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**NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,**

**Plaintiff,**

**v.**

**EXXON MOBIL CORP.,**

**Defendant.**

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
UNION COUNTY

**Docket No. UNN-L-3026-04**

CIVIL ACTION

PROPOSED COMPLAINT AND  
CROSSCLAIM IN INTERVENTION

## INTRODUCTION

1. This is a long-running case brought by the New Jersey Department of Environmental Protection (the Department) against ExxonMobil Corporation (Exxon). The Department sought damages for over a century's worth of severe damage and destruction to natural resources by Exxon at the Bayway and Bayonne refineries in New Jersey.
2. The Department valued the cost of restoring and replacing the resources damaged and destroyed by Exxon at \$8.9 billion.
3. After trial, the Department inexplicably abandoned its position, agreeing to a settlement (Settlement) that would require Exxon to pay only \$225 million. The Settlement would also release Exxon from liability for natural resource damages at over 800 other sites.
4. On information and belief, the Department and Exxon will soon ask this Court to approve and enter the Settlement.
5. Seven environmental groups wish to intervene to oppose entry of the Settlement on the grounds that it is unfair, unreasonable, and contrary to the public interest, the New Jersey Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11–23:24, and the public trust doctrine.

## JURISDICTION AND VENUE

6. The Court has jurisdiction over this action pursuant to N.J. Const. art. 6, § 3, ¶ 2.
7. Venue lies in this County pursuant to Rule 4:3-2(a)(2).
8. At least some of the acts, practices, and courses of business constituting the violations underlying the Department's causes of action occurred within Union County. For instance, the Bayway Refinery is located in Union County, and the discharges of

petroleum products and other hazardous substances from the refinery occurred within the County.

## **PARTIES**

9. Plaintiff Department is part of the Executive Branch of the State of New Jersey. The Department is charged with protecting and conserving natural resources, preventing pollution, and protecting the public's health and safety. First Am. Compl. (Bayway) ¶ 2 (Jan. 7, 2009). It is also trustee of the State's natural resources, which it must preserve and protect for the public's benefit. N.J.S.A. 58:10-23.11a.

10. Defendant Exxon is a corporation organized under the laws of New Jersey. Exxon is a "person" for purposes of N.J.S.A. 58:10-23.11b.

11. Environmental Intervenors New York / New Jersey (NY/NJ) Baykeeper, New Jersey Sierra Club, Clean Water Action, Delaware Riverkeeper Network, Environment New Jersey, Natural Resources Defense Council, and New Jersey Audubon are nonprofit citizen groups dedicated to protecting and enhancing the environment. Together, these groups have a combined base of hundreds of thousands of members and supporters. See Certification of Debbie Mans (NY/NJ Baykeeper); Certification of Jeff H. Tittel (New Jersey Sierra Club); Certification of David Pringle (Clean Water Action); Second Certification of Maya van Rossum (Delaware Riverkeeper Network); Certification of Doug O'Malley (Environment New Jersey); Certification of Gina Trujillo (Natural Resources Defense Council); Certification of Eric Stiles (New Jersey Audubon). Environmental Intervenor Delaware Riverkeeper is a full-time, privately funded ombudsman who is responsible for protecting the waterways in the Delaware River Watershed. First

Certification of Maya van Rossum (Delaware Riverkeeper). Environmental Intervenors have jointly submitted public comments to the Department opposing the Settlement.

### FACTS

12. This case began in 2004, when the Department sued Exxon pursuant to the Spill Act and New Jersey common law. See N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 397 (App. Div. 2007) [hereinafter Exxon I]. The Department sought to recover the costs of restoring and replacing natural resources damaged and destroyed as the result of hazardous discharges at the Bayway and Bayonne refinery sites. See id. The Department has alleged that Exxon's hazardous discharges and damage began at Bayonne around 1877 and at Bayway around 1909. See Dep't Post-Trial Br. 128-29, 161-62.

13. In 2006, the Superior Court held that Exxon is strictly liable for natural resource damages at the sites. See Exxon I, supra, 393 N.J. Super. at 397-98 (describing 2006 liability ruling).

14. In 2007, the Appellate Division held that the Spill Act empowered the Department "to seek compensation not just for physical injury to natural resources, but also for the loss of the benefits they provide." Id. at 410.

15. The Superior Court permitted the Department to seek natural resource damages for the entirety of the Bayway and Bayonne sites, including privately owned areas that are not, and have never been, tidally flowed. See N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp., No. UNN-L-3026-04, (Law. Div. July 24, 2009) (slip op. at 1-4).

16. The Department has described Bayonne and Bayway as "the biggest and dirtiest sites with the widest array of impacted natural resources" in New Jersey. See N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp., 420 N.J. Super. 395, 409 (App. Div. 2011) [hereinafter Exxon

II]. At trial, the Department’s witnesses described unlined pits and former mudflats more than ten feet deep in oily wastes; sludge lagoons; chemical-laced soils; and areas where petroleum has leached from underground and hardened, asphalt-like, on the surface. See Dep’t Post-Trial Br. 3, 6, 143-54.

17. By the 1970s, the soil and groundwater at the Bayonne site were contaminated with “at least some seven million gallons of oil, ranging in thickness from 7 to 17 feet.” Exxon II, supra, 420 N.J. Super. at 398 (citation omitted). The Department has identified seventeen different plumes of petroleum contamination floating atop groundwater over an 185-acre area at the site. Stratus Consulting Inc., Natural Resource Damages at the ExxonMobil Bayway and Bayonne Sites, 3-34 (2006).

18. At its Spill-Act remedy trial against Exxon, the Department sought \$8.9 billion in damages to cover costs necessary to restore and replace the natural resources damaged and destroyed at the two refinery sites during Exxon’s operations there.

19. After the remedy trial, the Department filed a brief with the Court that repeated its \$8.9-billion damages demand and characterized the pollution caused by Exxon’s hazardous discharges as “staggering and unprecedented in New Jersey.” Dep’t Post-Trial Br. 3. The Department described how “approximately 1,800 acres of wetlands, marshes, meadows and waters have been adversely affected by or buried under the discharge of hazardous substances, including over 600 chemicals.” Ibid.

20. Subsequently, and without explanation, the Department and Exxon agreed to a Settlement requiring Exxon to pay \$225 million, or less than three percent of the damages the Department sought and said it proved at trial.

21. The Settlement provides for the \$225 million to be held in a segregated account within New Jersey's Hazardous Site Discharge Cleanup Fund until the Settlement becomes final, but does not specify how the funds may be spent once the Settlement becomes final. Settlement 13 ¶ 5.

22. In addition, the Settlement defers indefinitely the remediation of Morses Creek, a heavily polluted waterway that serves as an open sewer for cooling water from the Bayway refinery. Settlement 20 ¶ 13; Dep't Post-Trial Br. 130-31, 138-39.

23. With small exceptions, the Settlement also releases Exxon from further liability for natural resource damages at more than 800 other sites. Settlement 4, 15-19. On information and belief, the Department has evaluated the extent of natural resource damages for only one of these additional sites.

#### **CLAIM FOR RELIEF**

24. Paragraphs 1-23 are incorporated by reference as if set forth fully herein.

25. The Settlement is unfair, unreasonable, and contrary to the public interest, the Spill Act, and the public trust doctrine.

#### ***Fairness, Reasonableness, and Consistency with the Public Interest***

26. Fairness encompasses "the concepts of corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible." United States v. Kramer, 19 F. Supp. 2d 273, 285 (D.N.J. 1998) (citation omitted). To demonstrate fairness, the Department must provide a reasoned explanation of how the Settlement terms are based upon and commensurate with Exxon's liability. See id.

27. To ascertain reasonableness, the Court must make an independent determination whether the Settlement will adequately compensate the public for its natural-resource loss,

of the adequacy of the Department's proposal for restoring and replacing the natural resources damaged and destroyed by Exxon, and of the risks and delays inherent in litigation. See id. at 287-88.

28. The Court must consider whether the Settlement is fair and reasonable not only to the settling parties, but also to the public at large. See id. at 280, 287-88.

### *The Spill Act*

29. The Spill Act reflects the Legislature's determination that the discharge of petroleum products and other hazardous substances threatens New Jersey's economy and environment. See N.J.S.A. 58:10-23.11a.

30. To remedy this threat, the Act provides that "the State is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction." Id. It reflects the Legislature's intent to hold polluters liable for "damage sustained within the State as a result of any discharge of [petroleum products and other hazardous substances]." See id.

31. The Act states that it "shall be liberally construed to effect its purposes." N.J.S.A. 58:10-23.11x.

32. The Act requires the Department, as trustee, "to invoke its rights when the public trust is damaged," Letter of Opinion, N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp., No. UNN-L-3026-04, (Law. Div. Aug. 29, 2008) (slip op. at 4) (citation omitted) [hereinafter "Exxon 2008"]; and to manage its natural and fiscal resources to promote public interest. N.J.S.A. 58:10-23.11a; Marsh v. N.J. Dep't of Env'tl. Prot., 152 N.J. 137, 145 (1997).

33. This requires the Department to recover adequate compensation for damage done to the State's natural resources, including the resources damaged and destroyed by Exxon.

*The Public Trust Doctrine*

34. Pursuant to New Jersey's expansive public trust doctrine, the Department has both the right and the duty to protect its natural resources in the interest of New Jersey's citizens. See Exxon 2008, *supra*, at 3-4; Hackensack Meadowlands Dev. Comm'n v. Mun. Sanitary Landfill Auth., 68 N.J. 451, 477 (1975), *vacated on other grounds sub nom. City of Philadelphia v. New Jersey*, 430 U.S. 141, 97 S. Ct. 987, 51 L. Ed. 2d 224 (1977).

35. The public trust doctrine protects resources on both public and private property, and encompasses uplands as well as tidal waters and tidally flowed lands. See Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 325-26 (1984).

36. The public trust doctrine obligates the Department to recover adequate compensation for the natural resources that Exxon damaged and destroyed.

\* \* \*

37. The Settlement is not fair, reasonable, or in the public interest. By agreeing to the Settlement, the Department has breached its duties under the Spill Act and public trust doctrine.

38. The Settlement fails to compensate the public adequately for over a century's worth of natural resource injuries perpetrated by Exxon at the Bayway and Bayonne sites. Based on the Department's own assessments, \$225 million would finance restoration and replacement of a tiny fraction of the natural resources that Exxon damaged and destroyed at those two sites alone.

39. The Settlement also defers remediation of heavily polluted Morses Creek until the Bayway refinery stops operating.



40. In addition, the Settlement releases Exxon from liability for its damage to and destruction of natural resources at over 800 additional sites—even though the Department has yet to assess the extent of injury to the resources at all but one of those additional sites.

41. Furthermore, the Settlement fails to ensure that any of the recovered monies will actually be used for restoration and replacement of the natural resources damaged or destroyed by Exxon.

42. The Department has provided no public explanation why it changed its valuation of natural resource damages from \$8.9 billion for the Bayway and Bayonne sites alone to \$225 million—or 2.5% of \$8.9 billion—for not only those two refinery sites, but also more than 800 additional sites.

43. The Settlement relinquishes substantial and valuable environmental claims against Exxon for a meager and unrestricted cash payment; squanders a critical opportunity to repair the damage done at Bayway, Bayonne, and the other polluted sites it covers; and prejudices members of the public who are entitled to sound management of New Jersey's natural and fiscal resources. By agreeing to the Settlement, the Department has unfairly and unreasonably breached its fiduciary duties under the Spill Act and public trust doctrine to manage New Jersey's natural and fiscal resources for the benefit of the public.

#### **REQUEST FOR RELIEF**

44. Environmental Intervenors request that the Court (1) hold that the Settlement is unfair, unreasonable, and contrary to the public interest, the Spill Act, and the public trust doctrine; (2) reject the Settlement; (3) award reasonable attorney fees and costs as appropriate; and (4) provide any further relief the Court deems necessary and proper.

Respectfully submitted,

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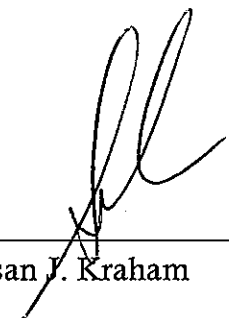
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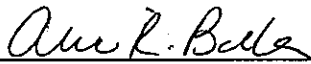
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Dated: June 8, 2015



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By: Susan J. Kraham



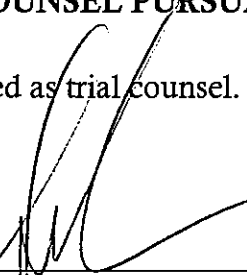
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By: Alice R. Baker

**DESIGNATION OF TRIAL COUNSEL PURSUANT TO R. 4:5-1(c)**

Susan J. Kraham is hereby designated as trial counsel.

Dated: June 8, 2015



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**CERTIFICATION PURSUANT TO R. 4:5-1(b)(3)**

I hereby certify that the matter in controversy herein is not the subject of another controversy. I further certify that it is not contemplated that another party should be joined.

I hereby certify that the foregoing statements made by me are true and am aware that if any of them is false, I am subject to punishment

Dated: June 8, 2015



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## **ADDENDUM: ADDRESSES OF APPLICANT INTERVENORS**

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2. New Jersey Sierra Club  
145 West Hanover Street  
Trenton, NJ 08618
3. Clean Water Action  
198 Brighton Avenue  
Long Branch, NJ 07740
4. Delaware Riverkeeper  
925 Canal Street, Suite 3701  
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