



NJDEP's Common Law Natural Resource Damage Claims Are "Back in Business" Once Again as Defendants Now May Face Jury Trials

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In August 2018, the New Jersey Department of Environmental Protection ("NJDEP") declared that environmental enforcement was "back in business" and brought its first new litigation seeking natural resource damages ("NRD") in ten years. Loyal readers of this blog will recall that we reported in 2019 on a trial court decision that dismissed the Department's common law claims for NRD related to a former Hess oil refinery and terminal and discussed NJDEP's pending appeal of the decision: "[NJDEP's Common Law Natural Resource Damage Claims Temporarily 'Out of Business.'](#)" On April 7, 2020, the Appellate Division reversed portions of that trial court decision, reinstating NJDEP's claim for strict liability for abnormally dangerous activities and clarifying the Department's ability to recover the cost of abating a public nuisance. However, the appellate court affirmed the dismissal of NJDEP's trespass claim. As noted in our earlier article discussing this case, the survival of these common law claims gives the Department the ability, otherwise not available for NRD claims under the Spill Compensation and Control Act ("Spill Act"), to put its NRD claims before a jury and gives NJDEP a firmer basis to recover damages resulting from discharges that occurred before passage of the Spill Act in 1977.

In finding that operating an oil refinery is not an abnormally dangerous activity, the trial court relied on the decision in *Biniek v. Exxon Mobil Corp.*, 358 N.J. Super. 587 (Law Div. 2002), which held that operating a gas station is not abnormally dangerous. The trial court also held that, even if operating a refinery was abnormally dangerous, the Spill Act "subsumed" common law claims for strict liability. The Appellate Division rejected both of these conclusions. First, it rejected the trial court's analogy with a gas station as "totally inapposite." "The extent of the operations [of the refinery], its proximity to sensitive waterways and environmental areas, and the danger of the pollutants allegedly used in Hess's operations that were discharged, albeit unintentionally," satisfy the criteria for an

abnormally dangerous activity set out in NJDEP v. Ventron Corp., 94 N.J. 473 (1983). The court did not explicitly hold that all oil refineries constitute an abnormally dangerous activity, so perhaps in a future case, a smaller refinery not located adjacent to sensitive waterways might fare better in resisting a similar claim.

Second, and of greater significance for New Jersey NRD defendants, the Appellate Division held that the Spill Act did not subsume common law claims for strict liability for abnormally dangerous activities. The court based this conclusion on the savings clause of the Spill Act that provides that the statute's remedies "are in addition to those provided by existing statutory or common law," N.J.S.A. 58:10-23.1 *l v*, and statements in earlier cases about the coexistence of Spill Act and common law remedies. This portion of the Hess decision is more significant for New Jersey NRD defendants than the other portion of the abnormally dangerous activities discussion, which focused narrowly on whether a particular oil refinery was abnormally dangerous. The case seems to foreclose any other defendants from arguing—as Hess successfully argued before the trial court—that common law strict liability claims cannot coexist with NJDEP's Spill Act claims.

With respect to the public nuisance claim, the Appellate Division largely favored NJDEP's position as well. The Appellate Division, like the trial court, held that the government cannot recover money damages in a claim for public nuisance, but can seek an injunction ordering the defendant to abate the nuisance. The appeals court emphasized, however, that the government can seek reimbursement for the costs of abatement and so it "restore[d] [NJDEP's] ability to otherwise seek 'monetary relief' associated with any judgment ordering abatement of a public nuisance, if plaintiffs succeed on their claim." Thus, NJDEP can recover the cost of restoring a damaged natural resource from an NRD defendant.

NJDEP could not convince the Appellate Division to reverse the dismissal of its trespass claim, however. A trespass occurs when the defendant invades land that is in the exclusive possession of another person. The appellate court agreed with the trial court that NJDEP cannot assert a trespass for damage to groundwater and surface water resources because the State of New Jersey's public trust interest in its water resources is shared with all the people of the state; NJDEP lacks the requisite "exclusive" property interest.

After being stymied in the first trial court decision in its new NRD cases, NJDEP will be emboldened now that the Appellate Division has revived some of its common law claims. The appellate court's rejection of the proposition that the Spill Act subsumed common law claims for strict liability for abnormally dangerous activities means it is now more likely that defendants in these often highly publicized cases will have to face a jury, which, it is generally understood, is more likely to find a defendant liable and to award higher damages. The Hess decision will strengthen NJDEP's hand in its pursuit of NRD.

For more information, please contact the author Michael Kettler at mkettler@riker.com or any attorney in our [Environmental Practice Group](#)

Attorney:

Michael S. Kettler

Practice:

Environmental Law