



# COUGHLIN DUFFY LLP

CASE ALERT, NO. 21

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## New Jersey Appellate Division Rules That “Loss Of Use” Damages Are Recoverable From Polluter Under New Jersey Spill Compensation And Control Act

On June 6, 2007, the New Jersey Appellate Division, on a question of first impression, held that damages for the “loss of use” of natural resources were recoverable under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.24 (“Spill Act”). New Jersey Dept. of Env’tl. Prot. v. Exxon Mobil Corp., \_\_\_ N.J. Super. \_\_\_, 2007 WL 1610091 (App. Div. 2007). This decision is significant as it affirmatively expands the definition of “cleanup and removal costs” under the Spill Act.

Exxon Mobil Corporation (“Exxon”), for the past fifteen years, has been remediating damage resulting from its discharge of hazardous substances into the natural resources of New Jersey. In 2004, the New Jersey Department of Environmental Protection (“DEP”) sought additional recovery from Exxon under Policy Directive 2003-07 for the “loss of use” of natural resources.

The issue on appeal was whether the Spill Act allows for damages for “loss of use” of natural resources. To address the issue, the Appellate Division embarked on an extensive review of the Spill Act’s legislative history as well as related statutes. The court found “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.” Exxon Mobil, supra, 2007 WL 1610091 at \*13 (citations omitted).

In reversing the decision of the trial court, 2006 WL 1477161 (N.J. Super. Ct. Law. May 26, 2006), the Appellate Division concluded that “the DEP’s claim for ‘compensatory restoration’ -- 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 the Act’s recent amendments.” Id. at \*13. Therefore, “if DEP ultimately proves injury to the public’s use of natural resources,” Id. at \*8, it can recover the damages for the loss of use.

A number of natural resource damage (“NRD”) suits have been filed by the DEP in New Jersey under the DEP’s 2003 Policy Directive. Many of these suits have been relatively inactive due to the uncertainty over the application of the Policy Directive and the DEP’s inability to finalize a formula for calculation of damages. The Exxon Mobil decision is the first clear expression of the New Jersey Court’s application of the 2003 Directive.

If you would like further information about this decision, please contact Suzanne C. Midlige or Michael E. Carrer in our Morristown, New Jersey office.

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