

Environmental Organizations Granted Right to Appeal NJDEP's \$225 Million NRD Settlement with Exxon Mobil, but Settlement Is Upheld

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The New Jersey Appellate Division recently affirmed a trial court's approval, under New Jersey's Spill Compensation and Control Act (Spill Act), of a high profile \$225 million settlement between the New Jersey Department of Environmental Protection (DEP) and Exxon Mobil Corporation (Exxon) for natural resource damages (NRD) allegedly caused by Exxon's operation of refinery facilities in Linden and Bayonne, New Jersey.

According to the Appellate Division, a state legislator and several environmental organizations challenging the settlement were properly precluded from intervening in the NRD trial and post-trial proceeding, which would have given them procedural rights accorded a party, including a right to appeal an adverse judgment. Despite the denial of intervention, the Appellate Division allowed the environmental organizations, but not the legislator, to appeal the trial court's decision and then ruled against them, finding that the trial court properly approved the settlement.

This newly minted right of appeal granted by the Appellate Division's decision is significant, and is likely to become more so, as a practical matter, given the change in New Jersey governors from Chris Christie to Phil Murphy. The Murphy administration's Environment and Energy Transition Advisory Committee has recommended that NRD cases be pursued more aggressively. When future NRD claims are litigated, environmental organizations might now claim an unofficial seat at the settlement negotiation table despite not being allowed to intervene as parties, because they can appeal the settlement if they are not satisfied with the outcome.

As discussed in our April 2016 [client alert](#) on the trial court decision, the fact that the DEP had alleged \$8.9 billion in NRD, but settled for \$225 million, led to controversy over the adequacy of the settlement and speculation that it might have been politically motivated. The legislator and environmental organizations unsuccessfully sought to persuade the trial court to reject the settlement. The trial court denied their motion to intervene in the proceeding but allowed them to submit briefs on an *amicus* basis so their arguments could be considered fully. Having presided over the entire 66-day trial and written the first 300 pages of its opinion, the trial court described the settlement as "an accurate reflection of the strength of DEP's case" and published an 81-page opinion explaining its decision to approve the settlement. The legislator and the environmental organizations appealed both the denial of their motion to intervene and the approval of the settlement.

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With respect to the motion to intervene, the Appellate Division agreed with the trial court that the legislator and environmental organizations could not intervene at the trial court level unless they have standing in their own right “to assert a claim or defense that presents a ‘common’ ‘question of law or fact’ with the pending action.” Since neither the Spill Act nor the New Jersey Environmental Rights Act allows a private entity to pursue a NRD claim, the legislator and environmental organizations were not eligible to intervene in the trial court.

The Appellate Division, however, concluded that participation in the trial court proceeding did not preclude a right to appeal the outcome in cases of great public interest when it is likely that no one will be asserting the public’s interest opposing the trial court judgment. The Appellate Division rejected the argument that third-party appeals were precluded by the fact that the DEP was envisioned by the legislature to represent the public interest, noting that the legislature had specifically encouraged additional public involvement in NRD claims when requiring the DEP to give notice to all affected parties and the public of any proposed NRD settlement under the Spill Act. According to the Appellate Division, the legislator representing a specific legislative district lacked a sufficient “personal or pecuniary interest or property right adversely affected by the judgement” to give him standing for the appeal. The Appellate Division took a different tack with respect to the environmental organizations finding that “their broad representation of citizen interests throughout this state” was a sufficient interest to support a right of appeal.

Having found that the environmental organizations were entitled to pursue the appeal, the Appellate Division agreed with the trial court that the settlement is to be approved if the settlement is “fair, reasonable, consistent with the Spill Act’s goals, and in the public interest.” Noting the trial court’s first hand familiarity with the testimony, arguments, and submissions made during the trial and the trial court’s lengthy, reasoned explanation for the basis for its decision approving the settlement, the Appellate Division affirmed the trial court’s judgment.

The environmental organizations also argued that the DEP should be required to deposit the proceeds of the settlement into the Spill Act fund so that it would be used solely for environmental purposes. The Appellate Division concluded that there was no statutory basis for such a restriction and denied that request for relief.

A constitutional amendment adopted by New Jersey voters in 2017 changes the existing law to require that first priority for future NRD proceeds be given to “repair, restore, or replace damaged or lost natural resources of the State, or permanently protect the natural resources of the State” and allows only 10% of any NRD proceeds to be expended for non-environmental purposes.

If you have any questions regarding the issues discussed in this Alert, please contact the author, **Daniel Flynn**.