

**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**  
**ESSEX CHEMICAL CORPORATION**

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

**ESSEX CHEMICAL CORPORATION'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 CORPORATION,  
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.,

Third-Party Defendants.

**ESSEX CHEMICAL CORPORATION'S ANSWER TO  
THIRD-PARTY COMPLAINT "B"**

Third-Party Defendant Essex Chemical Corporation ("Essex"), by and through its undersigned counsel, and (in accordance with this Court's Case Management Order V, Section 9, entered April 16, 2009), without waiver of any kind, hereby elects to answer only those allegations of the Third-Party Complaint "B" (the "Complaint") by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc. ("Third-Party Plaintiffs"), which relate specifically to it, and says:

**GENERALLY**

1. Essex 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. No response is required pursuant to CMO V as to paragraphs 1 through 15 of the Complaint.

**AS TO THE “THIRD-PARTY PLAINTIFFS”**

**(Paragraphs 16 through 18)**

3. No response is required pursuant to CMO V as to paragraphs 16 through 18 of the Complaint.

**AS TO THE “THIRD-PARTY DEFENDANTS”**

**(Paragraphs 19 through 210)**

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. With respect to the allegations of paragraph 84 of the Complaint, Essex admits that it is a corporation formed under the laws of the State of New Jersey with a place of business in Midland, Michigan as alleged in paragraph 84.

6. The allegations in paragraph 210 state a legal conclusion as to which no response is required.

**AS TO “DEFINITIONS”**

**(Paragraphs 211 through 236)**

7. No response is required pursuant to CMO V as to paragraphs 211 through 236 of the Complaint.

**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.

**AS TO THE “ESSEX CHEMICAL SITE”**

**(Paragraphs 1206 through 1223)**

9. The averments of paragraph 1206 of the Complaint appear to be for purposes of internal definition, only, and Essex makes no response thereto, but denies any averment therein which seeks to confer any liability upon Essex.

10. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 1207 of the Complaint, but denies any liability with respect to Essex which may be sought to be conferred by the allegations therein.

11. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 1208 of the Complaint but denies any liability with respect to Essex which may be sought to be conferred by the allegations therein.

12. It admits the allegations set forth in paragraph 1209 of the Complaint except denies that Dixon Chemical and Research Company, Inc. was incorporated in New Jersey in 1953.

13. It admits that Essex Industrial Chemicals, Inc. ("EIC") was a wholly owned subsidiary of Essex and that EIC operated a facility located at 330 Doremus Avenue, Newark, New Jersey (the "location") for a period of time, but denies any liability which may be sought to be conferred by the allegations of paragraph 1210 of the Complaint as to Essex.

14. It admits that EIC was acquired by Peridot Chemicals, Inc. and otherwise denies the allegations of paragraph 1211 of the Complaint.

15. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 1212 of the Complaint, but denies that Essex is liable in any respect for the actions or inactions of either or both of Peridot or General Chemical Corporation (now allegedly named Gentek Holding L.L.C.).



16. It denies each and every allegation set forth in paragraph 1213 of the Complaint except that it is without knowledge or information sufficient to form a belief as to the truth of the matters stated therein with respect to “Gentek” or “Peridot”, and denies any liability with respect to Essex which may be sought to be conferred by such allegations.

17. It admits that sulfuric acid, oleum, aluminum sulfate, magnesium oxide, and basic chromium sulfate were, for respective specific periods of time, produced at the location referred to in the Complaint but denies the remaining allegations of paragraph 1214 of the Complaint and any liability of Essex sought to be conferred by any allegations in this paragraph.

18. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 1215 of the Complaint.

19. It denies each and every allegation as set forth in paragraph 1216 of the Complaint.

20. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 1217 of the Complaint but denies any liability with respect to Essex which may be sought to be conferred by the allegations of paragraph 1217 of the Complaint..

21. It admits that on or about July 11, 1974 the United States Attorney for the District of New Jersey filed certain charges against Essex alleging violations of 33 U.S.C. § 407 and refers to the text of such filing for its content, but denies any liability with respect to Essex which may be sought to be conferred by the allegations of paragraph 1218 of the Complaint.

22. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 1219 of the Complaint but denies any liability with respect to

Essex which may be sought to be conferred by the allegations of paragraph 1219 of the Complaint..

23. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 1220 of the Complaint but denies any liability with respect to Essex which may be sought to be conferred by the allegations of paragraph 1220 of the Complaint.

24. It denies each and every allegation set forth in the paragraph 1221 of the Complaint.

25. It admits that EPA sent a General Notice Letter on or about September 15, 2003 and refers to the text of that letter for its content, but denies any liability as to Essex which may be sought to be conferred by the allegations of paragraph 1222 of the Complaint.

26. It denies each and every allegation set forth in paragraph 1223 of the Complaint as to Essex except it is without knowledge or information sufficient to form a belief as to the truth of the matters stated with respect to Gentek therein.

#### **AS TO FIRST COUNT**

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

27. Essex incorporates by reference as if fully set forth herein each of its responses in Paragraphs 1 through 3445 of the Complaint.

28. Essex 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 3447 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 3447 of the Complaint.

29. 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 3448 of the Complaint.

30. It denies that Third-Party Plaintiffs are entitled to contribution from Essex 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 3449 of the Complaint.

31. It is without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 3450 of the Complaint.

32. It denies that Third-Party Plaintiffs are entitled to contribution from Essex, and is otherwise without knowledge or information sufficient to form a belief as to the truth of the matters stated in paragraph 3451 of the Complaint.

#### **AS TO SECOND COUNT – “STATUTORY CONTRIBUTION”**

33. Essex repeats, reiterates, and realleges each and every one of its responses to paragraphs 1 through 3451, inclusive, of the Complaint and makes the same a part hereof as though fully set forth herein.

34. It denies each and every allegation set forth in paragraph 3453 of the Complaint.

**WHEREFORE**, Third-Party Defendant, Essex, 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 Essex upon which relief can be granted.

## **SECOND AFFIRMATIVE DEFENSE**

Essex 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 Essex 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 Essex 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**

Essex 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, Essex 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 Essex in the Complaint are barred because at all relevant times Essex 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 Essex 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, instrumentalities 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 AFFIRMATIVE DEFENSE**

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

### **FOURTEENTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims against Essex 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 Essex, were it claimed directly by Plaintiffs, would amount to unlawful taxation.

#### **TWENTIETH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims against Essex 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 shares of that liability.

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

Essex denies that Third-Party Plaintiffs have suffered any harm whatsoever arising from the matters alleged as to Essex 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 Essex exercised no control or for whose conduct Essex 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 Essex, 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 Essex denies that it is liable for the contamination described in the Complaint, in the event it is found liable, Essex 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 Essex 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 Essex alleged to give rise to liability in the Complaint is the subject of a release, covenant not to sue, or has been 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 Essex, 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**

Essex's liability to Third-Party Plaintiffs, if any, is limited to Spill Act and contribution claims by Third Parties 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.

### **THIRTY-THIRD AFFIRMATIVE DEFENSE**

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

### **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs cannot seek contribution under the Joint Tortfeasors Contribution Law because Essex 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**

Essex 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 Essex.

### **THIRTY-SIXTH AFFIRMATIVE DEFENSE**

Essex 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 Essex liable, in contribution, for any claims for which it would be a violation of public policy to hold Essex 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 Essex 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 Essex are barred to the extent of any legal extinguishments of actual or potential claims by the Plaintiffs as to Essex 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 Essex.

### **FORTIETH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims are barred because the relief sought against Essex, were it claimed directly by Plaintiffs, would amount to a "taking" of Essex'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 Essex's or others' 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 Essex, thereby exposing Essex 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 Essex 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 Essex,

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, Essex 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.

**COUNTERCLAIMS, 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 Essex 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.

**FOX ROTHSCHILD LLP**  
**Attorney for Third-Party Defendant Essex**

  
**BY: Kenneth H. Mack**

Dated: January 25, 2010

**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 ROTHSCHILD LLP**  
**Attorney for Third-Party Defendant Essex**

  
**BY: Kenneth H. Mack**

Dated: January 25, 2010

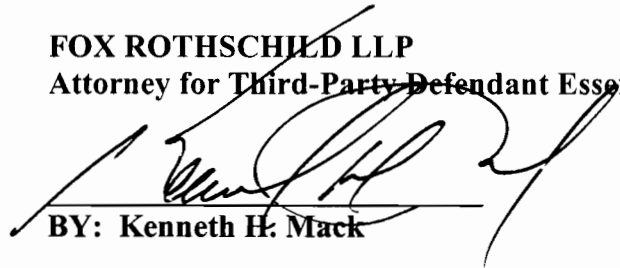
**CERTIFICATION PURSUANT TO R. 4:5-1(b) (2)**

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 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 ROTHSCHILD LLP**  
**Attorney for Third-Party Defendant Essex**



**BY: Kenneth H. Mack**

Dated: January 25, 2010