



Court Rules that Gas Station Defendants are Not Off the Hook for “Primary Restoration” Natural Resource Damages

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In a case before the United States District Court for the District of New Jersey, the New Jersey Department of Environmental Protection (“NJDEP”) seeks to recover natural resource damages (“NRD”) from a number of gas station defendants (the “Gas Station Defendants”) for the alleged discharge of Methyl Tertiary Butyl Ether (“MTBE”) into the groundwater at five gas station sites in northern and central New Jersey. NJDEP v. Amerada Hess Corp., Docket No. 15-6468 (Nov. 1, 2017). This past summer, the Gas Station Defendants sought leave to file a motion for partial summary judgment on the issue of whether the NJDEP could recover primary restoration natural resource damages. Under the New Jersey Spill Compensation and Control Act (the “Spill Act”), primary restoration damages are available to the NJDEP for the implementation of a primary restoration plan that would restore the environment to pre-discharge conditions more quickly than would occur through a remediating party’s proposed remediation program. The Gas Station Defendants contend, however, that such damages are only available where the NJDEP can establish that there is an “injury or threat to human health, flora or fauna” that provides a reasonable basis or justification for expedited restoration over and above the Gas Station Defendants’ planned remediation. While the Gas Station Defendants argued that a heightened legal standard should apply to claims for recovery of primary restoration damages, the District Court refused to adopt this view and determined that the burden of proof proposed by the Gas Station Defendants was not found in the Spill Act.

The Gas Station Defendants argued that the NJDEP was not entitled to primary restoration damages because the NJDEP-approved remediation plans for the MTBE contamination, once completed, would restore the contaminated groundwater to pre-discharge concentrations through the process of natural attenuation, and therefore, damages for the costs of an “expedited remediation” are not warranted. In fact, the Gas Station

Defendants took the position that the NJDEP may recover primary restoration damages only where the groundwater contamination gives rise to “an injury or threat to human health, flora or fauna” and that the NJDEP had not presented evidence of any such injury. The NJDEP argued to the contrary, that it was entitled to damages for any primary restoration plan that is “practicable,” which is a question of fact that cannot be resolved on summary judgment. The District Court agreed with the NJDEP and found that the appropriate burden of proof for claims for primary restoration damages under the Spill Act is to establish by a preponderance of evidence that the primary restoration plan is “practicable,” meaning “reasonably capable of being done” or “feasible” in light of “site-specific realities.”

The District Court noted that this inquiry is highly fact-specific and should take into account the estimated length of time required to complete the restoration plan, the cost of the restoration plan, the extent to which the restoration plan is concrete, nonabstract and readily implementable rather than abstract or conceptual, the regulatory approvals required for the restoration plan from authorities other than the NJDEP, and any other legal obstacles or barriers to the implementation of the restoration plan. The District Court went on to note that this factual inquiry should be accomplished through submission of fact and expert evidence and is generally not suitable for summary disposition. As such, it remains to be seen whether the NJDEP will ultimately prevail on its claim for primary restoration damages.

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