

Facing Groundwater Natural Resource Damages Claims: Challenging Lost Use Not A Lost Cause

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In recent years, states have aggressively pursued Natural Resource Damages ("NRD") for the impairment of groundwater. In particular, states have alleged "lost use" or "loss of use" damages as a critical component of groundwater NRD claims.

This article highlights the State of New Jersey's groundwater NRD recovery scheme, as it has aggressively sought to recover NRD from potentially responsible parties for the last several years, and because its program – for better or for worse – has been cited as a model for other states. The article then forecasts the future of NRD claims based upon recent judicial decisions, and provides practical strategic considerations to prepare for and resolve NRD "lost use" claims.

New Jersey's Program

New Jersey was one of the first states to develop a groundwater NRD program, and remains a model for others. The New Jersey Office of Natural Resource Restoration ("ONRR"), a division of the Department of Environmental Protection ("NJDEP") in 2003 began an energetic campaign to recover NRD.¹

New Jersey's NRD program is grounded in the "Public Trust Doctrine" which provides that "public lands, waters and living resources are held in trust by the government for the benefit of its citizens."² However, the program carries the weight of statutory authority as well – including the New Jersey Spill Compensation and Control Act's ("Spill Act") strict liability provision for "cleanup and removal costs," a term defined and interpreted by courts to include the costs of "restoration and replacement" of natural resources.³ Although NRD claims involving ecological injury may also be asserted by federal co-trustees, groundwater is "the sole responsibility of the State."⁴ For both groundwater and ecological NRD, NJDEP routinely asserts claims not only for the value of the natural resources, but also for their "loss of use."

New Jersey's groundwater NRD program has been controversial since its inception, and recent judicial decisions have only heightened that controversy. Rather than evaluating the existing conditions at each site and "establishing a baseline, determining the injury, and valuing the injury," NJDEP adopted a "one-size-fits-all" approach.⁵ Groundwater is automatically deemed

"injured" when contaminants exceed New Jersey Ground Water Quality Standards.⁶ NJDEP then values the injury through a mathematical formula which takes into consideration factors such as: (1) the groundwater planning area where the plume is located; (2) the annual groundwater recharge rate for that planning area; (3) the water rate (which varies by planning area); (4) the aerial extent of the plume; and (5) duration of the plume.⁷

Cracks In The Model

Although anecdotes abound, there is a dearth of reported cases addressing NRD for the loss of use of groundwater. However, two recent decisions serve as guideposts for companies facing an NRD claim: *New Jersey Department of Environmental Protection et al. v. Exxon Mobil Corp.* ("Exxon Mobil") and *New Mexico v. General Electric* ("New Mexico").⁸ Where the *Exxon Mobil* decision provides an insightful legal analysis of a loss of use claim under New Jersey statutory law, the *New Mexico* decision underscores that courts can and will conduct a critical factual analysis of a state's loss of use claim before allowing liability to be imposed. Taken together, the decisions establish that companies can and will successfully challenge sweeping "loss of use" claims by states.

In May 2006, a New Jersey trial court determined that the NJDEP is not entitled to recover "loss of use" damages for groundwater NRD.⁹ In *Exxon Mobil*, NJDEP asserted claims for natural resource damages against Exxon Mobil for NRD allegedly caused by ongoing product discharges.¹⁰

The court noted that, in contrast with the federal Oil Pollution Liability and Compensation Act (OPA), which explicitly provides strict liability for loss of use of natural resources, state laws such as the Solid Waste Management Act and Water Pollution Control Act did not expressly provide such relief to the state.¹¹ More importantly, the court observed that the Spill Act "neither contains a provision providing for damages for the 'loss of' natural resources, nor a provision providing for damages for the 'loss of use' of natural resources."¹² The fact that the legislature "has repeatedly amended the Spill Act and has not inserted a provision providing for damages for the 'loss of use,' or even the 'loss,' of natural resources leads the court to find that such damages are not recoverable under the Spill Act."¹³ The court concluded that judicial activism on NRD claims is not warranted: "without any legislative or appellate directive, the court will not expand the definition of cleanup and removal costs under the Spill Act to include damages for loss of use of natural resources."¹⁴

Not surprisingly, New Jersey has appealed the decision. Briefs have been submitted to the Appellate Division and oral argument is scheduled for April 25, 2007.

In *New Mexico*, the state's Attorney

General sought loss of use groundwater NRD under state common law on the theory that New Mexico had lost the use of certain groundwater because of contamination allegedly caused by GE and others.¹⁵ Significantly, the record revealed that the groundwater in question was subject to onerous permitting regulations and that, during the period of alleged "lost use," all water appropriation rights had been committed via issued permits.¹⁶

The *New Mexico* court found that the State of New Mexico could not recover loss of use damages based upon the specific facts presented. In particular, the Tenth Circuit agreed with the district court's determination that use of the groundwater at issue was lost "for reasons unrelated to the contamination."¹⁷ In other words, because all "useable" groundwater was already subject to valid permits held by uninterested third parties, the court determined, New Mexico would not have been able to use the groundwater even in the absence of any contamination caused by GE. Based on these facts, the Tenth Circuit concluded that New Mexico could not show any actionable loss of use.¹⁸

Where Are We Headed?

Between the legal hurdle to loss of use damages imposed by *Exxon Mobil* and the factual challenges presented in *New Mexico*, one thing is certain – states are taking steps to respond. At least one group, the National Association of Attorneys General, is currently drafting legislative guidance addressing loss of use groundwater damages and other issues arising out of the *New Mexico* decision.¹⁹ It is reasonable to assume that states will take legislative or administrative action in the wake of these judicial decisions. Alternately, it is conceivable that some states may reassess the viability of their NRD programs.

Companies faced with an NRD claim should consider the follow issues and immediately begin the process of developing strategies to evaluate the NRD claim:

Engage outside counsel at the outset. Retaining an experienced attorney who has a working knowledge of the issues and the players will prove critical to the outcome of resolving any NRD claim. In developing a defense strategy, companies must consider at least the following threshold issues: Is the State the appropriate (and only) trustee? Are there procedural or statute of limitations challenges to be made? What, if anything, can be learned from prior settlements entered into by a particular state? Is insurance coverage available?

Engage a consultant/economist with technical expertise and negotiating experience. Comprehending the state's claim against the company is key to a successful defense and/or settlement negotiations. To assist with this, engage a consultant and/or economist early in the process. An experienced consultant can help you examine the application of the state's groundwater calculation and

to consider whether a "resource-to-resource" settlement approach is feasible. The consultant should be familiar with prior NRD settlements in the state and with the states' preferences for land or other in-kind settlements, in lieu of cash. Where appropriate, also consider retaining an expert who is knowledgeable on land valuation.

Challenge the formula's numbers. It is essential to work with counsel and your consultant to identify weaknesses in the state's assumptions or inconsistencies in its approach. For example, if there is a claim to be made that the subject groundwater plume is diminishing in size due to remedial efforts, challenge the state's use of a static plume size. Question whether the entire plume consists of "useable" water. Consider challenging the duration of the plume by identifying relevant historical data relating to the beginning of contamination, and by identifying data suggesting that the remediation could end earlier than projected in the formula.

Keep an open mind about settlement. While it is important to evaluate any settlement opportunity offered by the state, it is critical to simultaneously develop a litigation strategy. The novel scientific issues presented by NRD claims have not been fully tested or accepted by the courts. It is only a matter of time before more cases wend their way through the courts, and companies should keep abreast of all judicial developments.

Be proactive. Savvy NRD defendants and those with potential exposure are keeping their legislative agents tuned into proposed amendments to the enabling statutes that form the basis of the states' NRD claims, and are preparing appropriate challenges.

¹ NJDEP Office of Natural Resource Restoration ("ONRR") website; See, Bradley M. Campbell, *NJDEP Policy Directive 2003-07*, ¶ 1, September 24, 2003, ("Policy Directive").

² NJDEP ONRR website; See, e.g., State Dept. of Envtl. Prot. v. Jersey Central Power and Light Co., 133 N.J. Super. 375 (App. Div. 1975); rev'd on other grounds, 69 N.J. 102 (1976).

³ N.J.S.A. § 58:10-22.11g(c)(1); § 58:10-22.11b; See, In re Kimber Petroleum Corp., 110 N.J. 69, 85 (1988).

⁴ NJDEP ONRR website.

⁵ Israel, Brian D., *Natural Resource Damages*, in ENVIRONMENTAL LAW PRACTICE GUIDE, 2006, Section 32B.05[3].

⁶ NJDEP ONRR website.

⁷ NJDEP ONRR website.

⁸ New Jersey Dept. of Envtl. Prot. et al. v. Exxon Mobil Corp., No. UNN-L-3025-04 (Law Div. May 26, 2005); on appeal at No. A-6589-05T5; *New Mexico v. General Electric*, 457 F.3d 1223 (10th Cir. 2006).

⁹ See, *Exxon Mobil*.

¹⁰ *Exxon Mobil*, slip. op. at 2.

¹¹ *Id.* at 7.

¹² *Id.* at 8.

¹³ *Id.* at 6-9.

¹⁴ *Id.* at 9.

¹⁵ 457 F.3d at 1235; See, 43 C.F.R. § 11.10.

¹⁶ *Id.* at 1252.

¹⁷ *Id.* (emphasis in original).

¹⁸ See, *Id.* at 1250-51 (citing N.M. STAT. ANN. § 72-12-1); Tenth Circuit Rules That CERCLA Natural Resource Damages Provisions Block State Common Law Claims for Damages, CHEMICAL WASTE LITIGATION REPORTER, Vol. 53, No. 1, p. 53.

¹⁹ States Draft Guide for Groundwater NRD Claims Following Key Ruling, INSIDE EPA'S SUPERFUND REPORT, Vol. XXI, No. 1, p. 4.

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