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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

NJ Enviro Decision Will Help Bankroll Site Cleanups

By **Martin Bricketto**

Law360, New York (August 07, 2014, 8:12 PM ET) -- A recent New Jersey Supreme Court decision allowing parties to launch contribution actions over contaminated sites without waiting on state enforcement efforts will help fund cleanups, but a finding that the state must approve actual cleanup costs could prove tough to implement, attorneys say.

Interpreting the state's Spill Compensation and Control Act, the court's July 28 decision in Magic Petroleum Corp. v. Exxon Mobil Corp. holds that parties on the hook for a contaminated parcel can sue others for contribution before the state Department of Environmental Protection resolves a remediation plan or some final tally of cleanup costs is reached. If others potentially share blame, a party shouldn't have to bear the cleanup costs alone until the remediation is complete, the court made clear.

“Allowing responsible parties to begin allocation proceedings while they remediate gives parties that contributed to the contamination stronger incentive to settle early, making more funds available for cleanup,” said Duane Morris LLP partner Paul Josephson, who chairs the administrative law section of the New Jersey State Bar Association.

“Earlier adjudication means there should be more parties available to contribute, because with the passage of time while a remediation is undertaken, which often take years to complete, defendants will tend to go out of business or disappear,” he added. “In all, this should mean more and better funded remediations commencing sooner rather than later.”

The justices rejected the notion that a party needs written approval of a remediation plan from the DEP before it can bring a Spill Act contribution claim, and distinguished between the total amount of cleanup and removal costs and a court's ability to assign a percentage of liability.

“While dischargers are required to have written approval for the actual expenses that they incur for the purpose of remediation in order to seek contribution for those expenses, that is not a prerequisite to allocation of responsibility for the costs associated with the approved remediation,” the opinion said.

That issue of approved costs has to be clarified and fleshed out, especially given the state's implementation of the Site Remediation Reform Act and its licensed site remediation professionals, or LSRP, program, under which regulated environmental professionals and not the DEP directly oversee site cleanups, according to attorneys.

“This is not something done now unless public funding is involved and there is no mechanism for NJDEP

to do so outside a case involving public money," said Dennis Toft, co-chair of Wolff & Samson PC's environmental group.

Litigation could end up filling in the blanks, or legislation making clear that any such approval of cleanup and removal costs can be delegated to LSRPs, according to Toft.

Until then, the Magic Petroleum decision could cause problems for contribution plaintiffs if, for example, a defendant insists on such state approval and otherwise refuses to pay its share of remediation expenses, according to Dennis Krumholz, who chairs the environmental practice at Riker Danzig Scherer Hyland & Perretti LLP.

"Obtaining DEP approval of a cleanup plan, or approval of the costs provided in the plan, is no longer the typical practice in light of the SRRA and the LSRP program, so it is not at all clear how this is going to happen," Krumholz said.

Still, attorneys suggest that contribution plaintiffs and cleanups in general would have faced bigger problems if the New Jersey Supreme Court went down the same legal path as the Appellate Division or the trial court, which tossed Magic Petroleum's suit against Exxon over contamination at a gas station property based on the doctrine of primary jurisdiction. Magic Petroleum's contribution action came in the midst of DEP enforcement proceedings.

"I think the trial court and the Appellate Division panel probably didn't fully appreciate the practical aspect of how these matters unfold," said Ira M. Gottlieb, who headsMcCarter & English LLP's environment and energy practice group.

The trial court in 2010 reasoned that the DEP's investigation would inform the allocation of liability, and an appellate panel the following year backed the dismissal, which was without prejudice. Both the DEP and the court could determine if Exxon contributed to the pollution, but only the DEP could "define the contaminants, determine the extent of the discharge, identify the authorized forms of investigative testing, and the permissive methodology of cleanup," the appellate panel said.

The panel added that a party has to secure written approval from the DEP of the investigation and the proposed remedial action before suing for reimbursement and contribution under the Spill Act.

Adopting those findings would have meant a significant delay in bringing contribution actions and created an unfair burden for parties that are liable for DEP purposes but may not be responsible for all or even most of the pollution at issue, according to attorneys. In the end, such parties would be less willing to cooperate with cleanup efforts, Gottlieb suggested.

As such a party, "I'm going to object. I'm going to dig my heels in," Gottlieb said, adding that smaller companies might have even opted for bankruptcy rather than shoulder lopsided costs by themselves.

Traditionally, the DEP didn't inject itself into contribution actions, and the regulator isn't approving cleanup plans on most sites these days because of the LSRP program, according to Toft.

"A requirement to have NJDEP determine responsibility among private parties or approve a cleanup plan as a prerequisite to a contribution action would be untenable," he said.

The high court's decision reaffirmed the way contribution cases are normally handled, according to

attorneys. But preserving the status quo here was important in and of itself.

“Otherwise you're making someone spend every last dime before they can sue for contribution, and there's a certain inefficiency in that and a certain unfairness in that,”Fox Rothschild LLP partner David Restaino said. “I think what happens sometimes is that principle gets muddled up with the theory that the NJDEP is the technical expert on cleanups.”

A driving force for New Jersey courts in environmental cases has been the prompt remediation of contaminated properties, and that motivation likely underlies the state Supreme Court's decision to grant Magic Petroleum's bid for certification, according to Krumholz.

“I think they saw the decisions below as a real impediment to cleaning up sites,” he said.

--Editing by Jeremy Barker and Edrienne Su.
