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2007NJ SUPERIOR COURT EXPANDS RECOVERY  
UNDER SPILL ACT TO DAMAGES FOR LOSS OF  
USE OF NATURAL RESOURCES

In a case of first impression, the New Jersey Superior Court Appellate Division expanded the scope of recovery under the New Jersey Spill Compensation and Control Act (Spill Act) (N.J.S.A. 58:10-23.11 to -23.24), holding that the New Jersey Department of Environmental Protection (NJDEP) can recover damages for loss of use of contaminated natural resources in addition to requiring restoration of resources.

*New Jersey Department of Environmental Protection v. ExxonMobil Corp.*, A-6588-05T5, 2007 N.J. Super. LEXIS 174 (N.J. Super. June 6, 2007).

ExxonMobil, while operating two refineries in New Jersey, admittedly discharged hazardous substances. ExxonMobil entered into consent orders to remediate the properties, but denied liability for loss of use of natural resources. NJDEP moved for partial summary judgment on whether “defendant was strictly liable . . . for all cleanup and removal costs under the Spill Act, including the restoration of natural resources.” *Id.* at \*1. ExxonMobil filed a cross motion for summary judgment arguing, in part, that the Spill Act did not allow NJDEP to seek damages for the loss of use of natural resources.

The trial court held that ExxonMobil was strictly liable under the Spill Act for restoration of the natural resources, but that the Spill Act did not support strict liability for the loss of use of the natural resources.

The Appellate Division reversed, holding that the Spill Act permits recovery of damages for loss of use of natural resources. In reaching this determination, the court looked first to the legislative intent of the Spill Act. The court found that the Spill Act should be construed broadly in order to serve as a “pioneering effort by government to provide monies for a swift and sure response to environmental contamination.” *Id.* at \*16 (internal quotations omitted). Consistent with this intent and the stated comprehensive nature of the statute, the court found that “loss of use” damages “are a component of costs of mitigating damage to public natural resources.” *Id.* at \*24.

The Appellate Division also looked to recent amendments to the Spill Act, which “consistently refer to ‘compensation for damage to, or loss of, natural resources.’” *Id.* at \*34. Perhaps the most persuasive for the court were the 2005 amendments, which extended contribution

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protection “for damage to, or the loss of, natural resources, or for the restoration of natural resources,” to potentially responsible parties that settle with NJDEP. *Id.* at \*36-\*37. The court found that there would be no need to extend contribution protection to the loss of natural resources “unless the Legislature recognized that settling polluters would otherwise be liable under the Spill Act for such damages.” *Id.* at \*38. The statutory construction is thus an implicit finding of authority, rather than direct language.

This decision is significant because the loss of use of natural resources has been an important component of NJDEP’s campaign to pursue natural resource damages claims against potentially responsible parties (PRPs). Since 2002, NJDEP has collected more than \$50 million in negotiating settlements for natural resource damages at nearly 1500 sites. Most of these sites involve groundwater contamination, and in many cases the groundwater has been or is being remediated by a PRP. Because the natural resource is being restored by the PRP through remediation, NJDEP’s only basis for seeking natural resource damages is to try to calculate the damage to the groundwater from the time that the release of a hazardous substance first occurred until the point in time when the groundwater was finally remediated. In other words, in many cases, NJDEP bases its natural resource damages claim on the period of time that the state has lost the use of the natural resource due to contamination. The lower

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court decision invalidated this theory of damages, at least under the Spill Act. The Appellate Division’s reversal allows NJDEP to continue to press its loss of use damages theory. The decision does not provide any standards for the elements of proof of loss of resources caused by a discharge, or for the valuation of damages. The retroactivity of such claims may merit a new constitutional or statutory analysis different from the remedial analyses previously accepted.

Unless the Supreme Court reverses the Appellate Division decision, it is probable that NJDEP will use this decision to more aggressively pursue damages for the loss of use of natural resources.

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