

Appellate Court Signals Shift in Interpretation of New Jersey's Spill Act in Relation to Investigation Costs

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New Jersey's Appellate Division, in the case of *Matejek v. Watson* (N.J. Super. Ct. App. Div., Mar., 3, 2017), interpreted the New Jersey **Spill Compensation and Control Act's** contribution provisions to allow a property owner to compel neighbors to share in the cost to investigate the cause of nearby contamination before having to show that the neighbors actually contributed to the contamination.

The case arose when oil was found in a brook near a condominium development, prompting the New Jersey Department of Environmental Protection (NJDEP) to remove underground storage tanks from five adjoining condominium units in 2006. After the tank removals, the NJDEP tested to confirm the absence of oil in the brook, but otherwise did nothing further to investigate the source of the contamination and its file remained open. During this time, the Legislature amended the Spill Act to transfer responsibilities for resolving site contamination issues to Licensed Site Remediation Professionals retained by private property owners. Seven years after the tank removals, one of the condominium unit owners sought to remove the cloud on title (arising as a result of the open NJDEP file) by investigating the source of the contamination, and sought an order "that would obligate all owners to participate in and equally share in an investigation and, if necessary, remediation of the property." Despite the lack of any evidence as to the precise source of the contamination or any proof of a causal nexus between any particular defendant's oil tank and the contamination at issue, the lower court ordered all of the other condominium owners to pay for the investigation and any required remediation, with the court's order "compel[ling] the division of the costs equally among the five owners."

The Appellate Division affirmed the lower court's decision allowing this type of equitable remedy despite the lack of evidence that any defendant actually contributed to the contamination—ordinarily a prerequisite to a contribution claim. The Appellate Division agreed with the trial court judge that the plaintiff lacked an adequate remedy at law to remove the cloud on its title and acknowledged the need to provide plaintiffs with a remedy "that would fairly burden all the potential dischargers with an investigation into the actual cause, the remediation of the property if necessary, and the fixing of responsibility for the discharge on those truly responsible." In explaining its ruling, the Appellate Division wrote that "we do not interpret the Spill Act as being so narrow or ineffectual as to permit a private action only on proof that another caused contamination in whole or in part." Requiring a single potential contributor to bear the costs of investigation would "render unduly burdensome a greater examination into the situation" and would not be "in the best interest of the health, safety and welfare

of the people[.]”

This decision represents an important development in New Jersey environmental law given prior decisions that a Spill Act contribution plaintiff is required to establish a nexus between the defendant and the contamination at issue. It shows that courts are willing, under the right circumstances, to order potentially responsible parties to share ratably in the costs of an investigation even without direct evidence of contribution to the contamination. The court expressly recognized that any initial decision in a case that forces a party to incur investigation costs even without anything linking it to the contamination would be subject to a later allocation/recoupment claim. In that additional future litigation, the parties exonerated by the investigation would be able to seek recovery of investigation costs or could seek an allocation of remediation costs if a private sharing agreement could not be reached. Those future possibilities may prove small comfort to parties who can now be forced into bearing potentially substantial investigative costs without any showing they contributed to the contamination.

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National Law Review, Volume VII, Number 67

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