



# No Second Guessing of DEP

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In last year's assessment of environmental jurisprudence during the 1998-1999 term, I observed that New Jersey courts were continuing to strictly construe the liability provisions of environmental statutes and to limit the availability of affirmative defenses under those laws. No significant decision issued during this past term addressed these principles, although one noteworthy case did limit the scope of strict liability in the common law context. Of greatest importance during the 1999-00 was the courts' unwavering adherence to a non-interventionist philosophy when reviewing DEP action.

In case after case in the arenas of rulemaking, permitting and enforcement, the Appellate Division refused to second-guess DEP's determinations, emphasizing instead the well-established presumption of reasonableness given to agency actions in areas involving their technical expertise. This essentially conservative approach, while consistent with the courts' strict interpretation of environmental statutes during the several most recent court terms, nonetheless is noteworthy for its similarity to the pioneering period of environmental law when judges nearly universally adopted the agency's positions on matters in which they felt themselves to be on unfamiliar terrain.

In a case likely to be widely cited, the Appellate Division limited the application of strict liability principles under common law, holding that the operator of a gasoline service station was not strictly liable to the contract purchaser because storage of gasoline in underground storage tanks at a gasoline service station is not an abnormally dangerous activity. *DeAngelo v. Exxon Corp.*, App. Div. No. A-791-98T3. In arguing that strict liability should be applied to defendants' activities, plaintiffs relied on the well-known New Jersey Supreme Court opinion in *T&E Industries v. Safety Light Corp.*, 123 N.J. 371, in which the Court held that the owner of a radium-contaminated property could hold a distant predecessor in title strictly liable for dangers arising from having engaged in an abnormally dangerous activity, i.e., depositing radium tailings on the property.

In *DeAngelo*, the Appellate Division found the storage of gasoline in underground tanks at a gasoline service center, in contrast, "falls far short" of the factors from the Restatement (Second) of Torts Section 520 cited by *T&E Industries* to consider in evaluating whether an activity is abnormally dangerous.

In reaching this conclusion, the court emphasized that: 1) underground storage of gasoline is a matter of common usage by gasoline service stations throughout the country; 2) any dangerous attributes of such storage are outweighed by the obvious value of the service station to the community; 3) there was no reason to find that the risk of accident caused by the tanks cannot be eliminated by the exercise of reasonable care; and 4) there was nothing about the location and operation of the service station that rendered it abnormal or uncommon when compared with other service stations.

The Appellate Division finally answered in the negative the question explicitly presented in *T&E Industries* 20 years ago as to whether use of an underground gasoline storage tank installed in earlier decades represents an abnormally dangerous activity.

## Deference to DEP

Most significant this past term were the Appellate Division cases upholding the DEP's judgment in promulgating rules, granting permits and assessing penalties. Without exception, the courts relied upon the well-established presumption of reasonableness given to agency decisions and refused to overturn agency action barring a showing that such action was arbitrary, capricious, or unreasonable, or that the agency had exceeded its statutory authority. In decisions that resemble the earliest days of judicial review of agency action, the Appellate Division pointedly declined to take a "hard look" at DEP determinations, and consistently deferred to what it characterized as the proper exercise of agency discretion and expertise.

Two significant appeals decided within days of each other involved direct challenges to DEP regulations. (A third, *Federal Pacific Electric Co. v. DEP*, App. Div. No. A-518-98T2, decision pending, is challenging DEP's application of the Ground Water Quality Standards, N.J.A.C. 7:9-6, as standards for site remediation. The author represents appellant in this matter and hopes for a different outcome from the decisions discussed herein.)

In *New Jersey Site Remediation Network v. DEP*, App. Div. No. A-5272-97T3, a collection of business and industry groups appealed from regulations promulgated by DEP which permit the agency to recover natural resource damages. Natural resource damages are defined as "the amount of money the Department has determined is necessary to restore, rehabilitate, replace or otherwise compensate for the injury to natural resources as a result of a discharge [of hazardous substances]." N.J.A.C. 7:26E-1.8.

Appellants argued that DEP's recovery of such damages and the standards to be applied to damage assessments as provided in the regulations are contrary to the requirements of the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq., (ISRA), the Hazardous Discharge Site Remediation Act, N.J.S.A. 58:10B-1 to -20 (HDA), and the Brownfield and Contaminated Site Remediation Act, L. 1997, c. 278 § 1, which amended and supplemented HDA. Specifically, appellants asserted that the Legislature intended to confine DEP's oversight and approval of site remediation to "statutorily mandated criteria" and prohibited the agency from acting until the statutorily mandated Environment Advisory Task Force made recommendations for remediation standards.

Appellants further argued that DEP is required by law to pursue natural resource damage claims through Superior Court actions rather than through the administrative process and that, because the site remediation process does not include addressing these damages, the agency was unauthorized to include addressing such damages as a condition precedent to site remediation approval and issuance of a "no further action" letter.

## Rejected

The Appellate Division summarily rejected each of the challengers' arguments. The court found that the statutory authority for natural resource damage assessment does not derive from the provisions of S. 1070 (the Senate Bill ultimately enacted in 1993 as ISRA and HDA) requiring promulgation of standards for remediation. Rather, the court held, the natural resource damages regulations "are more generic, and they find their source in the definitions of 'remedial action' under the Brownfield Act - and 'clean up and removal costs' under the Spill Act'." The court also based its decision on the fact that the Legislature had not invalidated the challenged regulations, although it has the constitutional authority to do so if it finds that the rules are inconsistent with its intent.

The court found further evidence in the Brownfield Act of the Legislature's acceptance of DEP's approach. The statute eliminated the requirement of a baseline ecological evaluation (BEE) for remediation of certain residential underground storage tanks. The court emphasized that the Legislature could have eliminated the requirement for a BEE generally, but chose not to do so.

In *In re Water Pollution Control Rules*, App. Div. No. A-5959-96T1, environmental advocacy groups challenged amendments promulgated by DEP to the Water Pollution Control Act (WPCA) regulations. Specifically, appellants asserted that N.J.A.C. 7:14A-13.5(b) and (k) of the New Jersey Pollutant Discharge Elimination System (PDES) regulations violate the express legislative purpose of the WPCA, implementing the Clean Water Act ("CWA"), 33 U.S.C. 1251 et seq. They argued that N.J.A.C. 7:14A-13.5(k) violates the express legislative purpose of the CWA because it allows the agency to issue NJPDES permits in the absence of assurances that the water quality standards will not be exceeded by the proposed discharge of pollutants. Appellants also argued that N.J.A.C. 7:14A-13.5(b)

violates the express legislative purpose of the CWA because it fails to account for "permitted effluent flows" and "existing instream levels of pollutants."

After consideration of the language of the relevant statutes compared to DEP regulations, the Appellate Division determined that the challenged regulations are valid and do not violate CWA's express legislative purpose as implemented by the WPCA. Of note is the fact that the court, in determining that N.J.A.C. 7:14A-13.5(b) is valid, specifically noted that the regulation is almost identical to its federal counterpart.

## Procedure

In addition to these substantive challenges, appellants in both *New Jersey Site Remediation Network and In re Water Pollution Control Rules*, charged that the rule adoptions had violated the Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.* (APA), because changes between the rules as proposed and as adopted were so substantial as to require republication for comment. The Appellate Division also rejected this argument in each case, although for differing reasons. The court determined in *New Jersey Site Remediation Network* that the changes were not so substantial as to require new publication, while in *In re Water Pollution Control Rules* it concluded that, although certain changes to the rules were substantial, appellants had notice of these changes, and they had been made in response to oral and written comments.

In addition to upholding DEP regulations, the courts also declined to stray from their well-worn path of deferring to the agency in permitting decisions. In *In re Stream Encroachment Permit No. 1411-90-0006.5*, No. A-5976-97T2 (App. Div. Dec. 7, 1999), the Appellate Division sustained DEP issuance of a Stream Encroachment Permit for a residential complex to be built adjacent to the Passaic River. The court set aside the objection by a neighboring municipality on the grounds of anticipated flooding, finding that the agency had issued the permit based upon credible evidence and deferring to the agency's application of its own regulations. In another case, also despite allegations by a third party of adverse environmental impacts, the court upheld DEP's issuance of a general wetlands permit on the grounds that the agency's decision was supported by the evidence. *In re Freshwater Wetlands Statewide General Permit No. 1215-94-0003.4*, App. Div. No. A-1602-96T1. In a companion action, the challenging party also had brought suit against the permittee under the New Jersey Environmental Rights Act, but the court rejected the use of the ERA to collaterally challenge a permit, noting that "an ERA action may not be sustained where defendant's conduct, alleged to violate environmental laws, was the very product of a DEP permit allowing that conduct to proceed." *Goldstein v. Johnkins*, No. A-2977-98T1.

## Enforcement

Finally, in addition to rulemaking and permitting, the Appellate Division this term also bowed to agency discretion in

the area of enforcement. In *DEP v. Gentek Building Products, Inc.*, App. Div. No. A-6118-97T2 (Oct. 21, 1999), defendant challenged penalties imposed by the agency for carbon monoxide emissions in excess of levels allowed by its air emissions permit, arguing, among other things, that the fines were inappropriate because there had been no finding that the emissions caused any environmental harm. In upholding the fines, the court held that DEP has no obligation to establish that the emissions cause any specific environmental harm. In addition, the court rejected defendant's argument that the emissions were mere technical violations that should have been tolerated without penalty, emphasizing that the Air Pollution Control Act is a strict liability statute and that neither intent nor fault is a necessary element of a violation, citing *DEP v. Alden Leeds, Inc.*, 153 N.J. 272 (1998).

In *DEP v. Diamond Hill Estates Sewer Company, Inc.*, App. Div. No. A-4273-98T1, the Appellate Division affirmed DEP's assessment of more than \$7 million in penalties for continuous violations of the company's water discharge permit individually against the person serving as president, director, and 95 percent shareholder of the defendant company. The agency had levied these penalties against the owner as the responsible corporate official pursuant to the WPCA. The court found that DEP's decision was not arbitrary, capricious, or unreasonable, was supported by credible evidence in the record, did not violate the legislative policies expressed or implied in the WPCA and comported with the regulatory criteria enacted by the agency.

In conclusion, the Appellate Division during the past term assumed a deferential position regarding DEP's rulemaking, permitting, and enforcement actions. While the opinions illustrate that the courts are willing to bless virtually any agency decision, it must be acknowledged that none of these cases presented circumstances in which the agency had blatantly overstepped its legal authority or where its decisions lacked at least some factual support. Therefore, we remain hopeful that, under the right circumstances, the courts will be willing to overturn DEP decisions which are not firmly embedded in the law and well supported by the facts.

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