

 [Click to Print](#) or Select '**Print**' in your browser menu to print this document.

Page printed from: [New Jersey Law Journal](#)

Disputed \$225M Exxon Settlement Now Open for Comment

Mary Pat Gallagher, New Jersey Law Journal

April 6, 2015

The controversial \$225 million proposed settlement between the state of New Jersey and Exxon Mobil Corp. was officially released for public comment April 6.

A consent judgment resolving the case was published in the New Jersey Register and posted on the website of the state Department of Environmental Protection (DEP).

The settlement, which resolves litigation seeking to recover for natural resource damage at Exxon's Bayonne and Bayway refineries, has been criticized for paying less than three cents on the dollar of the \$8.9 billion the state was seeking.

Harmful chemicals have been leaked, spilled and dumped on the sites since the late 1900s, contaminating the soil and groundwater, according to court papers. *New Jersey Department of Environmental Protection v. Exxon Mobil* was filed to recover the cost of restoring the sites and to compensate the public for the lost use of them until they are restored.

The state's experts estimated \$2.6 billion would be needed for restoration and \$6.3 billion to compensate for lost use.

Those sums do not include the cost of cleanup or remediation, which Exxon is already obligated to do under a 1991 consent decree.

The outlines of the \$225 million deal were known previously but additional details have now been made public.

Under the agreement, the DEP would release its claims with prejudice and promise not to sue or take judicial or administrative action against Exxon for anything discharged at the refineries before the effective date of the consent judgment.

The release covers all claims asserted or that could have been asserted as to "any contaminant, media, and/or theory of liability, arising from Exxon Mobil's activities at the Bayway and Bayonne facilities," including all areas to which any contaminants discharged at those places "have migrated."

A major area of exclusion pertains to "surface water" damage to nearby Newark Bay, the Arthur Kill, Kill Van Kull and Rahway River. Claims for those areas were bifurcated from the rest of the

suit in January 2006.

Under the settlement, the DEP would release the surface water claims without prejudice to its right to reassert them in a “new, separate and future lawsuit.” However, under the agreement, the state can only refile those claims after a formal natural resource damages assessment has been done by the “applicable trustees” and those trustees have determined Exxon’s liability “in a procedure that allows for participation by Exxon Mobil.”

The settlement does not define the term “trustees” but DEP spokesman Bob Bostock said it refers to the National Oceanic and Atmospheric Administration and the U.S. Fish and Wildlife Service. They began the assessment after the bifurcation and it is not known when the process will be finished, Bostock said.

Under the settlement, any future surface water suit DEP does bring would have to be a “multi-defendant action involving other responsible parties.”

Also not encompassed in the settlement are claims related to Morses Creek, into which the Bayway refinery dumps about 150 million gallons of water a day that it draws from the Arthur Kill and uses for cooling purpose.

A “final remedy determination” on the creek is being deferred because that is still going on.

In addition, the settlement would resolve liability for contamination at the 910 Exxon company service stations around the state that don’t have claims against them related to the potentially carcinogenic gasoline additive MTBE, or methyl tertiary-butyl ether.

Another 860 Exxon gas stations where MTBE was found are part of separate statewide litigation and are not part of the settlement.

The release of liability would cover an additional 16 Exxon facilities, including terminals in Atlantic City, Trenton and Paulsboro and “fuel farms” at the Teterboro and Morristown Municipal airports, some of which do have MTBE.

For those 16 locations, the DEP would provide Exxon with “contribution protection” for natural resource damage claims other than those that are part of the separate ongoing MTBE litigation.

Under the settlement, the DEP’s legal fees and costs for the 11-year-old lawsuit would come out of the \$225 million.

The litigation was handled by private counsel on a contingency basis—Kanner & Whiteley of New Orleans, aided by Nagel Rice of Roseland—who advanced all the costs.

According to the retainer agreement, they are expected to receive roughly \$45 million in fees, on top of reimbursement.

Bostock said he was not aware of any tabulation of costs in the case.

The DEP is allowing 60 days for public comment—twice the statutory 30-day minimum—because of the complexity and degree of public interest, Bostock said.

A bill that would set a 60-day minimum for all DEP settlements was approved by the Legislature on March 26 in reaction to the settlement and awaits action by Gov. Chris Christie, as does another measure passed the same day that would set aside at least half of any money recovered

in an environmental settlement, after the first \$50 million, for cleanup operations.

Once the comment period is done, the settlement will be submitted for approval to Michael Hogan, the retired Burlington County Superior Court judge serving on recall who tried the case last year.

Before going on the bench in 2000, Hogan was counsel to DEP commissioner Robert Shinn during the administration of Gov. Christine Todd Whitman. Shinn's successor, Bradley Campbell, who authorized the filing of the case in 2004, attacked the proposed settlement in a March 4 New York Times op-ed, calling it a "disgrace" that "left billions on the table."

Acting Attorney General John Hoffman, on the other hand, has lauded the agreement as one that "ensures the continuation of the Exxon Mobil-funded remediation work at these contaminated sites and ... holds the company financially accountable through payment of a historic natural resource damages settlement on top of Exxon's obligation to clean up the sites."

In 2014, with liability already established, Hogan presided over a months-long trial on damages but was asked not to decide them in light of the proposed settlement.

The state Senate passed a resolution in March urging Hogan to reject the agreement with Exxon.

On April 6, New Jersey Senate President Stephen Sweeney, D-Gloucester, announced plans to introduce legislation that "would prevent Exxon Mobil—and other corporate wrongdoers—from deducting the costs of legal settlements from their state tax bills." Fellow Sen. Raymond Lesniak, D-Union, condemned the deal as the "biggest corporate giveaway in history." Sweeney and Lesniak have said they will go to court to oppose the settlement if necessary.

Contact the reporter at mgallagher@alm.com.

Copyright 2015. ALM Media Properties, LLC. All rights reserved.