SUPERIOR COURT OF NEW JERSEY
MERCER VICINAGE

Neil H. Shuster
Presiding Judge
Chancery Division, General Equity
(609) 292-4696
(609) 292-4697

Mercer County Courthouse
P.O. Box 8068
Trenton, NJ 08650-0068

FAX COVER SHEET

TO: Christopher Gibson, Esq.
Joseph Fanaroff, DAG
Gage Andretta, Esq.

FROM: Honorable Neil H. Shuster, P.J.Ch.

RE: C-9-05

DATE: June 2, 2005

Order attached.

27 page(s) (including cover sheet)

ARCHER & GREINER
A Professional Corporation
One Centennial Square
Haddonfield, New Jersey 08033
(856) 795-2121
Attorneys for Plaintiff NL Industries, Inc.

NL INDUSTRIES, INC., Plaintiff, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendant.	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MERCER COUNTY CIVIL ACTION DOCKET NO. C-09-05 **ORDER FOR SUMMARY JUDGMENT**

THIS MATTER having been opened to the Court by Archer & Greiner, a Professional Corporation, attorneys for Plaintiff, NL Industries, Inc. ("NL"), on notice to Defendant, the New Jersey Department of Environmental Protection ("NJDEP") and Intervener, the Sayreville Economic and Redevelopment Agency ("SERA"); and the Court having considered the papers submitted by each party; and the Court having heard and oral argument; and good cause having been shown; on MAY 25, 2005 and for the reasons as set forth in attached to this Order

IT IS ON THIS 2nd day of JUNE, 2005,

ORDERED as follows:

1. The NJDEP's Motion to Dismiss NL's Verified Complaint hereby is **DENIED**;

2. NL's Motion for Summary Judgment hereby is **GRANTED**;

3. SERA's Cross-Motion for Summary Judgment hereby is **DENIED**~~, and~~

~~4. The Court hereby adjudges and declares that:~~

Neil W. Shuster, P.J.Ch.

NL INDUSTRIES, INC.

v.

NEW JERSEY DEPARTMENT
ENVIRONMENTAL PROTECTION

Docket No. C-9-05

MOTION FOR SUMMARY JUDGMENT, CROSS-MOTION BY NJDEP TO DISMISS and CROSS-MOTION BY SERA FOR SUMMARY JUDGMENT

This motion arises from a complaint filed along with a request for temporary restraints and a summary judgment motion by NL Industries ("NL"). NL filed this action against the New Jersey Department of Environmental Protection ("NJDEP") seeking a declaratory judgment interpreting N.J.S.A. 58:10-3(g). NL contends that this statute states that the NJDEP must make a determination that NL is not properly remediating the subject property before remediating it itself or allowing a third party to remediate the property. The parties came to an agreement regarding the temporary restraints in which the NJDEP agreed not to take any actions regarding the remediation of the property until the final disposition of this action. The Sayreville Economic and Redevelopment Agency ("SERA") filed a motion to intervene as a defendant and there was no objection.

The facts reveal that NL operated industrial facilities on the property from 1935 until 1982. The property itself occupies 400 acres on either side

of the Driscoll bridge at the mouth of the Raritan River in Sayreville, New Jersey. Although the property is in Middlesex County this court has jurisdiction due to the fact that the NJDEP is located in Mercer County. NL's industrial activities consisted mainly of the production of titanium dioxide, which is used in the manufacture of paints. NL processed ilmenite ore with sulfuric acid, extracting the titanium dioxide pigment. The waste from this process was disposed of primarily in lagoons on the property. When NL ceased using the property for this purpose, it leased a portion of the property to C-I-L Corporation of America ("C-I-L"), which produced sulfuric acid at the site from 1983 until 1989. At this time, C-I-L assigned its lease to Marsulex, which continued conducting activities related to the production and/or distribution of sulfuric acid (this portion of the property shall be referred to as the "Marsulex area").

In 1988, a proposed sale of the property triggered the Environmental Cleanup Responsibility Act ("ECRA"), later reenacted as the Industrial Site Recovery Act ("ISRA"), and NL became responsible under these statutes to remediate the property. C-I-L also became responsible under ECRA/ISRA when it assigned its lease to Marsulex in 1989, entering into an Administrative Consent Order ("ACO") with the NJDEP. NL conducted environmental investigations in 1988 and 1989 and began remediation work

in 1990. By 1994, NL had completed work on the initial areas of concern. In 1994, the NJDEP identified other areas of concern that NL must address. NL lists these as Areas 1, 2, 3, 4 and 5, the Tertiary Lagoon System, the Fly Ash Ponds and the Ore Storage Area. SERA states that the property is contaminated with such pollutants as antimony, arsenic, cadmium, copper, lead, PCB's, polycyclic aromatic hydrocarbons and radioactive contamination. NL states that it immediately began investigating and remediating these areas of concern. By 1997, C-I-L had made little progress on its area, and NL agreed to assume control of remediation of the whole property, including the Marsulex Area. NL thus entered into an Amended ACO (an amended version of the C-I-L ACO with NJDEP) with regard to this portion of the property. NL states that in 1999 it also completed demolition of the plant buildings on the property and that it has spent more than 11 million dollars remediating the property so far.

NL sets forth a number of ongoing and planned remediation activities, including capping a landfill on the property, conducting numerous tests, and injecting experimental lime slurry into low pH groundwater. NL is currently working with Environmental Resources Management, Inc., which employs Thomas Griffin as the Project Manager. NL asserts that its team of consultants and contractors has gained valuable experience working on the

property. NL has also posted financial security for the cleanup pursuant to N.J.A.C. 7:26C-7.2, which requires security in the amount of the estimated cost of the cleanup of $10,517,044.

SERA is a commission that was created by the Borough of Sayreville in 1997 in order to spearhead redevelopment efforts. Over the past several years it has, along with the Middlesex County Improvement Authority, targeted redevelopment of waterfront properties in Sayreville. SERA describes these properties as potentially precious, but currently old, unsightly industrial tracts. The property in question makes up about 400 acres of Sayreville's approximately 900 acres of waterfront property. Sayreville's Borough Planning Board first stated that the waterfront area should be designated as an area in need of redevelopment in 1996. The Borough Council adopted an ordinance in 1999 that set forth a plan for the redevelopment of the area. SERA contends that it had problems finding interest from potential redevelopers at that time because NL was remediating the property. SERA began its bid to take over remediation of the property in October 2000 when it passed a resolution authorizing its counsel to begin proceedings to acquire the property through condemnation. SERA asserts that NL's remediation of the property has been painfully slow. Sayreville

would like to reclaim the property for productive use as soon as possible, and would therefore like to take over remediation itself.

On November 9, 2001, SERA filed an action for declaratory judgment in the Law Division of the Middlesex County Vicinage asking for the right to take over the cleanup of the property upon condemnation, subject to NJDEP oversight. NL filed a motion for summary judgment and SERA cross-moved for the same. On March 22, 2002, the Honorable Robert A. Longhi granted summary judgment in favor of NL and denied SERA's cross-motion.

On July 1, 2002, SERA filed a condemnation complaint. On February 6, 2003, Judge Longhi held that SERA's taking was for a public purpose and that it satisfied the pre-litigation good faith negotiation requirements. On December 28, 2004, the Appellate Division upheld this ruling, and certification by the Supreme Court was subsequently denied. The Appellate Division, however, modified the trial court's ruling slightly when it stated that the property should be valued as if completely remediated and this amount should be paid into court pending the condemnation. Originally, the trial court had ruled that the valuation could be affected by the status of the remediation and the pollution on the property.

Previously, in February 2001, SERA applied to NJDEP for a Memorandum of Agreement ("MOA") that would allow SERA to remediate the property. Shortly after the filing of the condemnation action, SERA made an inquiry of the NJDEP regarding its MOA. The NJDEP advised SERA, by way of an August 20, 2002 letter from then-Assistant Commissioner Evan van Hook, that its application with the NJDEP had been held in abeyance pending condemnation. Van Hook stated that once this was completed, the NJDEP would enter into some sort of agreement with SERA to allow remediation of the property. NL responded by writing a letter, at van Hook's invitation, to Commissioner of the NJDEP Bradley Campbell (the "Commissioner"). The Commissioner's response, by letter of October 4, 2002, states that the NJDEP would address potential threats to the environment and to health by entering into an appropriate oversight agreement with SERA, and that NL's arguments that the NJDEP did not have the authority to do so were "utterly unpersuasive." Complaint, Ex. M (NJDEP denies the accuracy of the facts as related to the paragraph corresponding to this letter in NL's statement of facts even though NL attaches a copy of the actual letter to the complaint). NL subsequently met with the Commissioner, at which time NL contends that the Commissioner

informed them that the NJDEP had the authority to replace NL as the party performing the remediation without cause and without NL's consent.

NL filed this action on January 3, 2005 seeking a declaratory judgment that the NJDEP could not remove it as the party performing the remediation of the property pursuant to N.J.S.A. 58:10B-3(g). NL also seeks a declaratory judgment confirming that it has a right to remediate the Marsulex Area pursuant to the 1997 ACO. NL contends that according to N.J.S.A. 58:10B-3(g), before removing NL from the remediation, the NJDEP must provide a formal written determination that NL has failed to perform the remediation as required and that it must give NL the opportunity to cure. NL filed a motion for summary judgment along with its complaint. A decision on this motion should provide the parties with a final resolution of the case, since the question that NL presents is a fairly narrow question of law. NL also sought temporary restraints to prevent the NJDEP from removing NL as the party performing the remediation of the property. SERA subsequently filed a motion to intervene. Both NL and NJDEP agreed to SERA's intervention and the parties agreed to maintain the status quo pending the final resolution of this action. This agreement was memorialized in a March 29, 2005 Order of this court. The parties had met on March 17, 2005 to discuss a settlement and Christopher Gibson, counsel

for NL, states that Commissioner Campbell said that he would "fight to the death" to maintain the NJDEP's authority to replace NL as the party performing the remediation. Gibson Cert. ¶ 7. SERA had officially taken title to the property on March 24, 2005 (Andretta Cert. ¶ 24) and requested an MOA from the NJDEP, but this request is now being held in abeyance due to this agreement. The court now hears NL's motion for summary judgment along with SERA and NJDEP's cross-motions for summary judgment and to dismiss, respectively.

NJDEP submits opposition along with a motion to dismiss NL's complaint. NJDEP does not make any argument in opposition to NL's interpretation of N.J.S.A. 58:10B-3(g), but argues that the court should dismiss the complaint on numerous procedural grounds. The NJDEP argues that this case is not ripe for review, but that if it was that it should be heard in the Appellate Division. The NJDEP also argues that there is no justiciable controversy, that NL relies on facts that are future, contingent, and uncertain, that NL is asking the court for an advisory opinion, and that NL should have brought suit in the Law Division rather than in the Chancery Division. SERA also submits opposition, stating that the court should afford deference to NJDEP's policy of allowing a public entity to take over the cleanup. SERA also takes issue directly with NL's interpretation of the

statute, relying on the language of the statute and its legislative history. Finally, SERA argues that NL is judicially estopped from arguing that NJDEP cannot remove it as remediator of the site.

The primary issue before the court is therefore the question of whether it should interpret N.J.S.A. 58:10B-3(g) according to the interpretation of NL or SERA. The statute states as follows:

> (1) If the person required to establish the remediation funding source fails to perform the remediation as required, the department shall make a written determination of this fact. A copy of the determination by the department shall be delivered to the person required to establish the remediation funding source and, in the case of a remediation conducted pursuant to P.L.1983, c. 330 (C.13:1K-6 et al.), to any transferee of the property. Following this written determination, the department may perform the remediation in place of the person required to establish the remediation funding source. In order to finance the cost of the remediation the department may make disbursements from the remediation trust fund or the line of credit or claims upon the environmental insurance policy, as appropriate, or, if sufficient moneys are not available from those funds, from the remediation guarantee fund created pursuant to section 45 of P.L.1993, c. 139 (C.58:10B-20).
>
> (2) The transferee of property subject to a remediation conducted pursuant to P.L.1983, c. 330 (C.13:1K-6 et al.), may, at any time after the department's determination of nonperformance by the owner or operator required to establish the remediation funding source, petition the department, in writing, with a copy being sent to the owner and operator, for authority to perform the remediation at the industrial establishment. The department, upon a determination that the transferee is competent to do so, may grant that petition which shall authorize the transferee to

> perform the remediation as specified in an approved remedial action workplan, or to perform the activities as required in a remediation agreement, and to avail itself of the moneys in the remediation trust fund or line of credit or to make claims upon the environmental insurance policy for these purposes. The petition of the transferee shall not be granted by the department if the owner or operator continues or begins to perform its obligations within 14 days of the petition being filed with the department.
>
> (3) After the department has begun to perform the remediation in the place of the person required to establish the remediation funding source or has granted the petition of the transferee to perform the remediation, the person required to establish the remediation funding source shall not be permitted by the department to continue its performance obligations except upon the agreement of the department or the transferee, as applicable, or except upon a determination by the department that the transferee is not adequately performing the remediation.

N.J.S.A. 58:10B-3(g). NL is correct that the plain language of this statute clearly requires the NJDEP to make a determination that the party performing the remediation is not performing it as required. N.J.S.A. 58:10B-3(g)(1). This interpretation is consistent with the rest of the statute as set forth in N.J.S.A. 58:10B-3(g)(2) and (3).

SERA provides opposition to this interpretation of the statute by arguing that the statute is restricted to situations in which the NJDEP or a transferee is seeking access to the remediation funding source. However, there is no textual support for this interpretation in the statute at all. SERA cites the statute's title, which is, "Establishment of remediation funding

source, remediation trust fund, environmental insurance policy, and line of credit; parties authorized to perform cleanup upon any failure to establish remediation funding source." NL points to the title on the official website of the legislature, where the statute can be found with the title: "Establishment, maintenance of remediation funding source." NL states that the first title was created by the publisher, but admits the official nature of the second. NL also argues that, "[i]t is well established that the title cannot control the plain words of a statute." Cameron & Cameron, Inc. v. Planning Bd. of Warren, 250 N.J. Super. 296, 302 (App. Div. 1991)(citing City of Atlantic City v. County of Atlantic, 193 N.J. Super. 583, 586 (App. Div. 1984)). The court in Cameron also added, "Although the title is part of the act, it may not be used to create an ambiguity if the statute's body is clear." Ibid. (citations omitted). In this case, while the title does refer to the establishment of the remediation funding source in both of its incarnations, nowhere does it state that the language in the body of the statute only applies to the situation in which SERA states that it does. The court finds that the title should not affect the interpretation of the plain language of the statute.

SERA also argues that it does not qualify as a transferee under the statute and that therefore the statute should not apply to it. NL argues that the term transferee should apply to SERA because SERA is clearly a

transferee of the property. See N.J.S.A. 58:10B-3(g)(2). The term is not among the definitions listed in N.J.S.A. 58:10B-1. SERA may be correct that the most common transferee of such a property might be the transferee in the transaction that triggered the provisions of ISRA. But in this case, the triggering transaction was never completed and the property was later condemned, with the condemning transferee, SERA, becoming the owner. Though the usual case may be the one involving a private transferee that triggers ISRA, the plain language of the statute does not limit the term "transferee" to a transferee in a private transaction. The court will not read such a limitation into the statute.

Both SERA and NL cite other sources to bolster their interpretation of N.J.S.A. 58:10B-3(g). First, they argue that N.J.S.A. 58:10-23.11g(d)(4) is consistent with their respective interpretations. N.J.S.A. 58:10-23.11g(d)(4) provides immunity under the Spill Act for governmental entities that acquire a property through any of various listed methods. The statute also provides for an exception, granting no immunity for any governmental entity that "acquires ownership of real property by condemnation or eminent domain where the real property is being remediated in a timely manner at the time of the condemnation or eminent domain action." N.J.S.A. 58:10-23.11g(d)(4). SERA argues that this provision has no meaning if N.J.S.A. 58:10B-3(g) is

given NL's interpretation. It argues that the only reason to withhold immunity from such a party is because the statute assumes that the condemning party would be the one conducting the remediation. However, NL provides several persuasive situations that would give the statute meaning even when this was not the case. A party that took title through condemnation could prevent the party performing the remediation from entering the property, and it could interfere with the remediation through building or other actions. While the statute may assume that the condemning party might end up being the party performing the remediation in some situations, it does not mandate this, nor does it become meaningless if this is not the case.

NL and SERA also both cite to the legislative history of the statute. SERA cites history that shows that the legislature intended the act as a whole to encourage redevelopment of industrial areas, protect the public health, eliminate blight on neighborhoods, and other related goals that concern the prompt remediation of polluted lands and their redevelopment. See NL Brief Ex. 1 and 2; also see Andretta Cert. Ex. M, pg. 7-9. NL portrays the legislative history as pro-business and encouraging the private remediation of properties. See NL Brief Ex. 1, pg. 35; NL Brief Ex. 2, pg. 16-17. Both of these assertions are correct, and both are consistent with NL's

interpretation of the statute. Requiring a finding by the NJDEP before taking over remediation from the responsible party encourages private remediation and allows, to a certain extent, that party to control the costs of the remediation. But if the party does not perform its duties as required, that statute allows the NJDEP to step in. This latter power encourages parties to remediate the site properly, and allows the NJDEP to do so itself if it needs to.

Both SERA and the NJDEP also argue that the court should allow the NJDEP broad discretion in interpreting statutes. The NJDEP sets forth a lengthy description of the NJDEP's statutorily mandated role in cleaning up "brownfields" and the expertise that they have in overseeing the remediation of blighted industrial sites. N.J.S.A. 58:10B-3(g) is part of the Brownfield and Contaminated Site Remediation Act. The purposes of the Act are to facilitate cleanups of so-called "brownfields," generally former industrial areas blighted by pollution and lack of active use. N.J.S.A. 58:10B-1.2. The Legislature sought to impose "strict standards coupled with a risk based and flexible regulatory system [that] will result in more cleanups and thus the elimination of the public's exposure to these hazardous substances and the environmental degradation that contamination causes." Ibid.

The NJDEP contends that in the case of this property, NL has moved

painfully slow in working to remediate the property. The court makes no finding regarding the progress of the remediation. Indeed, such a finding would be within the proper scope and expertise of the agency. But this action asks only that the court interpret a narrow statute, which it has done. If the NJDEP is correct and NL has performed poorly in carrying out its duties, the NJDEP should make a written finding pursuant to the statute. The lengthy discussion of the statutory scheme and agency deference are not relevant to the question before the court and, importantly, not contradictory with the court's interpretation of the statute.

Therefore, for all of the above stated reasons, the court finds that NL's interpretation of N.J.S.A. 58:10B-3(g) is correct.

NL also seeks summary judgment on count II of its complaint, which seeks a declaratory judgment confirming its right under the 1997 amended ACO. NL argues that the ACO is a settlement that gives NL rights that the NJDEP may not unilaterally strip from it. SERA responds that the NJDEP is entitled to decide that a condemning party may take over a remediation despite an ACO with a prior owner. For this principle, it cites Superior Air Products v. NL Industries, 216 N.J. Super. 46, 60 (App. Div. 1987). However, Superior Air Products does not involve ACO's, and does not support SERA's contention at all. The NJDEP was a signatory to both the

original ACO and the amended ACO with NL. Complaint, Ex. A and B. Paragraph 8(B) of the amendment provides that if NL and C-I-L fail to live up to their obligations under the ACO, the NJDEP may "exercise full discretion concerning the ISRA obligations of the Responsible Parties for ISRA compliance" and that the NJDEP will then have the right to exercise any option available to it. Complaint, Ex. B. This language infers that the agreement is enforceable not only against C-I-L and NL, but also the NJDEP. While, as stated above, it can determine that NL is not complying with the ACO and regain its full discretion, it must abide by the terms of the agreement absent such a finding. Therefore, the court finds that the NJDEP is bound by the ACO.

The NJDEP's opposition, as well as SERA's, set forth procedural and jurisdictional grounds on which they contend that this court should dismiss NL's action. The NJDEP contends that this action should be filed in the Law Division and not the Chancery Division. While this court has determined that the Chancery Division is the correct division for the case to be heard, both the Chancery and Law Divisions have both law and equity jurisdiction. This would not be a reason, as the NJDEP contends, to dismiss the action.

Second, the NJDEP cites R. 2:2-3(a)(2), which governs appeals of final agency actions. R. 2:2-3(a)(2) provides in part that "...appeals may be taken to the Appellate Division as of right . . . (2) to review final decisions or actions of any state administrative agency or officer, . . . except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise; . . . ." Generally, this rule vests jurisdiction to review actions or inactions of an administrative agency or officer in the Appellate Division. See Prado v. State et al., 376 N.J. Super. 231, 238 (App. Div. 2005)(citing Pascucci v. Vagott, 71 N.J. 40, 51-53 (1976)). This court is cognizant that the law generally recognizes that the Appellate Division's exclusive jurisdiction is not eliminated based on the theory of the challenging party's claim or the nature of the relief sought. See Mutschler v. NJDEP, 337 N.J. Super. 1, 9 (App. Div. 2001) certif. den. 168 N.J. 292 (2001). "However, our courts have recognized limited exceptions to this general rule where considerations of efficient judicial administration militate in favor of conferring authority upon a trial court to review the action of a State agency or officer." Prado, supra, 376 N.J. Super. at 238. In Registrar & Transfer Co. v. Director, Division of Taxation, 166 N.J. Super. 75 (App. Div.), certif. den., 81 N.J. 63 (1979), the Appellate Division

reversed the findings of a trial court that had taken jurisdiction of a complaint for summary judgment requesting a ruling that certain items were not taxable under the New Jersey Sales and Use Tax Act. But while the trial court was reversed on the merits of the case, the Appellate Division referred approvingly to the fact that it took jurisdiction. The Appellate Division stated:

> [T]he interests of justice dictate that we adopt the extraordinary course of bypassing the administrative agency in this instance in order to decide the merits of the controversy. We do so in order to resolve the question of construction of the statute expeditiously, without requiring the parties at this stage of the litigation to go through the process of an administrative proceeding in order to have the issue come before this court at some time in the future. The absence of controverted facts and the lack of need for administrative expertise militate against imposing such substantial delay and expense upon the litigants. Under all the circumstances herein, we are satisfied that there is no compelling reason which would justify a transfer at this time. Fairness and justice require that we proceed to determine the merits of the controversy with dispatch. The trial judge appropriately considered the merits of the controversy on cross-motions for summary judgment, for the issue is clearly one of law as applied to the undisputed operative facts.

Id. at 79. The court also states:

> And since the issue for determination did not call for the exercise of administrative expertise and was purely a question of interpretation of a statute and its application to undisputed facts, we cannot fault the trial judge for continuing to exercise jurisdiction despite the intervening action of the Director in making a formal assessment while the matter was under judicial consideration.

Id. at 78. In addition, the procedural posture of this case makes it more susceptible to a determination by the trial court. In Abbott v. Burke, the plaintiffs sought a declaratory judgment that declared a statute to be unconstitutional. 100 N.J. 269, 277 (1985). The court ruled that the doctrine of exhaustion of administrative remedies should put the question first in the hands of the appropriate agency. Id. at 303. It only considered the exhaustion doctrine and not R. 2:2-3. It weighed the factors and eventually concluded that the extensive fact-finding that was necessary invoked the expertise of the agency. Id. at 297. In this case neither SERA nor the NJDEP argue that NL has not exhausted its administrative remedies – and appropriately so. NL asks for the court to make a declaratory judgment on a very narrow issue of law. The court finds that it is appropriate to make such a determination. In conjunction with the exception recognized in Prado, namely judicial economy, Registrar militates in favor of finding that the procedural posture and lack of the need for fact-finding in this case allows this court to retain jurisdiction. In addition, the agency has not established any record for the Appellate Division to review – it is not reviewing either a quasi-judicial or a quasi-legislative action of the agency. Such cases constitute an exception to its jurisdiction of agency actions. See Montclair Tp. v. Hughey, 222 N.J.Super. 441, 446 (App. Div. 1987).

The NJDEP also contends that this case is not ripe for review and that there is not an appropriate question for a declaratory judgment. The NJDEP further contends that there is no justiciable controversy, that the facts of the case are future and uncertain, and that any opinion would be in the form of an advisory opinion. "Our courts have . . . long held that we will not render advisory opinions or function in the abstract." Jackson v. Dept. of Corrections, 335 N.J.Super. 227, 230-231 (App. Div.), certif. den. 167 N.J. 630 (2000)(citing Crescent Park Tenants Ass'n v. Realty Eq. Corp. of N.Y., 58 N.J. 98 (1971)). "The related doctrines of standing, justiciability, ripeness and mootness that have evolved over the years are incidents of the primary conception that judicial power is to be exercised to strike down governmental action only at the instance of one who is himself harmed, or immediately threatened with harm, by the challenged conduct." Id. at 231 (citing Poe v. Ullman, 367 U.S. 497 (1961)). In this case these concepts are also intertwined with the purposes and limitations of the declaratory judgment act. This act states:

> A person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

N.J.S.A. 2A:16-53. "That statute empowers the courts to declare rights, status and other legal relations 'to afford litigants relief from uncertainty and insecurity.'" In re Ass'n of Trial Lawyers, 228 N.J.Super. 180, 183 (App. Div.), certif. den. 113 N.J. 660 (1988)(quoting U.S.A. Chamber of Commerce v. State, 89 N.J. 131, 140 (1982)). In Registrar, the Appellate Division found that "plaintiff's complaint for declaratory relief was properly brought under N.J.S.A. 2A:16-50 et seq. as a means of adjudicating its rights under the tax statute where there existed a bona fide controversy that had not yet reached the stage at which either party could have sought a coercive remedy." 166 N.J. Super. at 78. "Its [the Declaratory Judgment Act] purpose is to end uncertainty concerning the legal rights and relations of parties before they have suffered ineradicable damage or injury for which only a compensatory or coercive remedy can provide redress." In Re ATLA, supra, 228 N.J.Super. at 183 (quoting N.J. Ass'n for Retarded Citizens v. Human Services, 89 N.J. 234, 242 (1982)).

The harm that NL alleges does not seem to be speculative or uncertain. Though the NJDEP attempts to repudiate the statements and letters of the now-departed Assistant Commissioner van Hook, NL also sets forth in its complaint a February 20, 2003 conversation with Commissioner Campbell. NL states that at this meeting the Commissioner stated that the

NJDEP had the right to replace NL as the party performing the remediation and would do so upon SERA's acquisition of the property. Complaint, ¶ 63. Though the NJDEP is correct that it has not officially come to any agreement with SERA involving remediation, nor has it signed any such agreement, it ignores the fact that its representatives have consistently stated that they intended to give the remediation of the property over to SERA once the condemnation was complete. SERA has now completed this process and has submitted the question to the NJDEP, which has agreed to hold the question in abeyance pending the outcome of this action.

Additionally, this action does not constitute pre-enforcement review or an advisory opinion as the NJDEP contends that it does. For this proposition, as well as for the proposition that this case is not ripe for review, the NJDEP cites NJDEP v. Mobil Oil Corp., 246 N.J.Super. 331 (App. Div. 1991). Mobil involved a pre-enforcement challenge to an ACO. Id. at 333. The Appellate Division affirmed the trial court's denial of a preliminary injunction that would have enjoined enforcement of the order. It stated, "Mobil's application for preliminary injunctive relief invites the courts to become mediators, and ultimately arbitrators, in remediation and clean-up negotiations between DEP and the regulated community. We do not perceive this as our role, anymore than we condone 'consent' orders

which are the product of coercion." Id. at 337-338. Mobil, however, is distinguishable from the present situation because there is no imminent enforcement in this case. The NJDEP also cites In re Kimber Petroleum Corp. for the same principle, but the same distinction applies. 110 N.J. 69, appeal dismissed sub nom. Kimber Petroleum Corp. v. Daggett, 488 U.S. 935 (1988). In the words of the NJDEP, in Kimber the NJDEP ordered two companies to "fund the construction of an alternative water supply or face a threatened enforcement action." NJDEP Brief, pg. 5. The Kimber court stated that a party may not challenge enforcement of the Spill Act until the NJDEP has actually enforced some provision of it against the party. 110 N.J. at 84. In this case, such enforcement is not an issue. The court only needs to interpret this statute, which will specify the steps that the NJDEP must take to remove NL as the party performing the remediation. Moreover, NJDEP's contention that no evidence has been proffered that the statute is being "used inappropriately" is incorrect. As stated above, both former Assistant Commissioner van Hook and Commissioner Campbell have stated that they intend to make SERA the party performing the remediation when SERA takes title to the property.

This pending "use" leads the court to determine that there is no pre-enforcement review and that this is not an advisory opinion. In addition, the

court finds for the above stated reasons that the action that NL seeks to avoid – namely the NJDEP assigning the remediation to SERA without making a determination that NL has failed to perform the remediation as required – is imminent and constitutes a justiciable controversy under the declaratory judgment act. See N.J.S.A. 58:10B-3(g)(1).

Finally, SERA contends that NL is judicially estopped from arguing that this court has jurisdiction of this matter. In SERA's 2001 action, NL successfully argued that the court did not have the jurisdiction to grant SERA the relief that it sought. The doctrine of judicial estoppel "bar[s] a party to a legal proceeding from arguing a position inconsistent with one previously asserted." State, Dept. of Law & Public Safety, 142 N.J. 618, 632 (1995)(quoting N.M. v. J.G., 255 N.J.Super. 423, 429 (App. Div. 1992)). "[T]o be estopped [a party must] have convinced the court to accept its position in the earlier litigation. A party is not bound to a position it unsuccessfully maintained." Kimball Int'l Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 606-607 (App. Div. 2000) certif. den., 167 N.J. 88 (2001)(quoting In re Cassidy, 892 F.2d 637, 641 (7th Cir.), cert. denied, 498 U.S. 812 (1990)). While in this case it is clear that NL argued a position that the court accepted, the jurisdictional question was not the same. In that case SERA sought a declaratory judgment stating that it was entitled to remediate

the property once it condemned it; however, it cited no direct authority for the proposition, relying on general statutes that encouraged redevelopment. NL correctly argued that the court did not have jurisdiction to make such a decision because it fell within the discretion of the NJDEP. Remediation still falls within the discretion of the NJDEP, but the interpretation of this unambiguous statute does not. Even though this court has interpreted this statute, it is still within the power of the NJDEP to oversee the remediation and, if it needs to, remove NL. It just must do it within the bounds of the statute. Therefore, NL is correct when it argues that its position in that case does not contradict the one taken here. The court thus finds that the doctrine of judicial estoppel does not apply.

For the above stated reasons, NL's motion for summary judgment is GRANTED, NJDEP's motion to dismiss is DENIED and SERA's motion for summary judgment is DENIED.