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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, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., AND CLH HOLDINGS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION -ESSEX COUNTY DOCKET NO. ESX-L-9868-05 **COUNTERCLAIM OF DEFENDANTS MAXUS ENERGY CORPORATION AND TIERRA SOLUTIONS, INC.**

Pursuant to R. 4:7-1, Defendants Maxus Energy Corporation ("Maxus") and Tierra Solutions, Inc. ("Tierra") file this Counterclaim against the Plaintiffs New Jersey Department of

Environmental Protection ("NJDEP"), the Administrator of the New Jersey Spill Compensation Fund (the "Administrator"), and the Commissioner of the NJDEP ("Commissioner") (collectively, "Plaintiffs" or the "State") and allege as follows:

INTRODUCTION

1. In a January 12, 1897 message to the Senate and General Assembly—more than a century before the State singled out the Defendants in this lawsuit as scapegoats for the pollution that has long plagued the Passaic River and Newark Bay—New Jersey Governor John W. Griggs declared that the Passaic River,

> once clear and pure from its sources to its mouth[,] has undergone the fate of all similar streams that happen to flow through sections attractive to large populations and manufacturing industries. It has become the receptacle of the wash, the refuse, and the general sewage of the great and rapidly growing populations of the valley, until public comfort and health are threatened from the excess of pollution poured into the stream. This condition has been produced gradually, as the industries and population of the section have gradually increased. It affects several cities whose sewers empty into the river, and affects either directly at once, or will in the future affect, every municipal corporation that now exists or may be hereafter created in the Passaic valley from Little Falls to Newark. Any plan for the remedy and prevention of this unfortunate condition will involve both legal and practical difficulties of the most serious nature, as well as great expense.

Journal of the Fifty-Third Senate of the State of New Jersey Being the One Hundred and Twenty-First Session of the Legislature, at 17 (1897).

2. Again in 1902—some 40 years before the lone manufacturing facility upon which the State's lawsuit fixates was even constructed—the Governor of New Jersey admitted that pollution had already destroyed the Passaic River. In his inaugural address on January 21, 1902, Governor Franklin Murphy stated, "[t]he most important subject to which I can call your attention at this time is the pollution of the Passaic River from the adjacent population, which has destroyed the use and beauty of a noble stream and gravely injured manufacturing and property

interests on its banks. To remedy this condition is merely to pay the penalty of crowding population." "Gov. Murphy's Inaugural," *New York Times* (1/22/1902).

3. Notwithstanding having long acknowledged the unfortunate condition of the Passaic River, the State of New Jersey has never undertaken any meaningful efforts to remediate the pollution. Instead, by way of its Second Amended Complaint ("Complaint"), the State seeks to impose the environmental costs of the industrial revolution—not to mention the surge of manufacturing in New Jersey during two World Wars and the urban sprawl that has inevitably attended massive population growth—onto the backs of a select group of Defendants, which the State associates with the operations of a single manufacturing facility that opened some 40 years **after** the Governor of New Jersey publicly admitted that the Passaic River had already been destroyed by pollution from the adjacent population.

4. For more than 200 years, the State of New Jersey has owned and controlled all of the submerged lands of the Passaic River, the Hackensack River and Newark Bay, as well as portions of the submerged lands of the Kill van Kull and Arthur Kill. Thus, the State itself has long been, and remains, the owner and operator of virtually every square inch of the vast property that the Plaintiffs have dubbed the "Newark Bay Complex." And, it is the State itself, over the course of its long ownership tenure, which has overseen, and frequently even condoned, the contamination and environmental destruction of the Newark Bay Complex by hazardous substances and other compounds.

5. In effect, with the State's knowledge—and often express approval—the submerged lands of the Passaic River and the rest of the Newark Bay Complex, to which the State holds legal title, have been used as a liquid landfill, thereby fostering the industrial

revolution and economic and population growth in New Jersey, to the State's direct economic benefit.

6. The State has also long recognized and tolerated the massive pollution of the Passaic River because it served the economic interests of the municipalities that line its shores.

7. In its Tenth Annual Report for 1886, the Board of Health of the State of New Jersey declared, "Our larger cities near New York have it in their power to secure water-rights such as will be of the greatest financial as well as sanitary benefit. Some of our rivers can thus be readily and profitably used to aid in the removal of sewage." *Tenth Annual Report of the Board of Health of the State of New Jersey* (1887) at 15.

8. In 1895, Percy Jackson of the Board of Health of Belleville, New Jersey, acknowledged that "it is a loss of time to discuss here whether the Passaic river is polluted or not. We know that it is, and that the pollution comes from each and every municipality along the river using the Passaic river as a dumping ground." *Nineteenth Annual Report of the Board of Health of the State of New Jersey* (1895) at 17.

9. The longstanding and continued pollution of the Newark Bay Complex by municipalities in the region was primarily an economic decision. As the Center for Analysis of Public Issues noted in its 1972 report entitled *Pollution Control on the Passaic River* (hereinafter "*Pollution Control*"):

> The dreadful condition of the Passaic River is due primarily to the fact that dozens of municipalities use the river as a secondary waste disposal system. Bypassing raw or undertreated sewage into the stream is much cheaper than installing tertiary treatment facilities or laying new collection lines under city streets. It is also, in the view of many municipal officials, the only way to compete successfully for new property tax ratables. In the race for added local revenues, the town ready to welcome new industrial and residential construction without worrying about the additional sewage load has a great advantage. It can appeal directly to the taxpayers' pocketbooks: 'Locate here and you won't have to worry about the rising costs of sewage collection and treatment. We have the most

> economical waste catch basin in New Jersey -- the Passaic River.' For several months each year, much of the Passaic is just that -- a sewage catch basin for overloaded treatment plants, inadequate collection systems and streamside factory outfalls.

10. The wastes that have been discharged into the Newark Bay Complex include significant volumes of hazardous substances, many of which remain entrained in the sediments to this day. Even now, the Newark Bay Complex receives many millions of gallons of polluted wastewater annually.

11. The State of New Jersey has not only been fully aware of the hundreds of years of ongoing contamination of the Newark Bay Complex. It also has aided and abetted and publicly condoned such contamination. Indeed, the State deliberately facilitated the pollution of the Passaic River by issuing permits to, and otherwise allowing, municipalities and local and regional sewerage authorities, including the Passaic Valley Sewerage Commission ("PVSC"), to discharge sewage and other polluting matter into the Passaic River in direct violation of the plain terms of a New Jersey statute that long-ago expressed the Legislature's absolute prohibition of any such discharges.

12. This Counterclaim is a civil action brought pursuant to the New Jersey Spill Compensation Control Act, N.J.S.A. 58:1--23.11a *et seq.* ("Spill Act"), the Environmental Rights Act, N.J.S.A. 2A:35A-1, *et seq.*, the PVSC Statute, N.J.S.A. 58:14-1 *et seq.*, the New Jersey statutory provisions for contribution (N.J.S.A. 2A:53A-3 *et seq.* and/or N.J.S.A. 59:9-3 *et seq.*), and common law arising from the environmental contamination of the Newark Bay Complex as a result of the actions and omissions of the State of New Jersey. By this Counterclaim, Maxus and Tierra seek from Plaintiffs, *inter alia*, all or a proportionate share of cleanup and removal costs or damages, if any, for which Maxus and Tierra may be held liable in this lawsuit, an equitable share of the cleanup and removal costs that Maxus and Tierra have

incurred or will incur in the future relating to the Newark Bay Complex, as well as the further legal and equitable relief detailed more fully below.

THE PARTIES

13. NJDEP is a principal department within the Executive Branch of the State of New Jersey and is the successor to various departments and agencies of State government established to protect the environment, including the submerged lands which the State owns and all natural resources located within the jurisdiction of the State of New Jersey that are held in public trust by the State for the benefit of its citizens. The NJDEP is located at 401 East State Street, Trenton, New Jersey. NJDEP has represented that it is authorized to seek purported costs incurred by other State agencies relating to the Newark Bay Complex in this lawsuit.

14. The Commissioner is the chief executive officer of the NJDEP and has offices at 401 East State Street, Trenton, New Jersey.

15. The Administrator is the chief executive officer of the New Jersey Spill Compensation Fund and has offices at 401 East State Street, Trenton, New Jersey.

16. In their Complaint, plaintiffs NJDEP, Commissioner, and Administrator have sought to assert not only claims held by the NJDEP and the Spill Fund, but also claims held by other departments and agencies of the New Jersey State government and also relief on behalf of the State of New Jersey as a whole.

17. Counterclaimant Maxus is a corporation organized under the laws of the State of Delaware and is a defendant in this action.

18. Counterclaimant Tierra is a corporation organized under the laws of the State of Delaware and is a defendant in this action.

PROCEDURAL BACKGROUND

19. The State commenced this lawsuit on December 13, 2005, filing its original complaint against Defendants, Occidental Chemical Corporation ("Occidental"), Tierra, Maxus, Repsol YPF, S.A., YPF, S.A., YPF Holdings, Inc. and CLH Holdings (collectively, "Defendants").

20. After several revisions, the State's Complaint seeks to recover from the Defendants past and future "cleanup and removal costs"—as well as unspecified economic damages, punitive damages, damages for alleged "unjust enrichment," penalties and a variety of other forms of relief—purportedly arising from the alleged discharges into the Newark Bay Complex of 2,3,7,8-tetrachlorodibenzo-p-dioxin (a form of dioxin referred to as "TCDD") and other unspecified "hazardous substances." According to the State, discharges of these substances emanated from a plant operating at 80 Lister Avenue in Newark, New Jersey ("Lister Plant") for approximately twenty years before the plant was closed in 1969 and sold in 1971.

21. The State further alleges that, after operations at the Lister Plant ceased, TCDD "migrated" throughout the lower 17 miles of the Passaic River, Newark Bay, the lower reaches of the Hackensack River, the Arthur Kill, the Kill van Kull, "and into adjacent waters and sediments," which Plaintiffs define collectively as the "Newark Bay Complex." Plaintiffs contend that Occidental, Maxus and Tierra are "responsible for the liabilities arising from almost forty years of discharges of TCDD, DDT, and other hazardous substances" at 80 Lister Avenue.

22. Maxus and Tierra have substantially denied the State's allegations in the Complaint.

23. Despite owning and controlling virtually all of the submerged lands of the Newark Bay Complex during the gross contamination of these lands, the State of New Jersey has

done relatively little to investigate the scope of the contamination and has done nothing to remediate the problem.

24. In direct contrast to the State's inaction, Maxus and Tierra have completed the remedial actions required by the regulators to be taken at the former plant site at 80 Lister Avenue and an adjoining parcel at 120 Lister Avenue (which the Complaint defines as the "Lister Site"). In addition, Maxus and Tierra have spent many millions of dollars to assess and address contamination in the State-owned Newark Bay Complex. Specifically, Maxus and Tierra: (i) have implemented a Remedial Investigation and Feasibility Study ("RI/FS") under a 1994 Administrative Order On Consent ("AOC") with the United States Environmental Protection Agency ("EPA"), which addresses the lower 6 miles of the Passaic River; (ii) are funding and are implementing, as part of a "Cooperating Parties Group" ("CPG"), a further RI/FS under two additional AOCs executed by the CPG and EPA in 2004 and 2007, respectively, which addresses the lower 17 miles of the Passaic River; and (iii) are funding and are implementing an RI/FS for the Newark Bay under a separate AOC with EPA, also executed in 2004.

25. Additionally, Maxus and Tierra proposed and negotiated "a momentous agreement" in 2008 ("2008 AOC") with EPA that provides "for the most significant removal of contaminated material from the Passaic in history." *EPA Signs Agreement with Companies to Remove Major Source of Dioxin from the Lower Passaic River*, EPA Press Release dated 6/23/08. Pursuant to this AOC, 200,000 cubic yards of contaminated sediment will be removed from the portion of the Passaic River directly in front of the Lister Plant, at an estimated cost of $80 million. *Id.*

26. Implementing these AOCs has been a monumental task, resulting in the expenditure of many millions of dollars by Maxus and Tierra, all under the direction and supervision of EPA.

27. Maxus and Tierra are not identified as potentially responsible parties on any of the above-mentioned AOCs. Rather, such AOCs were implemented on behalf of Occidental. Indeed, Maxus did not exist until 1983, and Tierra did not exist until 1986, long after the Lister Plant was shut down and more than 80 years after the State's own governors admitted that the Passaic River had already been destroyed by pollution.

28. Maxus has never owned the Lister Site properties.

29. All actions that Maxus has taken with respect to the Lister Site and the Newark Bay Complex have been limited to addressing pre-existing environmental conditions, and have been taken in response to, and under the direction and supervision of, the State and EPA.

30. Maxus has never discharged any hazardous substance into the Newark Bay Complex.

31. Tierra is the current owner of 80 and 120 Lister Avenue. Tierra did not acquire those parcels until August 1986, and then solely to facilitate continued remediation of those properties after the 1986 SPA.

32. All actions that Tierra has taken at these properties have been limited to addressing environmental conditions there, and have been taken in response to, and under the direction and supervision of, the State and EPA.

33. Tierra has never discharged hazardous substances into the Newark Bay Complex. Nor have any hazardous substances been discharged from the Lister Site into the Newark Bay Complex at any time since Tierra became owner of the Lister Site in August 1986.

34. Although the State has singled out the Lister Plant in its Complaint, the Passaic River was grossly polluted long before manufacturing activities commenced at that location. Indeed, there were so many other plants discharging hazardous wastes into the Passaic River in the Newark area that the Passaic River would have been severely contaminated even if the Lister Plant had not existed.

35. In addition, long before TCDD was detected in the River, regulators repeatedly described the Passaic River as being heavily contaminated.

36. For example, in 1969, more than a decade before TCDD was detected in the Passaic River in 1983, the Assistant Commissioner of the Federal Water Pollution Control Administration concluded that the Passaic River was a dead river (*Pollution Control* at 22), and "a disgrace to the United States," and that it was a "fetid, polluted stream that offends human sensibilities and is a danger to health and welfare." "Pollution Tour Runs Aground on Muck," *New York Times* (12/6/69). The same regulatory official "wondered how so much pollution could have occurred if the" PVSC "had been doing its job." *Id.* The Chief Engineer of the PVSC thought "a cleanup might cost more money than people were willing to spend." *Id.*

37. In 1970, again long before TCDD was detected in the river, the Passaic River was called the second most polluted river in the United States. "Passaic River Facts," *Star-Ledger* (8/18/96).

38. Also in 1970, the NJDEP Commissioner concluded that, in many respects, "the water of the lower Passaic River is deadly." *Pollution Control* at 2.

39. Also in 1970, the New Jersey Fish and Game Commission had "given up" on the major sections of the Passaic River and no longer kept statistics on fish life in the Passaic River. "Passaic River Included Among 10 Most Polluted in Nation," *Newark Sunday News* (3/22/70).

40. More than a decade before TCDD was detected in the Passaic River, the Center for Analysis of Public Issues concluded: "[i]n tidal portions of the river, and particularly the stretch below Belleville, the river's self-purification ability is utterly overwhelmed. Massive BOD loading, very high coliform concentrations and heavy amounts of floating debris make this one of the most contaminated waterways in the world." *Pollution Control*, at 21.

41. Before TCDD was detected in the Passaic River, fish-consumption advisories had been issued for all or parts of the Newark Bay Complex. In 1976, the Office of Cancer and Toxic Substances Research and the Division of Fish, Game and Wildlife, both within the NJDEP, began conducting a survey of possible PCB contamination of aquatic animals caught within New Jersey. In December 1982, the NJDEP banned the sale of American eels and striped bass taken from, among other places, Newark Bay, the Lower Passaic River, the Lower Hackensack River, the Arthur Kill and the Kill van Kull as a result of PCB contamination. At the same time, the NJDEP issued a fish-consumption advisory for other types of fish taken from these waters due to PCB contamination. The 1982 fishing bans and advisories remain in effect today. NJDEP did not issue a fish advisory related to dioxin for any part of the Newark Bay Complex until 1983.

42. Nonetheless, the State's Complaint completely ignores the fact that the Newark Bay Complex was grossly polluted long before operations even commenced at 80 Lister Avenue and that it has received millions of gallons of polluted wastewaters from myriad sources annually since at least the 1800s to this day.

HISTORICAL BACKGROUND

43. The contamination in the Newark Bay Complex is a byproduct of the rapid growth and industrialization of the communities within the Complex.

44. New Jersey is distinguished as being the birthplace of industry and manufacturing in the United States. The industrial centers of Newark, Jersey City, and Paterson developed and thrived during the 1800s, generating goods and capital that spurred the development of New Jersey and the United States.

45. As the U.S. Army Corps of Engineers noted in a June 2004 Study Area Report, "[t]he Hackensack River and Passaic River basins and Newark Bay have been a center of industrial activity since the Industrial Revolution. As a result, hundreds of chemical, paint and pigment manufacturing plants, petroleum refineries, and other large industrial facilities have been located along their banks. Effluent from these facilities has caused severe contamination of sediments in the rivers."

46. The onset of World War II spurred further industrial development within New Jersey and the Newark Bay Complex. In 1943, manufacturing drove New Jersey's economy, accounting for fifty-five percent of the State's jobs. "The Undoing of the Industrial Revolution," *New York Times* (5/9/04). There were 107 sites in the Newark Bay Complex area where the United States government owned World War II era production facilities and equipment.

47. Environmental monitoring was reduced just as WWII production increased. The New Jersey State Board of Health noted it its 1944 Annual Report that it "had curtailed . . . the inspection of sewage treatment plants and outfall pipes" and "inspections that relate to stream pollution . . . ."

48. During the surge of WWII production in the Newark Bay Complex, wastewater treatment projects were delayed or halted entirely. The same number and type of treatment works were in operation in the Newark Bay Complex in 1950 as had been operational by 1942. Counsel for the Passaic Valley Sewerage Commission ("PVSC") testified before a United States

Senate Subcommittee in 1947 that "abatement programs didn't go forward" during "the war years . . . ." Counsel for the PVSC also asserted that "[t]he question of whether or not a stream in a certain region should be polluted is a matter which can be controlled by the residents of the district."

49. Over time, the majority of the industrial facilities that once operated in the Newark Bay Complex were shut down. As of 2004, manufacturing constituted only nine percent of New Jersey's employment. "The Undoing of the Industrial Revolution," *New York Times* (5/9/04). Nonetheless, there is still a significant industrial presence in the Newark Bay Complex, which continues to receive many millions of gallons of untreated and partially treated wastewater annually from municipalities and commercial enterprises within the region, just as it did in 1902 when the Governor of New Jersey declared that pollution had already destroyed the Passaic River.

SUMMARY OF DISCHARGES DURING THE STATE'S OWNERSHIP AND CONTROL

50. The contamination of the Newark Bay Complex took place during the time the State owned and controlled virtually all of the submerged lands within the Newark Bay Complex, and still continues today.

51. Since its admission into the United States on December 18, 1787, the State of New Jersey has held, and continues to hold, title to submerged lands within its jurisdiction subject to the influence of the ebb and flow of the tide up to the mean high water mark. The submerged lands owned and controlled by the State of New Jersey include all of the sediments in the Passaic River, the Hackensack River and Newark Bay, as well as portions of the submerged lands in Arthur Kill and Kill van Kull.

52. The State of New Jersey has owned and controlled these submerged lands at the time discharge of hazardous substances onto those lands have occurred.

53. In the State of New Jersey' 2003 Directive No. 1 In the Matter of the Lower Passaic River (hereinafter "2003 Directive"), the State of New Jersey admits that "the hazardous substances in the Lower Passaic River" were "discharged onto the land and into the waters of the State." *2003 Directive*, ¶ 293.

54. The Newark Bay Complex has received liquid and solid wastes from countless sources in the region, including untreated wastewater from industries and municipalities throughout the Newark Bay Complex.

The Passaic River

55. In an 1872 report to the Board of Public Works of Jersey City, Passaic River water was described as highly offensive to both smell and taste and as having a shocking degree of contamination by organic matter.

56. An 1879 report to the Newark Aqueduct Board noted that the water supply for Newark taken at the pumping station on the Passaic River near Belleville

> is exposed to contamination from the back-flow of the Newark sewage, the drainage of the Third River Valley, the sewage of Passaic and Paterson, and the contamination from a number of factories. When the tide is flowing, all of these sources of impurity have their greatest effect, and the water is decidedly objectionable even now. With the increase of population in Newark and along the river it must become more impure.

Report on Additional Water Supply to the Newark Aqueduct Board, at 41 (J.J.R. Croes 1879).

57. James Courter, an inspector for the Joint Board of Pollution from 1881 through 1885, was accustomed to taking at least a hundred dead sheep, goats, cattle, horses, dogs, and hogs out of the Passaic River every year. *The Monstrous Pollution of the Water Supply of Jersey City and Newark* at 85 (A. Leeds 1887) (hereinafter "*Monstrous Pollution*").

58. On February 15, 1882, the New York Times reported that the waters of the Passaic River "have long been contaminated by factory discharges and sewage matter, and the residents of Passaic, Newark, and Jersey City have been especially loud in their complaints." "Waters of the Passaic," *New York Times* (2/15/1882).

59. In 1887, Dr. Albert R. Leeds noted that in Paterson, "[t]here are more and more cotton mills and woolen factories, great locomotive works, a jute mill, silk and silk dyeing establishments, with other factories too numerous to mention . . . every day pouring forth millions of gallons of brilliantly colored and poisonous dyestuffs into the [Passaic] [R]iver." *Monstrous Pollution* at 82. Dr. Leeds noted that the Third River became a "large sewer" at its junction with the Passaic River and "it pours the accumulated filth cast into it during its downward course of ten miles directly into the Passaic . . . ." *Id.* at 83. Dr. Leeds observed that chemicals, dyes, waste acids used in the washing of copper and brass, waste arsenic and other deleterious chemicals were discharged into the Second River before its junction with the Passaic River. *Id.* at 84.

60. By the 1890s, the Passaic River emitted a stench so overpowering during periods of hot weather that factories proximate to the River had to stop production. At the same time, debris, murky water and raw sewage in the Passaic River made swimming unsafe. *The Passaic River Past, Present, Future* (N. Brydon 1974) (hereinafter "Brydon") at 279.

61. Untreated sewage comprised a full one-third of the total flow of the Passaic River in 1894. *Brydon* at 278. That summer, acid fumes blistered the paint of houses along the River and caused an epidemic of nausea in Newark and houses adjacent to the River were abandoned. *Id.* at 279.

62. On August 26, 1894, the New York Times reported

> It is many a day since any live fish have been caught in the Passaic River from the pool at the falls as far down as Passaic Bridge. In the Spring, and other times when there is a heavy volume of pure water coming over the falls, many perch, rock bass, sunfish, and eels come down; but as soon as the water subsides they can be found along the banks of the Passaic River by the thousands, dead, poisoned by the sewage, acids, and dyestuff that are discharged into the stream from the Paterson and Passaic factories.

"Polluted Passaic Water That Jersey City Drinks," *New York Times* (8/26/1894).

63. On September 2, 1894, the New York Times wrote:

> At Passaic Street, in the City of Passaic, where the street crosses the canal, is a cluster of mills as thick as any in Paterson. They are of a different character, but just as bad, or perhaps infinitely more dirty and foul. They are woolen mills, cotton mills, and dyehouses. *** Underneath the bridge is the trunk sewer which drains all the houses and business places of the milling district in Passaic, and which discharges its filth into the brook, which, in turn, passes through another lot of factories on the river bank and then empties into the Passaic River, freighted with all the vileness of fifty big factories, the sewage of a populous town, and dirtier than the worst of kitchen slops. *** From Passaic to Belleville the river may be said to be lined with factories on each side.

"Jersey City's Foul Water," *New York Times* (9/2/1894).

64. As the New York Times noted on September 24, 1895, "from Paterson down to the point of discharge in Newark Bay, the [Passaic] [R]iver is little better than a large open sewer. Passaic, Rutherford, Belleville, Kearny, East Newark, or Harrison; Newark, and the Oranges, one and all discharge their sewage direct into the river, which nowhere is much more than a quarter of a mile in width." "The Foul Passaic River," *New York Times* (9/24/1895).

65. In September of 1895, representatives of the boards of health of Harrison, Belleville and Kearny adopted a resolution declaring that "the condition of the Passaic river has been for some time past and is now such that, in our judgment, an epidemic is liable to arise therefrom at any time, and is such that the property for some distance from each of its banks has decreased in valuation by reason of the stenches and smells arising from the sewer matter at the present time disposed of in said river; and . . . the river has become a public nuisance and a

menace to the public health." *Nineteenth Annual Report of the Board of Health of the State of New Jersey* (1895) at 15-16.

66. On December 13, 1896, the New York Times observed that an inspection of the Passaic River "from its mouth to the Passaic Falls shows it to be greatly discolored and in a filthy condition." "Death in Passaic Water," *New York Times* (12/13/1896).

67. The PVSC concluded in an 1897 report that: (i) "the daily discharge of 70,000,000 gallons of sewage into the Passaic river below the Great Falls of Paterson was beyond its power to assimilate"; (ii) "the pollution had become a nuisance to residents along the banks, by the stench, and had caused depreciation of property and injury to health"; (iii) "fisheries had been destroyed"; (iv) "the river had ceased to be desirable for pleasure purposes, boating, bathing, etc.; no longer possessing the park values which so generous a stream should afford the large populations on its banks"; (v) "the use of the river for manufacturing purposes was suffering on account of the pollution"; and (vi) "the pollution of the lower Passaic river appeared to the Commissioners to be completely established as a public nuisance, an injury to health, and an increasing menace to property interests, from the beginning at the Great Falls to below Newark."

68. In *Monstrous Pollution*, Dr. Albert R. Leeds observed that, from 1882 until at least the time of his report in 1887, "the people of Newark have drunken much of their own sewerage, but a very much larger share has gone into the Jersey City water."

69. As of 1888, the municipalities of Newark, Harrison, Arlington, Belleville, Nutley, Kearney, Passaic, Paterson and Jersey City all derived their water supply from the Passaic River. By 1899, all of these municipalities derived their water supply from sources other than the Passaic River. *Sewage Pollution in the Metropolitan Area Near New York City and its Effect on*

Inland Water Resources, H.R. No. 57-691 (M. Leighton, 1902) (hereinafter "USGS Report") at 31-32.

70. According to the Twenty-First Annual Report of the Board of Health of the State of New Jersey for the year of 1897 ("1897 Board of Health Report"):

> An inspection of the [Passaic] river from its mouth to the Passaic Falls shows everywhere water discolored and full of suspended matters; a succession of sewer mouths with outflowing sewage; factories and dyehouses discharging water of many hues; shores blackened with deposits of filthy mud. The residents along the river all agree in testifying that boating and bathing have ceased to be pleasures; that in warm weather such nauseous odors are exhaled that on hot summer nights they are obliged to keep the windows of their homes closed and that in consequence of all this the houses are vacated and property values have decreased.

Twenty-First Annual Report of the Board of Health of the State of New Jersey at 267-268 (1898).

71. The 1897 Board of Heath Report noted that the lower Passaic River "is polluted with the sewage and waste of large cities, till it has become at times almost similar to an open cesspool." *Id.* at 270. The same report stated that "[t]he necessity for, and the quality of, the purification should be determined with judgment and discrimination, for it would be impolitic to place an embarrassment or restraint on our industries." *Id.* at 271.

72. By 1897, it was concluded by the State that the continued pollution of the lower Passaic River was unavoidable. As the 1897 Board of Heath Report stated:

> However much those cities, which some years ago drew their supply of pure water from the lower Passaic, may demand or desire a return to that pristine condition, the idea is impossible of attainment. A river like the Passaic cannot flow through a large and closely-built city and remain clean and pure, even though not a single sewer should discharge into it. Still, there would be street and surface washings after rains, the casual pollution of persons living on its banks, crossing bridges or boating on it, refuse matter cast into it at night as an easy method of disposal. These would seriously affect its character, and no legislative enactments and no reasonable police protection would keep out the offensive matter.

Id.

73. Recreational activities on the Passaic River were all but eliminated by 1900 as the result of sewage and industrial pollution. The Passaic River Amateur Rowing Association discontinued its regatta in 1901 because "by that time the river had become so foul it was impossible to find young men to row in the river." "New Chapter Opens in Life of the Passaic—Knowing Newark," *Star-Ledger* (10/31/96).

74. In 1899, the Board of Health of the Town of Harrison requested the Board of Health of the State of New Jersey "to render all assistance possible to assist in abating a nuisance, which, if something is not done soon will cause a plague, that is the filthy condition of the Passaic river." *Twenty-Third Annual Report of the Board of Health of the State of New Jersey*, at 139 (1900). As the Harrison Board of Health described the river then:

> It is nothing more nor less than an open sewer, and the smell that arises from it is unbearable at times and causes sickness among the residents who are compelled to reside along both the east and west banks of the river, in all the cities and towns from Newark and Harrison to Passaic. There are at the present time on the east bank of the Passaic [R]iver several large and handsome residences that have cost several thousand dollars to build and are now lying idle. The owners cannot live in them nor can they rent them, as no one will live in them on account of the filthy condition of the river, and the smell that arises from it.

Id.

75. In a 1901 report to the New Jersey Legislature, the PVSC noted that "[t]he evil condition of the whole river can scarcely be exaggerated, and what was apparent to the instructed four years ago is now evident to any person who may casually observe the river."

76. On March 20, 1901, the New York Times reported:

> The condition of the Passaic River is such that it can best be described as intolerable. During the past year it has become a more pronounced degree than ever before a public nuisance of the first magnitude. It was formerly offensive only in the Summer, but this year it remained so until frozen over. Owing to a light rainfall the river was low, and great areas of foul mud were exposed along its banks, creating dangerous conditions all the way from Newark Bay to Paterson. More than once last Summer and Fall factories on or near the river were

compelled to close because the operatives could not continue to work in the nauseating atmosphere of these exhalations.

77. On April 19, 1901, the New York Times wrote that the Passaic River was "[a]n immense open sewer" that "carries the offal of a score of places, including the Cities of Paterson, Passaic, and the Oranges, through the very heart of" Newark. "Passaic River Pollution," *New York Times* (4/19/1901).

78. On December 25, 1901, the New York Times observed that the Passaic River was "now little more than a great open sewer by the time it reaches Newark, and from that city on it is filthy beyond conception to those who have not personally observed it." "A $7,000,000 Sewage Plan in New Jersey," *New York Times* (12/25/1901).

79. In 1902, the U.S. Geological Survey ("USGS") noted that the "[p]ollution of the Passaic has caused its greatest damage in the reduction of realty values. We can not estimate with any degree of correctness the amount of this damage, but we know that it is enormous." The USGS further stated that although "[t]he banks of the Passaic from Paterson to Newark are naturally attractive," the "area is practically uninhabitable -- the residents along the shores are principally those who have lived there from birth and inherited the property upon which they dwell, or who moved there before the present conditions existed, and are encumbered with property which they can neither abandon nor sell." The 1902 USGS report also observed that there had been an absolute destruction of fisheries in the lower Passaic River valley. USGS Report at 33.

80. In enacting L. 1903 c. 102, the Legislature determined that the "Passaic river and many streams flowing into it within said sewerage district are polluted by sewage and other deleterious matter to the extent that the health of the people residing in said district is seriously endangered" and that "[i]mmediate relief therefrom is imperative . . . ."

81. As of at least 1905, the City of Paterson discharged no less than 17,000,000 gallons of untreated wastewater per day from its municipal collection system into the Passaic River, and at least 7,000,000 gallons of industrial waste were discharged daily into the Passaic River from factories within the City of Paterson. The City of Passaic discharged at least 2,000,000 gallons of untreated wastewater per day from its municipal collection system into the Passaic River, and at least 7,000,000 gallons of industrial waste were discharged into the Passaic River every day by factories within the City of Passaic. The Cities of Orange, Glen Ridge, Bloomfield, and Montclair discharged at least 3,500,000 gallons of untreated wastewater per day from their municipal collection system into the Passaic River. The City of East Orange discharged at least 2,000,000 gallons of untreated wastewater per day from its municipal collection system into the Passaic River. The City of Newark discharged at least 34,000,000 gallons of untreated wastewater per day from its municipal collection system into the Passaic River. The Cities of Harrison, East Newark, and Kearny discharged at least 7,500,000 gallons of untreated wastewater per day from their municipal collection system into the Passaic River. *Van Cleve v. PVSC*, 71 N.J.L. 183, 204-05 (Sup. Ct. 1904). Collectively, these municipal discharges added at least 66 million gallons of untreated wastewater, together with at least 14 million gallons of industrial waste, to the Passaic River every single day.

82. In 1906, the Joint Committee on Sewage Disposal of the City of Paterson acknowledged:

> Owing to ignorance, self-interest, and neglect, the rivers and streams have been converted into what are little better than open sewers; indeed, until stern necessity compelled serious attention to the magnitude of the evil and its ultimate trend, it was customary to look upon watercourses as the natural channels into which should be thrown all of the refuse and filth which life and activity created.

Report of the Joint Committee and of the Consulting Engineer on the Subject of Sewage Disposal, at 5 (1906). The Joint Committee noted that the Passaic River "has become a nuisance

to residents along the banks; it is an offense to sight and smell, and has caused depreciation in value of property; it is no longer desirable for pleasure purposes, boating, bathing, etc., and is objectionable for manufacturing purposes on account of the pollution." *Id.* at 6.

83. In enacting L. 1907 c. 10, the Legislature found that a "large number of municipalities and the inhabitants thereof are now discharging sewage and other polluting matter into the waters of the Passaic river within the Passaic valley sewerage district, between the Great falls at the city of Paterson and the mouth of the Passaic river at Newark bay, and said waters are thereby polluted. . . ."

84. In 1909, the Passaic River was "a large open sewer, so foul that in its waters fish cannot live." *Sewage Purification and Disposal*, at 179 (J.J. Cosgrove 1909).

85. By 1910, the mouth of the Passaic River was black from sewage and manufacturing wastes. *Water Quality of the Hudson-Raritan Estuary* at 153 (ISC Draft 11/81).

86. In a 1910 report, the New York Metropolitan Sewerage Commission concluded that the Passaic River was polluted beyond the limits of toleration. *Arthur Kill and Kill van Kull*, New York City Waters Survey Series Report No. 3 (New York State Dept. of Health 1960) at 2 (hereinafter "1960 New York Department of Health Report").

87. A letter from the Chief of Engineers of the United States Army in 1912 documented that the shores of the Passaic River, which were formerly occupied by a fine class of private residences, were deserted. The Chief of Engineers further stated that in low stages, it was sickening to approach the banks of the Passaic River. The Chief of Engineers observed that the water was very bad when at rest but was almost intolerable when stirred up by boats or other means. The Chief of Engineers concluded that improvement of the Passaic River above the

upper limit of the commercial wharves of Passaic was unworthy of being undertaken by the United States.

88. In 1912, it was observed that "[t]he rapid growth of the cities of Passaic and Paterson above and, in fact, of the entire lower valley, quickly changed [the Passaic River] so that for the past dozen years it has ordinarily been a black, foul-smelling channel differing but little from an open sewer." *Sewage Disposal*, at 342 (G. Fuller 1912).

89. In 1918, the Passaic River caught on fire, with the flames spreading almost like an explosion. Fireman from Newark and Kearny were called upon to attempt to put out the fire on the River. "The Passaic River Fire," *New York Times* (6/6/18).

90. The Thirty-Third Annual Report of the New Jersey Agricultural College Experiment Station, for the year ending June 30, 1920, noted that the Passaic River "is perhaps for much of its length, the worst polluted river in the United States. Raw sewage and factory waste make the stream uninhabitable for fish, but render it an ideal breeding place for the house mosquito." *Forty-First Annual Report of the New Jersey State Agricultural Experiment Station and the Thirty-Third Annual Report of the New Jersey Agricultural College Experiment Station*, at 526 (1921).

91. A 1926 U.S. War Department Survey stated that fish life in the Passaic River had been destroyed.

92. In enacting L. 1943 c. 76, the Legislature found that as a result of pollution from certain municipalities, "the Passaic River is again threatened with pollution, to the prejudice of the health, safety and welfare of the people of the State of New Jersey . . . ."

Newark Bay, The Kills and Other Parts of the Newark Bay Complex

93. "Pollution has been a problem in Newark Bay since at least 1880, when shad and oysters could not be sold due to contamination by coal oil." *Natural Resource Restoration Plan*

for Oil and Chemical Releases in the New York/New Jersey Harbor Estuary (New York/New Jersey Harbor Spill Restoration Committee, May 1996 Draft) (hereinafter "NY/NJ Harbor Spill Restoration Committee") at 20.

94. In November 1910, the Metropolitan Sewerage Commission of New York City reported that "[o]ccasionally, fields of greasy material, largely from oil works on the shores of the Kill van Kull" are carried into Newark Bay. *Water Quality of the Hudson-Raritan Estuary* at 153 (ISC Draft 11/81).

95. Fishing and oyster dredging in the Arthur Kill had ceased by 1916 as a result of pollution. *Combined Sewer Outfalls in the Interstate Sanitation District* (ISC 10/88) at 137.

96. The Annual Report of the Interstate Sanitation Commission ("ISC") for the year of 1937 noted that a great amount of sewage and trade wastes were discharged into the Kill van Kull or into open creeks or brooks that are tributaries of the Kill van Kull. The same report also observed that there were extensive sludge banks along the shore of the Kill van Kull that gave off offensive odors, particularly during the summer, at low tide.

97. According to the Annual Report of the ISC for the year of 1938, "[t]he fresh clear waters of the Kill van Kull have changed to brackish gray that constantly throws up, to the vision of the disinterested spectator, huge chunks of the undigested wastes from sewers and from a dozen industries."

98. The ISC reported that approximately 206 million gallons of industrial waste were discharged daily into the Arthur Kill in 1951.

99. In 1956, the ISC reported that approximately 75 million gallons of sewage, 219 million gallons of industrial waste, and 150 million gallons of non-contact cooling water were discharged into the Arthur Kill each day. According to the Commission, this amounted to "more

than four times the estimated average fresh water flow into the Kill from adjacent rivers and creeks." The ISC also reported that more than eighty percent of the biochemical oxygen demand ("BOD") loading into the Arthur Kill "is contributed to the northern four miles or 31% of the length of the Kill."

100. A 1960 report by the New York State Department of Health on the Arthur Kill and the Kill van Kull identified 23 industries that were discharging wastes into the Arthur Kill and the Kill van Kull or their tributaries. 1960 New York Department of Health Report at 11.

101. The 1960 New York Department of Health Report found that the quality of water in the Arthur Kill and Kill van Kull at the time was almost wholly a function of the sewage and industrial waste load imposed from New Jersey. *Id.* at 15.

102. The 1960 New York Department of Health Report concluded that the best usage of the Arthur Kill and the Kill van Kull was for transportation and disposal of sewage and industrial waste.

103. In 1962, the ISC reported that "[d]ue to lack of net flow out of the [Arthur] Kill, pollutional conditions of the Kill are primarily a result of pollutional sources (both domestic and industrial) discharging into the Kill." The ISC further noted that "[p]art of the pollution put into the Arthur Kill on a particular day will move away from the point of introduction and not return; however, part of it will return."

104. In 1962, the ISC reported that "the waters of the Arthur Kill where they are discharging through the Kill van Kull or into the Raritan Bay may, at times, exert some toxic effect and impart an unpleasant taste on fish life in the Bays."

105. In 1962, the ISC reported that of the "30 industries located on both shorelines of the Arthur Kill, approximately 24 discharge liquid wastes directly into the waterway. These wastes contain primarily soluble B.O.D. and primary treatment alone would be inadequate."

106. In 1962, the ISC reported that the "dissolved oxygen requirements of the Interstate Sanitation Commission are not being met in the Arthur Kill;" "pollution discharged directly into the Arthur Kill is distributed quickly through the entire waterway;" and "domestic sewage treatment plants are not providing the necessary B.O.D. removal."

107. On or about July 26, 1965, the Port Authority of New York and New Jersey ("Port Authority") reported that all or a portion of the untreated storm, commercial, industrial, and sanitary wastewater generated by the City of Newark's Peddie District, Wheeler District, Adams District, Queens District, and Waverly District was discharged into the Peripheral Ditch by the City of Newark, and thence into Newark Bay. According to the Port Authority, the City of Newark had been discharging up to 30 million gallons per day of "raw sewage" through the Newark Airport from the southern section of Newark and into Newark Bay since at least 1948.

108. On or about November 18, 1971, the Port Authority reported that "sewage from most of Port Newark is now discharged into a combination storm-sanitary sewer system which discharges into Newark Bay and/or the Newark Channel at the rate of 100,000 gallons per day from various outfalls."

109. On or about January 12, 1972, the NJDEP reported that "[a]ll facilities located in the Port Authority Terminal in Newark discharge any and all effluents to the storm sewers, and thence to Newark Bay."

110. The 1973 Final Environmental Impact Statement for the Maintenance of the Newark Bay, Hackensack and Passaic Rivers Navigation Project noted that the United States

Fish and Wildlife Service "reports that fish and wildlife resources of the area are of negligible value since industrial and commercial activity and the discharge of sanitary effluent from surrounding communities have resulted in pollution in the project area and its tributary waters."

111. According to an August 1981 report on the Combined Sewer Overflow Pollution Abatement Program, authored by the City of Elizabeth's consultant, Clinton Bogert Associates ("1981 Bogert Report"), the Elizabeth River was polluted for the entire reach of Elizabeth and fish and wildlife resources were practically extinct. The 1981 Bogert Report noted that the wetlands located in the southeastern portion of Elizabeth and bordering on Newark Bay had been modified by pollution and industrial development to such an extent that it has eliminated shell fish, flounder, striped bass and drum as a resource.

112. In November 1981, the ISC reported that a large "slug of pollution" persists in the Arthur Kill, which oscillates with the tide, a portion of which periodically enters and "disperses into Newark Bay." *Water Quality of the Hudson-Raritan Estuary* at 86 (ISC Draft 11/81). The ISC also noted that "[d]issolved oxygen is exceptionally low," "[o]il and grease are present in large quantities," and "heavy metals data show high readings for copper and iron" in the Arthur Kill. *Id.* at 90.

113. Thomas G. Dunn, the Mayor of Elizabeth, New Jersey, noted in an August 10, 1984 letter to the EPA that the "tidal reaches of the Elizabeth River are grossly polluted with the dissolved oxygen totally depleted. At times, a foul stench rises from the River due to its pollution. Floating turds can be observed."

114. It has been estimated that between October 1986 and August 1991, more than 18,276,051 gallons of hazardous materials and petroleum products entered Newark Bay. Estimates indicate that during this period, an average of 3,545,141 gallons of petroleum products

were released into the water bodies of Newark Bay on an annual basis, or approximately 10,000 gallons per day. "Assessment of Chemical Loadings to Newark Bay, New Jersey from Petroleum and Hazardous Chemical Accidents Occurring from 1986 to 1991," 25 Ecotoxicology and Environmental Safety, 202, 205 (D. Gunster, et al., 1993).

115. In 1996, the New York/New Jersey Harbor Spill Restoration Committee reported that the "Arthur Kill's shores are lined with refineries, 19 being petroleum facilities while 16 process non-petroleum chemicals. Mishandling of these chemicals has resulted in over 17.5 million gallons of petroleum products and other hazardous chemicals being discharged into the Kill during the period between 1986 and 1991." NY/NJ Harbor Spill Restoration Committee, at 17.

116. Mercury concentrations in sediments of the Arthur Kill have been measured as high as 2.8 μg/g dry weight. NY/NJ Harbor Spill Restoration Committee at 17.

117. According to the NY/NJ Harbor Spill Restoration Committee, the "Hackensack River carries a heavy load of pollutants," and mercury levels in the sediments of the Hackensack River have been detected as high as 4.4 μg/g dry weight. NY/NJ Harbor Spill Restoration Committee at 34.

Discharges From Mosquito Control Efforts

118. Beginning no later than the early 1900s, various types of oil were used to combat mosquitoes in New Jersey. "The first larvicides were waste oils discarded from various manufacturing processes. These were followed by the use of waste crank case oil and finally by fuel oils," which were employed until at least the 1960s. "Past Achievements, Current Activities and Contributions, and a View to the Future on Research on and Control of Mosquitoes in New Jersey," *Proceedings of Fiftieth Annual Meeting of the New Jersey Mosquito Extermination Association* at 109 (1963) (hereinafter "Control of Mosquitoes").

119. Early mosquito control in New Jersey through "[s]praying consisted of the application of oils or larvicides at the rate of 30 to 40 gallons per acre by means of knapsack, compressed air or high pressure spraying equipment. This program necessitated both small and large trucks as it was not uncommon for one spraying crew to use several hundred gallons of oil per day. Catch basins required weekly treatments to prevent mosquito emergence." "New Values in Mosquito Control," *Proceedings of the Thirty-Sixth Annual Meeting of the New Jersey Mosquito Extermination Association* at 144 (1949).

120. Catch basins and standing rain water were oiled in Newark to control mosquitoes. *Report of the Entomological Department of the New Jersey Agricultural College Experiment Station For the Year 1907* at 549 (1908). Catch basins in Paterson, Passaic and Clifton were also regularly sprayed with fuel oil to control mosquitoes. *Fortieth Annual Report of the New Jersey State Agricultural Experiment Station and the Thirty-Second Annual Report of the New Jersey Agricultural College Experiment Station*, at 490 (1920).

121. Mosquito breeding in the Passaic River "was controlled by the use of a rowboat and two men who patrolled the river and sprayed fuel oil wherever larvae were found." *Id.* Indeed, the "Passaic River was oiled whenever and wherever inspection revealed [mosquito] breeding." *Forty-First Annual Report of the New Jersey State Agricultural Experiment Station and the Thirty-Third Annual Report of the New Jersey Agricultural College Experiment Station*, at 526 (1921).

122. By its Complaint, the State seeks to impose liability for the purported discharge of DDT, which the State now categorizes as a hazardous substance. But the State, itself, through its departments and agencies, sprayed or funded the spraying of millions of pounds of DDT into the New Jersey environment.

123. DDT was widely used in New Jersey to combat mosquitoes beginning in the years immediately following World War II. In 1947, "a DDT solution was sprayed from an airplane over 2,500 acres of central and northern New Jersey's parks, watershed properties and private plantings." "DDT Saves the Pines," *New York Times* (9/6/1947).

124. As of 1948, DDT was "the most widely used chemical in mosquito extermination." "Research Activities in Chemical Control of Mosquitoes in New Jersey in 1953," *Proceedings of the Forty-First Annual Meeting of the New Jersey Mosquito Extermination Association* at 279 (1954).

125. By 1949, it was reported that "many thousands of pounds of DDT both in solution and as powder have been applied by the mosquito commissions [in New Jersey] for investigational as well as for practical purposes, without a single case of injury or damage to plants and higher animal life." "The Place of New and Old Insecticides in Mosquito Control in New Jersey," *Proceedings of the Thirty-Sixth Annual Meeting of the New Jersey Mosquito Extermination Association* at 139-40 (1949). DDT was applied in solutions using kerosene or fuel oil, and solvents such as xylene, benzene, acetone, and dimethyl phthalate cyclohexanone. *Id.* at 140. In 1948, seven counties in New Jersey treated catch basins with oil and DDT. *Id.* at 137.

126. DDT was utilized in the Passaic Valley to combat mosquitoes. For example, in 1948, treatments of DDT and DDD "were made on more than 200 acres of meadow land subject to flood by the Passaic River." "Field Trials with Insecticides for Mosquito Control in the Passaic Valley in 1948," *Proceedings of the Thirty-Sixth Annual Meeting of the New Jersey Mosquito Extermination Association* at 123 (1949).

127. In 1953, aldrin-impregnated granular tobacco dust was applied by helicopter to the North Arlington-Lyndhurst meadow in Bergen County. In the same year, approximately 10,000 gallons of DDT solution was applied to various areas in Bergen County and 3,000 gallons of DDT solution was applied to catch basins in Bergen County. *Proceedings of the Forty-First Annual Meeting of the New Jersey Mosquito Extermination Association*, at 292-93 (1954). Approximately 93,000 gallons of fuel oil and 5,000 gallons of DDT were applied in Hudson County in 1953 to combat mosquitoes. *Id.* at 297. DDT was also used in Passaic County to combat mosquitoes in 1953. *Id.* at 302.

128. Soil testing conducted in 1953 in nine New Jersey counties detected the presence of DDT. Three samples detected the presence of DDT in a range of 30 to 110 pounds per acre. In areas that received pre-mosquito season residual treatments plus seasonal DDT sprays, DDT was detected in an average amount of 6.27 pounds per acre, with one sample as high as fourteen pounds per acre. "Research Activities in Chemical Control of Mosquitoes in New Jersey in 1953," *Proceedings of the Forty-First Annual Meeting of the New Jersey Mosquito Extermination Association* at 280-83 (1954).

129. In 1956, approximately 600,000 pounds of DDT was sprayed over 600,000 acres in northern New Jersey, southern New York and northeast Pennsylvania in a joint effort by such states and the United States Government. "Drive Ends Today on Gypsy Moths," *New York Times* (6/16/56).

130. In 1957, more than 3,000,000 pounds of DDT was sprayed over approximately 3 million acres of New Jersey, New York, and Pennsylvania in a joint effort by such states with the United States Department of Agriculture. "Spraying Goes on Despite Protests," *New York Times* (5/25/57); "U.S. Aide Says DDT Caused No Illness," *New York Times* (2/22/58). At least

190,000 acres in parts of Bergen, Passaic, Morris, Sussex and Warren Counties were sprayed with DDT by the State of New Jersey and the United States Department of Agriculture as part of this effort. "Air Spray Attack Begins," *New York Times* (4/24/57); "Gypsy Moth Spray Hailed in New Jersey," *New York Times* (10/2/57).

131. At one time, DDT reportedly traveled down the Arthur Kill "like soap suds." "Oil in Arthur Kill: Publicity and Peril for Urban Marsh," *New York Times* (1/18/1990).

132. On information and belief, the New Jersey Department of Agriculture sprayed DDT on 71,000 acres in parts of Passaic, Bergen, Morris, Warren and Sussex counties in 1963. "Audubon Society Opposes Spraying Tracts in Jersey," *New York Times* (4/25/63).

133. In 1963, it was "estimated that approximately 80% of the 296,000 acres of coastal wetlands [in New Jersey] have received some mosquito control treatment." *Control of Mosquitoes* at 108.

Discharges From Sewer Systems

134. Municipalities in proximity to the Newark Bay Complex designed and built their sewer systems to discharge untreated wastewater directly into the Complex.

135. The Town of Kearny, for example, discharged its wastewater into the Passaic River via Frank's Creek. In 1907, wastewater from Kearny was observed overflowing the banks of Frank's Creek, forming pools. The New Jersey Agricultural College Experiment Station noted that "[a]s the matter stands at the present time Kearny maintains a nuisance that is a disgrace to its own civilization and the civilization of the State in which it is allowed to occur." *Report of the Entomological Department of the New Jersey Agricultural College Experiment Station For the Year 1907* at 549 (1908).

136. The United States Supreme Court recognized in *People of the State of New York v. State of New Jersey*, 256 U.S. 296 (1921), that the drainage of sewage into the Passaic River

resulted in it "becoming such a menace to the health and property of the adjacent communities that, in 1896, a commission was appointed by the Governor of New Jersey" to devise some system of sewage disposal which would afford relief. Nearly 30 years passed before the commission the Governor appointed actually implemented any such system.

137. Building an interceptor sewer along the Passaic River, to divert discharges into New York Bay was seen as a possible solution to the pollution problems in the Passaic River. The construction of the PVSC's Main Intercepting Sewer was completed in approximately 1924. Completion of the PVSC's Main Intercepting Sewer, however, did not eliminate the ongoing pollution of the Newark Bay Complex because the PVSC collection system was knowingly designed to overflow into the Passaic River, or its tributaries, whenever wastewater entering the system exceeded the capacity of the Main Intercepting Sewer.

138. Additionally, a number of municipal sewer systems within the Newark Bay Complex are "combined" sewers, meaning that they were specifically designed to collect wet-weather runoff (i.e., storm water), domestic sewage, and commercial and industrial wastewater in the same system, and to discharge the combination directly into the Newark Bay Complex, without treatment, whenever the combined volume of the runoff, domestic sewage and commercial/industrial wastewater entering the system exceeded its capacity.

139. In an August 14, 1935 report, the PVSC's Chief Engineer stated that the lower Passaic River was no longer suitable for bathing and swimming, noting that the truth of the matter is that regular examinations of the River water indicate that it is rarely safe for bathing because of the frequent presence of sewage bacteria brought into the stream from storm overflows from combined sewers, the unsanitary features remaining in the stream sometimes many days after rains and being swept back and forth with the tides.

140. The ISC, a joint agency of the States of New Jersey, New York, and Connecticut, noted in its 1947 Annual Report that in the case of combined sewers, it was uneconomical and impractical to construct sewage treatment plants large enough to accommodate all the storm water as well as the sanitary sewage and, therefore, "it has been customary to permit the excess combined sewage to overflow and discharge into the stream without treatment." The ISC further noted that although such overflows were contrary to the Tri-State Compact under which the ISC was established, "the overflow of excess storm water without treatment is presently condoned." Indeed, the ISC insisted that the bypassing of treatment plants, "as a result of which raw, incompletely or inadequately treated sewage is discharged into the waters of the District must be condoned . . . ."

141. As a member of the ISC, the State of New Jersey was not only fully aware that sewage and other polluting matter was being discharged into the Newark Bay Complex by surrounding communities, but also permitted and publicly condoned such pollution.

142. A number of municipalities chose to continue to pollute the Newark Bay Complex. In prepared testimony before a Subcommittee of the Committee on Public Works of the United States Senate and the Committee on Public Works of the House of Representatives in 1947, counsel for the PVSC noted that most of the municipalities in the PVSC had combined sewer systems. Counsel for the PVSC further testified: "In times of storm, the discharge becomes so great that it is necessary to bypass a considerable amount of waste into the Passaic River." In opposing legislation that would provide for federal control of stream pollution, counsel for the PVSC acknowledged that a "federal agency might very well determine that this method of operation is unsatisfactory and could require that the municipalities be put to the expense of installing dual sewerage systems. The cost of this would be staggering."

143. The reason the State of New Jersey condoned the discharge of untreated wastewater into the Newark Bay Complex was a simple matter of economics. As recognized by ISC in its 1950 Annual Report, "it is not desirable to have untreated sewage enter the District Waters by bypassing a plant" and that the "undesirability of such a situation is fully recognized . . . ." Yet, according to the ISC, bypasses of treatment plants serving combined sewers in the district occurred because the cost of constructing plants large enough to provide treatment for all inputs was believed to be simply too high.

144. Thus, as a member of the ISC, the State of New Jersey knowingly permitted the continued contamination of the Newark Bay Complex, rather than insisting that the municipalities construct systems that would eliminate combined sewer discharges, as the law plainly required.

145. New Jersey, as a member of the ISC, continued to condone discharges of untreated wastewater into the New Bay Complex from combined sewer systems in the region well into the 1950s and beyond. The ISC concluded in a 1953 report that "we must accept" discharges of storm water polluted with domestic sewage during periods of heavy rainfall because it would be impractical to attempt to reconstruct the collection systems of municipalities to provide a separate sewer for domestic wastes in light of the investments already made in combined sewers.

146. Seymour A. Lubetkin, Chief Engineer of the PVSC between 1954 and 1978, concluded that every entity connected to a municipal sewer system serviced by the PVSC had discharged its waste stream untreated into the Passaic River at some time or another because the practice of bypassing was so frequent.

147. The PVSC's consultant, Elson T. Killam Associates, Inc., estimated that combined storm water and sewage overflows into the Passaic River exceeded seven billion gallons per year in 1974 and 1975, with another 2 billion gallons being discharged into Newark Bay. *Report Upon Overflow Analysis to Passaic Valley Sewerage Commissioners Passaic River Overflows* (E. Killam Assoc's, Inc. 1976) at 194.

148. On or about August 15, 1978, the PVSC reported that 242 industries discharged wastewater containing heavy metals into the PVSC System, of which sixty-nine of the industries were located in Newark, and sixty-three were located in Paterson. The PVSC reported there were 109 electroplating and metal finishing facilities, twenty-seven organic chemical manufacturing facilities, ten inorganic chemical manufacturing facilities, thirty-one textile manufacturing facilities, eight plastics and synthetic material manufacturing facilities, seven pulp-paper and paperboard manufacturing facilities, six leather tanning and finishing facilities, and miscellaneous industrial and manufacturing facilities.

149. On or about August 15, 1978, the PVSC reported that in comparison to other wastewater treatment systems, "the PVSC raw wastewater is high in metals with particular emphasis on mercury, zinc, nickel, lead, and chromium."

150. On or about August 15, 1978, the PVSC reported that under typical operating conditions, wastewater entering the PVSC treatment plant from the PVSC System contained, without limitation, 67.8 lbs/day of cadmium; 1523.2 lbs/day of chromium; 999.1 lbs/day of copper; 1869.3 lbs/day of lead; 990.6 lbs/day of nickel; 5693.5 lbs/day of zinc; 1.9 lbs/day of beryllium; 25 lbs/day of arsenic; and 118.6 lbs/day of mercury. According to the PVSC, industrial sources accounted for ninety-two percent of the heavy metal loadings into the PVSC System. Of the total daily metal loadings into the PVSC System, the PVSC estimated that 5.7

lbs/day of cadmium, 25.8 lbs/day of chromium, 120.2 lbs/day of copper, 69.9 lbs/day of lead, 21.3 lbs/day of nickel, 277.4 lbs/day of zinc, and 1.1 lbs/day of mercury were contributed into the PVSC System from domestic sources; and 1.8 lbs/day of cadmium, 7.5 lbs/day of chromium, 30.6 lbs/day of copper, 63.5 lbs/day of lead, 26.0 lbs/day of nickel, 81.7 lbs/day of zinc, 0.06 lbs/day of arsenic, and 0.49 lbs/day of mercury were contributed into the PVSC System from wet-weather runoff and groundwater infiltration.

151. In 1980, a PVSC trunk line ruptured and the State of New Jersey allowed the PVSC to dump half a billion gallons of raw sewage into the Passaic River.

152. According to a report by the Center for Analysis of Public Issues, a chronic source of pollution in the lower Passaic River is "the municipal collection systems which bypass untreated wastewater into the Passaic during and immediately after heavy rainfall." *Pollution Control*, at 24.

153. A 1986 report by NJDEP's Office of Science and Research ("1986 OSR Report") confirmed that New Jersey Publicly Owned Treatment Works ("POTWs") continued to discharge priority pollutants long after manufacturing operations at 80 Lister Avenue had ceased.

154. According to the 1986 OSR report, metals, volatile organics, base neutrals, phenols, pesticides and PCBs were detected in the effluent of the Kearny Municipal POTW.

155. According to the 1986 OSR report, metals, volatile organics, base neutrals, and pesticides were detected in the effluent of the Arlington-Lyndhurst POTW .

156. According to the 1986 OSR report, metals, volatile organics, base neutrals, and pesticides were detected in the effluent of the PVSC.

157. An October 1988 report by the ISC on combined sewer overflows concluded that they were a major contributing factor to the poor water quality in the Arthur Kill.

158. In 1996, ten million gallons of wastewater entered the Passaic River each day. "Passaic River Facts," *Star-Ledger* (8/18/96).

159. In addition to the combined sewer overflows that pollute the Newark Bay Complex, a number of municipalities chose to continue to pollute the Newark Bay Complex, rather than to construct wastewater treatment facilities.

160. In 1953, the ISC noted that one quarter of the pollution in the Interstate Sanitation District, which includes parts of the Newark Bay Complex, were discharges of untreated wastewater.

161. The Borough of Carteret discharged untreated wastewater into the Rahway River and/or the Arthur Kill until it built a wastewater treatment plant in 1953. Similarly, the City of Bayonne discharged untreated wastewater directly into Newark Bay, the Kill van Kull, and Upper New York Harbor until it completed a wastewater treatment plant in 1954.

162. The south side of Newark discharged untreated wastewater directly into Newark Bay until 1965.

163. The City of Elizabeth continued to use the sewer in Bayway to discharge highly polluted, untreated, industrial wastes to the Arthur Kill until at least 1968.

164. In a report dated November 30, 1977, EPA noted that the Town of Kearny was "concerned about enforcing" the Town's industrial waste ordinance because of a "fear that the industry will move."

165. In his prepared statement before a Subcommittee of the Appropriations Committee of the United States House of Representatives on April 28, 1999, the Executive Director of the PVSC noted that "[t]he real key to improving the water quality of the Passaic River and Newark Bay is to reduce Combined Sewer Overflows." The PVSC's Executive

Director also observed that "[f]or the last 30 years New Jersey has been struggling to find a solution that is both economically viable and environmentally acceptable to the problem of CSOs." The PVSC's Executive Director stated that Newark, Jersey City, Paterson, Harrison, East Newark, Bayonne and Kearny "each has a combined sewer system which continually threatens the water quality of the Passaic River and Newark Bay during wet weather events." The PVSC's Executive Director acknowledged that "[t]he traditional solution for reducing CSOs is to separate the storm water from the sanitary sewers," but declared that "[t]his has never been and will never be a feasible solution."

166. In prepared statements before Subcommittees of the Appropriations Committee of the United States House of Representatives on or about April 12, 2000 and March 21, 2001, the Executive Director of the PVSC once again testified that the "real key to improving the water quality of the Passaic River and Newark Bay is to reduce Combined Sewer Overflows." Nonetheless, combined sewer systems continue to discharge untreated or partially treated wastewater into the Newark Bay Complex because the owners and operators of such systems have chosen to continue to pollute the Newark Bay Complex rather than spend the resources necessary to eliminate such discharges.

Contamination Facilitated by the State of New Jersey

167. For decades, the State of New Jersey has issued permits to various entities, including municipalities and local and regional sewerage authorities, including the PVSC, which permits purport to allow such entities to place or discharge sewage, waste and other polluting matter into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

168. N.J.S.A. 58:14-7 provides that "[n]o sewage or other polluting matter shall be discharged, directly or indirectly, into the waters of the Passaic river at any point between the

Great falls in the city of Paterson and the mouth of said river at Newark bay, or into the waters of any of the tributaries of said river which empty into it between said points . . . ."

169. N.J.S.A. 58:14-8 provides that "[n]o sewage, waste matter, article or substance, liquid or solid, of any kind which creates odors, gases or fumes, due to the putrefaction of organic matter or the presence of chemicals, or results in the presence of oil or grease on the surface of the waters of the Passaic river, or its tributaries, shall be placed or discharged, or be permitted to be placed or discharged, into the waters of said river between the points designated in section 58:14-7 of this title, or into its tributaries so designated."

170. In direct violation of N.J.S.A. 58:14-8, the State of New Jersey has issued permits to allow the discharge of sewage, waste and other polluting matter into the Passaic River in the form of combined sewer overflows in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

a. The State of New Jersey has issued a New Jersey Pollutant Discharge Elimination System ("NJPDES") general permit for combined sewer systems to allow the City of Newark to place or discharge sewage, waste and other polluting matter into the Passaic River from no less than twenty-one combined sewer overflow points in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

b. The State of New Jersey has issued an NJPDES general permit for combined sewer systems purporting to allow East Newark Borough to place or discharge sewage, waste and other polluting matter into the Passaic River from at least one combined sewer overflow point in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

c. The State of New Jersey has issued an NJPDES general permit for combined sewer systems purporting to allow the Town of Harrison to place or discharge sewage, waste and other polluting matter into the Passaic River from at least seven combined sewer overflow points in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

d. The State of New Jersey has issued an NJPDES general permit for combined sewer systems purporting to allow the Town of Kearny to place or discharge sewage, waste and other polluting matter into the Passaic River from at least six combined sewer overflow points in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

e. The State of New Jersey has issued an NJPDES general permit for combined sewer systems purporting to allow the City of Paterson to place or discharge sewage, waste and other polluting matter into the Passaic River from at least thirty-one combined sewer overflow points in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

f. The State of New Jersey has issued NJPDES permits for combined sewer systems purporting to allow them to place or discharge sewage, waste and other polluting matter into the Passaic River in the area between Great Falls and the mouth of the Passaic River at Newark Bay, even though the State of New Jersey has acknowledged that such discharges injure the environment and pose significant human health risks.

171. The State of New Jersey has also issued an NJPDES permit(s) to the PVSC purporting to permit the PVSC to place or discharge sewage, waste, polluting matter and/or

stormwater into the Passaic River in the area between Great Falls and the mouth of the Passaic River at Newark Bay in direct violation of New Jersey law.

172. The State has permitted and condoned the longstanding and frequent practice by municipalities and local and regional sewerage authorities of placing and discharging sewage, waste and other polluting matter into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

173. It its "Fact Sheet" for the NJPDES general permit for combined sewer systems, the State of New Jersey acknowledged that "[b]ecause CSOs discharges include raw sewage, they contain a combination of untreated human waste and pollutants discharged by commercial and industrial establishments. CSOs also have a significant storm water component that includes pollutants from urban and rural runoff. These pathogens, solids, and toxic pollutants may be discharged directly to the waters of the state during wet weather events."

174. According to Count V of the State's Complaint, "toxic wastes are inherently abnormally dangerous and their release, disposal, and/or discharge is an abnormally dangerous activity." Nonetheless, the State of New Jersey has permitted, and continues to permit, the PVSC and various municipalities to discharge toxic pollutants into the Passaic River in direct violation of New Jersey law.

175. It its "Fact Sheet" for the NJPDES general permit for combined sewer systems, the State of New Jersey also acknowledged that "Combined Sewer Overflows are a human health concern because they can create the potential for exposure to disease-causing pathogens, including protozoa, bacteria, and viruses." The State of New Jersey also noted that "[p]athogens, along with other pollutants like oxygen-demanding substances and toxics are discharged with

CSOs directly to the waters of the state during wet weather events. Pathogens in CSO discharges have been identified as [sic] significant human health concern."

176. The State of New Jersey has also issued NJPDES permits to various persons purporting to allow them to place or discharge stormwater into the Passaic River in the area between Great Falls and the mouth of the Passaic River at Newark Bay. Yet, as NJDEP Commissioner Jackson publicly acknowledged on February 14, 2008, "[t]he cumulative impacts of stormwater runoff pollution are profound, accounting for 60 percent of the pollution in New Jersey's waterways."

177. Municipalities, local and regional sewerage authorities, including the PVSC, and other persons have discharged, and continue to discharge, sewage, waste and other polluting matter into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay, in direct violation of New Jersey law, and they have been permitted to do so by the illegal permits issued by the State of New Jersey that purport to authorize such discharges.

Discharges During the State's Control of the Kearny Wastewater Treatment Plant

178. The Town of Kearny owns and operates a wastewater collection system that serves the southern section of Kearny ("Kearny South System"). There was no operational wastewater treatment plant connected to the Kearny South System until approximately 1954.

179. Even after the Kearny South System treatment plant ("Kearny South Treatment Plant") came on-line, it only employed primary treatment technologies, including basic grit screening and removal, primary clarification, and chlorine disinfection. As a result, wastewater discharged into the Kearny South Treatment Plant received little, if any, treatment before being discharged into the Newark Bay Complex.

180. The Kearny South System collected wastewater primarily from industrial facilities and the strength of the wastewater often overwhelmed the capabilities of the Kearny South Treatment Plant. Furthermore, throughout its history, the Kearny South Treatment Plant experienced frequent malfunctions and mechanical failures.

181. The Kearny South Treatment Plant was put into state "receivership" on or about May 15, 1970. This happened after Kearny had failed to carry out a court order requiring an upgrade in the primary treatment process employed by the plant.

182. On or about May 18, 1970, the New York Times reported that the NJDEP "has taken over operation of" the Kearny South Treatment Plant.

183. On or about May 19, 1970, Judge John F. Lynch of the New Jersey Superior Court, Chancery Division, in Hudson County, issued an order finding, *inter alia*, that: (i) Kearny had failed to comply with a court order dated July 1969; (ii) Kearny "has not at all times maintained and operated its sewage treatment plant at maximum efficiency and have in full working order all of the treatment units"; (iii) Kearny was "discharging raw sewage sludge into the waters of Newark Bay"; (iv) many of the treatment units at Kearny's treatment plant were not operational; and (v) Kearny had "created a public health hazard and is continuing to pollute the waters of Newark Bay. . . ."

184. As part of the State's take-over of the Kearny South Treatment Plant, the State was given the right to hire outside engineers to plan and carry out improvements at the plant and an engineer from the NJDEP was named to supervise operations.

185. On or about May 26, 1970, the NJDEP reported that wastewater received at the Kearny treatment plant was "industrial in nature" and contained hazardous substances including zinc and cyanide. The NJDEP noted that sludge was discharged to a shallow lagoon located at

the Kearny South Treatment Plant, and that the lagoon was completely filled with solids. NJDEP also reported that "overflow from this lagoon flows to Newark Bay." On information and belief, the overflow from the lagoon at the Kearny South Treatment Plant contained hazardous substances.

186. On information and belief, the State of New Jersey controlled the Kearny South Treatment Plant at the time hazardous substances were discharged from the Kearny South Treatment Plant into the Newark Bay Complex.

DISCHARGES BY THE NEW JERSEY DEPARTMENT OF TRANSPORTATION

187. The State, through the New Jersey Department of Transportation ("NJDOT"), is the current owner of property designated as Block 285, Lot 2 on the tax maps of the Town of Kearny, New Jersey (the "Kearny Oil Lake Site").

188. The State acquired the Kearny Oil Lake Site on or about March 6, 1968, at which time the Kearny Oil Lake Site contained oily wastes, sludge, and contaminated waste water. The lake of oil wastes on the Kearny Oil Lake Site was estimated to be fifteen acres in size. The Kearny Oil Lake Site contained more than ten million gallons of oil-contaminated water and more than 200,000 cubic yards of oily sludge containing hazardous substances and other compounds including phenol, phosphate, sulfate, cadmium, chromium, copper, iron, lead, nickel, mercury, sulfur and zinc.

189. On information and belief, from approximately 1949 until waste material was removed to make way for the construction of Interstate Highway 280, the Kearny Oil Lake Site periodically overflowed, particularly during wet weather, into Harrison Turnpike, storm drains, ditches, surrounding wetlands, and Frank's Creek, which is a tributary of the Passaic River.

190. By letter dated October 13, 1971, the PVSC informed NJDOT that an oil pool on the State's property was intermittently polluting Frank's Creek and inquired as to what NJDOT intended to do about the matter.

191. By letter dated November 12, 1971, the Deputy Attorney General for the State of New Jersey advised the PVSC that the issue of pollution from the Kearny Oil Lake Site had been referred to the NJDEP.

192. By letter dated January 28, 1972, the PVSC asked the NJDEP for "a report on what is being done concerning the pool of oil on the Department of Transportation's property in Kearny, which overflows during rain storms, discharging oil into Frank's Creek." NJDEP did not respond to the PVSC's January 28, 1972 letter.

193. By letter dated March 8, 1972, the PVSC asked the NJDEP to report on "what is being done by the State Department of Environmental Protection concerning the pool of oil in Kearny which discharges oil into Frank's Creek during rain storms."

194. On information and belief, an inspector for NJDEP's Bureau of Water Pollution Control executed an affidavit dated June 16, 1978, in which the inspector stated that he was aware that the NJDOT's Kearny Oil Lake Site had overflowed numerous times, both prior and subsequent to February 6, 1973.

195. The United States Coast Guard advised NJDEP in May of 1973 that discharges were being made from the Kearny Oil Lake Site into navigable waters of the United States in violation of Federal law.

196. NJDEP did not issue any abatement orders upon learning that NJDOT's Kearny Oil Lake Site was polluting waters of the State, including the Passaic River. Instead, an August 23, 1974 NJDEP memorandum recommended that NJDEP "negotiate with the Department of

Transportation" for the "immediate removal of the oil lake from their property" and noted that "[i]t is wrong to allow DOT to continue their pollution, as well as inconsistent with our other efforts."

197. An August 23, 1974 NJDEP memorandum stated that it was NJDEP's "impression that DOT was going to take some immediate steps to remove the oil" but noted that NJDOT's "actual intention was to wait until the highway goes through; which might not be for a period of years."

198. According to the NJDOT, the Kearny Oil Lake Site overflowed during periods of heavy rainfall and other times, including, but not limited to September 3, 1974 and April 29, 1974, carrying petroleum waste products into the waters of the State. Nonetheless, on information and belief, NJDEP did not seek or issue any orders requiring NJDOT to abate the pollution of the waters of the State from the NJDOT's Kearny Oil Lake Site during the 1970s.

199. By letter dated June 21, 1976, the EPA notified the State of New Jersey of a violation of Federal law as a result of an overflow from the Kearny Oil Lake Site into the waters of the United States.

200. On or about June 21, 1976, the State, through NJDOT, acquired the southern 1.212 acres of the property designated as Block 285, Lot 3 on the tax maps of the Town of Kearny.

201. On information and belief, NJDOT did not begin to remove the oily-water, sludge material and hazardous substances at the Kearny Oil Lake Site until 1977, when NJDOT began the construction of Interstate 280.

202. Hazardous substances and other compounds detected in the sediment at the State's Kearny Oil Lake Site include heptachlor epoxide, dieldrin, aroclor 1242, aroclor 1260,

aluminum, antimony, arsenic, barium, cadmium, chromium, lead, manganese, nickel, thallium, vanadium, and zinc.

203. During the construction of Interstate 280, NJDOT encountered an underground lake of free oil product floating upon the groundwater at the NJDOT Kearny Oil Lake Site which extended from the eastern limits of NJDOT's right-of-way to Frank's Creek to the west.

204. On or about May 3, 1977, the Hackensack Meadowlands Development Commission ("HMDC") reviewed and approved a plan by an NJDOT contractor for the disposal of 72,000 cubic yards of oil contaminated materials from Sections 8A and 8D of the Interstate 280 construction project in the MSLA 1-D Landfill. NJDOT disposed of approximately 87,000 cubic yards of contaminated materials from NJDOT's Kearny Oil Lake Site in the MSLA 1-D Landfill.

205. On information and belief, NJDOT disposed of contaminated materials containing hazardous substances at the MSLA 1-D Landfill in connection with the construction of Interstate 280.

206. By memorandum dated January 4, 1980, HMDC informed NJDOT that sampling data from one of the monitoring wells located at the MSLA 1-D Landfill showed increasing concentrations of BOD_5, COD and chlorides. A black liquid was also observed in the same well indicating liner damage at the NJDOT disposal area in the MSLA 1-D Landfill.

207. On or about January 30, 1978, the HMDC granted NJDOT permission to create a disposal area on the NJDOT Kearny Oil Lake Site that was designed to contain a maximum of 197,000 cubic yards of contaminated materials from Sections 8A and 8D of the Interstate 280 construction project. On information and belief, NJDOT disposed of contaminated materials

containing hazardous substances on the NJDOT Oil Lake Site in connection with the construction of Interstate 280.

208. By memorandum dated November 30, 1979, the HMDC advised NJDOT that recent inspections of the NJDOT "disposal area for oil-contaminated soils adjacent to Ramp 'M' indicates that top soil covering the side slopes of the disposal area has eroded, exposing contaminated materials . . . ." The HMDC noted that "rainfalls have caused oily discharges from the eroded areas into the ditch adjacent to Ramp 'M'. As this ditch connects directly into Franks Creek, oily discharges have been observed in Franks Creek at the ditch connection. This is a violation of the Federal Water Pollution Control Act."

209. NJDOT constructed, maintains, owns and operates two ditches on the NJDOT Kearny Oil Lake Site known as the North Ditch and the South Ditch, which discharge into Frank's Creek.

210. Oily leachate and/or floating oil was detected in NJDOT's North and South Ditches on the NJDOT Kearny Oil Lake Site.

211. In 1981, NJDOT obtained an NJPDES permit for discharges from its North Ditch. NJDOT's NJPDES permit expired on October 31, 1986. NJDOT contends that it reapplied for another NJPDES permit on July 13, 1986, but NJDEP never received the application. NJDOT submitted another NJPDES permit application, but had not received a new NJPDES as of June 21, 1991.

212. NJDEP gave NJDOT's North Ditch an "unacceptable" rating on several occasions, including the periods of November 1, 1986-November 31, 1986; November 1, 1987-October 31, 1988; and November 1, 1989-October 31, 1990. As a result of these unacceptable

ratings, NJDOT was in significant violation of the terms and conditions of its NJPDES permit for the North Ditch and/or the Water Pollution Control Act regulations.

213. NJDOT advised NJDEP by letter dated April 25, 1989 that it would "take the necessary action to see that our discharge into Frank's Creek complies with those limits set by our NJPDES permit." On information and belief, NJDOT did not take actions to abate the cause of the contamination from the North Ditch until at least 1991.

214. Due to the periodic non-compliance with the limits of its NJPDES permit, NJDOT was issued directives from the NJDEP to, *inter alia*, achieve an acceptable discharge rating and submit a report concerning details of remedial measures to be instituted and an implementation timetable.

215. NJDOT's consultant determined that one of the primary sources of contamination in NJDOT's North Ditch was from oil seeps from oil-contaminated soils that NJDOT had excavated and stockpiled on the NJDOT Kearny Oil Lake Site.

216. NJDOT's consultant determined that one of the primary sources of contamination in NJDOT's South Ditch was from leachate from the Kearny Landfill.

217. NJDOT informed NJDEP by letter dated June 21, 1991 that NJDOT had not implemented any of the remedial alternatives for the North and South Ditches identified by its consultant because it felt that implementation of such "a costly mitigation alternative, ranging from approximately $1 million to $6.6 million" would "not be in the best interest of the State of New Jersey with respect to the use of public funds."

218. On information and belief, contaminated discharges into storm drains, ditches and wetlands from the Kearny Oil Lake Site were carried into Frank's Creek and thence the Passaic River.

219. On information and belief, the periodic overflowing of the Kearny Oil Lake Site caused hazardous substances to be discharged into Frank's Creek and thence the Passaic River.

220. Hazardous substances and other compounds detected in sediment samples taken 500 feet across the Passaic River from the outlet of Frank's Creek include total extractable petroleum hydrocarbons ("TEPH"), polycyclic aromatic hydrocarbons, lead, and mercury.

221. The State, through NJDOT, was an owner and operator of a facility at the time hazardous substances were discharged from the Kearny Oil Lake Site to Frank's Creek and thence to the Passaic River.

COUNT I

CONTRIBUTION UNDER THE SPILL ACT -- § 58:10-23.11f(2)(a)

222. Maxus and Tierra repeat and incorporate paragraphs 1 through 221 of this Counterclaim by reference herein.

223. The State of New Jersey and its various departments are persons within the meaning of the Spill Act § 58:10-23.11b.o.

224. The State owned and controlled—and continues to own and control—all of the submerged lands of the Passaic River, the Hackensack River and Newark Bay, as well as portions of the submerged lands of the Kill van Kull and Arthur Kill, during times when hazardous substances were discharged on the State's property. By virtue of its ownership of the property in question during the time discharges were occurring, the State is a person in "any way responsible" for hazardous substances discharged into the Newark Bay Complex.

225. The State has breached the public trust by breaching its duty to protect and preserve the natural resources of the Newark Bay Complex (*see* Count II). By virtue of this breach of trust, the State is a person in "any way responsible" for hazardous substances discharged into the Newark Bay Complex.

226. Pursuant to permits issued by the State, and other conduct by which the State has condoned and/or permitted such activity, municipalities and local and regional sewerage authorities, including the PVSC, have discharged, and continue to discharge, sewage, waste and other polluting matter into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay. The State's conduct in allowing, condoning and purporting to authorize such discharges makes the State of New Jersey a person "in any way responsible" for the hazardous substances that were discharged, and continue to be discharged, by municipalities and local and regional sewerage authorities, including the PVSC.

227. On information and belief, the State, through its departments and agencies, funded, sprayed and/or contracted for the spraying of DDT that was discharged into the Newark Bay Complex and, therefore, is a "discharger" and/or person "in any way responsible" for hazardous substances discharged into the Newark Bay Complex.

228. On information and belief, hazardous substances were discharged from the Kearny South Treatment Plant and into the Newark Bay Complex during the State's control over the operations of that plant. On that basis, too, the State is a "discharger" and/or person "in any way responsible" for hazardous substances discharged from the Kearny South Treatment Plant.

229. Hazardous substances were discharged into the Newark Bay Complex from the Kearny Oil Lake Site during the time when the State, through NJDOT, owned and operated that property. On that distinct basis, the State is a "discharger" and a person "in any way responsible" for hazardous substances discharged into the Newark Bay Complex.

230. Maxus and Tierra are entitled to contribution from the State to recover a proportionate share of any cleanup and removal costs or damages, if any, for which Maxus or Tierra may found liable under the Spill Act in this lawsuit.

231. Maxus and Tierra have incurred and will continue to incur "cleanup and removal costs" within the meaning of the Spill Act, N.J.S.A. § 58:10-23.11b.d, in connection with implementing the AOCs identified in ¶¶ 24-25 of this Counterclaim, and in otherwise addressing environmental contamination in the Newark Bay Complex.

232. Maxus and Tierra are entitled to contribution from the State of New Jersey to recover a proportionate share of cleanup and removal costs that the Maxus and Tierra have incurred and will incur in the future.

WHEREFORE, as for this Count I, Maxus and Tierra respectfully request:

a. a judgment finding the State of New Jersey liable for contribution under the Spill Act;

b. an order requiring Plaintiffs to pay Maxus and Tierra the State's equitable share of cleanup and removal costs incurred and to be incurred by Maxus and Tierra in connection with the discharges of hazardous substances within the Newark Bay Complex;

c. pre-and post-judgment interest on the State's equitable share of such cleanup and removal costs incurred and to be incurred by Maxus and Tierra;

d. an order requiring Plaintiffs to pay Maxus and Tierra an equitable share of any cleanup and removal costs, damages, or other form of monetary relief, if any, for which Maxus or Tierra may found liable under the Spill Act in this lawsuit;

e. all costs incurred and to be incurred by Maxus and Tierra in connection with this action; and

f. such other and further relief that the Court deems just and proper.

COUNT II

ENVIRONMENTAL RIGHTS ACT CLAIM AND CLAIM TO ENFORCE N.J.S.A. 58:14-7 AND 58:14-8

233. Maxus and Tierra repeat and incorporate paragraphs 1 through 232 of this Counterclaim by reference herein.

234. NJDEP had no authority or discretion to permit municipalities and local and regional sewerage authorities, including PVSC, or any other persons to place or discharge sewage, waste and other polluting matter into the Passaic River and/or its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

235. By issuing permits and otherwise allowing such entities and persons to place or discharge sewage, waste and other polluting matter into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay, NJDEP has violated and continues to violate N.J.S.A. 58:14-8.

236. As a violator of N.J.S.A. 58:14-8, NJDEP is liable for "a penalty of one hundred dollars, and a further penalty of twenty-five dollars a day for each day the offense is continued . . . ."

237. NJDEP is destined to continue to violate N.J.S.A. 58:14-8, insofar as the NJPDES permits it has already issued typically have five year terms.

238. Furthermore, given that NJDEP has willfully ignored and violated N.J.S.A. 58:14-7 and 58:14-8 for decades, NJDEP, unless otherwise enjoined, will likely issue new NJPDES permits, once again purporting to permit municipalities and local and regional sewerage authorities, including PVSC, to place or discharge sewage, waste and other polluting matter into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

239. N.J.S.A. 58:14-7 and 58:14-8 are statutes designed to prevent or minimize pollution, impairment and the destruction of the environment. The Legislature sought to achieve that goal by prohibiting discharges of any "sewage" and other "polluting matter" into the Passaic River, leaving NJDEP with no authority or discretion to grant or permit any exceptions.

240. The New Jersey Environmental Rights Act, N.J.S.A. 2A:35A-4, authorizes "[a]ny person" to "commence a civil action in a court of competent jurisdiction against any other person alleged to be in violation of any statute, regulation or ordinance designed to prevent or minimize pollution, impairment or destruction of the environment."

241. Pursuant to N.J.S.A. 2A:35A-3.a., Maxus, Tierra, and NJDEP are "persons" within the meaning of New Jersey Environmental Rights Act.

242. Pursuant to N.J.S.A. 58:14-33, a corporation injured by the discharge, directly or indirectly, of any sewage or other polluting matter in violation of N.J.S.A. 58:14-7 or N.J.S.A. 58:14-8 may institute a lawsuit to enforce those statutory provisions.

243. Pursuant to N.J.S.A. 2A:35A-4.a, an action under the New Jersey Environmental Rights act "may be for injunctive or other equitable relief to compel compliance with a statue, regulation or ordinance, or to assess civil penalties for the violation as provided by law."

244. Pursuant to N.J.S.A. 2A:35A-4.a and N.J.S.A. 58:14-33, NJDEP should be compelled to comply with N.J.S.A. 58:14-7 and 58:14-8 and be enjoined from issuing any permits purporting to allow, or from taking any other action that permits, any person to place or discharge sewage, waste and other polluting matter into the Passaic River or any of its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

245. Pursuant to N.J.S.A. 2A:35A-4.a and N.J.S.A. 58:14-33, NJDEP should be held liable for a penalty of one hundred dollars for each and every violation of N.J.S.A. 58:14-8, and a further penalty of twenty-five dollars a day for each day the offense is continued.

246. Tierra and Maxus delivered written notice of this action to the State of New Jersey, the Attorney General of New Jersey, the Commissioner, and the governing bodies of the City of Newark, Borough of East Newark, Town of Harrison, Town of Kearny, City of Paterson, Fair Lawn Borough, Borough of Elmwood Park, Town of Fairfield, City of Passaic, Borough of Wallington, City of Clifton, Borough of Rutherford, Township of Nutley, Township of Lyndhurst, Township of Belleville, and the Borough of North Arlington, and at least thirty (30) days have passed since delivery of that notice.

WHEREFORE, as for this Count II, Maxus and Tierra respectfully request:

a. a judgment finding NJDEP to be in violation of N.J.S.A. 58:14-7 and 58:14-8;

b. an order compelling NJDEP to comply with N.J.S.A. 58:14-7 and 58:14-8 and declaring any permits issued by NJDEP in violation of N.J.S.A. 58:14-7 and 58:14-8 to be void;

c. an order enjoining NJDEP from issuing any permits purporting to allow, or otherwise taking any action that permits, sewage, waste and other polluting matter to be placed or discharged into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay;

d. an order finding NJDEP liable for a penalty of one hundred dollars for each and every violation of N.J.S.A. 58:14-8, and a further penalty of twenty-five dollars a day for each day the offense is continued;

e. reasonable counsel and expert witness fees in accordance with N.J.S.A. 2A:35A-10; and

f. such other and further relief that the Court deems just and proper.

COUNT III

BREACH OF THE PUBLIC TRUST

247. Maxus and Tierra repeat and incorporate paragraphs 1 through 246 of this Counterclaim by reference herein.

248. According to N.J.S.A. 58:10-23.11a, the State of New Jersey "is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction . . . ."

249. The State's Complaint asserts that "the State of New Jersey is the trustee of all natural resources within its jurisdiction for the benefit of its citizens and is vested with the authority to protect this public trust."

250. In multiple lawsuits, the State of New Jersey has contended that "'natural resources' of this State are all land, fish, shellfish, wildlife, biota, air, water and other such resources, owned, managed, held in trust or otherwise controlled by the State."

251. In multiple lawsuits, the State of New Jersey has contended that the "natural resources of this State include the 'waters of the state,' which are the ocean and its estuaries, all springs, streams and bodies of surface or ground water, whether natural or artificial, within the boundaries of this State or subject to its jurisdiction."

252. Nonetheless, the State of New Jersey has presided over the contamination and destruction of the natural resources within the Newark Bay Complex in direct breach of its duties and obligations as a public trustee for natural resources of the Newark Bay Complex.

253. The public trust doctrine has always been recognized in New Jersey and is deeply engrained in New Jersey's common law. The public trust doctrine in New Jersey is premised on

the common rights of all citizens to use and enjoy tidal land seaward of the mean high water mark.

254. The public trust doctrine applies to lands flowed by tidal waters in New Jersey.

255. The State of New Jersey holds natural resources of the Newark Bay Complex in public trust.

256. Tierra owns property on the banks of the Passaic River and is a beneficiary of the public trust that applies to the natural resources of the Newark Bay Complex.

257. As a trustee for natural resources of the Newark Bay Complex, the State of New Jersey has the same duties and obligations as an ordinary trustee.

258. As a trustee for natural resources of the Newark Bay Complex, the State of New Jersey has a duty to protect and preserve the corpus of the trust, namely the natural resources of the Newark Bay Complex which it holds in trust.

259. Rather than protect and preserve the natural resources of the Newark Bay Complex, the State of New Jersey has publicly condoned the contamination of the Newark Bay Complex.

260. The State of New Jersey has allowed the natural resources of the Newark Bay Complex to be dissipated and destroyed, despite being fully aware of the contamination of the Newark Bay Complex and the destruction of its natural resources.

261. Indeed, counsel for the PVSC, an entity created by the State of New Jersey and charged with the duty of preventing pollution of the waters of the Passaic River, asserted before a United States Senate Subcommittee that "[t]he question of whether or not a stream in a certain region should be polluted is a matter which can be controlled by the residents of the district."

262. The State, through NJDEP, has adopted a regulatory scheme which, besides being in plain violation of the expressed will of the Legislature, inevitably damages the natural resources of the Newark Bay Complex.

263. The State of New Jersey has granted permits to owners and operators of wastewater treatment systems, which purport to authorize such owners and operators to discharge untreated wastewater containing hazardous substances and other polluting matter into the Newark Bay Complex.

264. To this day, untreated wastewater continues to discharge into the Newark Bay Complex from combined sewer systems, which are designed to overflow and discharge untreated wastewaters directly into the Newark Bay Complex when wet-weather runoff causes the total inputs to exceed the capacity of the combined sewer system. The State of New Jersey has permitted such built-in discharges caused by combined sewer overflows, even though they have injured, and continue to injure, the natural resources within the Newark Bay Complex.

265. The State of New Jersey has authorized owners and operators of combined sewer systems to continue to operate their systems even though the State of New Jersey is fully aware that such systems do not have sufficient capacity to treat all of the wastewater entering the systems and that such systems have discharged, and continue to discharge, untreated wastewater containing hazardous substances and other polluting matter into the Newark Bay Complex.

266. The State of New Jersey has permitted stormwater to be discharged into the Newark Bay Complex, despite the fact that NJDEP Commissioner Jackson acknowledged on February 14, 2008 that "[t]he cumulative impacts of stormwater runoff pollution are profound, accounting for 60 percent of the pollution in New Jersey's waterways."

267. The State of New Jersey has permitted, and continues to permit, the discharge of untreated or inadequately treated wastewater containing hazardous substances and other polluting matter in contravention of N.J.S.A. 58:14-7, which provides that "[n]o sewage or other polluting matter shall be discharged, directly or indirectly, into the waters of the Passaic river at any point between the Great falls in the city of Paterson and the mouth of said river at Newark bay, or into the waters of any tributaries of said river which empty into it between said points . . . ."

268. The State of New Jersey has permitted, and continues to permit, the discharge of untreated or inadequately treated wastewater containing hazardous substances and other polluting matter in contravention of N.J.S.A. 58:14-8, which provides that "[n]o sewage, waste matter, article or substance, liquid or solid, of any kind which creates odors, gases or fumes, due to the putrefaction of organic matter or the presence of chemicals, or results in the presence of oil or grease on the surface of the waters of the Passaic river, or its tributaries, shall be placed or discharged, or be permitted to be placed or discharged, into the waters of said river between the points designated in section 58:14-7 of this title, or into its tributaries so designated."

269. Additionally, pollution sources in the Upper Passaic River, above Dundee Dam (which is outside of the Newark Bay Complex), are continuing to cause loadings of hazardous substances and other polluting matter within the Newark Bay Complex.

270. The State of New Jersey has breached the public trust by breaching its duty to protect and preserve the natural resources of the Newark Bay Complex.

271. The State's breach of the public trust has caused injury to the natural resources of the Newark Bay Complex.

272. Injury to the natural resources within the Newark Bay Complex was a direct and foreseeable consequence of the State's breach of the public trust.

273. Injury to the natural resources within the Newark Bay Complex is a direct and foreseeable consequence of the economic development promoted by the State of New Jersey.

274. According to the NJDEP, "[g]reat rivers -- those that drain large or diverse watersheds or that offer unique or uniquely valuable ecological and human services -- are among the most valuable natural resources on earth. The Passaic River was once a great river." *2003 Directive*, ¶ 12. Nonetheless, NJDEP has acknowledged that the "Passaic River watershed has been subject to numerous point and non-point discharges for over 100 years." *2003 Directive*, ¶ 1.

275. NJDEP has determined that the water in the Lower Passaic River contains hazardous chemicals. *2003 Directive*, ¶ 2.

276. NJDEP has determined that the sediment in the Lower Passaic River contains hazardous substances. *2003 Directive*, ¶ 3.

277. According to NJDEP, the "Lower Passaic River is a prime example of resource degradation at its worst." *2003 Directive*, ¶ 11.

278. According to NJDEP, "[c]learly, releases of chemical contaminants have adversely affected the Passaic River and reduced its ecological and human use services." *2003 Directive*, ¶ 13.

279. According to the State's Complaint, "the ecosystem and natural resources of the Newark Bay Complex have been significantly injured."

280. Injury to the natural resources of the Newark Bay Complex occurred during the State's tenure as public trustee for some or all of such resources, when the State had an obligation to protect and preserve such resources.

WHEREFORE, as for this Count III, Maxus and Tierra respectfully request:

a. a judgment finding the State of New Jersey liable for breach of the public trust;

b. an order enjoining NJDEP from permitting entities to violate the provisions of N.J.S.A. 58:14-7 and N.J.S.A. 58:14-8 and declaring any permits issued by the NJDEP in violation of N.J.S.A. 58:14-7 and 58:14-8 to be void;

c. an order requiring NJDEP to abate continuing discharges of untreated or inadequately treated wastewater into the Newark Bay Complex;

d. an order enjoining NJDEP from permitting wastewater treatment systems to discharge untreated or inadequately treated wastewater into the Newark Bay Complex;

e. an order requiring NJDEP to abate pollution sources from outside the Newark Bay Complex that have injured and continue to injure natural resources within the Newark Bay Complex, including, but not limited to, pollution sources in the Upper Passaic River above Dundee Dam;

f. an order removing NJDEP as trustee for natural resources within the Newark Bay Complex;

g. all costs incurred and to be incurred in connection with this action;

h. such other and further relief that the Court deems just and proper.

COUNT IV

AIDING AND ABETTING

281. Maxus and Tierra repeat and incorporate paragraphs 1 through 280 of the Counterclaim by reference herein.

282. Pursuant to N.J.S.A. 58:14-8, NJDEP had a duty not to permit any person to place or discharge any sewage, waste matter, article or substance, liquid or solid, of any kind which creates odors, gases or fumes, due to the putrefaction of organic matter or the presence of chemicals, or results in the presence of oil or grease on the surface of the waters of the Passaic river, or its tributaries, into the waters of said river between the points designated in N.J.S.A. 58:14-7, or into its tributaries so designated.

283. NJDEP has permitted municipalities and local and regional sewerage authorities, including the PVSC, to place or discharge sewage, waste and other polluting matter into the Passaic River in the area between Great Falls and the mouth of the Passaic River at Newark Bay, even though NJDEP knew that that such discharges would violate N.J.S.A. 58:14-7 and 58:14-8.

284. NJDEP has permitted municipalities and local and regional sewerage authorities, including the PVSC, to place or discharge sewage, waste and other polluting matter into the Passaic River in the area between Great Falls and the mouth of the Passaic River at Newark Bay, even though NJDEP knew that that such discharges would contain pathogens, solids, and toxic pollutants and would injure the environment and pose significant human health risks.

285. NJDEP had no authority or discretion to permit persons to place or discharge sewage, waste and other polluting matter into the Passaic River or its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

286. Municipalities and local and regional sewerage authorities, including the PVSC, have discharged, and continue to discharge, sewage, waste and other polluting matter into the

Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

287. The discharges by municipalities and local and regional sewerage authorities, including the PVSC, of sewage, waste and other polluting matter into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay violated, and continue to violate, N.J.S.A. 58:14-7 and 58:14-8.

288. NJDEP has acted in concert with, or pursuant to a common design with, municipalities and local and regional sewerage authorities, including the PVSC, in facilitating the discharge of sewage, waste and other polluting matter into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay, in violation of New Jersey law.

289. NJDEP knew that the discharge of sewage, waste and other polluting matter into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay constituted a violation of New Jersey law. Nonetheless, NJDEP has given, and continues to give, substantial assistance or encouragement to municipalities and local and regional sewerage authorities, including the PVSC, in such conduct by issuing permits to them purport to allow, or otherwise permitting, such entities to discharge sewage, waste and other polluting matter into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

290. NJDEP is liable for aiding and abetting municipalities and local and regional sewerage authorities, including the PVSC, in their longstanding and continuing discharges of sewage, waste and other polluting matter into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay.

291. Maxus and Tierra have been, and will continue to be, injured by NJDEP's conduct. The State seeks to recover costs from Maxus and Tierra purportedly attributable to contaminants, the very discharge of which NJDEP has aided and abetted.

292. In addition, NJDEP's conduct has enhanced the cleanup and removal costs that Maxus and Tierra have incurred in implementing the AOCs referenced in ¶¶ 24-25, *supra*. For example, NJDEP knew that a RI/FS of the Lower Passaic River, and another of Newark Bay, were being conducted by Maxus and/or Tierra at the time NJDEP aided and abetted the municipalities and sewerage authorities in discharging sewage, waste and other polluting matter into the Passaic River, and that the continuing discharges undermine efforts to investigate and remediate the River and the Bay.

WHEREFORE, as for this Count IV, Maxus and Tierra respectfully request:

a. a judgment finding NJDEP liable for aiding and abetting;

b. an order enjoining NJDEP from permitting or condoning, or otherwise taking any steps to facilitate or abet, any further discharges of sewage or polluting matter into the Passaic River and its tributaries in the area between Great Falls and the mouth of the Passaic River at Newark Bay;

c. an order finding NJDEP liable for a penalty of one hundred dollars for each and every violation of N.J.S.A. 58:14-8, and a further penalty of twenty-five dollars a day for each day the offense is continued;

d. reasonable counsel and expert witness fees; and

e. such other and further relief that the Court deems just and proper.

COUNT V

RECOUPMENT

293. Maxus and Tierra repeat and incorporate paragraphs 1 through 292 of this Counterclaim by reference herein.

294. As a result of the acts and omissions of the State of New Jersey and NJDOT, Maxus and Tierra have incurred, and will incur, costs in connection with the Newark Bay Complex.

295. The costs incurred and to be incurred in connection with the Newark Bay Complex by Maxus and Tierra have arisen out of the same transactions and occurrences that are the subject of the State's Complaint.

296. As a result of the acts and omissions of the State of New Jersey and NJDOT, any recovery by Plaintiffs against Maxus and/or Tierra should be reduced or extinguished.

297. The State of New Jersey has also directly benefited and continues to benefit from the activities that have caused contamination of the Newark Bay Complex. Such economic benefits include, but are not limited to, increased tax revenues from the activities that caused and continue to cause contamination of the Newark Bay Complex, avoided costs of preventing and addressing the contamination of the Newark Bay Complex; the return that has and will be earned on the amount of avoided costs; and any benefits accruing to the State of New Jersey as a result of a competitive market advantage in attracting industry and economic development to the State of New Jersey.

298. Any recovery by Plaintiffs against Maxus and/or Tierra should be reduced by the amount of any and all benefits that the State of New Jersey has received and continues to receive from activities that have caused the contamination of the Newark Bay Complex or be extinguished.

WHEREFORE, as for this Count V, Maxus and Tierra respectfully request:

a. a judgment that any recovery by Plaintiffs against Maxus and Tierra be reduced or extinguished under the doctrine of recoupment.

COUNT VI

PUBLIC NUISANCE

299. Maxus and Tierra repeat and incorporate paragraphs 1 through 298 of this Counterclaim by reference herein.

300. According to Count III of the State's Complaint, all or part of the Newark Bay Complex constitutes a public nuisance as the result of the release and discharge of hazardous substances.

301. Defendants will move to dismiss Count III of the Complaint insofar as it seeks only money damages, which are not available to the State as relief for a claim of public nuisance, and since any request for abatement of contamination in the Newark Bay Complex is clearly preempted by federal law.

302. Nevertheless, in the event the State is allowed to pursue a claim for public nuisance and establishes that all or part of the Newark Bay Complex constitutes a public nuisance, the State should be held liable for participating in creating and continuing any such public nuisance.

303. The State's own culpability in this regard stems from, among other things, its status as the sole owner of the property that allegedly constitutes the nuisance, and as the entity which has, for decades and for purely economic reasons, affirmatively permitted and condoned ongoing discharges of sewage, hazardous substances and other polluting matter, in violation of the plain terms of longstanding New Jersey statutes.

304. Thus, in the event Count III of the Complaint is not dismissed and any part of the Newark Bay Complex is deemed to constitute a public nuisance, the State of New Jersey should be held liable for its actions in creating and carrying on any such public nuisance.

WHEREFORE, as for this Count VI, Maxus and Tierra respectfully request:

a. a judgment finding the State of New Jersey liable for public nuisance in the event all or a part of the Newark Bay Complex is determined to constitute a public nuisance;

b. an order imposing on Plaintiffs an equitable share or responsibility for any relief the Court might award in connection Count III of the Complaint;

c. reasonable counsel and expert witness fees; and

d. such other and further relief that the Court deems just and proper.

COUNT VII

SETOFF

305. Maxus and Tierra repeat and incorporate paragraphs 1 through 304 of this Counterclaim by reference herein.

306. As a result of the acts and omissions of the State of New Jersey and NJDOT, Maxus and Tierra have incurred, and will incur, costs in connection with the Newark Bay Complex.

307. Maxus and Tierra are entitled to setoff the costs they have incurred and will incur in the future as a result of the State's and NJDOT's actions and omissions against any recovery by Plaintiffs in this action.

308. The State of New Jersey has also directly benefited and continues to benefit from the activities that have caused contamination of the Newark Bay Complex. Such economic benefits include, but are not limited to, increased tax revenues from the activities that caused and continue to cause contamination of the Newark Bay Complex, avoided costs of preventing and

addressing the contamination of the Newark Bay Complex; the return that has and will be earned on the amount of avoided costs; and any benefits accruing to the State of New Jersey as a result of a competitive market advantage in attracting industry and economic development to the State of New Jersey.

309. Any and all benefits that the State of New Jersey received from the activities that have caused the contamination of the Newark Bay Complex should be setoff against any recovery by Plaintiffs in this action.

WHEREFORE, as for this Count VII, Maxus and Tierra respectfully request:

a. A judgment finding Maxus and Tierra are entitled to a setoff;

b. an order setting off the State's and NJDOT's allocable share of liability for the discharge of hazardous substances within the Newark Bay Complex against any liability that Maxus and Tierra may incur in this action;

c. an order setting off any benefits that the State of New Jersey has received from the activities that have caused contamination of the Newark Bay Complex against any liability that Maxus and Tierra may incur in this action;

d. all costs incurred and to be incurred in connection with this action;

e. such other and further relief that the Court deems just and proper.

COUNT VIII

CONTRIBUTION

310. Maxus and Tierra repeat and incorporate paragraphs 1 through 309 of this Counterclaim by reference herein.

311. As a result of the State of New Jersey and NJDOT's acts and omissions, Maxus and Tierra are entitled to contribution from the State of New Jersey and NJDOT for a proportionate share of cleanup and removal costs, damages, or other loss or harm, if any, for

which Maxus and Tierra may be held liable, or which they have incurred or will incur in the future, relating to the Newark Bay Complex pursuant to N.J.S.A. 2A:53A-3 *et seq.* and/or N.J.S.A. 59:9-3 *et. seq.*

WHEREFORE, as for this Count VIII, Maxus and Tierra respectfully request a judgment against Plaintiffs for a proportionate share of cleanup and removal costs, damages, or other loss or harm, if any, for which Maxus and Tierra may be held liable, or which they have incurred or will incur in the future, relating to the Newark Bay Complex.

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC. and CLH HOLDINGS, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO. L-9868-05 CIVIL ACTION **CERTIFICATION OF SERVICE**

JOHN P. MITCHELL, in lieu of oath or affidavit, certifies and says:

1. I am an attorney-at-law and an associate at the law firm of Drinker Biddle & Reath LLP, co-counsel for Maxus Energy Corporation ("Maxus") and Tierra Solutions, Inc. ("Tierra") in connection with the above-captioned matter.

2. I hereby certify that, on this date, copies of Maxus and Tierra's Answer and Separate Defenses, Cross-Claim, Counterclaim, and this Certification of Service were served upon the court via hand delivery and electronic mail, and upon the following counsel of record via hand delivery and electronic mail:

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3. I hereby certify that, on this date, copies of Maxus and Tierra's Answer and Separate Defenses, Cross-Claim, Counterclaim, and this Certification of Service were served via electronic mail to the following additional counsel:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

John P. Mitchell

DATED: October 6, 2008