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Attorneys for Third-Party Defendant
Phelps Dodge Industries, Inc.

NEW JERSEY DEPARTMENT OF	:	SUPERIOR COURT OF NEW JERSEY
ENVIRONMENTAL PROTECTION, THE	:	LAW DIVISION: ESSEX COUNTY
COMMISSIONER OF THE NEW JERSEY	:	
DEPARTMENT OF ENVIRONMENTAL	:	DOCKET NO. L-9868-05 (PASR)
PROTECTION and THE ADMINISTRATOR	:	
OF THE NEW JERSEY SPILL	:	
COMPENSATION FUND,	:	CIVIL ACTION
	:	
Plaintiffs	:	
v.	:	
	:	
OCCIDENTAL CHEMICAL	:	
CORPORATION, TIERRA SOLUTIONS,	:	
INC., MAXUS ENERGY CORPORATION,	:	
REPSOL YPF, S.A., YPF, S.A., YPF	:	
HOLDINGS, INC. and CLH HOLDINGS,	:	
INC.,	:	
Defendants.	:	
	:	
MAXUS ENERGY CORPORATION and	:	
TIERRA SOLUTIONS,	:	
INC.,	:	THIRD-PARTY DEFENDANT
Third-Party Plaintiffs,	:	PHELPS DODGE INDUSTRIES, INC.
	:	ANSWER TO THIRD-PARTY
vs.	:	COMPLAINT “B”
	:	
3M COMPANY, et al.,	:	
	:	
Third-Party Defendants.	:	

Third-Party Defendant Phelps Dodge Industries, Inc. (“PHELPS DODGE”), by and through its undersigned counsel, and in accordance with this Court’s Case Management Order V,

Section 9, entered April 16, 2009 ("CMO V"), hereby answers the Third-Party Complaint "B" by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc. ("Third-Party Plaintiffs"), as follows:

GENERALLY

1. PHELPS DODGE 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. The allegations in Paragraphs 1 through 15 relate to other parties, as such, no response is required of PHELPS DODGE pursuant to CMO V. To the extent a response is required, PHELPS DODGE responds that the referenced pleadings speak for themselves and denies any allegations in Paragraphs 1 through 15 to the extent they vary therefrom.

AS TO THIRD PARTY PLAINTIFFS

(Paragraphs 16 through 18)

3. The allegations in Paragraphs 16 through 18 relate to other parties, as such, no response is required of PHELPS DODGE pursuant to CMO V.

AS TO THIRD PARTY DEFENDANTS

(Paragraphs 19 through 210)

4. The allegations in Paragraphs 19 through 146 relate to other parties, as such, no response is required of PHELPS DODGE pursuant to CMO V.

5. PHELPS DODGE admits the allegations in Paragraph 147.

6. The allegations in Paragraphs 148 through 209 relate to other parties, as such, no response is required of PHELPS DODGE pursuant to CMO V.

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

AS TO DEFINITIONS

8. Paragraphs 211 through 236 contain definitions. No response is required of PHELPS DODGE pursuant to CMO V.

AS TO FACTUAL ALLEGATIONS

9. The allegations in Paragraphs 237 through 2254 relate to other parties, as such, no response is required of PHELPS DODGE pursuant to CMO V.

Phelps Dodge Site (Paragraphs 2255 through 2283)

10. PHELPS DODGE admits that it formerly owned property with an address of 720 South Front Street, which also is identified as Block 11, Lot 4-1472 on the tax maps of the City of Elizabeth in Union County, New Jersey. PHELPS DODGE admits that it owns property with an address of 48-94 Bayway Avenue, which also is identified as Block 11, Lot 4-1457 on the tax map of the City of Elizabeth in Union County, New Jersey. PHELPS DODGE admits that the Arthur Kill, South Front Street, Amboy Avenue, Bayway Avenue and Myrtle Avenue bound, are adjacent to or near one or both of the two properties alleged in Paragraph 2255. PHELPS DODGE is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2255 with respect to the Goethals Bridge and denies all other allegations in Paragraph 2255.

11. PHELPS DODGE admits that Phelps Dodge Corporation acquired National Electric Products Corporation in 1930 and that operations conducted on the property owned by PHELPS DODGE included the manufacture of copper products, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 2256.

12. PHELPS DODGE admits that it has manufactured copper products at its property and used different processes over the history of its operations, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 2257.

13. PHELPS DODGE admits that the property located at 720 South Front Street was sold to 666 South Front Street Associates in June 1984, that it continues to conduct business on the property located at 48-94 Bayway Avenue, and denies any remaining allegations in Paragraph 2258.

14. PHELPS DODGE admits the allegations in Paragraph 2259, except for the allegation that “Phelps Dodge Industries, Inc. is the successor by merger to Phelps Dodge Copper Products Corporation and, therefore, succeeds to Phelps Dodge Copper Products Corporation’s environmental liabilities at the Phelps Dodge Site,” which states a legal conclusion as to which no response is required.

15. PHELPS DODGE admits the allegations in Paragraph 2260.

16. PHELPS DODGE admits that it used a variety of compounds in its operations. The allegation in Paragraph 2261 that PHELPS DODGE “Discharged Hazardous Substances and other compounds at the Phelps Dodge Site, including...” states a legal conclusion as to which no response is required.

17. PHELPS DODGE admits the existence of wastewaters from different sources on its property and that prior to 1967 different methods were used to manage wastewater, and denies the remaining allegations in Paragraph 2262.

18. PHELPS DODGE admits that wastewaters from its property were discharged to the City of Elizabeth sewer system and that PHELPS DODGE’s property is located within the

City of Elizabeth's "Area SW" sewer system tributary district. PHELPS DODGE is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 2263.

19. PHELPS DODGE admits filing an application with the Joint Meeting in March 1985, the terms of which and of Permit Number JM 0120 speak for themselves. PHELPS DODGE is without knowledge or information sufficient to form a belief as to the truth of the allegation in Paragraph 2264 that "On information and belief, for at least 50 years, an older and larger pickling operation at the Phelps Dodge Site discharged untreated process wastewater to the sewer."

20. PHELPS DODGE admits an application to the Joint Meeting dated 1992, the terms of which speak for themselves, and denies any remaining allegations in Paragraph 2265.

21. PHELPS DODGE is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2266.

22. PHELPS DODGE is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2267.

23. PHELPS DODGE admits the existence of documents that appear to discuss the results of analysis of water samples in March 1979, October 1980, March 1981 and March 1982, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 2268.

24. PHELPS DODGE is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2269.

25. PHELPS DODGE admits that an overflow of an oil water separator on its property occurred in August 1975, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 2270.

26. PHELPS DODGE admits the existence of a document that appears to discuss an investigation of floating oil conducted by a Joint Meeting inspection crew, but is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2271.

27. PHELPS DODGE admits that an analysis of water samples collected from a manhole near its truck scale detected copper, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 2272.

28. PHELPS DODGE is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2273 regarding what the Joint Meeting may have “found” and denies any remaining allegations in Paragraph 2273. The last sentence of Paragraph 2273 states a legal conclusion as to which no response is required.

29. PHELPS DODGE admits the existence of a document that appears to discuss a composite sample of effluent taken in October 1980 from a sampling point adjacent to a truck scale, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 2274.

30. PHELPS DODGE is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2275.

31. PHELPS DODGE admits a “spill” of 10% sulfuric acid solution to its pre-treatment system and that the Joint Meeting issued a notice of violation, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations

in Paragraph 2276. The last sentence of Paragraph 2276 states a legal conclusion as to which no response is required.

32. PHELPS DODGE admits an overflow of its pickling tank operation on May 26, 1990, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 2277.

33. PHELPS DODGE admits receiving a letter from the Joint Meeting that states that it “serves as formal notice of the above violations” and references samples taken in June 1990, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 2278.

34. PHELPS DODGE admits receiving notices of violation from the Joint Meeting, the terms of which speak for themselves, during a portion of the years referenced in Paragraph 2279.

35. The allegations in Paragraph 2280 state a legal conclusion as to which no response is required.

36. PHELPS DODGE denies the allegations in Paragraph 2281.

37. PHELPS DODGE admits a dye tracing study was conducted on the wastewater treatment system on its property, the terms of which study speak for themselves, and PHELPS DODGE denies any allegations in Paragraph 2282 to the extent they vary therefrom.

38. The allegations in Paragraph 2283 state a legal conclusion to which no response is required. To the extent a response is required, PHELPS DODGE denies the allegations in Paragraph 2283.

39. The allegations in Paragraphs 2284 through 3229 relate to other parties, as such, no response is required of PHELPS DODGE pursuant to CMO V.

Borne Chemical Site (Paragraphs 3230 through 3287)

40. To the extent the allegations in Paragraphs 3230 through 3257 relate to other parties, no response is required of PHELPS DODGE pursuant to CMO V. To the extent a response is required, PHELPS DODGE is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 3230 through 3257.

41. PHELPS DODGE admits that it received the Revised Third Supplemental Directive dated October 1994, the terms of which speak for themselves and PHELPS DODGE denies any allegations in Paragraph 3258 to the extent they are inconsistent with the document. To the extent that the other allegations in Paragraph 3258 relate to other parties, no response is required of PHELPS DODGE pursuant to CMO V.

42. To the extent that the allegations in Paragraph 3259 relate to other parties, no response is required of PHELPS DODGE pursuant to CMO V. To the extent a response is required; PHELPS DODGE denies the allegations in Paragraph 3259.

43. The allegations in Paragraphs 3260 through 3279 relate to other parties, and therefore no response is required of PHELPS DODGE pursuant to CMO V.

44. PHELPS DODGE denies the allegations in Paragraph 3280.

45. PHELPS DODGE admits that on one occasion, in 1981 it contracted for the disposal of polychlorinated biphenyl articles at a facility in Ohio and denies the remaining allegations in Paragraph 3281.

46. PHELPS DODGE is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 3282.

47. To the extent that the allegations in Paragraph 3283 relate to other parties, no response is required of PHELPS DODGE pursuant to CMO V. To the extent a response is

required, PHELPS DODGE admits that petroleum hydrocarbons have been detected at the Borne Chemical Site, but is without knowledge or information sufficient to form a belief as to the truth of any remaining allegations in Paragraph 3283.

48. The allegations in Paragraph 3284 state a legal conclusion as to which no response is required. To the extent a response is required, PHELPS DODGE denies the allegations in Paragraph 3284.

49. The allegations in Paragraphs 3285 through 3445 relate to other parties, and therefore no response is required of PHELPS DODGE pursuant to CMO V.

AS TO FIRST COUNT

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

50. PHELPS DODGE incorporates by reference, as if fully set forth herein, its responses to Paragraphs 1 through 3445.

51. To the extent that the allegations in Paragraph 3447 relate to other parties, no response is required of PHELPS DODGE pursuant to CMO V. To the extent a response is required, PHELPS DODGE 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 and is without knowledge or information sufficient to form a belief as to the truth of any remaining allegations in Paragraph 3447.

52. The allegations in Paragraph 3448 state legal conclusions as to which no response is required. To the extent a response is required, PHELPS DODGE refers to the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11f.a.(2)(a) and denies any allegations in Paragraph 3448 to the extent they vary therefrom.

53. To the extent that the allegations in Paragraph 3449 relate to the other parties, no response is required of PHELPS DODGE pursuant to CMO V. To the extent a response is required, PHELPS DODGE denies that it is liable to Third-Party Plaintiffs for contribution.

54. PHELPS DODGE is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 3450, and therefore denies the same.

55. To the extent that the allegations in Paragraph 3451 relate to other parties, no response is required of PHELPS DODGE pursuant to CMO V. To the extent a response is required, PHELPS DODGE denies the allegations in Paragraph 3451.

AS TO SECOND COUNT

Statutory Contribution

56. PHELPS DODGE incorporates by reference, as if fully set forth herein, its responses to Paragraphs 1 through 3451.

57. To the extent that the allegations in Paragraph 3453 relate to other parties, no response is required of PHELPS DODGE pursuant to CMO V. To the extent a response is required, PHELPS DODGE denies that it is liable to Third-Party Plaintiffs for contribution.

WHEREFORE, PHELPS DODGE demands dismissal of the Third-Party Complaint “B” in its entirety with prejudice, costs of litigation, attorneys’ fees and such other costs as the Court deems just.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

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

SECOND AFFIRMATIVE DEFENSE

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

THIRD AFFIRMATIVE DEFENSE

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

FOURTH AFFIRMATIVE DEFENSE

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

FIFTH AFFIRMATIVE DEFENSE

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

SIXTH AFFIRMATIVE DEFENSE

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

SEVENTH AFFIRMATIVE DEFENSE

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

EIGHTH AFFIRMATIVE DEFENSE

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

NINTH AFFIRMATIVE DEFENSE

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

TENTH AFFIRMATIVE DEFENSE

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

ELEVENTH AFFIRMATIVE DEFENSE

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

TWELFTH AFFIRMATIVE DEFENSE

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

THIRTEENTH AFFIRMATIVE DEFENSE

Third-Party Defendant cannot be held liable for or be required to pay Third-Party Plaintiffs' damages or other claims based on actions or inactions by Third-Party Defendant that arise out of conduct lawfully undertaken in compliance with permits or other approvals issued

by relevant government agencies, including the State of New Jersey and/or the United States and/or in compliance with applicable laws, regulations, rules, orders, ordinances, directives and common law, and other requirements of all foreign, federal, state and local government entities (“applicable Environmental Laws”).

FOURTEENTH THIRD AFFIRMATIVE DEFENSE

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

FIFTEENTH AFFIRMATIVE DEFENSE

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

SIXTEENTH AFFIRMATIVE DEFENSE

The Third-Party Complaint is barred and/or is constitutionally impermissible to the extent that it seeks to impose retroactive liability for acts that were previously authorized or condoned by law including applicable Environmental Laws.

SEVENTEENTH AFFIRMATIVE DEFENSE

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

EIGHTEENTH AFFIRMATIVE DEFENSE

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

NINETEENTH AFFIRMATIVE DEFENSE

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

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 Third-Party Defendant.

TWENTY-SECOND AFFIRMATIVE DEFENSE

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

TWENTY-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, including any settlements and approvals issued by a government agency.

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 Third-Party Defendant, were it claimed directly by Plaintiffs, would amount to unlawful taxation.

TWENTY-NINTH AFFIRMATIVE DEFENSE

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

THIRTIETH AFFIRMATIVE DEFENSE

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

THIRTY-FIRST 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-SECOND AFFIRMATIVE DEFENSE

Third-Party Plaintiffs have failed to join necessary and indispensable parties needed for a just adjudication of the claims asserted in this action, in whose absence complete relief can not be afforded the existing parties pursuant to R. 4:28-1 of the New Jersey Court Rules. These necessary and indispensable parties include, without limitation, State of New Jersey agencies and instrumentalities, including without limitation the State trustees for tidelands, certain United States agencies and instrumentalities with liability under the Spill Act, and certain state and local governmental agencies located outside the boundaries of New Jersey, including the

State of New York and its agencies and instrumentalities, all of whom are or may be separately liable for contamination allegedly located in the "Newark Bay Complex," as defined in Plaintiffs' Second Amended Complaint.

THIRTY-THIRD AFFIRMATIVE DEFENSE

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

THIRTY-FOURTH AFFIRMATIVE DEFENSE

Third-Party Defendant denies that Third-Party Plaintiffs have suffered any harm whatsoever, but in the event that they did suffer any form of injury or damage cognizable under applicable Environmental Law, such injury was caused by the intervening acts, omissions, or superseding acts of persons or entities over whom Third-Party Defendant exercised no control and for whose conduct Third-Party Defendant was not responsible including, without limitation, unpermitted and storm event discharges from publicly owned treatment works.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

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

THIRTY-SIXTH AFFIRMATIVE DEFENSE

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

THIRTY-SEVENTH 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-EIGHTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred to the extent that the conduct of Third-Party Defendants alleged to give rise to liability in the Third-Party Complaint is the subject of a release, covenant not to sue, or has otherwise been excused by Plaintiffs or other governmental agency, through issuance of a no further action letter, consent order, settlement agreement or other applicable document, with or without inclusion of contribution protection, or through the Plaintiffs' allowance of any applicable Statute of Limitations or Statute of Repose to lapse.

THIRTY-NINTH AFFIRMATIVE DEFENSE

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

FORTIETH AFFIRMATIVE DEFENSE

To the extent any discharge that allegedly originated from Third-Party Defendant 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, Third-Party Defendant cannot be found retroactively liable.

FORTY-FIRST 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-SECOND 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-THIRD AFFIRMATIVE DEFENSE

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

FORTY-FOURTH AFFIRMATIVE DEFENSE

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

FORTY-FIFTH AFFIRMATIVE DEFENSE

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

FORTY-SIXTH AFFIRMATIVE DEFENSE

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

FORTY-SEVENTH AFFIRMATIVE DEFENSE

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

FORTY-EIGHTH AFFIRMATIVE DEFENSE

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

FORTY-NINTH 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 Third-Party Defendant are barred to the extent of any legal extinguishments of actual or potential claims by the Plaintiffs against Third-Party Defendant pertaining to the alleged environmental contamination (including natural resource damage) of any site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against Third-Party Defendant. Examples of legal extinguishments that are or may be applicable to Third-Party Defendant include, with respect to each such site:

1. Any release or covenant not to sue granted by Plaintiffs to Third-Party Defendant;

2. Any settlement or other compromise between Plaintiffs and Third-Party Defendant;
3. Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against Third-Party Defendant;
4. Any failure to join a claim relating to the "Newark Bay Complex" (as defined in the Third-Party Complaint) in a prior litigation between Plaintiffs and Third-Party Defendant, which would result in relinquishment of such a claim by virtue of New Jersey's Entire Controversy Doctrine; and/or
5. Any issuance by Plaintiffs to Third-Party Defendant, directly or indirectly, of any "No Further Action" (a/k/a "NFA") determination, "Negative Declaration," or similar determination.

FIFTIETH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred because the relief sought against Third-Party Defendant, were it claimed directly by Plaintiffs, would amount to a "taking" of Third-Party Defendant's property in violation of its constitutional rights to due process and/or in violation of its rights under the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq.

FIFTY-FIRST AFFIRMATIVE DEFENSE

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

FIFTY-SECOND AFFIRMATIVE DEFENSE

To the extent Third-Party Defendant is acting or has acted to conduct environmental cleanup at any site(s) alleged by Third-Party Plaintiffs to be the subject of their contribution claims against Third-Party Defendant, the claims for equitable contribution under the Spill Act

in the Third-Party Complaint are barred because equity will not compel action that is already being undertaken and/or is unnecessary.

FIFTY-THIRD AFFIRMATIVE DEFENSE

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

FIFTY-FOURTH AFFIRMATIVE DEFENSE

Third-Party Defendant 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 Third-Party Defendant.

FIFTY-FIFTH AFFIRMATIVE DEFENSE

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

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

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

**MORGAN, LEWIS & BOCKIUS LLP
Attorneys for Third-Party Defendant
Phelps Dodge Industries, Inc.**

By 

Christopher J. McAuliffe

Dated: March 23, 2010

DESIGNATION OF TRIAL COUNSEL

In accordance with Rule 4:25-4 you are hereby notified that Glen R. Stuart and Christopher J. McAuliffe are assigned to try this case.

MORGAN, LEWIS & BOCKIUS LLP
Attorneys for Third-Party Defendant
Phelps Dodge Industries, Inc.

By


Christopher J. McAuliffe

Dated: March 23, 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.

**MORGAN, LEWIS & BOCKIUS LLP
Attorneys for Third-Party Defendant
Phelps Dodge Industries, Inc.**

By 

Christopher J. McAuliffe

Dated: March 23, 2010

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CERTIFICATE OF SERVICE

I hereby certify that Third-Party Defendant Phelps Dodge Industries, Inc. Answer to Third-Party Complaint "B" have been sent for filing via hand delivery to the Clerk of the Superior Court of New Jersey, Law Division, Essex County, and served upon all parties who have consented to electronic service by posting to <http://njdepvocc.sfile.com>. The following were served via first class, regular mail.

Borough of Hasbrouck Heights

Richard J. Dewland
Coffey & Associates
465 South Street
Morristown, NJ 07960

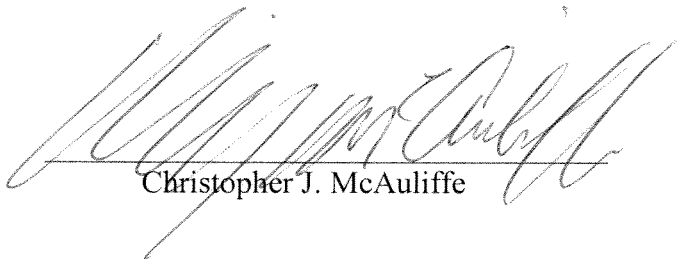
City of Orange

John P. McGovern
Assistant City Attorney
City of Orange Township
29 North Day Street
Orange, NJ 07050

Township of Hillside

Christine M. Burgess
Township Attorney
Hillside Township
Municipal Bldg.
1409 Liberty Avenue
Hillside, NJ 07205

Dated: March 23, 2010



Christopher J. McAuliffe

DB1/64067506.4