

Revisiting the New Jersey Superior Court's Approval of Exxon Mobil's NRD Settlement: A Closer Look at Large Natural Resource Damage Calculations

Daniel Flynn

Greenbaum, Rowe, Smith & Davis LLP Client Alert

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The decision by the New Jersey Department of Environmental Protection (DEP) to settle an \$8.9 billion natural resource damage (NRD) claim for \$225 million generated understandable controversy due to the size of the discount. The settlement was reached after 11 years of litigation and a 66 day trial, during which every aspect of the case was heavily contested. The parties relied on testimony from a total of 15 expert witnesses, all but one of whom had been challenged by the opposing party and, depending on the merits of the challenge, could have been disregarded by the court in assessing damages. The judge who presided over the trial had already drafted 300 pages of his opinion by the time he was notified of the settlement. In the 81 page opinion issued in August 2015 that examined and ultimately approved the proposed settlement, the court described the settlement as "an accurate reflection of the strength of the DEP's case." The fact that such a large reduction of an NRD claim was approved by a court that was so intimately familiar with the merits provides an important lesson: NRD claims are very complicated and need to be examined very closely by any company faced with a large NRD claim.

The litigation involved refineries in Bayonne and Linden that Standard Oil, a corporate predecessor of Exxon Mobil Corp., began to operate in 1877 and 1909, respectively. The DEP asserted its NRD claim under the New Jersey Spill Compensation and Control Act (the Spill Act), which is the state counterpart of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The damage calculation offered by DEP's expert witnesses imputed damages for the full time period these facilities were operated by Exxon Mobil and its predecessors.

Nearly every component of the NRD calculation proffered by the DEP's witnesses was disputed. For example, it included costs that were challenged as being unrelated to the discharge of hazardous substances; namely the cost of returning land that had lawfully been filled for industrial development back into marshes and reforestation of land that had been lawfully cleared. Also included was the cost of restoring the groundwater to the quality that had prevailed in 1877 and 1909, which according to Exxon Mobil essentially double-counted costs it is incurring under a separate consent agreement with the DEP for remediation of contamination emanating from the two facilities.

The disparity between the NRD alleged by the DEP and the amount accepted by the DEP in the settlement gave rise to speculation that the settlement may have been influenced by politics. In approving the settlement, the court noted that past negotiations under a prior governor had terminated when DEP

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offered to settle for \$325 million but Exxon Mobil would go no higher than \$20 million. The approval of the settlement by a court that sat through the lengthy trial and was far along in deciding the case may well indicate that the heavy discount on the damages alleged by the DEP reflected the merits of that particular NRD claim.

A takeaway from the Exxon Mobil NRD experience is that NRD calculations are a different animal than remediation costs. Remediation costs are tangible expenditures associated with the cleanup of contamination. NRD calculations are more intangible and therefore subject to speculation. For example, how are we to value the historical "lost use" of impacted groundwater that no one ever tried to use? Is it appropriate for NRD calculations to include the cost of rebuilding marshes that were lawfully filled in for industrial development? DEP and federal NRD trustees have to provide credible calculations for the total NRD they claim to have occurred. If the amount being sought is substantial, each element of the calculation should be examined closely, as was done in the Exxon Mobil case. It may be that the amount that the agency and trustees can actually recover is substantially less than the amount they have alleged.

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