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## Exxon Mobil Created Public Nuisance, Inviting Damages Remedy, Judge Says

By Henry Gottlieb

A judge has given the state another opportunity to pursue Exxon Mobil Corp. for the cost of cleaning up a century of pollution at two New Jersey oil refineries. Union County Superior Court Judge Ross Anzaldi ruled that the state proved that pollution caused a nuisance on lands held in the public trust or near the sites and that the only remaining issue was damages.

"While there may be disputed issues of fact concerning the extent of the damage that has occurred, the facts that relate to the basis of liability are not disputed," Anzaldi said in his Aug. 31 opinion.

"It is undisputed that during its operation and ownership of the subject properties, Exxon discharged hazardous substances," he said, granting summary judgment to the state Department of Environmental Protection on its public nuisance claim in *MIDEP v. Exxon Mobil*, ENN-L-3026-04.

Under a 1991 administrative agreement with the state, the company has identified sources of pollution and done some cleanup at the sites — 1,300 acres at the Bayway refinery in Linden and 288 acres in Bayonne. There are no public records



**TIGER IN THE TANK:** Though granting some of the company's motions, Judge Ross Anzaldi found Exxon Mobil created a public nuisance by discharging hazardous substances.

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of how much Exxon has spent under the agreement.

The case before Anzaldi is an attempt to force Exxon Mobil to go further and pay money damages or restore as much acreage as possible to a pristine state. In 2007, the state won the right to pursue money damages under the New Jersey Spill Compensation and Control Act for the public's loss of use of natural resources.

Anzaldi's Aug. 31 ruling, that Exxon Mobil is strictly liable for creating a nuisance on lands held in trust for the public, adds a common-law element to the state's case.

But he gave Exxon Mobil victories, too. He barred the state from collecting money damages for loss of use under the nuisance claim. And he denied summary judgment on the state's claim that Exxon Mobil pollution amounted to trespass on public property and that the company is liable for unjust enrichment.

The common-law and Spill Act claims provide the DEP with an adequate remedy at law, he said. "Allowing DEP to recover for unjust enrichment would, in essence, constitute a windfall double recovery," he said.

Anzaldi also is considering a defense claim that would wipe out the nuisance claim as well on a statute of limitations basis.

Exxon or its predecessors operated oil refineries at the sites from 1879 to 1993, and there was no dispute that crude oil and refined products spilled and leaked.

Indeed, by a 1977 estimate, the soil at the Bayonne site contained seven million gallons of oil, ranging in thickness from seven to 17 feet, and massive discharges into the creeks had flowed into the waterways between New Jersey and Staten Island.

Exxon argued that the refinery sites were not lands held in public trust so the state could not claim the company had created a nuisance affecting the public.

But Anzaldi agreed with the state's outside lawyers, Allan Kanner of Kanner & Whiteley in New Orleans and Bruce Nagel of Nagel Rice in Roseland, that courts facing similar issues have accepted the public nuisance theory as a tool for environmental enforcement.

"The damage to both the contaminated sites resulted from both the active disposing and accidental spilling of hazardous substances," Anzaldi ruled. "The resulting harm was great."

In a news release lauding the ruling, the Attorney General's Office said on Wednesday, "Judge Anzaldi accepted the state's argument while rejecting Exxon Mobil's contention that the state relinquished its trust interest in these natural resources when it conveyed grants to Exxon Mobil and its predecessors in the late 19th and early 20th centuries."

While the state has prevailed on the Spill Act and common-law nuisance claim, it needs to pass hurdles before getting to trial.

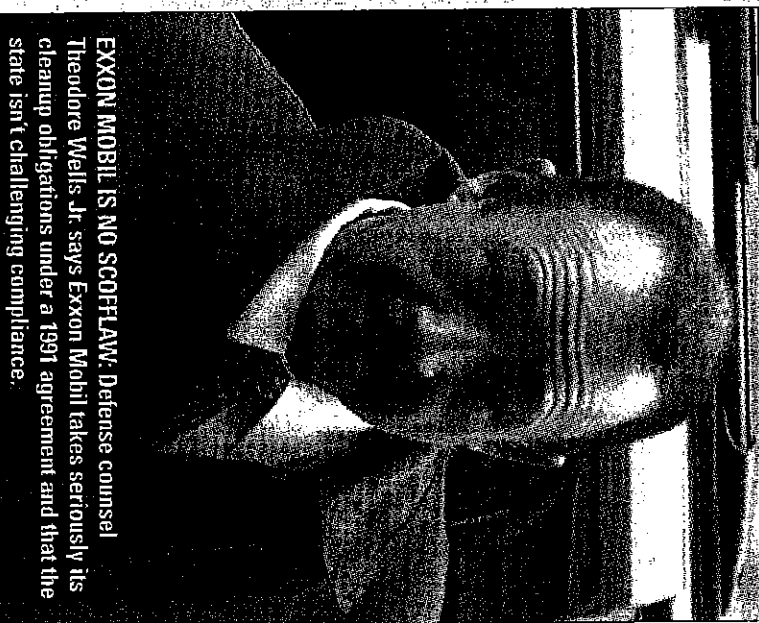
Anzaldi is considering an Exxon Mobil summary judgment argument that the Spill Act, adopted in 1977, should not be applied retroactively. The company also has moved to dismiss the common-law claim on grounds that the statute of limitations for the state's claim expired in 2001.

Deputy Attorney General Richard Engel, who is supervising the litigation for the state, says of the nuisance claim, "What we would like them to do is restore as much of the site as they possibly can to pre-discharge condition," he says. In the case of Bayway, that would cover a few hundred of the 1,300 acres.

Another option would be for Exxon Mobil to arrange to clean up polluted acreage elsewhere, he says.

Exxon Mobil's lawyer, Theodore Wells Jr. of Paul Weiss in New York, says argument pending before Anzaldi will define the areas for which the state can seek compensation.

"What remains unclear is whether the DEP could prove any natural resource damages given that the sites at issue, Bayway and Bayonne, have operated as refineries or industrial facilities,



**EXXON MOBIL IS NO SCOFFLAW:** Defense counsel Theodore Wells Jr. says Exxon Mobil takes seriously its cleanup obligations under a 1997 agreement and that the state isn't challenging compliance.

PHOTO BY DIEGO M. RAZINSKI

from which members of the public are excluded," Wells says.

"Since 1991, Exxon Mobil has been cleaning up the sites under the state's supervision, at a cost of millions of dollars, pursuant to administrative consent orders with the New Jersey DEP," Wells says. "Exxon Mobil takes its environmental responsibilities very seriously and has met its obligations under these agreements and will continue to do so. This lawsuit does not involve concerns about the cleanup of the sites, which is provided for under the administrative consent orders." ■

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