THE END OF NJDEP'S NRD LITIGATION APPROACH AS WE KNOW IT?

Gary P. Gengel and Kegan A. Brown
Latham & Watkins LLP

I. Introduction

On August 25, 2015, the Superior Court of New Jersey approved a $225 million consent judgment under the New Jersey Spill Compensation and Control Act ("Spill Act") between the New Jersey Department of Environmental Protection (NJDEP) and ExxonMobil Corporation (Exxon) for alleged natural resource damages (NRDs) attributable to, among other facilities, Exxon's former refineries in Linden and Bayonne, New Jersey. *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.* (Aug. 25, 2015), *available at* http://www.judiciary.state.nj.us/Settlement%20Opinion.pdf. The consent judgment concluded 11 years of litigation between NJDEP and Exxon, including a 66-day trial in which NJDEP sought $8.9 billion in NRDs, but where no judgment was issued at the time of the proposed consent judgment. The court's opinion approving the consent judgment provides much needed clarity regarding NJDEP's burden to prove NRDs, particularly primary restoration damages, and may cause NJDEP to rethink its litigation strategy for future NRD claims.

II. Spill Act NRDs

The Spill Act imposes joint and several liability for all "cleanup and removal costs" on dischargers of hazardous substances or persons "in any way responsible" for the discharge of a hazardous substance. N.J.S.A. 58:10-23.11g(c)(1). The term "cleanup and removal costs" includes the following types of NRDs: (1) primary restoration damages—"the cost to restore natural resources to their pre-discharge condition"; and (2) compensatory restoration damages—"damages for the ecological services and values lost as a result of the discharge," including the loss of use of a natural resource. *N.J. Dep't of Envtl. Prot. v. Essex Chem. Corp.*, 2012 N.J. Super. Unpub. LEXIS 593, at *15 (N.J. Super. Ct. App. Div. Mar. 20, 2012). "Cleanup and removal costs" also includes the "remediation" of a hazardous substance to applicable cleanup standards. N.J.S.A. 58:10-23.11b; *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, 393 N.J. Super. 388, 406 (N.J. Super. Ct. App. Div. 2007).

NJDEP has broad rights and remedies under the Spill Act. It can clean up a discharge and then bring an action against the allegedly responsible parties; direct the responsible parties to clean up the discharge in the first instance; or require responsible parties to pay for cleanup and removal costs prior to remedial action. *Id.* at 399–400. If NJDEP decides to commence a civil action under the Spill Act, the statute expressly provides that NJDEP may seek, among other types of relief, "the cost of restoration and replacement, where practicable, of any natural resource damaged or destroyed by a discharge." N.J.S.A. 58:10-23.11u(b)(4).

III. Proposed Consent Judgment

Under the consent judgment, Exxon agreed to pay $225 million to NJDEP to resolve NRD claims for the Linden and Bayonne refineries, and any NRD claims NJDEP has or may have at 16 other facilities and 1768 retail gas stations in New Jersey (excluding methyl tertiary butyl ether (MTBE) contamination claims, which are subject to a separate ongoing litigation). *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, slip op. at 1 (Aug. 25, 2015). In addition, Exxon agreed to satisfy its preexisting obligations under two administrative consent orders with NJDEP to remediate the Linden and Bayonne refineries. *Id.* at 4, 14.

IV. Court's Ruling and Reasoning

A. Standard of Review

At the outset, the court noted the standard of review to be applied to a proposed Spill Act consent judgment was an issue of first impression for New Jersey state courts. *Id.* at 17. Some federal courts, however, had reviewed Spill Act settlements using the same criteria statutorily required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): the consent judgment must be procedurally and substantively fair, reasonable, consistent with the

statute's purposes, and in the public interest. *Id.* at 18; 42 U.S.C. § 9622. The court adopted the same standard for Spill Act settlements. *Exxon Mobil*, slip op. at 18.

As the court explained, although deference to NJDEP's decision to settle the litigation must be given, the approval standard to be applied is "not without teeth." *Id.* at 21–22. As applied to a NRD settlement:

> [F]airness concerns the interactions among parties (settlers, non-settlers, and [NRD] trustees) and the methods trustees use to (1) calculate total damages; (2) apportion liability; and (3) calculate the amount each settler pays. Public interest and consistency with the governing statute concern whether the settlement is an appropriate mechanism for accomplishing environmental cleanup. Reasonableness links fairness with these two concepts by comparing the total recovery with the total damages estimate. Under this prong, courts examine whether the settlement amount appropriately reflects litigation risks and is a large enough sum to further the statute's goals and the public interest.

Id. at 22–23.

B. Summary of the Court's Analysis

In an 81-page opinion, the trial court approved the consent judgment. With respect to "fairness" considerations, the court held that the consent judgment was the product of negotiations between two highly sophisticated parties "on equal footing, and the process was open and candid," and NJDEP's method of calculating an adequate settlement amount was substantively fair (i.e., not arbitrary and capricious). *Id.* at 27, 39. The court also held that the consent judgment was reasonable, especially considering the litigation risks faced by NJDEP, including that NJDEP might not prove entitlement to any NRDs. *Id.* at 60–61; *Essex Chem.*, 2012 N.J. Super. Unpub. LEXIS 593, at *19 ("The trial court correctly determined, however, that plaintiffs' roles as trustees of the State's resources and their responsibilities under the Spill Act did not relieve them of their burden of proof on the issue of damages."). The consent judgment was consistent with the primary purposes of the Spill Act because it ensured the cleanup of hazardous substances, placed the financial burden of cleanup on Exxon, and promoted settlement of Spill Act claims. *Exxon Mobil*, slip op. at 67. Finally, the consent judgment was, in part, in the public interest because NJDEP decided "that the public interest is best served through settlement" and "that decision is entitled to deference." *Id.* at 70. Environmental groups and other opponents of the consent judgment have filed an appeal of the court's ruling.

Although there are many aspects of the court's reasoning and judgment that are noteworthy for practitioners, this article focuses on two specific issues: (1) the burden of proof for primary restoration damages, and (2) the quantification of natural resource service losses.

C. Primary Restoration Plan Must Be "Practicable"

In evaluating the litigation risks attendant to NJDEP's claim for primary restoration damages, the court held that NJDEP "has the burden of demonstrating, by a preponderance of the evidence, that any restoration plan is 'practicable.'" *Exxon Mobil*, slip op. at 50 (citing N.J.S.A. 58:10-23.11u(b)(4)). Thus, "if certain site-specific realities make primary restoration non-practicable, the State may not conduct primary restoration. If this is the case, courts in turn cannot award primary restoration damages." *Id.* at 50–51.

Notably, the court relied on N.J.S.A. 58:10-23.11u for why NJDEP must prove the "practicability" of any primary restoration plan. That section of the Spill Act lists the types of remedies available to NJDEP under the Spill Act, and among those remedies is "the cost of restoration and replacement, where practicable, of any natural resource damaged or destroyed by a discharge." N.J.S.A. 58:10-23.11u(b)(4).

Even assuming the "where practicable" language applies to both "restoration" and "replacement" of natural resources (as opposed to "replacement" only), requiring NJDEP to prove that its primary restoration plan is "practicable" seemingly requires the agency to take at least two steps. First, NJDEP will need to discuss and vet its expert's proposed

primary restoration plan with those individuals responsible for overseeing the site remediation—personnel in NJDEP's site remediation program (SRP) and perhaps the licensed site remediation professional (LSRP) hired by the responsible party. In the past, NJDEP did not undertake this type of coordination prior to seeking primary restoration damages as noted in the *Essex* case:

> The trial court also correctly noted that Essex had been working with the SRP for more than two decades to remediate the contamination and had implemented its remediation technologies with SRP's oversight and approval at a cost of about $5 million. SRP has not expressed any concern as to the pace of Essex's remediation efforts, nor had it required Essex to remediate the site in an expedited timeframe [as NJDEP sought through primary restoration damages]. Moreover, [NJDEP] failed to establish that Essex's proposed bioremediation plan would not work.

Essex Chem., 2012 N.J. Super. Unpub. LEXIS 593, at *19–20 (affirming NJDEP's failure to prove primary restoration damages at trial); *see also N.J. Dep't of Envtl. Prot. v. Essex Chem. Corp.*, MID-L-5685-07, slip op. at 9–10 (July 23, 2010) ("the [NJDEP Office of Natural Resource Restoration ("ONRR")] did not have any involvement with the day-to-day decisions about characterizing the extent of the contamination, did not provide any information or input into feasibility studies, nor have they . . . consulted with SRP before asking experts to recommend primary restoration strategies for the Site. This Court agrees with Essex that the lack of coordination is problematic. . . . Here, there was a history of collaboration between Essex and the SRP which was disregarded by the ONRR.").

Second, because the restoration of natural resources to a pre-discharge condition is sometimes or even often technically "practicable," the court's requirement that NJDEP prove the practicability of its primary restoration plan likely requires NJDEP to prove that its plan is cost-effective. Indeed, both the trial court approving the consent judgment and the *Essex Chemical* appellate panel both referenced cost as a factor in evaluating primary restoration damages. *Exxon Mobil*, slip op. at 51; *Essex Chem.*, 2012 N.J. Super. Unpub. LEXIS 593, at *18 ("The [trial] court found that [NJDEP] had not shown that their proposed [primary restoration] plan would justify the cost, or that the public would be harmed if Essex proceeded with its bioremediation plan. We are satisfied that there is sufficient credible evidence in the record to support the court's findings.").

Taken together, both *Exxon Mobil* and *Essex Chemical* strongly suggest that NJDEP cannot recover primary restoration damages if the restoration plan seeks to return the natural resource to a pre-discharge condition in a manner that does not fairly consider site-specific conditions, previous remediation work, and whether the benefits of the primary restoration plan outweigh its costs.

D. Natural Resource Service Losses Must Be Proven

At trial, NJDEP "took the position that the mere presence of contamination not only automatically equaled an 'injury,' but that it equaled a 100% injury" of natural resources. *Exxon Mobil*, slip op. at 58. This position was not new or unexpected: NJDEP has repeatedly asserted that injury alone entitles it to recovery of NRDs. *See, e.g.*, N.J. Dep't of Envtl. Prot. Office of Nat. Res. Restoration, http://www.nj.gov/dep/nrr/nri/nri_gw.htm ("Ground water injuries should be characterized during the remedial investigation process. This process must delineate the horizontal and vertical extent of contaminants. . . . Once characterization is complete, it is used in the ground water injury calculation to determine resource value.").

As part of its "reasonableness" evaluation of the consent judgment, the court noted that NJDEP's position that contamination equals 100 percent natural resource injury was inconsistent with the agency's own regulations. Pursuant to the Technical Requirements for Site Remediation (Tech Regs)—which apply to Spill Act cases [N.J.A.C. 7:26E-1.3; N.J.A.C. 7:26C-1.4(a)(4)]—an "injury" is "any adverse change or impact of a discharge on a natural resource or impairment of a

natural resource service, whether direct or indirect, long term or short, and that includes the partial or complete destruction or loss of the natural resource of any of its value." N.J.A.C. 7:26E-1.8.

This definition, the court held, leads to two conclusions. First, NJDEP cannot merely assume that the presence of contamination necessarily results in an "adverse change or impact" on a natural resource or the "impairment of a natural resource service." Instead, NJDEP must prove an alleged adverse change or impairment. *Exxon Mobil*, slip op. at 58. Second, an "injury" expressly contemplates a "partial . . . destruction or loss" of a natural resource (i.e., "losses of natural resources or their services that can be less than 100%"). *Id.* at 59. Consequently, NJDEP must prove the extent of any natural resource injury and service loss in order to satisfy its burden of proof, which is consistent with federal NRD regulations. *See* 43 C.F.R. § 11.13(e)(2) ("The purpose of [the quantification] phase is to establish the extent of the injury to the resource in terms of the loss of services that the injured resource would have provided had the discharge or release not occurred.").

V. Takeaways

The *Exxon Mobil* consent judgment opinion clarifies NJDEP's burden of proof to recover NRDs in two critical respects, both of which are likely to make NRD damage calculations more realistic and appropriate in the future.

First, NJDEP must prove the extent of any alleged natural resource injuries (i.e., natural resource service losses) and cannot merely assume that any amount of contamination results in a 100 percent service loss to the natural resource. This requirement will likely force NJDEP to focus its NRD litigation on the most significant natural resource injuries—situations where the anticipated NRDs to be recovered in litigation outweigh the cost of the agency (and its experts) performing a detailed natural resource damages assessment to identify and quantify the natural resource service losses.

Second, NJDEP must prove that the primary restoration plan underpinning its calculation of primary restoration damages is "practicable," which will require NJDEP to consider the investigative and remedial work already performed at the site, site-specific conditions that may limit primary restoration, and the environmental benefits likely to accrue from primary restoration in comparison to the costs. Importantly, the "practicability" requirement also is likely to reduce the unfairness of NJDEP's prior approach, where responsible parties worked cooperatively with SRP personnel to implement a remedial strategy only to have the ONRR division of NJDEP second-guess that approach and require additional remedial work as primary restoration.

These newly clarified requirements may enhance the prospects for NRD settlements and cause NJDEP to limit its NRD litigation to only those sites where the time and expense of preparing a case to prove both natural resource service losses and the cost-effectiveness or "practicability" of a primary restoration plan are justifiable given the agency's resource and budgetary constraints.

Gary P. Gengel *is a partner in the Environment, Land & Resources Department at Latham & Watkins LLP, where his practice focuses on remediation and NRD matters, and transactions. He can be reached by e-mail at gary.gengel@lw.com or by telephone at (212) 906-4690.*

Kegan A. Brown *is a partner in the Environment, Land & Resources and Litigation & Trial Departments at Latham & Watkins LLP, where his practice focuses on environmental and products liability litigation, and environmental regulatory and transactional matters. He can be reached by e-mail at kegan.brown@lw.com or by telephone at (212) 906-1224.*

The article "The End of NJDEP's NRD Litigation Approach as We Know It?" by Gary P. Gengel and Kegan A. Brown first appeared in the Superfund and Natural Resource Damages Litigation Committee Newsletter, Vol. 11, No. 2, March 2016, Section of Environment, Energy, and Resources, American Bar Association.