



# ENVIRONMENTAL LAW ALERT

August 2007

[www.sternslaw.com](http://www.sternslaw.com)

## Appellate Division Holds That DEP is Entitled to Seek Damages for Loss of Use of Natural Resources Under the Spill Act

By Jennifer L. Cordes, Esq.

In *New Jersey Department of Environmental Protection v. Exxon Mobil Corp.*, the Appellate Division considered whether an entity may be strictly liable under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.*, for damages for the loss of use of natural resources affected by the entity's discharge of hazardous substances. In this case of first impression, the court ruled that the DEP's claim for "compensatory restoration," or loss of use damages, is consistent with the Spill Act's express terms, is harmonious with legislative intent, and is in keeping with legislative directives articulated in recent amendments to the Spill Act.

In *Exxon Mobil*, the DEP asserted that "remediation" is one of the processes involved in the cleanup of a site and the removal of contaminants thereon.

According to DEP, remediation involves the cleanup of contaminants to 'risk-based' levels, whereas 'restoration and replacement' requires return of the natural resource to its pre-discharge condition (primary restoration) and replacement of the natural resource 'services and values' lost in the interim between contamination and cleanup completion (compensatory restoration). The latter includes both 'human use' and 'ecological' services, which encompass water uses such as for drinking and irrigation, and recreation such as swimming, fishing, boating, bird watching or nature viewing. Thus, as one component of NRD, DEP includes recovery for the residual injury that remains once the remedial cleanup process is completed, that is for the 'loss of use' of the affected natural resource caused by the polluter's wrong. In other words, 'loss of use' is a means of measuring the reduction of services provided by a polluted natural resource and establishing a value for its replacement.

In this case, the Company did not dispute that it was strictly liable under the Spill Act for the costs of physical restoration of natural resources damaged or destroyed by its discharge of hazardous substances (primary restoration). It also acknowledged that "loss of use" damages are available to the State under common law and other state statutes. However, the question before the *Exxon Mobil* court was whether the Spill Act afforded the State the same relief.

In reaching its decision, the court engaged in an extensive review of the Spill Act and its pertinent provisions, observing that the DEP is charged with "broad implied powers" and that the Spill Act is "consistent with the long-standing principle that the Legislature may prohibit activities that constitute a nuisance." *See In re Kimber Petroleum Corp.*, 110 N.J. 69, 74, *appeal dismissed sub nom., Kimber Petroleum Corp. v. Daggett*, 488 U.S. 935, 109 S. Ct. 358, 102 L. Ed. 2d 349 (1988); *Dep't of Env'tl. Prot. v. Ventron Corp.*, 94 N.J. 473, 494 (1983). In fact, the Appellate Division noted that New Jersey's Supreme Court has held that the Spill Act did "not so much change substantive liability as it establishe[d] new remedies for activities recognized as tortious both under prior statutes and the common law." *Ventron, supra*, 94 N.J. at 499. The DEP claimed that one of these remedies is the State's right to recover for the loss of use of natural resources injured or destroyed by a discharge, a claim embodied in both agency regulations and policy directive.

The court further noted that the Spill Act is to be liberally construed to effect its purposes and that there is a long-standing tradition of deferring, where appropriate, to an agency's interpretation of its authority. Accordingly, it held that the DEP's construction of the Spill Act is supported the statute. Specifically, the court looked to the Spill Act's definition of "cleanup and removal costs," which includes a reference to the DEP's ability to "take reasonable measures to prevent or mitigate damage to the public health, safety or welfare," in determining that loss of use damages are available. *See N.J.S.A. 58:10-23.11b.*

The court rejected Exxon Mobil's argument that the only provision of the Spill Act that imposes strict liability directly against polluters does not expressly mention "loss of use" damages. It also rejected the argument that the Spill Act's definition of "remediation" specifically exempts natural resource damages. The Appellate Division observed that the Spill Act should not be read in isolation, but as part of a whole statutory scheme.

The court concluded by saying that recent statutory amendments to the Spill Act were evidence of a "clear legislative recognition of DEP's authority to seek compensation not just for physical injury to natural resources, but also for the loss of the benefits they provide." The court found it significant that the Legislature amended the Spill Act after the DEP's adoption of its 2003 Policy Directive, "with changes that obviously reflect not only the Legislature's awareness of the agency's natural resource damages initiative," but also "that body's approval of DEP's interpretation of its regulatory powers under the Spill Act."

*Exxon Mobil* is significant in that it is the first time the Appellate Division has expanded liability for natural resource damages under the Spill Act, and may result in larger assessments against responsible parties. This case is also the first clear expression of how New Jersey courts will interpret cases filed since the DEP instituted its 2003 Policy Directive.

For more information on natural resource damages or claims under the Spill Act, please contact Jennifer L. Cordes at 609.989.5027 or [jcordes@sternslaw.com](mailto:jcordes@sternslaw.com).

*This publication is intended to provide information about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without consulting an attorney.*