

JULY-AUGUST 2017

VOL. 17-7

PRATT'S

ENERGY LAW

REPORT



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ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

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An A.S. Pratt® Publication

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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New Jersey Uses Sovereign Immunity to Escape Spill Act Liability

*By Edward F. McTiernan and Michael D. Daneker**

The authors of this article discuss a recent decision by the New Jersey Supreme Court, which addressed the question of whether New Jersey could rely upon sovereign immunity to avoid liability for pre-Spill Compensation and Control Act discharges.

New Jersey's Spill Compensation and Control Act (the "Spill Act") turns 40 this year.¹ The defining feature of the Spill Act is its prohibition on any unpermitted discharges of hazardous substances.² Because it imposes strict liability on dischargers and persons in any way responsible for discharges, limits defenses to acts of war, sabotage and acts of God, and includes a private right to seek contribution from other responsible parties, the Spill Act has prompted numerous environmental cleanups. However, after four decades, there are still many contaminated sites in the Garden State awaiting investigation and cleanup. As a result, the Spill Act is increasingly called upon to address regional situations ranging from groundwater pollution impacting entire aquifers to watershed-wide sediment contamination.

In recent years, the Spill Act and its federal counterpart, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),³ have been applied to complex environmental problems related to urbanization and widespread industrial activities rather than unpermitted discharges from a single facility. Not surprisingly, the cost to remediate these regional problems can be staggering.⁴ If these "mega-sites" are to be resolved in an efficient and cost-effective manner, all potentially responsible parties, including the government, will need to contribute their fair share. It is this backdrop that renders the

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¹ *N.J.S.A.* 58:10-23.11 to 23.24.

² See generally *Magic Petroleum Corp. v. Exxon Mobil Corp.*, 218 N.J. 390 (2014).

³ 42 USC §§ 9601 *et seq.*

⁴ For example, EPA estimates that it will cost \$1.38 billion to remediate sediments in the Lower Passaic River in New Jersey. See <https://www.epa.gov/newsreleases/epa-finalizes-passaic-river-cleanup-one-largest-superfund-projects-epa-history-will>.

New Jersey Supreme Court's decision in *NL Industries, Inc. v. State of New Jersey*⁵ so perplexing.

NL INDUSTRIES, INC. V. STATE OF NEW JERSEY

The cleanup in *NL* is precisely the type of novel problem that the Spill Act and CERCLA are now routinely expected to address. The “site” at issue in *NL* is not a factory or landfill, rather it is the shoreline of Raritan Bay including a seawall and jetty that were apparently first developed by the federal Army Corps of Engineers (“ACOE”) in the 1880s on land partially owned by the State of New Jersey. In 1966, the ACOE rebuilt the jetty and created a public beach. Three years later an unrelated commercial party agreed to install additional improvements intended to protect the public beach from erosion. These improvements included construction of a new seawall and reinforcement of the jetty using industrial slag. Both the ACOE and the State of New Jersey (acting through the Department of Environmental Protection (“DEP”)) approved this plan. Thirty-five years after it approved the placement of industrial slag on its property, New Jersey, acting through DEP, detected contamination along the seawall and in the bay. A subsequent investigation by the U.S. Environmental Protection Agency (“EPA”) determined that *NL* was the source of the slag and that a clean-up, estimated to cost \$79 million, was required. After EPA demanded that *NL* fund the cleanup, *NL* filed a complaint in state court seeking contribution from New Jersey pursuant to the Spill Act.

New Jersey sought to dismiss *NL*'s Spill Act claim by invoking sovereign immunity. The trial judge noted that the State has always been listed as a potentially responsible person in the key Spill Act definition and that the Legislature has never immunized or otherwise excluded the State from the class of persons from whom a discharger may seek contribution. The trial court also relied upon longstanding precedent to conclude that the Spill Act imposes liability for discharges that predate its adoption and therefore applied to the slag deposited on land owned by New Jersey in the late 1960s.⁶ As a result, the trial court rejected New Jersey's motion and the Appellate Division affirmed.⁷

On appeal, the New Jersey Supreme Court conducted a detailed analysis of the history of the Spill Act and its various amendments. The court agreed with

⁵ *NL Industries, Inc. v. State of New Jersey*, A-44-15(076550) (March 27, 2017) <http://njlaw.rutgers.edu/>.

⁶ In the seminal Spill Act decision, *Department of Environmental Protection v. Ventron*, 94 N.J. 473, 498 (1983), the New Jersey Supreme Court found that “the Legislature has expressly declared that the Spill Act should be given retroactive effect.”

⁷ *NL Industries, Inc. v. State of New Jersey*, 442 N.J. Super. 428 (Law Div. 2014), *aff'd* 442 N.J. Super. 403 (App. Div. 2015).

NL and the lower courts that the State was expressly included in the definition of “persons” and therefore subject to contribution claims by other dischargers and responsible persons. However, the court parted company with NL and the lower courts on the question of whether New Jersey could rely upon sovereign immunity to avoid liability for pre-Spill Act discharges. The New Jersey Supreme Court placed a great deal of emphasis on the fact that the definition of “person” predated the Spill Act amendments that created the private right of contribution. And, although it agreed that the State was liable for post-adoption discharges, in the final analysis the court failed to find a sufficient statement of Legislative intent to retroactively abrogate sovereign immunity and reversed.

A CONFOUNDING DECISION

The *NL* decision is confounding on many levels. The dissent takes issue with the “interpretive acrobatics” relied upon by the majority and notes that the basic reasoning used by the majority is contrary to the Legislature’s undisputed decision to encourage expeditious cleanups by making the State equally responsible with private parties.⁸ Many private responsible parties would agree. Moreover, courts in New Jersey, including the Supreme Court, have generally refused to expand the defenses available under the Spill Act. As recently as 2015, the New Jersey Supreme Court reasoned that because New Jersey’s general statute of limitations was not listed among the available Spill Act defenses, “[w]e decline to handicap the Spill Act’s intentionally broad effect” by reading any limitation into the right to seek contribution.⁹

It is hard to understand why the court departed from this line of cases when deciding *NL*. Finally, because the Eleventh Amendment generally prevents private parties from using CERCLA to recover from States, the holding in *NL* will inevitably slow cleanups at sites where New Jersey played a role prior to 1976. From now on private parties will be expected to shoulder the entire cost of such cleanups.¹⁰ As the Spill Act enters its fifth decade it may be time for the legislature to intervene to avoid a full-blown mid-life crisis.

⁸ Slip Opinion, Dissent at page 6.

⁹ *Morristown Associates v. Grant Oil Co.*, 220 N.J. 360, 384 (2015).

¹⁰ See *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114(1996).