

Garden State CLE Presents:



**Defending a case against the Department of
Environmental Protection:**

Strategy and Tactics

Instructor:



**Mary Lou Delahanty,
Attorney**

INTRODUCTION TO THE DEP AND ENVIRONMENTAL LAW DEFENSE

I. Presenters

A. Mary Lou Delahanty, Esquire

1. Since 1986, her practice has concentrated on environmental law defense.

2. Clients include:

- a. governmental entities,**
- b. private businesses, and**
- c. individual property owners whose land has become contaminated and the government brings an action for property remediation.**

B. Robert Ramsey, Esquire, Garden State CLE Senior Instructor

II. Insurance Coverage

A. Some carriers provide homeowners insurance policies that cover certain damages, e.g., a leaking underground fuel storage tank.

B. Environmental insurance fills the gap left by homeowners policies by covering loss or damages that result when an unexpected pollution incident happens. An environmental policy can cover a business against claims for bodily injury, property damage, cleanup costs, and business interruption.

III. The Spill Act and best practices/due diligence before buying/selling real estate:

A. The New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et. seq., (hereinafter Spill Act) allows a landowner who cleans up and removes a hazardous substance, such as a UST (underground storage tank) spill to bring a lawsuit for “contribution” against everyone else who contributed to the discharge or who otherwise should be liable for the cost of cleanup.

B. A commercial or residential buyer is required to do their due diligence prior to the sale to determine if the land has been contaminated in any way in order to avail themselves of the protections afforded by the Spill Act. To this end, the act establishes an affirmative duty to have the property inspected by an environmental consultant.

C. The Spill Act requires the seller to disclose any knowledge of contamination.

D. The Spill Act covers leaching, which occurs as excess water removes water-soluble nutrients from the soil by runoff or drainage. Leaching is an environmental problem for agricultural professionals whether chemical-heavy fertilizers or chemicals are swept out and find their way into water bodies. E.g., fuel leaking into the ground from a gas station.

E. The Spill Act is a strict liability statute.

F. The Spill Act was amended to provide an innocent-purchaser defense to persons who purchased contaminated property prior to September 14, 1993. Although the amendment provides criteria necessary for the establishment of the defense, it leaves open-ended the level of due diligence and inquiry necessary to have been performed by a past purchaser. See *N.L. Industries v. State*, 228 N.J. 280 (2017), for a discussion of governmental immunity.

G. Pursuant to the Spill Act, property owners have an affirmative duty to report a spill or any type of environmental contamination discovered on the property. Procedures to follow are contained in the Act; a hotline number may be found on the DEP website.

H. Case law that dramatically affected the insurance industry in New Jersey:

1. *Morton Intern. V. General Acc. Ins.*, 134 NJ 1 (1993), and

2. *Carter Wallace v. Admiral Insurance*, 154 N.J. 312 (1998).

I. Absolute Pollution Exclusion- all pollution claims are excluded.

J. Sudden accidental Pollution Exclusion- in addition to being sudden and accidental, *Morton* said there is no temporal requirement.

IV. How to Defend a Homeowner in an Administrative Action Brought by the DEP

A. Determine if the spilled substance is, in fact, a pollutant.

B. Determine where the substance come from. (Looking for indemnification.)

C. Is the claim a strict liability offense?

D. Is there Insurance coverage?

V. Swimming Pools- Most problems arise when people do not want an existing pool and do not follow proper procedures when filling it in and/or fail to advise a future owner of the existence of an underground pool.

VI. Private v. Commercial client- Whether the client is a private individual or a commercial entity, the case will generally turn on the quality of the expert testimony.

VII. Process

A. DEP issues an administrative order.

B. If a hearing is requested, it occurs at the OAL.

C. If a hearing is not requested, the order and penalty assessment become enforceable via a summary proceeding in the superior court.

D. Bench trial if claims are statutory. Jury trial if common law claims are asserted.

E. Legal fees- Many small businesses have inadequate insurance. Before accepting a case, the attorney must determine if the client has sufficient resources to pay for a case that will likely require prolonged litigation.

VIII. Structuring a Defense in a Commercial Case

A. Need an environmental expert to establish either an affirmative defense or that the State's proofs are not competent. Regarding the latter, see Dept. of Env'tl. Prot. v. Dimant, 212 N.J. 153 (2012).

B. When there are multiple defendants, the Spill Act allows the DEP to look at equitable factors to determine the responsibility of each party. See Magic petroleum Corp. v. Exxon Mobile Corp., 218 N.J. 390 (2014) for a discussion of these factors, which are called the *Gore* factors.

IX. Industrial Site Recovery Act (N.J.A.C. 7:26B)- comes into play when industrial property is sold.

X. Motor Vehicle Accidents- Drivers need not report gasoline or oil spills occurring as the result of a motor vehicle accident, but a commercial carrier transporting hazardous materials must report spills/leaks to the DEP.

XI. Mary Lou Delahanty's Contact Information

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