

# Hazardous Waste Law

## State Law

### New Jersey

#### **Nexus Between Discharge, Pollution Needed For Contribution Action Against Dry-Cleaner**

A single observed instance of a pipe leaking contaminants from a dry-cleaner is not enough to impose liability on the former operators of the facility under the New Jersey spill act for costs associated with contaminated ground water in nearby wells, the New Jersey Supreme Court held Sept. 26 (*New Jersey Department of Environmental Protection v. Dimant*, N.J., No. 067993, 9/26/12).

The New Jersey Department of Environmental Protection failed to prove a nexus between discharges from the facility while the owners operated it and the ground water contamination at issue under the state Spill Compensation and Control Act, the court said.

The decision "may encourage others to put DEP to its proofs," according to David Farer, an environmental lawyer with Greenbaum, Rowe, Smith & Davis LLP in Woodbridge, N.J. "It certainly establishes that DEP will have to connect the dots between an alleged discharger and the locus of the contamination for which the State seeks remediation or restoration costs," Farer told BNA in an email Oct. 1.

Jeff Tittel, director of the New Jersey Sierra Club, is concerned that the decision could make it harder to hold polluters liable under the Spill Act. The decision "makes it very hard for DEP to require cleanups where there is contaminated groundwater, especially in urban areas where there are many leaks and spills," Tittel said in a Sept. 27 statement. "This will mean more toxics in our groundwater and make it very difficult for DEP to enforce the Spill Act in those areas and require proper clean ups."

**Evidence That Pipe Leaked PCE on One Occasion.** Laundry and dry-cleaning operations have occurred at the location of Sue's Clothes Hanger since the 1950s.

Bharat K. and Priti B. Shah operated the business from 1985 to 1987, using two small dry-cleaning machines that used PCE. The next operators, Chouchan and Riad Samman, operated the dry-cleaning machines a few times per week for approximately 15 months until 1989.

In 1988, samples from nearby residential wells in Bound Brook, N.J., revealed PCE and other contaminants in the ground water.

A 1988 NJDEP investigation found PCE coming from a discharge pipe at Zaccardi's Cleaners near Sue's. The investigation found high PCE contamination levels inside Sue's, but no sign that the PCE was leaking into the environment. It also found PCE leaking from a pipe protruding from Sue's with a contamination level of more

than 3,000 times the maximum contaminant level for PCE.

NJDEP observed the drip on only that one occasion, and never returned to retest the pipe or photograph it. There was no evidence that it continued to drip, how often it dripped, or where the liquid went.

NJDEP sought contribution and costs expended in the investigation and remediation of the contaminated ground water from Sue's and its former owners under the Spill Act.

The trial court found that NJDEP failed to prove that a discharge by Sue's caused the contamination, and that without such a nexus, NJDEP could not seek contribution. The appellate court affirmed (26 TXLR 352, 3/24/11).

NJDEP petitioned the state supreme court for certification, which the court granted.

**Nexus Required to Obtain Damages.** NJDEP argued that the "undisputed evidence of Sue's PCE discharge, combined with the fact that the highest concentrations of PCE in the area were found in the groundwater beneath Sue's property, create the necessary causal nexus to impose liability under the Spill Act."

The court said the "determinative question" was not whether a discharge occurred at Sue's, "but whether the DEP has connected the discharge that did occur to the relief it has sought against Sue's."

A nexus must be shown between the discharge and the discharger, the court said, but also between the discharge in question and the contaminated site for which cleanup and related costs are incurred.

NJDEP argued that the court should look to the federal causation standard under the Comprehensive Environmental Response, Compensation, and Liability Act, under which a "plaintiff need only demonstrate 'some connection' between a defendant's actions and the environmental contamination that causes the incurrence of response costs."

By contrast, the legislative history and case law on the Spill Act establish "that the discharge of hazardous waste by an operator must be tied to the discharge by that operator and not another."

The court said that proof of a discharge can prompt injunctive relief under the Spill Act, but "in an action to obtain damages, authorized costs and other similar relief under the Act there must be shown a reasonable link between the discharge, the putative discharger, and the contamination at the specifically damaged site."

**NJDEP Failed to Prove Nexus.** The court found that the trial court properly found that NJDEP failed to connect the pipe leakage during Sue's operation to the contamination in question.

"[NJDEP] never presented sufficient proof of a reasonable, tenable basis for how the drip of fluid containing PCE observed at Sue's one day in 1988 resulted in the contamination of the groundwater in Bound Brook," the court said.

The court also agreed that "it would be fundamentally unfair to saddle Sue's" with investigatory obligations more than a decade after NJDEP discovered the dripping pipe. Accordingly, it also affirmed the dismissal of the claim seeking to have Sue's study the contamination and determine a remedy for the pollution at the site.

Justice Jaynee LaVecchia wrote the opinion.

Attorney General of New Jersey Jeffrey S. Chiesa, Deputy Attorney General Richard F. Engel, Assistant Attorney General Lewis A. Scheindlin, and Deputy Attorney General Mark D. Oshinskis represented NJDEP.

George R. Hardin, Arthur A. Povelones Jr., and James P. Krupka, of Hardin, Kundla, McKeon & Poletto P.A. in New York, represented Sue's Clothes Hanger Inc.

Jacob S. Grouser, of Hoagland, Longo, Moran, Dunst & Doukas in New Brunswick, N.J., represented Bharat K. Shah, Priti B. Shah, and PTR, PTB, PTM Corp.

David Farer is a member of the advisory board for BNA's *Toxics Law Reporter*.

BY PERRY COOPER

The opinion is at <http://op.bna.com/txlr.nsf/r?Open=pcor-8yjrr3>.

## Insurance

### *Duty to Indemnify*

#### Whether NCR Knew or Expected Harm From PCB Releases Ruled Question for Jury

**A** trial court erred when it granted summary judgment to paper manufacturer NCR Corp. in an insurance coverage dispute stemming from contamination of the Lower Fox River based on a finding that the damage was neither expected nor intended, a Wisconsin appeals court ruled Sept. 25 (*NCR Corp. v. Transport Ins. Co.*, Wis. Ct. App., No. 2011AP192, 9/25/12).

Whether NCR expected or intended at the time that its use of polychlorinated biphenyls from 1954 until 1971 would contaminate the river is a jury question, the Wisconsin Court of Appeals, District III ruled.

**Declaratory Judgment Action.** In 2005, NCR Corp. filed a declaratory judgment action against 25 of its insurers, including Transport Insurance Co., seeking an order that it is entitled to coverage for its liability for PCB contamination from its use of carbonless copy paper that contained Aroclor 1242.

Ruling on a motion for summary judgment, the trial court found that coverage attaches because NCR did not expect or intend the pollution to occur.

Transport appealed.

**'Mounting Evidence PCBs Were Harmful.'** Reversing the decision, the appeals court said whether NCR knew or expected that Aroclor 1242 would cause environmental harm is a fact question.

The court cited several pieces of evidence supporting NCR's position: The first scientific studies of PCBs in

the 1960s did not specifically identify Aroclor 1242; when NCR used PCBs, they were widely used in hundreds of commercial products; when NCR stopped using PCBs in 1971, there were no laws addressing the discharge of PCBs; EPA did not propose effluent limits for PCBs until 1974; no state or federal agency found NCR to have violated any environmental law at the time it was using Aroclor 1242; in 1969, NCR decided to replace Aroclor 1242 with a nonchlorinated solvent after reviewing journal articles on the effects of PCBs.

However, the court said "There was mounting evidence that PCBs were harmful and, at some point, NCR clearly would have known or expected that releases of Aroclor 1242 would cause environmental harm. Some of this evidence was known or available while NCR was still using the product. Therefore, it is appropriate for a jury to determine what NCR actually knew or expected and when it gained that knowledge or expectation."

Judge Michael W. Hoover wrote the opinion.

Full text of the opinion is available at <http://op.bna.com/txlr.nsf/r?Open=phas-8yntdk>.

## Clean Air Act

### *Emissions*

#### Supreme Court Will Not Review Decision Upholding Sulfur Regulations in Montana

**T**he U.S. Supreme Court Oct. 1 let stand a ruling upholding sulfur dioxide regulations in Montana (*Montana Sulphur & Chemical Co. v. EPA*, U.S., No. 11-1403, cert. denied 10/1/12).

The Supreme Court's decision not to review the ruling leaves intact a Jan. 19 decision by the U.S. Court of Appeals for the Ninth Circuit that upheld the Environmental Protection Agency's request that Montana revise its implementation plan to address sulfur dioxide and EPA's decision to put in place a federal implementation plan (*Montana Sulphur & Chemical Co. v. EPA*, 666 F.3d 1174 (9th Cir. 2012); 27 TXLR 120, 1/26/12).

Montana Sulphur & Chemical Co., a sulfur recovery plant, on May 18 filed a petition for Supreme Court review of the Ninth Circuit decision. The high court declined the appeal without comment.

EPA in 1993 directed Montana to revise its state implementation plan, but the agency found parts of the revisions inadequate to achieve attainment of national ambient air quality standards for sulfur dioxide. The agency partially disapproved the state's revisions and in 2008 issued a federal implementation plan to fill gaps in the state's plan.

**Air Quality Was Modeled.** EPA based its decisions on modeled air quality, not solely on monitored air quality, and Montana Sulphur has maintained that EPA's actions were invalid because monitors showed no violations of sulfur dioxide standards.

The Ninth Circuit sided with EPA in its Jan. 19 opinion, denying two consolidated petitions for review that Montana Sulphur had filed.

The appeals court said the Clean Air Act "expressly recognizes modeling as an appropriate regulatory tool."