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State DEP May Sue Exxon for Pre-Spill Act Natural Resources Damages, Judge Says

By Henry Gottlieb

New Jersey can pursue Exxon Mobil for natural-resource damage done by two refineries prior to enactment of the state's Spill Compensation and Control Act, a Union County judge says.

Ruling on the company's attempt to limit its exposure to damages for pollution at the 288-acre Bayonne works and the 1,800-acre Bayway Refinery in Linden, Superior Court Judge Ross Anzaldi held the Spill Act can be applied retroactively, not just forward from its 1977 enactment.

Anzaldi's Jan. 22 ruling, in *N.J. Department of Environmental Protection v. Exxon Mobil Corp.*, Unn-L-3026-04, is important because the case is a vehicle for setting the legal parameters of the state's 6-year-old Natural Resource Damages initiative. That is aimed at wresting huge sums from polluters to compensate for the public's loss of use of properties, not just for remediation in accordance with cleanup standards.

The state has said it doesn't want money damages but expendi-



PHOTO BY CARMEN NATALE

SPLIT DECISION: Union County Judge Ross Anzaldi gave the state a victory on retroactivity, but Exxon Mobil won on fee switching.

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tures by defendants to return the target properties to as near a pristine state as possible or for the purchase of lands elsewhere to compensate for the losses of the polluted acreage for recreation and other public pursuits.

Exxon Mobil says it has spent millions of dollars since 1991 on a state-supervised remediation under a consent order covering the two facilities, interconnected oil and petrochemical operations from 1909 to 1972.

"The contamination at both of these sites is well-documented," Anzaldi said. "It was estimated in 1977 that at least some seven million gallons of oil, ranging in thickness from 7 to 17 feet, are contained in the soil and groundwater underlying a portion of the former Bayonne site alone."

Under a 1990 amendment to the Spill Act, polluters can be held responsible for the costs of repairing, restoring or replacing property "from the time the property is damaged." Exxon Mobil argued that the responsibility applied only to remediation like the measures it has taken at the sites.

But Anzaldi ruled that the statute's language should be read broadly to encompass the Department of Environmental Protection's power to assess damages caused to natural resources and to require compensation for their loss of use by the public.

He did rule in Exxon Mobil's favor that common-law claims for damages, such as claims for nuisance and trespass, were subject to statutes of limitation.

Under nine environmental statutes such as the Spill Act, there are no statutes of limitations on suits to compel remediation, and the state argued such liberality should be applied to the common-law claims in the complaint. But Anzaldi agreed with Exxon that there was no authority to extend the wide-ranging expansion of the statute of limitations to common-law claims.

Even so, Richard Engel, the deputy attorney general supervising NRD litigation, says, "essentially everything we are looking for in the case we believe we can get through the Spill Act, so the fact that we won on the Spill Act issue is the most important thing."

"We won on the issue of the retroactivity of the Spill Act but the judge said he did not believe that the statute of limitation extension applied to the common-law claims," he says.

Exxon Mobil argued that there were numerous reported spills and historic discharges well before 1992, giving the state ample notice.

But Engel says even the judge's ruling on the law of the statute of limitations question doesn't rule out the possibility that common-law claims could survive. "Nobody said formally that we missed the deadline on the common-law claims, but obviously Exxon must think that we did," Engel says. "We have to go back and see if for some reason we cannot pursue those claims."

Fee-Shifting in Doubt

The state has hired outside contingency lawyers to pursue Exxon Mobil and other defendants in the damages cases. The firms in this case are Kanner & Whitely in New Orleans and Nagel Rice in Roseland.

The state wants defendants to pay the firms' fees, but an element of fee switching appears to be in jeopardy under Anzaldi's ruling, though lawyers in and out of the case disagreed about the effect.

Anzaldi ruled that Appellate Division decisions and the spirit and purpose of the Spill Act "should allow for fees to be given for all legal costs associated with remediation and restoration of the site but not for loss of or loss of use of natural resources."

Exxon Mobil's lawyer, Theodore Wells Jr. of Paul, Weiss, Riffkind, Wharton & Garrison in New York, referred a reporter's questions to the company.

Exxon Mobil says of Anzaldi's decision on the fees, "We view this as a significant ruling given that this lawsuit does not involve concerns about the cleanup of the sites, but only an effort by the state to recover monetary damages for alleged natural resource injuries at two privately-owned sites, Bayway and Bayonne."

Engel says it's correct that Anzaldi ruled that fee switching is not permissible when the damages are expressed in monetary terms. But he says the goal

of the loss-of-use claims are not to collect money damages but to effect primary restoration of the properties or the acquisition of new lands to replace the loss of use of the polluted ones.

He says the ruling won't affect the state's ability to find contingency lawyers to take cases like the one against Exxon Mobil.

But a lawyer outside the case, Edward McTiernan, leader of the environmental law team at Gibbons in Newark, says the ruling on legal fees is a blow to the state's Natural Resources Damages program.

"The initiative has, in some part, been about going to outside lawyers to try and do things the state wouldn't or couldn't do," he says. "In these relatively tight resource times, there are cases that might be marginal and without legal fees they may not be brought."

"Exxon wasn't disputing the need to remediate, and you will find that 99 percent of the defendants in these NRD cases are doing remediation," he says. Under Anzaldi's ruling, if the state sues the companies to make them go further and pay damage for loss of use by the public, "the state has to do it on its own dime," McTiernan says.

On the other hand, it's not a blow to the state that it is bound by the statute of limitations on common-law claims, McTiernan says.

"They don't need it," he says, because the Spill Act provides ample scope for the attempt to win damages.

Marilynn Greenberg, of Riker, Danzig, Scherer, Hyland & Perretti in Morristown, says "there does seem to be question of whether, in this economic climate, they will be able to use these outside lawyers to pursue loss of use cases or even charge it against their in-house counsel."

"Whether they are going to devote resources to this and not be able to collect legal fees is a question in this economic climate," she says.

She also says the ruling isn't clear enough to give definitive guidance on the fee issue and that more analysis by the Appellate Division is required.

In its defense on the merits of the state's case, Exxon Mobil has argued that the "loss of use" complaint is flawed because the two refineries were not designed for public use but were developed with the knowledge and



PHOTO BY DIRGO M. SADZINSKI/LEGAL TIMES

MORE TO COME: Exxon Mobil, represented by Theodore Wells Jr., has asked the judge to declare the state's restoration suit an unconstitutional taking.

encouragement of the state and were not open to the public.

In the meantime, the company is trying to slice away more of the state's case. It has two partial summary judgment motions pending, the first seeking to bar the state from recovering damages relating to the vast majority of the sites. The natural-resource damage provisions of the Spill Act are limited to lands encompassed within the so-called public trust doctrine such as waterways and certain shore areas, the company says.

The claim for damages for pollution of privately held sites "raises significant constitutional issues, including issues that implicate the due process and takings clauses of the U.S. Constitution," the company says.

The company also is seeking a ruling that Spill Act liability for discharge of hazardous substances does not extend to liability for physical modifications of property, such as the construction of refinery buildings, "especially given that the development and expansion of the refinery was encouraged by the state and some of the modifications were specifically permitted." ■