

### New Jersey Court Dismisses NJ DEP Claims in NRD Case

A New Jersey court has dismissed the New Jersey Department of Environmental Protection's ("NJDEP") common law claims for trespass and strict liability, and its common law public nuisance claim for monetary relief, in an action seeking natural resource damages ("NRD").

In August 2018, NJDEP filed three new actions to recover alleged NRD, the first such actions filed in New Jersey in more than a decade. NRD actions involve claims for the restoration of injured natural resources, and for loss to the value and use of natural resources, including surface and ground water, sediments, wetlands, and biota. The NJDEP and the New Jersey Attorney General's office described the three new NRD actions as heralding a "new day" for environmental enforcement in New Jersey, and representing just the first of many such actions to be filed in the months to come as the NJDEP moves to more aggressively pursue NRD claims.

One of those cases, [New Jersey Department of Environmental Protection, et al. v. Hess Corporation, et al.](#), Docket No. MID-L-4579-18, involves a former petroleum refinery, now used as a terminal, located in the Port Reading section of Woodbridge, New Jersey. NJDEP, represented by New Orleans attorney Allan Kanner, alleges that several releases of petroleum products over the years have adversely impacted various natural resources at the site. The Complaint asserts claims under New Jersey's Spill Compensation and Control Act ("Spill Act") and Water Pollution Control Act, as well as common law claims for trespass, public nuisance, and strict liability for an alleged abnormally dangerous activity.

Defendants Hess Corporation and Buckeye Partners, L.P. moved to dismiss the trespass claim and the strict liability claim, and to dismiss the public nuisance claim to the extent it sought monetary relief, rather than the injunctive remedy of abatement. In a decision entered on December 21, 2018, the Honorable Thomas D. McCloskey, J.S.C., granted the defendants' motions to dismiss, with prejudice.

The court agreed with the defendants that only a party having "exclusive possession" of property may bring an action for trespass. NJDEP, citing the Public Trust Doctrine, argued that it has a "controlling" interest over the natural resources at the refinery site superior to that of anyone else - even the title owner in possession of the site. Pointing out that a trusteeship interest inherently is non-exclusive, and that ultimate ownership of the natural resources rests in the citizens, the court held that the plaintiffs' allegations of trusteeship over the natural resources at the refinery site failed to state a valid trespass claim under New Jersey law. In dismissing the trespass claim, the court also observed that the law of public nuisance redresses common injuries belonging to the people as a whole, rendering it unnecessary and inappropriate to attempt to stretch the doctrine of trespass to cover such injuries.

The court also dismissed, in its entirety, NJDEP's claim of strict liability for an abnormally dangerous activity. The court observed that the NJDEP failed to cite any binding authority for the proposition that the storage and processing of crude oil and refined petroleum products is an "abnormally dangerous activity" under New Jersey law, and also observed that storage of gasoline products had already been determined by another court not to be an abnormally dangerous activity. The court further noted that the Spill Act was enacted specifically to impose strict liability on persons responsible for causing or contributing to injuries to natural resources. Judge McCloskey found, therefore, that the NJDEP's common law strict liability claim was subsumed within its Spill Act claim. On these two bases, the court dismissed the common law strict liability claim.

The defendants further sought dismissal of NJDEP's public nuisance claim, but only to the extent it sought monetary relief. New Jersey's Supreme Court, relying upon Restatement (Second) of Torts § 821(C), previously held that a public entity pursuing a public nuisance action only has the right to seek abatement, and that monetary damages are not available. See [In re Lead Paint Litigation](#), 191 N.J. 405, 428 (2007). NJDEP attempted to characterize the monetary relief sought - payment of future costs for physical restoration of natural resources - as abatement. However, in [In re Lead Paint Litigation](#), New Jersey's Supreme Court dismissed as improper a public nuisance claim for similar relief - the advance payment of anticipated costs to abate the alleged public nuisance. Relying on that precedent, Judge McCloskey held that the only relief that the NJDEP is entitled to seek under its public nuisance claim is the injunctive remedy of abatement.

This decision in the Hess case may have significant ramifications for how NRD cases are litigated in New Jersey. Motions to dismiss the common law claims are already pending in two other recently filed NRD actions. If other courts adopt and follow Judge McCloskey's lead, then the NJDEP may be limited to statutory claims in pursuing NRD actions, streamlining and limiting the issues to be litigated.

Archer & Greiner, P.C. represented Hess Corporation in the briefing and arguing of the motion to dismiss.

If you have any questions or would like more information, please contact [Christopher R. Gibson](#), [Marc A. Rollo](#), [Patrick M. Flynn](#) or [Matthew Conley](#) in Archer's [Environmental Law Group](#) at 856.795.2121.

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