

## Environmental Law

### N.J. Supreme Court Clarifies Need For Nexus Under the Spill Act

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On Sept. 26, the New Jersey Supreme Court issued a watershed decision in *NJDEP v. Dimant*, 2012 N.J. LEXIS 956 (2012), clarifying the nexus standard under the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11 et seq. Underscoring and expanding upon prior jurisprudence, the court specifically held that the Spill Act requires a reasonable nexus or connection between the alleged discharger, the hazardous substance discharged and the resulting damage at issue. In so holding, the court drew important legal distinctions between finding that a party discharged a hazardous substance and determining that a party is liable for cleanup and removal costs under the Spill Act.

The *Dimant* decision is important and instructive because it mandates that New Jersey Department of Environmental Protection (DEP) (or others suing under the Spill Act) must

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connect a discharge to the damages sought, i.e. to the specific contaminated natural resource or site at which cleanup and related costs were incurred. As discussed below, the Supreme Court rejected DEP's arguments for adoption of the more lenient federal standard for nexus, which requires only "some connection" between a release of a hazardous substance and the costs incurred. Indeed, the court distinguished the Spill Act from the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601 et seq., and determined that the New Jersey statute requires that a "reasonable nexus or connection must be demonstrated by a preponderance of the evidence." *Dimant*, 2012 LEXIS 956, at \*53. Under the Spill Act, the discharge must be connected to the specific environmental damage "in some real, not hypothetical, way... it is not enough ... to 'ask the trier of fact to supply the link'." *Id.*, quoting *N.J. Tpke. Auth. v. PPG Indus.*, 197 F.3d 96, 105 n.9 (3d Cir. 1999).

The *Dimant* case arose out of DEP's investigation of potential sources of pollution in the Longwood Avenue Groundwater Contamination Area in Bound Brook, New Jersey. Based on sampling conducted in 2000, DEP concluded that the main contaminant at

issue was perchloroethylene (PCE), a volatile organic compound commonly used in the dry-cleaning industry. DEP further concluded that the area around Sue's Clothes Hanger, a dry-cleaning business, was the primary source of the contamination. In 1988, DEP had collected samples of material dripping from a pipe that protruded from the back of Sue's building. This testing revealed that the pipe dripped PCE onto the driveway at concentrations 3,000 times above the cleanup standard. DEP believed that these sampling results alone were sufficient to link Sue's to the groundwater contamination in the area.

In 2004, DEP filed a complaint against several parties, including Sue's, seeking Spill Act damages associated with the groundwater pollution at issue. Prior to trial, DEP settled with most of the defendants, and one party filed for bankruptcy. The department ultimately proceeded to a bench trial against Sue's, armed with the evidence of PCE having dripped from Sue's pipe. At the conclusion of proofs, the trial court found that DEP had not established by a preponderance of the evidence that there was a nexus between the discharge by Sue's and the groundwater contamination in the area. DEP appealed, arguing that the trial judge had misapplied the Spill Act by not finding the defendant strictly liable for the contamination.

In affirming the trial court's ruling, the Appellate Division analyzed the language of the Spill Act and noted that DEP had not cited a single case where a discharge resulted in liability with-

out proof of *consequential* damage. The court noted that “cleanup and removal costs” are defined under the Spill Act as “all direct costs *associated with* a discharge, and those indirect costs ... *associated with* a discharge.” N.J.S.A. 58:10-23.11b (emphasis added). DEP argued that because PCE was found dripping onto the driveway, Sue’s was strictly liable under the Spill Act for all costs and damages associated with PCE contamination in the area. Relying on cases decided under CERCLA, the department claimed that there is no requirement for a direct nexus between a defendant’s release of a hazardous substance and the plaintiff’s incurrence of costs. The Appellate Division rejected this position, holding that DEP had the burden of demonstrating that Sue’s had some connection to the damages caused by the groundwater contamination in the area. DEP argued that it met its burden of nexus because the PCE dripping from the pipe *could* have migrated across the driveway, or through unseen cracks in the asphalt, and found its way into the groundwater. The Appellate Division dismissed these arguments, which were not established by the trial evidence, finding that “the circumstances [were] devoid of the critical factor that triggers Spill Act liability, namely that defendant must be in any way responsible for the discharge that *caused* the contamination.” *NJDEP v. Dimant*, 14 A.3d 780, 789 (App. Div. 2011).

Determined to prove Sue’s responsibility under the Spill Act, DEP appealed to the New Jersey Supreme Court. The Supreme Court carefully reviewed the factual record and agreed that DEP’s proofs at trial were inadequate against Sue’s, but modified the lower courts’ legal analysis concerning the nexus requirement under the Spill Act. First, the Court agreed with DEP that Sue’s had discharged a hazardous substance, but it declared that the “determinative question is not whether there was a discharge at Sue’s but whether the DEP has

connected the discharge that did occur to the relief that it has sought against Sue’s.” *Dimant*, 2012 LEXIS 956, at \*39. In its review of the legal arguments related to nexus, the court rejected DEP’s reliance on CERCLA and concluded that the language and legislative history of the Spill Act made it inappropriate to adopt the more lenient causation standard applied to CERCLA claims. However, the court also refused to apply the more stringent “proximate cause” standard, and instead fashioned a middle ground for establishing proof of a nexus under the Spill Act.

Specifically, the Supreme Court held that “on proof of the existence of a discharge, one can obtain prompt injunctive relief under the Spill Act. However, 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.” *Dimant*, 2012 LEXIS 956, at \*53-54. Under this holding, DEP could have sought injunctive relief against Sue’s in the late 1980s to abate the pipe discharge and conduct a study, but it failed to do so. The court barred DEP from obtaining injunctive relief because it had delayed enforcement for more than a decade. The court also found that DEP could not obtain damages from Sue’s for the groundwater contamination by presenting only a hypothetical nexus and asking the trier of fact to somehow connect Sue’s dripping pipe to damages for the groundwater pollution in Bound Brook without sufficient evidence of a link.

The regulated community should view *Dimant* as a helpful decision insofar as it requires DEP and other Spill Act plaintiffs to produce evidence that connects the dots between a defendant’s discharge and the specifically charged environmental damage. Further, the court rejected CERCLA’s more lenient nexus requirement and fashioned a new higher standard for the Spill Act. Previously,

New Jersey’s courts had looked to CERCLA jurisprudence for guidance in Spill Act cases, but *Dimant* now requires a separate, more demanding, analysis under the Spill Act.

The ultimate impact of *Dimant* remains to be seen as to what proofs are needed to recover damages under the Spill Act, which will certainly be litigated in the coming years. Parties will argue over the quantum of proofs and what facts and/or expert testimony are sufficient to establish a reasonable nexus between a discharge and a specifically damaged site. In addition, *Dimant* has created two different standards under the Spill Act: one for injunctive relief and another to recover damages. In light of this, DEP may lean toward enforcement actions for injunctive relief, which only requires proof of a discharge, as opposed to seeking damages, which requires evidence of a reasonable nexus. Furthermore, as *Dimant* requires all parties seeking Spill Act damages to meet a higher standard for nexus than under CERCLA, plaintiffs may have an incentive to file their claims in federal court to avail themselves of the more lenient federal nexus standard.

In any event, one lesson that must be taken from *Dimant* is that mere proof of a discharge, even through sampling data, may not be sufficient to establish the required nexus to recover damages. As such, Spill Act plaintiffs, as well as defendants looking to name third parties, would be wise to ensure that their consultants have collected sufficient data to link a discharge to the damages sought at a particular site before filing suit. Testifying experts will need to carefully examine the data to determine whether there is competent evidence to establish a reasonable nexus. Thus, the practical impact of *Dimant* will be additional due diligence and investigative work for all parties in Spill Act cases, and the trial courts will be left to apply *Dimant* to define what satisfies the reasonable nexus standard set forth by the Supreme Court. ■