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BY FACSIMILE 609-984-0836
AND FEDERAL EXPRESS

John Sacco, Director
Office of Natural Resource Restoration
Natural and Historic Resources
Department of Environmental Protection
501 East State Street
Trenton, New Jersey 08609-1101

Re: Good Faith Settlement Participation Commitment and Good Cause Defenses To Directive Dated September 19, 2003 "In the Matter of the Lower Passaic River, Directive No. 1 – Natural Resource Injury Assessment and Interim Compensatory Restoration of Natural Resource Injuries"

Dear Mr. Sacco:

This firm, along with local counsel, William L. Warren of Drinker Biddle & Reath LLP in Princeton, New Jersey, represents and hereby responds to the above-referenced Directive on behalf of Occidental Chemical Corporation (OCC, successor to Oxy-Diamond Alkali Corporation and Occidental Electrochemicals Corporation [f/k/a Diamond Shamrock Chemicals Company, Diamond Shamrock Corporation (DSC-1), and Diamond Alkali Company]), Occidental Petroleum Corporation (OPC), Maxus Energy Corporation (Maxus), Chemical Land Holdings Inc. (CLH), and Tierra Solutions, Inc. (Tierra Solutions, f/k/a Chemical Land Holdings, Inc.) (collectively the Respondents) in connection with the Directive. Respondents will participate in good faith with other recipients of the Directive in meetings with the New Jersey Department of Environmental Protection (NJDEP) and its counsel to seek to settle the demands made by the NJDEP in the Directive as invited by Commissioner Campbell at NJDEP's October 24, 2003 meeting. In addition, as required by N.J.A.C. 7:26C-4.2(g), the Respondents submit this letter to the NJDEP detailing all presently known good cause defenses to the Directive.

Respondents are complying with the requirements of the Directive through implementation of the Administrative Order on Consent described below; through assurance to the U.S. Environmental Protection Agency (EPA) at a meeting with EPA on September 4, 2003, that Respondents would participate in the EPA/Corps/NJDOT Passaic River project study funding; and through cooperation with the Passaic River Natural Resource Trustees Council, of

which NJDEP is a member. As the NJDEP is aware, Respondents have long been committed to investigation, remediation and restoration of the Passaic River Study Area. That commitment is evidenced by almost a decade of investigation relating to the condition of the Study Area, the existence, if any, of natural resource damages and the identification of potential restoration and remediation projects. It has been an undertaking of enormous complexity that after much time and expense appears ready to bear fruit. To date, Respondents (collectively, but in varying capacities) have invested nearly $50 million in these efforts and the compliance, implementation, and furtherance of an Administrative Order on Consent under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that was negotiated with NJDEP and entered with the United States Environmental Protection Agency (USEPA). Notwithstanding this Response, or the fact that the Directive is disruptive of the progress made, Respondents will continue to work with USEPA, the U.S. Army Corps of Engineers (Corps), the New Jersey Department of Transportation Office of Maritime Resources (NJDOT), and the Natural Resource Trustee Council (of which NJDEP is a member) to address conditions in the Passaic River.

NJDEP's assertions that the Respondents are liable pursuant to the Spill Compensation and Control Act (Spill Act) rest primarily on the Directive's allegations that:

- the Respondents are responsible parties by virtue of successor liability to the Diamond Alkali Company, which owned and operated a pesticides manufacturing plant in Newark New Jersey until the late 1960's;

- the "Diamond Alkali Company and its predecessors manufactured or processed chemicals at the Diamond Alkali Site including dicholorodiphenyl tricholoroethane (DDT) and the phenoxy herbicides;" and

- the Diamond Alkali Company discharged waste, specifically DDT, into the Passaic River and that dioxin, pesticides, and other hazardous substances alleged to be present in the soil and groundwater of the Diamond Alkali Site are emanating or have emanated into the Lower Passaic River.

With this Directive, NJDEP is attempting to require Respondents to perform an unauthorized assessment and restoration of natural resource damage of the entire Lower Passaic River watershed in the guise of a directive to execute a cleanup and removal action. The Directive clearly states:

- "The Department hereby directs Respondents to conduct an assessment of natural resources that have been injured by discharge of hazardous substances at sites in the Lower Passaic River watershed," to include injury identification, injury quantification, and value determination, Directive at ¶ 300; and

- "The Department hereby directs Respondents to implement interim compensatory restoration for natural resources that have been injured by discharges of hazardous substances at sites in the Lower Passaic River watershed," Directive at ¶ 301.

Even though the Directive then requires the Respondents to execute an administrative consent order to assure the "clean up and removal of the discharges *described above*," Directive at ¶302 (emphasis added), this recitation does not and cannot convert this directive to perform natural resource damage assessment and restoration into a directive for a cleanup and removal. As will be explained more fully below, the NJDEP's directive authority is limited to ordering parties to undertake cleanup and removal actions. Even the broad definition of cleanup and removal costs under the Spill Act does not support the expansion of NJDEP's authority necessary to sustain this Directive. In short, a directive requiring natural resource damage assessment and restoration is *ultra vires* and unsupported by law.

This response is provided before Respondents have had an opportunity to undertake formal discovery. Consequently, it is based largely on the allegations set forth in the Directive and information that the Respondents have been able to gather through limited investigation in this matter. There may therefore be additional facts, of which the Respondents are unaware, that may provide additional bases for asserting defenses to liability or the claim for treble damages set forth in the Directive. Accordingly, the Respondents specifically reserve their rights, notwithstanding N.J.A.C. 7:26C-4.2(h), to raise in the future any and all additional legal or factual defenses that they might have to the Directive.

I. The Passaic River Restoration Initiative is a federal/state partnership that will comprehensively address conditions in the Passaic River, and NJDEP should work within that Initiative.

In April 2000, the U.S. Congress authorized the Passaic River environmental restoration study, which is underway. USEPA and the U.S. Army Corps of Engineers by Memorandum of Understanding (MOU) of July 2, 2002, established the Urban River Restoration Initiative (URRI), a visionary initiative concerning "environmental remediation and restoration of degraded urban rivers and related resources." The Passaic River Restoration Initiative (PRRI) is one of eight pilot projects under URRI. To accomplish the Passaic River restoration, the Federal Natural Resources Trustees and NJDEP as the State Natural Resource Trustee also have entered a Memorandum of Agreement and established a Trustees' Council. Rather than seek to piecemeal natural resources restoration inefficiently with this Directive, NJDEP should work cooperatively and comprehensively to accomplish natural resource restoration in the Passaic River under PRRI. The federal partners, along with the NJDOT as non-federal sponsor, are designing a Feasibility Study to assess the conditions in the Passaic River and to identify alternatives to address river conditions. The Trustees are identifying their sampling needs and those will be incorporated into this $20 million Feasibility Study. With this Directive, NJDEP directs a handful of entities to undertake work that will be costly, duplicative, and out of sync

with what should be the thoughtfully-conceived, carefully-executed work plans that will be implemented under federal and state oversight and include the input of the State and Federal Natural Resources Trustees. Instead, NJDEP should work in partnership with other federal and state entities who are addressing the Passaic River restoration, and assure that other Directive respondents and local governmental entities cooperate in PRRI, as Respondents are doing. On October 29, 2003, at a meeting convened by EPA Region 2 at its offices in New York City, a high level New Jersey State official in response to a question posed to EPA officials by counsel for a noticed party stated to the assembled noticed parties that it is his expectation that in lieu of separate data-gathering, an offer to participate in funding the PRRI project study will constitute a good faith offer to comply with this Directive. Respondents seek to participate in a cooperating group offer and presently expect that a group will form and make a good faith offer to EPA/Corps/NJDOT on or before EPA's November 26, 2003 deadline. We strongly commend the proposition that NJDEP will consider that such a good faith offer to EPA also constitutes a good faith offer to comply with this Directive.

II. The Administrative Order on Consent (AOC) (Index No. II-CERCLA-0117) between USEPA and OCC preempts issuance of this Directive.

The lower six miles of the Passaic River constitute the Passaic River Study Area pursuant to the above-referenced AOC. Tierra Solutions on behalf of OCC is implementing this AOC, pursuant to which it has been conducting a Remedial Investigation and Feasibility Study in the Passaic River Study Area. NJDEP fully participated in the development and negotiation of this AOC, and it assigned a case manager to its implementation; NJDEP has received copies of all submittals thereunder. The extent of the Passaic River Study Area was identified in consultation with NJDEP. The Respondents have expended more than $18 million in data collection and analysis and an additional $30 million in other work. This work included an ecological sampling plan that has already been performed at a cost of nearly $2 million, the results of which will inform work under PRRI. All work performed pursuant to the AOC is being assimilated into PRRI. NJDEP has a long history with Tierra Solutions (and the entities for whom Tierra Solutions conducts work pursuant to contractual arrangements), including the entry of two Administrative Consent Orders (ACOs) in the mid-1980's, ACO I (March 13, 1984) and ACO II (December 21, 1984). As required by ¶ 67, at page 21 of the AOC, the NJDEP Diamond Alkali Project Manager-Passaic River Study Area received two copies of all work plans, reports, and other documents required to be submitted to USEPA under the AOC. The NJDEP ACOs were subsumed by the hereafter-described Consent Decree, as provided under its terms. NJDEP should continue in its well-established course of working cooperatively with Tierra Solutions, and not disrupt that course with this new Directive. Indeed, the AOC under which Tierra Solutions is now undertaking a Remedial Investigation and Feasibility Study in the Passaic River Study Area preempts this Directive vis-à-vis the Respondents.

The Directive is further preempted by the Consent Decree entered by Federal District Court concerning Remedial Design/Remedial Action for 80/120 Lister Avenue, to which NJDEP

is a party, to the extent that the Directive addresses "Covered Matters" under the Consent Decree. *United States of America v. Occidental Chemical Corporation, Chemical Land Holdings, Inc.*, Civil Action No. 89-5064 and *State of New Jersey, Department of Environmental Protection v. Occidental Chemical Corporation, Chemical Land Holdings, Inc.*, Civil Action No. 89-5025 (November 19, 1990). Once a consent decree under CERCLA has been entered by a federal court – imbuing that decree with the force of law – alternative state remedies may not be pursued. 42 U.S.C. § 9621(f). "At that point, other remedies based on state law are in effect preempted by the federal and state law embodied in the decree through a mechanism incorporating the federal standards and any relevant more stringent state standards." *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1455 (6th Cir. 1991). This is not to say that as a general matter CERCLA preempts state action, but rather that in this case, the terms of the Consent Decree itself preempt the state from undertaking action at odds with the terms of the Decree.

Federal law may preempt a state law, thereby invalidating it under the Supremacy Clause of the United States Constitution, in three instances: 1) when Congress, operating within constitutional limits, preempts state law by expressly stating an intent to do so; 2) when federal law is sufficiently comprehensive that courts may reasonably infer that Congress intended to leave no room for state regulation; and 3) where Congress has not completely displaced state regulation, federal law may preempt state law to the extent that state regulation conflicts with federal law. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987). In the latter instance, conflict may be present because "compliance with both federal and state regulations is a physical impossibility," *Fla. Lime & Avocado Growers, Inc. v Paul*, 373 U.S. 132, 142-43 (1963), or because the state regulation is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

In this case, Congress did not expressly state that CERCLA preempts state environmental regulation, nor in CERCLA did Congress enact a statute so comprehensive that courts may infer an intent to displace any supplementary state regulation. *See Akzo Coatings, 949 F.2d at 1455.* Indeed, CERCLA expressly states that it shall not be construed or interpreted as preempting any state from "imposing any additional liability or requirements with respect to the release of hazardous substances within the state." 42 U.S.C. § 9614(a). However, to the extent that the Directive serves as an obstacle to accomplishments and execution of the existent AOC, which has the force of law, the third basis for preemption exists. Indeed, because "more stringent state environmental laws must be incorporated by EPA into federal consent decrees if relevant and applicable, . . . the state may not seek other remedies that are at odds with the terms of the decree." *Akzo Coatings*, 949 F.2d at 1457.

In the case of the work being performed under the PRRI and pursuant to the AOC, NJDEP fully participated in the development and negotiation of that AOC. The extent of the Passaic River Study Area was identified in consultation with NJDEP. NJDEP has participated, and continues to be a partner, in its implementation by virtue of NJDEP's case manager's

participation in the initiative. The NJDEP may not now, through this Directive, impose obligations on Respondents that will conflict with the terms of the AOC.

In order to avoid conflict with the ongoing Remedial Investigation and Feasibility Study in the Passaic River Study Area under the AOC, as well as the PRRI, Respondents respectfully suggest that NJDEP withhold any action against any of them until such time as work is completed pursuant to the AOC. At that time, the very real risk of interference caused by duplicated and conflicted efforts and standards will be alleviated. Moreover, a more accurate assessment of the effort required for cleanup and removal will be possible.

Respondents welcome NJDEP's continued involvement in Tierra Solutions' ongoing efforts to satisfy the terms of the AOC. And, NJDEP is of course free to pursue legitimate cleanup and removal actions under the Directive against parties that have not entered cooperative agreements with the USEPA and the partners active in the PRRI. Although Respondents feel such action would be premature and unnecessary, NJDEP is not preempted from spending its own funds in pursuing an assessment and restoration of the Lower Passaic River watershed beyond the terms set forth in the AOC as long as the state's efforts do not interfere with the implementation of the AOC.

III. Basic principles of corporate law establish that certain entities bear no liability.

As will be more fully detailed below, under the directive authority found in section 58:10-23.11f.a(1) of the Spill Act, NJDEP may only direct actual dischargers of hazardous materials to undertake cleanup and removal actions. The corporate history of Respondents, as explained in this Section of the Response, makes clear that Respondents are, at most, either successor or parent corporations of the alleged discharger in this case, Diamond Alkali Company. The basis for liability against such entities, if any, must rest on the allegation that such entities are "persons in any way responsible" under the Spill Act, as opposed to an actual discharger. Thus, they are not within the ambit of the NJDEP's directive authority.

Moreover, even if, for the sake of argument, NJDEP was authorized under the Act to direct "persons in any way responsible" to carry out cleanup and removal actions, many of the named Respondents cannot be considered "persons in any way responsible" under New Jersey law.

A. Maxus (f/k/a Diamond Shamrock Corporation) is not liable under the Spill Act for the acts and conditions alleged under the Directive as it is not a discharger or person in any way responsible under the Act.

The NJDEP's assertion of liability against Maxus (f/k/a Diamond Shamrock Corporation [DSC-2, a different entity from DSC-1]) rests on the premise set forth in Section II.D.2 of the Directive, which seeks to establish that Maxus is a successor to the Diamond Alkali Company, a former owner and operator of the Site. Essentially, the Directive blurs the corporate history and

use of the name "Diamond Shamrock Corporation," confusing separate corporate entities and resulting in factual and legal error. A brief explanation of the corporate history makes clear that Maxus is not a corporate successor to the Diamond Alkali Company.

The Site in question previously consisted of three contiguous lots comprising 5.8 acres and located at 80 and 120 Lister Avenue in Newark, New Jersey. A 1.8 acre parcel comprising the Northeast portion of 80 Lister Avenue (the North Parcel) was acquired by Kolker Chemical Works, Inc. (Kolker), which by the mid-1940's was operating a plant engaged in the manufacture of agricultural chemicals. In 1951, Diamond Alkali Company acquired Kolker and Kolker was later merged into Diamond Alkali Company. In April of 1960, a 1.7 acre parcel (the Southwest Parcel) on 80 Lister Avenue was leased from Tripled Oil and Refining Company and, later, from Walker Ray Holding Company. In 1967, upon a merger with Shamrock Oil and Gas Company, Diamond Alkali changed its name to Diamond Shamrock Corporation (DSC-1). DSC-1 operated the plant until 1969. In 1971, the North Parcel was sold to an unrelated entity, Chemicaland Corporation, and thereafter to two other entities, also unrelated. Ultimately, the North and Southwest parcels were united under one owner, Marisol.

In 1983, well after the sale of the plant in 1971, as part of corporate reorganization, DSC-1 became a wholly owned subsidiary of a new, non-operating stock-holding Company known as the New Diamond Corporation. A few months later, DSC-1 changed its name, first to Diamond Chemicals Company, and shortly thereafter, to Diamond Shamrock Chemicals Company (DSCC).

In September 1983, the newly formed stock-holding company known as New Diamond Corporation took the name recently theretofore vacated by DSC-1, with New Diamond Corporation becoming Diamond Shamrock Corporation (DSC-2).[1] DSC-2, through a series of name changes, became known as Maxus Energy Corporation.

In April 1984, DSCC (formerly DSC-1) purchased the land at 120 Lister Avenue (previously owned by Seargent Pulp and Chemical) to assist in the cleanup at the former plant site at 80 Lister Avenue. DSCC also reacquired title to the 80 Lister Avenue property on January 27, 1986. DSCC did not conduct operations at the Site during this period of ownership; but acquired these properties to be better situated to implement the relevant AOCs pertaining to the property and the surrounding areas.

Sometime between January 27, 1986 and September 4, 1986, DSCC transferred title to the Site to a sister company, Diamond Shamrock Chemical Land Holdings (DSCLHI), an indirect subsidiary of DSC-2 (later known as Maxus). On September 4, 1986, DSC-2 sold all of

[1] As stated, at the time New Diamond Corporation changed its name to Diamond Shamrock Corporation, DSC-1 already had abdicated its own use of the name in favor of DSCC. DSC-1 and DSC-2 were never the same entity. Rather, DSC-2 existed contemporaneously with DSCC.

the stock of DSCC to Oxy-Diamond Alkali Corporation, an indirect wholly owned subsidiary of OPC). DSCC thereafter changed its name to Occidental Electrochemicals Corporation (OEC) and ultimately (along with Oxy-Diamond Alkali) merged into OCC, another OPC subsidiary. OCC thus became the successor by merger to DSCC (formerly known as Diamond Chemicals Company, Diamond Shamrock Corporation [DSC-1] and Diamond Alkali Company), the former owner and operator of the plant. Subsequently, DSCHLI changed its name to Chemical Land Holdings, Inc. (CLH). CLH never operated at the Site. CLH later changed its name to Tierra Solutions, Inc. (incorrectly identified in the Directive as Tierra Solution Incorporated).

As a threshold matter, the Directive identifies only the Diamond Alkali Company as a discharger in this case. Directive at ¶ 84. As the corporate history set forth above demonstrates, Maxus (DSC-2) is an entirely separate and legally distinct corporate entity from OCC, the successor to the Diamond Alkali Company. Significantly, the creation of DSC-2, later known as Maxus, occurred almost fifteen years after the last possible discharge at the site by the Diamond Alkali Company, whose conduct provides the basis for purported liability, if any. Moreover, Maxus was created twelve years after the property was sold to other unrelated entities. The sole connection between Maxus and DSC-1, the entity whose acts are alleged to provide the basis for liability is that for a three year period between 1983 and 1986, the entity that would later become known as Maxus (DSC-2) owned the stock of DSC-1 (a/k/a DSCC) in the capacity of a non-operating stock-holding company. During this time of Maxus' ownership, DSCC did not operate the Site, but rather merely reacquired the Site to assist with its investigation and remediation. As stated, DSC-1 (a/k/a DSCC) is now, by merger, OCC, an entity with which Maxus has no corporate relationship whatsoever.

In light of the above explanation of the relevant corporate history, under fundamental principles of corporate liability, DSC-2 (a/k/a Maxus) cannot be deemed a successor to DSC-1 (now OCC). Simply, Maxus cannot be held liable for the acts of a former subsidiary and certainly not as to such acts as occurred prior to the existence of the parent/subsidiary relationship. As a fundamental tenet of corporate law, a corporation is recognized as being a separate entity from its shareholders. *Lyon v. Barrett*, 89 N.J. 294, 300, 445 A.2d 1153 (1982). "Even in the case of a parent corporation and its wholly-owned subsidiary, limited liability normally will not be abrogated." *State, Dep't of Envtl. Prot. v. Ventron Corp.*, 94 N.J. 473, 500, 468 A.2d 150 (1983). Thus, absent conduct that would justify piercing the corporate veil (*e.g.*, fraud or injustice), which is not present here, liability incurred by its former subsidiary cannot be imputed to Maxus as a former parent.

The Spill Act has no specific provision that alters this core principle of corporate law. However, in claims for contribution and cost recovery under the Act, the Supreme Court of New Jersey has determined that because strict liability may attach to "[a]ny person who has discharged a hazardous substance *or is in any way responsible* for any hazardous substance," in particular circumstances a parent corporation may be liable for the violations of its subsidiary. *Ventron Corp.*, 94 N.J. at 502, 468 A.2d at 165; N.J. Stat. Ann. § 58:10-23.11g.c (emphasis

added). Specifically, it must be shown that the parent corporation had ownership or control over the property at the time of the discharge, thereby demonstrating that it was actually responsible for the hazardous substance in question. *Id.* In the absence of such a showing, liability may not attach to the parent corporation.

As stated above, the only connection between Maxus and the Site is that a former indirect subsidiary of Maxus, CLH (now Tierra Solutions), acquired title to the Site long after operations by DSC-1 at the Site had ceased. Indeed, DSC-2/Maxus was not even created until nearly fifteen years after cessation of Site operations by DSC-1. Even if CLH/Tierra Solutions, Inc. could be liable for mere ownership of the Site (which, as detailed below, we assert that it cannot), there is no basis for imputing the liability of the subsidiary (current or former) to the parent. DSC-2 (Maxus) certainly could not have asserted the requisite level of control over property of CLH, Maxus' indirect subsidiary for a period of time, where it only acquired CLH long after operations by DSC-1 at the Site had terminated. *See Analytical Measurements, Inc., v. Keuffel & Esser, Co.,* 843 F. Supp. 920, 925 (D.N.J. 1993) ("[Parent corporation] cannot be held liable under the Spill Act under the 'in any way responsible' standard discussed in *Ventron* because [parent corporation] did not own [subsidiary corporation] until approximately 20 years after the discharging had ceased."). Moreover, the Directive makes absolutely no allegation suggesting that DSC-2 (Maxus) exercised any control at all over CLH regardless of when operations ceased. Even if the Spill Act's directive authority, as opposed to its contribution or cost recovery authority, allows "persons in any way responsible" to be liable for discharges, absent such a proven allegation of control, there is no basis to find DSC-2 (Maxus) "responsible" or liable under the Act.

B. There is no basis for subsidiary liability (pre or post acquisition) to be imputed to OPC.

As the corporate history set forth above reveals, OPC is or has been the indirect parent corporation to Oxy-Diamond Alkali Corporation and OCC. Both are or were wholly owned, indirect subsidiaries of OPC. If non-dischargers are within the ambit of NJDEP's directive authority, as discussed above for liability to attach, a showing of sufficient control of the parent corporation over the subsidiary's property must be evidenced to demonstrate that the parent corporation was actually responsible for the hazardous substance in question. *Ventron Corp.*, 94 N.J. at 502, 468 A.2d at 165. Specifically, it must be shown that the parent corporation had ownership or control over the property at the time of the discharge, thereby demonstrating that it was actually a person "in any way responsible." *Id.*

The Diamond Alkali Site property had been conveyed out of DSCC (DSC-1) prior to the acquisition by Oxy-Diamond Alkali of the stock of DSCC. Accordingly, OPC was not the parent of any direct or indirect subsidiary entity at the time such entity had any interest in the Diamond Alkali Site. It is axiomatic that OPC would have been unable to exercise any control whatsoever over property in which neither it, nor any of its direct or indirect subsidiaries, ever

held any interest. No corporate relationship existed, and none is alleged, that would have allowed any exercise of control by OPC prior to its indirect subsidiaries, Oxy-Diamond Alkali and OCC, acquiring their respective, succeeding interests in DSCC (DSC-1) [Oxy-Diamond Alkali as purchaser of the stock of DSCC, and OCC as successor by subsequent merger]. Moreover, the Directive makes no allegations regarding OPC's conduct vis-à-vis its indirect subsidiaries post acquisition by them respectively of DSCC which no longer owned the Diamond Alkali Site. The Directive simply recites the fact of the parent/subsidiary relationship – a relationship that never existed at a time when either subsidiary had any interest in the Diamond Alkali Site; and even the successorship of OCC to DSCC only first came into being nearly eighteen years after DSCC's operations at the site had ceased. The Directive simply has not alleged that OPC was "responsible" within the meaning of the Spill Act for the purported contamination at the Diamond Alkali Site. Absent such a proven allegation, even if non-dischargers are subject to NJDEP directives as "persons in any way responsible," there is no basis for imputing the liability of its indirect subsidiaries to OPC as an indirect parent corporation.

C. Diamond Alkali Company, DSC-1, DSCC, Oxy-Diamond Alkali and OEC have merged into OCC, which bears liability if there is any.

As the corporate history above illustrates, Diamond Alkali Company, the alleged discharger in this case, has gone through a series of name changes, a stock sale and a merger. Section 58:10-23.11f.a(1) of the Spill Act makes no provision for actions against successors of dischargers in the exercise of NJDEP's directive authority. If, for the sake of argument only, we assume that NJDEP may issue a directive bootstrapping the language of the cost recovery and contribution section of the Act, Section 58:10-23g(c)(5)[2] identifies successor corporations of dischargers as potentially liable for the discharges of their predecessors where the property in question was acquired before September 14, 1993. As the Site was last acquired prior to that date, should NJDEP be authorized to issue a Directive under this authority, OCC would then solely bear the liability, if any, for any discharges at the Site.

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[2] Section 58:10-23.11g(5) provides in relevant part:
(5) A person . . . who owns real property acquired prior to September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of the section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that subparagraphs (a) through (d) apply:
...
(c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any persons in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to this section.

In this case, the Directive identifies Diamond Alkali Company as the alleged discharger at the Site. Directive at ¶84. As explained in the corporate history above, in 1967, during a merger with Shamrock Oil and Gas Company, Diamond Alkali Company became Diamond Shamrock Corporation (DSC-1). In 1983, DSC-1 changed its corporate name first to Diamond Chemicals Company, and then to Diamond Shamrock Chemicals Company (DSCC). In 1986, following the sale of all of DSCC's stock to Oxy-Diamond Alkali Corporation as its new parent corporation, DSCC changed its name to Occidental Electrochemicals Corporation (OEC). OEC, with its parent Oxy-Diamond Alkali, then merged into OCC. According to fundamentals of corporate law, OCC, then, stands as the successor corporation to the liabilities, if any, of DSC-1 (known at various times as Diamond Alkali Company, Diamond Shamrock Corporation, Diamond Chemical Company, Diamond Shamrock Chemicals Company, and Occidental Electrochemicals Corporation). OCC's liability would arise, not from any conduct of its own, but solely as the successor to any liabilities of DSC-1 for the Diamond Alkali Site.

D. Tierra Solutions, Inc., Tierra Solution, Incorporated, and Chemical Land Holdings, Inc.

The Directive names both Tierra Solutions, Inc. and "Tierra Solution, Incorporated" (the latter being a name with which Respondents are not familiar, and which Respondents believe may be simply a duplicative listing by NJDEP possibly involving some confusion over the legal corporate title of the entity). Tierra Solutions (f/k/a Chemical Land Holdings, Inc., f/k/a Diamond Shamrock Chemical Land Holdings, Inc.) acquired title to the Diamond Alkali Site property from DSCC (DSC-1, then a sister company of CLH) prior to the acquisition of the stock of DSCC by Oxy-Diamond Alkali in 1986. This was, of course, long after all chemical manufacturing operations by DSCC had ceased at the site. As NJDEP is aware, Tierra Solutions has been engaged cooperatively for many years in performing (pursuant to private contracts between Maxus and OCC and between Maxus and Tierra Solutions) the investigative and remedial obligations of OCC (as successor to DSCC) with respect to the Diamond Alkali Site and in performing the work required of OCC under the AOC for the Passaic River Study Area. The Directive makes no allegations as to Tierra Solutions that would be a legitimate basis of liability. Notwithstanding this, Tierra Solutions desires and intends to continue to work on behalf of OCC with USEPA, the Corps, NJDOT, and the Natural Resource Trustee Council (of which the NJDEP is a member) to address conditions in the Passaic River under the PRRI program as discussed earlier in this response. Tierra respectfully suggests that the NJDEP should work in partnership with other federal and state entities who are addressing the Passaic River restoration, and assure that other Directive respondents and local governmental entities cooperate in PRRI, as Respondents are doing.

IV. The Spill Act does not allow NJDEP to use a Directive for NRD restoration.

The Directive is also flawed because it seeks to impose, under N.J. Stat. Ann. § 58:10-23.11f.a(1), an obligation to conduct an assessment of natural resources that are alleged

to have been injured and to implement interim compensatory restoration work for alleged Natural Resource Damages (NRDs) in the Passaic River. Specifically, the Directive requires Respondents to "conduct an assessment of natural resources that have been injured by discharges of hazardous substances," to include identification and quantification of injuries, as well as a value determination. Directive at ¶300. Additionally, Respondents are directed to "implement interim compensatory restoration" for natural resources that have been injured. Directive at ¶301. Because this obligation goes far beyond what NJDEP is authorized by law to require under the Directive process, the Respondents have good cause to decline participation under the Directive.

The Spill Act provides that NJDEP may, through use of its directive power, order a discharger to clean up and remove its discharge:

> Whenever any hazardous substance is discharged, the department may, in its discretion, . . . direct the discharger ***to clean up and remove***, or arrange for the cleanup and removal of, ***the discharge***.

N.J. Stat. Ann. § 58:10-23.11f.a(1)(emphasis added). While the key term "clean up and remove" is not defined in the statute, the plain meaning of that term extends only to removing the discharged material from the environment. Nothing in these terms suggests that the directive power extends to requiring the broad NRD assessment and restoration activities the Directive seeks to apply to the Respondents.

Confirming the plain meaning of "clean up and remove," the Spill Act defines a related term, "cleanup and removal costs," and this definition demonstrates that "clean up and remove" does not include a broad obligation for NRD-related assessments. "Cleanup and removal costs" are defined to include removing the discharge and mitigating future risks, but do not include restoration of past damages:

> "Cleanup and removal costs" means all costs associated with a discharge . . . in the: (1) removal or attempted removal of hazardous substances, or (2) taking of reasonable measures to prevent or mitigate damage to the public health, safety, or welfare, including, but not limited to, public and private property, shorelines, beaches, surface waters, water columns and bottom sediments, soils and other affected property, including wildlife and other natural resources . . . .

N.J. Stat. Ann. § 58:10-23.11b. Item (1) of this definition is obviously narrowly tailored to the physical removal activities associated with removing or attempting to remove a discharge. Item (2) is targeted at future or ongoing damages, as illustrated by the terms "prevent" and "mitigate." "Prevent" obviously relates to future harm. "Mitigate" relates to ongoing harms.[3] But neither of

[3] Black's Law Dictionary (7th Ed. 1999) ("to make less severe or intense: the fired employee mitigated the damages for wrongful termination by accepting a new job").

these terms in any way incorporates an obligation to broadly compensate NJDEP by payment of monetary damages, in kind restoration, or otherwise, for the effects of alleged past natural resource damage.

Indeed, the statutory provision authorizing the NJDEP's directive authority, N.J. Stat. Ann. § 58:10-23.11f.a(1) speaks only of ordering "clean up and removal" and provides for recovery of "clean up and removal costs." The sole reference to "restoration and replacement" costs deals with payments of up to $500,000 to restore private residential water supplies contaminated by a discharge and is not relevant to this Directive. N.J. Stat. Ann. § 58:10-23.11f(e). Natural resource damage issues are only referenced in N.J. Stat. Ann. § 58:10-23.11g, which deals with liability but does not contain any directive power. This compels the conclusion that the extraordinary directive power provided in N.J. Stat. Ann. § 58:10-23.11f.a(1) does not extend to a directive for NRD restoration.

The overall statutory scheme supports this claim. For instance, the New Jersey Spill Compensation Fund (the Fund) is liable for both "cleanup and removal costs" – as defined in the statutory provision quoted above – and for "all direct and indirect damages," which are also specifically defined in the statute in a way that makes it clear that NRD restoration falls within that category:

> The fund shall be liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained, including but not limited to:
>
> * * *
>
> (2) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge[.]

N.J. Stat. Ann. § 58:10-23.11g. The only reasonable reading of the Spill Act is that NRD restoration, which the Directive erroneously attempts to impose on Respondents, is not an authorized use of the Directive power, which authorizes NJDEP only to order a discharger to "clean up and remove" a discharge, not to be liable for "all direct and indirect damages" like NRD restoration. It is also instructive that the definition of "Remediation" under the Spill Act, which includes "all necessary actions to investigate and cleanup or respond to any...discharge," expressly excludes the "payment of compensation for damage to, or loss of, natural resources." N.J. Stat. Ann. § 58:10-23.11f10. Because the Directive is thus unlawful and *ultra vires*, the Respondents have good cause to decline participation.

Numerous other provisions of the Spill Act support this view. For instance, the Spill Act section governing enforcement distinguishes between the costs of cleanup and removal and natural resource damages:

> b. The department may commence a civil action in Superior Court for, singly or in combination:
>
> * * *
>
> (2) the costs of any investigation, cleanup, or removal, and for the reasonable costs of preparing and successfully litigating an action under this subsection;
>
> * * *
>
> (4) the costs of restoration and replacement, where practicable, of any natural resource damaged or destroyed by a discharge[.]

N.J. Stat. Ann. § 58:10-23.11u. This section thus respects the Spill Act's general distinction between cleanup and removal costs as opposed to NRD restoration, and provides that NJDEP may seek either remedy through a judicial action. As explained earlier, the Directive power is more limited, and allows an order only relating to cleanup and removal costs, not NRD restoration. The drafters of the Spill Act knew what NRD restoration was, and knew how to include it when they chose to. The fact that this type of claim was not included in the language authorizing the Directive power demonstrates beyond doubt that this power was not intended to reach so far.

Case law interpreting the Spill Act supports Respondents in this conclusion. In *Analytical Measurements, Inc. v. Keuffel & Esser Co.*, 843 F. Supp. 920 (D.N.J. 1993), the District Court for the District of New Jersey adopted precisely this rationale, when it held that although a defendant was liable for "cleanup and removal costs" associated with a discharge, it was not liable for "indirect damages." *Id.* at 931 n.7. Thus, while the plaintiff was allowed to recover for cleanup and removal costs, it was ***not*** allowed to recover, *inter alia*, a $900,000 claim for reduction of property value. *Id.* at 931. "Reduction . . . in the value of property" caused by a discharge is specifically defined in subsection (1) of the definition of "direct and indirect damages," and the *Analytical Measurements* court specifically held that this item was not a "cleanup and removal cost." *Id.* By analogy, if subsection (1) is not a "cleanup and removal cost," neither should the NRD provisions of subsection (2). Thus, those costs are not subject to NJDEP's Directive power. Respondents have "good cause" to decline participation, since their view of the law has been endorsed by a court.[4]

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[4] *See, e.g., New Jersey Dep't. of Env. Prot. v. Exxon corp.*, 376 A.2d 1339, 1347 (N.J. Sup. Ct. 1997) (Spill Act "incorporates by reference all common law defenses"). In addition, support in a judicial decision makes refusal to comply "objectively reasonable". Respondents reiterate that, even though they have good cause defenses to the Directive as discussed herein, the activities contemplated by, and in which Respondents will be participating pursuant to, the PRRI program will result in performance of NRD investigation and restoration which will be incorporated into a final restoration plan ultimately approved by Congress under that program with full participation of the Trustees' Council, of which NJDEP is a participating member.

A. The lack of NRD procedures confirms that NRDs are not covered.

The lack of explicit NRD assessment procedures in the Spill Act and the fact that the Directive requires Respondents to invent procedures confirms that the Directive far exceeds NJDEP's authority under the Spill Act.

V. The Directive seeks to impose burdens for discharges not covered by the Spill Act.

A. The Spill Act does not authorize NJDEP to issue directives for pre-Act discharges.

As detailed above, Respondents maintain that NJDEP has acted beyond its statutory authority in issuing a directive under N.J. Stat. Ann. § 58:10-23.11f.a(1) that requires NRD assessment and restoration. Even if the Directive were not so flawed, DEP's authority to issue directives under that statute and to impose damages against dischargers who decline to participate in such directives extends only to discharges that occur after the effective date of the statute (April 1, 1977). Both the language and legislative history of NJDEP's authority to issue Directives as set forth in N.J. Stat. Ann. § 58:10-23.11f.a(1) make this point clear:

> Whenever any hazardous substance *is discharged*, the department may, in its discretion, act to clean up and remove or arrange for the clean up and removal of such discharge or *may direct the discharger* to clean up and remove or arrange for the clean up and removal of *such discharge*.

By the very terms of the statute, NJDEP can only issue a directive whenever a hazardous substance "is discharged," not whenever a hazardous substance "has been discharged." The plain meaning of the use of the present tense cannot be denied – only discharges occurring after the date of the Act are included within the ambit of the directive provision. "[W]hen a statute speaks plainly, the courts will enforce it as written." *In Re Adoption of N.J.A.C. 7:26B*, 250 N.J. Super. 189, 244 (App. Div. 1991) (invalidating NJDEP's ECRA regulations as in excess of legislative authority).

Use of the phrase "such discharge," when examined in the light of cases construing the term "discharge," also confirms the exclusively post-Act nature of the directive provision. Courts have consistently construed the term "discharge" expressly to exclude the continuing contamination or effects of a spill that occurred prior to the effective date of the Act. *State of N.J., Dep't of Envtl. Prot. v. Arky's Auto Sales,* 224 N.J. Super. 200, 510 A.2d 62 (App. Div. 1988); *Atl. City Mun. Util. Auth. v. Hunt,* 210 N.J. Super. 76, 509 A.2d 225 (App. Div. 1986); *Township of S. Orange Vill. v. Hunt,* 210 N.J. Super. 407, 510 A.2d 62 (App. Div. 1986); *State of N.J., Dep't of Envtl. Prot. v. J.T. Baker Chem. Co.,* 234 N.J. Super. 234, 560 A.2d 739 (Ch. Div. 1989). The phrase "such discharge" can only be interpreted to refer to a post-Act occurrence as opposed to the continuing effects of a pre-Act event. "Although Section 10-23.11x mandates that the Act be liberally construed, it does not require that the term discharge be interpreted

differently with respect to each provision of the statute." *J.T. Baker*, 234 N.J. Super. at 241. Given the use of the word "discharge," it follows that the authority to issue directives can only extend to those acts which qualify as a discharge as that term repeatedly has been construed by the courts. As the Appellate Division aptly stated:

> We think that Judge Perskie was correct in concluding that the legislature did not intend either that contamination be considered a discharge, or that, if a discharge occurred before the Act, but the effects continued after, the effects were covered under the Act for all purposes.

ACMUA v. Hunt, 210 N.J. Super. at 99-100.

The language authorizing NJDEP to address post-Act discharges is quite different from the language used by the Legislature to define NJDEP's authority with respect to pre-Act discharges:

> ...the department, subject to the approval of the administrator with regard to the availability of funds therefor,...may clean up and remove or arrange for the clean up and removal of any hazardous substance which...[h]as been discharged prior to the effective date of [the Act].

N.J. Stat. Ann. § 58:10-23.11f.b(3). Unlike its post-Act counterpart at subsection a(1), subsection b(3) contains no grant of authority to issue directives for pre-Act discharges. The ability of NJDEP to clean up or remove a pre-Act discharge is also limited by the requirement that expenditures for such discharges be approved by the Administrator of the Spill Fund and be further subject to a limitation on spending. *See* N.J. Stat. Ann. § 58:10-23.11f.d. The limitations imposed on NJDEP's ability to address pre-Act discharges provide clear evidence of legislative intent that the authority conferred to address pre-Act discharges is simply not as broad as that granted to address post-Act discharges. By treating the concepts of pre-Act and post-Act discharge separately under the statute and by defining NJDEP's powers differently with respect to those concepts, the distinction intended by the Legislature is apparent.

No New Jersey court has addressed whether NJDEP's directive authority under N.J. Stat. Ann. § 58:10-23.11f.a(1) extends to pre-Act discharges; however, the above reasoning is consistent with that undertaken by New Jersey courts that had looked more generally at the question of the Act's retroactivity. Although the strict joint and several liability provision of N.J. Stat. Ann. § 58:10-23.11g.a allows NJDEP to *recover* for its cleanup and removal costs incurred in removing hazardous substances discharged before the passage of the Act, *Ventron Corp.*, 94 N.J. at 487-98, 468 A.2d 150; *Arky's Auto Sales*, 224 N.J. Super. at 206, 539 A.2d 1280; *Township of S. Orange Vill. v. Hunt,* 210 N.J. Super. at 417, 510 A.2d 62, this authority has not been explicitly extended to allow NJDEP to issue directives for cleanup and removal under section 58:10-23.11f.a(1), let alone for NRD assessment and restoration, of pre-Act discharges.

Moreover, the authority to recover for pre-Act discharges clearly does not apply to the imposition of penalties. *J.T. Baker Co.*, 234 N.J. Super. at 247, 560 A.2d 739. As stated by the *J.T. Baker* court, "the fact that the Spill Act imposes retrospective liability for abatement costs does not mean that the entire statute was intended to have retrospective application." *Id.* at 242. Rather, it seems quite clear that any retrospective application is limited to recovery by NJDEP only for its costs expended in cleanup and removal actions. *See Arky's Auto Sales*, 224 N.J. Super. at 206, 539 A.2d 1280 ("[L]iability may be retrospectively imposed for the costs of cleanup and removal of a discharge prior to the effective date of the Spill Act . . . "); *Township of S. Orange Vill.*, 210 N.J. Super. at 417, 510 A.2d 62 ("[T]he strict liability provision of N.J.S.A. 58:10-2311g.a was prospective in nature except with regard to the DEP's ability to recover for its cleanup and removal costs incurred in removing hazardous substance discharged before the passage of the Act.").

While the Directive does not assert precisely when the Site allegedly became contaminated with dioxin, pesticides, and other hazardous substances, there can be no dispute that the discharges at issue necessarily occurred prior to the effective date of the statute. In light of the limitations imposed by the Act on NJDEP's directive authority, the Directive, together with its claim for penalties, and treble damages and threat of lien, must be withdrawn as invalid.

B. The Directive unlawfully seeks to impose restoration obligations for passive discharges, which are not subject to the Spill Act.

The Directive is unsupported by law in that it seeks to impose liability against the Respondents for hazardous substances that allegedly have "migrated" and "emanated" into the Passaic River from the soils or groundwater of the Site. *See* Directive ¶¶ 84, 86, and 88. By its own terms, the Spill Act limits use of NJDEP's directive power to cleanups and removals of *discharges*:

> Whenever any hazardous substance is *discharged*, the department may, in its discretion, . . . direct the discharger to clean up and remove, or arrange for the cleanup and removal of, the *discharge*.

N.J. Stat. Ann. § 58:10-23.11f.a(1)(emphasis added). A "discharge" is defined under the Act as:

> [A]ny intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances in to the waters or onto the lands of the State.

N.J. Stat. Ann. § 58:10-23.11b. These methods of release do not incorporate any passive activity, such as the migration or emanation of waste alleged by NJDEP in this matter.

Respondents' reading of the statute is entirely in agreement with New Jersey court's consistent rejection of "passive" discharges from liability under the Spill Act. As the court in

White Oak Funding, Inc. v. Winning reflected, "[t]he common thread running through these terms is that they all describe methods by which a substance can be transferred from a vessel, vehicle, pipe container, or any other source onto the land or into the water." 341 N.J. Super. 294, 300, 775 A.2d 222, 225 (App. Div.), *certif. denied*, 170 N.J. 209, 785 A.2d 437 (2001). As such, it is well settled that migration or emanation of hazardous substances already present in soil or groundwater are excluded from the statutory definition of "discharge." *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 215 F. Supp. 2d 482, 495 (D.N.J. 2002); *White Oak Funding, Inc,*. 341 N.J. Super. at 299, 775 A.2d 222; *State, Dep't of Evtl. Prot. v. J.T. Baker Co.*, 234 N.J. Super. 234, 240, 560 A.2d 739 (Ch. Div. 1989); *State, Dep't of Evtl. Prot. v. Arky's Auto Sales*, 224 N.J. Super. 200, 207, 539 A.2d 1280 (App. Div. 1988); *Atl. City Mun. Utils. Auth. v. Hunt*, 210 N.J. Super. 76, 96-100, 509 A.2d 225 (App. Div. 1986). A discharge under the Act "requires some act or omission of human conduct which causes a hazardous material not previously present to enter the waters or land." *White Oak Funding, Inc.*, 341 N.J. Super. at 299, 775 A.2d 222.

In this case, as explained above, the last possible discharge, if any, at the Site by the Diamond Alkali Company or its successors occurred in 1969, when the DSC-1 ceased operation at the Site. Even if, as NJDEP contends, the groundwater and soils at the Site were contaminated by that time due to a prior discharge, there is no basis for liability for any migration or emanation of hazardous waste that may have occurred after the initial discharge of waste into the environment. As already stated, there is further no basis of liability for discharges, if any, that occurred prior to the cessation of operations in 1969, as this would have been pre-Act discharges and thus outside of the scope of the Spill Act.

C. The Directive unlawfully seeks to impose cleanup and removal obligations for permitted discharges, which are not subject to the Spill Act.

While the Spill Act omits a grant of authority to NJDEP to issue directives for pre-Act discharges under N.J. Stat. Ann. § 58:10-23.11f.a, the Act explicitly makes lawful permitted discharges under N.J. Stat. Ann. § 58:10-23.11c. The Spill Act provides: "The discharge of hazardous substances is prohibited. This section shall not apply to discharges of hazardous substances pursuant to and in compliance with the conditions of a Federal or State permit..." N.J. Stat. Ann. § 58:10-23.11c. The Directive has made no attempt to differentiate between those discharges that have been made lawfully into the Lower Passaic River subject to valid permits by either Respondents or other named and unnamed parties, versus those that may have been made unlawfully, and to properly limit obligations of cleanup and removal accordingly. The amount of hazardous substances discharged in such a manner over time into the Passaic River from point sources along both the Lower and Upper Passaic River and its tributaries (*i.e.*, persons or entities holding NJPDES or NPDES discharge permits) is significant. To the extent that the NJDEP seeks to direct cleanup and removal of permitted discharges, its actions are *ultra vires* and unlawful.

VI. The Directive seeks to impose burdens upon parties not authorized by the Spill Act.

A. The Respondents are not "Dischargers" under the Spill Act and therefore are not subject to the Directive.

As indicated above, the Spill Act permits NJDEP to issue Directives only in certain cases, and then only to "dischargers." N.J. Stat. Ann. § 58:10-23.11f.a(1) provides in pertinent part that "[w]henever any hazardous substance is discharged, the department may ... direct the discharger to cleanup and remove, or arrange for the cleanup and removal of, such discharge." The term "discharger" is not defined under the Act; however, a discharge is limited to "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances in to the water or onto the land of the State." N.J. Stat. Ann. § 58:10-23.11b. Thus, a discharger, under the Act, is restricted to one who engages in an act or omission that results in any of the activities set out in the statute above.

Significantly, as explained above, New Jersey courts have refused to recognize "passive discharges" under the Spill Act, thereby excluding the migration or emanation of hazardous substances already present in soil or groundwater from the statutory definition of "discharge." *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 215 F. Supp. 2d 482, 495 (D.N.J. 2002). Thus, ownership of property from which already contaminated soils or ground water are migrating is not sufficient to convert the land owner to a "discharger" under the Spill Act.

In this case, the Directive identifies only Diamond Alkali as a discharger at the Site. Directive at ¶ 84. Following cessation of operations at the Site in 1969, Diamond Alkali Company merged effective November 30, 1987, as Occidental Electrochemicals Corporation) into OCC. To the extent that Diamond Alkali could have been considered a discharger, it is no longer a going concern and its liabilities, if any, belong to OCC that in and of itself is not a "discharger" under the Act.

B. "Persons in any way responsible" are not subject to NJDEP's directive authority under the Spill Act.

NJDEP is wholly without authority to issue a directive for cleanup and removal to "persons in any way responsible" for a discharge. The Spill Act is narrowly tailored to allow NJDEP to issue directives only in certain cases,[5] and then only to "dischargers" themselves. *See* N.J. Stat. Ann. § 58:10-23.11f.a(1). Notably absent from the directive authority is the right to direct "persons in any way responsible" to clean up or remove a discharge.[6]

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[5] *See* Section V, *supra*.

[6] Respondents acknowledge that NJDEP asserts the authority to direct "persons in any way responsible" to clean up and remove discharges in its administrative regulations implementing the Spill Act. *See* N.J. Admin. Code

Notably, the Legislature has taken meticulous care to insert that very provision in other parts of the statute. Indeed, it is particularly significant that pursuant to the very same amendment by which the right to direct "dischargers" was created, the Legislature simultaneously created liability for the class of persons identified as "in any way responsible." The failure to include this new class of liable party within the newly-created directive authority suggests quite clearly that the expressed limitation was intentional. Had the Legislature intended that the directive authority extend to persons other than dischargers, it would have so stated expressly. Indeed, when the Legislature has intended to address both classes of responsible parties, it has done so explicitly, as for example in the paragraph immediately following the Directive language regarding contribution rights (N.J. Stat. Ann. § 58:10-23.11f.a(2)). Because the authority to issue Directives applies only against dischargers, the Directive's claim for treble damages is likewise limited.[7] This is fully in keeping with Respondents' argument that NJDEP's directive power is an extraordinary one, as supported by the limitation to cleanup and removal actions, as argued in Section IV, *supra*.

In defining "discharge liability" in this case, all Respondents have been identified as "persons in any way responsible" by the NJDEP. *See* Directive at ¶ 89. (The Directive states that Diamond Alkali Company discharged wastes, *id.* at ¶ 84, but then elects to assign it liability as a "person in any way responsible," *id.* at ¶ 89.) Accordingly, NJDEP's exercise of its directive authority under N.J. Stat. Ann. § 58:10-23f.a(1) against these parties is unlawful.

VII. The Directive is flawed and unreasonable as a practical matter, which provides "good cause" to decline participation.

A. The Directive orders actions that are not "reasonable measures" to prevent or mitigate damages.

As described in Section IV above, the Directive is flawed in that it directs Respondents to undertake a natural resource damage assessment and restoration, undefined measures that are beyond the NJDEP's directive authority under N.J. Stat. Ann. § 58:10-23.11f.a(1). Further, NRD assessment and restoration are not a part of NJDEP's own Technical Requirements for Site Remediation. N.J. Admin. Code § 7:26E *et seq.* Obligations such as these that are beyond the scope of the NJDEP's statutory authority, and even NJDEP's own site remediation regulations, cannot be said to be reasonable in achieving a cleanup and removal.

§ 7:26C-4.2(a). To the extent that these regulations seek to authorize NJDEP to issue directives to any parties other than dischargers, the regulations are *ultra vires* and are unsupported by law.

[7] This argument also applies to the claim set forth in the Directive that Respondents might be subject to a lien against property pursuant to N.J. Stat. Ann. § 58:10-23.11f.f.

The Respondents' challenge to these Directive requirements as unreasonable provides good cause not to participate under the Directive as issued. The New Jersey Supreme Court has recognized that where a directive seeks to recover costs expended in a cleanup and removal action, the aggrieved party has a right to demonstrate that an element of the costs as imposed by the NJDEP is unreasonable. *Kimber*, 110 N.J. at 86. Similarly, "[a]n identical contention raised on an objectively reasonable basis could constitute a 'good-cause defense' to a pre-payment enforcement directive." *Id.*

The statutory obligations of dischargers under the directive authority of the Spill Act is limited to, at most, the cleanup and removal of the hazardous waste discharged at the Site. N.J. Stat. Ann. § 58:10-23.11f.a(1). As noted, Respondents recognize that where cleanup responsibility exists, this obligation properly extends to prevention and mitigation of risks – terms that contemplate alleviation of current harm as well as steps to deter future harm. *See* N.J. Stat. Ann. § 58:10-23.11b. *See also* N.J. Admin. Code 7:26C-4.1(a)(1). Respondents' understanding of the appropriate and reasonable obligations of cleanup and removal actions is consistent with and informed by the NJDEP's own Technical Requirements for Site Remediation. N.J. Admin. Code § 7:26E *et seq.*

The Technical Requirements for Site Remediation are promulgated by the NJDEP and constitute the basis of the NJDEP's review of the remediation of any contaminated site in New Jersey, including activities under the Spill Act. N.J. Admin. Code § 7:26E-1.3. Site remediation under the NJDEP regulations consists of numerous components that ensure that cleanup and removal at the site is achieved, and that any present conditions are mitigated and future harms are prevented. For example, the regulations include detailed requirements for the following:

- a preliminary assessment and site investigation in order to "identify the presence of any potentially contaminated areas of concern." N.J. Admin. Code § 7:26E-3.1.

- a remedial investigation in order to, among other purposes, "[c]ollect and evaluate all data necessary to evaluate the actual and potential ecological impacts and to characterize all natural resource injuries, including the nature and extent of injury to soil, water, flora and fauna, caused by the contaminants of potential ecological concern at the site." N.J. Admin. Code § 7:26E-4.1(a)(5). The remedial investigation is to include an investigation of ecological receptors, pursuant to code Section 7:26E-4.7.

- selection of a remedial action in order to develop and implement the most appropriate remedial action for the site, which must "reduce or eliminate exposure to contaminants above the applicable remediation standard." N.J. Admin. Code § 7:26E-5.1(c); and

- implementation of the selected remedial action that will, among other requirements, "treat[] and remove[] when practicable, or contain[] when treatment or removal are not practicable" all free and/or residual product. N.J. Admin. Code § 7:26E-6.1(d).

Clearly, these requirements are directed towards the cleanup and removal of discharges, and the mitigation of their current effects and prevention of any future harms. Thus, while parties may challenge whether an element of the costs imposed under these requirements are in fact reasonable, *see Kimber*, 110 N.J. at 85-86, these are the types of requirements that one expects to see associated with a cleanup and removal action pursuant to the Spill Act. *See, e.g., State, Dep't of Envtl. Prot. v. Hartford Ins. Co.*, 278 N.J. Super. 412, 415, 651 A.2d 472 (N.J. App. 1995), *rev'd on other grounds*, 143 N.J. 462, 672 A.2d 1154 (N.J. 1996) (finding that the cleanup and removal costs imposed under the cost recovery provision of the Spill Act include engineering costs associated with a remedial investigation and feasibility study); *see also Woodland Private Study Group v. New Jersey*, 616 F. Supp. 794, 800 (D.N.J. 1985), *judgment vacated as moot*, 846 F.2d 921 (3d Cir. 1988) ("[c]leanup and removal expenses are broadly defined, so as to include the costs of preparing an RI/FS."). Indeed, these specifications constitute the technical requirements of remediation actions and have been created for the very purpose of mitigating and preventing harm to the environment.

Significantly, nowhere in NJDEP's Technical Requirements for Site Remediation or in NJDEP's regulations for Department Oversight of the Remediation of Contaminated Sites, N.J. Admin. Code § 7:26C *et seq.*, can one find the terms used in this Directive: "an assessment of natural resources," "Injury Identification," "Injury Quantification," "Value Determination," and "interim compensatory restoration." Where, as here, obligations under a directive are not found in NDEP's own requirements for site remediation, they cannot be said to be reasonable measures to prevent or mitigate damages as part of a cleanup and removal action, and thus good cause exists to decline participation.

B. The Directive provides no methodology regarding how a potential NRD assessment is to be performed or what constitutes interim compensatory restoration.

Not only has the Directive impermissibly directed Respondents to undertake an NRD assessment and restoration, it has offered Respondents absolutely no guidance as to the scope or nature of these undertakings. As stated, NJDEP's Technical Requirements for Site Remediation and NJDEP's regulations for Department Oversight of the Remediation of Contaminated Sites do not even include the terms used in this Directive: "an assessment of natural resources," "Injury Identification," "Injury Quantification," "Value Determination," and "interim compensatory restoration." These are terms without meaning and Respondents are left to guess at what they might signify and require. Moreover, these terms appear to require actions that are well beyond those contemplated by not only the Spill Act, but even NJDEP's own regulatory scheme. While the regulations appear to include aspects of what might be required in "Injury Identification" and

"Injury Quantification" of natural resources, for example, section 7:26E-4.1(a)(5) requires evaluation and characterization of natural resource injuries, the extent of the overlap between what is required by the regulations and what is required by the Directive in unknown. Further, the Directive's call for "compensatory restoration" for natural resource damage is not only an enigma, but apparently reaches well beyond any requirements imposed in the NJDEP regulations.[8] In short, Respondents have good cause to decline participation in the terms of the Directive as the Directive provides no guidelines or methodology to carry out its own obligations.

C. The Directive does not even attempt to identify the natural resources that it alleges Respondents damaged.

Even assuming Respondents are responsible for any injury to natural resources, they are only responsible for injury, if any, to certain specific natural resources with the Lower Passaic River. The Directive, however, does not attempt to identify the injured resources for which each Respondent is responsible and the injured resources for which it cannot identify a responsible party. Rather, it requires reach Respondent to undertake joint and several liability for each natural resource that has been injured. If they even are liable at all, Respondents should only be responsible for natural resources that they have adversely impacted. Thus, the Directive should only require that Respondents inventory the natural resources in the Lower Passaic that have been injured. NJDEP may then, should it decide to do so, issue a Directive requiring evaluation, quantification and replacement or restoration of specific natural resources by those parties that it considers responsible for the injury to those resources.

VIII. The Directive violates principles of due process and fundamental fairness.

A. The coercive nature of the directive procedure is unconstitutional.

The Respondents' arguments that the Directive infringes upon rights of due process and fundamental fairness are twofold. First, Respondents maintain that the penalty provision of the Spill Act, upon which NJDEP relies in its Directive, is so coercive as to deprive Respondents of their right to due process and fundamental fairness. Second, Respondents maintain that the Directive in question is unconstitutional as applied.

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[8] The Technical Requirements for Site Remediation use the term "restored" only once, in which it is stated that; "All areas subject to remediation shall be restored, to the extent practicable, to pre-remediation conditions with respect to topography, hydrology and vegetation, unless alternate restoration is approved by the Department . . ." N.J. Admin. Code § 7:26E-6.4(b). In other words, where the remedial action causes a disturbance to the site, the regulations require the site's landscape to be returned to the condition it was in before the remedial action began. This is a far cry from restoring the site's natural resources to the condition that they were in pre-discharge, if that is what is meant by "interim compensatory restoration" for natural resources.

In order adequately to protect a party's right to due process, a party with reasonable grounds for contesting a Directive or administrative order must be able to do so without penalty. *See Ex Parte Young*, 209 U.S. 123 (1908); *Okla. Operating Co. v. Love*, 252 U.S. 331, 338 (1920). In this matter, NJDEP has issued a Directive to Respondents that includes with it the threat of substantial penalties pursuant to N.J. Stat. Ann. § 58:10-23.11u. Under that section of the statute, penalties may be imposed at the rate of $50,000.00 per day, per violation, with each day constituting a separate violation. The potential penalties in this case are staggering. The constitutional infirmity arises because the penalty provision in question now renders it a violation to refuse compliance with a Directive. A party faced with a Directive in which such penalties are threatened may thus be coerced into compliance with a Directive to which it has a reasonable defense as a result of the *in terrorem* effect of the threatened penalties. This was precisely the circumstance that led the New Jersey Supreme Court in the *Kimber* case to recognize a good cause defense to the treble damages provision contained within NJDEP's power to issue Directives. No such defense has been made applicable to the new penalty provision, however.

Even assuming the applicability of a good cause defense to the Spill Act's new penalty provision, however, the Directive still infringes upon rights to due process and fundamental fairness as applied. To cure the constitutional defects of the Spill Act's directive provision, the Court in *Kimber* read into the statute an implied good cause exception to the treble damages provision. Without such an exception, reasoned the Court, "the statute may infringe the state or federal constitutions." *Matter of Kimber Petroleum Corp.*, 110 N.J. 69, 82 (1988). The Directive as here presented to Respondents renders the right to a good cause defense, deemed essential by the *Kimber* Court, merely illusory. There is a substantial difference between stating that a right exists, and fostering the environment in which the right can flourish. The Directive in this case fails to recognize that distinction.

B. The Directive issued to Respondents is unconstitutional because it provides no basis to evaluate good cause defenses.

As noted above, the existence of a meaningful "good cause" defense is the keystone of the constitutionality of the Spill Act's aggressive liability scheme. While Respondents contest the constitutionality of the Spill Act as a general matter, the particular Directive issued to Respondents poses an even more significant constitutional problem. This is because the Directive is framed so vaguely that the Respondents cannot assess the reasonableness of what is ordered in the Directive or the costs associated with it.

The New Jersey Supreme Court specifically held that if the costs associated with cleanup and removal are not reasonable, a party receiving a Directive has a valid "good cause" defense. *Kimber*, 110 N.J. at 86 ("[I]n an appropriate case, an aggrieved party should have the right, in an action for reimbursement to recover costs, to demonstrate that an element of the costs imposed by DEP in unreasonable"). The Directive, however, seeks to circumvent that "good cause"

defense by depriving Respondents of any ability to assert this defense. It does so by failing to set forth any information that would allow Respondents to evaluate the appropriateness or reasonableness of the assessment and restoration that NJDEP seeks by the Directive. The nature of the assessment and restoration for the Lower Passaic River watershed is nowhere set forth; nor does the Directive specify the nature or amount of costs to be expended. The Directive is not allowed to end run this defense through vagueness, and because the order deprives Respondents of this critical "good cause" defense it is unconstitutional. Without sufficient information regarding the remedy to be required, there is no way to evaluate whether it is reasonable, and the Respondents are faced with the Hobson's choice of complying with a Directive that gives them no opportunity to assert the "reasonableness" defense, or risking the incurrence of treble damages if a "reasonableness" defense is later rejected.

This concern is particularly acute given the vagueness of the Directive and the lack of any clear standard for determining when the Directive has been complied with. As worded, the vague Directive gives NJDEP the opportunity to set the bar for compliance as high as it wishes if Respondents agree, but to assert that only minimal effort would be required under the Directive for compliance – in essence, assuming away the "reasonableness" defense after the fact – if NJDEP chooses to bring an enforcement action seeking $50,000 per day in penalties and treble damages. This is a Hobson's choice indeed – and the minimum requirement of due process is that an agency issuing an order must at least articulate the standards it expects a private entity to comply with. *See, e.g., General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995); *Trinity Broadcasting Co. v. F.C.C.*, 211 F.3d 618 (D.C. Cir. 2000). Because the Directive does not do so, it is unconstitutional.

The Directive is similarly flawed by virtue of its failure to set forth facts sufficient to establish the nexus between Respondents and alleged natural resource damage for the entire Lower Passaic River watershed. As NJDEP has interpreted the good cause defense conceived by the *Kimber* Court, a "responsible party must have an objectively reasonable basis for not complying with the Directive *at or near the time* the Directive is issued." 25 N.J.R. 2002, 2031, May 17, 1993. An understanding of the factual predicates for liability is thus essential to the very existence of a party's right to a good cause defense. Indeed, such factual information is necessary not only to enable a party to evaluate its potential liability or, more correctly, whether it has a good cause defense to assert, but also to permit both NJDEP and the court to evaluate the nature of any such defense. Any evaluation of a party's good cause defense will require that a party, NJDEP and the court be able to distinguish between those facts that might ultimately be relied upon to establish liability and those that were, in fact, relied upon in asserting the potential liability to which the threat of treble damages necessarily relates. It is thus fundamentally unfair that a directive not contain those facts that will form the basis of the treble damages claim. The ability to assert a defense to treble damages goes to the very heart of a party's constitutionally protected rights that *Kimber* decided to embody in the concept of the good cause defense. As it is the party's basis for resisting a directive at the time the directive was issued that will be evaluated, neither such party nor the court should be required to guess as to what formed the

basis for NJDEP's claim at that time. Without such factual information, a party is left without the means to evaluate intelligently its potential liability. Principles of due process and fundamental fairness, both of which are the very foundation of the good cause defense recognized by the New Jersey Supreme Court, require nothing less. *See Woodland Private Study Group v. NJDEP*, 616 F. Supp. 794, 811 (D.N.J. 1985).

The circumstances thus presented by NJDEP's Directive render meaningless the right to a good cause defense. Without such a defense, the Directive goes "beyond constitutional tolerance." *Kimber*, 110 N.J. at 81.

C. Unilateral agency compliance orders are only constitutional in emergency situations.

A recent decision of the United States Court of Appeals for the Eleventh Circuit has also substantially limited the ability of an administrative agency to issue unilateral compliance orders in non-emergency situations. In *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), the court rejected EPA's attempt to issue a compliance order requiring a major utility to upgrade pollution control equipment at its electric generating stations due to alleged Clean Air Act violations. In doing so, the court held that statutory provision that provided for unilateral agency orders in non-emergency situations, with no pre-enforcement judicial review and massive penalties, was unconstitutional. *TVA*, 336 F.3d at 1258-9. This reasoning is equally appropriate here. While the Respondents support efforts to address the environmental issues in the Passaic River – and in fact have voluntarily entered into an AOC with EPA to address those issues – there is no emergency situation needing unilateral agency action. Indeed, EPA is handling the situation. Ordinary judicial remedies can address any remaining concerns on the part of NJDEP, and if NJDEP intends to ensure that the NRD assessments it desires go forward quickly, its remedy is to perform them itself and to use whatever judicial redress it has available to it for cost recovery. It is not constitutional to deprive Respondents of a right to pre-enforcement judicial review when the situation does not call for it.

IX. Additional Legal Objections and Defenses.

Aside from the various defenses and objections the Respondents have raised in the discussion set forth in the foregoing sections of this letter, the Respondents also briefly set forth certain additional defenses upon which they may rely in opposing any effort by NJDEP to enforce the Directive. These defenses are listed below:

1. The Spill Act requires that any clean up and removal "shall, to the greatest extent possible, be in accordance with the National Contingency Plan." N.J. Stat. Ann. § 58:10-23.11f(3). Because NJDEP has failed to describe the actions it will undertake and/or has not yet implemented such actions, the Respondents reserve their right to challenge all or any part of NJDEP's directed assessment and restoration based on a failure to comply with the NCP.

EPA has primacy over matters related to remediation and removal, so there is "good cause" to delay compliance with the Directive until EPA's process has run its course.

2. The Respondents also reserve their right to assert any defense based on the expiration of the applicable statute of limitations that might be available at the time NJDEP seeks enforcement of the Directive.

3. The Directive purports to direct the Respondents, with others, to undertake a joint enterprise without advising how they can fulfill their individual objections under the Directive.

4. Any claim by NJDEP against the Spill Fund is barred because it has been more than one year after NJDEP has discovered the "damage" with respect to this matter.

5. Expenditures of funds from the Spill Fund for the work contemplated by the Directive are not authorized by the Spill Act, because it has not been shown that adequate funds from another source are unavailable. N.J. Stat. Ann. § 58:10-23.11fd.

6. NJDEP has acted in a manner that has denied the Respondents their constitutional rights to due process and equal protection by failing to name as respondents in the Directive other persons that NJDEP knows are responsible pursuant to the Spill Act or that could have been identified by reasonable investigation, including but not limited to, any transporters of waste to or owners of the other sites in question.

7. NJDEP's direction defining how compensatory restoration is to be calculated is in violation of the Administrative Procedure Act as an unpromulgated regulation.

8. Any damages sought beyond $50 million are not authorized by the Spill Act.

9. Any costs beyond those for removal amount to an impermissible tax.

10. Pre-enforcement Review should be allowed. If aforementioned exceptions and defenses to the Lower Passaic River Directive are not allowed, then parties named in Directive should not be precluded from challenging its terms upon issuance, i.e., there is no ban to pre-enforcement review, as a matter of due process.

11. The 80/120 Lister Avenue properties are participating in the Brownfields program, and this Directive is an impediment to that activity.

X. Treble damages are not available because good cause defenses exist to the issuance of the Directive.

As indicated throughout this Response, Respondents have an objectively reasonable belief that the natural resource damage assessment and restoration requirements of the Directive

are unsupported by law and impose unreasonable measures not calculated to achieve cleanup and removal as those terms are defined in the Spill Act. Herein, Respondents have provided detailed explanations of the bases for their reasoning, and have identified numerous good causes defenses for not complying with the Directive as written. *See* N.J. Admin. Code § 7:26C-4.2(h). As such, the assessment of treble damages for not complying with this Directive would be unlawful. *Kimber*, 110 N.J. at 83.

In addition to the specific points raised throughout this letter, the Respondents specifically reserve their right to challenge the constitutionality of N.J. Admin.Code 7:26C-4.2 to the extent it purports to require a waiver of any good cause defense not asserted by this letter. As the discussion in this Response makes plain, the evaluation of good cause defenses is an undertaking for the courts. Nothing in the *Kimber* case that gives rise to the good cause defense provides any authority for NJDEP, by administrative fiat, to limit those defenses. NJDEP's attempt to limit a party's good cause defense by regulation is likewise not authorized by statute. Moreover, according to the New Jersey Superior Court, appellate division, "regulations must be interpreted to allow a party to assert later developed evidence or evidence coming to light after a party initially responded to a directive and to rely on such evidence in asserting a 'good faith' defense in refusing to continue complying with a directive." *E.I duPont de Nemours and Co. v. State, Dep't of Envtl. Prot.*, 283 N.J. Super. 331, 358, 661 A.2d 1314 (N.J. App. 1995). Consequently, NJDEP's action is *ultra vires* as beyond the scope of authority granted by the Spill Act. NJDEP's attempt to regulate the constitutionally guaranteed right to a good cause defense inappropriately infringes on the province of the courts.

Please do not hesitate to contact the undersigned if you have any questions.

Yours very truly,

Carol Dinkins

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cc: William L. Warren, Esq.
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