

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
ROSS R. ANZALDI
PRESIDING JUDGE, CIVIL DIVISION



COURT HOUSE
ELIZABETH, NEW JERSEY 07207

July 24, 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NOT FOR PUBLICATION WITHOUT THE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. ExxonMobil 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 Natural Resource Damages related to (1) private uplands; (2) former tidal wetlands for which the state has disclaimed any rights pursuant to the Riparian Claim Amendment to the Constitution, and (3) tidally flowed lands conveyed in fee to ExxonMobil or its predecessors. A fourth section of the motion dealing with natural resources for which the state has not proffered evidence was withdrawn at the time of oral argument by Defendant. The court heard oral argument on this matter on June 1st, 2009.

At the outset, we must reiterate 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 independent grounds, each of which will be addressed separately.

Exxon's argument focuses on a number of unique and discrete locations on the site. In essence, Exxon is attempting to limit the scope of DEP's damages by analyzing each section of the site in question and determining whether there are legitimate claims for damages to resources held in trust for the public. Exxon contends that the State's claims overlook historic programs to promote filling and development of wetlands as well as valid transfers of state owned riparian lands to defendant's predecessors. Exxon argues that the state can only recover damages under the Spill Act or common law claims for property it holds in the "Public Trust" and that the above referenced sections of land do not fit in this category.

I. Private Land Above the Mean High Tide – ("Private Uplands")

The first issue addressed by the parties is what is referred to as "Private uplands," meaning the area of land that allegedly is not touched by the ebb and flow of the tide. The Spill Act defines "natural resources" as all "land...owned, managed, held in trust or otherwise controlled by the State." N.J.S.A. 58:10-23.11b. Under the public trust doctrine, the State has an interest in limited resources including the air, water and tidally flowed lands. Exxon contends that this does not include land above the mean "high water mark" what is referred to as the upland. This area consists of privately owned property not currently subject to the Ebb and Flow of the Tide. Exxon argues that only those areas below the mean high water mark are within the public trust. Exxon quotes from Dickinson v. Fund for Support of Free Pub Sch., 95 NJ 65, 73 (1983) - "the state owned all land below the mean high water mark on tidally flowed property while the interior land that the mean high tide did not reach was not tideland." Exxon states that no New Jersey Court has ever held that the public trust is applicable to private uplands where there was not a need for recreational beach access. Exxon therefore argues that because the site in question is highly industrialized and access is barred to the public; the recreational "beach access" line of cases is inapplicable.

In opposition, DEP argues that Exxon has substantially limited their valid interest in the land at issue. DEP argues that the public trust doctrine should be seen as a dynamic and expanding area which can change to encompass societal needs. DEP cites to Borough of Neptune City v. Borough of Avon-by-the-Sea 61 NJ 296, 309 (1972) that the public trust doctrine should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.

Next, DEP argues that the State's inherent police power gives it an interest in natural resources. They contend that the general overarching control of the State applies to the protection and preservation of these lands and waters to promote health, safety, and welfare of the people of the state. DEP argues that the State has a clear intent and right to exert control over resources no matter whether on public or private property. DEP contends that the State's police power affords it a management or control interest in natural resources of the state.

DEP contends some of the areas which are considered uplands, were not uplands when they were polluted. They argue that when the refinery waste was dumped into the ground, the areas in question were generally not yet uplands. Regardless of when they were polluted, DEP argues in the alternative that the idea of the mean high water mark as the standard is incompatible with the Spill Act's far reaching purpose. DEP contends that the underlying ecological principles of the contaminated areas make such a clear delineation impractical. For example, they posit that the ground water under the uplands could be contaminated as a result of the tide flowing underground past the general high water mark. DEP argues that to limit their authority to restore only those lands below the mean high water mark would be to effectively block the DEP from addressing the concerns of the legislature and the people of New Jersey to protect the resources of the state.

The Public Trust doctrine was first articulated by the New Jersey Supreme Court in Arnold v. Mundy, 6 NJL 1 (1821). The essence of the public trust doctrine is that the State holds the property in trust for the people. Those certain resources are neither private nor public but are common property, held by the sovereign in trust for the people. In Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 305-09 (1972), the New Jersey Supreme Court opined as to the nature of the public trust doctrine: "There is not the slightest doubt that New Jersey has always recognized the trust doctrine." Further stating that: "the public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit." Id. at 309.

The State has an obligation, as trustee, to invoke its rights when the public trust is damaged. New Jersey Dep't of Env'tl. Prot. v. Jersey Central Power & Light Co., 125 N.J. Super. 97, 103 (Law Div. 1973) ("The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus.").

Case law in New Jersey often addressed the public trust in relation to tidal waters on a public beach and issues such as beach access through private lands. The issue here does not deal with granting access to Exxon's upland property in order for the public to access the beach. Nor is the DEP simply seeking the costs of remediation of the property under the Spill Act. The issue is whether the Defendant may use the Public Trust doctrine in order to bar recovery of natural resource damages for pollution to private lands.

This court is guided by the New Jersey Supreme Court which has generally limited the public trust to that section of land subject to the ebb and flow of the tide. "The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people." Matthews v. Bay Head Improv. Ass'n, 95 N.J. 306, 312 (N.J. 1984). "The public trust doctrine is premised on the common rights of all the State's citizens to use and enjoy the tidal land seaward of the mean high water mark. Lusardi v. Curtis Point Property Owners Ass'n, 86 NJ 217, 228 (1981). Also see Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. at 309.

Though the Public Trust has not been applied to date to private uplands, the Spill Act clearly permits restoration and recovery of property no matter where located or created. 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. 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. The Appellate Division has clearly given DEP the ability to obtain damages under the Spill Act where a discharge has contaminated the property. Any lands which are contaminated as a result of actions by Exxon or its predecessors could be subject to damages as outlined by the Appellate Division under the Spill Act. This court will continue to read the Public Trust Doctrine expansively. Therefore Natural resource damages are recoverable under the Spill Act and the Public Trust doctrine does not bar such recovery. Motion is DENIED.

II. Riparian Claim Amendment and Tidally flowed lands conveyed in fee to ExxonMobil or its predecessors.

Exxon also seeks a ruling on current or former wetlands to which they allege DEP transferred their interest in the wetlands to private ownership and therefore the State cannot satisfy its legal burden. Exxon states that in total, the state is seeking to recover natural resources damages for 788.9 acres of intertidal and sub tidal areas. Exxon contends that only 26.21 of those acres are subject to the public trust. Exxon argues that the state disavowed interest in the majority of those lands via the 1981 Riparian Claim Amendment which removed from the public trust all former wetlands not claimed by the state.

Exxon also argues that the Riparian Claim amendment removed all unclaimed riparian lands from the public trust. This amendment required the state to seek claims related to formerly tide flowed lands within one year or forfeit any claims forever – in effect a de facto statute of limitations. The land in question on this issue is what has been referred to as formerly tide-flowed lands – meaning that they were once wetlands type environments subject to the tide. They have since been filled in as solid land and are not now subject to the flow of the tide.

DEP argues that regardless of the 1981 riparian claims amendment, the people of New Jersey did not relinquish their rights under the Public Trust and Spill Act to seek clean up of Riparian Lands. DEP states that it is undisputed that economic considerations had a role in the State’s early approach to its tidelands, but that Exxon has not pointed to one State Tidelands Grant that permitted pollution. Filling was permitted, but pollution was not and therefore it is actionable in this suit. DEP argues that Exxon is ignoring New Jersey’s Historical commitment to clean water and it is a perversion of the history to cherry-pick pro development quotes to reach the result that New Jersey intended pollution of the land.

The 1981 Amendment to the New Jersey Constitution states:

No lands that were formerly tidal flowed, but which have not been tidal flowed at any time for a period of 40 years, shall be deemed riparian lands, or lands subject to a riparian claim, and the passage of that period shall be a good

and sufficient bar to any such claim, unless during that period the State has specifically defined and asserted such a claim pursuant to law. This section shall apply to lands which have not been tidal flowed at any time during the 40 years immediately preceding adoption of this amendment with respect to any claim not specifically defined and asserted by the State within 1 year of the adoption of this amendment.

N.J. Const., Art. VIII, Sec. V, Para. 1

Exxon claims that the state does not have any interest in former wetlands that it conveyed to Exxon Mobil through grants from the Riparian Commission. Exxon argues that the State expressly transferred its interest to many of those areas as part of its own effort to transform the wetlands into private upland property to be used for development. In essence, that the view of the importance of wetlands has changed and initially wetlands were seen as wasted land and the state granted the land to private owners to promote development. Exxon states that only 5.15 acres of the 128.92 acres claimed by the state are not covered by commission grants which allowed filling in of the wetland.

Again, as stated above, DEP contends that any rights to lands conveyed to Exxon may have carried rights to develop the property but did not allow pollution of the location. DEP contends that the State retains significant control to manage and control the resources within its borders and therefore Exxon cannot utilize the conveyance of rights to land as a permission to pollute.

This court previously ruled on fundamentally similar issues in this matter in a letter opinion dated August 29, 2008. There, the court stated as follows:

The State has an obligation, as trustee, to invoke its rights when the public trust is damaged. New Jersey Dep't of Env'tl. Prot. v. Jersey Central Power & Light Co., 125 N.J. Super. 97, 103 (Law Div. 1973) ("The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus."). Title is not synonymous with trusteeship. In National Ass'n of Home Builders v. New Jersey Dep't of Env'tl. Prot., 64 F. Supp.2d 354, 358 (D.N.J. 1999), the court held that "title to such 'public trust property' is subject to the public's right to use and enjoy the property, **even if such property is alienated to private owners...** This right of the public to use and enjoy such 'public trust lands' does not disappear simply because the land that was once submerged is filled in." (emphasis added). The court found that the public trust applied to properties along the Hudson River, despite the fact that the State did not expressly retain its rights as public trustee in the conveying instruments.

On this basis, the public trust extends to the Arthur Kill, the Kill Van Kull, Morses Creek, and Piles Creek. The pollutants that escaped from the Bayway and Bayonne sites have impacted the wildlife and contaminated wetlands and marshes. Exxon argues that the State, through the Riparian

Amendment and Riparian Commission, granted fee simples to private parties and waived its right to make claims of title to the riparian waters. As a result, Exxon posits that the State no longer has an ownership interest in the subject properties. **In light of the language in National Ass'n of Home Builders, this argument must fail. The State's rights as public trustee exist even if the property has been alienated.** (Emphasis added.)

The court is in full agreement with its prior ruling that neither the Riparian Amendment, nor grants made of riparian lands to Exxon or its predecessors removes the State's rights as public trustee to seek damages for contamination. The arguments raised by Exxon in this motion do not bring to light any grounds for the court to deviate from its prior ruling. Therefore, Exxon's motion for summary judgment under the Riparian Amendment and for Riparian Grants is DENIED.

Conclusion:

Defendant Exxon's motion for partial summary judgment as to the Private Uplands is DENIED. Exxon's motion for partial summary judgment as to issues of the Riparian Claim Amendment and the Riparian Grants are DENIED.

An order has been filed by the court reflecting this decision

Very truly yours,

A handwritten signature in cursive script, appearing to read "Ross R. Anzaldi".

ROSS R. ANZALDI, P.J.Cv.

FILED

JUL 24 2009

ROSS R. ANZALDI, P.J.Cv.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
UNION COUNTY

DOCKET NO.: UNN-L-3026-04
(consolidated with UNN-L-1650-05)

Civil Action

**ORDER GRANTING DEFENDANT EXXON MOBIL CORPORATION'S
MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS FOR
NATURAL RESOURCE DAMAGES RELATED TO (1) PRIVATE UPLAND; (2)
FORMER WETLANDS NOT CLAIMED BY THE STATE PURSUANT TO THE
RIPARIAN CLAIM AMENDMENT; (3) TIDALLY FLOWED LANDS CONVEYED IN
FEE TO EXXONMOBIL OR ITS PREDECESSORS; AND (4) NATURAL RESOURCES
FOR WHICH THE STATE HAS NOT PROFFERED EVIDENCE**

THIS MATTER having come before the Court on the Motion of Defendant Exxon Mobil Corporation for Partial Summary Judgment on Plaintiff's Claims for Natural Resource Damages Related to (1) Private Upland; (2) Former Wetlands Not Claimed by the State Pursuant to the Riparian Claims Amendment; (3) Tidally Flowed Lands Conveyed in Fee to ExxonMobil or its Predecessors; and (4) Natural Resources For Which the State Has Not Proffered Evidence; and the Court having considered the submissions and oral arguments of the parties; and good cause having been shown;

IT IS on this 24th day of July, 2009, ORDERED that Defendant's motion for partial summary judgment is GRANTED as follows:

1. Plaintiff cannot recover natural resource damages for the 774.9 acres at Bayway and 238.3 acres at Bayonne of private property that are not, and have never been, tidally flowed.

DENIED

2. Plaintiff cannot recover natural resource damages for the former intertidal and subtidal areas at Bayway and Bayonne that the state did not claim pursuant to the Riparian Claim Amendment of 1981.

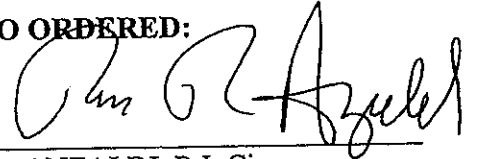
3. Plaintiff cannot recover natural resource damages for the former intertidal and subtidal areas at Bayway and Bayonne that are covered by Riparian Commission grants to Defendant and its predecessors.

~~4. Even with respect to the areas in which the State has a trust interest, Plaintiff cannot recover natural resources damages for which Plaintiff has not proffered any admissible evidence of actual harm resulting from an unpermitted discharge of petroleum or hazardous substances.~~ * Withdrawn

DENIED
DENIED

A COPY OF THIS ORDER SHALL BE SERVED WITHIN 7 DAYS OF RECEIPT ON ALL INTERESTED PARTIES.

IT IS SO ORDERED:



ROSS R. ANZALDI, P.J. Civ.

Motion was:

X

Opposed

Unopposed

LA2:863619.12

For the reasons set forth by the Court on the record on per letter memorandum dated July 24, 2007