

Environmental Law

Attempting To Clarify Spill Act Liability Issues

What the Supreme Court got right, and wrong, in the *Dimant* case

By Dennis J. Krumholz

In a provocative opinion, the Supreme Court of New Jersey last fall decided its first Spill Compensation and Control Act liability case in 15 years, *N.J. Dep't of Env'tl. Prot. v. Dimant*, 212 N.J. 153 (2012). The court's thorough opinion addresses a wide range of important Spill Act issues that invite analysis and commentary.

In *Dimant*, DEP sued to recover costs it had incurred in the investigation and remediation of contaminated ground water that had adversely impacted private wells in Bound Brook. Although DEP named several defendants, the only one remaining at the time of trial was Sue's Clothes Hanger (Sue's). The trial court found that the department had failed to establish that a "discharge" as defined by the Spill Act had taken place during Sue's operation of its dry cleaning business. The court dismissed the suit on the basis that the DEP "did not establish by a preponderance of the direct and circumstantial

evidence that there is a nexus between any discharge by defendant Sue's [] and the ground water contamination at issue." The department appealed.

Before the Appellate Division, the DEP asserted that Sue's should be strictly liable for the discharge, regardless of the amount of hazardous material discharged, and therefore responsible for costs of investigation and remediation of the impacted well field. The Appellate Division disagreed and affirmed the trial court's judgment. 418 N.J. Super. 530 (App. Div. 2011). The Appellate Division found first that the department had failed to establish a discharge on the part of Sue's since it was not clear that any hazardous substance had entered the environment. Of greater significance was its conclusion that the "defendant must be in any way responsible for the discharge that caused the contamination." On DEP's petition, the Supreme Court granted certification.

The court affirmed the judgment of the Appellate Division to dismiss DEP's suit against Sue's. This result was clearly correct. Although the evidence was questionable at best that a discharge had taken place during Sue's operations, the Supreme Court proceeded on the premise that Sue's had committed a discharge. The more critical consideration was that the evidence plainly was insufficient to establish that any contamination of the impacted wells was caused by the migration

of a discharge that might have occurred during Sue's operations. Only minuscule amounts of perchloroethylene (PCE) had "dripped" from the pipe at Sue's, and Sue's had operated dry cleaning machines for only slightly more than one year, whereas four decades of dry cleaning activities previously had been conducted at its location. Also, evidence of ground water flow from Sue's to the well field was inconclusive.

On those facts, the court correctly affirmed that DEP had not established the necessary nexus, or connection, between the dripping PCE and the well field contamination. It is noteworthy that the court refused to impose upon Sue's even the obligation to investigate the contamination or its potential remedies in light of the decade that had passed between discovery of the dripping pipe and initiation of the DEP's suit; the Appellate Division has held that no defense to Spill Act liability is available based on the passage of time. *Pitney Bowes v. Baker Industries*, 277 N.J. Super. 484, 488 (App. Div. 1994).

The court's affirmance of the Appellate Division judgment is but the beginning of its painstaking analysis of "discharge," "nexus" and related Spill Act concepts.

What constitutes a "discharge" under the Spill Act represents one important element of the opinion. The language of the act seems reasonably clear that a "discharge" requires hazardous substances to come into contact with water or land. For this reason, New Jersey courts have been careful to examine whether, as a factual matter, hazardous materials have been "discharged" when they come into contact with

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asphalt, concrete or a similar man-made and relatively impervious surface. Indeed, all three courts addressed the rate at which PCE dripped, “where the drip went” and whether the asphalt pavement beneath the dripping PCE was cracked or eroded.

The court concluded that the presence of asphalt beneath the dripping pipe, regardless of its integrity, was irrelevant to whether a discharge had taken place since “there was no structure to contain [the dripping PCE].” This formulation is an unwarranted expansion of what constitutes a discharge since it rests on the determination of whether the leaking hazardous substance is contained, not whether the released material actually comes into contact with the natural environment. See *White Oak Funding v. Winning*, 341 N.J. Super. 294, 300 (App. Div. 2001). It also is inconsistent with DEP’s rules distinguishing a “leak” — defined as an “escape of a hazardous substance from the ordinary containers ... into secondary containment ... from which it is cleaned up and removed prior to its escape into the waters or onto the land of the State” (N.J.A.C. 7:1E-1.6) — from the definition of “discharge.” Apparently impelling this determination was the court’s reluctance to diminish the authority of the DEP to prevent environmental harm where it is uncertain whether a discharge has occurred. The authority of the department, however, is not truly in doubt in light of its ability to obtain injunctive relief to address a threatened discharge. See *NJDEP v. Boro Auto Wrecking Co.*, 2006 WL 3007394 (N.J. Super. A.D. Oct. 24, 2006).

The court carefully parsed the statutory definition of “discharge” to conclude that a discharge may take place entirely within the boundaries of New Jersey without any resulting damage taking place. Although linguistically correct, the construction of the statutory definition helps but little because a “discharge,” that is, hazardous material coming into contact with the natural environment, constitutes harm in and of itself. Again, the court’s decision bespeaks solicitude for the DEP’s authority to adopt an expansive definition of “discharge.” The most sensible interpretation of the legislative purpose behind the differing definitions of a “discharge” that directly impacts New Jersey land or water, and one that occurs beyond the boundaries of the state but threatens “damage” to the

land or water of New Jersey is a prerequisite for the department to assert jurisdiction over a non-New Jersey discharge.

Perpetuating an error made by the Appellate Division, the Supreme Court characterized the litigation as a *contribution* action. In fact, the suit was a *cost recovery* action brought pursuant to N.J.S.A. 58:10-23.11g(c)(1), in which the DEP was seeking to compel an alleged discharger to reimburse the department for the costs expended to provide an alternative water supply and to investigate and remediate contamination for which it was allegedly responsible. The DEP plainly is not itself a discharger of hazardous substances; thus, it was not seeking contribution from another responsible party pursuant to N.J.S.A. 58:10-23.11f.a(2)(a) for that party’s share of the remedial costs.

This mischaracterization is more than simply a passing error, as it has the potential to create mischief in private-party contribution actions. That is, the court followed its reference to the joint and several liability standard provided at N.J.S.A. 58:10-23.11g(c)(1), with the assertion (in footnote 12) of the possibility of a “mechanism for divisibility” based on the use of “equitable factors” as provided under the contribution section of the act. This juxtaposition unfortunately tends to conflate the cost recovery and contribution sections of the act, and could lead courts and counsel to the mistaken conclusion that liability in a contribution action, as in a cost recovery action, is joint and several.

The vast majority of cases that address the subject have determined, however, that liability in a Spill Act private-party contribution action is only several. *SC Holdings v. A.A.A. Realty Co.*, 935 F. Supp. 1354, 1366 (D.N.J. 1996); *Reichhold v. U.S. Metals Refining Co.*, Civ. No. 03-453, 2004 WL 3312831, *7 (D.N.J. Oct. 22, 2004); *Ford Motor Co. v. Edgewood Properties*, Civ. Nos. 06-1278, 06-4266, 2007 WL 4526594, *7 (D.N.J. Dec. 18, 2007); *Pennsauken Solid Waste Management Auth. v. Ward Sand & Materials Co.*, CAM-L-13345-91 (N.J. Sup. Ct., Law Div., Sept. 3, 2008).

Confronted with the absence of a definition of causation in the Spill Act, the Supreme Court, like the lower courts, grappled with the issue of the degree of causation required to establish liability. The court correctly recognized as a thresh-

old matter that the Spill Act requires “proof of a connection between the discharge complained of and the resultant Spill Act response.” The court also was reasonably clear in rejecting proximate cause as the standard to be applied to establish a connection in Spill Act litigation, yet it offered only a policy justification as to why the causation standard applicable in tort cases generally is not appropriate in the environmental context. Ultimately, the court phrased the causation standard as simply a “real, not hypothetical” connection between the discharge and the environmental harm. In another formulation, the court required a “reasonable nexus or connection”; in a third, it mandated a “reasonable link between the discharge, the prospective discharger and the contamination at the specifically damaged site.” Unfortunately, none of these constructions, individually or collectively, establishes a specific replicable standard of causation that provides useful guidance to trial courts and counsel.

A close reading of the opinion suggests that the court intended the causation standard to be flexible and case-specific. The court observed that “the causation standard to be applied to Spill Act claims must accommodate the Act’s multiple forms of relief and must support and justify a range of relief available under the Act ...” It also noted that “all liability under the Spill Act is not tied to a static causation nexus.” This language suggests that the standard of causation needed to establish liability varies with the form of relief requested by the DEP and, potentially, by a private party in a Spill Act contribution action. That is, injunctive relief presumably would require the lowest degree of causation, an action to compel investigation of the effects of a discharge a somewhat higher level, and a claim to recover remedial costs the highest degree of causation.

The court provided no support for this approach in environmental or any other kind of action. Typically, statutory liability is established on proof of certain elements, independent of the relief sought. Damages, if any, then result based on different proofs. Tying proof of causation to the relief requested conflates the proof needed to establish liability and damages.

To its credit, the court attempted to provide guidance to the bench and bar when it drew on opinions of various United States district courts interpreting “two-

site” contamination cases under CERCLA. Unfortunately, the conflicting approaches on this point demonstrated by the federal courts, and the lack of a clear formulation of the causation required, provide little reliable guidance for determining an

appropriate standard to be applied under the Spill Act.

In conclusion, the *Dimant* case presented the court with a rare opportunity to clarify a series of fundamental Spill Act liability issues which, remarkably, have not

been definitively resolved in the decades since the act was adopted. While the court correctly decided the specific case presented, its discussion created greater uncertainty for those larger issues on which it attempted to clarify the law. ■