

To: Commission
From: Jon Aunio
Re.: Magic Petroleum v. Exxon Mobil Corp.
Date: July 11, 2016

MEMORANDUM

Executive Summary

The case of *Magic Petroleum c. Exxon Mobile Corp.* addresses two issues that identify areas of the law in which statutory drafting might be able to provide clarity. Those are:

- Whether claims for contribution under the Spill Act must be deferred under the doctrine of Primary Jurisdiction until a final resolution by the Department of Environmental Protection; and
- Whether it is necessary to obtain written consent of the Department of Environmental Protection before proceeding with a contribution claim.

Summary

This Memorandum concerns contribution claims made pursuant to the New Jersey Spill Compensation and Control Act (Spill Act).¹ The Spill Act makes all dischargers of hazardous waste material that contribute to a contamination jointly and severally liable. The issues placed before the Commission arose in the case of *Magic Petroleum v. Exxon Mobil Corp.*² The law authorizes private parties to engage in actions for contribution when the Department of Environmental Protection (DEP) holds one such party liable for cleanup costs.³

Magic addresses the question of whether a party must wait until after the DEP completes its investigation and approves a remedial action plan before filing a contribution action. *Magic* also address the question of whether the party must obtain written approval from the DEP prior to filing a claim for contribution.

The New Jersey Supreme Court, in *Magic*, held that parties may file a claim for contribution prior to the DEP making a final determination, and indicated that a court may allocate liability without the findings of the DEP but may not be able to address final damages. Furthermore, the Court explained that party need not obtain written approval from the DEP regarding a remediation plan prior to filing a claim.⁴

¹ *N.J.S.A.* 58:10-23.11 to -23.24.

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

³ *N.J.S.A.*

⁴ *Magic*, 218 N.J. 390.

Statute

Whenever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance. In an action for contribution, the contribution plaintiffs need prove only that a discharge occurred for which the contribution defendant or defendants are liable pursuant to the provisions of subsection c. of section 8 of P.L.1976, c.141 (C.58:10-23.11g)...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.

N.J.S. 58:10-23.11f subsec. a(2)(a).

Background

Magic Petroleum began operation of a gasoline refueling station in the early 1990s on Lot 19.01 in the Clarksburg are of Millstone Township.⁵ When Magic began operation, they were aware that several underground storage tanks were leaking contaminants into the soil and water.⁶ ExxonMobil owned a separate parcel where it similarly operated a gas refueling station with similar contamination.⁷ The DEP had previously begun investigation as early as 1989 and determined in 1991 that the contamination was a result of “discharge.”⁸ In 1995 the DEP issued a directive to remediate the site to Magic.⁹ DEP eventually sought an Administrative Consent Order to have Magic remediate the property with DEP oversight.¹⁰ Magic failed to comply and requested a stay until ExxonMobil was joined as a discharger for being a liable contributing party.¹¹ Further proceedings between the DEP and Magic were ongoing, while Magic entered into a private action in 2003 against ExxonMobil and other parties alleging partial responsibility of each.¹²

ExxonMobil moved to stay or dismiss that action pending the DEP’s determination which Exxon alleged was necessary prior to any allocation of liability.¹³ The Court granted the stay, noting that as the DEP was already collecting detailed data, the allocation would be accurate when the DEP concluded their analysis, and suggesting that the assessment would significantly affect

⁵ *Magic*, 218 N.J. at 396.

⁶ *Id.*

⁷ *Id.* at 397.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 398.

¹³ *Id.*

any amount awarded.¹⁴ The Appellate Division affirmed, indicating that while concurrent jurisdiction existed, only the DEP could “identify the contamination, analyze the extent of the discharge, and devise a cleanup strategy.”¹⁵ The Appellate Division found the potential findings of the DEP were necessary prior to any allocation of liability, and relied on the doctrine of primary jurisdiction to leave the matter to the expertise of the DEP to avoid inconsistent rulings.¹⁶ The Court further contended that any further action would require written approval by the DEP for a remediation plan prior to any claim under the Spill Act.¹⁷

Analysis

The Supreme Court first addressed the language and intent of the statute enacted in 1976 to reduce the threat of hazardous materials to the environment and economy.¹⁸ The relevant language prohibited discharge of hazardous substances and provided for its cleanup through the DEP.¹⁹ The primary purpose of the DEP is to act to clean up contamination resulting from such a discharge, or arrange and oversee the discharger in clean up and removal.²⁰ The Legislature sought expediency in removal, and made any such discharger strictly liable, with any contributors to be jointly and severally liable.²¹ Furthermore, the DEP may institute an action to recover any costs expended for removal from a discharger, and may collect the full amount from a single party though that party may not have been solely responsible.²²

In 1992, the Legislature amended the Act so that parties held liable by the DEP would be able to engage in private actions to seek contributions from other responsible parties.²³ Any such action was to be based on tort law contribution to achieve a sharing of responsibility, allocating the contribution based on party’s percentage liability.²⁴ Ultimately, the intent was to ensure that private parties directed by the DEP to do so, would engage in efficient and immediate remediation rather than failing to cooperate for fear of being held solely liable for substantial expenditures.²⁵ The standard of proof only required a discharger to prove that another party had discharged under

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 401.

¹⁹ *Id.*

²⁰ *Id.* at 402.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 403.

²⁴ *Id.*

²⁵ *Id.*

the Spill Act to be liable. ²⁶ Allocation of liability would be based on equitable factors as determined by the Court, known as the “Gore Factors.” ²⁷

I. Does Concurrent Jurisdiction Preclude the Court from Ruling on Allocation of Liability Prior to a Final Determination by the DEP?

The New Jersey Supreme Court concluded that the statute affords private parties the *same* right as the DEP to sue potentially responsible parties that caused discharge. Under circumstances in which the DEP is allowed to join a party at the onset of the claim prior to a remedial determination, a private party should be afforded the same right through a contribution claim. ²⁸ To find otherwise was deemed fundamentally unfair, particularly where the entire cost could be placed upon parties not substantially liable for damages. ²⁹ Furthermore, the statute grants only the Court jurisdiction over the claim, not the DEP, thus the only option available for those parties seeking to avail themselves is a claim in Superior Court. ³⁰ Additionally, the DEP specifically stated that in order to establish percentage liability, the Court was the proper venue to do so. ³¹

The Court concluded that liability allocation can be determined by the court based on expert proofs without a final determination or input from the DEP. The DEP however, maintains concurrent jurisdiction over the costs associated. The Court ultimately deals with the *allocation* of the liability, not the actual costs of remediation.

The Court noted that the legislative intent behind the statute is expediency and efficiency, and yet the case in issue involved years of litigation.

II. Is Written Approval by the DEP Necessary for Contribution Claim?

The Appellate court noted that the language of the current private right of claim, includes the language “cleans up and removes a discharge” and “persons who are liable for the cost of the cleanup and removal of that discharge.”³² The definition of cleanup and removal costs includes within it that all costs are subject to the approval of the DEP. The Appellate Division therefore decided that the allocation of the costs assessed by the Court cannot be performed without the approval of at least a remediation plan by the DEP.

The New Jersey Supreme Court concluded no approval was necessary. Allocation of costs necessarily implies that costs have been or will be incurred, and the Court must therefore allocate those costs in an equitable manner. The remediation plan cited by the Appellate Court is one that, when approved, would cite the method, means, and costs associated with cleaning the

²⁶ *Id.* at 411.

²⁷ *Id.* at 404.

²⁸ *Id.* at 408.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 410.

contamination, and analysis of where the discharges had come from. However, costs not yet approved would remain subject to the percentage liability determined by a finding of the court. Establishing liability earlier would be well within the intent of the statute.

Conclusion

As it is currently written, the statute is arguably less clear than the determination of the New Jersey Supreme Court on the issues identified above. Commission Staff seeks authorization to conduct additional research and outreach regarding the Spill Act in order to determine whether modification to the statute could serve to clarify the law in this area.