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Hess Can't Shake Claim Over Pollution At NJ Oil Refinery

By **Bill Wichert**

Law360 (April 7, 2020, 6:11 PM EDT) -- Environmental regulators can pursue a common law strict liability claim against Hess Corp. over contamination at an oil refinery in New Jersey since the company was engaged in "abnormally dangerous" activities by storing and processing petroleum at the site, a state appellate panel said Tuesday in reviving that claim.

In a suit from the state Department of Environmental Protection, the panel said a trial judge was wrong to toss the claim against Hess on the grounds that the company's activities were not abnormally dangerous and that the claim was "subsumed" by the state's Spill Compensation and Control Act, which the agency also has accused the oil giant of violating.

Applying the test set forth in the New Jersey Supreme Court's 1983 opinion in [New Jersey Department of Environmental Protection v. Ventron Corp.](#), the panel concluded that Hess' operations at the Woodbridge, New Jersey, facility "constituted an abnormally dangerous activity for purposes of maintaining a claim of common law strict liability against Hess."

"The extent of the operations, its proximity to sensitive waterways and environmental areas, and the danger of the pollutants allegedly used in Hess's operations that were discharged, albeit unintentionally, satisfy the Ventron criteria," the two-judge panel said.

In finding that the Spill Act did not subsume the strict liability claim, the panel said that statute "permits the DEP to pursue remedies under both the common law and the Spill Act because the Spill Act 'establishes new remedies for activities recognized as tortious both under prior statutes and the common law,'" citing Ventron.

"The ability to pursue relief under both the Spill Act and common law was consistent with the Legislature's intention to grant the DEP 'broad implied powers' to prevent environmental contamination," the panel added, citing the state Appellate Division's 2007 opinion in [N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp.](#)

The DEP **launched the action** Aug. 1, 2018, against Hess and Buckeye Partners LP, which are the facility's former and current owners, respectively. Hess began operating the refinery in 1958 and sold it to Buckeye Partners in 2013, according to the appellate opinion.

The five-count complaint included one count each under the Spill Act and the Water Pollution Control Act, and three common law counts of strict liability, trespass and public nuisance.

In his December 2018 ruling, Superior Court Judge Thomas Daniel McCloskey nixed the strict liability and trespass claims against Hess and Buckeye Partners. The judge also ruled that the DEP could obtain injunctive relief on the public nuisance claim, but not monetary damages. The DEP **appealed the decision**.

While appellate panel reinstated the strict liability claim against Hess, it upheld the dismissal of that claim as to Buckeye Partners, saying the complaint does not cite anything done by the company during its ownership with respect to contamination.

The panel also said Judge McCloskey properly dismissed the trespass claim because the state never held "exclusive possession" of the property. The appellate judges rejected the DEP's argument that "the state has ownership rights of water resources under the public trust doctrine," and "any pollution of public waters constitutes a trespass."

"Land in the public trust is held by the state on behalf of a second party, the people," the panel said. "Such land cannot be in 'exclusive possession' of the state as the interest created by the doctrine is intended to ensure that others have use of the same land. It does not grant to the state the exclusive possession of property."

As for the public nuisance claim, the panel restored the DEP's ability to pursue "monetary relief" associated with any judgment ordering abatement of a public nuisance, if plaintiffs succeed on their claim."

DEP attorney Allan Kanner of Kanner & Whiteley LLC told Law360 on Tuesday, "The appellate panel did an excellent job of again reminding us of the importance of the broad arsenal of rights and remedies provided DEP by the legislature, including historic common law rights which were expressly preserved by the Spill Act."

Counsel for Hess and Buckeye Partners did not immediately provide comment Tuesday.

Judges Garry S. Rothstadt and Scott J. Moynihan sat on the panel for the Appellate Division.

The DEP is represented by Allan Kanner, Elizabeth B. Petersen and Allison S. Brouk of Kanner & Whiteley LLC and Deputy Attorney General Richard F. Engel of the New Jersey Attorney General's Office.

Hess is represented by Christopher R. Gibson, Marc A. Rollo, Patrick M. Flynn and Matthew R. Conley of Archer & Greiner PC.

Buckeye Partners is represented by Brendan K. Collins and David A. Haworth of Ballard Spahr LLP.

The case is New Jersey Department of Environmental Protection et al v. Hess Corp. et al, case number A-0002893-18, in the Superior Court of New Jersey, Appellate Division.

--Editing by Abbie Sarfo.