

STATEMENT OF THE CASE

1. The Plaintiffs bring this civil action pursuant to the Spill Compensation and Control Act ("the Spill Act"), N.J.S.A. 58:10-23.11 to -23.24, the Water Pollution Control Act, N.J.S.A. 58:10A-1 to -20, 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 the Fairclough Fuel site in Montville Township, Morris County, New Jersey. Plaintiffs DEP and Administrator also seek reimbursement under the Spill Act for 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 Fairclough Fuels site, and to compel the Defendant 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 Fairclough Fuel site. Plaintiff DEP also seeks payment of a penalty it assessed against the Defendant for violating the Water Pollution Control Act.

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 ("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 N.B. Fairclough & Sons, Inc. is a corporation organized under the laws of the State of New Jersey, with a principal place of business located at 800 East 27th Street, Paterson, New Jersey.

AFFECTED NATURAL RESOURCE

Ground Water

6. 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.

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

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

9. 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.

10. 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.

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

GENERAL ALLEGATIONS

12. The Fairclough Fuel site consists of approximately .40 acres of real property located at 811 Route 202, Montville Township, Morris County, New Jersey, this property being also known and designated as Block 109, Lot 18, on the Tax Map of Montville Township ("the Fairclough Fuel Property"), and all other areas where any hazardous substance discharged there has become located (collectively, "the Site"), which plaintiff DEP has designated as Site Remediation Program Interest No. G000008802.

13. From July 1968 through November 1978, the Defendant owned the Fairclough Fuel Property, during which time the Defendant operated a fuel storage and auto repair business on the premises.

14. In November 1978, the defendant sold the Fairclough Fuel Property to Russell and Maureen Cuemon, who operated a transmission repair shop on the premises.

15. In May 1984, Russell and Maureen Cuemon sold the Fairclough Fuel Site Property to George Tokarski, who continues to own the Property, and operates an auto repair shop on the premises.

16. From July 1968 through November 1978, the Defendant's business activities at the Fairclough Fuel Property involved the storage and handling of "hazardous substances," as defined in N.J.S.A. 58:10-23.11b., certain of which were "discharged" there within the meaning of N.J.S.A. 58:10-23.11b.

17. In or about February 1974, plaintiff DEP inspected the Fairclough Fuel Property, and observed that approximately 1,300 gallons of fuel oil, a hazardous substance, had been discharged from a tanker truck into a drain which discharged north of the Fairclough Fuel Property.

18. On November 6, 1974, plaintiff DEP issued a Notice of Prosecution to the Defendant pursuant to N.J.S.A. 58:10-23.1 et seq. and N.J.S.A. 23:5-28 for the fuel oil discharge. Although the Defendant did not admit liability, it paid plaintiff DEP a fine of \$750.00.

19. In March 1975, as part of the investigation of the February 1974 discharge, plaintiff DEP detected petroleum odors in a residential potable well approximately 150 feet north of the Fairclough Fuel Property, which well the Defendant voluntarily replaced in April 1975.

20. In March 1977, the Montville Township Board of Health informed plaintiff DEP of an oil discharge in a pond approximately 300 feet north of the Fairclough Fuel Property.

21. During its investigation of the pond discharge, plaintiff DEP further detected petroleum odors in four residential potable wells north the Fairclough Fuel Property.

22. On November 21, 1977, the Montville Board of Health installed four soil borings on the Fairclough Fuel Property. Two of the borings revealed a substantial, visible layer of oil contamination in the soil. A water sample taken from one of the borings had visible petroleum products present, as did water samples taken from two of the borings which were converted to observation wells. The Board of Health also excavated a test trench on the site, in which oil was observed to collect.

23. In February 1978, plaintiff DEP inspected two residential potable wells north of the Fairclough Fuel Property and detected petroleum odors in both.

24. In April 1978, plaintiff DEP again inspected the Fairclough Fuel Property and found petroleum products in a catch

basin at the northwest corner of the premises and in a connected storm sewer from which the petroleum products were leaking onto the soils and into the ground water through cracks in the sewer line.

25. During the April 1978 investigation, plaintiff DEP further observed oil being discharged to a drainage ditch from a pipe connecting the ditch to the Fairclough Fuel Property, which is located approximately 150 feet to the south from the drainage ditch.

26. In April 1978, the Defendant tested fuel lines at the Fairclough Fuel Property, which tests revealed that hazardous substances were being discharged into the groundwater, which lines the Defendant replaced the same month.

27. On June 1, 1978, plaintiff DEP issued a Notice of Prosecution and Offer of Settlement to the Defendant pursuant to the Spill Act, specifically, N.J.S.A. 58:10-23.11c., N.J.S.A. 58:10-23.11e., and N.J.S.A. 58:10-23.11u., for the fuel lines discharges.

28. Although the Defendant did not admit liability for the fuel line discharges, the Defendant paid plaintiff DEP a fine of \$1,000.00.

29. In August 1985, plaintiff DEP inspected various properties in the vicinity of the Fairclough Fuel Property, the results of which revealed the presence of hazardous substances, specifically petroleum hydrocarbons, at levels exceeding plaintiff

DEP's cleanup criteria, in a residential potable well approximately 100 feet north of the Fairclough Fuel Property.

30. In 1985, plaintiff DEP established a well restriction area for 29 private potable wells in the area around the Fairclough Fuel Site, and recommended that the affected potable wells be sealed, and that the affected residences be connected to the municipal supply system.

31. At various times from February 1974 through October 1985, plaintiff DEP investigated the Site, during which time plaintiff DEP attempted to delineate the nature and extent of the contamination caused by the discharges plaintiff DEP discovered in 1974 and 1977.

32. Sampling results from these investigations revealed the presence of various hazardous substances exceeding plaintiff DEP's cleanup criteria in the soils and ground water at and underlying the Site, with petroleum odors detected in 15 potable wells in the vicinity of the Fairclough Fuel Property.

33. On December 31, 1985, plaintiff DEP issued a Spill Act Directive ("December 1985 Directive") to the Defendant pursuant to N.J.S.A. 58:10-23.11f.a., directing the Defendant to initiate as potable well sampling program, develop a soils contamination remedial action plan, develop groundwater contamination investigation and remedial action plans upon completion of the groundwater contamination investigation, and supply affected

residences with an alternate source of potable water. The Defendant failed to comply with the 1985 Directive.

34. On April 8, 1987, plaintiff DEP issued a Spill Act Directive ("April 1987 Directive") to the Defendant, directing the Defendant to fund the extension of the municipal water supply system to the affected residences, the connection of those residences to the municipal water supply system, and the sealing of the affected wells.

35. The Defendant was unwilling to comply with the April 1987 Directive, therefore requiring plaintiffs DEP and the Administrator to fund and implement the extension of the municipal water supply system to the affected residences, the connection of those residences to the municipal water supply system, and the sealing of the affected potable wells.

36. On February 18, 1988, plaintiff DEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment ("February 1988 AONOCAPA") to the Defendant pursuant to its enabling legislation, N.J.S.A. 13:1D-1 to -19, and the Water Pollution Control Act, N.J.S.A. 58:10A-1 to -20, for discharging hazardous substances at the Fairclough Fuel Property, which contamination adversely impacted nearby potable wells.

37. In the February 1988 AONOCAPA, plaintiff DEP ordered the Defendant to perform certain interim remedial measures, a remedial investigation and a feasibility study, and to submit a remedial

action work plan for remediating the contamination. DEP further assessed a \$190,500 penalty against in the Defendant for discharging hazardous substances at the Site.

38. The Defendant has not completed the remediation the Site that plaintiff DEP ordered it to take in the February 1988 AONOCAPA and, moreover, has not paid the \$190,500 plaintiff DEP assessed.

39. In October 1999, plaintiff DEP approved a Remedial Action Selection Report for the Site pursuant to N.J.S.A. 58:10-23.11f.a. and N.J.A.C. 7:26E-5.2, which describes the proposed remedial action, and how plaintiff DEP determined the proposed remedial action is the most appropriate alternative for the Site.

40. The remedial action DEP has approved for the Site primarily provides for the delineation of the soils and groundwater contamination, the removal and off-site disposal of all contaminated soils, and the remediation of the remaining soils contamination and groundwater contamination.

41. Although the Defendant has initiated the remediation of the Site, the soils and groundwater contamination continues.

FIRST COUNT

Spill Act

42. Plaintiffs DEP and Administrator repeat each allegation of paragraph nos. 1 through 41 above as though fully set forth in its entirety herein.

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

44. Plaintiff DEP has incurred, and will continue to incur, costs for the Site.

45. Plaintiff Administrator has certified, and will continue to certify, for payment, valid claims made against the Spill Fund concerning the Site and, further, has approved, and will continue to approve, other appropriations to remediate the Site.

46. Plaintiffs DEP and Administrator have also 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 by the discharge of hazardous substances at the Fairclough Fuel Property.

47. 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.

48. The Defendant is the discharger of hazardous substances at the Fairclough Fuel Property, and is liable, 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 Fairclough Fuel Property. N.J.S.A. 58:10-23.11g.c.(1).

49. The Defendant, as the owner of the Fairclough Fuel Property at the time hazardous substances were discharged there, also is a person otherwise responsible for the discharged hazardous substances, and is liable, 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 Fairclough Fuel Property. N.J.S.A. 58:10-23.11g.c.(1).

50. 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).

51. 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 Defendant to reimburse the Plaintiffs, 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 Fairclough Fuel Property, with applicable interest;
- b. Enter declaratory judgment against the Defendant, 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 Fairclough Fuel Property;
- c. Order the Defendant to reimburse the Plaintiffs, without regard to fault, in an amount equal to three times the cleanup and removal costs the Plaintiffs have incurred for the Site;
- d. Enter declaratory judgment against the Defendant, without regard to fault, in an amount equal to three times any

cleanup and removal costs that the Plaintiffs will incur for the Site;

- e. Enter judgment against the Defendant, without regard to fault, compelling the Defendant 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 Fairclough Fuel Property, 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 Fairclough Fuel Property;
- f. Award the Plaintiffs their costs and fees in this action; and
- g. Award the Plaintiffs such other relief as this Court deems appropriate.

SECOND COUNT

Water Pollution Control Act

52. Plaintiffs repeat each and every allegation of Paragraphs 1 through 51 above as though fully set forth in its entirety herein.

53. The Water Pollution Control Act, N.J.S.A. 58:10A-1 to -20, authorizes Plaintiff DEP to prevent, control and abate the pollution of the waters of this State. N.J.S.A. 58:10A-4.

54. The Defendant is a "person" within the meaning of N.J.S.A. 58:10A-31.

55. "Pollutants," within the meaning of N.J.S.A. 58:10A-3n., were "discharged" at the Fairclough Fuel Property within the meaning of N.J.S.A. 58:10A-3e., in violation of N.J.S.A. 58:10A-6a, and the regulations promulgated pursuant thereto, specifically, N.J.A.C. 7:14A-1.2(c).

56. The unpermitted discharge of pollutants is a violation of the Water Pollution Control Act for which plaintiff DEP may assess a penalty of not more than \$50,000 pursuant to N.J.S.A. 58:10A-10d.(1)(a). Further, each day the violation continues is a separate violation. Ibid.

57. The Defendant's discharge of pollutants at the Fairclough Fuel Property was a violation of the Water Pollution Control Act, for which plaintiff DEP assessed a \$190,500 penalty against the Defendant on February 18, 1988, and which penalty the Defendant has not paid as of the filing of this action.

58. Pursuant to N.J.S.A. 58:10A-10a.(3) plaintiff DEP may assess a civil administrative penalty against any person who violates the Water Pollution Control Act, and seek to collect upon, or enforce, the penalty in a summary proceeding in the Superior Court. N.J.S.A. 58:10A-10d.(6)(a).

PRAYER FOR RELIEF

WHEREFORE, plaintiff DEP prays that this Court:

- a. Order the Defendant to pay plaintiff DEP the \$190,500 penalty plaintiff DEP assessed against the Defendant on February 18, 1988, with interest;
- b. Award plaintiff DEP its costs and fees in this action;
and
- c. Award Plaintiff DEP such other relief as this Court deems appropriate.

THIRD COUNT

Public Nuisance

59. Plaintiffs repeat each and every allegation of Paragraphs 1 through 58 above as though fully set forth in its entirety herein.

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

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

62. 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 resource.

63. As long as the ground water remain contaminated due to the Defendant's conduct, the public nuisance continues.

64. Until the ground water is restored to its pre-injury quality, the Defendant is 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 Defendant 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 Fairclough Fuel Property, with applicable interest;
- b. Enter declaratory judgment against the Defendant 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 Fairclough Fuel Property;
- c. Enter judgment against the Defendant, compelling the Defendant 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 Fairclough Property, 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 Fairclough Property;

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

FOURTH COUNT

Trespass

65. Plaintiffs repeat each allegation of Paragraphs 1 through 64 above as though fully set forth in its entirety herein.

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

67. The Defendant is liable for trespass, and continued trespass, since hazardous substances were discharged at the Fairclough Fuel Property.

68. As long as the ground water remains contaminated, the Defendant's trespass continues.

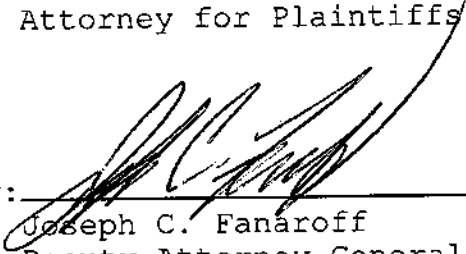
PRAYER FOR RELIEF

WHEREFORE, plaintiffs DEP and Administrator pray that this Court:

- a. Order the Defendant 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 Fairclough Fuel Property, with applicable interest;
- b. Enter declaratory judgment against the Defendant 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 Fairclough Fuel Property;
- c. Enter judgment against the Defendant, compelling the Defendant 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 Fairclough Fuel Property, 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 Fairclough Fuel Property;

- 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: 
Joseph C. Fanaroff
Deputy Attorney General

Dated: 10/26/09

DESIGNATION OF TRIAL COUNSEL

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

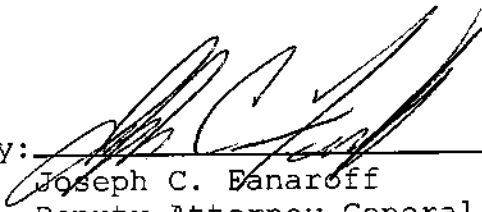
CERTIFICATION REGARDING OTHER PROCEEDINGS AND PARTIES

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-6537-03T3. 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: _____


Joseph C. Eanaroff
Deputy Attorney General

Dated: *10/26/04*