

Kenneth H. Mack, Esq.
FOX ROTHSCHILD LLP
997 Lenox Drive
Building Three
Lawrenceville, NJ 08648
Tel: (609) 896-3600
Fax: (609) 896-1469

ATTORNEY FOR THIRD-PARTY DEFENDANT THE DOW CHEMICAL 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.

AMERICAN CYANAMID,
BAYER CORPORATION,
BAYONNE INDUSTRIES, INC.,
BP MARINE AMERICAS, INC.,
CHEMICAL WASTE MANAGEMENT INC.,
DOW CHEMICAL COMPANY,
DURAPORT REALTY ONE LLC,

SUPERIOR COURT OF NEW
JERSEY
LAW DIVISION: ESSEX COUNTY

DOCKET NO. L-9868-05 (PASR)

CIVIL ACTION

**THE DOW CHEMICAL
COMPANY'S ANSWER TO
THIRD-PARTY COMPLAINT
"D"**

DURAPORT REALTY TWO LLC,
EPEC POLYMERS, INC.,
GAESS ENVIRONMENTAL SERVICES, INC.,
GATX TERMINALS CORPORATION,
GOODRICH CORPORATION,
HESS CORPORATION,
IMTT-BAYONNE,
KINDER MORGAN ENERGY PARTNERS,
L.P.,McKESSON CORPORATION,
McKESSON ENVIROSYSTEMS CO.,
SAFETY-KLEEN CORPORATION,
SHULTON INCORPORATED, USA,
SUN PIPELINE CO.,
SUN REFINING AND MARKETING CO.,
SUN OIL CO.,
SUPERIOR MPM LLC,
THOMAS & BETTS CORP.,
WASTE MANAGEMENT, INC.
WYETH,

Third-Party Defendants.

**THE DOW CHEMICAL COMPANY'S ANSWER
TO THIRD-PARTY COMPLAINT "D"**

Third-Party Defendant The Dow Chemical Company ("Dow"), by and through its undersigned counsel, and (in accordance with this Court's Case Management Order V, Subsection Section 9(iv) entered April 16, 2009), without waiver of any kind, hereby elects to answer only those allegations of the Third-Party Complaint "D" (the "Complaint") by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc. (the "Third-Party Plaintiffs"), which relate specifically to it, including any allegations concerning parcel(s) or site(s) which the Complaint alleges Dow is associated with, and says:

AS TO "PROCEDURAL BACKGROUND"

1-7. No response is required pursuant to CMO V as to paragraphs 1 through 7 of the Complaint.

AS TO THE FIRST COUNT

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

8. Dow incorporates by reference each of its responses to paragraphs 1-7, inclusive, of the Complaint, as if fully set forth herein its responses as asserted in Paragraph 8 hereof.

9. Dow denies that it is “a Discharger” and/or “a person in any way responsible” for the discharge of Hazardous Substances into the Newark Bay Complex” as alleged in paragraph 9 of the Complaint, refers and relates to the text of the Spill Act for the content thereof, and is without knowledge or information sufficient to form a belief as to the truth of the remaining matters stated in paragraph 9 of the Complaint.

10. It refers and relates to the text of N.J.S.A. 58:10-23.11f.a.(2)(a), and the remaining provisions of the Spill Act for the content thereof and otherwise makes no response to the averments of paragraph 10 of the Complaint.

11. It denies that Third Party Plaintiffs are entitled to contribution from Dow under the Spill Act and is otherwise without knowledge or information sufficient to form a belief as to the truth of the matter stated in paragraph 11 of the Complaint.

12. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 12 of the Complaint.

13. It denies that it has or is violating the Spill Act, further denies that Third Party Plaintiffs are entitled to contribution from Dow, and is otherwise without knowledge or information sufficient to form a belief as to the truth of the matter stated in paragraph 13 of the Complaint.

14-74. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraphs 14 through 74 of the Complaint, except denies any liability on the part of Dow which any such allegations may seek with respect to Dow.

AS TO “DURAPORT REALTY SITE”

75. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 75 of the Complaint.

76. It admits that the New Jersey Department of Environmental Protection issued a “Directive and Notice to Insurers” regarding the “Duraport Realty Site” ostensibly pursuant to the Spill Act, refers and relates to the text of such Directive for its contents, but denies any liability as to Dow which may be sought to be conferred by the allegations of paragraph 76 of the Complaint.

77. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 77 of the Complaint but denies any liability with respect to Dow which may be sought to be conferred by the allegations of paragraph 77 of the Complaint.

78. It denies each and every allegation set forth in paragraph 78 of the Complaint as to Dow, except admits that Dow is a Delaware Corporation with its principal place of business in Midland, Michigan, and is without knowledge or information (or understanding, in light of the vagueness of a number of these allegations) sufficient to form a belief as to the truth of the remaining matters stated in paragraph 78 of the Complaint.

79. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 79 of the Complaint except denies such allegations to the extent directed at Dow.

80. It denies each and every allegation set forth in paragraph 80 of the Complaint, except is without knowledge or information sufficient to form a belief as to the truth of the matters stated with respect to “Rollins Terminals” therein.

81. It denies each and every allegation set forth in paragraph 81 of the Complaint as to Dow, and is without knowledge or information sufficient to form a belief as to the truth of the remaining matters stated therein.

82-89. No response by Dow is required to the allegations of paragraphs 82 through 89, inclusive, of the Complaint.

AS TO THE SECOND COUNT - "STATUTORY CONTRIBUTION"

90. Dow repeats, reiterates, and realleges each and every one of its responses to paragraphs 1 through 89, inclusive, of the Complaint and makes the same a part hereof as though fully set forth herein.

91. It denies each and every allegation set forth in paragraph 91 of the Complaint.

WHEREFORE, Third Party Defendant, Dow, demands judgment dismissing the Complaint as against it, and taxing costs thereof upon the Third Party Plaintiffs, and such other or further relief as the Court deems just, equitable, or appropriate.

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 Dow upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Dow 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") with respect to Newark Bay Complex and Passaic River, or the discharges alleged against Third Party Plaintiffs, their agents, employees, successors and assigns ("Third Party Plaintiffs").

THIRD AFFIRMATIVE DEFENSE

Claims of Third-Party Plaintiffs, their agents, employees, successors and assigns (“Third-Party Plaintiffs”) as against Dow are barred, in whole or in part, by the statutory defenses to liability provided by the Spill Act and Water Pollution Control Act (“WPCA”).

FOURTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs have no Spill Act claim against Dow 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’ claims are barred by the entire controversy doctrine.

SIXTH AFFIRMATIVE DEFENSE

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

SEVENTH AFFIRMATIVE DEFENSE

Damages sought by Third-Party Plaintiffs are wholly speculative, conjectural, unreasonable, excessive and/or arbitrary and capricious.

EIGHTH AFFIRMATIVE DEFENSE

Dow cannot be liable for or be required to pay Third-Party Plaintiffs’ damages that arise out of conduct not prohibited under N.J.S.A. 58:10-23.11c.

NINTH 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 permitted by law including applicable Environmental Laws.

TENTH AFFIRMATIVE DEFENSE

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

ELEVENTH AFFIRMATIVE DEFENSE

The claims asserted against Dow in the Complaint are barred because at all relevant times Dow exercised due care with respect to hazardous substances, if any, that may have been handled at the subject property alleged, 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 Dow 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, instrumentals and officials, and the United States and its agencies and officials.

TWELFTH AFFIRMATIVE DEFENSE

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

THIRTEENTH THIRD AFFIRMATIVE DEFENSE

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

FOURTEENTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims against Dow 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.

FIFTEENTH 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, and last clear chance.

SIXTEENTH AFFIRMATIVE DEFENSE

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

SEVENTEENTH AFFIRMATIVE DEFENSE

Third Party Plaintiffs' 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.

EIGHTEENTH AFFIRMATIVE DEFENSE

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

NINETEENTH AFFIRMATIVE DEFENSE

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

TWENTIETH AFFIRMATIVE DEFENSE

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

TWENTY-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 that Third-Party Plaintiffs have not incurred Cleanup and Removal costs recoverable under the Spill Act and that Third-Party Plaintiffs have failed to conduct cleanup and removal activities in accordance with the National Contingency Plan to the greatest extent possible, as required under the Spill Act.

TWENTY-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.

TWENTY-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* including, without limit, State of New Jersey agencies and instrumentalities, including, without limitation, Trustees for tidelands, and United States agencies and instrumentalities with liability under the Spill Act.

TWENTY-FOURTH 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 more than their equitable share of that liability.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Dow denies that Third-Party Plaintiffs have suffered any harm whatsoever arising from the matters alleged as to Dow in the Complaint, but in the event that they did suffer any form

of injury or damage cognizable with such claims, such injury was caused by the intervening acts, omissions, or superseding acts of persons or entities over whom Dow exercised no control and for whose conduct Dow was not responsible including, without limit, unpermitted and storm event discharges from publicly owned treatment works.

TWENTY-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 Dow, 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.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Although Dow denies that it is liable for the contamination described in the Complaint, in the event it is found liable, Dow 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.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Arguendo, but without admission that Dow is jointly and severally liable with Third Party Plaintiffs or any other person for the matters alleged in the Complaint, then, 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.

TWENTY-NINTH AFFIRMATIVE DEFENSE

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

THIRTIETH AFFIRMATIVE DEFENSE

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

THIRTY-FIRST AFFIRMATIVE DEFENSE

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

THIRTY-SECOND AFFIRMATIVE DEFENSE

Dow's liability to Third-Party Plaintiffs, if any, is limited to Spill Act and contribution claims by Third Parties excludes any such claims which may properly be apportioned to parties pursuant to *Burlington Northern and Santa Fe Railway Co., et al. v. United States, et al.*, 556 U.S. ____; 129 S.Ct. 1870 (2009), and other comparable decisional law.

THIRTY-THIRD AFFIRMATIVE DEFENSE

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

THIRTY-FOURTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs cannot seek contribution under the Joint Tortfeasors Contribution Law because Dow is not liable for “the same injury” caused by Third-Party Plaintiffs’ discharges and do not share a common liability to the State.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

Dow 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 Dow.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

Dow reserves the right to assert and hereby invoke each and every defense that may be available during the course of this action.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

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

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

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

THIRTY-NINTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs claims for contribution, whether under the Spill Act or the New Jersey statutory provisions for contribution (including N.J.S.A. 2A:53A-1 *et seq.*), are derivative of, and are therefore no greater than, Plaintiffs’ claims against Third-Party Plaintiffs. Consequently, Third-Party Plaintiffs’ claims against Dow are barred to the extent of any legal extinguishments of actual or potential claims by the Plaintiffs against Dow 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 Dow.

FORTIETH AFFIRMATIVE DEFENSE

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

Third-Party Plaintiffs' claims are barred to the extent the relief sought by Third-Party Plaintiffs in the Third-Party Complaint which conflict with Dow'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 Dow, thereby exposing Dow to inconsistent responsibilities, penalties and liabilities, and the possibility of paying twice for the same actions (i.e., double recovery).

FORTY-SECOND AFFIRMATIVE DEFENSE

To the extent Dow 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 Dow, 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.

FORTY-THIRD AFFIRMATIVE DEFENSE

Without admitting liability, Dow 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.

FORTY-FOURTH AFFIRMATIVE DEFENSE

The Third Party Plaintiffs have failed in whole or in part to mitigate any damages allegedly sustained by them.

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.

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

FOX ROTHCHILD LLP
Attorney for Third-Party Defendant Dow


BY: Kenneth H. Mack

Dated: October 21, 2009

DESIGNATION OF TRIAL COUNSEL

In accordance with Rule 4:25-4, you are hereby notified that Kenneth H. Mack is assigned to try this case.

FOX ROTHCHILD LLP
Attorney for Third-Party Defendant Dow


BY: Kenneth H. Mack

Dated: October 21, 2009

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 all or some of the non-parties listed on the October 7, 2009 posting by O'Melveny and Myers may constitute non-parties who should be joined in the action pursuant to R. 4:28; and
- (d) In either event, some or all of such non-parties are subject to joinder pursuant to R.4:29-1(b) because of potential liability to any party on the basis of the same transactional facts.

FOX ROTHCHILD LLP
Attorney for Third-Party Defendant Dow


BY: Kenneth H. Maek

Dated: October 21, 2009

Kenneth H. Mack, Esq.
FOX ROTHSCHILD LLP
997 Lenox Drive
Building Three
Lawrenceville, NJ 08648
Tel: (609) 896-3600
Fax: (609) 896-1469

ATTORNEY FOR THIRD-PARTY DEFENDANT THE DOW CHEMICAL COMPANY

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SUPERIOR COURT OF NEW JERSEY
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CIVIL ACTION

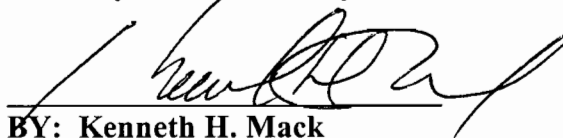
CERTIFICATION OF SERVICE

I, Kenneth H. Mack, hereby certify that on October 21, 2009, I caused to be served an Answer to Third Party Complaint "D" on behalf of Third Party Defendant The Dow Chemical Company by first class mail to the Clerk of the Court, Superior Court of New Jersey, Essex County, 50 W. Market Street, Newark, NJ 07102.

I further certify that the above-referenced Answer was served electronically on all parties who have consented to service by electronic posting on the following website: <http://njdepvocc.sfile.com>.

I further certify that the above-referenced Answer was served by regular mail on counsel for all parties who have not consented to service by electronic posting.

FOX ROTHSCHILD LLP
Attorney for Third-Party Defendant Dow



BY: Kenneth H. Mack

Dated: October 21, 2009