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Some Say NJ Had Little Choice but to Settle With Exxon

Mary Pat Gallagher, New Jersey Law Journal

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The proposed $225 million pollution settlement between New Jersey and Exxon Mobil Corp. has been criticized as inadequate, given the state's nearly $9 billion damages claim, but some lawyers and environmentalists have questioned whether the state's valuation of the case would have withstood judicial scrutiny.

The settlement, for a century of pollution at Exxon's Bayway and Bayonne refinery sites, has been attacked as a deal that would pay less than three cents on the dollar for natural resource damage the state's experts valued at $8.9 billion, in the context of a case where liability was already decided and a ruling on a dollar figure, after months of trial, was imminent.

But some lawyers and environmental advocates said the state's failure to adopt a methodology for calculating damages for harm to natural resources through the formal rule-making process—as it committed to do more than a decade ago when it settled another suit—may have weakened its negotiating position and led to a lower settlement in not just the Exxon case but in other natural resource damage suits it has brought.

Steven Picco of Saul Ewing in Princeton, who chairs the firm's energy, environment and utilities practice, said this issue dates back years.

In February 2004, while at Reed Smith, Picco sued the New Jersey Department of Environmental Protection (DEP) on behalf of the New Jersey Society for Environmental, Economic Development (SEED), the New Jersey State Chamber of Commerce, the Fuel Merchants Association of New Jersey, the American Petroleum Institute and other business interests over how the DEP was calculating natural resource damage. Five months earlier, the state had issued a policy directive stating that it had begun to address more than 4,000 potential claims around the state for natural resource damage, which is distinct from cleanup or remediation and typically involves restoring injured resources to their baseline condition and compensating the public for the lost use of them. The directive said it had successfully resolved some claims and planned to accelerate the process in order to avoid statute of limitations problems.

The SEED suit alleged that DEP had been sending out letters notifying companies of potential liability under the New Jersey Spill Act and giving them 10 days to agree to engage in settlement talks or be sued, with damages assessed under an "amorphous new calculation" that was still

being devised but would be “more rigorous.” The modifications to the prior formula would result in “substantially higher” damages in the overwhelming majority of cases, the complaint said. The suit also claimed that neither the regulated community nor the public had been asked for input on the new calculation and efforts to obtain information about it had been rebuffed.

The plaintiffs asked the court to compel the DEP commissioner “to promulgate and adopt the method of quantifying [the] alleged legal obligation to compensate the state for groundwater NRD in accordance with the provision of the New Jersey Administrative Procedures Act.” The case settled soon after, with the state agreeing to adopt formal rules.

“We were going to win that case,” Picco said. “We started to talk and they said, ‘We’ll come out with rules.’”

A March 23, 2003, letter from deputy attorney general Richard Engel to Picco said the DEP “has long planned to promulgate regulations to improve the current Natural Resource Damage program” and “is currently developing its regulatory proposals, and plans to file one or more rule proposals prior to Aug. 1, 2005.” Engel’s letter said the “forthcoming rules clearly will afford the NJ SEED plaintiffs an administrative forum, subject to judicial review, in which to present policy and legal arguments presented in or related to the pending litigation.”

But the rule making never occurred, according to Picco.

“It’s never been done despite repeated requests to do it,” Picco said. “We followed up until it became clear that their inability to come up with rules was costing them in court.”

The state has never won a natural resource damage case in court, Picco said.

“They’ve settled a bunch but I’m not aware of any case where their specific calculation has been upheld by the court,” Picco said.

But there are several cases in which the court declined to adopt the state’s methodology or called it into doubt, Picco said, adding that “the courts were essentially doing our work for us.”

Attorney general spokesman Lee Moore confirmed that all natural resource recoveries have been through settlements.

Picco said the lack of rules governing natural resource damage calculation may have impacted the state’s decision to enter into the Bayway/Bayonne settlement with Exxon.

“I’ve got to believe that in addition to whatever budget or political pressure was involved, they have got to be a little nervous about their record,” Picco said. “The law is clear that they have the right to charge NRD but they have never been able to come up with a judicially approvable methodology.”

Picco said he believes the state “would have had to be concerned about how it would justify the number”—referring to the $8.9 billion damage figure—and that concern would serve as “an incentive to settlement.”

Bill Wolfe, the director of nonprofit environmental advocacy group New Jersey Public Employees for Environmental Responsibility, said the issue is one he’s been raising since the SEED case. Wolfe is not a lawyer but spent 13 years as a policy analyst and planner for the DEP, and was

policy director for the Sierra Club's New Jersey chapter for seven years.

Wolfe said the lack of valuation rules leaves the state vulnerable to challenges on the amount of damages.

The state "knows it has a weak legal hand," making it reluctant to push too hard and more willing to settle, Wolfe said, adding that Exxon's lawyers are "sharp enough to know this" too.

"There's this wink and a nod going on where the DEP is saying, 'We won't squeeze you too hard if you just come to the table and settle,'" Wolfe said, adding that it's been "a quiet little dance for 10 years," with the state knowing it can't get more than pennies on the dollar.

Wolfe said that although he is an ardent environmentalist, he sympathizes with the "regulated community" because the state's approach to calculation is "so discretionary and so vague, the sky's the limit." He shared his concerns with the state Assembly Judiciary Committee at a March 19 hearing on the Bayway/Bayonne settlement and submitted a letter he wrote to the state comptroller in 2012. The letter referred to court decisions Wolfe said jeopardized "the recovery of NRD at more than 120 sites and potentially cripple[d] the ability of DEP to enforce the NRD provisions of New Jersey's cleanup laws."

One was a 2007 decision in a suit against Exxon over benzene and toluene contamination of private wells in Ewing, where the judge dismissed the natural resource damage claim, stating that if the state's formula for valuation "is to be relied upon in litigation, it either has to be a rule or it has to be sufficiently supported in the context of the case in which the department tries to use it." The other was a 2012 appellate ruling that said the state failed to prove compensatory restoration damages because the type of analysis used by its expert was "flawed and unconvincing."

But Susan Kraham of Columbia University's Environmental Law Clinic said natural resource damage cases are routinely litigated around the country in the absence of regulations governing damages calculations.
Moore declined to say what role, if any, the lack of formal valuation rules or methodology played in the decision to settle the Bayway/Bayonne case.

"There are various accepted ways to calculate natural resource damages, and the state has used different methodologies depending on the type of injury and site," Moore said.

Asked why valuation rules never materialized, DEP spokesman Bob Considine said, "It's difficult to comment on the aims of prior administrations and why a formal rule-making process was not established."

"I would offer that pursuing one official methodology while you're in the midst of litigating cases isn't necessarily in your best interest either," he said, adding that the proposed Bayway/Bayonne accord would be the second largest natural resource damage settlement against a single corporation in U.S. history, behind the Exxon Valdez settlement.

"And it's on top of Exxon Mobil's separate obligation to remediate the sites," Considine said.

The private law firms representing the state in the Bayway/Bayonne case—Kanner & Whiteley in New Orleans and Nagel Rice in Roseland—declined to comment, as did Exxon and Trenton environmental attorney Bradley Campbell, who was the DEP commissioner when the Bayway/Bayonne suit was filed and the SEED case was settled.

Contact the reporter at mgallagher@alm.com.

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