

New Jersey Supreme Court Finds No Retroactive Liability for State Under the New Jersey Spill Act

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The New Jersey Supreme Court's most recent encounter with New Jersey's Spill Compensation and Control Act (Spill Act), *NL Industries, Inc. v. New Jersey*, involved the State of New Jersey's potential liability for contamination of state-owned property that occurred prior to the 1976 enactment of the Spill Act. Being compelled to undertake an expensive remediation of State property, NL Industries sought to compel the State to contribute its fair share of the cleanup costs. The New Jersey Supreme Court, however, ruled on March 27, 2017 that the New Jersey Legislature had not waived the State's sovereign immunity with respect to contamination occurring prior to enactment of the Spill Act, thereby ending NL Industries' quest to compel the State to contribute.

The project that created the contamination began in September 1968 when Sea-Land Development Corporation notified the State of its intent to protect Laurence Harbor from erosion by constructing a seawall that would be partly made from "slag." Slag is a byproduct of an industrial smelting operation undertaken to produce a base metal (such as lead or iron) from its ore. Slag looks and functions like rock, but typically contains lead and other heavy metals that are regulated as "hazardous substances" under the Spill Act and its federal counterpart, CERCLA. Sea-Land received permission from the State to construct the seawall, part of which was to be located on riparian land owned by the State. Construction of the seawall was completed in the early 1970s.

In 1976, the New Jersey Legislature enacted the Spill Act, which prohibited the discharge of hazardous substances into the environment and made any person who discharged hazardous substances liable without fault for their cleanup. "Person" was defined to include the State, which courts have subsequently held to constitute a waiver of the State's sovereign immunity to such liability. In 1979, the Legislature amended the Spill Act to extend that liability retroactively so that it applied to discharges that occurred prior to 1976. It also extended liability to "persons in any way responsible" for the hazardous substance being remediated. This was subsequently interpreted by the courts to include the owners of the property at the time of its contamination. Finally, in 1991, the Legislature amended the Spill Act to allow a private party conducting a remediation to obtain contribution from other "persons" responsible for the discharge under the Spill Act for their fair share of the remediation costs.

In 2007, the New Jersey Department of Environmental Protection detected contamination along the seawall and reported it to the United States Environmental Protection Agency (EPA). The EPA investigated the site further under the federal CERCLA statute. In 2014, EPA demanded that NL Industries undertake the remediation, estimated to cost \$79 million overall, based on the agency's finding that slag from NL

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Industries' nearby lead smelting facility had been used in the seawall construction. NL Industries filed a complaint in state court seeking contribution from the State under the Spill Act based on its responsibility as the land owner and regulator that approved the project. The State sought dismissal of NL Industries' complaint claiming, among other things, that it had not waived its sovereign immunity with respect to discharges occurring prior to enactment of the Spill Act.

The trial court and Appellate Division denied the State's motion, concluding that the State's waiver of sovereign immunity, when including the State within the definition of "persons," carried through in the later amendments that subjected such persons to retroactive liability and contribution actions brought by private parties. This outcome was consistent with the way the federal government is treated under CERCLA.

The New Jersey Supreme Court, with one Justice dissenting, disagreed. According to the Supreme Court, the legislative intent to waive sovereign immunity retroactively has to be "clear and unambiguous." The Court agreed that the initial 1976 legislation was sufficient to waive sovereign immunity for discharges occurring after the effective date of the Spill Act, but concluded that the "necessary clarity" was lacking in the 1979 and 1991 amendments. As a result, the State's sovereign immunity was not waived with respect to the extensions of Spill Act liability to discharges occurring before its effective date and to contribution actions by private parties conducting a remediation.

The Supreme Court also expressed its thoughts on two other issues that were rendered moot by its decision on sovereign immunity. It agreed with the trial court that the New Jersey Tort Claims Act, which requires among other things that a governmental entity be given notice of the claim within 90 days of its accrual, does not apply to private contribution actions against governmental entities under the Spill Act. In addition, the Court found no intent by the Legislature to waive the State's sovereign immunity with respect to discretionary governmental activities such as regulating entities that discharge hazardous substances. Thus, a Spill Act claim against the State could not be based on the State's failure to stop a company from discharging a hazardous substance or its approval of such a discharge.

Please contact the author, **Daniel Flynn**, with any questions regarding the issues discussed in this Alert.