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Attorneys for “B” Third-Party Defendant  
Atlas Refinery, Inc.

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NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, at al,  
Plaintiffs,

-vs-

OCCIDENTAL CHEMICAL CORPORATION,  
et al, Defendants,

-and-

MAXUS ENERGY CORPORATION and  
TIERRA SOLUTIONS,  
Defendants/Third-Party Plaintiffs

-vs-

3M COMPANY, et al,  
Third-Party Defendants.

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SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – ESSEX COUNTY

Docket No. L-9868-05 (PASR)

**ANSWER TO THIRD-PARTY  
COMPLAINT “B”  
ON BEHALF OF  
ATLAS REFINERY, INC.  
WITH DEFENSES,  
AND DEMANDS**

Third-Party Defendant **Atlas Refinery, Inc.** (“Atlas”), reserves all rights that have been extended to third-party defendants by reason of Case Management Orders (“CMOs”) entered in this matter, including procedural rights regarding the form of pleadings, and by way of Answer to the Third-Party Complaint, states:

### **AS TO PROCEDURAL BACKGROUND**

1. Pursuant to the Case Management Orders and in particular CMO V, Atlas is not compelled to respond to the allegations in paragraphs 1-15 and reserves its right to do so in the event a response is required.

### **AS TO THE PARTIES**

2. Pursuant to the Case Management Orders and in particular CMO V, Atlas is not compelled to respond to the allegations in paragraphs 16-210 and reserves its right to do so in the event a response is required, except as set forth in the following paragraph.
3. In response to paragraph 36, Atlas Refinery, Inc. admits that it is a New Jersey corporation located at 142 Lockwood Street, Newark, New Jersey.

### **AS TO DEFINITIONS**

4. Pursuant to the Case Management Orders and in particular CMO V, Atlas is not compelled to respond to the allegations in paragraphs 211-236 and reserves its right to do so in the event a response is required. Subject to this reservation, Atlas states that paragraphs 211-236 do not recite factual allegations but instead recite definitions which do not require a response.

### **AS TO FACTUAL ALLEGATIONS**

5. Pursuant to the Case Management Orders and in particular CMO V, Atlas is not compelled to respond to the allegations in paragraphs 237-515 and reserves its right to do so in the event a response is required.
6. Atlas admits the allegations of paragraph 516.
7. Atlas is without sufficient knowledge to form a belief as to the truth of the allegations of paragraph 517 except to admit that 142 Lockwood Street, Newark, New Jersey is located approximately within one-quarter mile of the Passaic River.
8. Atlas is without sufficient knowledge to form a belief as to the truth of the allegations of paragraph 518.

9. Atlas denies the allegations of paragraph 519, except to admit that Atlas has conducted processes involving the refining of animal, marine and vegetable oils and various related operations.

10. Atlas denies the allegations of paragraph 520, except to admit that the Third-Party Plaintiffs have supplied Atlas with a report of the Passaic Valley Sewerage Commissioners ("PVSC") for the year 1972 which includes descriptions of observations allegedly made by investigators working on behalf of the PVSC.

11. Atlas denies the allegations of paragraph 521, except to admit that the Third-Party Plaintiffs have supplied Atlas with a "Nexus Package" that includes an excerpt from a report of the PVSC for the year 1972 which includes descriptions of observations allegedly made by investigators in 1972 working on behalf of the PVSC.

12. Atlas is without sufficient knowledge to form a belief as to the truth of the allegations of paragraph 522, except to admit that the Third-Party Plaintiffs have supplied Atlas with a "Nexus Package" that includes copies of PVSC correspondence dated September 21, 1977 and City of Newark Engineering Department correspondence dated August 25, 1977 and excerpts from a 1978-1979 Feasibility Study conducted for the PVSC which include descriptions of observations allegedly made in or about 1977 and 1978 by investigators working on behalf of the City of Newark Engineering Department and/or the PVSC.

13. Atlas denies the allegations of paragraph 523, except to admit that the Third-Party Plaintiffs have supplied Atlas with a "Nexus Package" that includes copies of PVSC correspondence dated September 21, 1977 and City of Newark Engineering Department correspondence dated August 25, 1977 and excerpts from a 1978-1979 Feasibility Study conducted for the PVSC which include descriptions of observations allegedly made in or about 1977 and 1978 by investigators working on behalf of the City of Newark Engineering Department and/or the PVSC.

14. Atlas is without sufficient knowledge to form a belief as to the truth of the allegations of paragraph 524, except to admit that the Third-Party Plaintiffs have supplied Atlas with a “Nexus Package” that includes copies of PVSC correspondence dated September 21, 1977 and City of Newark Engineering Department correspondence dated August 25, 1977 and several 1979 reports of “River Inspectors” and excerpts from a 1978-1979 Feasibility Study conducted for the PVSC which include descriptions of observations allegedly made in or about 1977 and 1978 by investigators working on behalf of the City of Newark Engineering Department and/or the PVSC.

15. Atlas denies the allegations of paragraph 525, except to admit that the Third-Party Plaintiffs have supplied Atlas with a “Nexus Package” that includes copies of PVSC correspondence dated September 21, 1977 and City of Newark Engineering Department correspondence dated August 25, 1977 and dated April 1, 1981 and several 1979 reports of “River Inspectors” and excerpts from a 1978-1979 Feasibility Study conducted for the PVSC which include descriptions of observations allegedly made in or about 1977 and 1978 by investigators working on behalf of the City of Newark Engineering Department and/or the PVSC.

16. Atlas is without sufficient knowledge to form a belief as to the truth of the allegations of paragraph 526, except to admit that the Third-Party Plaintiffs have supplied Atlas with a “Nexus Package” that includes a copy of a letter dated February 14, 2006, from the United States Environmental Protection Agency addressed to Atlas Refining, Inc. which speaks for itself.

17. Atlas denies the allegations of paragraph 527.

18. Pursuant to the Case Management Orders and in particular CMO V, Atlas is not compelled to respond to the allegations in paragraphs 528-3445 and reserves its right to do so in the event a response is required.

### **AS TO THE FIRST COUNT**

19. In response to paragraph 3446, Atlas repeats its answers to the foregoing allegations.
20. Atlas denies the allegations of paragraph 3447.
21. The allegations of paragraph 3448 do not recite factual allegations but instead recite legal conclusions and statutory provisions which do not require a response.
22. Atlas denies the allegations of paragraph 3449.
23. Atlas is without sufficient knowledge to form a belief as to the truth of the allegations of paragraph 3450.
24. Atlas denies the allegations of paragraph 3451.

### **AS TO THE SECOND COUNT**

25. In response to paragraph 3452, Atlas repeats its answers to the foregoing allegations.
26. Atlas denies the allegations of paragraph 3453.

### **SEPARATE DEFENSES**

1. The Third-Party Complaint is barred in whole or in part for failure to state a cause of action against Atlas Refinery, Inc.

2. Any cleanup cost or other liability incurred by the Third-Party Plaintiffs was caused solely by the negligence, acts or omissions of third parties over whom Atlas Refinery, Inc. had no control.
3. Any and all damages for which defendant may be liable are barred or limited by the Joint Tortfeasor Contribution Act, N.J.S.A. 2A:53A-1, et seq. and by the Comparative Negligence Act, N.J.S.A. 2A:15-5.1, et seq.
4. The relief requested violates public policy.
5. The relief is barred by election of remedies.
6. Atlas Refinery, Inc. is not a discharger or a person in any way responsible for a discharge under N.J.S.A. 58:10-23 et seq. ("Spill Act").
7. No actions or inactions by Atlas Refinery, Inc. have resulted in any permanent impairment or damage to a natural resource.
8. Claims of Third-Party Plaintiffs, their agents, employees, successors and assigns ("Third-Party Plaintiffs") are barred, in whole or in part, by the statutory defenses to liability provided by the Spill Act and Water Pollution Control Act ("WPCA").
9. Third-Party Plaintiffs have no Spill Act claim against Atlas Refinery, Inc. because they are not dischargers and have not cleaned up and/or removed a discharge of hazardous substances within the meaning of the Spill Act.
10. The Third-Party Complaint is barred, in whole or in part, because Third-Party Plaintiffs are not the real parties in interest, but are corporations who volunteered or agreed to undertake certain costs of environmental clean-up while having no legal responsibility for such costs, and while the legal responsibility for such clean-up costs belongs solely to other entities.

11. The Third-Party Complaint is barred by the entire controversy doctrine.
12. The Third-Party claims are barred in whole or in part by the doctrine of federal preemption.
13. Third-Party Plaintiffs' claims against Atlas Refinery, Inc. are barred, in whole or in part, by the applicable Statute of Limitations and Statute of Repose.
14. Third-Party Plaintiffs' claims are barred in whole or in part by the doctrine of accord and satisfaction.
15. Third-Party Plaintiffs' claims against Atlas Refinery, Inc. are barred, in whole or in part, by laches and estoppel.
16. The Third-Party Complaint is barred in whole or in part because the Third-Party Plaintiffs may not relitigate those issues which are concluded by reason of res judicata, collateral estoppel and/or judicial estoppel.
17. Third-Party Plaintiffs' claims are barred, in whole or in part, by the doctrine of unclean hands, and/or "in pari delicto."
18. Atlas Refinery, Inc. did not own or operate a "Major Facility" as defined by the Spill Act or the WPCA.
19. Third-Party Plaintiffs' claims are barred, in whole or in part, by Third-Party Plaintiffs' failure to comply with the prerequisites to liability under the Spill Act including, without limitation to, Third-Party Plaintiffs have not incurred costs authorized by the Spill Act and Third-Party Plaintiffs have failed to direct cleanup and removal activities in accordance with the National Contingency Plan to the greatest extent possible.

20. Third-Party Plaintiffs have failed to join necessary and indispensable parties needed for a just adjudication of the claims asserted in this action, in whose absence complete relief can not be afforded the existing parties pursuant to R. 4:28-1 including, without limit, all entities in the Cooperating Parties Group, the State of New Jersey agencies and instrumentalities, and United States agencies and instrumentalities.

21. Although Atlas Refinery, Inc. denies that it is liable for the contamination described in Third-Party Plaintiffs' Complaint, in the event it is found liable, Atlas Refinery, Inc. is entitled to an offset against any such liability on its part for the equitable share of the liability of any person or entity not joined as a defendant in this action that would be liable to Third-Party Plaintiffs.

22. Under N.J.S.A. 2A:15-97, the amount of damages, if any, should be reduced by any amounts recovered from any other source.

23. Third-Party Plaintiffs' claims are barred to the extent that the conduct of Atlas Refinery, Inc. alleged to give rise to liability in the Third-Party Complaint is the subject of a release, covenant not to sue, or otherwise excused by Plaintiffs, including, without limit, through issuance of a no further action letter, consent order, settlement agreement or other applicable document.

24. The disposal of waste, if any, which allegedly originated from Atlas Refinery, Inc., was undertaken in accordance with then state of the art, accepted industrial practice and technology, and then prevailing legal requirements.

25. The Third-Party Complaint is barred in that it seeks to impose retroactive liability.

26. Atlas Refinery, Inc.'s liability to Third-Party Plaintiffs, if any, is limited to Spill Act and contribution claims by Third Parties excludes any such claims which may properly be apportioned to parties pursuant to Burlington Northern and Santa Fe Railway Co. v. United States, and other comparable decisional law.



27. Third-Party Plaintiffs cannot assert contribution claims against Atlas Refinery, Inc. because the discharges for which the Plaintiffs are seeking relief from Defendants/Third-Party Plaintiffs are different from Atlas Refinery, Inc.'s alleged discharges, and Third-Party Defendants do not share a common liability to the State.

28. Atlas Refinery, Inc. incorporates by reference any affirmative defense asserted by other parties in this action to the extent such affirmative defenses are defenses to Third-Party Plaintiffs' claims and do not impose liability on Atlas Refinery, Inc..

29. Atlas Refinery, Inc. reserves the right to assert and hereby invoke each and every Environmental Law defenses that may be available during the course of this action.

30. Third-Party Plaintiffs' claims for contribution, whether under the Spill Act or the New Jersey statutory provisions for contribution (including N.J.S.A. 2A:53A-1 et seq.), are derivative of, and are no greater than, Plaintiffs' claims against Third-Party Plaintiffs. Accordingly, Third-Party Plaintiffs reserve the right to assert against Third-Party Plaintiffs any and all defenses that the Third-Party Plaintiffs could have asserted against the Plaintiffs.

31. Third-Party Plaintiffs' claims are barred because the relief sought against Atlas Refinery, Inc., were it claimed directly by Plaintiffs, would amount to a "taking" of Atlas Refinery, Inc.'s property in violation of its constitutional rights to due process and/or in violation of its rights under the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq.

32. Without admitting liability, Atlas Refinery, Inc. alleges that if it is found to have been engaged in any of the activities alleged in the Third-Party Complaint, such activities were de minimus and not the cause of any damages or other claims by Third-Party Plaintiffs.

33. Without admitting liability, Atlas Refinery, Inc. alleges that if it is found to have been engaged in any of the activities alleged in the Third-Party Complaint, its liability is “several” as opposed to “joint and several” because a non-public party suing under the Spill Act’s contribution provision is not entitled to joint and several liability.

34. The Case Management Orders are void, unenforceable and unconstitutional to the extent that they deny Atlas due process by prohibiting Atlas from making application to dismiss the Third-Party Complaint and invoking other substantive and procedural remedies as early as possible in the litigation.

#### **REQUEST FOR ALLOCATION UNDER RULE 4:7-5(c)**

Pursuant to Rule 4:7-5(c) and Young v. Latta, 124 N.J. 584 (1991), this defendant advises all parties that if any co-defendant settles, the liability of that settling party shall remain an issue to be determined by the trier of fact and this defendant shall seek an allocation of fault by percentage against the settling party and a corresponding credit in favor of this defendant. This notice is intended to apply with equal force to the liability of settling parties and to the liability of members of the Cooperating Parties Group.

#### **DEMAND FOR JURY TRIAL**

**PLEASE TAKE NOTICE** that Third-Party Defendant, Atlas Refinery, Inc., hereby demands a trial by jury on all issues for which a right of jury trial obtains.

#### **DESIGNATION OF TRIAL COUNSEL**

**PLEASE TAKE NOTICE** that pursuant to R. 4:25-4, Thomas N. Ryan, Esq., is hereby designated as trial counsel on behalf of Third-Party Defendant, Atlas Refinery, Inc.

## ANSWER TO CROSS-CLAIMS

Third-Party Defendant, Atlas Refinery, Inc., denies the allegations of cross-claims for contribution and indemnification heretofore or hereafter asserted by any defendant or third-party defendant herein.

**LADDEY, CLARK & RYAN, LLP**  
Attorneys for Third-Party Defendant  
Atlas Refinery, Inc.

Dated: March 1, 2010



By: Thomas N. Ryan, Esq.

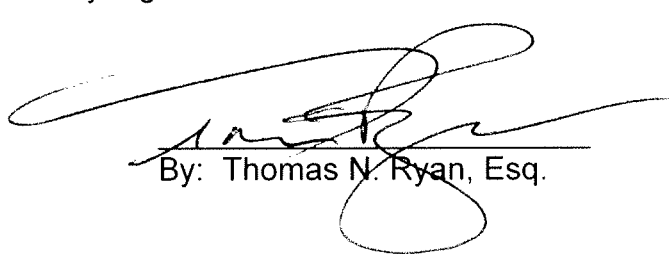
## CERTIFICATIONS

1. I certify that, to the knowledge of the undersigned, the within matter in controversy is not the subject of any other action pending in any court or before any arbitration tribunal, nor is any such proceeding contemplated by the undersigned.

2. I hereby certify that, to the knowledge of the undersigned, no other party should be joined in this matter at this time, except as may be indicated in this party's Separate Defenses, and in particular Separate Defense #20.

3. I hereby certify that this pleading was served within the time period provided for in our Rules of Court, as modified by CMOs issued in this case providing for service by web site posting, or within the time period allowed by Stipulation or Order filed herewith and upon the following persons by regular mail: See annexed Certification of Limited Service by Regular Mail.

Dated: March 1, 2010



By: Thomas N. Ryan, Esq.