

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street
PO Box 093
Trenton, NJ 08625-0093
Attorney for Plaintiffs

CONFIRMED
TO DEPT
TRENTON

DEC 29 2004

FILED
Office of the Superior Court Clerk
By Deputy Clerk of Superior Court
CHARLES J. MCCAFFERY
CAPE MAY COUNTY

By: Carol Lynn DeMarco
Deputy Attorney General
(609) 984-5189

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CAPE MAY COUNTY
DOCKET NO.

CPM-L-742-04

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION and
THE ADMINISTRATOR OF THE NEW
JERSEY SPILL COMPENSATION
FUND,

Plaintiffs,

v.

GRACE OIL CO.;
DAVID C. LEVARI (d/b/a Levari
Citgo);
"ABC CORPORATIONS" 1-10 (Names
Fictitious); and
"JOHN DOES" 1-10 (Names
Fictitious),

Defendants.

Civil Action

COMPLAINT

Plaintiffs New Jersey Department of Environmental Protection ("DEP"), and the Administrator of the New Jersey Spill Compensation Fund ("Administrator") (collectively, "the Plaintiffs"), having their principal offices at 401 East State Street in the City of Trenton, County of Mercer, State of New Jersey, by way of Complaint

against the above-named defendants (collectively, "the Defendants"), say:

STATEMENT OF THE CASE

1. The Plaintiffs bring this civil action pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.24 ("the Spill Act"), and the common law, for reimbursement of the cleanup and removal costs they have incurred, and will incur, as a result of the discharge of hazardous substances at two sites in Upper Township, Cape May County, which have contributed to the Allendale Road groundwater contamination in Upper Township, Cape May County. The costs and damages the Plaintiffs seek include the damages they have incurred, and will incur, for any natural resource of this State that has been, or may be, injured as a result of the discharge of hazardous substances at the Upper Township sites, and to compel the Defendants to perform, under plaintiff DEP's oversight, or to fund plaintiff DEP's performance of, any further assessment and restoration of any natural resource that has been, or may be, injured as a result of the discharge of hazardous substances at the Upper Township sites.

THE PARTIES

2. Plaintiff DEP is a principal department within the Executive Branch of the State government vested with the authority to conserve natural resources, protect the environment, prevent

pollution, and protect the public health and safety. N.J.S.A.
13:1D-9.

3. In addition, with the State being the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction, plaintiff DEP is vested with the authority to protect this public trust. N.J.S.A. 58:10-23.11a.

4. Plaintiff Administrator is the chief executive officer of the New Jersey Spill Compensation Fund ("the Spill Fund"). N.J.S.A. 58:10-23.11j. As chief executive officer of the Spill Fund, plaintiff Administrator is authorized to approve and pay cleanup and removal costs plaintiff DEP incurs, N.J.S.A. 58:10-23.11f.c. and d., and to certify the amount of any claim to be paid from the Spill Fund, N.J.S.A. 58:10-23.11j.d.

5. Defendant Grace Oil Co. is corporation organized under the laws of the State of New Jersey, with a principal place of business located at 3017 Route 9 South, Rio Grande, New Jersey.

6. Defendant David C. Levari, doing business as Levari Citgo, is an individual whose dwelling or usual place of abode is 116 Reading Avenue, Beesley's Point, New Jersey.

7. Defendants "ABC Corporations" 1-10, these names being fictitious, are entities whose identities cannot be ascertained as of the filing of this Complaint, which discharged hazardous substances, or are otherwise responsible for the hazardous substances discharged, at one or more properties in Upper Township,

Cape May County, which discharges have contributed to the Allendale Road groundwater contamination in Upper Township, Cape May County.

8. Defendant "John Does" 1-10, these names being fictitious, are individuals whose identities cannot be ascertained as of the filing of this Complaint, who discharged hazardous substances, or are otherwise responsible for the hazardous substances discharged at, one or more properties in Upper Township, Cape May County, which discharges have contributed to the Allendale Road groundwater contamination in Upper Township, Cape May County.

AFFECTED NATURAL RESOURCE

Ground Water

9. Ground water is an extremely important natural resource for the people of New Jersey, supplying more than 900 million gallons of water per day, which provides more than half of New Jersey's population with drinking water.

10. Not only does ground water serve as a source of potable water, it also serves as an integral part of the State's ecosystem.

11. Ground water provides base flow to streams, and influences surface water quality and wetland ecology and the health of the aquatic ecosystem.

12. Ground water also provides cycling and nutrient movement, prevents salt water intrusion, provides ground stabilization, prevents sinkholes, and provides maintenance of critical water levels in freshwater wetlands.

13. Ground water and the other natural resources of the State are unique resources that support the State's tourism industry, which helps sustain the State's economy.

14. There are more than 6,000 contaminated sites in New Jersey that have confirmed groundwater contamination with hazardous substances.

GENERAL ALLEGATIONS

15. The Grace Oil site consists of approximately 0.4 acres of real property located at Roosevelt Avenue and Route 9, Upper Township, Cape May County, New Jersey, this property being also known and designated as Block 730, Lots 23 through 26, inclusive, on the Tax Map of Upper Township ("the Grace Oil Property"), and all other areas where any hazardous substance discharged there has become located (collectively, "the Grace Oil Site"), which plaintiff DEP has designated as Site Remediation Program Interest No. 025569.

16. From 1936 to the present, defendant Grace Oil has owned the Grace Oil Property, during which time "hazardous substances," as defined in N.J.S.A. 58:10-23.11b., were "discharged" there within the meaning of N.J.S.A. 58:10-23.11b., which substances include benzene, toluene, and perchloroethylene ("PCE").

17. Since the late 1920s, the Grace Oil Property has been used as a retail gasoline service station.

18. In February 1993, defendant Grace Oil commenced a remedial investigation pursuant to N.J.S.A. 58:10-23.11f.a. and N.J.A.C. 7:26E, under plaintiff DEP's oversight, during which defendant Grace Oil has investigated the nature and extent of the contamination at the Grace Oil Site.

19. Sampling results from the remedial investigation revealed the presence of various hazardous substances at concentrations exceeding plaintiff DEP's cleanup criteria in the ground water at the Site.

20. The Levari Citgo site consists of approximately 8,800 square feet of real property located at 10 Route 9 South, Upper Township, Cape May County, New Jersey, this property being also known and designated as Block 653, Lot 4, on the Tax Map of Upper Township ("the Levari Citgo Property"), and all other areas where any hazardous substance discharged there has become located (collectively, "the Levari Citgo Site").

21. In April 1985, defendant David C. Levari purchased the Levari Citgo Property, and was the owner of record as of the filing of this Complaint.

22. At various times, defendant David C. Levari operated a retail gasoline service station at the Levari Citgo Property, during which time "hazardous substances," as defined in N.J.S.A. 58:10-23.11b., were "discharged" there within the meaning of

N.J.S.A. 58:10-23.11b., which substances include benzene, toluene, ethylbenzene and total xylenes.

23. In 2000, plaintiff DEP commenced a remedial investigation pursuant to N.J.S.A. 58:10-23.11f.a. and N.J.A.C. 7:26E, during which plaintiff DEP investigated the nature and extent of the contamination at the Levari Citgo Site.

24. In December 2001, plaintiff DEP removed five of the seven onsite underground storage tanks, leaving two underground storage tanks in place due to engineering constraints.

25. Sampling results from the remedial investigation revealed the presence of various hazardous substances at concentrations exceeding plaintiff DEP's cleanup criteria in the ground water at the Levari Citgo Site.

26. The Allendale Road Groundwater Contamination area consists of various properties located in the Allendale Road area of Upper Township, Cape May County ("Allendale Road Area"), a mixed use residential and commercial area.

27. Between 1992 and 1994, the Cape May County Health Department ("Health Department") sampled various private potable wells in the Allendale Road Area.

28. Sampling results from the Health Department's investigation revealed the presence of various hazardous substances, including PCE, at concentrations exceeding plaintiff

DEP's cleanup criteria in the water from 12 wells, and at lower concentrations in the water from 9 wells.

29. In response to the Health Department's findings, plaintiff DEP installed point-of-entry treatment systems on each of the affected potable wells from which water containing hazardous substances at concentrations exceeding plaintiff DEP's cleanup criteria was being drawn.

30. In 1996, plaintiff DEP completed its analysis of water supply alternatives for the Allendale Road Area, which resulted in plaintiff DEP concluding that the appropriate remediation was to extend the public water supply lines to the affected properties.

31. In or around 1999, local authorities completed the water line extensions, connected 84 residences and businesses to the public water supply system, and sealed the affected potable wells, which activities the Spill Fund and plaintiff DEP funded.

32. Plaintiff DEP initiated an investigation to further determine the nature and extent of the contamination in the Allendale Road Area, and to identify the sources of the contamination, during which plaintiff DEP identified the Grace Oil Property as a source of PCE, benzene, toluene, ethylbenzene and total xylenes, and the Levari Citgo Property as a source of the benzene, toluene, ethylbenzene and total xylenes detected in the Allendale Road Area groundwater.

33. Although plaintiff DEP, and others have undertaken remediation activities for the Allendale Road Area, the groundwater contamination continues.

FIRST COUNT

Spill Act

34. Plaintiffs DEP and Administrator repeat each allegation of paragraph nos. 1 through 33 above as though fully set forth in its entirety herein.

35. Each defendant is a "person" within the meaning of N.J.S.A. 58:10-23.11b.

36. Plaintiff DEP has incurred, and will continue to incur, costs as a result of the discharge of hazardous substances at the Grace Oil and Levari Citgo Properties, including costs for the Allendale Road Area.

37. Plaintiff Administrator has certified, and may continue to certify, for payment, valid claims made against the Spill Fund concerning the Allendale Road Area, including for the Grace Oil and Levari Citgo Sites, and, further, has approved, and may continue to approve, other appropriations for the Allendale Road Area, including the Grace Oil and the Levari Citgo Sites.

38. The Plaintiffs also have incurred, and will continue to incur, costs and damages, including lost use and reasonable assessment costs, for any natural resource of this State that has been, or may be, injured as a result of the discharge of hazardous

substances at the Grace Oil and Levari Citgo Properties, including for the Allendale Road Area.

39. The costs and damages the Plaintiffs have incurred, and will incur, for the Allendale Road Area, including for the Grace Oil and Levari Citgo Sites are "cleanup and removal costs" within the meaning of N.J.S.A. 58:10-23.11b.

40. Defendant Grace Oil Co., as the owner of the Grace Oil Property at the time hazardous substances were discharged there, is a person otherwise responsible for the discharged hazardous substances, and is liable, jointly and severally, without regard to fault, for all cleanup and removal costs and damages, including lost use and reasonable assessment costs, that the Plaintiffs have incurred, and will incur, to assess, mitigate, restore, or replace, any natural resource of this State that has been, or may be, injured as a result of the discharge of hazardous substances at the Grace Oil Property. N.J.S.A. 58:10-23.11g.c.(1).

41. Defendant David C. Levari is a discharger of hazardous substances at the Levari Citgo Property, and is liable, jointly and severally, without regard to fault, for all cleanup and removal costs and damages, including lost use and reasonable assessment costs, that the Plaintiffs have incurred, and will incur, to assess, mitigate, restore, or replace, any natural resource of this State that has been, or may be, injured as a result of the

discharge of hazardous substances at the Levari Citgo Property.
N.J.S.A. 58:10-23.11g.c.(1).

42. Defendant David C. Levari, as the owner of the Levari Citgo Property at the time hazardous substances were discharged there, also is a person otherwise responsible for the discharged hazardous substances, and is liable, jointly and severally, without regard to fault, for all cleanup and removal costs and damages, including lost use and reasonable assessment costs, that the Plaintiffs have incurred, and will incur, to assess, mitigate, restore, or replace, any natural resource of this State that has been, or may be, injured as a result of the discharge of hazardous substances at the Levari Citgo Property. N.J.S.A. 58:10-23.11g.c.(1).

43. Defendants ABC Corporations discharged hazardous substances at one or more properties in Upper Township, Cape May County, or are otherwise responsible for the hazardous substances discharged at one or more of these Properties, and thus, are liable, jointly and severally, without regard to fault, for all cleanup and removal costs and damages, including lost use and reasonable assessment costs, that the Plaintiffs have incurred, and will incur, to assess, mitigate, restore, or replace, any natural resource of this State that has been, or may be, injured as a result of the discharge of hazardous substances at one or more of these properties. N.J.S.A. 58:10-23.11g.c.(1).

44. Defendants John Does are individuals that discharged hazardous substances at one or more properties in Upper Township, or are otherwise responsible for the hazardous substances discharged at one or more of these properties, and thus, are liable, jointly and severally, without regard to fault, for all cleanup and removal costs and damages, including lost use and reasonable assessment costs, that the Plaintiffs have incurred, and will incur, to assess, mitigate, restore, or replace, any natural resource of this State that has been, or may be, injured as a result of the discharge of hazardous substances at one or more of these properties. N.J.S.A. 58:10-23.11g.c.(1).

45. Pursuant to N.J.S.A. 58:10-23.11u.a.(1)(a) and N.J.S.A. 58:10-23.11u.b., plaintiff DEP may bring an action in the Superior Court for injunctive relief, N.J.S.A. 58:10-23.11u.b.(1); for its unreimbursed investigation, cleanup and removal costs, including the reasonable costs of preparing and successfully litigating the action, N.J.S.A. 58:10-23.11u.b.(2); natural resource restoration and replacement costs, N.J.S.A. 58:10-23.11u.b.(4); and for any other unreimbursed costs or damages plaintiff DEP incurs under the Spill Act, N.J.S.A. 58:10-23.11u.b.(5).

46. Pursuant to N.J.S.A. 58:10-23.11q., plaintiff Administrator is authorized to bring an action in the Superior Court for any unreimbursed costs or damages paid from the Spill Fund.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs DEP and Administrator pray that this Court:

- a. Order the Defendants to reimburse the Plaintiffs, jointly and severally, without regard to fault, for all cleanup and removal costs and damages, including lost use and reasonable assessment costs that the Plaintiffs have incurred for any natural resource of this State injured as a result of the discharge of hazardous substances at the Grace Oil and Levari Citgo Properties, including for the Allendale Road Area, with applicable interest;
- b. Enter declaratory judgment against the Defendants, jointly and severally, without regard to fault, for all cleanup and removal costs and damages, including lost use and reasonable assessment costs that the Plaintiffs will incur for any natural resource of this State injured as a result of the discharge of hazardous substances at the Grace Oil and Levari Citgo Properties, including for the Allendale Road Area;
- c. Enter judgment against the Defendants, jointly and severally, without regard to fault, compelling the Defendants to compensate the citizens of New Jersey for the injury to their natural resources as a result of the discharge of hazardous substances at the Grace Oil and

Levari Citgo Properties, by performing, under plaintiff DEP's oversight, or funding plaintiff DEP's performance of, any further assessment and compensatory restoration of any natural resource injured as a result of the discharge of hazardous substances at the Grace Oil and Levari Citgo Properties, including for the Allendale Road Area;

- d. Award the Plaintiffs their costs and fees in this action; and
- e. Award the Plaintiffs such other relief as this Court deems appropriate.

SECOND COUNT

Public Nuisance

47. Plaintiffs repeat each allegation of Paragraphs 1 through 46 above as though fully set forth in its entirety herein.

48. Ground water is a natural resource of the State held in trust by the State.

49. The use, enjoyment and existence of uncontaminated natural resources is a right common to the general public.

50. The groundwater contamination at the Site constitutes a physical invasion of public property and an unreasonable and substantial interference, both actual and potential, with the exercise of the public's common right to this natural resources.

51. As long as the ground water remains contaminated due to the Defendants' conduct, the public nuisance continues.

52. Until the ground water is restored to its pre-injury quality, the Defendants are liable for the creation, and continued maintenance, of a public nuisance in contravention of the public's common right to clean ground water.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs DEP and Administrator pray that this Court:

- a. Order the Defendants to reimburse the Plaintiffs for all cleanup and removal costs and damages, including restitution for unjust enrichment, lost use and reasonable assessment costs that the Plaintiffs have incurred for any natural resource of this State injured as a result of the discharge of hazardous substances at the Grace Oil and Levari Citgo Properties, including for the Allendale Road Area, with applicable interest;
- b. Enter declaratory judgment against the Defendants for all cleanup and removal costs and damages, including restitution for unjust enrichment, lost use and reasonable assessment costs that the Plaintiffs will incur for any natural resource of this State injured as a result of the discharge of hazardous substances at the

Grace Oil and Levari Citgo Properties, including for the Allendale Road Area;

- c. Enter judgment against the Defendants, compelling the Defendants to compensate the citizens of New Jersey for the injury to their natural resources as a result of the discharge of hazardous substances at the Grace Oil and Levari Citgo Properties by performing, under plaintiff DEP's oversight, or funding plaintiff DEP's performance of, any further assessment and compensatory restoration of any natural resource injured as a result of the discharge of hazardous substances at the Grace Oil and Levari Citgo Properties, including for the Allendale Road Area;
- d. Award the Plaintiffs their costs and fees in this action; and
- e. Award the Plaintiffs such other relief as this Court deems appropriate.

THIRD COUNT

Trespass

53. Plaintiffs repeat each allegation of Paragraphs 1 through 52 above as though fully set forth in its entirety herein.

54. Ground water is a natural resource of the State held in trust by the State for the benefit of the public.

55. The Defendants are liable for trespass, and continued trespass, since hazardous substances were discharged at the Grace Oil and Levari Citgo Properties, including for the Allendale Road Area.

56. As long as the ground water remains contaminated, the Defendants' trespass continues.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs DEP and Administrator pray that this Court:

- a. Order the Defendants to reimburse the Plaintiffs for all cleanup and removal costs and damages, including restitution for unjust enrichment, lost use and reasonable assessment costs that the Plaintiffs have incurred for any natural resource of this State injured as a result of the discharge of hazardous substances at the Grace Oil and Levari Citgo Properties, including for the Allendale Road Area, with applicable interest;
- b. Enter declaratory judgment against the Defendants for all cleanup and removal costs and damages, including restitution for unjust enrichment, lost use and reasonable assessment costs, that the Plaintiffs will incur for any natural resource of this State injured as a result of the discharge of hazardous substances at the

Grace Oil and Levari Citgo Properties, including for the Allendale Road Area;

- c. Enter judgment against the Defendants, compelling the Defendants to compensate the citizens of New Jersey for the injury to their natural resources as a result of the discharge of hazardous substances at the Grace Oil and Levari Citgo Properties by performing, under plaintiff DEP's oversight, or funding plaintiff DEP's performance of, any further assessment and compensatory restoration of any natural resource injured as a result of the discharge of hazardous substances at the Grace Oil and Levari Citgo Properties, including for the Allendale Road Area;
- d. Award the Plaintiffs their costs and fees in this action; and
- e. Award the Plaintiffs such other relief as this Court deems appropriate.

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs

By: Carol Lynn DeMarco
Carol Lynn DeMarco
Deputy Attorney General

Dated: 12/28/04

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, the Court is advised that Carol Lynn DeMarco, Deputy Attorney General, is hereby designated as trial counsel for the Plaintiffs in this action.

CERTIFICATION REGARDING OTHER PROCEEDINGS AND PARTIES

Undersigned counsel hereby certifies, in accordance with R. 4:5-1(b)(2), that the matters in controversy in this action may be considered to be the subject of another pending action: New Jersey Society for Environmental, Economic Development, et al. v. Bradley M. Campbell, et al., Docket No. A-6537-03 T3. Otherwise, the matters in controversy in this action are not the subject of any other pending or contemplated action in any court or arbitration proceeding known to the Plaintiffs at this time, nor is any non-party known to the Plaintiffs at this time who should be joined in this action pursuant to R. 4:28, or who is subject to joinder pursuant to R. 4:29-1. If, however, any such non-party later becomes known to the Plaintiffs, an amended certification shall be filed and served on all other parties and with this Court in accordance with R. 4:5-1(b)(2).

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs

By: Carol Lynn DeMarco
Carol Lynn DeMarco
Deputy Attorney General

Dated: 12/28/04