

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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

Plaintiffs,

v.

ATLANTIC RICHFIELD CO., et al.,

Defendants.

Civil Action No. 3:15-cv-6468-
(FLW-LHG)

CONSENT ORDER AS TO LIVINGSTON
SITE

This matter, having been opened to the Court by Plaintiffs New Jersey Department of Environmental Protection ("NJDEP"), the Commissioner of the NJDEP, and the Administrator of the New Jersey Spill Compensation Fund ("Administrator") (collectively, "Plaintiffs"), in their named capacity and as trustee of the natural resources of New Jersey, and Defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation (collectively, "ExxonMobil"); and those parties, being hereinafter referred to individually as a "Party" and collectively as the "Parties," having amicably resolved their dispute regarding the Livingston Site before trial hereby agree as follows:

I. LITIGATION BACKGROUND

1. Plaintiffs initiated this action on or around June 28, 2007 by filing a complaint against ExxonMobil and other defendants in the Superior Court of the State of New Jersey, Mercer County, Docket MER-L-1622-07. The matter was removed to the United States District Court for the District of New Jersey, and later assigned to the multi-district litigation in the United States District Court for the Southern District of New York, MDL No. 1358 (VSB) ("Multi-District Litigation"). There was a remand of nineteen trial sites to the United States District Court for the District of New Jersey, Civil Action No. 3:15-cv-6468 (FLW-LHG) (the "Remanded Litigation"); the remainder of the case continues in the Southern District of New York.

2. Plaintiffs filed amended complaints; the latest was the Fifth Amended Complaint, filed September 28, 2018 (the "Complaint").

3. Plaintiffs' Complaint includes a claim for natural resource damages ("NRD"), including restoration. Specifically, the Complaint includes statutory claims under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.24 ("Spill Act"), the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 to -20 ("WPCA"), as well as common law claims for products liability, negligence and public nuisance. The

Complaint also included a claim for trespass. This claim has been dismissed, but Plaintiffs reserve their appellate rights as to this claim.

4. This case was removed to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1446(d) and the Energy Policy Act of 2005, 42 U.S.C. § 745, *et seq.*, which expressly authorized the removal of legal actions related to allegations involving methyl tertiary butyl ether ("MTBE") contamination, and then assigned to the United States District Court for the Southern District of New York as part of the Multi-District Litigation.

5. As part of the Multi-District Litigation, the United States District Court for the Southern District of New York instituted a "focus site" approach to the Litigation designed to prepare a discrete number of sites for an initial trial. Pursuant to this "focus site" approach, 20 sites were selected for trial, with ten sites each selected by Plaintiffs and Defendants, including ExxonMobil. After dismissals and settlements, only four trial sites remain, and the only remaining trial site for which plaintiffs seek damages from ExxonMobil is the Livingston Site.

6. Prior to 2011, ExxonMobil was conducting investigation and other remediation at the Livingston Site under the direction and supervision of NJDEP. Since 2011, ExxonMobil has been

investigating and remediating the Livingston Site under the direction and supervision of the LSRP, as defined herein.

7. The LSRP at the Livingston Site is required to comply with all remediation statutes and rules and utilize NJDEP guidance materials when making remediation decisions.

8. NJDEP represents that the data collected by the LSRP and provided to the NJDEP demonstrates that there has been no, and ExxonMobil represents that it is not aware of any, discharge of Hazardous Substances at the Livingston Site since August 31, 2015.

II. PARTIES' OBJECTIVES

9. ExxonMobil, as the former owner of the Property and the underground storage tanks at the Property, has been performing its remediation obligations at the Livingston Site under the applicable laws and technical regulations, which have contributed to restoration at the Livingston Site.

10. The Parties recognize restoration must take into account the remediation efforts at the Livingston Site.

11. SRWMP and ONRR, as a division and a bureau within NJDEP that oversee remediation and restoration, respectively, shall coordinate to avoid imposing duplicative remediation and restoration obligations on ExxonMobil at the Livingston Site. Accordingly, agreement has been reached between the Parties

regarding the procedure for jointly evaluating and conducting remediation and restoration at Livingston.

12. ExxonMobil's full compliance with the terms and procedures of this Consent Order shall constitute satisfaction of its remediation and restoration obligations under all applicable laws for discharges that occurred prior to the Effective Date at the Livingston Site.

With the agreement and consent of the Parties, it is hereby **ORDERED** that the Consent Order is approved as follows:

III. PARTIES BOUND

13. This Consent Order applies to, and is binding upon, the Parties.

IV. DEFINITIONS

14. Unless otherwise expressly provided, the terms used in this Consent Order that are defined in the Spill Act, or in the regulations promulgated pursuant to the Spill Act, shall have their statutory or regulatory meaning. Whenever the terms listed below are used in this Consent Order, the following definitions shall apply:

"Claims" shall mean any and all actions, claims, causes of action, crossclaims, counterclaims, third-party claims, interventions, demands, suits, liens, judgments, duties, rights, debts, obligations of any kind, whatsoever, in law or in equity, past, present or future, whether under state or federal

law or under rule, regulation or administrative order, whether known or unknown, suspected or unsuspected, whether legal, equitable, or statutory, manifested or not manifested, barred or not barred by principles of collateral estoppel or res judicata and whether asserted, could have been asserted or not asserted in the Complaint, arising from discharges of Hazardous Substances that occurred prior to the Effective Date of this Consent Order at the Livingston Site. Claims shall also specifically include all product liability causes of action related to MTBE including claims of manufacturing defect, design defect and failure to warn.

"Commissioner" shall mean the Commissioner of the NJDEP.

"Complaint" shall mean Plaintiffs' Fifth Amended Complaint in this Litigation.

"Consent Order" shall mean this Consent Order.

"Day" shall mean a calendar day unless expressly stated to be a Working Day. "Working Day" shall mean a day other than a Saturday, Sunday, or State holiday. In computing time under this Consent Order, where the last day would fall on a Saturday, Sunday, or State holiday, time shall run until the close of business of the next Working Day.

"Defendants" shall mean each of the defendants named in the Complaint in this Litigation.

"ExxonMobil" shall mean Exxon Mobil Corporation, a New Jersey corporation with its principal place of business at 5959 Las Colinas Boulevard, Irving, Texas, and ExxonMobil Oil Corporation, a New York corporation with its principal place of business at 5959 Las Colinas Boulevard, Irving, Texas, and their parent companies, officers, directors, employees, predecessors, predecessors in interest, parents, successors, successors in interest and subsidiaries, except that no other party named as one of the other Defendants in the Complaint shall be considered a related entity of ExxonMobil.

"Hazardous Substances" shall have the same meaning as N.J.S.A. 58:10-23.11b. of the Spill Act and shall include, but shall not be limited to, MTBE.

"Litigation" shall mean the Remanded Litigation, captioned New Jersey Department of Environmental Protection, et al. v. Amerada Hess Corp., et al., C.A. Nos. 3:07-5284 and 3:15-cv-06468 (FLW-LHG), the Multi-District Litigation, captioned In Re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, MDL No. 1358 (SDNY) (VSB).

"Livingston Site" or "Livingston" shall mean ExxonMobil's former service station #31310, located at 38 East Mount Pleasant Avenue, Livingston, Essex County, New Jersey (the "Property") and includes all other areas to which any Hazardous Substance discharged on the Property has migrated.

"LSRP" shall mean the Licensed Site Remediation Professional retained by ExxonMobil for the Livingston Site pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C-1.3.

"MTBE" shall mean methyl tertiary butyl ether, neat or as a part of gasoline or as a contaminant of other fuel, and the degradation byproducts of commercial grade MTBE, including tertiary butyl alcohol ("TBA").

"NJDEP" shall mean the New Jersey Department of Environmental Protection, including the ONRR and SRP.

"ONRR" shall mean the Office of Natural Resource Restoration of the NJDEP. ONRR shall include any outside consultants whose opinion(s) ONRR deems necessary to the restoration of the Livingston Site.

"Paragraph" shall mean a portion of this Consent Order identified by an Arabic numeral or an upper case letter.

"Plaintiffs" shall mean plaintiffs the NJDEP, the Commissioner, and the Administrator of the New Jersey Spill Compensation Fund, including in their capacities as described in paragraphs 14 to 18 of the Complaint, and any successor department, agency, or official.

"SRWMP" shall mean the Site Remediation and Waste Management Program of NJDEP.

V. PLAINTIFFS' RELEASES AND RESERVATIONS

15. Plaintiffs hereby forever release, covenant not to sue, and dismiss with prejudice their Claims in this Litigation.

16. The release referenced in Paragraph 15 of this Consent is limited as follows:

- a. Plaintiffs reserve all rights to pursue Claims based on ExxonMobil's failure to satisfy any term or provision of this Consent Order;
- b. Plaintiffs reserve all rights to prosecute actions against ExxonMobil concerning criminal liability; and
- c. Plaintiffs reserve all rights to pursue Claims concerning ExxonMobil's liability for any violation of federal or state law that occurs after the Effective Date of this Consent Order.

17. This Court retains jurisdiction to enforce the terms of this Consent Order.

VI. PARTIES' COVENANTS

18. ExxonMobil agrees to continue to remediate the Livingston Site in accordance with the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 to -31, the Site Remediation Reform Act, N.J.S.A. 58:10C-1 to -29, the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, the Remediation Standards, N.J.A.C. 7:26D, and the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. These actions to remediate pursuant to these

requirements are referred to as "Remediation" for purposes of this Consent Order.

19. In addition to continued Remediation pursuant to Paragraph 18, ExxonMobil shall monitor the conditions and perform additional actions at the Livingston Site to ensure that restoration will be achieved as determined by ONRR and consistent with the requirements set forth in any then applicable New Jersey statutes, NJDEP regulations, NJDEP technical guidance, and case law. For the purposes of this Consent Order, actions to ensure that restoration will be achieved are referred to as "Restoration." In the event NJDEP determines that Restoration is not being achieved at the Livingston Site based on the current activities at the Site, ExxonMobil shall confer with ONRR and shall implement additional Restoration, to the extent practicable, as directed by NJDEP, subject to the dispute resolution provisions set forth in Section VII below.

20. Any Remediation and Restoration pursuant to Paragraphs 18 and 19, respectively, shall be conducted so as to avoid duplicative tasks, achieve efficiencies, and ensure that Remediation and Restoration are both ultimately achieved.

21. Within 60 days of the entry of this Consent Order, ExxonMobil will meet with ONRR to discuss any immediate Restoration (if any) to be undertaken.

22. On no less than an annual basis, ExxonMobil shall provide SRWMP and ONRR with an update of all Remediation and/or Restoration data collected at the Livingston Site.

23. ExxonMobil shall comply with all applicable statutes and regulations not specifically addressed herein.

VII. DISPUTE RESOLUTION

24. In the event the Parties are unable to resolve disagreements regarding the work described in this Consent Order, any Party may request in writing an in-person, technical meeting to discuss the disputed issue(s).

25. In the event the Parties are unable to resolve all remaining disputes by way of informal dispute resolution under Paragraph 24, any Party may refer remaining issues in dispute to NJDEP's Office of Dispute Resolution upon seven days written notice to the other Party.

26. Any Party may submit a three-page, single-spaced, statement of dispute to the Commissioner no sooner than 30 days after an in-person Alternative Dispute Resolution meeting with NJDEP's Office of Dispute Resolution. The statement must include a certification that it is the opinion of the Party bringing the dispute to the Commissioner that the process in NJDEP's Office of Dispute Resolution is no longer providing further assistance towards resolving the dispute. Within 14 days after the statement of dispute is submitted to the

Commissioner, the other Party may submit a three-page, single-spaced, response. The Commissioner's Office, *sua sponte* or at the request of one or more of the Parties, may establish any further procedures it deems necessary to properly inform the Commissioner so that she has sufficient information to make an informed decision. The parties agree that any decision the Commissioner renders pursuant to this Paragraph is binding on the Parties and not subject to appeal. The Commissioner's decision pursuant to this Paragraph shall be made in writing.

VIII. EFFECT OF SETTLEMENT AND CONTRIBUTION PROTECTION

27. This Consent Order shall apply to the Livingston Site only.

28. Nothing in this Consent Order shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Order. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Order may have under applicable law.

29. ExxonMobil expressly reserves all rights, including, but not limited to, any right to indemnification and contribution, defenses, claims, demands, and causes of action that ExxonMobil may have concerning any matter, transaction, or occurrence, whether or not arising out of the subject matter of

the Complaint, against any person not a party to this Consent Order.

30. When entered, this Consent Order shall constitute a judicially approved settlement within the meaning of N.J.S.A. 58:10-23.11f.a.(2)(b) and 42 U.S.C. § 9613(f)(2) and will resolve the liability of the ExxonMobil to Plaintiffs for the purpose of providing contribution protection to ExxonMobil from contribution actions under Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Spill Act, the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 et seq., the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to -5.8 or any other statute, regulation or common law principle related to the causes of action pleaded in the Complaint or matters addressed in this Consent Order, and for any capacity under which Plaintiffs sued related to the Livingston Site. The Parties agree, and by entering this Consent Order this Court finds, ExxonMobil is entitled, upon fully satisfying its obligations under this Consent Order, to protection from contribution actions pursuant to Sections 113(f)(2) of CERCLA, 42 U.S.C. §§ 9613(f)(2), the Spill Act, N.J.S.A. 58:10-23.11f.a.(2)(b), and any other statute, regulation, or common law principle that provides contribution rights against ExxonMobil with regard to the subject matter of the Complaint

related to the Livingston Site or matters addressed in this Consent Order.

31. In accordance with N.J.S.A. 58:10-23.11e2 the Plaintiffs published a copy of the draft Consent Order on Plaintiffs' website, published notice of this Consent Order in the New Jersey Register, and arranged for notice, as described in the following paragraph, to other parties in this case and to the other potentially responsible parties. Such notice included the following information:

- a. the caption of this case;
- b. the name of the Settling Defendant;
- c. a summary of the terms of this Consent Order;
- d. that a copy of the draft Consent Order is available on DEP's website; and
- e. that there are sixty (60) days to comment on the proposed Consent Order.

32. In fulfillment of N.J.S.A. 58:10-23.11e2 the Parties have provided written notice of this Consent Order to all other Defendants remaining in the case and to other potentially responsible parties by:

- a. ExxonMobil sending a letter to liaison defense counsel and serving a copy of such letter on counsel of record in the above captioned litigation via LexisNexis File and Serve; and

b. ExxonMobil publishing notice in the following newspapers:

- i. Asbury Park Press;
- ii. Atlantic City Press;
- iii. Bergen Record;
- iv. Burlington County Times;
- v. New Jersey Herald;
- vi. South Jersey Times; and
- vii. Star Ledger; and

c. The Plaintiffs distributing a copy of the New Jersey Register Notice via the Site Remediation Program's and the Office of Natural Resource Restoration's websites, which the public can access at <http://nj.gov/dep/srp/legal/> and <http://nj.gov/dep/nrr/settlements/index.html>, respectively. This notice is deemed compliant with the notice requirement of N.J.S.A. 58:10-23.11e2.

33. Plaintiffs will submit this Consent Order to the Court for entry pursuant to Paragraph 45 below unless, as a result of the notice of this Consent Order pursuant to Paragraphs 31 and 32 above, the Plaintiffs receive information that discloses facts or considerations that indicate to Plaintiffs, in their sole discretion, that the Consent Order is inappropriate, improper, or inadequate.

IX. NO FINDINGS OR ADMISSIONS OF LIABILITY

34. Nothing contained in this Consent Order shall be considered an admission by ExxonMobil, or a finding by Plaintiffs or this Court, of any wrongdoing or liability whatsoever on the part of ExxonMobil at the Livingston Site.

X. GENERAL PROVISIONS

35. Plaintiffs enter into this Consent Order pursuant to the police powers of the State of New Jersey for the enforcement of the laws of the State and the protection of the public health and safety and the environment. Any obligations imposed upon ExxonMobil by this Consent Order are continuing regulatory obligations pursuant to these police powers.

36. Nothing in this Consent Order shall be deemed to constitute preauthorization of a claim against the Spill Fund within the meaning of N.J.S.A. 58:10-23.11k. or N.J.A.C. 7:1J.

37. This Consent Order shall be governed by and interpreted under the laws of the State of New Jersey.

38. If any provision of this Consent Order or the application thereof to any person or circumstance, to any extent, is held to be invalid or unenforceable, (a) the parties hereto shall negotiate in good faith a valid and enforceable provision as similar in terms to such invalid or unenforceable provisions as may be possible and (b) the remainder of this Consent Order or the application of such provision to persons or circumstances other than those as to which it is held invalid or

unenforceable, shall not be affected thereby and each provision of this Consent Order shall be valid and enforced to the fullest extent permitted by law.

XI. ACCESS TO INFORMATION

39. Upon receipt of a written request by one or more of Plaintiffs, ONRR, and/or SRWMP, ExxonMobil shall submit or make available to Plaintiffs, ONRR, and/or SRWMP all information ExxonMobil has concerning Remediation and/or Restoration at the Livingston Site, including data, technical records, and contractual documents.

40. ExxonMobil may assert any applicable claim of confidentiality or privilege for any information submitted to Plaintiffs, ONRR, and/or SRWMP pursuant to Paragraph 39. ExxonMobil, however, agrees not to assert any privilege or confidentiality claim as to data related to Livingston Site conditions, sampling, or monitoring.

XII. MODIFICATION

41. This Consent Order may only be modified by written agreement between the Parties with approval by this Court and represents the entire integrated agreement between Plaintiffs and ExxonMobil, and supersedes all prior negotiations, representations or agreements, either written or oral, with respect to the subject matter hereof.

42. Nothing in this Consent Order shall be deemed to alter this Court's power to enforce, supervise, or approve modifications to this Consent Order.

XIII. EFFECTIVE DATE

43. The Effective Date of this Consent Order shall be the date upon which this Consent Order is entered by this Court.

XIV. ENTRY OF THIS CONSENT ORDER

44. The Parties consent to the entry of this Consent Order without further notice after the comment period specified in Paragraph 31.

45. Upon conclusion of the public comment period specified in Paragraph 31, Plaintiffs shall promptly submit this Consent Order to this Court for entry.

46. If for any reason the Court should decline to approve this Consent Order in the form presented, this Consent Order is voidable at the sole discretion of any Party unless this Consent Order is modified by agreement of the Parties and the terms of the Consent Order not approved by the Court may not be used as evidence in any litigation between the Parties.

XV. SIGNATORIES/SERVICE

47. Each undersigned representative of a Party to this Consent Order certifies that he or she is authorized to enter into the terms and conditions of this Consent Order and to

execute and legally bind such Settling Party to this Consent Order.

48. This Consent Order may be signed and dated in any number of counterparts, each of which shall be an original, and such counterparts shall together be one and the same Consent Order.

49. ExxonMobil identifies in this paragraph an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Order. ExxonMobil agrees to accept service in this manner, and to waive the formal service requirements set forth in the New Jersey Rules of Court or Federal Rules of Civil Procedure, including service of a summons.

For ExxonMobil:

Marc Rollo, Esq.

Archer & Greiner P.C.

One Centennial Square

Haddonfield, NJ 08033

For NJDEP:

David Bean, Chief

Office of Natural Resource Restoration

NJDEP

Mail Code 501-04

P.O. 420

Trenton, NJ 08625-0420

50. The Parties to this Consent Order agree that it was negotiated fairly between them at arms' length and that the final terms of this Consent Order shall be deemed to have been jointly and equally drafted by them, and that the provisions of this Consent Order therefore should not be construed against a Party to it on the grounds that the Party drafted or was more responsible for drafting the provision(s).

SO ORDERED this day of , .

U.S.D.J.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION CONSENTS TO
THE FORM AND ENTRY OF THIS ORDER

By: _____
David E. Haymes, Director
Division of Enforcement, Technical, and Financial Support

Dated: _____

By: _____
Raymond Bukowski, Assistant Commissioner
Natural & Historic Resources

Dated: _____

NEW JERSEY SPILL COMPENSATION FUND CONSENTS TO THE FORM AND
ENTRY OF THIS ORDER

By: _____
David E. Haymes, Administrator
New Jersey Spill Compensation Fund

Dated: _____

Gurbir S. Grewal,
Attorney General of New Jersey
Attorney for Plaintiffs

By: _____
Gwen Farley
Deputy Attorney General

Dated: _____

EXXONMOBIL CORP. CONSENTS TO THE FORM AND ENTRY OF THIS ORDER

By: _____

Dated: _____

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