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Attorneys for Third-Party Defendant,  
Borough of Carteret/File No. 13030-062

NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, THE  
COMMISSIONER OF THE NEW JERSEY  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION, and THE ADMINISTRATOR  
OF THE NEW JERSEY SPILL COMPENSATION  
FUND,

Plaintiffs,

-vs-

OCCIDENTAL CHEMICAL CORPORATION,  
TIERRA SOLUTIONS, INC., MAXUS ENERGY  
CORPORATION, RESPOL 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-

BAYONNE MUNICIPAL UTILITIES  
AUTHORITY, BOROUGH OF CARTERET,  
BOROUGH OF EAST NEWARK, BOROUGH OF  
EAST RUTHERFORD, BOROUGH OF  
ELMWOOD PARK, BOROUGH OF FAIR  
LAWN, BOROUGH OF FANWOOD, BOROUGH  
OF FRANKLIN LAKES, BOROUGH OF  
GARWOOD, BOROUGH OF GLENWOOD,  
BOROUGH OF GLEN ROCK, BOROUGH OF  
HALEDON, BOROUGH OF HASBROUCK  
HEIGHTS, BOROUGH OF HAWTHORNE,  
BOROUGH OF KENILWORTH, BOROUGH OF  
LODI, BOROUGH OF MOUNTAINSIDE,  
BOROUGH OF NEW PROVIDENCE,  
BOROUGH OF NORTH ARLINGTON,  
BOROUGH OF NORTH CALDWELL,

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY  
DOCKET NO.: ESX-L-9868-05(PASR)

Civil Action

**BOROUGH OF CARTERET'S  
ANSWER TO DEFENDANTS/THIRD-  
PARTY PLAINTIFFS MAXUS  
ENERGY CORPORATION AND  
TIERRA SOLUTIONS, INC.'S  
THIRD-PARTY COMPLAINT "A"**

BOROUGH OF NORTH HALEDON, BOROUGH OF PROSPECT PARK, BOROUGH OF ROSELLE PARK, BOROUGH OF ROSELLE, BOROUGH OF RUTHERFORD, BOROUGH OF TOTOWA, BOROUGH OF WALLINGTON, BOROUGH OF WEST PATERSON, BOROUGH OF WOOD-RIDGE, CITY OF BAYONNE, CITY OF CLIFTON, CITY OF EAST ORANGE, CITY OF ELIZABETH, CITY OF HACKENSACK, CITY OF JERSEY CITY, CITY OF LINDEN, CITY OF NEWARK, CITY OF ORANGE, CITY OF PASSAIC, CITY OF PATERSON, CITY OF RAHWAY, CITY OF SUMMIT, CITY OF UNION CITY, HOUSING AUTHORITY OF THE CITY OF NEWARK, JERSEY CITY MUNICIPAL UTILITIES AUTHORITY JOINT MEETING AND UNION COUNTIES, LINDEN ROSELLE SEWERAGE AUTHORITY, BOROUGH OF CARTERET VALLEY SEWERAGE AUTHORITY, PORT AUTHORITY OF NEW YORK AND NEW JERSEY, RAHWAY VALLEY SEWERAGE AUTHORITY, THE NEW JERSEY DEPARTMENT OF TRANSPORTATION, THE STATE OF NEW JERSEY, TOWN OF BELLEVILLE, TOWN OF HARRISON, TOWN OF KEARNY, TOWN OF NUTLEY, TOWN OF WESTFIELD, TOWN OF WOODBRIDGE, TOWNSHIP OF BERKELEY HEIGHTS, TOWNSHIP OF BLOOMFIELD, TOWNSHIP OF CEDAR GROVE, TOWNSHIP OF CLARK, TOWNSHIP OF CRANFORD, TOWNSHIP OF HILLSIDE, TOWNSHIP OF IRVINGTON, TOWNSHIP OF LITTLE FALLS, TOWNSHIP OF LIVINGSTON, TOWNSHIP OF LYNTHURST, TOWNSHIP OF MAPLEWOOD, TOWNSHIP OF MILLBURN, TOWNSHIP OF MONTCLAIR, TOWNSHIP OF ORANGE, TOWNSHIP OF SADDLE BROOK, TOWNSHIP OF SCOTCH PLAINS, TOWNSHIP OF SOUTH HACKENSACK, TOWNSHIP OF SOUTH ORANGE VILLAGE, TOWNSHIP OF SPRINGFIELD, TOWNSHIP OF UNION, TOWNSHIP OF WEST ORANGE, TOWNSHIP OF WINFIELD PARK, TOWNSHIP OF WYCKOFF, and VILLAGE OF RIDGEWOOD,

Third-Party Defendants.

Third-Party Defendant, Borough of Carteret, with its principal address at 61 Cooke Avenue, Carteret, New Jersey, by way of Answer to the Third-Party Complaint "A" brought by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc., says:

**ANSWER**

1. The Borough of Carteret admits it is a public body and a municipality of the State of New Jersey. The Borough of Carteret further admits that on or about April 11, 1907, the Borough of Roosevelt was incorporated by an act of the State Legislature and, in a general election held on or about November 27, 1922, changed its name to the Borough of Carteret. All of the allegations against the Borough of Carteret are denied. The Borough of Carteret is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraphs 1 through 1147, denies the allegations and leaves Third-Party Plaintiffs to their proofs at the time of trial.

WHEREFORE, the Borough of Carteret demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

**FIRST COUNT**

**(New Jersey Spill Compensation and Control Act,  
N.J.S.A. 54:10-23.11f.a.(2)(a))**

2. The Borough of Carteret repeats and realleges its answers contained in Paragraph 1 as if set forth at length herein.

3. The Borough of Carteret is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraphs 1148 through 1158, denies the allegations and leaves Third-Party Plaintiffs to their proofs at the time of trial.

WHEREFORE, the Borough of Carteret demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

**SECOND COUNT**  
**(Statutory Contribution)**

4. The Borough of Carteret repeats and realleges its answers contained in Paragraphs 1 through 3 as if set forth at length herein.

5. The Borough of Carteret is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraphs 1159 through 1160, denies the allegations and leaves Third-Party Plaintiffs to their proofs at the time of trial.

WHEREFORE, the Borough of Carteret demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

**THIRD COUNT**  
**(Enforcement of N.J.S.A. 58:14-7 and N.J.S.A. 58:14-8**  
**and Environmental Rights Act Claim**

6. The Borough of Carteret repeats and realleges its answers contained in Paragraphs 1 through 5 as if set forth at length herein.

7. The Borough of Carteret is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraphs 1161 through 1186, denies the allegations and leaves Third-Party Plaintiffs to their proofs at the time of trial.

WHEREFORE, the Borough of Carteret demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

**FOURTH COUNT**  
**(Nuisance)**

8. The Borough of Carteret repeats and realleges its answers contained in Paragraphs 1 through 7 as if set forth at length herein.

9. The Borough of Carteret is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraphs 1187 through 1195, denies the allegations and leaves Third-Party Plaintiffs to their proofs at the time of trial.

WHEREFORE, the Borough of Carteret demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

**FIFTH COUNT**  
**(Breach of the Public Trust)**

10. The Borough of Carteret repeats and realleges its answers contained in Paragraphs 1 through 9 as if set forth at length herein.

11. The Borough of Carteret is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraphs 1196 through 1229, denies the allegations and leaves Third-Party Plaintiffs to their proofs at the time of trial.

WHEREFORE, the Borough of Carteret demands judgment dismissing the Third-Party Complaint, awarding attorney's fees and costs of suit, and such other relief as the Court may deem just and equitable.

**AFFIRMATIVE DEFENSES**

1. The Third-Party Complaint "A" fails to state a claim upon which relief may be granted.

2. The Third-Party Complaint "A" must be dismissed for failure to join necessary and indispensable parties.
3. The Borough of Carteret is not liable pursuant to the New Jersey Tort Claims Act, *N.J.S.A. 59:1-1-12.3*.
4. Third-Party Plaintiffs have failed to provide notice in accordance with *N.J.S.A. 59:8-1, et seq.*
5. Third-Party Plaintiffs lack standing.
6. Third-Party Plaintiffs have failed to exhaust administrative remedies.
7. Any wrongful conduct alleged in the Third-Party Complaint "A" resulted from and was proximately caused by the conduct of persons other than the Borough of Carteret or by the conduct of persons over whom the Borough of Carteret had no control, or by the superseding intervention, criminal illegal or tortuous acts of others outside the control of the Borough of Carteret.
8. Without admitting any liability, if it is determined that the Borough of Carteret engaged in any of the activities alleged in the Third-Party Complaint "A," such activities were *de minimis*.
9. Any damages were caused by an Act of God.
10. The claims asserted in the Third-Party Complaint "A" are barred, in whole or in part, by the applicable statutes of limitation.
11. Plaintiffs' and Defendants/Third-Party Plaintiffs' costs incurred or to be incurred at the site are unreasonable, duplicative, not cost effective, and not consistent with the National Contingency Plan.

12. To the extent that the Borough of Carteret is found liable in this matter, joint and several liability is inappropriate because there are distinct harms or a reasonable basis for apportionment of the harm suffered.

13. At all times relevant, the Borough of Carteret complied with all applicable laws, regulations or standards and government approvals.

14. Plaintiffs and Defendants/Third-Party Plaintiffs failed to provide notice to the Borough of Carteret that it was considered a potentially responsible party prior to undertaking numerous response actions relating to the site, which has precluded the Borough of Carteret from commenting upon or participation in the selection of the remedial action at the site. This has resulted in a deprivation of the Borough of Carteret's substantive and procedural due process rights under the Federal and State Constitutions.

15. Plaintiffs' and Defendants/Third-Party Plaintiffs' Complaints include costs not yet expended. The New Jersey Spill Compensation and Control Act ("Spill Act"), *N.J.S.A. 58:10-223.11, et seq.* does not authorize Plaintiffs and Defendants/Third-Party Plaintiffs to recover future costs. Therefore, any claims are premature and not yet ripe for adjudication.

16. The Third-Party Complaint "A" is an unauthorized retroactive application of the Spill Act and other applicable case law.

17. The Borough of Carteret has at all times acted in good faith.

18. To the extent that this action is brought pursuant to the Spill Act, the Borough of Carteret is not liable because any release or threat of release of any hazardous substance was an omission of a third party other than an employee or agent of the Borough of Carteret. The Borough of Carteret exercised due care with respect to any such alleged hazardous substance in light of all relevant facts and circumstances. The Borough of Carteret took precautions against

foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. Consequently, the Borough of Carteret is not liable under the Spill Act.

19. Plaintiffs' and Defendants/Third-Party Plaintiffs' claims for relief are barred by waiver, estoppel and/or laches.

20. In the event Plaintiffs' and Defendants/Third-Party Plaintiffs' claims are not barred by their own conduct, then any recovery by these parties should be reduced in the proportion that such parties' acts or omissions bear to the acts or omissions that caused the alleged injuries or damages.

21. Plaintiffs and Defendants/Third-Party Plaintiffs have failed to comply with the necessary conditions precedent for the maintenance of a claim under the Spill Act.

22. The Borough of Carteret is not a "responsible party" under the Spill Act.

23. Certain of the costs incurred or to be incurred by the Plaintiffs and/or Defendants/Third-Party Plaintiffs in connection with the site are not "response costs," recoverable from the Borough of Carteret, within the meaning of Section 101 (23), (24) and (25) of CERCLA, 42 U.S.C. 9601 (23), (24) and (25), as applied to the Spill Act.

24. Certain of the actions taken to date by Plaintiffs and/or Defendants/Third-Party Plaintiffs for which Third-Party Plaintiffs are making a claim against the Borough of Carteret were not consistent with the National Contingency Plan because, among other things, the Borough of Carteret was not provided with notice or an opportunity to comment.

25. The Borough of Carteret exercised reasonable care under all the circumstances herein. Consequently, it is not liable to Plaintiffs or Defendants/Third Party Plaintiffs under the common law or any statutory theory of recovery averred herein.

26. The claims for relief are time barred by the terms of the Spill Act.

27. Third-Party Plaintiffs' claims against the Borough of Carteret are barred, in whole or in part, by Section 107(b)(3) of CERCLA, 42 U.S.C. 9607(b)(3) because any releases or threats of releases of hazardous substances including those allegedly attributable to the Borough of Carteret, an allegation the Borough of Carteret denies, were caused by the acts or omissions of third parties other than the Borough of Carteret's employees or agents, or other than one with whom the Borough of Carteret had a direct or indirect contractual relationship, and the Borough of Carteret exercised due care with respect to the alleged hazardous substances taking into consideration the characteristics thereof, in light of all the relevant facts and circumstances and took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such act or omissions.

28. Third-Party Plaintiffs have not paid more than their fair share of any damages, costs or other relief sought by the Plaintiffs, New Jersey Department of Environmental Protection, the Commissioner of the New Jersey Department of Environmental Protection, and the Administrator of the New Jersey Spill Compensation Fund and are, therefore, not entitled to contribution from the Borough of Carteret.

29. Third-Party Plaintiffs' claims for indemnification are barred because any alleged liability of the Borough of Carteret, liability the Borough of Carteret denies, would be secondary, indirect, passive, precarious, constructive, technical and/or imputed, and the liability of all or some of the Defendants/Third-Party Plaintiffs are direct, active and primary.

30. Third-Party Plaintiffs are not entitled to recover attorney's fees or costs, or fees of litigation.

31. Third-Party Plaintiffs are not entitled to recovery for any alleged unjust enrichment as there exists an adequate remedy at law to redress Third-Party Plaintiffs' claims.

32. Third-Party Plaintiffs' claims are barred by the statutory defenses to liability provided by the Spill Act.

33. Third-Party Plaintiffs' claims are barred to the extent they seek relief for conduct occurring or damage incurred before the effective date of the Spill Act.

34. Third-Party Plaintiffs' claims are barred to the extent they seek recovery for any punitive damages as such claims are barred by public policy and applicable laws.

35. To the extent that Third-Party Plaintiffs' claims against the Borough of Carteret are subject to contribution or any reduction or offset from other parties, any damages recovered against the Borough of Carteret shall be reduced accordingly.

36. The Borough of Carteret hereby asserts and adopts all other defenses which have been or will be asserted at any time by any other party in this action to the extent said defenses are applicable to the Borough of Carteret.

37. The Borough of Carteret reserves the right to assert additional defenses that may be uncovered during the course of this action.

#### **COUNTERCLAIMS AND CROSSCLAIMS**

In accordance with Case Management Order V, the Borough of Carteret is not asserting any counterclaims or crossclaims at this time and reserves its rights to do so as specified by the Court's Order.

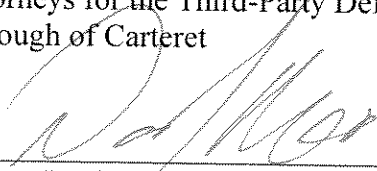
#### **DESIGNATION OF TRIAL COUNSEL**

In accordance with R. 4:25-4, David J. Mairo, Esq. is designated as trial counsel.

**CERTIFICATION PURSUANT TO R. 4:5-1**

It is hereby certified in accordance with R. 4:5-1 that the specific matter in controversy is not, to my knowledge, the subject of any action pending in any Court, nor of any pending arbitration proceeding. Other than the above-referenced actions, there are no other actions or arbitration proceedings in existence or contemplated at this time, and I know of no other party who should be joined in this action. I hereby certify that these statements made by me are true. I am aware that if any of these statements is willfully false, I am subject to punishment.

McMANIMON & SCOTLAND, LLC  
Attorneys for the Third-Party Defendant,  
Borough of Carteret

By:   
David J. Mairo, Esq.

Dated: December 3, 2009

**FILING CERTIFICATION**

I certify that the original and one copy of the within Answer and Separate Defenses have been sent via Federal Express for filing to the Clerk of the Superior Court of New Jersey, Law Division, Essex County, Veteran's Courthouse, 50 W. Market Street, Newark, New Jersey 07102, and a copy of the same has been sent via regular mail to Third-Party Plaintiffs' attorneys as follows:

William L. Warren, Esq.  
Drinker, Biddle & Reath, LLP  
105 College Road East, Suite 300  
Princeton, New Jersey 08542-0627

Thomas E. Starnes, Esq.  
Andrews Kurth, LLP  
1350 I Street, NW, Suite 1100  
Washington, DC 20005

I further certify a copy of said document has been placed on the electronic platform provided by Defendants (<http://njdepvocc.sfile.com>).

McMANIMON & SCOTLAND, LLC  
Attorneys for the Third-Party Defendant,  
Borough of Carteret

By: 

David J. Mairo, Esq.

Dated: December 3, 2009