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Environmental case unlikely to ease liability, exposure for businesses in contaminated sites

By Katie Eder

One skipped step while testing possible sources of contaminated groundwater in the 1980s cost the New Jersey Department of Environmental Protection a state Supreme Court case against a dry cleaner Wednesday, but an environmental law expert said it won't ease the site remediation liability and costs businesses potentially face under the vague language of the state Spill Compensation and Control Act.

"Environmental laws are intentionally broadly written, to make sure taxpayers don't end up paying for cleanups, so businesses hold a lot of the responsibility, even if they're not directly responsible for the contamination," said Richard Ericsson, chair of the environmental practice group at Hackensack-based Cole, Schotz, Meisel, Forman & Leonard P.A.

"But for businesses in New Jersey, this case is helpful, because it holds government to a higher standard in proving its case. It tells the DEP they have to do the investigation right and take common sense steps the first time around; that they can't come back 10 years after a contamination and say, 'We're making two plus seven equal 11 because we have the power to do that' — which the DEP sometimes does and gets away with."

In *NJDEP v. Ofra Dimant*, the court determined state investigators failed to demonstrate a causal link between discharges of a contaminant they discovered dripping from a pipe at Sue's Clothes Hangers in 1988 and nearby residential wells in Bound Brook tainted by groundwater that held traces of that contaminant, so the company will not have to recover cleanup costs.

Ericsson said if investigators had taken action to establish a preponderance of evidence — which the court has now ruled necessary in order for the state to hold a suspected polluter responsible for contaminating groundwater — Sue's would have been liable to pay for all cleanup costs, which could have potentially "dwarf(ed) anything Sue's could have ever made from operating a dry cleaner."

Though Ericsson said not much has changed in terms of "limited time, limited money, limited people" at the DEP since 1988, he noted the agency will ensure it won't continue to make the same mistake in failing to collect soil samples to catch guilty parties, so businesses shouldn't expect to escape responsibility for site remediation as a result of this case.

"The state has a lot of power under the Spill Act, which is why it was interesting the court demanded some level of fairness in the state's allegations against Sue's," Ericsson said. "But I think this case just reminds the DEP it can't skip steps, and I don't think they will again."