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BASF Catalysts, LLC

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.

MAXUS ENERGY CORPORATION and:
TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs,

v.

3M COMPANY, et al.,

Third-Party Defendants.

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION: ESSEX COUNTY
:
: DOCKET NO. L-9868-05 (PASR)
:
:
: CIVIL ACTION
:
: **THIRD-PARTY DEFENDANT BASF**
: **CATALYSTS, LLC'S ANSWER AND**
: **AFFIRMATIVE DEFENSES TO**
: **THIRD-PARTY COMPLAINT "B"**

BASF CATALYSTS, LLC'S ANSWER TO THIRD-PARTY COMPLAINT "B"

Third-Party Defendant BASF Catalysts, LLC ("BASF Catalysts")¹, by and through its undersigned counsel, and in accordance with this Court's Case Management Order V, Section 9, entered April 16, 2009 ("CMO V"), hereby answers Third-Party Complaint "B" (the "Complaint") by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc. ("Third-Party Plaintiffs"), as follows:

GENERALLY

BASF Catalysts denies each and every allegation contained in Third Party Complaint "B" that is not otherwise herein addressed, including, without limitation, any allegations concerning the relief sought in the First Count and Second Count and all headings and titles used in Third-Party Complaint "B".

AS TO PROCEDURAL BACKGROUND

(Paragraphs 1 through 15)

1-15. BASF Catalysts responds that the referenced pleadings speak for themselves. No response is required pursuant to CMO V.

AS TO THE THIRD-PARTY PLAINTIFFS

(Paragraphs 16 through 18)

16-18. No response is required pursuant to CMO V.

¹ Effective April 1, 2010, substantially all of the assets and liabilities of BASF Catalysts, LLC will be transferred to its parent company, BASF Corporation, including all liability, if any, relating to the claims asserted against BASF Catalysts, LLC in Third-Party Complaint "B".

AS TO THE THIRD-PARTY DEFENDANTS

(Paragraphs 19 through 209)

19-38. Since the allegations in Paragraphs 19 through 38 relate to other parties, no response is required pursuant to CMO V.

39. BASF Catalysts admits the allegations in Paragraph 39 of the Complaint.

40-209. Since the allegations in Paragraphs 42 through 209 relate to other parties, no response is required pursuant to CMO V.

210. The allegations in Paragraph 210 state conclusions of law to which no response is required.

AS TO DEFINITIONS

211-236. Paragraphs 211 through 236 contain definitions. No response is required pursuant to CMO V.

AS TO FACTUAL ALLEGATIONS

(Paragraphs 237 through 3445)

237-3445. The referenced pleadings speak for themselves. No response is required pursuant to CMO V, except to the extent noted below.

Engelhard Site

1174. BASF Catalysts admits that the real property located at 429 Delancy Street in Newark, Essex County, New Jersey (the “Engelhard Site”) consists of approximately 42 acres. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 1174 of the Complaint.

1175. BASF Catalysts admits only that a description of the Engelhard Site has been provided in reports prepared on behalf of Engelhard Corporation and submitted to the New Jersey Department of Environmental Protection. BASF Catalysts neither admits nor denies the remaining allegations contained in Paragraph 1175 of the Complaint but refers Third-Party Plaintiffs to said reports, the contents of which speak for themselves.

1176. BASF Catalysts admits that in or about 1958, Charles Engelhard, Jr. consolidated his family's holdings to form Engelhard Industries, Inc., a New Jersey corporation. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 1176 of the Complaint.

1177. BASF Catalysts admits that in 1967, Engelhard Industries, Inc., a Delaware Corporation formed in 1960, merged with Minerals Philipp to form Engelhard Minerals & Chemicals Corporation, which consisted of the Minerals & Chemicals Division, Industries Division and Philipp Brothers Division. BASF Catalysts further admits that in 1981, Engelhard Corporation was established following the spin-off of the Philipp Brothers Division. The remaining allegations contained in Paragraph 1177 state conclusions of law to which no response is required. To the extent a response is required, BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 1177 of the Complaint.

1178. BASF Catalysts admits only that Engelhard Corporation prepared a Site Evaluation Submission dated November 21, 1985 pursuant to New Jersey's Environmental Cleanup Responsibility Act and neither admits nor denies the allegations contained in

Paragraph 1178 of the Complaint, but refers Third Party Plaintiffs to said document, the content of which speaks for itself. The remaining allegations contained in paragraph 1178 of the Complaint state conclusions of law to which no response is required. To the extent a response is required, BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 1178 of the Complaint.

1179. BASF Catalysts admits that BASF Aktiengesellschaft (“BASF AG”) completed its acquisition of Engelhard Corporation through the merger of Iron Acquisition Corp., a wholly owned subsidiary of BASF AG, into Engelhard Corporation. BASF Catalysts further admits that on or about August 1, 2006, Engelhard was renamed BASF Catalysts, LLC. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 1179 of the Complaint.

1180. The allegations contained in paragraph 1180 of the Complaint state conclusions of law to which no response is required.

1181. BASF Catalysts admits that Engelhard Corporation’s operations at the Engelhard Site consisted of the recovery and refining of precious metals, primarily platinum group metals, gold and silver, as well as the manufacturing of catalysts using such precious metals. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 1181 of the Complaint.

1182. BASF Catalysts admits the allegations contained in Paragraph 1182 of the Complaint.

1183. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1183 of the Complaint.

1184. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1184 of the Complaint.

1185. BASF Catalysts admits a dry well was connected to a sanitary sewer system in 1974. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 1185 of the Complaint.

1186. The allegations contained in paragraph 1186 of the Complaint state conclusions of law to which no response is required. To the extent a response is required, BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1186 of the Complaint.

1187. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1187 of the Complaint.

1188. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1188 of the Complaint.

1189. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1189 of the Complaint.

1190. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1190 of the Complaint.

1191. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 1191 of the Complaint.

1192. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1192 of the Complaint.

1193. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1193 of the Complaint.

1194. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 1194 of the Complaint.

1195. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1195 of the Complaint.

1196. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1196 of the Complaint.

1197. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1197 of the Complaint.

1198. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1198 of the Complaint.

1199. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1199 of the Complaint.

1200. BASF Catalysts admits only that Engelhard Corporation prepared a Site Evaluation Submission dated November 21, 1985 pursuant to New Jersey's Environmental

Cleanup Responsibility Act and neither admits nor denies the allegations contained in Paragraph 1200 of the Complaint, but refers Third Party Plaintiffs to said document, the content of which speaks for itself. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 1200 of the Complaint.

1201. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1201 of the Complaint.

1202. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1202 of the Complaint.

1203. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 1203 of the Complaint.

1204. BASF Catalyst admits only that on or about July 13, 2007 EPA sent a General Notice Letter to BASF Catalyst and neither admits nor denies the allegations contained in Paragraph 1204 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

1205. The allegations contained in Paragraph 1205 state conclusions of law to which no response is required. To the extent a response is required, BASF Catalyst denies the allegations contained in Paragraph 1205 of the Complaint.

The Bayonne Barrel and Drum Site PRPs

3112-3114. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 3112-3116 of the Complaint.

3115. BASF Catalysts neither admits nor denies the allegations contained in Paragraph 3115 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3116. BASF Catalysts neither admits nor denies the allegations contained in Paragraph 3116 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3117. BASF Catalysts admits only that on or about August 24, 2004, Engelhard Corporation entered into an Agreement for Recovery of Past Response Costs with the EPA and neither admits nor denies the allegations contained in Paragraph 3117 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3118. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 3118 of the Complaint.

Bayonne Barrel and Drum Site PRPs: BASF Catalysts LLC

3143. BASF Catalysts admits only that it sent the EPA a letter dated December 7, 1995, responding to EPA's Request for Information, and neither admits nor denies the remaining allegations contained in Paragraph 3143 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3144. The allegations contained in Paragraph 3144 of the Complaint state conclusions of law to which no response is required.

3145. BASF Catalysts admits that Engelhard Corporation conducted operations at 429 Delancy Street in Newark, New Jersey and at 1 West Central Avenue in East Newark,

New Jersey. BASF Catalyst admits that Engelhard Corporation's operations at 429 Delancy Street in Newark, New Jersey consisted of the recovery and refining of precious metals, primarily platinum group metals, gold and silver, as well as the manufacturing of catalysts using such precious metals. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 3145 of the Complaint.

3146. BASF Catalysts admits that EPA provided Engelhard Corporation a summary of information allegedly taken from labels affixed to drums found at the Bayonne Barrel and Drum site. BASF Catalysts neither admits nor denies the allegations contained in Paragraph 3143 of the Complaint, but refers Third-Party Plaintiffs to said document, the content of which speaks for itself.

3147. BASF Catalysts lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 3147 of the Complaint.

3148. BASF Catalysts admits the allegations contained in Paragraph 3148 of the Complaint.

3149. The allegations contained in Paragraph 3149 state conclusions of law to which no response is required. To the extent a response is required, BASF Catalysts denies the allegations contained in Paragraph 3149 of the Complaint.

AS TO FIRST COUNT

New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11.f.a.2(a)

3446. With respect to Paragraph 3446 of the Complaint, BASF Catalysts incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 3445 herein.

3447-3448. BASF Catalysts is without knowledge or information sufficient to form a belief as to the truth of the matters stated in Paragraphs 3447 and 3448, and therefore denies the same.

3449-3451. BASF Catalysts denies that it is liable to Third-Party Plaintiffs for contribution. BASF Catalysts is without knowledge or information sufficient to form a belief as to the truth of the matters alleged in Paragraphs 3449 through 3451, and therefore denies the same.

AS TO SECOND COUNT

Statutory Contribution

3452. With respect to Paragraph 3452 of the Complaint, BASF Catalysts incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 3451 herein.

3452-3453. BASF Catalysts denies that it is liable to Third-Party Plaintiffs for contribution. BASF Catalysts is without knowledge or information sufficient to form a belief as to the truth of the matters alleged in Paragraphs 3452 through 3453, and therefore denies the same.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Third-Party Complaint is barred in whole or in part as it fails to state a cause of action against Third-Party Defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Third-Party Defendant is not a discharger or a person in any way responsible for a discharge under N.J.S.A. 58:10-23 et seq. (“Spill Act”).

THIRD AFFIRMATIVE DEFENSE

The claims of Third-Party Plaintiffs are barred in whole or in part by the statutory defenses to liability provided by the Spill Act and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. (“WPCA”).

FOURTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs have no Spill Act claim against Third-Party Defendant because they have not cleaned up and/or removed a discharge of hazardous substances within the meaning of the Spill Act.

FIFTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs have no right of contribution against Third-Party Defendant under the WPCA.

SIXTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs’ claims are barred, in whole or in part, by the entire controversy doctrine.

SEVENTH AFFIRMATIVE DEFENSE

To the extent the Third-Party Complaint purports to seek any relief under New Jersey's Environmental Rights Act, N.J.S.A. 2A:35A-1 et seq., in whole or in part, the pleading is barred because Third-Party Plaintiffs have failed to meet the procedural and/or substantive requirements entitling them to sue Third-Party Defendant under that statute.

EIGHTH AFFIRMATIVE DEFENSE

Some or all of Third-Party Plaintiffs do not have standing to sue.

NINTH AFFIRMATIVE DEFENSE

Upon information and belief, Third-Party Plaintiffs are mere corporate shells who are periodically infused with cash or equivalent contributions by other corporate entities which money Third-Party Plaintiffs purport to use to address the environmental contamination at issue in this litigation. Consequently, the claims by Third-Party Plaintiffs are barred under the collateral source doctrine or its equitable equivalent.

TENTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs are not the real parties in interest for pursuit of the claims set forth in the Third-Party Complaint, nor are Third-Party Plaintiffs acting in the capacity of an executor, administrator, guardian of a person or property, trustee of an express trust, or a party with whom or in whose name a contract has been made for the benefit of another. Consequently, all claims are barred under R. 4:26-1 of the New Jersey Court Rules.

ELEVENTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs are mere volunteers for remediation of the environmental contamination for which they claim contribution and/or other relief from Third-Party Defendant. Consequently, the claims in the Third-Party Complaint are barred, in whole or in part.

TWELFTH AFFIRMATIVE DEFENSE

The claims brought by Third-Party Plaintiffs reflect damages that are wholly speculative, conjectural, unreasonable, excessive and/or arbitrary and capricious.

THIRTEENTH AFFIRMATIVE DEFENSE

Third-Party Defendant cannot be held liable for or be required to pay Third-Party Plaintiffs' damages or other claims based on actions or inactions by Third-Party Defendant that arise out of conduct lawfully undertaken in compliance with permits or other approvals issued by relevant government agencies, including the State of New Jersey and/or the United States and/or in compliance with applicable laws, regulations, rules, orders, ordinances, directives and common law, and other requirements of all foreign, federal, state and local government entities ("applicable Environmental Laws").

FOURTEENTH AFFIRMATIVE DEFENSE

At common law, Third-Party Defendant held, and still holds, a usufructuary interest allowing it, along with all other citizens, the reasonable use of assets held for the benefit of the public by the State of New Jersey under the Public Trust Doctrine. Third-Party Defendant has at all relevant times acted in accordance with its rights of reasonable use of publicly held assets. As a matter of law, Third-Party Plaintiffs' claims are derivative of, and cannot be any greater than, the claims that the State of New Jersey has or would

have against Third-Party Defendant directly. As a result, the claims set forth in the Third-Party Complaint are barred, in whole or in part.

FIFTEENTH AFFIRMATIVE DEFENSE

The Third-Party Complaint is barred and/or is constitutionally impermissible to the extent that it seeks to impose retroactive liability for acts that were previously authorized or condoned by law including, but not limited to, applicable Environmental Laws.

SIXTEENTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' Complaint is barred to the extent that it seeks relief for damages incurred prior to the effective date of the Spill Act.

SEVENTEENTH AFFIRMATIVE DEFENSE

At all relevant times, Third-Party Defendant complied with all applicable Environmental Laws, regulations, industry standards and ordinances, and otherwise conducted itself reasonably, prudently, in good faith, and with due care for the rights, safety and property of others.

EIGHTEENTH AFFIRMATIVE DEFENSE

The claims asserted against Third-Party Defendant in the Third-Party Complaint are barred because at all relevant times Third-Party Defendant exercised due care with respect to hazardous substances, if any, that may have been handled at the subject property or properties, took precautions against foreseeable acts or omissions of others and the consequences that could reasonably result from such acts or omissions, and because any release or threat of release of any hazardous substances, if any, and any costs or damages resulting therefrom, were caused solely by the negligence, acts or omissions of third parties over whom Third-Party Defendant had no control, whether by,

in whole or part, contract or otherwise, or any duty to control, including without limitation the State of New Jersey and its agencies and officials, and the United States and its agencies and officials.

NINETEENTH AFFIRMATIVE DEFENSE

The claims set forth in the Third-Party Complaint are barred in whole or in part by the doctrine of preemption.

TWENTIETH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs suffered no losses or injuries that were proximately caused by Third-Party Defendant.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims against Third-Party Defendant are barred, in whole or in part, by the applicable Statute of Limitations, Statute of Repose, and/or the equitable doctrines of laches and estoppel.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred in whole or in part by the doctrines of accord and satisfaction, waiver, consent, estoppel, release and/or assumption of risk.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred, in whole or in part, by the "unclean hands" doctrine.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

The claims for equitable contribution under the Spill Act in the Third-Party Complaint are barred because: (1) equity will not compel action that is impossible of performance; (2) equity will not exceed the rights of parties existing at law; (3) equity

will not consciously become an instrument of injustice; and/or (4) equity will not permit double satisfaction.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred, in whole or in part, by the doctrines of collateral estoppel, *res judicata*, and/or judicial estoppel including in connection with prior findings as to Third-Party Plaintiffs' intentional misconduct.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims against Third-Party Defendant are subject to setoff and recoupment and therefore must be reduced accordingly.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Third-Party Defendant did not own or operate a "Major Facility" as defined by the Spill Act or the WPCA.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred, in whole or in part, by Third-Party Plaintiffs' failure to comply with the prerequisites to liability under the Spill Act including, without limitation to, that Third-Party Plaintiffs have not incurred costs authorized by the Spill Act and that Third-Party Plaintiffs have failed to direct cleanup and removal activities in accordance with the National Contingency Plan to the greatest extent possible.

TWENTY-NINTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred because neither they nor Plaintiffs have incurred "costs of restoration and replacement ... of any natural resources damaged or destroyed by a discharge" under the Spill Act.

THIRTIETH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs have failed to join necessary and indispensable parties needed for a just adjudication of the claims asserted in this action, in whose absence complete relief can not be afforded the existing parties pursuant to R. 4:28-1 of the New Jersey Court Rules. These necessary and indispensable parties include, without limitation, State of New Jersey agencies and instrumentalities, including, without limitation, the State trustees for tidelands, certain United States agencies and instrumentalities with liability under the Spill Act, and certain state and local governmental agencies located outside the boundaries of New Jersey, including, without limitation, the State of New York and its agencies and instrumentalities, all of whom are or may be separately liable for contamination allegedly located in the “Newark Bay Complex,” as defined in Plaintiffs’ Second Amended Complaint.

THIRTY-FIRST AFFIRMATIVE DEFENSE

Third-Party Plaintiffs’ claims are not ripe for adjudication, inter alia, because Third-Party Plaintiffs have a joint liability to the Plaintiffs and have not paid and will not pay more than their fair or equitable share of the liability.

THIRTY-SECOND AFFIRMATIVE DEFENSE

Third-Party Defendant denies that Third-Party Plaintiffs have suffered any harm whatsoever, but in the event that they did suffer any form of injury or damage cognizable under applicable Environmental Laws, such injury was caused by the intervening acts, omissions, or superseding acts of persons or entities over whom Third-Party Defendant exercised no control and for whose conduct Third-Party Defendant was not responsible

including, without limitation, unpermitted and storm event discharges from publicly owned treatment works.

THIRTY-THIRD AFFIRMATIVE DEFENSE

If Third-Party Plaintiffs sustained any injury or are entitled to any damages, such injury and damages were wholly, or in part, caused by Third-Party Plaintiffs' own acts or omissions, negligence, lack of due care and fault and/or that of Third-Party Plaintiffs' agents or employees. In the event that Third-Party Plaintiffs are found to have sustained any injury and are entitled to damages, Third-Party Plaintiffs' recovery against Third-Party Defendant, if any, must be reduced by the proportionate damages caused by the acts and conduct of Third-Party Plaintiffs and/or its agents or employees.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

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

THIRTY-FIFTH AFFIRMATIVE DEFENSE

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

THIRTY-SIXTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred to the extent that the conduct of Third-Party Defendants alleged to give rise to liability in the Third-Party Complaint is the subject of a release, covenant not to sue, or has otherwise been excused by Plaintiffs,

including, without limitation, through issuance of a no further action letter, consent order, settlement agreement or other applicable document, with or without inclusion of contribution protection, or through the Plaintiffs' allowance of any applicable Statute of Limitations or Statute of Repose to lapse.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

The disposal of waste, if any, which allegedly originated from Third-Party Defendant, was undertaken in accordance with the then state of the art, the then accepted industrial practice and technology, and the then prevailing legal requirements for which Third-Party Defendant cannot be found retroactively liable.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs are not entitled to recover costs incurred for cleanup actions not undertaken in coordination or conjunction with federal agencies.

THIRTY-NINTH AFFIRMATIVE DEFENSE

The damages or other relief that Third-Party Plaintiffs seek, if awarded, would result in unjust enrichment to the Third-Party Plaintiffs.

FORTIETH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred due to its own conduct in unilaterally, and without notice to Third-Party Defendant, implementing clean-up plan(s) or taking other actions that resulted in the commingling of formerly divisible areas of environmental harm.

FORTY-FIRST AFFIRMATIVE DEFENSE

Third-Party Defendants' liability to Third-Party Plaintiffs, if any, is limited to Spill Act and contribution claims and excludes any such claims which may properly be

apportioned to parties pursuant to *Burlington Northern and Santa Fe Railway Co., et al. v. United States, et al.*, 556 U.S. ____, 129 S.Ct. 1870 (2009), and other comparable decisional law.

FORTY-SECOND AFFIRMATIVE DEFENSE

Third-Party Plaintiffs cannot assert contribution claims against Third-Party Defendants because the discharges for which the Plaintiffs are seeking relief are different from Third-Party Defendants' alleged discharges.

FORTY-THIRD AFFIRMATIVE DEFENSE

Third-Party Plaintiffs cannot seek contribution under the Joint Tortfeasors Contribution Law because Third-Party Defendant(s) are not liable for "the same injury" caused by Third-Party Plaintiffs' discharges and do not share a common liability to the State of New Jersey.

FORTY-FOURTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred to the extent they seek to hold Third-Party Defendant liable, in contribution, for any claims for which it would be a violation of public policy to hold Third-Party Defendant liable, including, but not limited to, punitive damages and penalties.

FORTY-FIFTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred, in whole or in part, because no actions or inactions by Third-Party Defendant have resulted in any permanent impairment or damage to a natural resource.

FORTY-SIXTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims for contribution, whether under the Spill Act or the New Jersey statutory or common law provisions for contribution, are derivative of, and are therefore no greater than, Plaintiffs' claims against Third-Party Plaintiffs. Consequently, Third-Party Plaintiffs' claims against Third-Party Defendant are barred to the extent of any legal extinguishments of actual or potential claims by the Plaintiffs against Third-Party Defendant pertaining to the alleged environmental contamination (including natural resource damage) of any site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against Third-Party Defendant. Examples of legal extinguishments that are or may be applicable to Third-Party Defendant include, with respect to each such alleged site/nexus, the following:

1. Any release or covenant not to sue granted by Plaintiffs to Third-Party Defendant;
2. Any settlement or other compromise between Plaintiffs and Third-Party Defendant;
3. Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against Third-Party Defendant;
4. Any failure to join a claim relating to the "Newark Bay Complex" (as defined in the Third-Party Complaint) in a prior litigation between Plaintiffs and Third-Party Defendant, which would result in relinquishment of such a claim by virtue of New Jersey's Entire Controversy Doctrine; and/or
5. Any issuance by Plaintiffs to Third-Party Defendant, directly or indirectly, of any "No Further Action" (a/k/a "NFA") determination, "Negative Declaration," or similar determination.

FORTY-SEVENTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred because the relief sought against Third-Party Defendant, were it claimed directly by Plaintiffs, would amount to a "taking" of

Third-Party Defendant's property in violation of its constitutional rights to due process and/or in violation of its rights under the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq.

FORTY-EIGHTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred to the extent the relief sought by Third-Party Plaintiffs in the Complaint is at odds with Third-Party Defendant's responsibilities to conduct ongoing environmental cleanups under oversight of the Plaintiffs at any site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against Third-Party Defendant, thereby exposing Third-Party Defendant to inconsistent responsibilities, penalties and liabilities, and the possibility of paying twice for the same actions (i.e., double recovery).

FORTY-NINTH AFFIRMATIVE DEFENSE

To the extent Third-Party Defendant is acting or has acted to conduct environmental cleanup at any site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against Third-Party Defendant, the claims for equitable contribution under the Spill Act in the Third-Party Complaint are barred because equity will not compel action that is already being undertaken and/or is unnecessary.

FIFTIETH AFFIRMATIVE DEFENSE

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

FIFTY-FIRST AFFIRMATIVE DEFENSE

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

FIFTY-SECOND AFFIRMATIVE DEFENSE

Third-Party Defendant reserves the right to assert and hereby invoke each and every Environmental Law defenses that may be available during the course of this action.

COUNTER-CLAIMS, CROSS CLAIMS AND THIRD/FOURTH PARTY CLAIMS

No such claims are required to be asserted at this time and are expressly reserved pursuant to CMO V.

DESIGNATION OF TRIAL COUNSEL

In accordance with Rule 4:25-4, you are hereby notified that David P. Schneider, Esq. is hereby designated as trial counsel.

WHEREFORE, Third-Party Defendant BASF Catalysts, LLC respectfully requests that the Court enter an Order dismissing the Third-Party Complaint "B" with prejudice, and awarding costs, attorney fees and any other relief the Court deems just and proper.

Bressler, Amery & Ross, P.C.
Attorney for Third-Party Defendant
BASF Catalysts, LLC
325 Columbia Turnpike
Florham Park, NJ 07932

A handwritten signature in black ink, appearing to read "DPSchneider", written over a horizontal line.

David P. Schneider

Dated: March 29, 2010

CERTIFICATION PURSUANT TO R. 4:5-1(b) (2)

Pursuant to R. 4:5-1(b)(2), the undersigned hereby certifies that:

- (a) The matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding and no action or arbitration proceeding is contemplated by the undersigned; and
- (b) Since it is the legal position of the undersigned that the potential liability, if any, of a third party defendant for the claims set forth in the Third-Party Complaint is several, only, there are no non-parties which should be joined in the action pursuant to R. 4:28; but that
- (c) In the event the Court shall determine that the potential liability of a third party defendant, if any, for the claims set forth in the Third-Party Complaint is in any respect joint and several (which is denied), then the undersigned states that there are other non-parties that may have discharged hazardous substances into the Newark Bay Complex contributing to the harm alleged by the Third-Party Plaintiffs. O'Melveny and Meyers has filed with the Special Master, a list of over 1,000 non-parties who, according to the New Jersey Department of Environmental Protection, discharged hazardous substances into the Newark Bay Complex. Subsequent investigation/discovery will determine which, if any of those non-parties or others not yet identified should be joined in this case.

Bressler, Amery & Ross, P.C.
Attorney for Third-Party Defendant
BASF Catalysts, LLC
325 Columbia Turnpike
Florham Park, NJ 07932



David P. Schneider

CERTIFICATE OF SERVICE

I, David P. Schneider, an attorney at law of the State of New Jersey, do hereby state upon my oath as follows:

1. I am a partner in the law firm of Bressler, Amery & Ross, P.C., 325 Columbia Turnpike, Florham Park, New Jersey 07932, which represents Third-Party Defendant BASF Catalysts, LLC ("BASF Catalysts") in the above-captioned matter.

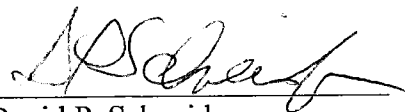
2. I hereby certify that BASF Catalysts' Answer to Third-Party Complaint "B" of Defendants Maxus Energy Corporation and Tierra Solutions, Inc. was served upon the Clerk of Court, Superior Court of New Jersey, Essex County, 50 W. Market Street, Newark, New Jersey 07102, via overnight mail on March 29, 2010.

3. I hereby certify that BASF Catalysts' Answer to Third-Party Complaint "B" of Defendants Maxus Energy Corporation and Tierra Solutions, Inc. was served electronically on March 29, 2010 on all parties which have consented to service by posting on the following website, <http://njdepvocc.sfile.com>.

4. The following Counsel of Record were served on March 29, 2010 via first class, regular mail:

John P. McGovern, Esq.
Assistant City Attorney
City of Orange
29 North Day Street
Orange, NJ 07050
Counsel for Third-Party Defendant City of Orange

Richard J. Dewland, Esq.
Coffey & Associates
465 South Street
Morristown, NJ 07960
Counsel for Third-Party Defendant Borough of
Hasbrouck Heights


David P. Schneider

Dated: March 29, 2010