

State Supreme Court Reins In DEP Damages Claims

New Jersey Supreme Court Decision in *Dimant* Requires DEP to Show Reasonable Link Between Defendant's Activities and Contamination to Support Spill Act Damage Claim

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On September 26, 2012, the New Jersey Supreme Court decided the case of *NJDEP v Dimant*, rejecting an attempt by the New Jersey Department of Environmental Protection (DEP) to seek damages from an alleged discharger under the New Jersey Spill Compensation and Control Act (Spill Act) without first establishing the necessary connection, or nexus, between the alleged discharge and the contamination at the specifically damaged site.

At issue were costs to clean up groundwater contaminated by the common dry cleaning solvent perchlorethylene (PCE) in Bound Brook, New Jersey. DEP had sued to recover costs associated with the investigation and remediation of PCE contaminated groundwater found in residential wells. The defendant was a dry cleaner that had operated near the contaminated wells and had used PCE for 15 months, between 1987 and 1989. During that period of time, and in the course of a single site inspection, the DEP had noted an external pipe at the dry cleaner's premises which they observed to be dripping a liquid containing high levels of PCE onto the pavement.

DEP argued that this discharge was sufficient to connect the dry cleaner to the PCE- contaminated groundwater in the nearby wells. The Court rejected this argument, finding that DEP had not met its burden of proof. It noted that DEP never presented sufficient proof of a "reasonable, tenable basis" for how drips of fluid observed at the dry cleaner on one occasion resulted in groundwater contamination in the Bound Brook wells.

The Court upheld the prior trial court and Appellate Division decisions in the case, holding that in order to obtain damages relief under the Spill Act, a real, not hypothetical, nexus must be shown to exist between the discharge of hazardous substances and the actual contamination at the specifically damaged site. That the substance dripping on the pavement in one location was the same as the substance found in the groundwater in another location was not a sufficient connection and did not constitute the "reasonable link" required to impose liability on the defendant.

The Spill Act provides that "[a]ny person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred." The Court's *Dimant* decision is significant in clarifying the requirement for imposing this liability. For parties who face potential

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responsibility for the cleanup of contamination under the Spill Act, it is critical to analyze whether a sufficient connection exists between the discharge for which they are alleged to be responsible and the contamination at issue.

For additional information on the *Dimant* decision and/or liability under the Spill Act, please contact **Daniel L. Schmutter**, the author of this Alert, or **David B. Farer**, Chair of our Environmental Department.