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Attorney for Third-Party Defendant
The New Jersey Department
of Transportation

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

NEW JERSEY DEPARTMENT OF :
ENVIRONMENTAL PROTECTION, et al., :

Plaintiffs,

v.

OCCIDENTAL CHEMICAL CORPORATION,
et al.,

Defendants.

MAXUS ENERGY CORPORATION and
TIERRA SOLUTIONS, INC.,

Third-Party Plaintiffs, :

v. :

BAYONNE MUNICIPAL UTILITIES
AUTHORITY, et al.,

Third-Party Defendants.

: THIRD PARTY DEFENDANT
DEPARTMENT OF TRANSPORTATION'S
: ANSWER AND SEPARATE
AFFIRMATIVE DEFENSES TO
: THIRD PARTY COMPLAINT "A"
OF DEFENDANTS/THIRD PARTY
: PLAINTIFFS, MAXUS ENERGY
CORPORATION AND TIERRA
: SOLUTIONS, INC.

Third-Party Defendant, The New Jersey Department of
Transportation ("NJDOT"), with an address at 1035 Parkway Avenue,

P.O. Box 600, Trenton, New Jersey 08625-0600, in accordance with this court's Case Management Order V, submits the following Answers and Separate Affirmative Defenses to the Third Party Complaint "A" (Against Public Entities) of Defendants/Third-Party Plaintiffs, Maxus Energy Corporation and Tierra Solutions, Inc. (Hereinafter referred to as "Third-Party Plaintiffs"). Pursuant to Case Management Order V, the NJDOT answers only those allegations that relate specifically to the New Jersey Department of Transportation as a Third Party Defendant or parcels or sites to which it is allegedly associated.

1. Paragraphs 1 through 7 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

2. In response to paragraph 8 of the Third Party Complaint, the referenced pleading speaks for itself. To the extent that the paragraph contains contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, no answer is required of the NJDOT in accordance with Case Management Order V.

3. Paragraphs 9 through 14 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with

the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

4. Paragraphs 15 through 51 relate to allegations made in the original defendants' Counterclaim, which pleading speaks for itself. Furthermore, they contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

5. Paragraphs 52 through 103 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

6. The NJDOT admits the allegations set forth paragraph 104 of the Third Party Complaint.

7. Paragraphs 105 to 138 of the Third Party Complaint identify Third Party Defendants, other than the NJDOT, to which no answers are required of the NJDOT in accordance with Case Management Order V.

8. Paragraph 139 of the Third Party Complaint contains a legal conclusion, to which no answer is required.

9. Paragraphs 140 through 164 of the Third Party Complaint contain definitions to which no answers are required.

10. Paragraphs 165 through 1131 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

11. The NJDOT admits the allegations set forth in paragraph 1032.

12. The NJDOT denies the allegations set forth in paragraph 1033.

13. The NJDOT lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 1034 and therefore denies the allegations.

14. Paragraphs 1037 through 1042 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

15. The NJDOT denies the allegations in the first sentence of paragraph 1043.

16. The State lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies the allegations contained in paragraph 1044.

17. The NJDOT admits that it acquired the property described in paragraph 1045 but lacks sufficient knowledge or information to

form a belief as to the truth of the remainder of the allegations and therefore denies the allegations.

18. The NJDOT denies the allegations contained in paragraph 1046.

19. The NJDOT lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 1047 and therefore denies the allegations.

20. The NJDOT lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 1048 and therefore denies the allegations.

21. The allegations contained in the first sentence of paragraph 1049 pertain to the actions of other than the NJDOT and thus no response is required. The NJDOT lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in the second sentence of paragraph 1049 and therefore denies the allegations.

22. The NJDOT lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 1050 to 1065 and therefore denies the allegations.

23. The NJDOT denies the allegations contained in paragraph 1066.

24. Paragraphs 1067 through 1104 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with

the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

25. The NJDOT lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 1105 and 1106 and therefore denies the allegations.

26. Paragraphs 1107 through 1147 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

FIRST COUNT

27. In response to paragraph 1148 of the Third Party Complaint, the NJDOT repeats and incorporates by reference its responses to the allegations contained in paragraphs 1 through 1147 of the Third Party Complaint as if fully set forth herein.

28. Paragraph 1149 of the Third Party Complaint contains a legal conclusion to which no answer is required.

29. Paragraphs 1150 through 1152 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

30. The NJDOT denies the allegations in paragraph 1153.

31. Paragraph 1154 of the Third Party Complaint contains

allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

32. Paragraph 1155 of the Third Party Complaint contains a legal conclusion to which no response is required.

33. The NJDOT denies the allegations contained in paragraph 1156.

34. The NJDOT lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 1157 and therefore denies the allegations.

35. In response to the allegations contained in paragraph 1158 of the Third Party Complaint, the NJDOT denies the allegations as to the NJDOT. The NJDOT further denies that the Third Party Plaintiffs are entitled to any of the relief pled for in Count I from the NJDOT.

WHEREFORE, the NJDOT demands judgment against Third-Party Plaintiff as follows:

- a. Dismissal of the Third-Party Complaint "A" with prejudice in its entirety;
- b. Awarding attorney's fees, interest and costs of suit; and
- c. Such other relief as the Court may deem necessary, just and equitable.

SECOND COUNT

36. In response to paragraph 1159 of the Third Party Complaint, the NJDOT repeats and incorporates by reference its response to the allegations contained in paragraphs 1 through 1158 of the Third Party Complaint as if fully set forth herein.

37. The NJDOT lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 1160 and therefore denies the allegations.

WHEREFORE, the NJDOT demands judgment against Third-Party Plaintiff as follows:

- a. Dismissal of the Third-Party Complaint "A" with prejudice in its entirety;
- b. Awarding attorney's fees, interest and costs of suit; and
- c. Such other relief as the Court may deem necessary, just and equitable.

THIRD COUNT

38. In response to paragraph 1161 of the Third Party Complaint, the NJDOT repeats and incorporates by reference its response to the allegations contained in paragraphs 1 through 1160 of the Third Party Complaint as if fully set forth herein.

39. Paragraph 1162 of the Third Party Complaint contains allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the

NJDOT in accordance with Case Management Order V.

40. The allegations in paragraphs 1163 to 1164 contain legal conclusions and thus no response is required.

41. Paragraphs 1165 through 1177 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

42. The allegations in paragraph 1178 contain a legal conclusion and thus no response is required.

43. Paragraphs 1179 through 1181 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

44. The allegations in paragraph 1182 contain a legal conclusion and thus no response is required.

45. Paragraphs 1183 through 1186 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

WHEREFORE, the NJDOT demands judgment against Third-Party Plaintiff as follows:

a. Dismissal of the Third-Party Complaint "A" with prejudice in its entirety;

b. Awarding attorney's fees, interest and costs of suit; and

c. Such other relief as the Court may deem necessary, just and equitable.

FOURTH COUNT

46. In response to paragraph 1187 of the Third Party Complaint, the NJDOT repeats and incorporates by reference its response to the allegations contained in paragraphs 1 through 1186 of the Third Party Complaint as if fully set forth herein.

47. Paragraphs 1188 through 1195 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

WHEREFORE, the NJDOT demands judgment against Third-Party Plaintiff as follows:

a. Dismissal of the Third-Party Complaint "A" with prejudice in its entirety;

b. Awarding attorney's fees, interest and costs of suit; and

c. Such other relief as the Court may deem necessary, just and equitable.

COUNT V

49. In response to paragraph 1196 of the Third Party

Complaint, the NJDOT repeats and incorporates by reference its responses to the allegations contained in paragraphs 1 through 1195 of the Third Party Complaint as if fully set forth herein.

50. Paragraphs 1197 through 1229 of the Third Party Complaint contain allegations not specifically related to the NJDOT as a Third Party Defendant or parcels or sites allegedly associated with the NJDOT as a Third Party Defendant, to which no answers are required of the NJDOT in accordance with Case Management Order V.

WHEREFORE, the NJDOT demands judgment against Third-Party Plaintiff as follows:

- a. Dismissal of the Third-Party Complaint "A" with prejudice in its entirety;
- b. Awarding attorney's fees, interest and costs of suit; and
- c. Such other relief as the Court may deem necessary, just and equitable.

SEPARATE AFFIRMATIVE DEFENSES

FIRST SEPARATE AFFIRMATIVE DEFENSE

Recovery is barred in this action by the reason of Third-Party Plaintiffs' failure to comply with the New Jersey Tort Claims Act, N.J.S.A. 59:8-1 et seq.

SECOND SEPARATE AFFIRMATIVE DEFENSE

Recovery is barred in this action by the reason of Third-Party Plaintiffs' failure to state a claim against the NJDOT upon which relief can be granted.

FOURTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Plaintiffs' Third Party Complaint against the NJDOT is barred by the Doctrines of Collateral Estoppel, Res Judicata and Entire Controversy.

FIFTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Plaintiffs' Third Party Complaint against NJDOT is barred by the applicable statute of limitations.

SIXTH SEPARATE AFFIRMATIVE DEFENSE

The damages alleged by Third-Party Plaintiffs were caused by a third party or third parties, the acts or omissions of whom Third Party Defendant NJDOT is not responsible.

SEVENTH SEPARATE AFFIRMATIVE DEFENSE

Parties other than Third Party Defendant NJDOT are comparatively and/or contributorily negligent and, therefore, the Third Party Plaintiffs' claims are barred by, or must be apportioned under the New Jersey Comparative Negligence Act, N.J.S.A. 2A:15-5.1 et seq.

EIGHTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Plaintiffs' claims are barred or, in the alternative, the damages to which they are entitled must be reduced as a result of statutory defenses available under the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. ("Spill Act"), and similar environmental legislation.

NINTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Defendant NJDOT at all times acted pursuant to its lawful authority and all actions constitute exercise of appropriate authority.

TENTH SEPARATE AFFIRMATIVE DEFENSE

The Doctrines of Laches, Waiver, Avoidable Consequences, Estoppel, failure to exhaust administrative remedies and/or unclean hands may act to bar Third Party Plaintiffs' claims as to the NJDOT.

ELEVENTH SEPARATE AFFIRMATIVE DEFENSE

Any injuries and/or damages allegedly sustained by the Third-Party Plaintiffs were caused by the joint or several negligence and/or intentional acts of co-defendants and third parties over whom Third Party Defendant NJDOT had no control.

TWELFTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Defendant NJDOT's conduct was not the proximate cause of damages alleged by Third Party Plaintiffs.

THIRTEENTH SEPARATE AFFIRMATIVE DEFENSE

Claims against Third Party Defendant NJDOT for costs of suit and/or attorney's fees are improper in this action.

FOURTEENTH SEPARATE AFFIRMATIVE DEFENSE

Any action or inaction on the part of Third Party Defendant NJDOT was the result of the exercise of judgment, discretion or legislative function vested in it within the meaning

of N.J.S.A. 59:2-3 and 59:3-2.

FIFTEENTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Defendant NJDOT at all times relevant to this action acted in good faith and without fraud, malice or any intent to damage or harm Third Party Plaintiffs.

SIXTEENTH SEPARATE AFFIRMATIVE DEFENSE

The Court lacks jurisdiction over the subject matter.

SEVENTEENTH SEPARATE AFFIRMATIVE DEFENSE

Recovery is or may be barred in whole or in part by the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq., and/or the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq., and/or the doctrine of sovereign immunity, and the State is entitled to all protections, immunities, exemptions and limitations enumerated therein.

EIGHTEENTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Plaintiffs are barred from recovery by reason of failure to mitigate or avoid any of the alleged damages referred to in its Third Party Complaint.

NINETEENTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Plaintiffs' claims are barred by the equitable doctrine of unclean hands.

TWENTIETH SEPARATE AFFIRMATIVE DEFENSE

Third Party Defendant NJDOT's conduct did not cause any injury to Third Party Plaintiffs.

TWENTY-FIRST SEPARATE AFFIRMATIVE DEFENSE

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

TWENTY-SECOND SEPARATE AFFIRMATIVE DEFENSE

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

TWENTY-THIRD SEPARATE AFFIRMATIVE DEFENSE

Third Party Defendant NJDOT did not own or operate a "Major Facility" as defined by the Spill Act.

TWENTY-FOURTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Plaintiffs lack standing to pursue some or all of their third party claims.

TWENTY-FIFTH SEPARATE AFFIRMATIVE DEFENSE

Although Third Party Defendant NJDOT denies that it is liable for the contamination described in the Third-Party Complaint, in the event that it is found liable, it is entitled to an offset against any such liability on their 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 the State.

TWENTY-SIXTH SEPARATE AFFIRMATIVE DEFENSE

Without admitting any liability, should it be determined that Third Party Defendant NJDOT engaged in any of the activities

alleged in the Third Party Complaint "A", such activities were *de minimus*.

TWENTY-SEVENTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Plaintiffs' Third Party Complaint includes claims for costs not yet expended. The Spill Act does not authorize Third Party Plaintiffs to recover future costs. Therefore, Third Party Plaintiffs' claims are premature and not yet ripe for adjudication.

TWENTY-EIGHTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Defendant NJDOT is not a "responsible party" under the Spill Act.

TWENTY-NINTH SEPARATE AFFIRMATIVE DEFENSE

Certain of the costs incurred or to be incurred by Third Party Plaintiffs in connection with the site are not "response costs" recoverable from the NJDOT within the meaning of Section 101(23), (24) and (25) of CERCLA, 42 U.S.C. § 01 (23), (24) and (25), as applied to the Spill Act.

THIRTIETH SEPARATE AFFIRMATIVE DEFENSE

Certain of the actions taken to date by Third Party Plaintiffs for which they are making a claim against Third Party Defendant NJDOT were not consistent with the National Contingency Plan because, among other things, NJDOT was not provided with notice or an opportunity to comment.

THIRTY-FIRST SEPARATE AFFIRMATIVE DEFENSE

Certain of claims for relief herein are time-barred by the express terms of the Spill Act.

THIRTY-SECOND SEPARATE AFFIRMATIVE DEFENSE

Third Party Plaintiffs' claims against the NJDOT 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 NJDOT, an allegation which NJDOT denies, were caused by acts or omissions of third party other than NJDOT's employees, or other than with whom the NJDOT had a direct or indirect contractual relationship, and the NJDOT exercised due care with respect to the alleged hazardous substance is concerned, an allegation which the NJDOT denies, 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 be foreseeable from such acts or omissions.

THIRTY-THIRD SEPARATE AFFIRMATIVE DEFENSE

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

THIRTY-FOURTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Plaintiffs' claims for indemnification are barred since any alleged liability of the NJDOT, which denies such

claims, would be secondary, indirect, passive, precarious, constructive, technical and/or imputed, and the liability of all or some of the Third Party Plaintiffs are direct, active and primary.

THIRTY-FIFTH SEPARATE AFFIRMATIVE DEFENSE

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

THIRTY-SIXTH SEPARATE AFFIRMATIVE DEFENSE

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

THIRTY-SEVENTH SEPARATE AFFIRMATIVE DEFENSE

The NJDOT hereby demands a trial by jury.

THIRTY-EIGHTH SEPARATE AFFIRMATIVE DEFENSE

The NJDOT reserves the right to amend this Answer to assert any additional defenses it may have which further investigation reveals to be appropriate.

THIRTY-NINTH SEPARATE AFFIRMATIVE DEFENSE

Third Party Defendant NJDOT hereby adopts the Separate Defenses heretofore and hereinafter asserted by all co-Third-Party Defendants to the extent such defenses are not otherwise set forth herein.

FORTIETH SEPARATE AFFIRMATIVE DEFENSE

Third Party Defendant NJDOT reserves the right to assert such other affirmative defenses as may become known to said Third Party Defendant.

CLAIM FOR CONTRIBUTION

Third Party Defendant NJDOT demands contribution from all defendants and co-third party defendants in accordance with the provisions of the Joint Tortfeasors Contribution Law and the Comparative Negligence Law.

RESERVATION OF RIGHTS

Third Party Defendant NJDOT reserves the right, at or before trial, to move to dismiss the Third Party Complaint and/or for summary judgment, on the ground that it fails to state a claim upon which relief can be granted and/or Third Party Defendant NJDOT is entitled to judgment as a matter of law, based on any or all of the above defenses.

NOTICE PURSUANT TO RULES 1:5-1(a) AND 4:17(c)

Please take notice that the undersigned attorneys do hereby demand, pursuant to the above-cited Court Rules, that each party herein serving pleadings and interrogatories and receiving answers thereto, serve copies of all such pleadings and answered interrogatories and all documents, papers and other materials referred to therein, received from any party, upon the undersigned attorneys and take notice that this is a continuing demand.

CERTIFICATION REGARDING OTHER PROCEEDINGS AND PARTIES

Undersigned counsel hereby certifies, in accordance with R. 4:5-1(b)(2), that the matters in controversy in this action are not the subject of any other pending or contemplated action in any court or arbitration proceeding known to Third Party Defendant NJDOT at this time, nor is any non-party known to Third Defendant NJDOT at this time who should be joined in this action pursuant to R. 4:28, or who is subject to joinder pursuant to R. 4:29-1. If, however, any such non-party later becomes known to Third Party Defendant NJDOT, an amended certification shall be filed and served on all other parties and with this Court in accordance with R. 4:5-1(b)(2).

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, Dale Laster Lessne, Deputy Attorney General, is hereby designated as trial counsel for Third Party Defendant NJDOT in the within designated matter.

CERTIFICATION

I hereby certify that a copy of the within pleading was timely filed and served within the time prescribed by R. 4:6-1.

ANNE MILGRAM
Attorney General of New Jersey
Attorney for Third Party Defendant
New Jersey Department of
Agriculture

By: Dale Laster Lessne
Dale Laster Lessne
Deputy Attorney General

DATED: November 5, 2009