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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0316-09T2

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Plaintiff-Appellant,

v.

EXXON MOBIL CORPORATION,

Defendant-Respondent.

Argued January 25, 2011 - Decided May 31, 2011

Before Judges Carchman, Graves and Waugh.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket Nos. L-3026-04 and L-1650-05.

Richard F. Engel, Deputy Attorney General, argued the cause for appellant (Paula T. Dow, Attorney General, attorney; Mr. Engel, Allan Kanner (Kanner & Whiteley), Rebecca J. Davis (Kanner & Whiteley), and Elizabeth B. Petersen (Kanner & Whiteley) of the Louisiana bar, admitted pro hac vice, of counsel and on the brief).

Theodore V. Wells, Jr. (Paul, Weiss, Rifkind, Wharton & Garrison) argued the cause for respondent (Archer & Greiner, P.C., and Mr. Wells, attorneys; Marc A. Rollo, Steven J. Fram, Arthur H. Jones, Jr., Daniel J. Toal (Paul, Weiss, Rifkind, Wharton & Garrison) of the New York bar,

admitted pro hac vice, and Alice A. Brown (Exxon Mobil Corporation) of the Texas bar, admitted pro hac vice, on the brief).

PER CURIAM

By leave granted, the Department of Environmental Protection (DEP) appeals from a July 23, 2009 order of the Law Division denying its application for an award of natural resource damages (NRD) against defendant Exxon Mobil[1] (Exxon Mobil) under the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.11z (Spill Act). Specifically, DEP contends that the trial court erred in denying DEP's motion for interlocutory payment now of approximately $1 million in natural resource damages assessment costs. We disagree and conclude that, under the facts presented, the issue of the award of such costs is best reserved until the conclusion of the litigation. Accordingly, we affirm.

DEP moved for an order requiring defendant to pay the invoices of five experts that prepared reports for DEP regarding the natural resource damages assessment at defendant's Bayway and Bayonne refinery sites. To understand the nature of the dispute, we identify each expert and then provide an expansive statement of facts related to the cleanup.

[1] Defendant inconsistently refers to its name as "ExxonMobil" and "Exxon Mobil." For ease of reference, we refer to defendant using the latter spelling.

The first expert was Emily W. B. Southgate, an historical ecologist, whose itemized bills total $34,228.19. Southgate prepared an historical report entitled "Pre-Twentieth Century Site History of the Bayonne Plant, Constable Hook, Bayonne, New Jersey, and Bayway Refinery, Linden," prepared in October 2006, with corrections added in December 2007 (the Southgate report). The report described the Bayonne site in the "Constable Hook" area. Until the late nineteenth century when the Standard Oil Company, Exxon Mobil's predecessor, began its operations the area included: salt marshes farmed for salt hay, inland fruit and vegetable farming until at least 1880, and good water quality supporting fisheries and oyster beds in New York Bay. The Bayway site in Linden, north of the Rahway River and east of U.S. Route 1, also contained salt marshes along the Arthur Kill, Morses Creek and Piles Creek; farming was the primary occupation; and water quality in the Arthur Kill was appropriate for swimming until the beginning of the twentieth century.

DEP's second expert was Dr. Eldon C. Blancher, of Toxicological & Environmental Associates, Inc. (TEA), who presented itemized bills totaling $257,887.54. TEA jointly participated in preparing a report described below in the section on DEP's fourth expert, Stratus Consulting, Inc. (Stratus).

DEP's third expert was 3TM International, Inc. (3TM), whose bills totaled $135,517.23. 3TM prepared a November 2, 2006, report entitled "Summary Expert Report: Pro Forma Economic Analysis, New Jersey Natural Resource Damage Claims, New Jersey v. ExxonMobil Corporation, Bayonne and Bayway, New Jersey Sites" (the 3TM report). This report described the nature and extent of the contamination at the Bayway and Bayonne sites, set forth a conceptual restoration model for the sites and presented an economic analysis of reasonable restoration methodologies. 3TM reported numerous toxic contaminants on almost 580 acres of historical wetlands and concluded that restoring certain parts of the sites into productive wetlands was technically feasible. 3TM envisioned a thirty-year restoration program, with two years of pre-construction activities, four years of cleanup and infrastructure demolition and reconstruction, two years of wetlands construction and twenty-two years of wetlands maintenance and monitoring. 3TM projected that its proposed restoration program would cost $2.457 billion (or $1.594 billion at net present value), with 62% of those costs attributable to contaminated soil excavation, removal and disposal and backfilling.

The fourth DEP expert was Stratus, whose bills totaled $416,900.90. Stratus and TEA prepared a November 2006 report

entitled "Natural Resource Damages at the ExxonMobil Bayway and Bayonne Sites" (the Stratus report). The Stratus report outlined a plan to restore and replace natural resources at the Bayway and Bayonne sites, which would cost $8.9 billion. The report addressed only the refinery sites themselves, and not "the Arthur Kill, the Kill van Kull, Newark Bay, New York Harbor, or the broader Hudson-Raritan Estuary," which would be addressed in future reports. The Stratus report described in great detail the natural environment that was present at the sites before they became contaminated, the nature of the contamination found on the sites and a proposed restoration plan, relying upon the on-site restoration specifications and costs established in the 3TM report. The report estimated that the Bayway site could sustain restoration of 464 acres of intertidal wetlands, 59 acres of palustrine meadow and 28 acres of upland forest; the Bayonne site, with ongoing industrial operations, could sustain 25 acres of restored intertidal habitat. Those on-site restorations would cost $2.5 billion. In addition, off-site replacement of 11,000 acres of intertidal salt marsh, 19,000 acres of palustrine meadow/forest, and 3,400 acres of upland meadow/forest would be needed to compensate for the decades of harm at the site and because some portions of the site cannot be restored; this would cost $6.4 billion.

DEP's fifth expert was Robert Morrison of DPRA Inc., whose bills totaled $336,501.07. Morrison prepared a December 15, 2006, "Expert Witness Report" including three opinions: (1) "Concentrations of hazardous substances in soil at the Bayway and Bayonne facilities exceed soil restoration criteria"; (2) "Concentrations of hazardous substances in groundwater at the Bayway and Bayonne facilities exceed the appropriate criteria for restoration purposes"; and (3) "Intrusive investigations performed at the Bayway and Bayonne facilities are sufficient to identify the need for a comprehensive restoration program."

In support of its motion seeking payment of these costs, DEP submitted certifications of John N. Sacco, Director of DEP's Office of Natural Resource Restoration. In his March 2006 certification, Sacco explained that DEP initiated a natural resource damages initiative in 2002 in order to establish liability for those natural resources contaminated by hazardous substances. Through that process, DEP had reached voluntary settlements for natural resource damages at about 1,500 sites, preserving more than 5,200 acres and recovering $50 million in compensation for the public. At that time, Sacco's office was actively negotiating with a number of responsible parties regarding natural resource damages at 200 other sites. Unlike

many other responsible parties, from 1993 through 2006, defendant had never approached Sacco's office about possible restoration plans for its sites.

Sacco was assigned to identify possible preliminary restoration projects for the natural resource injuries caused by defendant, which he analyzed in consultation with DEP case managers for the Bayway and Bayonne sites. At Bayway, the managers recommended dredging the highly contaminated sediments of Morses Creek, which the refinery had used as a discharge trench for its wastewater, and also removing a dam and the hardened creek banks, to restore daily tidal flows. Dredging was also needed for the polluted Piles Creek. The former marshlands adjacent to Morses Creek required removal of contaminated sediments, fill and petroleum tar, and filling instead with clean substrate so that marsh vegetation could be restored. A similar process was needed for the site's 45 acres of sludge lagoons.

At the Bayonne site, Sacco noted the chromium fill used in former wetlands, and he recommended excavation of that contaminated fill and rehabilitation of the wetland environments. Sacco noted that International Matex Tank Terminals had purchased part of this site from defendant, and defendant's settlement of its natural resource damages liability

with DEP could be used as a model for similar restoration projects for defendant to undertake at the site.

In his December 2007 certification, Sacco explained that his office seeks to achieve "primary restoration" whenever possible, meaning the return of natural resource to its condition prior to the discharge of the hazardous substance or, if that cannot be accomplished, replacement of the lost resource and its services. In Sacco's view, "[p]rimary restoration includes the costs of assessing the damage to natural resources caused by a discharge." In addition, "compensatory restoration" is the public's loss of the uses, values, and benefits of the resource during the time between the discharge and the completion of restoration or replacement. The discharger has a duty to provide both primary and compensatory restoration, and DEP prefers restoration projects and improved public access to natural areas over payments of cash.

Sacco assisted in coordinating experts to assess the damage at defendant's Bayway and Bayonne sites, and he opined that the proposals they developed were consistent with DEP's goals. He explained: "Tidal wetlands are one of the most productive ecosystems on the planet, and their restoration, especially in the highly urbanized and developed region of northeastern New Jersey, is an important goal" of DEP, and is "extremely

important" for New Jersey's citizens. He noted the area's "limited open space and recreational opportunities associated with functioning natural ecosystems," adding that restoration "would provide the Arthur Kill region . . . with unparalleled public use potential that has been unavailable due to the degree of contamination at and adjacent these sites." DEP's plans for the Bayway site would change it from an "industrial outfall to a functioning tidal creek and associated wetlands complex," allowing for the return of interdependent species that rely upon a healthy ecosystem. The Bayonne site's ongoing industrial uses limited the potential for on-site restoration; some wetlands restoration would be possible, and defendant could also provide off-site replacement for those resources that could no longer be restored.

In his June 2008 certification, Sacco further explained that after DEP initiated its litigation, defendant was given the opportunity to participate in developing DEP's restoration plans at these sites, but defendant declined. In Sacco's opinion, the Bayway and Bayonne sites "contained, and continued to contain (in a highly degraded condition), valuable and unique resources of the State which are especially important because of their location." Sacco observed that defendant sought to consider the "baseline" for restoration purposes as including "current

'background' levels of pollution in New Jersey," an approach Sacco viewed as contrary to the Spill Act and having "no bearing on [defendant's] duty to restore the natural resources it has damaged and destroyed."

In interrogatory answers, DEP acknowledged that "oversight costs have been incurred in connection with the Site Remediation Program which have been billed and reimbursed to and by [defendant]. Based on the best available information, no such bills are outstanding."

To pursue the State's natural resource damages claims, the Attorney General entered into a Special Counsel Agreement with Allan Kanner & Associates. That agreement was the subject of litigation in New Jersey Society for Environmental and Economic Development v. Campbell (NJSEED), No. MER-L-343-04. The agreement provided that special counsel "shall advance, and represents that it has the financial capacity to fund, all costs incurred in the performance of its duties" pursuant to the agreement. The State agreed that special counsel "shall be compensated and reimbursed for reasonable, direct costs" as defined in the agreement as follows:

> Direct costs which will be reimbursed, in whole or in part, out of the ultimate recovery include:
>
> i. Costs incurred to investigate and develop the assigned NRD cases,

costs related to the assigned NRD cases incurred at the request of the Attorney General and/or the DEP, and costs related to all other putative NRD cases, regardless of whether Special Counsel is involved in the prosecution of same.

. . . .

v. Costs reasonably related to representation including, but not limited to, investigation, filing fees, discovery, pre-trial proceedings, experts and consultants, trial and appeal, and any other activity requested by the Attorney General and/or the DEP related to representation in assigned NRD cases.

. . . .

viii. Nothing herein shall be constructed [sic] to limit Special Counsel's ability to seek reimbursement of costs from Defendants under cost shifting theories. By virtue of this Agreement, the State in no way waives its right to pursue any and all claims for damages.

. . . .

11. The repayment of costs is contingent upon a recovery being obtained. If no recovery is made, the State owes nothing for costs.

DEP referred to several depositions from defendant's personnel to show that defendant had not made efforts to address natural resource damages. Donald D. Esch, who headed

defendant's remediation team since about 1993, was responsible for performing a "baseline ecological assessment," but he had not ever analyzed the "pre-discharged state of the ecosystem." Esch's reading from the early 1990s led him to conclude that if "properly applied economics" and "sound economic principles" were used, any natural resource damages would be "pretty small." Because that would be a de minimus amount, Esch never engaged an expert to calculate what those damages might be at the Bayway or Bayonne sites. Esch also did not view the Morses Creek or Piles Creek as natural resources but rather they were "engineered units that were part of the refinery that had carried that name." He described Morses Creek as being "re-engineered" away from its original route, so that for a number of years it operated as part of the refinery's waste water treatment system, pursuant to permits.

Richard Harley testified that under the administrative consent order (ACO) between DEP and defendant, defendant was not concerned with natural resource damages. Rather, defendant focused on three ACO goals: finding all of the pollution on the surface, in the subsurface, and in adjoining properties; developing a plan to deal with all of that pollution; and avoiding adverse effects on human health.

Brent Boyd Archibald testified that before defendant commenced operations on the Bayway site, it was undeveloped property. He did not know what wildlife might have been found there at that time; defendant did not try to establish information about the site's natural environment. Archibald recalled mentioning in passing to Mr. Len Racioppi that defendant "might want to get a handle on what the damages might have been in advance of any litigation" in view of DEP's announcements about a limited time available for voluntary natural resource damages settlements. Racioppi agreed that was something defendant "might want to consider in the future," but not at that time. Archibald understood that this delay might mean that DEP would use "a more robust formula" if settlement was deferred until a later date, but he believed the opportunity to settle would still remain.

As of his December 2005 deposition, Racioppi maintained that defendant did not have in place any plan to address natural resource damages in conjunction with the site remediation. At the time, defendant was following the sequential steps needed to comply with DEP's technical rules.

John Hanning indicated that defendant had not paid any sums to address the interim loss of natural resources at the site,

and he was not aware of any policy in place to pay for such damages or budget to reserve funds for such damages.

In his deposition, Kenneth B. Siet indicated that, following DEP's technical rules, defendant prepared a baseline ecological evaluation and went a step further by performing some soil and surface water sampling. As of January 2007, DEP had not yet reviewed that evaluation and advised defendant whether to take additional steps. The focus of that process is whether currently existing contamination has the potential to reach an existing natural resource or "potential ecological receptor" on a future date; it does not address what natural resources previously might have existed on the site.

Answering DEP's motion, defendant submitted in response parts of several expert reports. The February 2008 report of Paul D. Boehm, Ph.D., of Exponent, opined that DEP's experts' findings and opinions were "unreliable and invalid," and based upon "inadequate and/or inappropriate data and scientifically flawed methodologies and processes."

Thomas C. Ginn, Ph.D., also from Exponent and reporting in February 2008, addressed in great detail his view of the ecological conditions at the sites and his criticism of the Stratus report and another DEP expert, Dr. Joanna Burger. Among numerous other things, Ginn opined that the vast majority of the

Bayway and Bayonne sites are used for industrial purposes, which is why they were not available to provide any significant environmental services. Ginn found that the abundances of benthic macroinvertebrates, fish densities in Morses and Piles Creeks and numbers of bird species seen were all comparable to or higher than in reference areas. Ginn criticized Burger's limited personal observations at the site and lack of critical evaluation of the scientific data. Ginn asserted that in several ways Lipton and Blancher in the Stratus report inappropriately and unscientifically extrapolated from the data to conclude that complete or total ecological injury had occurred. He further criticized the Stratus report's failure to acknowledge that some losses of ecological services may have arisen from lawful development of the sites for refinery purposes, and not from hazardous substance discharges.

Another expert for defendant, William H. Desvousges, Ph.D., opined in his February 2008 report that no significant losses in ecological services had occurred at the Bayonne site, so he did not calculate any damages for that site. As to the Bayway site, he calculated past reductions in ecological services only from 1977 and projecting forward until remediation/restoration activities are completed. He used the 1977 date "on advice of counsel." He found that only twenty to forty-seven acres of

onsite restoration would be required, and restoration costs would range from $1,378,000 to $1,837,000. If he instead used the higher estimates developed by Dr. John Rogers for restoration of all habitat areas, Desvousges calculated that restoration damages would range between $1,965,000 and $3,004,000; the top of that range reflected the higher cost for an offsite salt marsh project, the approach that Rogers preferred. The cost under that calculation would be $45,600 per acre, well within the $10,000 to $84,000 per-acre range that Desvousges had seen for similar projects, whereas the DEP's experts used a figure well outside that range, $274,000 per acre. Desvousges criticized the Stratus report as "inherently flawed" and "unlike any that I have seen in more than 20 years of conducting NRDAs." He contended that the Stratus report failed to conform to sound economic principles or practices, failed to account for contamination from other sources, and overstated the baseline conditions including the effects of the refinery structures in the damage estimates.

On appeal, DEP raises a number of issues but all are focused on whether the trial court erred in denying its motion for payment of the natural resource damages assessment costs.

DEP first asserts that the Spill Act authorizes the reimbursement of these costs, and the trial court

mischaracterized them as "money damages," failing to appreciate DEP's primary restoration proposal to remove and clean up hazardous waste from the refinery sites. DEP contends that recovering these costs now are "part of the Spill Act's swift justice" to meet the Legislature's intent to remedy hazardous contamination. It further claims that its authority is "automatic and undisputed where a party has discharged hazardous substances." According to DEP, the trial court's approach limits DEP's resources and its ability to have polluters participate cooperatively in cleaning up polluted sites.

In his decision, the trial judge referenced his prior determination that defendant was responsible in strict liability for loss of use damages. The judge also concluded that there was "statutory authority for recovery of costs associated with a study to develop a restoration plan." In view of defendant's assertion that it already was performing ecological studies, the judge concluded that there were genuine issues of material fact "as to whether requiring Exxon Mobil to fund a second study to develop a plan for the restoration of natural resources would constitute [duplicative] expenditures. A finder of fact must determine what expenditures need to be made and which have already been made." DEP's motion for an order requiring

defendant to fund studies to develop a restoration plan was denied without prejudice.

As to the present motion, the judge noted that this case did not involve DEP's need to clean up hazardous substances in the face of a defendant's refusal to do so; in that type of case, it might be appropriate to require payment for the cleanup without waiting for the conclusion of the litigation. He observed that this was a damage case. The judge denied DEP's application for expert fees with respect to the damage claims explaining that he did so without prejudice, so that if DEP was "ultimately successful, not in being awarded some damages but . . . having the trier of fact finding that those experts[']analysis are appropriate, reasonable, and . . . stand up to scrutiny, . . . obviously then you'll be able to make your application."

In denying DEP's motion for partial summary judgment, the judge invoked the basic principles governing consideration of such a motion, questioning whether there exists

> a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

Conversely, "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). The judge concluded there was such an issue and denied relief. We granted leave to appeal.

On our review, we apply the same standard that governs trial courts in reviewing summary judgment matters. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

In considering the issues involved, the parties do not dispute that under the Spill Act, DEP is authorized to recover natural resource damages assessment costs. The only issues raised here are the extent of the costs and when they may be recovered.

DEP asserts that the trial judge's decision has halted DEP's ability to proceed with natural resource damage assessments in numerous cases, due to a lack of immediate funding. However, under the terms of the special counsel agreement, the costs are to be paid by counsel subject to reimbursement. Presumably, no public funds have been expended as a result of the extant contract between the Attorney General

and special counsel. We recognize that this arrangement is not dispositive of the underlying argument that DEP may be entitled to interlocutory reimbursement, but the contract does impact on any claims that funding may be prejudiced by the denial of interlocutory relief.

We do recognize the legitimacy of DEP's concern that the trial judge's ruling will create an incentive for parties to avoid cooperating with DEP. DEP has presented evidence that defendant has not cooperated in discussing natural resource damages issues, and the trial judge agreed: "[T]here's no question in my mind that there was no cooperation in the sense of you get your expert, I'll get my expert and let's have them sit down maybe they can work something out." While DEP would hope for that type of cooperation and earlier efforts to address the natural resource damages restoration, in the absence of such cooperation, DEP's concern can be addressed when the cost issue is tried, with proofs that a defendant should not retain the time value of money that it should have spent on natural resources restoration at an earlier date.

There is a significant dispute as to the reasonableness of the costs. While DEP argues that it has endeavored to avoid the risk of duplicative costs, an issue of concern to the trial judge, DEP asserts that defendant "confirmed that no duplication

has occurred" by using expert reports that were not prepared as part of the remediation process and "did not present evidence or argue that the costs were unreasonable or excessive."

Defendant disagreed, stating that it consistently has maintained that the Stratus report was "not only outlandish, but its underlying methodology is patently unreliable and, therefore, inadmissible." This dispute raises the issue of fact that cannot be adjudicated on a motion for summary judgment.

We disagree with defendant's focus on DEP's application for "litigation costs," allegedly arising from the choice to pursue litigation instead of administrative action against defendant. The trial judge made clear, and we agree, that DEP's entitlement to reimbursement does not turn on whether DEP ultimately "wins" the litigation, but rather in successfully proving to the trier of fact that the experts' analysis was "appropriate, reasonable" and able to "stand up to scrutiny." Whether in litigation or in administrative action, DEP required expert analysis of the type of natural resource damage restoration needed, and if defendant did not prepare a reasonable analysis on which DEP could rely, then defendant must be equally responsible to pay the reasonable costs of that analysis in either forum.

Defendant's emphasis on only the Spill Act's "cost-shifting provision," N.J.S.A. 58:10-23.11u(b)(2), disregards the broad

authority granted to DEP under that Act. Whenever DEP determines that there is a violation of the Spill Act, it may bring a civil action, levy an administrative penalty, or bring an action for a civil penalty, or simultaneously pursue any combination of those approaches. N.J.S.A. 58:10-23.11u(a)(1). If it chooses the first option, DEP

> may commence a civil action in Superior Court for, singly or in combination:
>
> (1) a temporary or permanent injunction;
>
> (2) the costs of any investigation, cleanup or removal, and for the reasonable costs of preparing and successfully litigating an action under this subsection;
>
> (3) the cost of restoring, repairing, or replacing real or personal property damaged or destroyed by a discharge, . . . ;
>
> (4) the cost of restoration and replacement, where practicable, of any natural resource damaged or destroyed by a discharge; and
>
> (5) any other costs incurred by the department pursuant to P.L.1976, c.141.
>
> [N.J.S.A. 58:10-23.11u(b) (emphasis added).]

Although subsection (2) allows for recovery of "reasonable costs of preparing and successfully litigating an action," that does not limit DEP's recovery. DEP asserts that the costs it now seeks are those of its "investigation" under N.J.S.A. 58:10-23.11u(b)(2), as a necessary prerequisite to its authority to recover the "cost of restoration and replacement, where

practicable, of any natural resource damaged or destroyed by a discharge" pursuant to N.J.S.A. 58:10-23.11u(b)(4). That authority under the statute does not limit DEP's recovery simply to costs upon successfully pursuing litigation.

DEP also argues that because the Spill Act uses the phrase "attempted removal" in its "cleanup and removal costs" definition, DEP's costs are recoverable even if, in full or in part, DEP's natural resource damages plan is not implemented. While this argument has some merit, it is not inconsistent with the trial judge's ruling. The definition at N.J.S.A. 58:10-23.11b (emphasis added) provides:

> "Cleanup and removal costs" means all direct costs associated with a discharge, and those indirect costs that may be imposed by the department pursuant to section 1 of P.L. 2002, c. 37 [N.J.S.A. 58:10B-2.1] associated with a discharge, incurred by the State or its political subdivisions or their agents or any person with written approval from the department in the: (1) removal or attempted removal of hazardous substances, or (2) taking of reasonable measures to prevent or mitigate damage to the public health, safety, or welfare, including, but not limited to, public and private property, shorelines, beaches, surface waters, water columns and bottom sediments, soils and other affected property, including wildlife and other natural resources, and shall include costs incurred by the State for the indemnification and legal defense of contractors . . . .

While this provision allows recovery of costs even if a removal attempt is unsuccessful, it does not foreclose a challenge as to reasonableness of the costs. That is the scope of the judge's decision and is one of the issues that can be resolved at trial.

Additional issues may be addressed as well. Defendant claims that it "has complied with the DEP's regulations, including those dealing with NRD issues, preparing Baseline Ecological Evaluations and other ecological studies to begin characterizing any natural resource injuries, submitting them to the department, and revising them according to the DEP's comments." Then, it claims, DEP abandoned this administrative route to pursue natural resource damages instead through litigation.

In response, DEP observes that compliance with the Technical Requirements for Site Remediation rules, N.J.A.C. 7:26E-1 to -8.7 and Appendices A through H (the Technical rules), does not suffice because "[a]s recognized by this Court, remediation is not equivalent to restoration."[2] DEP asserts that defendant had not investigated or even considered natural resource damage implications at these sites. As we previously noted, DEP has presented evidence that defendant did not

[2] In fact, however, the judge recited that this was DEP's position; it made no express finding to that effect.

evaluate natural resource damages until its experts responded to this motion; moreover, technical rules do not purport to address natural resource damages issues. Nevertheless, factual issues still exist that must be adjudicated and resolved at trial.[3]

We conclude that the trial judge properly denied DEP's application for interlocutory payment of its experts' natural resource damages assessments costs, pending a hearing to resolve the factual issues raised by the parties.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

[3] For the first time, DEP asserts in its reply brief that defendant has not restored the Sludge Lagoon Operable Unit (SLOU) of its site, but rather "capped the approximately 42 acre hazardous waste disposal area with a clay layer, essentially warehousing hundreds of thousands of cubic yards of hazardous substances. These interim containment measures have failed to prevent continued migration of contaminants." Because this issue is raised for the first time in the reply brief on appeal and without citation to the record, we decline to consider this issue. The issue can be raised during the further proceedings in the Law Division.