

# Client Alert

Latham & Watkins Environment, Land &  
Resources Department

## Natural Resource Damages After *NJDEP v. Dimant*

In a unanimous opinion, the New Jersey Supreme Court held that liability for damages under the New Jersey Spill Compensation and Control Act (Spill Act) requires evidence of a reasonable link between the discharge, the discharger, the contamination and the relief sought by the plaintiff.<sup>1</sup> The decision should limit the New Jersey Department of Environmental Protection's (NJDEP) claims for natural resource damages (NRDs) and force the NJDEP to accept that it is its burden to prove that the alleged discharger actually caused the NRDs at issue.

### The Spill Act

Four years before Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980,<sup>2</sup> New Jersey passed the Spill Act. That Act imposes strict, joint and several liability on any person who has discharged or is "in any way" responsible for the discharge of hazardous substances.<sup>3</sup> When a discharge is discovered, the Spill Act authorizes NJDEP to either (1) issue an administrative order for the discharger to remove the discharge, or (2) remove the discharge itself and seek reimbursement of its "cleanup and removal costs" from the discharger.<sup>4</sup> "Cleanup and removal costs" means all direct and indirect costs associated with the removal of a hazardous substance or the "taking of reasonable measures to prevent or mitigate damage to the public health, safety, or welfare ...."<sup>5</sup>

In addition to "cleanup and removal costs," NJDEP may seek natural resource damage assessment costs and two types of NRDs: (1) primary restoration – "the cost to restore natural resources to their pre-discharge conditions"; and (2) compensatory restoration – "damages for the ecological services and values lost as a result of the discharge ... includ[ing] damages for the loss of use of a natural resource."<sup>6</sup> Recovery of NRDs, however, requires that NJDEP prove that its primary restoration damages are necessary, appropriate and cost-effective,<sup>7</sup> and that its compensatory restoration damages are derived from an actual harm caused by the injury to the natural resource.<sup>8</sup>

### Facts of *Dimant*

In 1988, a groundwater sampling in Bound Brook, New Jersey revealed high levels of perchloroethylene (PCE), a compound commonly used in dry cleaning.<sup>9</sup> During the investigation of the groundwater contamination, NJDEP collected two samples

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from the laundromat Sue's Clothes Hanger (Sue's).<sup>10</sup> Both samples contained PCE in excess of applicable standards.<sup>11</sup> The first sample – collected from an indoor pit – was found not to be a source of the groundwater contamination because there was no evidence that the pit leaked into the environment.<sup>12</sup> The second sample – collected from a pipe jutting out of the building – was found to be dripping a PCE-laden liquid onto the asphalt.<sup>13</sup> Notably, NJDEP did not identify any cracking or eroding of the asphalt, conditions that might have allowed the PCE to enter the environment.<sup>14</sup> Nor did NJDEP revisit Sue's at a later date to determine whether the pipe was still leaking or to conduct additional sampling.<sup>15</sup> In 2000, without any evidence, NJDEP concluded that the leaking pipe at Sue's was a source of the PCE contamination in the groundwater.<sup>16</sup> Accordingly, NJDEP brought an action against Sue's to recover cleanup and removal costs and NRDs.<sup>17</sup>

The trial court held Sue's not liable under the Spill Act because there was no evidence that the PCE in the groundwater came from Sue's operations. In short, NJDEP failed to establish a sufficient nexus between the leaking pipe at Sue's and the groundwater contamination.<sup>18</sup> The Appellate Division affirmed, again holding that NJDEP failed to carry its burden of proving a nexus between Sue's and the groundwater contamination. As the Appellate Division explained, there was no proof of a "causal nexus between a discharge and environmental damage."<sup>19</sup>

## Court's Analysis

At the outset of its opinion, the New Jersey Supreme Court (Court) explained that a Spill Act "discharge" results from one of two separate circumstances: "(1) a spill or leak 'into the waters or onto the lands of the State'; or (2) a spill or leak 'into waters outside the jurisdiction of the State when damage may result' inside the state."<sup>20</sup> Either way, the Court held, NJDEP must prove "some connection between the discharge complained of and the alleged discharger[.]"<sup>21</sup> The Supreme Court flatly rejected the NJDEP's contention that NJDEP only has to prove a discharge had occurred and did not have to prove a causal link to the contamination at issue or the relief sought.<sup>22</sup> Said another way, NJDEP contended that a more "liberal" – and lesser – burden of proving nexus applies to the NJDEP.

As the Court explained, "[a] nexus ... must be demonstrated to exist between the discharge for which one is responsible ... and the contaminated site for which cleanup and other related authorized costs are incurred."<sup>23</sup> Recognizing that "the causation standard to be applied to Spill Act claims 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 the recovery of damages and those costs available under the Act, as the request for relief is framed," the Court held that "it is not enough for a plaintiff to simply prove that a defendant produced a hazardous substance and that the substance was found at the contaminated site[.]"<sup>24</sup> Although the Spill Act does not "require proof of the common law standard of proximate-cause causation," NJDEP must prove a "reasonable link" between the discharge, the discharger, and the contamination at the site in order for NJDEP to recover cleanup costs or NRDs.<sup>25</sup> If, however, NJDEP seeks an injunction to stop further discharges or to require an investigation, then a lesser burden of proof could apply. As the Court explained, "on proof of the existence of a discharge, one can obtain prompt injunctive relief under the Spill Act."<sup>26</sup>

Applying this causation standard to Sue's, the Court held that NJDEP "never presented sufficient proof of a reasonable, tenable basis for how the drip[s] of fluid containing PCE observed at Sue's one day in 1988 resulted in the contamination of the groundwater in Bound Brook."<sup>27</sup> The Court also noted that it would be

"fundamentally unfair" to ask Sue's to study the contamination and determine a remedy for its discharge given the length of time since NJDEP first discovered the discharge in 1988.<sup>28</sup>

## Takeaways

### Liability for "Discharges" and "Damages" are Distinct

*Dimant* holds that "[l]iability for post-discharge removal naturally exists independent of damages arising from the discharge itself."<sup>29</sup> In short, the existence of a "discharge" does not mean "damages" necessarily exist or that the alleged discharger is responsible for such damages. Rather, NJDEP must prove a discharge, the costs or damages sought, and a nexus between the two.<sup>30</sup> The Court's interpretation of the Spill Act solidifies the recent *Essex Chemical and Union Carbide* NRD cases, where three courts rejected NJDEP's argument that groundwater contamination alone proves NRDs.<sup>31</sup> Like any other tort cause of action, NJDEP must prove an actual loss to recover NRDs.<sup>32</sup>

### Causation Required Depends on Relief Sought

The principal issue in *Dimant* concerned the proofs necessary for NJDEP to recover cleanup and removal costs and NRDs against Sue's.<sup>33</sup> In analyzing the issue, the Court explained that one size does not fit all.<sup>34</sup> Thus, the two types of NRDs – primary restoration and compensatory restoration – must be analyzed separately.

For primary restoration claims, NJDEP is seeking to have the natural resource returned to its pre-discharge conditions (*i.e.*, removal of hazardous substances to non-detect levels). Arguably, NJDEP could seek such relief through an injunction alone.<sup>35</sup> Under *Dimant*, NJDEP will undoubtedly contend that it need only prove the existence of the discharge and the identity of the alleged discharger to establish causation and obtain an injunction for primary restoration.<sup>36</sup> That seems too narrow a reading of *Dimant*, however. Certainly, such evidence could arguably justify an injunction to stop the discharge and to investigate what harm, if any, was caused to the environment. But without proof of a nexus between the discharge and the contamination that allegedly requires remediation and restoration, *Dimant* should not entitle NJDEP to an order requiring the alleged discharger to engage in any form of primary restoration.

For compensatory restoration claims, NJDEP typically seeks money (or in-kind contributions such as land) to allegedly *compensate* for the lost use of a natural resource or for an alleged loss of non-use values of the resource. *Dimant* means that NJDEP must prove a "reasonable link" between the discharge and the alleged compensatory restoration damages.<sup>37</sup> If NJDEP meets this causation requirement, it must then prove the existence and quantum of alleged damages to natural resources.<sup>38</sup>

### Equity May Be Considered in Determining Liability

The significance of *Dimant* extends beyond Spill Act causation. The Court's holding implicitly added an equitable component to Spill Act liability: "To the extent that the DEP claims that there was enough of a connection to support having Sue's study the contamination and determine a remedy for its discharge, we conclude that it would be fundamentally unfair to saddle Sue's with such an investigatory obligation, on a joint and several liability basis, at this time, considerably more than a decade after the DEP discovered the dripping pipe during Sue's operation."<sup>39</sup> Such

equitable considerations have historically been limited to Spill Act contribution actions.<sup>40</sup> Moreover, none of the Spill Act defenses – act or omission caused solely by war, sabotage, or God; permitted discharge; *de micromis* discharge; and innocent landowner — explicitly include equitable considerations.<sup>41</sup> While the Court previously relied on NJDEP to “not arbitrarily exercise its power to assert Spill Act claims,” *Dimant* signals that the Court may have lost faith in NJDEP’s fair exercise of its authority.<sup>42</sup> At a minimum, *Dimant* supports the decisions in *Essex Chemical and Union Carbide* that certain factual circumstances may make it unfair for NJDEP to recover NRDs, especially where the responsible party has been cooperatively working with the agency for years to investigate and remediate the contamination.<sup>43</sup>

## Conclusion

*Dimant* reinforces the view that NJDEP must prove each element of Spill Act liability: the discharge, discharger, nexus between the two and the contamination and, finally, damages. *Dimant* also suggests that in addition to defending against these Spill Act elements, parties can successfully raise equitable arguments to defeat or limit Spill Act claims. While the significance of *Dimant* will become more clear in the coming years, it appears certain that NJDEP will need to reevaluate how (and when) it pursues NRDs from parties.

### Endnotes

<sup>1</sup> *N.J. Dep’t of Env’tl. Prot. v. Dimant*, No. A-2-11 (N.J. Sept. 26, 2012).

<sup>2</sup> 42 U.S.C. § 9601 *et seq.* (2012).

<sup>3</sup> N.J.S.A. 58:10-23.11g(c)(1) (2012).

<sup>4</sup> *In re Kimber Petroleum Corp.*, 539 A.2d 1181, 1183 (N.J. 1988).

<sup>5</sup> N.J.S.A. 58:10-23.11b.

<sup>6</sup> *N.J. Dep’t of Env’tl. Prot. v. Essex Chemical Corp.*, 2012 N.J. Super. Unpub. LEXIS 593, \*15 (N.J. Super. Ct. App. Div. Mar. 20, 2012). Both the *Essex Chemical* case and *N.J. Dep’t of Env’tl. Prot. v. Union Carbide Corp.*, No. MID-L-5632-07 (N.J. Super. Ct. Law Div. Mar. 29, 2011) were tried by Latham & Watkins LLP and resulted in the complete dismissal of NJDEP’s claims for NRDs.

<sup>7</sup> *Id.* at \*19-20 (NJDEP was “required to establish by a preponderance of the credible evidence that their expedited remediation plan should be implemented rather than Essex’s plan.... [NJDEP] did not show that there was a need to restore the properties to pre-discharge conditions within ten years, particularly when there was no evidence showing that the hazardous substances remaining on the properties were causing harm to any of the flora and fauna or posed any threat to the public health, safety or welfare.... The court additionally found that plaintiffs had not shown how the benefits of their remediation plan would justify its cost or that it would be harmful to permit Essex to implement its bioremediation plan.”)

<sup>8</sup> *Id.* at \*24 (upholding trial court’s ruling that compensatory restoration damages “should ‘reflect or be equivalent to the loss.’”); *see also Union Carbide Corp.*, slip op. at 9 (denying compensatory restoration damages because NJDEP “failed to adequately identify a loss for which the public must be compensated.... [NJDEP] merely failed to provide any real proof of those lost services that [NJDEP] assume[s] to be present.”).

<sup>9</sup> *Dimant*, slip op. at 9.

<sup>10</sup> *Id.* at 11.

<sup>11</sup> *Id.* at 11-12.

<sup>12</sup> *Id.* at 11.

<sup>13</sup> *Id.* at 11-12.

<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Id.* (internal citations omitted).

<sup>16</sup> *Id.* at 13.

<sup>17</sup> *Id.* at 26.

<sup>18</sup> *Id.* at 3, 15-16.

<sup>19</sup> *Id.* at 18, 21.

<sup>20</sup> *Id.* at 22 (quoting N.J.S.A. 58:10-23.11b).

<sup>21</sup> *Id.* at 29.

<sup>22</sup> *Id.* at 21, 30.

<sup>23</sup> *Id.* at 30.

<sup>24</sup> *Id.* at 37 (emphasis in original).

<sup>25</sup> *Id.* at 5, 38.

<sup>26</sup> *Id.* at 37-38.

<sup>27</sup> *Id.* at 41.

<sup>28</sup> *Id.* at 42; *see also id.* at 38-39 (“Nor can the DEP credibly claim, more than a decade after first observing the dripping pipe on Sue’s premises, that Sue’s must bear the expense of studying the various ways in which that drip might have contributed to the groundwater pollution and what must now be done to remediate the groundwater pollution. The belated posture of this proceeding renders saddling Sue’s with such a claim, on this record, unfair[.]”).

<sup>29</sup> *Id.* at 35.

<sup>30</sup> *Id.* at 30.

<sup>31</sup> *Essex Chemical*, 2012 N.J. Super. Unpub. LEXIS 593 (affirming trial court’s dismissal of NJDEP’s NRD claims although groundwater was contaminated by defendant); *Union Carbide*, slip op. at 13 (rejecting NJDEP’s claims for NRDs despite the “undisputed” fact “that Defendant’s historical operations contaminated groundwater”).

<sup>32</sup> *Dimant*, slip op. at 30 (noting “various [Spill Act] provisions refer to a connection or causal link between a discharge and damages”); *id.* at 35 (“On the other hand, some causal link is undoubtedly required to impose liability for damages resulting from a discharge.”).

<sup>33</sup> *Id.* at 26.

<sup>34</sup> *Id.* at 37.

<sup>35</sup> *N.J. Dep’t of Env’tl. Prot. v. Kafil*, 930 A.2d 457, 459 (N.J. Super. Ct. App. Div. 2007) (“Certainly, as a matter of definition and historic development, the injunctive remedy includes the power to order mandatory relief as well as prohibitory relief.”).

<sup>36</sup> *Dimant*, slip op. at 37-38.

<sup>37</sup> *Id.* at 38.

<sup>38</sup> *Supra* notes 7 and 8.

<sup>39</sup> *Dimant*, slip op. at 42 (emphasis in original).

<sup>40</sup> N.J.S.A. 58:10-23.11f(a)(2)(a) (“In resolving contribution claims, a court may allocate the costs of cleanup and removal among liable parties using such equitable factors as the court determines are appropriate.”).

<sup>41</sup> N.J.S.A. 58:10-23.11g(d); N.J.S.A. 58:10-23.11c; N.J.S.A. 58:10-23.11g12.

<sup>42</sup> *Marsh v. N.J. Dep’t of Env’tl. Prot.*, 703 A.2d 927, 933 (N.J. 1997).

<sup>43</sup> *Essex Chemical*, 2012 N.J. Super. Unpub. LEXIS 593, \*19-20 (“The trial court also correctly noted that Essex had been working with the [Site Remediation Program (SRP)] for more than two decades to remediate the contamination and had implemented its remediation technologies with SRP’s oversight and approval at a cost of about \$5 million. SRP had not expressed any concern as to the pace of Essex’s remediation efforts, nor had it required Essex to remediate the site in an expedited timeframe.”); *id.* at \*24-25 (affirming trial court’s ruling that compensatory restoration damages would risk giving NJDEP a “windfall”); *Union Carbide*, slip op. at 7 (“The Defendant has been working closely with the SRP and has been in full compliance with the requests of the SRP. The Court finds no basis to intervene when a division of the NJDEP has stated that it has no objection to the current primary restoration plan.”).

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