



The ExxonMobil NRD Settlement: Beyond The Headlines

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The litigation between the State of New Jersey and ExxonMobil over natural resource damages allegedly caused by former Exxon oil refineries in Bayonne and Linden appears to have come to a close earlier this year when the New Jersey Supreme Court rejected petitions filed by third parties challenging the State's settlement of its claims against Exxon. In particular, the State's decision to settle after trial for \$225 million—where the State had previously claimed damages of \$8.9 billion—led to several challenges to the settlement. Although the public attention surrounding the settlement focused on the large sums at stake and the attendant political controversy, the Appellate Division's February decision approving the settlement, NJDEP v. ExxonMobil Corp., 453 N.J. Super. 272 (App. Div. 2018), set important precedents in New Jersey environmental law that will outlast the current controversy. First, the Appellate Division found that one of the objectors lacked standing to challenge the settlement, a rare result in a state that has allowed liberal access to the courts to redress environmental grievances. Second, the Appellate Division also issued the first binding legal precedent in New Jersey setting forth a standard for courts to evaluate and either approve or reject the State's settlement of claims under the Spill Compensation and Control Act, N.J.S.A.58:10-23.11 et seq. (the "Spill Act").

New Jersey courts rarely reject challenges to the State's actions as an environmental regulator on the basis that the challenger, usually an environmental group, lacks a sufficient stake in the controversy, a legal concept referred to as "standing." This liberal view of standing in New Jersey is in contrast to the restrictive approach of the federal courts, which has increasingly denied access to the federal courts to those challenging government actions. ExxonMobil, however, is a rare case where New Jersey courts held that a challenger lacked such access.

Among the parties challenging the ExxonMobil settlement were environmental groups, such as the Sierra Club and

the Delaware Riverkeeper Network, and former New Jersey State Senator Raymond Lesniak. The Court held that the environmental groups had standing to challenge the settlement, but that Senator Lesniak did not. In a brief discussion, the Court concluded that Senator Lesniak did not have a sufficient “personal or pecuniary interest or property right adversely affected” by the allegedly inadequate settlement, but that the environmental groups had standing based on “their broad representation of citizen interests throughout this state.” The justification for the disparate treatment is unclear. Senator Lesniak represented the legislative district that includes the Linden refinery for decades and he lives in Elizabeth, near the Linden refinery, which would seem to qualify as the “slight additional private interest” that confers standing in cases of great public interest. The somewhat cryptic discussion of standing in ExxonMobil awaits development in future cases that could more clearly elucidate a standard for determining whether challengers have standing. It seems clear based on ExxonMobil, however, that environmental groups with a broad-based, geographically dispersed membership are more likely than an individual or a small group of people from a discrete geographical area to have standing in future similar cases.

The ExxonMobil decision also made new law for New Jersey on the substantive issue of whether the court should have upheld the terms of the settlement the State entered into with ExxonMobil. Perhaps not surprisingly, the Law Division and then Appellate Division in ExxonMobil adopted the same standard that federal courts long have used to evaluate CERCLA consent decrees: whether the proposed settlement is fair, reasonable, consistent with the goals of the statute, and in the public interest. Although the State had advocated unsuccessfully before the trial court for an even more deferential standard that would uphold its settlements absent clear and convincing evidence of fraud, federal trial courts usually have deferred to the agency defending the settlement and approved contested settlements under the standard the Supreme Court adopted. For example, the Law Division in ExxonMobil detailed the numerous litigation risks the State faced to conclude that the settlement amount was reasonable; although objectors criticized the amount as “pennies on the dollar” for the State’s claimed damages, these litigation uncertainties meant that the State might have recovered far less than \$225 million if the litigation had continued. These settlements become even more difficult to reverse on appeal, as they are “encased in a double layer of swaddling” because of the deference given to both the agency’s expertise and the evaluation of the trial court, whose decision will be upheld unless it abused its discretion.

Court review of a State settlement of Spill Act litigation is less likely to recur in the context of environmental groups’ objections to the settlement, as these cases typically do not attract the public scrutiny given to the case against ExxonMobil. Rather, ExxonMobil’s standard for reviewing settlements will be important in cases where the State brings claims against multiple defendants for contributing to the same environmental harm. This is because the Spill Act provides contribution protection to settling defendants, which may leave the jointly and severally liable non-settling defendants to bear more than their proportionate share of the liability. Thus, in the more typical situation, other defendants, rather than members of the public, challenge the settlement on the basis that the

settling party will bear an unfairly low share of the cost of remediation or natural resource damages. The ExxonMobil standard could make it rather difficult for non-settling parties to overturn future settlements that they believe are too low.

The legal principles the courts applied in approving the ExxonMobil settlement will likely outlast today's headlines. This decision may make it more difficult for objectors to challenge the State's actions as an environmental regulator, and will provide the standard for evaluating the State's settlement of complex Spill Act litigation.

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