New York Law Journal

News

Challenging Cleanup and Removal Costs From Petroleum Discharges

Courts consider how to proceed when parties are liable under Navigation Law and state seeks reimbursement.

By Wendy A. Marsh

July 14, 2008

New York's Navigation Law regulates petroleum discharges, making dischargers strictly liable for all necessary cleanup and removal costs. If a discharger fails to promptly remediate a contaminated site, the state will conduct cleanup and removal activities and seek indemnification. The ability of a discharger to challenge the reasonableness of cleanup and removal costs incurred by the state has been the cause of much consternation on the part of environmental practitioners. To date, courts have not allowed dischargers to challenge the state's expenditures in the context of a Navigation Law action, holding either that the discharger lacked a legal right to assert a challenge or that the attempt to do so was untimely.

While the current guidance provided by the courts is less than logical, it at least sets forth a procedure to preserve the ability to challenge cleanup and removal costs.

Standard Procedure

Generally, after a discharge has occurred, the New York State Department of Environmental Conservation (NYSDEC) will send a "liability letter" to the property owner and other potentially liable entities directing the discharger to remediate the spill. If NYSDEC cannot identify any potential dischargers or convince identified dischargers to conduct the remediation, it will utilize the New York Environmental Protection and Spill Compensation Fund ("Fund") to retain a state contractor to undertake remediation efforts.

Once remediation is completed, NYSDEC transfers the matter to the Attorney General's Office for recovery of the expenditures. The attorney general then sends a certified letter, which will be referred to in this article as the "AG Demand Letter" to the potential dischargers, setting forth a "Statement of Total Costs" expended by the Fund and demanding payment within 30 days. Often, the AG Demand Letter is the first notice a potential discharger receives of its alleged liability for costs associated with a spill that occurred years earlier.

If the matter is not settled, the attorney general will bring an action against potential dischargers under the Navigation Law seeking indemnification of the costs expended by the Fund.

Statutes and Regulations

Under Navigation Law §181(1) and (2), any person who has discharged petroleum "shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages." Section 172(4) defines "cleanup and removal" as "the (a) containment or attempted containment of a discharge, (b) removal or attempted removal of a discharge, or (3) taking of reasonable measures to prevent or mitigate damages to the public health, safety, or welfare . . . "[1]

At the heart of the debate concerning the ability to challenge the reasonableness of cleanup and removal costs expended by the Fund is §185 of the Navigation Law, titled "Hearings for Persons on Claims filed with the Administrator [of the Fund]." At apparent odds with the title of this section, which would appear to give a discharger the right to a hearing to challenge cleanup and removal costs, the State Comptroller has consistently maintained that an actual "spiller" cannot contest either the validity or amount of a claim. We know of no hearings that have been held on this issue.

The only clear ability for a discharger to challenge cleanup and removal costs is found in 2 NYCRR §403.1, Challenge of Cleanup and Removal Costs:

A person challenging claims for cleanup and removal costs presented to the fund for payment must file a written notice with the administrator no later than seven calendar days after such claim for payment is received by the administrator. Such notice shall state, the particular items being challenged and the basis for the challenge.

Unfortunately, since the discharger is not notified when a claim is received by the Administrator, it is difficult, if not impossible, to object in writing within seven days.

Decisional Law Background

State of New York v. Wisser Co. was one of the first reported cases to examine the reasonableness of cleanup and removal costs.[2] Defendant Wisser Company owned a gasoline station with leaking underground storage tanks. After it failed to conduct the requisite cleanup and removal, NYSDEC utilized the Fund to do so. The state then sued Wisser and succeeded on a motion for summary judgment, receiving reimbursement and statutory penalties.

The Appellate Division, Third Department, affirmed the award. While acknowledging that the state failed to provide notice of the fund's receipt of the cleanup cost claims, the court reasoned that since Wisser did receive letters providing notice of the leak, its responsibility for cleanup and removal, and its responsibility for reimbursement, "the absence of notice to defendant of the Fund's receipt of the cleanup cost claims did not result in prejudice to defendant such that it was denied an opportunity to controvert such claims (internal citation omitted)."[3]

The court went on to hold that such being the case, "[i]n order to challenge the claims for cleanup and removal costs presented to the Fund, defendant was required to file a written notice with the Fund no later than seven calendar days after such claims for payment were received by the administrator (2 NYCRR 403.1)."[4] Interestingly, the court did not clarify whether a hearing would have been held if a claim had been timely filed, or if there would have been a separate arbitration proceeding on the issue.

As to the timing of the notice, the court stated:

> Moreover, it is clear that defendant failed to respond to the Fund administrator's Sept. 26, 1986 letter requesting reimbursement for costs expended to date. Even if defendant's time to bring a challenge under 2 NYCRR 403.1 is measured from that date, we are compelled to conclude that such time 'has long passed' and that defendant's duty to reimburse plaintiff 'has now become absolute' (internal citation omitted).[5]

The court utilized the date of the AG Demand Letter as the trigger of the time to challenge the cleanup and removal costs.

Ten years later, the Third Department revisited the issue in *State of New York v. Ackley*.[6] A gas spill was discovered below a gas station owned by Robert Ackley. After Mr. Ackley unsuccessfully attempted to conduct the remediation, NYSDEC advised him that it would assume responsibility for remediation and seek reimbursement.

The state's action to recover the cleanup and removal costs was not brought until almost 10 years later.

Mr. Ackley died before the state brought action, and his estate proceeded from that point forward. The estate asserted that even if the state were granted partial summary judgment on liability, the estate was entitled to a hearing to challenge the reasonableness of the expenses. Supreme Court disagreed, denying the request for a hearing, granting the state's motion for partial summary judgment and awarding reimbursement costs. The Third Department reversed on appeal on the ground that it could not determine from the record which of the costs incurred by the Fund fell within the six-year statute of limitations.

The court also held, however, that while §185 does authorize a discharger to challenge the reasonableness of the costs incurred, Mr. Ackley's challenge was untimely since he "[had been] told of his ultimate liability for the cleanup costs, and plaintiff's intent to seek reimbursement thereof, just days after the spill occurred' (internal citation omitted)."[7] The court appears to have been referring to the initial "liability letter" sent out very early in the process, immediately following a spill, well before any funds are expended by the state.

The issue was addressed a third time in 2003, in *State of New York v. Speonk Fuel*.[8] The state brought an action to recover costs for the cleanup of a fuel storage tank leak in Suffolk County. The state moved for partial summary judgment, and Speonk opposed the motion, claiming, among other things, that it had raised a triable issue regarding the reasonableness of the cleanup costs expended. Supreme Court awarded the state all cleanup costs incurred within six years of the commencement. On appeal, the Third Department held, among other things, that as a discharger, the defendant was strictly liable and was not entitled to a hearing on the reasonableness of the state's cleanup expenditures, and stated:

> The provision in Navigation Law §185 . . . is expressly limited to claims presented by injured persons to the Fund for payment, or the injured person's contest to a proposed settlement. Section 185(1) is inapplicable here, where the Fund seeks reimbursement from the discharger for cleanup costs.[9]

Thus, the Third Department effectively held that when the Fund is utilized, §185 is inapplicable to allow a hearing for a discharger.

In 2004, the Court of Appeals affirmed the Third Department's ruling in *Speonk*, but clarified the issue of the right to challenge expenditures. The Court held that while the Navigation Law does not create a right by a discharger to contest the reasonableness of costs incurred by the state in the cleanup of a discharge, the discharger nonetheless has whatever rights exist under Article 78 to challenge the state's conduct as arbitrary or capricious or an abuse of discretion.[10] The Court of Appeals in *Speonk* steered practitioners into the world of Article 78 as an avenue to challenge cleanup and removal costs expended by the Fund, but provided no direction as to the accrual date of an Article 78 proceeding.

In 2005, the Third Department applied *Speonk* to two cases. In *State of New York v. Dennin*,[11] the court upheld its previous decision in *Speonk*, but expanded its holding to address due process concerns. The court held that the unavailability of a hearing in the context of a Navigation Law action did not pose a constitutional impediment since Article 78 provides sufficient procedural safeguards by providing dischargers with an avenue to challenge the reasonableness of remediation costs.

In the second case, *State v. Neill*, the Third Department stated outright that "[n]owhere in the Oil Spill Act is a discharger afforded any right to contest the reasonableness of the costs incurred by the [Environmental Protection and Oil Spill Compensation] Fund in an action brought by the State to recoup these [monies] (internal citation omitted)."[12] In this second case, the court did not reference any remedy under Article 78.

It is abundantly clear from the foregoing cases that a discharger cannot contest the reasonableness of cleanup and removal costs in the context of the state's action for reimbursement. The Court of Appeals and the Third Department have clarified that the proper vehicle in which to raise such a challenge is an Article 78 proceeding. It is important for practitioners to ensure that a client who is a potential discharger retains the ability to assert such a claim in a timely manner.

Article 78 Proceedings

After years of providing little, if any, guidance on the correct way to challenge the reasonableness of cleanup and removal costs expended by the Fund, one court finally established a path for practitioners to follow to preserve their clients' right to challenge such costs if they are held liable under the Navigation Law. The case providing this direction was *George Moore Truck v. NYSDEC*, decided by Justice Phillip R. Rumsey in Cortland County Supreme Court.[13] The procedure is not foolproof, since it requires an action to be commenced by a potentially innocent party well before there is a determination of liability pursuant to the Navigation Law, but it is a step in the right direction.

In *George Moore Truck*, the petitioner brought an Article 78 proceeding seeking review of actions taken by NYSDEC in connection with cleanup and removal activities at a salvage yard. NYSDEC moved to dismiss the petition as premature, since no final determination had yet been made as to the total amount expended in the cleanup. In deciding the motion, the court properly noted, citing *Speonk* and *Dennin*, that "[t]he Court of Appeals has held, however, that the reasonableness of the actual expenditures made by DEC to clean up a spill may not be raised in an action brought pursuant to the Navigation Law, to recover those costs." The court, therefore, determined that an Article 78 was a proper vehicle for the petitioner to assert its claim that NYSDEC had acted in an arbitrary and capricious manner by incurring unreasonable and unnecessary costs.[14]

With regard to the accrual date for the Article 78, the court focused on the AG Demand Letter dated Jan. 24, 2006:

> This [Attorney General] letter plainly reflects and communicates a "final determination" of the agency as to the amount spent on the clean up prior to the date of the letter, as well as petitioner's liability for that amount. Were no action taken within four months (CPLR 217[1]) of petitioner's receipt of the letter, respondent could reasonably argue that the time for contesting the reasonableness of the amounts set forth therein had passed.[15]

The court determined that the AG Demand Letter triggered the four-month statute of limitations for commencing an Article 78 proceeding. Moreover, the court noted that the issue of the reasonableness of cleanup costs is more properly addressed in connection with the liability issues:

> It is, however, most reasonable, under the circumstances, to defer consideration of such matters until there has been a final determination as to whether petitioner is, in fact, liable for all or part of such costs, or at least until an action has been brought to determine its liability (at which time it may be appropriate to consolidate the two matters, or try them together). Accordingly, this matter shall be held in abeyance, and marked off the trial calendar, pending the commencement of further proceedings by either party.[16]

The decision was not appealed, and there are no other reported cases involving Article 78 proceedings that have been decided.

Substantive Issues Remain

Under the guidance provided by the foregoing cases, practitioners should commence an Article 78 within four months after receipt of the AG Demand Letter. It has been our experience that the state and courts will voluntarily agree to hold such Article 78 proceedings in abeyance pending resolution of the underlying liability action. It is unclear whether this will remain the norm into the future.

The current procedure, requiring the commencement of a special proceeding before any assessment of liability, does not seem to be the best avenue to resolve this important issue. It generates a number of problems. First, potentially innocent parties are obligated to commence an action in court in order to protect potential rights that may not be implicated until years in the future. Moreover, there are many instances when potential dischargers do not receive an AG Demand Letter. It is unclear in such cases when an Article 78 action accrues. Additionally, the standard of review, whether the expenditures were arbitrary and capricious, may prove a difficult hurdle in many instances. This is compounded by the fact that the "arbitrary and capricious" assessment must be completed before it is even clear who is ultimately responsible for the cleanup and removal costs. Finally, it is unclear how the requirement to conduct the cleanup and removal consistent with the NCP will come into play in these Article 78 proceedings.

It appears that a more logical resolution of the issue of the reasonableness of cleanup and removal costs would be for the court to make a determination, based upon and immediately following the determination of underlying liability.

Wendy A. Marsh *is a partner and member of the environmental practice group at Hancock & Estabrook in Syracuse.*

Endnotes:

1. Navigation Law §176 states that the "cleanup and removal of petroleum and actions to minimize damages from discharges shall be, to the greatest extent possible, in accordance with the National Contingency Plan [NCP]." Therefore, arguably, cleanup and removal activities conducted by the Fund should be consistent with the NCP.

2. See *State of New York v. Wisser*, 170 AD2d 918 (3d Dept. 1991), overruled by *State of New York v. Speonk Fuel*, 762 NYS2d 674 (3d Dept. 2003).

3. Id.

4. Id.

5. Id.

6. See *State of New York v. Ackley*, 734 NYS2d 722 (3d Dept. 2001).

7. *Ackley*, 734 NYS2d at 724.

8. See *State of New York v. Speonk Fuel*, 762 NYS2d 674 (3d Dept. 2003).

9. Id. at 677.

10. See generally, *Speonk Fuel*, 3 NY3d 720.

11. See *State of New York v. Dennin*, 17 AD3d 744 (3d Dept. 2005).

12. *State v. Neill*, 795 NYS2d 355, 357 (3d Dept. 2005).

13. See *George Moore Truck v. New York DEC*, 12 Misc.3d 1178(A), 2006 WL 1867325 (New York Sup. Ct. Cortland Co. 2006) (unpublished opinion).

14. Id.

15. Id.

16. Id.