

David J. McLean  
Gary P. Gengel  
Rebecca K. Brown  
Latham & Watkins LLP  
One Newark Center, 16<sup>th</sup> Floor  
Newark, NJ 07101  
Tel: 973-639-1234  
Fax: 973-639-7298  
Attorney For Third-Party Defendant Covanta Essex Company

NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, THE  
COMMISSIONER OF THE NEW JERSEY  
ENVIRONMENTAL PROTECTION AGENCY,  
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,

MAXUS ENERGY CORPORATION and  
TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs,

vs.

3M COMPANY,  
A.C.C., INC.,  
ACH FOOD COMPANIES, INC.,  
ACTIVE OIL SERVICE,  
ADCO CHEMICAL COMPANY,  
AGC CHEMICALS AMERICAS, INC.,  
ALDEN-LEEDS, INC.,  
ALLIANCE CHEMICAL, INC.,  
ALUMAX MILL PRODUCTS, INC.,  
AMCOL REALTY CO.,  
AMERICAN INKS AND COATINGS CORPORATION,

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

DOCKET NO. L-9868-05 (PASR)

CIVIL ACTION

**COVANTA ESSEX COMPANY'S  
ANSWER TO THIRD-PARTY  
COMPLAINT "B"**

APEXICAL, INC.,  
APOLAN INTERNATIONAL, INC.,  
ARKEMA, INC.,  
ASHLAND INC.,  
ASHLAND INTERNATIONAL HOLDINGS, INC.,  
ASSOCIATED AUTO BODY & TRUCKS, INC.,  
ATLAS REFINERY, INC.,  
AUTOMATIC ELECTRO-PLATING CORP.,  
AKZO NOBEL COATINGS, INC.,  
BASF CATALYSTS LLC,  
BASF CONSTRUCTION CHEMICALS INC.,  
BASF CORPORATION,  
BAYER CORPORATION,  
BEAZER EAST, INC.,  
BELLEVILLE INDUSTRIAL CENTER,  
BENJAMIN MOORE & COMPANY,  
BEROL CORPORATION,  
B-LINE TRUCKING, INC.,  
BORDEN & REMINGTON CORP.,  
C.S. OSBORNE & CO.,  
CAMPBELL FOUNDRY COMPANY,  
CASCHEM, INC.,  
CBS CORPORATION,  
CELANESE LTD.,  
CHEMICAL COMPOUNDS INC.,  
CHEMTURA CORPORATION,  
CLEAN EARTH OF NORTH JERSEY, INC.,  
COSMOPOLITAN GRAPHICS CORPORATION,  
CIBA CORPORATION,  
COLTEC INDUSTRIES INC.,  
COLUMBIA TERMINALS, INC.,  
COMO TEXTILE PRINTS, INC.,  
CONAGRA PANAMA, INC.;  
CONOPCO, INC.,  
CONSOLIDATED RAIL CORPORATION,  
COOK & DUNN PAINT CORPORATION,  
COSAN CHEMICAL CORPORATION,  
COVANTA ESSEX COMPANY,  
CRODA, INC.,  
CRUCIBLE MATERIALS CORPORATION,  
CURTISS-WRIGHT CORPORATION,  
CWC INDUSTRIES, INC.,  
DARLING INTERNATIONAL, INC.,  
DAVANNE REALTY CO.,

DELEET MERCHANDISING CORPORATION,  
DELVAL INK AND COLOR,  
INCORPORATED,DILORENZO PROPERTIES  
COMPANY, L.P.,  
E.I. DU PONT DE NEMOURS AND COMPANY,  
EASTMAN KODAK COMPANY,  
EDEN WOOD CORPORATION,  
ELAN CHEMICAL COMPANY, INC.,  
EM SERGEANT PULP & CHEMICAL CO.,  
EMERALD HILTON DAVIS, LLC,  
ESSEX CHEMICAL CORPORATION,  
EXXON MOBIL  
F.E.R. PLATING, INC.,  
FINE ORGANICS CORPORATION,  
FISKE BROTHERS REFINING COMPANY,  
FLEXON INDUSTRIES CORPORATION,  
FLINT GROUP INCORPORATED,  
FORT JAMES CORPORATION,  
FOUNDRY STREET CORPORATION,  
FRANKLIN-BURLINGTON PLASTICS, INC.,  
GARFIELD MOLDING COMPANY, INC.,  
GENERAL CABLE INDUSTRIES, INC.;  
GENERAL DYNAMICS CORPORATION,  
GENERAL ELECTRIC COMPANY,  
GENTEK HOLDING LLC,  
GIVAUDAN FRAGRANCES CORPORATION,  
G. J. CHEMICAL CO.,  
GOODY PRODUCTS, INC.,  
GORDON TERMINAL SERVICE CO. OF N.J., INC.,  
HARRISON SUPPLY COMPANY,  
HARTZ MOUNTAIN CORPORATION,  
HAVENICK ASSOCIATES L.P.,  
HEXCEL CORPORATION,  
HEXION SPECIALTY CHEMICALS, INC.,  
HOFFMANN-LA ROCHE INC.,  
HONEYWELL INTERNATIONAL INC.,  
HOUGHTON INTERNATIONAL INC.,  
HUDSON TOOL & DIE COMPANY, INC,  
HY-GRADE ELECTROPLATING CO.,  
ICI AMERICAS INC.,  
INNOSPEC ACTIVE CHEMICALS LLC,  
INX INTERNATIONAL INK CO.,  
ISP CHEMICALS INC.,  
ITT CORPORATION,

KEARNY SMELTING & REFINING CORP.,  
KAO BRANDS COMPANY,  
KOEHLER-BRIGITT STAR, INC.,  
LINDE, INC.,  
LUCENT TECHNOLOGIES, INC.,  
MACE ADHESIVES & COATINGS COMPANY, INC.,  
MALLINCKRODT INC.,  
MERCK & CO., INC.,  
METAL MANAGEMENT NORTHEAST, INC.,  
MI HOLDINGS, INC.,  
MILLER ENVIRONMENTAL GROUP, INC.,  
MORTON INTERNATIONAL, INC.,  
N L INDUSTRIES, INC.,  
NAPPWOOD LAND CORPORATION,  
NATIONAL FUEL OIL, INC.,  
NATIONAL-STANDARD, LLC,  
NELL-JOY INDUSTRIES, INC.,  
NESTLE U.S.A., INC.,  
NEW JERSEY TRANSIT CORPORATION,  
NEWS AMERICA, INC.,  
NEWS PUBLISHING AUSTRALIA LIMITED,  
NORPAK CORPORATION,  
NOVELIS CORPORATION,  
ORANGE AND ROCKLAND UTILITIES, INC.,  
OTIS ELEVATOR COMPANY,  
PRC-DESOTO INTERNATIONAL, INC.,  
PASSAIC PIONEERS PROPERTIES COMPANY,  
PFIZER INC.,  
PHARMACIA CORPORATION,  
PHELPS DODGE INDUSTRIES, INC.,  
PHILBRO, INC.,  
PITT-CONSOL CHEMICAL COMPANY,  
PIVOTAL UTILITY HOLDINGS, INC.,  
PPG INDUSTRIES, INC.,  
PRC-DESOTO INTERNATIONAL, INC.,  
PRAXAIR, INC.,  
PRECISION MANUFACTURING GROUP, LLC,  
PRENTISS INCORPORATED,  
PROCTER & GAMBLE MANUFACTURING COMPANY,  
PRYSMIAN COMMUNICATIONS CABLES AND  
SYSTEMS USA LLC,  
PSEG FOSSIL LLC,  
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,  
PURDUE PHARMA TECHNOLOGIES, INC.,

QUALA SYSTEMS, INC.,  
QUALITY CARRIERS, INC.,  
RECKITT BENCKISER, INC.,  
REICHHOLD, INC.,  
REVERE SMELTING & REFINING CORPORATION,  
REXAM BEVERAGE CAN COMPANY,  
ROMAN ASPHALT CORPORATION,  
ROYCE ASSOCIATES, A LIMITED PARTNERSHIP,  
R.T. VANDERBILT COMPANY, INC.,  
RUTHERFORD CHEMICALS LLC,  
S&A REALTY ASSOCIATES, INC.,  
SCHERING CORPORATION,  
SEQUA CORPORATION,  
SETON COMPANY,  
SIEMENS WATER TECHNOLOGIES CORP.  
SINGER SEWING COMPANY  
SPECTRASERV, INC.,  
STWB, INC.,  
SUN CHEMICAL CORPORATION,  
SVP WORLDWIDE, LLC,  
TATE & LYLE INGREDIENTS AMERICAS, INC.,  
TEVA PHARMACEUTICALS USA, INC.,  
TEVAL CORP.,  
TEXTRON INC.,  
THE DIAL CORPORATION,  
THE DUNDEE WATER POWER AND LAND COMPANY,  
THE NEWARK GROUP, INC.,  
THE OKONITE COMPANY, INC.,  
THE SHERWIN-WILLIAMS COMPANY,  
THE STANLEY WORKS,  
THE VALSPAR CORPRATION,  
THIRTY-THREE QUEEN REALTY INC.,  
THREE COUNTY VOLKSWAGEN CORPORATION,  
TIDEWATER BALING CORP.,  
TIFFANY & CO.,  
TIMCO, INC.,  
TRIMAX BUILDING PRODUCTS, INC.,  
TROY CHEMICAL CORPORATION, INC.,  
UNIVERSAL OIL PRODUCTS COMPANY,  
V. OTTILIO & SONS, INC.,  
VELSICOL CHEMICAL CORPORATION,  
VEOLIA ES TECHNICAL SOLUTIONS, L.L.C.,  
VERTELLUS SPECIALTIES INC.,  
VITUSA CORP.,

VULCAN MATERIALS COMPANY,  
W.A.S. TERMINALS CORPORATION,  
W.A.S. TERMINALS, INC.,  
W.C. INDUSTRIES,  
WHITTAKER CORPORATION,  
WIGGINS PLASTICS, INC.,  
ZENECA INC.,

**COVANTA ESSEX COMPANY'S  
ANSWER TO THIRD-PARTY COMPLAINT "B"**

Third-Party Defendant Covanta Essex Company ("Covanta"), 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 the Third-Party Complaint "B" by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc. ("Third-Party Plaintiffs"), as follows:

**GENERALLY**

1. Covanta 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 the Second Count and all headings and titles used in Third-Party Complaint "B".

**AS TO PROCEDURAL BACKGROUND**

**(Paragraphs 1 through 15)**

2. Covanta 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)**

3. No response is required pursuant to CMO V.

**AS TO THE THIRD PARTY DEFENDANTS**

**(Paragraphs 19 through 209)**

4. To the extent that the allegations in Paragraphs 19 through 209 relate to other parties, no response is required pursuant to CMO V.

5. Covanta admits that it is a New Jersey partnership with its principal place of business at 183 Raymond Boulevard in Newark, New Jersey. Covanta denies the remaining allegations in Paragraph 68 of Third-Party Complaint B.

6. The allegations in Paragraph 210, state a legal conclusion as to which no response is required. To the extent the allegations in Paragraph 210 are deemed to be factual allegations, they are denied.

**AS TO DEFINITIONS**

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

**AS TO FACTUAL ALLEGATIONS**

**(Paragraphs 237 through 3445)**

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

**AMERICAN REF-FUEL SITE**

9. Covanta admits that the Port Authority of New York and New Jersey is the owner of the “American Ref-Fuel Site.” Covanta is without knowledge or information sufficient to

form a belief as to the truth of the remainder of the allegations contained in paragraph 408 of Third-Party Complaint B and accordingly, denies those allegations.

10. Covanta admits that the Essex County Resource Recovery Facility is a waste to energy facility located on the American Ref-Fuel Site. Covanta admits that entered into various agreements with the Port Authority of New York and New Jersey. Those documents speak for themselves and Covanta refers to them for its complete terms. Covanta is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in paragraph 409 of Third-Party Complaint B and accordingly, denies those allegations.

11. Covanta admits the allegations in paragraph 410 of Third-Party Complaint B.

12. With respect to paragraph 411 of Third-Party Complaint B, Covanta admits that a November 1993 Stormwater Runoff Characterization and Treatability Study prepared for the American Ref-Fuel Company addresses stormwater runoff at the American Ref-Fuel Site. That document speaks for itself and Covanta refers to it for its complete terms. Covanta denies the remaining allegations in Paragraph 411 of Third-Party Complaint B.

13. Covanta is without information sufficient to form a belief as to the truth of the allegations in Paragraph 412 of Third-Party Complaint B, and on that basis they are denied.

14. Covanta admits that American Ref-Fuel received a letter from the NJDEP dated June 21, 1993. That document speaks for itself and Covanta refers to it for its complete terms. Covanta denies the remaining allegations in Paragraph 413 of Third-Party Complaint B.

15. Covanta admits that American Ref-Fuel received a letter from the NJDEP dated June 8, 1994. That document speaks for itself and Covanta refers to it for its complete terms. Covanta denies the remaining allegations in Paragraph 414 of Third-Party Complaint B.



16. Covanta admits that American Ref-Fuel received a letter from the NJDEP dated March 25, 1995. That document speaks for itself and Covanta refers to it for its complete terms. Covanta denies the remaining allegations in Paragraph 415 of Third-Party Complaint B.

17. Covanta admits that American Ref-Fuel received a letter from the NJDEP dated June 8, 1994. That document speaks for itself and Covanta refers to it for its complete terms. Covanta denies the remaining allegations in Paragraph 416 of Third-Party Complaint B.

18. Covanta admits that American Ref-Fuel received a letter from the NJDEP dated June 20, 1995. That document speaks for itself and Covanta refers to it for its complete terms. Covanta denies the remaining allegations in Paragraph 417 of Third-Party Complaint B.

19. Covanta denies that it received a letter from NJDEP dated June 22, 1998 but admits that American Ref-Fuel received a letter from the NJDEP dated June 22, 1988. That document speaks for itself and Covanta refers to it for its complete terms. Covanta denies the remaining allegations in Paragraph 418 of Third-Party Complaint B.

20. Covanta admits that on or about December 1, 1992, NJDEP and American Ref-Fuel Company entered into an Administrative Consent Order. That document speaks for itself and Covanta refers to it for its complete terms. Covanta denies the remaining allegations in Paragraph 419 of Third-Party Complaint B.

21. Covanta is without information sufficient to form a belief as to the truth of the allegations in Paragraph 420 of Third-Party Complaint B, and on that basis they are denied.

22. Covanta is without information sufficient to form a belief as to the truth of the allegations in Paragraph 421 of Third-Party Complaint B, and on that basis they are denied.

23. Covanta admits that American Ref-Fuel received a letter from the EPA dated August 13, 2004. That document speaks for itself and Covanta refers to it for its complete terms. Covanta denies the remaining allegations in Paragraph 422 of Third-Party Complaint B.

24. The allegations in Paragraph 423 of Third-Party Complaint B are conclusions of law and, therefore, no response is required. To the extent the allegations in Paragraph 423 are deemed to be factual allegations, they are denied.

#### AS TO FIRST COUNT

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

25. Covanta incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 24 herein.

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

27. Covanta denies that it is liable to Third-Party Plaintiffs for contribution. Covanta 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**

28. Covanta incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 24 herein.

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

### **FIRST AFFIRMATIVE DEFENSE**

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

### **SECOND AFFIRMATIVE DEFENSE**

Covanta 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 Covanta 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 Covanta 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**

The Third-Party Complaint is barred, in whole or in part, because Third-Party Plaintiffs have failed to meet the procedural and/or substantive requirements entitling them to sue Covanta under New Jersey’s Environmental Rights Act, *N.J.S.A. 2A:35A-1 et seq.*

#### **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 Covanta. 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**

Covanta cannot be held liable for or be required to pay Third-Party Plaintiffs' damages or other claims based on actions or inactions by Covanta 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 THIRD AFFIRMATIVE DEFENSE**

At common law, Covanta 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. Covanta 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 Covanta directly. As a result, the claims set forth in the Third-Party Complaint are barred, in whole or in part.

#### **FIFTEENTH AFFIRMATIVE DEFENSE**

The State of New Jersey is legally barred from asserting direct claims against Covanta for the damages sought in its Amended Complaint. Consequently, all claims that are or may be derivative of the State of New Jersey’s claims are barred as to the Covanta as well, including the claims set forth in the Third-Party Complaint.

#### **SIXTEENTH 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 applicable Environmental Laws.

### **SEVENTEENTH 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.

### **EIGHTEENTH AFFIRMATIVE DEFENSE**

At all relevant times, Covanta 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.

### **NINETEENTH AFFIRMATIVE DEFENSE**

The claims asserted against Covanta in the Third-Party Complaint are barred because at all relevant times Covanta 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 Covanta 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.

### **TWENTIETH AFFIRMATIVE DEFENSE**

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

### **TWENTY-FIRST AFFIRMATIVE DEFENSE**

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

#### **TWENTY-SECOND AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims against Covanta 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-THIRD 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-FOURTH THIRD AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims are barred, in whole or in part, by the doctrine of "coming to the nuisance."

#### **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

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

#### **TWENTY-SIXTH 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-SEVENTH 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-EIGHTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims are barred because the relief sought against Covanta, were it claimed directly by Plaintiffs, would amount to unlawful taxation.

#### **TWENTY-NINTH AFFIRMATIVE DEFENSE**

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

#### **THIRTIETH AFFIRMATIVE DEFENSE**

Covanta did not own or operate a "Major Facility" as defined by the Spill Act or the WPCA.

#### **THIRTY-FIRST 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, Third-Party Plaintiffs' have not incurred costs authorized by the Spill Act and Third-Party Plaintiffs' have failed to direct cleanup and removal activities in accordance with the National Contingency Plan to the greatest extent possible.

#### **THIRTY-SECOND 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.

#### **THIRTY-THIRD 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 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-FOURTH THIRD 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-FIFTH AFFIRMATIVE DEFENSE**

Covanta 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 Law, such injury was caused by the intervening acts, omissions, or superseding acts of persons or entities over whom Covanta exercised no control and for whose conduct Covanta was not responsible including, without limitation, unpermitted and storm event discharges from publically owned treatment works.

#### **THIRTY-SIXTH 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 Covanta, 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-SEVENTH AFFIRMATIVE DEFENSE**

Although Covanta denies that it is liable for the contamination described in Third-Party Plaintiffs' Complaint, in the event it is found liable, Covanta 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-EIGHTH 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-NINTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims are barred to the extent that the conduct of Covanta 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.

#### **FORTIETH AFFIRMATIVE DEFENSE**

The disposal of waste, if any, which allegedly originated from Covanta, 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 Covanta cannot be found retroactively liable.

#### **FORTY-FIRST AFFIRMATIVE DEFENSE**

Any discharge that allegedly originated from Covanta, was investigated and remediated by a licensed professional and under the direct oversight of state and/or federal agencies with the then state of the art, the then accepted industrial practice and technology, and the then prevailing requirements for which Covanta cannot be found retroactively liable.

#### **FORTY-SECOND AFFIRMATIVE DEFENSE**

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

#### **FORTY-THIRD AFFIRMATIVE DEFENSE**

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

#### **FORTY-FOURTH THIRD AFFIRMATIVE DEFENSE**

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

#### **FORTY-FIFTH AFFIRMATIVE DEFENSE**

Covanta's 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-SIXTH AFFIRMATIVE DEFENSE**

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

#### **FORTY-SEVENTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs cannot seek contribution under the Joint Tortfeasors Contribution Law because Covanta(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-EIGHTH AFFIRMATIVE DEFENSE**

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

#### **FORTY-NINTH AFFIRMATIVE DEFENSE**

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

#### **FIFTIETH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs claims for contribution, whether under the Spill Act or the New Jersey statutory provisions for contribution, are derivative of, and are therefore no greater than, Plaintiffs’ claims against Third-Party Plaintiffs. Consequently, Third-Party Plaintiffs’ claims against Covanta are barred to the extent of any legal extinguishments of actual or potential claims by the Plaintiffs against Covanta 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 Covanta. Examples of legal extinguishments that are or may be applicable to Covanta include, with respect to each such site:

- A. Any release or covenant not to sue granted by Plaintiffs to Covanta;
- B. Any settlement or other compromise between Plaintiffs and Covanta;

- C. Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against Covanta;
- D. 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 Covanta, which would result in relinquishment of such a claim by virtue of New Jersey's Entire Controversy Doctrine; and/or
- E. Any issuance by Plaintiffs to Covanta, directly or indirectly, of any "No Further Action" (a/k/a "NFA") determination, "Negative Declaration," or similar determination.

#### **FIFTY FIRST AFFIRMATIVE DEFENSE**

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

#### **FIFTY SECOND 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 Covanta'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 Covanta, thereby exposing Covanta to inconsistent responsibilities, penalties and liabilities, and the possibility of paying twice for the same actions (*i.e.*, double recovery).

#### **FIFTY THIRD AFFIRMATIVE DEFENSE**

To the extent Covanta 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 Covanta, 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.

#### **FIFTY FOURTH AFFIRMATIVE DEFENSE**

Without admitting liability, Covanta 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 FIFTH AFFIRMATIVE DEFENSE**

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

#### **FIFTY SIXTH AFFIRMATIVE DEFENSE**

Covanta 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 J. McLean is assigned to try this case.

WHEREFORE, Third-Party Defendant Covanta Essex Company 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.

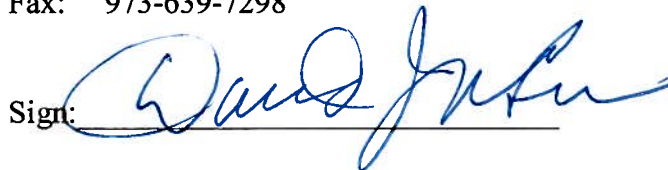
Dated: November 23, 2009

Respectfully submitted,

David J. McLean  
Gary P. Gengel

Rebecca K. Brown  
LATHAM & WATKINS LLP  
One Newark Center, 16<sup>th</sup> Floor  
Newark, NJ 07101  
Tel: 973-639-1234  
Fax: 973-639-7298

Sign: \_\_\_\_\_

A handwritten signature in blue ink, appearing to read "David J. Brown", is written over a horizontal line.

Attorney for Third-Party Defendant  
Covanta Essex Company

**CERTIFICATION PURSUANT TO RULE 4:5-1(B)(2)**

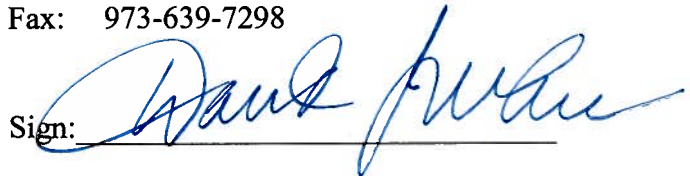
Undersigned counsel hereby certifies, in accordance with Rule 4:5-1(b)(2), that: (a) the matters in controversy in this action are not the subject of any other known or pending court action or arbitration proceeding (though the same may become the subject of a federal action pursuant to certain federal environmental statutes) and (b) reference is made to the October 20, 2009 "Additional Discharger" posting by O'Melveny and Myers as to non-parties who may be joined to this action pursuant to Rule 4:28, or who may be subject to joinder pursuant to Rule 4:29-1.

Dated: November 23, 2009

Respectfully submitted,

David J. McLean  
Gary P. Gengel  
Rebecca K. Brown  
LATHAM & WATKINS LLP  
One Newark Center, 16<sup>th</sup> Floor  
Newark, NJ 07101  
Tel: 973-639-1234  
Fax: 973-639-7298

Sign: \_\_\_\_\_



Attorney for Third-Party Defendant  
Covanta Essex Company



## CERTIFICATE OF SERVICE

I, Rebecca K. Brown, hereby certify under penalty of perjury that:

1. I am an attorney-at-law in the State of New Jersey and am associated with the law firm of Latham & Watkins LLP, attorneys for Defendant Covanta Essex Company.
2. I am a member in good standing of the bar of this Court.
3. On this date, an original and two correct copies of the Answer to Third-Party Complaint "B" of Maxus Energy Corporation and Tierra Solutions, Inc. and Case Information Statement were hand delivered by messenger for filing with the Clerk of Superior Court of New Jersey, 50 West Market Street, Newark, New Jersey 07102
4. On this date, a courtesy copy of the Answer to Third-Party Complaint "B" of Maxus Energy Corporation and Tierra Solutions, Inc. and Case Information Statement were hand delivered by messenger to the Honorable Sebastian P. Lombardi, J.S.C., 470 Dr. Martin Luther King, Jr. Boulevard, Newark, New Jersey 07102.
5. On this date, a copy of the Answer to Third-Party Complaint "B" of Maxus Energy Corporation and Tierra Solutions, Inc. and Case Information Statement were served electronically on all parties who have consented to service by electronic posting on the following website, <http://njdepvocc.sfile.com>
6. On this date, a copy of the Answer to Third-Party Complaint "B" of Maxus Energy Corporation and Tierra Solutions, Inc. and Case Information Statement were served by regular mail, on counsel for all parties who have not consented to service by electronic posting.

Donald J. Camerson, II, Esq. Bressler, Amery & Ross, P.C. 325 Columbia Turnpike Florham Park, NJ 07932 973.660.4433 973.514.1660 - fax <a href="mailto:dcamerson@bressler.com">dcamerson@bressler.com</a>
---

Joseph B. Fiorenzo, Esq.  
Sokol, Behot & Fiorenzo  
433 Hackensack, NJ 07601  
201.488.1300  
jbfioenzo@sbflawfirm.com

Anthony J. Reitano, Esq.  
Herold Law, PA  
25 Independence Blvd.  
Warren, NJ 07059-6747  
908.647.1022  
908.647.7721 - fax  
areitano@heroldlaw.com

Thomas M. Egan, Esq.  
Assistant Municipal Attorney  
City of Clifton Law Department  
900 Clifton Avenue  
Clifton, NJ 07013  
973.470.5817  
973.470.5254 - fax  
tegan@cliftonnj.org

John P. McGovern, Esq.  
Assistant City Attorney  
City of Orange Township  
29 North Day St.  
Orange, NJ 07050  
973.266.4197  
973.674.2021 - fax  
jmcgovern@ci.orange.nj.us

Eric S. Aronson, Esq.  
Greenberg Traurig, LLP  
200 Park Avenue  
Florham Park, NJ 07932  
973.360.7900  
973.301.8410 - fax  
aronsone@gtlaw.com

Steven R. Gray, Esq.  
Water, McPherson, McNeill, P.C.  
300 Lighting Way  
P.O. Box 1560  
Secaucus, NJ 07096  
201.863.4400  
201.863.2866 - fax  
sgray@lawwmm.com

Kenneth H. Mack, Esq.  
Fox Rothschild LLP  
997 Lenox Drive, Building Three  
Lawrenceville, NJ 08648  
609.895.6631  
609.896.1469 - fax  
kmack@foxrothschild.com

Joe R. Caldwell, Esq.  
Baker Botts L.L.P.  
1299 Pennsylvania Ave. N.W.  
Washington, D.C. 20004-2400  
202.639.7788  
202.585.1074 - fax  
joe.caldwell@bakerbotts.com

Thomas Spiesman, Esq.  
Porzio Bromberg & Newman, P.C.  
100 Southgate Parkway  
Morristown, NJ 07962  
973.889.4208  
973.538.5146 – fax  
tspiesman@pbnlaw.com

Donald J. Camerson, II  
Bressler, Amery & Ross, P.C.  
325 Columbia Turnpike  
Florham Park, NJ 07932  
973.660.4433  
973.514.1660 - fax  
dcamerson@bressler.com

Robert A. White, Esq.  
Morgan, Lewis & Bockius LLP  
502 Carnegie Center  
Princeton, NJ 08540-6241  
609.919.6600

Keith E. Lynott, Esq.  
McCarter & English, LLP  
100 Mulberry Street  
4 Gateway Center  
Newark, NJ 07102  
973.622.4444  
973.624.7070 - fax  
klynott@mccarter.com

Norman W. Spindel, Esq.  
Lowenstein Sandler PC  
65 Livingston Avenue  
Roseland, NJ 07068  
973.597.2500  
973.597.2515 - fax  
nspindel@lowenstein.com

Corinne A. Goldstein, Esq.  
Covington & Burling, LLP  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004  
cgoldstein@cov.com  
202.662.5534  
202.778.5534 - fax  
cgoldstein@cov.com

Norman W. Spindel, Esq.  
Lowenstein Sandler PC  
65 Livingston Avenue  
Roseland, NJ 07068  
973.597.2500  
973.597.2515 - fax  
nspindel@lowenstein.com

Kenneth M. Worton, Esq.  
Deputy Attorney General  
State of New Jersey  
One Penn Plaza East  
Newark, NJ 07105-2246  
973.491.7034  
973.491.7044 - fax  
kworton@njtransit.com

Paul Casteleiro, Esq.  
200 Washington St., 5th Floor  
Hoboken, NJ 07030  
201.656.1696  
201.656.4688 - fax  
paul@casteleirolaw.com

John A. Daniels, Esq.  
Daniels & Daniels LLC  
6812 Park Ave.  
Guttenberg, NJ 07093  
202.868.1868  
201.868.2122 - fax  
jad1903@gmail.com

Bradley L. Mitchell, Esq.  
Stevens & Lee  
600 College Road East  
Suite 4400  
Princeton, NJ 08540  
609.987.6680  
610.371.7928 - fax  
blm@stevenslee.com

Howard A. Neuman, Esq.  
Satterlee Stephens Burke & Burke  
LLP  
33 Wood Avenue South  
Iselin, NJ 08830  
732.603.4966  
hneuman@ssbb.com

Nicholaus M. Kouletis, Esq.  
Pepper Hamilton, LLP  
Suite 400  
301 Carnegie Center  
Princeton, NJ 08543-5276  
609.452.0808  
609.452.1147 - fax  
kouletisn@pepperlaw.com

Robert T. Barnard, Esq.  
Thompson Hine LLP  
335 Madison Ave., 12th Floor  
New York, NY 10017  
212.344.5680  
212.344.6101 - fax  
Robert.Barnard@ThompsonHine.com

Thomas Spiesman, Esq.  
Porzio Bromberg & Newman, P.C.  
100 Southgate Parkway  
Morristown, NJ 07962  
973.889.4208  
973.538.5146 – fax  
tspiesman@pbnlaw.com

Carl R. Woodward, III, Esq.  
cwoodward@carellabyrne.com  
Brian H. Fenlon, Esq.  
bfenlon@carellabyrne.com  
Carella, Byrne, Bain, Gilfillan, Cecchi,  
Stewart & Olstein  
5 Becker Farm Road  
Roseland, NJ 07068  
973.994.1700

Gerald Poss, Esq.  
Gerald Poss, P.A. & Associates  
58 Vose Avenue  
South Orange, NJ 07079-2026  
973.762.6400  
gpossinc@aol.com

Russell S. Burnside, Esq.  
Greenberg Dauber Epstein & Tucker,  
P.C.  
One Gateway Center, Suite 600  
Newark, NJ 07201  
973.643.3700  
973.643.1218 - fax  
rburnside@greenbergdauber.com

Dated: November 23, 2009

Rebecca K. Brown  
LATHAM & WATKINS LLP  
One Newark Center, 16<sup>th</sup> Floor  
Newark, NJ 07101  
Tel: 973-639-1234  
Fax: 973-639-7298

Sign:



Attorney for Third-Party Defendant  
Covanta Essex Company