**To:** **New Jersey Law Revision Commission**
**From:** **Jennifer Weitz, Counsel**
**Date:** **November 09, 2020**
**RE:** **The Spill Compensation and Control Act, N.J.S. 58:10-23.11 *et seq.* (*Magic Petroleum v. Exxon Mobil Corp.*, 218 N.J. 390 (2014).)**

# UPDATE MEMORANDUM

## Executive Summary

The New Jersey Spill Compensation and Control Act (the "Act") requires all dischargers of hazardous waste material contributing to contamination to be held jointly and severally liable.[1] In addition, the Act authorizes private parties to engage in actions for contribution when the Department of Environmental Protection (DEP) holds one party liable for the cleanup costs.[2]

In *Magic Petroleum v. Exxon Mobil Corp.[3]* the New Jersey Supreme Court determined pursuant to the Act that a property owner or other responsible parties are permitted to file contribution claims in the Superior Court, and that the court may allocate liability before the final resolution of a site remediation plan by the DEP.

In July 2016, the New Jersey Law Revision Commission authorized a project based on the New Jersey Supreme Court's decision in *Magic Petroleum v.Exxon Mobil Corp.*[4] Due to the highly specialized nature of this area of law, the Commission sought information to determine whether statutory modification of the Spill Control and Compensation Act was necessary to clarify the statute.

In light of the Court's decision in *Magic Petroleum*, which was based on the plain language of the statute, and subsequent legislative activity, Staff recommends the conclusion of work in this area.

## Background

In *Magic Petroleum v. Exxon Mobil Corp*. the New Jersey Supreme Court construed the Spill Control and Compensation Act, N.J.S. 58:10-23.11 *et seq*. ("the Act"), to find that any private party deemed a discharger under the Act may file contribution claims in Superior Court, rather than with the Department of Environmental Protection ("DEP"), and that such claims may be filed before the DEP issues a final number for cleanup and removal costs.[5] Additionally, the Court held that written approval by the DEP for the remediation plan is not required prior to filing a contribution claim.[6]

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[1] N.J. STAT. ANN. 58:10-23.11 et seq. (West 2020).
[2] *Id.*
[3] *Magic Petroleum Corp. v. Exxon Mobil Corp.*, 218 N.J. 390 (2014).
[4] NEW JERSEY LAW REVISION COMMISSION (2016) 'Magic Petroleum v. Exxon Mobil Corp.'. *Minutes of NJLRC meeting 21 Jul. 2016*, Newark, New Jersey
[5] *Id.*
[6] *Id*. at 412.

In the early 1990s Magic Petroleum ("Magic") bought a lot in Millstone Township, where it operated a gas refueling and service station.[7] At the time of the purchase, Magic was aware that the property contained several underground storage tanks that were leaking petroleum hydrocarbons into the soil and ground water.[8] The Department of Environmental Protection ("DEP") had dealt with this lot before Magic purchased it, requiring the removal of two of the storage tanks pursuant to the Act after the DEP found evidence of discharges.[9] Across the street from Magic, ExxonMobil owned and operated another gas station, "rife with its own contamination issues."[10]

Subsequently, Magic Petroleum's station was found to be a source of ground and water contamination.[11] In 1995, the DEP notified Magic that it had to remediate hazardous substances discharged on the lot.[12] Magic removed three additional storage tanks in 1997, and, in 1999, it entered into an Administrative Consent Order, agreeing to remediate its property under the oversight of the DEP.[13]

In 2003, the DEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment, asserting that Magic failed to comply with the 1999 Consent Order.[14] Magic requested an administrative hearing, and a stay of proceedings to allow ExxonMobil to be admitted as a party, so that liability could be allocated.[15] Magic also requested that the DEP join ExxonMobil in the remediation plan.[16] The DEP responded that allocating responsibility should be negotiated with ExxonMobil or brought before a court.[17]

At the administrative hearing, the Administrative Law Judge ("ALJ") concluded that the contamination of Magic's lot was the result of a discharge for which Magic was "in any way responsible" under the Act.[18] The ALJ also found that Magic violated the Administrative Consent Order.[19] The DEP adopted the ALJ's decision in December 2006.[20]

In 2003, while the DEP proceedings were ongoing, Magic filed a claim in Superior Court for contribution under the Act, alleging that ExxonMobil and several other parties were responsible for part of the costs of cleaning up the contamination on Magic's lot.[21] In 2010, ExxonMobil filed a notice to stay the case or to dismiss the complaint without prejudice.[22] The Court dismissed the case without prejudice, reasoning that since the DEP was present on Magic's lot collecting data

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[7] *Id*. at 396.
[8] *Id*.
[9] *Id*.
[10] *Id.*
[11] *Id*.
[12] *Id.* at 397.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id*. at 398.
[22] *Id.*

about the contamination, any allocation of liability would be more accurate if it was done after the DEP had made detailed findings.[23]

Magic appealed to the Appellate Division.[24] The Appellate Division affirmed the trial court's order, explaining that while the Superior Court had sole jurisdiction to allocate the costs among liable parties, several other issues had to be addressed before reaching allocation.[25] The Appellate Division also held that any party seeking contribution under the Act must obtain written approval from the DEP for the remediation plan prior to filing a contribution claim.[26] Magic petitioned the Supreme Court, which granted certification.[27]

The Supreme Court began its discussion by noting that the stated purpose of the Act is to allow the State

> to control the transfer and storage of hazardous substances and to provide liability for damage sustained … as a result of any discharge … by requiring the prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharges.[28]

The Court also noted that since the DEP is charged with managing public funds to quickly and efficiently restore lands spoiled by contamination, the DEP is also authorized to "act to clean up and remove or arrange for cleanup and removal of such discharge or may direct the discharger to clean up and remove or arrange for the cleanup and removal of the discharge." [N.J.S. 58:10-23.11f(a)(1).][29]

In N.J.S. 58:10-23.11g(c)(1) the Legislature established strict liability for causing environmental contamination, and mandated that dischargers are jointly and severally liable.[30] The Court noted that under this statute, the DEP may collect all cleanup costs from one discharger even if that party is only partially responsible for the contamination.[31]

However, in 1992 the Act was amended to clarify that any discharger ordered by the DEP to pay for the entire cost of cleanup is entitled to seek contribution from other responsible parties.[32] [*P.L.* 1991, *c.*372, § 14.] The amendment expressly created a separate contribution cause of action for private parties seeking to recover part of the cleanup costs.[33] Significantly, the Legislature directed that contribution plaintiffs seek relief before a court, bestowing upon the courts liberal

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[23] *Id.*
[24] *Id.*at 399.
[25] *Id.*
[26] *Id.*
[27] 213 N.J. 387 (2013).
[28] N.J. STAT. ANN. 58:10-23.11a (West 2020).
[29] *Id.* at 402.
[30] *Id.*
[31] *Id.*
[32] *Id.*at 403.
[33] *Id.*

discretion to "allocate the costs of cleanup and removal among the liable parties using such equitable factors as the court determines are appropriate."[34]

The Court summarized the amendment by noting that the private right of action in contribution allows dischargers designated by the DEP to share costs with additional potentially responsible dischargers not initially designated by the DEP.[35] The Court also noted that the Legislature intended for courts to be the venue for allocating percentages of liability.[36]

The Court determined that Magic, or any other responsible party, was permitted to file contribution claims in Superior Court, and that a court may allocate liability before the final resolution of a site remediation plan by the DEP.[37] The Court explained that, by statute, dischargers have the same rights as the DEP to sue other potentially responsible parties in order to recover contribution costs for contamination, where those other parties caused a portion of the discharge.[38] Because the DEP may join a party at the onset of a claim, prior to determining the full extent of the contamination, a private entity similarly is granted the right to hold a responsible party accountable through a contribution claim.[39]

The Court noted that under N.J.S. 58:10-23.11f(a)(2)(a), the Act gives the courts, rather than the DEP, jurisdiction over contribution claims.[40] Because the Legislature did not intend for private parties to use the DEP as the forum for bringing contribution claims, the only recourse a private party discharger has to obtain contribution from other responsible parties is in the Superior Court.[41] The Court also pointed out that contribution claims do not require the DEP's expertise, since such claims allocate liability, and assigning liability is well within the experience of judges.[42] Therefore, the DEP and the courts have concurrent jurisdiction over the recovery of cleanup costs—private parties rely on the courts to recover contribution costs from other entities that caused environmental contamination via a percentage of liability, and the final determination of costs is determined by the remediation that is overseen by the DEP and its surrogates.[43]

Additionally, the Court observed that forcing a discharger to shoulder all the costs of cleanup until remediation is complete would be contrary to the stated goals of the Act, which is intended to promote prompt remediation.[44] Therefore, the Court held that a party determined by the DEP to be a discharger and responsible for the cost of cleanup is entitled to bring a contribution claim against other potentially responsible parties before the final tally of cleanup costs.[45] This is

[34] *Id.* at 404. See, N.J.S. 58:10-23.11f(a)(2)(a).
[35] *Id.*at 405.
[36] *Id.*
[37] *Id.*at 407-08.
[38] *Id.*at 408.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*at 409.
[43] *Id.*at 409-10.
[44] *Id.*at 410.
[45] *Id.*

consistent with the legislative intent to encourage expeditious and efficient remediation of site contamination.[46]

The Court then addressed the second issue raised, whether the DEP's written approval of the investigation and remediation plan is needed prior to filing a claim for contribution.[47] The Court concluded that it is not, basing its decision on the plain language of the statute and the legislative intent to amend the Act to clarify and permit a private claim for contribution.[48] The Court noted that the Legislature made clear the proofs necessary for contribution plaintiffs to succeed on a claim, specifying that under N.J.S. 58:10-23.11f(a)(2)(a) plaintiffs only need to prove that a contribution defendant is liable for a discharge under the Act in order to prevail.[49]

Here, Magic was not asking the trial court to assign a final allocation of cleanup costs, but instead asked that the court assign a percentage of liability.[50] The Court noted that such a determination does not require DEP approval.[51] The Court went on to explain that forcing contribution plaintiffs to obtain written approval from the DEP prior to filing a contribution claim would lengthen the overall cleanup process and discourage parties from cooperating with the DEP.[52] Therefore, the Court held that written approval for the remediation plan is not required prior to filing a contribution claim.[53]

**Legislative Activity**

Since the Courts' decisions in *Magic Petroleum*, the Spill Act has been amended twice. In 2015, the Act was amended regarding the duration of public notice given by the DEP prior to agreeing to an administrative or judicially approved settlement.[54] The amendment increased the timeframe for public notice from at least 30 days prior to the agreement to at least 60 days prior to the agreement.[55]

Several additional amendments were made to the Act in 2019.[56] Notably, it revised the definition of "remediation" to make it consistent with other laws, amended the laws governing the remediation of contaminated sites, and clarified the role and responsibilities of licensed site remediation professionals.[57]

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[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*at 411.
[50] *Id.*
[51] *Id.*
[52] *Id*. at 412.
[53] *Id.*
[54] *P.L.* 2015, *c.* 166, § 1. Assembly Judiciary Committee Statement to Assembly, No. 4307, dated March 19, 2015.
[55] *P.L.* 2015, *c.* 166, § 1, codified at N.J.S. 58:10-23.11(e)(2).
[56] *P.L.* 2019, *c.* 263. The definition of remediation is codified at N.J.S. 58:10-23.11(b). The amendments regarding remediation of contaminated sites and licensed site remediation professionals are codified at N.J.S. 58:10-23.11(g);
[57] Assembly Environment and Solid Waste Committee Statement to Assembly, No. 5293, dated June 10, 2019.

In the current session, two bills have been introduced. A1185/S2903 increases the Act's cap on the recovery of damages from certain dischargers.[58] It was introduced on January 14, 2020, and referred to the Assembly Environment and Solid Waste Committee.

A1692 provides that the cap on tax liability in connection with the transfer of hazardous substances to major facilities would also apply to all successors in interest of those owners and operators.[59]

## Conclusion

Based on the Court's discussion in *Magic Petroleum*, and the ongoing legislative activity with regard to the Spill Control and Compensation Act, Staff recommends that the Commission discontinue its work in this area.

[58] www.njleg.state.nj.us/bills/BillView.asp
[59] *Id.*