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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,

v.

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,

v.

3M COMPANY, *et als.*,

Third-Party Defendants.

SUPERIOR COURT OF  
NEW JERSEY

LAW DIVISION – ESSEX COUNTY

Docket No. ESX-L-9868-05 (PASR)

**GENTEK HOLDING LLC'S  
ANSWER TO THIRD-PARTY  
COMPLAINT "B"**

**GENTEK HOLDING LLC'S ANSWER AND AFFIRMATIVE DEFENSES**  
**TO THIRD-PARTY COMPLAINT "B"**

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

1. GenTek 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."

**PROCEDURAL BACKGROUND**  
**(Paragraphs 1 - 15)**

2. GenTek avers that no response is required pursuant to CMO V. To the extent a response is deemed to be necessary, the factual averments contained in Paragraphs 1 through 15 are denied.

**THE PARTIES**  
**Third-Party Plaintiffs**  
**(Paragraphs 16 - 18)**

3. No response is required pursuant to CMO V. To the extent a response is deemed to be necessary, the factual averments contained in Paragraphs 16 through 18 are denied.

**Third-Party Defendants**  
**(Paragraphs 19 - 209)**

4. To the extent that the allegations in Paragraphs 19 - 209 relate to other parties, no response is required pursuant to CMO V. To the extent a response is deemed to be necessary, the factual averments are denied.

5. The factual averments contained in Paragraph 98 are admitted. By way of further response, GenTek Holding, LLC denies being the owner or operator of the so-called “Essex Site” as that phrase is defined in the Complaint.

6. The allegations contained in Paragraph 210 constitute conclusions of law to which no response is required. To the extent a response is deemed to be necessary, the allegations are denied.

**DEFINITIONS**  
**(Paragraphs 211 – 236)**

7. Paragraphs 211 through 236 constitute definitions, to which no response is required pursuant to CMO V. To the extent a response is deemed to be necessary, the factual averments contained in Paragraphs 211 through 236 are denied.

**FACTUAL ALLEGATIONS**  
**(Paragraphs 237 – 3445)**

8. The pleadings referenced in Paragraphs 237 through 3445 refer to other parties or sites unrelated to GenTek and therefore, no response is required pursuant to CMO V. To the extent a response is deemed to be necessary, the factual averments are denied.

**“Essex Chemical Site”**  
**(Paragraphs 1206 – 1223)**

9. Paragraph 1206 appears to be limited to averments directed to an “Essex Chemical Company” and, therefore, no response is required pursuant to CMO V.

10. GenTek admits the averments regarding the general location of the so-called “Essex Site” with postal address of 330 Doremus Avenue in Newark. By way of further response, GenTek Holding, LLC is not the owner or operator of the facility currently located at 330 Doremus Avenue in Newark. GenTek is aware that, currently, uncontaminated storm water from the facility is directed to storm drains and is discharged to the Passaic River via permitted outfalls, while other storm water is collected in secondary containment and used as process water. GenTek denies that the River receives unimpeded overland flow and sheet flow directly from the so-called Essex Site. After reasonable investigation, GenTek is without knowledge or information sufficient to form a belief as to the remaining averments contained in Paragraph 1207. Accordingly, the remaining factual averments contained in Paragraph 1207 are denied.

11. Based upon the definition of “Essex” contained in Paragraph 1209 of the Complaint, the averments of Paragraph 1208 are directed to “Essex Chemical Corporation” and, therefore, no response is required pursuant to CMO V. To the extent a response is deemed to be necessary, after reasonable investigation, GenTek is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 1208. Accordingly, the factual averments contained in Paragraph 1208 are denied.

12. The averments of Paragraph 1209 are directed to “Dixon Chemical and Research Company, Inc.” and also to Essex Chemical Corporation and, therefore, no response is required pursuant to CMO V. By way of further response, the allegations relating to incorporation and corporate name changes are predicated on legal conclusions to which no response is required. To the extent a response is deemed to be necessary, after reasonable investigation, GenTek is without knowledge or information sufficient to form a belief as to any factual averments

contained in Paragraph 1209. Accordingly, the factual averments contained in Paragraph 1209 are denied.

13. The averments of Paragraph 1210 relate to “Essex Industrial Chemicals Incorporated” and also to Essex Chemical Corporation and, therefore, no response is required pursuant to CMO V. By way of further response, the allegations relating to Essex Industrial being “formed and operated as a wholly-owned subsidiary of Essex” are predicated on legal conclusions to which no response is required. To the extent a response to the factual averments of Paragraph 1210 is deemed to be necessary, the factual averments regarding the relationship between Essex Chemical Corporation and Essex Industrial Chemicals Corporation are admitted on information and belief.

14. The averments of Paragraph 1211 relate to “Peridot Chemicals (New Jersey) Inc.” and Essex Industrial Chemicals Incorporated and, therefore, no response is required pursuant to CMO V. By way of further response, the allegations of Paragraph 1211 constitute legal conclusions to which no response is required. To the extent a response is deemed to be necessary, the factual averments contained in Paragraph 1211 regarding Peridot’s acquisition of Essex Industrial are admitted on information and belief.

15. The allegations contained in Paragraph 1212 constitute conclusions of law for which no response is required. To the extent a response is deemed to be necessary, the factual averments contained Paragraph 1212 regarding the merger between Peridot and General Chemical Corporation are admitted. By way of further response, on October 11, 2002, General Chemical Corporation and various of its affiliates filed petitions for relief under chapter 11 of the Bankruptcy Code. Pursuant to a Joint Plan of Reorganization approved by order of the United States Bankruptcy Court for the District of Delaware dated October 7, 2003, certain

corporate restructuring transactions were effectuated, including, without limitation, changing the name of General Chemical Corporation to GenTek Holding Corporation. GenTek Holding Corporation changed its corporate structure from a corporation to a limited liability company in 2005. Therefore, GenTek Holding, LLC, denies being the successor to the liabilities of “Essex Industrial” as pleaded in Paragraph 1212.

16. No response is required pursuant to CMO V to the averments relating to Essex Chemical Corporation contained in Paragraph 1213. The allegations relating to GenTek as a successor and owner and/or operator are predicated upon legal conclusions for which no response is required. To the extent a response is deemed to be necessary, on October 11, 2002, General Chemical Corporation and various of its affiliates filed petitions for relief under chapter 11 of the Bankruptcy Code. Pursuant to a Joint Plan of Reorganization approved by order of the United States Bankruptcy Court for the District of Delaware dated October 7, 2003, certain corporate restructuring transactions were effectuated, including, without limitation, changing the name of General Chemical Corporation to GenTek Holding Corporation. GenTek Holding Corporation changed its corporate structure from a corporation to a limited liability company in 2005. Therefore, GenTek Holding, LLC, denies being the successor to the liabilities of Essex Industrial or Peridot. By way of further response, GenTek Holding, LLC is not owner or operator of the facility currently located at 330 Doremus Avenue in Newark.

17. The factual averments contained in Paragraph 1214 are admitted in part and denied in part as follows: GenTek Holding, LLC is not the owner or operator of the facility currently located at 330 Doremus Avenue in Newark. GenTek is aware that the facility located at 330 Doremus Avenue currently manufactures aluminum sulfate. The phrase “Hazardous Substances” is predicated upon a legal conclusion for which no response is required. To the

extent that a response is deemed to be required, aluminum trihydrate and sulfuric acid are currently used in the manufacturing processes conducted at the facility located at 330 Doremus Avenue.

18. The factual averments contained in Paragraph 1215 are admitted in part and denied in part as follows: GenTek Holding, LLC is not the owner or operator of the facility currently located at 330 Doremus Avenue in Newark. GenTek is aware that some but not all of the chemicals listed in Paragraph 1215 have been reported as detected in analytical results for samples of soil and/or groundwater collected from the facility located at 330 Doremus Avenue.

19. GenTek is unaware, and therefore denies, that any flooding of the facility has occurred during the period in which GenTek is alleged to be associated with the so-called “Essex Site.” After reasonable investigation, GenTek is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in Paragraph 1216. Accordingly, the remaining factual averments contained in Paragraph 1216 are denied.

20. GenTek Holding, LLC is not the owner or operator of the facility currently located at 330 Doremus Avenue in Newark, and no response is required pursuant to CMO V to the averments contained in Paragraph 1217 that predate GenTek’s alleged association with the site. To the extent that a response is deemed to be necessary, GenTek denies having any first-hand knowledge of the factual averments contained in Paragraph 1217, but admits that one document provided as part of the Third-Party Plaintiffs’ nexus package appears to report a release of oleum and nitric acid on October 31, 1972. GenTek does not admit or vouch for the accuracy of that document. GenTek denies that this reported event had any impact on the Passaic River or the wider Newark Bay Complex.

21. The factual averments contained in Paragraph 1218 relate to Essex Chemical Corporation and, therefore, no response is required by GenTek. By way of further response, no response is required pursuant to CMO V to the averments contained in Paragraph 1218 that predate GenTek's alleged association with the site. To the extent that a response is deemed to be necessary, GenTek denies having any first-hand knowledge of the factual averments contained in Paragraph 1218, but admits that one document provided as part of the Third-Party Plaintiffs' nexus package appears to relate to charges filed by the United States Attorney General for the District of New Jersey against Essex Chemical Corporation alleging violations of 33 U.S.C. § 407 for discharge of acidic compounds. GenTek does not admit or vouch for the accuracy of that document. GenTek denies that this reported event had any impact on the Passaic River or the wider Newark Bay Complex.

22. GenTek Holding, LLC is not the owner or operator of the facility currently located at 330 Doremus Avenue in Newark, and no response is required pursuant to CMO V to the averments contained in Paragraph 1219 concerning the so-called Essex Site during any period of time when GenTek was not associated with the site. To the extent that a response is deemed to be necessary, GenTek denies having any first-hand knowledge of the factual averments contained in Paragraph 1219, but admits that one document provided as part of the Third-Party Plaintiffs' nexus package appears to report a release of aluminum sulfate on April 4, 1983. GenTek does not admit or vouch for the accuracy of that document. GenTek denies that this reported event had any impact on the Passaic River or the wider Newark Bay Complex.

23. GenTek Holding, LLC is not the owner or operator of the facility currently located at 330 Doremus Avenue in Newark, and no response is required pursuant to CMO V to the averments contained in Paragraph 1220 concerning the so-called Essex Site during any



period of time when GenTek was not associated with the site. To the extent that a response is deemed to be necessary, GenTek denies having any first-hand knowledge of the factual averments contained in Paragraph 1220, but admits that one document provided as part of the Third-Party Plaintiffs' nexus package appears to report an air-borne release of oleum on October 17, 1991. GenTek does not admit or vouch for the accuracy of that document. GenTek denies that this reported event had any impact on the Passaic River or the wider Newark Bay Complex.

24. No response is required pursuant to CMO V to the averments contained in Paragraph 1221 that predate GenTek's alleged association with the site. To the extent a response is deemed to be necessary, the factual averments are denied.

25. The averments of Paragraph 1222 are directed at Essex Chemical Corporation and therefore no response is required by GenTek pursuant to CMO V.

26. The allegations contained in Paragraph 1223 are legal conclusions to which no response is required. To the extent a response is deemed to be necessary, the allegations are denied.

#### **FIRST COUNT**

#### **New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11.f.a.2(a)** **(Paragraphs 3446-3451)**

27. The responses contained in Paragraphs 1 through 26 are incorporated herein by reference.

28. As to GenTek, the allegations in Paragraph 3447 are legal conclusions to which no response is required. To the extent a response is deemed to be necessary, the allegations are denied.

29. As to GenTek, the allegations in Paragraph 3448 are legal conclusions to which no response is required. To the extent a response is deemed to be necessary, the allegations are denied.

30. As to GenTek, the allegations in Paragraph 3449 are legal conclusions to which no response is required. To the extent a response is deemed to be necessary, the allegations are denied. By way of further response, it is denied that Third-Party Plaintiffs are entitled to contribution from GenTek.

31. As to GenTek, the allegations in Paragraph 3450 are legal conclusions to which no response is required. To the extent a response is deemed to be necessary, the allegations are denied.

32. As to GenTek, the allegations in Paragraph 3451 are legal conclusions to which no response is required. To the extent a response is deemed to be necessary, the allegations are denied. By way of further response, it is denied that Third-Party Plaintiffs are entitled to contribution from GenTek.

**WHEREFORE**, GenTek respectfully demands judgment in its favor and against Third-Party Plaintiffs on this Count, together with costs and an award of fees and such other and further relief that this Court deems necessary and proper. By way of further response, GenTek denies that Third-Party Plaintiffs are entitled to any of the relief demanded in the WHEREFORE clause of their Complaint.

**SECOND COUNT**  
**Statutory Contribution**  
**(Paragraphs 3452-3453)**

33. The responses contained in Paragraphs 1 through 32 are incorporated herein by reference.

34. As to GenTek, the allegations in Paragraph 3453 are legal conclusions to which no response is required. To the extent a response is deemed to be necessary, the allegations are denied. By way of further response, it is denied that Third-Party Plaintiffs are entitled to contribution from GenTek.

**WHEREFORE**, GenTek respectfully demands judgment in its favor and against Third-Party Plaintiffs on this Count, together with costs and an award of fees and such other and further relief that this Court deems necessary and proper. By way of further response, GenTek denies that Third-Party Plaintiffs are entitled to any of the relief demanded in the WHEREFORE clause of their Complaint.

### **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 GenTek upon which relief can be granted.

#### **SECOND AFFIRMATIVE DEFENSE**

GenTek 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 GenTek 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 GenTek under the WPCA.

#### **SIXTH AFFIRMATIVE DEFENSE**

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

#### **SEVENTH AFFIRMATIVE DEFENSE**

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

#### **EIGHTH AFFIRMATIVE DEFENSE**

One or both of the Third-Party Plaintiffs do not have standing to sue.

#### **NINTH AFFIRMATIVE DEFENSE**

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 GenTek. 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**

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

#### **FOURTEENTH AFFIRMATIVE DEFENSE**

At common law, GenTek held, and still holds, an 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. GenTek 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 GenTek 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 GenTek 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 GenTek as well, including the claims set forth in the Third-Party Complaint.

**SIXTEENTH AFFIRMATIVE DEFENSE**

The Third-Party Complaint is barred and/or 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, GenTek 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 GenTek in the Third-Party Complaint are barred because at all relevant times GenTek 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 GenTek had no control, whether by, in whole or in 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 GenTek.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims against GenTek are barred, in whole or in part, by the applicable Statute of Limitations, Statute of Repose, and/or 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 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 GenTek, were it claimed directly by Plaintiffs, would amount to unlawful taxation.

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

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

#### **THIRTIETH AFFIRMATIVE DEFENSE**

GenTek 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, 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 cannot 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 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**

GenTek 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 GenTek exercised no control and for whose conduct GenTek 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 GenTek, 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 GenTek denies that it is liable for the contamination described in Third-Party Plaintiffs' Complaint, in the event it is found liable, GenTek 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 GenTek 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 GenTek, 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 GenTek cannot be found retroactively liable.

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

Any discharge that allegedly originated from GenTek, 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 GenTek 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 AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims are barred due to their own conduct unilaterally, and without notice to GenTek, 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**

GenTek'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.*, 129 S.Ct. 1870 (2009), and other comparable decisional law.

#### **FORTY-SIXTH AFFIRMATIVE DEFENSE**

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

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

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

#### **FORTY-EIGHTH AFFIRMATIVE DEFENSE**

Third-Party Plaintiffs' claims are barred to the extent they seek to hold GenTek liable, in contribution, for any claims for which it would be a violation of public policy to hold GenTek 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 GenTek 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 GenTek are barred to the extent of any legal extinguishments of actual or potential claims by the Plaintiffs against GenTek pertaining to the alleged environmental contamination of any site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against GenTek. Examples of legal extinguishments that are or may be applicable to GenTek including, with respect to each such site:

- A. Any release or covenant not to sue granted by Plaintiffs to GenTek;
- B. Any settlement or other compromise between Plaintiffs and GenTek;
- C. Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against GenTek;
- 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 GenTek, 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 GenTek, 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 GenTek, were it claimed directly by Plaintiffs, would amount to a "taking" of GenTek'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 GenTek'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 GenTek, thereby exposing GenTek 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 GenTek is acting or has acted to conduct environmental cleanup at site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against GenTek, 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, GenTek 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**

GenTek 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 GenTek.

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

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

#### **FIFTY-SEVENTH AFFIRMATIVE DEFENSE**

General Chemical Corporation and various of its affiliates filed petitions for relief under chapter 11 of the Bankruptcy Code. Pursuant to a Joint Plan of Reorganization approved by order of the United States Bankruptcy Court for the District of Delaware dated October 7, 2003, certain corporate restructuring transactions were effectuated, including, without limitation, changing the name of General Chemical Corporation to GenTek Holding Corporation. GenTek Holding Corporation changed its corporate structure from a corporation to a limited liability company in 2005. Therefore, GenTek Holding, LLC, denies having liability for the claims pleaded in the Complaint based upon the alleged actions or omissions of Dixon Chemical & Research Co., Inc., Essex Chemical Corporation, Essex Industrial Chemicals Inc., Peridot Chemical (New Jersey) Inc., or General Chemical Corporation.

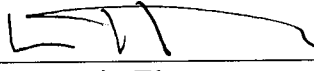
**COUNTERCLAIMS, CROSS-CLAIMS, THIRD/FOURTH PARTY CLAIMS**

Counterclaims, cross-claims, third-party claims and fourth-party claims are expressly reserved pursuant to CMO V. Therefore, GenTek is not required to assert such claims at this time.

**WHEREFORE**, Third-Party Defendant GenTek 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.

Respectfully Submitted,

WOLFF & SAMSON PC

By:   
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Attorneys for Third-Party Defendant  
GenTek Holding LLC



**RULE 4:5-1 CERTIFICATION**

I hereby certify that this matter is not the subject of any other action pending in any court or of a pending arbitration proceeding and I know of no other parties who should be joined in this action pursuant to R. 4:28 as it is the legal position of GenTek Holding LLC that liability of a third-party defendant for the claims set forth in Third-Party Complaint "B," if any, is several. However, should the Court determine that the potential liability of a third-party defendant, if any, is joint and several for the claims set forth in Third-Party Complaint "B," then GenTek Holding LLC states that there are other parties that may have discharged Hazardous Substances into the Newark Bay Complex contributing to the damages alleged by Defendants/Third-Party Plaintiffs. The identity of all known parties believed to have discharged Hazardous Substances will be identified in accordance with the procedures set forth in Case Management Order V. Likewise, additional discovery or investigation may identify additional parties to be joined in the litigation.

Wolff & Samson PC  
Attorneys for Third-Party Defendant  
GenTek Holding LLC

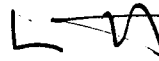
By: \_\_\_\_\_

Lee Henig-Elona

Dated: January 12, 2010

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Answer to Third-Party Complaint "B" and Affirmative Defenses was filed with the Clerk of Court, Superior Court of New Jersey, Essex County, and was served upon all parties which have consented to electronic service by posting to <http://njdepvocc.sfile.com> on this 12<sup>th</sup> day of January, 2010. All other counsel of record were served via first-class, regular mail.



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Lee Henig-Elona

Dated: January 12, 2010