

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

AMON, J.  
LEVY, M.J.  
2902

STATE OF NEW YORK and ALEXANDER B.  
GRANNIS, as Commissioner of the New York State  
Department of Environmental Conservation and Trustee of  
Natural Resources,

07

No. \_\_\_\_\_

Plaintiffs,

-against-

EXXONMOBIL CORPORATION and  
EXXONMOBIL REFINING & SUPPLY COMPANY,

Defendants.

COMPLAINT AND  
DEMAND FOR  
JURY TRIAL

FILED  
CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.

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\* JUL 17 2007 \*

BROOKLYN OFFICE

Plaintiffs State of New York and Alexander B. Grannis, as Commissioner of the New York State Department of Environmental Conservation ("DEC") and Trustee of its Natural Resources (together the "State"), by their attorney, Andrew M. Cuomo, Attorney General of the State of New York, allege as follows:

**NATURE OF THE ACTION**

1. Plaintiffs bring this civil action pursuant to the citizen suit provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), the citizen suit provisions of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a)(1), the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, the Oil Pollution Act ("OPA"), 33 U.S.C. § 2701 *et seq.*, the New York State Navigation Law, § 1 *et seq.*, the New York State Environmental Conservation Law ("ECL"), and the New York common law of public nuisance, indemnification, and restitution.

2. On information and belief, Defendants ExxonMobil Corporation and

ExxonMobil Refining & Supply Company (together referred to as "Exxon"), and their predecessors spilled, leaked, released, discharged, or otherwise discarded at least seventeen million gallons of various petroleum products and other non-petroleum pollutants from certain oil refining and storage facilities in Greenpoint, Brooklyn, New York, into the surrounding environment, including into the air, soils, subsurface soils, groundwater, wetlands, and the surface waters and sediments of Newtown Creek (the "Creek"). The widespread contamination has formed a massive plume of underground petroleum and other pollutants in the Greenpoint area (the "Spill") (together the Spill and the Creek are referred to as the "Site").

3. This action seeks a cleanup of the Spill, including the soils, subsurface soils and groundwater, wetlands, the vapors in the soil and air, and of the Creek, including its sediments, as well as the recovery of all past and future costs incurred by the State in response to the release and threatened release of petroleum, pollutants, solid and hazardous wastes, and hazardous substances into the environment as part of the Spill and into the Creek. The State also seeks from Exxon all available penalties and natural resource damages arising from its contamination at the Site.

#### **JURISDICTION AND VENUE**

4. This Court has original jurisdiction over the federal statutory claims in this complaint, pursuant to 28 U.S.C. § 1331, 33 U.S.C. § 1365(a)(1), 42 U.S.C. § 6972(a)(1)(B), 33 U.S.C. § 2701 *et seq.*, 42 U.S.C. §§ 9607 and 9613, and 28 U.S.C. § 2201. The Court has supplemental jurisdiction, under 28 U.S.C. § 1367, for the remaining claims, which are based upon New York statutes and common law and arise out of a common nucleus of operative facts shared with the federal claims. The Court also has jurisdiction to enter a declaratory judgment

under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 9613.

5. Venue is proper in this District pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b) because the threatened and actual releases of petroleum, pollutants, solid and hazardous wastes, and/or hazardous substances that give rise to this action occurred and/or are occurring in this District and the Site is located in this District.

6. On February 8, 2007, the State of New York mailed to the defendants notices of its intent to sue on the violations described in this complaint arising under the CWA, 33 U.S.C. § 1365(b)(1)(A), and under RCRA, 42 U.S.C. § 6972(b)(2)(A), and also mailed copies of those notices to the Administrator of the United States Environmental Protection Agency ("EPA") and to the Commissioner of DEC, as required under the CWA, 33 U.S.C. § 1365(b)(1)(A), and RCRA, 42 U.S.C. § 6972(b)(2)(A). The notice describing the violations under RCRA is annexed as Exhibit 1, and the notice describing the violations under the CWA is annexed as Exhibit 2.

7. Exxon's violations of the CWA and RCRA are ongoing and will continue in the future.

8. Neither EPA nor the State of New York has commenced and is diligently prosecuting a prior court action relating to Exxon's contamination of the Site under the CWA, 33 U.S.C. § 251 *et seq.*, or under RCRA, 42 U.S.C. § 6972(a)(1)(B); has incurred costs to initiate a remedial investigation and feasibility study under section 104 of CERCLA, 42 U.S.C. § 9604, and is diligently proceeding with a remedial action under section 104 of CERCLA, 42 U.S.C. § 9604; is actually engaging in a removal action under section 104 of CERCLA, 42 U.S.C. § 9604; or has commenced an action or issued an administrative order under section 106

of CERCLA, 42 U.S.C. § 9606, or under RCRA, 42 U.S.C. § 6973.

9. All requirements for filing a citizen suit under the CWA, 33 U.S.C. § 1365(b)(1)(A), and under RCRA, 42 U.S.C. § 6972(b)(2)(A)-(C), have been satisfied.

#### THE PARTIES

10. Plaintiff, State of New York, as a body politic and a sovereign entity, brings this action on behalf of itself and as *parens patriae*, trustee, guardian, and representative on behalf of all residents and citizens of New York, particularly those citizens and residents who live in the vicinity of the Site.

11. Plaintiff Alexander B. Grannis, Commissioner of DEC, and Trustee of the State of New York's natural resources pursuant to CERCLA, 42 U.S.C. § 9607(f)(2)(b), joins in this action to recover damages for injury to, or loss of, the State's natural resources.

12. On information and belief, Defendant ExxonMobil Corporation is a publicly held corporation organized under the laws of the State of New Jersey. It is the successor of the Mobil Oil Corporation ("Mobil"), through a merger in 1999, and of other companies that operated at the Site.

13. Mobil was the owner and operator of a petroleum facility located at 300 North Henry Street, Brooklyn, New York and an oil refinery located between Greenpoint and Norman Avenues, Brooklyn, New York.

14. On information and belief, Defendant ExxonMobil Refining & Supply Company is a corporation organized under the laws of the State of New Jersey. On information and belief, it operates and manages refining and supply facilities on behalf of ExxonMobil Corporation, including operating and managing remediation efforts at such facilities.

**FACTS COMMON TO ALL CLAIMS**

15. Since at least the early 1900's, Exxon and its predecessors, including the Standard Oil Company, the Standard Oil Company of New York, and Mobil Oil Company, have owned and operated petroleum refining and storage facilities – at times known as the Brooklyn Terminal – located in the Greenpoint neighborhood of Brooklyn, New York. On information and belief, Exxon also owned the property on which the facilities were located.

16. These facilities included a large tank farm property and a refinery and storage facility that encompassed all of the land now bounded by North Henry Street, Greenpoint Avenue, Norman Avenue, and Apollo Street in Brooklyn, and Newtown Creek. On information and belief, Exxon continues to own an inactive petroleum storage facility within the area.

17. In the course of operations at these facilities, Exxon spilled, leaked, released, discharged, or otherwise discarded over seventeen million gallons of petroleum, pollutants, solid and hazardous wastes, and other hazardous substances into the environment, including into the soils, subsurface soils, groundwater, wetlands, and surface waters.

18. The plume of contaminants from Exxon's Spill has migrated, and continues to migrate, to the Creek. As it reaches the edge of the Creek these contaminants seep into the Creek's waters through discrete cracks, fissures, channels and gaps in bulkheads located along the Creek's shoreline including at properties known as the Peerless Importers and the Steel Equities properties. The Peerless Importers property is located at 26 Bridgewater Street and Moecker Avenue in Brooklyn (Block #2666, Lots 1, 52, 125), and the Steel Equities property is located at 100 and 120 Apollo Street and Bridgewater Street in Brooklyn (Block #2666, Lots 101 and 201). The bulkhead seepages have occurred, without limitation, on the dates set forth

in exhibit C to the notice of intent to sue attached as Exhibit 2, and they continue to occur.

19. In February 1990, an oil spill of 50,000 gallons from an aboveground storage tank, No. 69, occurred at the Mobil Oil Terminal, 300 North Henry Street, Brooklyn. DEC entered into an administrative Order on Consent with Mobil, under NY Navigation Law §§173, 175, and 176, and the Water Pollution Control Law, ECL § 17-0501, for the investigation and remediation of only the spill from tank No. 69 and the petroleum free product plume under Exxon's current and former petroleum refining and storage facilities ("On-Site Order"). The On-Site Order did not address the Spill's dissolved groundwater plume, soil contamination, vapor releases, or contamination of the Creek and its biota.

20. In June 1990, DEC entered into a separate administrative Order on Consent with Mobil, under NY Navigation Law §§173, 175, and 176, and the Water Pollution Control Law, ECL § 17-0501, for the investigation and remediation of only the petroleum free product plume that had migrated through the subsurface and off the boundaries of Exxon's current and former petroleum refining and storage facilities ("Off-Site Order"). The Off-Site Order did not address the Spill's dissolved groundwater plume, soil contamination, vapor releases, or contamination of the Creek and its biota.

21. Exxon owns and operates two systems to recover only petroleum free product from the subsurface in Greenpoint, Brooklyn: (1) the Off-Site Free Product Recovery System ("Off-Site Recovery System") located on Bridgewater Street, Greenpoint, Brooklyn, New York, which includes an outfall into Newtown Creek located at the end of Meeker Avenue; and (2) the Brooklyn Terminal Free Product Recovery System ("On-Site Recovery System") located at 400 Kingsland Avenue, Brooklyn, New York, which also includes an outfall into Newtown Creek.

22. As an incident of their operation, these free product recovery systems recover contaminated groundwater, which is treated with air strippers and then discharged into Newtown Creek through the two aforesaid outfalls. Each of these outfalls is currently regulated by the New York State Pollution Discharge Elimination System ("SPDES") permit equivalency program, with oversight by DEC.

23. Over the history of the operations of these outfalls, Exxon discharged through these outfalls various petroleum contaminants, pollutants, solid and hazardous wastes, and other hazardous substances, some of which were not authorized to be discharged by the SPDES permit equivalency program. Such unauthorized discharges occurred, without limitation, on the dates set forth in exhibit A to the notice of intent to sue annexed as Exhibit 2.

24. From March 9, 2007, until on or about June 28, 2007, Exxon shut down both of its petroleum free product recovery systems despite the objection to the shutdown made by the State and the State's demand that Exxon continue recovery of released petroleum and treatment of contaminated groundwater. This shutdown reduced Exxon's recovery of petroleum free product to *de minimis* amounts and thus effectively suspended Exxon's on-site and off-site recovery efforts, in violation of Exxon's obligations under the On-Site and Off-Site Orders and under law. The Exxon On-Site and Off-site Orders require the recovery of petroleum free product from the subsurface in Greenpoint, Brooklyn.

25. On information and belief, Exxon's shutdown exacerbated the Spill's contamination of the Site, including worsening groundwater seepage into the Creek and causing visible petroleum sheens on the Creek's surface waters.

26. Despite the On-Site and Off-Site Orders, and Exxon's obligations under the law,

millions of gallons of petroleum, pollutants, solid and hazardous wastes, and hazardous substances remain under the subsurface at least fifty years after the Spill, thereby presenting ongoing imminent and substantial endangerments to the people who live near the Site and to the environment at and surrounding the Site.

27. The presence of the Spill in the subsurface of the affected area of Greepoint presents the risk of toxic vapors from the Spill migrating through the subsurface and entering the homes and commercial establishments in the area.

28. Exxon has refused and failed to investigate and remediate the environmental conditions created by its Spill, including refusing and failing to address the contaminated soils, the contaminated subsurface soils, the contaminated groundwater and dissolved groundwater plume, the contaminated wetlands, and the contaminated Creek, which refusal and failure has created risks to the public health and the environment at the Site.

29. The State has incurred costs and expenses in responding to Exxon's releases of petroleum and other pollutants and contaminants, including without limitation costs of oversight and investigation.

**FIRST CLAIM FOR RELIEF**  
**RESOURCE CONSERVATION AND RECOVERY ACT**

30. Petroleum is a "solid waste" and a "hazardous waste" under sections 1004(27) and 1004(5), respectively, of RCRA, 42 U.S.C. § 6903(27) and § 6903(5). Other pollutants discharged by Exxon from its facilities and recovery systems are also solid and hazardous wastes under RCRA.

31. The release, leaks, spills and other discharges from Exxon's current and former

Greenpoint petroleum refining and storage facilities over the years constitute illegal "disposal" under section 1004(3) of RCRA, 42 U.S.C. § 6903(3).

32. Exxon is the past owner and operator of a solid waste disposal facility within the meaning of section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B).

33. Exxon has contributed to the past and present handling, storage, and disposal of solid and hazardous waste, as defined in section 1004 of RCRA, 42 U.S.C. § 6903.

34. Exxon's petroleum, other pollutants, and solid and hazardous wastes have entered into, and continue to enter into the environment at and about the Site, including the soils, subsurface soils and groundwater, the air, and the Creek.

35. The presence of the petroleum, other pollutants, and solid and hazardous wastes, including vapors and explosive gases, in the environment at and about the Site presents imminent and substantial endangerments to the health of persons and to the environment within the meaning of section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B).

36. Exxon is liable for penalties not to exceed \$25,000 per day per violation payable to the United States pursuant to 42 U.S.C. §§ 6928(a) and (g), 6972(a).

**SECOND CLAIM FOR RELIEF**  
**CLEAN WATER ACT**

37. The CWA prohibits the discharge of any pollutant by any person without a permit. 33 U.S.C. § 1311(a).

38. Petroleum products are pollutants under section 502(6) of the CWA, 33 U.S.C. § 1362(6). Other chemical wastes and solid and hazardous wastes have been discharged into the environment by Exxon and these wastes are also pollutants under section 502(6) of the CWA,

33 U.S.C. § 1362(6).

39. The petroleum and other pollutants from Exxon's Spill have migrated to the Creek and entered, and continue to enter into the Creek through discrete cracks, fissures, channels and gaps in bulkheads along the Creek that constitute "point sources" under section 502(14) of the CWA, 33 U.S.C. § 1362(14).

40. Newtown Creek is a navigable water of the United States under section 502(7) of the CWA, 33 U.S.C. § 1362(7).

41. Exxon's discharge of the petroleum and other pollutants from point sources in the bulkheads is not authorized by a SPDES permit or other requirement of the State's SPDES permit equivalency program. These discharges, whose dates are specified, without limitation, in exhibit C to the notice of intent to sue attached as Exhibit 2, have violated the prohibition set forth in 33 U.S.C. § 1311(a), and such discharges to the Creek from point sources in the bulkheads are continuing.

42. Exxon's discharges of the petroleum and other pollutants to the Creek constitute unlawful discharges of a pollutant under section 502(12) of the CWA, 33 U.S.C. § 1362(12), and are in violation of 33 U.S.C. § 1311(a) and of effluent standards or limitations under the CWA.

43. Exxon is liable for penalties up to \$25,000 per day per violation payable to the United States pursuant to 33 U.S.C. §§ 1319(d) and 1365(a).

**THIRD CLAIM FOR RELIEF**  
**OIL POLLUTION ACT**

44. Exxon's current and former Greenpoint oil refining and storage facilities

constitute an "onshore facility" under section 1001(24) of OPA, 33 U.S.C. § 2701(24).

45. Exxon is the owner or operator of an onshore facility from which there has been and continues to be a discharge of oil, within the meaning of sections 1001(7), (23), and (26) of OPA, 33 U.S.C. §§ 2701(7), (23), and (26). The discharges continue and said discharges constitute an incident under section 1001(14) of OPA, 33 U.S.C. § 2701(14), which incident occurred after August 18, 1990.

46. Newtown Creek is a navigable water of the United States under section 1001(21) of OPA, 33 U.S.C. § 2701(21).

47. Accordingly, Exxon is a "responsible party" and is liable to the State for the State's removal costs and damages, within the meaning of section 1002(a) of OPA, 33 U.S.C. § 2702(a).

48. Exxon's release of oil into navigable waters and adjoining shorelines, and the environment, has caused injury to, destruction of, and/or loss of the natural resources of the State under sections 1001(20) and 1002 of OPA, 33 U.S.C. §§ 2701(20) and 2702.

**FOURTH CLAIM FOR RELIEF  
COMPREHENSIVE ENVIRONMENTAL RESPONSE,  
COMPENSATION, AND LIABILITY ACT**

49. Exxon's Greenpoint oil refining and storage facilities constitute a "facility" under section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

50. Among the chemicals that were released and that threaten to be released into the environment from the facility are hazardous substances, which contaminated the environment, including soils, surface waters, groundwater, and the Creek, within the meaning of sections 101(14) and 101(22) of CERCLA, 42 U.S.C. §§ 9601(14) and 9601(22).

51. The release and threatened release of hazardous substances have caused the State to incur response costs for investigation, oversight, and related activities. The State will incur further response costs as defined in section 101 of CERCLA, 42 U.S.C. § 9601, for investigations, remediation, oversight, and enforcement.

52. The response costs mentioned above are costs of removal or remedial action with the meaning of sections 101(23), (24), (25), (31), and section 107(a) of CERCLA, 42 U.S.C. §§ 9601(23), (24), (25), (31), and § 9607(a).

53. The State is entitled to recover from responsible persons all response costs for actions that are not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300, under section 107(a) of CERCLA, 42 U.S.C. § 9607.

54. Pursuant to section 107(a) of CERCLA, 42 U.S.C. § 9607(a), Exxon is liable as owner and/or operator at the time of disposal, as current owner and/or operator, and/or as generator of materials containing hazardous substances, which materials were disposed at the Site.

55. Pursuant to section 107(a) of CERCLA, 42 U.S.C. § 9607(a), Exxon is strictly, jointly, and severally liable to the State for past response costs incurred by the State in response to the release or threatened release at and from the Site.

56. Pursuant to sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, Exxon is strictly, jointly, and severally liable for future response costs to be incurred by the State as a result of the release or threatened release of hazardous substances at and from the Site.

57. The release of hazardous substances into the environment has caused injury to, destruction of and/or loss of the natural resources of the State within the meaning of sections

101(16) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(16) and 9607(a).

58. Pursuant to sections 107(a) and 113 of CERCLA, 42 U.S.C. §§ 9607(a) and 9613, Exxon is strictly, jointly, and severally liable for any natural resource damages.

**FIFTH CLAIM FOR RELIEF**  
**NEW YORK STATE NAVIGATION LAW**

59. At all relevant times, Exxon or one of its predecessors owned the Greenpoint oil refining and storage facilities along the Creek.

60. At all relevant times, Exxon or one of its predecessors operated the Greenpoint oil refining and storage facilities along the Creek

61. At all times relevant hereto, Exxon's acts or omissions resulted in a discharge of petroleum at the Site.

62. At all times relevant hereto, Exxon failed to timely report said petroleum discharge.

63. At the times relevant hereto, Exxon failed to take all measures necessary to clean up and remove said discharge.

64. Pursuant to Article 12 of the NY Navigation Law, Exxon is strictly liable, without regard to fault, for all cleanup and removal costs incurred and to be incurred by the State, and for all direct and indirect damages, including without limitation damages to natural resources and the costs of restoration of Newtown Creek and the soils and groundwater affected by the Spill.

65. By reason of Exxon's discharge of petroleum and its failure to timely report said discharge, and its failure to take all measures necessary to clean up and remove said discharge,

Exxon has violated the provisions of Article 12 of the NY Navigation Law and is liable under NY Navigation Law § 192 to the State for mandatory penalties in the amount of not more than \$25,000 for each offense and, for any continuing violation, a like penalty for each day that the offenses continued or are continuing.

66. Pursuant to NY Navigation Law § 176, Exxon has an obligation to contain its discharges of petroleum.

67. By shutting down each of the petroleum free product recovery systems, Exxon breached its duty set forth in NY Navigation Law § 176, and is liable under NY Navigation Law § 192 to the State for mandatory penalties in the amount of not more than \$25,000 for each day from March 9, 2007 to June 28, 2007, that the On-Site Recovery System was shutdown, and is liable under NY Navigation Law § 192 to the State for mandatory penalties in the amount of not more than \$25,000 for each day from March 9, 2007 to June 28, 2007, that the Off-Site Recovery System was shutdown.

**SIXTH CLAIM FOR RELIEF**  
**NEW YORK STATE ENVIRONMENTAL CONSERVATION LAW**

68. Groundwater in general and Newtown Creek are "waters of the state" as defined in ECL § 17-0105. The Creek is also a tidal waterway that contains designated tidal wetlands.

69. Newtown Creek is classified by the State as a class SD water body, which prohibits the addition of petroleum products in amounts that cause a visible sheen.

70. Groundwater beneath and surrounding the Site is classified as GA, which prohibits the addition of pollutants to such water in excess of groundwater standards of the State.

71. For decades, Exxon has discharged and continues to discharge petroleum, pollutants, solid and hazardous wastes, and hazardous substances into the waters of the State, including into groundwater and Newtown Creek and its tidal wetlands.

72. The discharge of said pollutants and wastes has caused and is causing or contributing to a condition in contravention of surface water and groundwater standards adopted by DEC. These discharges accordingly are in violation of ECL § 17-0501 *et seq.* and the standards established under ECL § 17-0301.

73. The discharge of said pollutants also violates ECL § 25-0101 *et seq.* and related regulations, which prohibit the pollution of the State's tidal wetlands.

74. The contaminants from Exxon's Spill and its facilities have migrated to the Creek and entered, and continue to enter, into the Creek through discrete fissures, channels, conduits and other means in bulkheads along the Creek that constitute "point sources" under ECL §§ 17-0105(16), and 17-0505.

75. These discharges through the point sources in and about the bulkheads are unpermitted and in contravention of ECL §§ 17-0501, 17-0505, 17-0511, 17-0701, 17-0803, and 17-0807, and 6 New York Codes, Rules and Regulations § 750-1.4(a).

76. Exxon also discharged pollutants to the Creek from its On-Site and Off-Site Recovery Systems through the two outfalls, and the discharge of certain of these pollutants, as specified in exhibit A to the notice of intent to sue annexed as Exhibit 2, was not authorized by a SPDES permit or any other requirement of the State's SPDES permit equivalency program.

77. These discharges through the two outfalls, as specified in exhibit A to the notice of intent to sue annexed as Exhibit 2, were unpermitted and in contravention of ECL §§ 17-

0501, 17-0505, 17-0511, 17-0701, 17-0803, and 17-0807, and 6 New York Codes, Rules and Regulations § 750-1.4(a).

78. Pursuant to ECL § 71-1929, Exxon has violated Article 17, titles 1-11, the regulations promulgated thereunder, and/or the permit issued pursuant thereto by (a) discharging through point sources in the bulkheads without a SPDES permit or its equivalency, and (b) discharging pollutants in the past through the two outfalls not authorized by a SPDES permit or a permit equivalency, and is subject to a civil penalty not to exceed \$37,500 per day for each violation.

79. Pursuant to ECL §§ 71-1929 and 71-1931, the State is entitled to an injunction requiring Exxon to cease these unpermitted discharges of contaminants into the groundwater and Creek unless and until it obtains a SPDES permit for such discharges from DEC.

80. As a result of its discharges to tidal wetlands, Exxon has violated the tidal wetlands provision of Article 25 of the ECL, and pursuant to ECL §§ 71-2501, 71-2503, 71-2505, and 71-2507, the State is entitled to civil penalties of not more than \$25,000 for each violation and injunctive relief.

**SEVENTH CLAIM FOR RELIEF**  
**PUBLIC NUISANCE**

81. The release of petroleum, pollutants, solid and hazardous wastes, and hazardous substances from the Site and their presence in the environment, including groundwater, at and in the vicinity of the Site constitute a continuing public nuisance.

82. Exxon participated in the creation of this continuing public nuisance at and in the vicinity of the Site. Exxon has maintained this continuing public nuisance at and in the vicinity

of the Site.

83. The State has incurred costs to abate the public nuisance at this Site.

84. Exxon is liable to the State under the common law of public nuisance and New York Real Property and Proceedings Law, Section 841, for all costs of abatement of this public nuisance, and all damages, including natural resource damages arising from it.

**EIGHTH CLAIM FOR RELIEF**  
**INDEMNIFICATION**

85. At all times relevant hereto, Exxon had and continues to have a duty and obligation to the public to investigate the scope of and abate completely and permanently the contamination described herein, and to alleviate the harm and risk of harm resulting from the contamination.

86. Exxon has failed to perform its duties and obligations to do so.

87. The State has the duty and obligation to protect the public health and the environment and to remediate Inactive Hazardous Waste Disposal Sites, such as this Site, pursuant to ECL §§ 3-0301, 27-1301 *et seq.*, and other environmental and public health laws of the State.

88. Because of Exxon's failure to perform its duties and obligations, the State has had to investigate the scope of and abate the chemical contamination at and near the Site at the State's expense.

89. In taking the action and incurring the expenses set forth herein, the State has performed duties and obligations owed by Exxon.

90. Accordingly, by reason of the State's payments for the costs of investigation and

remediation of the Site, the State obtained by operation of law an implied right to indemnification against Exxon in the amount of such payments.

**NINTH CLAIM FOR RELIEF**  
**RESTITUTION**

91. The actions taken and expenses incurred by the State were necessary to ensure the health, safety, and well-being of the public and the environment of the State.

92. Exxon has been unjustly enriched by the State's performance of the duties and obligations owed by Exxon.

93. The State is entitled to restitution from Exxon for the expenses incurred by it in performing Exxon's duties and obligations.

94. The State has no adequate remedy at law.

**PRAAYER FOR RELIEF**

WHEREFORE, the State requests judgment in its favor and against Exxon upon each claim and, further, requests that this Court enter judgment against Exxon on each claim:

1. Declaring Exxon to be strictly, jointly, and severally liable to the State for the remediation of the Spill's contamination of the Site and surrounding groundwater, and ordering Exxon to investigate, remediate and abate the contamination of the soils, subsurface soils, groundwater, air, and Creek, including its sediments and biota;

2. Declaring Exxon to be strictly, jointly, and severally, liable to the State for, and awarding to the State, all costs and expenses, including interest, attorneys' fees, and other costs of enforcement, incurred by the State in responding to the release or threat of release of the petroleum, pollutants, solid and hazardous wastes, and hazardous substances at the Site, and

damages to the State's natural resources, and entering judgment in an amount to be determined by the Court;

3. Declaring Exxon to be strictly, jointly, and severally, liable to the State for all further response costs and expenses, including interest, attorneys' fees, and other costs of enforcement, to be incurred by the State in responding to the release or threat of release of the petroleum, pollutants, solid and hazardous wastes, and hazardous substances at the Site, and damages to the State's natural resources;

4. Declaring Exxon strictly, jointly, and severally liable to the State for penalties under the NY Navigation Law and the ECI, for each violation to the maximum extent provided by law, and applying all appropriate civil penalties under the CWA pursuant to 33 U.S.C. § 1365(a) and under RCRA pursuant to 42 U.S.C. § 6972(a), and entering judgment against Exxon in an amount to be determined by the Court;

5. Enjoining Exxon from further discharges of petroleum, pollutants, solid and hazardous wastes, and hazardous substances into the groundwater and Creek in violation of law; and

6. Granting the State all costs of litigation, including reasonable attorney and expert witness fees, pursuant to 33 U.S.C. § 1365(d) and 42 U.S.C. § 6972(e); and

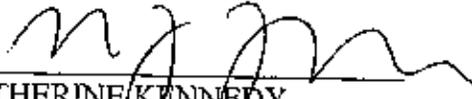
7. Ordering such other and further relief, in law or in equity, as the Court deems just and proper.

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, the State demands trial by

jury in this action of all issues triable by jury in this matter.

Dated: New York, New York  
July 17, 2007

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DIVISION OF PUBLIC ADVOCACY  
Environmental Protection Bureau

February 8, 2007

**Via Certified United States Mail**

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Albany, New York 12207

Chevron Environmental Management  
Company  
Corporation Service Company  
Registered Agent in New York State  
80 State Street  
Albany, New York 12207-2543

Steve P. Trifiletti  
ExxonMobil Refining & Supply Company  
Global Remediation  
Inwood Terminal  
464 Doughty Boulevard  
Inwood, New York 11096

BP America Inc.  
4101 Winfield Rd.  
Warrenville, Illinois 60555

Chevron Corporation  
6001 Bollinger Canyon Rd.  
San Ramon, California 94583

BP America Inc.  
CT Corporation System  
Registered Agent in New York State  
111 Eighth Ave.  
New York, New York 10011

Chevron Corporation  
The Prentice-Hall Corporation System, Inc.  
Registered Agent in New York State  
80 State Street  
Albany, New York 12207

Phelps Dodge Corporation  
One North Central Ave.  
Phoenix, Arizona 85004-4416

Phelps Dodge Corporation  
CT Corporation System  
Registered Agent in New York State  
111 Eighth Ave.  
New York, New York 10011

Keyspan Corporation  
Corporation Service Company  
Registered Agent in New York State  
80 State Street  
Albany, New York 12207-2543

Keyspan Corporation  
One Metrotech Center  
Brooklyn, New York 11201

RE: Notice of Intent to Sue ExxonMobil Corporation, ExxonMobil Refining & Supply Company, Chevron Corporation, Chevron Environmental Management Company, BP America Inc., Phelps Dodge Corporation, and Keyspan Corporation for Violations of the Resource Conservation and Recovery Act in Greenpoint, Brooklyn, New York

Dear Sirs and Madams:

The State of New York (State) hereby gives notice of its intent to sue ExxonMobil Corporation and its affiliate, ExxonMobil Refining & Supply Company (together "Exxon"), Chevron Corporation and its affiliate, Chevron Environmental Management Company (together "Chevron"), BP America Inc. (BP), Phelps Dodge Corporation (PD), and Keyspan Corporation (Keyspan) under 42 U.S.C. § 6972(a)(1)(B) for violating the federal Resource Conservation and Recovery Act (RCRA) by creating an imminent and substantial endangerment to health and the environment in Newtown Creek (the Creek) and portions of the adjacent shoreline. In its action, the State will seek injunctive relief under RCRA for solid or hazardous waste contamination of soils and groundwaters, and the surface waters and sediments of the Creek, all of which may pose, separately and collectively, an imminent and substantial endangerment to the health of Greenpoint's residents and to the Creek and its surrounding environs. The State's ultimate goal is the cleanup of the Creek.

#### **I. The Contamination of Newtown Creek with RCRA Solid or Hazardous Wastes**

An historic and underappreciated resource, Newtown Creek is a 3.5-mile-long waterway that separates Queens and Brooklyn, New York and that flows into the East River, making it a tributary of the invaluable New York Harbor. The Creek itself has several tributaries – Whale Creek, Dutch Kills, Maspeth Creek, and English Kills – and approximately 170 acres of sediment bed.

Recent samples of the Creek's surface waters and sediments have revealed that industrial wastes, including petroleum, are present in the Creek. Attached as Exhibit A is a list of the wastes, or chemicals, currently found in the Creek. Some of those listed – for example, arsenic, lead, copper, various polychlorinated biphenyls (PCBs), various pesticides, various polynuclear aromatic hydrocarbons (PAHs), various semi-volatile organic compounds (SVOCs), and various volatile organic compounds (VOCs) – are known to be toxic or carcinogenic. Most, if not all, of

the chemicals listed in Exhibit A are solid or hazardous wastes under RCRA when, as here, they have been discarded.

The presence of these RCRA wastes in the Creek's waters and sediments may pose a threat to the health of its citizens and residents – in particular, nearby residents, subsistence fishers and crabbers, and recreational users. The continued presence of these wastes may also pose a threat to the Creek's aquatic life – fish, shellfish, crustaceans, and plants – and to any birds – waterfowl and wading birds, for instance – that migrate through or eat biota from the Creek. In addition, the Creek's contamination endangers the various other natural resources that exist within the Creek's ecosystem – its surface waters, its sediments, and its tidal wetlands, among others. Finally, the Creek's pollution may also pose a threat to the overall water quality of New York Harbor.

## **II. The RCRA Solid or Hazardous Wastes Disposed of by Exxon, Chevron, BP, Phelps Dodge, and Keyspan Created an Imminent and Substantial Endangerment**

Each of the companies noticed here by the State have contributed or are contributing solid or hazardous wastes to the current contamination of the Creek's waters and sediments and adjacent land areas, and therefore bear responsibility for creating environmental conditions that may pose an imminent and substantial endangerment to public health and the environment, all in violation of RCRA.

### **A. Exxon**

Since at least the early 1900's, if not earlier, Exxon and its predecessors, including the Standard Oil Company, the Standard Oil Company of New York, and Mobil Oil Company, have owned and operated petroleum refinery and storage facilities – at times known as the Brooklyn Terminal – located in the Greenpoint neighborhood of Brooklyn. At one point, these facilities included a large tank farm property (now a part of the Newtown Creek Wastewater Treatment Plant) and a refinery and storage facility that encompassed all of the land now bounded by North Henry Street, Greenpoint Avenue, Norman Avenue, Apollo Street, and Newtown Creek. Exxon still owns an inactive petroleum storage facility within that area.

During the many decades of Exxon's operation of its Greenpoint petroleum refinery and storage facilities, Exxon spilled, leaked, or otherwise discarded at least seventeen million gallons of various petroleum products and other non-petroleum pollutants from its Greenpoint facilities into the surrounding environment, including into the soils, subsurface soils, groundwater, and the waters and sediments of Newtown Creek. This widespread contamination has formed a massive plume of underground petroleum and other pollutants in the Greenpoint area (the Spill). Vapors from the Spill's pollutants continue to present ongoing health risks to the people of Greenpoint.

Exxon's disposal of solid or hazardous wastes is ongoing as the Spill's pollutants continue to move into the Creek through seeps in shoreline bulkheads located at the Peerless

Importers and Steel Equities properties<sup>1</sup> and, on information and belief, through contaminated groundwater flowing into the Creek. Exxon also continues to dispose of solid or hazardous wastes through its on-site and off-site free product recovery systems, which are currently discharging into the Creek solid or hazardous wastes not authorized by any federal or state permit or equivalency.

Many, if not all, of the solid or hazardous wastes disposed of, or being disposed of, by Exxon have been detected in the recent sampling of the Creek's surface waters and sediments, *see* the attached Exhibit A, and have also been detected in recent groundwater sampling in the Greenpoint area, *see* the attached Exhibit B. Creek sediment samples also found petroleum - as much as 10% of the dry weight of the sample.

B. Chevron

Chevron, and its predecessors, including Paragon Oil Company and Texaco Inc., owned and operated a petroleum storage facility that was located in Greenpoint, Brooklyn at the corner of Bridgewater Street and Meeker Avenue and which bordered the Creek. During the course of its ownership and operation of this facility, Chevron and its predecessors spilled, released, and otherwise disposed of petroleum and other contaminants into the environment in the area of its facility, which contaminants entered the subsurface, soils, and groundwater, as well as the surface waters and sediments of the Creek and its tributaries. For years, and continuing to the present, contaminants from these releases have discharged into the adjacent Creek through gaps, cracks, and fissures in a bulkhead along the Creek at the site of the facility, which is now known as the Peerless Importers property. These bulkhead discharges are ongoing.

Many, if not all, of the solid or hazardous wastes disposed of, or being disposed of, by Chevron have been detected in the recent sampling of the Creek's surface waters and sediments, *see* the attached Exhibit A, and have also been detected in recent groundwater sampling in the Greenpoint area, *see* the attached Exhibit B. Creek sediment samples also found petroleum - as much as 10% of the dry weight of the sample.

C. BP

BP, including a predecessor, Amoco, owns and operates the BP Amoco Bulk Storage Facility located at Norman Avenue and Apollo Street in Greenpoint, Brooklyn, adjacent to the Creek. During the course of its ownership and operation of the facility, BP spilled, released, and otherwise disposed of petroleum and other pollutants into the environment in the area of its facility and those pollutants entered the subsurface, soils, and groundwater, as well as the surface waters and sediments of the Creek and its tributaries. Petroleum and other pollutants from the

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<sup>1</sup> The Peerless Importers property is located at 26 Bridgewater Street and Meeker Avenue (Block #2666, Lots 1, 52, 125), and the Steel Equities property is located at 100 and 120 Apollo Street and Bridgewater Street (Block #2666, Lots 101 and 201).

BP facility have migrated through the subsurface and merged with contaminants from Exxon's Spill, eventually discharging into the Creek's waters and sediments. Exxon, Chevron, and BP together will hereafter be referred to as the "oil companies."

Many, if not all, of the solid or hazardous wastes disposed of, or being disposed of, by BP have been detected in the recent sampling of the Creek's surface waters and sediments, *see* the attached Exhibit A, and have also been detected in recent groundwater sampling in the Greenpoint area, *see* the attached Exhibit B. Creek sediment samples also found petroleum - as much as 10% of the dry weight of the sample.

D. Phelps Dodge

Phelps Dodge operated a copper smelting plant on its Laurel Hill site, located on the north bank of the Creek downstream of Maspeth Creek and east of the Kosciuszko Bridge. This site is a State Superfund Site listed on the State's Registry of Inactive Hazardous Waste Disposal Sites as Site No. 241002. The primary contaminants of concern at the PD site are heavy metals, including cadmium, chromium, copper, lead, and mercury, as well as PAHs and PCBs. Past discharges, spills, leaks, and disposal from the facility's operation caused sediment contamination in the Creek and those sediments serve as continuing sources of contaminant releases. Many, if not all, of the solid or hazardous wastes disposed of by PD have been detected in recent sampling of the Creek's surface waters and sediments. *See* Exhibit A, attached hereto.

E. Keyspan

Keyspan Corporation, and its predecessors, are past and present owners and operators of several manufactured gas plant (MGP) facilities along Newtown Creek. Specifically, Keyspan has owned and operated three sites: (1) the Greenpoint Energy Center site, a manufactured gas plant (MGP) located at 287 Maspeth Avenue, Brooklyn, New York and adjacent to the Creek; (2) the Equity Works MGP site, located at Maspeth Avenue, Brooklyn and in close proximity to the Creek; and (3) the Scholes Street Holder Station site, located at 338 and 350 Scholes Street, Brooklyn, New York and also in close proximity to the Creek.

Keyspan's operations at these three facilities resulted in the release into the environment of a wide variety of contaminants, including arsenic, metals, PCBs, petroleum products, VOCs, chlorinated solvents, SVOCs, and ferro-ferric cyanide complexes. These solid or hazardous wastes have entered the soil, subsurface, and groundwater at Keyspan's facilities and, on information and belief, the surface waters and sediments of the Creek. These wastes continue to exist in the Creek's sediments and thus serve as continuing sources of contaminant releases.

Many, if not all, of the solid or hazardous wastes disposed of, or being disposed of, by Keyspan have been detected in the recent sampling of the Creek's surface waters and sediments.

See Exhibit A, attached hereto. Many, if not all, have also been detected in soil sampling at the Keyspan Greenpoint Energy Center site. See Exhibit C, attached hereto.

### **III. The State of New York's Intention to File Suit**

In light of all the facts described above, the oil companies, PD, and Keyspan, as past or present generators, transporters, or owners and operators of facilities where solid or hazardous wastes were treated, stored, or disposed of, have contributed, or are contributing, to the past or present handling, storage, treatment, transportation, or disposal of solid and of hazardous wastes in such a way as to have created an imminent and substantial endangerment at their facilities, as well as in the Creek and its surrounding environs. Pursuant to the RCRA citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), the State accordingly intends to sue these companies for "contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." RCRA defines disposal as a "discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." See 42 U.S.C. § 6903(3).

The oil companies, PD, and Keyspan are in violation of RCRA's imminent and substantial endangerment provision until such time as they cease to dispose of pollutants, and until such pollutants are remediated by them. At the close of the 90-day notice period, the State intends to file a citizen suit against the oil companies, PD, and Keyspan pursuant to 42 U.S.C. § 6972(a)(1)(B). The State intends to seek all available injunctive relief for the companies' creation of an imminent and substantial endangerment in violation of RCRA, as well as the State's legal fees and costs.

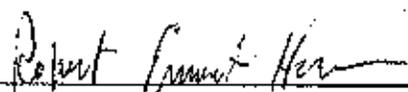
The claims set forth above are not exclusive. This Notice of Intent to Sue is sent without waiver of or any prejudice to the rights of the State of New York, the Attorney General of the State of New York, or any other agency or officer of the State of New York to advance any additional or further legal and/or factual claims, including any federal claim for relief and/or state law and/or common law cause of action based upon information or facts that are now known or may become known in the future.

This Notice of Intent to Sue sufficiently states grounds for filing suit. During the 90-day RCRA notice period, the State will be willing to discuss effective remedies for the violations noted in this letter. If you wish to pursue such discussions in the absence of litigation, please initiate those discussions within ten (10) days of receiving this notice so that a meeting can be arranged and settlement negotiations may be completed before the end of the notice period. If you wish to discuss these matters further, please do not hesitate to contact the undersigned. At the close of the 90-day notice period, unless significant progress is made in remedying these

violations, the State intends to file a citizen suit against the oil companies, PD, and Keyspan under 42 U.S.C. § 6972(a)(1)(B).

Sincerely,

ANDREW M. CUOMO  
Attorney General of the State of New York

By:   
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Cc: (By Certified Mail)

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<b>EXHIBIT A</b>		
<b>POLLUTANTS IN NEWTOWN CREEK</b>		
<b>SEDIMENTS AND SURFACE WATER</b>		
<b>MARCH, JULY 2004</b>		
	<b>SEDIMENT</b>	<b>SURFACE WATER</b>
<b>METALS</b>		
Aluminum	X	X
Antimony	X	X
Arsenic	X	
Barium	X	X
Cadmium	X	
Calcium	X	X
Chromium	X	
Cobalt	X	
Copper	X	X
Iron	X	X
Lead	X	X
Magnesium	X	X
Manganese	X	X
Mercury	X	
Nickel	X	
Potassium	X	X
Selenium	X	
Sodium	X	X
Vanadium	X	
Zinc	X	X
<b>PCBs (Polychlorinated Biphenyls)</b>		
Aroclor 1242	X	
Aroclor 1254	X	
Aroclor 1260	X	
<b>PESTICIDES</b>		
4,4-DDD	X	
4,4-DDE	X	X
4,4-DDT	X	X
Aldrin		X
Alpha-chlordane	X	
Beta-BHC		X
Gamma-BHC(Lindane)		X
Gamma chlordane	X	
Dieldrin	X	
Endosulfan		X
Endrin Aldehyde		X
Gamma-BHC		X
Heptachlorepoide		X
<b>PAHs</b>		
Acenaphthene	X	X
Anthracene	X	
Benzo(a)anthracene	X	
Benzo(a)pyrene	X	
Benzo(b)fluoranthene	X	
Benzo(g,h,i)perylene	X	
Benzo(k)fluoranthene	X	
Chrysene	X	
Dibenz(a,h)anthracene	X	
Fluoranthene	X	
Fluorene	X	
Indeno(1,2,3)pyrene	X	



**EXHIBIT B**  
**POLLUTANTS FOUND IN GROUNDWATER**

benzene  
toluene  
ethylbenzene  
xylenes  
methyl tert butyl ether (MTBE)  
naphthalene  
1,2,4-trimethylbenzene  
1,3,5-trimethylbenzene  
n-butylbenzene  
isopropylbenzene  
n-propylbenzene  
p-isopropyltoluene  
sec-butylbenzene  
naphthalene  
acenaphthene  
fluorene  
phenanthrene  
anthracene  
fluoranthene  
pyrene  
benzo(a)anthracene  
chrysene  
benzo(b)fluoranthene  
benzo(k)fluoranthene  
benzo(a)pyrene  
indeno(1,2,3-cd)pyrene  
dibenz(a,h)anthracene  
benzo(g,h,i)perylene  
t-amyl methyl ether  
t-butyl alcohol  
chloroform  
1,1-dichloroethane  
cis-1,2-dichloroethene  
tetrachloroethene  
trichloroethene  
vinyl chloride  
bis(2-ethylhexyl)phthalate  
sec-butylbenzene  
cyclohexane  
1,2,4-trichlorobenzene  
benzo(b)pyrene  
2-methylnaphthalene  
acetone  
tert-butylbenzene  
chlorobenzene  
heptane

**EXHIBIT C**  
**POLLUTANTS FOUND IN SOILS AT KEYSpan SITE**  
**MARCH 2004**

acetone  
2-butanone  
benzene  
toluene  
ethylbenzene  
xylenes  
tetrachloroethene  
styrene  
naphthalene  
2-nethylnaphthalene  
acenaphthylene  
acenaphthene  
dibenzofuran  
fluorene  
4,6-dinitro-2-methylphenol  
phenanthrene  
anthracene  
carbazole  
fluoranthene  
pyrene  
benzo(a)anthracene  
chrysene  
bis(2-ethylhexyl)phthalate  
benzo(b)fluoranthene  
benzo(k)fluoranthene  
benzo(a)pyrene  
indeno(1,2,3-cd)pyrene  
dibenzo(a,h)perylene  
arsenic  
barium  
cadmium  
chromium  
cyanide  
lead  
mercury  
selenium  
silver





STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO  
Attorney General

DIVISION OF PUBLIC ADVOCACY  
Environmental Protection Bureau

February 8, 2007

**Via Certified United States Mail**

ExxonMobil Corporation  
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5959 Las Colinas Boulevard  
Irving, Texas 75039-2298

ExxonMobil Corporation  
Corporation Service Company  
Registered Agent in New York State  
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Albany, New York 12207

Steve P. Trifiletti  
ExxonMobil Refining & Supply Company  
Global Remediation  
Inwood Terminal  
464 Doughty Boulevard  
Inwood, New York 11096

RE: Notice of Intent to Sue ExxonMobil Corporation and ExxonMobil Refining & Supply Company for Clean Water Act Violations in Greenpoint, Brooklyn, New York

Dear Sirs and Madams:

The State of New York (State) hereby gives notice of its intent to sue ExxonMobil Corporation and its affiliate, ExxonMobil Refining & Supply Company (together "Exxon"), under 33 U.S.C. § 1365 for ongoing violations of the Federal Water Pollution Control Act, more commonly known as the Clean Water Act (CWA), 33 U.S.C. §§ 1251, *et seq.* Specifically, the State will seek civil penalties and injunctive relief under the CWA for ongoing, unpermitted discharges of pollutants by Exxon into Newtown Creek, a navigable water of the United States, in violation of 33 U.S.C. § 1311, which makes unlawful any discharge of a pollutant by any person without a permit.

## **I. Exxon's Greenpoint Spill**

Since at least the early 1900's, if not earlier, Exxon and its predecessors, including the Standard Oil Company, the Standard Oil Company of New York, and Mobil Oil Company, have owned and operated petroleum refinery and storage facilities – at times known as the Brooklyn Terminal – located in the Greenpoint neighborhood of Brooklyn, New York. At one point, these facilities included a large tank farm property (now a part of the Newtown Creek Wastewater Treatment Plant) and a refinery and storage facility that encompassed all of the land now bounded by North Henry Street, Greenpoint Avenue, Norman Avenue, Apollo Street, and Newtown Creek. Exxon still owns an inactive petroleum storage facility within that area.

During the many decades of Exxon's operation of its Greenpoint petroleum refinery and storage facilities, Exxon spilled, leaked, or otherwise discarded at least seventeen million gallons of various petroleum products and other non-petroleum pollutants from those facilities into the surrounding environment, including into the soils, subsurface soils, groundwater, and the surface waters and sediments of Newtown Creek. This widespread contamination has formed a massive plume of underground petroleum and other pollutants in the Greenpoint area (the Spill).

Exxon owns and operates two systems to recover only free petroleum product from the ground: (1) the Off-Site Free Product Recovery System (Off-Site Recovery System) located on Bridgewater Street, Greenpoint, New York, which includes an outfall into Newtown Creek located at the end of Meeker Avenue; and (2) the Brooklyn Terminal Free Product Recovery System (On-Site Recovery System) located at 400 Kingsland Avenue, Greenpoint, New York, which also includes an outfall into Newtown Creek. As an incident of their operation, these systems recover some contaminated groundwater, which is treated with carbon filters and/or airstrippers and then discharged into Newtown Creek through the two outfalls. Each of these outfalls is currently regulated by the State Pollution Discharge Elimination System (SPDES) program.

## **II. Exxon's Ongoing Violations of Clean Water Act: Unpermitted Discharges of Pollutants from Exxon Outfalls and from Newtown Creek Bulkheads**

The CWA prohibits the discharge of any pollutant from a point source into the waters of the United States, except pursuant to and in compliance with a permit. *See* 33 U.S.C. § 1311(a); 33 U.S.C. § 1342(a). The CWA defines "pollutant" broadly to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6); *see also United States v. Hamel*, 551 F.2d 107, 111 (6th Cir. 1977) (finding that gasoline was a pollutant under the Act). The CWA defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged," 33 U.S.C.

§ 1362(14); see also *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 118-19 (2d Cir. 1994) (holding that Act's point source definition should be "broadly interpreted"). The Creek is a navigable water of the United States. See 33 U.S.C. § 1362(7); see also *Rapanos v. United States*, 126 S.Ct. 2208, 2006 U.S. LEXIS 4887 (2006) (defining "navigable waters" as used in the CWA).

A. Violations Relating to Outfalls

Exxon is currently violating section 301(a) of the CWA by discharging unpermitted petroleum products and other pollutants into Newtown Creek through the On-Site and Off-Site Recovery Systems outfalls, which are pipes and thus point sources under the Act. The various chemicals being discharged by those outfalls originated from Exxon's Spill and are pollutants under the CWA. The discharge of these pollutants is not currently authorized by the State's SPDES program.

Although Exxon was likely aware of the discharge of these unpermitted pollutants because it, of course, had access to its own raw sampling data, it nevertheless failed to notify the State of the presence of these unpermitted pollutants as required by the Clean Water Act. The State discovered Exxon's unpermitted discharges when it required Exxon to disclose the raw data from its monthly sampling events starting in early 2006. This raw data revealed that Exxon is discharging numerous unpermitted pollutants into the Creek through its two SPDES pipes, including lead, volatile solvents such as acetone, and other potentially toxic and/or carcinogenic chemicals that can cause great harm to public health or the environment. See the attached Exhibit A, which is a chart based on the raw sampling data the State has obtained to date that specifically identifies Exxon's unpermitted pollutants, the particular pipe that discharged the unpermitted pollutant, and the dates of Exxon's unpermitted discharges.

Based on the State's understanding of Exxon's On-Site and Off-Site Recovery Systems and how they have operated to date, and in light of the raw discharge data obtained by the State to date, the unpermitted discharges from Exxon's SPDES pipes are occurring on a nearly daily basis and have occurred for at least the last five years, if not since the beginning of Exxon's operation of the pipes. Each daily discharge of a single unpermitted pollutant from a point source constitutes a separate violation under the Clean Water Act, and the State fully intends to seek the appropriate penalties available under the Act for each violation.

B. Violations Relating to Newtown Creek Bulkheads

Exxon is also currently violating the Clean Water Act by discharging unpermitted petroleum products and other pollutants into Newtown Creek through bulkheads located at two properties that are adjacent to each other and border the Creek's Greenpoint, Brooklyn shoreline. These two properties are commonly known as the Peerless Importers and Steel Equities properties. The Peerless Importers property is located at 26 Bridgewater Street and Meeker

Avenue (Block #2666, Lots 1, 52, 125), and the Steel Equities property is located at 100 and 120 Apollo Street and Bridgewater Street (Block #2666, Lots 101 and 201).

The plume of contaminants from Exxon's Spill has migrated, and continues to migrate, to the Creek. As it reaches the edge of the Creek – specifically the bulkheads located along the Creek's shoreline at the Peerless Importers and Steel Equities properties – these pollutants seep into the Creek's waters through cracks, fissures, and gaps in the bulkheads. The cracks, fissures, and gaps, as well as the bulkheads themselves, are point sources as defined by the Clean Water Act because they convey Exxon's spilled pollutants from the ground to the Creek's waters. The pollutants identified in Exhibit B, which is attached to this letter, are many of the pollutants that Exxon is discharging through the bulkhead seeps into Newtown Creek. The State also believes that one or more of the following petroleum products or constituents are also discharging from the bulkheads: crude oil, naphtha, fuel oils (Nos. 2, 4, or 6), kerosene, gasoline, gas oil, diesel fuel, and lead, among others. Many of these pollutants are potentially toxic and/or carcinogenic chemicals – such as benzene, which has been identified by the United States Environmental Protection Agency as a known carcinogen – that can cause great harm to public health and the environment.

Furthermore, the bulkhead seeps are nearly continuous in occurrence. Exxon does not have a permit to discharge any pollutants from the bulkheads at issue. Thus, each daily discharge of a single unpermitted pollutant from the bulkheads constitutes a separate violation under the Clean Water Act, and the State fully intends to seek the appropriate penalties available under the Act for each violation.

Exxon has been aware of these unpermitted bulkhead discharges for many years, and at least for the last five years, because it operated a boom containment system at the Peerless Importers bulkhead up until early 2005. During its operation of this system, Exxon regularly – perhaps even weekly – skimmed the water in the Creek for oil and other pollutants that had been illegally discharged by the bulkhead seeps. See the attached Exhibit C, which lists, among other things, all the dates for which the State can currently document an Exxon skimming event at the Peerless Importers bulkhead. Exxon may know of additional unpermitted discharges at that bulkhead.

Exxon is also aware of the unpermitted discharges at the Steel Equities bulkhead. The State recently approached Exxon and asked it to take responsibility for stopping the discharges at Steel Equities. Exxon declined.

The bulkhead seeps at the Peerless Importers and Steel Equities properties are ongoing, as documented by Exhibit C, which identifies all unpermitted bulkhead discharges known to the State at this point. Riverkeeper, a nonprofit environmental watchdog organization, has also documented numerous unpermitted discharges at the bulkheads, and Exxon is already aware of those discharges through the Clean Water Act suit brought by Riverkeeper against Exxon in 2004. See *Riverkeeper v. Exxon Mobil Corp.*, Civil Case No. 04-2056 (CBA/RLM) (E.D.N.Y.);

Riverkeeper Notice of Intent to Sue Letter for Clean Water Act Violations, dated January 20, 2004; *see also* Exhibit C, attached hereto, which lists, among other things, unpermitted bulkhead discharges observed by Riverkeeper. Each of the discharges listed in the attached Exhibit C constitutes a separate violation of the Clean Water Act and the State will seek the appropriate penalties available under the Act for each such violation.

### III. Exxon's Violations Are Harming the State of New York

Exxon's unpermitted discharges from its On-Site and Off-Site Recovery Systems outfalls and from the bulkheads at the Steel Equities and Peerless Importers properties constitute ongoing and significant violations of the Clean Water Act that have inflicted, and continue to inflict, great harm upon the State of New York, its citizens and residents, and the environment. The pollutants illegally discharged to date by Exxon – various kinds of petroleum, petroleum compounds and constituents, toxic metals, and volatile and semi-volatile compounds, among others – pose a significant threat to the health of those New York citizens and residents who use the Creek, and connected surface waters, for subsistence fishing, crabbing, and recreational activities, as well as to those who live close to the Creek. Exxon's illegal discharges, furthermore, have helped to create an offensive nuisance that interferes with the enjoyment of the environment by nearby residents.

New York's environment also continues to suffer because of Exxon's ongoing illegal discharges. The Creek is a water of the State of New York. Exxon's pollution of the Creek contributes to the degradation of its water quality, and in turn, threatens the recently improving water quality of New York Harbor, of which the Creek is a tributary. Exxon's pollution of the Creek also harms the State-owned tidal wetlands found in the Creek, which are a valuable resource for the protection of water quality. Exxon's pollution, furthermore, poses a serious threat to all of the Creek's wildlife, including any birds, fish, crustaceans, shellfish, or benthic organisms that live in, or near, the Creek, or that frequent it for food.

Finally, the State itself has also been harmed by Exxon's illegal discharges as it has had to expend monies and resources to attempt to stop, ameliorate, or mitigate the public health risks and environmental harms associated with Exxon's pollution of the Creek. The State anticipates that these efforts will increase in the future and that it will be forced to expend substantial monies and resources to address Exxon's ongoing pollution of the Creek.

Exxon will remain in violation of the CWA each day that oil and other pollutants are discharged through the bulkheads into the Creek and each day it discharges unpermitted pollutants from its On-Site and Off-Site Recovery Systems. As noted in 33 U.S.C. § 1319(d) and 40 C.F.R. § 19.4, violations are subject to a civil penalty not to exceed \$32,500 for each such violation. At the close of the 60-day notice period, the State intends to file a citizen suit under section 505(a) of the CWA, 33 U.S.C. § 1365(a), against Exxon. The State intends to seek penalties, injunctive relief, legal fees and costs for these violations of the CWA.

The claims set forth above are not exclusive. This Notice of Intent to Sue is sent without waiver of or any prejudice to the rights of the State of New York, the Attorney General of the State of New York, or any other agency or officer of the State of New York to advance any additional or further legal and/or factual claims, including any federal claim for relief and/or state law and/or common law cause of action based upon information or facts that are now known or may become known in the future.

This Notice of Intent to Sue sufficiently states grounds for filing suit and conforms with all requirements of 33 U.S.C. § 1365(b) and 40 C.F.R. § 135.3(a). During the 60-day CWA notice period, the State remains willing to discuss effective remedies for the violations noted in this letter. If you wish to pursue discussions in the absence of litigation, please initiate such discussions within ten (10) days of receiving this Notice. At the close of the 60-day period, unless significant progress is made in remedying these violations, the State will file a citizen suit against Exxon under CWA section 505(a), 33 U.S.C. § 1365(a). If you wish to discuss these matters further, please do not hesitate to contact the undersigned.

Sincerely,

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EXHIBIT A												
UNPERMITTED POLLUTANTS DISCHARGED BY EXXON THROUGH ITS OFF-SITE AND ON-SITE SPDES PIPES (2006)												
	1/11/2006	2/9/2006	3/9/2006	4/5/2006	5/11/2006	6/22/2006	7/11/2006	8/10/2006	9/26/2006	10/13/2006	11/29/2006	12/28/2006
<b>OFF-SITE</b>												
acetone	X					X	X	X	X	X	X	X
2-butanone						X			X			
carbon disulfide	X											
chlorobenzene	X							X				
1,1-dichloroethane	X	X	X	X	X	X	X	X	X	X		X
1,2-dichloroethane						X	X	X	X	X		
methyl tert butyl ether	X	X	X	X	X	X	X	X	X	X	X	
1,1,2-trichloroethane									X		X	
4-methyl-2-pentanone	X						X			X	X	
1,2,4-trimethylbenzene	X	X	X	X	X	X	X	X	X	X	X	
1,3,5-trimethylbenzene	X	X	X	X	X	X	X	X	X	X	X	
chloroethane			X	X	X	X	X	X	X	X		X
chloromethane											X	
isopropylbenzene											X	
n-propylbenzene											X	
vinyl chloride										X		
methylene chloride			X			X						
arsenic										X		
iron	X	X	X	X	X	X	X	X	X	X	X	
lead							X	X	X			
manganese	X	X	X	X	X	X	X	X	X	X	X	
magnesium												X
sodium												X
boron												X
barium												X
<b>ON-SITE</b>												
acetone					X							
sec-butylbenzene		X	X									
tert-butylbenzene		X	X									
cis-1,2-dichloroethylene		X		X	X	X		X	X	X	X	
hexane		X	X									
p-isopropyltoluene		X	X									
n-butylbenzene											X	
methylene chloride												X
naphthalene		X	X									
1,2,3-trichlorobenzene			X									
1,2,4-trimethylbenzene		X	X						X			
1,3,5-trimethylbenzene		X	X						X			
tetrachloroethylene		X	X					X	X		X	X
trichloroethylene					X		X		X	X		X
boron												X
barium												X
iron				X								X
manganese												X
magnesium												X
sodium												X

\* All units are in ug/L.

**EXHIBIT B**  
**POLLUTANTS DISCHARGING FROM BULKHEADS**

benzene  
toluene  
ethylbenzene  
xylenes  
methyl tert butyl ether (MTBE)  
naphthalene  
1,2,4-trimethylbenzene  
1,3,5-trimethylbenzene  
n-butylbenzene  
isopropylbenzene  
n-propylbenzene  
p-isopropyltoluene  
sec-butylbenzene  
acenaphthene  
fluorene  
phenanthrene  
anthracene  
fluoranthene  
pyrene  
benzo(a)anthracene  
chrysene  
benzo(b)fluoranthene  
benzo(k)fluoranthene  
benzo(a)pyrene  
indeno(1,2,3-cd)pyrene  
dibenz(a,h)anthracene  
benzo(g,h,i)perylene  
t-amyl methyl ether  
t-butyl alcohol  
chloroform  
1,1-dichloroethane  
cis-1,2-dichloroethene  
tetrachloroethene  
trichloroethene  
vinyl chloride  
bis(2-ethylhexyl)phthalate  
sec-butylbenzene  
cyclohexane  
1,2,4-trichlorobenzene  
benzo(b)pyrene  
2-methylnaphthalene  
acetone  
tert-butylbenzene  
chlorobenzene  
heptane

**EXHIBIT C****Observations of Unpermitted Bulkhead Discharges Into Newtown Creek**

<b>Date</b>	<b>Witness</b>
February 6, 2002	Exxon
July 2, 2002	Exxon
July 10, 2002	Exxon
July 23, 2002	Exxon
August 1, 2002	Exxon
August 6, 2002	Exxon
August 13, 2002	Exxon
October 25, 2002	Riverkeeper
December 11, 2002	Riverkeeper
December 16, 2002	Exxon
January 8, 2003	Exxon
January 15, 2003	Exxon
January 20, 2003	Exxon
February 6, 2003	Exxon
February 13, 2003	Exxon
February 25, 2003	Exxon
March 11, 2003	Exxon
March 18, 2003	Exxon
March 20, 2003	Exxon
April 1, 2003	Exxon
April 8, 2003	Exxon
April 15, 2003	Exxon
April 22, 2003	Exxon
April 29, 2003	Exxon
May 5, 2003	Riverkeeper

May 6, 2003	Exxon
May 12, 2003	Riverkeeper
May 20, 2003	Exxon
May 29, 2003	Exxon
June 3, 2003	Exxon
June 9, 2003	Riverkeeper
June 10, 2003	Exxon
June 17, 2003	Exxon
June 24, 2003	Exxon
July 2, 2003	Exxon
July 9, 2003	Exxon
July 14, 2003	Exxon
July 22, 2003	Exxon
July 29, 2003	Exxon
August 5, 2003	Exxon
August 11, 2003	Riverkeeper
August 12, 2003	Riverkeeper and Exxon
August 19, 2003	Exxon
August 26, 2003	Exxon
August 27, 2003	Riverkeeper
September 4, 2003	Exxon
September 9, 2003	Exxon
September 10, 2003	Riverkeeper
September 18, 2003	Exxon
September 22, 2003	Riverkeeper
September 23, 2003	Exxon
September 29, 2003	Exxon
October 9, 2003	Exxon
October 14, 2003	Exxon

October 17, 2003	Riverkeeper
October 21, 2003	Exxon
October 30, 2003	Riverkeeper and Exxon
November 4, 2003	Exxon
November 11, 2003	Exxon
November 13, 2003	Riverkeeper
November 18, 2003	Exxon
November 25, 2003	Riverkeeper
November 26, 2003	Exxon
December 10, 2003	Exxon
December 15, 2003	Exxon
January 9, 2004	Exxon
February 13, 2004	Exxon
March 2, 2004	Exxon
March 3, 2004	Exxon
March 11, 2004	Exxon
March 15, 2004	Exxon
March 23, 2004	Exxon
March 25, 2004	Riverkeeper
April 7, 2004	Exxon
April 12, 2004	Exxon
April 20, 2004	Exxon and Riverkeeper
April 21, 2004	Riverkeeper
April 28, 2004	Exxon
April 29, 2004	Exxon
May 10, 2004	Riverkeeper
May 11, 2004	Exxon
May 13, 2004	Exxon
May 19, 2004	Exxon

May 24, 2004	Exxon
May 25, 2004	Riverkeeper
June 3, 2004	Exxon
June 5, 2004	Riverkeeper
June 15, 2004	Exxon
July 1, 2004	Riverkeeper
July 2, 2004	Riverkeeper
July 6, 2004	Riverkeeper
July 14, 2004	Exxon and Riverkeeper
July 15, 2004	Exxon and Riverkeeper
July 20, 2004	Exxon
July 28, 2004	Riverkeeper
July 29, 2004	Riverkeeper
August 4, 2004	Exxon
August 11, 2004	Exxon
August 12, 2004	Riverkeeper
August 13, 2004	Riverkeeper
August 14, 2004	Riverkeeper
August 15, 2004	Riverkeeper
August 16, 2004	Riverkeeper
August 17, 2004	Riverkeeper
August 18, 2004	Exxon and Riverkeeper
August 19, 2004	Riverkeeper
August 26, 2004	Exxon
September 3, 2004	Exxon
September 23, 2004	Riverkeeper
November 2, 2004	Exxon

November 11, 2004	Exxon
November 12, 2004	Riverkeeper
November 15, 2004	Riverkeeper
November 22, 2004	Exxon
December 8, 2004	Riverkeeper
December 14, 2004	Riverkeeper
December 16, 2004	Riverkeeper
February 2, 2005	Exxon
February 9, 2005	Exxon
March 10, 2005	Exxon
March 15, 2005	Exxon
March 22, 2005	Exxon
April 5, 2005	Riverkeeper
April 7, 2005	Riverkeeper
April 12, 2005	Riverkeeper
April 13, 2005	Riverkeeper
April 15, 2005	Riverkeeper
May 31, 2005	Riverkeeper
June 21, 2005	Riverkeeper
July 28, 2005	Riverkeeper
July 29, 2005	Riverkeeper
August 26, 2005	Riverkeeper
September 1, 2005	Riverkeeper
September 20, 2005	Riverkeeper
October 14, 2005	Chevron
October 28, 2005	Riverkeeper
November 1, 2005	Riverkeeper
November 3, 2005	Riverkeeper

November 5, 2005	Riverkeeper
November 7, 2005	Riverkeeper
November 9, 2005	Riverkeeper
December 1, 2005	Riverkeeper
December 2, 2005	Riverkeeper
December 8, 2005	Chevron
December 15, 2005	Riverkeeper
December 16, 2005	Riverkeeper
December 20, 2005	Chevron
December 23, 2005	Chevron
December 27, 2005	Chevron
December 30, 2005	Chevron
January 6, 2006	Chevron
January 10, 2006	Chevron
January 24, 2006	Chevron
January 27, 2006	Chevron
February 3, 2006	Chevron
February 7, 2006	Chevron
February 8, 2006	Riverkeeper
February 14, 2006	Chevron
February 23, 2006	Chevron
March 6, 2006	Chevron
March 20, 2006	Chevron
March 23, 2006	NYSDEC
March 27, 2006	Chevron
April 18, 2006	Chevron
April 20, 2006	Chevron
May 1, 2006	Chevron
May 11, 2006	Riverkeeper

May 17, 2006	NYSDEC
May 22, 2006	NYSDEC
May 23, 2006	NYSDEC
May 30, 2006	Riverkeeper and NYSDEC
May 31, 2006	Riverkeeper and NYSDEC
June 1, 2006	NYSDEC
June 2, 2006	NYSDEC
June 5, 2006	NYSDEC
June 6, 2006	NYSDEC
June 7, 2006	NYSDEC
June 19, 2006	NYSDEC
June 20, 2006	NYSDEC
June 21, 2006	NYSDEC
June 28, 2006	NYSDEC
July 5, 2006	NYSDEC
July 6, 2006	NYSDEC
July 7, 2006	Riverkeeper and NYSDEC
July 10, 2006	NYSDEC
July 11, 2006	NYSDEC
July 12, 2006	NYSDEC
July 14, 2006	NYSDEC
July 17, 2006	NYSDEC
July 18, 2006	NYSDEC
July 24, 2006	NYSDEC
July 26, 2006	Riverkeeper
July 27, 2006	NYSDEC and Riverkeeper
August 1, 2006	NYSDEC
August 2, 2006	NYSDEC

August 15, 2006	NYSDEC
August 17, 2006	Riverkeeper
August 28, 2006	NYSDEC
August 29, 2006	NYSDEC
August 30, 2006	NYSDEC
September 5, 2006	NYSDEC
September 6, 2006	NYSDEC
September 7, 2006	NYSDEC
September 8, 2006	Riverkeeper
September 11, 2006	NYSDEC
September 12, 2006	NYSDEC
September 13, 2006	NYSDEC
September 14, 2006	NYSDEC
September 18, 2006	Riverkeeper
October 3, 2006	NYSDEC
October 4, 2006	NYSDEC
October 13, 2006	Riverkeeper
October 16, 2006	Riverkeeper
October 18, 2006	Riverkeeper
October 24, 2006	NYSDEC
October 25, 2006	NYSDEC
October 31, 2006	NYSDEC
November 8, 2006	NYSDEC
November 10, 2006	Riverkeeper
November 14, 2006	NYSDEC
November 15, 2006	Riverkeeper and NYSDEC
November 16, 2006	NYSDEC
November 17, 2006	NYSDEC

November 18, 2006	NYSDEC
November 21, 2006	NYSDEC
November 27, 2006	NYSDEC
November 28, 2006	NYSDEC
November 29, 2006	NYSDEC
December 17, 2006	Riverkeeper
December 18, 2006	Riverkeeper
January 2, 2007	NYSDEC
January 25, 2007	Riverkeeper