

## Environmental Law

# Court Imposes Retroactive Liability on ExxonMobil for Natural Resource Damages

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In a case of first impression, the Hon. Ross R. Anzaldi rejected ExxonMobil Corporation's efforts to limit its liability for natural resource damages by ruling that the Spill Compensation and Control Act is retroactive with respect to the Department of Environmental Protection's claims for the restoration of and compensation for the loss and loss of use of the state's natural resources damaged or destroyed during nearly a century of operations at its former refinery sites in Bayonne and Linden (the Bayway refinery).

The ruling came in a denial of ExxonMobil's motion to dismiss all claims for natural resource damages ("NRD") caused by any discharges of hazardous substances which occurred prior to the April 1, 1977, effective date of the Spill Act. ExxonMobil had operated the Bayonne site as a refinery from 1879 to 1972 and continues to maintain a small

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operation there, while the Bayway refinery and petrochemical complex which is transversed by the New Jersey Turnpike was owned and operated from 1909 until it was sold in 1993, and is currently owned by Conoco Phillips.

The essential analysis undertaken by the court in finding retroactivity for NRD is straight-forward and direct.

First, the Supreme Court of New Jersey held in the landmark case of *DEP v. Ventron*, 94 N.J. 473(1983), that a discharger was liable for "cleanup and removal costs" associated with remediating mercury contamination in the Meadowlands, even though the discharges predated the effective date of the Spill Act.

Second, the trial court in this case previously held that "cleanup and removal costs" include the physical restoration of natural resources damaged or destroyed by discharges, *NJDEP v. ExxonMobil Corporation*, 2006 WL 1477161 (2006).

Third, in an interlocutory review of that ruling, the Appellate Division held that in addition to the physical restoration of natural resources, the compensatory component of NRD for the interim loss of use of damaged natural resources between the time of discharge and the completion of restoration was also a cleanup and removal cost, *NJDEP v. ExxonMobil Corporation*, 393 N.J. Super. 388 (App. Div. 2007).

Therefore, the Spill Act imposes

retroactive NRD liability for the physical restoration and compensation for the loss and loss of use of natural resources damaged or destroyed by pre-act discharges.

The court noted that during the course of operations at the sites "crude oil and refined products were lost through spills and leaks," that hazardous substances had been discharged into surface waters and wetlands, and that "contamination at both of these sites is well documented."

Under the Spill Act, dischargers of hazardous substances face strict, joint and several liability for all costs of cleanup and removal, with defenses generally limited to acts or omissions caused solely by war, sabotage or god. N.J.S.A. 58:10-23.11g.c and d. These cleanup and removal costs include the "cost of restoration and replacement" of any natural resource damaged or destroyed by a discharge. N.J.S.A. 58:10-23.11g.a(2) and 11u.b(4), *In re Kimber Petroleum Corp.*, 110 N.J. 69, 85, appeal dismissed, 488 U.S. 935 (1988). But the extent of those costs was not fully addressed until the Department of Environmental Protection expanded its NRD program in 2002, leading to the instant case against ExxonMobil.

In 2002 the DEP expanded its NRD program, reviewing thousands of potential claims as the result of an impending statute of limitations and offering to enter into settlement discussions with voluntary responsible parties (DEP Policy Directive

2003-07). In 2004, NRD lawsuits were brought by the DEP against a number of responsible parties who did not enter the voluntary settlement program, including ExxonMobil.

In 2006, the trial court granted DEP's motion for partial summary judgment, holding ExxonMobil strictly liable under the Spill Act for the physical restoration of natural resources damaged or destroyed by its discharges, *NJDEP v. ExxonMobil Corporation*, 2006 WL 1477161 (2006). The court determined that the physical restoration of natural resources was a "cleanup and removal cost" but that "[w]ithout any legislative or appellate directive, the court will not expand the definition of cleanup and removal costs under the Spill Act to include damages for the loss of use of natural resources."

The Appellate Division, providing that guidance, held that recovery of the value, use or benefit that natural resources provide is part of statutory restoration and replacement, and therefore loss of use compensatory damages are also cleanup and removal costs for which a polluter is strictly liable under the Spill Act.

The issue addressed by the trial court in this most recent ruling was whether the state could recover NRD as a result of discharges which occurred as far back as 1879, thereby requiring ExxonMobil to restore natural resources damaged by such discharges to their pre-discharge condition and compensate the public for the interim loss of use between the time of discharge and the completion of restoration.

The scope of the obligation to restore and replace natural resources was outlined by the Appellate Division in its loss of use ruling. Although the term "natural resource damages" is not defined in the Spill Act, and never even appeared in the statute until 2005 (N.J.S.A. 58:10-23.11f22), subsequent to the DEP's expanded NRD initiative, the Appellate Division in this case clearly established the parameters of NRD under the Spill Act and the distinction between the aspects of "cleanup and removal" that related to the remediation of contaminated sites under DEP's site remediation program

(which ExxonMobil agreed to perform in two 1991 Administrative Consent Orders) and those "cleanup and removal costs" associated with NRD:

...."remediation" to risk-based standards is different from "restoration" of natural resources to pre-discharge conditions (primary restoration) or "replacement" of the ecological services and values lost through compensation (compensatory restoration). *NJDEP v. ExxonMobil Corporation*, 393 N.J. Super. at 406.

In finding that loss of human and ecological use came within the statutory definition of "cleanup and removal costs," the Appellate Division detailed several restoration projects proposed by the DEP for the two sites, and stated that the department's preference for actual restoration work and natural resource protection in lieu of the payment of money damages, set forth in Policy Directive 2003-7, was a "'forward looking' approach seeking natural resource improvements to make up for historical lost use." The court noted that the directive's policy favoring restoration projects and the approach taken by DEP in this case are clearly efforts to mitigate damage within the statutory meaning of cleanup and removal costs. In support of its arguments, the DEP, referred the courts to several legislative appropriations acts since 2004 which mandate that all NRD recoveries can only be used "for the direct and indirect costs of restoration and associated consulting and legal services."

In denying ExxonMobil's motion to dismiss NRD claims for pre-act discharges, the trial court held that the retroactive liability in *Ventron* "becomes applicable here as a result of the Appellate Division's loss of use ruling." Quoting extensively from that ruling, the court stated that the legislature intended to expand DEP's "abilities to recover compensatory damages from polluters," and that in light of the

remedial purposes of the statutory scheme, "defendant's insistence on such a strict interpretation, which leaves the public less than whole for its loss, is unwarranted."

Since the Appellate Division determined that natural resource damages, including loss of use compensation, are cleanup and removal costs, and that the act imposes liability for the remediation of pre-act discharges, the trial court concluded that the DEP can also recover NRD for pre-act discharges.

The distinction between remediation and restoration underscored by the Appellate Division outlines the scope of NRD liability beyond risk-based levels for which polluters are strictly liable, and now it is held that such liability attaches for damage to natural resources caused by discharges of hazardous substances that occurred prior to 1977.

In the same ruling, the court dismissed DEP's common-law claims on statute of limitations grounds. ExxonMobil had also moved to dismiss DEP's claim for attorney fees as a separate element of recoverable costs under the Spill Act. The court ruled that the DEP is entitled to recover attorney fees associated with remediation and physical restoration of natural resources, but not legal fees for the recovery of money damages above what is needed to restore the land.

While the initial impetus for passage of the Spill Act was fear of an oil spill that might impact the Jersey shore, the overall purpose of the law evolved as the primary means of addressing the lurid legacy of hazardous waste from historic industrial activity that caused the destruction of many of New Jersey's once-rich natural heritage. The retroactivity ruling represents a major judicial reinforcement of the legislative finding that "New Jersey's lands and waters constitute a unique and delicately balanced resource" whose protection and preservation promotes the health, safety and welfare of the people, and of the NRD program that implements the legislative determination that the polluter and not the public should bear the burden of restoring these resources. ■