

# **EAGLE TRANSPORT'S PETITION FOR DECLARATORY RULING**

Presentation on the Merits

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# EMC'S JUDICIAL FUNCTION IN HEARING PETITION

- General Assembly's role to prescribe violations and defenses
  - Focus is on the statutory language
  - Apply rules of construction like a court does
- Not what the Commission prefers the law to be

# THE ISSUE PRESENTED

Did the General Assembly declare in the Oil Control Act that any person engaged in using, storing or transporting fuel or oil that is discharged to the environment is ***absolutely*** liable for all the costs to respond by assessing the impacts and then conducting a remediation - ***without any possible defenses, and no matter the cause of the discharge?***

Answer - **NO.**



# ABSOLUTE LIABILITY V. STRICT LIABILITY

- Absolute liability means just that – its absolute, applying to a class of persons, ***with no defenses available.***
- Strict liability:
  - Potential liability merely be engaging in some act (or owning property)
    - Ex. Using, storing or transporting oil or hazardous substance
  - Can be liable even if not negligent in any way
  - **BUT defenses available for events beyond the persons control that can cause a discharge**
    - Ex. act of God, act of another person

# ABSOLUTE LIABILITY V. STRICT LIABILITY

**GS 143-215.84(a)** – Removal of Prohibited Discharges – any person having ***control*** over oil . . . . discharged in violation of [the Oil Control Act] shall collect and remove the discharge and restore the area

- Not “possession” (DEQ’s replacement term), but “control.”
- No unique law for oil carriers – applies to any person using, storing or transporting oil

# STATUTORY LANGUAGE - “DISCHARGES”

## GS 143-215.83 :

- Unlawful discharges
- Exceptions
- Only place in Oil Control Act where this subject is addressed, so applies to ***all of the Oil Control Act***

# STATUTORY LANGUAGE - “DISCHARGES”

## GS 143-215.83(a) : “Unlawful Discharges”

- Broad Declaration – it is unlawful to discharge oil to the environment,
- *Except as otherwise provided . . . .*

# STATUTORY LANGUAGE - “DISCHARGES”

## GS 143-21583(b) : “*Excepted Discharges*”


- When discharge is authorized; and
- ***When any person subject to liability under this “Article” (meaning the entire Oil Control Act) proves the discharge was caused by . . . .***



# STATUTORY LANGUAGE - “DISCHARGES” : FORCE MAJEURE DEFENSES

- An act of God;
- An act of war or sabotage;
- Negligence on the part of the United States government or the State of North Carolina or its political subdivisions;
- ***An act or omission of a third party, whether any such act or omission was or was not negligent, or***
- Any act or omission by or at the direction of a law-enforcement officer or fireman.

GS 143-215.83(b)(2)



# STATUTORY LANGUAGE - “DISCHARGES” : FORCE MAJEURE DEFENSES

- Common thread to defenses- events that deprive person in control of oil of that control
- Either all these defenses are available, or they are not
  - Issue here is not limited to third-party defense

# **STRICT LIABILITY APPLIES TO ALL ENVIRONMENTAL LAWS (NOT ABSOLUTE LIABILITY)**

- Federal Water Pollution Control Act
  - Model for state Oil Control Act
  - Same defenses available
- Superfund laws

# DEQ REWRITES THE DISCHARGE STATUTE

- **The Law:** When any person subject to liability under this “Article” (meaning the entire Oil Control Act) proves the discharge was caused by . . . . any of the force majeure events . . . they have no liability under the “Article” (the Act) - for the discharge and/or cleanup
- **DEQ’s Rewrite:** When any person subject to liability under this “statute” (re: discharges) proves the discharge was caused by . . . . any of the force majeure events . . . they have no liability for the discharge, but can still be held absolutely liable for clean up

# Questions?

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