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NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, THE
COMMISSIONER OF THE NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, and THE ADMINISTRATOR
OF THE NEW JERSEY SPILL COMPENSATION
FUND,

Plaintiffs,

-VS-

OCCIDENTAL CHEMICAL CORPORATION,
TIERRA SOLUTIONS, INC., MAXUS ENERGY
CORPORATION, RESPOL YPF, S.A., YPF, S.A.
YPF HOLDINGS, INC. and CLH HOLDINGS,
INC.,

Defendants.

MAXUS ENERGY CORPORATION and
TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs,

-VS-

BAYONNE MUNICIPAL UTILITIES
AUTHORITY, BOROUGH OF CARTERET,
BOROUGH OF EAST NEWARK, BOROUGH OF
EAST RUTHERFORD, BOROUGH OF
ELMWOOD PARK, BOROUGH OF FAIR
LAWN, BOROUGH OF FANWOOD, BOROUGH
OF FRANKLIN LAKES, BOROUGH OF
GARWOOD, BOROUGH OF GLENWOOD,
BOROUGH OF GLEN ROCK, BOROUGH OF
HALEDON, BOROUGH OF HASBROUCK
HEIGHTS, BOROUGH OF HAWTHORNE,
BOROUGH OF KENILWORTH, BOROUGH OF
LODI, BOROUGH OF MOUNTAINSIDE,
BOROUGH OF NEW PROVIDENCE,
BOROUGH OF NORTH ARLINGTON,
BOROUGH OF NORTH CALDWELL,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-L-9868-05(PASR)

Civil Action

**CITY OF PASSAIC'S ANSWER TO
DEFENDANTS/THIRD-PARTY
PLAINTIFFS MAXUS ENERGY
CORPORATION AND TIERRA
SOLUTIONS, INC.'S THIRD-PARTY
COMPLAINT "A"**

BOROUGH OF NORTH HALEDON, BOROUGH OF PROSPECT PARK, BOROUGH OF ROSELLE PARK, BOROUGH OF ROSELLE, BOROUGH OF RUTHERFORD, BOROUGH OF TOTOWA, BOROUGH OF WALLINGTON, BOROUGH OF WEST PATERSON, BOROUGH OF WOOD-RIDGE, CITY OF BAYONNE, CITY OF CLIFTON, CITY OF EAST ORANGE, CITY OF ELIZABETH, CITY OF HACKENSACK, CITY OF JERSEY CITY, CITY OF LINDEN, CITY OF NEWARK, CITY OF ORANGE, CITY OF PASSAIC, CITY OF PATERSON, CITY OF RAHWAY, CITY OF SUMMIT, CITY OF UNION CITY, HOUSING AUTHORITY OF THE CITY OF NEWARK, JERSEY CITY MUNICIPAL UTILITIES AUTHORITY JOINT MEETING AND UNION COUNTIES, LINDEN ROSELLE SEWERAGE AUTHORITY, CITY OF PASSAIC VALLEY SEWERAGE AUTHORITY, PORT AUTHORITY OF NEW YORK AND NEW JERSEY, RAHWAY VALLEY SEWERAGE AUTHORITY, THE NEW JERSEY DEPARTMENT OF TRANSPORTATION, THE STATE OF NEW JERSEY, TOWN OF BELLEVILLE, TOWN OF HARRISON, TOWN OF KEARNY, TOWN OF NUTLEY, TOWN OF WESTFIELD, TOWN OF WOODBRIDGE, TOWNSHIP OF BERKELEY HEIGHTS, TOWNSHIP OF BLOOMFIELD, TOWNSHIP OF CEDAR GROVE, TOWNSHIP OF CLARK, TOWNSHIP OF CRANFORD, TOWNSHIP OF HILLSIDE, TOWNSHIP OF IRVINGTON, TOWNSHIP OF LITTLE FALLS, TOWNSHIP OF LIVINGSTON, TOWNSHIP OF LYNTHURST, TOWNSHIP OF MAPLEWOOD, TOWNSHIP OF MILLBURN, TOWNSHIP OF MONTCLAIR, TOWNSHIP OF ORANGE, TOWNSHIP OF SADDLE BROOK, TOWNSHIP OF SCOTCH PLAINS, TOWNSHIP OF SOUTH HACKENSACK, TOWNSHIP OF SOUTH ORANGE VILLAGE, TOWNSHIP OF SPRINGFIELD, TOWNSHIP OF UNION, TOWNSHIP OF WEST ORANGE, TOWNSHIP OF WINFIELD PARK, TOWNSHIP OF WYCKOFF, and VILLAGE OF RIDGEWOOD,

Third-Party Defendants.

Third-Party Defendant, City of Passaic, with its principal address at 330 Passaic Street, Passaic, New Jersey, by way of Answer to the Third-Party Complaint "A" brought by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc., says:

ANSWER

1. The City of Passaic admits it is a public body and a municipality of the State of New Jersey and a member of the City of Passaic Valley Sewerage Commissioners. All of the allegations against the City of Passaic are denied. The City of Passaic is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraphs 1 through 1147, denies the allegations and leaves Third-Party Plaintiffs to their proofs at the time of trial.

WHEREFORE, the City of Passaic demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

FIRST COUNT

**(New Jersey Spill Compensation and Control Act,
N.J.S.A. 54:10-23.11f.a.(2)(a))**

2. The City of Passaic repeats and realleges its answers contained in Paragraph 1 as if set forth at length herein.

3. The City of Passaic is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraphs 1148 through 1158, denies the allegations and leaves Third-Party Plaintiffs to their proofs at the time of trial.

WHEREFORE, the City of Passaic demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

SECOND COUNT
(Statutory Contribution)

4. The City of Passaic repeats and realleges its answers contained in Paragraphs 1 through 3 as if set forth at length herein.

5. The City of Passaic is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraphs 1159 through 1160, denies the allegations and leaves Third-Party Plaintiffs to their proofs at the time of trial.

WHEREFORE, the City of Passaic demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

THIRD COUNT
(Enforcement of N.J.S.A. 58:14-7 and N.J.S.A. 58:14-8
and Environmental Rights Act Claim

6. The City of Passaic repeats and realleges its answers contained in Paragraphs 1 through 5 as if set forth at length herein.

7. The City of Passaic is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraphs 1161 through 1186, denies the allegations and leaves Third-Party Plaintiffs to their proofs at the time of trial.

WHEREFORE, the City of Passaic demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

FOURTH COUNT
(Nuisance)

8. The City of Passaic repeats and realleges its answers contained in Paragraphs 1 through 7 as if set forth at length herein.

9. The City of Passaic is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraphs 1187 through 1195, denies the allegations and leaves Third-Party Plaintiffs to their proofs at the time of trial.

WHEREFORE, the City of Passaic demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

FIFTH COUNT
(Breach of the Public Trust)

10. The City of Passaic repeats and realleges its answers contained in Paragraphs 1 through 9 as if set forth at length herein.

11. The City of Passaic is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraphs 1196 through 1229, denies the allegations and leaves Third-Party Plaintiffs to their proofs at the time of trial.

WHEREFORE, the City of Passaic demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

AFFIRMATIVE DEFENSES

1. The Third-Party Complaint "A" fails to state a claim upon which relief may be granted.

2. The Third-Party Complaint "A" must be dismissed for failure to join necessary and indispensable parties.

3. The City of Passaic is not liable pursuant to the New Jersey Tort Claims Act, *N.J.S.A. 59:1-1-12.3*.

4. Third-Party Plaintiffs have failed to provide notice in accordance with *N.J.S.A.* 59:8-1, *et seq.*
5. Third-Party Plaintiffs lack standing.
6. Third-Party Plaintiffs have failed to exhaust administrative remedies.
7. Any wrongful conduct alleged in the Third-Party Complaint "A" resulted from and was proximately caused by the conduct of persons other than the City of Passaic or by the conduct of persons over whom the City of Passaic had no control, or by the superseding intervention, criminal illegal or tortuous acts of others outside the control of the City of Passaic.
8. Without admitting any liability, if it is determined that the City of Passaic engaged in any of the activities alleged in the Third-Party Complaint "A," such activities were *de minimis*.
9. Any damages were caused by an Act of God.
10. The claims asserted in the Third-Party Complaint "A" are barred, in whole or in part, by the applicable statutes of limitation.
11. Plaintiffs' and Defendants/Third-Party Plaintiffs' costs incurred or to be incurred at the site are unreasonable, duplicative, not cost effective, and not consistent with the National Contingency Plan.
12. To the extent that the City of Passaic is found liable in this matter, joint and several liability is inappropriate because there are distinct harms or a reasonable basis for apportionment of the harm suffered.
13. At all times relevant, the City of Passaic complied with all applicable laws, regulations or standards and government approvals.

14. Plaintiffs and Defendants/Third-Party Plaintiffs failed to provide notice to the City of Passaic that it was considered a potentially responsible party prior to undertaking numerous response actions relating to the site, which has precluded the City of Passaic from commenting upon or participation in the selection of the remedial action at the site. This has resulted in a deprivation of the City of Passaic's substantive and procedural due process rights under the Federal and State Constitutions.

15. Plaintiffs' and Defendants/Third-Party Plaintiffs' Complaints include costs not yet expended. The New Jersey Spill Compensation and Control Act ("Spill Act"), *N.J.S.A. 58:10-223.11, et seq.* does not authorize Plaintiffs and Defendants/Third-Party Plaintiffs to recover future costs. Therefore, any claims are premature and not yet ripe for adjudication.

16. The Third-Party Complaint "A" is an unauthorized retroactive application of the Spill Act and other applicable case law.

17. The City of Passaic has at all times acted in good faith.

18. To the extent that this action is brought pursuant to the Spill Act, the City of Passaic is not liable because any release or threat of release of any hazardous substance was an omission of a third party other than an employee or agent of the City of Passaic. The City of Passaic exercised due care with respect to any such alleged hazardous substance in light of all relevant facts and circumstances. The City of Passaic took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. Consequently, the City of Passaic is not liable under the Spill Act.

19. Plaintiffs' and Defendants/Third-Party Plaintiffs' claims for relief are barred by waiver, estoppel and/or laches.

20. In the event Plaintiffs' and Defendants/Third-Party Plaintiffs' claims are not barred by their own conduct, then any recovery by these parties should be reduced in the proportion that such parties' acts or omissions bear to the acts or omissions that caused the alleged injuries or damages.

21. Plaintiffs and Defendants/Third-Party Plaintiffs have failed to comply with the necessary conditions precedent for the maintenance of a claim under the Spill Act.

22. The City of Passaic is not a "responsible party" under the Spill Act.

23. Certain of the costs incurred or to be incurred by the Plaintiffs and/or Defendants/Third-Party Plaintiffs in connection with the site are not "response costs," recoverable from the City of Passaic, within the meaning of Section 101 (23), (24) and (25) of CERCLA, 42 *U.S.C.* 9601 (23), (24) and (25), as applied to the Spill Act.

24. Certain of the actions taken to date by Plaintiffs and/or Defendants/Third-Party Plaintiffs for which Third-Party Plaintiffs are making a claim against the City of Passaic were not consistent with the National Contingency Plan because, among other things, the City of Passaic was not provided with notice or an opportunity to comment.

25. The City of Passaic exercised reasonable care under all the circumstances herein. Consequently, it is not liable to Plaintiffs or Defendants/Third Party Plaintiffs under the common law or any statutory theory of recovery averred herein.

26. The claims for relief are time barred by the terms of the Spill Act.

27. Third-Party Plaintiffs' claims against the City of Passaic are barred, in whole or in part, by Section 107(b)(3) of CERCLA, 42 *U.S.C.* 9607(b)(3) because any releases or threats of releases of hazardous substances including those allegedly attributable to the City of Passaic, an allegation the City of Passaic denies, were caused by the acts or omissions of third parties other

than the City of Passaic's employees or agents, or other than one with whom the City of Passaic had a direct or indirect contractual relationship, and the City of Passaic exercised due care with respect to the alleged hazardous substances taking into consideration the characteristics thereof, in light of all the relevant facts and circumstances and took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such act or omissions.

28. Third-Party Plaintiffs have not paid more than their fair share of any damages, costs or other relief sought by the Plaintiffs, New Jersey Department of Environmental Protection, the Commissioner of the New Jersey Department of Environmental Protection, and the Administrator of the New Jersey Spill Compensation Fund and are, therefore, not entitled to contribution from the City of Passaic.

29. Third-Party Plaintiffs' claims for indemnification are barred because any alleged liability of the City of Passaic, liability the City of Passaic denies, would be secondary, indirect, passive, precarious, constructive, technical and/or imputed, and the liability of all or some of the Defendants/Third-Party Plaintiffs are direct, active and primary.

30. Third-Party Plaintiffs are not entitled to recover attorney's fees or costs, or fees of litigation.

31. Third-Party Plaintiffs are not entitled to recovery for any alleged unjust enrichment as there exists an adequate remedy at law to redress Third-Party Plaintiffs' claims.

32. Third-Party Plaintiffs' claims are barred by the statutory defenses to liability provided by the Spill Act.

33. Third-Party Plaintiffs' claims are barred to the extent they seek relief for conduct occurring or damage incurred before the effective date of the Spill Act.

34. Third-Party Plaintiffs' claims are barred to the extent they seek recovery for any punitive damages as such claims are barred by public policy and applicable laws.

35. To the extent that Third-Party Plaintiffs' claims against the City of Passaic are subject to contribution or any reduction or offset from other parties, any damages recovered against the City of Passaic shall be reduced accordingly.

36. The City of Passaic hereby asserts and adopts all other defenses which have been or will be asserted at any time by any other party in this action to the extent said defenses are applicable to the City of Passaic.

37. The City of Passaic reserves the right to assert additional defenses that may be uncovered during the course of this action.

COUNTERCLAIMS AND CROSSCLAIMS

In accordance with Case Management Order V, the City of Passaic is not asserting any counterclaims or crossclaims at this time and reserves its rights to do so as specified by the Court's Order.

DESIGNATION OF TRIAL COUNSEL

In accordance with R. 4:25-4, David J. Mairo, Esq. is designated as trial counsel.

CERTIFICATION PURSUANT TO R. 4:5-1

It is hereby certified in accordance with R. 4:5-1 that the specific matter in controversy is not, to my knowledge, the subject of any action pending in any Court, nor of any pending arbitration proceeding. Other than the above-referenced actions, there are no other actions or arbitration proceedings in existence or contemplated at this time, and I know of no other party who should be joined in this action. I hereby certify that these statements made by me are true. I

am aware that if any of these statements is willfully false, I am subject to punishment.

McMANIMON & SCOTLAND, LLC
Attorneys for the Third-Party Defendant,
City of Passaic

By: 

David J. Mairo, Esq.

Dated: December 7, 2009

FILING CERTIFICATION

I certify that the original and one copy of the within Answer and Separate Defenses have been sent via Federal Express for filing to the Clerk of the Superior Court of New Jersey, Law Division, Essex County, Veteran's Courthouse, 50 W. Market Street, Newark, New Jersey 07102, and a copy of the same has been sent via regular mail to Third-Party Plaintiffs' attorneys as follows:

William L. Warren, Esq.
Drinker, Biddle & Reath, LLP
105 College Road East, Suite 300
Princeton, New Jersey 08542-0627

Thomas E. Starnes, Esq.
Andrews Kurth, LLP
1350 I Street, NW, Suite 1100
Washington, DC 20005

I further certify a copy of said document has been placed on the electronic platform provided by Defendants (<http://njdepvocc.sfile.com>).

McMANIMON & SCOTLAND, LLC
Attorneys for the Third-Party Defendant,
City of Passaic

By: 

David J. Mairo, Esq.

Dated: December 7, 2009