JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street, PO Box 093
Trenton, New Jersey 08625-0093
Attorney for Plaintiffs

By: John F. Dickinson, Jr.
Deputy Attorney General
(609) 984-4863

JACKSON GILMOUR & DOBBS, PC
3900 Essex Lane, Suite 700
Houston, Texas 77027

By: William J. Jackson, Special Counsel
(713) 355-5000

GORDON & GORDON
505 Morris Avenue
Springfield, New Jersey 07081

By: Michael Gordon, Special Counsel
(973) 467-2400

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) and CLH HOLDINGS, Defendants MAXUS ENERGY CORPORATION and TIERRA SOLUTIONS, INC., Third-Party Plaintiffs, v. 3M COMPANY, *et al.*, Third-Party Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY DOCKET NO. ESX-L9868-05 (PASR) <u>Civil Action</u> BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO APPROVE DEFENDANTS' SETTLEMENT AGREEMENT AND THIRD-PARTY CONSENT JUDGMENT AND ENTER ORDERS

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

SETTLEMENT AND APPROVAL PROCESS 1

FACTUAL BACKGROUND 4

A. Contamination of the Newark Bay Complex 4

B. Claims Asserted in the Passaic River Litigation 7

1. Claims Against OCC, Maxus and Tierra 7

2. Claims Against the Repsol/YPF Defendants 9

3. Claims Against the Third-Party Defendants 10

C. Damages Sought in the Passaic River Litigation 11

1. Past Cleanup and Removal Costs 11

2. Future Cleanup and Removal Costs 13

3. Economic, Disgorgement and Punitive Damages 15

4. Damages Claimed Against the Repsol/YPF Defendants 17

5. Damages Claimed Against the Third-Party Defendants 18

LEGAL ARGUMENT 18

POINT I STANDARD FOR APPROVAL OF THE SETTLEMENTS 18

A. Standard Considered Under the Spill Act and Other New Jersey Cases 19

1. Standard applied to Plaintiffs' decision to settle 19

2. Standard applied in other New Jersey court-approved settlements 20

3. Standard applied by federal courts 21

a. Fairness under CERCLA 22

b. Reasonableness under CERCLA 23

POINT II THE SETTLEMENTS MEET THE THRESHOLD FOR COURT APPROVAL 24

A. Summary of Settlement Terms 25

1. Repsol/YPF Settlement Agreement 25

2. Third-Party Consent Judgment 27

B. Procedural Considerations of the Settlements 28

C. Substantive Consideration of the Settlements....29

POINT III FUTURE OF THE PASSAIC RIVER LITIGATION....34

A. Reordering of the Trial Tracks....35

B. Track VIII Scheduling....37

C. Credit for the Settlement Funds 38

CONCLUSION....41

TABLE OF AUTHORITIES

Page

Cases

Aetna Cas. & Sur. Co.,
258 N.J. Super. 167 (App. Div. 1992) 5

Builders League of South Jersey, Inc. v. Gloucester County Utils. Auth.,
386 N.J. Super. 462 (App. Div. 2006) 20

Campbell v. Dep't of Civil Serv.,
39 N.J. 556 (1963) 19

Dep't of Envtl. Prot. v. Ventron Corp.,
94 N.J. 473 (1983) 33

Dep't of Pub. Advocate, Div. of Rate Counsel v. N.J. Bd. of Pub. Utils.,
206 N.J. Super. 523 (App. Div. 1985) 19

Evansville Greenway & Remediation Trust v. S. Ind. Gas & Elec. Co., Inc.,
2010 WL 3781565 (S.D. Ind. Sept. 20, 2010) 30

In re Acushnet River & New Bedford Harbor,
712 F. Supp. 1019 (D. Mass. 1989) 22, 23

In re Tutu Water Wells CERCLA Litig.,
326 F.3d 201 (3d Cir. 2003).....21

Judson v. Peoples Bank & Trust Co.,
25 N.J. 17 (1957) 18

Lenox Towing v. County of Bergen,
2011 WL 5026073 (N.J. App. Div. October 24, 2011).....37

Marsh v. N.J. Dep't Envtl. Prot.,
152 N.J. 137 (1997) 30

Morris County Fair Hous. Council v. Boonton Township,
197 N.J. Super. 359 (Law Div. 1984), ...18, 20

N.J. Dep't of Envtl. Prot. v. Dimant,
212 N.J. 153 (2012) 21

Newman v. Isuzu Motors Am., Inc.,
367 N.J. Super. 141 (App. Div. 2004) 32

Nolan v. Lee Ho,
120 N.J. 465 (1990) 18

Ocean County Chapter Inc. of, Izaak Walton League of Am.,
303 N.J. Super. 1 (App. Div. 1997) 18, 19

Pascarella v. Bruck,
190 N.J. Super. 118, 462 A.2d 186 (App. Div. 1983), ...18

Piniero v. N.J. Div. of State Police,
404 N.J. Super. 194 (App. Div. 2008) 36

Rivers v. LSC P'ship,
378 N.J. Super. 68 (App. Div.), ...37

Rogers v. Spady,
147 N.J. Super. 274 (App. Div. 1977) 39

United States v. Cannons Eng'g Corp.,
899 F.2d 79 (1st Cir. 1990) 21, 22, 31, 33

United States v. Kramer,
19 F. Supp. 2d 273 (D. N.J. 1998) 31

United States v. Rohm & Haas Co.,
721 F. Supp. 666 (D. N.J. 1989) 21, 22, 23, 24, 31

Warner Co. v. Sutton,
274 N.J. Super. 464 (App. Div. 1994) 20

Young v. Latta,
123 N.J. 584 (1991) 38

Statutes

42 U.S.C.A. § 9613(f)(2) 38

42 U.S.C.A. § 9622 21

N.J.S.A. 52:10-23.11e2 .....19, 29

N.J.S.A. 58:10-23.11b 11

N.J.S.A. 58:10-23.11f 19, 38

N.J.S.A. 58:10-23.11v 38

Rules

R. 4:43-2(e)(1)(C) 20

PRELIMINARY STATEMENT

Today, the New Jersey Department of Environmental Protection ("DEP"), the Administrator of the New Jersey Spill Compensation Fund (the "Administrator") and the Commissioner of the New Jersey Department of Environmental Protection (collectively the "State" or "Plaintiffs") present the Court with two comprehensive settlement agreements that together resolve claims against 265 parties, recoup over $148 Million of the State's past costs and recover another $17 Million for the restoration of the Passaic River. While a full and final resolution of the Passaic River Litigation was not yet attainable, the tendered settlements constitute a vast stride toward the final resolution of this litigation and the ultimate restoration of the Passaic River for the people of New Jersey. Thus, after eight years of intense litigation – and following 14 months of intricate and, at times, arduous negotiations with hundreds of distinct parties, conflicting factions and warring interests – the State is pleased to present for entry by this Court the Repsol/YPF Settlement Agreement (Exhibit B) and Third-Party Defendant Consent Judgment (Exhibit C).[1]

SETTLEMENT AND APPROVAL PROCESS

In the summer of 2012, Plaintiffs began settlement discussions with the Settling Third-Party Defendants. Those negotiations culminated on March 23, 2013, when 179 private and 79 public Third-Party Defendants announced to the Court that they had approved the Third-Party Consent Judgment. After the Third-Party Settlement was in place – and following years of previously unsuccessful settlement efforts – Plaintiffs restarted negotiations with all of the Original Defendants. After many more months of incredibly complex settlement negotiations,

[1] All references to Exhibits in this brief are to the exhibits in the Certification of Janine V. Mickens, Esq., in Support of Plaintiffs' Motion to Approve Defendants' Settlement Agreement and Third-Party Consent Judgment dated October 28, 2013.

Plaintiffs were able to reach agreement with the Repsol/YPF Defendants resulting in the Repsol/YPF Settlement Agreement. Unfortunately, Plaintiffs were unable to reach an agreement with Occidental Chemical Corporation ("OCC"), which is the lone remaining non-settling party to the Passaic River Litigation.[2] Thus, Plaintiffs are moving to try their remaining Spill Act and common law claims for damages and costs against OCC in 2014.

As provided by the Consent Order on the Approval Process for the Proposed Consent Judgment, and following the statutory requirements and administrative practice, on May 6, 2013, DEP published a proposed Third-Party Consent Judgment in the New Jersey Register.[3] (www.state.nj.us/dep/srp/legal/.) A copy of the Third-Party Consent Judgment is attached hereto as Exhibit C, and a summary of the settlement terms are included in Exhibit A. The Third-Party Consent Judgment resolves the claims brought in the litigation against those third-party defendants listed on Exhibit A to the Consent Judgment (herein, the "Settling Third-Party Defendants"). Thereafter, on July 1, 2013, DEP also published a proposed Court-Approved Settlement Agreement ("Repsol/YPF Settlement Agreement") in the New Jersey Register. (www.state.nj.us/dep/srp/legal/.) A copy of the Repsol/YPF Settlement Agreement is attached hereto as Exhibit B, and a summary of its terms are also included in Exhibit A.[4] The Repsol/YPF Settlement Agreement resolves all of Plaintiffs' claims in the litigation against

[2] While the Plaintiffs and Settling Parties concluded their negotiations and the public comments were received, the Special Master has worked through the remaining motions and negotiations with those third-party defendants that did not settle with the State. Accordingly, if the Court enters the pending settlements now before the Court, there are no parties or claims that should remain in the case, other than the claims related to OCC.

[3] Pursuant to the orders of this Court governing the approval process for both settlements dated January 24, 2013, March 26, 2013, and April 25, 2013, DEP followed the administrative procedure of providing widespread notice of the proposed settlements to interested parties and the public by publishing notices in the New Jersey Register and, on three separate dates, in each of three newspapers, posting the proposed settlement documents on its website and on CT Summation and making available to the public on its website and at its offices in Trenton an administrative record of more than 3,500 documents.

[4] Although one settlement is termed as a consent judgment and the other a court approved settlement, the functional

Repsol, S.A. ("Repsol"), YPF, S.A. ("YPF"), YPF International, Ltd. ("YPFI"), YPF Holdings, Inc., CLH Holdings, Inc., Maxus International Energy, Inc., Maxus Energy Corporation ("Maxus") and Tierra Solutions, Inc. ("Tierra") (collectively, the "Settling Defendants").

Comments to the settlements were accepted through July 31, 2013. DEP received comments from three distinct groups. First, DEP received comments on the Third-Party Consent Judgment and the Repsol/YPF Settlement Agreement from three non-profit organizations, all of which support the settlements. Second, DEP received 13 sets of comments to the Repsol/YPF Settlement Agreement from Third-Party Defendants raising legal issues and/or questions regarding the intersection of the two settlements. Finally, DEP received comments to the Repsol/YPF Settlement Agreement from OCC.

After full consideration of all comments, on September 30, 2013, DEP issued its Response to Comments Received on Proposed Settlements in the Passaic River Litigation ("Response to Comments"), attached hereto as Exhibit D. The Response to Comments outlines DEP's consideration of the proposed settlements and the comments received as follows:

> In developing the settlements and evaluating the comments received thereto, DEP considered (i) its statutory authority and responsibility under the Spill Act and other statutes, (ii) its administrative expertise, (iii) the extensive administrative record, (iv) the risk and expense of continued litigation against the settling parties, (v) the procedural and substantive status of the litigants both prior to and following the entry of the proposed settlements, (vi) the potential costs and risks of continued litigation with the remaining parties, (vii) the goals of the State in initiating the Passaic River Litigation and (viii) the substantial recoveries and benefits obtained for the State.

(Id.) After full consideration of the all of the above factors, and finding that the settlements are fair and confer a substantial benefit to the public, the State moves that the Court enter the

---

result is the same. The Repsol/YPF Settlement Agreement is drafted as a court approved settlement agreement to avoid any dispute over the jurisdictional effect or impact of such agreement.

Repsol/YPF Settlement Agreement and, simultaneously or immediately thereafter, the Third-Party Consent Judgment,[5] as well as the attached scheduling orders and dismissal orders necessary to effectuating and entering them both.

FACTUAL BACKGROUND

A. Contamination of the Newark Bay Complex

For more than two decades, OCC's predecessor-in-interest, Diamond Shamrock Chemical Company ("DSCC"), intentionally discharged 2,3,7,8-tetrachlorodibenzo-p-dioxin ("TCDD"), DDT and various other pesticides, herbicides and chemicals from their manufacturing plant at 80 Lister Avenue, Newark, New Jersey (the "Lister Property"), into the Passaic River. The DEP, the United States Environmental Protection Agency ("EPA") and other regulatory agencies have determined that TCDD, in particular, is one of the most toxic chemicals ever developed, is extremely harmful to human health and the environment and can cause adverse health effects (including cancer and reproductive damage) at very low concentrations. TCDD contamination associated with discharges from the Lister Property operations have been found in the sediment of the Lower Passaic River at concentrations of up to 5,300,000 parts per trillion and its continued migration has created one of the worst dioxin sites in the world. In addition to the imminent and substantial danger that TCDD poses to human and animal populations, the presence of TCDD in the sediment continues to impact commerce, industry,

[5] As fully discussed in the Response to Comments, a condition of the Repsol/YPF Settlement Agreement is that the Settling Defendants agreed not to contest the entry of the Third-Party Consent Judgment. (Ex. B, Settlement Agreement ¶ 50; see also Resp. to Cmts at p. 22.) This obligation considerably condensed and simplified the settlement process, but it is only enforceable if the Court enters the Repsol/YPF Settlement Agreement first and then enters the Third-Party Consent Judgment second. (Id.) If the Court does not approve the Repsol/YPF Settlement Agreement, the State requests that the Court honor its commitments and defer making a decision on the Third-Party Consent Judgment until after the Settling Defendants have had an opportunity to submit comments to DEP on the Third-Party Consent Judgment and that agreement can be reevaluated under those circumstances.

navigation and dredging and has significantly damaged the ecosystem and natural resources of the Passaic River and the State of New Jersey.

In OCC/DSCC's[6] unsuccessful lawsuit seeking insurance coverage, the Appellate Division reviewed the Lister Property plant operations finding that OCC/DSCC's actions in discharging TCDD and other hazardous substances into the Passaic River "constituted intentional conduct with the corresponding intentional injury inextricably intertwined." Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co., 258 N.J. Super. 167, 216 (App. Div. 1992). Based upon its examination of the record, the court found that OCC/DSCC "intentionally and knowingly discharged hazardous pollutants with full awareness of their inevitable migration to and devastating impact upon the environment." Id. at 197. Today, extremely high concentrations of TCDD remain in the sediments of the Passaic River, are migrating into Newark Bay and continue to be a threat to human health and the environment.

In 1983, dioxin contamination was discovered at the Lister Property and across the Ironbound section of Newark. Governor Thomas H. Kean issued Executive Order 40, declaring a state of emergency and authorizing DEP to take immediate action to protect the public health and environment. DEP secured the site and was responsible for overseeing cleanup. In 1984, EPA added the Lister Site to the federal National Priorities List ("NLP") as one of the most contaminated sites in the country, and EPA later became the lead government agency responsible for overseeing the cleanup. The Diamond Alkali Superfund Site is more broadly defined to include the Lister Property itself and the extent of the dioxins (including TCDD), which spread

[6] In 1986, OCC purchased Diamond Shamrock Chemicals Corporation ("DSCC"), the chemical operations and successor of Diamond Shamrock Corporation ("DSC-1"), and, in 1987, OCC merged DSCC into itself. On February 7, 2012, OCC stipulated in the Consent Order on Track III Kolker-Era Issues that DSC-1 is the successor to Diamond Alkali Organic Chemicals Division, Inc., Kolker Chemical Works, Inc. and various related entities, that they all discharged hazardous substances into the Passaic River for decades and that DSC-1 is "strictly, jointly and severally liable under the Spill Compensation and Control Act…" for

from the Lister Property throughout the 17 miles of the lower Passaic River and Newark Bay and into portions of the Hackensack River, the Arthur Kill and the Kill Van Kull.

In addition to the interim remedy at the Lister Site (where vast quantities of dioxins and other OCC/DSCC contaminants were sequestered and remain entombed), the Diamond Alkali Superfund Site currently involves at least five ongoing remedial investigations involving the environmental condition of the Newark Bay Complex including:

- Focused Feasibility Study Report for the Lower Eight-Miles of the Lower Passaic River ("FFS");
- RI/FS for the Lower 17 Miles of the Lower Passaic River (Administrative Settlement Agreement and Order on Consent for Remedial Investigation / Feasibility Study; CERCLA Docket No. 02-2007-2009);
- RI/FS for Newark Bay (Administrative Settlement Agreement and Order on Consent for Remedial Investigation / Feasibility Study; CERCLA Docket No. 02-2004-2010);
- Passaic River 10.9 Removal Action (Administrative Settlement Agreement and Order on Consent for Removal Action; CERCLA Docket No. 02-2012-2015 Mile 10.5 Removal); and
- Phase I Removal Action for the Lower Passaic River Study Area for the Diamond Alkali Superfund Site (Administrative Settlement Agreement and Order on Consent for Removal Action; CERCLA Docket No. 02-2008-2020).

With the exception of the FFS, the CERCLA studies are being funded and/or implemented by the responsible parties, including Maxus, Tierra, and some of the Settling Third-Party Defendants.

OCC did not purchase DSCC and its ongoing chemicals business from Maxus until 1986, after the Diamond Alkali Superfund Site was added to the NPL. As part of the transaction, OCC/DSCC sold the Lister Property to Tierra, which was created to hold the property while it was being remediated, with both parties having knowledge of the extensive contamination of the

---

all of the past and future costs at issue. Accordingly, as used herein, "OCC/DSCC" refers to OCC, DSCC/DSC-1 and their predecessors in interest at the Lister Site.

property. Also, as part of the transaction, Maxus agreed to indemnify OCC for certain environmental liabilities associated with DSCC and the Lister Property in the 1986 Stock Purchase Agreement ("SPA") between the companies. The next year, OCC merged DSCC into itself and became the legal successor for the Lister Property discharges. This Court has already entered a judgment holding OCC liable for all past and future cleanup and removal costs associated with the hazardous substances discharged from the Lister Property.

B. Claims Asserted in the Passaic River Litigation

As a result of the damages to the State of New Jersey caused by the discharges from the Lister Property, Plaintiffs initiated the Passaic River Litigation against OCC, Maxus, Tierra and the Repsol/YPF Defendants (the "Original Defendants"). Plaintiffs identified these entities as primarily responsible (directly or indirectly) for the contamination of the Newark Bay Complex and damages suffered by the State and elected to use their authority under the Spill Act to seek joint and several damages from the Original Defendants. Maxus and Tierra joined over three hundred third-party defendants, alleging those entities also contributed to the contamination of the Newark Bay Complex and the State's damages. A consideration of each of the claims asserted in the litigation is necessary for a comprehensive evaluation of the settlements.

1. Claims Against OCC, Maxus and Tierra

Plaintiffs brought the Passaic River Litigation to recover all of the costs and damages the State and public incurred as a result of the intentional discharges from the Lister Property, to obtain a declaratory judgment that OCC is responsible for all of the State's future cleanup costs, if any, and to recover the costs and fees incurred by DEP in prosecuting the Passaic River Litigation. (See Ex. H, Doc 296 of the Consent Judgment Record (Pls.' 4th Am. Compl. ¶ 5).) Plaintiffs' claims were focused on OCC as the direct successor to DSCC and the actual

discharger at the Lister Property. (Id. ¶¶ 29-30.) In addition to the claims against OCC as the direct successor, Plaintiffs also brought claims against Maxus and Tierra as the owner of the Lister Property and/or successors in interest to DSCC or DSC-1 (a/k/a Diamond Shamrock Corporation). (See Ex. H, Doc 296 of the Consent Judgment Record (Pls.' 4th Am. Compl. ¶¶ 31-37).)

During the course of the Passaic River Litigation, this Court entered three judgments as to OCC, Maxus and Tierra that substantially inform both of the pending settlements. First, the Court ruled that OCC is the direct successor by merger to DSCC and is responsible for all cleanup and removal costs associated with the hazardous substances discharged from the Lister Property and into the Newark Bay Complex. (See Ex. H, Doc 39 of the Consent Judgment Record (July 19, 2011 Order Partially Granting Plaintiffs' Motion for Summary Judgment Against OCC, Maxus and Tierra).) Accordingly, OCC has been adjudicated a "discharger" under the Spill Act and found strictly, jointly and severally liable for the State's past and future cleanup and removal costs associated with the hazardous substances discharged from the Lister Property. (Id.)

The Court also found that Maxus must indemnify OCC for certain environmental liabilities at issue pursuant to the express terms of the SPA. (Ex. I, May 21, 2012 Order Granting OCC's Motion for Partial Summary Judgment Against Maxus.) Important to any analysis of the pending settlements, the Court also ruled that Maxus was not directly responsible to the State as the successor to – or a "mere continuation" of – DSCC or Diamond Shamrock Corporation. (See Ex. H, Doc 42 of the Consent Judgment Record (May 21, 2012 Order Granting In Part and Denying In Part Plaintiffs' Motion for Partial Summary Judgment Against Maxus).) The Court also found that, with knowledge of the contamination, Tierra purchased the Lister Property from

OCC in order to facilitate OCC's purchase of the chemicals business from Maxus. (See Ex. H, Doc 40 of the Consent Judgment Record (August 24, 2011 Order Granting Plaintiffs' Motion for Partial Summary Judgment Against Tierra).) The Court thus found Tierra "in any way responsible" under the Spill Act. (Id.) Finally, the Court also held that Maxus is liable as the alter ego of Tierra for those costs that Tierra may be required to bear as the owner of the Lister Property.[7] (See Ex. H, Doc 42 of the Consent Judgment Record (May 21, 2012 Order Granting In Part and Denying In Part Plaintiffs' Motion for Partial Summary Judgment Against Maxus).)

2. Claims Against the Repsol/YPF Defendants

Plaintiffs also pursued claims against the Repsol/YPF Defendants, Maxus and Tierra alleging fraudulent transfers, alter ego and breaches of fiduciary duties arising from Maxus's alleged liabilities for damages related to the Passaic River (the "Fraudulent Transfer Claims"). (Ex. H, Doc 296 of the Consent Judgment Record (Pls.' 4th Am. Compl. ¶¶ 157-176).) Repsol, YPF and their subsidiaries other than Maxus/Tierra were not alleged to be directly responsible as dischargers under the Spill Act, only vicariously liable for the environmental liabilities of Maxus. OCC later filed cross-claims similar to DEP's Fraudulent Transfer Claims. The settlements do not seek to limit OCC's cross-claims, and the Repsol/YPF Defendants continue to deny the allegations set forth therein.

Plaintiffs have been vigorously litigating the Fraudulent Transfer Claims for many years. For almost three years, Plaintiffs litigated – and ultimately prevailed upon – the initial motions to dismiss filed by several of the Repsol/YPF Defendants contesting the personal jurisdiction of the courts of New Jersey, although the foreign defendants will be permitted to address these issues

[7] Maxus and Tierra contested, and have stated their intention to appeal, the Court's ruling as to their direct responsibility under the Spill Act, especially in-so-far as the ruling holds Tierra strictly, jointly and severally responsible for all cleanup and removal costs associated with hazardous substances that were discharged off-site

again by motion or at trial on the merits. The State devoted significant resources to experts and fees associated with the Fraudulent Transfer Claims – and was in the process of preparing its experts and taking dozens of depositions around the globe – when the Republic of Argentina repatriated YPF and took control of the majority of YPF's stock from its then-parent company, Repsol YPF, S.A. Since then, discovery on the Fraudulent Transfer Claims has been stayed.

3. Claims Against the Third-Party Defendants

Seeking to change the nature of Plaintiffs' action, Maxus and Tierra filed Third-Party Complaints against 308 parties (the "Third-Party Defendants") in 2009. (See Ex. H, Docs 44, 45, 46, 47 (Third-Party Compl. A, B, C and D).) Maxus and Tierra alleged that all of the Third-Party Defendants may have contributed in some way to pollution in the Passaic River or the adjoining waters of the Newark Bay Complex. Maxus and Tierra asserted contribution claims against all Third-Party Defendants for contribution under the Spill Act, N.J.S.A. 58:10-23.11f.a.(2)(A), and the Joint Tortfeasor Contribution Law, N.J.S.A. 2A:53A-1. These claims are predicated on Maxus and Tierra being found liable to Plaintiffs for damages attributable to the Third-Party Defendants and on Maxus and Tierra spending money under CERCLA investigating the Newark Bay Complex. In addition to their contribution claims, Maxus and Tierra assert claims against certain public entities based on alleged violations of N.J.S.A. 58:14-7 and N.J.S.A. 58:14-8 (statutes involving the management of the Passaic Valley Sewerage Commissioners), nuisance and breach of the public trust. Plaintiffs elected not to join in the claims against the Third-Party Defendants, and the Court reserved any and all claims Plaintiffs may have against the Third-Party Defendants arising from or related to the Newark Bay Complex, as well as claims against any future third- or fourth-party defendants. (Ex. H, Doc 1603 of the Settlement Agreement Record

---

before Tierra purchased the Lister Property in the mid-1980s.

(Dec. 15, 2010 Order [reserving Plaintiffs' claims against third-parties and non-parties]).) The inclusion of the Third-Party Defendants in the Passaic River Litigation significantly slowed the pace of Plaintiffs' claims and drastically increased the costs incurred by the State in continuing the litigation.

C. Damages Sought in the Passaic River Litigation

The citizens of the State have been significantly injured as a result of the discharges from the Lister Property. The TCDD discharged by OCC has spread throughout the Passaic River and Newark Bay Complex and resulted in costs and damages Plaintiffs have sought to recover in the Passaic River Litigation. Below is a summary of the costs and damages sought in the litigation and for which Plaintiffs have resolved or reserved their claims against the Settling Defendants and Settling Third-Party Defendants.

1. Past Cleanup and Removal Costs

A primary objective of the Passaic River Litigation was to recover all past costs, including the cost of litigating the case. As part of its oversight role and investigation into the contamination of the Newark Bay Complex, DEP incurred cleanup and removal costs that are sought in the Passaic River Litigation. These costs include participation in the EPA's FFS study, funding damage assessments with the federal NRD trustees, researching dioxin and PCB contamination in the Newark Bay Complex and the development of fish and crab consumption advisories. In addition to the direct costs of DEP salaries and the direct costs of contractors, the Spill Act provides that DEP shall recover its indirect costs or administrative costs associated with DEP employees' overhead and employment costs. N.J.S.A. 58:10-23.11b; (Ex. E, Butler Cert.). The direct costs and the indirect cost calculation is set forth in Exhibit E in the certification of

Roger Butler. As of April 30, 2013, DEP's past costs totaled $29,719,264.63, exclusive of attorneys' fees and litigation costs. (Ex E, Butler Cert. p. 2.)

In addition to the direct and indirect costs, DEP incurred $41,210,766.96 in administrative, litigation and consulting expenses, including attorneys' fees, through July 2013. (Ex. G, Dickinson Cert. ¶ 7.) Once the Passaic River Litigation was initiated, the Executive Branch has annually requested through the budgeting process funding for the case, and the Legislature has annually supported this effort from 2007-2014. This funding was appropriated from the Spill Compensation Fund and the Hazardous Discharge Site Cleanup Fund. (Id. ¶ 5.) The Legislature has also directed that any recovery in the Passaic River Litigation be used to reimburse these funds, subject to future appropriations. (Id.) Plaintiffs sought to recover all of its costs, fees and expenses under the Spill Act and under the Uniform Fraudulent Transfer Act.

In addition to costs incurred by the State through DEP, other departments and agencies of the State also incurred costs as a result of the Lister Property discharges that were sought in the Passaic River Litigation. In particular, the New Jersey Department of Transportation's Office of Maritime Resources incurred costs and funded various projects directly related to dioxin-contaminated sediments in the Newark Bay Complex and the efforts to mitigate the damage caused by dioxin and other hazardous substances in the Newark Bay Complex. (Ex. F, Douglas Cert. ¶ 6.) Specifically, New Jersey responded to the crisis to commercial navigation caused by dioxin-contaminated sediments by commencing a series of studies and projects aimed at addressing contaminated sediments and restrictions on ocean disposal of dredge material. (Id. ¶ 7.) These efforts have included funding and administration of pilot and demonstration projects and studies designed to improve management of contaminated dredged materials in the Newark Bay Complex, working with EPA and the United States Army Corps of Engineers as part of the

FFS, developing beneficial uses for contaminated dredge material, developing sediment decontamination technologies and addressing and eliminating contamination of sediments at the sources. (Id.) These response efforts were necessary to mitigate the damage caused by contaminated sediments in the Newark Bay Complex, particularly, sediments contaminated with dioxin. (Id. ¶ 7-8.) The costs incurred by DOT and sought in the Passaic River Litigation total $77,124,281.71. (Id. ¶ 8.) These costs are set forth in detail in the attached Exhibit F, certification of Scott Douglas of the New Jersey Department of Transportation's Office of Maritime Resources.

In total, the State has incurred the following cleanup and removal costs that were asserted in the Passaic River Litigation and which are being retired by the settlements:

DEP Past Investigation and Oversight Costs	$29,719,264.63
DOT Past Investigation Costs	$77,124,281.71
Litigation Costs and Experts'/Attorneys' Fees (as of July 2013)	$41,210,766.96
TOTAL:	$148,054,313.30

All of these costs are recouped under the pending settlements, and the State has covenanted not to sue the settling parties or OCC for any of these amounts.

2. Future Cleanup and Removal Costs

There are currently several ongoing studies of the environmental condition of the Newark Bay Complex being undertaken under CERCLA as part of the Diamond Alkali Superfund Site. In 1989, DEP transferred lead for the investigation of the Passaic River and remainder of the Newark Bay Complex to EPA. Since that time, DEP has maintained a supporting or oversight role in the CERCLA investigation. However, DEP also retained its independent authority to enforce compliance with New Jersey environmental laws, including this pursuit of the Passaic River Litigation. With the exception of the FFS, the CERCLA studies are being funded and/or

implemented by the responsible parties, including Maxus, Tierra and the Settling Third-Party Defendants.

The FFS (Focused Feasibility Study Report for the Lower Eight-Miles of the Lower Passaic River) is a study directed at developing a plan to remediate the most contaminated portion of the Passaic River and abate the source of the overwhelming dioxin contamination throughout the system, while the broader studies of the remainder of the Newark Bay Complex continue. The FFS has been funded by EPA with financial and technical support provided by DEP. The last public version of the FFS was issued in 2007, and the revised final draft of the FFS is anticipated to be released in December 2013 or early 2014. After the FFS is publicly released, it is anticipated that a proposed plan for remediation of the lower eight miles of the Passaic River will be issued by EPA in cooperation with DEP. The 2007 draft of the FFS provided remedy alternatives projected to cost between $863,000,000 and $2,272,000,000. Based on information available to DEP, the revised FFS will estimate costs for the remedial alternatives of $916,000,000 and $3,518,000,000. Future costs anticipated to be incurred by DEP in the implementation of the selected FFS remedy are unknown. Under CERCLA, the State of New Jersey could be asked to take over long term maintenance and provide up to 10% of the costs of any remedy funded under the Federal Superfund.

Costs for DEP oversight associated with the FFS are partially covered by EPA grants, which are not sought in the litigation or covered by the settlements. Other costs associated with DEP's oversight of the FFS, including technical support through DEP's contractor, the Louis Berger Group, are included within the past costs sought in the Passaic River Litigation. (See Ex. E, Butler Cert. p. 4.) DEP cannot estimate future costs to be incurred in the technical support

role, although, based on the anticipated release date for the final FFS, the expenses are not likely to be substantial.

Plaintiffs have also worked with the federal NRD trustees to evaluate the damages to natural resources in the Newark Bay Complex, and the costs of such is included in Plaintiffs' claims for past cleanup and removal costs. A NRD assessment plan has not been completed for the Newark Bay Complex, and there is no estimate as to when an assessment will begin or be completed. Plaintiffs, however, have reserved their claims for NRD against OCC and the Settling Third-Party Defendants under certain terms and conditions. (Ex. B, Settlement Agreement ¶ 29; Ex. C, Consent Judgment ¶ 25.) The Court also entered an order reserving Plaintiffs' NRD claims. (Ex. H, Doc 1606 of the Settlement Agreement Record (April 24, 2012 Consent Order on Reservation of Plaintiffs' Natural Resource Damages Claims).)

One of the major reasons for bringing the Passaic River Litigation was to assure that, if there were to be a publicly-funded remedy in the Passaic River, the polluters – and not the public – would pay the State's costs of such remedy. An important feature of the two settlements before the Court are that they provide the DEP with the means to secure funding for its future remediation costs through the continued litigation against OCC, the Setting Third-Party Defendants and/or other responsible parties.

3. Economic, Disgorgement and Punitive Damages

In addition to past and future cleanup and removal costs, Plaintiffs have sought additional damages resulting from the discharges from the Lister Property recoverable under the Spill Act and/or common law. These additional damages include "economic damages," "disgorgement damages" and "punitive damages." (Ex. H, Doc 296 of the Consent Judgment Record (Pls.' 4th Am. Comp. ¶¶ 4, 132, 139, 148, 152 and 156).) Plaintiffs have also reserved these Spill Act and

common law damages claims against OCC to be tried in Track VIII, together with the scope of OCC/DSCC-related contamination. (Ex. B, Settlement Agreement ¶ 29.)

The dioxin impacts in the Passaic River and around the Lister Property have had an undeniable and direct impact on navigation, maintenance costs and jobs and have had a stigmatizing effect on commerce, property values and redevelopment efforts in the immediate area. Thus, the "Economic damages" in the settlements are defined as " any and all damages, loss of value of real or personal property, costs, expenditures, lost income of any kind and lost tax revenue, including (without limitation) loss of revenue associated with lost industrial, manufacturing, commercial, residential or mixed use development, navigation and port facilities, increased costs of and expenditures for health or medical treatment and other expenditures, including costs for impacts to navigation and commerce in or related to the Newark Bay Complex . . . ." (Ex. B, Settlement Agreement ¶ 19.17.) A similar definition is provided in the Third-Party Consent Judgment. (Ex. C, Consent Judgment ¶ 18.8.) Although economic damages are defined inclusively, the Lister Property is the major contributor to the economic damages and blight claimed in the Passaic River Litigation. These damages are recoverable under the Spill Act and the common law and were reserved against OCC/DSCC. The Consent Judgment dismissed these claims against Settling Third-Party Defendants in exchange for their assignment of other economic damages claims to the State, which Plaintiffs may seek to develop these claims in Track VIII. (Ex. C, Consent Judgment ¶ 32.)

Plaintiffs may also seek disgorgement damages, or similar measures of damages, as an alternative measure of damages and in support of punitive damages. These damages are also attributable almost exclusively to the conduct that occurred at the Lister Property and the resulting discharges to the Passaic River. Such damages may be based on the lack of appropriate

waste infrastructure at the Lister Property, discharges and improper waste practices based only upon OCC/DSCC profit margins, the failure to properly close the Lister Plant and the failure to reduce dioxin discharges associated with the processes utilized at the Lister Plant and/or the rental value of the unauthorized river disposal of discharges from the Lister Plant. (Id.) Plaintiffs also seek punitive damages under common law based upon the operational conduct of OCC/DSCC and its adjudicated intentional discharges from the Lister Property. OCC/DSCC's conduct and intentional discharges were egregious, even when compared to industry standards of the time.

4. Damages Claimed Against the Repsol/YPF Defendants

In addition to the damages claimed against OCC, Plaintiffs pursued judgments against the Repsol/YPF Defendants for damages equal to the value of the allegedly fraudulently transferred assets, to the extent necessary to satisfy Maxus's and Tierra's environmental liabilities to Plaintiffs, and for other legal and equitable relief by which YPF and Repsol would be liable for the environmental liabilities of Maxus and Tierra. (See Ex. H, Doc 296 of the Consent Judgment Record (Pls.' 4th Am. Compl. ¶¶ 157-176).) Plaintiffs also pursued punitive damages for the allegedly fraudulent conduct, as well as attorneys' fees and costs of court, under the Uniform Fraudulent Transfer Act. (Id. ¶¶ 157-165.) Although these damages are derivative of damages sought against Maxus and Tierra, they include damages that were separate and apart from the claims against OCC as the primary discharger at the Lister Property.

OCC sought similar damages, although its claims and damages relate more directly to the contractual relationship between OCC, Maxus and the Repsol/YPF Defendants. (Ex. H, Doc 1623 of the Settlement Agreement Record (OCC's Am. Cross-Claims).) The settlements do not impact or seek to resolve OCC's claims against Maxus and the Repsol/YPF Defendants.

5. Damages Claimed Against the Third-Party Defendants

In their Third-Party Complaints, Maxus and Tierra sought contribution for any damages awarded to Plaintiffs in the Passaic River Litigation and additional money spent under CERCLA investigating the Newark Bay Complex. (See Ex. H, Docs 44, 45, 46, 47 (Third-Party Compl. A, B, C and D).) These damage claims were derivative of Plaintiffs' claims against Maxus and Tierra or otherwise subject to analogous claims under federal law. The Third-Party Consent Judgment seeks to resolve these claims and/or reserve them for a future federal action involving the costs incurred under CERCLA.

LEGAL ARGUMENT
POINT I
STANDARD FOR APPROVAL OF THE SETTLEMENTS

The settlement of litigation ranks high in the public policy of New Jersey. Judson v. Peoples Bank & Trust Co., 25 N.J. 17, 35 (1957). "Settlements permit parties to resolve disputes on mutually acceptable terms rather than exposing themselves to the uncertainties of litigation." Ocean County Chapter Inc. of Izaak Walton League of Am., 303 N.J. Super. 1, 10 (App. Div. 1997) (citing Morris County Fair Hous. Council v. Boonton Township, 197 N.J. Super. 359, 366 (Law Div. 1984), aff'd o.b., 209 N.J. Super. 108 (App. Div. 1986)). "Settlements also save parties litigation expenses and facilitate the administration of the courts by conserving judicial resources." Ibid. (quoting Morris County). Accordingly, settlements are generally upheld absent clear and convincing evidence of fraud or other compelling circumstances. See ibid.; Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). Retired Justice Virginia Long best described the policy while sitting on the Appellate Division:

> In our view the beginning point of this analysis is the strong public policy in this state in favor of settlements. Pascarella v. Bruck, 190 N.J. Super. 118, 125, 462 A.2d 186 (App. Div. 1983), certif. den. 94 N.J. 600, 468 A.2d 233 (1983). The point of this policy is not the salutary effect of settlements on our overtaxed

> judicial and administrative calendars (although this is an undeniable benefit) but the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone. In recognition of this principle, courts will strain to give effect to the terms of a settlement wherever possible.
>
> [Dep't of Pub. Advocate, Div. of Rate Counsel v. N.J. Bd. of Pub. Utils., 206 N.J. Super. 523, 528 (App. Div. 1985).]

A. Standard Considered Under the Spill Act and Other New Jersey Cases

New Jersey law provides limited guidance on approval of environmental settlements. The Spill Act's contribution protection provision provides that a discharger that "has entered into an administrative or judicially approved settlement with the State, shall not be liable for claims for contribution regarding matters addressed in the settlement," but provides no other guidance regarding court approval. N.J.S.A. 58:10-23.11f.a(2)(b) (emphasis added). The Spill Act does provide guidance on notice and timing of court consideration, requiring that DEP provide public notice of the details of any administrative or judicially approved settlement at lease thirty days before the settlement is entered. N.J.S.A. 52:10-23.11e2. Although the Spill Act affords Plaintiffs the flexibility to resolve their claims administratively, because Plaintiffs' claims are currently pending before the Court in a specially managed litigation and to ensure the contribution protection provided by the settlements, Plaintiffs are presenting both settlements to the Court for approval and entry.

1. Standard applied to Plaintiffs' decision to settle

Plaintiffs' decision to settle, and terms of the settlement as agency actions, will be upheld unless shown to be arbitrary, capricious or unreasonable or that it violates legislative policies or that the findings on which it was based are not supported by the evidence. See Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963) (addressing the standard applied to agency actions); Ocean County, supra, 303 N.J. Super 1 (considering DEP's settlement of a contested case). As

discussed below, the terms of the settlements were reasonable based upon the claims brought in the litigation and are well within Plaintiffs' discretion. Furthermore, Plaintiffs followed all of the procedural requirements of the Spill Act.

2. Standard applied in other New Jersey court-approved settlements

In certain other types of cases where the public interest is implicated and the private dispute between two parties may have a significant impact on many non-parties, judicial approval has been sought. R. 4:32-2(e)(1)(C), for example, provides that in a class action, "The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate." Judicial review has also been conducted by the courts of New Jersey in other types of cases where the public interest is potentially impacted by a settlement. See, e.g., Builders League of South Jersey, Inc. v. Gloucester County Utils. Auth., 386 N.J. Super. 462 (App. Div. 2006) (settlement of lawsuit challenging sewer connection fees); Warner Co. v. Sutton, 274 N.J. Super. 464 (App. Div. 1994) (settlement of lawsuit challenging zoning ordinance); Morris County, supra, 197 N.J. Super. 359.

In Morris County, the court noted that, although the settlement provision of the predecessor of R. 4:32 only applied by its literal terms to class actions, "it has been found to contain appropriate 'guiding principles' for settlement of other representative lawsuits," and that "it is the court's responsibility to determine, based upon the relative strengths and weaknesses of the parties' positions, whether the settlement is 'fair and reasonable,' that is, whether it adequately protects the interests of the persons on whose behalf the action was brought." Morris County, supra, 197 N.J. Super. at 368-370. Whether the settlement is fair and reasonable is similar to the standard applied by federal courts when considering CERCLA settlements.

3. Standard applied by federal courts.

Under CERCLA, the relevant standard for approving a settlement agreement is whether the proposed settlement is fair, reasonable and faithful to the objectives of the governing statute. See In re Tutu Water Wells CERCLA Litig., 326 F.3d 201, 207 (3d Cir. 2003); United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990). These factors take on different forms depending on the factual setting of a given case or settlement. However, it was intended "first, that the judiciary take a broad view of proposed settlements, leaving highly technical issues . . . to the discourse between parties; and, second, that the [court] treat each case on its own merits, recognizing the wide range of potential problems and possible solutions." Cannons, supra, 899 F.2d at 85-86. Other factors are also considered, including the strength of the government's case, the good faith efforts of the negotiators, the possible risks of and transaction costs involved in litigation under CERCLA, the effect of the proposed settlement on non-settling parties, the complexity, expense and likely duration of the litigation and the ability of the defendant to withstand a greater judgment. United States v. Rohm & Haas Co., 721 F. Supp. 666, 680 (D. N.J. 1989). However, unlike the Spill Act, CERCLA specifically provides for court approval of CERCLA settlements and provides factors to be considered in approving the settlements. 42 U.S.C.A. § 9622. Although it is appropriate to look to federal case law for guidance regarding the judicial approval of settlements under CERCLA, it must be recognized that "there are important differences between CERCLA and the Spill Act that require some pause before assuming that an alignment in standards is appropriate." N. J. Dep't of Envtl. Prot. v. Dimant, 212 N.J. 153, 178 (2012).

a. Fairness under CERCLA

Federal courts consider both procedural fairness and substantive fairness when evaluating CERCLA settlements. Procedural fairness considers the negotiation process, including its candor, openness and bargaining balance. See Cannons, supra, 899 F.2d at 86; Rohm & Haas, supra, 721 F. Supp. at 680-81. Substantive fairness looks at whether a party is bearing "the cost of the harm for which it is legally responsible." Cannons, supra, 899 F.2d at 87. Thus, "settlement terms must be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each [defendant] has done." Ibid. However, courts recognize that there is no formula for how comparative fault is to be measured, and the "chosen measure of comparative fault should be upheld unless it is arbitrary, capricious, and devoid of a rational basis." Ibid. Moreover, federal courts acknowledge that a government environmental agency not only must be "given leeway to construct the barometer of comparative fault, but the agency must also be accorded flexibility to diverge from an apportionment formula in order to address special factors not conducive to regimented treatment." Id. at 87-88. Great deference is given to the environmental agency's settlement choices. See ibid.

Federal courts under CERCLA also recognize that there is a need to encourage (and reward) early, cost-effective settlements, and that such quick settlements may result in a lowered settlement figure. See id. at 88 (citing In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1032 (D. Mass. 1989)). In weighing the substantive fairness of a settlement, federal courts recognize that "in the early phases of environmental litigation, precise data relevant to determining the total extent of harm caused and the role of each [defendant] is often unavailable. Yet, it would disserve a principal end of [CERCLA]—achievement of prompt settlement and a

concomitant head start on response activities—to leave matters in limbo until more precise information was amassed." Ibid. (citation omitted).

b. Reasonableness under CERCLA

In evaluating CERCLA settlements, the factor of "reasonableness" considers: (1) the settlement's efficiency as a vehicle for cleansing the environment;[8] (2) whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures; and (3) the relative strength of the parties' litigating positions. See id. at 89-90. In evaluating whether the settlement satisfactorily compensates the public for the costs of cleanup measures, federal courts recognize that the actual cost of remedial measures is often unknown at the time of settlement and the agency cannot "be held to a standard of mathematical precision." Id. at 90. Thus, "[i]f the figures relied upon derive in a sensible way from a plausible interpretation of the record, the court should normally defer to the agency's expertise." Ibid. Also, the litigation risks to the government in proceeding with the case are an important consideration. See ibid. Where the outcome of the government's case is uncertain, the settlement should mirror that factor. Ibid. Even if the agency has a strong case, a reasonable settlement may take into account the benefit of early resolution and litigation costs in offering a settlement for less than full recovery. See ibid. (citing Rohm & Haas, supra, 721 F. Supp. at 680 (interpreting "reasonableness" in light of CERCLA's congressional goal of expediting effective remedial action and minimizing litigation)). Finally, federal courts seek to ensure that the settlement is consistent with the intent and purpose of CERCLA: accountability, the desirability of a clean environment and promptness of response activities. Id. at 91.

[8] Because Plaintiffs are not seeking a cleanup in the Passaic River Litigation, this factor is not relevant to the Court's evaluation of the settlements.

The late Chief United States District Court Judge John F. Gerry noted that this test comports with the standard applicable within the Third Circuit for judicial approval of class actions. Rohm & Haas Co., supra, 721 F. Supp. at 680. When Judge Gerry focused upon the part of the class action test that ordinarily addresses whether the proposed settlement adequately protects the interests of the persons on whose behalf the action was brought, he converted the fiduciary judicial role of protecting class members to furthering the fundamental purposes of the environmental legislation under which the settlement arose: "The court's core concern in deciding whether to approve this proposed decree is with ensuring that the decree furthers the public interest as expressed in CERCLA." Id. In evaluating the proposed settlements, this Court should consider whether the settlements further the public interest as expressed in the Spill Act.

POINT II
THE SETTLEMENTS MEET THE THRESHOLD FOR COURT APPROVAL

Both settlements are fair, reasonable, consistent with the statutory purposes, and in the best interest of the parties involved. The settlements were developed with full participation by sophisticated counsel seeking the best result for their clients. DEP also followed its administrative process, providing notice and opportunity to comment to all parties and the public and developing a comprehensive record supporting the settlements. The settlements also provided substantial benefits to all settling parties, and OCC, and reasonably resolve the claims against the settling parties in the litigation. At the same time, the settlements do not unduly burden any party and leave Plaintiffs' remaining claims against OCC to be tried after further discovery. Accordingly, after consideration by the Court, the settlements should be approved and the claims resolved thereby should be dismissed as set forth in the agreements.

A. Summary of Settlement Terms

Both settlements are attached as Exhibits B and C. Also, Exhibit A is an executive summary of the key terms of each settlement. The summary is intended to provide the Court with an overview of the settlements and the interrelations between the provisions of each. The exact details of the settlements are more complex and result from almost a year of negotiations with sophisticated parties and counsel with very divergent interests. Given the complexities of the parties' relationships, the complex nature of the Newark Bay Complex contamination and the myriad legal claims and issues presented in the litigation, it would be impossible to outline and explain each and every provision of the settlements. Nevertheless, to the extent questions and concerns about the settlements were raised in the comments to the settlements, DEP addressed those in the Response to Comments, which is attached as Exhibit D.

Each settlement agreement also includes specific case management orders and dismissal orders. The entry of these orders are prerequisites to the settlements becoming effective and are necessary to ensure the settling parties receive the full benefits of settlement, including avoiding unnecessary future litigation costs and dismissal of the claims against them. (See Ex. B, Settlement Agreement ¶ 77; Ex. C, Consent Judgment ¶57.)

1. Repsol/YPF Settlement Agreement

When OCC chose not to participate meaningfully in global settlement negotiations, Plaintiffs, the Repsol/YPF Defendants, Maxus and Tierra were left to develop a settlement structure that would resolve many of Plaintiffs' claims against the Settling Defendants, while recognizing the contractual relationship between Maxus and OCC. In consideration of Maxus's indemnity obligations to OCC, Plaintiffs and the Settling Defendants developed a "high-low" settlement that resolves Plaintiffs' claims against the Settling Defendants and certain claims

against OCC, but leaves open the possibility that the Settling Defendants may pay more in the future due to OCC's claims against them. Under the terms of the Repsol/YPF Settlement Agreement, the Settling Defendants agreed to pay the State $130 Million, to be applied first to past cleanup and removal costs, and then as a credit against their own NRD, if any, but not that of OCC. (Ex. B, Settlement Agreement ¶¶ 21 and 24.) OCC is provided with a covenant not to sue and contribution protection from Plaintiffs' claims for past costs and certain future costs. (Id. ¶ 28.) The Settlement Agreement also caps the Settling Defendants' future liability for certain claims up to another $400 Million in the event OCC is successful in its claims against Repsol and/or YPF and YPFI and collects from those entities. (Id. ¶ 43.)

Importantly, Plaintiffs' resolution of their claims against the Settling Defendants leaves the legally responsible defendant, OCC, jointly and severally responsible for the future cleanup and removal costs associated with the Lister Property, and for the damages caused by OCC and its predecessors, while leaving OCC's indemnity and contribution claims intact. (Id. ¶ 29.) While the liabilities of the other Repsol/YPF Defendants, besides Tierra, were derivative of Maxus's alleged indemnity liability, OCC's liability to the State is direct, as it is DSCC as a matter of law. Importantly, OCC has contractually allocated its liability with Maxus through the indemnity agreement negotiated as part of the SPA. Thus, the settlement with the Repsol/YPF Defendants expressly recognizes that Maxus has a continuing indemnity obligation to OCC and does not impact or impair that obligation or ruling in any way. (Id. ¶ 60.) The settlement also recognizes OCC's continuing cross-claims against the Repsol/YPF Defendants. However, because the Settling Defendants have agreed to resolve Plaintiffs claims against them, and some of the claims against OCC, a condition of the settlement is that OCC's cross-claims be tried after Plaintiffs' claims against OCC are resolved. (Id. ¶ 77 and CMO.)

2. Third-Party Consent Judgment

The Third-Party Consent Judgment was designed to remove the Settling Third-Party Defendants from the litigation and equitably resolve many of Plaintiffs' potential claims against Third-Party Defendants. Maxus's and Tierra's Third-Party Complaints alleged that the Third-Party Defendants were liable in contribution to Maxus and Tierra for the costs and damages incurred, and to be incurred, by Maxus and Tierra in remediating contamination related to OCC/DSCC's discharges of hazardous substances into the Newark Bay Complex and that might be awarded to Plaintiffs in the Passaic River Litigation. (See Ex. H, Docs 44, 45, 46, 47 (Third-Party Compl. A, B, C and D).) Plaintiffs did not join in the claims against the Third-Party Defendants, and the Court reserved Plaintiffs' potential claims against the same. (Ex. H, Doc 1603 of the Settlement Agreement Record (Dec. 15, 2010 Order [reserving Plaintiffs' claims against third-parties and non-parties]) and Doc 1606 of Settlement Agreement Record (April 24, 2012 Consent Order on Reservation of Plaintiffs' Natural Resource Damages Claims).) However, the addition of the Third-Party Defendants had its desired result: greatly complicating the litigation and increasing the burdens on the Court, State and local governmental entities.

Under the terms of the Third-Party Consent Judgment, the Settling Third-Party Defendants will collectively pay the State $35.4 Million and assign certain economic damage claims to the State. (Ex. C, Consent Judgment ¶¶ 20 and 32.) Each settling private Third-Party Defendant is paying approximately $195,000[9] and each public Third-Party Defendant is paying $95,000. (Id.) In exchange, the Settling Third-Party Defendants are retiring, and will also receive a covenant not to sue and contribution protection under the Spill Act for, the State's past

[9] Certain discounts or adjustments were made for parties settling affiliated entities or parties with an inability to pay. (See Ex. C, Schedule 1.)

cleanup and removal costs and certain future cleanup and removal costs. (Id. ¶¶ 20 and 39.) The Settling Third-Party Defendants are also contributing toward the restoration of the Passaic River and will receive a NRD credit equal to 20% of the settlement funds (approximately $7 Million). (Id.)

If entered, the Third-Party Consent Judgment will result in the dismissal of all claims asserted in the Passaic River Litigation against the Settling Third-Party Defendants, subject to the State's reservation of certain claims against the Settling Third-Party Defendants. Those reservations are subject to certain thresholds, particularly within the FFS Area, based upon the fact that the majority of the risk, and thus the remedy, within the FFS Area is driven by TCDD and the hazardous substances intentionally discharged by OCC/DSCC. (Id. ¶¶ 25 and 39.) The Settling Defendants, including Maxus and Tierra, have agreed not to oppose the entry of the Third-Party Consent Judgment and the dismissal of the third party claims, subject to the approval of the Repsol/YPF Settlement Agreement. (Ex. B, Settlement Agreement ¶ 50.)

B. Procedural Considerations of the Settlements

Both settlements were developed in a fair and open manner that allowed for reasonable participation by all parties willing to engage in good faith negotiations. The Repsol/YPF Settlement Agreement was developed during a Court-ordered mediation with Plaintiffs, OCC, Maxus, Tierra and the Repsol/YPF Defendants. (Ex. J, Aug. 28, 2012 Consent Order on Mediation Among Pls. and Direct Defs.) Likewise, the negotiations over the Third-Party Consent Judgment were open to all Third-Party Defendants willing to commit to confidential settlement discussions. After the development of a confidential term sheet, Plaintiffs and those Third-Party Defendants interested in settlement entered a Memorandum of Understanding outlining a procedure for finalizing the terms of a Consent Judgment. Thereafter, the Court

entered an order staying discovery and allowing Plaintiffs and all interested Third-Party Defendants to finalize negotiations. (Ex. K, Oct. 2, 2012 Order Staying Third-Party Proceedings.) Once finalized, acceptance of the Third-Party Consent Judgment was offered to all participating Third-Party Defendants, subject to approval by Plaintiffs. (Ex. L, Jan. 24, 2013 Consent Order for Approval Process for Proposed Consent Judgment.)

Finally, Plaintiffs followed the specific procedure for public participation required by the Spill Act. As outlined in the Court's orders governing the approval process for both settlements, DEP followed its administrative procedure for approving and entering the settlements required by N.J.S.A. 58:10-23.11e2. DEP issued widespread notice to the interested parties and the public. (www.state.nj.us/dep/srp/legal/.) DEP also made the settlements and an administrative record of more than 3,500 documents available for public review on its website and its Trenton headquarters. (Id.) DEP received 15 sets of comments for the two proposed settlements and issued a response to each of the comments. (Ex. D, Resp. to Cmts.) In particular, OCC was given the opportunity to provide comments, and DEP provided a detailed response to each of OCC's comments. (Id.) Finally, DEP considered all of the comments received and determined to proceed with its approval of the negotiated settlement terms. Accordingly, all interested parties and the public have had ample opportunity to participate in the settlement review process as provided by the Legislature, and DEP has exercised its discretionary authority and specialized expertise to develop settlement terms that further the purposes of the Spill Act and are in the public interest.

C. Substantive Consideration of the Settlements

When the State initiated the Passaic River Litigation, its goals were to recover damages suffered by the State as a result of discharges of dioxin and other hazardous substances from the

Lister Property, including recovering its substantial past investigation costs and economic damages. The State also sought to ensure funding for any potential State funding of any cleanup and to also facilitate cleanup action on the Passaic River. The two pending settlements and the judgments previously obtained against OCC will now assure that most of these goals have been or will be achieved, subject to Plaintiffs' remaining claims against OCC. Collectively, the settlements will be some of the largest ever obtained by the State in an environmental litigation and represent the culmination of eight years of hard work and determination. The settlements also provide substantial benefits to non-settling OCC and all of the settling parties and reasonably resolve the claims against the settling parties in the litigation. Likewise, the settlements do not unduly burden any party and leave Plaintiffs' remaining claims against OCC to be tried after further discovery.

In particular, the settlements provide significant benefits that result in a fair and reasonable settlement to the State, including:

- Compensation for all of the State's past costs at 100 cents on the dollar. The $165 Million in settlement funds ensure that all of the State's out-of-pocket costs claimed in the litigation are recovered, in addition to the substantial investment the State made in funding the Passaic River Litigation.

- The State is also avoiding substantial litigation costs by not pursuing its Fraudulent Transfer Claims against the Settling Defendants. The prosecution of such claims would have involved 30-40 additional depositions all over the world and required several extremely expensive experts to decipher complex international transactions and oil field valuations. Likewise, the State will avoid the costs of litigating its past costs claims and going through disruptive discovery of DEP and DOT personnel. Further, the State avoids the costs of continuing the litigation with hundreds of Third-Party Defendants. The avoidance of these costs is another significant factor in favor of settlement. See Evansville Greenway & Remediation Trust v. S. Ind. Gas & Elec. Co., Inc., No. 3:07-cv-66, 2010 WL 3781565, at *3 (S.D. Ind. Sept. 20, 2010). Additionally, DEP must be mindful of the future litigation costs as the keeper of the public purse and the Spill Fund. Marsh v. N.J. Dep't Envtl. Prot., 152 N.J. 137, 145 (1997).

- The State will avoid the litigation risk associated with some of its claims, a significant factor in determining reasonableness. Cannons, supra, 899 F.2d at 90. Although

Plaintiffs believe strongly in their claims, there are inherent litigation risks in any lawsuit and special risks of collection from foreign private and public entities. The claims against the Repsol/YPF Defendants were vigorously contested in both substance and jurisdiction. A subsequent loss on the jurisdictional issues could undo any victory Plaintiffs might obtain at trial. Also, the Settling Defendants asserted numerous defenses to many of Plaintiffs' claims, including the scope and nature of Tierra's landowner liability and recovery of certain damages. Many of those risks are avoided by the settlements.

- The settlements will also refocus the litigation on the intentional discharger, OCC, and allow for an expedited path to trying Plaintiffs' remaining claims against OCC. The addition of the Third-Party Defendants added years of discovery and litigation procedures that will be avoided by the settlements. Likewise having the claims against the Repsol/YPF Defendants tried before Plaintiffs' claims against OCC would have further added years to obtaining any final verdict and recovery for the State's damages.[10] This refocusing has the recognized benefit of "eas[ing] the strain on public enforcement resources and this court." Rohm & Haas, supra, 721 F. Supp. at 696 (recognizing the benefit of a settlement that would dismiss ten defendants and allow the governmental agency to refocus the litigation on the major contributor).

- The settlements also preserve Plaintiffs' claims against Settling Defendants and Settling Third-Party Defendants in the event Plaintiffs incur future costs and need to pursue such costs. In fact, Repsol/YPF have contractually recognized that risk exists in the lower 8 miles, up to $530 Million, and have agreed to a complete reopener outside of the FFS. This places the "the risks of future uncertainties upon the settling parties" rather than the State. United States v. Kramer, 19 F. Supp. 2d 273, 288-289 (D. N.J. 1998).

- Together, the settlements also provide approximately $17 Million for NRD restoration to benefit the affected communities. This money will be available now, rather than after the conclusion of the current trial and appeals, and after a process to assert natural resource damage claims in future litigation.

In addition to the State, the Settling Defendants and Settling Third-Party Defendants also receive meaningful benefits making the settlements fair to the settling parties. Those benefits include:

- The resolution of the State's past costs claims and certain future costs. The settlements pay in-full the State's claims for past costs and provide for contribution protection for future costs up to certain concurring limits. This contribution protection is provided to encourage settlement and resolution of the State's claims. Cannons, supra, 899 F.2d at 92.

[10] At the time the tracks were organized, one of the major goals articulated for putting the Repsol/YPF claims ahead of the State's damages claims was to encourage settlement with the foreign defendants. That goal has now been achieved, in part. Moreover, while OCC's dispute with Repsol/YPF still exists, it is not now ripe for adjudication. Unless the State prevails against OCC *and* Maxus denies OCC's tender of any judgment the State obtains under the indemnity, OCC cannot know if there is a deficiency or default by Maxus to form the basis of its claims against the foreign defendants.

- The settlements also result in the dismissal of all claims against the Settling Third-Party Defendants and all of Plaintiffs' claims against the Settling Defendants. Most notably, the parties most affected by the Third-Party Consent Judgment, Maxus and Tierra, do not oppose its entry or the dismissal with prejudice of all claims brought by Maxus and Tierra, further easing the expense on the court and affected parties.[11] (Ex. B, Settlement Agreement ¶ 50.)

- In recognition of the ongoing EPA process and the upcoming FFS, the settlements also preserve CERCLA and federal claims between all of the parties. Both settlements preserve claims for costs against the settling parties in the CERCLA process and allow the parties to seek to recover those sums in federal court under federal law. The settlements are also limited in geographic scope to the area of the Newark Bay Complex involved in the Passaic River Litigation and they exclude upland sites and areas not addressed as part of the Diamond Alkali Superfund Site, including the upper Hackensack River.

- The settlements also avoid future litigation costs. The costs of the Settling Third-Party Defendants' defense to Maxus's and Tierra's claims and participation in the litigation were substantial and could have exceeded the settlement funds paid by most Settling Third-Party Defendants. Likewise, although the Repsol/YPF Defendants will continue to litigate with OCC, they avoid the costs of continuing to litigate with Plaintiffs.

- The settlements also provide procedures for future claims by Plaintiffs. The Repsol/YPF Settlement Agreement provides procedures for seeking future costs against both the Settling Defendants and OCC, while the Third-Party Consent Judgment provides procedures for seeking NRD. These procedures limit the timing of future action by the State.

- The Repsol/YPF Settlement Agreement also provides a significant cap of the Repsol/YPF Defendants' future exposure for claims remaining against OCC.

[11] Maxus's and Tierra's agreement is subject to the Court first considering and approving the Repsol/YPF Settlement Agreement. (Id. at ¶ 50.)

Finally, the Repsol/YPF Settlement Agreement provides OCC with significant and tangible benefits that OCC would not otherwise receive,[12] including:

- The agreement resolves all of Plaintiffs' past costs claims. The payments received under these settlements recoup and retire all of Plaintiffs' past costs (excluding damages), and Plaintiffs are providing OCC a covenant not to sue for their past costs. In short, though choosing to sit on the sidelines, OCC receives a $148 Million benefit.
- OCC is also receiving covenants not to sue for economic damages, NRD and punitive damages to the extent such damages are not caused by the intentional conduct of DSCC or are unrelated to DSCC. Though Plaintiffs continue to pursue these damages against OCC, the threshold for recovering such damages has been raised.
- The settlements also preserve OCC's federal CERCLA claims and claims for indemnity against Maxus.
- To the extent $17 Million is applied to restoration projects in the Passaic River, that flows to OCC's benefits by reducing the total damages and continuing impacts.

Considering all of the benefits to the parties involved and the significant amount of consideration provided, it is indisputable that the settlements are fair and reasonable for all involved. The State will receive a significant recovery and may continue to pursue the principal discharger for remaining damages, while the settling parties will receive meaningful contribution protection and the ability to pursue certain of their claims in the more appropriate federal forum. The settlements are also supported by the purpose of the Spill Act and other New Jersey environmental laws. Those responsible for contamination of the Newark Bay Complex, through direct discharges or through contractual commitments, are paying for the costs incurred by the State and may be held liable in the future if additional costs become necessary. See Dep't of

[12] For the many reasons set forth in the Response to Comments, OCC did not have to execute the Repsol/YPF Settlement agreement in order to accept the benefits conferred to OCC therein. (See Ex. D, Resp. to Cmts. pp. 18-19 and 21-22.) Since OCC is a party to this case and settlement process and is openly accepting the benefits of the settlement that its indemnitor obtained, OCC meets the requirements of N.J.S.A. 58:10-23.11f.a(2)(b). Moreover, the language of N.J.S.A. 58:10-23.11f.a(2)(b) is not intended to restrict DEP from intentionally resolving the liabilities of related parties. N.J.S.A. 58:10-23.11f.a(2)(b) is designed to protected DEP against the former common law rule that settlement with one joint and several tortfeasor releases all other joint and several tortfeasors. That former rule has since been rejected in New Jersey. Newman v. Isuzu Motors Am., Inc., 367 N.J. Super. 141, 152 (App. Div. 2004). To apply the rule as restricting DEP's settlement authority, rather than protecting the public against inadvertent settlements, would be to fundamentally misunderstand the rule.

Envtl. Prot. v. Ventron Corp., 94 N.J. 473 (1983) (Spill Act establishing the person responsible for pollution must pay for its cleanup).

Finally, deference should be given to the DEP's decision to settle and its ability to negotiate a fair and reasonable settlement to all parties affected. Cannons, supra, 899 F.2d at 84 and 88-89. As outlined in its response to comments, DEP considered the following in developing the settlements: (i) its statutory authority and responsibility under the Spill Act and other statutes; (ii) its administrative expertise; (iii) the extensive administrative record; (iv) the risk and expense of continued litigation against the settling parties; (v) the procedural and substantive status of the litigants both prior to and following the entry of the proposed settlements; (vi) the potential costs and risks of continued litigation with the remaining parties; (vii) the goals of the State in initiating the Passaic River Litigation; and (viii) the substantial recoveries and benefits obtained for the State. (Ex. D, Resp. to Cmts. p. 9.) Having taken into consideration all of these competing considerations, Plaintiffs believe the settlements are in the best interest of the public and parties involved and provide a fair and reasonable resolution of the claims against the Settling Defendants and Settling Third-Party Defendants.

POINT III
FUTURE OF THE PASSAIC RIVER LITIGATION

If both settlements are approved by the Court, the Passaic River Litigation will be dramatically narrowed. The Third-Party Defendants will be dismissed, leaving only Plaintiffs and Original Defendants. Plaintiffs' claims against OCC will be narrowed, and Plaintiffs will no longer have any involvement in the claims against the Repsol/YPF Defendants. OCC and the Repsol/YPF Defendants may proceed to resolve their remaining claims, if any, on a schedule set by the Court after Plaintiffs' remaining damages are determined. Plaintiffs' claims for declaratory judgment for future costs, economic, disgorgement and punitive damages against

OCC will remain, but will be narrowed to focus on the conduct of OCC and DSCC. As a result, Track VIII, Plaintiffs' damages claims against OCC, will be primed for an expedited resolution. Further, OCC's claims against the other Original Defendants will be positioned to be resolved when, and if, Plaintiffs recover additional damages from OCC subject to Maxus's indemnity obligations, and Maxus is unable to fulfill those obligations. Importantly, after 8 years of intense litigation, the State will be much closer to finally getting its day in court and presenting to the Court and a jury the full measure of the costs and damages suffered by the people of New Jersey.

A. Reordering of the Trial Tracks

A condition of the Repsol/YPF Settlement Agreement is that Plaintiffs' claims against OCC be tried or resolved before OCC's cross-claims against the Repsol/YPF Defendants. Under the proposed Case Management Order ("CMO"), which is an exhibit to the Repsol/YPF Settlement Agreement, the current order of the Trial Tracks would be rearranged so that the next phase of this litigation would be Trial Track VIII—Plaintiffs' unresolved Spill Act and common law claims against OCC. Under the CMO, Plaintiffs would have a short period of time to amend their complaint to account for the settlements, and OCC would have an opportunity to respond as necessary. (Ex. B, Settlement Agreement CMO ¶ 2.) Thereafter, discovery could commence through supplemental case management orders and under the Special Master's supervision. This would allow Plaintiffs to finally move forward with trying their remaining long-delayed claims and would reset the schedule to a more traditional and logical order. This will avoid the State's need to participate in significant discovery, expert and trial costs of claims against the Repsol-YPF Defendants. This reordering is not only fair and reasonable based on the claims remaining in the litigation, but necessary for Plaintiffs and the Settling Defendants to receive the benefits of settlement. Trying Track VIII first makes sense for several reasons.

First, reorganizing the Trial Tracks is efficient and practicable. The State has endeavored to try its claims against OCC for more than eight years. While OCC may want to delay this event in order to pursue contractual and tort claims against other parties, such an approach is no longer appropriate in this case. The initial inclination of the Court was that the road to settlement could be paved by first determining who would be the party responsible for paying the State's claims, and that so long as OCC and the Repsol-YPF defendants could not resolve that issue, no settlement could be achieved. Now that two substantial settlements have been reached by the parties, a return to the more traditional and logical sequencing of the trial tracks is the most efficient and fair way to proceed. Trying Track VIII first preserves judicial resources and the resources of the State (and OCC). OCC's claims against the Settling Defendants are predicated upon Plaintiffs successfully prosecuting its remaining Spill Act and common law claims against OCC. In other words, if OCC does not incur liabilities to Plaintiffs as the result of a Track VIII trial, they have no indemnification or tort damages to pursue against the Settling Defendants.

Second, the deferral of Track IV discovery in connection with moving Track VIII forward is also reasonable under the circumstances. If, for whatever reason, OCC is successful in challenging the Repsol/YPF Settlement on appeal, the State would be right back as a party to Track IV and litigating against Repsol, YPF and the foreign parties. Thus, Track IV needs to remain stayed while the appeals process runs on the Repsol/YPF Settlement so as to not prejudice the settling parties. More importantly, given the contingent nature of OCC's claims against the Settling Defendants, this Court is well within its discretion to focus discovery efforts on claims that must be tried, as opposed to those claims that may never become necessary. The management of trial, and any requested discovery, is deferred to the sound discretion of the trial judge. Piniero v. N.J. Div. of State Police, 404 N.J. Super. 194, 204 (App. Div. 2008) (stating

trial court has broad discretion to determine scope of discovery); see also Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div.), cert. denied, 185 N.J. 296 (2005) (explaining deference to trial court on discovery absent abuse of discretion); see also Lenox Towing v. County of Bergen, No. L–9004–09 and L–9317–09, 2011 WL 5026073 (N.J. App. Div. October 24, 2011) (same). Moreover, the proposed CMO does not invariably preclude discovery—discovery is permitted with leave of court. Consequently, if OCC demonstrates, or this Court determines, that OCC should have leave to pursue certain Track IV discovery during Track VIII, it is certainly not unequivocally precluded, but such discovery should generally wait until after a determination of the extent of OCC's liability in Track VIII.

B. Track VIII Scheduling

Once the trial tracks are reset, the Court and the Special Master can proceed to establish a schedule for discovery and trial of Plaintiffs' remaining claims. Track VIII involves the completion of Plaintiffs' Spill Act claims, as well as the trial of its common law nuisance, trespass and strict liability claims against OCC. The claims underlying Track VIII have been litigated for approximately eight years, and OCC's Spill Act liability has already been decided against OCC on summary judgment. Consequently, while the scope of Track VIII is not unlimited, it will require considerable litigation efforts in 2014.

The focus of Track VIII will be the scope of contamination and damages, including Plaintiffs' cleanup and removal costs, economic damages and punitive damages. Accordingly, Track VIII will be expert-intensive. Track VIII may also involve specific liability issues such as post production-era discharges and matters relevant to Plaintiffs' common law claims. Plaintiffs anticipate relatively limited written discovery and fact depositions, followed by an intensive expert discovery period. A period for appropriate dispositive motions may also serve to further

narrow the issues that remain for trial. Track VIII can be tried toward the end of 2014, with the trial court deciding the Spill Act issues and the jury deciding the common law jury questions and damages. Plaintiffs anticipate a punitive damages phase thereafter.

C. Credit for the Settlement Funds

Upon entry of the settlements, significant claims against OCC will be resolved, and OCC will be credited with the settlement funds allocated to the resolution of those claims. As set forth in the Repsol/YPF Settlement, in exchange for Repsol's and YPF/Maxus's payment of $130 Million, OCC will receive a covenant not to sue and contribution protection for Plaintiffs' past cleanup and removal costs, including attorneys' fees and litigation costs, herein presented to the Court. (Ex. B, Settlement Agreement ¶¶ 28 and 63; see Ex E, Butler Cert.; Ex. F, Douglas Cert.; Ex. G, Dickinson Cert.) The settlement funds represent a significant portion of the State's past costs, and, together with the settlement funds from the Third-Party Consent Judgment, will provide 100% recovery for such costs and, consequently, a 100% credit to OCC.

Under the Spill Act, whenever a discharger settles its liability to the State, the liability of all other dischargers is reduced by the amount of the settlement. This is a dollar-for-dollar credit. N.J.S.A. 58:10-23.11f. The State may also not receive a double recovery for the claims and damages resolved. N.J.S.A. 58:10-23.11v. Thus, under the Spill Act, OCC's liability to the State will be reduced by the amount of the total settlement funds for Spill Act costs and damages. CERCLA contains a similar credit mechanism that reduces the liability of non-settling parties by the amount of the settlement. 42 U.S.C.A. § 9613(f)(2). For common law claims, on the other hand, non-settling parties typically receive a credit equal to the settling parties' fair share of the total damages awarded at trial, regardless of the amount of the settlement. Young v. Latta, 123 N.J. 584, 591 (1991). This requires a determination at trial of the percentage of fault for each

party in the litigation and any responsible third parties (settling parties and third-party defendants). If the settling parties are found not liable at trial, the non-settling party gets no credit, and the plaintiff may retain the settlement funds and also obtain the full amount of the verdict. Rogers v. Spady, 147 N.J. Super. 274, 278 (App. Div. 1977).

In total, the settlements will provide a joint payment of $165.4 Million to resolve the State's claims against the settling parties. As detailed above, the State's past cleanup and removal costs, including attorneys' fees and litigation expenses, total $148,054,313.30. (See Exs. E, F and G.) The settlements contemplate that the settlement funds will cover the State's past costs and then be applied to NRD restoration. The Repsol/YPF Settlement Agreement provides that the settlement funds shall first be applied to Plaintiffs' claims for past cleanup and removal costs and then to NRD owed by the Settling Defendants. (Ex. B, Settlement Agreement ¶¶ 24 and 63(c).) In addition to the language of the Settlement Agreement, the case management order attached to the Settlement Agreement, and which the parties seek to have the Court enter, provides:

> In determining the liability of OCC and other entities and parties which have not settled their liability to Plaintiffs through the Settlement Agreement or Third-Party Defendant Consent Judgment ("Non-Settling Parties"), such alleged liability of the Non-Settling Parties shall be reduced in accordance with New Jersey law and the application of the Settlement funds to the State's Past Cleanup and Removal Costs and for natural resources damages ("NRD"). The Court shall take judicial notice of the amounts paid by the Settling Defendants under the Settlement Agreement in determining the liability of the Non-Settling Parties. To the extent that any further proof will be required or permitted to establish the Settling Defendants' alleged share of liability, there shall be no discovery by any party against the Settling Defendants, except in accordance with Paragraph 5 herein.

(Ex. B, Settlement Agreement CMO ¶ 4.) If entered, the case management order would allocate the settlement funds first to past cleanup and removal costs and then to NRD. This would be significant because it would allow the State to retire its past costs claims and apply any additional

funds to NRD, which is not sought in the litigation but which would indirectly benefit OCC. This is in conformity with the statutory prohibition against double recovery and this Court's reservation order.

Because the Third-Party Consent Judgment was negotiated before the Settling Defendants agreed to resolve the remainder of the State's past costs, including the claims against OCC, the Consent Judgment does not indicate how the settlement funds will be allocated and leaves that issue to the Court. (Ex. C, Consent Judgment Order of Dismissal ¶ 7.) The Consent Judgment does, however, provide for a credit to the Settling Third-Party Defendants' NRD liability up to 20% of the settlement funds, or $7,080,000, which is allocated to restoration. (Ex. C, Consent Judgment ¶ 25.) Although the Third-Party Consent Judgment does not allocate use of the settlement funds, it does generally provide what credits will be provided to non-settling parties, including OCC. (Id. ¶ 43.) Also, in order to avoid a dispute during the settlement approval process and because the Settling Third-Party Defendants are assigning their claims for economic damages to Plaintiffs, the Consent Judgment provides that OCC shall receive a proportionate allocation credit at trial for any economic damages, consistent with the common law rule outlined above. (Id. ¶ 32(b).)

Based on the amount of the settlement funds and the claims resolved against OCC through both settlements, OCC should receive credit for the settlement funds as follows:

$148,054,313.30	To Retire Plaintiffs' Claims for Past Costs as of July 2013
$7,080,000.00	NRD Restoration from the Settling Third-Parties
$10,365,686.70	NRD Restoration from the Settling Defendants
$165,400,000	TOTAL

OCC will also be entitled to a proportionate allocation credit at trial for any economic damages attributed to the Settling Third-Party Defendants, consistent with the common law rule. (Ex. C, Consent Judgment ¶ 32(b).) Such allocation and credit provide significant benefits to OCC. It

resolves the most tangible claims that could have remained against OCC, providing immediate benefit and avoiding the litigation costs associated with trying those claims. It also provides a dollar-for-dollar credit regardless of whether the past costs are recoverable under common law or the Spill Act. Regardless of the percentage of Plaintiffs' past costs attributed to the Settling Defendants and/or the Settling Third-Party Defendants, such will surely be less than 100%, which is effectively what OCC is receiving. Finally, unlike typical settlements, OCC is not only getting a credit for the settlement funds, OCC is getting a complete covenant not to sue and contribution protection for the past costs. Without that, OCC would be exposed to additional claims by Plaintiffs and the Settling Third-Party Defendants.

CONCLUSION

For the reasons above, Plaintiffs respectfully request that the Court approve the proposed settlements, enter the case management and dismissal orders attached to the Repsol/YPF Settlement Agreement and the Third-Party Consent Judgment and allow the State to proceed to trial on its remaining costs and damages claims against OCC in 2014.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for the Plaintiffs

By: _____
John F. Dickinson, Jr.
Deputy Attorney General

Dated: October 28, 2013

Of Counsel:
JACKSON, GILMOUR & DOBBS, PC
3900 Essex Lane, Suite 700
Houston, Texas 77027

GORDON & GORDON
505 Morris Avenue
Springfield, New Jersey 07081