

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

DOCKET # _____

STATE OF NEW HAMPSHIRE

v.

SHELL OIL COMPANY, SHELL PETROLEUM INC., and its predecessor companies
and subsidiaries including, but not limited to, entities known as Shell Oil Products Company
LLC

PETITION FOR RECOVERY OF EXPENDITURES

1. Plaintiff, the State of New Hampshire (“Plaintiff”), created the Oil Discharge and Disposal Cleanup Fund (the “Fund”) as a financial resource of last resort for the clean-up of gasoline and diesel spills from underground storage tanks, like those found underneath service stations. The Fund functions as “excess insurance,” meaning it pays claims only if there is no other available coverage or other third-party payer. Multiple recoveries for Fund-reimbursed clean-up costs are expressly prohibited and a Fund applicant is required to repay the Fund if there is recovery from another source. The Fund also gains a subrogation right upon payment to assert any claim that the Fund recipient may have against a third party.

2. Defendant Shell Oil Company, a wholly-owned subsidiary of Defendant Shell Petroleum Inc. (together, “Shell”), has owned, operated, and supplied facilities (“Shell Facilities”) with these underground storage tanks, including service stations, in the State of New Hampshire from the 1930s until 1998. Shell’s underground storage tanks leaked, and Shell submitted claims to the Fund. Other Fund applicants who were subsequent owners of Shell

Facilities also submitted Fund applications for clean-up of pollution that occurred while Shell was the owner, operator, or supplier. The Fund has paid more than \$2.4 million for the clean-up of these sites.

3. Shell, however, never told the Fund that it had insurance coverage for these leaks, or even disclosed the existence of potential coverage. That was a critical omission because Shell did have coverage. Shell filed claims with its insurers for Underground Storage Facility (USF) leaks occurring at sites throughout the nation, sued its insurers to establish coverage through a complaint that identified specific USF sites, including sites in New Hampshire, and ultimately released this nationwide array of claims in a series of settlements worth more than \$414 million.

4. Because Shell deliberately misled the Fund into reimbursing expenses which should not have been reimbursed, and because the Fund has a subrogation right with respect to the divested sites at which Shell retains primary liability for pollution, the Fund has filed this lawsuit to recover its expenditures, including interest and attorney fees and seeks enhanced compensatory damages. The Fund brings five counts: (1) the right to full repayment with interest under RSA 146-D:6 and :7; (2) breach of contract; (3) fraud; (4) unjust enrichment; and (5) statutory subrogation under RSA 146-D:6.

I. The Parties

5. Plaintiff is the State of New Hampshire, acting through its Attorney General, Joseph A. Foster.

6. Defendant Shell Oil Company is a corporation organized under the laws of the State of Delaware on February 8, 1922. At all times material to this Petition, Shell Oil Company

directly or through predecessor companies or subsidiaries transacted business in New Hampshire through the ownership or operation of petroleum-fuel terminals and dispensing facilities which distributed and sold petroleum fuels in New Hampshire. It has been at all material times the partly- or wholly-owned subsidiary of the multinational conglomerate Royal Dutch Shell plc.

7. Defendant Shell Petroleum Inc. is a subsidiary of Royal Dutch Shell plc and currently the sole owner of Shell Oil Company.

II. Jurisdiction and Venue

8. This Court has jurisdiction over the allegations raised in this Petition pursuant to RSA 491:7.

9. Venue in Merrimack County is appropriate under RSA 507:9.

III. Background

A. Shell Owned, Operated, and Supplied Wholesale and Retail Petroleum Distribution Locations, Including Service Stations, Many of Which Leaked Gasoline or Diesel and Polluted the State of New Hampshire

10. Shell Oil owned, operated, leased, distributed, and supplied petroleum terminals and dispensing facilities including service stations throughout the State of New Hampshire from the 1930s until approximately July 31, 1998. The number of Shell branded stations in New Hampshire has, at times, exceeded 75.

11. Shell purchased and divested these types of assets throughout the 1930s-1998 timeframe, concluding with the mass transfer of all remaining Shell Oil branded petroleum fuel facilities in 1998 to Motiva Enterprises LLC, a newly created joint venture of Shell, Saudi Refining, and, until 2001, Texaco. Currently, there are in New Hampshire both (i) formerly Shell

owned, operated, or supplied facilities still in operation and (ii) other facilities that closed subsequent to a Shell divestiture or change to a non-Shell operator or supplier.

12. The majority, if not all, of these Shell owned, operated, or supplied facilities had an “Underground Storage Facility” (“USF”). A USF is:

a location consisting of a system of underground storage tanks, pipes, pumps, vaults, fixed containers and appurtenant structures, singly or in any combination, which are used or designated to be used for the storage, transmission, or dispensing of oil or petroleum liquids, which are within the size, capacity and other specifications prescribed by rules adopted by the commissioner [of the Department of Environmental Services] pursuant to RSA 146-C:9, VI.

RSA 146-D:2, II. Simply put, a USF is an underground storage tank and related piping, pumps, and structures used to store or dispense petroleum.

13. USFs leak, and there is no dispute that USFs at facilities operated by Shell leaked petroleum into soil and sometimes groundwater in New Hampshire. As discussed below, subsequent owners of Shell owned, operated, or supplied facilities have filed documents with the State of New Hampshire affirming this fact.

B. The State Created the Fund to Ensure USF Leaks Were Remediated Where the USF Operator Had No Other Financial Recourse

14. These USF leaks occurred throughout the nation with such frequency that they spurred Congressional action to regulate USFs and, in 1988, action by the General Court to mitigate this environmental threat. The General Court created the Fund to address “the costs incurred by the owners of Underground Storage Facilities for the cleanup of oil discharge and

disposal, to protect groundwater, and for reimbursement of third party damages.” RSA 146-D: 1.

The Fund was required because:

gasoline and diesel fuel . . . comprise a sufficiently distinct class of property which represents a potential serious health and safety problem to the citizens of New Hampshire. In particular, gasoline and diesel fuel present a potential threat to the quality of New Hampshire's groundwater and environment because of the speed with which these products are able to flow into, and contaminate, valuable groundwater supplies.

Id.

15. The Fund is overseen by the Oil Fund Disbursement Board (the “Board”). The Board adopts rules relating to, inter alia, processing applications to the Fund for compensation for oil discharge remediation, procedures for verifying the accuracy of those applications, determining specifics as to what costs are reimbursable, and developing eligibility criteria. RSA 146-D:5. The particular rules governing reimbursement are found in the Code of Administrative Rules Chapter Odb 400.

16. The Fund expressly functions as “excess insurance.” RSA 146-D:6, III.

17. The Fund by statute and rule has several mechanisms to ensure that an applicant’s costs are not reimbursed, or are later recouped, if the applicant has insurance or a third party is liable for remediation costs.

18. Each Fund applicant is required to submit a request for reimbursement using a form provided by the State.

19. The reimbursement request form has been periodically modified, but every variant of the reimbursement request form has required the applicant to affirm, under penalty of perjury,

that “the representations made in this Request for Reimbursement are to the best of my knowledge true and correct” and to “agree to reimburse the [F]und for any payments made to me based upon incorrect information.”

20. The request form and the associated instructions include language expressly informing the applicant that the Fund does not cover costs when there is insurance or a liable third-party.

21. Every variant of the form, either in the form itself or the enclosed instructions, directed the applicant to disclose any other insurance coverage

22. Each version of the request form has required the applicant to affirm knowledge that the applicant “may not seek reimbursement of expenses paid by an alternate insurance plan(s) or third-party source” and sign a statement declaring “I understand I may not seek reimbursement of costs covered under other insurances.”

23. Beginning in approximately 1992, applicants were required to submit with their request an “Acceptance of Conditions for Fund Eligibility,” which included an affirmation that the applicant “hereby acknowledges receipt of RSA 146-D . . . and declares and represents that he/she fully understands the eligibility requirements provided by law.”

24. Beginning in approximately 1994, the request for reimbursement form asked the claimant “Do you have liability or damage insurance? If ‘Yes’ you must provide a statement that coverage is not available.”

25. The instructions for the request form state expressly that the Fund does not cover costs if insurance is available. Beginning in approximately 1995, the form specifically informed

applicants that the Fund was “excess insurance.” The instructions directed applicants to provide a copy of any pollution exclusion that the applicant believed precluded coverage and a letter from the insurer if a claim was denied. The applicant was also directed to first seek reimbursement from other insurance and to include a copy of the insurance claim with the Fund application.

26. The Fund statute was amended in 1997 to make clear that, upon payment from the Fund for clean-up and corrective action costs or for third party liability costs, the Fund would gain a subrogation right to assert the applicant’s right to recover from any other potential responsible party. RSA 146-D: 6, IX.

27. The 1997 change to the statute specifies that an “owner shall not receive multiple compensation for the same injury and any such compensation shall be repaid to the [F]und.” RSA 146-D:6, IX.

C. Shell Applied to the Fund but Did Not Disclose that It Had Insurance or that It Settled Insurance Claims for USF leaks

28. Shell applied to the Fund for reimbursement of costs to clean up contamination caused by USF leaks at its sites in New Hampshire.

29. Shell submitted requests for reimbursement for USF leaks for at least six locations in New Hampshire. The Fund ultimately reimbursed \$997,419.91 for USF remediation at those sites. The State is continuing to investigate the possibility of additional Shell reimbursement requests.

30. When asked on the reimbursement request forms for each of those sites whether there was any other insurance coverage, Shell did not disclose any coverage or identify even a single insurance policy.

31. Shell did not provide copies of pollution exclusions or letters denying insurance claims.

32. Shell had insurance coverage. The company in fact sued its insurers for coverage of USF leak claims and settled those claims for value, releasing the USF claims in exchange for hundreds of millions of dollars.

33. Shell did not disclose these settlements, or even the existence of the litigation, even though the law requires that an applicant “shall not receive multiple compensation for the same injury and any such compensation shall be repaid to the Fund.” RSA 146-D: 6, IX. Shell affirmed knowledge of this requirement in its “Acceptance of Conditions for Fund Eligibility.”

1. Shell’s Extensive Insurance Program and Shell’s Lawsuit Asserting Coverage for Leaking USFs

34. Over the last decades, hundreds of insurance companies have issued multiple insurance policies to Shell, including garage liability, comprehensive general liability, property damage, pollution liability, excess, and umbrella policies.

35. These insurers include private, third-party insurers, Shell’s captive insurers, and mutual-liability insurers in which Shell was a shareholder along with other large energy companies.

36. These policies provided coverage for investigation and corrective action of environmental contamination caused by leaking USFs owned, operated, or supplied by Shell in the State of New Hampshire.

37. On information and belief, Shell followed industry practice by requiring Shell-branded service station owners, as well as jobbers and distributors, to maintain both third-party liability and property damage insurance coverage naming Shell as an additional insured.

38. Shell initiated formal and informal legal proceedings to enforce its rights under hundreds of insurance policies for reimbursement of corrective actions taken at leaking USFs at both divested and then owned service stations in New Hampshire. Litigation included *Shell Oil v. Certain Underwriters at Lloyds*, No. CGC-93-954709 (Sup. Ct. of CA, County of S.F.).

39. In *Certain Underwriters*, Shell Oil sued hundreds of named insurers for the costs associated with corrective action of various sites including service stations. Shell alleged damage to ground and surface water, air, and land at and around Shell owned, operated, leased and supplied petroleum fuel facilities.

40. The *Certain Underwriters* complaints ultimately listed hundreds of service station with leaking USFs where Shell expended funds for remediation, including eleven New Hampshire sites. Shell itself applied to the Fund for reimbursement at six of those sites, and subsequent owners applied for reimbursement at others.

2. Shell's Settlement with Insurers of the USF Claims

41. In settlement talks with insurers, Shell included USF leak remediation costs in what it termed a request for coverage of "marketing systems," a term referring to both service stations and bulk plants.

42. Shell ultimately entered into comprehensive settlements with its insurers. These settlements included broad releases of environmental liability claims and expressly identified the claims asserted in the *Certain Underwriters* litigation. Those broad releases cover claims for USF leak liability and property damage and, as stated above, covered the claims at service stations for USF leaks in New Hampshire.

43. Shell first reached settlement with insurers in 1994 and completed the last settlements in 1999.

44. The total of the settlements exceeds \$414 million.

45. In the settlements, Shell also indemnified the insurers against any liability for the claims released, including any attempt by the Fund to assert its subrogation rights against the insurers.

D. The Fund Has Also Paid to Reimburse USF Leak Remediation Costs at Sites Formerly Owned by Shell

46. Motiva Enterprises, LLC, assumed ownership of certain Shell assets service station assets in New Hampshire in 1998. It was the initial Fund applicant at four sites, two of which were listed in the *Certain Underwriters* litigation. The Fund has paid \$293,125.71 for remediation at those sites.

47. There are other former Shell Facilities where the Fund also paid for USF remediation. The State of New Hampshire has ongoing investigation to identify these other sites. To date, the State of New Hampshire has identified four such sites where the Fund has paid a total of \$1,122,415.55.

CLAIMS FOR RELIEF

Count I – RSA 146-D:6 and D:7

48. Plaintiff incorporates by reference all allegations in the preceding paragraphs of this Petition.

49. An owner shall not receive multiple compensation for the same injury and any such compensation shall be repaid to the fund. RSA 146-D:6, IX.

50. Any person who misrepresents any material fact or submits any false material statement, information, or certification to the board shall forfeit any right to reimbursement under this chapter. RSA 146-D:7

51. The Fund has made clear to Shell, both in prior communications and with the filing of this petition, that Shell owes the Fund full reimbursement of all the Fund payments for USF sites where Shell submitted applications, or where pollution occurred when the site was owned, operated, or supplied by Shell. Pursuant to RSA 146-D:6 and D:7, the Fund is entitled to full repayment, with interests and the costs of this litigation.

Count II – Breach of Contract

52. Plaintiff incorporates by reference all allegations in the preceding paragraphs of this Petition.

53. Shell entered into a contract with the State of New Hampshire each and every time it submitted a request for reimbursement, with associated documentation, and the Fund reimbursed Shell for remediation costs.

54. The contract had various terms, set forth with specificity above, which required inter alia disclosure of insurance and any third-party liable for remediation costs, and the repayment of Fund disbursement if Shell receives multiple recoveries for any expense.

55. These terms are more than material; they are essential to the Fund program. The Fund is “excess insurance” and therefore pays only if there is no other insurance, and no third party, responsible for the remediation.

56. Shell breached this contract when it did not disclose the existence of insurance, did not disclose that it made claims on its insurers for remediation of USF leaks, did not disclose that it settled those claims for more than \$414 million, and did not repay the Fund after this multiple recovery.

57. As part of the contract, Shell “agree[d] to reimburse the [F]und for any payments made to [Shell] based upon incorrect information.”

58. Consequently, the State is entitled to full repayment of all funds disbursed to Shell.

Count III – Fraud

59. Plaintiff incorporates by reference all allegations in the preceding paragraphs of this Petition.

60. As set forth with specificity above, Shell submitted certain applications for reimbursement to the Fund.

61. These applications misrepresented that Shell did not have insurance coverage for USF investigation and remediation.

62. Shell did not, as it was required to do, attach copies of liability and damage policies covering the Shell USF sites for which it sought reimbursement.

63. These misrepresentations regarding insurance coverage were knowing and intentional. Shell had already made claims upon insurers for these USF remediation costs and beginning in 1994 released the USF claims in settlements in exchange for what would ultimately total more than \$414 million.

64. Shell intended that the Fund would rely on these misrepresentations because the Fund is “excess insurance” and will not pay either where there is other insurance that provides coverage or where there would be multiple recoveries.

65. The Fund was more than justified in relying on Shell’s disclosures on the Fund reimbursement requests, particularly because the disclosures were made on penalty of perjury.

Count IV - Unjust Enrichment

66. Plaintiff incorporates by reference all allegations in the preceding paragraphs of this Petition.

67. The Fund conferred a benefit on Shell when it reimbursed Shell for remediation costs at USF sites.

68. Shell also recovered for those same costs when it settled the USF claims with insurers.

69. It would be unjust for Shell to retain the benefit conferred by the Fund.

Count V - Statutory Subrogation

70. Plaintiff incorporates by reference all allegations in the preceding paragraphs of this Petition.

71. As set forth above, when the Fund pays for clean-up and corrective action costs or for third party liability costs the Fund gains a subrogation right to assert the applicant's right to recover from any other potential responsible party. RSA 146-D:6, IX.

72. The Fund has paid such costs to Motiva and others for USF leaks at sites which were previously owned by Shell.

73. The USF leaks occurred, at least in part, during the time the sites were owned by Shell, as Shell itself disclosed by listing some of those sites in the *Certain Underwriters* litigation.

74. The Fund stands in the shoes of Motiva and other Fund claimants and may assert their claims against Shell for the damage to their property.

75. Shell, as the party responsible for the pollution, retains primary liability for the pollution.

WHEREFORE, based upon the allegations contained herein, Plaintiff respectfully requests the Court enter judgment as follows:

A. Enter judgment in favor of Plaintiff and against Defendant on all claims for relief;

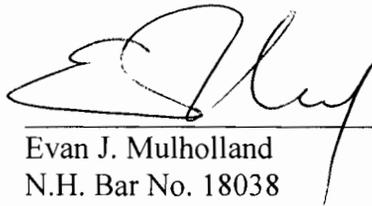
- B. Award Plaintiff damages in an amount to be determined at trial, including full recovery with interest of all Fund reimbursements for clean-up and corrective action where Shell submitted the Fund request or where Shell was responsible for the pollution, and enhanced compensatory damages;
- C. Award Plaintiff its attorneys' fees and costs, expert witness fees, and pre-judgment and post-judgment interest; and
- D. Award such other and further relief as the Court deems necessary and proper.

PLAINTIFF DEMANDS A JURY TRIAL ON ALL ISSUES SO TRIABLE.

Respectfully submitted this 3rd day of September 2013.

THE STATE OF NEW HAMPSHIRE,
By its attorneys,

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