

filed on 12/29/04.

PETER C. HARVEY  
ATTORNEY GENERAL OF NEW JERSEY  
R.J. Hughes Justice Complex  
25 Market Street  
P.O. Box 093  
Trenton, New Jersey 08625

By: Mark D. Oshinskie  
Deputy Attorney General  
(609) 984-6640

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MIDDLESEX COUNTY  
DOCKET NO. d-9504-04

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

Plaintiffs,

v.

OHIO CASUALTY INSURANCE )  
COMPANY; WEST AMERICAN )  
INSURANCE COMPANY; and CRUM )  
& FORSTER INSURANCE COMPANY, )

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 ("the Defendants"), Ohio Casualty Insurance Company, West American

Insurance Company and Crum & Forster Insurance Company (collectively, "the Defendants") say:

STATEMENT OF THE CASE

1. Plaintiffs bring this civil action brought pursuant to the Spill Compensation and Control Act ("the Spill Act"), N.J.S.A. 58:10-23.11 to -23.24, for reimbursement of the cleanup and removal costs they have incurred, and will incur, as a result of the discharge and/or unsatisfactory storage or containment of hazardous substances at the Livingston Avenue Citgo site ("the Site") located in North Brunswick, Middlesex 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 by the discharge of hazardous substances at the Site, 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 Livingston Avenue Citgo site. Plaintiff DEP also seeks payment of a penalty it assessed against the Defendant for violating the Water Pollution Control Act.

PARTIES

2. Plaintiff DEP is a principal department within the Executive Branch of the State government and is vested with the

authority to conserve natural resources, protect the environment, prevent pollution of the State of New Jersey, and protect the health, safety and welfare of the citizenry of this State. 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" or "the Fund") and was so appointed pursuant to the Spill Act, specifically N.J.S.A. 58:10-23.11j. As chief executive officer of the Spill Fund, plaintiff Administrator is authorized, among other things, to approve and make payments for any cleanup and removal costs incurred by plaintiff DEP, N.J.S.A. 58:10-23.11f.c. and d.; and certify the amount of any claim to be paid from the Spill Fund, N.J.S.A. 58:10-23.11j.d.

5. Defendant Ohio Casualty Insurance Company ("Ohio Casualty") is an insurance company whose principal place of business is located at 136 North Third Street, Hamilton, Ohio.

6. Defendant West American Insurance Company ("West American") is an insurance company whose principal place of business is located at 2600 East Nutwood Avenue, Fullerton, California.

7. Defendant Crum & Forster Insurance Company ("Crum & Forster") is an insurance company whose principal place of business is located at 5 Century Drive, Parsippany, NJ.

8. 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.

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

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

11. 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.

12. 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.

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

### GENERAL ALLEGATIONS

14. The Livingston Avenue Citgo site consists of a former gasoline station including real property located at 686 Livingston Avenue, North Brunswick, Middlesex County, New Jersey. This property is also known and designated as Block 103, Lot 2, on the Tax Map of North Brunswick Township (the "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 PI No. 012572.

15. On or before April 17, 1986, gasoline, which is a petroleum product and therefore is a "hazardous substance" as defined by N.J.S.A. 58:10-23.11b., was "discharged" at the Site within the meaning of N.J.S.A. 58:10-23.11f.a.(1).

16. During all times relevant, Edgar Jennings, Sr. and Sandra Jennings owned and operated the gasoline station known as Livingston Avenue Citgo.

17. Mr. and Mrs. Jennings and Livingston Avenue Citgo were, at all times relevant, insured and covered by the Ohio Casualty Insurance Company in accordance with the following policy numbers: GAO 8 01 87 and GAO 8 02 87 (effective October 6, 1985-October 6, 1986); MPO 3 45 76 2 (effective October 6, 1986-October 6, 1987); GAO 8 00 68 (effective October 6, 1986-October 6, 1987); an unnumbered policy apparently issued on October 6, 1986; and GAO 7 24 05 (the effective period of which is unknown); and by West

American Policy Nos. GAW 1 27 06, the effective period of which is unknown, and GAW 8 22 86, effective October 6, 1984-October 6, 1985; and a Crum & Forster Insurance Company Policy No. 523 4069259. Hereinafter, these policies are collectively referred to as "the insurance policies."

18. On or before April 17, 1986, gasoline, which is a petroleum product and therefore is a "hazardous substance" as defined in N.J.S.A. 58:10-23.11b., was "discharged" at and from the Property within the meaning of N.J.S.A. 58:10-23.11b and N.J.S.A. 58:10-23.11f.a. (1).

19. On or about November 12, 1987 DEP was notified that gasoline vapors were detected at the Site.

20. On various dates in January and February, 1988, DEP personnel further investigated the Site and found gasoline contamination in the ground water as well as in the soil.

21. On February 10, 1988, DEP issued a letter to Edgar Jennings, Sr. requiring him to conduct remedial work at the Site.

22. On February 15, 1988, Edgar Jennings, Sr. informed DEP that he had obtained an estimate to conduct remedial work at the Site and that he could not afford to perform the work.

23. On or about February 22, 1988, DEP installed recovery trenches and a groundwater treatment system at the Site.

24. On or about September 1, 1988, plaintiff DEP issued a Spill Act Directive ("Directive") to the station owner, Edgar

Jennings, Sr. requesting Mr. Jennings to assume responsibility for the contaminant treatment system at the Site and to pay for or reimburse DEP for any work DEP performed or would perform to remediate the Site, and directing Mr. Jennings to fund or perform the assessment, mitigation, restoration, and replacement of any natural resource that has been, or may be, injured by the discharge(s) of hazardous substances at and from the Property.

25. A copy of this Directive was simultaneously sent to the Volk George Insurance Agency at 440 South Main St., Milltown, New Jersey and the Ohio Casualty Group at 44 West Ferris Street, East Brunswick, New Jersey.

26. Upon information and belief, Edgar Jennings, Sr. through his attorney, Joseph J. Rosta, Jr., contacted his insurers and requested that they extend coverage for these activities required by the Directive.

27. The remedial action is ongoing, and to date, plaintiffs have incurred both direct and indirect costs totaling in excess of \$763,956.88.

28. On October 23, 2003, Kimber Petroleum and Edgar Jennings, Sr. survivors, namely Edgar Jennings, Jr. and Sandra Jennings-Baxter, agreed to reimburse the Department for \$480,000 of these costs.

29. Once these payments are made, the Department will still be owed \$283,956.88.

30. Livingston Avenue Citgo assigned its rights in these insurance policies to DEP through a written agreement, signed by Sandra Jennings-Baxter f/k/a "Sandra Jennings," on January 3, 2000.

31. Plaintiffs are the third-party beneficiaries of the policies, which policies are intended by the parties to those insurance contracts to benefit those injured by acts or omissions of the insureds. Plaintiffs' injuries are of the type covered by the policies.

32. The Ohio Casualty, West American and Crum & Forster policies were intended to and do cover certain liabilities, losses, damages, costs and/or expenses arising from the activities of Defendants arising out of the ownership, maintenance or use of the Property.

33. Again in April and May, 1998 and in November 2004, the Department requested payment from the insurers for the liabilities of the insured. The insurers have declined to make such payments or even engage in settlement discussions.

34. Ground water and soils are "natural resources" of the State, as defined in N.J.S.A. 58:10-23.11b., which have been, or may be, injured by the discharges of hazardous substances at and from the Property.



FIRST COUNT

**Spill Act**

35. Plaintiffs DEP and Administrator repeat each allegation of paragraphs no. 1 through 34 above as though fully set forth their entirety herein.

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

37. 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 and from the Livingston Avenue Citgo Property.

38. 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.

39. The Defendants were the insurers of the discharger of hazardous substances at the Livingston Avenue Citgo property, and therefore are 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 Property.  
N.J.S.A. 58:10-23.11g.c.(1).

40. The Defendants, as the insurers of the owners and operators of the Property at the time hazardous substances were discharged there, also are a person otherwise responsible for the discharged hazardous substances, and are 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 Property. N.J.S.A. 10-23.11g.c.(1).

41. 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 plaintiff DEP incurs under the Spill Act, N.J.S.A. 58:10-23.11u.b.(5).

42. 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 New Jersey Department of Environmental Protection and the Administrator of the Spill Compensation Fund, 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 and damages including lost use and reasonable assessment costs that the plaintiffs have incurred for the Site, with applicable interest;
- b. Enter declaratory judgment against the Defendants, jointly and severally, without regard to fault, for any future 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 a hazardous substance at the Site;
- c. Enter judgment against the Defendants, 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

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 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.

SECOND COUNT

**Public Nuisance**

43. Plaintiffs repeat each and every allegation of Paragraphs 1 through 42 above as though fully set forth in its entirety herein.

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

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

46. 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.

47. As long as the ground water remain contaminated the public nuisance continues.

48. 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 Site, 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 Site;

- c. Enter judgment against the Defendants, 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 Site, 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 Site;
- 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**

49. Plaintiffs repeat each allegation of Paragraphs 1 through 48 above as though fully set forth in its entirety herein.

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

51. The Defendants are liable for trespass, and continued trespass, since hazardous substances were discharged at the Site.

52. As long as the ground water remains contaminated, the 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 Site, 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 Site;
- 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 Site, 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 Site;

- 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

##### **Failure to Honor Insurance Policy**

53. By failing to pay the amounts due and demanded under the policies or to even engage in good faith negotiations, defendant insurers have exhibited bad faith.

#### PRAYER FOR RELIEF

WHEREFORE, plaintiffs DEP and Administrator pray that this Court:

- a. Order the defendants to pay to DEP the full amount of the policies.
- b. Order the Defendants to reimburse plaintiffs DEP and Administrator, jointly and severally, without regard to fault, for all cleanup and removal costs



plaintiffs DEP and Administrator have incurred for the Site, with applicable interest;

- c. Enter declaratory judgment against the Defendants, jointly and severally, without regard to fault, for any cleanup and removal costs plaintiffs DEP and Administrator will incur for the Site;
- d. Order the defendants to reimburse plaintiffs DEP and Administrator, jointly and severally, without regard to fault, for all cleanup and removal costs and damages, including lost use and reasonable assessment costs, plaintiffs DEP and Administrator have incurred for any natural resource of this State that has been, or may be, injured by the discharges of hazardous substances at and from the Property, with applicable interest;
- e. Enter declaratory judgment against the Defendants, jointly and severally, without regard to fault, all cleanup and removal costs and damages, including lost use and reasonable assessment costs, plaintiffs DEP and Administrator will incur for any natural resource of this State that has been, or may be, injured by the discharges of hazardous substances at and from the Property;

- f. Enter declaratory judgment against the Defendants compelling the Defendants to assess, mitigate, restore and replace, under plaintiff DEP's oversight, any natural resource that has been, or may be, injured by the discharges of hazardous substances at and from the Property;
- g. Award plaintiffs DEP and Administrator their costs and fees in this action; and
- h. 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: Mark D. Oshinskie  
Mark D. Oshinskie  
Deputy Attorney General

Dated: 12/28/09

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, the Court is advised that Mark D. Oshinskie, 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 there 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

By: Mark D. Oshinski  
Mark D. Oshinski  
Deputy Attorney General

Dated: 12/28/04