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NEW JERSEY DEP'T OF ENV.	:	SUPERIOR COURT OF NEW JERSEY
PROTECTION, ET AL.	:	COUNTY OF GLOUCESTER
Plaintiff	:	CHANCERY DIVISION
	:	
	:	DOCKET NO. GLO-L-000297-19
	:	
	:	
EXXONMOBIL CORPORATION,	:	CIVIL ACTION
	:	
Defendant	:	<b>OPINION</b>

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DATE OF HEARING: February 14, 2020  
DATE OF DECISION: February 14, 2020

Plaintiffs: NJ DEP, Commissioner of NJ DEP, Admin. Of NJ Spill Compensation Fund. - Richard Engel, D.A.G., Allan Kanner, Esq., Special Counsel to A.G., Elizabeth Petersen, Esq., *Pro Hac Vice*, Allison Brouk, Esq., *Pro Hac Vice*

Defendant: Exxon Mobil Corp., - David Edelstein, Esq., Marc Rollo, Esq, Diane Sullivan, Esq., Richard Heaslip, Esq.

**I. OVERVIEW**

The New Jersey Department of Environmental Protection, the Commissioner of the New Jersey Department of Environmental Protection, and the Administrator of the New Jersey Spill Compensation Fund ("Plaintiffs"), filed for an order granting partial summary judgment on the issue of liability under the Spill Act and for payment of the state's Natural Resource Damage Assessment costs. Plaintiffs assert that the material facts demonstrate that ExxonMobil is liable under the Spill Act as an owner of property where hazardous substances were discharged, as

a discharger, and by virtue of being a party in any way responsible for said discharge. Defendant argues that it cleaned up the Lail Site and installed Berms to prevent sediment from entering the waterways and to prevent fish from entering the embayment. Defendant states that its efforts in cleaning up the site were deemed a "success" by the DEP, as recently as December 2019, only to be reengaged in litigation for the costs of a Natural Resource Damage Assessment which was not required when the DEP issued a "No Further Action" letter in 2012.

For the reasons that follow, summary judgment is in favor of plaintiff granted on the issue of liability for cleanup and remediation under the spill act. Plaintiff's request for upfront payment of assessment costs is denied as there are factual issues surrounding the migration of aluminosilicate materials and PCBs from the Lail Site.

## **II. FACTS**

1. In 1999, Mobil Corporation merged with Exxon Corporation and formed ExxonMobil Corp., defendant.
2. Defendant is a corporation organized and existing under the laws of the State of New Jersey, with its main place of business located at 5959 Las Colinas Blvd., Irving, TX, 75039-2298.
3. Exxon Mobil is a "person" within the meaning of N. J. S. A. 58:10-23.11(b).

4. Exxon Mobil acquired the Lail Property from Thomas Lail in or about 1999.
5. The Lail Property consists of approximately 12.46 acres of real property located at Cohawken and Berkeley Road, Paulsboro, Gloucester County, New Jersey, and has been designated with Site Remediation Program Interest No. G000006032 by the New Jersey Department of Environmental Protection.
6. In the 1950's during the construction of Route 295, the Lail Property was filled with waste materials from the former Mobil Paulsboro Refinery.
  - Defendant disputes this fact. During the construction of I-295, the Lail Site was used as a borrow pit. Defendant states that the refilling activities are unclear because discovery was not performed, however, some aluminosilicate materials from the Mobil refinery were used as fill in limited areas of the property.
7. The Lail Property is located in a tidal area of the Delaware Estuary and is adjacent to a portion of Mantua Creek.
8. The tidal influence connects the Lail Property and embayment to the Little Mantua Creek and Mantua Creek.

- Defendant disputes this fact. Defendant states that it is unaware of any connection between the embayment and the Little Mantua Creek. Defendant also states that investigations have demonstrated that migrations as suggested by Plaintiff did not occur.

9. Mantua Creek communicates with the Delaware River Estuary.

10. Mantua Creek and its associated wetlands and mudflats border the embayment from north to southeast with I-295 forming the northwest border.

11. Because of the communication between the embayment and the associated wetlands, ExxonMobil was required to install two berms in connection with the Interim Remedial Measures taken at the Lail Site to "reduce the movement of biota and tidal flow to and from the embayment."

- Defendant disputes the suggestion the hazardous material migrated from the embayment. Defendants investigations approved by the DEP reveal that sediments and other material from off-site sources were carried into the embayment by tides and remained there. Defendant states that Berms were used to prevent off-site sediments/materials from refilling the excavation area.

12. PCBs are the primary hazardous substances discharged from and present at the Lail Site.

- Defendant disputes this fact. Defendant states that plaintiffs have not produced evidence that PCBs are currently present at the Lail Site at concentrations harmful to human, animal, or environmental health.

13. PCBs were commercially produced for industrial application in heat transfer systems, hydraulic fluids, and electrical equipment. They were later incorporated into other uses such as printing inks, paints, and pesticides. The manufacture of PCBs was stopped in 1979 as a result of evidence that PCBs build up in the environment and cause harmful effects. PCBs tend to stay mostly in the soil and sediment but are also found in the air and water.

14. Once PCBs enter the food chain, they have a tendency to absorb into fat tissue. PCBs build up in fish to levels that are hundreds of thousands times higher than the levels in the surrounding water. When people consume fish that have already accumulated PCBs, the PCBs then accumulate in their bodies.

- Defendant disputes this fact as a vague generalization. Defendant states there is no

evidence of the elevated PCB levels represented by Plaintiff or that elevated PCB in humans is tied to consumption of affected fish.

15. PCBs have been shown to cause cancer in animals, and there is evidence that PCBs may cause cancer in exposed humans. PCBs have also been shown to cause a number of serious health effects besides cancer in humans and animals, including effects on the nervous systems of developing fetus, the immune system, and the reproductive system. Studies have show that unborn and young children are most a risk to PCB exposure.

- Defendant disputes this as a vague generalization. Defendant states there is no evidence that humans, animals, or plants have been adversely affected by PCBs at the Lail Site.

16. PCBs are organic chemicals that were banned in the United States in or about 1979.

17. Due to elevated concentrations of PCBs in the tissues of fish caught in the Delaware River Basin, the State of New Jersey has issued fish consumption advisories for this region.

- Defendant does not dispute this fact but disputes the connection suggested by Plaintiff that the

advisories were issued because of migrations from the Lail Site.

18. In the late 1980's, the states of New Jersey, Delaware, and Pennsylvania, first identified the Delaware Estuary as impaired on their respective lists pursuant to Section 303(d) of the Clean Water Act ("CWA"), 33 U.S.C § 1313. The states identified the impairments based on their findings of elevated levels of PCBs in the tissue of fish caught in this portion of the Delaware River. The listing was based upon failure to attain one of the estuary's primary designated uses - fishable waters - and the inherent protection of human health from consumption of unsafe fish.

- Defendant does not dispute this fact but state that it is immaterial to the motion for summary judgment because plaintiff has not established a connection between conditions at the Lail Property and the Delaware River.

19. Today, the Delaware, New Jersey, and Pennsylvania advisories cover the entire Delaware estuary and bay. The advisories range from a no-consumption recommendation for all species taken between the C&D Canal and the Delaware Pennsylvania border to consumption of no more

than one meal per month of striped bass or white perch in Zones 2 through 4.

- Defendant disputes for lack of knowledge.

20. On December 9, 1993, ExxonMobil entered into a Memorandum of Agreement "MOA" with the State of New Jersey and Mr. Thomas Lail related to the removal of drums and associated contaminated soil from the Lail Property.

21. The drums were removed from the property by 1995 but PCB contamination remains in the groundwater, surface water, sediments, and soil at the Lail Site, including the embayment, wetlands, and upland areas, despite interim remedial measures undertaken in the late 2000s.

- Defendants do not dispute that drums were removed from the Lail Property. Defendant disputes the rest of the paragraph as the site was remediated under the supervision of the NJDEP. Based upon sampling data submitted by Defendant, NJDEP agreed that no further remedial action was necessary. In December 2019, NJDEP concluded that the remediation was a success.

22. ExxonMobil has conducted certain remedial activities at the Lail Property pursuant to an Administrative Consent Order with DEP dated October 4, 2005.



23. An Interim Remedial Measure ("IRM") was performed by ExxonMobil's environmental contractor, Arcadis U.S., Inc. ("Arcadis"), as art of site remediation measures at the Lail property.

24. ExxonMobil performed an Ecological Risk Assessment at the Lail Property following implementation of the IRM.

25. ExxonMobil's Remedial Action Work Plan indicates that ExxonMobil's proposed final remedy under the Site Remediation Program will include in part

- a. Maintaining engineering controls at the site in the form of a chain-link fencing during upland restoration planting and monitoring to effectively restrict access to the property at least until vegetation becomes a natural barrier for restricting site access.

- b. Implementing institutional controls in the form of a deed restriction using a Conservation Restriction/Easement. If a Conservation Easement cannot be obtained the site will be deed restricted to non-residential use.

- c. Implementing a program for monitoring engineering and institutional controls at the site and providing the NJDEP with a certified biennial deed notice monitoring report.

d. Conducting a biological monitoring for terrestrial and aquatic habitats which were remediated as part of the IRM in accordance with the Biological Monitoring Plan included in appendix A.

26. Because the Lail property has not been remediated to an unrestricted use, it will be the subject of a deed restriction in perpetuity due to the contamination that remains at the property.

- Defendant disputes this fact. Defendant states that the Lail Site is now a functioning, healthy ecosystem, and the deed restrictions that are in place ensure its preservation in the future.

27. ExxonMobil has not received a "No Further Action" letter from the Department regarding contamination issues at the Lail site other than those specific to the removal of certain drum carcasses and associated contaminated soils from a limited area at the Lail Site.

- Defendant does not dispute that it received a no further action letter in connection to the drums, however, disputes all remaining contentions. Defendant states that it received specific approval letters indicating its compliance with all requirements and regulations at the site.

28. The 1996 "No Further Action" letter does not reference or release ExxonMobil's natural resource damage liability.

- Defendant does not dispute this fact but states that it does not need an explicit release to have complied with regulatory obligations.

29. The 1996 NFA expressly states that it "shall not restrict or prohibit the Department or any other agency from taking regulatory action under any other statute, rule, or regulation.

- Not disputed by Defendant states that Plaintiff did not take any regulatory action for twenty-two (22) years after issuing the letter.

30. ExxonMobil's LSRP has not issued a RAO for the Lail Site.

31. An RAO, if issued pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N. J. A. C. 7:26:C, et seq., would not include an evaluation of natural resource damages.

32. In the 2017 Arcadis Report entitled, *Biological Monitoring Technical Memorandum - Year 5 and Overall Summary*, which was submitted to the Department by ExxonMobil's environmental contractor Arcadis, Arcadis reported certain results of sampling required under the

Site Remediation Program. These results demonstrated that 23 of 30 small mammal and fish tissue PCB sampling analyses performed detected PCBs in the tissues of those mammals and fish collected.

- Disputed as to the suggestion that site conditions pose any risk or that the cited sampling results indicate any natural resource injuries. Based on the results of the monitoring Arcadis concluded that the remediation efforts were successful at reducing PCB concentrations and there is no unacceptable risk.

33. In 2010, ExxonMobil proposed that no additional remedial measures be taken at the Lail Site.

- Defendant disputes this statement as not based in fact. While undisputed that defendant recommended no further action, no contamination risk exists.

34. In January 2012, ExxonMobil submitted a final, site-wide Remedial Action Work Plan that considered all of the prior remedial work that has been done at the Lail Site and itself "concluded that no further remedial action other than continued biological monitoring and maintenance of institutional controls was required."

35. No natural resource damage evaluation or assessment is referenced in connection with the 2012 RAWP or the administrative file for the Lail Property.

- Disputed. Under NJDEP rules potential natural resource injuries are supposed to be evaluated through the performance of an ecological evaluation and risk assessment. Both of those studies were performed by Defendant. The studies indicated that there was no continued risk to plants or animals, NJDEP approved this conclusion on March 1, 2012.

36. A natural resource damage assessment for the Lail Site has not been performed.

- Disputed for the same reasons as #35.

37. It is unknown how far off-site its pollution has travelled.

- Disputed. Defendants fully delineated the extent of PCBs during its remedial actions at the property. Studies conducted by Defendant concluded that materials did not travel off site.

38. Because an NRDA has not been undertaken by or on ExxonMobil's behalf for the Lail Site, the performance of such a study is not duplicative of the prior site remediation performed for the Lail Site.

- Disputed. No further assessment is appropriate or necessary.

39. Plaintiffs filed their complaint on March 7, 2019 pursuant to the New Jersey Spill Compensation and Control Act and the Water Pollution Control Act and the common law for natural resource damages. Plaintiffs also filed for injunctive relief associated with ExxonMobil's discharges of hazardous substances and pollutants at the Lail Site.

40. Defendant filed a motion for more definite statement on June 21, 2019, which was denied on October 25, 2019 following briefing and oral argument.

41. Defendant provided plaintiff its answers and affirmative defenses on November 25, 2019.

Defendant's counterstatement of facts is largely uncontested.

### **III. ARGUMENTS**

#### **(a) Plaintiffs**

Plaintiffs advance that the material facts demonstrate that ExxonMobil is liable under the New Jersey Spill Compensation and Control Act ("Spill Act"), N. J. S. A. 58:10-23.11a. et seq., as an owner of property where hazardous substances have been discharged, or as a discharger of hazardous substances, or as a person in any way responsible for those discharged substances under the joint and several liability

provision of the Spill Act, N. J. S. A. 58:10-23.11g.c(1).

Plaintiff states that defendant's liability under the Spill Act obligates its funding of the state's Natural Resource Damage Assessment, including costs already incurred and future costs on an on-going basis.

Plaintiffs state that defendant's discharges at the Lail site began in the 1950's when drums containing petroleum were dumped on the property. Plaintiff alleges that the drums contained hazardous substances, including various forms of petroleum distillates and aluminosilicate materials containing polychlorinated biphenyls. According to plaintiff the discharges from the Lail site damaged or destroyed natural resources at the site and in the areas where the substances have migrated.

Plaintiff states that PCBs have been found in the ground water, surface water, and aquatic animals in the areas surrounding and connected to the Lail Site by the communication of various waterways. Plaintiff alleges that captured fish and aquatic animals have exhibited PCB levels hundreds of thousands times higher than safe level. As a result, advisories have been issued in the waterways connected to the Lail Site warning consumers to either avoid or significantly limit their consumption of fish captured in those waterways. Plaintiff states that the PCBs have been shown to cause cancer in fish and

aquatic animals as well as in the humans who consume affected fish.

Plaintiff argues that by virtue of its undisputed liability under the act the court must grant summary judgment on the issue of liability and seeks an order obligating defendant to cover the costs of a Natural Resource Damage Assessment, and to reimburse past costs for the state's remediation of those areas and waterways affected by defendant's pollution.

**(b) Defendant**

Defendant argues that this is a case about monetary damages, not about the cleanup of the Lail Site. Defendant states that the cleanup of the Lail Site was completed under the supervision of the state and, in 2012, and deemed a success. Defendant states that in 2012, the NJDEP did not require defendant to conduct any further remediation, investigation, or restoration, other than biological monitoring to confirm the effectiveness of the final remediation. Defendant states that plaintiff brings its claim seven (7) years later, outside the five-and-a-half-year statute of limitations provided by the Spill Act.

Defendant argues that New Jersey Courts have routinely denied Natural Resource Damage Assessments when the DEP's Office of Natural Resource Restoration has not coordinated with the DEP's Site Remediation Program and then sought different



restoration through litigation. Here, defendant states the Lail Site was restored under the direct supervision of the Site Remediation Program.

In its restoration of the Lail Site ExxonMobil planted 5,100 trees, 935 shrubs, and 6,200 aquatic plants and then actively managed the property for seven years to ensure that the new plants were healthy and not overtaken by invasive species. Defendant states that the Lail Site is now a thriving ecosystem with environmental qualities far exceeding the condition of the property prior to the alleged contamination.

Defendant states that the strict liability standard applies to the cleanup of the Lail Site, not the issue of damages. Defendant states that to recover damages, plaintiff must establish a causal link between the defendant's alleged discharge and the specific damages sought. Defendant argues that the facts advanced by plaintiff for cleanup liability, specifically, that hazardous substances from the Paulsboro refinery were stored at the Lail Site, and that ExxonMobil cooperated with the NJDEP for the remediation and restoration of the Lail Site is not sufficient to conclude that it is liable for plaintiff's alleged damages.

Defendant states that based on the generalizations in plaintiff's moving papers, plaintiff is unable to establish a causal link between the discharges by ExxonMobil and the alleged

damages. Defendant states that numerous environmental assessments have established that the PCBs did not migrate from the Lail site, and in fact PCBs entered the embayment from the Mantua Creek and Delaware Estuary, and not the other way around as argued by plaintiff. Therefore, defendant argues, summary judgment should be denied.

**(c) Plaintiff's Reply**

Plaintiff's reply bolsters its argument for an upfront award of the costs. Plaintiff argues that the legislature intended that the Spill Act be construed liberally to assist the DEP in effecting its purposes. New Jersey Dep't of Environmental Protection v. ExxonMobil Corp., 393 N.J. Super 388, 401.

Plaintiff argues that the state Supreme Court's holding in In re Kimber Petroleum imbues the DEP with broad implied powers. 110 N.J. 69, 74. Plaintiff argues that the request for upfront payment of assessment costs is consistent with that implied powers derived from the act.

The court takes note that Plaintiff is correct in its assertion that the Spill Act is a broad act empowering the DEP to act quickly and efficiently for the safety of the public and the preservation of our ecological systems and natural resources, however, significant remediation has already occurred at the property and defendant has produced studies indicating

that there is no unreasonable risk to plant and animal life in the area.

Absent from Plaintiff's arguments, is any direct statutory language requiring the court to order defendant to pay the costs of a natural resource damage assessment upfront. To the contrary, as defendant argues the statute provides that Plaintiff is entitled to recovery its reasonable costs of successful litigation. Therefore, an assessment done in preparation for trial would be reimbursed by defendant if plaintiff is successful in proving that PCBs did migrate from the site and contaminate the state's waterways.

The court concludes, however, that this reply does not strengthen the argument for summary judgment, because if established by Plaintiff's experts that PCBs did migrate off site, a conflict between the studies conducted by the defendant would result and a material issue would be raised for trial.

#### **IV. LAW**

##### *Motion for Summary Judgment*

Summary judgment will be granted where there is no "genuine issue of material fact requiring disposition at trial." Judson v. Peoples Bank & Tr. Co. of Westfield, 17 N.J. 67, 74 (1954).

A court should grant summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine

issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 528-9 (1995). Where the party opposing summary judgment points only to disputed issues of fact that are "of an insubstantial nature," summary judgment is the appropriate disposition. Id.

"A trial court should not grant summary judgment when the matter is not ripe for such consideration, such as when discovery has not yet been completed." Driscoll Const. Co., Inc. v. State Dep't of Tansp., 371 N.J. Super. 304, 317 (App. Div. 2004).

#### *Spill Act*

The Spill Act provides that "any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred." N. J. S. A. 58:10-23.11g(c)(1). The act also provides that "such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit[.]" Id. The Appellate Division has held that under the Spill Act "clean up and removal costs" include primary restoration, compensatory restoration, and loss of value, as well as the costs of performing the assessment.

New Jersey Dep't of Environmental Protection v. Exxon Mobil Corp., 393 N.J. Super. 388 (App. Div. 2007).

Liability is established under the Spill Act where a defendant: (1) is a person and (2) has discharged or is in any way responsible for the discharge of a hazardous substance. N. J. S. A. 58:10-23.11g(c)(1). Plaintiffs may recover "the reasonable costs of preparing and successfully litigating an action" under the act. N. J. S. A. 58:10-23.11u(b)(2).

## **V. DECISION**

### **I. EXXONMOBIL IS LIABLE FOR CLEANUP UNDER THE SPILL ACT FOR ITS DISCHARGES AT THE LAIL SITE**

The spill act applies a strict liability standard which establishes liability for any person responsible for the discharge of hazardous substances. It is undisputed based on the facts, and based on the lack of argument in opposition, that defendant is liable for cleanup of the Lail Site under the Act.

To establish liability under the spill act the plaintiff needs to prove only two facts: (1) the actor was a person within the meaning of the statute, and (2) said person was responsible in any way for the discharge of hazardous substances. "Persons" under the act include: "public or private corporations, companies, associations, societies, firms, partnerships, joint stock companies, individuals, the United States, the State of New Jersey, and any of its political subdivisions or agents."

N. J. S. A. 58:10-23.11b. ExxonMobil is a corporation organized and existing under the laws of the State of New Jersey. The court finds by clear and convincing evidence that defendant is a person within the meaning of the statute.

A "discharge" under the Act is "any intention or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying, or dumping of hazardous substances into waters or onto the lands of the State, or into waters outside the jurisdiction of the State when damage may result to the lands waters or natural resources within the jurisdiction of the State." N. J. S. A. 58:10-23.11b. ExxonMobil admits that hazardous materials, including PCBs were stored at the Lail Site. Based on defendant's admissions it is undisputed that in the 1950's the Lail Site was used for the dumping of drums containing petroleum products, waste from the Mobil Paulsboro Refinery, and other hazardous substances, including PCBs. Therefore, the court finds by clear and convincing evidence that defendant is responsible for the discharge of hazardous substances within the meaning of the statute.

Defendant is therefore liable for the full cleanup and remediation of the Lail Site, and summary judgment on this issue is granted.

**II. SUMMARY JUDGMENT IS IMPROPER AS TO THE UPFRONT PAYMENT OF THE NATURAL RESOURCES DAMAGE ASSESSMENT BECAUSE PLAINTIFF HAS NOT ESTABLISHED A CAUSAL LINK BETWEEN THE DISCHARGES AND PLAINTIFFS DAMAGES**

The legislature employed a strict liability standard for clean up under the spill act to expedite the cleanup process. Damages, under the Act, require a causal link between the discharges and the specific damages alleged. NJDEP v. Dimant, 212 N.J. 153, 182 (2012). In establishing such a link it is insufficient that a plaintiff "simply prove that a defendant produced a hazardous substance and that the substance was found at the contaminated site and 'ask the trier of fact to supply the link.'" Id. (quoting N.J. Tpk. Auth. v. PPG Indus., 197 F.3d 96, 205 (3d. Cir. 1999)).

Here, Plaintiffs have not produced evidence indicating that the PCBs found in the waterways are the same as the PCBs found in the embayment. Defendant conducted studies which the DEP approved indicating that PCBs were coming from the waterways into the embayment and not the other way around. In addition, defendant's studies indicated that the PCBs at the Lail Site did not migrate into Mantua Creek or the Delaware Estuary. These conflicting assertions without expert opinions or forensic analyses to tip the scales one way or another create issues of material fact which, at a minimum, require discovery to resolve.

Plaintiffs may recover their litigation costs under the act if their damage claims are successful and the reasonableness of those costs are established. N. J. S. A. 58:10-23.11u(b)(1). Here, plaintiff has neither succeeded on its claim for damages, discerned its costs, or established their reasonableness.

Therefore, the court finds by clear and convincing evidence that factual issues exist over the migration of PCBs into the Mantua Creek and Delaware Estuary from the Lail Site precluding the establishment of a causal link between defendant's discharges and plaintiff's alleged damages. Summary judgment on this issue is denied.

## **VI. CONCLUSION**

Summary judgment is granted as to liability under the spill act for clean up and remediation. The court shall deny the request for upfront costs for the Natural Resource Assessment as factual issues exist over whether PCBs migrated from the Lail Site.