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MONMOUTH COUNTY

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MONMOUTH COUNTY  
DOCKET NO. *L-2719-03*

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STATE OF NEW JERSEY, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION and ACTING :  
ADMINISTRATOR, NEW JERSEY :  
SPILL COMPENSATION FUND, :  
 : Civil Action  
Plaintiffs, :  
 : COMPLAINT  
v. :  
 :  
FREDERICK BARRY; MARGARET M. :  
BARRY a/k/a MARGARET :  
MILDENBERG; and SAMUEL :  
KHOUDARY, :  
 :  
Defendants. :

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Plaintiffs State of New Jersey, Department of Environmental Protection ("DEP") and Acting Administrator, New Jersey Spill Compensation Fund ("Administrator"), 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, say:

### STATEMENT OF THE CASE

1. Plaintiffs DEP and Administrator bring this civil action pursuant to the Spill Compensation and Control Act ("the Spill Act"), N.J.S.A. 58:10-23.11 to -23.14, to recover the cleanup and removal costs they have incurred, and will incur, as a result of the discharge of hazardous substances at the Superfund site commonly known as Bog Creek Farm located in Howell Township, Monmouth County, New Jersey.

### 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. Plaintiff Administrator is the chief executive officer of the New Jersey Spill Compensation Fund ("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 any 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.

4. Defendant Frederick Barry is an individual whose mailing address is P.O. Box 472, Ocean View, New Jersey 08230.

5. Defendant Margaret Barry, a/k/a Margaret Mildenberg, is an individual whose mailing address is P.O. Box 1026, Pomona, New Jersey 08240.

6. Defendant Samuel Khoudary ("defendant Khoudary") is an individual whose mailing address is P.O. Box 577, Old Bridge, New Jersey 08857.

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

#### FIRST COUNT

8. The Bog Creek Farm property comprises approximately 12 acres of real property located on Monmouth County Road 547, also called Squankum Road and Lakewood-Farmingdale Road, Howell Township, Monmouth County, New Jersey, this property being also known and designated as Block 46, Lot 29, on the Tax Map of Howell Township, and all other areas where any hazardous substance discharged there has become located (hereinafter "the Site" or "the Bog Creek Farm Site").

9. From 1976 through 1979, defendant Frederick Barry and defendant Margaret Barry ("the Barry defendants") owned the real property comprising the Bog Creek Farm property, during which time they did not satisfactorily store or contain materials there that were, or contained, hazardous substances within the meaning of

N.J.S.A. 58:10-23.11f.b.(2), certain of which were discharged within the meaning of N.J.S.A. 58:10-23.11f.b.(3).

10. Hazardous substances discharged at the Site included, but were not limited to, acetone, benzene, 1,2-dichloroethane, methylene, chloride, toluene, trichloroethene and xylene.

11. On various occasions from 1977 through 1981, plaintiff DEP inspected the Bog Creek Farm Site and observed a pond approximately 20 feet by 60 feet in size that fed into Squankum Brook. The pond contained a dark liquid with a strong chemical odor. A black rubbery latex-type material was present on the Site south of the pond. Residual material was found along the banks of a stream located north of the pond. Ditches on the Site contained a black residual material that emitted a chemical odor. At the rear of the property was an open pit approximately 40 feet by 150 feet by 10 feet deep. The open pit contained dead animals and chemicals. Dead vegetation was present at the rear of the pit area. Hazardous substances were found in a pond downstream from the Site.

12. From 1981 through the present, defendant Khoudary has owned the real property comprising the Bog Creek Farm property. During defendant Khoudary's ownership of the Bog Creek Farm property, hazardous substances, within the meaning of N.J.S.A. 58:10-23.11f.b(3), have been present at the Site.

13. On September 8, 1983, the United States Environmental Protection Agency ("EPA") placed the Site on the National Priorities List, 40 C.F.R. Part 300, Appendix B. The National Priorities List, which was established pursuant to Section 105(a) of CERCLA, 42 U.S.C.A. §9605(a), is a list EPA promulgates of hazardous waste sites that pose the greatest threat to the human health and safety, and the environment.

14. From 1984 through 1985, EPA performed a remedial investigation and feasibility study of the Bog Creek Farm Site pursuant to Section 104 of CERCLA, 42 U.S.C.A. §9604, to determine the nature and extent of the contamination, and to evaluate various ways to remediate it.

15. Sampling results from the remedial investigation and feasibility study revealed that soil near the waste disposal pits was contaminated with volatile organic compounds. Ground water at the Site was contaminated with volatile organic compounds, and contaminated sediments were present in Squankum Brook.

16. On September 30, 1985, EPA, with plaintiff DEP's concurrence, issued a Record of Decision ("1985 ROD") for the Bog Creek Farm Site, in which EPA documented and explained the preferred remedy to address the contaminated soil at the Site.

17. The remedy EPA selected in the 1985 ROD primarily provides for the evacuation and incineration of the buried wastes and contaminated soil at the Site; the backfill, regrade and

revegetation of the Site; and the initiation of a long-term monitoring program to ensure the effectiveness of the remedy. The monitoring program involves periodic samplings and analyses of ground water, surface water, and sediments at the Site.

18. On or about June 28, 1989, EPA, with plaintiff DEP's concurrence, issued a second Record of Decision ("1989 ROD") for the Site, in which EPA documented and explained the preferred remedy to address the contaminated ground water, surface water, and sediments at the Site.

19. The remedy EPA selected in the 1989 ROD primarily provides for installation of an on-site remediation system to extract and treat the contaminated ground water, followed by reinjection on-site; restoration of the upper Kirkwood aquifer to DEP cleanup goals; and the excavation and incineration of contaminated sediments in Squankum Brook.

20. On March 31, 1989, plaintiff DEP issued a directive ("1989 Directive") to the Barry defendants and defendant Khoudary, pursuant to N.J.S.A. 58:10-23.11f.a., directing the defendants to arrange for the cleanup and removal of the hazardous substances that were discharged at the Site by paying to DEP the cost of the remedy EPA selected in the 1989 ROD.

21. The Barry defendants failed to respond to the 1989 Directive, thus requiring plaintiff DEP to perform the remedial action selected for the Site using public funds.

22. On April 4, 1989, defendant Khoudary informed plaintiff DEP that he was unwilling to comply with the 1989 Directive, thus requiring plaintiff DEP to perform the remedial action selected for the Site using public funds.

23. Plaintiff DEP and EPA implemented both the 1985 ROD and 1989 ROD using public funds.

24. As persons responsible for hazardous substances, certain of which were not satisfactorily stored or contained at the Bog Creek Farm property, the defendants are liable, jointly and severally, without regard to fault, for all costs plaintiffs DEP and Administrator have incurred, and will incur, to remediate the Site. N.J.S.A. 58:10-23.11.g.c(1).

25. By failing to comply with the 1989 Directive, the Barry defendants and defendant Khoudary are also persons who are liable in an amount equal to three times the cleanup and removal costs plaintiffs DEP and Administrator have incurred, and will incur, at the Site for implementing the remedy outlined in the 1989 ROD. N.J.S.A. 58:10-23.11f.a(1).

26. On November 29, 1995, plaintiff Administrator filed a first priority lien (Docketed Judgment No. DJ-312495-95) against the real property comprising the Site pursuant to N.J.S.A. 58:10-23.11f. and/or g.

27. On November 15, 1995, plaintiff Administrator also filed a non-priority lien (Docketed Judgment No. DJ-312500-95) against

all revenues and other real and personal property of the Barry defendants pursuant to N.J.S.A. 58:10-23.11f. and/or g.

28. On February 24, 2000, plaintiff Administrator filed an amended first priority lien (Docketed Judgment No. DJ-312495-95) against the real property comprising the Site.

29. Plaintiff DEP has incurred, and will continue to incur, cleanup and removal costs concerning the Site.

30. Plaintiff Administrator has approved, and will continue to approve, appropriations from the Spill Fund to remediate the Site.

31. The costs and damages plaintiffs DEP and Administrator have incurred, and will incur, for the Site are "cleanup and removal costs" within the meaning of N.J.S.A. 58:10-23.11b.

32. 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 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); and for any other unreimbursed costs plaintiff DEP incurs under the Spill Act, N.J.S.A. 58:10-23.11u.b(5).

33. 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 plaintiffs DEP and Administrator, jointly and severally, without regard to fault, for all cleanup and removal costs the plaintiffs have incurred for the Bog Creek Farm Site, plus applicable interest;

b. Enter declaratory judgment against the defendants, jointly and severally, without regard to fault, for any cleanup and removal costs plaintiffs DEP and Administrator may incur for the Bog Creek Farm Site;

c. Order the defendants to conduct an assessment of the nature and extent of any injury to the natural resources of this State damaged or destroyed by the discharges at the Bog Creek Farm Site;

d. Order the defendants to restore, rehabilitate, replace, or acquire the equivalent of injured natural resources and/or natural resource services that have been injured as a result of discharges at the Bog Creek Farm Site, including both: (1) primary restoration, which is an action that returns injured natural resources and natural resource services to the pre-discharge baseline; and (2) compensatory restoration, which is an action that compensates for interim losses of natural resources and natural resource services that occur from the initial date of the

injury until the date the primary restoration has returned the injured natural resources and natural resource services to the pre-discharge baseline;

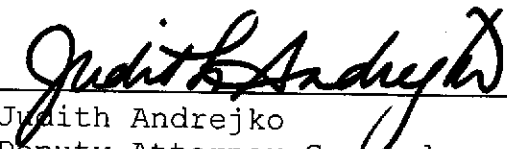
e. Order the defendants to reimburse plaintiffs DEP Administrator, jointly and severally, without regard to fault, in an amount equal to three times the cleanup and removal costs plaintiffs DEP and Administrator have incurred for the Bog Creek Farm Site;

f. Award plaintiffs DEP and Administrator their costs and fees in this action; and

g. Award plaintiffs DEP and Administrator such other relief as this Court deems appropriate.

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

By: \_\_\_\_\_

  
Judith Andrejko  
Deputy Attorney General

Dated: *June 18, 2003*

DESIGNATION OF TRIAL COUNSEL

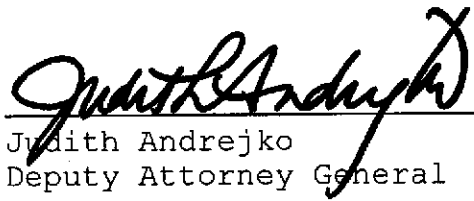
Pursuant to R. 4:25-4, the Court is advised that Judith Andrejko, Deputy Attorney General, is hereby designated as trial counsel for plaintiffs in this action.

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 are not the subject of any other pending or contemplated action in any court or arbitration proceeding known to plaintiffs at this time, nor is any non-party known to 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 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: \_\_\_\_\_

  
Judith Andrejko  
Deputy Attorney General

Dated: *June 18, 2003*

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