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New Jersey Court Dismisses NJDEP Natural Resource Damages Claim

On August 24, 2007, the Superior Court of New Jersey issued an important bench ruling regarding the New Jersey Department of Environmental Protection's ("NJDEP" or "Department") natural resource damage ("NRD") claim calculation. *N.J. Dept. of Env'tl. Prot. v. Exxon Mobil Corp.*, Docket No. MER-L-2933-02 (N.J. Super. Ct. Law Div. Aug. 24, 2007). The case arose out of allegations made by the NJDEP, based upon one set of sampling conducted in 1987, that private wells in the Hillwood Lakes area of Ewing Township had sustained benzene and toluene contamination. As a result of this contamination, NJDEP sought approximately \$260,000 as compensation for the cost to replace the water lines in the Hillwood Lakes area, in addition to natural resources damages.

Exxon Mobil moved for summary judgment on the issue of natural resources damages months ago, but the Court opted to delay its decision until the Appellate Division could issue a ruling in the similarly captioned case, *New Jersey Department of Environmental Protection v. Exxon Mobil Corporation*. In June, the Appellate Division held that the Spill Act authorized the award of natural resource damages for loss of use of natural resources. 393 N.J. Super. 388 (Law Div. 2007). Relying upon that decision, the Court refused to dismiss the current case on such grounds. However, the Court awarded partial summary judgment to Exxon Mobil, dismissing the NJDEP's claim with prejudice, because the Department had not provided sufficient expert support to uphold the assumptions utilized in the natural resource damages formula.

The Court noted that, in the context of litigation, NJDEP could have relied upon the formula to meet its burden of proof in either of two ways, by promulgating the formula as a rule, or by presenting expert proof supporting each of the elements of the formula, but NJDEP did neither.

The NJDEP argued that, while the formula itself may not be applicable to all NRD claims, it was appropriate in this case. The Court, failing to find this argument persuasive, determined that the NJDEP's proffered expert opinion was inadequate because it depended entirely upon the surrogate ground water formula as the basis to calculate the damages, a formula that was unsupported by expert testimony or reports in the record.

Specifically, the Court determined that the NJDEP's assumption in the formula that the duration of damages should be 30 years was unsupported by the record. NJDEP relied upon this number for administrative convenience because some contaminants of concern would dissipate from the area within 30 years while others might take a take longer or shorter period. But, as the Court noted, the Department failed to explain why the NJDEP chose to utilize 30 years in the equation as opposed to another value.

The Court also noted that the NJDEP failed to provide a scientific basis to support its delineation of the ground water contamination plume. Although the NJDEP's experts claimed that 24 acres in the Hillwood Lakes area had been impacted by the alleged

contamination, none of the experts involved had an adequate scientific explanation for utilizing that area. Similarly, the Department also lacked adequate support for its assumption regarding the cost of providing public water. Because ground water cannot be easily valued in the marketplace, the Court opined that the Department should have utilized rule making to justify a default value so that the number used in the damages calculation could be subjected to notice and comment. The Court concluded that, while agencies need to make some assumptions for “administrative convenience,” they do not have free reign to make such assumptions without also providing adequate scientific support.

The Court’s decision here does not go so far as to hold that the ground water surrogate value calculation cannot be supported. Rather, the Court emphasized that because the Department opted not to follow the rule making process to establish a natural resources damages formula, the NJDEP had to provide adequate scientific support for the assumptions used in the formula. While the Court noted that there may be adequate proofs available somewhere to support the use of those assumptions in this case, they were not presented by the NJDEP. Hence, the formula must be rejected in this instance.

It would seem, as a matter of efficiency, the NJDEP’s next step would be to proceed with rule making rather than defend the assumptions utilized in its natural resources damages formula on a case by case basis; however, the Department has not yet made any meaningful progress on this front. In fact, the Court further stressed the appropriateness of rule making by alluding to the *New Jersey Society of Environmental & Economic Development v. Campbell* (“NJSEED”) case (Docket No. MER-L-343-04 (N.J. Super. Law Div., Mercer County) (Sabatino, J.)), reminding the NJDEP that it settled that particular case by agreeing to subject the ground water formula utilized in natural resource damages to administrative rule making. Although no such proposed rule has been published, there seem to be clear indications that rule making is appropriate and should be forthcoming. In the interim, companies involved in cases or settlement discussions wherein the NJDEP has calculated natural resource damages using this formula may have the benefit, even if temporary, of relying upon the *Exxon Mobil* decision to improve their bargaining positions since the NJDEP clearly cannot rely upon the formula in future litigation proceedings, without first developing further scientific justification in each case’s record for the assumptions used in the formula.

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