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Using the Oil Spill Fund to Facilitate Brownfield Development

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I. INTRODUCTION

When property owners or developers think of the Office of the State Comptroller's New York Environmental Protection and Spill Compensation Fund (Oil Spill Fund), it is probably because they are concerned about becoming the target of a cost recovery action seeking reimbursement for Oil Spill Fund costs incurred for a cleanup overseen by the New York State Department of Environmental Conservation (DEC).

However, funding cleanup and removal is only one of the missions of the Oil Spill Fund. A lesser known but equally important role of the Oil Spill Fund is to provide compensation to parties who have suffered economic damages in connection with the discharge of petroleum. In this role, the Oil Spill Fund has become a tool for facilitating the redevelopment of brownfield sites. This article discusses who is eligible to file claims for reimbursement from the Oil Spill Fund, reviews procedures for processing claims, and provides practical insights on filing claims.

After passage of the Brownfield/Superfund Law of 2003 (the Brownfield Amendments),[1] many prospective purchasers and developers began to explore use of the New York State Brownfield Cleanup Program (BCP) to help defray the costs of development projects. These parties have been willing to endure the extensive and time-consuming remedial procedures and public participation requirements of the BCP because of the very generous tax credits available under the BCP.[2]

The BCP may make sense for complex developments or for

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[1] 2003 N.Y. Laws 1, as modified by 2004 N.Y. Laws 577.

[2] The Brownfield Amendments created three types of tax credits for developers or owners of sites admitted into the BCP. The most significant tax credit is the Brownfield Redevelopment Tax Credit (BRTC). Similar to the state Investment Tax Credit (ITC), the BRTC applies to three types of costs: site preparation costs, qualified tangible property (QTP) costs, and on-site groundwater remediation. Under the QTP credit, a taxpayer admitted into the BCP may be eligible to claim up to 22% of the value of the improvements of the property. *See* "Environmental Remediation Process Is Undergoing Sweeping Changes Mandated by New Brownfields Law," 76 New York Bar Journal, No. 8 (Oct. 2004).

heavily contaminated sites. However, the added costs and delays inherent in the BCP may make less economic sense for purchasers or developers of sites contaminated with petroleum. Under certain circumstances, the Oil Spill Fund may be a better alternative than the BCP. While Oil Spill Fund reimbursements likely will not rival BCP tax credits in the amount of financial assistance provided, the relatively straightforward nature of the damage claim process can be used efficiently to obtain reimbursement of out-of pocket costs for remediating petroleum contamination and other losses. Importantly, the Oil Spill Fund claim procedures and eligibility criteria are well established[3] and not subject to the kind of changes recently witnessed in the BCP.[4]

II. OVERVIEW OF THE OIL SPILL FUND

A. Strict Liability

The Oil Spill Fund was established in 1977 with the enactment of Article 12 of the Navigation Law, which is also known as the Oil Spill Prevention, Control and Compensation Law[5] (Article 12). Article 12 is the primary legal mechanism for dealing with liability for, and cleanup of, oil spills on land and water in New York State. Article 12 prohibits the unpermitted discharge of petroleum into the waters of the state or onto land from which the petroleum might drain into those waters.[6]

The Oil Spill Fund, which is administered by the State Comptroller, is strictly liable for all cleanup and removal costs and for direct and indirect damages.[7] The Oil Spill Fund pays for the cleanup and removal of petroleum discharges when the responsible party is unknown or when the responsible party is unable or unwilling to pay for a cleanup.[8] The Oil Spill Fund also pays eligible damage claims submitted by persons injured by a petroleum discharge when the responsible party refuses reimbursement or when the responsible party is unknown. The Oil Spill Fund is required to seek reimbursement of cleanup costs and damage claim payments;[9] to accomplish this, the Oil Spill Fund refers most of its cost recovery work to the Office of the Attorney General. As part of this cost recovery obligation, the Oil Spill Fund may record liens against contaminated property when the owner is a discharger and fails to pay for the cleanup.[10] Article 12 also obligates the Oil Spill Fund to facilitate settlements among dischargers and persons who suffer damages as a result of a discharge.[11] The Oil Spill Fund reviews BCP applications to determine if there has been a petroleum discharge at the site and to determine the extent to which the Oil Spill Fund is at risk for paying cleanup and removal costs or direct and indirect damages for off-site petroleum contamination. If the Oil Spill Fund compensates a claimant, it will acquire the claimant's claims against the discharger by subrogation.[12]

The Oil Spill Fund is strictly liable for "cleanup and removal costs."[13] The term is defined to include the following:

- The cost to restore, repair or replace real or personal property damaged or destroyed by a discharge;[14]
- Loss of income or impairment of earning capacity because of damage to real or personal property, including damage or destruction to natural resources;
- Reduction in property value;
- Loss of tax revenue by a state or local government for up to one year; and
- Interest on a loan to offset economic harm from discharge.[15]

While the Oil Spill Fund is strictly liable for cleanup and removal costs and direct and indirect damages, Article 12 also makes any person who has discharged petroleum strictly liable, without regard to fault, for cleanup and removal costs and direct and indirect damages, no matter by whom sustained.[16] A discharger is not eligible for reimbursement from the Oil Spill Fund, even if the discharger may have paid more than its perceived share of cleanup costs.[17] One of the first critical questions that a developer, owner or purchaser must ask is whether it may be considered a responsible party under the Navigation Law.

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[3] 2 NYCRR Parts 401-404.

[4] Because of the potential size of the BCP tax credits, DEC recently published new BCP eligibility criteria that have the effect of narrowing the definition of what constitutes an eligible brownfield site. *See* David J. Freeman and Lawrence P. Schnapf, "Brownfield Cleanup Program's Final Site Eligibility Criteria," New York Law Journal, p. 3 (April 20, 2005); David J. Freeman and Lawrence P. Schnapf, "Brownfield Cleanup Program's Draft Eligibility Criteria," New York Law Journal, p. 4 (Nov. 16, 2004).

[5] N.Y. Nav. Law § 12-170 *et seq.*

[6] N.Y. Nav. Law §§ 172, 173.

[7] N.Y. Nav. Law § 181(2).

[8] N.Y. Nav. Law § 186.

[9] N.Y. Nav. Law § 187.

[10] N.Y. Nav. Law § 181-a.

[11] N.Y. Nav. Law § 183.

[12] N.Y. Nav. Law § 188.

[13] N.Y. Nav. Law § 172(5).

[14] The injured person must have title, right, or interest in the real or personal property. 2 NYCRR § 402.1.

[15] N.Y. Nav. Law § 181(2).

[16] N.Y. Nav. Law § 181(2).

[17] *See* Merrill Transport Co. v. State, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dept. 1983), *motion denied,* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983); White v. Regan, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dept. 1991), *appeal denied,* 79 N.Y.2d 754, 581 N.Y.S.2d 282 (1992).

B. Who Is a Discharger?

Although the term "discharger" is frequently used when referring to parties liable for the discharge of petroleum, Article 12 does not contain a definition of a discharger, nor does that term appear in the law. Instead, Article 12 provides that any person "who has discharged petroleum" will be strictly liable without regard to fault for all cleanup and removal costs as well as direct and indirect damages resulting from a discharge of petroleum.[18] This cleanup liability extends to discharges that occurred prior to the 1977 enactment date of the statute.[19]

Article 12 defines a discharge as any "intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the state when damage may result to the lands, waters or natural resources within the jurisdiction of the state."[20] In addition, the term "waters" is defined to include not only surface water, but groundwater, as well.[21]

To effectuate the intent of the legislation, courts have liberally construed Article 12, finding a broad range of entities liable under Article 12. Those entities include operators of a facility where a release has occurred,[22] owners of tanks where there has been a discharge of petroleum,[23] corporate shareholders who directly, actively, and knowingly are involved in the actions or inaction that lead to a discharge or allowed it to continue,[24] suppliers of heating oil,[25] sellers and installers of oil tanks,[26] oil brokers,[27] an environmental contractor who caused a release when removing a tank,[28] and homeowners with leaking heating oil tanks.[29]

With limited exceptions, any person responsible for causing an unauthorized discharge of petroleum must notify the New York State Spill Hotline within two hours of discovery.[30] The State has interpreted the reporting obligation to apply to owners or operators of the facility where the spill occurred, as well as to a person or owner who is in actual or constructive control of the property or petroleum.[31] Dischargers are required to stop the petroleum discharge immediately, to take all reasonable containment measures, and then to implement the cleanup of any contamination associated with the discharge.[32]

Responders, Good Samaritans, and cleanup contractors have limited protection from liability in their spill remediation roles under Article 12,[33] while a responsible party may only raise the defenses to liability specified under Section 181(4). Until recently, only acts or omissions "caused solely by war, sabotage or governmental negligence" could be asserted as affirmative defenses to liability. The Brownfield Amendments added a new defense that was modeled, to a limited extent, on the third-party defense found in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[34] The Brownfield Amendments also added a secured creditor exemption that resembles the CERCLA secured creditor exemption in form.[35]

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18 N.Y. Nav. Law § 181.

19 1977 State v. Cities Service Co., 180 A.D.2d 940, 580 N.Y.S.2d 512 (3d Dept. 1992).

20 N.Y. Nav. Law Nav. Law § 172(8).

21 N.Y. Nav. Law Nav. Law § 172(18).

22 Roosa v. Campbell, 291 A.D.2d 901, 737 N.Y.S.2d 461 (4th Dept. 2002).

23 Leone v. Leewood Service Station, Inc, 212 A.D.2d 669, 624 N.Y.S.2d 610 (2d Dept. 1995).

24 State v. Markowitz, 273 A.D.2d 636, 710 N.Y.S.2d 407, 412 (3d Dept. 2000); Malin v. Bill Wolf Petroleum Corp., 272 A.D.2d 527, 708 N.Y.S.2d 888 (2d Dept. 2000) (defendant who controlled corporate discharger liable).

25 Merrill Transport Co. v. State, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dept. 1983).

26 Mendler v. Federal Ins. Co., 159 Misc. 2d 1099, 607 N.Y.S.2d 1000 (Sup. Ct. New York Co. 1993).

27 State v. Montayne, 199 A.D.2d 674, 604 N.Y.S.2d 978 (3d Dept. 1993).

28 Hilltop Nyack Corp. v. TRMI Holdings, 264 A.D.2d 503, 694 N.Y. S.2d 717 (2d Dept. 1999).

29 State v. Arthur L. Moon Inc., 228 A.D.2d 826, 643 N.Y.S.2d 760 (3d Dept. 1996).

30 17 NYCRR Part 32.3. The New York State Spill Hotline phone number is (800) 457-7362.

31 *See* 17 NYCRR Part 32.3. According to the DEC Spill Response Guidance Manual Section 1.1, the reporting requirement does not apply to discharges where the quantity is known to be less than five gallons, the discharge is contained and under the control of the discharger, the discharge has not and will not reach the State's waters or any land from which the discharge could impact water, and the spill is cleaned up within two hours of discovery. A spill will not be considered to have impacted land if it occurs on a paved surface such as asphalt or concrete. However, a spill in a dirt or gravel parking lot is considered to have impacted land and is reportable. Because the gerunds used to define a discharge are in the present tense (*e.g.*, spilling, leaking, releasing), some argue that reporting obligations do not apply to historical petroleum contamination discovered after the discharge took place; there is risk in taking this position as many DEC regional offices interpret the discovery of any petroleum contamination to be a reportable event.

32 17 NYCRR Part 32.5; 6 NYCRR Part 611.

33 N.Y. Nav. Law § 178-a.

34 42 U.S.C. § 9607(b)(3).

35 N.Y. Nav. Law § 181(4)(b).

C. Are There Buried Tanks on the Property?

One of the more vexing issues for developers or owners of property is whether they may be liable as dischargers because of current or former underground storage tanks (USTs) at a site that they do not operate or did not operate in the past.

Until 2001, it was unclear if landowners who did not actively operate the source of contamination such as a storage tank system used by a tenant or who did not otherwise cause the contamination (that is, a non-discharging landowner) could be strictly liable for discharges.[36] In *State v. Green,*[37] the New York Court of Appeals ruled that while Article 12 does not impose liability based solely on ownership of contaminated land, a landowner that can control activities occurring on its property and that has reason to believe petroleum products will be stored there could be liable as a discharger for the cleanup costs. The Court said that liability was predicated on a party's capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill. To avoid liability under Article 12, the property owner must show that it is "faultless." The Court of Appeals recently extended its ruling in *Green* and held that an owner with knowledge of a spill who fails to take actions to remediate the contamination may be liable as a discharger under the Navigation Law.[38]

In most cases, a property owner with a tenant who operated USTs generally will be found to be responsible for a discharge because the owner as landlord exercised or could have exercised control over the tenant's operations through lease covenants or by other means. In a similar vein, one might ask what happens if a tenant abandons tanks when it vacates the premises. Purchasers and developers have argued that tanks remain the property of the tenant and are not part of the real estate. However, there have been a number of cases that have held that the USTs are trade fixtures appurtenant to the real estate, thereby making the purchaser/developer the owner of the tanks and thus, responsible for contamination from that tank system.[39] After considering two damage claim applications with similar facts, the Oil Spill Fund denied the claims because, in part, the tanks installed by prior operators/owners were, by the terms of the lease, deemed part of the real property and were, by the terms of the lease, owned solely and absolutely by the landlord.[40] The applicants contested the Oil Spill Fund's denials and lost.

Less clear is what happens where a subsequent purchaser discovers contamination from a tank system with tanks that were properly closed in place under requirements in effect at the time. Some cases have held owners or buyers liable as dischargers where they could have known about the existence of contamination through the exercise of reasonable diligence or should have known about the presence of the tank system from the use of the property.[41] In any event, the uncertainty in the law highlights the importance of performing comprehensive due diligence prior to taking title to identify the possible existence of tank systems, and to determine if there is an ongoing discharge at the property. As with most oil spill cases, there are a number of factors to examine in determining liability for a discharge. In advising clients on possible liability for subsequent owners, one must evaluate many factors, including, for example, when the discharge began, if that fact can be ascertained, whether cleanup and removal activities have been undertaken and to what extent, whether the purchaser/developer has conducted or will conduct adequate due diligence, and whether the purchaser/developer has any relationship to the former property owner/operator, to the former system owner/operator or to a supplier of petroleum to the property. It is possible, in certain very limited circumstances, that a subsequent purchaser/developer could be found to be a "faultless" landowner.[42]

III. FILING CLAIMS FOR REIMBURSEMENT WITH THE OIL SPILL FUND

A. Eligibility for Reimbursement

Section 181(2) of Navigation Law makes the Oil Spill Fund strictly liable for cleanup and removal costs and for direct and indirect damages resulting from the unpermitted discharge of petroleum. This liability includes reimbursement for damaged or destroyed real or personal property; loss of income; natural resource damage; loss of tax revenue; and interest on loans secured to counter economic harm. Section 182 authorizes a person who has been the victim of an oil spill to file a damage claim application with the Oil Spill Fund. Section 183 requires the Oil Spill Fund to promote a settlement of a damage claim with the responsible party, if known. Section 184 permits the Fund to settle a damage claim directly with a claimant when the responsible party cannot be determined.

The Oil Spill Fund will not reimburse a damage claim submitted by a responsible party. Section 181(1) provides that a discharger of petroleum is strictly liable, without regard to fault, for cleanup and removal costs and for direct and indirect damages, no matter by whom sustained. A discharger cannot expect reimbursement from the State for costs the discharger is required under the law to bear. In sum, it is the Oil Spill Fund's responsibility to accept and review damage claims from injured

36 *Compare* Busy Bee Food Services v. WCC Tank Lining Technology, Inc., 202 A.D.2d 898, 609 N.Y.S.2d 118 (3d Dept. 1994) *with* White v. Long, 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995) *and* Popolizio v. City of Schenectady, 269 A.D.2d 670, 701 N.Y.S.2d 755 (3d Dept. 2000).

37 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001).

38 State v. Speonk Fuel Inc., 3 N.Y.3d 720, 786 N.Y.S.2d 375 (2004), *reargument denied,* 4 N.Y.3d 740, 790 N.Y.S.2d 652 (2004).

39 Golovach v. Belomont, 4 A.D.3d 730, 773 N.Y.S.2d 139 (3d Dept. 2004); Drouin v. Ridge Lumber, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dept. 1994).

40 310 South Broadway Corporation v. McCall, 275 A.D.2d 549, 712 N.Y.S.2d 206 (3d Dept. 2000).

41 New York v. Robin Operating Corp., 3 A.D.2d 767, 773 N.Y.S.2d 135 (3d Dept 2004); Oliver Chevolet, Inc. v. Mobil Oil Corp., 249 A.D.2d 793, 671 N.Y.S.2d 850 (3d Dept. 1998).

42 FCA Associates v. Texaco, Inc., 2005 U.S. Dist. LEXIS 6348 (W.D.N.Y. March 31, 2005).

parties, to negotiate a settlement between a claimant and a responsible party when possible, and to reimburse injured parties for eligible out-of-pocket losses when a responsible party does not.

One of the advantages of applying to the Oil Spill Fund is that claimants do not necessarily have to endure the delays commonly associated with the BCP in obtaining approval of a remedial action. Instead, a claimant can undertake cleanup and removal activities ranging from a simple site investigation to a complete cleanup to pre-spill conditions and submit a damage claim application to the Oil Spill Fund, either when cleanup and removal activities are complete or before, if total costs are known. Claimants should be aware that the Oil Spill Fund will ask DEC to review the damage claim application and to advise the Oil Spill Fund whether DEC finds the cleanup and removal activities for which reimbursement is sought to be necessary and the expenses for such activities to be reasonable. A prudent claimant will consider hiring an environmental consultant or contractor familiar with cleanup and removal requirements. If cleanup and removal activities are complicated, it may be worthwhile to confer with DEC staff regarding the proposed remedial plan, although the Oil Spill Fund does not require pre-approval of remedial plans. It is important to note that a claimant is not limited to the type of cleanup and removal activities that would be undertaken by DEC. Thus, a claimant wishing to remediate a site more completely than DEC would require may receive full reimbursement of cleanup and removal costs.

B. Filing the Damage Claim Application

To file a damage claim application, a claimant must complete the damage claim application form[43] and any relevant attachments. The claimant must submit with the damage claim application appropriate and relevant documentation explaining, to the extent the applicant can, the circumstances of the spill and of the direct and indirect losses suffered by the claimant. The Oil Spill Fund may request additional material if needed; applicants refusing to supply requisite documentation risk denial of their claim. The damage claim application, together with completed relevant attachments and supporting documentation, should be sent by certified mail or hand delivery to the New York Environmental Protection and Spill Compensation Fund, Office of the State Comptroller.[44] The claim may be amended if further losses are incurred prior to settlement.[45] Alleged losses will be reviewed in significant detail before a settlement can be finalized or payment certified to the State Comptroller.[46]

Upon receipt of a damage claim application, the Oil Spill Fund will send a letter to the claimant acknowledging receipt of the claim and notifying the claimant of the claim number. If the claim is not defective on its face, the Oil Spill Fund will send a Notice of Claim, together with a copy of the claim, to the alleged responsible party or parties. The purpose of the Notice of Claim is to advise the alleged responsible party of the claim and to allow the responsible party the opportunity to offer information in rebuttal.

The Oil Spill Fund will send a copy of the claim to DEC asking for information pertaining to the petroleum contamination at issue and for a review of any cleanup and removal activities undertaken by the claimant. In the event that neither the claimant nor DEC can identify a responsible party, the Oil Spill Fund may proceed to settle the claim directly with the claimant.

When a responsible party is known, the Oil Spill Fund is obligated to attempt to promote a settlement between the discharger and the claimant.[47] If a claimant fails to participate in settlement discussions without good cause, the claim may be denied.[48] The Oil Spill Fund may be an active participant in settlement negotiations between parties or may not participate at all. A claimant and a responsible party may reach a confidential settlement. It is not necessary for the Oil Spill Fund to know the exact terms of a settlement, merely that a settlement has been reached. In this event, the claimant may simply notify the Oil Spill Fund that the matter has been resolved and the claim will be closed.

If a responsible party denies liability for the spill or disputes the validity, timeliness or other aspect of the claim, the Oil Spill Fund will evaluate any material submitted in rebuttal by the responsible party, all relevant information in the claim and any supplemental information or responses. The Oil Spill Fund then determines who the responsible party is and sends a Notice of Determination. The Notice of Determination offers a responsible party another opportunity to settle with the claimant and informs the responsible party that the Oil Spill Fund will do so if the responsible party does not. If a responsible party wishes to contest the validity or amount of the claim to be paid by the Oil Spill Fund, it may request a hearing.[49] A responsible party may not contest the Oil Spill Fund's determination of liability with a hearing; instead, an Article 78 petition must be filed.

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[43] Claim forms are available at the Office of State Comptroller website at www.osc.state.ny.us.

[44] 2 NYCRR Part 402.3(b) Office of the State Comptroller, New York Environmental Protection and Spill Compensation Fund, 110 State Street-13th Floor, Albany, New York 12236.

[45] 2 NYCRR Part 402.3(d).

[46] N.Y. Nav. Law § 180.

[47] 2 NYCRR Part 402.6(a).

[48] 2 NYCRR Part 402.6(a)(1).

[49] N.Y. Nav. Law § 185.

C. Statute of Limitations

One of the issues claimants must address is when the discharge causing the damage occurred. Claims for reimbursement must be filed within three years after the date of discovery of damage, and within 10 years of the date of the incident causing the damage.[50] The date a claim is postmarked, if sent by mail, or the date the claim is received by the Oil Spill Fund, if hand delivered, is the date used to determine whether a claim is timely filed.[51] Claims may be filed with the Oil Spill Fund during the pendency of a legal action or an insurance claim for the same losses. However, if the claimant obtains recovery from another source, the Fund must be notified and the amount of the recovery will be deducted from any settlement of the claim before the Fund.

Both prongs of the statute of limitations must be satisfied or a claim will fail.[52] Thus, in no case will a claimant be able to recover damages from the Oil Spill Fund more than 10 years after the start of the incident that caused the damage, regardless of when or how those damages were discovered.

Determining when a discharge began is important, but difficult. While it is helpful to provide as much information as possible in a damage claim application, claimants need not supply a date for the start of the discharge if it is not known. It is better not to estimate a date if the specific spill date is not known; rather, the claimant should indicate on the application form that the starting time of the discharge is unknown.

Generally, the date of discovery of damage means the date of discovery of financial loss. However, there may be earlier triggers. For example, the statute of limitations may be deemed to have begun to run when a Phase II Environmental Site Assessment investigation detects the presence of petroleum contamination on a claimant's property, when a Phase I Environmental Site Assessment uncovers evidence of a spill on a claimant's property, when a claimant becomes aware that a tank system on the property failed a tank integrity test, or when a claimant has reason to know that petroleum contamination from another site reached claimant's site. In instances such as these, the date such knowledge is gained will be the date the Oil Spill Fund uses to trigger the statute of limitations. Thus, actual as well as constructive knowledge of petroleum contamination could trigger the running of the statute of limitations for purposes of filing a compensable claim with the Oil Spill Fund.

In some instances it may be advisable for a claimant to file a protective damage claim application as soon as it learns of a discharge causing damage. A bare-bones application form may be filed with the Oil Spill Fund, together with a cover letter noting that the claim has been filed simply to toll the statute of limitations. Later, when cleanup and removal activities are complete, for example, the claimant may supplement its original filing and ask that the Fund resume consideration of its claim.

D. Diminution in Value Claims

Claims for loss in value of real property will be paid only if the damage is permanent. Spill sites where DEC or a responsible party is conducting cleanup and removal activities are considered to have suffered damage of a temporary nature; these claims cannot be compensated during the pendency of the cleanup. However, if the property is placed on the market during the cleanup and sells for less than its fair market value clean or if it does not sell at all, and if the diminution in value or failure to sell is related exclusively to the spill and to no other market factor, the Oil Spill Fund may arrange a settlement prior to completion of the cleanup. Any diminution in value must relate particularly to the petroleum contamination and to no other market force or condition.

As it is the claimant's burden to document any reduction in value, at least two appraisals must accompany the claim. The appraisals must show the value of the property both with contamination and in an uncontaminated state. The fact that a realtor has expressed reservation about a property's marketability or has refused to list the property will be insufficient for purposes of establishing a property damage claim. If a real estate agent actually declines to list a property or if a listed property does not sell during the listing period, a claimant must advertise the property in newspapers of general circulation in the region in order to sell the property. Documentation of such advertising must be submitted to the Oil Spill Fund as part of the damage claim application.

An injury to property will be considered permanent when the injury cannot be repaired or the property restored, when the injury potentially could be repaired but only after an entirely unpredictable lapse of time, or when the injury will continue indefinitely. If a cleanup and removal action is approved by DEC, but residual contamination will remain at or near the spill site, the claimant may have a claim for diminution in value. In the case of a permanent injury to property, the Oil Spill Fund may elect to pay the reduction in the value of the property, rather than the cost of repairing or restoring the property. Where the injury to property is temporary, the Oil Spill Fund may pay the costs of repair or restoration of the property and loss of income or earnings while the property was unavailable for use. If, however, the cost of the repair or restoration of a temporary injury or the loss of income resulting from a temporary injury is greater than the reduction in market value of the property, the Oil Spill Fund may elect to reimburse the lesser amount.

IV. SETTLING OIL SPILL LIENS

The Oil Spill Fund may file a lien against property that is the site of a discharge if the Oil Spill Fund incurs cleanup and removal costs and if a responsible party fails to make payment within 90 days of a demand.[53] The lien is a nonpriority lien

[50] N.Y. Nav. Law § 182. Z&H Realty, Inc. v. Office of State Comptroller, 259 A.D.2d 928, 686 N.Y.S.2d 900 (3d Dept. 1999).

[51] 2 NYCRR Part 402.3(b). Note that the regulations of the Oil Spill Fund are currently under revision.

[52] Z&H Realty, Inc. v. Office of State Comptroller, 259 A.D.2d 928, 686 N.Y.S.2d 900 (3d Dept. 1999).

[53] N.Y. Nav. Law § 181-a.

that does not subordinate previously perfected security interests.[54] The notice of lien is to be indexed in the same manner as a lien under Lien Law Section 10.[55] An action to vacate an environmental lien is governed by Lien Law Section 59, and should not be brought as an Article 78 proceeding.[56]

Environmental liens customarily are not reviewed during a Phase I Environmental Site Assessment unless the environmental consultant specifically is requested to look for cleanup liens. Instead, the ASTM E1527-00 Practice for Phase I Environmental Site Assessments provides that cleanup lien searches are the responsibility of the client or user of the report. In any event, the potential presence of a lien should be identified in a title search. If an environmental lien has been filed against a property, purchasers and developers may contact the Oil Spill Fund to inquire about the lien. If the Oil Spill Fund has referred the matter for cost recovery, the Oil Spill Fund may direct inquiries to the Office of the Attorney General.

V. OPTIONS FOR OWNERS OR DEVELOPERS WHO ARE INELIGIBLE FOR OIL SPILL FUND COMPENSATION

If the damage claim of an owner or developer is denied in whole or in part, there are other options for seeking recovery of direct and indirect costs. Perhaps the most common option is the filing of an action under Article 12 of the Navigation Law for contribution or indemnity.

In 1991 Article 12 was amended to provide a statutory remedy for indemnification or contribution actions. Under Section 181(5), a party may recover its cleanup and removal costs, as well as other direct and indirect damages resulting from a petroleum discharge.[57] Initially, there had been some confusion over whether a party that was considered a discharger could bring an action under Section 181(5) against another discharger. However, the Court of Appeals has ruled that a "faultless landowner" who is liable as a discharger simply because of its status as the owner of the property impacted by the discharge may seek contribution or indemnity under the Navigation Law.[58] This includes seeking recovery against prior owners/dischargers.[59] Thus, landowners whose property is contaminated and persons not responsible for a petroleum discharge who suffer damages or incur response costs may file a private statutory action for indemnification against a discharger.

While an "as is" clause in a contract should not prevent an injured party from bringing a private cost recovery action under Section 181(5),[60] there is some authority to suggest that a plaintiff who contractually assumed liability may not be able to recover in a contribution action.[61] One area that can be fraught with peril is a lease where a landlord inadvertently takes title to abandoned USTs and therefore could be considered liable for discharges from those tanks.[62]

Some courts have also ruled that dischargers may bring contribution claims under Navigation Law Section 176(8).[63] Under this line of cases parties who undertake cleanup and removal or who reimburse the Oil Spill Fund in exchange for a release from liability will not lose any common law right of contribution.[64] To bring an action under this section a plaintiff must show that it has incurred some cleanup costs.[65] One case has held that a plaintiff must obtain approval from DEC for its cleanup to be able to bring a contribution claim under Section 176(8).[66]

Article 12 provides that the statutory private right of action does not preempt other available common law and equitable remedies.[67] Thus, a developer or property owner who is barred from pursuing a statutory claim for contribution or indemnity

54 N.Y. Nav. Law § 181-a (4).

55 N.Y. Nav. Law § 181-c.

56 Art-Tex Petroleum, Inc. v. New York State Department of Audit and Control, 93 N.Y.2d 830, 687 N.Y.S.2d 619 (1999).

57 N.Y. Nav. Law § 181(5). Courts have held that the relief authorized by Section 181(5) is in the nature of a claim for indemnification and is, therefore, governed by a six-year statute of limitations. Dominick Bologna v. Kerr-McGee Corporation, 95 F. Supp. 2d 197 (S.D.N.Y. 2000); 145 Kisco Ave. Corp. v. Dufner Enterprises, 198 A.D.2d 482, 604 N.Y.S.2d 963 (2d Dept. 1993). The statute of limitations begins to run when the plaintiff should have discovered the contamination with reasonable diligence. Patel v. Exxon Corp., 284 A.D.2d 1007, 726 N.Y.S.2d 527 (4th Dept. 2001); Kozemko v. Griffith Oil Company, Inc., 256 A.D.2d. 1199, 682 N.Y.S.2d 503 (4th Dept. 1998). The statute has been applied retroactively. Leone v. Leewood Service Station, Inc., 212 A.D.2d 669, 624 N.Y.S.2d 610 (2d Dept. 1995); Snyder v. Newcomb, 194 A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dept. 1993).

58 State v. Green, 96 N.Y.2d 403, 408, 729 N.Y.S.2d 420, 424 (2001).

59 White v. Long, 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995).

60 State v. Tartan Oil Corp., 219 A.D.2d 111, 114-115, 638 N.Y.S.2d 939 (3d Dept. 1996).

61 101 Fleet Place Associates v. New York Telephone Co., 197 A.D.2d 27, 609 N.Y.S.2d 896 (1st Dept. 1994); State v. Griffith Oil Co., Inc., 299 A.D.2d 894, 750 N.Y.S.2d 685 (4th Dept. 2002).

62 310 South Broadway Corporation v. McCall, 275 A.D.2d 549, 712 N.Y.S.2d 206 (3d Dept. 2000).

63 This section provides that "[n]otwithstanding any other provision of law to the contrary, including but not limited to section 15-108 of the general obligations law, every person providing cleanup, removal of discharge of petroleum or relocation of persons pursuant to this section shall be entitled to contribution from any other responsible party."

64 Dora Homes, Inc. v. Epperson, 344 F. Supp. 2d 875 (E.D.N.Y. 2004); *In the matter of the* Application of the City of New York, 2002 N.Y. Slip Op. 50713U, 2002 N.Y. Misc. LEXIS 1978 (Sup. Ct. Kings Co. Oct. 8, 2002), *aff'd in part sub nom.*, City of New York v. Mobil Oil Corp., 12 A.D.3d 77, 783 N.Y.S.2d 75 (2d Dept. 2004); Volunteers of America v. Heinrich, 90 F. Supp. 2d 252 (W.D.N.Y. 2000).

65 FCA Associates v. Texaco, Inc., No. 03-CV-6083T, 2005 U.S. Dist. LEXIS 6348 (W.D.N.Y. March 31, 2005).

66 Atlantic Richfield Co. v. Current Controls, Inc., No. 93-CV-0950E(H), 1996 U.S. Dist. LEXIS 13828 (W.D.N.Y. Sept. 6, 1996).

67 N.Y. Nav. Law § 193; New York v. Lunking, 2003 N.Y.Slip Op. 51389U, 2003 N.Y. Misc. LEXIS 1378 (Sup. Ct. Albany Co. Oct. 27, 2003); Calabro v. Sun Oil Co., 276 A.D.2d 858, 714 N.Y.S.2d 781 (3d Dept. 2000).

may be able to pursue common law remedies such as nuisance, trespass, or negligence, as well as common law contribution or indemnity.[68] Navigation Law Section 190 authorizes the State and injured parties to file claims directly against insurance carriers for a responsible party.

Another litigation option might be to file an action under Section 7002 of the federal Resource Conservation and Recovery Act (RCRA)[69] citizen-suit provision. While plaintiffs are not entitled to money damages under this section, they may seek an order compelling a responsible party to remediate contamination. Some developers and purchasers have used RCRA Section 7002 actions as a business model where they purchase discounted mortgage notes, file a RCRA Section 7002 action to order a cleanup, and then sell the note for a profit when the property has been remediated. To prevail under a RCRA Section 7002 action, the plaintiff must show that the defendant contributed or is contributing "to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."[70]

The key question in these RCRA Section 7002 cases centers on whether there is an "imminent and substantial endangerment." While a full discussion of this cause of action is beyond the scope of this article, it should be noted that the standard does not require an actual immediate risk, but simply that actual harm may occur. Some courts have held that contaminants above groundwater levels are sufficient to constitute an imminent and substantial endangerment while others require that there be completed pathways of exposure.[71] If an approved cleanup remedy has been installed and is operating, some courts in New York have found that no relief that can be awarded even if the remedy will allow residual contaminants to remain *in situ* and does not restore the property to its pre-spill condition.[72]

The federal Oil Pollution Act of 1990 (OPA)[73] also allows claims for reimbursement of cleanup costs associated with petroleum spills. However, the act and its accompanying regulations are cumbersome and require substantial and very early coordination with federal officials for reimbursement to issue. A full discussion of OPA claims is beyond the scope of this article.

Of course, developers or purchasers who are not interested in working with the Oil Spill Fund or in pursuing litigation may still apply to the BCP. If the site is not eligible for the BCP, New York State has other financial resources that may be available to private parties directly or through local governments.[74]

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[68] Dora Homes, Inc. v. Epperson, 344 F. Supp. 2d 875 (E.D.N.Y. 2004).

[69] 42 U.S.C. § 6972(a)(1)(B).

[70] 42 U.S.C. § 6972(a)(1)(B).

[71] *See* Interfaith Community Organization v. Honeywell Int'l, 263 F. Supp. 2d 796 (D.N.J. 2003), *aff'd,* 399 F.3d 248 (3d Cir.), *cert. denied,* 125 S. Ct. 2951 (2005).

[72] Kara Holding Corp. v. Getty Petroleum, No. 99 Civ. 0275 (RWS), 2004 U.S. Dist. LEXIS 15864 (S.D.N.Y. 2004); 87th Street Owners Corp. v. Carnegie Hill-87th Street Corp., 251 F. Supp. 2d 1215 (S.D.N.Y. 2000).

[73] Oil Pollution Liability and Compensation Act, 33 U.S.C. § 2701 *et seq.*

[74] *See* Brownfields Self Help/Financial Resources Manual (July 2001).