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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0635-20**

**IN RE NEW JERSEY  
DEPARTMENT OF  
ENVIRONMENTAL  
PROTECTION DIRECT  
OVERSIGHT DETERMINATION  
AGAINST SOLVAY  
SPECIALTY POLYMERS  
USA, LLC.**

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Argued March 15, 2022 – Decided January 9, 2023

Before Judges Fisher, DeAlmeida and Smith.

On appeal from the New Jersey Department of Environmental Protection.

Daniel J. Toal (Paul, Weiss, Rifkind, Wharton & Garrison LLP) of the New York bar, admitted pro hac vice, argued the cause for appellant Solvay Specialty Polymers USA, LLC (Theodore V. Wells, Jr., attorney; Kegan A. Brown, of counsel and on the briefs; Thomas Pearce and Taylor West, on the briefs).

Samuel R. Simon, Deputy Attorney General, argued the cause for respondent Department of Environmental Protection (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Samuel R. Simon, Richard F.

Engel and Erin M. Hodge, Deputy Attorneys General,  
on the brief).

Edward Lloyd (Morningside Heights Legal Services)  
argued the cause for amicus curiae New Jersey Chapter  
of the Sierra Club (Edward Lloyd, on the brief).

The opinion of the court was delivered by

DeALMEIDA, J.A.D.

Appellant Solvay Specialty Polymers USA, LLC (Solvay) appeals from the September 25, 2020 determination of the Department of Environmental Protection (DEP) that Solvay is subject to compulsory and discretionary direct oversight of its remediation of hazardous substances it discharged into the ground, air, and water from a facility it operates in West Deptford. We affirm.

## I.

Since 1990, Solvay has owned and operated a manufacturing plant along the Delaware River (the Site). The Site has been used to manufacture polyvinylidene fluoride (PVDF), a type of fluoropolymer, since 1985. To manufacture PVDF, a process aid is needed to create an emulsion process. From 1985 to 2010, the primary process aid used at the Site was Surflon S-111. Surflon S-111 predominately contains ammonium perfluorononanoate, which presents as perfluorononanoic acid (PFNA) in the environment. PFNA is a specific per- and polyfluoroalkyl substance (PFAS). From 1995 to 2003, Solvay

also used another process aid, sodium perfluorooctanoate (NaPFO), which presents as perfluorooctanoic acid (PFOA), another specific PFAS, in the environment.

PFAS is an umbrella term used to describe thousands of man-made chemicals that bioaccumulate, are extremely resistant to degradation, and pose a substantial threat to human health and the environment. PFAS is linked to a number of serious medical conditions, including increased rates of kidney and testicular cancer, pregnancy-induced hypertension and/or pre-eclampsia, decreases in birth weight, increases in cholesterol, increased risk of thyroid disease, decreased antibody responses to vaccines, increased risk of decreased fertility, and increased risk of asthma.

Having been informed of sampling data establishing the presence of PFNA and PFOA in the Delaware River and the water system of nearby Paulsboro, Solvay began investigating and remediating PFNA and PFOA that might be attributable to the Site. At DEP's request, in September 2013, Solvay entered into the agency's site remediation program and hired a licensed site remediation professional (LSRP) to oversee its remediation efforts.

In March 2019, DEP issued a Statewide PFAS Directive (Statewide Directive) to Solvay and other entities. The Statewide Directive stated DEP's

determination that Solvay is responsible for PFAS contamination arising from the Site. According to the Statewide Directive, the Site had the second highest capacity in the world for using Surflon S-111 to make PVDF and "discharged massive amounts" of PFNA, contaminating the Site, off-site properties, and the State's natural resources, including air, surface waters, groundwater, and drinking water sources. The Statewide Directive also states DEP's determination that the Site and surrounding area are contaminated with PFOA as a result of Solvay's operations.

The Statewide Directive seeks from Solvay, among other things: (1) a good faith estimate of future costs to investigate, test, treat, cleanup, and remove the contamination, all of which are Solvay's responsibility; (2) reimbursement of the costs DEP incurred to investigate, treat, cleanup, and remove PFNA, PFOA, and other PFAS compounds at and around the Site prior to issuance of the Statewide Directive, which at the time totaled \$3,105,084.91, see N.J.S.A. 58:10-23.11(g)(c)-(d); and (3) assumption, on an expedited basis, of responsibility for the operation and maintenance of drinking water treatment systems installed by DEP at numerous sites to address PFAS contamination from the Site. The Statewide Directive provided detailed steps to be taken by Solvay within site-specific timeframes, required the production of information with

respect to the historic use of PFAS compounds and replacement chemicals at the Site, and stated that if Solvay failed to comply, it would be subject to penalties in the form of treble damages under the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11 to -23.24.

In April 2019, Solvay responded to the Statewide Directive and asserted good cause defenses to its substantive provisions. Solvay argued it is not liable under the Spill Act for PFAS impacts not caused by the Site, DEP's attempt to shift the cost of investigating and remediating PFAS impacts Statewide to Solvay and other entities was unreasonable, especially given DEP's knowledge of other PFAS sources not included in the Statewide Directive, and DEP's claim for past costs lacked sufficient evidentiary support.

Solvay did, however, agree to assume responsibility for the operation of seven of the private potable wells identified in the Statewide Directive because the LSRP overseeing Solvay's remediation had determined those wells contain PFAS attributable to the Site. Solvay also paid \$1,055,444 of DEP's past costs based on its analysis of documentation provided by DEP, and expressed a willingness to pay additional past costs if DEP provided sufficient documentation.

On September 25, 2020, DEP issued a determination that remediation of the Site and all locations to which contaminants from the Site have migrated are subject to compulsory and discretionary direct oversight by the agency (Direct Oversight Determination). According to the Direct Oversight Determination, compulsory direct oversight was triggered by Solvay's failure to comply with the site-specific timeframes set forth in the Statewide Directive. N.J.S.A. 58:10C-27(a)(2); N.J.A.C. 7:26C-3.4(d). In addition, the Direct Oversight Determination stated that discretionary direct oversight was warranted because one or more sensitive natural resources have been injured by contamination from the Site. N.J.S.A. 58:10C-27(b)(2); N.J.A.C. 7:26C-14.3(a)(2). DEP explained that pursuant to N.J.A.C. 7:26C-14.3(b), it evaluated the injuries to water resources, i.e. groundwater, drinking water, and surface water, i.e. the Delaware River and several of its tributaries, all of which are sensitive natural resources, see N.J.A.C. 7:1E-1.8, and determined that these injuries are regional in scope, constitute more than five acres, and were caused by PFAS from the Site, warranting discretionary direct oversight. DEP also considered whether Solvay: (1) was in compliance with applicable remediation statutes and regulations; (2) implemented an interim response action necessary to contain contaminants and prevent contaminant migration and exposure of receptors; (3) entered a

voluntary agreement with DEP to resolve natural resource injuries caused by discharges at the Site; and (4) implemented green remediation as part of its remediation efforts. N.J.A.C. 7:26C-14.3(b)(1).

The Direct Oversight Determination stated that Solvay and its LSRP must immediately comply with all direct oversight duties set forth in N.J.S.A. 58:10C-27(c) and N.J.A.C. 7:26C-14.2(b). Those duties include: (1) submission of a proposed public participation plan for DEP approval, N.J.S.A. 58:10C-27(c)(7); N.J.A.C. 7:26C-14.2(b)(2)(iii); (2) completion of a remediation cost review, N.J.A.C. 7:26C-14.2(b)(2)(i); (3) establishing a remediation funding source other than a self-guarantee in an amount at least equal to the estimated cost of the remediation, N.J.S.A. 58:10C-27(c)(4); N.J.A.C. 7:26C-14.2(b)(2)(ii); (4) submission of a schedule for completion of outstanding tasks, N.J.A.C. 7:26C-14.2(b)(2)(v)(2); (5) obtaining DEP approval prior to making any disbursements or modifications to established letters of credit, N.J.S.A. 58:10C-27(c)(5); N.J.A.C. 7:26C-14.2(b)(6); (6) implementing a DEP-approved public participation plan, N.J.S.A. 58:10C-27(c)(7); N.J.A.C. 7:26C-14.2(b)(8); (7) ensuring all submissions by the LSRP be given simultaneously to DEP and Solvay with no pre-review by Solvay, N.J.S.A. 58:10C-27(c)(6); N.J.A.C. 7:26C-14.2(b)(7); (8) submitting a feasibility study for DEP approval when

required, N.J.S.A. 58:10C-27(c)(2); N.J.A.C. 7:26C-14.2(b)(3); and (9) implementing each remedial action selected by DEP for the Site, N.J.S.A. 58:10C-27(c)(3); N.J.A.C. 7:26C-14.2(b)(4).<sup>1</sup>

Failure to comply with the Direct Oversight Determination can result in penalties, which DEP may adjust considering "the compliance history of the violator" and whether "the violation is the result of any intentional, deliberate, purposeful, knowing or willful act or omission . . . ." N.J.A.C. 7:26C-9.5(a)(4) – (b); N.J.A.C. 7:26C-9.6.

On November 4, 2020, Solvay filed a notice of appeal from the Direct Oversight Determination. It argues that the Direct Oversight Determination violates its due process rights as established in In re Kimber Petroleum Corp., 110 N.J. 69 (1988), by requiring Solvay to comply with the Direct Oversight Determination before it has an opportunity to have its good-cause defenses to the Statewide Directive adjudicated in the Law Division. In addition, Solvay

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<sup>1</sup> DEP contends that its prior approval of remediation at the Site was already required because the Site is being remediated under the Federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 to § 6992k, and was, and continues to be, a priority site under the Government Performance and Results Act, 40 U.S.C. § 11101 to § 11703. See N.J.A.C. 7:26C-2.3(a)(1). According to DEP, Solvay does not agree DEP's prior approval is required under these statutes.



argues that the Direct Oversight Determination should be invalidated because it is arbitrary, capricious, and unreasonable.

Six days later, on November 10, 2020, DEP filed a complaint in the Law Division to, among other things, compel Solvay to: (1) investigate and remediate the Site's pollution and damage to the environment; and (2) disclose information about the health and environmental impact of its operations at the Site. In addition, DEP requests the Law Division to determine whether Solvay failed, without good cause, to comply with the Statewide Directive.<sup>2</sup>

## II.

Solvay's arguments must be analyzed against a complex statutory and regulatory background. Under the Spill Act, "any . . . person who discharges a hazardous substance or is in any way responsible for a hazardous substance . . . that was discharged at a contaminated site" is "responsible for conducting the remediation" of that site. N.J.S.A. 58:10-23.11b. "A party even remotely responsible for causing contamination will be deemed a responsible party under

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<sup>2</sup> During the pendency of this appeal, the DEP Commissioner, this court, and the Supreme Court denied Solvay's applications for a stay of the Direct Oversight Determination pending appeal. Solvay subsequently informed DEP that, pending resolution of this appeal and the Law Division action, it would perform the tasks demanded by DEP pursuant to the Direct Oversight Determination to avoid the imposition of administrative penalties for non-compliance.

the Act." Kimber, 110 N.J. at 85 (citing State Dep't of Env't. Prot. v. Ventron Corp., 94 N.J. 473, 501-03 (1983)). "'Remediation' . . . means all actions to investigate, clean up, or respond to any known, suspected, or threatened discharge, including . . . remedial action . . . ." N.J.S.A. 58:10-23.11b.

The Spill Act has long authorized DEP to remove hazardous substances that have been discharged into the environment and then bring a cost recovery action against the responsible parties, N.J.S.A. 58:10-23.11q, or to issue an administrative directive requiring responsible parties to remove hazardous substances they discharged into the environment. N.J.S.A. 58:10-23.11g. The Supreme Court has held that the statute also impliedly authorizes DEP to issue an administrative directive requiring responsible parties to make a payment to compensate DEP for the cost of its past cleanup of contaminated sites. Kimber, 110 N.J. at 73-75. Liability under the Spill Act is strict, absolute, joint, and several. N.J.S.A. 58:10-23.11(g)(c)-(d).

In 2009, the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 to -29, was enacted to augment DEP's regulatory enforcement of the remediation of contaminated sites. Before enactment of the statute, all remediation was conducted with direct DEP involvement. The SRRA shifts control of remediation, in most instances, to a licensed professional retained by the

responsible party. The statute created a Site Remediation Professional Licensing Board to license LSRPs. N.J.S.A. 58:10C-7. A discharger of hazardous substances responsible to remediate its contamination shall retain an LSRP to perform the remediation. N.J.S.A. 58:10B-1.3(b)(1). After the responsible party notifies DEP of the name and license information of the LSRP, N.J.S.A. 58:10B-1.3(b)(2), the discharger conducts the remediation without the prior approval of DEP, unless otherwise directed by the agency. N.J.S.A. 58:10B-1.3(b)(3). The LSRP independently verifies that the remediation complies with applicable environmental laws and regulations. N.J.S.A. 58:10C-16(i). In addition to other requirements, the remediation must "meet the mandatory remediation timeframes and expedited site[-]specific timeframes established by" DEP. N.J.S.A. 58:10B-1.3(b)(8).

DEP, however, "shall undertake direct oversight of a remediation of a contaminated site . . . [when] the person responsible for conducting the remediation at a contaminated site has failed to meet a mandatory remediation timeframe or an expedited site[-]specific timeframe adopted by" DEP. N.J.S.A. 58:10C-27(a)(2). This is commonly referred to as mandatory direct oversight.

In addition, DEP "may undertake direct oversight of a remediation of a contaminated site . . . [when] the department determines that more than one

environmentally sensitive natural resource has been injured by contamination from the site . . . ." N.J.S.A. 58:10C-27(b)(2). This is commonly referred to as discretionary direct oversight. In addition to the criteria in the statute, DEP

will consider the following criteria when evaluating . . . whether to undertake direct oversight of . . . the entire remediation of a contaminated site:

[w]hether . . . [g]round water contamination is greater than five acres . . . .

[N.J.A.C. 7:26C-14.3(b)(2)(i).]

The Direct Oversight Determination states DEP's conclusion that direct oversight of Solvay's compliance with the Statewide Directive is both mandated by statute and warranted by the exercise of the DEP Commissioner's discretion.

A.

Solvay argues that the Direct Oversight Determination violates the holding in Kimber by circumventing its constitutional right to have its good-cause defenses to the Statewide Directive adjudicated in the Law Division prior to being compelled to comply with the Statewide Directive. We disagree.

In Kimber, DEP traced groundwater contamination in a residential neighborhood to a gasoline station leased by Kimber. 110 N.J. at 72. Acting pursuant to the Spill Act, DEP directed Kimber to pay \$2.16 million to fund construction of an alternate water supply for the affected neighborhood. Ibid.

The directive stated that a failure to make the payment would subject Kimber to the penalty of treble damages. Ibid. Kimber appealed, arguing that the Spill Act's treble damages provision violated its due process rights under the federal and State constitutions because it is triggered only when a DEP directive is disputed, thus serving to deter a judicial challenge to state action. Id. at 72-73, 75. In other words, Kimber argued that even if it had a reasonable, but invalid, defense to the directive, it risked the imposition of treble damages if it elected to not comply with the directive and then unsuccessfully challenged the directive.

With respect to Kimber's federal due process rights, the Court explained,

[t]he [United States] Supreme Court has held that it is sufficient for the due process guarantee of the federal constitution that there be some forum where an order's validity can be challenged without penalty; it need not be the same forum where enforcement actions are prosecuted and the challenge need not be pre-payment. Under this analysis, the pre-adjudication payment of actual costs under the statute with the opportunity later to contest the legality or reasonableness of such costs without further penalty could be viewed as satisfying essential due process concerns.

[Id. at 79 (citations omitted) (footnote omitted).]

The Court found, however, "there remain doubts as to the [Spill] Act's validity under the federal constitution because of the way in which it combines the lack

of a pre-enforcement hearing with strict liability and added penalty for noncompliance." Ibid. The Court noted that

[w]hile none of the individual components of the Spill Act enforcement framework violates due process requirements the combined weight of the joint and several strict liability scheme with the lack of a pre-enforcement hearing opportunity and the imposition of punishment in the form of treble damages upon failure to comply – even if such failure is predicated upon a reasonable defense – may be beyond constitutional tolerance.

[Id. at 80-81.]

The Court illustrated the constitutional concerns:

The Spill Act, as the State would have it interpreted and applied, could have a draconian impact on affected parties. A small company with arguably little or no actual responsibility for the discharge of a hazardous substance might be forced to pay a large amount of money, with no effective pre-payment judicial recourse, no means to challenge the DEP's estimate of the monetary amount needed, and a potentially long delay before it gets its refund from the Spill Fund or the contribution due from the other liable dischargers. The result in fact could be confiscatory.

[Id. at 82.]

The Court observed that "[t]his kind of problem – undue harshness in the individual application of the Act's enforcement provisions – can be rectified by recognition of the availability of a good-cause exception." Ibid.

Applying the fundamental fairness doctrine underlying the State Constitution's due process protections, see State v. Miller, 216 N.J. 40, 71 (2103), the Court interpreted the Spill Act to allow the subject of a DEP directive to assert good-cause exceptions to its provisions:

[w]e therefore hold that treble damages need not be assessed if the party opposing such damages had an objectively reasonable basis for believing the DEP's directive was either invalid or inapplicable to it, and that any decision by the DEP to seek treble damages in a recovery action be subject to judicial review as any other agency action.

[Id. at 83.]

Good-cause defenses, however, are not raised through a direct challenge to a DEP directive. Id. at 84.

A good-cause defense is relevant only once a company refuses to comply with a DEP directive and DEP moves in court to enforce the directive. In accordance with its directive the DEP in its enforcement action may seek treble damages as a penalty for non-compliance. If the court determines that a company's basis for non-compliance is objectively reasonable, even if the court does not ultimately uphold the company's argument, DEP's request for treble damages may be rejected if not reasonable in light of all the circumstances.

[Ibid. (footnote omitted).]

Thus, Kimber places constitutionally required limits on the imposition of treble damages in an enforcement action brought by DEP after a responsible

party does not comply with a DEP directive in the event the responsible party asserts a good-cause defense to the directive, even if that defense ultimately proves unsuccessful. Kimber does not, as Solvay argues, "excuse" a responsible party from complying with a DEP directive because it has asserted good-cause defenses to the directive that have not yet been adjudicated. Nor does Kimber preclude DEP enforcement of a directive that is the subject of a responsible party's assertion of good-cause defenses.

To the contrary, as expressly contemplated by Kimber, DEP may, consistent with due process considerations, enforce a directive after a responsible party has asserted its good-cause defenses. Kimber serves only as a limitation on potentially confiscatory treble damages as a penalty where a responsible party has refused to comply with a directive, if its good-cause defenses, although objectively reasonable, are not established in an enforcement action, and a court determines that such damages are not reasonable in light of all of the circumstances.

Solvay has effectuated its rights under Kimber by asserting what it contends are good-cause defenses to some provisions of the Statewide Directive and refusing to comply with those provisions. DEP subsequently filed a complaint in the Law Division against Solvay seeking enforcement of the



Statewide Directive. Solvay will have the opportunity in that action to adjudicate its good-cause defenses to the provisions of the Statewide Directive with which it has refused to comply. If it establishes those defenses are valid, penalties will not be assessed. If Solvay does not prevail on its defenses, but establishes they were objectively reasonable, it may argue that the imposition of treble damages as a penalty for its partial non-compliance is not reasonable considering all of the circumstances.

The mere issuance of the Direct Oversight Determination does not trigger the due process protections established in Kimber. We have carefully considered Solvay's arguments to the contrary, including its claim that by issuing the Direct Oversight Determination DEP deprived Solvay of its property (funds expended to comply with the Statewide Directive) and reputation without due process, and conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only these comments.

The Direct Oversight Determination is not a penalty. It is a tool through which DEP seeks compliance with the Statewide Directive while its enforcement action – and Solvay's good-cause defenses – are being adjudicated in the Law Division. If DEP seeks penalties in its enforcement action for Solvay's failure to comply with the agency's decisions on the Direct Oversight Determination,

no such penalties may be imposed without a hearing. N.J.A.C. 7C:26-9.9. At such a hearing, Solvay is free to argue for an extension of the holding in Kimber because the penalties sought are of such a potentially confiscatory nature as to warrant the due process protections established in that case for treble damages. See E.I. du Pont de Nemours and Co. v. State, Dep't of Env't Prot., 283 N.J. Super. 331, 355 (App. Div. 1995) ("[A] responsible party's good cause defenses are . . . available if DEP chooses to prosecute the . . . penalties provisions in a given enforcement action."). As then-Judge Alito explained,

[i]n order to enforce [its] directive, the DEP must initiate a cost recovery action in a court of competent jurisdiction. In such an action, a responsible party may assert a good cause defense based on an objectively reasonable belief that a directive was invalid in whole or in part.

[Manor Care, Inc. v. Yaskin, 950 F.2d 122, 124 (3d Cir. 1991) (citing Kimber, 110 N.J. at 82-84).]

To the extent that compliance with the Direct Oversight Determination requires Solvay to expend funds on its remediation efforts, it does so as an enforcement mechanism of the Statewide Directive. Solvay has the opportunity in the pending enforcement action to defend against compelled compliance with any aspect of the Statewide Directive through direct oversight by DEP.

In addition, Solvay argues that issuance of the Direct Oversight Determination inflicts on it the negative stigma that it has not complied with environmental laws and regulations. However, under the federal constitution, "reputation alone . . . is [n]either 'liberty' [n]or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." Paul v. Davis, 424 U.S. 693, 701 (1976); see also Clark v. Twp. of Falls, 890 F.2d 611, 619 (3d Cir. 1989). The State Constitution's due process protections are triggered only when a State action affects a reputational interest accompanied by an additional protectable interest. Doe v. Poritz, 142 N.J. 1, 102-03 (1995).

Solvay makes no convincing argument that its reputation or any additional interest is negatively affected by the Direct Oversight Determination. Solvay is statutorily obligated to remediate the contamination resulting from operations at the Site. The effect on Solvay's reputation of the fact that it must conduct remediation under the direct oversight of DEP, as opposed to under the auspices of an LSRP outside of the agency's direct supervision, is not sufficient to trigger constitutional due process protections. There are a number of circumstances in which direct oversight is triggered, not all of which relate to a discharger's non-compliance with its remediation obligations. Solvay also has an opportunity to restore any alleged harm to its reputation in the enforcement action by

establishing that it has fully satisfied its responsibility to remediate contamination arising from the Site.

B.

Nor are we persuaded by Solvay's argument that the Direct Oversight Determination is arbitrary, capricious, and unreasonable. A "strong presumption of reasonableness attaches to the actions of the administrative agencies." In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001) (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993)). The scope of our review of a final decision of an administrative agency is limited and we will not reverse such a decision unless it is "arbitrary, capricious, or unreasonable, or . . . not supported by substantial credible evidence in the record as a whole." In re Stallworth, 208 N.J. 182, 194 (2011) (citing Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). When making that determination, we consider:

(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Ibid. (citing In re Carter, 191 N.J. 474, 482-83 (2007)).]

We are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue . . . ." Carter, 191 N.J. at 483 (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). We will, however, generally "afford substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing." Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 420 (2009) (quoting Richardson v. Bd. of Trs., 192 N.J. 189, 196 (2007)). Substantial deference must be extended to an agency's interpretation of its own regulations, particularly on technical matters within the agency's expertise. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004).

With respect to mandatory direct oversight, DEP found Solvay failed to comply with two expedited site-specific timeframes established in the Statewide Directive: (1) that Solvay conduct remediation activities related to certain potable wells within ninety days of receiving the Statewide Directive; and (2) that Solvay identify, sample, and implement treatment and monitoring of all wells with documented exceedances of certain PFNA and PFOA levels within 120 days of receiving the Statewide Directive. Solvay argues that the Statewide Directive does not have independent legal force and is not a final agency

decision and, therefore, violation of its provisions setting site-specific timeframes cannot form the basis for mandatory direct oversight.

We find in DEP's broad statutory authority to oversee the remediation of contaminated sites the ability to establish site-specific timeframes for identified actions in the Statewide Directive. Solvay's failure to comply with those timeframes is a sufficient basis for DEP's determination that its direct oversight of Solvay's remediation of the Site and wide-ranging environmental impacts resulting from the migration of PFAS from the Site is mandated. This conclusion is sufficient to affirm the Direct Oversight Determination.

However, we also find sufficient support in the record for DEP's determination that discretionary direct oversight is warranted. We review the Commissioner's exercise of her statutory discretion for an abuse of discretion. An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. I.N.S., 779 F.2d 1260, 1265 (7th Cir. 1985)).

Solvay argues that DEP's discretionary oversight determination is not supported by substantial, credible evidence that surface water has been injured by PFAS attributable to the Site. According to Solvay, the presence of PFAS in

surface water alone does not constitute an injury under the Act. It also argues that because DEP has not adopted surface water quality standards or screening criteria for PFNA or PFOA, it is not possible for the agency to determine that surface water has been injured by those contaminants from the Site.<sup>3</sup>

We have carefully reviewed the record and do not find DEP mistakenly exercised its discretion when it determined direct oversight of remediation of the Site is warranted. An injury includes "any adverse change or impact of a discharge on a natural resource or impairment of a natural resource service, whether direct or indirect, long-term or short-term, and that includes the partial or complete destruction or loss of the natural resource or any of its value." N.J.A.C. 7:26E-1.8. The record includes evidence that sampling in the Delaware River revealed levels of PFNA that exceeded levels found anywhere else in the world at the time. Elevated levels of PFNA were detected in fish in the Delaware River near the Site, and PFNA linked to the Site was found in fish tissue in nearby tributaries. The concentration of PFAS in fish tissue led DEP to issue consumption advisories due to human health concerns. Surely, where otherwise edible fish are rendered unsafe due to surface water contamination, the natural

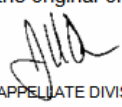
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<sup>3</sup> Although Solvay disputes that groundwater and drinking water suffered a qualifying injury as a result of PFAS attributable to the Site, its merits brief addresses only surface water. We find this omission in Solvay's briefing telling.

resource in question – the surface water – has suffered a "loss of value" within the meaning of N.J.A.C. 7:26E-1.8. In addition, the record contains sufficient evidence that Solvay is not in compliance with environmental statutes and regulations, that its contamination of groundwater exceeds five acres, and that its remediation efforts have been insufficient. N.J.A.C. 7:26C-14.3(b). The imposition of direct oversight of Solvay's remediation of the Site was not a mistaken exercise of the Commissioner's discretion.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION