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ATTORNEYS FOR THIRD-PARTY DEFENDANT
TROY CHEMICAL CORPORATION, INC.

NEW JERSEY DEPARTMENT OF	:	SUPERIOR COURT OF NEW JERSEY
ENVIRONMENTAL PROTECTION and	:	LAW DIVISION: ESSEX COUNTY
THE ADMINISTRATOR OF THE NEW	:	
JERSEY SPILL COMPENSATION FUND,	:	DOCKET NO. L-9868-05
	:	
Plaintiffs	:	
v.	:	CIVIL ACTION
	:	
OCCIDENTAL CHEMICAL	:	TROY CHEMICAL
CORPORATION, TIERRA SOLUTIONS,	:	CORPORATION'S ANSWER TO
INC., MAXUS ENERGY CORPORATION,	:	THIRD-PARTY COMPLAINT "B"
REPSOL YPF, S.A., YPF, S.A., YPF	:	
HOLDINGS, INC. and CLH HOLDINGS,	:	
INC.,	:	
Defendants.	:	
	:	
MAXUS ENERGY CORPORATION and TIERRA	:	
SOLUTIONS,	:	
INC.,	:	
Third-Party Plaintiffs,	:	
	:	
vs.	:	
	:	
3M COMPANY, <i>et al.</i> ,	:	
	:	
Third-Party Defendants.	:	

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

Third-Party Defendant Troy Chemical Corporation, Inc. ("Troy Chemical"), 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. Troy Chemical 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. Troy Chemical responds that the referenced pleadings speak for themselves. No response is required pursuant to CMO V.

AS TO THE THIRD PARTY PLAINTIFFS

(Paragraphs 16 through 18)

3. No response is required pursuant to CMO V.

AS TO THE THIRD PARTY DEFENDANTS

(Paragraphs 19 through 209)

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

5. Troy Chemical admits the allegations in Paragraph 197.

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

AS TO DEFINITIONS

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

AS TO FACTUAL ALLEGATIONS

(Paragraphs 237 through 3445)

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

9. In response to Paragraph 2872, Troy Chemical admits that Troy Chemical is the current owner of the property at One Avenue L, Newark, New Jersey. Troy Chemical is without knowledge or information sufficient to form a belief as to whether that site has been active as an industrial site since the early 1900s. Troy Chemical admits there is an operational chemical manufacturing plant occupying approximately 5.8 acres of land on the site.

10. Troy Chemical denies the allegations in Paragraph 2873. Troy Chemical was created in 1980, when it purchased assets from a separate company named Troy Chemical ("Predecessor Company").

11. Troy Chemical was created in June 1980, and therefore denies that it used mercury at the Troy Chemical site anytime prior to June 1980. Troy Chemical began phasing out the production of mercury compounds in 1980 and ceased production of mercury compounds in or about 1986. Troy Chemical denies the remaining allegations in Paragraph 2874.

12. Troy Chemical admits that Pierson's Creek is a waterway that discharges to the Port Newark Channel. Troy Chemical is without sufficient knowledge or information to form

a belief as to the truth of the remaining allegations in Paragraph 2875 and therefore denies same.

13. Troy Chemical is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 2876 and therefore denies same.

14. Troy Chemical neither admits nor denies the contents of the PVSC report referenced in Paragraph 2877, as the report speaks for itself. Troy Chemical is without sufficient knowledge or information to form a belief as to the truth of the allegations regarding PVSC treatment levels and discharges in Paragraph 2877 and therefore denies same.

15. To the extent that Paragraph 2878 is referencing a particular report, such report speaks for itself. Troy admits that mercury has been detected in some sediment and surface water samples of Pierson's Creek and in some soil and groundwater samples at the Troy Chemical site. Without identification of the specific sampling locations, date, or results of the "detects" referenced in paragraph 2878, Troy Chemical is without sufficient knowledge or information upon which to form a belief as to the truth of the specific allegations in paragraph 2878, and therefore denies same.

16. Troy Chemical neither admits nor denies the contents of the NJDEP report referenced in Paragraph 2879, as the report speaks for itself. To the extent a response is necessary, Troy Chemical denies the allegations in Paragraph 2879.

17. To the extent that Paragraph 2880 is referencing a particular report, such report speaks for itself. Without identification of the specific sampling locations, date, or results of the "detects" referenced in Paragraph 2880, Troy Chemical is without sufficient knowledge or information upon which to form a belief as to the truth of the specific allegations in Paragraph 2880, and therefore denies same.

18. To the extent that Paragraph 2881 is referencing a particular report, such report speaks for itself. Without identification of the specific sampling locations, date, or results of the “detects” referenced in Paragraph 2881, Troy Chemical is without sufficient knowledge or information upon which to form a belief as to the truth of the specific allegations in Paragraph 2881, and therefore denies same.

19. To the extent that Paragraph 2882 is referencing a particular report, such report speaks for itself. Without identification of the specific sampling locations, date, or results of the “detects” referenced in Paragraph 2882, Troy Chemical is without sufficient knowledge or information upon which to form a belief as to the truth of the specific allegations in Paragraph 2882, and therefore denies same.

20. Troy Chemical admits only that it received a letter dated August 24, 2006 from the U.S. EPA. The contents of the letter speak for themselves. To the extent a response is necessary, Troy Chemical denies the allegations in Paragraph 2883.

21. Paragraph 2884 contains a conclusion of law to which no response is required.

AS TO FIRST COUNT

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

22. Troy Chemical incorporates by reference as if fully set forth herein its responses and denials as asserted in Paragraphs 1 through 21 herein.

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

24. Troy Chemical denies that it is liable to Third-Party Plaintiffs for contribution under the New Jersey Spill Compensation and Control Act. Troy Chemical is without

knowledge or information sufficient to form a belief as to the truth of the matters alleged in Paragraphs 3449 through 3451, and therefore denies same.

AS TO SECOND COUNT

Statutory Contribution

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

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

FIRST AFFIRMATIVE DEFENSE

27. 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

28. 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

29. 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

30. 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

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

SIXTH AFFIRMATIVE DEFENSE

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

SEVENTH AFFIRMATIVE DEFENSE

33. 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

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

NINTH AFFIRMATIVE DEFENSE

35. 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

36. 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

37. 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

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

THIRTEENTH AFFIRMATIVE DEFENSE

39. 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 AFFIRMATIVE DEFENSE

40. 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

41. 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

42. 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

43. 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

44. 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

45. 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 because any release or threat of release of any hazardous substances, if any, and any costs or damages resulting there from, were caused solely by the negligence, acts or omissions of third parties over whom Third-Party Defendant had no control, whether by, in whole or part, contract or otherwise, or any duty to control, including without limitation the State of New Jersey and its agencies and officials, and the United States and its agencies and officials.

TWENTIETH AFFIRMATIVE DEFENSE

46. 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

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

TWENTY-SECOND AFFIRMATIVE DEFENSE

48. 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

49. 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

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

TWENTY-FIFTH AFFIRMATIVE DEFENSE

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

TWENTY-SIXTH AFFIRMATIVE DEFENSE

52. 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

53. 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

54. 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

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

THIRTIETH AFFIRMATIVE DEFENSE

56. 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

FORTY-THIRD AFFIRMATIVE DEFENSE

69. 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

70. Third-Party Defendants' 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

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

FORTY-SIXTH AFFIRMATIVE DEFENSE

72. 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-SEVENTH AFFIRMATIVE DEFENSE

73. 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

74. 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

75. 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:

- A. Any release or covenant not to sue granted by Plaintiffs to Third-Party Defendant;
- B. Any settlement or other compromise between Plaintiffs and Third-Party Defendant;
- C. Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against Third-Party Defendant;
- 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 Third-Party Defendant, 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 Third-Party Defendant, directly or indirectly, of any "No Further Action" (a/k/a "NFA") determination, "Negative Declaration," or similar determination.

FIFTIETH AFFIRMATIVE DEFENSE

76. 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

77. 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

78. 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

79. 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

80. Third-Party Defendant 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 Third-Party Defendant.

FIFTY FIFTH AFFIRMATIVE DEFENSE

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

FIFTY SIXTH AFFIRMATIVE DEFENSE

82. Troy Chemical Corporation ("New Troy") was created in June 1980, when it purchased assets from a separate company named Troy Chemical ("Predecessor Company"). New Troy is not responsible or liable for any operations, discharges, or releases prior to June 1980.

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

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


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

Dated: December 23, 2009.

Respectfully submitted,

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A handwritten signature in cursive script that reads "Daniel R. Lavoie". The signature is written in dark ink and is positioned above a horizontal line.

Daniel R. Lavoie

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

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

Dated: December 23, 2009

Respectfully submitted,



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