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Environmental LAW

Is it time to amend the Navigation Law?

Landowner liability for petroleum contaminated sites

One of the most perplexing and frustrating environmental issues that arises in connection with the acquisition of real property has been the draconian, and many would argue inequitable, use of the Navigation Law to affix liability for spills or releases of petroleum.

The law fastens strict liability on any person identified as a "discharger." In the abstract that seems quite reasonable: Any person who has spilled gasoline or fuel oil or another form of petroleum should be required to clean up their mess. The problem is that the key to the statute is classifying someone as a discharger — the term is not defined in the statute.

By RONALD G. HULL
Daily Record Columnist

Rather, the term has been examined and explained by the courts in ways that are not intuitive or easily understood. Now, a serious effort is under way to revisit and amend the statute, but without addressing the fundamental question of how to define just who is a discharger.

Relatively early in the judicial evolution of the caselaw, the courts struggled with the question of whether a landowner should be strictly liable to remediate petroleum contamination regardless of fault. The Fourth Department established a basic ground rule that classification of a person as a discharger under the Navigation Law should be a function of a person's conduct, not their status as a landowner, (*Drouin v. Ridge Lumber*, 209 A.D.2d 957 [4th Dept. 1994]).

In other words, the fact that a person has come to own a piece of contaminated property should not make them responsible if the problem was caused by someone else. However, that seeming bright line test has been eroded over the years by expanding notions of what conduct (or failure to act) leads to liability.

In 2000, the Third Department took a different approach, concluding that liability attaches to the current owner of the petroleum "system," i.e., tanks and piping, which was the source of the discharge, even if the owner acquired the system after the leak had been repaired, (*State v. Speonk Fuel, Inc.*, 273 A.D.2d 681 [3d Dept. 2000]).

This line of caselaw has been expanded to include unknowing acquisition of tanks abandoned by a previous owner, even if the current owner was diligent and took steps to have all tanks removed from the property prior to purchase, (*Matter of Veltri v. New York State Comptroller*, 81 A.D.3d 1050 [3d Dept. 2011]).

The courts have also imposed liability as a discharger on landlords on the grounds that they have the ability to control a tenant's handling of petroleum, (*State v. Green*, 95 N.Y.2d 403 [2001]), on current owners who failed to require known contamination to be cleaned up by the seller prior to purchase, (*State v. Speonk Fuel*, 3 N.Y.3d 720 [2004]), and, finally, owners have now been found liable to remediate spills that occurred before they acquired the property based on their capacity to abate the harm by cleaning up the contamination resulting from a spill, (*State v. C. J. Burth Services, Inc.*, 79 A.D.3d 1298 [3d Dept. 2010]).

The prevailing interpretation appears to be that liability as a discharger may be based on ownership of the petroleum system or "upon a potentially responsible party's capacity to prevent spills before they occur or the ability to clean up contamination thereafter," (*Matter of Huntington and Kildare, Inc. v. Grannis*, 89 A.D.3d 1195 [3d Dept. 2011]).

Since every landowner has access to the site and, therefore, the "ability" to clean up contamination, this final interpretation of how one becomes a "discharger" has brought the cases full circle: Every owner of contaminated property where a discharge has occurred is strictly liable as a discharger under the Navigation Law. Furthermore, there is no "innocent landowner" safe harbor under the Navigation Law; no amount of pre-acquisition due diligence will exempt an owner from strict liability.

As the caselaw interpretation of the Navigation Law has evolved ever closer to a position of strict liability for landowners regardless of knowledge or fault and based for all practical purposes on status, a legislative effort to amend the statute to afford non-culpable landowners some relief has gained some traction.

The proposed amendment would revise the statute to require the Department of Environmental Conservation to accept evidence from an alleged discharger pointing toward other culpable parties and to make a determination whether a third party is

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solely responsible for the discharge. Alternatively, if there is more than one party that qualifies under the statute as a discharger, the amendment would require DEC to apportion liability between and among the dischargers.

The amendment would also entitle a party who performs a clean-up of a petroleum contaminated site to a formal limitation of liability as compared to the weaker and non-binding "no further action" letters which are currently issued.

Finally, the bill would amend the statute to require the comptroller, as administrator of the State Spill Fund, to consider claims by an alleged discharger that other parties are wholly or partially responsible and make a determination whether multiple dischargers should be held accountable for a spill.

The proposed amendment would not overrule the caselaw expansively defining who is a "discharger," but would provide landowners with passive or inherited liability an administrative escape hatch to force the DEC and the comptroller to consider claims that multiple parties should be required to clean up a spill and to apportion liability based on relative culpability.

These remedies would be in addition to the existing right to bring an action for contribution. The Comptroller's Office has opposed the amendment as redundant of existing authority and burdensome on DEC and further opposes the liability limitation. EPL/Environmental Advocates, an environmental lobbying group, opposes the bill as likely to result in major or lasting harm to the environment.

By contrast, the Environmental Law Section of the State Bar Association is considering whether to recommend an even more expansive amendment that would also provide a liability exemption for public corporations that acquire contaminated sites involuntarily through tax foreclosure.

Petroleum contaminated sites are the largest category of contaminated sites in New York.

The Navigation Law has been largely unchanged since 1992 while the courts have moved steadily to expand the concept of dischargers to include most, if not all, owners of such sites without regard to participation in, or even knowledge of, the discharge.

The present legislative effort to provide some relief to passively liable parties ensnared in the statute's net bears a close look from anyone who could be affected by it, which for all practical purposes is anyone who acquires real property in New York state.

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