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NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, et al.,

Plaintiffs,

vs

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY**

OCCIDENTAL CHEMICAL CORPORATION,  
et al.,

Defendants.

**Docket No. ESX-L-9868-05**

MAXUS ENERGY CORPORATION and  
TIERRA SOLUTIONS, INC.,

**CIVIL ACTION**

Third-Party Plaintiffs,

**ANSWER AND AFFIRMATIVE  
DEFENSES**

vs

BAYONE MUNICIPAL UTILITIES, et al.

Third-Party Defendants.

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Third-Party Defendant, Borough of Roselle (hereinafter "Roselle"), by way of Answer to Third-Party Plaintiff's Complaint "A" (hereinafter the "Complaint"), admits, denies and alleges as follows:

Except as expressly stated below, Roselle answers and responds only to those allegations that are directed toward it. To the extent that an allegation is directed toward parties other than Roselle, no response is required by Roselle, and Roselle has insufficient information to admit or deny any allegations set forth in the Complaint and Amended Complaint except as set forth herein.

1. Roselle admits the allegations in Paragraph 735 of the Complaint that are directed

at Roselle.

2. Roselle has insufficient information to either admit or deny the allegations in Paragraph 736 of the Complaint and leaves Third-Party Plaintiffs to their proofs.

3. Roselle has insufficient information to either admit or deny the allegations in Paragraph 738 of the Complaint and leaves Third-Party Plaintiffs to their proofs.

4. Roselle admits the allegations in Paragraph 739 of the Complaint that are directed at Roselle as to commercial, industrial, and sanitary wastewater. Roselle denies LRSA receives storm water discharge from the Borough of Roselle.

5. Roselle has insufficient information to either admit or deny the allegations in Paragraph 740 of the Complaint and leaves Third-Party Plaintiffs to their proofs.

6. Roselle has insufficient information to either admit or deny the allegations in Paragraph 741 of the Complaint and leaves Third-Party Plaintiffs to their proofs.

7. Roselle has insufficient information to either admit nor deny the allegations in Paragraph 742 of the Complaint and leaves Third-Party Plaintiffs to their proofs.

8. Roselle denies the allegations in Paragraph 743 of the Complaint that are directed at Roselle.

#### **AFFIRMATIVE DEFENSES**

1. Third-Party Plaintiffs fail to state a claim against Roselle upon which relief may be granted.

2. Third-Party Plaintiffs' claims are barred, in whole or in part, as they legally cannot establish the requisite elements of their claims.

3. Roselle is not a discharger or a person in any way responsible for a discharge under the Spill Act.

4. Third-party Plaintiffs' claims are barred by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq.

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

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

7. Third-Party Plaintiffs' claims are barred, in whole or in part, by the statutory defenses to liability provided by the Spill Act and Water Pollution Control Act ("WPCA").

8. 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.

9. Third-Party Plaintiffs' claims are barred, in whole or in part, by the doctrines of waiver, consent, estoppel, release, and assumption of risk.

10. Third-Party Plaintiffs' claims are not ripe for adjudication.

11. Third-Party Plaintiffs' claims are barred or diminished by the doctrines of release, waiver and/or accord and satisfaction.

12. Roselle denies that Third-Party Plaintiffs have suffered any harm and in the event that they did suffer any form of injury or damage cognizable at law, such injury was caused by the intervening acts, omissions, or superseding acts of persons or entities over whom Roselle exercised no control and for whose conduct Roselle was not responsible.

13. Third-Party Plaintiffs' claims are barred insofar as the acts and conduct, as alleged in the Complaint, conformed to and were pursuant to laws, statutes, rules, regulations and industry standards existing at all material times alleged in the Complaint.

14. Third-Party Plaintiffs have failed to exhaust their administrative remedies.

15. Any costs allegedly incurred or to be incurred by Third-Party Plaintiffs, if any, are unreasonable, duplicative, and not cost effective and, therefore, are not recoverable.

16. Third-Party Plaintiffs cannot seek contribution for civil penalties under the Spill Act insofar as the acts or omissions purportedly giving rise to the civil penalty predated the effective date of the Spill Act.

17. Any injury or damages suffered by Third-Party Plaintiffs have been increased by thier failure to mitigate their damages.

18. The damages sought by Third-Party Plaintiffs are wholly speculative and conjectural.

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

20. Third-Party Plaintiffs' Complaint is barred to the extent that it seeks to impose retroactive liability for acts that were previously authorized or condoned by law.

21. Third-Party Plaintiffs' claims are barred, in whole or in part, by the doctrines of collateral estoppel, res judicata, judicial estoppel, and accord and satisfaction.

22. Third-Party Plaintiffs are not entitled to recover attorneys' fees or costs, or fees of litigation.

23. If damages are awarded to Third-Party Plaintiffs they would be unjustly enriched.

24. Third-Party Plaintiffs' claims are barred by the statutory defenses to liability provided by the Spill Compensation and Control Act ("Spill Act").

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

26. Roselle did not own or operate a "Major Facility" as defined by the Spill Act, N.J.S.A. 58:10-23.11b.

27. In the event that Third-Party Plaintiffs are entitled to contribution from Roselle under the Spill Act, such relief is limited to "clean up and removal costs" as defined in N.J.S.A. 58:10-23.11b.

28. Third-Party Plaintiffs' claims for indemnification are barred because of their negligence, culpable conduct, and/or contributory negligence.

29. Third-Party Plaintiffs' claims for indemnification are barred as they were guilty of failure to act in good faith and/or provide appropriate cooperation.

30. The costs, damages and penalties Third-Party Plaintiffs seek to recover are unreasonable, excessive, arbitrary, and capricious.

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

32. Third-Party Plaintiffs' claims against Roselle that are subject to contribution, or any reduction or offset from other parties, any damages recovered against Roselle shall be reduced accordingly.

33. Roselle reserve the right to incorporate by reference the defenses pled, now or in the future, by any other Defendant or Third-Party Defendant, to the extent applicable to Roselle.

34. Roselle asserts against Third-Party Plaintiffs all defenses Roselle has or could have against them.

35. Roselle reserves the right to assert additional defenses that may be uncovered during the course of this action.

**PRAYER FOR RELIEF**

Roselle reserves the right to amend this answer.

**WHEREFORE**, Roselle respectfully prays that:

- (i) Judgment against Third-Party Plaintiffs on their claims against Roselle be entered;
- (ii) Third-Party Plaintiffs' claims against Roselle be dismissed with prejudice at Third-Party Plaintiffs' cost;
- (iii) Third-Party Plaintiffs recover nothing by this suit;
- (iv) Roselle be awarded its costs of court, expenses, and attorneys' fees; and
- (v) Roselle be granted such other relief, both special and general, at law or in equity, to which it is justly entitled.

**DEMAND FOR STATEMENT OF DAMAGES**

**PLEASE TAKE NOTICE** that Roselle, pursuant to the provisions of Rule 4:5-2, demands that they be furnished with a statement of the monetary amounts of all damages claimed herein within five (5) days of the date of this pleading.

**RULES 4:5-1 CERTIFICATION**

In accordance with the Rule 4:5-1, I certify that the matter in controversy is not the subject of any other action, lawsuit, arbitration or other proceedings, either pending or contemplated.

LAW OFFICE OF JOHN G. HUDAK, ESQ., LLC  
Attorney for Defendant, Borough of Roselle

BY:

JOHN G. HUDAK

DATED: November 24, 2009