

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2009

PHILADELPHIA, SEPTEMBER 18, 2008

An incisivemedia publication

ENVIRONMENTAL LAW

Protecting Natural Resources Under the Public Trust Doctrine

BY KENNETH J. WARREN

Special to the Legal

On Aug. 29, the Superior Court of New Jersey entered summary judgment in favor of the New Jersey Department of Environmental Protection, or NJDEP, and against Exxon Mobil Corp. on the NJDEP's claims for public nuisance in *NJDEP v. Exxon Mobil Corp.* The ruling demonstrates the continuing vitality of a common law cause of action to abate pollution causing injury to the public. It also underscores the public's right to control the use of resources held in trust for the public even where the state has conveyed the property on which the resources are located to a private party.

The basic facts of the case are of no surprise to persons familiar with industrial development in the early 1900s. Exxon's predecessors operated oil refineries in Linden, N.J., at the Bayway site and Bayonne, N.J., at the Bayonne site, both of which are near New York Harbor. A waterfront area of the Bayway site borders on the Arthur Kill, and two streams flowing through the site join to form Morses Creek. The Bayonne site is likewise situated near navigable waters. The two refineries were operated for several decades as an integrated petrochemical facility.



KENNETH J. WARREN

is a shareholder in the environmental practice group at Hangley Aronchick Segal & Pudlin. He is a former chairman of the American Bar Association section of environment, energy and resources. He is a member of the Board of Trustees of the Academy of Natural Sciences.

During operations at the refineries, crude oil and refined products spilled and leaked onto the sites. Millions of gallons of petroleum products are present in the soil and groundwater. Impacts to a nearby canal and surrounding creeks and former wetland areas occurred. On Nov. 27, 1991, Exxon's predecessor entered into an administrative consent order under the New Jersey Spill Act requiring it to remediate the sites under the NJDEP's direction. The remedial action is ongoing.

As a result of the AOC, to the extent feasible the two sites will eventually be cleaned to risk-based standards. NJDEP, however, also seeks to restore some or all of the sites to their natural conditions or to compensate the public for their lost use. Consequently, the NJDEP invoked the public trust doctrine in combination with a common law public nuisance claim to enjoin and abate the

nuisance allegedly resulting from the pollution and to recover damages. The NJDEP sought this relief even though the facilities located on the sites were owned and operated by Exxon. The NJDEP asserted that the public trust doctrine afforded New Jersey citizens rights in riparian property titled in a corporate name.

The public trust doctrine holds that the public has rights in public lands, waters and living resources and that the state has an obligation to preserve the resources for the benefit of its citizens. As a consequence, these public rights may not be sold, transferred or alienated, and in any conveyance the protected public uses must be preserved. The property to which the public trust attaches historically included waters that are navigable in fact and land subject to the tide. The doctrine protects this property for various commercial and personal uses such as boating, swimming, fishing and navigation.

Originating in Roman law, the ancient public trust doctrine permitted the utilitarian uses of land for public purposes such as roads or even for commercial enterprises. Most often the doctrine was invoked to allow public access to riparian lands for boating and other recreational uses. Until recently, the doctrine was only occasionally

invoked to protect environmental quality. Legal commentators have advocated application of the public trust doctrine to address environmental harms to the services and benefits that ecosystems provide. Nevertheless, statutory claims under federal and state environmental statutes such as the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA, and the New Jersey Spill Act have been a more prevalent method of pursuing environmental cleanup goals and natural resource damages.

With this background, the significance of the Exxon court's decision is apparent. The court granted judgment in favor of the state under a common law public nuisance claim seeking to preserve and restore natural resources. The decision combined the public trust doctrine with a public nuisance cause of action to overcome many perceived obstacles to the common law claims.

In its defense, Exxon contended that because New Jersey had conveyed the lands and riparian waters to its predecessor, the state no longer maintained any rights as public trustee. As a result, even if the government could compel Exxon to remediate the property to risk-based standards through statute, in Exxon's view the government had no right to seek full restoration because it was no longer a public trustee of the property conveyed.

The court disagreed. In rejecting Exxon's argument, the court cited authority holding that a private party's title to public trust property is subject to the public's right to use and enjoy the property. The public's right survives even a recorded conveyance that did not contain language reserving rights for the

public. From this principle, the court concluded that the public held and continues to hold rights in the Arthur Kill, the Kill Van Kull, Morses Creek and Piles Creek. The action of the New Jersey Riparian Amendment and Riparian Commission granting fee simple title to private parties and waiving any claim to riparian waters was not effective to vitiate public trust rights.

After determining that the public maintained rights in the contaminated property, the court next examined whether the state could vindicate these rights through a public nuisance claim. Exxon contended that NJDEP must establish a "special injury" to prove a public nuisance claim. The "special injury" requirement is found in Section 821C(1) of the "Restatement (Second) of Torts" which requires that "in an individual action for public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public." The court noted that a separate subsection, Section 821C(2), allows a public agency to maintain a proceeding to abate a public nuisance. Relying on the language of Section 821C(2), the court rejected Exxon's effort to expand the special injury requirement for individual actions to public agency actions for abatement governed by a different subsection of the "Restatement."

The court next examined a question of potentially broad applicability — whether the right to an uncontaminated environment is held in common by the public. The court referenced the "Restatement (Second) of Torts" Section 821B comment which noted the "tendency ... to treat significant interferences with recognized aesthetic

values or established principles of conservation of natural resources as amounting to a public nuisance." The court held that "the right to an uncontaminated environment is a right held common to the public." As a result, the NJDEP was entitled to a judgment against Exxon if Exxon unreasonably interfered with this common right.

Turning again to "Restatement (Second) of Torts" Section 821B, the court found that Exxon had unreasonably interfered with the common right. The court noted that the pollution at the sites raised concern for the public health, the discharge was proscribed by the New Jersey Spill Act, and Exxon had discharged contaminants over many years resulting in significant damage to the environment. Alternatively, the court cited the New Jersey Supreme Court decision in NJDEP v. Ventron Corp. as support for the conclusion that the disposal of toxic waste is an abnormally dangerous condition for which the discharger may be held strictly liable. Thus, a person causing pollution from disposal activities may be held liable for interfering with rights common to the public without regard to the benefits to society from the discharger's operations. The NJDEP was therefore entitled to summary judgment against Exxon on liability.

The NJDEP was less successful in its effort to obtain common law damages. In an earlier appeal in the case, the appellate division held that under the Spill Act, the NJDEP could recover damages for loss of use of public rights. A loss-of-use claim generally seeks compensation for the period from when the resource was first impaired until it is

restored, or for resources that cannot be restored. That decision did not address common law claims. On remand, the court noted that under the language of the “Restatement,” an individual may recover damages upon showing special harm. In contrast, a public agency that does not show special harm is entitled only to abatement. The court therefore held that notwithstanding the appellate division’s ruling under the Spill Act, the NJDEP may not recover damages under common law without a showing of special harm.

In support for limiting the NJDEP to injunctive relief, the court cited to a leading natural resource damages case, *New Mexico v. General Electric Co.* In that case, New Mexico brought claims for natural resource damages on account of pollution of the groundwater. The district court stated that absent proof of special injury, the state may be limited to equitable relief.

The New Mexico case may also presage additional issues that the Exxon court may confront. In reviewing a natural resource damages claim brought under the CERCLA, the New Mexico district court and on review the 10th U.S. Circuit Court of Appeals held that the cost of restoration was the appropriate measure of damages. These courts further held that the state’s public nuisance and negligence claims were pre-empted by CERCLA to the extent they sought damages or a remedy other than restoration, replacement or acquisition of the equivalent of a contaminated natural resource. The New Mexico courts also concluded that New Mexico had not shown a right to loss of use damages because it had not demonstrated that the pollution of the

groundwater foreclosed any use. In particular, additional groundwater was not available for appropriation regardless of the contamination, and the groundwater was replaced pending restoration.

In the Exxon action, the amount of recoverable damages likely will be vigorously contested if and when the court assesses damages under the Spill Act (or under common law if the appellate division so requires). The refinery sites have been dedicated to industrial uses for decades. Despite the court’s holding that the conveyance of the sites to private parties did not transfer or eliminate the public’s rights, proof that the public utilized the environmentally impaired property, or absent the contamination would have utilized the property, will be difficult.

NJDEP may contend that the court should examine the loss of benefits and services that the ecosystem would have provided to the public absent the pollution. For example, the wetlands, creeks and land contaminated by the spills and releases would have provided benefits such as clean water and aquatic habitat. Under this theory, the court should calculate the monetary value of these lost services as the measure of damages. Exxon is likely to argue that restoring the sites to the extent feasible and preserving resources equivalent to those not capable of restoration constitutes full compensation. Damages issues will likely continue to engender considerable debate.

The Exxon decision provides one piece of the puzzle created when long-standing common law doctrines are invoked to address environmental

issues. The decision shows that simple title vested in a private party will not preclude the state from protecting public uses and reduces the likelihood that the state will face a successful constitutional takings claim when it infringes on the property owner’s full control of its real estate. The decision also reflects a reluctance of courts to allow monetary recovery under a common law restoration claim. Significantly, almost 40 years after professor Joseph L. Sax described the potential use of the public trust doctrine to protect natural resources, courts are adapting the doctrine to modern environmental conditions and affirming the state’s right to compel restoration of contaminated land and waters. Future case law will clarify the contours of the common law rights and the scope of potential remedies. •