

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
:
IN RE: METHYL TERTIARY BUTYL :
ETHER (“MTBE”) PRODUCTS :
LIABILITY LITIGATION : **OPINION AND ORDER**
----- :
:
This document relates to: : **Master File No. 1:00-1898**
: **MDL 1358 (SAS)**
: **M21-88**
United Water of New York, Inc. v. Amerada :
Hess Corp., et al., 04-CV-2389 (SAS) :
:
City of New York v. Amerada Hess :
Corp., et al., 04-CV-3417 (SAS) :
:
County of Suffolk and Suffolk County Water :
Authority v. Amerada Hess Corp., et al., :
04-CV-5424 (SAS) :
:
----- X

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

In 2002 and 2003, New York water providers sued various corporations for their use and handling of the gasoline additive methyl tertiary butyl ether (“MTBE”).¹ The actions were eventually transferred to this Court

¹ The parties have engaged in extensive motion practice. This Opinion assumes the reader’s familiarity with this Court’s previous opinions, in which the facts underlying these actions are comprehensively discussed. For a thorough recitation of plaintiffs’ fact allegations see, for example, *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.* (“*In re MTBE*”), 379 F. Supp. 2d 348, 364-67

pursuant to section 1407 of Title 28 of the United States Code as part of a large multi-district litigation (“MDL”) involving MTBE.

Defendants now move for summary judgment on the ground that plaintiffs’ claims are untimely under New York law in three actions selected to focus the litigation – the *United Water* action, the *City of New York* action, and the *Suffolk County* action.² While this Opinion is not binding on parties in the other actions in this MDL, it is nonetheless “intended to provide strong guidance”³ to all

(S.D.N.Y. 2005).

² See *United Water* Defendants’ Memorandum of Law in Support of their Motion for Summary Judgment Based on the Statute of Limitations (“*United Water* Defs. Mem.”), at 12; *City of New York* Defendants’ Memorandum of Law in Support of their Motion for Summary Judgment Based on the Statute of Limitations (“*City of New York* Defs. Mem.”), at 14; *Suffolk County* Defendants’ Memorandum of Law in Support of their Motion for Summary Judgment Based on the Statute of Limitations (“*Suffolk County* Defs. Mem.”), at 15.

The Second Circuit recently reversed this Court’s decision finding federal subject matter jurisdiction over certain actions in this MDL. See *In re MTBE*, No. M21-88, MDL 1358, 2007 WL 1500338, at *18, *20, *23 (2d Cir. May 24, 2007). Because the three actions addressed in this Opinion assert claims under the Toxic Substances Control Act (“TSCA”), this Court maintains jurisdiction based on the presence of a federal question and/or the statutory jurisdiction conferred by Congress in TSCA. See 15 U.S.C. § 2619(a) (“The district courts of the United States shall have jurisdiction over suits brought under this section . . .”).

³ *In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65, 73 (S.D.N.Y. 2004).

parties when considering the effect of statutes of limitations in those actions. For the reasons stated below, defendants' motions in these three actions are granted in part and denied in part.

II. BACKGROUND

A. Procedural History

In the early 1980s, as tetraethyl lead was being phased out, gasoline suppliers added MTBE to gasoline in relatively small quantities to maintain the gasoline's octane rating. A decade later, in the early 1990s, the suppliers significantly increased the amount of MTBE added to gasoline to satisfy a mandate under the federal Clean Air Act. That mandate required them to provide reformulated gasoline products with an increased oxygen content to certain U.S. markets, including the New York City metropolitan area.

However, in 2000, the state of New York enacted a ban on MTBE, to take effect four years later. In 2002 and 2003, several water providers in the New York City metropolitan area sued many entities that had once manufactured or distributed gasoline containing MTBE for both common law and statutory violations.⁴ Plaintiffs on this motion are:

⁴ By 2004, defendants had stopped supplying MTBE-containing gasoline to New York.

- (1) United Water of New York (“UNWY”), the plaintiff in the *United Water* action;
- (2) the City of New York (“the City”), the plaintiff in the *City of New York* action; and
- (3) the County of Suffolk (“the County” or “Suffolk County”) and the Suffolk County Water Authority (“SCWA”), the two plaintiffs in the *Suffolk County* action.

Plaintiffs later amended each complaint (or summons with notice) to name additional defendants and, as a result, the defendants in each action are almost identical. For each action, Table 1, below, lists the initial filing dates and dates on which pleadings were amended to add new defendants. Whether a statute of limitations has run is measured by the date a lawsuit is commenced as to each defendant⁵ unless the claim against a particular defendant relates back to an earlier filing. The only relation-back argument advanced by any plaintiff is that of the *Suffolk County* plaintiffs against certain later-added Citgo and Valero entities.⁶

⁵ See N.Y. C.P.L.R. 203(c) (McKinney 2003 & Supp. 2005) (“In an action which is commenced by filing, a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced.”).

⁶ See *infra* Part VIII.B.

Table 1: Filing Dates⁷

Action	Initial Filing (# of defendants named)	Subsequent Filings Adding New Defendants (# of new defendants added)
<i>City of New York</i>	10/31/03 (29)	2/26/04 (13), 12/10/04 (13)
<i>United Water</i>	11/10/03 (50)	4/27/04 (2), 10/29/04 (20), 8/18/05 (3)
<i>Suffolk County</i>	8/19/02 (1)	10/9/02 (15), 3/12/03 (3), 11/5/04 (46), 8/18/05 (3)

B. MTBE’s Properties

For purposes of these motions, the relevant properties of MTBE are its solubility in water, its degradability, and its taste and odor thresholds. Gasoline is a mixture of hundreds of compounds. Compared to the other components of gasoline, MTBE is extremely soluble in water,⁸ and relatively slow to degrade into

⁷ Tables 4, 5, and 6, appended hereto, list in detail the dates on which each defendant was first named in the *City of New York*, *United Water*, and *Suffolk County* actions, respectively.

⁸ MTBE has solubility in water of about 48,000 mg/L. *See* United States Environmental Protection Agency (“EPA”), November 3, 2000 Longhorn Pipeline Environmental Assessment, *available at* <http://www.epa.gov/earth1r6/6en/xp/longhorn.htm>, at appx. 6A, tbl. 6A-3. Among the components of traditional gasoline, benzene is the most soluble in water with a solubility of around 1,800 mg/L. *See id.* After benzene, the next most soluble components are other alkyl benzenes (compounds related to benzene, including toluene, ethyl benzene and xylene (with benzene, “BTEX”)), with solubilities in the 100-500 mg/L range. *See id.* Most other components have solubilities well below 50 mg/L. *See id.* Plaintiffs allege that defendants initially represented that MTBE had a low solubility in water. Indeed, the *first* revision of

other compounds.⁹ Due to its solubility, MTBE moves faster and farther in groundwater than other gasoline components.¹⁰ Due to its low degradation rate, it persists longer in soil and water than other gasoline components. These properties alone are not problematic, but MTBE also imparts an unpleasant taste and odor to drinking water that can be perceived at concentrations much lower than other gasoline components, and some studies suggest that it may be carcinogenic to animals and/or humans.¹¹

a Product Safety Bulletin on MTBE, published by its largest manufacturer in 2003, states that MTBE is soluble in water at 4.3% (roughly equivalent to 45,000 mg/L). *See* January 17, 2003 Lyondell Chemical Company MTBE Product Safety Bulletin (“Lyondell MTBE Bulletin”), Ex. 6 to Declaration of Robin Greenwald, liaison counsel for plaintiffs and counsel for plaintiffs UWNY, SCWA, and Suffolk County (“Greenwald Decl.”), in Support of United Water’s Memorandum of Law In Opposition to Defendants’ Motion for Summary Judgment Based on the Statute of Limitations (“UWNY Opp.”), at 2, 28-29.

⁹ *See* Lyondell MTBE Bulletin at 2, 28-29. MTBE is also somewhat more difficult to remove from groundwater. *See, e.g.*, March 9, 2001 Letter from Stephen M. Jones, former CEO of SCWA (“3/9/01 Jones Letter”), Ex. 4 to Declaration of Peter C. Condron, counsel for *Suffolk County* defendants, in Support of *Suffolk County* Defendants’ Motion for Summary Judgment Based on the Statute of Limitations (“*Suffolk County* Condron Decl.”), at SCWA0019050 (explaining that MTBE breaks through carbon filters faster than other contaminants, requiring more frequent maintenance and additional costs to replace carbon filters).

¹⁰ *See* Lyondell MTBE Bulletin at 2.

¹¹ *See id.*; *see also* October 13, 1998 Maine Department of Human Services Report, The Presence of MTBE and Other Gasoline Compounds in Maine’s Drinking Water (“Maine Report”), Ex. J to Declaration of Ramin Pejan,

III. LEGAL STANDARDS

A. Summary Judgment

Defendants have moved for summary judgment on the grounds that all of plaintiffs' claims are time-barred by the applicable statutes of limitations. Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."¹² An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."¹³ A fact is material when it "might affect the outcome of the suit under

Assistant Corporation Counsel, in Support of the City's Opposition to Defendants' Motion for Summary Judgment ("Pejan Decl."), at 2, 7, 13 (reporting results of various prior taste and odor studies, reporting their own findings, and estimating cancer risks based on available data).

¹² Fed. R. Civ. P. 56(c).

¹³ *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112, 116 (2d Cir. 2006) (quoting *Stuart v. American Cyanamid Co.*, 158 F.3d 622, 626 (2d Cir. 1998)).

the governing law.”¹⁴ “It is the movant’s burden to show that no genuine factual dispute exists.”¹⁵

To defeat a motion for summary judgment for a particular claim, the non-moving party must raise a genuine issue of material fact as to each element of that claim. To do so, it must do more than show that there is “some metaphysical doubt as to the material facts,”¹⁶ and it “may not rely on conclusory allegations or unsubstantiated speculation.”¹⁷ However, “all that is required [from a nonmoving party] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.”¹⁸

In determining whether a genuine issue of material fact exists, the court must construe the evidence in the light most favorable to the non-moving

¹⁴ *Bouboulis v. Transport Workers Union of Am.*, 442 F.3d 55, 59 (2d Cir. 2006) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)).

¹⁵ *Vermont Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)).

¹⁶ *McClellan v. Smith*, 439 F.3d 137, 144 (2d Cir. 2006) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

¹⁷ *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005) (quoting *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2002)).

¹⁸ *McClellan*, 439 F.3d at 144 (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)).

party and draw all justifiable inferences in that party's favor.¹⁹ However, "[i]t is a settled rule that '[c]redibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment.'"²⁰ Summary judgment is therefore inappropriate "[i]f there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party[.]"²¹

B. Relevant Statutes of Limitations

Plaintiffs in the three focus actions have brought similar claims. They include:

- (1) common law property tort claims for trespass and nuisance;
- (2) deceptive business practices claims for violations of section 349 of the New York General Business Law ("section 349"); and
- (3) strict liability claims for violations of Article 12 of the New York Navigation Law ("Article 12").

¹⁹ See *Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 456 (2d Cir. 2007) (citing *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 312 (2d Cir. 1997)).

²⁰ *McClellan*, 439 F.3d at 144 (quoting *Fischl v. Armitage*, 128 F.3d 50, 55 (2d Cir. 1997)). *Accord Anderson*, 477 U.S. at 249.

²¹ *American Home Assurance Co. v. Hapag Lloyd Container Linie, GmbH*, 446 F.3d 313, 315-16 (2d Cir. 2006) (citing *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002)).

Plaintiffs seek monetary damages as well as equitable remedies.²² Plaintiffs' claims are governed by several different statutes of limitations, which are summarized below.

1. The Limitations Period for Property Tort Claims Seeking Monetary and Equitable Relief

The common law property tort claims for which plaintiffs seek damages are generally governed by the three year limitations period of section 214(4) of the New York Civil Practice Law and Rules ("CPLR").²³ This provision, however, is altered by the discovery rule of section 214-c(2), which modifies the date on which the three year limitation period begins to run:

Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for . . . injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within . . . *property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury*

²² These actions are somewhat unusual among toxic tort/groundwater contamination actions in that plaintiffs do not allege personal injuries. Plaintiffs' claims are generally premised on interference with their usufructuary rights due to MTBE contamination.

²³ This provision states: "The following actions must be commenced within three years: . . . 4. an action to recover damages for an injury to property except as provided in section 214-c[.]" N.Y. C.P.L.R. 214 (McKinney 2003).

*should have been discovered by the plaintiff, whichever is earlier.*²⁴

To the extent plaintiffs' tort claims (or any of their claims) seek injunctive relief, they are governed by the omnibus statute of limitations in section 213(1) which imposes a six year limitation for claims seeking equitable relief.

2. The Limitations Period for Claims Brought Under Section 349 of the New York General Business Law

Plaintiffs' claims under section 349²⁵ are governed by section 214(2) of the CPLR. It states:

The following actions must be commenced within three years:
* * * 2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215[.]²⁶

As with all equitable claims in these actions, any claims for injunctive relief under section 349 are governed by section 213(1), which is discussed below.

²⁴ N.Y. C.P.L.R. 214-c (McKinney 2003) (emphasis added).

²⁵ See N.Y. Gen. Bus. Law § 349(a), (h) (McKinney 2004 & Supp. 2005).

²⁶ N.Y. C.P.L.R. 214 (McKinney 2003).

3. The Limitations Period for Claims Brought Under Article 12 of the New York Navigation Law

Plaintiffs' claims to recover remediation costs under Article 12²⁷

sound in indemnity, and are therefore governed by section 213(2) of the CPLR, which states:

The following actions must be commenced within six years:
* * * 2. an action upon a contractual obligation or liability, express or implied, except as provided in section two hundred thirteen-a of this article or article 2 of the uniform commercial code or article 36-B of the general business law[.]²⁸

4. The Limitations Period for Equitable Remedies

To the extent plaintiffs seek equitable relief as a remedy, plaintiffs' claims are subject to the six-year omnibus statute of limitations.²⁹ Where adequate legal and equitable remedies co-exist, the legal statute of limitations controls both – a plaintiff may not extend the limitations period on its damages claims by requesting equitable remedies.³⁰ But if legal remedies alone provide an

²⁷ See N.Y. Nav. Law §§ 170-197 (McKinney 2004).

²⁸ N.Y. C.P.L.R. 213 (McKinney 2003).

²⁹ Section 213 states: “The following actions must be commenced within six years: * * * 1. an action for which no limitation is specifically prescribed by law[.]” N.Y. C.P.L.R. 213 (McKinney 2003).

³⁰ See *Colodney v. New York Coffee & Sugar Exch.*, 163 N.Y.S.2d 283, 286 (1st Dep’t 1957) (citing *Keys v. Leopold*, 241 N.Y. 189, 193 (1925)).

incomplete or imperfect remedy, equitable claims remain separate and subject to their own limitations period.³¹

Because plaintiffs are seeking equitable relief requiring defendants to prevent or limit future injuries, legal remedies alone are insufficient. Thus, to the extent they seek equitable relief, plaintiffs' claims are subject to the six-year omnibus statute of limitations of section 213(1).

For example, assume that a 1998 MTBE release saturated nearby soil and led to a detection (also in 1998) of MTBE in a plaintiff's well at a concentration of 90 parts MTBE per billion of water ("ppb"). Further assume that the detection caused plaintiff to shut down the well and required plaintiff to treat the well immediately. Remedies for such injuries include both damages and an injunction requiring future remediation. Plaintiff's lost profits due to its well being out of service and plaintiff's past remediation costs are compensatory in nature, thus subject to the three-year statute of limitations for damages actions.³² Plaintiff's request for an order requiring future soil remediation is equitable in

³¹ See *Hanover Fire Ins. Co. v. Morse Dry Dock & Repair Co.*, 270 N.Y. 86, 89-90 (1936).

³² If claims for past remediation costs succeed on an indemnity theory under Article 12 (rather than on tort theories governed by section 214-c(2)), then they are subject to the six-year statute of limitations for indemnity actions. See *infra* Part VII.A.

nature, thus subject to the six-year omnibus statute of limitations. It follows that if plaintiff filed suit in 2003, its claim would be time-barred as to damages, but not as to equitable relief regarding the need for future remediation.

IV. DETERMINATIONS THAT APPLY TO EACH OF THE FOCUS ACTIONS

A. Claims Must Be Addressed on a Site-by-site Basis

Where a plaintiff alleges “distinct acts of trespass[,]” it “is entitled to recover damages for any injuries that [it] can prove were attributable to that trespass.”³³ However, if the injuries are merely “an outgrowth, maturation or complication of the [prior] contamination of plaintiffs’ well water[,]” then those injuries constitute a single claim.³⁴ Whether plaintiffs’ injuries resulted from a prior contamination is a question of fact.³⁵

³³ *Giardina v. Parkview Homeowners’ Ass’n*, 680 N.Y.S.2d 354, 355 (4th Dep’t 1998).

³⁴ *Bimbo v. Chromalloy Am. Corp.*, 640 N.Y.S.2d 623, 625 (3d Dep’t 1996) (quotations and citations omitted).

³⁵ *See State of New York v. Fermenta ASC Corp.*, 656 N.Y.S.2d 342, 345 (2d Dep’t 1997) (“Whether the violation of the regulatory standard which SCWA first discovered in 1991 was an ‘outgrowth, maturation or complication’ of the original contamination of the groundwater was a question of fact for the trial court.” (quoting *Bimbo*, 640 N.Y.S.2d at 623)).

The process by which MTBE moves from multiple release points, through soil and groundwater and a network of aquifers, and into plaintiffs' wells is complex. Further, these actions are somewhat unique among groundwater actions in that they present hundreds of wells, some of which are interconnected, and thousands of MTBE detections at varying concentrations.

In deciding a recent motion in this MDL, this Court stated:

[w]hile a site-by-site approach is undoubtedly more complicated, such an analysis is required given that [plaintiff] alleges injuries at “multiple locations, in multiple aquifers, and at different points in time.” The question of when (and whether) each release caused the alleged injury of which [plaintiff] complains will require an analysis of factual circumstances specific to each release site (*e.g.*, the amount and duration of the spill) and the location of the injury (*e.g.*, type of aquifer, level of contamination), and therefore must be determined on a site-by-site basis.³⁶

This reasoning justifying a site-by-site approach applies with equal force here.

Moreover, though the aquifers in plaintiffs' water systems appear to be interconnected to some degree,³⁷ they do not appear sufficiently interconnected

³⁶ *In re MTBE*, No. M21-88, MDL 1358, 2006 WL 3771011, at *3 (S.D.N.Y. Dec. 14, 2006) (citations omitted) (deciding statute of limitations motion under California law in the *Orange County Water District* action).

³⁷ *See, e.g., City of New York* Second Amended Complaint at ¶ 122 (MTBE products “move freely throughout the groundwater in these aquifers [from which the City draws water] and such water can be drawn up by the City’s wells at any time”); *Suffolk County* Plaintiffs’ Local Rule 56.1 Statement of Undisputed

to permit the legal conclusion that an injury to one well is an injury to the entire system. The *degree* of interconnection is a factual issue to be determined with the aid of expert hydrogeologists, but it is clear for present purposes that not all wells are connected to the others. If the wells were sufficiently interconnected for an injury at one well to be deemed an injury to the entire water system, then MTBE levels at all wells in the system would rise and fall together. But the facts here show that at any given moment, MTBE levels vary from one well to the next.³⁸ As a result, it cannot be said that one well's injury is every well's injury.

Therefore, each injury that plaintiffs can prove is separate and distinct from a prior contamination will be treated as a separate claim. By the same token, injuries that are an outgrowth, maturation, or complication of a prior contamination will be treated as a single injury. For example, the City's Well 53

Facts ("SCWA 56.1") at ¶ 1 (acknowledging "the physical interconnections of the water system").

³⁸ See April 7, 1997 Briefing on MTBE Detection and Analysis in New York City's Drinking Water, produced by New York City Department of Environmental Protection ("City MTBE Briefing Document"), Ex. 10 to Declaration of Peter C. Condrón, counsel for *City of New York* defendants, in Support of *City of New York* Defendants' Motion for Summary Judgment Based on the Statute of Limitations ("*City of New York* Condrón Decl."), at NYC-0016434-35 (noting variations in MTBE levels across wells and time in the *City of New York* action); February 13, 2007 *Suffolk County* Statute of Limitations Chart ("2/13/07 *Suffolk County* SoL Chart"), Ex. A to February 13, 2007 Letter to the Court from Robin Greenwald (showing same in the *Suffolk County* action).

shows detections of MTBE at moderate levels in 1996 (before its limitations date under any theory of recovery) and very high levels in 2002 (during the limitations period under any theory of recovery).³⁹ If the City can establish that these detections are separate and distinct, its claim based on the post-limitations-date detection is timely.

B. The Limitations Period for Property Damage Claims Is Three Years from Plaintiffs' Discovery of Each Injury

Plaintiffs seek damages for public and private nuisance, for trespass, and for damage to property based on strict products liability. These claims are governed by the three-year statute of limitations set forth in section 214(4), as modified by section 214-c(2). For most property-damage tort claims, the traditional injury rule of accrual applies. In toxic tort actions, however, section 214-c(2)'s discovery rule deems accrual to occur at the time a plaintiff actually or constructively discovers its injury, rather than the time of the injury itself.

³⁹ See City of New York's Local Rule 56.1 Statement of Additional Facts ("City of New York 56.1") at ¶ 14 (MTBE detected in City Well 53 at a concentration of 7.8 ppb in 1996 and at 170 ppb in 2002) (citing May 2002 Sampling Progress Report #3 from Malcolm Pirnie, Inc. to William A. Yulinsky of the New York City Department of Environmental Protection, Ex. A to Declaration of Daniel Greene, Assistant Corporation Counsel for the City).

Section 214-c(2)'s discovery rule applies here because plaintiffs assert injuries "caused by the latent effects of exposure to any substance . . . upon or within property[.]" and courts routinely apply this rule to cases alleging groundwater contamination.⁴⁰ Section 214-c(2)'s discovery rule necessarily replaces the traditional injury-accrual rule.⁴¹

C. New York's Continuing Tort Doctrine Does Not Apply to Plaintiffs' Claims Governed by Section 214-c

New York's common law continuing tort doctrine generally allows plaintiffs a measure of flexibility in cases where plaintiffs' injury is ongoing or recurring.⁴² However, this doctrine is not available to these plaintiffs. In *Jensen v. General Electric*, the New York Court of Appeals held that when the New York Legislature enacted section 214-c, it intended to abrogate the continuing tort doctrine for damages claims governed by that rule.⁴³ Because the property damage

⁴⁰ See, e.g., *Jensen v. General Elec. Co.*, 82 N.Y.2d 77, 82 (1993).

⁴¹ See *Rothstein v. Tennessee Gas Pipeline Co.*, 87 N.Y.2d 90, 93 (1995).

⁴² Under the continuing tort doctrine, "a cause of action for a continuous or recurring wrong accrues anew every day, or for each injury[.]" 75A New York Jurisprudence, Limitations and Laches § 267 (2007).

⁴³ See *Jensen*, 82 N.Y.2d at 89-90. The *Jensen* court explicitly noted that the continuing tort doctrine remains applicable to claims for injunctive relief. Plaintiffs' claims for injunctive relief are discussed *supra* at Part III.B.4.

claims in these actions are governed by section 214-c(2), plaintiffs may not rely on the continuing tort doctrine.

D. A Claim Does Not Accrue Upon The Mere Detection of MTBE in a Well

Section 214-c(2) establishes two triggers for evaluating the date of accrual in determining whether a claim is timely. One trigger is actual knowledge – the date plaintiff *had* sufficient information to have discovered its injury. The other trigger is constructive knowledge – the date by which, through the exercise of reasonable diligence, plaintiff *should have had* sufficient knowledge to discover its injury.

The parties disagree about how much information plaintiffs needed to discover that they were injured. Defendants contend that plaintiffs’ awareness of the presence of MTBE in their wells was sufficient. Plaintiffs argue that they could not have discovered an injury sufficiently for claims to accrue unless they also knew of MTBE’s hazards.⁴⁴

⁴⁴ See Suffolk County Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment Based on the Statute of Limitations (“SCWA Opp.”) at 12-15.

The fact is that even clean, clear, good-tasting water contains dozens of contaminants at low levels.⁴⁵ On its journey through the water cycle as rain, surface water, and groundwater in an aquifer, water collects many contaminants of various types: bacteria, parasites, heavy metals, organic compounds (including MTBE), inorganic compounds, and even radioactive substances. This water is eventually pumped from a well to a treatment facility, where many of these contaminants are removed or reduced in concentration before the water is pumped to a consumer's home.

New York, like other states, does not have a zero-tolerance policy on contaminants in drinking water. Indeed, the costs associated with a zero-tolerance rule make such a rule impracticable. Therefore, the mere detection of MTBE in wells at very low levels would not make a reasonable person aware of a legally-cognizable injury sufficient to trigger the statute of limitations.

The issue of what knowledge is necessary for a plaintiffs' MTBE claims to accrue was recently addressed in *Atkins v. ExxonMobil*.⁴⁶ *Atkins* relied

⁴⁵ See, e.g., New York City Annual Water Supply Statements for 1997, 1998, 1999, and 2000, Ex. 11 to *City of New York* Condrón Decl. (listing contaminants allowed to be and actually detected in drinking water served to customers).

⁴⁶ 780 N.Y.S.2d 666, 668-69 (3d Dep't 2004).

on two New York Court of Appeals cases that held: “For purposes of CPLR 214-c, discovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, ‘the injured party discovers the primary condition on which the claim is based.’”⁴⁷ The *Atkins* court found that knowledge of the presence of MTBE alone was insufficient for plaintiffs to have discovered their injuries, and that plaintiffs had raised triable issues of fact as to what information about MTBE was available to them and when.⁴⁸ Thus, a plaintiff’s claims accrue when it first knows of both (1) the presence of MTBE at a level sufficient to constitute an injury and (2) the harmful impact of MTBE on drinking water.

Despite this recent Third Department authority, defendants rely on a Third Department case decided six years *before Atkins*. Defendants cite *Oliver Chevrolet, Inc. v. Mobil Oil Corp.* for the proposition that an injury accrues upon

⁴⁷ *MRI Broadway Rental, Inc. v. U.S. Mineral Prods. Co.*, 92 N.Y.2d 421, 429 (1998) (quoting *Matter of New York County DES Litig.*, 89 N.Y.2d 506, 509, 514-15 (1997)).

⁴⁸ *See Atkins*, 780 N.Y.S.2d at 668 (“It has been observed that ‘discovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, ‘the injured party discovers the primary condition on which the claim is based.’” (quoting *MRI Broadway*, 92 N.Y.2d at 429, and *New York County DES Litig.*, 89 N.Y.2d at 514-15) (emphasis in *Atkins*)).

detection.⁴⁹ Even if this case were controlling authority, which it is not, it is distinguishable for at least two reasons. *First*, despite their undisputed actual knowledge of gasoline leaks in 1973 and 1984, the *Oliver* plaintiffs made no effort to investigate whether this leakage had affected their well water.⁵⁰ By contrast, plaintiffs here regularly tested their wells for MTBE.

Second, and more important, the harms that result from gasoline spills were well known throughout the time period at issue in *Oliver*.⁵¹ The same cannot be said of MTBE. While plaintiffs here were aware of the *presence* of MTBE (they regularly tested their wells for it), questions of fact remain as to whether and when they became aware of the *harms* MTBE may cause to groundwater at

⁴⁹ See *City of New York* Defs. Mem. at 17 (citing 671 N.Y.S.2d 850, 851 (3d Dep't 1998)).

⁵⁰ See *Oliver*, 671 N.Y.S.2d at 851.

⁵¹ Benzene, toluene, ethyl benzene, and xylene are and have been of primary environmental concern in gasoline spills. Benzene has long been a common industrial chemical, and has also long been known to be a carcinogen. Evidence suggests that some water providers and environmental agencies' initial motivation to test for MTBE was not that they perceived MTBE to be harmful, but because it was a useful tool to predict the movement of BTEX in a gasoline plume. See December 23, 1987 Letter from Robert Lamonica, Vice President of Leggette, Brashears & Graham, Inc. (consulting geologists), to William J. Schickler, SCWA Chief Engineer, Ex. 14 to *Suffolk County* Condron Decl., at SCWA0005498 (recommending testing for MTBE, "the presence of which . . . may presage further problems" in wells neighboring a known MTBE spill).

various concentrations.⁵² As noted by the *Atkins* court, “plaintiffs’ submissions raised triable issues of fact as to when their awareness of the dangers and consequences of MTBE exposure or contamination occurred or should have occurred, and, indeed, of the scientific and public awareness of such dangers”⁵³

Despite the foregoing requirements, plaintiffs’ damages claims governed by section 214-c(2) accrue without regard to plaintiffs’ knowledge of defendants’ identities. Because section 214-c(2) does not require plaintiffs to know the *cause* of their injury before the injury accrues,⁵⁴ accrual of a cause of

⁵² See, e.g., Minutes of May 6, 1998 Meeting of Long Island Groundwater Research Institute (“LIGRI”) Advisory Council (“5/6/98 LIGRI Minutes”), Ex. L to Declaration of Peter C. Condrón in Support of Defendants’ Supplemental Memorandum on the Statute of Limitations (“*Suffolk County Condrón Supp. Decl.*”), at SCWAPROIOS0000020000 (“Most of what we know about MTBE has been learned in the past couple of years.”).

⁵³ *Atkins*, 780 N.Y.S.2d at 668.

⁵⁴ See *Bano v. Union Carbide Corp.*, 361 F.3d 696, 709 (2d Cir. 2004) (“The fact that there may be a delay before ‘the connection between th[e] symptoms and the injured’s exposure to a toxic substance is recognized’ does not delay the start of the limitations period.” (quoting *New York County DES Litig.*, 89 N.Y.2d at 509)). Subsection (4) of 214-c extends accrual dates in cases where “technical, scientific or medical knowledge and information sufficient to ascertain the cause of [plaintiff’s] injury had not been discovered, identified or determined” before plaintiff’s claim expired. N.Y. C.P.L.R. 214-c. See *New York County DES Litig.*, 89 N.Y.2d at 511-12 (holding that because subsection (4) explicitly addressed plaintiffs who lacked knowledge of causation, claims governed by

action based on that injury is not deferred until plaintiffs know which defendant(s) to sue.

E. Once MTBE Levels Exceed New York’s Maximum Contaminant Level, Plaintiffs Have Actual Knowledge of an Injury as a Matter of Law

While the mere presence of MTBE in the water does not trigger the statute of limitations, there does come a point where the concentration levels are so significant as to warrant discovery of a cognizable injury as a matter of law. In these actions, that level is established by the New York Maximum Contaminant Level (“MCL”). Once the MTBE concentrations pass the levels established by the state, the statute of limitations begins to run as a matter of law.

As water providers, plaintiffs knew about their duty to comply with this regulatory standard. From 1989 until 2003, the amount of MTBE allowed in drinking water was limited to 50 ppb by the state’s MCL for volatile organic compounds (of which MTBE is one).⁵⁵ In 2003, the state established a separate

subsection (2) accrue without regard to plaintiff’s knowledge of causation). Subsection (4) is not applicable in these three actions – no plaintiff or defendant argues that it should be, and no plaintiff has alleged or proven facts necessary to invoke that subsection.

⁵⁵ January 26, 2000 Memorandum from Paul Ponturo, Chief of Suffolk County Department of Health’s Division of Environmental Quality, Office of Water Resources (“1/26/00 Ponturo Mem.”), Ex. 10 to *Suffolk County Condron Decl.*, at NY-CTYSUFF025318 (stating that New York has regulated MTBE as an

MCL for MTBE which limited the acceptable concentration of MTBE in drinking water to 10 ppb.⁵⁶

To illustrate, if a plaintiff detected MTBE in a well at 70 ppb in 1997 while the then-effective MCL was 50 ppb. The detection of MTBE at a level surpassing the MCL proves – as a matter of law – the plaintiff’s awareness of its legally-cognizable harm. Thus, based on those facts, plaintiff would have discovered its injury upon detection and the claim would expire three years later.⁵⁷

Finally, other facts suggest that plaintiffs knew that MTBE might be hazardous at various levels of concentration *below* the MCL. When such facts are undisputed and they establish that a plaintiff had actual knowledge of an injury before the limitations period began, then claims based on those injuries will also

unspecified organic contaminant since 1989, and that New York was “developing a new regulation in no small part in response to the frequency of MTBE detection, public concerns, and some health effects studies nearing completion”).

⁵⁶ See New York Register, December 24, 2003, Ex. 5 to Declaration of Stephen J. German, counsel for *Suffolk County* and *United Water* plaintiffs, In Support of SCWA Opp., at 4 (creating MCL for MTBE at 10 ppb).

⁵⁷ In addition, claims based on detections so low that they do not constitute an injury are not actionable. Plaintiffs have agreed not to pursue claims based solely on detections below 0.5 ppb. See February 23, 2007 Case Management Order No. 24 (voluntarily dismissing those SCWA wells for which SCWA has not incurred remediation costs and also have not had a recent detection above 0.5 ppb). As a result, this 0.5 ppb constitutes the *de minimis* threshold for an injury.

be barred as a matter of law. However, when factual questions remain as to plaintiffs' knowledge, summary judgment is inappropriate. Defendants may still present their case to a jury and they may well prevail in light of the evidence presented. Nonetheless, the question here is not whether the defendants will *likely* prevail, but whether they *must* prevail as a matter of law.

F. Facts That Bear on Constructive Knowledge Raise Questions That Must Be Decided by a Jury

In the absence of proof of actual knowledge of the hazards of MTBE at a particular concentration, injuries based on detections below the MCL require an inquiry as to constructive knowledge.⁵⁸ Defendants present many facts that support a finding that plaintiffs had sufficient knowledge to trigger the statute of limitations on their claims. However, it must be remembered that the inquiry here is limited to whether a reasonable finder of fact could reach any *other* conclusion.⁵⁹ And, indeed, they could. Some of defendants' facts are disputed,

⁵⁸ This Court previously rejected the state's MCL as defining injury and held that detections of MTBE at concentrations below the MCL could support standing to sue. The Court noted, however, that a trier of fact might conclude that contamination below a certain concentration did not cause any injury. *See In re MTBE*, 458 F. Supp. 2d 149, 158 (S.D.N.Y. 2006).

⁵⁹ *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1019 (2003).

and others require assessments of weight and credibility which this Court may not decide in addressing a motion seeking summary judgment.

It is no easy task to determine what plaintiffs should have known at a particular point in time, had they exercised reasonable diligence, with respect to the potential harms to soil or groundwater caused by MTBE. Moreover, it is by definition a fact-intensive inquiry⁶⁰ which involves at least two considerations. *First*, what was publicly known at a particular point in time as to the potential harms caused by MTBE. And, *second*, whether such public knowledge specified the concentrations of MTBE at which these potential harms would be realized. In order to conduct this inquiry, the trier of fact will need to consider many circumstances, including, but not necessarily limited to:

- (1) publicly available literature on the subject (*e.g.*, published studies, press releases by the parties or third parties, industry publications, or EPA publications);

⁶⁰ MTBE is a relatively new component of gasoline, and there is evidence in the record suggesting that little was known about its properties until recently. *See, e.g.*, December 9, 2005 Deposition of Louis A. Briganti, former Chief Chemist at Hackensack Water Company (predecessor to United Water New Jersey) (“12/9/05 Briganti Dep.”), Ex. 2 to Greenwald Decl., at 121 (former United Water New Jersey (“UWNJ”) Chief Chemist first learned of MTBE’s high mobility in groundwater “a couple of years ago”). (UWNJ is an affiliate of UWNY which performs laboratory services for UWNY.) *But see* November 30, 2005 Deposition of Paul Ponturo, Ex. 3 to *Suffolk County* Condron Decl., at 213-14 (County of Suffolk knew of MTBE’s mobility, persistence, and taste and odor thresholds by 1998).

- (2) government regulations (*e.g.*, a state's MCL or municipal ordinances) throughout the relevant time frame;
- (3) knowledge obtained from other lawsuits;
- (4) a plaintiff's efforts to remediate the presence of MTBE at certain concentrations;
- (5) a plaintiff's efforts to remove a well from service (or its policy to do so) at particular concentrations;
- (6) a plaintiff's lobbying efforts to ban all use of MTBE in conjunction with its knowledge of public information and the state's MCL; and
- (7) customer complaints about the taste or odor of water.

Such an inquiry is clearly fact-specific, and thus the constructive knowledge question needs to be discussed case-by-case.

V. APPLICATION OF THESE PRINCIPLES TO PLAINTIFFS' PROPERTY DAMAGE CLAIMS

A. The *City of New York* Action

The City first sued on October 31, 2003, filing a Summons with Notice in the New York State Supreme Court for Queens County. The City named additional defendants in its initial Complaint, filed on February 26, 2004, and also in its Second Amended Complaint, filed on December 10, 2004. As a result, the limitations dates for the City's damages claims are October 31, 2000 against

initially-named defendants, and February 26, 2001 or December 10, 2001 against later-named defendants.⁶¹

Defendants assert that *all* of the City's property damage claims relating to its Queens water system are time-barred because the City knew or should have known of the *presence* of MTBE in *some* wells in that system

⁶¹ The dates on which the City first named each defendant in the *City of New York* action are listed in Table 4, appended hereto. The City's claims against the later-named Citgo and Valero entities will be measured against the date of an earlier filing because claims against these entities relate back to that earlier filing. *See infra* Part VIII.B and Table 4.

Also, in its Summons with Notice and its initial and Amended Complaints, the City named scores of "Doe" defendants, describing them as "corporations, partnerships, associations, natural persons, or other entities that are not presently known to the City." *City of New York* Second Amended Complaint at ¶ 57. "[T]he Second Circuit has held that 'Rule 15(c) does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities.'" *Schwartz v. Town of Plainville*, No. 3:05-CV-1427, 2007 WL 1051695, at *2 (D. Conn. Apr. 9, 2007) (quoting *Barrow v. Wethersfield*, 66 F.3d 466, 470 (2d Cir. 1995), *op'n mod'd and aff'd*, 74 F.3d 1366, 1367 (2d Cir. 1996)). "It is familiar law that 'John Doe' pleadings cannot be used to circumvent statutes of limitations because replacing a 'John Doe' with a named party in effect constitutes a change in the party sued." *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1075 (2d Cir. 1993) (citations omitted). Accordingly, the City's claims against later-named defendants do not relate back to its earlier claims against Doe defendants, and as a result, the timeliness of claims against these later-named defendants is measured by the date on which each defendant was first named. *See infra* Table 4.

between 1995 and 1999.⁶² This assertion is incorrect for two reasons discussed above. *First*, knowledge of the *presence* of MTBE alone is insufficient to establish an injury. *Second*, an injury to one well does not trigger the statute of limitations for all wells in the system.

Defendants cannot establish that *all* of the City's claims are time-barred by proving that the City knew that MTBE was present in *some* of its wells before the limitations date. To the contrary, twelve of the City's wells had no MTBE detections until after October 31, 2000; eleven of these had no detections until after December 10, 2001.⁶³ Injuries arising from the last eleven of these MTBE detections are therefore timely as to all defendants. Injuries arising from the April 4, 2001 detection in Well 36, the earliest of these eleven, are timely as to those defendants named in the City's initial complaint, but untimely as to later-added defendants.

⁶² See *City of New York* Defs. Mem. at 16, 18-19, 20; *id.* at 19 (stating that "all the pertinent information . . . that [the City] needed to commence running of the statute of limitations" was "that its system had been impacted with MTBE," and that "[s]uch knowledge bars the City from pursuing any claims concerning its long-ago contaminated and inter-connected Queens water supply system").

⁶³ See April 21, 2006 *City of New York* Statute of Limitations Chart, Attachment to April 24, 2006 Letter from Daniel Greene to Peter Sacripanti, defense liaison counsel and counsel for defendant ExxonMobil Corporation. MTBE was first detected in the City's Well 36 on April 4, 2001. See *id.*

In addition, defendants point to facts that tend to establish the City's knowledge of the hazards of MTBE.⁶⁴ The City admits that it was aware in April 1997 that "MTBE disperses rapidly in water and is less biodegradable than common gasoline hydrocarbons" and that "MTBE is highly mobile in soils, and will therefore find its way into ground water."⁶⁵ The City also admits that it knew in May 1998 that "MTBE is a fast moving contaminant," and that standard treatment methods might not remove MTBE as effectively as other contaminants.⁶⁶ The City further admits that it knew in 1999 that MTBE's presence in groundwater was attributable to leaking underground storage tanks.⁶⁷

These admissions establish the City's awareness of the sources of MTBE contamination and the properties of MTBE that make it likely to infiltrate aquifers. The admissions also show that because the City knew MTBE to be

⁶⁴ See, e.g., *City of New York Defendants' Local Rule 56.1 Statement of Undisputed Facts* ("*City of New York Defs. 56.1*") at ¶¶ 13, 22; Exs. 10, 12 to *City of New York Condrón Decl.*

⁶⁵ *City of New York Defs. 56.1* at ¶ 13 (quoting City MTBE Briefing Document at NYC-0016434).

⁶⁶ May 21, 1998 email from Edward Kunsch, Lab Director for Jamaica Water Supply Company (now owned and operated by the City of New York) ("Kunsch 5/21/98 email"), Ex. 12 to *City of New York Condrón Decl.*, at NYC-0015303.

⁶⁷ See *City of New York Defs. 56.1* at ¶ 22.

hazardous at some level (the MCL, at least), it had considered potential remediation options. But they do not establish the City's knowledge that MTBE's harms were manifest at particular levels below the MCL.

The City also admits that it knew in 1999 that New York's MCL for MTBE might be lowered from 50 ppb to 10 ppb.⁶⁸ This tends to show the City knew of an increasing concern that MTBE might be harmful at levels below the MCL, but it does not establish as a matter of law that the City was aware of legally-actionable injuries for detections below 50 ppb.

The City also had some concern by 1997 that MTBE might be a human carcinogen.⁶⁹ And the EPA's December 1997 MTBE Advisory – of which the City should have been aware – suggested that MTBE *might* cause taste and

⁶⁸ See *id.*; “MTBE – An Overview,” Memorandum Prepared by New York City Department of Environmental Protection for March 2000 City Council Hearing (“DEP City Council Overview”), Ex. 10 to *City of New York* Condron Decl., at NYC-0015381. See also City MTBE Briefing Document at NYC-0016437 (April 1997 statement that New York's MCL was 50 ppb, the EPA's then-current “lifetime health advisory for MTBE is a range of 20-200” ppb, and that a “revised health advisory is expected soon”).

⁶⁹ See City MTBE Briefing Document, Ex. 10 to *City of New York* Condron Decl., at NYC-0016437 (“While MTBE has been reported to cause cancer in laboratory animals, its potential cancer risk to humans has not been evaluated.”).

odor risks to drinking water at levels above 20-40 ppb.⁷⁰ But nothing in the record suggests that the City knew with any certainty that MTBE caused cancer in humans, or that MTBE contamination below the MCL might cause taste and odor problems or pose health risks.

Defendants also argue that the City's awareness of two early MTBE lawsuits, the *South Tahoe* and *Berisha* actions, triggered the statute of limitations.⁷¹ While defendants might succeed in convincing a trier of fact to consider a plaintiff's awareness of other suits in the total mix of information available to a plaintiff, such awareness is insufficient to impute either actual or constructive knowledge to a plaintiff as a matter of law.⁷²

⁷⁰ See December 1997 EPA Advisory on MTBE, Ex. 10 to *Suffolk County Condron Decl.* ("1997 EPA Advisory"), at NY-CTSUFF024487 (estimating that MTBE *below* 20-40 ppb was unlikely to cause taste and odor problems for most consumers, but acknowledging that some consumers would be able to detect MTBE below these levels because the ability to taste or smell MTBE varies from person to person).

⁷¹ See *City of New York Defs. Mem.* at 20. The City denies it had actual knowledge of these suits. See *City of New York* 56.1 at ¶ 29.

⁷² See, e.g., *E.W. French & Sons, Inc. v. General Portland, Inc.*, 885 F.2d 1392, 1400 (9th Cir. 1989) ("The existence of the lawsuit and [plaintiffs'] knowledge of it, however, are not tantamount to actual or constructive knowledge of the . . . claim."); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1171 (5th Cir. 1979) ("The filing by others of a similar lawsuit against the same defendants may in some circumstances suffice to give notice, but to rule that it does so *as a matter of law* is to compel a person situated like these plaintiffs to file

Defendants do offer some undisputed evidence, however, that proves certain of the City's claims are untimely. On April 7, 1998, the City detected MTBE at 62.4 ppb in a distribution system to which Well 10 contributed.⁷³ When the City removed Well 10 from service on April 21, 1998 in response to high MTBE detections, the City was clearly on notice of an injury.⁷⁴ Samples taken that day revealed MTBE levels of 274 ppb.⁷⁵ Beginning on November 9, 1998, Well 10 was pumped to remove the contaminated water from the ground, a process which took over three years.⁷⁶ Well 10's MTBE level was first observed to have

suit, on the pain of forfeiting his rights" (emphasis in original)).

⁷³ See DEP City Council Overview at NYC-0015380.

⁷⁴ See May 21, 2001 Kunsch email ("Kunsch 5/21/01 email"), Ex. 12 to *City of New York Condron Decl.*, at NYC-0000378. Cf. *Whitney v. Quaker Chem. Corp.*, 90 N.Y.2d 845, 847 (1997) (holding that where plaintiff's symptoms "led him to make repeated visits to the hospital and the health center for treatment, to file a workers' compensation claim and to submit injury investigation reports to his employer[,] such "actions, together with plaintiff's statements and the documentary evidence of his diagnoses demonstrate that plaintiff had discovered the injury underlying his claims.").

⁷⁵ See DEP City Council Overview at NYC-0015380.

⁷⁶ See DEP Memorandum Regarding MTBE Detections, Ex. 12 to *City of New York Condron Decl.*, at NYC-0012055.

fallen below 50 ppb in December 1999, and the well was not returned to service until August 9, 2001.⁷⁷

Because the City's April 21, 1998 detection at 274 ppb was far above the then-applicable MCL of 50 ppb, the City knew of the presence of MTBE at hazardous levels – and was thus on notice of an injury to Well 10 – at the time of that detection. Claims arising from that injury are thus time-barred. Furthermore, the City's decision to remove Well 10 from service due to MTBE contamination independently establishes an injury because it shows that the City knew MTBE was present and perceived it as hazardous at the detected level.

Claims arising from the 1998 contamination of City Wells 38 and 38A are also time-barred. The City detected MTBE in water pumped from those wells at 31 ppb in November 1998. In response, it took them offline, later noting that this action was taken despite sub-MCL detections.⁷⁸ The City's action proves that at the time it removed these wells from service, it perceived an MTBE hazard at 31 ppb.⁷⁹ Accordingly, after Wells 38 and 38A were removed from

⁷⁷ See Kunsch 5/21/01 email at NYC-0000378; January 11, 2002 Kunsch email, Ex. 12 to *City of New York* Condrón Decl., at NYC-0012104.

⁷⁸ See DEP City Council Overview at NYC-0015381.

⁷⁹ The record reflects that the City was motivated *solely* by concerns about MTBE when it removed these wells from service. See *id.* (“four wells, in

service, contamination of any City well at or above 31 ppb is deemed to have immediately put the City on notice of an injury.

B. The *United Water* Action

UWNY filed a Summons with Notice on November 10, 2003 in the New York State Supreme Court for Rockland County. It added new defendants in its initial Complaint, filed on October 29, 2004 and in its Third Amended Complaint, filed on August 18, 2005. All of UWNY's property damage tort claims are governed by section 214-c. Accordingly, the relevant limitations dates for these claims are November 10, 2000, October 29, 2001, and August 18, 2002.⁸⁰

Of the New York focus actions, the *United Water* action involves the fewest wells. Only eighteen of UNWY's wells have ever had detections of MTBE over 0.5 ppb. Table 2, below, lists the first and most recent MTBE detections for these eighteen wells; detections that occurred before the first limitations date (November 10, 2000) are shown in italics.

two well fields, have been removed from service, three due to the effects of MTBE [Wells 10, 38, and 38A], and one due to potential effects of MTBE [Well 10A]”).

⁸⁰ The dates on which UWNY first named each defendant in the *United Water* action are listed in Table 5, appended hereto. UWNY's claims against the later-named Citgo and Valero entities will be measured against the date of an earlier filing because claims against these entities relate back to that earlier filing. See *infra* Part VIII.B and Table 5.

Table 2: Summary of UWNY MTBE Detections⁸¹

UWNY Well	First Detect		Latest Detect (as of 8/17/06)	
	Date	Level (ppb)	Date	Level (ppb)
SV 1	September 13, 1994	0.71	August 26, 1999	0.64
SV 6	February 7, 1998	1.42	September 3, 1998	0.56
Tallman 26	February 4, 1999	2.88	September 25, 1999	0.7
Sparkill 8	November 16, 1989	9.4	March 14, 2006	4.34
SV 100	January 29, 1998	1.24	September 20, 2003	0.59
Tappan 16	August 27, 1998	0.72	July 12, 2001	0.66
New City 23	October 10, 1998	0.78	July 23, 2002	1.36
Elmwood 66	March 8, 1999	1.5	November 5, 2003	0.58
SV 99	April 20, 1999	0.62	April 20, 2002	7.22
Monsey 31	August 26, 1999	0.7	May 31, 2005	0.59
Blauvelt 15	January 24, 2000	0.58	July 12, 2001	0.79
Ramapo 85	April 21, 2000	0.77	July 27, 2001	0.69
Ramapo 84	July 21, 2000	0.58	April 20, 2002	6.85
Eckerson 82	December 18, 2000	0.66	January 3, 2001	0.66
Pinebrook 69	April 25, 2001	0.58	June 28, 2003	0.81
Viola 28	June 19, 2002	0.51	April 25, 2003	1.34
Piermont 25	July 11, 2002	1.8	August 7, 2002	1.8
SV 3	November 13, 2003	0.51	May 15, 2005	0.54

For the same reasons as in the *City of New York* action, UWNY’s claims did not *all* accrue in 1989 when UWNY detected MTBE in its Sparkill 8

⁸¹ See August 17, 2006 *United Water* Statute of Limitations Chart (“8/17/06 *United Water* SoL Chart”), Ex. B to August 18, 2006 Letter to the Court from Eileen A. Clarke, counsel for *United Water* (“8/18/06 Clarke Letter”).

well.⁸² Defendants also assert that because UWNY first detected MTBE in several wells before the limitations date, *all* claims for contamination arising from those wells are time-barred.⁸³ This is incorrect for two reasons.

First, UWNY's claims for these first detections did not necessarily accrue at the time of the detection. Defendants do not offer uncontested evidence that proves UWNY had or should have had the requisite knowledge of MTBE's harms at the detected levels before the limitations date. Defendants point to UWNY's knowledge that leaking gasoline tanks are frequently release points for MTBE,⁸⁴ but as with the City of New York, UWNY's knowledge of the *source* of contamination alone is insufficient to trigger the statute of limitations on its claims.

⁸² See *United Water Defs. Mem.* at 15.

⁸³ See *id.* at 16. Defendants' Memorandum identified the following as the wells in which UWNY first detected MTBE before the limitations date: Elmwood 66, Monsey 31, New City 23, Ramapo 85, and Tallman 26. UWNY has updated its chart since defendants' papers were submitted, identifying additional wells in which MTBE was first detected before the limitations date (*e.g.*, Blauvelt 15).

⁸⁴ See September 12, 1990 Letter from Karl H. Weed, Environmental Engineer for New York State Department of Environmental Conservation, to John L. Clark of the Palisades Interstate Park Commission, Ex. M. to Declaration of James A. Pardo, counsel for *United Water Defendants* ("Pardo Decl."), in Support of *United Water Defs. Mem.*

Defendants also argue that because UWNY considered litigation in connection with the 1989 contamination of its Sparkill 8 well, it must have been aware of its injuries based on MTBE contamination.⁸⁵ This evidence demonstrates that UWNY was aware of the availability of legal remedies for gasoline spills and that MTBE was a part of the 1989 spill, but it does not establish that UWNY knew of the hazards of MTBE at 9.4 ppb before the limitations date. In fact, the evidence of record suggests that gasoline, not MTBE, was UWNY's primary concern with the 1989 Sparkill 8 contamination.⁸⁶

⁸⁵ See *United Water* Defs. Mem. at 15 (citing December 2, 2005 Deposition of Donald Distanto, UWNY Engineering Manager, Ex. R to Pardo Decl., at 225). UWNY denies that it considered litigation based on *MTBE* contamination, but admits it considered litigation to remediate the released petroleum hydrocarbons. See *United Water's* Local Rule 56.1 Statement of Undisputed Facts ("UWNY 56.1") at ¶ 15.

⁸⁶ See November 27, 1989 Memorandum to File from Louis A. Briganti, Ex. E to Pardo Decl. (focusing on benzene contamination and noting that MTBE was also detected). See also Len Maniace, "Gas Storage Tanks Being Removed," undated newspaper article (apparently contemporaneous with closing of service station responsible for Sparkill 8 contamination), Ex. G to Pardo Decl., at NY-UWNYLAB-000000305 (noting the presence of benzene in groundwater and customer complaints of water that tasted like gasoline as a result of the Palisades Interstate Parkway service station gasoline spill).

However, UNWY's assertion that it "did not *begin* to perceive the risks of MTBE to groundwater before 2003" is questionable, at best.⁸⁷ Though public information on the hazards of MTBE was relatively scarce in the early 1980s, the record demonstrates that the amount and quality of such information increased through the 1990s and into this century.⁸⁸ If defendants prove to a jury

⁸⁷ UNWY Opp. at 2 (emphasis added). For example, despite the *suggestion* that UNWY had non-MTBE motives for removing Sparkill 8 from service, it is undisputed that UNWY detected MTBE at 9.4 ppb in that well in 1989 and removed it from service shortly thereafter. See February 23, 2006 Declaration of Donald Distanto, Ex. 10 to UNWY Opp. ("Distanto Decl."), at ¶ 13. If the trier of fact concludes that UNWY removed that well from service specifically based on concerns about MTBE, this fact would serve as evidence that UNWY knew as early as 1989 that MTBE was harmful at concentrations near 10 ppb, and the 1989 Sparkill 8 claim would be time-barred.

⁸⁸ See, e.g., March 1992 Risk Evaluation for Groundwater Exposure Pathway (report by Camp, Dresser & McKee, environmental consultants, commissioned by Northville Industries), Ex. 15 to *Suffolk County Condron Decl.*, at SCWA0000101-02 ("Since limited data from the eastern plume, and the literature available pertaining to MTBE and [another contaminant] indicate that they are not readily susceptible to biodegradation, they were simulated as conservative, non-decaying contaminants."); Minutes of November 13, 1996 Meeting of the LIGRI Advisory Council at SCWAPROIOS00002059 (suggesting that source of MTBE contamination is atmospheric and seeking research into biodegradation); March 1998 American Water Works Association Research Foundation ("AWWARF") Request for Proposals to develop a national database of MTBE concentrations, Ex. 14 to *City of New York Condron Decl.*, at NYC-0015653 (suggesting MTBE in surface waters could come from "a combination of boating activities and atmospheric washout in rain and snow," reviewing existing studies, noting "considerable uncertainty regarding [taste and odor] threshold levels," and proposing new study); 5/6/98 LIGRI Minutes at SCWAPROIOS00001999-2001 (showing knowledge that MTBE is a gasoline

that UWNY knew or should have known before November 10, 2000 that MTBE was hazardous at concentrations as low as 0.71 ppb, UWNY's claims based on contamination of its SV 1, SV 6, and Tallman 26 wells are time-barred.⁸⁹ (UWNY detected MTBE in SV 1 at 0.71 ppb on September 13, 1994, in SV 6 at 1.42 ppb on February 7, 1998, and in Tallman 26 at 2.88 ppb on February 4, 1999. None of these wells has had a detection within the limitations period.) Likewise, if defendants prove to a jury that UWNY knew or should have known MTBE to be hazardous at concentrations of 1.24 ppb before the limitations date, at least some of UWNY's claims for contamination of its Sparkill 8, SV 100, and Elmwood 66 wells are time-barred.⁹⁰

additive; suggesting it may arrive in groundwater from spills *or* atmospheric releases, has a higher solubility than other gasoline components, may be a carcinogen, affects taste and odor at low concentrations, and is slow to biodegrade; and noting that there is no movement to ban MTBE); January 19, 2000 email from Yves Mikol of the New York City Department of Environmental Protection, Ex. 14 to *City of New York* Condron Decl., at NYC-0017194 (forwarding AWWARF email listing MTBE study completed in 1992 and 2000 and studies to be completed in 2001 and 2002).

⁸⁹ See UWNY 56.1 at ¶ 20 (admitting the last detection of MTBE in Tallman 26 was on September 21, 1999).

⁹⁰ See 8/17/06 *United Water* SoL Chart (showing pre-limitations-date MTBE detections at levels of 1.24 ppb or higher in Sparkill 8, SV 100, and Elmwood 66, as well as post-limitations-date detections in these wells at various levels).

Second, even if some claims for contamination of these wells did accrue before the limitations date (and are thus time-barred), later detections could have arisen from new sources of contamination, resulting in timely claims. As discussed above, if a detection can be shown to be separate and distinct from prior contamination, it gives rise to a new injury, and a new claim accrues when UWNY knew that the presence of MTBE at the detected level was hazardous.

Several wells in this action could present such facts. UWNY wells Sparkill 8, SV 100, Tappan 16, New City 23, Elmwood 66, SV 99, Monsey 31, Blauvelt 15, Ramapo 85, and Ramapo 84 all have first detections before the limitations date. For example, if Ramapo 84 showed no MTBE detections between July and November 2000, its April 20, 2002 detection might present a new and timely claim. At this time, there is scant information in the record submitted to the Court as to detections other than the first and last detections.⁹¹

Defendants also point out that the first detection dates and levels provided by UWNY may not be accurate. UWNY has not yet been able to locate raw well-testing data for certain periods during 1991 to 1997.⁹² Defendants accuse

⁹¹ Further discovery will hopefully adduce such information, clarifying which MTBE detections are separate and distinct from prior contaminations.

⁹² Defendants initially stated that UWNY had not produced well-testing data for the entire 1991 to 1997 period, but later correspondence clarified that

UWNY of spoliation and urge this Court to infer that these missing results include MTBE detections before the limitations date.⁹³ The record does not warrant such an inference. No evidence suggests any intentional or reckless destruction,⁹⁴ nor

plaintiffs had been mistaken about the years for which such tests were conducted and had ultimately produced well-testing records for certain years in that range. *See* July 6, 2006 Letter to the Court from James A. Pardo (“7/6/06 Pardo Letter”), at 2 (noting that UWNY had not produced well-testing data for 1996, 1997, and parts of 1993); Undated Declaration of Sheng-Lu Soong, UWNJ Chief Chemist, Ex. A to 8/18/06 Clarke Letter (responding to 7/6/06 Pardo Letter and averring that despite her earlier testimony that UWNY began regular MTBE testing in 1991, such testing did not begin until late 1994).

As to the data that UWNY has not yet produced, defendants argue that plaintiff has failed to comply with its discovery obligations because it has not searched UWNJ’s Chemware database for responsive information. (UWNJ’s employees are the persons most familiar with UWNY’s testing procedures and records. *See* 12/9/05 Briganti Dep., Ex. C to Pardo Decl., at 25.) UWNY responds that it has searched an analogous Excel/Access database that contained the same information as the Chemware database. Defendants also assert that UWNY has not produced paper records that might contain sampling data. These missing records are *indexed* by the PerkinElmer database, but that database does not contain the sampling data defendants seek. UWNY does not assert that this information is duplicated elsewhere in analogous form.

⁹³ *See United Water Defs. Mem.* at 20 (“defendants are entitled to an adverse inference that MTBE was detected in those wells before the limitations date”).

⁹⁴ UWNJ’s employees have averred that the records were not intentionally destroyed, that they do not believe the records were destroyed at all, and that a search is underway to locate them. *See* March 27, 2006 Declaration of Sheng-Lu Soong, Ex. 10 to Greenwald Decl., at ¶¶ 9-11; March 27, 2006 Declaration of Keith Carnick, UWNJ Director of Water Quality Assurance, Ex. 10 to Greenwald Decl., at ¶¶ 5-10.

was the missing information subject to a preservation order or a common law duty to preserve. The earliest of the allegedly missing information would have been created twelve years prior to the earliest lawsuit, thus it is not at all unreasonable that it would not have been maintained. Even the latest of the missing information was created six years prior to the first lawsuit. Indeed, production of such information might be more beneficial to UWNY than detrimental: proof of MTBE detections during that time could support additional, possibly timely claims.⁹⁵

C. The *Suffolk County* Action

SCWA and the County filed their initial Summons with Complaint on August 19, 2002 in the New York State Supreme Court for Suffolk County. They named new defendants in each of the following pleadings: their Supplemental Summons, filed on October 9, 2002; their Second Supplemental Summons, filed on March 12, 2003; their Third Amended Complaint, filed on November 5, 2004;

⁹⁵ Such claims would be timely if UWNY had neither actual nor constructive knowledge of the hazards of MTBE at the detected levels before the limitations date.

and their Fourth Amended Complaint, filed on August 18, 2005.⁹⁶ Under section 214-c, the limitations periods began three years prior to those filings.

The *Suffolk County* defendants argue that plaintiffs suffered a “single, indivisible” injury: contamination of the groundwater in Suffolk County. They also argue that knowledge of the presence of MTBE is sufficient for the *Suffolk County* plaintiffs’ injury to accrue. Defendants therefore conclude that detections of MTBE in SCWA’s Samuel Street #4 well in 1989⁹⁷ and in the County’s water distribution system in February 1991 triggered a single limitations clock for all of plaintiffs’ claims.⁹⁸ But, as discussed above, there is no “single, indivisible injury” in the sense that plaintiffs’ property damage claims all stand or fall together. Plaintiffs’ claims based on early detections are indeed likely to be stale,⁹⁹ but subsequent detections in those wells (to the extent they are separate and distinct

⁹⁶ The dates on which the *Suffolk County* plaintiffs first named each defendant in their action are listed in Table 6, appended hereto. Their claims against the later-named Citgo and Valero entities will be measured against the date of an earlier filing because claims against these entities relate back to that earlier filing. *See infra* Part VIII.B and Table 6.

⁹⁷ *See* 2/13/07 *Suffolk County* SoL Chart.

⁹⁸ *See Suffolk County* Defs. Mem. at 1.

⁹⁹ It is *possible* that an early claim is not stale. Take, for example, a detection at 0.6 ppb in 1995. No evidence shows conclusively that plaintiffs knew before the limitations date that concentrations as low as 0.6 ppb would be harmful. (Indeed, a jury may find that such low concentrations are not/were not harmful.)

from a prior contamination), or in other wells, are not barred because plaintiffs failed to timely assert the earlier claims.¹⁰⁰

Plaintiffs' knowledge of the mere presence of MTBE in Suffolk County wells does not trigger the statute of limitations. As discussed earlier, a reasonable jury could find that SCWA and the County did not know their groundwater interests were affected by MTBE until well after they discovered its presence.¹⁰¹

Defendants argue that plaintiffs must have had sufficient knowledge of MTBE's hazards in order to be aware of claims arising from the Holbrook and Northville incidents.¹⁰² In 1992, SCWA sued a Sunoco affiliate based on the

¹⁰⁰ MTBE was detected in Samuel Street #4 at 29 ppb in January 1989, but SCWA also reports detections in the same well in November 2006. *See* 2/13/07 *Suffolk County* SoL Chart. Even if a trier of fact determined that SCWA knew that a 29 ppb detection was sufficient to time-bar claims arising from the 1989 detection, if that well showed low or no detections for some significant period between 1989 and 2006, the 2006 detection could give rise to a timely claim.

¹⁰¹ *See, e.g.*, February 17, 2007 Declaration of Michael LoGrande, Chairman of SCWA ("LoGrande Decl."), Ex. 1 to *Suffolk County* Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' Supplemental Motion for Summary Judgment Based on the Statute of Limitations ("SCWA Supp. Opp."), at ¶ 23 (stating that SCWA could not have known with certainty before a March 2000 EPA Notice of Intent to Eliminate MTBE from Gasoline that MTBE affected taste and odor at levels around 2 ppb).

¹⁰² *See Suffolk County* Defs. Mem. at 10-14.

4,000-gallon Holbrook gasoline spill; that lawsuit ended in a settlement in 1998.¹⁰³ Plaintiff SCWA also settled claims arising from a leak of over one million gallons of gasoline at Northville Terminal (the County denies it took part in this settlement).¹⁰⁴ While plaintiffs admit they knew MTBE was released in both spills, they argue that the earlier litigation and settlement were motivated by concerns about gasoline contamination in general, not MTBE specifically.¹⁰⁵ They claim that they were unaware of MTBE's hazards at that time and point out that no MTBE released in the Northville incident reached any of SCWA's production wells.¹⁰⁶ Further, there is evidence that plaintiffs were primarily, if not

¹⁰³ See November 3, 1992 Complaint in *Suffolk County Water Authority v. Oryx Energy Company et al.*, No. 30949-92 (N.Y. Sup. Ct.), Ex. 11 to *Suffolk County* Condron Decl., at 19; May 20, 1998 Settlement Agreement between SCWA and Defendants in that action, Ex. 13 to *Suffolk County* Condron Decl., at SCWA0006330.

¹⁰⁴ See *Suffolk County* Defendants' Local Rule 56.1 Statement of Undisputed Facts ("*Suffolk County* Defs. 56.1") at ¶ 42. Plaintiffs never filed suit for the Northville incident. See SCWA Opp. at 16.

¹⁰⁵ See SCWA 56.1 at ¶ 28. By analogy, defendants' position is that knowledge of the long-understood ill effects of eating beef bars subsequent claims based on the use of bovine growth hormone.

¹⁰⁶ See SCWA Opp. at 16 ("SCWA [in the Holbrook action] sued for removal of all these contaminants [benzene, toluene, xylenes, and MTBE] from the well field, without any regard to, or knowledge of, MTBE's particular threat to groundwater." As to Northville, "SCWA focused its concerns not upon MTBE, but on the removal of the gasoline generally.").

exclusively, concerned about other gasoline components.¹⁰⁷ Thus, the facts of the Northville and Holbrook incidents do not prove, as a matter of law, SCWA's knowledge of MTBE's hazards.

Defendants also suggest that SCWA's advocacy of a "total ban" on MTBE in New York shows it was aware of MTBE's harms as early as July 1999.¹⁰⁸ While it is undisputed that SCWA advocated a total ban at that time, this does not prove, as a matter of law, that it was aware of MTBE's harms at any particular concentration. It only shows that SCWA knew the source of MTBE contamination, that MTBE was harmful at some level, and that a ban would reduce the frequency and/or magnitude of MTBE detections in groundwater.¹⁰⁹

¹⁰⁷ See, e.g., March 19, 1991 Analytical Report of Contaminants at Holbrook Site, Ex. 12 to *Suffolk County* Condon Decl., at NY-CTYSUFF010704 (showing high levels of benzene, toluene, ethyl benzene, xylenes, and MTBE). BTEX (including benzene, toluene, xylenes, and ethyl benzene) has long been a known environmental hazard following a gasoline spill. See *supra* note 50.

¹⁰⁸ See July 30, 1999 SCWA Press Release, Ex. 4 to *Suffolk County* Condon Decl., at SCWA00001588.

¹⁰⁹ See *id.*; March 1, 2000 SCWA Testimony to United States House of Representatives Subcommittee on Health and Environment, Ex. 4 to *Suffolk County* Condon Decl., at SCWA0019293-94 ("Absent a prohibition on the use of MTBE in Suffolk County, the *potential* will always exist that MTBE will continue to degrade our water resources." (emphasis added)).

On this record, summary judgment based on the statute of limitations is not proper for any claim in the *Suffolk County* action. The most recent version of the *Suffolk County* plaintiffs' statute of limitations chart shows no pre-limitations-date detections of MTBE at levels above the MCL,¹¹⁰ and there is no undisputed evidence that those plaintiffs knew or should have known of any particular injury before the limitations date. For example, it is unclear when SCWA's claim accrued for its 1997 detection of MTBE at 3.1 ppb in its Woodchuck Hollow Road #1 well.¹¹¹ The record does not show a specific date by which SCWA knew or should have known MTBE was hazardous at 3.1 ppb. In December 1997, the EPA issued an Advisory stating that taste and odor were unlikely to be detected by most consumers at concentrations *below* 20-40 ppb.¹¹² That Advisory explained that the 20-40 ppb level was an estimate based on the EPA's review of several studies on MTBE taste and odor.¹¹³ Suffolk County was

¹¹⁰ See 2/13/07 *Suffolk County* SoL Chart.

¹¹¹ See *id.*

¹¹² See 1997 EPA Advisory at NY-CTSUFF024487.

¹¹³ See *id.* For example, a 1997 study conducted by Yvonne Shen on behalf of the Orange County (California) Water District indicated that some people were able to detect MTBE at levels as low as 2.5 ppb. See *Western States Petroleum Ass'n v. Department of Health Servs.*, 99 Cal. App. 4th 999, 1012 (3d Dist. 2002) (discussing the Shen study in greater detail in the context of a challenge to a California Department of Health Services regulation of MTBE in

certainly aware by January 2000 that “some consumers can detect [MTBE] in drinking water at concentrations as low as 2.5 parts per billion.”¹¹⁴ But in early 1998, the County appears to have relied on the EPA’s December 1997 Advisory.¹¹⁵

The County and SCWA are both in the water protection business, and are held to a high standard of constructive knowledge.¹¹⁶ By the late 1990s,

drinking water). The record does not show when the Shen study first became publicly available, but it is clear that by August 1998, a *summary* of the Shen study’s results was available on the EPA’s web site. *See* Steven A. Book, *MTBE In California Drinking Water*, dated March 1998, Ex. G to *Suffolk County Condron Supp. Decl.*, at SCWAPROIOS000001083 (slide show on EPA web site summarizing findings of several MTBE studies, printed on August 24, 1998 by George Proios of the Suffolk County Department of Health). The EPA web site’s summary of the Shen study’s results is somewhat inconsistent with the more extensive discussion of the study’s results in the *Western States Petroleum* decision. *See* 99 Cal. App. 4th at 1012.

¹¹⁴ 1/26/00 Ponturo Mem. at NY-CTYSUFF025318. A trier of fact must determine whether accrual is triggered by the County’s awareness that *some* consumers are able to taste or smell MTBE in water at certain levels.

¹¹⁵ *See* January 27, 1998 Memorandum from Paul Ponturo (“1/27/98 Ponturo Mem.”), Ex. 10 to *Suffolk County Condron Decl.*, at NY-CTYSUFF024005-06; 5/6/98 LIGRI Minutes, Attachment B to August 15, 2006 Letter to the Court from Peter Condron, at LIGRI000028.

¹¹⁶ MTBE’s hazards can be more easily imputed to these water-supplier plaintiffs than, for example, to an individual homeowner plaintiff. *See* October 12, 2000 SCWA Press Release, Ex. 4 to *Suffolk County Condron Decl.* (noting that SCWA is a leader in MTBE detection techniques and was one of the first to understand its sources). Numerous memoranda and emails indicate that the County and SCWA kept very current on information pertaining to MTBE detection, treatment, and hazards. *See, e.g.*, 3/9/01 Jones Letter at SCWA0019050 (“[SCWA] has been on the leading edge of MTBE detection and tracking.”);

plaintiffs had access to an array of studies on MTBE's properties and hazards, each study conducted according to a different method and reaching a somewhat different conclusion.¹¹⁷ Which of the available studies plaintiffs should have discovered through the exercise of reasonable diligence, whether plaintiffs determined or should have determined from those studies that MTBE concentrations of less than 20 ppb threatened the taste and odor of drinking water, and when plaintiffs made or should have made such a determination are all questions for the trier of fact.

D. Conclusions as to Plaintiffs' Property Damage Claims

Future discovery may reveal that additional claims are barred. As water providers, plaintiffs are likely to have had actual knowledge of MTBE's hazards soon after such information became available. The examples in the table below should provide guidance on the application of this Opinion so that as discovery continues with respect to additional wells, the parties can predict with some degree of certainty which of plaintiffs' claims will be barred.

March 2000 Suffolk County Department of Health Services MTBE Fact Sheet, Ex. 10 to *Suffolk County* Condrón Decl., at NY-CTYSUFF023918; 1/27/98 Ponturo Mem., at NY-CTYSUFF024005-06.

¹¹⁷ See, e.g., George Proios' MTBE file, Ex. G to *Suffolk County* Condrón Supp. Decl., at SCWAPROIOS000001082-85 (printout of website listing various studies and summarizing their methods and conclusions).

Table 3: Hypothetical Well Facts and Results

Well	Example Facts for Well	Result
A	First MTBE detection in 1997 at 50 ppb.	Barred.
B	First MTBE detection in 2002 at 50 ppb.	Not barred.
C	First MTBE detection in 1997 at 50 ppb; non-detect during 1999-2001; next MTBE detection in 2002 at 75 ppb after major MTBE release in 2002.	Barred as to injury for first detection. Not barred as to injury for 2002 detection if plaintiffs can show it to be separate and distinct from the prior injury.
D	First MTBE detection in 1997 at 50 ppb; continued detections during 1998-2002 between 40-60 ppb.	Entirely barred because plaintiffs are unlikely to be able to show separate and distinct injuries.
E	First MTBE detection in 1998 at 1.5 ppb; second MTBE detection in 2002 at 20 ppb.	To be resolved by trier of fact.
F	First MTBE detection in 1991 at 60 ppb; non-detect until second detection in 2002 at 60 ppb.	First detection to be resolved by trier of fact; second detection not barred.
G	Known MTBE release near well in 1999; well tested for MTBE beginning in 1992; first MTBE detection in 2001.	Not barred because plaintiffs suffered no actual injury until after the limitations date.

VI. NEW YORK GENERAL BUSINESS LAW § 349 CLAIMS

Section 349 is a consumer protection statute. It creates a private right of action for “any person who has been injured by reason of any violation of this section[,]” including “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state[.]”¹¹⁸

¹¹⁸ N.Y. Gen. Bus. Law § 349(h), (a). Section 349 is broader than common law fraud. *See Gaidon v. Guardian Life Ins. Co.*, 94 N.Y.2d 330, 330 (1999) (“*Gaidon I*”) (“Although a person’s actions may at once implicate both

Section 214(2) requires plaintiffs to file section 349 claims for damages within three years of accrual.¹¹⁹ Such claims accrue at the time plaintiff is injured.¹²⁰ No discovery rule is applicable to section 349 claims.¹²¹

A. Plaintiffs’ Section 349 Claims Accrued at the Same Time as Their Property Damage Claims

The pivotal question is when did plaintiffs suffer their injury. In *Gaidon II*, a class action alleging section 349 violations in the sale of life insurance policies, the New York Court of Appeals held that plaintiffs were first injured – and their section 349 claims accrued – when defendants failed to honor their representations to plaintiffs.¹²² Specifically, defendants sold “vanishing-premium” life insurance policies to plaintiffs based on representations that the

[section 349 and common law fraudulent inducement], General Business Law § 349 contemplates actionable conduct that does not necessarily rise to the level of fraud.”).

¹¹⁹ See *Gaidon v. Guardian Life Ins. Co.*, 96 N.Y.2d 201, 210 (2001) (“*Gaidon I*”).

¹²⁰ See *id.* (“accrual of a section 349(h) private right of action first occurs when plaintiff has been injured by a deceptive act or practice violating section 349” (citation omitted)).

¹²¹ See *Wender v. Gilberg Agency*, 716 N.Y.S.2d 40, 41-42 (1st Dep’t 2000) (“Plaintiff’s claims under General Business Law § 349, however, are time-barred as . . . the date of discovery rule is not applicable and cannot serve to extend [the] limitations period.” (citations omitted)).

¹²² See *Gaidon II*, 96 N.Y.2d at 211.

policies' dividends would cover the premium payments, requiring no additional payments from plaintiffs after a certain time. *Gaidon II* held that plaintiffs were injured for purposes of section 349 when defendants' representations proved false (*i.e.*, when plaintiffs were required to either make additional premium payments or face cancellation of their policies), rather than at the time plaintiffs could have known defendants' representations might have been false (*i.e.*, when plaintiffs received the policies, which explicitly required premium payments and explicitly did not guarantee dividends).¹²³

Here, plaintiffs offer evidence that at least some defendants represented (or industry groups represented on their behalf) that MTBE was safe for the environment, had low solubility in water, and would not impact the taste or odor of drinking water at low levels.¹²⁴ Applying the *Gaidon II* rationale, plaintiffs here were injured for purposes of section 349 when they learned – contrary to defendants' representations – that MTBE was present in their wells at a

¹²³ *See id.* at 211-12 (“plaintiffs suffered no measurable damage until the point in time when those expectations were actually not met”).

¹²⁴ *See, e.g.*, April 3, 1993 Memorandum titled: “ARCO Chemical Company MTBE Odor/Health Effects Response Team,” Ex. 2 to SCWA Opp., at LAN0380179-85.

level plaintiffs knew or should have known was hazardous.¹²⁵ As a result, plaintiffs' section 349 claims accrue at the same time as their tort claims.

B. The Continuing Tort/Continuing Violation Doctrine Does Not Apply to the Section 349 Claims Presented By These Plaintiffs

Plaintiffs argue that any time-barred section 349 claims are saved by the common law doctrine referred to, seemingly interchangeably, as the continuing tort, continuing wrong, or continuing violation doctrine. But that doctrine is not applicable to all claims.¹²⁶ Plaintiffs rely primarily on *Shelton v. Elite Model Management, Inc.*, a lower court decision, which held in dicta that the continuing violation doctrine *may* be applied to section 349 claims.¹²⁷ New York law appears unsettled on this point. The parties did not cite, nor could the Court find, controlling authority on whether the doctrine is available for section 349 claims.

¹²⁵ Thus, plaintiffs' section 349 claims accrued at the same time as their tort claims. *See infra* Part IV.D-F.

¹²⁶ *See Leonhard v. United States*, 633 F.2d 599, 613 (2d Cir. 1980) (“[d]espite the general principle that a cause of action accrues when the wrong is done, regardless of when it is discovered, *certain* wrongs are considered to be continuing wrongs, and the statute of limitations, therefore, runs from the commission of the last wrongful act.” (emphasis added; citations omitted)).

¹²⁷ *See* 812 N.Y.S.2d 745, 757-58 (Sup. Ct. N.Y. Co. 2005). It is beyond cavil that the *Shelton* court's statement that the continuing violation doctrine is applicable to section 349 claims was dicta because the court dismissed plaintiffs' section 349 claims on other grounds. *See id.* at 758.

In any event, I need not rule on the doctrine's applicability to plaintiffs' section 349 claims because plaintiffs have failed to demonstrate requisite predicate facts. The continuing wrong doctrine does not apply unless a defendant's wrongful acts continue after the limitations period has begun.¹²⁸ In *Selkirk v. New York*, a defamation case, the court refused to apply the doctrine because defendant's allegedly defamatory acts had ceased before the limitations period began.¹²⁹ Similarly, in *Leonhard v. United States*, where plaintiff brought a civil rights action accusing the government of wrongfully separating him from his children, the court held that the doctrine did not apply because plaintiff failed to show that his alleged harm was caused by affirmative acts the defendants committed during the limitations period.¹³⁰

¹²⁸ See *Neufeld v. Neufeld*, 910 F. Supp. 977, 985 (S.D.N.Y. 1996); *Selkirk v. State of New York*, 671 N.Y.S.2d 824, 826 (3d Dep't 1998).

¹²⁹ See *Selkirk*, 671 N.Y.S.2d at 826 ("Claimants maintain that this doctrine should be invoked here because they have continued to suffer damages from the date of the State's wrongful acts. This argument does not support the application of the doctrine since *it may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct.*" (emphasis added; citations omitted)).

¹³⁰ See *Leonhard*, 633 F.2d at 613-14.

Plaintiffs' reliance on *Shelton* and *Neufeld* is misplaced because those cases are easily distinguishable.¹³¹ In both cases, defendants' wrongful conduct had continued throughout a portion of the relevant limitations period. Specifically, in *Neufeld*, where plaintiffs alleged intentional infliction of emotional distress ("IIED"), defendant's actions (abuse and harassment) during the limitations period gave rise to independently-actionable IIED claims.¹³² In *Shelton*, a section 349 case, because defendants' misrepresentations continued during the limitations period, the court found that the continuing violation doctrine would have applied and saved plaintiffs' time-barred claims (had those claims not been dismissed for other reasons).¹³³

Plaintiffs offer no evidence that defendants made any affirmative misrepresentations after 1999 (the earliest of the limitations dates in these actions). As a result, even assuming the doctrine could be applied to section 349 claims, the record in these actions does not support its application here. It follows that any

¹³¹ See *Shelton*, 812 N.Y.S.2d at 757-58 (continuing violation doctrine applicable to section 349 claims); *Neufeld*, 910 F. Supp. at 985 (continuing wrong doctrine applicable to intentional infliction of emotional distress claims).

¹³² See *Neufeld*, 910 F. Supp. at 985 ("Because many of [defendants'] 'last actionable acts' occurred within the statute of limitations period, the action is not time-barred.").

¹³³ See *Shelton*, 812 N.Y.S.2d at 756-58.

section 349 claims that accrued before the limitations date are barred on statute of limitations grounds.

VII. NEW YORK NAVIGATION LAW ARTICLE 12 CLAIMS

Article 12 is entitled Oil Spill Prevention, Control, and Compensation; it is commonly referred to as the “Oil Spill Act” and the “Oil Spill Law.” Article 12 defines and prohibits the discharge of petroleum, imposes an obligation on dischargers to “immediately undertake to contain” discharged petroleum, and imposes strict liability against dischargers for, *inter alia*, “all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section[.]”¹³⁴

Each of these actions includes an Article 12 claim. Defendants move for summary judgment on these claims on the following grounds: (1) these claims are for property damage and are time-barred by the three-year statute of limitations; (2) plaintiffs have not proven that defendants are dischargers of petroleum; and (3) plaintiffs have not proven that they incurred remediation costs. For the reasons discussed below, summary judgment is denied as to the Article 12 claims.

¹³⁴ *Id.* §§ 172(8); 173; 176(1); 181(1).

A. Plaintiffs May Assert Both Indemnity and Damages Claims

Article 12 permits claims for both property damage and indemnity, but a different statute of limitations and accrual rule applies to each type of claim.¹³⁵ Claims for property damage caused by petroleum spills are subject to the three-year statute of limitations of section 214-c(2), accruing at the time the injury is discovered. Claims for indemnification for cleanup and removal costs are governed by the six-year statute of limitations of section 213(2), accruing when a plaintiff incurs a loss by performing an obligation it claims a defendant should have performed. Each payment of remediation costs for which a petroleum discharger is responsible incurs a new loss for a plaintiff, creating a new indemnity claim with its own new statute of limitations (it *does not*, however, reset the clock on an already-expired indemnity claim).¹³⁶

¹³⁵ Section 181(5) states that “any injured person” may assert a claim “for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section[.]” N.Y. Nav. Law § 181(5). *See also State of New York v. Stewart’s Ice Cream Co., Inc.*, 64 N.Y.2d 83, 88 (1984) (applying section 213(2) to plaintiff’s Article 12 claims for indemnification of remediation costs); *AL Tech Specialty Steel Corp. v. Allegheny Int’l Credit Corp.*, 104 F.3d 601, 610-11 (3d Cir. 1997) (same); *Town of Guilderland v. Texaco Ref. and Mktg., Inc.*, 552 N.Y.S.2d 704, 706 (3d Dep’t 1990) (applying section 214(4) to plaintiff’s Article 12 claims for property damage caused by an explosion of spilled gasoline).

¹³⁶ *See Stewart’s Ice Cream*, 64 N.Y.2d at 88-89 (holding that the state’s Article 12 cost-recovery claims sounded in indemnity and thus accrued

Defendants argue, based on their reading of *New York v. Stewart's Ice Cream*, that only the state or private parties acting pursuant to DEC orders are entitled to assert indemnity claims under Article 12.¹³⁷ This argument is wrong, however, because the *Stewart's Ice Cream* court only held that under the law of restitution, the state's claims were properly characterized as claims for indemnity.¹³⁸

individually upon each expenditure by plaintiff). *See also AL Tech*, 104 F.3d at 611 (“[I]t is settled law in New York that an action for indemnity or contribution does not generally accrue until the payment is made by the party seeking recovery. [Plaintiff] may thus seek to recover cleanup costs under the Oil Spill Act that it incurred within six years prior to its filing To the extent that [plaintiff] is seeking to recover for future remediation costs, the limitations period has not yet begun.” (citation omitted)).

¹³⁷ *See City of New York Defendants' Reply* at 7-8 (“the six-year statute applies only to Navigation Law claims made by the State for money expended from the Environmental Protection and Spill Compensation fund, or where a private party seeks costs incurred pursuant to a DEC-ordered cleanup.” (emphasis added)).

¹³⁸ *See Stewart's Ice Cream*, 64 N.Y.2d at 88. Defendants also rely on *Town of Guilderland*, where the court held that a municipality's Article 12 claim for damage arising from an *explosion* caused by gasoline fumes emanating from discharged gasoline was not a remediation-cost-recovery claim, but a damages claim. *See United Water Defs. Mem.* at 21 (citing *Town of Guilderland*, 552 N.Y.S.2d at 706). Here, plaintiffs' costs were incurred in *cleanup and removal* of petroleum, and thus give rise to claims for indemnity, not property damage.

Several cases following *Stewart's Ice Cream* have found that a private plaintiff can seek restitution, without any discussion of whether plaintiff was ordered to remediate by the DEC.¹³⁹ In addition to allowing cost recovery by the state and by private parties who have been ordered by the DEC to remediate, Article 12 in fact also allows cost recovery by political subdivisions of the state and any private party who acts with DEC approval.¹⁴⁰

Plaintiffs allege that they performed obligations owed by defendants and seek indemnity for the costs incurred in performance of those obligations. If defendants are indeed petroleum dischargers, then they are obligated to remediate such discharges.¹⁴¹ If plaintiffs paid for or undertook remediation of those spills, then plaintiffs have performed an obligation on defendants' behalf. It would be

¹³⁹ See, e.g., *AL Tech*, 104 F.3d at 610-11; *Bologna v. Kerr-McGee Corp.*, 95 F. Supp. 2d 197, 204-05 (S.D.N.Y. 2000). As discussed below, while private plaintiffs must prove the costs they incurred, nothing in *Stewart's Ice Cream* suggests that private plaintiffs' ability to recover under a theory of indemnity is conditioned on a DEC-ordered cleanup. Nonetheless, DEC approval is required to recover cleanup and removal costs. See *infra* Part VII.D.

¹⁴⁰ Article 12 invites efforts to remediate: "Nothing in [section 176] is intended to preclude cleanup and removal by any person threatened by such discharges, who, as soon as is reasonably possible, coordinates and obtains approval for such actions with ongoing state or federal operations and appropriate state and federal authorities" N.Y. Nav. Law § 176(7)(a).

¹⁴¹ See N.Y. Nav. Law § 176(1).

unjust to allow defendants to shift the costs of remediation – fairly attributable to defendants – onto plaintiffs. These conditions are sufficient under New York law to establish a contract implied in law, giving rise to a claim for indemnity.¹⁴²

B. Plaintiffs Are Able to Show that Defendants Are Responsible for Petroleum Discharges

To prevail on their Article 12 claims, plaintiffs must prove to a jury that one or more defendants is at least partially responsible for some discharge of petroleum that a plaintiff paid to remediate.¹⁴³ It is undisputed that many of the defendants supplied gasoline to plaintiffs’ relevant geographic areas and that petroleum discharges have occurred prior to the limitations period, including one spill of about one million gallons of gasoline.¹⁴⁴ Moreover, because Article 12

¹⁴² See *Stewart’s Ice Cream*, 64 N.Y.2d at 88. Nonetheless, as discussed *infra* at Part VII.D, section 172(5) requires plaintiffs UWNV and SCWA to show that DEC “approved” of its actions in order to proceed on its Article 12 claims.

¹⁴³ Plaintiffs must show that a defendant is responsible for a “discharge,” defined as “any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters” N.Y. Nav. Law § 172(8).

¹⁴⁴ See, e.g., *Suffolk County Defs.* 56.1 and SCWA 56.1 at ¶¶ 28, 38, 41; December 29, 2004 Declaration of James J. Dargan III, Employee in Defendant Motiva Enterprises LLC’s Supply Operations Department, Ex. E to Pejan Decl., at 26 (listing three stations in Suffolk County to which Motiva directly delivers gasoline).

imposes strict liability on petroleum dischargers, plaintiffs' proof need not be elaborate.¹⁴⁵ At the close of discovery, and prior to trial, plaintiffs will be required to submit offers of proof as to each defendant sued under Article 12, that it discharged gasoline in the relevant area at the relevant time.

C. Plaintiffs Are Able to Show the Costs They Incurred

Defendants also argue that plaintiffs fail to show the costs they allegedly incurred for remediation. However, UWNY specifically identifies such costs: "In 2002, UWNY expended \$860,000.00 for construction of a treatment facility to remove MTBE contamination from the Tallman 26 well."¹⁴⁶ Both SCWA and Suffolk County state that they "[have] spent, and [are] expected to spend in the future, significant sums of money in additional monitoring, testing,

¹⁴⁵ See *Fuchs & Bergh, Inc. v. Lance Enters., Inc.*, 802 N.Y.S.2d 749, 750 (2d Dep't 2005) ("plaintiffs made a prima facie showing of entitlement to judgment as a matter of law [on their Article 12 claims] by demonstrating that the defendants [fuel companies] overfilled one of the plaintiffs' two oil tanks and discharged oil onto the plaintiffs' premises").

¹⁴⁶ Distant Decl. at ¶ 8. See also *id.* at ¶¶ 6, 9.

and treatment of water contaminated with MTBE.”¹⁴⁷ Indeed, defendants admit that the City incurred remediation and monitoring costs.¹⁴⁸

D. UWNY and SCWA Must Show DEC Approval

Section 172(5) of the Navigation Law defines “cleanup and removal costs” to mean “all costs associated with the cleanup and removal of a discharge . . . incurred by the state or its political subdivisions or their agents or any person *with approval of the department [DEC]*.”¹⁴⁹ This section permits recovery of any remediation costs incurred by political subdivisions of the state, including those of the City of New York and Suffolk County. But for a plaintiff who is not the state or a political subdivision or agent of the state, DEC approval is required to permit a plaintiff’s costs to qualify as recoverable cleanup and removal costs under Article 12.¹⁵⁰ Accordingly, UWNY and SCWA, which are

¹⁴⁷ LoGrande Decl. at ¶ 34; February 13, 2007 Declaration of Paul Ponturo, Ex. 2 to SCWA Supp. Opp., at ¶ 24. Investigation and monitoring costs are among those costs that may be recovered under Article 12. *See State of New York v. Neill*, 795 N.Y.S.2d 355 (3d Dep’t 2005), *appeal dismissed*, 5 N.Y.3d 823 (2005).

¹⁴⁸ See *City of New York* Defs. 56.1 at ¶¶ 12, 16, 17, 19, 20.

¹⁴⁹ N.Y. Nav. Law § 172(5) (McKinney 2004) (emphasis added).

¹⁵⁰ *See Bologna*, 95 F. Supp. 2d at 203-04 (quoting N.Y. Nav. Law § 172(5)).

not political subdivisions or agents of the state,¹⁵¹ must show DEC approval for their remediation costs to qualify as cleanup and removal costs.¹⁵²

In sum, all plaintiffs may assert damage *and* indemnity claims under Article 12. Those claims that seek to recover cleanup and removal costs actually incurred by a plaintiff in the remediation of a petroleum discharge attributable to a defendant are claims for indemnity. Those claims are therefore subject to section 213(2)'s six-year statute of limitations. The indemnity claims accrue at the time plaintiff incurs a remediation cost, and a new and independent indemnity claim accrues *each* time a plaintiff incurs such a cost.

Plaintiffs' Article 12 claims that seek damages for injuries to property caused by a petroleum discharge attributable to a defendant are claims for damages. Such claims include claims for injury to property, claims for diminution

¹⁵¹ UWNY's Complaint makes clear that it is a private entity. *See United Water* Third Am. Compl. at ¶ 7. SCWA describes itself as a "self-supporting, public benefit corporation." *Suffolk County* Compl. at ¶ 8.

¹⁵² Section 172(5) does not specify how or at what time a private plaintiff should obtain DEC approval. Explicit approval before remediation costs were incurred would clearly satisfy the statute's requirement, but other facts may suffice. As a remedial statute, Article 12 should be liberally construed. *See 145 Kisco Ave. Corp. v. Dufner Enters., Inc.*, 604 N.Y.S.2d 963 (2d Dep't 1993). Here, the remediation was undertaken by expert, government-regulated water providers. Accordingly, if DEC was notified of plaintiffs' remediation efforts and took no action, its approval is implied.

of property value, and claims for business losses. These damages claims are subject to section 214-c(2)'s three-year statute of limitations. Like plaintiffs' tort claims, these Article 12 property damage claims accrued at the time of the plaintiff's actual or constructive discovery (whichever came first) of its injury. To avoid the time bar on their Article 12 damages claims, plaintiffs must show that such injuries occurred *after* the limitations period began, and that they are separate and distinct from injuries that occurred *before* the limitations period.

VIII. SUFFOLK COUNTY PLAINTIFFS' ARGUMENTS REGARDING LATE-ADDED DEFENDANTS

A. *Suffolk County* Plaintiffs Have Not Shown That Equitable Estoppel Is Warranted

Suffolk County plaintiffs filed their initial complaint on August 19, 2002, and named additional defendants (the "Late-Added" defendants) in successive amended complaints, the last of which was filed on August 18, 2005.¹⁵³ The Late-Added defendants submitted joinders to the *Suffolk County* statute of limitations motion in which they argue that because plaintiffs named them significantly later than the other defendants, the limitations motion – as applied to Late-Added defendants – should be analyzed based on the later dates on which

¹⁵³ See *supra* Table 1.

they were named.¹⁵⁴ Plaintiffs respond that the limitations analysis against the Late-Added defendants should be no different than for the other defendants. Plaintiffs argue that under the doctrine of equitable estoppel, their failure to timely name some defendants is excused by the complexity of New York’s gasoline market, the removal of their action to federal court, and defendants’ misrepresentations.¹⁵⁵

“Under New York law, the doctrines of equitable tolling or equitable estoppel ‘may be invoked to defeat a statute of limitations defense when the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action.’”¹⁵⁶

The elements of estoppel are with respect to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to [it]self: (1) lack of knowledge of the true facts; (2) reliance upon

¹⁵⁴ See Joinder By Late-Added Defendants to Defendants’ Supplemental Reply Memorandum in Support of [Defendants’] Motion for Summary Judgment Based on the Statute of Limitations, at 3.

¹⁵⁵ See *Suffolk County Plaintiffs’ Statute of Limitations Sur-Reply Regarding Equitable Tolling*, dated March 27, 2007, at 2-3.

¹⁵⁶ *Abbas v. Dixon*, 480 F.3d 636, 642 (2d Cir. 2007) (quoting *Doe v. Holy See (State of Vatican City)*, 793 N.Y.S.2d 565, 568 (3d Dep’t 2005)).

the conduct of the party estopped; and (3) a prejudicial change in [its] position¹⁵⁷

Plaintiffs have not shown that they were induced by fraud, misrepresentations, or deception to refrain from filing a timely action. Nor have plaintiffs shown that any defendant made false representations or concealed material facts. The complexity of the New York gasoline market does not establish such conduct. Neither does any delay that plaintiffs attribute to their involuntary removal to federal court. Accordingly, the limitations dates for claims against a defendant – including the Late-Added defendants – shall be calculated from the date that defendant was sued.¹⁵⁸ For example, the Irving Oil defendants were first sued on August 18, 2005. Property damage and indemnity claims are subject to respective three- and six-year limitations periods. Therefore, the limitations dates for claims against the Irving Oil defendants are August 18, 2002 for property damage claims and August 18, 1999 for indemnity claims and claims seeking equitable relief.

¹⁵⁷ *Smith v. Smith*, 830 F.2d 11, 12 (2d Cir. 1987). *Accord Abercrombie v. Andrew College*, 438 F. Supp. 2d 243, 265 (S.D.N.Y. 2006).

¹⁵⁸ In cases where claims against a later-named defendant relate back to a claim in an earlier complaint, the later-named defendant will be treated as having been named in the earlier complaint for statute of limitations purposes. *See infra* Part VIII.B.

B. *Suffolk County Plaintiffs’ Claims Against the Later-Added Citgo and Valero Entities Relate Back to Claims Against Affiliated, Earlier-Named Entities*

Plaintiffs argue that even if the Court finds that estoppel is not warranted, under the relation-back doctrine, certain later-added Citgo and Valero defendants should be treated as having been named in an earlier complaint.¹⁵⁹

Rule 15(c) provides that an amendment to change the parties against whom a claim is asserted “relates back to the original pleading” if three conditions are met: (1) “the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading;” (2) “within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment . . . has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits;” and (3) within this same period, this party “knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.”¹⁶⁰

Plaintiffs SCWA and Suffolk County named Citgo Petroleum Corporation in their October 9, 2002 First Amended Complaint, and later named Citgo Refining and Chemical Company LP and PDV Midwest Refining LLC in

¹⁵⁹ See *Suffolk County Plaintiffs’ Sur-Reply In Response to Joinder by Late-Added Defendants’ Supplemental Reply Memorandum In Support of [Their] Motion for Summary Judgment Based on the Statute of Limitations*, dated March 7, 2007 (“SCWA Joinder Sur-Reply”), at 5-7.

¹⁶⁰ *Ish Yerushalayim v. United States*, 374 F.3d 89, 91 (2d Cir. 2004) (quoting Fed. R. Civ. P. 15(c); citations omitted).

their November 5, 2004 Third Amended Complaint.¹⁶¹ These three “Citgo entities” are related to one another, and are all represented by the firm of Eimer, Stahl, Klevorn & Solberg LLP.¹⁶² Similarly, SCWA and Suffolk County named Valero Marketing and Supply Company in their October 9, 2002 First Amended Complaint, and later named Valero Energy Corporation, Valero Refining Company, and Valero Refining and Marketing Company in their November 5, 2004 Third Amended Complaint.¹⁶³ These four “Valero entities” are also related to one another, and are all represented by the firm of Bracewell & Giuliani LLP.¹⁶⁴

Plaintiffs’ allegations have remained essentially the same since their initial Complaint. Plaintiffs alleged, and continue to allege, that defendants manufactured, distributed, or sold products containing MTBE that were consumed

¹⁶¹ See SCWA 56.1 at ¶ 7.

¹⁶² See Citgo Petroleum Corp., Registration of Securities in A Business-Combination Transaction (SEC Form S-4 filed January 18, 2005), Ex. 5 to SCWA Joinder Sur-Reply, at EX-21.1 (Citgo Petroleum Corporation is a parent to the later-named Citgo entities).

¹⁶³ See SCWA 56.1 at ¶ 7.

¹⁶⁴ See Valero Energy Corp., Annual Report (SEC Form 10-K, filed February 27, 2007), available at <http://www.sec.gov>, at EX-21.01 (Valero Energy Corporation is a parent to the other later-named Valero entities and to the earlier-named Valero Marketing and Supply Company).

in the Suffolk County market, and further allege that defendants did so with culpable knowledge of MTBE's potential environmental impact.

The later-named Citgo and Valero entities are not prejudiced by their later addition to this action. They were on notice of potential suit when their affiliates were named in the First Amended Complaint, which alleged facts and causes of action very similar to those in the Third Amended Complaint (in which the later-named Citgo and Valero entities were first named). Moreover, their common counsel should have made the related entities aware of the action.

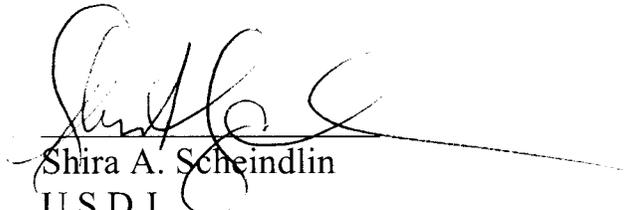
Therefore, SCWA's and Suffolk County's claims against the later-added Citgo and Valero entities relate back to the claims asserted in their October 9, 2002 First Amended Complaint. Accordingly, these entities may not raise a limitations defense against claims in the *Suffolk County* action that were timely as of October 9, 2002.¹⁶⁵

¹⁶⁵ United Water and the City did not make relation-back arguments as to any defendants, but for the same reasons that relation-back is appropriate as to the Citgo and Valero entities in the *Suffolk County* action, it is appropriate as to those entities in the *United Water* and *City of New York* actions. Accordingly, in the *United Water* action, claims against later-named Citgo and Valero entities relate back to the naming – in the *United Water* action – of the first-named Citgo entity and first-named Valero entity, respectively. Likewise, claims against later-named Citgo and Valero entities in the *City of New York* action relate back to the filing in which a related entity was first named in that action. *See infra* Tables 4 & 5.

IX. CONCLUSION

For the foregoing reasons, defendants' motions in the above-captioned actions are each denied in part and granted in part. The Clerk of the Court is directed to close these motions (numbers 891, 907, 934, 959, 962, 963, 964, and 1410 on the docket sheet).

SO ORDERED:



Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
June 4, 2007

Table 4: Dates on Which *City of New York* Defendants Were First Named¹⁶⁶

City of New York Defendant	First Named in City of New York Action		
	In Doc.	Filed On	In Court
Amerada Hess Corporation	SWN	10/31/03	Sup. Ct. Queens Co.
Atlantic Richfield Company	SWN	10/31/03	Sup. Ct. Queens Co.
BP Amoco Corporation	SWN	10/31/03	Sup. Ct. Queens Co.
Chevron Texaco Corporation	SWN	10/31/03	Sup. Ct. Queens Co.
Chevron USA Inc.	SWN	10/31/03	Sup. Ct. Queens Co.
Citgo Petroleum Corporation	SWN	10/31/03	Sup. Ct. Queens Co.
Coastal Corporation d/b/a Coastal Oil New York, Inc.	SWN	10/31/03	Sup. Ct. Queens Co.
Conoco Phlllips Company	SWN	10/31/03	Sup. Ct. Queens Co.
El Paso Merchant Energy-Petroleum Company	SWN	10/31/03	Sup. Ct. Queens Co.
Exxonmobil Corporation	SWN	10/31/03	Sup. Ct. Queens Co.
Exxonmobil Oil Corporation	SWN	10/31/03	Sup. Ct. Queens Co.
Gulf Oil Limited Partnership	SWN	10/31/03	Sup. Ct. Queens Co.
Irving Oil Corporation	SWN	10/31/03	Sup. Ct. Queens Co.
Irving Oil Limited	SWN	10/31/03	Sup. Ct. Queens Co.
Lyondell Chemical Company	SWN	10/31/03	Sup. Ct. Queens Co.
Motiva Enterprises, LLC	SWN	10/31/03	Sup. Ct. Queens Co.
Shell Oil Company	SWN	10/31/03	Sup. Ct. Queens Co.
Statoil Marketing and Trading (US) Inc.	SWN	10/31/03	Sup. Ct. Queens Co.
Sunoco, Inc.	SWN	10/31/03	Sup. Ct. Queens Co.
Sunoco, Inc. (R&M)	SWN	10/31/03	Sup. Ct. Queens Co.
Texaco Refining and Marketing, Inc.	SWN	10/31/03	Sup. Ct. Queens Co.
Tosco Corporation	SWN	10/31/03	Sup. Ct. Queens Co.
Tosco Refining Company, Inc	SWN	10/31/03	Sup. Ct. Queens Co.
Ultramar Energy, Inc.	SWN	10/31/03	Sup. Ct. Queens Co.
Ultramar Limited	SWN	10/31/03	Sup. Ct. Queens Co.
United Refining Company	SWN	10/31/03	Sup. Ct. Queens Co.
Unocal Corporation	SWN	10/31/03	Sup. Ct. Queens Co.
Valero Energy Corporation	SWN	10/31/03	Sup. Ct. Queens Co.

¹⁶⁶ In the *City of New York* action, the timeliness of claims against the later-named Citgo and Valero entities will be measured from October 31, 2003, the date on which the City first named Citgo Petroleum Corporation and Valero Energy Corporation. *See supra* Part VIII.B.

In Tables 4, 5, and 6, the following abbreviations designate documents in which defendants were first named: SWN - Summons with Notice; OC - Original Complaint; [N]AC - Nth Amended Complaint.

<i>City of New York Defendant</i>	First Named in <i>City of New York</i> Action		
	In Doc.	Filed On	In Court
Valero Marketing and Supply Company Does (1-100 in SWN; 1-87 in OC; 1-77 in 2AC)	SWN	10/31/03	Sup. Ct. Queens Co.
BP America, Inc.	OC	2/26/04	Sup. Ct. Queens Co.
BP Products North America, Inc.	OC	2/26/04	Sup. Ct. Queens Co.
Crown Central Petroleum Corporation	OC	2/26/04	Sup. Ct. Queens Co.
Equilon Enterprises LLC	OC	2/26/04	Sup. Ct. Queens Co.
Getty Petroleum Marketing Inc.	OC	2/26/04	Sup. Ct. Queens Co.
Koch Industries, Inc.	OC	2/26/04	Sup. Ct. Queens Co.
Marathon Ashland Petroleum LLC	OC	2/26/04	Sup. Ct. Queens Co.
Marathon Oil Company	OC	2/26/04	Sup. Ct. Queens Co.
Mobil Oil Corporation	OC	2/26/04	Sup. Ct. Queens Co.
The Premcor Refining Group, Inc.	OC	2/26/04	Sup. Ct. Queens Co.
Shell Trading (US) Company	OC	2/26/04	Sup. Ct. Queens Co.
Texaco, Inc.	OC	2/26/04	Sup. Ct. Queens Co.
Valero Refining and Marketing	OC	2/26/04	Sup. Ct. Queens Co.
BP Amoco Chemical Company, Inc.	2AC	12/10/04	S.D.N.Y.
Citgo Refining and Chemical Company, LP	2AC	12/10/04	S.D.N.Y.
Costal Eagle Point Oil Company	2AC	12/10/04	S.D.N.Y.
Duke Energy	2AC	12/10/04	S.D.N.Y.
Equistar Chemicals, LP	2AC	12/10/04	S.D.N.Y.
Flint Hills Resources, LP	2AC	12/10/04	S.D.N.Y.
George E. Warren Corporation	2AC	12/10/04	S.D.N.Y.
Giant Yorktown, Inc.	2AC	12/10/04	S.D.N.Y.
Lyondell-Citgo Refining, LP	2AC	12/10/04	S.D.N.Y.
Mobil Corporation	2AC	12/10/04	S.D.N.Y.
Shell Oil Products Company LLC	2AC	12/10/04	S.D.N.Y.
TRMI Holdings Inc.	2AC	12/10/04	S.D.N.Y.
Vitol S.A.	2AC	12/10/04	S.D.N.Y.

Table 5: Dates on Which *United Water* Defendants Were First Named¹⁶⁷

<i>United Water</i> Defendant	First Named in <i>United Water</i> Action		
	In Doc.	On Date	In Court
Amerada Hess Corporation	SWN	11/10/03	Sup. Ct. Rockland Co.
Atlantic Richfield Company	SWN	11/10/03	Sup. Ct. Rockland Co.
BP America	SWN	11/10/03	Sup. Ct. Rockland Co.
BP Amoco Chemical Company	SWN	11/10/03	Sup. Ct. Rockland Co.
BP Company North America, Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
BP Corporation North America, Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
BP Global Special Products (America), Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
BP Products North America, Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
BP Products North Americas, Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
Chevron U.S.A., Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
Chevron Texaco Corporation	SWN	11/10/03	Sup. Ct. Rockland Co.
Citgo Petroleum Corporation	SWN	11/10/03	Sup. Ct. Rockland Co.
Citgo Refining and Chemical[s] Company, LP	SWN	11/10/03	Sup. Ct. Rockland Co.
Coastal Eagle Point Oil Company	SWN	11/10/03	Sup. Ct. Rockland Co.
Coastal Mobile Refining Company, LP	SWN	11/10/03	Sup. Ct. Rockland Co.
Conoco Phillips Company	SWN	11/10/03	Sup. Ct. Rockland Co.
Crown Central Petroleum Corporation	SWN	11/10/03	Sup. Ct. Rockland Co.
El Paso CGP Company	SWN	11/10/03	Sup. Ct. Rockland Co.
El Paso Corporation	SWN	11/10/03	Sup. Ct. Rockland Co.
El Paso Merchant Energy-Petroleum Company	SWN	11/10/03	Sup. Ct. Rockland Co.
Equilon Enterprises, LLC	SWN	11/10/03	Sup. Ct. Rockland Co.
Exxonmobil Chemical Company, Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
Exxonmobil Corporation	SWN	11/10/03	Sup. Ct. Rockland Co.
Exxonmobil Oil Corporation	SWN	11/10/03	Sup. Ct. Rockland Co.
Getty Petroleum Marketing, Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
Getty Properties Corporation	SWN	11/10/03	Sup. Ct. Rockland Co.
Gulf Oil, LP	SWN	11/10/03	Sup. Ct. Rockland Co.
Koch Industries, Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
Lyondell Chemical Company	SWN	11/10/03	Sup. Ct. Rockland Co.
Marathon Ashland Petroleum, LLC	SWN	11/10/03	Sup. Ct. Rockland Co.
Marathon Oil Company	SWN	11/10/03	Sup. Ct. Rockland Co.

¹⁶⁷ In the *United Water* action, the timeliness of claims against the later-named Citgo and Valero entities will be measured from November 10, 2003, the date on which UWNY first named Citgo Petroleum Corporation and Valero Energy Corporation. *See supra* Part VIII.B.

<i>United Water Defendant</i>	First Named in <i>United Water</i> Action		
	In Doc.	On Date	In Court
Mobil Corporation	SWN	11/10/03	Sup. Ct. Rockland Co.
Motiva Enterprises, LLC	SWN	11/10/03	Sup. Ct. Rockland Co.
Premcor, Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
Shell Oil Company	SWN	11/10/03	Sup. Ct. Rockland Co.
Shell Oil Products Company	SWN	11/10/03	Sup. Ct. Rockland Co.
Shell Oil Products Company, LLC	SWN	11/10/03	Sup. Ct. Rockland Co.
Shell Petroleum, Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
Shell Trading (US) Company	SWN	11/10/03	Sup. Ct. Rockland Co.
Star Supply Petroleum, Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
Sunoco, Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
Sunoco, Inc. (R&M)	SWN	11/10/03	Sup. Ct. Rockland Co.
Texaco Refining & Marketing (East), Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
Texaco, Inc	SWN	11/10/03	Sup. Ct. Rockland Co.
The Premcor Refining Group, Inc.	SWN	11/10/03	Sup. Ct. Rockland Co.
Tosco Corporation	SWN	11/10/03	Sup. Ct. Rockland Co.
Unocal Corporation	SWN	11/10/03	Sup. Ct. Rockland Co.
Valero Energy Corporation	SWN	11/10/03	Sup. Ct. Rockland Co.
Valero Marketing and Supply Company	SWN	11/10/03	Sup. Ct. Rockland Co.
Valero Refining and Marketing Company	SWN	11/10/03	Sup. Ct. Rockland Co.
Texaco Refining & Marketing (East), Inc.	OC	4/27/04	S.D.N.Y.
Texaco Refining & Marketing Inc.	OC	4/27/04	S.D.N.Y.
American Refining Group, Inc.	2AC	10/29/04	S.D.N.Y.
Ashland, Inc.	2AC	10/29/04	S.D.N.Y.
ATOFINA Petrochemicals, Inc.	2AC	10/29/04	S.D.N.Y.
Coastal Oil New England	2AC	10/29/04	S.D.N.Y.
Colorado Refining Company	2AC	10/29/04	S.D.N.Y.
Equistar Chemicals, L.P.	2AC	10/29/04	S.D.N.Y.
FHR/GP, LLC	2AC	10/29/04	S.D.N.Y.
Flint Hills Resources	2AC	10/29/04	S.D.N.Y.
Giant Yorktown, Inc.	2AC	10/29/04	S.D.N.Y.
Lyondell Petrochemical GP, Inc.	2AC	10/29/04	S.D.N.Y.
Lyondell-Citgo Refining, LP	2AC	10/29/04	S.D.N.Y.
PDV Midwest Refining, LLC	2AC	10/29/04	S.D.N.Y.
Placid Refining Company, LLC	2AC	10/29/04	S.D.N.Y.
Sinclair Oil Corporation	2AC	10/29/04	S.D.N.Y.
The Premcor Refining Group, Inc.	2AC	10/29/04	S.D.N.Y.
TMR Company	2AC	10/29/04	S.D.N.Y.
TPI Petroleum, Inc.	2AC	10/29/04	S.D.N.Y.

<i>United Water Defendant</i>	First Named in <i>United Water</i> Action		
	In Doc.	On Date	In Court
Union Oil Company of California	2AC	10/29/04	S.D.N.Y.
United Refining Company	2AC	10/29/04	S.D.N.Y.
Valero Refining Company	2AC	10/29/04	S.D.N.Y.
Irving Oil Corporation	3AC	8/18/05	S.D.N.Y.
Irving Oil, Limited	3AC	8/18/05	S.D.N.Y.
Total Petrochemicals USA, Inc.	3AC	8/18/05	S.D.N.Y.

Table 6: Dates on Which *Suffolk County* Defendants Were First Named¹⁶⁸

<i>Suffolk County</i> Defendant	First Named in <i>Suffolk County</i> Action		
	In Doc.	On Date	In Court
Amerada Hess Corporation	OC	8/19/02	Sup. Ct. Suffolk Co.
Atlantic Richfield Company	1AC	10/9/02	Sup. Ct. Suffolk Co.
BP Corporation America Inc. f/k/a BP Amoco Corp.	1AC	10/9/02	Sup. Ct. Suffolk Co.
BP Products North America Inc.	1AC	10/9/02	Sup. Ct. Suffolk Co.
Chevron Texaco Corporation	1AC	10/9/02	Sup. Ct. Suffolk Co.
CITGO Petroleum Corporation	1AC	10/9/02	Sup. Ct. Suffolk Co.
El Paso CGP Co.	1AC	10/9/02	Sup. Ct. Suffolk Co.
Equilon Enterprises, LLC	1AC	10/9/02	Sup. Ct. Suffolk Co.
Exxon Mobil Corporation	1AC	10/9/02	Sup. Ct. Suffolk Co.
Motiva Enterprises, LLC	1AC	10/9/02	Sup. Ct. Suffolk Co.
Phillips Petroleum Co.	1AC	10/9/02	Sup. Ct. Suffolk Co.
Shell Oil Company	1AC	10/9/02	Sup. Ct. Suffolk Co.
Shell Oil Products US	1AC	10/9/02	Sup. Ct. Suffolk Co.
Sunoco Inc. (R&M)	1AC	10/9/02	Sup. Ct. Suffolk Co.
Tosco Corporation	1AC	10/9/02	Sup. Ct. Suffolk Co.
Valero Marketing and Supply Company	1AC	10/9/02	Sup. Ct. Suffolk Co.
ConocoPhillips Company	2AC	3/12/03	Sup. Ct. Suffolk Co.
Getty Petroleum Marketing, Inc.	2AC	3/12/03	Sup. Ct. Suffolk Co.
Lyondell Chemical Company	2AC	3/12/03	Sup. Ct. Suffolk Co.
American Refining Group, Inc.	3AC	11/5/04	S.D.N.Y.
Ashland, Inc.	3AC	11/5/04	S.D.N.Y.
ATOFINA Petrochemicals, Inc.	3AC	11/5/04	S.D.N.Y.
BP Amoco Chemical Company	3AC	11/5/04	S.D.N.Y.
Chevron USA, Inc.	3AC	11/5/04	S.D.N.Y.
CITGO Refining and Chemical Company, LP	3AC	11/5/04	S.D.N.Y.
Coastal Eagle Point Oil Company	3AC	11/5/04	S.D.N.Y.
Coastal Mobile Refining Company	3AC	11/5/04	S.D.N.Y.
Coastal Oil New England	3AC	11/5/04	S.D.N.Y.
Colorado Refining Company	3AC	11/5/04	S.D.N.Y.
Crown Central Petroleum Corporation	3AC	11/5/04	S.D.N.Y.
El Paso Corporation	3AC	11/5/04	S.D.N.Y.

¹⁶⁸ In the *Suffolk County* action, the timeliness of claims against the later-named Citgo and Valero entities will be measured from October 9, 2002, the date on which the *Suffolk County* plaintiffs first named Citgo Petroleum Corporation and Valero Marketing and Supply Company. *See supra* Part VIII.B.

<i>Suffolk County Defendant</i>	First Named in <i>Suffolk County</i> Action		
	In Doc.	On Date	In Court
El Paso Merchant Energy-Petroleum Company	3AC	11/5/04	S.D.N.Y.
Equistar Chemicals, LP	3AC	11/5/04	S.D.N.Y.
ExxonMobil Chemical Company, Inc.	3AC	11/5/04	S.D.N.Y.
ExxonMobil Oil Corporation	3AC	11/5/04	S.D.N.Y.
FHR/GP, LLC	3AC	11/5/04	S.D.N.Y.
Flint Hills Resources, LP	3AC	11/5/04	S.D.N.Y.
Getty Properties Corporation	3AC	11/5/04	S.D.N.Y.
Giant Yorktown, Inc.	3AC	11/5/04	S.D.N.Y.
Gulf Oil, Limited Partnership	3AC	11/5/04	S.D.N.Y.
Lyondell Petrochemical GP, Inc.	3AC	11/5/04	S.D.N.Y.
Lyondell-Citgo Refining, LP	3AC	11/5/04	S.D.N.Y.
Marathon Ashland Petroleum, LLC	3AC	11/5/04	S.D.N.Y.
Marathon Oil Company	3AC	11/5/04	S.D.N.Y.
Mobil Corporation	3AC	11/5/04	S.D.N.Y.
PDV Midwest Refining, LLC	3AC	11/5/04	S.D.N.Y.
Placid Refining Company, LLC	3AC	11/5/04	S.D.N.Y.
Shell Oil Products Company	3AC	11/5/04	S.D.N.Y.
Shell Oil Products Company, LLC	3AC	11/5/04	S.D.N.Y.
Shell Petroleum, Inc.	3AC	11/5/04	S.D.N.Y.
Shell Trading (US) Company	3AC	11/5/04	S.D.N.Y.
Sinclair Oil Corporation	3AC	11/5/04	S.D.N.Y.
Sunoco, Inc.	3AC	11/5/04	S.D.N.Y.
Texaco Refining & Marketing (East), Inc.	3AC	11/5/04	S.D.N.Y.
Texaco Refining & Marketing Inc.	3AC	11/5/04	S.D.N.Y.
Texaco, Inc.	3AC	11/5/04	S.D.N.Y.
The Premcor Refining Group, Inc.	3AC	11/5/04	S.D.N.Y.
TMR Company	3AC	11/5/04	S.D.N.Y.
TPI Petroleum, Inc.	3AC	11/5/04	S.D.N.Y.
Union Oil Company of California	3AC	11/5/04	S.D.N.Y.
United Refining Company	3AC	11/5/04	S.D.N.Y.
Unocal Corporation	3AC	11/5/04	S.D.N.Y.
Valero Energy Corporation	3AC	11/5/04	S.D.N.Y.
Valero Refining and Marketing Company	3AC	11/5/04	S.D.N.Y.
Valero Refining Company	3AC	11/5/04	S.D.N.Y.
Irving Oil Corporation	4AC	8/18/05	S.D.N.Y.
Irving Oil, Limited	4AC	8/18/05	S.D.N.Y.
Total Petrochemicals, Inc.	4AC	8/18/05	S.D.N.Y.

-Appearances-

Liaison Counsel for Plaintiffs and Counsel for Plaintiffs in the *Suffolk County and United Water Actions*:

Robin Greenwald, Esq.
Robert Gordon, Esq.
C. Sanders McNew, Esq.
Steven J. German, Esq.
Eileen A. Clarke, Esq.
Curt Marshall, Esq.
Weitz & Luxenberg, P.C.
180 Maiden Lane
New York, New York 10038
Tel: (212) 558-5500

Counsel for Plaintiffs in the *Suffolk County and United Water Actions*:

Scott Summy, Esq.
Carla Burke, Esq.
Baron & Budd, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, Texas 75219
Tel: (214) 521-3605

Counsel for Plaintiff in the *City of New York Action*:

Scott Pasternack, Senior Corporation Counsel
Of Counsel: Susan E. Amron, Daniel Greene, Ramin Pejan, and Amanda C. Goad
New York City Law Department
100 Church Street, Room 6-145
New York, New York 10007-2601
Tel: (212) 676-8517

-Appearances (cont'd)-

Liaison Counsel for Defendants and Counsel for Defendants in the *United Water Action*:

Peter John Sacripanti, Esq.
James A. Pardo, Esq.
Stephen J. Riccardulli, Esq.
Jennifer N. Kalnins, Esq.
McDermott Will & Emery LLP
50 Rockefeller Plaza, 11th Floor
New York, New York 10020
Tel: (212) 547-5583

Counsel for Defendants in the *Suffolk County and City of New York Actions*:

Richard E. Wallace, Jr., Esq.
Peter C. Condron, Esq.
Wallace King Domike & Branson PLLC
1050 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
Tel: (202) 204-1000