



# Appellate Division Revives Environmental Rights Act Claims to Compel Cleanup of Contaminated Sites—For Now

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On August 15th, the Appellate Division permitted the owner of contaminated property to assert a claim under the Environmental Rights Act ("ERA"), N.J.S.A.2A:35A-1 et seq., to compel prior owners that allegedly discharged hazardous substances to remediate the contamination. Bradley v. Kovelesky, Docket No. A-0423-14 (App. Div. Aug. 15, 2016). The ERA allows private parties to seek injunctive relief for violations of New Jersey environmental statutes in the face of government inaction, but the ERA has not been used successfully to compel remediation of wholly past discharges of hazardous substances. The New Jersey Supreme Court currently is considering a similar issue in another case. See Dalton v. Shanna Lynn Corp., Docket No. A-4846-12 (App. Div. Nov. 6, 2015), certif. granted, 223 N.J. 406 (2015), and our earlier entry on the Dalton case. If the Supreme Court adopts or does not disturb Bradley's approach to the ERA, owners of contaminated property and parties cleaning up contaminated sites may obtain broader relief against dischargers than previously has been available to them through the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 etseq. ("Spill Act").

In Bradley, the plaintiffs were executors of an estate whose decedent owned property contaminated by asphalt dumping. After discovering the contamination, the plaintiffs brought Spill Act and common law tort claims against a construction company that formerly owned the site. The plaintiffs later sought to amend their complaint to add an ERA claim seeking to compel the defendants to remediate plaintiffs' property. The trial court granted summary judgment for the defendants on all counts. The trial court held that the proposed ERA amendment was futile, finding that the defendants' past discharges could not satisfy the ERA requirement that the violation of environmental law likely will recur in the future. N.J.S.A.2A:35A-4(a).

On appeal, however, the Appellate Division reinstated the ERA claim. The appellate court disagreed that the ERA claim was futile, noting plaintiffs alleged that defendants' failure to remediate the property is a continuing violation of the Brownfield and Contaminated Site Remediation Act ("BCSRA") that would likely recur in the future. An amendment to the BCSRA passed with the 2009 Site Remediation Reform Act imposes an affirmative obligation to remediate contamination: a discharger or person in any way responsible for a hazardous substance under the Spill Act "shall remediate the discharge of a hazardous substance." N.J.S.A. 58:10B-1.3(a). Before Bradley recognized the continuing obligation created by the 2009 amendment, courts uniformly rejected ERA claims against predecessor landowners, as these owners' past discharges would not recur. E.g., Bowen Eng'g v. Estate of Reeve, 799 F. Supp. 467, 479 (D.N.J. 1992); In re Flintkote Co., 533 B.R. 887, 892 (D. Del. 2015), aff'd, 2016 WL 3997217 (3d Cir. July 26, 2016). Parties already have begun to take notice of the Appellate Division's holding in Bradley. For instance, the appellant in Flintkote has asked the Third Circuit to reconsider its July 2016 opinion dismissing its ERA claim.

The ERA provides two advantages that the Spill Act does not. Under the ERA, a plaintiff can seek an injunction compelling other responsible parties to remediate before spending any of its own funds. The Spill Act, on the other hand, permits contribution claims only after the plaintiff begins remediation. Magic Petroleum Corp. v. Exxon Mobil Corp., 218 N.J. 390, 410 (2014). In addition, the ERA allows a prevailing party to recover its attorneys' fees, N.J.S.A. 2A:35A-10, whereas a prevailing Spill Act contribution plaintiff may not recover such fees. See In re Thomas, 278 N.J. Super. 580, 586-87 (App. Div. 1995).

The Supreme Court in Dalton ultimately may resolve this issue in the same way as the Bradley court or it may choose a different approach but, for now, an ERA claim seeking to compel remediation of a past discharge from the responsible party is viable.

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