

## NJ Appellate Division Upholds Denial Of NJDEP's Claims for Natural Resource Damages

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*Greenbaum, Rowe, Smith & Davis LLP Client Alert*

**April 2012**

The Superior Court of New Jersey Appellate Division's recent decision in *New Jersey Department of Environmental Protection et als. v. Essex Chemical Corporation* affirmed the trial court's determination that the State failed to carry the burden of proof on its claims for natural resource damages in a case involving property in the Township of South Brunswick.

Essex Chemical Corporation previously owned and operated a paper products preparation facility at the site. For over 26 years, with the oversight and approval of NJDEP, the company conducted extensive soil and groundwater remediation work at a cost of \$5 million, committing to additional spending to continue the onsite and offsite cleanup of contamination.

In June 2007, the State filed an action against Essex that included claims under the Spill Compensation and Control Act (Spill Act) to recover natural resource damages resulting from discharges of hazardous substances at the property. The State sought \$5.7 million in primary restoration damages for implementation of the NJDEP's preferred remediation plan for returning the property to its pre-discharge condition in a more timely manner, and \$2.3 million in compensatory damages.

The key elements of the Appellate Division's opinion are:

- Consistent with the Appellate Division's 2007 decision in *N.J. Department of Environmental Protection. v. Exxon Mobil Corp.*, the State has the right to seek natural resource damages for contamination resulting from the discharge of hazardous substances,
- However, the plaintiffs role as the trustees of the State's natural resources and their responsibilities under the Spill Act do not relieve

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them of their burden of establishing primary restoration and compensation damages by a preponderance of credible evidence, and

- The trial court was not required to accord the NJDEP's experts any special deference, particularly where their opinions were based on economic, rather than environmental factors.

Applying these principles, the Appellate Division stated that the trial court's findings and denial of the NJDEP's claims for natural resource damages were supported by the record. The State failed to present sufficient justification for imposing primary restoration costs on Essex for implementation of NJDEP's expedited remediation plan, or show that it would be harmful to implement the company's plan. Similarly, the State's experts did not establish that their analysis for determining compensatory damages would impose costs on Essex reasonably related to injuries caused by the site contamination.

While the decision in this case does not limit the type or amount of natural resource damages that the State can recover from a responsible party, it does raise the bar for proving its case. As a result, it is likely that going forward, the NJDEP will be more selective in determining whether or not to pursue NRD claims at certain sites.

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