From: Allison Brouk
To: AG-PFASProposal
Subject: Kanner & Whiteley LLC Response to Michigan Attorney General RFP for PFAS Litigation
Date: Wednesday, June 5, 2019 12:29:44 PM
Attachments: Kanner & Whiteley Response to Michigan PFAS RFP.PDF

Dear Ms. Synk:

Attached please find Kanner & Whiteley LLC's response to the Michigan Attorney General RFP for PFAS Litigation. If you have any questions or need any additional information please let me know.

Best,

Allison Brouk
Kanner & Whiteley, L.L.C.
701 Camp Street
New Orleans, LA
(504) 524-5777

Response of Kanner & Whiteley LLC
to State of Michigan Department of the Attorney General
Request for Proposals for PFAS Manufacturer Tort Litigation

Submitted by

KANNER & WHITELEY, LLC
701 Camp Street
New Orleans, LA
(504) 524-5777
a.brouk@kanner-law.com

June 5, 2019

Polly Synk
Assistant Attorney General
Michigan Department of the Attorney General
(517) 335-7664
synkp@michigan.gov

Re: Response of Kanner & Whiteley LLC to State of Michigan Department of the Attorney General Request for Proposals for PFAS Manufacturer Tort Litigation

Thank you for the opportunity to submit this response to the State of Michigan's Department of the Attorney General's Request for Proposals for PFAS Manufacturer Tort Litigation. The following information provided by Kanner & Whiteley, LLC responds to the specific questions posed in the RFP.

With more than thirty-eight years of experience practicing environmental law, natural resource damages, and complex litigation, Kanner & Whiteley has the experience and expertise to successfully advocate on behalf of the State of Michigan in any complex matter and is particularly positioned to provide outside legal services for the State in connection with the PFAS contamination. The firm has an unmatched record in natural resource damage litigation, having obtained for its clients two of the largest natural resource damage recoveries in United States history. The firm is intimately familiar with the issues associated with PFAS and related litigation, as it currently represents the State of New Mexico in an action brought against the United States and the U.S. Department of the Air Force.

Allan Kanner, the founding member of the firm, is also familiar with PFAS litigation through his work as an expert witness in the Minnesota natural resource damage case against PFAS-manufacturer 3M Company, putative trial counsel in a case settled as part of the DuPont settlement in the Southern District of Ohio PFAS MDL, and as the author of an article on PFAS developments.

Given the firm's expertise in these areas, as well as the firm's experience in representing government clients, Kanner & Whiteley will provide first-rate services throughout the course of the representation of the State in this matter. We are happy to provide you with any additional information that you may need. We look forward to discussing this matter with you further.

Kanner & Whiteley's specific responses to the questions posed in the RFP are as follows:

1. Bidder Contact Information

1.1. Identify the bidder's contact person for the RFP process. Include name, title, address, email, and phone number.

Allison Brouk will serve as the contact person for Kanner & Whiteley for the RFP process. Ms. Brouk may be contacted using the information below:

Allison Brouk
Senior Associate
Kanner & Whiteley, LLC
701 Camp Street
New Orleans, LA 70130
Phone: (504) 524-5777
Email: a.brouk@kanner-law.com

1.2. Identify the person authorized to sign a contract resulting from this RFP. Include name, title, address, email, and phone number.

Allan Kanner, President and Founding Member, will serve as the person authorized to sign a contract for Kanner & Whiteley resulting from this RFP. Mr. Kanner's contact information is below:

Allan Kanner
President and Founding Member
Kanner & Whiteley, LLC
701 Camp Street
New Orleans, LA 70130
Phone: (504) 524-5777
Email: a.kanner@kanner-law.com

2. Company Background Information

2.1. Identify the company's legal business name, address, phone number, and website.

Kanner & Whiteley, LLC
701 Camp Street
New Orleans, LA 70130
Phone: (504) 524-5777
Website: www.kanner-law.com

2.2. Identify the State your business is organized in.

Kanner & Whiteley is an LLC incorporated under the laws of Louisiana.

2.3. Identify the location (city and state) that would have primary responsibility for this work if awarded a contract.

All of Kanner & Whiteley's employees are based in the New Orleans, Louisiana office.

2.4. Identify the practice group area, if applicable, proposed to handle the work.

The team of Kanner & Whiteley attorneys responsible for environmental litigation would be the primary group handling the matters addressed in this RFP.

2.5. Explain any partnerships and strategic relationships you have that would bring significant value to the State.

To best position the State to recover its maximum damages, Kanner & Whiteley will develop a team of experts to assist in the calculation of the State's damages. Kanner & Whiteley has close working relationships with a number of experts in the field of natural resource damages that can assist in the evaluation of the State's damages and the presentation of these damage calculations at trial. The appropriate expert that would best represent the State's interests would be determined on a case-by-case basis.

Kanner & Whiteley has extensive experience working with different state administrations and internal departments to streamline the information gathering process necessary to produce a complete picture for purposes of presenting and, as needed, litigating governmental claims, with as little disturbance as possible to the State's daily operations. This experience, together with the assistance of the best experts in the field, would provide the State with outstanding results.

2.6. If you intend to use subcontractors to perform the work, disclose: (1) the subcontractor's legal business name, website, address, phone number, and primary contact person; (2) a description of subcontractor's organization; (3) a complete description of the services or products it will provide; (4) information concerning subcontractor's ability to provide the services; (5) whether the bidder has a previous working experience with the subcontractor, and if yes, provide details of that previous relationship.

With respect to discovery, Kanner & Whiteley would likely employ a document management vendor, which would be determined after evaluating the specific needs of the case. Kanner & Whiteley has extensive experience in handling document intensive matters including matters involving substantial amounts of electronically stored information (ESI). Members of the firm are familiar with a variety of programs used to host, manage, and review ESI in a secure environment, including Ipro, Everlaw, Eclipse, Relativity, Summation, Concordance and Kazeon, and the firm has established relationships with these vendors. Such vendors have platforms for hosting, searching, and producing documents, as well as for gathering and coding defensive discovery documents.

Kanner & Whiteley has used vendors in the past to prepare documents for review, but all documents are reviewed by Kanner & Whiteley attorneys, legal support staff, and other qualified assistants hired on a temporary basis as necessary. For example, in connection with the work for the State of Louisiana in the *Deepwater Horizon* litigation, Kanner & Whiteley used the vendor eMag to prepare several terabytes of ESI for review by Kanner & Whiteley employees for

responsiveness and privilege. Throughout the course of the New Jersey Department of Environmental Protection's natural resource damage litigation against ExxonMobil, Kanner & Whiteley successfully handled all of the Department's document production. Further, the firm successfully defeated defendant's challenges to the Department's assertion of the deliberative process privilege, protecting thousands of privileged materials from disclosure.

Kanner & Whiteley would likely also employ expert witnesses in the course of this litigation, as described in §2.5 above.

2.7. Identify the name and title of the individuals you propose as key personnel. Attach resumes or CVs for each person.

The attorneys listed below would provide the services described in this RFP. Each attorney is a member in good standing in each jurisdiction in which they are licensed. In addition to the information provided below, the resumes of these team members are included as **Exhibit A** to this response.

ALLAN KANNER (B.A., University of Pennsylvania; J.D., Harvard Law School) is the founder and senior member at Kanner & Whiteley, L.L.C. Mr. Kanner has a wealth of experience litigating complex class action lawsuits and practices in the areas of natural resource damages, products liability, environmental, toxic tort, commercial litigation, and consumer fraud. Law 360 recently profiled Mr. Kanner as a "Titan of the Plaintiffs Bar." *Chambers USA* has ranked Mr. Kanner as a Band 1 environmental lawyer, its highest ranking, stating that "Allan Kanner of Kanner & Whiteley enjoys a 'sterling reputation' for plaintiff-side representation in toxic tort trials" (2009); that "[b]y reputation and work product, he is one of the top practitioners" (2015); that Mr. Kanner "offers considerable expertise in bringing class action claims and acting for public sector institutions in natural resource damage disputes" (2018); and that "Allan Kanner is highly commended for his 'top-notch' environmental litigation work. He is a preeminent environmental plaintiffs litigator with excellent experience handling major environmental and consumer fraud disputes. His expertise extends into class action claims and the representation of public bodies in environmental damages disputes" (2019).

In addition to his trial practice, Mr. Kanner has also served the legal profession as an Adjunct Professor at Tulane Law School (1990-2008), a Visiting Lecturer in Law at the University of California, Berkeley (Spring 2004), at Yale Law School (Fall 2002), Visiting Senior Lecturer at Duke University (Fall 2000) (Spring 2004), and Visiting Professor at the University of Texas Law School (Spring 2001). Mr. Kanner is a frequent lecturer and speaker on a variety of topics, and is the author of ENVIRONMENTAL AND TOXIC TORT TRIALS (Lexis-Nexis) (2d. ed.), as well as over sixty articles in the diverse fields of torts, trial practice, civil discovery, civil RICO, natural resource damages, environmental law, toxic torts, class actions, and business and consumer fraud. During 1998 and 1999, Mr. Kanner was one of the principal authors of the LOUISIANA JUDGES' COMPLEX LITIGATION BENCH BOOK, and he has also been an instructor at the Louisiana Judicial College. After graduating from Harvard Law School, he clerked for the late Judge Robert S. Vance of the U.S. Court of Appeals, Fifth Circuit. He has successfully handled novel and complex matters throughout the United States.

Mr. Kanner has taught and written extensively in his areas of expertise. Many of his articles have been relied upon by courts and legal scholars. Mr. Kanner's publications often discuss topics related to natural resoruce damage litigation and other legal issues unique to natural resoruce trustees. Mr. Kanner has recently published an article related to PFAS litigation, entitled *Emerging Trends In Perflourinated Chemical Regulation And Litigation*, ABA Environmental and Engery Litigation News Letter (August 28, 2017). He has also authored numerous natural resource damage articles, including *The Public Trust Doctrine, Parens Patriae, And The Attorney General As The Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57 (Fall 2005)

Mr. Kanner is the past President of the Louisiana Association of Justice ("LAJ") (2008-2009) and is on the American Association of Justice Board of Governors. In the wake of Hurricanes Katrina and Rita, he founded and headed the LAJ insurance section to encourage cooperation and information sharing among attorneys representing insureds against their carriers. Mr. Kanner is licensed to practice in the following courts: State of Louisiana; State of New Jersey; State of California; State of Oklahoma; State of New York; Commonwealth of Pennsylvania; District of Columbia; and the State of Texas.

ELIZABETH B. PETERSEN (B.A., University of California at Berkeley; J.D., Tulane University School of Law, Certificate of Environmental Law), Member, joined Kanner & Whiteley in 1996. Ms. Petersen practices in the fields of environmental law, complex litigation, and class actions, including consumer fraud and environmental property damage litigation. Ms. Petersen is a member of the litigation teams the State of New Jersey in its natural resource damage cases. Ms. Petersen also represented the State of Louisiana in the *Deepwater Horizon* litigation. Prior to joining Kanner & Whiteley, she practiced in the areas of civil and maritime litigation. Ms. Petersen is admitted to practice before the United States District Courts for the Eastern and Western Districts of Louisiana, and Louisiana State Courts (10/6/1995). She has also been admitted to practice *Pro Hac Vice* in the United States District Courts for the Western District of Missouri, the District of Puerto Rico, the Southern District of Texas; the Northern District of Illinois, and the Circuit Court of Escambia County, Florida.

CYNTHIA ST. AMANT (B.S., Louisiana Tech University; J.D., Paul M. Hebert Law Center at Louisiana State University), Member, joined Kanner & Whiteley, L.L.C. in 1998 where she practices general, civil, commercial, consumer fraud, class action and environmental law. Before joining Kanner & Whiteley, L.L.C., she worked at the Louisiana Supreme Court, clerking for Justices Lemmon and Bleich and serving as a staff attorney in the Court's Civil Staff Division. Ms. St. Amant is a member of both the Louisiana and Texas bars and is admitted to practice before Louisiana State and Federal Courts, Texas State Courts and the Fifth Circuit Court of Appeal. She graduated with a Bachelor of Science degree in Business Administration from Louisiana Tech University in 1993. In 1996, she obtained a Juris Doctor degree from the Paul M. Hebert Law Center at Louisiana State University.

ALLISON BROUK (B.A., Tulane University; J.D., Tulane University School of Law, Certificate of Environmental Law), Senior Associate, joined Kanner & Whiteley in 2011. Ms. Brouk is a member of the team handling litigation on behalf of the State of New Jersey to recover for damages to its natural resources against various defendants, including the case

against ExxonMobil Corp. which, following a 66-day trial, resulted in a $225 million settlement, the largest natural resource damage settlement in the history of the State. Ms. Brouk also serves as Special Counsel to the New Mexico Attorney General in the State's litigation against the United States related to PFAS contamination at the Cannon Air Force Base and Holloman Air Force Base, as well as the State's litigation against Dollar General regarding its deceptive marketing and sales practices related to its sale of obsolete motor oil. Ms. Brouk also part of the Kanner & Whiteley litigation team representing the State of Louisiana in its claim related to the *Deepwater Horizon* oil spill, the largest environmental disaster ever to occur in the Gulf of Mexico. Ms. Brouk has also litigated on behalf of private property owners for damage suffered by pollution. She is also involved in landmark litigation relating to oil companies' failures to follow the best practices required under federal law in armoring facilities against risks associated with climate change that threaten the facilities and surrounding communities, in addition to other violations of their Clean Water Act permits.

Ms. Brouk graduated magna cum laude from Tulane University Law School, where she received a Certificate in Environmental Law. While in law school, Ms. Brouk practiced as a student attorney for the Tulane Environmental Law Clinic. Ms. Brouk was Editor in Chief of the Tulane Environmental Law Journal and was a member of the Tulane Moot Court Board. Ms. Brouk also served as an intern for U.S. District Judge Stanwood R. Duval, Jr. in the Eastern District of Louisiana.

3. Experience

3.1. Describe at least 3 relevant experiences supporting your ability to successfully perform the work set forth in the SOW. Include a description of services provided and results obtained. Include contact information for the clients you represented.

While its cases encompass a wide array of substantive law, Kanner & Whiteley is a recognized leader in the field of environmental law, with specialized expertise in litigating novel natural resource damage and environmental tort cases on behalf of government agencies. The firm is known for its persistence, preparation, personal attention to detail, and its strategic thinking, all of which have allowed it to effectively and efficiently serve its clients. Kanner & Whiteley takes great pride in the leadership role it plays in many of this country's major cases, including those resulting in landmark decisions and precedent-setting rulings.

Kanner & Whiteley has represented various state attorneys general or state agencies, the firm also has experience and success representing public entities on other levels including school boards, counties, and municipalities in a variety of litigation. This experience gives the firm a direct understanding of the complexities faced by public entities such as the State of Michigan and the challenges they face to balance various interests while protecting their citizens and the public fisc. Examples of work performed by Kanner & Whiteley for its public entity clients include the following:

- **State of Louisiana (2010-2015)**

Kanner & Whiteley was retained by Louisiana Attorney General James D. "Buddy" Caldwell as Special Counsel and trial counsel to assist the State of Louisiana with its claims resulting from the 2010 *Deepwater Horizon* oil spill in the Gulf of Mexico, including the State's claims to recover economic losses, response costs, and natural resource damages. The firm was retained by the Attorney General immediately after the spill to counsel the State in its efforts to stop the spill, mitigate, and recover available damages.

Throughout this massive litigation, Kanner & Whiteley successfully managed the production of millions of pages of documents from numerous state agencies; coordinated efforts among the United States and the Gulf states to develop an estimate of damages and implement early restoration projects; and litigated three phases of trial to determine allocation of liability and the appropriate amount of civil penalties. Ultimately, Kanner & Whiteley participated in the negotiation of the $18.7 billion global settlement agreement that resolved all remaining claims against BP Exploration and Production, Inc. brought by the United States, Louisiana, the rest of the Gulf States, and a majority of local government entities in those states. Kanner & Whiteley worked to help secure the recovery of more than $8.8 billion in both environmental and economic damages resulting from the disaster for the State of Louisiana.

- **State of New Mexico (2016-present)**

The New Mexico Attorney General retained Kanner & Whiteley to represent the State in a recently filed suit against the United States and the U.S. Department of the Air Force seeking an order requiring the Air Force to clean up the extensive contamination at the Cannon Air Force Base near Clovis, New Mexico and the Holloman Air Force Base near Alamogordo, New Mexico. Defendants' contamination and pollution of the environment at Cannon and Holloman with PFAS has created an imminent and substantial endangerment to human health and the environment in violation of the New Mexico Hazardous Waste Act. The case is *State of New Mexico et al. v. The United States et al.*, case number 6:19-cv-00178, in the U.S. District Court for the District of New Mexico.

- **State of New Jersey (2002-present)**

Since 2002, Kanner & Whiteley has acted as Special Counsel to the New Jersey Attorney General and the New Jersey Department of Environmental Protection both to develop New Jersey's comprehensive natural resource damages program and litigate these claims against industry defendants unwilling to amicably resolve their natural resource damage liability with the Department. Initially, the firm was retained to work with former Commissioner Bradley Campbell and former Attorney General David Samson to review and prioritize the State's viable NRD claims and prepare legal theories and factual information to enable enforcement of the State's claims. The firm worked extensively with the New Jersey Division of Law, the Department of Environmental Protection and a number of experts to develop the State's natural resource damage program which included the review and evaluation of hundreds of case files for possible prosecution and/or settlement opportunities. With regard to these matters, Kanner & Whiteley has worked primarily under the supervision of John Sacco, former Chief of the Office of Natural Resource Restoration and current Assistant Director of the Division of Parks and

Forestry; Richard Engel, Deputy Attorney General, Environmental Section; and, for a short period, Kevin Auerbacher, former Assistant Attorney General.

Kanner & Whiteley began litigating the leading case in New Jersey's natural resource damage program in 2004 against ExxonMobil for injuries at two of ExxonMobil's former refinery sites in the State. In a 2007 opinion in that case, the Appellate Division found in favor of the State on appeal from a partial summary judgment ruling (under the New Jersey Spill Act), finding that damages for loss of use and services of the State's natural resources are available to the State in addition to primary restoration. *New Jersey Dep't of Envt'l Prot. v. Exxon Mobil Corp.*, 393 N.J. Super. 388 (App.Div. 2007). Thereafter, Kanner & Whiteley tried the issue of damages on behalf of the State from January 2014 through September 2014 before the Honorable Judge Michael Hogan in Burlington County, New Jersey. Throughout the course of the 66-day trial—during which 25 witnesses were called, 13 of those being experts—Kanner & Whiteley's small team of attorneys opposed a substantially larger defense team. Following the completion of post-trial briefing, the parties reached an agreement to resolve ExxonMobil's NRD liabilities at the sites, and others across the State, for $225 million, the largest NRD recovery in the State's history. The settlement was approved by the trial court, finding that the result was fair, reasonable, and in the public interest and was subsequently upheld on appeal.

In the context of approving attorneys' fees and costs, Judge Hogan discussed Kanner & Whiteley's efforts in the case and its work with the State. Judge Hogan wrote:

> [T]he court by necessity has also become very familiar with the history and previous rulings of this eleven year old case. There can be no question that this case raised complex and novel issues of law, including the application of the controversial Habitat Equivalency Analysis methodology. The Firm was required to undertake a sixty-six day trial before Exxon became motivated to reach a settlement with the State while awaiting the court's decision on the merits. Even the fundamental and difficult question of whether there was a cause of action under the Spill Act for NRD (loss of use) made its way to the Appellate Division on an interlocutory basis as well as statute of limitation issues. The Firm provided the legal services to be successful on those trips to the Appellate Division. Altogether there were three rulings of the Appellate Division litigated by the State under the guidance of Mr. Kanner and his Firm.
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> * * *
>
> [T]he high difficulty of conducting discovery and defending the State's prerogatives from a more-than-able adversary demonstrates to this court a high level of competence and skill. There were many novel and untested questions that the Firm had to address at various stages of the proceedings, such as expert evidence questions, loss of use over time damages under the Spill Act,

> retroactivity of the Spill Act, the role of physical improvements, the application of the Public Trust Doctrine over private uplands, and the applicability of Habitat Equivalency Analysis methodology in NRD litigation, to name a few of the issues that required experienced, motivated, and highly skilled counsel.
>
> [Letter Opinion, *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, No. UNN-L-3026-04 (Law Div. Aug. 25, 2015), at 4-5.]

Judge Hogan described additional observations from the two years spent overseeing the case and ultimately the trial:

> The Firm was up against a determined adversary who created a daunting ten year defense that a less experienced, less determined, or less skilled effort would not have been able to timely, professionally, and, for the most part, successfully meet the challenge.
>
> [*Id.* (footnotes omitted).]

During many of the same years that Kanner & Whiteley litigated the claims against ExxonMobil, the firm also pursued litigation on behalf the State of New Jersey against a number of other corporate defendants, also for compensation for damage to or destruction of natural resources of the State. Kanner & Whiteley continues to represent the State of New Jersey on a number of natural resource damage cases.

On August 1, 2018, Kanner & Whiteley filed suit on behalf of the State of New Jersey against Hess Corporation and Buckeye Partners seeking compensation for the lost use and value of resources injured as a result of discharges at the former Hess refinery in Woodbridge, New Jersey. *See N.J. Dep't of Envtl. Prot. v. Hess Corp., f/k/a Amerada Hess Corp. & Buckeye Partners, L.P.*, Superior Court, Middlesex County, No. MID-L-004579-18.

On March 7, 2019, Kanner & Whiteley filed suit on behalf of the State of New Jersey against ExxonMobil Corp. seeking natural resource damages and restoration for years of injuries caused by PCBs and other contaminants dumped by the company beginning in the 1950s into the wetlands and tidal embayment at the company's property known as the "Lail Site" in Gloucester County, New Jersey. The case is *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, Superior Court, Gloucester County, No. GLO-L-000297-19.

For additional information regarding Kanner & Whiteley's experience, see the firm's resume, attached to this response as **Exhibit B.**

3.2. Provide publicly available motions, briefs, and other documents relevant to your experience in providing the legal services sought under this RFP.

The following documents relevant to Kanner & Whiteley's experience related to the services sought under this RFP are included as **Exhibit C** to this response:

- Complaint, *State of New Mexico et al. v. The United States et al.*, case number 6:19-cv-00178 (D.N.M.) (filed March 5, 2019);

- Complaint, *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, Superior Court, Gloucester County, No. GLO-L-000297-19 (filed March 7, 2019);

- Letter Opinion, *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, No. UNN-L-3026-04 (Law Div. Aug. 25, 2015); and

- Allan Kanner, *Emerging Trends In Perflourinated Chemical Regulation And Litigation*, ABA Environmental and Engery Litigation News Letter (August 28, 2017).

4. Conflict of Interest

4.1. Provide detailed information regarding any prior, current, or anticipated future relationship with any manufacturer of PFAS or PFAS-containing products that could give rise to potential actual or apparent conflict of interests.

Kanner & Whiteley is not involved in any material arrangements, relationships, or associations with any manufacturer PFAS or PFAS-containing products that could give rise to potential actual or apparent conflict of interests.

4.2. Disclose any actual, apparent, or potential conflict of interest between the bidder and the State of Michigan.

Kanner & Whiteley is not involved in any material arrangements, relationships, or associations that would cause a conflict that would prevent the firm from representing the State in PFAS litigation. Although Kanner & Whiteley does represent the State of New Mexico in a PFAS-related matter, that arrangement would not in any way interfere with the firm's representation of the State of Michigan.

4.3. With respect to any information provided in response to the questions above, provide an explanation of why an actual, apparent, or potential conflict of interest would not arise, or the measures that would be taken to avoid such a conflict.

As stated above, Kanner & Whiteley's representation of other clients in PFAS-related matters will not interfere with the firm's representation of the State of Michigan's interests. The State of New Mexico's PFAS matter involves New Mexico-specific sites and wholly different defendants than the instant matter, as New Mexico has not included the manufacturers of PFAS or PFAS-based products as defendants. As such, the interests of the states in the independent

lawsuits are not conflicting and the arguments asserted by the firm on behalf of New Mexico would not adversely affect the State of Michigan.

To ensure that no conflict arises as a result of Kanner & Whiteley's representation of other clients in PFAS-related matters, Kanner & Whiteley will keep all documents and communications related to its representation of the State of Michigan separate from all other PFAS-related matters and maintain the strictest of confidentiality, unless otherwise explicitly agreed to by a representative of the State. If any issue arises that may impact the State of Michigan's interests, Kanner & Whiteley will immediately notify the State.

5. SAAG Contract

5.1. Bidder must affirm agreement with the terms of the SAAG Contract. If you do not agree, you must provide redline edits to the SAAG Contract with your proposal, and include justification for requesting deviation from the terms.

Kanner & Whiteley agrees to the terms of the SAAG Contract.

6. Fee Arrangement

6.1. Bidder must submit a proposed Fee Arrangement which: (1) aligns with the SAAG Contract and (2) clearly sets forth how the bidder proposes to address payment in the event of recovery.

Kanner & Whiteley agrees to be retained on a contingency fee basis, with payment conditioned on the recovery by the State from any final order, including administrative order, or authorized settlement.

Kanner & Whiteley proposes a tiered contingent fee arrangement, which is based on the amount of recovery and stage of litigation as set forth below. Payment for the legal services is based on a contingency fee percentage of the recovery in natural resource damage proceedings, shall be recovered on the net benefits to the State following payment of reimbursable costs, and shall include the recovery of interest earned from the date on which defendants transfer any recoveries to the State:

- For cases where trial has commenced or will commence in 60 days, the case is tried to verdict, the case is settled on appeal or litigated through appeal:
    1. 25 % of any recovery up to $10,000,000; plus
    2. 22 ½ % of any portion of the next $15,000,000 recovered; plus
    3. 20 % of any portion of the recovery exceeding $25,000,000 million.

- For cases that are settled or otherwise concluded after the filing of the complaint but prior to trial:
    1. 20 % of any recovery up to $10,000,000; plus
    2. 17 ½ % of any portion of the next $15,000,000 recovered; plus

3. 15 % of any portion of the recovery exceeding $25,000,000 million.

- For cases that are settled or otherwise concluded prior to the filing of the complaint:
    1. 15 % of any recovery up to $10,000,000; plus
    2. 12 ½ % of any portion of the next $15,000,000 recovered; plus
    3. 10 % of any portion of the recovery exceeding $25,000,000 million.

If no recovery is made, Kanner & Whiteley would not be reimbursed for any costs of litigation.

EXHIBIT “A”

KANNER & WHITELEY, L.L.C.
ATTORNEYS AT LAW

Allan Kanner

Allan Kanner is the founding member of Kanner & Whiteley, LLC, a national firm handling natural resource damages, environmental, toxic torts, whistleblower, first-party insurance, class action and complex business litigation. Kanner & Whiteley is a national boutique law firm made up of Mr. Kanner and three partners, Conlee Whiteley, Lili Petersen and Cindy St. Amant who have worked together as a team for over twenty-two years. The firm's successful reputation is built on its ability to effectively manage and successfully litigate and try substantial, cases to successful completion on a cooperative basis with in-house counsel, co-counsel, or referring counsel.[1]

Mr. Kanner is highly regarded nationally as a trial lawyer and legal strategist. Mr. Kanner is a Lawdragon 500 Leading Lawyer in America 2017, and a 2016 Top Rated Litigator, The American Lawyer. The firm has been honored as a National Law Journal Finalist, 2016 Elite Trial Lawyers (Pharmaceutical Category). The Firm was also a Finalist, 2015 Elite Trial Lawyers (Environmental Category). In 2014, Law360 recognized Mr. Kanner as a "Titan of the Plaintiffs' Bar" (2014).[2] He is best known for handling novel case claims, especially those arising from mass disasters, mass torts and consumer fraud.

In the *BP Deepwater Horizon* litigation, working for the State of Louisiana, the firm recovered the largest payment from a single defendant ever, the largest natural resource damages recovery for any state in history plus additional damages of almost $10 billion.[3] Mr. Kanner has won significant environmental, toxic tort, commercial, consumer fraud and civil RICO cases throughout the United States for private and government clients. He has won numerous jury verdicts, has reached multi-million dollar settlements, and has been asked by courts and/or co-counsel to serve in various litigation leadership roles. Examples of some of these cases include *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (representing the State of Louisiana and as Co-Coordinating Counsel for the State Interests); *In re: Cooper Tire & Rubber Co. Tire Litig.*, MDL No. 1393 (lead counsel in consumer fraud class action ending with a settlement valued over $1 billion); *N.J. DEP v. ExxonMobil*, No. UNN-L-3026-04 c/w UNN-L-1650-05 (Sup. Ct., NJ) (lead counsel for the State of New Jersey; settlement of $225 million for environmental damage following 10 years of litigation and an 8 month trial); *Bonilla v. Trebol Motors Corp.* (co-lead counsel; $129 million jury verdict in RICO class action trial) ("Mr. Kanner,

[1] *See*, www.kanner-law.com. Kanner & Whiteley is an equal opportunity employer striving for diversity within its practice as well as in its alliances with co-counsel.

[2] Mr. Kanner's Lawdragon 500 profile appears at www.lawdragon.com/2017/10/01/lawyer-limelight-allan-kanner/ , and his Law360 profile appears at www.law360.com/articles/585076/titan-of-the-plaintiffs-bar-allan-kanner .

[3] The prior record for a recovery by a state by private counsel was $225 million, which the firm won for the State of New Jersey. *New Jersey Department of Environmental Protection v. Exxon Mobil Corporation*, No. UNN-L-3026-04 (Union county Superior Court, NJ).

who served as lead counsel at trial, has perhaps as much experience litigating complex class action suits as any attorney in the United States. He has authored, chaired, consulted on, contributed to, and give articles, symposiums, classes, books, practice guides, etc."); *In re: Synthroid Marketing Litig.,* MDL No. 1182 (co-lead counsel in national consumer fraud class action; $98 million settlement); *Lemmings v. Second Chance Body Armor*, No. CJ-2004-64 (Mayes County Dist. Ct., Okla.) (lead counsel in national class action; $29 million settlement); *In re: Cox Enter., Inc. Set-Top Cable Television Box Antitrust Litig.,* MDL No. 2048(W.D. Okla.) (co-lead counsel in antitrust class action; $6.3 million jury verdict in test case; on appeal); *In re: Budeprion XL Marketing and Sales Litig.,* MDL No. 2107 (E.D. Pa.) (lead counsel in $10.6 million nationwide consumer fraud class action); E.g., *In re Dollar General Corp., Motor Oil Marketing And Sales Practices Litigation*, MDL No. 2709 (W.D. Mo.) (Lead Counsel); *In re Synthroid Marketing Litigation*, MDL No. 1182 (N.D. Ill.) (one of five co-lead counsel; successfully resolved); *Talalai v. Cooper Tire & Rubber Co*., MID-L-8839-OOMT, Mass Tort 259 (Law Div. Middlesex County, N.J.) (lead counsel in national class action; successfully resolved).

Mr. Kanner has enjoyed a distinguished thirty-six year career representing individuals, businesses and governmental entities in hundreds of complex, multi-district and high profile cases in both state and federal courts, starting with *In re: Three Mile Island Litig.* (M.D. Pa.) and *In re: Louisville Sewer Explosions Litig.* (E.D. Ky.). According to Chambers USA (2009), "Allan Kanner of Kanner & Whiteley enjoys a 'sterling reputation' for plaintiff-side representation in toxic tort trials."

Many of Mr. Kanner's landmark victories have established important precedents for other litigants or spurred transformative legislative and regulatory action. *Coleman v. Block,* No. A1-83-47 (D.N.D.) (enjoined all farm foreclosures nationwide on constitutional due process grounds and led to new FMHA regulatory guidelines); *Local 7-515 OCAW v. American Home Products*, Civ. No. 92-1238 (D.PR.)(lead counsel in Civil RICO class action obtaining compensation for workers who lost their jobs because of tax motivated corporation restructuring, leading to new federal laws barring abusive corporate tax and relocation practices); *Hanson v. Acceleration Life Ins. Co.,* Civ. No. A3:97-152 (D.N.D.) (lead counsel in national consumer fraud class action; $14.7 million settlement for elderly purchasers of long term care insurance, leading to new federal laws eliminating bad policies and untoward actuarial practices); *Petrovic v. Amoco Oil Company* ($10.6 million settlement on landmark environmental pollution case); *Samples v. Conoco* ($66 million for decreased property values caused by pollution); *Roeder v. Atlantic Richfield* ($18 million settlement property owner pollution case spurring EPA action).[4] Mr. Kanner's pioneering environmental justice work was honored by the U.S. Civil Rights Commission.[5]

Courts have repeatedly recognized Mr. Kanner's zealous advocacy:

> *New Jersey Department of Environmental Protection v. Exxon Mobil*, No. UNN-L-3026-04 (consolidated with HUD-4415-04) (August 25, 2015, Hogan, J.) ("The Firm has labored in the high weeds of this litigation for eleven years,...The Firm was up against a determined adversary who

[4] EPA Is Moving To Designate Contaminated Nevada Cooper Mine A Superfund Site, NEW YORK TIMES (Dec. 25, 2015), A 17 ("The federal proposal comes after the residents filed a class-action lawsuit in 2011....")

[5] U.S. Commission on Civil Rights, THE BATTLE FOR ENVIRONMENTAL JUSTICE IN LOUISIANA (Sept. 1993), p. 48. ("The residents used legal action to challenge industry on environmental problems. There was no substantial support from civil rights or environmental groups...Attorneys played a primary role in the mobilization and resolution process.").

created a daunting ten year defense that a less experienced, less determined, or less skilled effort would not have been able to timely, professionally, and, for the most part, successfully meet the challenge...Litigating natural resource damages is a complex and time intensive undertaking, involving a close and confident relationship between the Attorney General, the DEP and the Firm. The court was able to observe that this was true during the trial. The Kanner Firm is, under any definition, a small law firm. It is dwarfed by the firms that it opposed in this case. Yet by having the focus of those attorneys assigned to the case devote the majority of their time to their client's efforts, they undoubtedly were precluded from taking on numerous new clients particularly because of their limited size. The Attorney General's Office, having worked with the firm for over a year on a non-compensation basis before formally retaining the firm, was most certainly well aware of the limitations their retainer agreement and subsequent litigation would place on the economics of the firm and it is no doubt a reason for their support of the Firm's application.")

In re: SCBA Liquidation, Inc.. f/k/a Second Chance Body Armor, Inc. No. 04-12515 (W.D. Mich) (November 11, 2013) ("But for the Class and the efforts of Class Counsel, the interests of many of these individual vest purchasers would not have been adequately represented in this bankruptcy case and these individuals would not have received any compensation for their valid vast claims." As the bankruptcy court noted, "Class Counsel has protected the 'little guys.'")

Ralph Shaffer v. Continental Casualty Company, CV 06-2235-PSG (June 12, 2008) (Final Approval of national class action for seniors against long term care insurer) ("The Court finds Class Counsel have achieved a substantial benefit for the Class in the face of formidable defenses to liability and difficult damages issues. *Class Counsel's skill and experience enhanced the Settlement*, and Class Counsel took on a substantial risk by taking this case on a contingency basis and advancing all of the necessary litigation expenses. Class Counsel fought numerous motions, took or defended several depositions in various locations throughout the Country, analyzed thousands of documents and several expert reports, extensively prepared for trial, and after nearly two years of litigation and effort to build a compelling case against an aggressive opponent, engaged in difficult settlement negotiations.")

Lemmings, et al., v. Second Chance Body Armor, Inc., et al., CJ-2004-62 (District Court, Mayes County, Oklahoma) (Final Approval Hearing for a national class action for police departments against makers of faulty bulletproof vest, 9/23/05, Judge James D. Goodpaster) ("Having been in this business some 40 years and having been through some litigation right here from this bench and personally I think that the lawyers for the claimants and for Toyobo have done *an outstanding job* and I really do

thank you all for the hard work that all of you have done in putting this settlement together."); (2/9/05 Order Certifying Class Action with Findings of Fact and Conclusion of Law) ("Plaintiffs' lawyers are qualified, experienced and generally able to conduct the proposed litigation and there are no antagonistic interests between the representative party and the class. Plaintiffs have retained attorneys that are qualified and skilled in complex and consumer class litigation.")

Wallace v. American Agrinsurance, Inc., No LR-C-99-669 (E.D.Ark, 2005) ("*I have nothing but admiration for you* and your associates for the outstanding manner in which you at all time represented the [national rice grower] class plaintiffs in this case.")

Samples v. Conoco, Inc., No. 2001-CA-000631, Div. J (Escambia County, First Judicial Circuit Court , Florida, 2003) (Class Counsel were "shown to be qualified, adequately financed and possessed sufficient experience...[and] have demonstrated both their commitment to vigorously pursue this matter on behalf of the class [for pollution property damages] as well as their qualifications to do so.")

Janes v. CIBA-GEIGY Corporation, Docket No. L-1669-01 Mass Tort 248 (Law Div. Middlesex Cty.) (5/16/03 Opinion and Order Certifying Litigation Class for pollution property damages) (Plaintiffs' "attorneys are qualified and experienced to conduct this litigation. Class counsel has the requisite experience, skill, and competency in dealing with class actions and complex litigation.")

Hanson v. Acceleration Life Ins. Co., Civ. No. A3:97-152 (D.N.D. Mar. 18, 1999) (certifying class of senior long term care insurance purchasers, rejecting filed rate doctrine and denying summary judgment): Order of December 11, 1999 (approving final settlement of $14.7 million), pp. 8-9: ("*This litigation was hard fought* throughout its two year pendency and required thousands of hours of counsel's time and hundreds of thousands of dollars advanced for expenses, with significant risk of no compensation. Both local counsel and national *class counsel are commended for their willingness to take on this cause when there were virtually no precedents to assure them of likely success.* They are all highly skilled and well-experienced attorneys who appreciate the risky nature of this litigation, yet their desire to correct a perceived injustice suffered by a vulnerable group of people led them to take this risk. *Counsel's considerable skill, both in the substantive areas of this case as well as in discovery and class action procedure, together with their degrees of preparation were primary factors leading to the favorable settlement for the class. Of equal note is the fact that counsel unquestionably put the interests of the class far ahead of their own interest."*) (emphasis added). This case involved a North Dakota class action certified against Acceleration Life Insurance and Commonwealth Life Insurance Company for fraud in connection with

multiple premium increases of up to 700% between 1989 and 1997 on "guaranteed renewable" Long-Term Care insurance policies. Shortly before trial a national class action settlement, supervised and approved by the federal magistrate, was entered into which brought over $7.7 million in cash payouts to numerous elderly policyholders and their families and an additional $4 million in insurance benefits tailored to the specific needs of each class member.

Talalai v. Cooper Tire & Rubber Co., MID-L-8839-00MT, Mass Tort 249, (Law Div. Middlesex Cty.) (11/1/01 Opinion and Order Certifying National Class and Preliminarily Approving Settlement) ("The attorneys of Kanner & Whiteley, L.L.C. have substantial jury trial experience with a number of multi-million-dollar verdicts, including a number of successful class action trials. *The firm is known for its willingness to try class actions to verdicts and has done so on at least three occasions, winning every time*"); Opinion of September 13, 2002 (Approving Certification and Final Settlement of National Class), p. 5: ("The Stipulation was the result of extensive and intensive arm's length negotiations among highly experienced counsel, with the benefit of extensive discovery and full knowledge of the risks inherent in this litigation.")

Milkman v. American Travellers Life Insurance Co., No. 3775, (Ct. Cm. Pleas, First Judicial District, June Term 2000) (Preliminary Approval of National Class: 11/26/01) ("As demonstrated by the credentials set forth in the Motion, the Plaintiff's attorneys are more than capable of representing the interests of the Class and there do not appear to be any conflicts of interest between the Plaintiff and the Class."). (Final Approval of National Class: 4/1/02), p. 47 ("Again, the quality of the legal representation provided by Class Counsel is exceptional. The extensive experience of each of the firms and individual attorneys serving the Class is set forth in Kanner Affidavit Paragraphs 54 through 68. Moreover, the Court can attest to Class Counsel's professionalism and skill, as demonstrated by the extensive memoranda of law and the first-class oral arguments delivered on behalf of the Class.").

Bonilla, et al. v. Trebol Motors Corporation, et al., No. 92-1795 (JP) (D.P.R.) ($129,000,000 jury verdict in civil RICO class action against Volvo and local distributor) (describing the firm's abilities on March 27, 1997, as follows: *"We have no trouble concluding that the experience and resources of Kanner & Whiteley was a major reason that the plaintiffs' class was able to so successfully present its case to the jury and achieve such an estimable result. Mr. Kanner, who served as lead counsel at trial, has perhaps as much experience litigating complex class action suits as any attorney in the United States.* He has authored, chaired, consulted on, contributed to, and given articles, symposiums, classes, books, practice guides, etc. More importantly, his resume is replete with instances in which he served as counsel in complex class action suits. His experience

was essential to the success realized by the plaintiffs in this action.") (emphasis added).

Glass, Molders, Pottery Plastics, and Allied Workers International Union, et al. v. Wickes Companies, Inc., No. L-06023-88 (Sup.Ct., Camden Cty., February 24, 1992) (certifying national class of workers who lost jobs as a result of tortious conduct occurring in the context of hostile corporate raid) (describing the firm's abilities to represent the class as follows: "Plaintiffs' attorneys have extensive professional experience representing plaintiffs in class actions. Additionally, the attorneys representing the plaintiffs are equipped with the staff and resources to adequately handle a technical and complex class action. *In short, I am satisfied that plaintiffs' attorneys are committed to the class and competent to advocate its interest.*"); (emphasis added) Order Approving Counsel Fees of December 16, 1993 ("This Court finds that the Kanner firm, [and co-counsel] have all provided outstanding service to the class and faithfully executed their fiduciary duties in connection with this litigation.") (emphasis added).

Local 7-515, Oil Chemical and Atomic Workers International Union (OCAWIU), et al v. American Home Products, et al., Civ. No. 92-1238 (JP) (D.P.R.) (Order of April 13, 1992, certifying national class of workers who lost jobs as a result of fraudulent job transfers to Puerto Rico under civil RICO theory), *Oil Chemical and Atomic Workers International Union v. American Home Products, et al.*, Civil No. 91-1093 consol. with Civil No. 92-1238 (Order of September 17, 1992, approving $24 million settlement); p. 38 of transcript: "Indeed, the Court affirmatively finds that Mr. Kanner and [co-counsel] have in all matters handled this case and conducted themselves, in relation to their co-counsel, with *the highest degree of professionalism, integrity and ability.* There is no doubt in the Court's mind, based on his intimate familiarity with the record, that *but for the outstanding efforts of Mr. Kanner and [co-counsel] there would not have been such a significant and landmark result in this case,* and I have been telling you all this long before this moment." (emphasis added).

The Board of Commissioners of the New Orleans Exhibition Hall Authority v. Missouri Pacific Railroad Company, et al., No. 92-4155 (Judgment of February 15, 1996) "It must be said that both firms and all attorneys involved in this protracted litigation exemplified *the highest standard of trial experience and skill* which was brought to bear on this *novel and difficult matter* in a specialized area of the law.") (emphasis added).

Mr. Kanner also enjoys the highest "av" rating from Martindale-Hubbell, and has been voted a Louisiana Super Lawyer (2007-2016). He is on BNA's Board of Advisors for both THE CLASS ACTION REPORTER and THE TOXIC LAW REPORTER, and the Editorial Boards, ENVIRONMENTAL LAW REPORTER and ENVIRONMENTAL FORENSICS JOURNAL. Kanner is a member of the American Law Institute and past President of the Louisiana Association of Justice and former Governor of the American Association of Justice. His cases and results have

been featured in *The Wall Street Journal*, *Business Week*, *The National Law Journal*, *The New York Times, Newsweek, Washington Post,* CNN and other news outlets.

Kanner earned an A.B. degree from the University of Pennsylvania and a J.D. degree from Harvard Law School. He is the author of 2 books and scores of scholarly articles, which are regularly relied upon by Judges, scholars and practitioners. He has served as an adjunct professor of law at Tulane University, Duke Law School, Yale Law School, and the University of Texas. He is a former law review editor and former federal appellate clerk.

KANNER & WHITELEY, L.L.C.
ATTORNEYS AT LAW

Elizabeth B. Petersen

Elizabeth ("Lili") is a member of Kanner & Whiteley and has been with the firm since 1996. She practices primarily in the areas of environmental law, complex litigation and class actions, including consumer fraud and environmental property damage litigation.

Since Lili has served as Special Counsel to the State of New Jersey, and is involved in litigation on behalf of the State of New Jersey to recover for damage to its natural resources from various defendants, including a case against ExxonMobil for which the State reached a $225 million settlement, its largest ever natural resource damage recovery. She also serves as counsel to the Conservation Law Foundation in a landmark case against ExxonMobil for its failure to follow the best practices required under federal law in armoring the ExxonMobil Everett Terminal in Massachusetts against risks associated with climate change that threaten the terminal and surrounding communities, as well as violations of its Clean Water Act permit. Lili served as Special Counsel to the Louisiana Attorney General representing the State of Louisiana in the litigation against the many defendants associated with the Deepwater Horizon oil spill disaster in the Gulf of Mexico, in which she assisted in the recovery of more than $8.8 billion in both environmental and economic damages for the State of Louisiana resulting from the disaster.

Lili has also been involved in a number of cases on behalf of private property owners for damage suffered because of pollution, including contaminated ground and surface waters, which have resulted in multi-million dollar settlements. *See, e.g., Roeder v. Atlantic Richfield Co.,* 3:11 - CV - 00105-RCJ -WGC (D. Nev.) (securing a settlement valued at $19.5 million for residents living near contaminated groundwater); *Zancorp Properties, et al., v. Browning Ferris Industries, et al.,* No. 466933 (19th J.D.C. LA); *Guste v. Shell Oil Co.,* No. 95-0601-D (E.D. LA) (reaching a multi-million dollar settlement after six days of trial); *Samples v. Conoco, Inc.*, No. 01-631 (Fla. 1 JDCC) (reaching a settlement that provided for client payments of $65 million plus additional monies for attorney fees and costs); *Petrovic v. Amoco Oil Co.*, No. 98-3816, 99-1334 (8th Cir.).

She has also litigated as co-lead counsel for class of purchasers of a prescription drug where misrepresentations by the manufacturer inflated purchase prices. *In re: Synthroid Marketing Litigation*, MDL No. 1182, 264 F.3d 712 (7th Cir. 2001) (reaching a settlement of $98 million, affirmed on appeal).

Lili has taught as an adjunct professor at Tulane Law School in the area of toxic torts. Prior to joining Kanner & Whiteley, she practiced in the areas of civil and maritime litigation.

Lili is a member of the State Bar of Louisiana, and is licensed to practice law in the Louisiana State Courts, the United States District Courts for the Eastern and Middle Districts of Louisiana, and the United States Courts of Appeals for the Fifth Circuit. She has also been admitted to practice *pro hac vice* in various federal and state courts throughout the country.

KANNER & WHITELEY, L.L.C.
ATTORNEYS AT LAW

Cindy St. Amant

Cindy, a member of Kanner & Whiteley, has been with the firm since 1998. She practices primarily in the areas of consumer fraud, insurance, antitrust, pharmaceutical, agricultural products, environmental law and general class action litigation, on behalf of a variety of clients. She has been appointed as class counsel in many of the firm's class actions and has an active role in the litigation, class certification, trial and settlement of cases against product manufacturers, drug manufactures and insurance companies.

Cindy is managing the MDL *In re: Dollar General Corp. Motor Oil Marketing and Sales Practices Litigation* in which the firm serves as lead counsel. Before that, she managed the *Press* overhead and profit class action (the only successfully resolved class action after Katrina), the *Cox* antitrust MDL, and the firm's Chinese drywall litigation. In addition, she has managed large, multistate class actions, such as the *Cooper Tire* litigation, which consisted of 33 state class actions involving violations of state consumer fraud statutes or deceptive trade practices associated with the alleged faulty manufacture of tires, and the *Second Chance* litigation, which consisted of 7 state class actions alleging claims of breach of warranty and violation of state consumer protections laws associated with the sale of faulty bullet proof vests to law enforcement officers. Both of these actions ended in multi-million dollar settlements providing relief to consumers who had purchased potentially defective and deadly products. Additionally, she has handled a number of insurance coverage and broker liability claims following Hurricanes Katrina and Rita, including the *Press* class action against Louisiana Citizens Property Insurance Corporation for unpaid overhead and profit associated with certain property damage claims.

A member of the State Bars of Louisiana and Texas, Cindy is licensed to practice law in all Louisiana and Texas State Courts, the United States District Courts for the Eastern, Middle and Western Districts of Louisiana, the United States District Courts for the Eastern and Western Districts of Arkansas, the United States District Court for Northern District of Florida, the United States District Court for Western District of Michigan, the United State District Court for the District of Colorado, and the United States Courts of Appeals for the Fifth and Tenth Circuits. She has also been admitted to practice pro *hac vice* in various federal and state courts throughout the country.

In addition to her legal career, Cindy is actively involved in the community including serving on the Rayne Early Childhood Program Board as a Member (2010-2015) and currently as Chair (2016-present). She also served as Rayne Early Childhood Program Parents' Committee, Officer (2012-2014). In addition, she has served the Bricolage Academy of New Orleans as a Board Member (2013 school year) and as a Committee Member (2014 school year) of the Bricolage Community Association. She is also a perennial sponsor and active participant of Carrollton Boosters baseball and soccer leagues.

KANNER & WHITELEY, L.L.C.
ATTORNEYS AT LAW

Allison S. Brouk

Allison is an associate at Kanner & Whiteley, L.L.C. and has been with the firm since 2011. Her practices focuses on environmental law, natural resource damage litigation, complex litigation, and class actions.

Allison is part of the Kanner & Whiteley litigation team representing the State of New Jersey in natural resource damage cases for the State, including a case against Exxon Mobil Corp., for which, following a 66-day bench trial, the parties reached a $225 million settlement, the State's largest ever natural resource damage recovery.

Allison was also part of the litigation team representing the State of Louisiana in its claim related to the Deepwater Horizon oil spill, in which she assisted in the recovery of more than $8.8 billion in both environmental and economic damages for the State of Louisiana resulting from the incident, the largest environmental disaster ever to occur in the Gulf of Mexico.

Allison currently serves as Special Counsel to the Attorneys General of the State of Mississippi and the State of New Mexico in the States' respective cases against Dollar General regarding its deceptive and misleading marketing and sales practices used in connection with its obsolete motor oil products.

Allison also represents the Conservation Law Foundation in landmark cases against Exxon Mobil Corp. and Shell Oil Co. for their failure to follow the best practices required under federal law in armoring the certain coastal fuel terminals against risks associated with climate change that threaten the terminals and surrounding communities, as well as violations of the companies' Clean Water Act permits.

Allison previously served as class counsel in *Roeder v. Atlantic Richfield Co.*, in which she assisted in securing and overseeing the administration of a class action settlement valued at $19.5 million that included compensation for property damages, future medical costs and the extension of the city water system to properties in the community previously serviced by contaminated well water, as well as water right permits for residents wishing to maintain the use of private wells.

Allison graduated *magna cum laude* from Tulane University Law School, where she received a Certificate in Environmental Law. While in law school, she practiced as a student attorney for the Tulane Environmental Law Clinic, was Editor in Chief of the Tulane Environmental Law Journal and was a member of the Tulane Moot Court Board. She also served as an intern for U.S. District Judge Stanwood R. Duval, Jr. in the Eastern District of Louisiana.

Allison is admitted to practice in the State of Louisiana, the Eastern, Middle and Western District Courts of Louisiana, and the Fifth Circuit Court of Appeals. She has also been admitted to practice *pro hac vice* in various courts throughout the country. She is a member of the Louisiana Bar Association, the Federal Bar Association and the Louisiana Association for Justice.

In addition to her legal work, Allison is Presodent of the Board of Directors of Teaching Responsible Earth Education (T.R.E.E.), a non-profit organization providing comprehensive curriculum based, life-science and earth education programs in "Outdoor Classrooms" to children throughout Louisiana.

EXHIBIT “B”

KANNER & WHITELEY, L.L.C.
ATTORNEYS AT LAW

701 Camp Street ■ New Orleans, Louisiana 70130 ■ (504) 524-5777 ■ Fax (504) 524-5763

FIRM BIOGRAPHY

Kanner & Whiteley, L.L.C. ("K&W") is an AV-rated national trial firm founded in 1981 that excels in handling complex and novel matters in a variety of substantive areas of the law, including the representation of state natural resources trustees. Based in New Orleans, Louisiana, Kanner & Whiteley has successfully secured historic recoveries on behalf of its clients for over 38 years. The firm has been especially successful in environmental and toxic tort litigation, pioneering many of the most important developments in these fields. The firm's attorneys are held in high regard for their persistence, preparation, attention to detail, ability to synthesize large amounts of complex information, problem solving, creativity and strategic thinking. According to Chambers USA, Kanner & Whiteley "enjoys a 'sterling reputation' for plaintiff-side representation," and Allan Kanner has been separately lauded as "'the best oil and gas' expert in the world as lead counsel for [The Deepwater Horizon] spill litigation." Sonia Smith, *Lawmakers Briefed On State's Oil Spill Response*, BATON ROUGE ADVOCATE (June 10, 2010). Mr. Kanner and Ms. Whiteley are 2017 and 2018 Lawdragon 500 Leading Lawyers in America, and the firm was honored as a Finalist by The National Law Journal in 2015 and 2016 as Elite Trial Lawyers.

NATURAL RESOURCE DAMAGE, ENVIRONMENTAL AND TOXIC TORT EXPERIENCE

Since its inception, Kanner & Whiteley has been on the cutting edge of environmental, natural resource and toxic tort law developments. Starting with *Three Mile Island* and the *Louisville Sewer Explosions*, the firm has achieved an unmatched record in helping clients to navigate through the complex and dynamic backdrop of environmental laws and regulations. Our litigation practice has involved successful claims for recovery of compensation for environmental damage to persons, property, government and the Public Trust resulting from contamination in fields including but not limited to toxic torts, natural resource damages, nuclear power, the Resource Consevation Recovery Act, the Clean Water Act, and the Clean Air Act. The firm has pursued causes of action for both private and public entities under various theories, including nuisance, trespass, strict liability, unjust enrichment, *parens patriae*, as well as both federal and state environmental statutes. These actions have taken the form of class, multiple party, government, and individual plaintiff proceedings against a multitude of corporations, including ExxonMobil, Shell, Texaco, ConocoPhillips, and BP/Amoco. Most recently, the firm secured groundbreaking settlements in two of the largest natural resource damage (NRD) cases in history.

The firm has the best NRD record of any firm in America. The firm acts as Special Counsel to the New Jersey Attorney General and the Department of Environmental Protection to both develop New Jersey's comprehensive natural resource damages program, as well as litigate

these claims against industry defendants unwilling to amicably resolve their natural resource damage liability with the Department. Initially the firm worked with Commissioner Bradley Campbell and Attorney General David Samson to catalog and prioritize the State's viable claims and prepare legal theories and factual information to enable the State to enforce its interests.

The firm began litigating the leading and largest case in New Jersey's natural resource damage program in 2004 against Exxon Mobil for injuries at two of Exxon's former refinery sites in the State. In a 2007 opinion in that case, the New Jersey Appellate Division found in favor of the State on appeal from a partial summary judgment ruling (under the New Jersey Spill Act), finding that damages for loss of use and services of the State's natural resources are available to the State. *New Jersey Dep't of Envt'l Prot. v. Exxon Mobil Corp.*, 393 N.J. Super. 388 (App. Div. 2007). Damages were tried from January 2014 through September 2014. After trial, the parties reached a settlement for $225 million. The settlement was approved by the trial and appellate courts as fair and in the interests of the public.

In addition to the case against ExxonMobil, Kanner & Whiteley has served or serves as Special Counsel to the State of New Jersey in other matters seeking restoration or compensation for natural resource injuries and other complex litigation matters. On August 1, 2018, as part of the environmental initiative of the new administration, Kanner & Whiteley filed suit on behalf of the State against Hess Corporation and Buckeye Partners seeking compensation for the lost use and value of resources injured as a result of discharges at the former Hess refinery in Woodbridge, New Jersey. *See N.J. Dep't of Envtl. Prot. v. Hess Corp., f/k/a Amerada Hess Corp. & Buckeye Partners, L.P.*, Superior Court, Middlesex County, No. MID-L-004579-18. Kanner & Whiteley also filed a complaint on behalf of the State of New Jersey against Exxon Mobil Corp. seeking natural resource damages and restoration for years of injuries caused by polychlorinated biphenyl ("PCB") and other contaminants dumped at the Lail Site in Gloucester County, New Jersey. *See New Jersey Department of Environmental Protection, et al. v. Exxon Mobil Corporation,* No. GLO-L-000297-19.

The firm was also retained by Louisiana Attorney General James D. "Buddy" Caldwell as Special Counsel to represent the State of Louisiana with its claims resulting from the BP Deepwater Horizon oil spill in the Gulf of Mexico, including claims to recover economic losses, response costs and natural resource damages. The firm was involved in the negotiation of the $18.7 billion global settlement agreement with British Petroleum that resolved all remaining claims against BP Exploration and Production, Inc. brought by the United States, Louisiana and the rest of the Gulf States, and a majority of local government entities in those states. Kanner & Whiteley secured the recovery of more than $8.8 billion in both environmental and economic damages resulting from the disaster solely for the State of Louisiana, the largest of the States' recoveries and the largest single NRD recovery ever. In addition, the firm assisted the State in its response efforts to the impacts from the spill.

In addition to its current work for the State of New Jersey, Kanner & Whiteley represents the State of New Mexico in PFAS litigation against the United States Air Force. *State of New Mexico, ex rel. v. The United States et al.,* No. 6:19-cv-00178 (D.N.M.).

Kanner & Whiteley continues to bring pioneering environmental cases under innovative theories of liability. In September of 2016, Kanner & Whiteley joined the Conservation Law Foundation in bringing a landmark case against ExxonMobil for failure to follow the best practices required under federal law in armoring the ExxonMobil Everett Terminal in Massachusetts against sea level rise, flooding, and other risks associated with climate change that threaten the Terminal, as well as the repeated violations of its permit conditions. *Conservation Law Found., Inc. v. ExxonMobil Corp. et al.* 1:16-cv-11950-MLW (D. Mass). The trial court denied ExxonMobil's efforts to dismiss this landmark case.

The complaint, filed in the United States District Court for the District of Massachusetts, seeks penalties and injunctive relief for ExxonMobil's violations of the Resource Conservation Recovery Act and the Clean Water Act associated with operations at its Everett Terminal. The complaint alleges in part that despite a broad corporate understanding of the certainty and the effects of climate change dating back decades, ExxonMobil failed to take action to address imminent risks of increased flooding and greater storm tides at the Terminal and to protect local communities from the increased risk of oil and hazardous pollution discharges and spills at the Terminal that are associated with the effects of climate change. In addition, the complaint alleges that ExxonMobil routinely discharges toxic pollutants into the Island End and Mystic Rivers in amounts that far exceed permitted levels and degrade water quality. The firm is also pursuing similar claims against Shell Oil Company relating to violations of the Clean Water Act and the Resource Conservation and Recovery Act for its facility in Providence, Rhode Island. *Conservation Law Found., Inc. v. Shell Corporation USA,* 1:17-cv-00396-WES-KDA (USDC R.I.).

TRIAL AND APPELLATE EXPERIENCE

Kanner & Whiteley has an excellent trial and appellate reputation. The firm has substantial jury trial experience with a number of multi-million-dollar verdicts, including three successful class action trials. Kanner & Whiteley has successfully litigated civil RICO, environmental, toxic tort, antitrust, and fiduciary duty class actions.

The firm has served as lead counsel in a number of cases, including the following: *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 (E.D. La.) (representing the State of Louisiana to recover for natural resource damages following Deepwater Horizon Oil Spill); *N.J. Dep't of Envtl. Prot. vs. ExxonMobil, Corp.*, Superior Court Union County, Docket No. UNN-L-3026-04 consolidated with UNN-L-1650-05 (representing the State of New Jersey to recover for natural resource damages at the sites of two former refineries under the New Jersey Spill Act and common law theories including nuisance); *In re: Avandia Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 1871 (E.D. Pa.) (representing the State of Louisiana in a fraud case); *In re: Budeprion XL Marketing and Sales Practices Litigation* (MDL 2107) (E.D. Pa.) (Lead Counsel, pending national pharmaceutical consumer class action); *In re Cox Enterprises, Inc.*, *Set-Top Cable Television Box Anti-Trust Litigation*, MDL No. 2048 (W.D. Okla.) (Co-Lead Counsel) ($6 million antitrust jury verdict); *Roeder v. Atlantic Richfield Co.,* 3:11 - CV - 00105-RCJ -WGC *(D. Nev.)* (Settled pollution property damage class action)*; Shaffer v. Continental Casualty Co.*, No. CV-06-2235-RGK (C.D. Cal.) (Lead Counsel) ($60 million class action long term care insurance settlement.);

Lemmings v. Second Chance Body Armor, et al., No. CJ-2004-64 (Mayes County District Court, OK) (2/19/05) (certification of class of bullet proof vest purchasers/users) (7/12/05 Order Preliminarily Approving $29 million national class settlement) (9/23/05 Final Approval Granted); *Samples v. Conoco, Inc.,* No. 2001-CA-000631, Div. J (Escambia County, First Judicial Circuit Court, Florida, 2003) (Litigation of groundwater contaminant class action; $65 million property owner class settlement); *Talalai v. Cooper Tire & Rubber Co.,* MID-L-8839-OOMT, Mass Tort 259, (Law Div. Middlesex Cty.) (multi-million-dollar national class settlement on behalf of Cooper Tire purchasers; final approval granted on 9/13/02); *Hanson v. Acceleration Life Ins. Co.*, Civ. No. 3:97-152 (D.N.D. 1999) ($14.7 million settlement on behalf of Long Term Care policyholders); *Wallace v. American Agrisurance*, No. LR-C-99-669 (E.D.AR) ($3.7 million settlement on behalf of rice growers holding CRC Plus policies); *Petrovic v. Amoco Oil Co.,* 200 F.3d 1140 (8th Cir. 1999) (settlement of certified pollution property class action affirmed on appeal); *Tompkins v. BASF*, No. 96-59 (Traill County, N.D.) (multi-million-dollar settlement on behalf of agricultural product purchasers); *Clark v. Household Finance Corp.*, No. 97-2-22420 (King County, WA, 12/29/97) (certification and settlement of statewide class for defrauded employees). *In re Synthroid Marketing Litigation*, MDL 1182, 264 F.3d 712 (7th Cir. 2001) ($89 million nationwide class action settlement granted final approval and affirmed on appeal); and *Bonilla v. Trebol Motors*, No. 92-1795 (D. P.R.) ($129.5 million class action verdict affirmed in part and reversed in part on appeal; settled as to all parties).

Courts have consistently acknowledged the firm's expertise in handling complex litigation and trials:

> Letter Opinion, *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, Dkt. Nos. L-3026-04, L-1650-05 (Aug. 25, 2015), at 4-5:
> ("[T]he court by necessity has also become very familiar with the history and previous rulings of this eleven year old case. There can be no question that this case raised complex and novel issues of law, including the application of the controversial Habitat Equivalency Analysis methodology. The Firm was required to undertake a sixty-six day trial before Exxon became motivated to reach a settlement with the State while awaiting the court's decision on the merits. Even the fundamental and difficult question of whether there was a cause of action under the Spill Act for NRD (loss of use) made its way to the Appellate Division on an interlocutory basis as well as statute of limitation issues. The Firm provided the legal services to be successful on those trips to the Appellate Division. Altogether there were three rulings of the Appellate Division litigated by the State under the guidance of Mr. Kanner and his Firm…[T]he high difficulty of conducting discovery and defending the State's prerogatives from a more-than-able adversary demonstrates to this court a high level of competence and skill. There were many novel and untested questions that the Firm had to address at various stages of the proceedings, such as expert evidence questions, loss of use over

time damages under the Spill Act, retroactivity of the Spill Act, the role of physical improvements, the application of the Public Trust Doctrine over private uplands, and the applicability of Habitat Equivalency Analysis methodology in NRD litigation, to name a few of the issues that required experienced, motivated, and highly skilled counsel…The Firm was up against a determined adversary who created a daunting ten year defense that a less experienced, less determined, or less skilled effort would not have been able to timely, professionally, and, for the most part, successfully meet the challenge.")

New Jersey Department of Environmental Protection v. ISP Environmental Services et al, No. UNN-L-2271-07 (Super. Ct., Civil, Union County, New Jersey) (Fasciale, J.) *Hr'g Tr.* (Mar. 5, 2013) at 4-5 (The Attorney General's Office and Special Counsel, Kanner and Whiteley, have a lengthy substantive attorney/client relationship. The firm has been Special Counsel to the AG since July 2003, and prior to the time, the firm worked with the DEP for over a year to assess potential claims. Since 2003, Kanner and Whiteley, has litigated numerous cases on behalf of the attorney general. The firm has also participated in development of the State's natural resource initiative. The firm is a national reputable practice, and Allan Kanner, the primary attorney in this matter, is the founding member of the firm.")

Ralph Shaffer v. Continental Casualty Company, CV 06-2235-PSG (June 12, 2008) (Final Approval) ("The Court finds Class Counsel have achieved a substantial benefit for the Class in the face of formidable defenses to liability and difficult damages issues. Class Counsel's skill and experience enhanced the Settlement, and Class Counsel took on a substantial risk by taking this case on a contingency basis and advancing all of the necessary litigation expenses. Class Counsel fought numerous motions, took or defended several depositions in various locations throughout the Country, analyzed thousands of documents and several expert reports, extensively prepared for trial, and after nearly two years of litigation and effort to build a compelling case against an aggressive opponent, engaged in difficult settlement negotiations.")

Lemmings, et al., v. Second Chance Body Armor, Inc., et al., CJ-2004-62 (District Court, Mayes County, Oklahoma) (Final Approval Hearing 9/23/05, Judge James D. Goodpaster) ("Having been in this business some 40 years and having been through some litigation right here from this bench and personally I think that the lawyers for the claimants and for Toyobo have done an outstanding

job and I really do thank you all for the hard work that all of you have done in putting this settlement together."); (2/9/05 Order Certifying Class Action with Findings of Fact and Conclusion of Law) ("Plaintiffs' lawyers are qualified, experienced and generally able to conduct the proposed litigation and there are no antagonistic interests between the representative party and the class. Plaintiffs have retained attorneys that are qualified and skilled in complex and consumer class litigation.")

Wallace v. American Agrinsurance, Inc., No LR-C-99-669 (E.D.Ark, 2005) ("I have nothing but admiration for you and your associates for the outstanding manner in which you at all time represented the class plaintiffs in this case.")

Samples v. Conoco, Inc., No. 2001-CA-000631, Div. J (Escambia County, First Judicial Circuit Court, Florida, 2003) (Class Counsel were "shown to be qualified, adequately financed and possessed sufficient experience...[and] have demonstrated both their commitment to vigorously pursue this matter on behalf of the class as well as their qualifications to do so.")

Janes v. CIBA-GEIGY Corporation, Docket No. L-1669-01 Mass Tort 248 (Law Div. Middlesex Cty.) (5/16/03 Opinion and Order Certifying Litigation Class for pollution property damages) (Plaintiffs' "attorneys are qualified and experienced to conduct this litigation. Class counsel has the requisite experience, skill, and competency in dealing with class actions and complex litigation.")

Hanson v. Acceleration Life Ins. Co., Civ. No. A3:97-152 (D.N.D. Mar. 18, 1999) (certifying class, rejecting filed rate doctrine and denying summary judgment): Order of December 11, 1999 (approving final settlement of $14.7 million), pp. 8-9: ("*This litigation was hard fought* throughout its two year pendency and required thousands of hours of counsel's time and hundreds of thousands of dollars advanced for expenses, with significant risk of no compensation. Both local counsel and national *class counsel are commended for their willingness to take on this cause when there were virtually no precedents to assure them of likely success*. They are all highly skilled and well-experienced attorneys who appreciate the risky nature of this litigation, yet their desire to correct a perceived injustice suffered by a vulnerable group of people led them to take this risk. *Counsel's considerable skill, both in the substantive areas of this case as well as in discovery and class action procedure, together with their degrees of preparation were primary factors leading to the favorable settlement for the class. Of equal note is the fact that counsel*

unquestionably put the interests of the class far ahead of their own interest.") (emphasis added)

Talalai v. Cooper Tire & Rubber Co., MID-L-8839-00MT, Mass Tort 249, (Law Div. Middlesex Cty.) (11/1/01 Opinion and Order Certifying National Class and Preliminarily Approving Settlement) ("The attorneys of Allan Kanner & Associates, P.C. have substantial jury trial experience with a number of multi-million-dollar verdicts, including a number of successful class action trials. The firm is known for its willingness to try class actions to verdicts and has done so on at least three occasions, winning every time"); Opinion of September 13, 2002 (Approving Certification and Final Settlement of National Class), p. 5: ("The Stipulation was the result of extensive and intensive arm's length negotiations among highly experienced counsel, with the benefit of extensive discovery and full knowledge of the risks inherent in this litigation.")

Milkman v. American Travellers Life Insurance Co., No. 3775, (Ct. Cm. Pleas, First Judicial District, June Term 2000) (Preliminary Approval of National Class: 11/26/01) ("As demonstrated by the credentials set forth in the Motion, the Plaintiff's attorneys are more than capable of representing the interests of the Class and there do not appear to be any conflicts of interest between the Plaintiff and the Class."). (Final Approval of National Class: 4/1/02), p. 47 ("Again, the quality of the legal representation provided by Class Counsel is exceptional. The extensive experience of each of the firms and individual attorneys serving the Class is set forth in Kanner Affidavit Paragraphs 54 through 68. Moreover, the Court can attest to Class Counsel's professionalism and skill, as demonstrated by the extensive memoranda of law and the first-class oral arguments delivered on behalf of the Class.")

Bonilla, et al. v. Trebol Motors Corporation, et al., No. 92-1795 (JP) (D.P.R.) ($129,000,000 jury verdict in civil RICO class action against Volvo and local distributor) (describing the firm's abilities on March 27, 1997, as follows: *"We have no trouble concluding that the experience and resources of Allan Kanner & Associates, P.C. was a major reason that the plaintiffs' class was able to so successfully present its case to the jury and achieve such an estimable result. Mr. Kanner, who served as lead counsel at trial, has perhaps as much experience litigating complex class action suits as any attorney in the United States*. He has authored, chaired, consulted on, contributed to, and given articles, symposiums, classes, books, practice guides, etc. More importantly, his resume is replete with instances in which he served as counsel in complex class action suits. His experience

was essential to the success realized by the plaintiffs in this action.") (emphasis added)

Glass, Molders, Pottery Plastics, and Allied Workers International Union, et al. v. Wickes Companies, Inc., No. L-06023-88 (Sup.Ct., Camden Cty., February 24, 1992) (certifying national class of workers who lost jobs as a result of tortious conduct occurring in the context of hostile corporate raid) (describing the firm's abilities to represent the class as follows: "Plaintiffs' attorneys have extensive professional experience representing plaintiffs in class actions. Additionally, the attorneys representing the plaintiffs are equipped with the staff and resources to adequately handle a technical and complex class action. *In short, I am satisfied that plaintiffs' attorneys are committed to the class and competent to advocate its interest.")*; (emphasis added) Order Approving Counsel Fees of December 16, 1993 ("This Court finds that the Kanner firm, [and co-counsel] have all *provided outstanding service to the class* and faithfully executed their fiduciary duties in connection with this litigation.") (emphasis added)

Local 7-515, Oil Chemical and Atomic Workers International Union (OCAWIU), et al. v. American Home Products, et al., Civ. No. 92-1238 (JP) (D.P.R.) (Order of April 13, 1992, certifying national class of workers who lost jobs as a result of fraudulent job transfers to Puerto Rico under civil RICO theory), *Oil Chemical and Atomic Workers International Union v. American Home Products, et al.,* Civil No. 91-1093 consol. with Civil No. 92-1238 (Order of September 17, 1992, approving $24 million settlement); p. 38 of transcript: "Indeed, the Court affirmatively finds that Mr. Kanner and [co-counsel] have in all matters handled this case and conducted themselves, in relation to their co-counsel, with *the highest degree of professionalism, integrity and ability*. There is no doubt in the Court's mind, based on his intimate familiarity with the record, that *but for the outstanding efforts of Mr. Kanner and [co-counsel] there would not have been such a significant and landmark result in this case,* and I have been telling you all this long before this moment." (emphasis added)

The Board of Commissioners of the New Orleans Exhibition Hall Authority v. Missouri Pacific Railroad Company, et al., No. 92-4155 (Judgment of February 15, 1996) "It must be said that both firms and all attorneys involved in this protracted litigation exemplified *the highest standard of trial experience and skill* which was brought to bear on *this novel and difficult matter* in a specialized area of the law.") (emphasis added)

Due to the firm's trial experience and success, Allan Kanner is regularly asked to lecture and write on presenting the plaintiff's case for trial. The firm is especially well known for its ability to communicate novel theories effectively, and has been featured in *Business Week*, *American Bar Association Journal*, *New York Times, Washington Post* and *Wall Street Journal* articles.

ATTORNEYS

ALLAN KANNER is the founder and senior member at Kanner & Whiteley, L.L.C. Mr. Kanner has a wealth of experience litigating complex class action lawsuits, and practices in the areas of environmental, toxic tort, commercial litigation, and consumer fraud. He is the nation's leading Natural Resource Damage lawyer having won over $9 Billion in NRD recoveries. From 2010-2016 he was lead counsel for the State of Louisiana, recovering over $8.8 billion, midway through trial, in the BP Deepwater Horizon oil spill litigation. Allan Kanner has served as Special Counsel to the New Jersey Attorney General and the New Jersey Department of Environmental Protection since 2002 to both develop New Jersey's comprehensive NRD program and litigate these claims against industry defendants unwilling to amicably resolve their NRD liability with the State. Kanner & Whiteley, with Allan Kanner as lead counsel, began litigating the leading case in New Jersey's NRD program in 2004 against ExxonMobil for injuries at two of ExxonMobil's former refinery sites in the State. Following the completion of pre-trial motion practice, including multiple arguments before the Appellate Division; a nine-month bench trial on damages; and post-trial briefing, the parties reached an agreement to resolve ExxonMobil's NRD liabilities at the sites, and others across the State, for $225 million, the largest NRD recovery in the State's history. During many of the same years that Kanner & Whiteley litigated the claims against ExxonMobil, the firm also pursued litigation on behalf the State against a number of other corporate defendants, also for compensation for damage to or destruction of natural resources of the State. Mr. Kanner is currently lead counsel for the State of New Jersey in the recently filed suit against Hess Corporation and Buckeye Partners, L.P. related to NRD at the Port Reading Terminal, and ExxonMobil related to NRD at Lail. He is also currently lead counsel for the State of New Mexico in its pollution litigation against the United States Air Force.

Allan Kanner has served an Adjunct Professor at Tulane Law School, and has taught as a Visiting Lecturer in Law at Yale Law School (Fall 2002), Visiting Senior Lecturer at Duke University (Fall 2000), and Visiting Professor at the University of Texas Law School (Spring 2001). He is the author of ENVIRONMENTAL AND TOXIC TORT TRIALS (Lexis-Nexis) (2d ed.), as well as over 50 articles in the diverse fields of torts, trial practice, civil discovery, civil RICO, environmental law, toxic torts, class actions, and business and consumer fraud. Mr. Kanner has taught and written extensively in his areas of expertise. Many of his articles have been relied upon by courts and legal scholars. His publications and presentations include the following:

- Allan Kanner, *Emerging Trends In Perflourinated Chemical Regulation And Litigation*, ABA Environmental and Engery Litigation News Letter (August 28, 2017).
- Allan Kanner, *Environmental Gatekeepers: Natural Resource Trustee Assessments And Frivilous Deubert Challenges*, 49 ELR 10420 (May 2019).

- Allan Kanner, *More Than Seals And Sea Otters: OPA Causation And Moratorium Damages*, (forthcoming in DUKE ENVTL. L. & POL'Y F.).
- Allan Kanner & Caitrin Reilly, *Like a Phoenix Rising from the Ashes: Melding Wildfire Law Into a Comprehensive Statute*, (forthcoming in J. ENVTL. L. & LITIG.)
- Allan Kanner, *Issues Trustees Face In Natural Resource Damage Assessments*, Part II, J. OF ENVTL. PROT. (April 2017).
- Allan Kanner, *Issues Trustees Face In Natural Resource Damage Assessments*, Part I, J. OF ENVTL. PROT. (April 2017).
- Allan Kanner, Elizabeth Petersen & Allison Brouk, *Federal Environmental Laws Require Hardening Against Climate Change*, Vol. I, ABA ENVTL. & ENERGY LITIG. NEWS LETTER, Issue No. 1 (Nov. 2016).
- Allan Kanner, *Which Came First, The Incident Or the Oil: The Moratorium and OPA Causation*, Vol. I, ABA ENVTL. & ENERGY LITIG. NEWS LETTER, Issue No. 1 (Nov. 2016).
- Allan Kanner, *Experts in Natural Resource Damages and Toxic Tort Litigation*, Proceedings of the International Network of Environmental Forensic Conference, J. OF ENVTL. PROT. (2015)
- Allan Kanner, *Natural Resource Restoration*, 28 TUL. ENVTL. L. J., 355 (Summer 2015)
- ENVIRONMENTAL & TOXIC TORT TRIALS (2005, Lexis);
- CIVIL RICO (1998, Center for Continuing Legal Education) (Co-author M.H. Patel).

During 1998 and 1999 Allan Kanner was one of the principal authors of the LOUISIANA JUDGES' COMPLEX LITIGATION BENCH BOOK. He has taught at the Louisiana Judicial College, and the Brookings Institute is Judicial Symposium on Civil Justice Issues. He is a member of the bars of California, District of Columbia, Louisiana, New Jersey, New York, Oklahoma, Pennsylvania, Texas and Puerto Rico (Federal) and has successfully handled matters throughout the United States.

ELIZABETH B. PETERSEN, member, joined Kanner & Whiteley, L.L.C. in 1996. Ms. Petersen practices in the fields of environmental law, complex litigation and class actions, including consumer fraud and environmental property damage litigation. She has taught seminars on toxic torts as an adjunct professor at Tulane Law School. Prior to joining Kanner & Whiteley, she practiced in the areas of civil and maritime litigation. She is admitted to practice before the United States District Court for the Eastern and Western Districts of Louisiana and before all Louisiana State Courts. She has also been admitted to practice *Pro Hac Vice* in the United States District Courts for the Western District of Missouri; the District of Puerto Rico; the Southern District of Texas; the Northern District of Illinois; the Circuit Court of Escambia County, Florida; the District Court for Kay County, Oklahoma; and before several of New Jersey's State Courts. Ms. Petersen graduated in 1992 with a Bachelor of Arts degree in English from the University of California at Berkeley with Distinction. In 1995, she obtained a Juris Doctor degree and Certificate of Environmental Law from Tulane University School of Law.

CYNTHIA ST. AMANT, member, joined Kanner & Whiteley, L.L.C. in 1998 where she practices general, civil, commercial, consumer fraud, class action and environmental law. Before joining Kanner & Whiteley, L.L.C., she worked at the Louisiana Supreme Court, clerking

for Justices Lemmon and Bleich and serving as a staff attorney in the Court's Civil Staff Division. Ms. St. Amant is a member of both the Louisiana and Texas bars and is admitted to practice before Louisiana State and Federal Courts, Texas State Courts and the Fifth Circuit Court of Appeal. She graduated with a Bachelor of Science degree in Business Administration from Louisiana Tech University in 1993. In 1996, she obtained a Juris Doctor degree from the Paul M. Hebert Law Center at Louisiana State University.

ALLISON S. BROUK, associate, joined Kanner & Whiteley, L.L.C. in 2011 and is part of the Kanner & Whiteley litigation team representing the State of New Jersey in natural resource damage cases for the State, including a case against ExxonMobil. Ms. Brouk was also part of the litigation team representing the State of Louisiana in its claim related to the Deepwater Horizon oil spill, the largest environmental disaster ever to occur in the Gulf of Mexico. Ms. Brouk has also served as class counsel in litigation involving property damage related to contaminated groundwater, as well as landmark litigation relating to oil company's failure to follow the best practices required under federal law in armoring its facility against risks associated with climate change that threaten the terminal and surrounding communities, as well as violations of its Clean Water Act permit. Ms. Brouk is admitted to practice in the State of Louisiana; the Eastern, Middle and Western District Courts of Louisiana; and the Fifth Circuit Court of Appeals. She is a member of the Louisiana Bar Association, the Federal Bar Association and the Louisiana Association for Justice. She graduated magna cum laude from Tulane University Law School, where she received a Certificate in Environmental Law. While in law school, she practiced as a student attorney for the Tulane Environmental Law Clinic. Ms. Brouk was Editor in Chief of the Tulane Environmental Law Journal and was a member of the Tulane Moot Court Board. She also served as an intern for U.S. District Judge Stanwood R. Duval, Jr. in the Eastern District of Louisiana.

EXHIBIT “C”

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.* HECTOR BALDERAS, Attorney General, and the NEW MEXICO ENVIRONMENT DEPARTMENT,	§	Case No. _____
Plaintiffs,	§	Complaint
v.	§	
THE UNITED STATES and THE UNITED STATES DEPARTMENT OF THE AIR FORCE,	§	
Defendants.	§	

THE STATE OF NEW MEXICO, by and through New Mexico Attorney General Hector H. Balderas, and the New Mexico Environment Department (collectively, "Plaintiffs" or the "State"), file this Complaint against the above-named Defendants and in support thereof allege as follows:

INTRODUCTION AND STATEMENT OF THE CASE

1. This is a civil action by the State against Defendants United States and the U.S. Department of the Air Force (collectively, "Defendants") brought pursuant to the New Mexico Hazardous Waste Act, NMSA 1978, § 74-4-1 to -14.[1]

2. This action arises from the improper disposal of and failure to contain or address contaminants and hazardous wastes at Cannon Air Force Base ("Cannon"), located approximately

[1] Concurrent with the filing of this Complaint, Plaintiffs have issued a notice to Defendants under the Resource Conservation and Recovery Act ("RCRA") of their intent to bring a claim to remedy the imminent and substantial endangerment created by the conduct of Defendants described herein, and reserves the right to seek any additional remedies that may be available under the law, including but not limited to a claim for natural resource damages pursuant to Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") §107(a)(4), 42 U.S.C. § 9607(a)(4).

seven miles southwest of Clovis, New Mexico and above the Ogallala Aquifer, and Holloman Air Force Base ("Holloman"), located in the Tularosa Basin between the Sacramento and San Andreas mountain ranges ten miles west of Alamogordo, New Mexico, by Defendants, resulting in contamination and pollution of the environment, including public and private water sources both on- and off-site, with per- and polyfluoroalkyl substances ("PFAS"), also known as fluorochemicals, such as perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS"), and other known or suspected toxic compounds.

3. Defendants' discharges and the resulting contamination at Cannon and Holloman have created an imminent and substantial endangerment to human health and the environment.

4. As a result of this ongoing and persistent contamination and pollution, the State seeks declaratory and injunctive relief, and reimbursement of past and future costs incurred by the State associated with these environmental and public health risks and injuries at Cannon and Holloman.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331.

6. This Court has the authority to grant declaratory relief, 28 U.S.C. § 2201, as well as further relief requested in this Complaint, including injunctive relief, 28 U.S.C. § 2202.

7. This Court has personal jurisdiction over Defendants as they conduct sufficient business with sufficient minimum contacts in the State, and/or intentionally subjected themselves to this jurisdiction through the commission of tortious activity within the State.

8. Venue is proper in the United States District Court for the District of New Mexico pursuant to 28 U.S.C. § 1391, because the acts described in this Complaint occurred in this judicial district.

PARTIES

Plaintiffs

9. Plaintiff, the New Mexico Environment Department ("NMED") is a state executive agency pursuant to the Department of Environment Act, NMSA 1978, §§ 9-7A-1 to -15. NMED is charged with the administration and enforcement of the New Mexico Hazardous Waste Act ("HWA") and the Hazardous Waste Management Regulations, 20.4.1-20.4.5 NMAC, and has authority to bring this lawsuit. NMSA 1978, § 74-1-6(A); NMSA 1978, § 74-4-13(A).

10. New Mexico Attorney General Hector Balderas, is the "attorney for the State of New Mexico," *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 1973-NMSC-087, ¶ 5, 85 N.M. 521, and his office is recognized in Article V, Section 1 of the New Mexico Constitution. The New Mexico Legislature has authorized the Attorney General to prosecute and defend, in any court, civil actions in which the State is a party, when, in his judgment, the interest of the State requires such an action. NMSA 1978, § 8-5-2; *State ex rel. Attorney Gen. v. Reese*, 1967-NMSC-172, ¶ 14, 78 N.M. 241, 245, 430 P.2d 399.

11. Plaintiffs bring these claims, in part, pursuant to their authority to guard against adverse environmental and health impacts and risks associated with contamination such as that which is present at Cannon and Holloman.

12. Under Article XX, Section 21 of the New Mexico Constitution, "protection of the state's beautiful and healthful environment is . . . declared to be of fundamental importance to the public interest, health, safety and the general welfare." This provision "recognizes that a public trust duty exists for the protection of New Mexico's natural resources . . . for the benefit of the people of this state." *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015).

Defendants

13. Defendant is the United States of America, including all federal government agencies and departments responsible for the acts alleged in this Complaint.

14. The Department of the Air Force is one of three military departments of the U.S. Department of Defense and is responsible for the administration and operation of the United States Air Force. The Department of the Air Force is and was at all times relevant to this Complaint the owner and operator of Cannon and Holloman.

GENERAL FACTUAL ALLEGATIONS

A. PFAS Background

15. PFAS comprise a family of approximately 3,500 manmade chemicals not found in nature that have been in use since the 1940s. The backbone of a PFAS chemical is a chain of carbon atoms, which may be fully (per) or partly (poly) fluorinated.

16. Due to their ability to repel heat, oil, stains, grease, and water, PFAS are found in a wide array of industrial and consumer products. Companies used PFAS to make, among other things, carpet, clothing, stain-resistant fabrics for furniture, paper packaging for food, and other materials such as cookware that are resistant to water, grease, or stains.

17. The two most recognized members of the PFAS family are PFOS and PFOA, which are long, eight-chain PFAS. PFOS and PFOA easily dissolve in water and thus they are mobile and readily spread in the environment. They are also persistent. PFOS and PFOA have degradation periods of years, decades, or longer under natural conditions and have a half-life in the human body of two to nine years.

18. PFOA and PFOS also readily contaminate soils and leach from soil into groundwater, where they can travel significant distances.

19. PFOS and PFOA are strong, stable, bioaccumulative, and biomagnifying, meaning that they resist degradation due to light, water, and biological processes and tend to accumulate in organisms up the food chain.

20. Further, PFOS and PFOA are toxic, meaning that they pose significant threats to public health and the environment. Exposure to PFOS and PFOA presents health risks even when PFOS and PFOA are ingested at seemingly low levels.

21. PFOS and PFOA exposure is associated with a variety of illnesses, including increased risk in humans of testicular cancer, kidney cancer, thyroid cancer, high cholesterol, ulcerative colitis, and pregnancy-induced hypertension, as well as other conditions. The chemicals are particularly dangerous for pregnant woman and young children.

22. Toxicology studies show that PFOS and PFOA are readily absorbed after oral exposure and are relatively stable once ingested so that they accumulate in individual organs for significant periods of time, primarily the serum, kidney, and liver.

23. Studies further found that individuals with occupational exposure to PFOA run higher risks of bladder and kidney cancer.

24. In studies involving laboratory animals, PFOA and PFOS exposure increased the risk of tumors, changed hormone levels, and affected the function of the liver, thyroid, pancreas, and the immune system.

25. The adverse effects associated with both PFOS and PFOA are additive when both chemicals are present, meaning that their individual adverse effects are cumulative.

26. However, injuries are not sudden and can arise months or years after exposure to PFOS and/or PFOA.

27. PFAS were formally identified as "emerging contaminants" by the U.S. Environmental Protection Agency ("EPA") in 2014. This term describes contaminants about which the scientific community, regulatory agencies, and the public have an evolving awareness regarding their movements in the environment and effects on public health. PFAS, like other emerging contaminants, are the focus of active research and study, which means new information is released periodically regarding the effects on the environment and human health as a result of exposure to the chemicals.

28. Six PFAS were included by the EPA in the Third Unregulated Contaminant Monitoring Rule per the 1996 Safe Drinking Water Act Amendments in May 2012. Monitoring of these substances was required between 2013 and 2015 to provide a basis for future regulatory action to protect public health.

29. According to the EPA, PFOA and PFOS pose potential adverse effects for the environment and human health. *See, e.g.*, U.S. EPA, *Technical Fact Sheet—Perfluorooctane Sulfonate (PFOS) and Perfluorooctanoic Acid (PFOA)* (Nov. 2017), *available at* https://www.epa.gov/sites/production/files/2017-12/documents/ffrrofactsheet_contaminants_pfos_pfoa_11-20-17_508_0.pdf.

30. In January 2009, EPA established a drinking water Provisional Health Advisory ("HA") level for PFOA and PFOS—two of the PFC compounds about which we have the most toxicological data. EPA set the Provisional HA level at 0.4 parts per billion ("ppb") for PFOA and 0.2 ppb for PFOS.

31. In 2016, following additional study, the EPA lowered the HA for PFOS and PFOA. EPA established the HA levels for PFOS and PFOA at 70 parts per trillion ("ppt"), or 0.07 micrograms per liter ("µg/L"). In addition, EPA, in issuing its 2016 HAs, directs that when both

PFOA and PFOS are found in drinking water, the *combined* concentrations of PFOA and PFOS should be compared with the 70 ppt HA.

32. In 2018, the Agency for Toxic Substances and Disease Registry ("ATSDR") released an updated Toxicological Profile for PFAS that revised its minimal risk levels ("MRLs") for PFOA and PFOS. An MRL is the estimated amount of a chemical a person can eat, drink, or breathe each day without a detectable risk to health. The intermediate oral (15 to 364 days) MRL for PFOA was revised from the previous level of $2x10^{-5}$ (0.00002) mg/kg/day to $3x10^{-6}$ (0.000003) mg/kg/day and for PFOS was revised from the previous level of $3x10^{-5}$ (0.00003) mg/kg/day to $2x10^{-6}$ (0.000002) mg/kg/day. These new MRLs were lowered because they now take into consideration immune system effects; the former thresholds were based only developmental health effects.

33. The EPA acknowledges that the studies associated with PFAS are ongoing and that based upon additional information, the HAs may be adjusted.

34. Additionally, at least four states, Vermont, California, Minnesota, and New Jersey, have adopted limits or health guidelines on PFAS that are lower than the current EPA HAs.

35. As of July 2018, the New Mexico Water Quality Control Commission voted to add PFOA and PFOS to the list of toxic pollutants the State regulates "at a risk-based level" of 70 ppt, matching the federal level. *See* 20.6.2.3103.A(2) and 20.6.2.7.T(2)(s) NMAC. New Mexico's Hazardous Waste Bureau, with the Ground Water Quality Bureau, developed the NMED Risk Assessment Guidance for Site Investigation and Remediation, which helps to determine if a site is contaminated to a point that warrants further investigation or action. The associated screening levels and soil screening levels were developed based on the standards found in 20.6.2.3103

NMAC. The Hazardous Waste Bureau uses those screening levels in its administration of the HWA and the Hazardous Waste Management Regulations.

36. Additional PFAS for which there are currently less scientific information include: Perfluorohexane sulfonic acid ("PFHxS"); Perfluorooctane sulfonamide ("PFOSA"); Perfluorononanoate acid ("PFNA"); Perfluorododecanoic acid ("PFDoA"); and Perfluorobutanesulfonic acid ("PFBS").

37. While more studies have been conducted and thus more is known regarding PFOS and PFOA, all PFAS have generally demonstrated similar characteristics to PFOS and PFOA.

38. By 2015, PFOA was voluntarily phased out of production by the major manufacturers. However early studies of the replacement PFAS indicate they are nearly as harmful. There are still some applications of traditional PFOA and PFOS and the chemicals are persistent in pre-existing products made prior to the phaseout.

B. PFAS in AFFF Used at Bases

39. In the 1960s, 3M Company and the U.S. Navy developed "aqueous film-foaming foam" ("AFFF"), a firefighting foam containing PFOS and PFOA. AFFF concentrate contains fluorochemicals used to meet required performance standards for fire extinguishing agents.

40. In the 1970s, military sites, civilian airports, and firefighting training centers began using AFFF worldwide.

41. The United States Air Force began purchasing and using AFFF-containing PFAS for firefighting training activities and petroleum fire extinguishment in 1970.

42. AFFF was primarily used on Air Force installations at fire training areas, but may have also been used, stored, or released from hangar fire suppression systems, at firefighting

equipment testing and maintenance areas, and during emergency response actions for fuel spills and mishaps.

43. A 1980s study by the U.S. Navy found that AFFF has "adverse effects environmentally" and kills aquatic life.

44. As early as 2011, the U.S. Department of Defense acknowledged that there was a PFAS crisis among its facilities. An internal study identified 594 military sites that were likely to have contaminated groundwater, although it was noted that this number may underestimate the problem by not including AFFF spills, pipeline leaks, or aircraft hangar fire suppression systems.

45. In March 2018, the military acknowledged that PFAS were present at 121 military sites and suspected at hundreds of others. At least 564 drinking water supplies in communities near military sites have PFAS levels that exceed EPA's HA.

46. The USAF is working to replace its current inventory of AFFF with more formations based on shorter carbon chains, such as Phos-Chek, a six-carbon chain ("C6") based foam that does not contain PFOS.

47. C6 PFAS are the most prominent replacements for traditional eight-carbon chain PFAS as they are thought to degrade faster. DuPont, one of the major consumers and producers of PFOA, has a spinoff company, Chemours, that manufactures the most well-known C6 product known as GenX.

48. C6 products are still PFAS and presents similar health and environmental concerns to longer-chain PFAS. In May 2015, 200 scientists signed the Madrid Statement, "which expresses concern about the production of all fluorochemicals, or PFAS, including those that have replaced PFOA. PFOA and its replacements are suspected to belong to a large class of artificial compounds called endocrine-disrupting chemicals; these compounds, which include chemicals used in the

production of pesticides, plastics, and gasoline, interfere with human reproduction and metabolism and cause cancer, thyroid problems and nervous system disorders." A. Blum et al., *The Madrid Statement on Poly-and Perfluoroalkyl Substances (PFASs)*, ENVIRON. HEALTH PERSPECT. 123:A107–A111 (2015), *available at* http://dx.doi.org/10.1289/ehp.1509934.

49. To the extent the Air Force intends to utilize this alternative, its use must similarly be compliant with applicable statutes and common laws that are protective of human health and the environment.

C. PFAS Contamination at New Mexico Air Force Bases

Cannon Air Force Base

50. Cannon is located in eastern New Mexico, near the city of Clovis. Cannon encompasses approximately 3,789 acres of land owned by the United States and hosts a population of roughly 7,800 people.

51. Clovis, New Mexico is a city with a population of approximately 39,000 that relies upon the Ogallala Aquifer for its potable water.

52. Cannon includes two perpendicular active runways in the central and southwest portions; maintenance, support, and operational facilities west of the central runway/flightline; supplemental hangars and apron areas in the south-central region; a wastewater treatment plant to the east; and a golf course and residential and service facilities in the northwest portion.

53. Adjacent land to Cannon includes mixed-use land utilized as residential, agricultural, and farmland to the north; agricultural and farmland to the east and south; and agricultural and open grassland to the west.

54. Cannon is an active military installation that currently houses the 27th Special Operation Wing, which conducts sensitive special missions including close air support, unmanned aerial vehicle operations, and non-standard aviation in response to the Secretary of Defense.

55. Cannon was developed in 1929 when Portair Field was established as a civilian passenger terminal. The Army Air Corps acquired control of the facility in 1942, and it became known as the Clovis Army Air Base. Clovis Army Air Base operated as an installation for aviation, bombing, and gunnery training until 1947 when the facility was deactivated. The Base was reactivated as Clovis Air Force Base in 1951 and became a permanent military installation in June 1957, when it was renamed Cannon Air Force Base.

56. Defendants have used AFFF at Cannon for more than fifty years in training and actual firefighting events at the base. During routine training exercises, AFFF was sprayed directly on the ground and/or tarmac at several fire training areas, allowing PFOA and PFOS to travel to the surrounding groundwater, causing contamination on and offsite. PFAS remains at very high concentrations in groundwater both on and off the base.

57. In addition to routine training for personnel, additional releases of PFAS-containing AFFF have occurred at Cannon through testing of the equipment, false alarms, equipment malfunctions, and other incidental releases in the hangars, fire stations, and other locations. Once the AFFF-containing PFAS was released into the environment, the contamination migrated off-site.

58. On July 26, 2017, Defendants provided NMED with a "*Site Inspection of Aqueous Film Forming Foam (AFFF) Release Areas Environmental Programs Worldwide Installation-Specific Work Plan*" for Cannon ("Cannon SI Work Plan"). The provision of this report to NMED was described "as a courtesy" in a July 27, 2017 letter to NMED.

59. The purpose of the Cannon SI Work Plan was to identify locations where PFAS may have been used and released into the environment and to provide an initial assessment of possible migration pathways and receptors of potential contamination.

60. The Cannon SI Work Plan identified thirteen AFFF release areas that were recommended for site investigation, although it did not preclude the presence of PFAS contamination at other areas throughout the site. The following areas are known to have confirmed releases of AFFF:

a. **Former Fire Training Area ("FTA") No. 2**—Former FTA No. 2 is located in the southeast corner of Cannon, approximately 1,000 feet south of the active FTA, and was used for fire training exercises from approximately 1968 to 1974. The area includes two round depressions in the land surface, each measuring approximately 100 feet in diameter. Fire training exercises were conducted twice per quarter using approximately 300 gallons of the unused jet propellant JP-4. No specific AFFF use was reported at Former FTA No. 2; however, since the FTA operated after initial use of AFFF at the base, it is likely that AFFF was used at this location.

b. **Former FTA No. 3**—Former FTA No. 3 is located in the southeast corner of the base, approximately 800 feet southeast of the active FTA, and was used concurrently with FTA No. 2 between approximately 1968 and 1972. Training exercises were conducted twice per quarter in an unlined, half-moon shaped area approximately 100 feet in length. No specific use of AFFF at Former FTA No. 2 was recorded; however, since the FTA operated after initial use of AFFF at the base, it is likely that AFFF was used at this location.

c. **Former FTA No. 4**—Former FTA No. 4 was used form 1974 through 1995 for fire training exercises. Training activities were conducted twice per quarter, during which an unknown volume of AFFF was used. FTA No. 4 consisted of an unlined circular area approximately 400 feet in diameter with a mock aircraft located in the center. Prior to 1985, the jet propellant JP-4 and AFFF runoff generated during fire training exercises collected in an unlined pit. The pit was backfilled in 1985 and a new, lined pit with an oil/water separator was installed to handle collected runoff. The oil/water separator was subsequently removed in 1996.

d. **Hangar 119**—General storage warehouse hangar located in the west central portion of the base, west of the flight apron, with three accidental AFFF releases. The first incident occurred in September 2006 when approximately 60 gallons of AFFF discharged into a storm drain after the AFFF system was accidentally activated, possibly due to a corroded valve. The second incident occurred in September 2012 when a "significant amount" of AFFF was discharged into bay number one and flowed onto asphalt on the north side of the structure between Hangar 119 and Building 102. Incident reports indicate that a "huge

amount" of AFFF entered a storm drain while the rest was left to evaporate. The third incident occurred in July 2013 when an unknown quantity of AFFF was discharged onto the concrete flight ramp outside of the bays, which convey liquid directly to the South Playa Lake. Due to the large quantity of AFFF released at Hangar 119, there is the potential that AFFF migrated to grassy areas to the south and southwest of the structure.

e. **Hangar 133**—Small aircraft hangar located in the west central portion of the base, immediately south of Hangar 119, with two additional AFFF releases. Several hundred gallons of AFFF were released during a scheduled rinsing of the hangar fire system in December 2000 and entered a nearby storm drain. Approximately 200 gallons of AFFF were released into a hangar bay following a power outage in July 2001. Most of the AFFF entered a floor trench and was routed to the wastewater treatment plan ("WWTP"); however, AFFF that did not enter the floor trench was washed into nearby infield soil and allowed to evaporate.

f. **Former Sewage Lagoon**—The former sewage lagoons consisted of two unlined surface impoundments that were used from 1966 to 1998 and received sanitary and industrial waste from base facilities prior to the construction of the WWTP. The former sewage lagoons would have received any AFFF that entered the sanitary sewer system from 1966 to 1998. Documented releases of AFFF to the sanitary system from Hangars 199 and 208 were reported prior to and during 1998. As such, there is evidence that AFFF was released to the environment at the former sewage lagoons.

g. **North Playa Lake Outfall**—North Playa Lake, located southeast of the WWTP, received all Cannon sanitary and industrial wastewater from 1943 to 1966. Currently, all treated effluent from the WWTPP is released primarily to North Playa Lake with a portion also released to the golf course for irrigation. Since there is no accepted wastewater treatment process for PFAS, any wastewater collected at the WWTP containing PFAS would be passed on to North Playa Lake.

h. **South Playa Lake Outfall**—South Playa Lake is located in the southwestern portion of Cannon and serves as the base's primary stormwater collection point. The lake has received stormwater runoff from portions of the flightline area since 1943. Solvents, fuels, oils, greases, and AFFF are all potential contaminants that would have discharged to the lake from the flightline area. Documented releases of AFFF in the hangars resulted in AFFF entering storm drains with liquid being subsequently routed to South Playa Lake.

i. **Hangar 109**—Parking and general maintenance hangar located in the west central portion of Cannon, with two accidental AFFF releases. The first release occurred in December 1999 when an office fire activated the AFFF fire suppression system, releasing approximately 500 gallons of AFFF in the hangar bay that reportedly entered the floor trench and was routed to the WWTP. No AFFF was reportedly released outside the hangar in 1999. A second release of approximately twenty-five gallons of AFFF solution occurred in 2016. Installation personnel identified that AFFF was released outside the hangar and was allowed to evaporate west and southwest of the hangar.

j. **Active FTA**—Active FTA located in the southeast portion of Cannon, immediately northwest of FT-07, FT-08, and FTA-4. The FTA became operational in 1997 and consists of a circular lined burn pit with a mockup of a large aircraft, a propane fuel tank, a control panel, and a lined evaporation pond. Fire training exercises are conducted at the active FTA approximately monthly using water or AFFF. The fire department also conducts annual vehicle foam checks at the FTA. Liquids discharged into the lined burn pit, including water and AFFF, drain to the lined evaporation pond located approximately 300 feet southwest of the pit and are left to evaporate. The liner of the evaporation pit has required repairs in the past, and breaches in the liner have allowed AFFF to infiltrate the soils beneath the liner. Additionally storms in May 2015 resulted in significant flash flooding across Cannon, which likely resulted in any residual AFFF located in the evaporation basin to overflow and be released in the surrounding environment.

k. **Landfill #4**—Closed landfill covering approximately 7 acres in the east central portion of Cannon that was only operational for one year between 1967 and 1968. The landfill received domestic and industrial wastes including solvents, paints, thinners, and waste oils. Disposal activities consisted of placing waste material into a trench, burning the accumulated waste, and then covering the burned material with soil. Due to the period of operation, AFFF would not have been included in landfilled refuse; however, the landfill cover was revegetated and used water from North Playa Lake, located immediately south of Landfill #4, which receives treated effluents from the WWTP.

l. **Perimeter Road Fuel Spill**—A fuel tanker truck overturned while traveling along Perimeter Road in the southeast corner of the base. All fuel from the tanker was released on the southeast side of the road. The fire department responded with crash trucks and reportedly sprayed AFFF on the fuel spill. The response was conducted over several days with multiple fire trucks discharging the entire supply of AFFF on the release. Contaminated soils were excavated, but the excavation depth is unknown.

m. **Flightline Crash Areas**—Three aircraft crashes have occurred along the flightline where the fire department responded with the use of AFFF. Two incidents involving F-16 aircraft were identified at the southern end of the flightline, and a third incident involving an F-111 aircraft occurred at the north end of the flightline. No information regarding the amount of AFFF released is known at this time.

n. **Whispering Winds Golf Course Outfall**—The base golf course began receiving a portion of treated effluent from the WWTP to fill ponds and irrigate the greens in approximately 2002. The golf course is irrigated five nights per week for approximately four hours using a sprinkler system. Any wastewater collected at the WWTP containing AFFF therefore could be released at the golf course.

o. **Hangar 204**—Hangar 204 was identified as an area for additional investigation due to the release of AFFF outside the structure; however, it was determined during a scoping visit that based on surface topography surrounding the hangar, any AFFF released from hangar doors would drain directly to storm drains in the apron or would evaporate on the concrete apron. Any AFFF that entered the storm drain would have been routed to South Playa

Lake. Infiltration of AFFF into soils in the vicinity of Hangar 204 was thus thought to be unlikely and, therefore, it was removed from further investigation.

61. In August 2018, Cannon submitted a "*Final Site Investigation Report, Investigation of Aqueous Film Foaming Foam Cannon Air Force Base, New Mexico*" to NMED ("Cannon SI Report"). As stated in the Cannon SI Report, exceedances of the EPA's HA of 70 ppt for groundwater were detected in six of the eighteen environmental restoration program monitoring wells at the base.

62. Fourteen AFFF release areas at Cannon were analyzed for PFAS contamination in the soil and groundwater. PFOS and PFOA concentrations in soil and sediment were compared against the regional screening level (RSL) of 0.126 mg/kg. Groundwater concentrations for PFOA and PFOS, or PFOA and PFOS combined, were compared against the EPA's HA of 70 ppt.

63. At Former FTA No. 3, PFOS was detected above the RSL in the surface sample at 0.24 mg/kg, nearly twice the RSL.

64. At Former FTA No. 4., PFOS was detected above the RSL in the surface soil samples at each of the three locations with the highest detected concentration being 0.61 mg/kg, nearly five times the RSL.

65. At Hangars 119 and 113, PFOS was detected above the RSL at each location with the highest detected concentration being 0.42 mg/kg, more than three times the RSL.

66. At the Former Sewage Lagoons, PFOS was detected above the RSL at two subsurface sample sites with the highest detected concentration being 0.29 mg/kg, more than twice the RSL.

67. At the North Playa Lake Outfall, PFOS and PFOA combined were detected above the HA values at both surface water sample sites, with the highest detected combined value being 0.123 µg/L, nearly two times the HA.

68. At Hangar 109, PFOS was detected above the RSL at a maximum concentration of 0.23 mg/kg, nearly twice the RSL.

69. At the Active FTA, PFOS was detected above the RSL at a surface soil location at a concentration of 1.1 mg/kg, more than eight times the RSL, the highest of all soil samples on the base.

70. Two locations, Landfill #4 and Flightline Aircraft Crashes, were presented in the Basewide Groundwater Sampling. PFOS was detected basewide above the HA at five sample sites with a maximum detected concentration of 24 µg/L, 342 times the HA. PFOA was detected above the HA at four sample sites with a maximum detected concentration of 3.1 µg/L, forty-four times the HA. PFOS and PFOA combined exceeded the HA at six sample sites with the maximum concentration of 26.2 µg/L, 374 times the HA.

71. Notably, because these compounds are persistent and bioaccumulative, any detectable amount that can be ingested, regardless of whether or not it exceeds the HA or RSLs, will add to the lifetime concentration of PFAS in any given individual.

72. NMED learned in late 2018 that following a preliminary assessment in 2015 and a scoping visit in in 2016, the Air Force collected samples at four of its public supply wells in 2016, at fourteen potential PFAS release sites in 2017, and at off-base private water supply wells in 2018. The Air Force test results documented high concentrations of PFAS compounds in both on- and off-base groundwater. Sampling has detected PFAS in some off-base wells, which provide drinking water and livestock and irrigation water to local dairies, including the Highland Dairy, half of a mile south and slightly east of Cannon. Air Force sampling showed a maximum of 539 ppt for PFOA in the Highland Dairy well (7.7 times the EPA HA), and Highland Dairy's own

sampling showed 2,920 PFOA (nearly 42 times the HA), with a total PFOS/PFOA of 14,320 ppt in an irrigation well (more than 204 times the HA).

73. The Air Force itself has determined that the "presence [of PFOS and PFOA at Cannon] in drinking water at levels above the EPA [HAs] poses an imminent and substantial danger to public health or welfare," and notified NMED of this determination via letter on January 10, 2019.

74. On September 26, 2018 NMED sent a letter confirming that a teleconference with the Air Force on August 13, 2018, in which the State noted that the detection of PFAS compounds in groundwater exceeding the HA counted as "a notifiable discharge even if the specific date, sources and volumes of the discharge are not yet known." The Air Force provided a formal notice of the discharge event to NMED on August 14, 2018.

75. NMED advised that the Cannon SI Report that was submitted August 27, 2018 would count as an Interim Corrective Action report subject to several conditions as well as additional corrective actions.

76. The Air Force responded to NMED's September 26 letter on October 26, 2018, and declined to make the revisions requested by NMED.

Holloman Air Force Base

77. Holloman is located in Otero County near the city of Alamogordo. The base covers approximately 59,800 acres and hosts a population of roughly 21,000.

78. Alamogordo, New Mexico is a city with a population of approximately 31,000 people who rely partially upon groundwater in the Tularosa Basin for potable water.

79. Holloman, formerly known as Alamogordo Army Air Field, was initiated as a wartime temporary facility in 1942. In March 1947, after a brief inactivation at the end of World

War II, the installation was transferred to the Air Material Command with the mission of providing facilities and testing of pilotless aircraft, guided missiles, and allied equipment in support of the Air Material Command Research and Development Program. The base was renamed Holloman Air Force Base in 1948.

80. Holloman is currently home of the 49th wing of the Air Combat Command, 96th Test Group, 54th Fighter Group, and the German Air Force Flying Training Center. Operations at Holloman include missile testing, aircraft and pilot training, operational equipment and systems testing, and aircraft maintenance and storage.

81. In 2015, the "*Final Preliminary Assessment Report for Perfluorinated Compounds at Holloman Air Force Base, Alamogordo, New Mexico*" identified thirty-one potential PFAS release areas at Holloman. The Preliminary Assessment was provided to NMED as part of the EPA's Health Advisory proceedings.

82. In November 2018, Defendants released the "*Final Site Inspection of Aqueous Film Forming Foam (AFFF) Release Areas Environmental Programs Worldwide*" for Holloman. ("Holloman SI Report").

83. The Holloman SI Report detailed five AFFF release areas, but did not rule out the possibility that releases had occurred elsewhere at the site:

a. **Former FTA**—Fire training activities were conducted generally at the Former FTA since 1942, although the exact dates of fire training in this area is unknown. Fire training was conducted in two unlined burn pit areas within the Former FTA. The volume of AFFF used during each training exercise is unknown. Fire training activities continued at this location until 1990 when training exercises were moved to the current FTA.

b. **Sewage Lagoon Area Outfall**—Prior to construction of a WWTP in 1996, wastewater from Holloman was discharged directly into the sewage lagoon area that was comprised of seven unlined lagoons. Approximately 1.2 million gallons of domestic and industrial wastewater were discharged into the sewage lagoon daily.

c. **Apache Mesa Golf Course Outfall**—In 2011, the golf course began receiving a portion of the effluent from the WWTP to fill two golf course ponds and irrigate greens. Releases of AFFF from within the industrial shops and Holloman would be routed through the WWTP and eventually lead to the water holding tank at the Apache Mesa Golf Course.

d. **Lake Holloman Outfalls**—Wastewater from Holloman was discharged directly into the sewage lagoon area and eventually to Lake Holloman prior to construction of the WWTP in 1996.

e. **Evaporation Pond No. 2**—The evaporation basin was installed in 1991 and currently collects all discharges containing AFFF, routed through hangar bay floor drains from hangars located in the western ramp area of the West Hangar Group. The Holloman Fire Department uses this basin for monthly AFFF tests and firehose washouts. AFFF is reportedly sprayed from vehicles into the pond until a consistent flow pattern is established.

84. The Former FTA (FT-31), the Sewage Lagoon Area Outfall, the Apache Mesa Golf Course Outfall, the Lake Holloman Outfalls, and Evaporation Pond No. 2 release areas were analyzed for PFAS contamination in the soil, sediment, surface water, and groundwater. PFOS and PFOA concentrations in soil and sediment were compared against the RSL of 0.126 mg/kg. Groundwater concentrations for PFOA and PFOS, or PFOA and PFOS combined were compared against the EPA HA of 70 ppt.

85. Six surface soil samples, including one duplicate, and six subsurface soil samples, including one duplicate, from a total of five locations, were taken and analyzed for PFAS at the Former FTA (FT-31). The soils were analyzed for PFOA and PFOS, with each being detected at each sample site. PFOS was detected above the RSL more than half the time with the highest concentration exceeding the 0.126 mg/kg RSL at 1.13 mg/kg, nearly nine times the limit. At the three groundwater sample sites at FT-31, PFOS, PFOA, and PFOA and PFOS combined were detected well above the EPA HA of 0.07 µg/L, with the highest concentrations being 48.4 µg/L (691 times the HA), 254 µg/L (3,628 times the HA), and 302.4 µg/L (4,314 times the HA), respectively.

86. At the Sewage Lagoon Area Outfall, groundwater results at three locations revealed PFOS, PFOA, and PFOS and PFOA combined all exceeding EPA's HA. The surface water sample also revealed PFOS, PFOA, and combined concentrations exceeding the HA.

87. One groundwater, two sediment, two surface water, and two effluent samples were taken at the Apache Mesa Golf Course Outfall. PFOA and PFOS combined were detected above the HA in the groundwater sample with a maximum concentration of 0.1371 µg/L, nearly twice the HA. PFOS, PFOA, and PFOS and PFOA combined exceeded the HA at both of the surface water sample locations, with the highest concentration of 1.317 µg/L. Likewise, PFOS, PFOA, and the two combined exceeded the HA in both of the effluent samples with the highest concentration of 0.995 µg/L, fourteen times the HA.

88. Sediment and surface water samples were taken at Lake Holloman Outfalls. PFOS was detected in sediment above the RSL at 0.519 mg/kg, four times the RSL. The surface water samples each had concentrations of PFOS, PFOA, and PFOS and PFOA combined that exceed the EPA HA, with the maximum concentration of PFOS and PFOA combined at 3.188 µg/L, forty-five times the HA.

89. Finally, soil and groundwater were analyzed at Evaporation Pond No. 2. PFOS was detected above the RSL at the surface and subsurface intervals for each of the soil samples with a maximum concentration of 5.71 mg/kg, the highest of all soil samples for Holloman and forty-five times the RSL. PFOA was also detected above the RSL at the surface level for each sample. PFOS, PFOA, and PFOS and PFOA combined were detected above the HA in the groundwater sample with a maximum PFOS and PFOA combined concentration of 1066.6 µg/L, more than 15,000 times the HA and the highest of all groundwater samples at the base.

90. Sampling at both Cannon and Holloman is ongoing in an effort to more fully characterize the extent of the groundwater contamination plumes and their migration outside of the site boundaries.

STATUTORY AND REGULATORY BACKGROUND

91. Congress enacted the Resource Conservation and Recovery Act ("RCRA") in 1976 in response to "a rising tide of scrap, discarded, and waste materials" that had become a matter of national concern. 42 U.S.C. § 6901(a)(2), (4) (1984). In enacting RCRA, Congress declared it a national policy "that, where feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b).

92. Congress recognized, however, that the "collection of and disposal of solid wastes should continue to be primarily the function of the State, regional, and local agencies. . . ." 42 U.S.C. § 6901(a)(4). Thus, RCRA allows any state to administer and enforce a hazardous waste program subject to authorization from the EPA. 42 U.S.C. § 6926(b).

93. RCRA includes a clear and unambiguous waiver of sovereign immunity:

> Each [federal entity] engaged in [disposal or management of hazardous waste] shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements. . . . The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine . . .).

42 U.S.C. § 6961.

94. EPA authorized New Mexico's state program pursuant to RCRA in 1985, 40 C.F.R. § 272.1601(a), and delegated to New Mexico "primary responsibility for enforcing its hazardous waste management program." 40 C.F.R. § 272.1601(b). New Mexico's HWA and regulations promulgated pursuant to it are incorporated by reference into RCRA. 40 C.F.R. § 272.1601(c)(1).

95. The purpose of New Mexico's HWA is to "ensure the maintenance of the quality of the state's environment; to confer optimum health, safety, comfort and economic and social well-being on its inhabitants; and to protect the proper utilization of its lands." § 74-4-2.

96. Pursuant to the HWA, NMED is authorized to issue permits, § 74-4-4.2(C), and must deny them if an applicant has made a material misrepresentation or has violated any provision of the HWA, among other reasons. § 74-4-4.2(D).

97. NMED may bring suit in the appropriate district court to immediately restrain any person, including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed to or is contributing to the past or current handling, storage, treatment, transportation, or disposal of solid waste or hazardous waste or the condition or maintenance of a storage tank that may present an imminent and substantial endangerment to health or the environment. § 74-4-13.

98. The HWA § 74-4-3(K) defines "hazardous waste" as:

> [A]ny solid waste or combination of solid wastes that because of their quantity, concentration or physical, chemical or infections characteristics may:
>
> (1) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or
>
> (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported,

> disposed of or otherwise managed. 'Hazardous waste' does not include any of the following, until the board determines that they are subject to Subtitle C of the federal Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6901 et seq.: drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil or natural gas or geothermal energy; fly ash waste; bottom ash waste; slag waste; flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels; solid waste from the extraction, beneficiation or processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore; or cement kiln dust waste.

99. New Mexico's Legislature has granted wide latitude to its environmental programs in order to ensure protection of its natural resources. New Mexico's Environmental Protection Regulations and the rulemaking procedures thereunder are to be "liberally construed to carry out their purpose." 20.1.1.108 NMAC.

CAUSE OF ACTION

First Cause of Action:
Violation of the New Mexico Hazardous Waste Act

100. All allegations above are incorporated herein as if specifically set forth at length.

101. Defendants are a "person" under NMSA § 74-4-3(M).

102. PFAS, as described herein, are discarded materials and each is a "solid waste" as defined under the HWA, NMSA § 74-4-3(O), and a "hazardous waste" as defined under NMSA § 74-4-3(K).

103. As a result of the releases of PFAS and other hazardous wastes at Cannon and Holloman as described herein, Defendants have contributed to and will continue to contribute to the past and present handling, storage, treatment, transportation, and/or disposal of solid or hazardous waste which has or may present an imminent and substantial endangerment to health and/or the environment in violation of the HWA, § 74-4-13.

104. Conditions at Cannon and Holloman, as described herein, have presented or may present an imminent and substantial endangerment to health and/or the environment via continued migration of contamination in groundwater and/or drinking water at and around the Bases. In addition to natural resources throughout the environment, members of the public and those living in or visiting surrounding areas are or will be directly exposed to contaminants through all pathways of migration.

105. Although Defendants have acknowledged that the presence of PFOA and PFOS presents an imminent and substantial danger at Cannon, Defendants have declined to take remedial action required under the law.

106. By reason of the foregoing acts and omissions of Defendants, the State is entitled to an order for such relief as may be necessary to remedy the results of Defendants' conduct. Such relief includes but is not limited to injunctive relief compelling Defendants to take all steps necessary to achieve permanent and consistent compliance with the HWA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the State of New Mexico, respectfully requests that the Court enter judgment in its favor and against Defendants by granting relief as follows:

a. An order declaring that Defendants' conduct violated the HWA;

b. Immediate injunctive relief requiring the abatement of ongoing violations of the HWA, abatement of the conditions creating an imminent and substantial endangerment, and to fund any costs associated with each compliance whether incurred by the State or third parties performing abatement;

c. A permanent injunction directing Defendants to take all steps necessary to achieve permanent and consistent compliance with HWA;

d. All available civil penalties under applicable statutes;

e. The payment for past costs incurred by the State and not yet reimbursed by the Defendants in connection with its oversight and efforts to obtain compliance with the HWA in this matter;

f. A declaratory judgment providing the State with a mechanism for reimbursement of future costs incurred by the State in connection with its oversight and efforts to monitor compliance with the HWA in this matter;

g. A judgment awarding the State costs and reasonable attorneys' fees incurred in prosecuting this action, together with prejudgment interest, to the full extent permitted by law; and

h. A judgment awarding the State such other relief as may be necessary, just, or appropriate under the circumstances.

Dated: March 4, 2019

Respectfully submitted:

HECTOR H. BALDERAS
NEW MEXICO ATTORNEY GENERAL

/s/ P. Cholla Khoury
P. Cholla Khoury
William G. Grantham
Assistant Attorneys General
ckhoury@nmag.gov
wgrantham@nmmag.gov
Post Office Drawer 1508
Santa Fe, NM 87504
(505) 717-3500

NEW MEXICO ENVIRONMENT DEPARTMENT

/s/ Jennifer Hower
Jennifer Hower
General Counsel
Christopher Atencio
Assistant General Counsel
Special Assistant Attorneys General
Jennifer.hower@state.nm.us
Christopher.atencio@statem.nm.us
New Mexico Environment Department
121 Tijeras Ave. NE
Albuquerque, NM 87102
Phone: (505) 222-9554
Fax: (505) 383-2064

Counsel for Plaintiff the State of New Mexico

Gurbir S. Grewal
ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street; PO Box 093
Trenton, NJ 08625-0093
Ph: (609) 376-2761
By: Richard F. Engel, Deputy Attorney General
Bar No. 009401981

KANNER & WHITELEY, L.L.C.
Special Counsel to the Attorney General
By: Allan Kanner
701 Camp Street
New Orleans, LA 70130
Ph: (504) 524-5777
Bar No. 033981980

ATTORNEYS FOR PLAINTIFFS

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. EXXON MOBIL CORPORATION, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - GLOUCESTER COUNTY DOCKET NO. _____ COMPLAINT AND JURY TRIAL DEMAND

Plaintiffs, the New Jersey Department of Environmental Protection ("Department" or "DEP"), the Commissioner of the Department of Environmental Protection ("Commissioner"), and the Administrator of the New Jersey Spill Compensation Fund ("Administrator") (collectively the "Plaintiffs" or "the

State"), file this Complaint against defendant Exxon Mobil Corporation (hereinafter "ExxonMobil") and allege as follows:

STATEMENT OF THE CASE

1. Plaintiffs bring this civil action against ExxonMobil pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.24 ("the Spill Act"); the Water Pollution Control Act, N.J.S.A. 58:10A-1 to -20 ("WPCA"); and the common law of New Jersey for cleanup and removal costs and damages they have incurred, and will incur, for any natural resource of this State that has been, or may be, injured as a result of the discharge of hazardous substances or pollutants at ExxonMobil's Lail Property, as further described below. The hazardous substances and pollutants were discharged at the Lail Property, which is in Paulsboro Borough and East Greenwich Township, but the discharged substances have also migrated off the Lail Property. The total area those substances have migrated to is referred to hereinafter as the "Contaminated Site."

2. In the late 1950s, Mobil Corporation used the Lail Property for the dumping of drums containing petroleum products and other hazardous substances, thereby discharging hazardous substances and pollutants throughout the Lail Property.

3. In 1999, Mobil Corporation merged with Exxon Corporation and formed Defendant ExxonMobil, a successor corporation.

4. Over the years, unlabeled drums have been discovered on the Lail Property that contained various forms of petroleum distillates, which have caused injuries to nearby natural resources. Natural resources are damaged by, among other hazardous substances and pollutants, petroleum distillates and aluminosilicate material containing polychlorinated biphenyl ("PCB") contamination. These PCBs are toxic in the environment and have been linked to lasting adverse human health effects, including on the central nervous system and respiratory tract, blood disorders, and other serious health conditions. Remedial studies conducted at the Contaminated Site demonstrate a nexus between ExxonMobil's discharges and the contamination present.

5. New Jersey is seeking natural resource damages for the injuries to the groundwater, surface water, ecological resources, sediments, wetlands, and biota (non-human living resources) resulting from ExxonMobil's discharges of hazardous substances and pollutants.

6. The costs and damages Plaintiffs seek include the damages the State has incurred, and will incur, for any natural resource of this State that has been, or may be, injured as a result of the discharge of hazardous substances and pollutants at the Lail Property. Further, Plaintiffs seek an order compelling ExxonMobil to perform, under the Department's oversight, or to fund the Department's performance of, any

further assessment and restoration and replacement of any natural resource that has been, or may be, injured as a result of the discharge of hazardous substances and pollutants at the Lail Property, and to compensate the citizens of New Jersey for the lost use or value of any such injured natural resource.

THE PARTIES

7. The Department is a principal department within the Executive Branch of the State government, and under the leadership of the Commissioner, it is vested with the authority to conserve natural resources, protect the environment, prevent pollution, and protect the public health and safety. N.J.S.A. 13:1D-9; N.J.S.A. 58:10-23.11b; N.J.S.A. 58:10A-3.

8. In addition, the State is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction. The Department is vested with the authority to protect this public trust and to seek compensation for any injury to the natural resources of this State. N.J.S.A. 58:10-23.11a.

9. Plaintiff Administrator is the chief executive officer of the New Jersey Spill Compensation Fund ("the Spill Fund"). N.J.S.A. 58:10-23.11j. As chief executive officer of the Spill Fund, plaintiff Administrator is authorized to approve and pay any cleanup and removal costs the Department incurs, N.J.S.A.

58:10-23.11f.c and d, and to certify the amount of any claim to be paid from the Spill Fund. N.J.S.A. 58:10-23.11j.d.

10. Defendant ExxonMobil is a corporation organized and existing under the laws of the State of New Jersey, with its main place of business located at 5959 Las Colinas Boulevard, Irving, Texas 75039-2298.

11. In 1999, Mobil Corporation merged with Exxon Corporation to form its successor, Defendant ExxonMobil.

AFFECTED NATURAL RESOURCES

12. PCB contamination has been found in the surface water, groundwater, soils, sediments, wetlands, and other ecological resources at the Contaminated Site.

Surface Water

13. Approximately 850 million gallons of surface water per day supplies nearly half of New Jersey's population with drinking water.

14. Surface water in New Jersey is also used for other commercial and industrial purposes, such as cooling water and electrical generation, boating, fishing, and transportation of goods and services.

15. The tourism and recreation industries, which are vital to the economy of this State, are dependent on clean waters and beaches.

16. Surface waters also provide commercial, recreational, aesthetic and ecological value, including support to aquatic communities, to the citizens of the State.

17. The Lail Property is located in a tidal area of the Delaware Estuary and is directly connected to the tidally-influenced Mantua Creek that flows into the Delaware River, two surface waters of the State. Tidal flow from the Mantua Creek enters an embayment through an approximately 100-foot-wide channel.

18. Contamination discharged at the Lail Property has migrated off the Lail Property through this tidal action as well as ground and surface water flow, causing adverse impacts to the surface water resources at the Contaminated Site.

19. PCB levels in the Delaware Estuary surface waters, for example, remain orders of magnitude above the water quality criteria.

Groundwater

20. Groundwater is an extremely important natural resource for the people of New Jersey, supplying more than 900 million gallons of water per day, which contributes more than half of New Jersey's drinking water.

21. Not only does groundwater serve as a source of potable water, it also serves as an integral part of the State's ecosystem. Groundwater provides base flow to streams and

influences surface water quality, wetland ecology, and the health of the aquatic ecosystem.

22. Groundwater also provides cycling and nutrient movement, prevents saltwater intrusion, provides ground stabilization, prevents sinkholes, and provides maintenance of critical water levels in freshwater wetlands.

23. Groundwater and the other natural resources of the State are unique resources that support the State's tourism industry, which helps sustain the State's economy.

24. To the extent that groundwater sampling has been conducted at the Contaminated Site, results have shown PCBs at levels that exceed water quality criteria.

Sediments

25. New Jersey’s land and aquatic resources are also comprised of unique and complex ecosystems.

26. Sediments are a critical example of New Jersey ecological resources.

27. Sediments can sustain a wide diversity of plants and animals that are essential in a healthy food chain. Sediments, particularly in New Jersey’s coastal areas, including riverine coastal environments such as those present at the Contaminated Site, are a part of the State’s ecosystems that provide a living substrate for submerged and emergent flora and that support

diverse invertebrate species, wading birds, and fish and shellfish populations.

28. PCB levels in sediment at the Contaminated Site remain at levels exceeding risk criteria. See Arcadis U.S., Inc., *Biological Monitoring Technical Memorandum – Year 5 and Overall Summary, Former Lail Property Gloucester County, New Jersey* (Dec. 2017) ("2017 Arcadis Report") (evidencing continued presence of PCBs at levels exceeding risk criteria in sediments).

Wetlands

29. Wetlands are a critical example of New Jersey's ecological resources, which include land and aquatic resources comprised of unique and complex ecosystems.

30. New Jersey has approximately 730,000 acres of freshwater wetlands and 250,000 acres of coastal wetlands.

31. Wetlands can sustain a wide diversity of plants and animals that are essential in a healthy food chain.

32. Wetlands perform many additional functions, which include the improvement of water quality, sediment trapping, groundwater recharge, shoreline protections, and protecting land from flooding and erosion.

33. Prior to discharges at the Lail Property, the tidally-impacted area at the Contaminated Site, discussed above, supported various forms of wetlands and mudflats and associated

flora and fauna. These natural resources have been and continue to be adversely affected by discharges at the Lail Property.

34. An approximately 16-acre, tidally influenced embayment and several freshwater emergent wetlands surround the immediate Lail Property boundaries.

35. Late successional forest is present at the southwest portion of the Lail Property.

36. Mantua Creek and its associated wetlands and mudflats border the embayment from north to southeast with I-295 forming the northwest border.

37. Sampling conducted after remedial measures performed by ExxonMobil confirm the continued presence of PCBs in these mudflats and wetlands at levels exceeding risk based criteria. See 2017 Arcadis Report.

Biota

38. New Jersey's ecosystems – forests, lakes, rivers, wetlands, agricultural lands, coastal estuaries, pinelands, and grasslands – are among the most complex and diverse in the nation.

39. New Jersey is home to more than 2,000 plant species, which include entire communities of rare flora that cannot be found anywhere else in the world. Approximately 15 percent of the native plant species in New Jersey, however, are now at risk of extinction, with a total of 331 vascular plant species listed

as endangered and an additional 32 that have already been extirpated.

40. New Jersey wildlife includes approximately 900 species, including 90 mammal species, 79 reptile and amphibian species, more than 400 fish species, and approximately 325 species of birds. Approximately 1.5 million shorebirds and as many as 80,000 raptors make migratory stopovers here each year.

41. At least 17 percent of New Jersey's native vertebrate species and 24 percent of its native invertebrate species are at risk of extinction. Several threatened and endangered raptor species have difficulty breeding because of the bioaccumulation of toxic compounds.

42. New Jersey's biodiversity provides a wealth of ecological, social, and economic goods and services that are an integral part of the ecological infrastructure for all cultural and economic activity in the State.

43. New Jersey's ecosystems, however, are vulnerable to pollution, degradation, and destruction from the discharge of hazardous substances and pollutants. Contamination from the discharge of hazardous substances and pollutants is one of the major causes of biodiversity loss.

44. Natural resource injuries to biota in New Jersey negatively impact not only the individual species directly

involved, but the capacity of the injured ecosystems to regenerate and sustain such life into the future.

45. Natural vegetative communities for the area at and around the Contaminated Site include emergent wetlands, forested deciduous wetlands, moist deciduous woods, and deciduous woods.

46. Four distinct terrestrial habitats identified as previously and to some extent currently existing at the Contaminated Site include the following: a rock berm in the western embayment, which provides significant cover for small mammals; successional herbaceous habitats of the southwest embayment and southern embayment, which have varying degrees of dense herbaceous cover, standing water and inundated areas lacking cover, and limited mature forest borders as covers; and limited late successional forest with dense cover in the eastern embayment.

47. Contamination discharged at the Lail Property has caused adverse impacts to biota, such as fish and mammals described above, and PCBs remain at the Contaminated Site at levels exceeding risk criteria. See Arcadis Report (evidencing continued presence of PCBs at levels exceeding risk criteria in fish and mammals).

PCB CONTAMINATION

48. PCBs are man-made organic chemicals that were manufactured and widely used extensively in industrial and

commercial applications, including electrical equipment such as capacitors, transformers and switches; plasticizers in paints, plastics, and rubber products; and hydraulic fluids. PCBs may also be created as a by-product in certain manufacturing processes such as dye and pigment production.

49. The manufacture of PCBs was banned in 1979 as a result of extensive scientific evidence finding that PCBs are extremely toxic and build up in the environment, causing harmful effects to humans, animals and the environment. However, PCB use continued in existing applications.

50. PCBs have been shown to cause cancer in both humans and animals that are exposed to the chemical along with a suite of adverse health effects including compromise of the nervous, immune and reproductive systems. The U.S. Environmental Protection Agency (“EPA”) has identified PCBs as a possible human carcinogen and also that PCBs have non-cancer health effects.

51. PCBs are widespread in the environment, and are persistent in soils and sediments, but are also found in the air and water. Sources and pathways of PCBs include both point sources and non-point sources, such as contaminated soils and contaminated sediment. Sources of PCBs in surface water are frequently sediments containing PCBs that were deposited decades ago yet persist due to the contaminants’ properties.

52. PCBs build up in fish exposed to the contaminant.

53. PCBs that enter the food chain tend to absorb into and collect in fatty tissue of humans and take an extended amount of time before leaving the body.

54. Due to elevated concentrations of PCBs in the tissues of fish caught in the Delaware River Basin, the State of New Jersey has issued fish consumption advisories for this region.

55. In the 1990s, New Jersey listed the Delaware Estuary as "impaired" in accordance with Section 303(d) of the Federal Clean Water Act ("CWA"), because PCB contamination in fish tissue impaired the Estuary's designated use: fishable waters. In accordance with the CWA, states and the EPA shared responsibility for establishing total maximum daily loads ("TMDLs") for each pollutant contributing to impairment. A TMDL is defined as the maximum amount of a pollutant that can be assimilated by a water body without causing the applicable water quality criterion to be exceeded. TMDLs for PCBs for the Delaware Estuary – from Trenton to the mouth of the Delaware Bay – were established jointly by EPA Regions II and III on December 15, 2003. A TMDL for the Delaware Bay was established by EPA Regions II and III on December 14, 2006.

56. PCB levels in the Delaware Estuary surface waters remain orders of magnitude above the water quality criteria, and

consumption advisories in effect recommend little or no consumption of many species of Estuary fish due to PCBs.

GENERAL ALLEGATIONS

57. The Lail Property consists of approximately 12.46 acres of real property located at Cohawken and Berkeley Road, Paulsboro, Gloucester County. This includes 12.26 acres designated as Block 403 Lot 1.04 on the Tax Map of East Greenwich Township and 0.2 acres designated as Block 106.03 Lot 2.01 on the Tax Map of Paulsboro. The Contaminated Site includes, collectively, the Lail Property as well as a 16-acre embayment and wetland and all other areas where any hazardous substance and pollutant discharged at the Lail Property has become located, which plaintiff DEP has designated as Site Remediation Program Interest No. G000006032.

58. From 1999 through the present, ExxonMobil has owned the Lail Property. Mobil Corporation acquired the property from Thomas Lail, who owned the Property from 1979 to 1998. Prior to that, Joseph Applebaum owned the Property, beginning in 1951.

59. In the late 1950s, Mobil Corporation used the Lail Property for the dumping of drums containing petroleum products. During this time, “hazardous substances,” as defined in N.J.S.A. 58:10-23.11b, were "discharged" at and from the Lail Property within the meaning of N.J.S.A. 58:10-23.11b.

60. Investigations began in 1982 when disposed drums were discovered on the adjacent B&B Chemicals Property. In 1986, additional drums were discovered on the Lail Property. These drums were not labeled and contained various forms of petroleum distillates.

61. Inspections reveal that an aluminosilicate material containing PCB contamination has been found in the groundwater, soils, wetlands, sediments, surface water, and other ecological resources at the Contaminated Site.

62. The aluminosilicate material was piled up to nine feet thick in some areas. Tens of thousands of cubic yards of contaminated material that had presented years of risks and damage to human health and the environment was removed from the embayment, wetlands, and adjacent uplands during the implementation of the interim remedial measure ("IRM") that is described in paragraph 68 below. Additional material contaminated with aluminosilicate remains in all of the areas despite those remedial steps.

63. Remedial studies and activities conducted at the Contaminated Site demonstrate a nexus between ExxonMobil's discharges and the contamination present.

64. Despite ExxonMobil's unique position to know the true toxic nature of the PCBs and other materials it discarded into the environment at the Lail Property, as well as increased

public awareness and understanding of the dangers associated with PCBs, ExxonMobil took no steps to remedy the conditions at the Contaminated Site until it was required to do so under DEP oversight.

65. On December 9, 1993, ExxonMobil entered into a Memorandum of Agreement ("MOA") with the State of New Jersey and Mr. Thomas Lail to remove the drums and associated contaminated soil from the Contaminated Site.

66. The drums were removed by 1995, but PCB contamination remains in the groundwater, surface water, sediments, and soil in the embayment, wetlands, and upland areas despite interim remedial measures undertaken in the late 2000s.

67. Pursuant to an Administrative Consent Order dated October 4, 2005, ExxonMobil has begun to address the contamination of PCBs at the Site, focusing on the embayment, wetlands, and upland areas. This MOA terminated in April of 2005. Extensive groundwater, soil, wetlands, surface water and sediment contamination remains.

68. An IRM was performed by ExxonMobil's environmental contractor, Arcadis U.S., Inc. ("Arcadis"), as part of site remediation measures at the Contaminated Site in 2008 and 2009 to address the primary source of the PCB-containing aluminosilicate material that had been discharged by ExxonMobil. The IRM was designed to minimize the ongoing risks posed by the

discharges of hazardous substances and pollutants at the Contaminated Site.

69. Following IRM implementation, in 2010, an environmental risk assessment ("ERA") was performed to evaluate potential additional and ongoing risks to ecological receptors based on the PCB-impacted soil and sediment remaining in place.

70. The ERA performed for ExxonMobil concluded that the IRM eliminated the primary and ongoing source of Lail Property-related PCBs (specifically the aluminosilicate material deposited in soil and sediment at the Lail Property) and that remaining PCB exposure risks to ecological receptors are below the risk-based thresholds employed by the DEP's Site Remediation Program.

71. Thereafter, the Department requested additional monitoring of aquatic and terrestrial biota to determine whether tissue concentrations in small mammals and fish are declining.

72. While the IRM and certain remedial measures limited ongoing exposure to remaining natural resources present on or near the Contaminated Site as of the time the IRM was performed in 2008 and 2009, no natural resource damage assessment or restoration measures designed to address the legacy contamination and ongoing exposure have been conducted at the Contaminated Site.

73. The extent of damages to natural resources prior to the IRM and continuing thereafter has not been evaluated and ExxonMobil has not performed any primary or compensatory restoration therefor.

74. In addition, with extremely limited exception, ExxonMobil has not characterized or evaluated the impact of PCBs and other constituents it discharged at the Lail Property, which have migrated by way of surface and groundwater influences. The impacts to Mantua Creek and the Delaware River continue given the persistence of PCBs in soils and sediments there that have migrated from the Lail Property.

75. In the 2017 Arcadis Report, *Biological Monitoring Technical Memorandum—Year 5 and Overall Summary*, submitted to the Department by ExxonMobil's environmental contractor Arcadis, Arcadis reported certain results of sampling required under the Site Remediation Program. These results demonstrated that 23 of 30 small mammal PCB sampling analyses performed detected PCBs in the tissue of those mammals collected.

76. The 2017 Arcadis Report also found that PCBs were detected in all locations where soil samples were taken. While a number of these samples reflected levels lower than those present prior to the IRM, PCB contamination remains throughout the Contaminated Site.

77. In addition, the 2017 Arcadis Report found the presence of PCBs in the fish tissue sampled. While they were in some instances at levels somewhat lower than those found prior to the IRM, they remain above risk-based levels, and no change to the fish consumption advisory related to PCBs in this area can be expected.

78. PCBs also remain in the sediments at the Contaminated Site, often reflecting only minor change from levels present prior to the IRM activities.

79. Despite the remaining contamination not addressed by the IRM and the insufficient delineation of the contamination that spread off of the Lail Property, in 2010, ExxonMobil proposed that no additional remedial measures be taken at the Contaminated Site.

FIRST COUNT

Spill Compensation and Control Act

80. Plaintiffs repeat each allegation of Paragraphs 1 through 79 above as though fully set forth in its entirety herein.

81. ExxonMobil is a "person" within the meaning of N.J.S.A. 58:10-23.11b.

82. The Department and the Administrator have incurred, and will continue to incur, cleanup and removal costs and damages, including lost use or value and reasonable assessment

costs, for any natural resource of this State that has been, or may be, injured by the discharges at the Lail Property.

83. The costs and damages the Department and the Administrator have incurred, and will incur, for the Contaminated Site are "cleanup and removal costs" within the meaning of N.J.S.A. 58:10-23.11b.

84. ExxonMobil, as the discharger of hazardous substances at and from the Lail Property, is liable, without regard to fault, for all cleanup and removal costs and damages, including lost use or value and reasonable assessment costs, the Department and Administrator have incurred, and will incur, to assess, mitigate, restore, and replace any natural resource of this State that has been, or may be, injured by the discharges of hazardous substances at the Lail Property. N.J.S.A. 58:10-23.11g.c(1).

85. ExxonMobil, as the owner of the Lail Property at the time hazardous substances were discharged there, is responsible for the discharged hazardous substances, and is liable, without regard to fault, for all cleanup and removal costs and damages, including lost use or value and reasonable assessment costs, the Department and the Administrator have incurred, and will incur, to assess, mitigate, restore, and replace any natural resource of this State that has been, or may be, injured by the

discharges of hazardous substances at the Lail Property. N.J.S.A. 58:10-23.11g.c(1).

86. Pursuant to N.J.S.A. 58:10-23.11u.a.(1)(a) and N.J.S.A. 58:10-23.11u.b., the Department may bring an action in the Superior Court for injunctive relief, N.J.S.A. 58:10-23.11u.b(1); for its unreimbursed investigation, cleanup and removal costs, including the reasonable costs of preparing and successfully litigating the action, N.J.S.A. 58:10-23.11u.b(2); natural resource restoration and replacement costs, N.J.S.A. 58:10-23.11u.b(4); and for any other unreimbursed costs or damages the Department incurs under the Spill Act, N.J.S.A. 58:10-23.11u.b(5).

87. Pursuant to N.J.S.A. 58:10-23.11g, the Administrator is authorized to bring an action in the Superior Court for any unreimbursed costs or damages paid from the Spill Fund.

PRAYER FOR RELIEF

WHEREFORE, the Department and the Administrator request that this Court:

a. Order ExxonMobil to reimburse the Department and Administrator, without regard to fault, for all cleanup and removal costs and damages that the Department and Administrator have incurred, including lost use or value and reasonable assessment costs, for any natural resource of this State injured by the

discharges of hazardous substances at the Lail Property, with applicable interest;

b. Enter declaratory judgment against ExxonMobil, without regard to fault, for all cleanup and removal costs and damages the Department and Administrator will incur, including lost use or value and reasonable assessment costs, for any natural resource of this State injured by the discharges of hazardous substances at the Lail Property;

c. Enter declaratory judgment against ExxonMobil, without regard to fault, compelling it to perform any further remediation and restoration of the Contaminated Site in conformance with the Site Remediation Reform Act, N.J.S.A. 58:10C-1 to -29, and all other applicable laws and regulations;

d. Enter judgment against ExxonMobil compelling it to perform, under the Department's oversight, or to fund the Department's performance of, any further remediation, restoration, and replacement of natural resources injured at of the Contaminated Site, and the assessment of any natural resource that has been or may be, injured by the discharge of hazardous substances at the Lail Property, and compelling ExxonMobil to compensate the citizens of New Jersey

for the lost use or value of any injured natural resource;

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

f. Award the Department and Administrator such other relief as this Court deems appropriate.

SECOND COUNT

Water Pollution Control Act

88. Plaintiffs repeat each allegation of Paragraphs 1 through 87 above as though fully set forth in its entirety herein.

89. ExxonMobil is a "person" within the meaning of N.J.S.A. 58:10A-3.

90. Except as otherwise exempted pursuant to N.J.S.A. 58:10A-6d. and p., which are not applicable here, it is unlawful for any person to discharge any pollutant except to the extent the discharge conforms with a valid New Jersey Pollutant Discharge Elimination System permit issued by the Commissioner pursuant to the WPCA, or pursuant to a valid National Pollutant Discharge Elimination System permit issued pursuant to the federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251 to 1387. N.J.S.A. 58:10A-6a.

91. The unauthorized discharge of pollutants is a violation of the WPCA for which any person who is the discharger is strictly liable, without regard to fault. N.J.S.A. 58:10A-6a.

92. The Department has incurred, or may incur, costs as a result of the discharge of pollutants at the Lail Property.

93. The Department has also incurred, and will continue to incur, costs and damages, including compensatory damages and any other actual damages for any natural resource of this State that has been, or may be, lost or destroyed as a result of the discharge of pollutants at the Lail Property.

94. The cost and damages the Department has incurred, and will incur, for the Contaminated Site are recoverable within the meaning of N.J.S.A. 58:10A-10c(2)-(4).

95. ExxonMobil discharged pollutants at the Lail Property, which discharges were neither permitted pursuant to N.J.S.A. 58:10A-6a., nor exempted pursuant to N.J.S.A. 58:10A-6d. or N.J.S.A. 58:10A-6p., and is liable, without regard to fault, for all costs and damages, including compensatory damages and any other actual damages for any natural resource of this State that has been, or may be, injured, lost or destroyed as a result of the discharge of pollutants at the Lail Property. N.J.S.A. 58:10A-6af.

96. The Commissioner, pursuant to N.J.S.A 58:10A-10c., has authority to bring this action for: 1) injunctive relief; 2) the

reasonable costs of any investigation, inspection, or monitoring survey that led to the establishment of the violation, including the costs of preparing and litigating the case; 3) any reasonable cost incurred by the Department, Commissioner and Administrator in removing, correcting, or terminating the adverse effects upon water quality resulting from any unauthorized discharge of pollutants for which action under this section may be brought; 4) compensatory damages and any other actual damages for any natural resource of this State that has been, or may be, lost or destroyed as a result of the unauthorized discharge of pollutants; and 5) the actual amount of any economic benefits accruing to the violator from any violation, including savings realized from avoided capital or noncapital costs resulting from the violation, the return it has or that may be earned on the amount of avoided costs, any benefits accruing as a result of a competitive market advantage enjoyed by reason of the violation, or any other benefit resulting from the violation. N.J.S.A. 58:10A-10c(5).

PRAYER FOR RELIEF

WHEREFORE, the Commissioner of the Department prays that this Court:

a. Permanently enjoin ExxonMobil, by requiring it to remove, correct, or terminate the adverse effects upon

water quality resulting from any unauthorized discharge of pollutants at the Lail Property;

b. Enter an order assessing against ExxonMobil, without regard to fault, the reasonable costs for any investigation, inspection, or monitoring survey leading to the establishment of the violation, including the costs of preparing and litigating the case;

c. Enter declaratory judgment against ExxonMobil, without regard to fault, assessing all reasonable costs that will be incurred for any investigation, inspection, or monitoring survey leading to establishment of the violation, including the costs of preparing and litigating the case;

d. Enter an order assessing against ExxonMobil, without regard to fault, all reasonable costs incurred for removing, correcting, or terminating the adverse effects upon water quality resulting from any unauthorized discharge of pollutants at the Lail Property;

e. Enter declaratory judgment against ExxonMobil, without regard to fault, assessing all reasonable costs that will be incurred for removing, correcting, or terminating the adverse effects upon water quality

resulting from any unauthorized discharge of pollutants at the Lail Property;

f. Enter an order assessing against ExxonMobil, without regard to fault, all compensatory damages and other actual damages incurred for any natural resource of the State that has been, or may be, injured, lost, or destroyed as a result of the unauthorized discharge of pollutants at the Lail Property;

g. Enter declaratory judgment against ExxonMobil, without regard to fault, assessing all compensatory damages and other actual damages for any natural resource of this State that will be lost or destroyed as a result of the unauthorized discharge of pollutants at the Lail Property;

h. Enter an order assessing against ExxonMobil, without regard to fault, the actual amount of any economic benefits it has accrued, including any savings realized from avoided capital or noncapital costs, the return it has earned of the amount of avoided costs, and benefits ExxonMobil has enjoyed as a result of a competitive market advantage, or any other benefit it has received as a result of having violated the WPCA;

i. Enter declaratory judgment against ExxonMobil, without regard to fault, assessing the actual amount of any

economic benefits it will accrue, including any savings to be realized from avoided capital or noncapital costs, the return to be earned on the amount of avoided costs, and benefits that will accrue as a result of a competitive market advantage it has enjoyed, or any other benefit that will accrue to it as a result of having violated the WPCA;

j. Award the Commissioner her costs and fees in this action; and

k. Award the Commissioner such other relief as the Court deems appropriate.

THIRD COUNT

Public Nuisance

97. Plaintiffs repeat each allegation of Paragraphs 1 through 96 above as though fully set forth in its entirety herein.

98. Groundwater, surface water, sediment, wetlands, and biota are natural resources of the State held in trust by the State.

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

100. The contamination of the groundwater, surface water, sediment, wetlands, and biota at the Contaminated Site constitutes a physical invasion of the property and an

unreasonable and substantial interference, both actual and potential, with the exercise of the public's common right to these natural resources.

101. As long as the groundwater, surface water, sediment, wetlands, and biota at the Contaminated Site remain contaminated due to the ExxonMobil's conduct, the public nuisance continues.

102. Until the groundwater, surface water, sediments, wetlands and biota are restored to their pre-discharge conditions, ExxonMobil is liable for the creation, and continued maintenance, of a public nuisance in contravention of the public's common right to uncontaminated natural resources.

PRAYER FOR RELIEF

WHEREFORE, the Department and the Administrator request that this Court:

a. Order ExxonMobil to reimburse the Department and Administrator, without regard to fault, for all cleanup and removal costs and damages, lost use or value and reasonable assessment costs that the Department and Administrator have incurred for any natural resource of this State injured by the discharges of hazardous substances and pollutants at the Lail Property, with applicable interest;

b. Enter declaratory judgment against ExxonMobil, for all cleanup and removal costs and damages, including lost

use or value and reasonable assessment costs, the Department and Administrator will incur for any natural resource of this State injured by the discharges of hazardous substances and pollutants at the Lail Property;

c. Enter declaratory judgment against ExxonMobil, compelling it to perform any further remediation and restoration of the natural resources injured at the Contaminated Site in conformance with the Site Remediation Reform Act, N.J.S.A. 58:10C-1 to -29, and all other applicable laws and regulations;

d. Enter judgment compelling ExxonMobil to perform, under the Department's oversight, or by funding the Department's performing of any further assessment and compensatory restoration of any natural resource injured by the discharge of hazardous substances and pollutants at the Lail Property;

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

f. Award the Department and Administrator such other relief as this Court deems appropriate.

FOURTH COUNT

Trespass

103. Plaintiffs repeat each allegation of Paragraphs 1 through 102 as if fully set forth in their entirety herein.

104. Groundwater, surface water, sediment, wetlands, and biota are natural resources of the State held in trust by the State for the benefit of the public.

105. The hazardous substances and pollutants in the groundwater, surface water, sediment, wetlands, and biota at the Contaminated Site constitute a physical invasion of public property without permission or license.

106. ExxonMobil is liable for trespass, and continued trespass, because the hazardous substances and pollutants in the groundwater, surface water, sediment, wetlands, and biota at the Contaminated Site resulted from discharges of hazardous substances and pollutants at the Lail Property.

107. As long as the resources at the Contaminated Site remain contaminated due to ExxonMobil's conduct, the trespass continues.

108. Until the resources are restored to their pre-discharge quality, ExxonMobil is liable for trespass, and continued trespass, upon public property.

PRAYER FOR RELIEF

WHEREFORE, the Department and the Administrator request that this Court:

a. Order ExxonMobil to reimburse the Department and Administrator, without regard to fault, for all cleanup and removal costs and damages that the Department and Administrator have incurred, including the lost use or value, and reasonable assessment costs for any natural resource of this State injured by the discharge of hazardous substances and pollutants at the Lail Property, with applicable interest;

b. Enter declaratory judgment against ExxonMobil, without regard to fault, for all cleanup and removal costs and damages that the Department and Administrator will incur, including the lost use or value, and reasonable assessment costs for any natural resource of this State injured by the discharge of hazardous substances and pollutants at the Lail Property;

c. Enter declaratory judgment against ExxonMobil, without regard to fault, compelling it to perform any further remediation, restoration, and replacement of natural resources injured at the Contaminated Site in conformance with the Site Remediation Reform Act,

N.J.S.A. 58:10C-1 to -29, and all other applicable laws and regulations;

d. Enter judgment against ExxonMobil, without regard to fault, compelling it to perform, under the Department's oversight, or to fund the Department's performance of, any further assessment and restoration of any natural resource that has been, or may be, injured as a result of the discharge of hazardous substances and pollutants at the Lail Property, and compelling ExxonMobil to compensate the citizens of New Jersey for the lost use or value of any injured natural resource;

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

f. Award the Department and Administrator such other relief as this Court deems appropriate.

FIFTH COUNT

Strict Liability

109. Plaintiffs repeat each allegation of Paragraphs 1 through 108 above as though fully set forth in its entirety herein.

110. During the period of time that ExxonMobil and its predecessors were engaged in dumping drums containing petroleum products, hazardous substances were stored at and discharged

from the Lail Property into numerous natural resources of the State, including, but not limited to surface waters, groundwater and wetlands, thereby causing damage to and destruction of natural resources.

111. By storing and discharging hazardous substances at the Lail Property and into the State's natural resources in such manner as to cause said damage and destruction, ExxonMobil engaged in an abnormally dangerous activity for which it is strictly liable.

PRAYER FOR RELIEF

WHEREFORE, the Department and the Administrator request that this Court:

a. Order ExxonMobil to reimburse the Department and Administrator, without regard to fault, for all cleanup and removal costs and damages, including loss of use or value and reasonable assessment costs, that the Plaintiffs have incurred for any natural resource of this State injured by the discharges of hazardous substances and pollutants at the Lail Property, with applicable interest;

b. Enter declaratory judgment against ExxonMobil, without regard to fault, for all cleanup and removal costs and damages, including loss of use or value and reasonable assessment costs, the Department and the Administrator

will incur for any natural resource of this State injured by the discharges of hazardous substances and pollutants at the Lail Property;

c. Enter judgment against ExxonMobil, without regard to fault, compelling it to compensate the citizens of New Jersey for the damages to, or loss of, their natural resources as a result of the discharges of hazardous substances and pollutants at the Lail Property, by performing under the Department's oversight, or by funding Department's performance of, any further assessment, restoration, and replacement of any natural resource injured by the discharge of hazardous substances and pollutants at the Lail Property;

d. Award the Department and the Administrator their costs and fees in this action; and

e. Award the Department and the Administrator such other relief as this Court deems appropriate.

SIXTH COUNT

Tortious Interference

112. Plaintiffs repeat each allegation of Paragraphs 1 through 111 above as though fully set forth in its entirety herein.

113. Groundwater, surface water, sediment, wetlands, and biota are natural resources of the State held in trust by the State.

114. The State maintains a fiduciary duty to protect these trust resources and is vested with the authority to do so.

115. ExxonMobil has intentionally, and without justification, discharged hazardous substances and pollutants at the Lail Property.

116. ExxonMobil's discharges of contaminants at the Lail Property have caused injuries to natural resources of the State that Plaintiffs have a duty to protect.

117. The contamination of the groundwater, surface water, sediment, wetlands, and biota at the Contaminated Site constitutes a physical invasion of the public trust and thereby an unreasonable and substantial interference with the same. This invasion of the public trust is to the extent that it has caused an unreasonable and substantial interference with the State's ability to fulfill its duty as trustee to protect the natural resources of the State.

118. As long as the groundwater, surface water, sediment, wetlands, and biota at the Contaminated Site remain contaminated due to the ExxonMobil's conduct, these interferences continues.

119. Until the groundwater, surface water, sediments, wetlands and biota are restored to their pre-discharge

conditions, ExxonMobil is liable for the creation, and continued maintenance, of an interference with the public trust and an interference with the State's ability to protect trust resources in contravention of the common law.

PRAYER FOR RELIEF

WHEREFORE, the Department and the Administrator request that this Court:

a. Order ExxonMobil to reimburse the Department and Administrator, without regard to fault, for all cleanup and removal costs and damages, lost use or value and reasonable assessment costs that the Department and Administrator have incurred for any natural resource of this State injured by the discharges of hazardous substances and pollutants at the Lail Property, with applicable interest;

b. Enter declaratory judgment against ExxonMobil, without regard to fault, for all cleanup and removal costs and damages, including lost use or value and reasonable assessment costs, the Department and Administrator will incur for any natural resource of this State injured by the discharges of hazardous substances and pollutants at the Lail Property;

c. Enter declaratory judgment against ExxonMobil, without regard to fault, compelling it to perform any further

remediation, restoration, and replacement of any natural resource injured at the Contaminated Site in conformance with the Site Remediation Reform Act, N.J.S.A. 58:10C-1 to -29, and all other applicable laws and regulations;

d. Enter judgment compelling ExxonMobil to perform, under the Department's oversight, or by funding the Department's performing of any further assessment, restoration, and replacement of any natural resource injured by the discharge of hazardous substances and pollutants at the Lail Property;

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

f. Award the Department and Administrator such other relief as this Court deems appropriate.

Gurbir S. Grewal
ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street, PO Box 093
Trenton, NJ 08625-0093

By: /s/ Richard F. Engel
Richard F. Engel,
Deputy Attorney General

Allan Kanner, Esq.
KANNER & WHITELEY, L.L.C.
701 Camp Street
New Orleans, LA 70130
Special Counsel to the Attorney General

By: /s/ Allan Kanner

Allan Kanner, Esq.
ATTORNEYS FOR PLAINTIFFS

Dated: March 7, 2019.

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a trial by jury on all issues so triable.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, the Court is advised that Allan Kanner, Special Counsel to the Attorney General, is hereby designated as trial counsel for Plaintiffs in this action.

CERTIFICATION REGARDING OTHER PROCEEDINGS AND PARTIES

Undersigned counsel hereby certifies, in accordance with R. 4:5-1(b)(2), that the matters in controversy in this action are not the subject of any other pending or contemplated action in any court or arbitration proceeding known to Plaintiffs at this time, nor is any non-party known to Plaintiffs at this time who should be joined in this action pursuant to R. 4:28, or who is subject to joinder pursuant to R. 4:29-1. If, however, any such non-party later becomes known to Plaintiffs, an amended certification shall be filed and served on all other parties and with this Court in accordance with R. 4:5-1(b)(2).

Gurbir Grewal
ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street, PO Box 093
Trenton, NJ 08625-0093

By: /s/ Richard F. Engel_____
Richard F. Engel,
Deputy Attorney General

Allan Kanner, Esq.
KANNER & WHITELEY, L.L.C.
701 Camp Street
New Orleans, LA 70130
Special Counsel to the Attorney General

By: /s/ Allan Kanner_____
Allan Kanner, Esq.

ATTORNEYS FOR PLAINTIFFS

Dated: March 7, 2019.

Civil Case Information Statement

Case Details: GLOUCESTER | Civil Part Docket# L-000297-19

Case Caption: ATTORNEY GENERAL VS EXXON MOBIL CORPORAT ION
Case Initiation Date: 03/07/2019
Attorney Name: ALLAN KANNER
Firm Name: KANNER & WHITELEY, LLC
Address: 701 CAMP ST
NEW ORLEANS LA 70130
Phone:
Name of Party: PLAINTIFF : Attorney General
Name of Defendant's Primary Insurance Company (if known): Unknown

Case Type: ENVIRONMENTAL/ENVIRONMENTAL COVERAGE LITIGATION
Document Type: Complaint with Jury Demand
Jury Demand: YES - 6 JURORS
Hurricane Sandy related? NO
Is this a professional malpractice case? NO
Related cases pending: NO
If yes, list docket numbers:
Do you anticipate adding any parties (arising out of same transaction or occurrence)? NO

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? YES

If yes, is that relationship: Other(explain) Regulatory Agency

Does the statute governing this case provide for payment of fees by the losing party? YES

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:

Do you or your client need any disability accommodations? NO
If yes, please identify the requested accommodation:

Will an interpreter be needed? NO
If yes, for what language:

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b)

03/07/2019
Dated

/s/ ALLAN KANNER
Signed

SUPERIOR COURT OF NEW JERSEY
BURLINGTON VICINAGE

CHAMBERS OF
Michael J. Hogan, J.S.C.
Retired, T/A Recall

BURLINGTON COUNTY
COURTHOUSE
49 RANCOCAS ROAD
P.O. BOX 6555
MOUNT HOLLY, NJ 08060
(609) 518-5558

August 25, 2015

Allan Kanner, Esq.
Elizabeth Peterson, Esq.
Special Counsel to the Attorney General
Kanner & Whitely, LLC
701 Camp Street
New Orleans, LA 70130

Marc A. Rollo, Esq.
Archer & Greiner, P.C.
One Centennial Square
Haddonfield, NJ 08033

John J. Hoffman, Acting New Jersey Attorney General
Richard F. Engel, Deputy Attorney General
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, NJ 08625-0093

Letter Opinion – Not for Publication
Without Approval of the Committee on Opinions

Re: Motion to Approve Attorneys Fees and Costs
New Jersey Department of Environmental Protection v. Exxon Mobil Corp.,
Docket No. UNN-L-3026-04, consolidated with Docket No. UNN-L-1650-05

Dear Counsel:

The firm of Kanner and Whiteley, L.L.C. (the "Firm" or "Kanner Firm"), with the support of the State of New Jersey ("State"), has applied for the approval of its contingent fee pursuant to N.J. Ct. R. 1:21-7. This rule, in relevant part, provides:

> (c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another . . . an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:
>
> (1) 33 1/3% on the first $ 750,000 recovered;
> (2) 30% on the next $750,000 recovered;
> (3) 25% on the next $750,000 recovered;
> (4) 20% on the next $750,000 recovered;

> (5) on all amounts recovered in excess of the above application for reasonable fee in accordance with the provisions of paragraph (f) hereof;
>
> . . .
>
> (f) If at the conclusion of a matter an attorney considers the fee permitted by paragraph (c) to be inadequate, an application on the written notice to the client may be made to the Assignment Judge or the designee of the Assignment Judge for the hearing and determining of a reasonable fee in light of all the circumstances. This rule shall not preclude the exercise of a client's existing right to a court review of the reasonableness of an attorney's fee.

(emphasis added). In this matter, the State is not questioning the reasonableness of the Firm's fee; rather it is supporting the fee in all respects as reasonable and in accordance with the State's special counsel agreement ("SCA").

The underlying legal services upon which this fee application is based are the services and costs provided by the Firm related to New Jersey Department of Environmental Protection v. Exxon Mobil Corp., Docket No. UNN-L-3026-04, consolidated with Docket No. UNN-L-1650-05. The Firm's client, the State of New Jersey, is to receive a lump sum payment from ExxonMobil ("Exxon") of $225 million as settlement for the State's natural resource damage claims at the Bayway and Bayonne refinery sites as part of a global settlement. The settlement includes claims and certain potential claims at other Exxon sites in New Jersey.[1] The settlement, which the court has previously found to be fair and reasonable and in the public interest, is the largest settlement in New Jersey's environmental jurisprudence to date, according to the Firm and the State.

Under R. 1:21-7(c), the maximum fee recoverable after credit for cost and expenses would be $812,500. The Firm is seeking $44,397,633.41 in contingent fees plus $5,699,332.93 in costs, which would be paid from the gross recovery of 224,000.000.[2] This fee request is extraordinary, and as such, it is consistent with most other facets of the Exxon matter.

As noted above, the rule requires that the application be submitted to the Assignment Judge or the Assignment Judge's designee. For this application, the Union County Assignment Judge, Hon. Karen Cassidy, has authorized the court herein to consider the fee application. Paragraph Fourteen of the approved consent judgment provides that Exxon and the State shall be responsible for their respective fees and costs. Therefore this fee application is not a fee-shifting application.

On July 9, 2003, the State and the Firm entered into a contingent fee agreement to pursue a natural resources damages lawsuit against Exxon. The litigation commenced with the filing of

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[1] A more detailed discussion of the case background and settlement terms is found in previous court decisions and most recently in the courts approval of the consent judgment that settles the case.

[2] The actual settlement is $225 million, but the $1 million recovered for the Paulsboro litigation is not an action in which the Firm participated, thus they seek no fee or costs.

the initial complaints on August 18, 2004. The original SCA provided in relevant part that for cases where settlement occurs after commencement of a trial the contingent fee would be 25% of the first $10,000,000 recovered; 22.5% of the next $15,000,000 recovered; and 20% of any amount recovered over $25,000,000. For cases assigned to the firm where there is a settlement before a suit is instituted, the fee is 15% of the first $10,000,000 recovered. All of these sums were net after deduction for costs.

The SCA was subsequently modified to come into compliance with a lawsuit and order of Superior Court entered subsequent to the contingent fee agreement. This suit challenged the authority of the Attorney General to enter into such a contingent fee agreement with a special counsel. N.J. Soc. for Envtl. & Econ. Dev. v. Campbell, Docket. No. MER-L-343-04 (N.J. Super. Ct. Law. Div. June 17, 2004) (Sabatino, J.S.C.). The outcome of that case provided that the contingent fee agreement was permissible, but special counsel had to follow the procedure and limitations set forth in R. 1:21-7. Thereafter, by confirming letter from the Attorney General on June 28, 2004, the contingent fee agreement was amended to come into in compliance with the Rule as per the court order.

According to Mr. Kanner's certification, for a considerable period of time prior to entering the SCA, the Firm worked with the Attorney General's Office and the Department of Environmental Protection to assist these offices in the development of its Natural Resource Damage Program. This process involved substantial investigation work, including file review, as well as out-of-pocket costs by the Firm. This extensive general work in support of the NRD program is referred to by Mr. Kanner in his certification as the "Mining Process."[3] These services to the State were performed by the Firm at no cost to the State. According to Mr. Kanner, "Kanner and Whiteley bore the costs of this process and expended considerable time and effort in the furtherance of the Department's NRD program, while receiving no compensation. Instead, the thinking at the time was that the Firm would be subsequently retained as Special Counsel to litigate numerous NRD cases on behalf of the Department."[4]

While the Firm's brief and Mr. Kanner's certification show great effort prior to the SCA, the court finds no basis for considering fees and costs based on those services as part of this application. Such services are certainly a good example of the "no stone left unturned" approach to the Firm's NRD efforts However, the expectation of the Firm as stated by Mr. Kanner was that their gratis pre-SCA services would be rewarded with being named special counsel for litigation with the opportunity to earn a fee under a subsequent formal agreement.[5] That expectation was met. While no doubt these pre-SCA services were valuable to the State, under the terms of the arrangement as determined by the Attorney General at that time and accepted by the Firm, those efforts were essentially a form of business development, rewarded by obtaining a litigation retainer agreement from the State.

The SCA does not provide for compensation or costs for services rendered retroactively or prior to its entry. The provision 9(i) of the retainer agreement is prospective in nature and provides no language to suggest it was to be applied retroactively. As former Attorney General

[3] Kanner Certification, Pg. 6, ¶ 10.
[4] Kanner Certification, Pg. 7, ¶ 13.
[5] Ibid.

Samson made clear in the earlier retaining letter of May 31, 2002, executed by Mr. Kanner, the Firm "was authorized to investigate these prospective claims completely at your own expense" and that "this engagement is without fee." Therefore, the court concludes that the examination of the reasonableness of the fee application under the court rule is limited to the contingent fee earned under the four corners of the July 9, 2003 agreement only.

R. 1:27-7(f) requires that that the fee review must be based on a finding that the fees are "reasonable in light of all the circumstances." To make that determination, courts review the relevant factors under the Rules of Professional Conduct ("R.P.C."), and more specifically R.P. C. 1.5. Ehrlich v. Kids of North Jersey. 338 N.J. Super. 442 (App. Div. 2001). In considering these factors it should be noted that the sheer size of the application for $50 million in fees and costs dwarfs the New Jersey caselaw precedents. Even applying those precedents that demonstrate a reasonableness finding in more modest fee applications, when the fee is of such a magnitude a court should also consider whether a contingent fee reaches such a tipping point that what is reasonable becomes an unearned windfall, even if the percentages of recovery are agreed upon by the client.

Below the court examines the factors under R.P.C. 1.5.

R.P.C. 1.5(a)(1) – The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal series properly.

The court has been responsible for this case since the spring 2013, but the court by necessity has also become very familiar with the history and previous rulings of this eleven year old case. There can be no question that this case raised complex and novel issues of law, including the application of the controversial Habitat Equivalency Analysis methodology. The Firm was required to undertake a sixty-six day trial before Exxon became motivated to reach a settlement with the State while awaiting the court's decision on the merits. Even the fundamental and difficult question of whether there was a cause of action under the Spill Act for NRD (loss of use) made its way to the Appellate Division on an interlocutory basis as well as statute of limitation issues. The Firm provided the legal services to be successful on those trips to the Appellate Division. Altogether there were three rulings of the Appellate Division litigated by the State under the guidance of Mr. Kanner and his Firm.[6]

The Firm has labored in the high weeds of this litigation for eleven years, and during that time it received no compensation or reimbursement, as agreed. However, during that extensive time period the Firm still had to expend money for salaries and firm overhead associated with this case. Mr. Kanner has certified that 40,000 legal service hours of non-compensated time and $5 million in costs were advanced by the firm over the eleven years.[7] These legal services included, in addition to other efforts, three interlocutory appeals, retention of multiple experts, depositions and extensive and difficult discovery practice culminating in a sixty-six day trial. Following the trial there was extensive post-trial briefing as well as the services related to the

[6] Two published and one unpublished decisions.

[7] The court has rounded the numbers for discussion purposes.

final settlement approval. This included another trip to the Appellate Division to fend off a challenge by a group of environmental organizations seeking intervention.[8]

Likewise the high difficulty of conducting discovery and defending the State's prerogatives from a more-than-able adversary demonstrates to this court a high level of competence and skill. There were many novel and untested questions that the Firm had to address at various stages of the proceedings, such as expert evidence questions, loss of use over time damages under the Spill Act, retroactivity of the Spill Act, the role of physical improvements, the application of the Public Trust Doctrine over private uplands, and the applicability of Habitat Equivalency Analysis methodology in NRD litigation, to name a few of the issues that required experienced, motivated, and highly skilled counsel.

The Firm was up against a determined adversary who created a daunting ten year defense that a less experienced, less determined, or less skilled effort would not have been able to timely, professionally, and, for the most part, successfully meet the challenge.

R.P.C 1.5(a)(2) – The likelihood, if apparent to the client that the acceptance of particular employment would preclude other employment by the lawyer.

Natural resource damages, are a relatively unsettled form of damage that are not based so much on tortious activity but based on an expert's opinion of how much money it takes to restore injured natural resources over time, and how much money is needed to compensate for the loss of use of the natural resource over time. These conclusions are by no means determinable by a simple, scientifically objective test. In this case the alleged time period for the damage is as much as a hundred years. Litigating natural resource damages is a complex and time intensive undertaking, involving a close and confident relationship between the Attorney General, the DEP and the Firm. The court was able to observe that this was true during the trial.

The Kanner Firm is, under any definition, a small law firm. It is dwarfed by the firms that it opposed in this case. Yet by having the focus of those attorneys assigned to the case devote the majority of their time to their client's efforts, they undoubtedly were precluded from taking on numerous new clients particularly because of their limited size. The Attorney General's Office, having worked with the firm for over a year on a non-compensation basis before formally retaining the firm, was most certainly well aware of the limitations their retainer agreement and subsequent litigation would place on the economics of the firm and it is no doubt a reason for their support of the Firm's application.

R.P.C. 1.5(a)(3) – The fee customarily charged in the locality for similar legal services.

Because of the size of the fee in this case and its contingent basis there are no state court parallels for such attorney fee amounts in this locality, which for purposes of this determination the court considers to be the entire State of New Jersey. The DEP is a state-wide agency that has been involved historically in many lawsuits in state and federal courts regarding their efforts in

[8] As provided in the Firm's brief, "Written and documentary discovery was also expansive involving approximately 70 expert and fact depositions and over a million pages of document reviewed by the parties and selected for duplication in discovery. Exhibits used at trial totaled over 380,000 pages." Brief in Support of Motion, 12.

protection of the environment under many statutes and their related regulations. While there are no cases with the same or similar fee determinations in New Jersey environmental jurisprudence, as the Firm has cited in its brief, there are numerous cases which provided fee awards that are similar to the percentages sought in this case, even though the ultimate dollar award may be far less. In New Jersey Department of Environmental Protection v. ISP Environmental Services, Docket. No. UNN-L-2271-07 (N.J. Super. Ct. Law Div.), for example, a case in which the DEP was represented by the Kanner Firm, the Superior Court found that a percentage of 24% of the net recovery was reasonable. Of note to this court, is that the settlement in the example was arrived before trial, unlike the instant case where there was a complex and lengthy trial was completed.

The overall fee percentage the Firm seeks in this case, after having conducted a lengthy trial is approximately 20.4% of the net recovery after taking into consideration the contingent fee rule and applying the agreed-upon fee schedule in the SCA. The Attorney General has supplied a list of numerous contingent fee agreements it has with special environmental counsel that provides for a range of similar percentages. The court concludes this factor is satisfied because there is ample basis to conclude that an overall 20.4% recovery rate in such a novel, complex, and nearly on-of-a kind environmental case is within the range of percentages for contingent fee agreements that is customary for the New Jersey locality.

R.P.C. 1.5(a)(4) – The amount involved and the results obtained.

In the underlying case, New Jersey sought $8.9 billion. The settlement with Exxon recovered $225 million. Many public comments opposing the settlement were based on objections to the facially apparent disparity. Relying on this fact alone to argue that the settlement figure was not a substantive outcome oversimplifies the issues that were at stake. Obviously, the Firm and New Jersey believe that this settlement was a successful outcome, and the court has determined it to be fair, reasonable, and in the public interest.

The trial evidence demonstrated that the DEP's NRD strategy from the beginning in 2003 was to bring responsible parties to the table to reach compromise and settlement. Policy Directive 2003-07 (PEX 0544) demonstrated that and former Commissioner Campbell and John Sacco of the DEP testified to that point as well. In trial, the evidence also demonstrated the fact the DEP was mostly successful in this strategy with New Jersey industries. However, Exxon did not take the State's settlement bait. Exxon was for eleven years an exception to the many companies who chose to compromise with the DEP on NRD issues. Exxon exercised its rights and refused to settle and thus forced the hand of the DEP and its counsel to expend ten years of effort and to try the case to its conclusion.

Only after this marathon of a trial and before the court issued its merits trial decision, did the efforts of the State through the representation by the Firm cause Exxon to change course and negotiate a settlement that has been determined to be in the best interest of the public. While the stated goal of the DEP was to recover $8.9 billion, as the trial evidence clearly showed and the subsequent certifications of the Attorney General Hoffman and Commissioner Martin demonstrated, the goal was a litigation goal which had great risk of not being fully achieved. When placed in the context of the settlement efforts over the years through different

administrations, the amount of the settlement was certainly in line with the settlement strategy that the trial evidence showed was a vital component of the NRD program during the pendency of this litigation.

Having presided over the trial and reviewed all the testimony and evidence, the court believes that while its trial decision findings may have led to a different conclusion, the recovery of $225 million is a success for the citizens of New Jersey. This result as well does justice to the Spill Act. By the State and Exxon trying the case, both sides got to see the hand of cards that each side held and, thus, for the first time were in a position to judge for themselves the risks of continuing to play the high stakes gamble. Faced with the trial evidence, the parties found the common ground that had eluded them for 11 years.

In a less complex case, where there was no trial, and the matter was settled without the extraordinary efforts of the Firm and the Attorney General's Office, a good argument could be made that such a fee as the Firm claims here, even if agreed to by the State, would fall into unearned windfall territory when judged against the outcome. But that situation does not exist here. The court finds the fees are in line with the results achieved and otherwise satisfy this factor.

R.P.C. 1.5 (a) (5) – The time limitations imposed by the client or circumstances.

This fact is not relevant to this fee application. There were not any time limitations imposed on the Firm by either the Attorney General, the DEP, or the courts.

R.P.C. 1.5 (a) (6) – The nature and length of the professional relationship with the client.

The professional relationship between the Firm and the State has been ongoing, wherein the State has authorized broad responsibilities over many years, demonstrating a strong trust and respect between the Firm and the Attorney General's Office and the DEP. In addition, while the Attorney General and the Firm have been jointly representing the State, the relationship between them has been apparently seamless as they have pursued the litigation to date.

Beginning in May 2002, the parties formalized an initial representation wherein the Firm was retained, but without cost to the State to help with the development of the DEP's natural resource program. As stated by Mr. Kanner in his certification, "the firm worked for over a year to investigate and assess potential NRD claims, working closely with the DOL and the Department's Office of Natural Resource Restoration (ONRR) and the Bureaus of Site Remediation to evaluate hundreds of sites and hazardous discharges throughout the State."[9] This initial effort was gratis by the Firm, who were expecting to be retained, and indeed were on July 9, 2003, to begin the litigation that the Attorney General would subsequently authorize.

Over several administrations and multiple Attorneys General and DEP Commissioners, the Firm has represented the State in other cases in addition to Exxon. The court is satisfied that this factor favors the application. This long-term relationship has provided the State with a

[9] Kanner Certification, Pg. 4, Item 5.

consistent legal strategy, which is in substantial part responsible for the ultimate settlement outcome in this matter.

R.P.C. 1.5 (a)(7) – The experience, reputation, and ability of the lawyer or lawyers performing the services.

Based upon the exhibits that accompanied the application, the Firm, whose home base is New Orleans, Louisiana, is a well-known environmental firm not only in their home state but in many other jurisdictions around the United States. The Firm or its predecessors has been in existence for thirty-four years. The Firm most recently also represents the State of Louisiana in its environmental claims involving the 2010 BP oil spill. Mr. Kanner himself, has authored academic articles on complex environmental issues as well as having taught on an adjunct basis at nationally known universities. Undoubtedly, former Commissioner Campbell held the firm in high regard because of its reputation when he initiated the relationship between the DEP and the Firm. From the early 2000s onward, succeeding commissioners and attorneys general continued to recognize the abilities, experience, and reputation of the Firm by continuing and building on their relationship.

R.P.C. 1.5 (a)(8) – Whether the fee is fixed or contingent.

The fees sought in this case are contingent on a successful recovery. Contingent fee agreements serve a broad purpose, permitting greater access to our court system for those with claims, but without the financial means to legally pursue such claims. In the areas of litigation where they are permitted they also serve to level the playing field between a deep-pocketed defendant and a client of limited means. Such fee arrangements permit a law firm to assess the risk, and then to take on such a client, and the firm is rewarded for its risk by receiving a fee from the recovery that most likely would exceed what it would have received on an hourly basis, win or lose. Most importantly, if the law firm is not successful in recovery, the client pays no fee for the services. Another benefit of a contingent fee is to potentially weed out frivolous claims. Before taking on such a contingency, the law firm will surely satisfy itself that the dispute risks and unknowns are worth the pursuit of a legitimate claim with genuine recovery potential.

In the public sector, where claims by the State involve complex legal and scientific environmental claims, a contingent fee arrangement, such as in this case, also plays another positive role. Such a fee arrangement allows for the State to husband its resources, and to pursue such complex litigation without the added and extensive costs of paying an experienced law firm by the hour to pursue a case, win or lose. In addition it allows the State to retain law firms that have a special legal expertise and experience that the Attorney General's office might not possess. From a law firm's perspective, they have to decide the legitimacy of the claims and conclude that there is merit sufficient to support taking the risk of exposing its firm resources that could lead to no recovery in the worst case after the expenditure of much time, effort, and expense. It is in this context that the State and the Firm entered into its contingent fee agreement.

There is an inherent risk in any contingent fee agreement, and in the instant case the risk was more significant than the average. To be successful, the Firm would have to litigate many issues that were novel and the outcome was uncertain even before the exposure to the risks

associated with an extensive and prolonged trial. This holds true for the risks of an adverse outcome on appeal.

One of the most important risks was to establish that, as a matter of law, compensatory damages for loss of use of adversely affected natural resources were recoverable under the Spill Act. This issue was overcome by the Firm when the Appellate Division held "'loss of use', is a means of measuring the reduction of services provided by a polluted natural resource and establishing a value for its replacement" and "we find that the DEP's claim for 'compensatory restoration' – loss of use damages – is consistent with the Spill Act's express terms, is harmonious with legislative intent, and is in keeping with the legislative directives articulated in the Act's recent amendments." N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 393, 410 (App. Div. 2007).

It is this "loss of use" holding that is probably the most important ruling in the case's long history because of its far-ranging precedent, now preserved because of the approved settlement. This important precedent will benefit the public in providing legal support for DEP negotiations with potentially responsible parties in future cases for NRD brought or contemplated by the State. There were many other risks that the Firm and its client faced as well. Those additional risks are set forth in much detail in the court's decision to approve the settlement and need not be repeated here.

The retainer agreement between the Firm and the State was a comprehensive and detailed agreement. In addition to the recovery schedule, the agreement provided that if there is no recovery, there is no fee to be paid to the Firm, and "the repayment of costs is contingent upon a recovery being obtained. If no recovery is made the State owes nothing for costs."[10]

The agreement also gives the Attorney General an independent right to reduce the calculated fee if he determines the fee is unreasonable, using many of the factors found under R.P.C. 1.5(a). Under the retainer agreement the Firm faced the risk that it would have to expend millions of dollars to pursue the litigation and come up empty handed. The benefit to the State is obvious. If, at the conclusion of the case after all appeals are exhausted, the final result is that no money is recovered, the taxpayers of the state will not be obligated to pay the Firm a penny.

* * *

Before coming to a conclusion, the contingent fees and costs must be examined.[11] The Firm provided the court a professional services summary. Subsequent to that submission the

[10] Retainer Agreement, Item 11 (July 9, 2003).

[11] Prior to the oral argument on the fee application on July 30, 2015, the court received unsolicited correspondence from the law firm of Nagel Rice, LLP. The Nagel firm, in its July 24, 2015, letter supports the Kanner Firm application. They also represented that they provided services to the Kanner Firm in connection with this case. On inquiry by the court during oral argument it was represented that the Nagel firm performed services as an associated counsel, and that fees owed to the Nagel firm will be paid from the approved fees payable to the Kanner Firm by the State. Mr. Kanner also confirmed that they are not considered reimbursable costs under his application. It was also confirmed that the Nagel firm has no retainer agreement directly with the State regarding the Exxon litigation. Therefore, the court makes no findings regarding the extent or merits of the Nagal Rice submission, as the payment of their fees and costs is the responsibility of the Kanner Firm and does not entail further payment by the State.

court forwarded to counsel requests for additional information which were responded to in a timely fashion. In addition to reviewing the initial submission in support of the reasonableness of the contingent fee, which included a summary of professional services and costs, with the receipt of more detailed information, the court was able to review the detail of the costs making up the total of reimbursable costs. The court was also provided with and reviewed a list of other contingent fee special counsel agreements the Attorney General has entered into since 2002, along with the hourly rates charged by the Kanner Firm in environmental matters.[12] The Attorney General's list of law firms who have or are acting as special counsel in environmental cases, demonstrates, with only two exceptions, that the contingent fee percentages are in line with the SCA in this case.[13]

The court also asked for and received via a certification from DAG Richard Engel, a further explanation of the scope of review of the fees and costs that he and his staff undertook before recommending that the court approve the fees as being reasonable. The Firm represented that it performed 40,063.40 hours of work by fifteen lawyers and seven paralegals, through December 12, 2014. The Firm has continued to perform services since that date, and under the terms of the SCA will have to continue to do so as necessary. They represent that they expended $5,171,168.71 in reimbursable costs pursuant to the SCA. The Attorney General's Office does not dispute these costs. The court, after having reviewed the detail reimbursable costs, finds them to be reasonable and in accordance with the SCA.

The legal fees themselves are calculated based on $224 million. Of the $225 gross recovery $1 million represents the recovery on the Paulsboro Litigation, for which the Firm performed no services under the SCA. The net recovery therefore is $218,300,667.07 ($224,000,000 minus reimbursable costs of $5,699,332.93 equals $218,300,667.07).

Pursuant to Rule 1:21-7, the fee calculated on the first $3 million of the recovery equals $812,500. Thereafter the fee is calculated based upon the SCA. On the next $7 million (25%) which equates to $1,750,000. On the next $15 million (22.5%) which equates to $3,375,000. On the balance of the recovery ($189,300,667.07), after deducting $4 million which was allocated for the remaining off-site recoveries, which are being settled without litigation, the fee is 20% or $37,860,133.41. The remaining $4 million generates a fee under the SCA based on 15% or $600,000 because the claims were settled without their having to be litigated.

To summarize:

Rule 1:21-7 fees:	$812,500.00	first $3 million
SCA fees:	$1,750,000.00	next $7 million – 25%
	$3,375,000.00	next $15 million – 22.5%

[12] In the submission, it was pointed out that the Firm generally performs most of its work on a contingent fee basis, but it was able to submit hourly rates for its professional staff relative the Firm's work on the recent BP oil spill case for the State of Louisiana. It was further pointed out by the Attorney General's Office that such hourly rates are generally lower than customary hourly rates charged in New Jersey and the Northeast.

[13] One of those exceptions is New Jersey Department of Environmental Protection v. Occidental Chemical Corp, Docket. No ESX-L-9868-05, where the agreement provided for a hybrid where counsel was paid $23 million on $355.4 million in recoveries, plus fees paid on an hour rate.

	$37,860,133.41	next $189,300,667.07 – 20%
	$4,000,000.00	non-litigated recovery – 15%
TOTAL FEE:	$44,397,633.41	

After considering the R.P.C 1.5(a) factors above, and after a thorough review of the Firm's submission, and the Attorney General's supplemental response to questions posed by the court, the court is satisfied that the requested fees and costs are reasonable. In making that finding, the court is well aware of the significance of the size of the fee award. But the court is also aware of the unusual nature of this case, in which the Firm for eleven years has worked diligently and professionally on behalf of their client, the State of New Jersey, without receiving any compensation. The court likewise recognizes the risk that they have taken in financing this litigation for the State of New Jersey – that risk being a real possibility that in the end after all appeals are exhausted there might not be any recovery. That would mean that the eleven-plus years of effort and cost would be absorbed by the Firm.

It is also important to note that the Firm's work may not yet be done, as the approval of the settlement by the court could be the subject of an appeal, which could potentially add years to their effort with uncertain outcomes. This award of fees includes any such future services, should any appeal arise. The SCA provides "Special Counsel's duty to represent the State in assigned NRD case shall include acting on behalf of the State in all levels of appeal."[14] While the rewards for success in this case are generous, such reward potential is counterbalanced by the great risks the Firm faced, which are significant and substantial and will continue until all appeals have been exhausted and the consent judgment becomes non-appealable.

By the terms of the Consent Judgment the $225 million payment by Exxon will be held by the State in a segregated account and cannot be used for any purpose, which the court interprets as including the payment of legal fees and costs, until the Consent Judgment "becomes final and non-appealable."[15] One final point on this application. Contained in the Firm's proposed order submitted with the application is Item 3, which states the fee "shall be adjusted to include all applicable interest thereupon." The interest referred to is footnoted to reference the fact that the settlement proceeds as part of the consent judgment are to be placed in an interest bearing account until the "judgment becomes final and non-appealable." The court will not approve the payment of interest to the Firm accrued in this fashion. Since the terms of the SCA at Paragraph 3 require the Firm to represent the State through appeals and the consent judgment is not fully executed until by its terms it is "non-appealable," the court finds that the fees are not contractually earned and thus not payable by the State until such time as the final judgment becomes "non-appealable."

The Firm has demonstrated no entitlement to a portion of interest earned by the State, as it has performed no efforts related to the accrual of interest. To permit the payment of such interest to the Firm would be unreasonable and an affront to R. 1:21-7(f). and R.P.C. 1.5. The interest provision in the consent judgment was to ensure that if the settlement is not approved, or if the court's approval of the settlement is overturned on appeal, that Exxon would promptly

[14] SCA, Item 3 (emphasis added).
[15] Consent Judgment, ¶ 5.

have its money returned with interest. Even if such interest provision was not in the consent judgment, the State likely would place such settlement funds in an interest bearing account as a prudent practice. The SCA does not contemplate such an unearned payment to the Firm.

In conclusion, the court GRANTS the motion and approves the fee and cost application consistent with this opinion and attached Order.

MICHAEL J. HOGAN, P.J. Ch.
(retired T/A recall)

cc: Superior Court of New Jersey – Union Vicinage
Susan J. Kraham, Esq.
Richard Rudin, Esq.

August 28, 2017

ARTICLES

Emerging Trends in Perfluorinated Chemical Regulation and Litigation

Inaction by the federal government and some state regulators should not be misinterpreted to mean that the current federal guideline is sufficiently protective.

By Allan Kanner – August 28, 2017

Under the 1996 Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f et seq., the U.S. Environmental Protection Agency (EPA) is required periodically to generate a new list of no more than 30 unregulated contaminants to be monitored by public water systems. 40 C.F.R. § 141.40. Each iteration of this list is known as the Unregulated Contaminant Monitoring Regulation (UCMR). UCMR 3 was published on May 2, 2012, and required the monitoring of 30 contaminants between 2013 and 2015. The list includes six perfluorinated compounds (PFC), including perfluorooctanoic acid (PFOA) and perfluorooctane sulfanate (PFOS). Currently, the EPA's minimum reporting requirements for PFOA and PFOS, considered to be indicator chemicals for the presence of other PFCs, are 0.04 µg/L and 0.02 µg/L, respectively, and the combined lifetime exposure limit is 70 ppt.

Two developments of note have occurred in conjunction with increased awareness of the dangers of PFCs: state guidelines and personal injury litigation. States have begun to take their own close looks at PFCs and their possible effects on the states' drinking water supplies, implementing guidelines more stringent than the EPA regulations. At the same time, personal injury class actions have revolved around manufacturers' failure to properly dispose of PFOA and similar PFCs.

Expansion of U.S. State Monitoring Rules

In light of UCMR 3 and independent state testing following claims of water contamination from manufacturing plant emissions, states are moving toward regulation of PFCs. A few states in particular have begun the process of adopting stricter standards than those suggested by the EPA

as an appropriate exposure level. (These suggested exposure levels are not binding regulations but rather technical guidelines for state and local governments to use in determining how best to handle these persistent chemicals.) This handful of regulations and guidelines represents the shift that states are making as the prevalence and danger of PFCs are brought to light in an increasing number of water supply systems around the country.

Vermont's guidelines call for a health advisory level of 20 ppt. Vermont, where a Saint-Gobain fabric manufacturing plant is suspected of being the cause of significant PFOA contamination, decided to adopt a more stringent health advisory level of 20 ppt, much lower than the EPA's UCMR monitoring levels and the lifetime health advisory. The state notes that in recommending this low exposure level, it considered the entire population, including children's exposure, over the long term.

Despite the new exposure level's basis in science, Saint-Gobain has filed multiple suits against the state, two of which were unsuccessful, arguing that this level is not based on generally accepted scientific standards, failing to recognize that there likely will never be 100 percent consensus on any given effect of any given chemical.

Nonetheless, Vermont is moving forward with its crackdown on PFCs and is in the process of signing into law a bill that extends liability for contamination of potable water supplies to emitters of PFOA. Those that release PFOA into the air, groundwater, surface water, or soil will be liable for the costs of extending municipal water lines to the affected areas. 10 Vt. Stat. Ann. § 6615e. The legislation passed in the Vermont Senate in February 2017 and passed in the House May 4, 2017.

New York classified chemicals as hazardous substances. New York has also taken steps toward regulation of PFOA: Governor Cuomo issued emergency regulations to classify PFOA as a hazardous substance in 2016 after severe PFOA contamination was found in Hoosick Falls, another location of a Saint-Gobain facility. As of March 3, 2017, PFOA and PFOS are considered permanent hazardous substances under New York law. 6 N.Y. Comp. Codes R. & Regs. pt. 597.3.

New Jersey has proposed a 14 ppt guidance level. New Jersey is currently proposing the lowest guidance level yet of 14 ppt, which is significantly lower than its current 40 ppt guidance level and the EPA's 70 ppt. The N.J. Department of Environmental Protection (DEP) issued a report in 2014 finding that PFOA and other PFCs were detected in two-thirds of the water systems sampled in 2009 and 2010. Given this information as well as

the multiple exposure routes, New Jersey's Drinking Water Quality Institute recommended the significantly lower health advisory guidance in 2016.

Minnesota recognizes long-term effects of chemicals. In May of 2017, Minnesota reevaluated its Drinking Water Guidance Value originally issued in 2009. It adopted a much lower guidance value of 27 ppt for PFOS and 35 ppt for PFOA. These revised guidance values are based on short-term periods, weeks to months, but with the understanding that PFCs remain in the human body for years and will bioaccumulate with each successive exposure.

California published a notice of intent addressing water supply contamination. California is also taking action to curb PFC contamination in its water supply. On September 16, 2016, the California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) published a notice of intent to list PFOA and PFOS as known to the state to cause reproductive toxicity under California's Safe Drinking Water and Toxic Enforcement Act of 1986. The list of chemicals is known as the Proposition 65 List, which requires listing a chemical when an authoritative body formally identifies the chemical as causing reproductive toxicity and the evidence considered to reach that conclusion meets the sufficiency criteria laid out by the regulation.

Recent Litigation

Recent personal injury class actions have revolved around the failure of manufacturers and government entities to properly dispose of PFOA and similar PFCs. A few large lawsuits against prominent chemical companies have made national headlines. These suits are unique because, though dealing with water contamination, they are not claims under the Clean Water Act. Because PFCs, as unrecognized and unregulated chemicals, are essentially legally no different than water, the attorneys brought medical-monitoring claims, as well as claims for negligence, trespass, and an amalgam of traditional torts.

DuPoint litigation ends with a settlement focusing on research. *Leach v. E. I. Du Pont de Nemours & Co. & Lubeck Public Service District*, Case No. 01-C-608 (Wood Cnty. W. Va. Cir. Ct.), was filed for medical monitoring on behalf of all those that had consumed water laced with the chemical. A settlement agreement for the *Leach* class action was approved on February 28, 2005, which required that a scientific panel be assembled to conduct research into diseases that may be linked to PFOA exposure. Diseases found to have a

"probable link" to PFOA exposure would be preserved for personal injury claims against DuPont.

Importantly, the results of this study were legally applied only to those that qualified to be class members, namely, people living within the six identified water districts that had consumed water with PFOA levels of .05 ppb or higher for at least one year, which is a deviation from the toxic tort standard for the general population. Such specifications were required by the settlement agreement in order to expedite causation issues in future litigation. With these particular parameters, DuPont agreed not to contest general causation; each plaintiff in turn would need to prove specific causation. Six diseases were found to have such a probable link—high cholesterol, kidney cancer, testicular cancer, thyroid disease, pregnancy-induced hypertension/preeclampsia, and ulcerative colitis—and those diagnosed brought successful claims for negligence, negligent infliction of emotional distress, and punitive damages.

The agreement was carefully worded to require the scientists to show a "probable link," not definitive proof that PFOA could cause a given disease. The reports issued by the panel are careful to explain that "[a] 'probable link' in this setting is defined in the Settlement Agreement to mean that given the available scientific evidence, it is more likely than not that among Class Members a connection exists between PFOA exposure and a particular human disease." Despite this, the science panel has been cited by articles and studies around the world. For example, a recent study in the Netherlands highlighted the studies in its analysis of "high-exposure communities." Herremans Oomen Ag, Significance of PFOA Blood Test Results for People Living Nearby DuPont/Chemours (Nov. 2016).

Coinciding with the 2005 settlement agreement, the EPA entered into a Consent Agreement with DuPont for its violation of the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 et seq., and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., in which DuPont paid $16.5 million. TSCA section 2607(e) provides that "any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the Administrator." DuPont conducted extensive research on PFOA exposure, both for animals and humans, including blood tests in 1981 that showed transplacental movement of the chemical, but did not share this information with the EPA when it became available or following a 1997 request for known

toxicological information about PFOA. As such, DuPont violated the TSCA and its RCRA permit, which required sharing information that may warrant a modification. Pursuing other companies with similar permits in this manner may encourage safer handling of PFCs as well as put pressure on regulators to address PFC contamination with sufficient regulations to protect human health.

DuPont litigation settles for multimillion-dollar award. DuPont again found itself in court with the first personal injury multidistrict litigation (MDL), *In re E.I. Du Pont de Nemours & Co. C-8 Personal Injury Litigation*, MDL No. 2433, for PFC contamination. The case was recently settled for $671 million.

The suit dealt with decades' worth of PFOA contamination in southeastern Ohio and northern West Virginia that originated from DuPont's Washington Works plant in Parkersburg, West Virginia. The lawsuit revealed that DuPont had known since as early as the 1960s that PFOA was likely dangerous to human health. No. 2:13-CV-170, 2016 WL 659112, at *8 (S.D. Ohio Feb. 17, 2016). In 1991, DuPont scientists determined that the internal safety limit for PFOA concentration in drinking water should be set at 1 ppb. *Leach v. E.I. Du Pont de Nemours & Co.*, 2002 WL 1270121, at *4 (W. Va. Cir. Ct. Apr. 10, 2002). Despite this, DuPont failed to inform the public when the company found three times that level of contamination in a local water district.

St.-Gobain finds itself the subject of two states' lawsuits. Saint-Gobain is in the midst of legal battles in both New York and Vermont following PFOA contamination from its Bennington, Vermont, fabric plant and its Hoosick Falls, New York, plastics plant. Both were the impetus for each state to adopt stricter PFC guidelines and regulations.

In Vermont, the plant contaminated the local groundwater aquifer, soil, and private drinking wells, which led to a class action bringing negligence, nuisance, trespass, battery, and strict liability claims and demanding that the company pay for remedial measures to prevent further and eliminate current contamination in the water supplies. *Sullivan v. Saint-Gobain Performance Plastics Corp.*, 2016 WL 7487723 (D. Vt. 2016). The class also brought a claim for a violation of RCRA, which defines actors that may be responsible for hazardous waste, including the "owner operator of a . . . facility, who has contributed or who is 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." 42 U.S.C. § 6972(a)(1)(B). The manufacturing

operations at the plant released significant amounts of PFOA into the atmosphere, which resulted in environmental contamination around the facility, including contamination of the groundwater and local drinking water supplies. Plaintiff's Class Action Complaint, *Sullivan v. Saint-Gobain Performance Plastics Corp.*, 2016 WL 7487723.

The residents of Hoosick Falls brought a class action against Saint-Gobain, as well as Honeywell International, for medical monitoring and diminution in property values due to the stigma created by PFOA contamination in their community drinking water supplies. *Baker v. Saint-Gobain Performance Plastics Corp.*, 2016 WL 40228974 (N.D.N.Y. 2016). In 2016, the EPA designated the plants as Superfund sites, ultimately impacting homeowners' ability to obtain a mortgage. This is common when homes are not equipped with potable water supplies. Without the ability to obtain a mortgage, property values in the village have been affected and remain the primary claim in the class action.

The U.S. military fought a litigation war stemming from PFC contamination. Recently, the U.S. military, following decades of using PFC-laced firefighting foam in training and in emergency response, has come under fire from nearby communities that have found large swaths of PFC contamination in their water supplies.

A notable group of cases out of Pennsylvania concerns contamination around the Willow Grove Naval Base. Plaintiffs in these actions have brought claims against the U.S. Department of the Navy as well as four manufacturers of the foam and PFOA. *In Giovanni v. U.S. Department of the Navy*, 2:16-cv-04873 (2016), the Giovanni family has raised claims for medical monitoring for themselves, as well as for health assessments for themselves and other individuals exposed to the chemical. In the suits against the manufacturers, the most prominent being *Bates v. 3M Co.*, 2:16-cv-04961-PBT (E.D. Pa. 2016), plaintiffs brought claims for negligence, nuisance, and medical monitoring, as well as two products liability claims, failure to warn, and design defect.

Given the number of military bases throughout the country, and more significantly the world, lawsuits similar to these will likely only increase in number.

Future Issues

Following the UCMR 3 testing of public water supplies completed between 2013 and 2015, systems across the country were found to have reportable levels of PFC contamination. Significantly, the reporting levels required by the EPA are much higher than those adopted by some states; and, as

such, there is a high probability that many more systems are contaminated at levels lower than EPA's advisory levels but at levels that are likely deleterious to human health.

Because the Trump administration has emphasized deregulation, it is unlikely that the EPA will be moving toward a binding regulation on PFCs in the near future. Inaction by the federal government and some state regulators, however, should not be misinterpreted to mean that the current federal guideline is sufficiently protective. Without a federal regulation, it will be up to the states to independently monitor and regulate PFC contamination.

If regulators continue to ignore the persistence of PFCs, lawsuits will only continue to proliferate as contamination becomes increasingly more prevalent throughout the world. PFCs are found in everything from Scotchgard to Teflon to firefighting foam used on U.S. military bases around the country. With so many exposure routes, PFCs have the potential to reach the litigation levels seen with polychlorinated biphenyl (PCB) and methyl tertiary butyl ether (MTBE) contamination lawsuits. Many of the same plaintiffs will likely come forward, including the states, private and public water service providers, and local communities.

Given their bioaccumulative and persistent nature, PFCs and their contamination problems are not going to dissipate any time soon.

Allan Kanner is named partner of Kanner & Whiteley, LLC in New Orleans, Louisiana.
