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No Safe Harbor: Can New Jersey Face Liability under State Spill Act?

By Paul M. Hauge – February 11, 2016

Be careful what you wish for. That may be the message of the New Jersey Appellate Division's September 23, 2015, opinion in *NL Industries, Inc. v. State of New Jersey*, No. A-0869-14T3. Affirming a "thoughtful and erudite" 2014 Law Division opinion by Judge Douglas K. Wolfson, the appellate court held that the onerous liability regime of the 1976 Spill Compensation and Control Act (commonly known as the Spill Act), which imposes strict joint and several liability for cleanups on both the dischargers of hazardous substances and on the much broader class of parties "in any way responsible" for the hazardous substances, is equally applicable to the state. As a result, the state may be responsible for a portion of the remediation of a contaminated site on the shoreline of Raritan Bay that will likely cost more than \$75 million. The story is far from over, however: On January 15, 2016, the New Jersey Supreme Court granted the state leave to appeal from the Appellate Division's decision.

The history of the "Raritan Bay Slag Site" goes back to the 1950s, when state and federal officials began to study ways to prevent shoreline erosion in Laurence Harbor. The state shared responsibility for the maintenance, operation, and inspection of the beach-fill and levee structures that were eventually constructed.

Development plans for the area in the 1960s led to a proposal to construct a seawall, using slag materials. At least some of the material used in the seawall, which was completed in the early 1970s, allegedly consisted of furnace slag from a lead smelting facility operated by NL Industries. The state did not construct the seawall, but according to NL's complaint, the state owned the land under the seawall, approved it, issued a riparian grant to the developer that sought to build it, and issued a permit for it.

Fast forward to 2009. Studies showed that the area was contaminated with high levels of lead and other metals. The U.S. Environmental Protection Agency (EPA) designated it as a Superfund site and proceeded to develop a cleanup plan. In 2014, EPA order NL to perform the cleanup. NL sued the state, alleging that it bore most of the responsibility for the contamination.

Accustomed to being the plaintiff rather the defendant in such cases, the state moved to dismiss NL's complaint, arguing that substantive and procedural provisions of the Tort Claims Act immunized it from liability, that the Spill Act did not permit suits against the state for pre-1976 discharges, and that NL's allegations were insufficient to prove that it was "in any way responsible" for the contamination. Judge Wolfson (affirmed by Judge John C. Kennedy, writing for the Appellate Division) rejected all three arguments, holding that (1) the protections of the Tort Claims Act, such as the requirement that a potential plaintiff first file a notice of claim, do not apply to Spill Act claims; (2) the Spill Act's legislative history and controlling case law showed that, contrary to the state's position, the legislature "consciously intended the State to be subject to the Act" in the same way as private parties, including retroactive liability for pre-enactment discharges; and (3) the state's involvement in the project, as alleged by NL, was enough to make it "in any way responsible" for the contamination.

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There is considerable irony in the courts' unequivocal rejection of the positions advanced by the State, which has consistently argued for broad interpretations of the Spill Act's provisions, especially the scope of the phrase "in any way responsible," and opposed private defendants' attempts to shrink, or at least halt the expansion of, the statute's wide liability net. On a more practical level, the *NL Industries* decision opens the door for private parties to assert Spill Act claims against the state based on "passive" involvement in, or mere approval of, activities that led to environmental contamination. In environmental law, as elsewhere, turnabout is fair play.

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