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NRD claims: what's recoverable and what's not

The New Jersey Department of Environmental Protection on behalf of the state is continuing its intensive pursuit to recover compensation for Natural Resource Damages from parties characterized as "polluters". NJDEP is aggressively seeking settlements from not only recalcitrant parties, but also from those who are currently conducting remediation activities and have spent hundreds of thousands of dollars to restore contaminated sites. Under various NRD settlements, NJDEP is not only obtaining monetary damages for ground water issues, but the settlements involved responsible parties donating large parcels of land to the State for restitution for alleged NRD. By way of example, the May 15th, 2006 NJ Register, 38 N.J.R. 2219, reports that the proposed NRD Settlement Agreement between NJDEP and Southland Corporation involves a donation of 81.6 acres of real property to NJDEP, the construction of a corporate parking area, recording a public access easement which will allow the public to park and access the transferred property in constructing three trail bridges.

Due to concerns regarding expiration of the statute of limitations, NJDEP is aggressively prosecuting through litigation many NRD claims. In fact, NJDEP has allocated ap-



Heidi Minuskin

proximately \$12 million to the Passaic River litigation. This litigation involves NJDEP's demanding responsible parties to assess or restore alleged natural resource injuries to the Passaic River caused by eighteen contaminated sites within its watershed. According to NJDEP Commissioner Lisa Jackson, the \$12 million will be spent on legal and expert services, investigative expenses and other associated costs with the Passaic River initiative to force earlier remediation.

NJDEP is not just pursuing big sites. In recent months, NJDEP has filed numerous complaints against parties it deems responsible for NRD due to discharges of hazardous substances at much smaller sites. In these complaints, NJDEP is

seeking reimbursement for all cleanup and removal costs and damages, including reimbursement for restitution, unjust enrichment, loss of use, and reasonable assessment costs for any natural resources of the state.

In determining whether to settle with the NJDEP, targeted parties need to assess potential liability for the NRD claims. NJDEP characterizes natural resource injuries into two categories: ecological and groundwater injury. NJDEP calculates groundwater damages in accordance with an existing groundwater formula. However, there is no current formula being used to calculate the ecological injuries. Thus, it is difficult to fully assess the scope of potential NRD liability.

Given the substantial damages at stake and the inability to fully assess potential exposure, some parties have chosen to challenge NJDEP's right to assert NRD claims and the type of damages sought. On May 26, 2006, the Superior Court of NJ, Law Division, Union County, issued an unpublished opinion in *NJDEP v. Exxon Mobile Corporation* (UNN-L-3026-04), wherein Exxon challenged NJDEP's position that it is entitled to damages for loss of use and restoration of natural resources as a matter of law. In his opinion, Judge Anzaldi addressed two issues:

1) whether Exxon was strictly liable under New Jersey's Spill Compensation and Control Act for NRD; and 2) if strictly liable, does NRD include damages for restoration of natural resources and damages for "loss of use" for natural resources. Relying on the New Jersey Supreme Court's decision in *re Kimber Petroleum Corp.*, 110 N.J. 69(1985), the Court found that Exxon could be held strictly liable for natural resource damages for restoration as a matter of law. However, on the second issue the court found that damages for loss of use, or even loss of natural resources, are not damages which are recoverable under the Spill Act. This opinion is presently being considered for publication.

NJDEP is appealing Judge Anzaldi's decisions as it relates to the loss of use component of NRD. It is likely that as NJDEP pursues its claims in courts, other parties will challenge NJDEP's right to certain damages and the calculations of such damages. The effect of NRD will be felt not only in the huge damage claims at issue, but also in real estate transactions as NJDEP refuses to issue any no further action determinations until NRD issues are fully resolved.

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