

New Jersey NRD Decision Further Develops Case Law (And the Trend is Not Good for Property Owners)

New Jersey is the most aggressive jurisdiction in the nation when it comes to commencing natural resource damage (NRD) recovery actions. As a result, a body of case law is taking shape in New Jersey on important, unresolved issues related to the implementation of the state's NRD program.

One such issue was the subject of a July 24, 2009, letter opinion in *NJDEP v. ExxonMobil Corporation* written by Judge Anzaldi, Presiding Judge of the Civil Division, Superior Court of New Jersey (Docket No. UNN-L-3026-04). The question before Judge Anzaldi was whether the state has the right and standing to recover NRD for injuries occurring on private uplands, former tidal wetlands not subject to a state riparian claim and tidally flowed lands conveyed in fee to ExxonMobil or its predecessors.

ExxonMobil argued that the state can only recover NRD for property that is not privately held because privately held land is not subject to the Public Trust Doctrine. The Public Trust Doctrine is a legal doctrine that traces its roots back to Roman jurisprudence. It generally stands for the proposition that ownership, dominion and sovereignty over land flowed by tidal waters is held in trust by the state for the people. Under this theory, as ExxonMobil argued, the state has no right to NRD in connection with private uplands, "the area of land that allegedly is not touched by the ebb and flow of the tide." Judge Anzaldi, however, decided to read the Public Trust Doctrine expansively and found that natural resource injuries to private property are "recoverable under the Spill Act and the Public Trust Doctrine does not bar such recovery."

Next, ExxonMobil argued that the state had no cause of action with respect to current or former wetlands that were transferred to private ownership. Again, these arguments failed to gain traction with Judge Anzaldi. He noted that this argument had previously been addressed in an August 29, 2008, Appellate Division opinion that concluded that "[t]itle is not synonymous with trusteeship." Despite the grants of riparian lands made by the state to ExxonMobil or its predecessors, Judge Anzaldi held that these transactions did not terminate the state's rights as public trustee to seek NRD damages. As a result, ExxonMobil's motions for partial summary judgment related to private uplands and riparian grants were denied.

Judge Anzaldi's broad interpretation of the Public Trust Doctrine in the *ExxonMobil* case provides further support to an already aggressive New Jersey NRD program.

Please contact any member of Drinker Biddle's Environmental Group or any other Drinker Biddle lawyer if you would like a copy of the *ExxonMobil* decision.

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