

To: Commission
From: Jayne J. Johnson
Re: New Jersey
Date: June 10, 2013

This Memorandum results from Commission Staff monitoring of state judicial decisions clarifying statutory language. Staff seeks Commission authorization for a project to modify the language of the New Jersey Spill Compensation and Control Act, *N.J.S.* 58:10-23.11, et seq. (Spill Act, the Act) to reflect the determination made by the Supreme Court in *N.J. Dep't of Env'tl. Prot. v. Dimant*, 212 N.J. 153, 182 (2012), that a reasonable connection must exist between the discharge, the putative discharger, and the contamination at the damaged site and must be established by a preponderance of evidence to establish liability.

I. Background

A “massive offshore oil spill” was the “initial impetus for the Spill Act” enacted by the Legislature in 1976. 212 N.J. at 160. The purpose of the Spill Act was “to protect public health, safety and welfare and to preserve the state's lands, waters and natural resources.” *See N.J.S.* 58:10-23.11a. The Act authorizes the Department of Environmental Protection (DEP) to respond to environmental contamination and imposes strict liability upon “any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance.” *N.J.S.* 58:10-23.11g(c)(1). The Act created the “most comprehensive spill cleanup program in the nation.” *Id.*; *see Governor's Press Release for Assembly Bill No.1903* at 1. Subsequently, several states followed suit and in 1980 Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *Id.* Like CERCLA, the Spill Act creates a “superfund” to finance cleanup of abandoned sites where a responsible party has not been identified and in emergency situations. *Id.* at 162.

The Spill Act was amended in 1993 when the Legislature created the “innocent purchaser defense” establishing that property owners were not liable for contamination on acquired property if they could establish the following: (1) they acquired the property after the discharge; (2) at that time, they did not know, and had no reason to know, that any hazardous substance had been discharged at the property; (3) they did not discharge the hazardous substance, they were not in any way responsible for the hazardous substance, and they were not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs; and (4) they gave notice of the discharge to DEP when they discovered it. *See N.J.S.* 58:10-23.11g. The Act was again amended in 1997 to add a provision affirmatively making owners of property acquired after September 14, 1993 strictly liable, if, at the time of acquisition, that the person “knew or should have known” that a hazardous substance had previously been discharged at the real property. *N.J.S.* 58:10-23.11g.

II. *Dimant*

In *Dimant*, the Supreme Court considered the Spill Act for first time in fifteen years to clarify a “series of fundamental Spill Act liability issues which, remarkably, have not been definitely resolved in the decades since the [A]ct was adopted.” Dennis J. Krumholz, 211 N.J.L.J. 575 at 1, 3 (Mar. 4, 2013); e.g. *Marcantuone N.J. Sch. Dev. Auth. v. Marcantuone*, 428 N.J. Super. 546 (App.Div.2012, 428 N.J. Super. 546 (App. Div. 2012) (holding liability existed under the Spill Act for property owner who failed to conduct due diligence when acquiring a condemned property), *revers’g White Oak Funding, Inc. v. Winning*, 341 N.J. Super. 294, (App.Div.), *certif. denied*, 170 N.J. 209 (2001).

In *Dimant*, DEP sought “contribution for costs expended in the investigation and remediation of contaminated groundwater” from two dry cleaners. 212 N.J. at 159. In 1988, a DEP investigation of residential wells revealed the presence of perchloroethylene (PCE), a chemical used in the dry-cleaning, automobile mechanic, and machine shops. *Id.* at 164. PCE is a volatile organic compound that quickly evaporates when exposed to air and dissolves in water. *Id.* A gas station, a car dealership and three dry cleaners were located near the contaminated site. The investigation focused on two dry cleaners, Sue's and Zaccardi's. *Id.* During the investigation, a leaking pipe with more than three thousand times the permitted level of PCE was found. *Id.* The DEP investigator never returned to retest the pipe. *Id.* Notably, Sue's was purchased in 1987 by the current owner and discontinued its dry-cleaning business in 1989. *Id.* at 165.

After more than a decade, DEP prepared a report concluding that Zaccardi's and Sue's were responsible for the PCE contamination. *Id.* Zaccardi's subsequently settled the claim. *Id.* at 159. The case pertaining to Sue's proceeded to trial, the court held that DEP did not establish by a preponderance of the evidence that Sue's contributed to the contamination of the groundwater. *Id.* at 166-67. Further, DEP could not offer any evidence linking the PCE contaminated groundwater to Sue's, and other nearby businesses could have been responsible for the PCE discharge. *Id.* DEP appealed the trial court's decision, and the Appellate Division affirmed, stating that the Spill Act requires a causal nexus between a discharge and damages from the discharge. *Id.*

The Supreme Court considered the case and found that Sue's had discharged PCE and ruled that the Spill Act contains no de minimis exception. *Id.* at 173. Upholding the lower court's decision, the Supreme Court defined the term discharge as applied to the Spill Act and clarified the Appellate Division's construction of the definition. *Id.* The Supreme Court acknowledged that the Act does not provide a causation standard. *Id.* at 178. The Court looked to the case law involving CERCLA which likewise does not define the standard for causation. *Id.* at 179. Courts recognize that CERCLA requires “some connection” between a discharge and the response costs to remediate the discharge. *Id.* The Court concluded that the legislative impetus for the absence of a causation standard in CERCLA and the development of the “some connection” standard differs from that of the Spill Act. *Id.* In addition, the Spill Act provides for joint and several liability for damages “carrying significantly different and potentially more severe consequences” than the CERCLA which “permits divisibility among responsible parties.” *Id.* at 178-79. After analyzing the legislative history, the Court also rejected establishing a proximate-cause standard like that found in tort law. *Id.* at 181. The Court concluded that as a threshold matter the Act requires a “nexus” between the discharge and the relief sought. *Id.* at 179. The Court stated that

its previous holdings underscored “the important point that the phrase ‘*in any way responsible*’ requires some connection between the discharge complained of and the alleged discharger.” *Id.* at 178 (emphasis added); *Dept. of Environmental Protection v. Ventron Corp.*, 94 N.J. 473 (1983); *Matter of Kimber Petroleum Corp.*, 110 N.J. 69 (1988); *Marsh v. N.J. Dep’t of Env’tl. Prot.*, 152 N.J. 137, 144 (1997).

The Court noted that the causation standard “must accommodate the Act’s multiple forms of relief and must support and justify a range of relief available under the Act, which includes injunctive relief, and/or recovery of damages and those costs available under the Act.” *Id.* at 182. On “proof of existence of a discharge,” the Court held that injunctive relief may be obtained under the Act. *Id.* When seeking damages, the Court held that once the threshold nexus is satisfied, then there must be shown by a preponderance of evidence “a reasonable link between the discharge, the putative discharger, and the contamination at the specifically damaged site.” *Id.*

Staff seeks approval to draft statutory language providing a causation standard for claims seeking damages under the Spill Act in response to the Supreme Court decision in *Dimant*.