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

By: Michael E. McMahon
Deputy Attorney General
(609) 984-0214

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
DOCKET NO. L-1801-06

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs, v. PENHORN PLAZA DEVELOPMENT ASSOCIATES; HARBANS L. BHASIN; 801 PENHORN AVENUE, LLC; "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 ("the Defendants"), say:

STATEMENT OF THE CASE

1. 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, and the common law, for reimbursement of the cleanup and removal costs and damages they have incurred, and will incur, as a result of the discharge of hazardous substances at the McKay's Landfill site in Secaucus, Hudson County. Plaintiff DEP further brings this action pursuant to the Sanitary Landfill Facility Closure and Contingency Fund Act, N.J.S.A. 13:1E-100 to -116 ("Sanitary Landfill Act"), for reimbursement of the damages it has incurred, and will incur, as a result of the improper closure of the sanitary landfill facility located at the McKay's Landfill site. 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 and/or the improper closure of the sanitary landfill facility at the McKay's Landfill site. Further, the Plaintiffs seek an order compelling 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,

and/or closure of the sanitary landfill facility at the McKay's Landfill site.

THE PARTIES

2. Plaintiff DEP is a principal department within the Executive Branch of the State government, vested with the authority to conserve and protect natural resources, protect the environment, prevent pollution, and protect the public health and safety. N.J.S.A. 13:1D-9.

3. In addition, the State is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction, for which plaintiff DEP is vested with the authority to protect this public trust and to seek compensation for any injury to the natural resources of this State. 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 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.

5. Defendant Penhorn Plaza Development Associates, is a sole proprietorship, organized under the laws of the State of New Jersey, with a principal place of business located at 301 Penhorn Avenue, Unit 5, Secaucus, New Jersey.

6. Defendant Harbans L. Bhasin, is an individual whose dwelling or usual place of abode is 42 Pocono Road, Denville, New Jersey. He is the sole proprietor of defendant Penhorn Plaza Development Associates.

7. Defendant 801 Penhorn Avenue, LLC, is a limited liability company organized and existing under the laws of the State of New Jersey, with a principal place of business located at 901 Penhorn Avenue, Unit 1, Secaucus, New Jersey.

8. Defendants "ABC Corporations" 1-10, these names being fictitious, are entities with identities that cannot be ascertained as of the filing of this Complaint, certain of which are corporate successors to, predecessors of, or are otherwise related to, defendants Penhorn Plaza Development Associates and 801 Penhorn Avenue, LLC.

9. Defendants "John Does" 1-10, these names being fictitious, are individuals whose identities cannot be ascertained as of the filing of this Complaint, certain of whom are partners, officers, directors, and/or responsible corporate officials of, or are otherwise related to, defendants Penhorn Plaza Development Associates, Harbans L. Bhasin, 801 Penhorn Avenue, LLC, and one or more of the ABC Corporation defendants.

AFFECTED NATURAL RESOURCE

Ground Water

10. 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.

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

12. Ground water provides base flow to streams and other surface water bodies, and influences surface water quality and wetland ecology and the health of aquatic ecosystems.

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

14. Ground water is a unique resource that supports the State's tourism industry, and is also used for commercial, industrial and agricultural purposes, all of which help sustain the State's economy.

15. There are more than 6,000 sites in New Jersey confirmed as having ground water contaminated with hazardous substances.

GENERAL ALLEGATIONS

16. The McKay's Landfill site consists of approximately 11 acres of real property located on Penhorn Avenue, City of Secaucus, Hudson County, New Jersey, this property being also known and designated as Block 44, Lot 5.04, on the Tax Map of the City of Secaucus ("the McKay's Landfill 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. G000004462.

17. From approximately 1943 to 1988, Benjamin McKay and various members of the McKay family, all deceased, one or more of the ABC Corporation defendants and/or one or more of the John Doe defendants, owned the McKay's Landfill Property, and operated an unpermitted landfill on the premises.

18. On June 3, 1988, Benjamin McKay sold the McKay's Landfill Property to defendant Penhorn Plaza Development Associates.

19. On March 30, 2001, defendant Penhorn Plaza Development Associates sold the McKay's Landfill Property to defendant 801 Penhorn Avenue, LLC, which, as of the filing of this Complaint was the owner of record of the McKay's Landfill Property.

20. During the time that Benjamin McKay and the various members of the McKay family owned the McKay Landfill Property, and operated a landfill there, "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 included benzene, chlorobenzene, arsenic, cadmium, copper, lead, nickel, thallium, zinc, benzo(a)pyrene, dibenzo(a,h)anthracene, dieldrin and polychlorinated byphenals ("PCBs").

21. During the time that Benjamin McKay and other members of the McKay family owned the McKay Landfill Property, and operated a landfill there, "solid wastes," within the meaning of N.J.S.A. 13:1E-3a., were also "disposed of" there within the meaning of N.J.S.A. 13:1E-3c., certain of which contained benzene, chlorobenzene, arsenic, cadmium, copper, lead, nickel, thallium, zinc, benzo(a)pyrene, dibenzo(a,h)anthracene, dieldrin and PCBs.

22. Certain of the solid wastes disposed of at the McKay's Landfill Property were deposited on, or in, the land as fill for the purpose of permanent disposal or storage for a period exceeding six months, thereby creating a "sanitary landfill facility" at the McKay's Landfill Property within the meaning of N.J.S.A. 13:1E-3q.

23. At all times relevant to this Complaint, Occidental Chemical Corp.'s predecessors, Diamond Alkali Company and Diamond Shamrock Corporation, processed chromium at a facility in the Town of Kearny, Hudson County, one component of which was the generation of chromate chemical production waste ("CCPW"), which

contains various "hazardous substances" within the meaning of N.J.S.A. 58:10-23.11b., which substances included hexavalent chromium, nickel and vanadium.

24. At various times between 1948 and 1976, Occidental and/or its predecessors, transported, or arranged to have transported, CCPW to the McKay's Landfill Property, which was "discharged" there within the meaning of N.J.S.A. 58:10-23.11b., and/or "disposed of" there within the meaning of N.J.S.A. 13:1E-3c.

25. From 1994 through 1999, Occidental performed a remedial investigation pursuant to N.J.S.A. 58:10-23.11f.a. and N.J.A.C. 7:26E, to determine the nature and extent of the CCPW contamination at the Site.

26. Additionally, from 1994 through 1999, defendant Penhorn Plaza Development Associates performed a remedial investigation pursuant to N.J.S.A. 58:10-23.11f.a. and N.J.A.C. 7:26E, during which defendant Penhorn Plaza Development Associates investigated the nature and extent of the non-CCPW contamination at the Site.

27. Sampling results from the remedial investigation defendant Penhorn Plaza Development Associates performed revealed the presence of various hazardous substances at concentrations exceeding plaintiff DEP's cleanup criteria in the ground water and soils at the Site, which substances included benzene,

chlorobenzene, arsenic, cadmium, copper, lead, nickel, thallium, zinc, benzo(a)pyrene, dibenzo(a,h)anthracene, dieldrin and PCBs.

28. On July 28, 2000, defendant Penhorn Plaza Development Associates entered into a Memorandum of Agreement with plaintiff DEP to address these non-chromium constituents.

29. On February 20, 2001, plaintiff DEP issued Occidental a conditional no further action letter pursuant to N.J.A.C. 7:26C-2.6 for the CCPW contamination at the Site.

30. On June 18, 2001, plaintiff DEP approved a Classification Exception Area ("CEA") excluding the designated groundwater for use as a potable water source because of the benzene and chlorobenzene contamination.

31. On June 28, 2001, 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 described the proposed remedial action for contaminants other than chromium, and how plaintiff DEP determined the proposed remedial action is the most appropriate alternative for the Site.

32. The remedial action plaintiff DEP has approved for the Site primarily provides for a deed notice restricting future use of the McKay's Landfill Property to non-residential purposes and requiring the use of engineering controls, including asphalt paving, a concrete slab to minimize potential pathways of exposure, and a vegetative landscape cover.

33. Although defendant Penhorn Plaza Development Associates and Occidental Chemical have initiated the remediation of the Site, the groundwater and soils 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 McKay's Landfill Property.

37. Plaintiff Administrator has certified, or may certify, for payment, valid claims made against the Spill Fund concerning the Site, and, further, has approved, or may approve, other appropriations for the Site.

38. The Plaintiffs have incurred, and will continue to incur, costs and damages, including lost value 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 McKay's Landfill Property.

39. The costs and damages the Plaintiffs 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.

40. Defendants Penhorn Plaza Development Associates, Harbans L. Bhasin, 801 Penhorn Avenue, LLC, one or more of the ABC Corporation Defendants, and/or one or more of the John Doe Defendants, as knowing purchasers of the McKay's Landfill Property, a property at which hazardous substances were previously discharged, are persons in any way responsible for the discharged hazardous substances, and are jointly and severally liable, without regard to fault, for all cleanup and removal costs and damages, including lost value 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 by the discharge of hazardous substances at the McKay's Landfill Property. N.J.S.A. 58:10-23.11g.c.(3).

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 or damages 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 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 value 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 McKay's Landfill Property, 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 value 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 McKay's Landfill Property;

c. Enter judgment against defendant Penhorn Plaza Development Associates, compelling defendant Penhorn Plaza Development Associates to perform, under plaintiff DEP's oversight, or to fund plaintiff DEP's performance of, any further cleanup of hazardous substances at the McKay's Landfill Property, other than those associated with chromate chemical production wastes;

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

Sanitary Landfill Act

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

44. Defendants are persons who have "owned" the sanitary landfill facility located at the McKay's Landfill Property within the meaning of N.J.S.A. 13:1E-102b.

45. Plaintiff DEP has incurred, and will continue to incur,

costs resulting from the improper closure of the sanitary landfill facility located at the McKay's Landfill Property.

46. Plaintiff DEP has also certified, or may also certify, for payment, valid claims made against the Sanitary Landfill Facility Contingency Fund concerning the sanitary landfill facility at the McKay's Landfill Property.

47. Plaintiff DEP has incurred, and will continue to incur, costs and damages, including lost value and reasonable assessment costs, for any natural resource of this State that has been, or may be, injured as a result of the disposal of solid wastes at the McKay's Landfill Property.

48. As the owners of the sanitary landfill facility at the McKay's Landfill Property, the Defendants are liable, jointly and severally, for the sanitary landfill facility's proper closure as required by law, and for any damages, either direct or indirect, proximately resulting from the improper closure of the sanitary landfill facility at the McKay's Landfill Property, including lost value and reasonable assessment costs, that plaintiff DEP has 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 improper operation and/or closure of the sanitary landfill facility at the McKay's Landfill Property. N.J.S.A. 13:1E-103.

49. Pursuant to N.J.S.A. 13:1E-9b. and d., plaintiff DEP may bring an action in the Superior Court for the costs of any investigation, inspection or monitoring survey, and the reasonable costs of preparing and litigating the case, N.J.S.A. 13:1E-9d.(2); the costs to remove, correct or terminate any adverse effects upon water and air quality, N.J.S.A. 13:1E-9d.(3); compensatory damages, including the lost value and assessment costs, that plaintiff DEP incurs for any natural resource of this State that has been, or may be, injured as a result of the improper closure of the sanitary landfill facility located at the McKay's Landfill Property; and for any other actual damages. N.J.S.A. 13:1E-9d.(3).

PRAYER FOR RELIEF

WHEREFORE, plaintiff DEP prays that this Court:

a. Order the Defendants to reimburse plaintiff DEP, jointly and severally, for all direct and indirect damages, including lost value and reasonable assessment costs, for any natural resource of this State injured as a result of the improper closure of the sanitary landfill facility at the McKay's Landfill Property, with applicable interest;

b. Enter declaratory judgment against the Defendants, jointly and severally, for all direct and indirect damages, including lost value and reasonable assessment costs that plaintiff DEP will incur for any natural

resource of this State injured as a result of the improper closure of the sanitary landfill facility at the McKay's Landfill Property;

c. Award plaintiff DEP its costs and fees in this action; and

d. Award plaintiff DEP such other relief as the Court deems appropriate.

THIRD COUNT

Public Nuisance

50. Plaintiffs repeat each allegation of Paragraph nos. 1 through 49 above as though fully set forth in its entirety herein.

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

52. The use, enjoyment and existence of uncontaminated natural resources are rights common to the general public.

53. 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.

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

55. 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 value 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 McKay's Landfill Property, with applicable interest;

b. Enter declaratory judgment against the Defendants for all cleanup and removal costs and damages, including restitution for unjust enrichment, lost value 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 McKay's Landfill Property;

c. Enter judgment against defendant Penhorn Plaza Development Associates, compelling defendant Penhorn Plaza Development Associates to abate, under plaintiff DEP's oversight, the nuisance by performing any further

cleanup of the hazardous substances discharged at the McKay's Landfill Property, other than those associated with chromate chemical production wastes;

d. 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 McKay's Landfill 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 McKay's Landfill Property;

e. Award the Plaintiffs their costs and fees in this action; and

f. Award the Plaintiffs such other relief as this Court deems appropriate.

FOURTH COUNT

Trespass

56. Plaintiffs repeat each allegation of Paragraph nos. 1 through 55 above as though fully set forth in its entirety herein.

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

58. The Defendants are liable for trespass, and continued trespass, since hazardous substances were discharged at the McKay's Landfill Property.

59. 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 value 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 McKay's Landfill Property, with applicable interest;

b. Enter declaratory judgment against the Defendants for all cleanup and removal costs and damages, including restitution for unjust enrichment, lost value 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 McKay's Landfill Property;

c. Enter judgment against defendant Penhorn Plaza Development Associates, compelling defendant Penhorn

Plaza Development Associates to cease, under plaintiff DEP's oversight, the trespass by performing any further cleanup of hazardous substances discharged at the McKay's Landfill Property;

d. 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 McKay's Landfill 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 McKay's Landfill Property;

e. Award the Plaintiffs their costs and fees in this action; and

f. Award the Plaintiffs such other relief as this Court deems appropriate.

ZULIMA V. FARBER
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs

By: _____
Michael E. McMahon
Deputy Attorney General

Dated: March 29, 2006

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, the Court is advised that Michael E. McMahon, 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 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).

ZULIMA V. FARBER
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs

By: _____
Michael E. McMahon
Deputy Attorney General

Dated: March 29, 2006