SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
ROSS R. ANZALDI
PRESIDING JUDGE, CIVIL DIVISION

COURT HOUSE
ELIZABETH, NEW JERSEY 07207

January 22, 2009

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LETTER OPINION
NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

Re: New Jersey Department of Environmental Protection v. Exxon Mobil Corporation.
Docket No. UNN-L-3026-04

Dear Counselors,

This matter comes before this court by way of Defendant Exxon Mobil Corporation's (hereinafter "Exxon") motion for partial summary judgment against Plaintiff New Jersey Department of Environmental Protection (hereinafter "DEP"). Exxon moves for partial summary judgment as to issues of Spill Act Retroactivity, Statute of Limitations on DEP's common law claims, and Counsel Fees. This court heard oral argument on this motion on November 21, 2008.

From the late nineteenth century and early twentieth century until 1993, ExxonMobil and its predecessors operated oil refineries and related facilities on the Bayway and

Bayonne sites. The Bayway site is located on 1,300 acres in Linden, N.J. and was primarily used as a refinery and petrochemical facility from 1909 through 1972. Bayway is currently privately owned and operated by Conoco Phillips. The Bayonne refinery, located on 288 acres in the southeastern portion of Bayonne, was owned and operated by ExxonMobil and its predecessors from 1879 to 1972. The site is currently privately owned by IMTT, with the exception of a 65 acre tract retained by ExxonMobil.

Industrialization at the two sites occurred prior to ExxonMobil's operations. At Bayway, for example, the Staten Chemical Company began its operations in 1889, and the Mountain Copper Company began operating smelters prior to 1902. In addition, the New Jersey Extraction Works, which was involved in copper and silver works, started operation around 1890. Furthermore, the Short Line Railroad also built railroad tracks sometime between 1904 and 1908 in what is now referred to as the Sludge Lagoon Operable Unit. At Bayonne, industrialization dates back to 1812, when the Hazard Power Company constructed a munitions plant in portions of what has become known as the Solvent and Sulfur Tank Fields.

During much of the period from 1909 to 1972, and in particular throughout the 1930's, 1940's, and 1950's, the Bayonne and Bayway refineries were interconnected by pipeline and operated as a single, integrated refinery and petrochemical facility, generally known as "Jersey Works." By the early 20th century, New York Harbor had become the busiest port complex in the world, with one half of the nation's foreign commerce passing through it. The surrounding metropolitan and outer lying areas, including Bayonne and Linden, contained approximately 14 million people. With the New York side of the harbor filled with development, future growth shifted focus to the New Jersey waterfront. For example, by 1939, the Bayonne works consisted of 650 acres housing 13 docks, pipelines with a capacity of 125,000 barrels per day, 10 boiler houses, and electrical power plants, and an elaborate complex of stills and other buildings.

Throughout much of the late 19th century and early 20th century, the State affirmatively sought to rid New Jersey of its wetlands through the Riparian Commission. The Riparian Commission had the authority to sell grants or leases for the State's riparian lands. The commission grants were given in fee simple and conveyed outright an irrevocable ownership of the riparian land. Some of the land owned and operated by ExxonMobil was transferred to it through riparian grants.

During the course of operations at the Bayonne and Bayway refineries, crude oil and refined products were lost through spills and leaks. Neither party disputes that these products, which include, *inter alia*, monocyclic aromatics, PAHs, amines, pesticides, and various inorganics such as chromium and arsenic, are considered hazardous substances. The contamination at both of these sites is well documented. 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. As of 2006, 17 non-aqueous phase liquid plumes were present in the groundwater at Bayonne. The documented level of contamination in the waters and sediment of the Platty Kill Canal in Bayonne is so high that ExxonMobil has recommended permanently closing and filling in the canal with an impermeable barrier (estimating 50,000 cubic yards of impacted sediments). Additionally,

Morses Creek has been subject to years of discharges resulting in a hydrocarbon content ranging from 640 to 280,000 ppm which has subjected the area to a gelatinous, oily emulsion overlying gray silt. Moreover, a former wetlands area, commonly referred to as the Pitch/Mudflat Area, was described by a DEP official who visited the Bayway in 2005 as "tar flats" which are likely low in macronutrients because they are essentially composed of "pitch," stillbottoms, and petroleum distillate residues, and which tidally drain to Horses Creek.

On November 27, 1991, ExxonMobil's predecessor in interest entered into an Administrative Consent Order (ACO) in which Exxon agreed to remediate, under DEP's supervision and direction, the Bayonne and Bayway sites. The ACO provided that ExxonMobil would (1) reimburse DEP for all costs incurred investigating and responding to ExxonMobil's discharges, (2) undertake remedial investigations of the sites and prepare work plans, (3) prepare feasibility studies, (4) undertake all necessary actions to remediate the sites under DEP's supervision, (5) undertake any necessary additional remedial investigation and actions, (6) submit quarterly progress reports to the DEP, and (7) pay the DEP's oversight costs.

At the outset, we must note that this suit is not for remediation and restoration but for money damages to compensate the state for loss of, and loss of use of natural resources. Against this factual backdrop, Exxon asserts claims for partial summary judgment on three distinct grounds, each of which will be addressed separately.

I. Spill Act Retroactivity

The first issue raised by Exxon is whether the Spill Act authorizes monetary recovery for natural resource damages which are attributable to pre-Act (1977) discharges. Initially, the Spill Compensation and Control Act, N.J.S.A. § 58:10-23.11 et. seq. (hereinafter "Spill Act") did not apply to discharges occurring before April 1, 1977. The Spill Act was amended in 1979 to include a retroactivity provision under section 11f which allowed for the Spill fund to be used to remove hazardous substances which had been discharged prior to the effective date of the act, if they posed a substantial risk of imminent damage to the public health or safety, or imminent and severe damage to the environment. In 1990, a subsequent amendment authorized the DEP to bring a civil action against a responsible party for damages. It authorized commencing a:

> "civil action in Superior Court for.... the cost of restoring, repairing, or replacing real or personal property damaged or destroyed by a discharge, any income lost from the time the property is damaged to the time it is restored, repaired or replaced, and any reduction in value of the property caused by the discharge by comparison with its value prior thereto; and the cost of restoration and replacement, where practicable, of any natural resource damaged or destroyed by a discharge." N.J.S.A. 58:10-23.11g.a.(1)

The general issue raised by the parties is whether sections 11g and 11f should in effect be read in conjunction to allow plaintiff monetary recovery from Exxon for damages caused by discharges prior to 1977, the creation of the Spill Act.

Exxon argues that section 11f, which allows for the retroactive recovery of remediation costs, and the 1990 amendments, which allows for civil damages for loss of natural resources cannot be combined to authorize the DEP to recover retroactively for pre-Act discharges. They contend that the amendment applicable to section 11g simply allowed the DEP to recover what the Spill Fund was already authorized to recover- damages caused by post-Act discharges.

Exxon argues generally that the terms of a statute will not be given retroactive effect "unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the legislature cannot otherwise be satisfied." Kopczynski v. Camden County, 2 N.J. 419, 424 (1949). Exxon argues that there is no such clear and imperative language in the Spill Act, nor did the legislature intend that the 1990 amendment should apply retroactively.

DEP's argument relies heavily on DEP v. Ventron Corp., 94 N.J. 473 (1983), where the New Jersey Supreme Court ruled that for the "costs of cleanup and removal" there is express retroactivity. DEP contends that this retroactivity has been held to also include natural resources restoration and damages. Plaintiffs also cite to Atlantic City MUA v. Hunt, 210 N.J. Super 76 (App. Div 1986) that "the strict liability provision of N.J.S.A. 58:10-23.11g(a) was prospective except with regard to DEP's ability to recover for its cleanup and removal costs incurred in removing hazardous substances discharged before the passage of the Act." Atlantic City MUA v. Hunt, 210 N.J. Super at 91. DEP analogizes the above quote with the more recent Appellate Division decision in this case which held that both primary restoration and loss of use have been held to be "cleanup and removal" costs under the Act. New Jersey Dep't of Environmental Protection v. Exxon Mobil Corp., 393 N.J. Super. 388, 405-406 (App. Div. 2007).

Generally, the law in New Jersey directs toward prospective application of statutes unless there has been: (1) express or implicit declaration by the legislature; (2) a curative nature to the statute; (3) expectation by the parties which warrant retroactive application. Gibbons v. Gibbons, 86 NJ 515, 521-523 (1981). The Supreme Court of New Jersey generally addressed Spill Act retroactivity in the case of DEP v. Ventron Corp. There, the court stated:

> When considering whether a statute should be applied prospectively or retroactively, our quest is to ascertain the intention of the Legislature. In the absence of an express declaration to the contrary, that search may lead to the conclusion that a statute should be given only prospective effect. *Citing* Rothman v. Rothman, 65 N.J. 219, 224 (1974). As noted, the Legislature has expressly declared that the Spill Act should be given retroactive effect. DEP v. Ventron Corp., 94 N.J. 473, 498 (1983).

Ventron dealt with retroactive clean up and removal costs, specifically remediation, but did not address the type of damages sought in this case. The holding in Ventron, affirming retroactive liability under part of the Spill Act, becomes applicable here as a result of the Appellate Division's recent ruling in DEP v. Exxon. The Appellate Division in this case repeatedly explained that "the legislature intended to expand, not contract, the agency's abilities to recover compensatory damages from polluters." NJDEP v. Exxon, 393 N.J. Super. at 405. Further stating that "Given the obvious remedial purposes of the statutory scheme, N.J.S.A.

58:10-23.11v, defendant's insistence on such a strict interpretation, which leaves the public less than whole for its loss, is unwarranted." Id. at 403. The court concluded, holding that:

> "lending the Act an expansive reading necessary to accomplish its goals, the definition of "cleanup and removal costs" is sufficiently broad to encompass DEP's power to assess damages caused to natural resources and to require compensation for their loss of use. Indeed, "[t]he definition of cleanup and removal costs is broad and consistent with the broad authority granted [DEP] under the Spill Act." Id.

The court stated that when they harmonize all parts of the statute to give the Act its overall purpose and meaning, the DEP's broad, inclusive interpretation is correct. Id. at 404. The Appellate division read into the Spill Act broad implied powers. Specifically, that the statute's use of "cleanup and removal costs" was meant to include natural resources damages and loss of use of resources. It is clear that subsection (11)f was revisited in the amendments in order to provide retroactive authority of the DEP for remediation costs. The question is whether that same retroactivity can be read into section (11)g which deals with liability of discharging parties.

This court finds the argument raised by NJDEP to be a logical analysis and continuation of the Appellate Divisions decision. That is, that retroactive application should apply to all removal costs including natural resources damages. That argument is derived from the rationale that costs and damages can be obtained for pre-Act discharges as a result of the wording of the amendments to the Spill Act. The Appellate Division has said that cleanup, removal and remediation costs should be read broadly to include natural resource damages and loss of use of said natural resources. Therefore, this court finds that it should follow that retroactive application should apply to the whole broad interpretation of removal costs as defined by the Appellate Court including natural resources damage.

When looking at the intent of the Spill Act, as well as the Appellate Divisions' recent interpretation in this case, it is clear to this court that if the Act is intended to impose liability for remediation of Pre-Act discharges, this should also be applied to natural resource damages. The Appellate Division clearly stated ""cleanup and removal costs" is sufficiently broad to encompass DEP's power to assess damages caused to natural resources and to require compensation for their loss of use." NJDEP v. Exxon, 393 N.J. Super. at 403. Therefore, under the Spill Act, Defendant Exxon Mobil's motion for partial summary judgment as to retroactivity is **DENIED**.

II. Common Law Statute of Limitations

The court next heard oral argument on Exxon's claim that the relevant statute of limitations restricts the applicability of DEP's common law claims for nuisance and trespass. Under N.J.S.A. 2A:14-1.2, there is a ten-year limitations period for actions commenced by the State, and also that such actions would not be deemed to have accrued prior to January I, 1992. This statute of limitations is altered under N.J.S.A. 58:10B-17.1 which places limitations on civil actions regarding environmental laws. It states in relevant part:

b. (1) Except where a limitations provision expressly and specifically applies to actions commenced by the State or where a longer limitations period would otherwise apply, and subject to any statutory provisions or common law rules extending limitations periods, any civil action concerning the payment of compensation for damage to, or loss of, natural resources due to the discharge of a hazardous substance, commenced by the State pursuant to the State's environmental laws, shall be commenced within five years and six months next after the cause of action shall have accrued. N.J.S.A. 58:10B-17.1

The underlying issue on this motion is a rather narrow concept. Are the common law claims of nuisance and trespass part of the "state's environmental laws" including "any other law or regulation by which the State may compel a person to perform remediation activities on contaminated property." The statute gives a list of nine specific laws which are examples of which environmental laws are intended to apply such as the Spill Act, Brownfield Act, and Industrial Site Recovery Act. The claims at issue here, nuisance and trespass clearly are not one of the enumerated statutes. They also are clearly not statutory law but are common law claims. They also, at their foundation are not environmental laws per se but laws of general application to a wide variety of situations.

Exxon's argument is that the general ten-year statute of limitations for actions commenced by the state bars recovery for the alleged common law claims because they would have accrued well before the statutory cut off of January 1, 1992. Therefore, any cause of action must be commenced within ten years of January 1, 1992. Exxon further argues that subsequent amendments extending the limitations period for actions under the "State's environmental laws" does not apply to the alleged common law claims.

Exxon points out that the contamination at the sites is the result of spills dating back since the late 1800s. Furthermore, that there were "numerous reported spills" and "historic discharges" which clearly would have given the DEP notice of the contamination well before 1992. The bulk of Exxon's' argument consists of a dissection of what the term "environmental laws" means and why this definition does not include common law claims such as nuisance. Looking at both the common usage in case law as well as statutory application, Exxon interprets "environmental laws" to only mean statutory environmental causes of action.

The statute itself defines the term environmental laws as:

"State's environmental laws" means the "Spill Compensation and Control Act," the "Water Pollution Control Act," the "Brownfield and Contaminated Site Remediation Act," the "Industrial Site Recovery Act," the "Solid Waste Management Act," the "Comprehensive Regulated Medical Waste Management Act," the "Major Hazardous Waste Facilities Siting Act," the "Sanitary Landfill Facility Closure and Contingency Fund, the "Regional Low-Level Radioactive Waste Disposal Facility Siting Act," **or any other law or regulation by which**

the State may compel a person to perform remediation activities on contaminated property. N.J.S.A. 58:10B-17.1c (emphasis added).

The primary issue then is, if the common law claims are not one the states enumerated "environmental laws," do they fit under the "any other law or regulation..." section of the statute. Exxon argues that the common law claims do not count because "law or regulation" could only imply to a statute, positive law, or actual regulation. Exxon points to NJDEP v. Caldeira, 171 N.J. 404 (2002), where the court held that the DEP's fraudulent transfer action did not fall within the definition of the state's "environmental laws." The court stated:

> DEP's UFTA action against the former owners of a landfill to set aside a putative fraudulent transfer does not arise under the environmental laws any more than a UFTA action between physicians could be said to arise under the medical laws. The fact that the proceeds of a UFTA judgment may be spent for closure purposes does not alter or affect the fundamental nature of the underlying action as one not arising under the environmental laws. Accordingly, the site remediation statute is inapplicable here.
> State Dep't of Envtl. Prot. v. Caldeira, 171 N.J. 404, 418 (N.J. 2002)

DEP argues that the clear understanding of the law should be that both the Spill Act and the common law claims are laws which the State is using to compel a person to perform remediation activities and as such fit the statutes description. Plaintiffs argue that the statute is clear and unambiguous – that if the common law causes of nuisance or trespass can be used buy the State to compel remediation activities, then they are "environmental laws" for the purposes of the statute.

The court was not directed by either party to conclusive authority either for, or against the inclusion of the common law into "any other law or regulation." DEP separates the wording of the statute into two parts; whether it is a "law or regulation" and whether it is being used by the state to compel a person to perform remediation activities. DEP relies heavily on the fact that these common law claims are being used by the state to obtain damages which will in turn likely be used for remediation of the contaminated property. Exxon's reading of the statute requires the court to interpret "any other law" to apply solely to statutes and positively enacted laws. In effect the court has to presume that if the legislature intended common laws to be applicable under the environmental laws limitation they would have said as much in the statute.

N.J.S.A. 58:10B-17.1c clearly lists certain statutes which the legislature determined should be subject to an adjusted limitations period. It is clear that nuisance and trespass are not on the list, nor are they similar in their development and application than the nine statutes which are expressly stated. The court is also aware that these common law claims are the result of environmental contamination and are being used to compel remediation and natural resources damages.

The court is confident that the legislature's intent in referring to a "law or regulation", in light of the previously mentioned nine statutes, did not intend to incorporate general common law into the limitations exceptions of 58:10B-17.1c. This reading is consistent with the principle

of *ejusdem generis* raised by Exxon through the New Jersey Supreme Court's ruling in State v. Hoffman, 149 N.J. 564 (N.J. 1997).

> "Under this rule, when general words follow specific words in a statutory enumeration, the general words are construed to embrace only the objects similar in nature to those objects enumerated by the preceding specific words. This technique saves the legislature from spelling out in advance every contingency in which the statute could apply. State v. Hoffman, 149 N.J. 564, 584 (N.J. 1997)

Reading the statute on its face, the court is not convinced that such a broad reading should take place in order to apply general common law claims into a statute which clearly was intended to apply to only certain types of laws. This court is simply left with no authority for the presumption that such a wide ranging expansion of the statute of limitations for environmental statutes should be extended to common law claims. Therefore the motion for summary judgment as common law claims in regards to statute of limitations is GRANTED.

III. Counsel Fees.

Finally, the court addresses Exxon's motion for the denial of counsel fees which the DEP has claimed they are owed. The court is again confronted with a question of how broadly to interpret the provisions and purposes of the Spill Act. Defendant's argument is that counsel fees should only be granted when there is express authority, and the Spill act provides no such authority. Defendants point to Rule 4:42-9(a) which outlines the eight specific fee shifting exceptions provided and concludes that the present situation is not covered.

Defendants state that the only possible exception would be subsection (a)(8) which allows "where counsel fees are permitted by statute." Yet, they argue that the Spill Act provides only for the "reasonable costs of preparing and successfully litigating an action under (the act)." Defendants cite to DEP v. Standard Tank Cleaning Corp., 284 N.J. Super 381 (App. Div. 1995) where similar wording under the Water Pollution Control Act was found to not award counsel fees, but only general litigation fees (filing, postage, copying). In that case the statute allowed for the "reasonable costs of preparing and litigating the case." The DEP contends that the statute referenced in DEP v. Standard Tank, supra, is vastly different in scope and purpose than the Spill Act and as such should not be treated the same.

Exxon points out that counsel fees are allowed in other sections of the Spill Act but not here thus showing that the legislature did not intend such a result. DEP concedes that the Spill Act does not specifically award counsel fees in this area but they look to the Appellate Divisions recent ruling in this case for a broad reading of the purposes of the Act.

> Indeed, "[t]he definition of cleanup and removal costs is broad and consistent with the broad authority granted [DEP] under the Spill Act." The term has been interpreted to include administrative oversight costs; **the costs of legal services necessary to remediate an environmental insult**;

> and the costs of natural resource physical restoration, even though none of these has been expressly articulated in the Spill Act's liability provision. New Jersey Dep't of Environmental Protection v. Exxon Mobil Corp., 393 N.J. Super. 388, 403 (App.Div. 2007)

DEP's primary argument though is in the importance of protecting the public trust. Specifically, they argue that the availability of funds to use for the remediation of contaminated sites requires that counsel fees be granted. In effect they are arguing that the importance of remediating this land and "making the public whole" warrants the imposition of counsel fees for polluters who "continuously manifest an attitude of confrontation with the DEP." *See NJDEP Opposition Brief at pg. 64.*

Exxon provides a generally analogous precedent by citing to Standard Tank.

> Deeply imbedded in New Jersey jurisprudence is the principle that legal expenses . . . are not recoverable absent express authorization by statute, court rule, or contract. Consequently, where the Legislature has intended to authorize awards of counsel fees, it has expressly so provided rather than treating counsel fees as simply a component of the costs of litigation.
>
> Consequently, we must assume that if the Legislature had intended to authorize awards of counsel fees to the Attorney General or the DEP, it would have expressly stated that the litigation costs awardable under *N.J.S.A.* 58:10A-10(c)(2) include counsel fees. In the absence of such an express statement, **we construe the authorization for an assessment of the "reasonable costs of preparing and litigating the case" to refer solely to the fees of outside experts and other general litigation expenses.** Dept. of Environmental Protection v. Standard Tank Cleaning Corp., 284 N.J. Super. 381, 410 (App.Div. 1995)

However, Standard Tank did not deal with the same statute or factual situation which is present in this case. Here, NJDEP argues that the purpose of the Spill Act can be "more fully realized if the polluter is forced to pay all of the harm it causes," including costs of litigation. *NJDEP Opposition Brief at pg. 66.* Most relevant for this court's analysis though is the binding holding of the Appellate Division's ruling in this case. There, the court interpreted the costs of cleanup and removal to include "**the costs of legal services necessary to remediate an environmental insult.**" NJDEP v. Exxon, 393 N.J. Super. at 403. (emphasis added).

The Spill Act on its face does not call for counsel fees in the present situation. The ability to obtain outside counsel fees is generally clear and defined in this state requiring express authorization by statute, contract, or court rule. This court finds that the Appellate Division, quoted above, unmistakably found that the costs of legal services should be imposed in some aspects of cleanup and remediation actions, but the extent of that is not explained. There is some tension between the holding in Standard Tank, *supra* and the appellate divisions ruling in this case. Standard Tank only applied costs of litigating the case to include fees and outside costs,

not the likely large amount of counsel fees for all legal services provided by NJDEP's in-house and outside counsel. That ruling aside, this court is bound by the Appellate Divisions more recent direction on the Spill Act in this case.

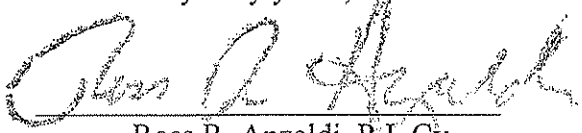
The court finds that the Appellate Divisions guidance, as well as the spirit and purpose of the act, as argued by NJDEP, should allow for fees to be given for all legal costs associated with remediation and restoration of the site but not for loss of or loss of use of natural resources. As outlined above, there are two sections to this case: the remediation and restoration of the physical land, and money damages sought to compensate the state for loss of, and loss of use of natural resources. As to the first section, dealing with restoration, the Appellate Division has clearly stated that party can obtain the costs of legal services necessary to remediate the environmental insult. This is because those costs are the direct result of fulfilling the purpose of the Spill Act, the remediation and reclamation of polluted land. On the other hand, the court is not convinced either the statute itself, or the guidance from the higher courts requires giving counsel fees for any claims where only money damages, above what is needed to restore the land, are being sought. This court is simply not confronted with adequate precedent or legal argument which effectively requires such wide ranging imposition of counsel fees for damages sought outside the traditional scope of the Spill Act.

Conclusion:

Defendant Exxon's motion for Partial Summary Judgment on the grounds of Retroactivity of the Spill Act is **DENIED.** However, ExxonMobil's motion for Partial Summary on the grounds of statute of limitations violations on the common law claims is **GRANTED.** Lastly, Exxon's motion for denial of counsel fees to NJDEP should be **GRANTED IN PART AND DENIED IN PART.** This court finds that the Appellate Divisions guidance, as well as the spirit of the 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 as those are intended for solely money damages, not for remediation.

An order has been filed by the court reflecting this decision

Very truly yours,



Ross R. Anzaldi, P.J. Cv.