 42nd Street (Block 43, Lot 26) in Readington Township.
2. Robert Juromski subdivided Block 43, Lot 26 into two lots, now

known as Lot 26 and Lot 26.01.

3. Robert Juromski and Mary Jane Juromski, his wife, own and reside at 37 42nd Street, in Readington Township (Lot 26.01).

4. Robert Juromski and Mary Jane Juromski purchased 39 42nd Street (Lot 25).

5. Robert Juromski and Mary Jane Juromski rent 35 42nd Street and 39 42nd Street to tenants. These two properties are entitled "Juromski Residence" on DEP-4, even though they are not the Juromskis' actual residences.

6. The New Jersey Department of Environmental Protection (DEP) is a governmental agency of the State of New Jersey, with principal offices located at 401 East State Street, City of Trenton, Mercer County, New Jersey.

7. The DEP's authority and jurisdiction includes ensuring that drinking water from wells meet standards, called maximum contaminant levels (MCL), and administering the Spill Compensation and Control Act ("Spill Act"), which established the Spill Fund. The Spill Fund is used to clean-up and remove contamination and to pay for installation of potable well treatment systems and pay residents' expenses incurred therefor, through a claim and payment system.

8. The contaminants of concern in this matter are volatile organic chemicals (VOCs) known as 1,1,1- trichloroethane (TCA) and 1,1-dichloroethene (DCE); the MCL for DCE is 2 ppb, and for TCA is 30 ppb.

9. As a result of its evaluation of various methods of dealing with the contaminated wells, the DEP determined to install POET well treatment system at each of the contaminated wells consisting of a granulated active

carbon (GAC) filter together with air strippers.

10. A POET system removes the contaminants from the well water prior to drinking the water to ensure that the well meets drinking water standards. A POET system consists of a granulated active carbon (GAC) filter, according to "Practical Applications," (DEP-8). Air "strippers" also called aeration units, were also installed on all wells except the Bianco well. An air "stripper" is a mechanical device that removes volatile gases that may be emitted from an organic chemical in the water. This also extends the life of the GAC carbon filter if they are installed in tandem.

11. Robert Juromski did not question the validity, necessity, or cost of the POET well treatment systems, filter changes, or the installation of air strippers or other equipment, from 1989 forward. Mr. Juromski testified that the DEP personnel who visited his property were friendly and that they told him they knew he was not responsible.

12. The DEP Spill Fund seeks reimbursement from the Juromskis in the amount of \$221,179.00 for installation of capital equipment, sampling, operation and maintenance, since 1989, at eight different properties/wells.

13. The DEP presented to the Juromskis a letter attaching a Directive and Notice to Insurers dated December 17, 2008 (JUR-3), notifying the Juromskis that the DEP had identified the Juromski property as the source of the TCE and DCE contamination found in potable wells on 42nd Street, that the Juromskis are responsible and strictly liable for the discharges and cleanup of the hazardous substances, and directing the Juromskis to take remedial and corrective actions.

14. The DEP, Environmental Claims Administration, Spill Compensation Fund next presented to the Juromskis a letter dated March 31, 2011 (DEP 6), notifying the Juromskis that the DEP has determined that they are the responsible party in connection with a hazardous waste discharge on 42nd

Street, Readington, NJ, that the Environmental Claims Administration has received claims for damages from the owners of the affected properties and has been providing compensation to install, monitor and maintain POETS to remove these hazardous substances from their drinking water supplies, and advising the Juromskis of their obligations and responsibilities.

15. The Juromskis timely filed an Arbitration Request (JUR-4).

16. Thereafter, the Juromskis retained counsel and an expert, Craig Kunz, P.E., LSRP, who sought documents from DEP with respect to what claims and amounts were at stake. The efforts to obtain information, including a Document Production Request and several OPRA requests, continued over a period of two years (JUR-11).

17. In May 2012, pursuant to a case management order, Mr. Kunz issued an expert report (JUR-8) concluding that there was not a valid technical basis for \$86,630 of the \$212,750 in invoices which the DEP produced.

Claims involving Juromski (37 42nd Street)

18. In about 1989, Robert Juromski received notice from Readington Township that his well at 37 42nd Street, Block 43, Lot 26.01, might be contaminated. The well was tested by Readington Township.

19. Testing showed that Robert Juromski's well at 37 42nd Street (Lot 26.01) was not contaminated, and this result was confirmed by Sindy Pinchuk, who was the case manager for DEP, for the 42nd Street Well Contamination Area claims to the Spill Fund.

20. The DEP did not install a POET system on the well on Robert Juromski's property at 37 42nd Street, Readington Township.

21. Because there was no POET system at 37 42nd Street, DEP incurred no expenses between 1989 and the present time for any well treatment, operation, maintenance or testing for the Robert and Mary Jane Juromski property at Lot 26.01, with a street address of 37 42nd Street, Readington Township

22. The \$4,548.01 in invoices attributable to 37 42nd Street on the compilation (DEP-4 at 27 of 39) is not valid. No witness from DEP validated those expenditures. This amount, \$4,548.01, is disallowed and will not be reimbursed.

The Bianco and Wessel Claims

23. DEP's policy now, and at the relevant time, in 1989, was that wells that were tested and determined to have pollutants that exceeded the maximum contaminant level (MCL) had to have a second, confirming test done, and that test was required to also show an exceedance of the MCL before the POET well treatment, maintenance, operation and sampling expenditures were approved as valid and eligible to be reimbursed by the Spill Fund.

24. The Spill Fund paid claims for installation of equipment, maintenance, operation and sampling, from 1989 for two wells located at 29 42nd Street (owned by Bianco) and 41 42nd Street (owned by Wessel).

25. The Bianco well never had an exceedance of any MCL for TCA or DCE, and this was acknowledged by the DEP's witness.

26. There is no factual basis in the record for the Spill Fund's expenditure of \$11,514.00 for the treatment, testing, maintenance and operation of the Bianco well at 29 42nd Street, Readington Township.

27. Despite this, the Spill Fund paid for the installation of an air stripper

at a cost of \$6,512.00, as well as a GAC treatment system on the Bianco well; as well as annual changes of the carbon filter and water testing, for a total of \$11,514.00. (DEP-4 at 2 of 39.) These amounts are disallowed and \$11,514.00, will not be reimbursed to the Spill Fund.

28. The Wessel well, at 41 42nd Street, had a single exceedance of the MCL.

29. No witness testified that there was a second, confirmatory test, and thus no treatment systems should have been installed. DEP's witness, Andrew Sites, stated that the June 26, 1989, sample was probably the second, confirmatory test, theorizing that the Wessel's initial test was probably done privately, which is why DEP had no record of it. This opinion is speculative and not supported by any evidence in the record. Additionally, Mr. Sites conceded that after three years' worth of no detections ("NDs") of any pollutant above the MCL, the DEP should have removed the POET system in 1992.

30. A review of the compilation of Vendor Invoices (JUR-1 at 1 of 5) also shows that the initial test which showed an exceedance occurred on May 2, 1989, and the air stripper was not installed until September 9, 1992, which means that more than three years had elapsed with no detection of pollution above the MCL before the air stripper was installed. On this basis, DEP should not be reimbursed for any expenditures made during the period between 1992 and 1995.

31. The Spill Fund paid for the installation of an "air stripper" at a cost of \$6,512.00, as well as, a granulated active carbon (GAC) treatment system on the Wessel well as well as annual changes of the carbon filter and water testing for a total for the Wessel residence of \$31,151.00, since 1989 (JUR-1 at 3 of 5).

32. There is no factual basis in the record for the Spill Fund's

expenditure of \$31,151.00 for the treatment, testing, maintenance and operation of the Wessel well at 41 42nd Street, Readington Township, and the amount of \$31,151.00 will not be reimbursed to the Spill Fund.

The Adams Claim

33. The DEP's March 31, 2011, letter to the Juromskis invited them to settle Spill Fund claims pursuant to N.J.A.C. 7:1J-7.2(a), by contacting the owners of the affected properties to discuss the terms of the claims' settlement, including arranging to take over future maintenance and monitoring costs, within sixty (60) days of the date of this letter.

34. Pursuant to DEP's invitation to the Juromskis to contact the owners of the affected properties counsel for the petitioners, Janine G. Bauer, Esq., inquired with DEP and learned that, in addition to the two wells for tenants of the Robert Juromskis, that the wells requiring future maintenance and monitoring belonged to the Adams and the Pajuneses. Ms. Bauer reached out to them to settle their claims.

35. Roger and Nancy Adams settled their claim with the Juromskis. (JUR-5). The Juromskis contend that under the terms of the General Release and Settlement Agreement, Robert Juromski and Mary Jane Juromski are not liable or responsible for the expenditures the Spill Fund paid on behalf of the Adams, for the period 1989 through to the date of the Release.

36. The Juromskis contend that the legal effect of the General Release signed by the Juromskis and the Adams is that it operates as a final settlement of the Adams claims against the Spill Fund.

37. The Juromskis further contend that the DEP is not a claimant in its own right, and that DEP has lost standing to pursue the Adams claim, and that in light of the failure of the DEP to move to substitute the Spill Fund for

the Adams claim, combined with the failure to call Roger or Nancy Adams to testify at the Arbitration, the Adams's claims are discharged, citing Marshall v. Raritan Valley Disposal, 398 N.J. Super. 168 (App. Div. 2008). As the Spill Fund is strictly liable for the costs of the treatment, sampling, maintenance and operation, the liability will remain with the Fund, and the Adams claim for \$47,761.16 (DEP-4, at 16 of 39) should not be reimbursed.

38. The Juromskis alternatively contend that if the Adams' claim is considered despite the General Release and Settlement Agreement, it should be determined that that \$15,191 in costs are invalid based on change-out of carbon filters when no breakthrough occurred at the mid-fluent point. (DEP-4 at 16 of 39).

39. However, I have previously concluded that the DEP's requirement for annual changeouts of the GAC units is reasonable and valid. Therefore, \$15,191 in costs based on change-out of carbon filters of the Adams' claim are valid.

40. As was previously stated, the liability of Robert Juromski or Mary Jane Juromski for the alleged discharge that caused the contamination of the wells with TCA and DCE has not been determined, and will not be determined by this Arbitration, nor has responsibility to clean up and remove the contamination been determined, based on Exxon Corp. v Mack, 237 N.J. Super. 16, 27-28.

41. The issue of the Juromskis' responsibility for the expenditures made by the Spill Fund on behalf of Adams, and any defense to such liability is not part of this arbitration and is to be dealt with in a subsequent cost recovery litigation between the parties.

Air Strippers

42. Mr. Sites initially testified that it was necessary to install air strippers to remove volatile organic chemical (VOC) pollution, where the combination

of TCA and DCE in the wells was above 300 ppb. He testified that it was DEP's policy to install air strippers when the VOCs were above 300 ppb. However, he conceded that there was no document that specified any standard for installation of an air stripper. When he was asked to go through the "Practical Applications" document he prepared for the seminar in 1990 at Rutgers University (DEP-8), he could find no such 300 ppb standard, guide or specification. There was no other document that contained this guideline.

43. Ultimately, Mr. Sites acknowledged that DEP does not have specifications for air strippers since they are one of a kind and must be individually designed to fit into a home.

44. Based upon my conclusion that that any claim involving the cost of installation air strippers or involving their maintenance or operation shall be disallowed as invalid, the installation of five air strippers at an installation cost of \$32,560, and periodic maintenance costs of \$20,820 at the Pajunes, Adams, Juromski/35, Gonzalez and Juromski/39 residences, for a total of \$53,580 is invalid and shall be disallowed. It is noted that I previously disallowed claims involving the Wessel residence at Paragraph 37.

45. Although there was testimony regarding the frequency of GAC carbon change-outs necessary for a GAC-only POET system versus the frequency when GAC is the back-up to an air stripper, the only well that had a GAC-only system was Bianco, and I have denied reimbursement for the Bianco claim to the Spill Fund in the amount of \$11,514.00 at Paragraph 26, *infra*.

46. Of the total of \$221,179 in claims, I have disallowed a total of \$100,793. All other claims are allowed and approved as reasonable and necessary expenditures.

ORDER

Based on the findings of fact and the legal conclusions set forth herein, I hereby **ORDER** that of the total of \$221,179 in claims, \$100,793 is disallowed. I further **ORDER** that all other claims are allowed and approved as reasonable and necessary expenditures.

This determination is final. Any action for judicial review shall be filed in the Appellate Division of the Superior Court within 30 days of the filing of this decision with the Administrator. N.J.S.A. 58:10-23.11n.

MAY 10, 2013

DATE

JOSEPH F. MARTONE, ALJ, ARBITRATOR

Date Received at Agency:

Date Mailed to Parties:

APPENDIX

LIST OF WITNESSES

For Juromski:

Robert Juromski
Mary Jane Juromski
Craig A. Kunz

For the Department:

Donald Kakas
Andrew Sites

LIST OF EXHIBITS

Arbitrators Exhibits:

ARB-1 Arbitrator's Oath, dated March 1, 2013
ARB-2 Agreement for Extension of Time for Decision

For Juromski:

JUR-1 Wessel Invoices (Supplemental to DEP-4)
JUR-2 Site Map of 42nd Street
JUR-3 Directive and Notice, December 23, 2008
JUR-4 Arbitration Request-April 19, 2011
JUR-5 General Release and Settlement Agreement
JUR-6 Craig A. Kunz Curriculum Vitae
JUR-7 Spill Fund Laboratory Data Summary-Juromski/37
JUR-8 Report of Craig A. Kunz, P.E., April 2012

- JUR-9 Addendum Report of Craig A. Kunz, February 15, 2013
- JUR-10 Potable Well Treatment Cost Basis Report of Craig A. Kunz, February 22, 2013
- JUR-11 Package of Juromski's Document Requests
- JUR-12 DEP-GAC Specifications, September 2009
- JUR-13 Bids submitted to Township of Readington, May – July 1989
- JUR-14 May 31, 1989 letter from Division of Water Resources to Readington Township
- JUR-15 Andrew Sites Cost Calculations
- JUR-16 Craig A. Kunz Summary of Costs
- JUR-17 Spill Fund-Vendor Invoice Dataset

For the Department:

- DEP-1 Google earth Aerial Photo of 42nd Street Area
- DEP-2 August 13, 1990 Memo Evaluating Alternatives
- DEP-3 Evaluation of Alternatives Water Supply, July 1990, Lawler, Matusky & Skally, Engineers
- DEP-4 Compilation of Invoices and Claims for 42nd Street Area
- DEP-5 [Exhibit Withdrawn]
- DEP-6 March 31, 2011, Spill Fund Notice to Mr. and Mrs. Juromski
- DEP-7 Andrew Sites, Curriculum Vitae
- DEP-8 POET Seminar Materials
- DEP-9 Andrew Sites Response to Kunz Report (Paragraphs 18 through 23 not accepted in evidence as argumentative)