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Spill Act Case Law Update: Private Parties May Bring a Spill Act Contribution Claim Prior to NJDEP Approval of Cleanup Plan

By: Keith P. McManus

In a highly-anticipated decision, the Supreme Court of New Jersey recently held that private parties need not obtain regulatory approval of the cleanup plan for the site before filing a contribution claim under the New Jersey Spill Compensation and Control Act ("Spill Act"). In so holding, the Court reversed a 2012 decision by the Appellate Division that sparked considerable debate in the environmental community concerning the timing and prerequisites for filing a Spill Act contribution claim.

In *Magic Petroleum Corp. v. Exxon Mobil Corp.* (A-46-12, July 28, 2014), the Court reviewed the Appellate Division's decision concerning cleanup costs associated with a gas station in Millstone Township that was owned and operated by Magic Petroleum. The New Jersey Department of Environmental Protection ("NJDEP") initiated enforcement action against Magic Petroleum concerning discharges from underground storage tanks at the gas station. While the enforcement action was pending in the Office of Administrative Law, Magic Petroleum filed a Spill Act contribution claim in Superior Court against Exxon Mobil and others, alleging that the defendants were responsible for a portion of the cleanup costs. Exxon Mobil argued to the trial court that Magic Petroleum's Spill Act claim was premature because allocation of liability cannot proceed until the NJDEP, which was conducting investigations at the Magic Petroleum property, had determined the extent of the contamination and the nature of the remediation that would be required. The trial court agreed and dismissed Magic Petroleum's Spill Act claim without prejudice. On appeal, the Appellate Division upheld the dismissal, holding that the doctrine of primary jurisdiction mandated that courts defer to the NJDEP with respect to the evaluation of the contamination at issue. The Appellate Division further held that a private party must obtain written approval of its remediation plan from the NJDEP prior to filing a Spill Act contribution claim.

In reversing the Appellate Division's decision, the Court held that the doctrine of primary jurisdiction is not applicable to Spill Act contribution claims and, therefore, private parties may file such claims prior to the completion of investigation and remedial planning activities. The Court relied on the language of the Spill Act, which confers jurisdiction for contribution claims on the court, not the NJDEP, and provides courts with "liberal discretion" to allocation cleanup costs. Moreover, the Court held that judges do not need the expertise of the NJDEP in order to allocate Spill Act liability based on the facts and expert testimony.

Importantly, the Court also explicitly held that NJDEP approval of a cleanup plan is not a prerequisite to filing a Spill Act contribution claim. Rather, the Court noted that the Spill Act dictates that "plaintiffs need only prove that a contribution defendant is liable for a discharge under the Spill Act in order to prevail on a [contribution] claim" and that the "issue of allocation of liability is independent from the issue of the total amount of costs." While the Court acknowledged that private parties may only recover those cleanup and removal costs that are approved by the NJDEP or a Licensed Site Remediation Professional, such approval is not required to file a contribution claim and is "not a prerequisite to allocation of responsibility for the costs associated with the approved remediation." ■

For more information about any of the topics covered in this issue of the *Environmental Law Alert*, please contact:

David P. Schneider, Esq.
dschneider@bressler.com
973.966.9671

DJ Camerson, II, Esq.
djcamerson@bressler.com
973.660.4433

Karen E. Murphy, Esq.
kmurphy@bressler.com
973.660.4442

Keith P. McManus, Esq.
kmcmanus@bressler.com
973.245.0680

Benjamin S. Weisfelner, Esq.
bweisfelner@bressler.com
973.660.4475

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