SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
ROSS R. ANZALDI
PRESIDING JUDGE, CIVIL DIVISION

COURT HOUSE
ELIZABETH, NEW JERSEY 07207

August 29, 2008

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LETTER OF OPINION
NOT FOR PUBLICATION WITHOUT APPROVAL

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

Dear Counsel:

This matter comes before this court by way of Plaintiff New Jersey Department of Environmental Protection's (hereinafter "DEP") motion for partial summary judgment against Defendant Exxon Mobil Corporation (hereinafter "Exxon"). DEP moves for partial summary judgment on its common law claims for public nuisance and trespass. DEP also seeks judgment as a matter of law that Exxon's behavior constituted an abnormally dangerous activity and that DEP is entitled to damages for loss of use, restitution, and unjust enrichment.

From the late nineteenth century and early twentieth century until 1993, Exxon 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 Exxon 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 Exxon.

Industrialization at the two sites occurred prior to Exxon'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 twentieth 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 and expansion of the two sites began. 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, electrical power plants, and an elaborate complex of stills and other buildings.

Throughout much of the late nineteenth century and early twentieth 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 Exxon 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, is 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 Exxon 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 on 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, Exxon's predecessor in interest entered into an Administrative Consent Order (hereinafter "ACO") in which defendant agreed to remediate, under DEP's supervision and direction, the Bayonne and Bayway sites. The ACO provided that Exxon would (1) reimburse DEP for all costs incurred investigating and responding to Exxon'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.

Against this factual background, DEP asserts common law claims of public nuisance and trespass against Exxon. Exxon raises a variety of objections to DEP's common law claims. Most prominently, Exxon argues that the State is precluded from bringing these claims because the lands in dispute are not subject to the public trust.

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.
>
> ...
>
> The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people. (6 N.J.L. at 78)
>
> ...
>
> The observation to be made is that the statements in our cases of an unlimited power in the legislature to convey such trust lands to private persons may well be too broad. It may be that some such prior conveyances constituted an improper alienation of trust property or at least that they are impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein.
>
> ...

> 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.

The State has an obligation, as trustee, to invoke its rights when the public trust is damaged. New Jersey Dep't of Envtl. 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 Envt. 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.

Pursuant to the Restatement (Second) of Torts, the State is one of a limited class of plaintiffs that has a right to bring an action for public nuisance:

> § 821C Who Can Recover for Public Nuisance
>
> (1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.
>
> (2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must
>
> (a) have the right to recover damages, as indicated in Subsection (1), or
>
> (b) have authority as a public official or public agency to represent the state or a political subdivision in the matter, or
>
> (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

As a practical matter, the only parties that are in a position to abate a public nuisance are the State and an individual that has suffered some special harm. Thus, "absent some special interest in some private citizen, it is questionable whether anyone but the State can be considered the proper party to sue for recovery of damages to the environment." New Jersey Dep't of Envtl. Prot. v. Jersey Central Power & Light Co., 133 N.J. Super. 375, 393 (App. Div. 1975).

Exxon argues that DEP failed to establish a "special injury." However, this element only applies to private parties seeking to make a claim of public nuisance. Section 821C of the Restatement states, "[i]n order to recover damages in an **individual** action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public." (emphasis added). That same section of the Restatement gives a public agency the right to assert a claim of public nuisance independent of the requirement to demonstrate a special injury.

In this capacity, DEP asserts a claim against Exxon for public nuisance. In In re Lead Paint Litigation, 191 N.J. 405 (2007), the Supreme Court, relying on the Restatement, established the evaluative framework that should be applied when analyzing a claim of public nuisance. "A public nuisance is an unreasonable interference with a right common to the general public." Restatement (Second) of Torts, § 821B. Here, DEP argues that the right common to the public is "the right to an uncontaminated environment." Jersey City Redevelopment Authority v. PPG Industries, 655 F. Supp. 1257, 1265-66 (D.N.J. 1987). On further scrutiny, the District Court in Jersey City Redevelopment Authority does not unequivocally hold that the right to an uncontaminated environment is a right held common to the general public for the purposes of public nuisance law. However, that does not end the court's analysis. This court also notes that "environmental tort litigation had its origins in concepts of public nuisance, and... the language adopted in the Restatement is in part a reflection of early environmentalists' hopes of creating means to ensure broad-based avenues for pollution control." In re Lead Paint Litigation, 191 N.J. at 425. To this end, there has been "a tendency... to treat significant interferences with recognized aesthetic values or established principles of conservation of natural resources as amounting to a public nuisance." Restatement (Second) of Torts, § 821B comment e. On this basis, the court is satisfied that, for the purposes of public nuisance law, the right to an uncontaminated environment is one held in common by the public.

A number of jurisdictions have permitted the State to use the doctrine of public nuisance as a tool for environmental enforcement. In Wood v. Picillo, the court held the defendants liable under a public nuisance theory without a finding of negligence. 442 A.2d 1244 (R.I. 1982). The court opined that "liability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct." Id. at 1247. In State, Dep't. of Envt'l. Protection v. Ventron Corp., 94 N.J. 473 (1983), the New Jersey Supreme Court held defendants strictly liable for nuisance resulting from disposal of chemicals into open drainage ditches. The court announced that a "landowner is strictly liable... for harm caused by toxic wastes that are stored on his property." Id. at 488. In New Jersey Dep't of Envtl. Prot. V. Harris, 214 N.J. Super. 140 (App. Div. 1986), the court found a public nuisance where the defendant failed to close a landfill and stop discharge from its facility. The court reasoned that the defendants' "failure to cease the

discharge of pollutants from the facility constituted a public nuisance which presented a direct, immediate and potential threat to the environment, public health safety and welfare." Id. at 144.

As this court understands the case law and the spirit of the Restatement, the right to an uncontaminated environment is a right held common to the public. Accordingly, Exxon will be held liable for public nuisance if it unreasonably interfered with this common right.

The Restatement provides criteria for determining whether a common right has been the subject of unreasonable interference:

> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts, § 821B. Here, elements of all three criteria are present. First, Exxon's discharge of toxic materials has raised concern for the public health. Second, Exxon's conduct is proscribed by the Spill Act. N.J.S.A. 58:10-23.11, et seq. Third, Exxon's destructive conduct occurred over a number of years resulting in significant damage to the natural environment.

Furthermore, pursuant to the Restatement, "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm." § 519. An abnormally dangerous activity can constitute a public nuisance if it interferes with rights common to the public. § 520 comment c. In Ventron, supra, the New Jersey Supreme Court stated, "a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others." 94 N.J. at 488. The rationale for holding such defendants strictly liable "is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril." Id. at 489. (quoting Rylands v. Fletcher, L.R. 1 Ex. 265, 279-80 (1866), aff'd, L.R. 3 H.L. 330 (1868)).

The court adopted the Restatement's six factor test for determining whether an activity is abnormally dangerous:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. at 491. The court applied four of these six factors and found that the disposal of toxic waste is an abnormally dangerous condition. The Ventron court concluded that "a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others." Id. at 488. In reaching this conclusion, the court evaluated the Restatement factors. The court found that pollution from toxic wastes necessarily harms the environment, that the magnitude of such harm is great, and that no safe way exists to dispose of mercury by simply dumping it. The court specifically commented that while the disposal of toxic waste may be beneficial to society, "the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it." Id. at 493. (quoting Restatement (Second), 520 comment h at 39).

Applying these factors, this court reaches the same conclusion. The damage to the contaminated sites resulted from both the active disposing and accidental spilling of hazardous substances. The resulting harm was great. Just as with the defendants in Ventron, Exxon is not saved by the fact that its activities produced some benefit to society.

At oral argument, Exxon sought to procedurally distinguish Ventron from the instant motion. The trial court in Ventron made its ruling after a fifty-five day trial. Id. at 482. Exxon also cited to T & E Industries, Inc. v. Safety Light Corp., 123 N.J. 371, 391 (1991), which stresses the fact-sensitive application of the Restatement factors and cautions against *per se* rulings. This court is aware of the Supreme Court's commentary in T & E, but nonetheless, has no problem entering judgment for DEP.

The fact that the substantive controlling law requires a fact-sensitive analysis is not enough, by itself, to defeat a motion for summary judgment. Rather, "a court should deny a summary judgment motion *only* where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill v. Guardian Life Ins. Co., 142 N.J. 520, 529 (1995) (emphasis in original). While there may be disputed issues of fact concerning the extent of the *damage* that has occurred, the facts that relate to the basis of *liability* are not disputed. It is undisputed that during its operation and ownership of the subject properties, Exxon discharged hazardous substances. DEP is entitled to summary judgment on its claim of public nuisance as to liability. DEP is left to its proofs as to damages.

While DEP's motion is primarily premised on establishing Exxon's liability for its common law claims, the parties also addressed issues of damages. Exxon correctly points out that the extent and magnitude of the damages are clouded with issues of fact. This court cannot make any findings, as a matter of law, as to the extent of damages.

However, In re Lead Paint Litigation is instructive concerning the damages available at common law for a public nuisance. Under the Restatement, a private party has the right to sue for damages. 191 N.J. at 428. "Conversely, however, the public entity, as the modern representative of the sovereign in public nuisance litigation, has only the right to abate." Id. The right to abate includes "the right to visit upon the owner of the land from which the public nuisance emanates, the obligations, including the costs, of the abatement." Id. The court continued, stating explicitly that "there is no right either historically, or through the Restatement (Second)'s formulation, for the public entity to seek to collect money damages in general... Rather, there is only a private plaintiff's right to recover damages through an action arising from a special injury." Id.

DEP cites to § 921 of the Restatement that provides "[i]f one is entitled to a judgment for harm to land..., the damages include compensation for... (b) the loss of use of the land." This language is taken from the Restatement's general section on damages. Section 821 is more specific and should be applied as the Supreme Court interpreted it in In re Lead Paint Litigation. That section reads:

> (1) In order to **recover damages** in an ***individual*** action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.
>
> (2) In order to maintain a proceeding **to enjoin to abate** a public nuisance, one must
>
> (a) have the right to recover damages, as indicated in Subsection (1), or
>
> (b) **have authority as a public official or public agency to represent the state or a political subdivision in the matter**,

(emphasis added). Thus, in order to recover damages under a theory of public nuisance, an individual, as opposed to a public entity, must establish a special harm. However, a state agency may sue to abate a nuisance without showing a special harm. Thus, DEP is not entitled to loss of use damages on its public nuisance claim.

The fact that loss of use damages are available under the Spill Act does not change this result. In concluding that loss of use damages are statutorily authorized, the Appellate Division relied on the legislative history and intent of the Spill Act, and not the damages that would have been available at common law. See New Jersey Dep't of Environmental Protection v. Exxon Mobil Corp., 393 N.J. Super 388 (App. Div. 2007).

This court's rulings with regards to pubic nuisance liability and damages is bolstered by the Federal District Court's analysis in New Mexico v. General Electric Co., 335 F. Supp. 2d. 1185 (D.N.M. 2004). The facts of General Electric are markedly similar to the instant matter in many regards. General Electric operated an industrial facility in the State. New Mexico alleged that General Electric's activities resulted in the contamination of the State's ground water. New Mexico sued, in part, in its capacity as public trustee. New Mexico brought claims, among others, of common law public nuisance and trespass. The court found that the State "may pursue claims of common-law... public nuisance to remedy the alleged injury to the public's groundwater and to vindicate the State's interest." Id. at 1235. With regards to damages, the court noted that "[g]enerally, public nuisance claims are brought to abate" an interference with a right held by the public. Id. 1236. The court concluded that "[a]bsent proof of some discrete 'special injury' to the State's interest apart from the injury to the public's interest..., Plaintiffs may be limited to equitable relief seeking the abatement of the claimed nuisance." Id. at 1241. The General Electric court also relied heavily on the Restatement in its analysis.

DEP also seeks summary judgment on its claim of trespass. "An action for trespass arises upon the unauthorized entry onto another's property, real or personal. [A] trespass on property, whether real or personal, is actionable, irrespective of any appreciable injury. Under a trespass theory, a plaintiff may assert a claim for whatever damages the facts may lawfully warrant." Pinkowski v. Township of Montclair, 299 N.J. Super. 557, 571 (App. Div. 1997) (internal citations and quotations omitted). At common law, trespass did not require a showing of fault as a basis of liability. Ventron, 94 N.J. at 488. Additionally, the invasion must be to land that is in the exclusive possession of the plaintiff. Id. at 488-89.

Here, it is not disputed that the State is not in "exclusive control" of the Bayway and Bayonne sites. Rather, DEP argues that, pursuant to the public trust doctrine, the State has exclusive dominion and control over its natural resources, i.e. waterways and ground water. Exxon contends that holding natural resources in public trust does not equate to "exclusive control" as the term commonly implies. In National Ass'n of Home Builders v. New Jersey Dep't of Envt. Prot., 64 F. Supp.2d 354, 358 (D.N.J. 1999), the court held that land subject to the public trust cannot be properly alienated. In part, this provides the DEP with standing to bring a cause of action for public nuisance.

The essence of the public trust doctrine is that the State holds the property in trust for the people. In Arnold v. Mundy, 6 N.J.L. 1, 57-58 (1821), the court made the following distinction between land owned by the sovereign and land held in the public trust:

> Again--it is said, that although the king may be the owner of this sort of property, by the common law, yet he is not so to every intent; that he holds the *jure coronoe* **as a trustee for the people, and, therefore, cannot convey to their prejudice**. It is likened to the other dominions of the crown, which they assert he has no power to alienate; and **they run a distinction between what the king has as king, in virtue of his prerogative, and what he holds in his own right, as private property**.

(emphasis added). The gravamen of the tort of trespass is that someone has interfered with a party's exclusive possession of land. All the tort requires is a showing of an unauthorized entry. If the State is deemed to be in exclusive control of land in the public trust for the purposes of trespass, than almost any invasion, by anyone, could give the State grounds for a trespass action. Moreover, the land in the public trust is held by the State on behalf of a second party, the people. This court cannot find that land subject to the public trust is in the "exclusive possession" of the State. Accordingly, DEP's request for summary judgment on its trespass claim is denied.

Again, this court found the trespass analysis in General Electric, supra, useful. In that case, just as in this one, the State brought an action for trespass in its capacity as public trustee. The court engaged in a focused discussion of how the concept of the public trust related to the notion of exclusive possession under trespass law. The court distinguished between holding property pursuant to the public trust and owning private property. The court acknowledge that if the contaminated property was actually owned by the State that a claim of trespass would be clearly viable. General Electric, 335 F. Supp. 2d at 1233-34. However, New Mexico "assert[ed] the State's broader sovereign and public *trust/parens patriae* interests in protecting the public's right... These interests fall outside of the scope of the law's protection traditionally afforded to private landowners' right of exclusive possession by the law of trespass." Id. at 1234-35.[1]

The court also explained the theoretical tension that exists when the State claims on one hand that it holds the property in trust for the public, and then on the other hand, claims that its has exclusive possession of that same property:

> The distinction between private possessory rights and public trust interests parallels the distinction between the trespass and public nuisance causes of action: the law of trespass redresses injuries to an owner's right to actual and exclusive possession of the affected property caused by "an actual physical invasion"; in contrast..., the law of *public nuisance* redresses injuries to common rights belonging to the public as well as providing a remedy against threats to the public's health, safety and welfare.
>
> Absent the pleading of an exclusive possessory legal interest pertaining to the groundwater in question, this court concludes that Plaintiffs cannot maintain a common-law cause of action for *trespass* as against those who have allegedly contaminated the public's groundwater by releasing hazardous substances at South Valley. Instead,... they may pursue claims of common-law and statutory public nuisance to remedy the alleged injury to the public's groundwater and to vindicate the State's interest in making that groundwater available for public use.

Id. at 1235.

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[1] The Tenth Circuit has expressed approval of this analysis in this regard. New Mexico v. General Electric Co., 467 F.3d 1223, 1248 n. 36 (10th Cir. 2006) ("We agree with the district court...the State as guardian of the public trust has no possessory interest in the sand, gravel, and other minerals that make up the aquifer -- a necessary requisite to maintaining a trespass action.").

This court reaches a similar conclusion in the instant matter. The law of trespass does not provide the appropriate remedy for Exxon's activity. Public nuisance is the proper vehicle for DEP to seek redress for its injuries.

While the submissions of the parties overwhelmingly focused on the issues of trespass and nuisance, DEP also seeks summary judgment on its claim of unjust enrichment. Unjust enrichment is only available when there is no adequate remedy at law. National Amusements, Inc. v. New Jersey Turnpike Authority, 261 N.J. Super. 468, 478 (Law Div. 1992). In tort cases, "the goal is to restore the plaintiff to the extent possible to the same position he or she was in prior to the occurrence of the wrong." Maul v. Kirkman, 270 N.J. Super. 596, 618 (App. Div. 1994). Also, in order to state a claim for unjust enrichment a plaintiff must show that the defendant received a benefit. Adamson v. Ortho-McNeil Pharm., Inc., 463 F. Supp. 2d 496, 505 (D.N.J. 2007).

Here, the common law (and Spill Act) claims provide DEP with an adequate remedy at law. Allowing DEP to recover for unjust enrichment would, in essence, constitute a windfall double recovery. Such an outcome is inconsistent with ordinary tort principles of damages.

Conclusion:

Exxon behavior constituted an abnormally dangerous activity as a matter of law, and Exxon is liable for public nuisance as a matter of law. With regards to liability for public nuisance DEP's motion is **GRANTED**. However, DEP's claim for summary judgment on loss of use damages is **DENIED**. DEP's request for summary judgment on unjust enrichment is also **DENIED**. Lastly, DEP's motion for partial summary judgment on its trespass claim is **DENIED**. Counsel for DEP shall prepare and submit an order that reflects this decision.

Very truly yours,

Ross R. Anzaldi, P.J. Cv.