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NEW JERSEY DEPARTMENT OF	:	SUPERIOR COURT OF NEW JERSEY
ENVIRONMENTAL PROTECTION, THE	:	LAW DIVISION: ESSEX COUNTY
COMMISSIONER OF THE NEW JERSEY	:	DOCKET NO.: ESX-L-9868 (PASR)
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, and THE ADMINISTRATOR	:	CIVIL ACTION
OF THE NEW JERSEY SPILL COMPENSATION.	:	
FUND,	:	
	:	CITY OF BAYONNE'S ANSWER TO
Plaintiffs,	:	DEFENDANTS/THIRD PARTY
	:	PLAINTIFF'S MAXUS ENERGY
-vs-	:	CORPORATION AND TIERRA
	:	SOLUTIONS, INC'S THIRD-PARTY
OCCIDENTAL CHEMICAL CORPORATION,	:	COMPLAINT "A",
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 HASBROUK :
 HEIGHTS, BOROUGH OF HAWTHORNE, :
 BOROUGH OF KENIL WORTH, BOROUGH OF :
 LODI, BOROUGH OF MOUNTAINSIDE, :
 BOROUGH OF NEW PROVIDENCE, :
 BOROUGH OF NORTH ARLINGTON, :
 BOROUGH OF NORTH CALDWELL, :
 BOROUGH OF NORTH HADELDON, BOROUGH :
 OF PROSPECT PARK, BOROUGH OF :
 ROSELLE PARK, BOROUGH OF ROSELLE, :
 BOROUGH OF RUTHERFORD, BOROUGH OF :
 TOTOWA, BOROUGH OF WALLINGTON, :
 BOROUGH OF WEST PETERSON, BOROUGH :
 OF WOOD-RIDGE, CITY OF BAYONNE, CITY :
 OF CLIFTON, CITY OF EAST ORAGE, 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, HOUSIN AUTHORITY OF THE :
 CITY OF NEWARK, JERSEY CITY MUNICIPAL :
 UTILITIES AUTHORITY JOINT MEETING AND :
 UNION COUNTIES, LINDEN ROSELLE :
 SEWERAGE AUTHORITY, CITY OF PASSAIC :
 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 SADDLEBROOK, 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, City of Bayonne, with its principal address located at City Hall, 630 Avenue C, Bayonne, New Jersey, by and through its undersigned counsel, and in accordance with the Court's Case Management Order V, Section 9, entered on April 16, 2009 ("CMO V"), by way of its Answer to the Third-Party Complaint "A" brought by Defendants/Third-Party Plaintiffs Maxus Energy Corporation and Tierra Solutions, Inc. ("Third Party Plaintiffs"), says as follows:

ANSWER

1. The City of Bayonne admits it is a public body and a municipality of the State of New Jersey. All of the allegations against the City of Bayonne are denied. The City of Bayonne 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. Furthermore, the City of Bayonne further denies each and every allegation contained in the Third-Party Complaint "A" that is not otherwise addressed herein, including without limitation, any allegations concerning the relief sought in all causes of action, in all heading and titles used in Third-Party Complaint "A".

WHEREFORE, the City of Bayonne demands judgment dismissing the Third-Party Complaint "A", 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 City of Bayonne repeats and realleges its answers contained in Paragraph 1 as if set forth at length herein.

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

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

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

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

11. The City of Bayonne 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 City of Bayonne 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

FIRST AFFIRMATIVE DEFENSE

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

SECOND AFFIRMATIVE DEFENSE

The Third-Party Complaint "A" must be dismissed for failure to join necessary and indispensable parties.

THIRD AFFIRMATIVE DEFENSE

The City of Bayonne is not liable pursuant to the New Jersey Tort Claims Act. *N.J.S.A. 59:1-1-12.3.*

FOURTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs have failed to provide notice in accordance with *N.J.S.A. 59:81-, et seq.*

FIFTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs lack standing.

SIXTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs have failed to exhaust administrative remedies.

SEVENTH AFFIRMATIVE DEFENSE

Any wrongful conduct alleged in the Third-Party Complaint "A" resulted from and was proximately caused by the conduct of persons other than the City of Bayonne or by the conduct of persons over whom the City of Bayonne had no control, or by the superseding intervention, criminal illegal or tortuous acts of others outside the control of the City of Bayonne.

EIGHTH AFFIRMATIVE DEFENSE

Without admitting any liability, if it is determined that the City of Bayonne engaged in any of the activities alleged in the Third-party Complaint "A," such activities were *de minimis*.

NINTH AFFIRMATIVE DEFENSE

Any damages were caused by an Act of God.

TENTH AFFIRMATIVE DEFENSE

The claims asserted in the Third-Party Complaint "A" are barred, in whole or in part, by the applicable statutes of limitation.

ELEVENTH AFFIRMATIVE DEFENSE

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.

TWELFTH AFFIRMATIVE DEFENSE

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

THIRTEENTH AFFIRMATIVE DEFENSE

At all times relevant, the City of Bayonne complied with all applicable laws, regulations or standards and government approvals.

FOURTEENTH AFFIRMATIVE DEFENSE

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

FIFTEENTH AFFIRMATIVE DEFENSE

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.*

SIXTEENTH AFFIRMATIVE DEFENSE

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

SEVENTEENTH AFFIRMATIVE DEFENSE

The City of Bayonne has at all times acted in good faith.

EIGHTEENTH AFFIRMATIVE DEFENSE

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

NINETEENTH AFFIRMATIVE DEFENSE

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

TWENTIETH AFFIRMATIVE DEFENSE

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.

TWENTY-FIRST AFFIRMATIVE DEFENSE

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.

TWENTY-SECOND AFFIRMATIVE DEFENSE

The City of Bayonne is not a "responsible party" under the Spill Act.

TWENTY-THIRD AFFIRMATIVE DEFENSE

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 City of Bayonne within the meaning of Section 101 (23), (24) and (25) of the CERCLA, 42. U.S.C. 9601 (23), (24) and (25), as applied to the Spill Act.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

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 City of Bayonne were not consistent with

the National Contingency Plan because, among other things, the City of Bayonne was not provided with notice or an opportunity to comment.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

The City of Bayonne 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.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

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

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims against the City of Bayonne 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 City of Bayonne, an allegation the City of Bayonne denies, were caused by the acts or omissions of third parties other than the City of Bayonne's employees or agents, or other than one with whom the city of Bayonne had a direct or indirect contractual relationship, and the City of Bayonne 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.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

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 City of Bayonne.

TWENTY-NINTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims for indemnification are barred because any alleged liability of the City of Bayonne, liability the City of Bayonne 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.

THIRTIETH AFFIRMATIVE DEFENSE

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

THIRTY-FIRST AFFIRMATIVE DEFENSE

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

THIRTY-SECOND AFFIRMATIVE DEFENSE

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

THIRTY-THIRD AFFIRMATIVE DEFENSE

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.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

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.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

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

THIRTY-SIXTH AFFIRMATIVE DEFENSE

The City of Bayonne 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 City of Bayonne.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

The City of Bayonne reserves the right to assert additional defenses that may be uncovered during the course of this action.

THIRTY-EIGHTH 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.

THIRTY-NINTH AFFIRMATIVE DEFENSE

Third Party Defendant is not a discharger or person in any way responsible for a discharge in accordance with *N.J.S.A. 58:10-23, et seq.* (New Jersey Spill Act.)

FORTIETH AFFIRMATIVE DEFENSE

Third Party Plaintiffs' claims 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");

FORTY-FIRST AFFIRMATIVE DEFENSE

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

FORTY-SECOND AFFIRMATIVE DEFENSE

Third Party Plaintiffs have no right or contribution against this Third Party Defendant under the WPCA.

FORTY-THIRD AFFIRMATIVE DEFENSE

Third Party Plaintiffs' claims are barred in whole or in part by the Entire Controversy Doctrine.

FORTY-FOURTH AFFIRMATIVE DEFENSE

To the extent the Third Party Complaint purports to seek any relief under the new Jersey Environmental Rights Act., *N.J.S.A. 2A:35A- et seq.*, in whole or in part, the claim is barred because Third Party Plaintiffs failed to meet the procedural and/or substantive requirements entitling them to sue Third party Defendants under the statute.

FORTY-FIFTH AFFIRMATIVE DEFENSE

The Third Party Complaint is barred to the extent some or all of Third Party Plaintiffs do not have standing to bring suit.

FORTY-SIXTH AFFIRMATIVE DEFENSE

The claims asserted by Third Party Plaintiffs in Third Party Complaint "A" are barred by the applicable statutes of limitations.

FORTY-SEVENTH AFFIRMATIVE DEFENSE

The Third Party Complaint is barred to the extent provided in the New Jersey Spill Act with regard to liability for Municipal Waste.

FORTY-EIGHTH AFFIRMATIVE DEFENSE

Third party Plaintiffs' claims are barred to the extent that they assert claims for damages that are only speculative, conjectural, unreasonable, excessive, and/or arbitrarily capricious.

FORTY-NINTH AFFIRMATIVE DEFENSE

The claims against this Third Party Defendant are barred to the extent that they would be required to pay Third Party Plaintiffs' damages or other claims based upon actions or inactions by Third Party Defendant that arise out of conduct lawfully undertaken and in compliance with permits for or approved and issued by relevant governmental agencies, including State of New Jersey an/or the United States and/or in compliance with applicable laws, regulations, rules, orders, ordinances, directives, and common law, and other requirements from all appropriate governmental entities.

FIFTIETH AFFIRMATIVE DEFENSE

Insofar as the State of New Jersey is barred from asserting direct claims against this Third Party Defendant for the damages sought in the Amended complaint, all claims that may be derivative of claims by the State of New Jersey are barred as to this third Party Defendant, including all the claims set forth in Third Party Complaint.

FIFTY-FIRST AFFIRMATIVE DEFENSE

Third Party Complaint is barred and/or is unconstitutional and impermissible to the extent that it seeks to impose retroactive liability for acts that were previously authorized and/or condoned by applicable laws, regulations, statutes, permits, or approvals by State and/or other local, county, or municipal governmental entities. At all times this 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.

FIFTY-SECOND AFFIRMATIVE DEFENSE

The claims set forth in the Third Party Complaint are barred in whole or in part by the doctrine of preemption.

FIFTY-THIRD AFFIRMATIVE DEFENSE

The Third Party Plaintiffs suffered no losses or injuries that were proximately caused by this Third Party Defendant.

FIFTY-FOURTH AFFIRMATIVE DEFENSE

Third Party Plaintiffs' claims are barred in whole or in part by the Doctrine of Accord and Satisfaction, Waiver, Consent, Estoppel, and/or Assumption of Risk.

FIFTY-FIFTH AFFIRMATIVE DEFENSE

Third Party Plaintiffs' claims are barred in whole or in part by the Doctrine of Unclean Hands.

FIFTY-SIXTH AFFIRMATIVE DEFENSE

The claims for contribution under the Spill Act asserted in the Third Party complaint are barred under the equitable doctrines including the impossibility performance, status of existing law, as well as the prohibition from collecting double recovery.

FIFTY-SEVENTH AFFIRMATIVE DEFENSE

Third Party Plaintiffs' claims are barred in whole or in part by the doctrine of collateral estoppel, res judicata and judicial estoppel including, but not limited to, prior findings and rulings as to Third Party Plaintiffs' intentional misconduct.

FIFTY-EIGHTH AFFIRMATIVE DEFENSE

Third Party Plaintiffs' claims are barred to the extent that neither Third Party Plaintiffs nor Plaintiffs have incurred any cost of restoration and replacement of any natural resources alleged to have been damaged or destroyed by any discharge in accordance with the Spill Act.

FIFTY-NINTH AFFIRMATIVE DEFENSE

Third Party Defendant denies the Third Party Plaintiffs have suffered any harm whatsoever to the extent that injury was caused by intervening acts, omissions, or superseding acts of persons or entities over whom this Third Party Defendant had no control or for whose conduct this Third party Defendant was not responsible, including without limitation the event of any discharge which may have been from any treatment works, maintained and operated by other entities, accordingly, there can be no liability to this Third Party Defendant.

SIXTIETH AFFIRMATIVE DEFENSE

To the extent the Third Party Plaintiff sustained an injury and is 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 damage, Third Party Plaintiffs' recovery from this third Party Defendant, if any, must be reduced by the portion of damages caused by the acts and conduct of Third Party Plaintiffs and/or their agents or employees.

SIXTY-FIRST AFFIRMATIVE DEFENSE

Although Third Party Defendant denies that it is liable for the contamination described in Third Party plaintiffs' Complaint, in the event that it is found liable, this Third Party Defendant is entitled to an apportionment of liability with regard to equitable factors.

SIXTY-SECOND AFFIRMATIVE DEFENSE

In accordance with *N.J.S.A. 2A:15-97*, the amount of damages, if any, should be reduced by any amount recovered from any other source.

SIXTY-THIRD AFFIRMATIVE DEFENSE

There can be no liability as to this Third Party Defendant insofar as disposal of waste, if any, which allegedly originated through this third Party Defendant, was done in accordance with the state of the art of the time and was in accordance with municipal disposal practices and technology and the prevailing legal requirements from which Third Party Defendant cannot be found to be retroactively liable.

SIXTY-FOURTH AFFIRMATIVE DEFENSE

Third Party Plaintiffs' claims are barred to the extent that damages or other relief sought by Third Party Plaintiffs would constitute an unjust enrichment to Third Party Plaintiffs.

SIXTY-FIFTH AFFIRMATIVE DEFENSE

Third Party Plaintiffs cannot assert a contribution claim against this Third Party Defendant because the discharges for which Plaintiffs are seeking relief as against Third Party Plaintiffs are different and distinct from the releases, if any, which may be attributable to this third Party Defendant.

SIXTY-SIXTH AFFIRMATIVE DEFENSE

Third Party Plaintiffs cannot seek contribution under the joint tort feisor's contribution law because this Third Party Defendant is not liable for the "same injuries" caused by Third Party Plaintiffs' discharges, and, this Third party Defendant does not share a common liability to the State of New Jersey.

SIXTY-SEVENTH AFFIRMATIVE DEFENSE

Third Party Plaintiffs' claims are barred in whole or in part because no actions or inactions of this Third Party Defendant have resulted in any permanent or temporary damage to a natural resource. Without admitting liability, this Third Party Defendant alleges that if it is found to have engaged in any of the activities alleged in the Third Party complaint, its actions or contribution to the conditions

created, if any, were not the cause of any damage, injury or other claim asserted against third Party Plaintiffs or asserted by Third Party Plaintiffs.

SIXTY-EIGHTH AFFIRMATIVE DEFENSE

Third Party Defendant incorporates by reference in the affirmative defense asserted by other parties in this action to the extent such affirmative defense are defenses to the Third Party Plaintiffs' claims and do not impose liability of this Third Party Defendant.

SIXTY-NINTH AFFIRMATIVE DEFENSE

City of Bayonne is not a discharger or a person in any way responsible for a discharge under *N.J.S.A. 58:10-23 et seq.*,

SEVENTIETH 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").

SEVENTY-FIRST AFFIRMATIVE DEFENSE

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

SEVENTY-SECOND AFFIRMATIVE DEFENSE

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

SEVENTY-THIRD AFFIRMATIVE DEFENSE

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

SEVENTY-FOURTH AFFIRMATIVE DEFENSE

To the extent the Third-Party Complaint "A" 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 the City of Bayonne under that statute.

SEVENTY-FIFTH AFFIRMATIVE DEFENSE

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

SEVENTY-SIXTH 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.

SEVENTY-SEVENTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs are not the real parties in interest for pursuit of the claims set forth in Third-Party Complaint "A", 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.

SEVENTY-EIGHTH AFFIRMATIVE DEFENSE

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

SEVENTY-NINTH AFFIRMATIVE DEFENSE

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

EIGHTIETH AFFIRMATIVE DEFENSE

City of Bayonne cannot be held liable for or be required to pay Third-Party Plaintiffs' damages or other claims based on actions or inactions by the City of Bayonne 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").

EIGHTY-FIRST AFFIRMATIVE DEFENSE

At common law, the City of Bayonne 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. The City of Bayonne 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 the City of Bayonne directly. As a result, the claims set forth in Third-Party Complaint "A" are barred, in whole or in part.

EIGHTY-SECOND AFFIRMATIVE DEFENSE

The State of New Jersey is legally barred from asserting direct claims against the City of Bayonne 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 City of Bayonne as well, including the claims set forth in Third-Party Complaint "A".

EIGHTY-THIRD AFFIRMATIVE DEFENSE

Third-Party Complaint "A" 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.

EIGHTY-FOURTH 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.

EIGHTY-FIFTH AFFIRMATIVE DEFENSE

At all relevant times, the City of Bayonne 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.

EIGHTY-SIXTH AFFIRMATIVE DEFENSE

The claims set forth in Third-Party Complaint "A" are barred in whole or in part by the doctrine of preemption.

EIGHTY-SEVENTH AFFIRMATIVE DEFENSE

Third Party Plaintiffs suffered no losses or injuries that were proximately caused by the City of Bayonne.

EIGHTY-EIGHTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims against the City of Bayonne 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.

EIGHTY-NINTH 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.

NINTIETH AFFIRMATIVE DEFENSE

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

NINETY-FIRST AFFIRMATIVE DEFENSE

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

NINETY-SECOND AFFIRMATIVE DEFENSE

The claims for equitable contribution under the Spill Act in Third-party Complaint "A" 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.

NINETY-THIRD 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.

NINETY-FOURTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred because the relief sought against the City of Bayonne, were it claimed directly by Plaintiffs, would amount to unlawful taxation.

NINETY-FIFTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims against the City of Bayonne are subject to setoff and recoupment and therefore must be reduced accordingly.

NINETY-SIXTH AFFIRMATIVE DEFENSE

The City of Bayonne did not own or operate a "Major Facility" as defined by the Spill Act or the WPCA.

NINETY-SEVENTH 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.

NINETY-EIGHTH 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.

NINETY-NINTH 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.

ONE HUNDREDTH 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.

ONE HUNDRED FIRST AFFIRMATIVE DEFENSE

City of Bayonne 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 person or entities over whom City of Bayonne exercised no control and for whose conduct City of Bayonne was not responsible including, without limitation, unpermitted and storm event discharges from publically owned treatment works.

ONE HUNDRED SECOND 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 the City of Bayonne, 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.

ONE HUNDRED THIRD AFFIRMATIVE DEFENSE

Although the City of Bayonne denies that is liable for the contamination described in Third-Party Plaintiffs' Complaint, in the event it is found liable, the City of Bayonne 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'.

ONE HUNDRED FOURTH 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.

ONE HUNDRED FIFTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs' claims are barred to the extent that the conduct of the City of Bayonne alleged to give rise to liability in Third-Party Complaint "A" 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.

ONE HUNDRED SIXTH AFFIRMATIVE DEFENSE

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

ONE HUNDRED SEVENTH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs are not entitled to recover costs incurred for cleanup actions not undertaken in coordination or conjunction with federal agencies.

ONE HUNDRED EIGHTH AFFIRMATIVE DEFENSE

The damages or other relief that Third-Party Plaintiffs seek, if awarded, would result in unjust enrichment to the Third-Party Plaintiffs.

ONE HUNDRED NINTH AFFIRMATIVE DEFENSE

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

ONE HUNDRED TENTH AFFIRMATIVE DEFENSE

City of Bayonne 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.

ONE HUNDRED ELEVENTH AFFIRMATIVE DEFENSE

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

ONE HUNDRED TWELVETH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs cannot assert indemnification claims against the City of Bayonne because the discharges for which the Plaintiffs are seeking relief are different from the City of Bayonne's alleged discharges.

ONE HUNDRED THIRTIETH AFFIRMATIVE DEFENSE

Third-Party Plaintiffs cannot seek contribution under the Joint Tortfeasors Contribution Law because the City of Bayonne is 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.

ONE HUNDRED FOURTEENTH AFFIRMATIVE DEFENSE

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

ONE HUNDRED FIFTEENTH AFFIRMATIVE DEFENSE

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

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

- A. Any release or covenant not to sue granted by Plaintiffs to the City of Bayonne;
- B. Any settlement or other compromise between Plaintiffs and the City of Bayonne;
- C. Any expiration of the statute of limitations or statute of repose governing Plaintiffs' right to maintain a claim against the City of Bayonne;
- D. Any failure to join a claims relating to the "Newark Bay Complex" (as defined in Third-Party Complaint "A") in a prior litigation between Plaintiffs and the City of Bayonne 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 the City of Bayonne, directly or indirectly, of any "No Further Action" (a/k/a "NFA") determination, "Negative Declaration," or similar determination.

ONE HUNDRED SEVENTEENTH AFFIRMATIVE DEFENSES

Third-Party Plaintiffs' claims are barred because the relief sought against the City of Bayonne, were it claimed directly by Plaintiffs, would amount to a "taking" of the City of Bayonne'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.

ONE HUNDRED EIGHTEENTH AFFIRMATIVE DEFENSES

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

ONE HUNDRED NINETEENTH AFFIRMATIVE DEFENSES

The City of Bayonne incorporates by reference and any affirmative defense asserted by other parties in this action to the extent such affirmation defenses are the defenses to Third-Party Plaintiffs' claims and do not impose liability on the city of Bayonne.

ONE HUNDRED TWENTIETH AFFIRMATIVE DEFENSES

The City of Bayonne reserves the right to assert and hereby invoke each and every Environmental Law defenses that may be available during the course of this action.

COUNTERCLAIMS AND CROSS CLAIMS AND FOURTH PARTY CLAIMS

In accordance with Case Management Order V, the City of Bayonne is not asserting any counterclaims or cross claims or fourth party claims at this time and reserves its rights to do so as specified by the Court's Order.

WHEREFORE, Third Party Defendant, City of Bayonne, demands judgment as follows:

1. Dismissing the Third Party Plaintiffs' Complaint against it;
2. Awarding counsel fees, interests and costs of suit; and
3. For such other relief as the Court deems just, equitable and proper.

DESIGNATION OF TRIAL COUNSEL

In accordance with R.4-25-4, Donna M. Russo is designated as trial counsel.

CERTIFICATION PURSUANT TO RULE 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.

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
13501 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>) in accordance with Management Order V.

CITY OF BAYONNE, LAW DIVISION
Attorneys for the Third Party Defendant,
City of Bayonne

By: _____

Donna M. Russo, Esq.

Dated: February 9, 2010

R. 4:6-1 CERTIFICATION

The undersigned hereby certifies that this pleading was filed within the time period provided by R. 4:6-2 (c) and as provided by Case Management Order V.

CITY OF BAYONNE, LAW DIVISION
Attorneys for the Third Party Defendant,
City of Bayonne

By: 

Donna M. Russo, Esq.

Dated: February 9, 2010