



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

P.O. BOX 402

MAIL CODE 401-07

Trenton, NJ 08625-0402

TEL: # (609) 292-2885

FAX # (609) 292-7695

BOB MARTIN
Commissioner

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

November 6, 2014

Re: Comments Concerning Proposed Occidental Chemical Corporation Consent Judgment
In the matter of *New Jersey Department of Environmental Protection, et al. v. Occidental
Chemical Corporation et al.*, ESX-L-9868-05 (PASR) (The "Passaic River Litigation")

TO:

Citizens Advisory Committee
of the New York New Jersey Harbor &
Estuary Program
17 Battery Place, Suite 915
New York, NY 10004

William S. Kibler
Raritan Headwaters Association
2121 Larger Cross Road
Gladstone, NJ 07934
bkibler@raritanheadwaters.org

Joseph Della Fave
Ironbound Community Corporation
179 Van Buren Street
Newark, NJ 07105

Debbie Mans
NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735
debbie@nynjbaykeeper.org

Helen Henderson
American Littoral Society
18 Hartshorne Drive, Suite #1
Highlands, NJ 07732
helen@littoralsociety.org

Harvey Morginstin
Passaic River Boat Club
56 Hyde Road
Bloomfield, NJ 07003
harvey.morginstin@gmail.com

David B. Hird
Weil, Gotshal & Manges LLP
1300 Eye Street NW, Suite 900
Washington, DC 20005
david.hird@weil.com

Doug O'Malley
Environment New Jersey
5 S. Montgomery Street
Trenton, NJ 08608

Laurie Stauhs Howard
Passaic River Coalition
330 Speedwell Avenue
Morristown, NJ 07960
lhoward.passaicriver@gmail.com

Hon. Bill Pascrell, Jr.
United States House of Representatives
Robert A. Roe Federal Building
200 Federal Plaza, Suite 500
Paterson, NJ 07505
bill.pascrell@mail.house.gov

Edward Potosnak III
New Jersey League of Conservation Voters
P.O. Box 1237
Trenton, NJ 08607
ed.potosnak@njlcv.org

Joann Ramos
Iselin, NJ
JOANN.S.RAMOS@CBP.DHS.GOV

Bill Sheehan
Hackensack Riverkeeper
231 Main Street
Hackensack, NJ 07601

Andrew Skroback
Chadbourne & Parke LLP
1200 New Hampshire Avenue, NW
Washington, DC 20036
askroback@chadbourne.com

Jeff Tittel
Sierra Club, New Jersey Chapter
145 West Hanover Street
Trenton, NJ 08618
jeff.tittel@SierraClub.org

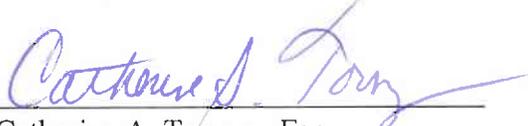
William L. Warren
Drinker Biddle & Reath LLP
105 College Road East
P.O. Box 627
Princeton, NJ 08542
William.Warren@dbr.com

The New Jersey Department of Environmental Protection (the "Department") is in receipt of your comments concerning the proposed Occidental Chemical Corporation Consent Judgment, which was published for comment in the New Jersey Register on September 15, 2014. Copies of the comments are attached to the Department's Response to Comments.

Attached are the following documents:

- 1) Attachment A – Response of the New Jersey Department of Environmental Protection to Comments Received on Proposed Occidental Chemical Corporation Consent Judgment in the Passaic River Litigation.
- 2) Attachment B – The July 22, 2014 Order, as amended September 30, 2014, of Hon. Sebastian P. Lombardi, J.S.C. setting forth the schedule for briefing and hearing on judicial approval of the proposed consent judgment.

Sincerely,


Catherine A. Tormey, Esq.
Deputy Advisor to the Commissioner

cc: Hon. Sebastian P. Lombardi, J.S.C.
Hon. Marina Corodemus, J.S.C. (Ret.), Special Master

Attachment A

DEPARTMENT OF ENVIRONMENTAL PROTECTION
P.O. Box 402
MAIL CODE 401-07
Trenton, NJ 08625-0402
TEL: # (609) 292-2885
FAX # (609) 292-7695

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BOB MARTIN
Commissioner

**RESPONSE OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL
PROTECTION TO COMMENTS RECEIVED ON PROPOSED
CONSENT JUDGMENT WITH OCCIDENTAL CHEMICAL CORPORATION
IN THE PASSAIC RIVER LITIGATION**

On September 15, 2014, the New Jersey Department of Environmental Protection (“DEP” or the “State”) published Notice of a proposed Consent Judgment with Occidental Chemical Corporation (“OCC Consent Judgment”) in the New Jersey Register in connection with the administrative process to enter into a settlement with OCC in the matter of New Jersey Department of Environmental Protection, et al. v. Occidental Chemical Corporation, et al.; Docket No. ESX-L-9868-05 (PASR), Superior Court of New Jersey, Law Division, Essex County (the “Passaic River Litigation”). The settlement, as embodied in the OCC Consent Judgment, provides substantial benefits to the citizens of New Jersey.

The proposed OCC Consent Judgment, if approved and entered by the court pursuant to the Order on the Approval Process for the Proposed OCC Final Consent Judgment, will achieve the overarching goal of the Passaic River Litigation – to ensure that the polluters, not the taxpayers of New Jersey, bear the costs of cleaning up the Passaic River and the Newark Bay Complex¹ contaminated by the discharges of hazardous substances from 80 Lister Avenue in Newark, New Jersey (“Lister Property” or “Lister Site”). Additionally, the State will recover economic damages, namely the State’s lost income and sales tax revenues associated with the decrease in economic activity caused by OCC’s contamination of the Passaic River. Moreover, with this settlement and the prior settlements,² the State will have recovered all of its past cleanup costs, as well as all fees and costs it incurred in bringing this litigation. Finally, although the State reserved its natural resource damages (“NRD”) claims from the litigation, the State will apply \$50 million from the OCC Consent Judgment and \$17.4 million from the prior settlements to restoration projects designed to mitigate the damages to the natural resources of the Newark Bay Complex and to compensate the public for the lost human use services. The OCC Consent Judgment, if approved and entered, will put an end to the State’s involvement in nine years of

¹ The Newark Bay Complex is defined as the Lister Property, the 17 miles of the lower Passaic River and Newark Bay and portions of the Hackensack River, the Arthur Kill and the Kill Van Kull.

² The “prior settlements” are (i) the “RYM Settlement Agreement” (a/k/a the Repsol/YPF Settlement Agreement), between Plaintiffs and the Repsol/YPF Defendants (MIEC, Repsol, YPF, YPFI, YPFH and CLHH), Maxus Energy Corporation (“Maxus”) and Tierra Solutions, Inc. (“Tierra”) (these parties are sometimes referred to collectively herein as “the RYM Parties”); and (ii) the Consent Judgment between Plaintiffs and 261 Settled Third-Party Defendants (the “Third-Party Consent Judgment”), which were brought into the Passaic River Litigation by Maxus, et al., but against whom Plaintiffs had reserved their claims. The prior settlements were approved and entered by the court on December 12, 2013.

contentious and hard-fought litigation and will result in total settlement payments of \$355.4 million and the achievement of all of the State's goals in bringing this lawsuit.

Importantly, the Passaic River Litigation was not brought to enforce a cleanup of the Passaic River or to recover money for the State to independently implement a cleanup of the River. The Passaic River and the remainder of the Newark Bay Complex are part of the federal Diamond Alkali Superfund Site, which is being investigated under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9601 to 9675, with the United States Environmental Protection Agency ("EPA") acting as the lead agency.³ Any ultimate cleanup of the Passaic River and Newark Bay will be directed by EPA under CERCLA through its authority to pursue responsible parties to fund the cleanup. Accordingly, the settlement funds recovered by the State are not designated for cleaning up the Passaic River. However, to the extent public funds are used, in whole or part, for a cleanup under CERCLA, the proposed OCC Consent Judgment ensures that OCC, not the citizens of New Jersey, will pay any State share of future cleanup costs.

A. Contamination and Proposed Cleanup of the Passaic River

For decades, OCC's predecessor, DSCC, manufactured DDT, Agent Orange and other pesticides and herbicides at the Lister Property. During that time, DSCC intentionally and regularly dumped product and waste, specifically including a particularly harmful form of dioxin (2,3,7,8-TCDD), into the Passaic River from the Lister Property.⁴ The dioxin from the Lister Property has spread throughout the Newark Bay Complex.

Currently, the Diamond Alkali Superfund Site involves at least five ongoing remedial investigations. One of these investigations culminated with the issuance by EPA of the Focused Feasibility Study Report for the Lower Eight-Miles of the Lower Passaic River (the "FFS"). The FFS is directed at developing a plan to remediate the most contaminated portion of the Passaic River and remove the source of ongoing contamination to the remainder of the Newark Bay Complex. Broader studies of the remainder of the Newark Bay Complex continue. The FFS was funded by EPA with financial and technical support provided by DEP. On March 10, 2014, EPA released the final FFS report, and, on April 11, 2014, EPA released its Proposed Plan for the cleanup of the lower eight miles of the Passaic River. The Proposed Plan calls for the dredging and disposal of 4.3 million cubic yards of contaminated sediments. The remaining contaminated sediments would be capped. EPA estimates this Proposed Plan will cost approximately \$1.73 billion and require five years of construction. EPA is currently considering the comments it received on the FFS Proposed Plan and will address them in its Record of Decision when the final cleanup decision for the lower eight miles is released.

³In 1984, EPA added the Lister Site to its National Priorities List, designating it as a Superfund Site. Today, the Diamond Alkali Superfund Site is more broadly defined to include the Lister Site plus the areal extent of the dioxins (including 2,3,7,8-TCDD), which spread from the Lister Site throughout the 17 miles of the lower Passaic River and Newark Bay, and into portions of the Hackensack River, the Arthur Kill and the Kill Van Kull.

⁴As used herein "OCC/DSCC" refers to OCC, DSCC/DSC-1, and their predecessors in interest at the Lister Property. In 1986, OCC purchased Diamond Shamrock Chemicals Corporation ("DSCC"), the chemical operations and successor of Diamond Shamrock Corporation ("DSC-1"), with knowledge of the Lister plant's practices and environmental condition and, in 1987, knowingly merged DSCC into itself.

Future costs anticipated to be incurred by DEP in the implementation of the selected FFS remedy are unknown, but expected to be minimal. It is anticipated that EPA will require those who polluted the Passaic River to pay for its remediation, including the FFS, and that EPA will not use significant public funds for the remedy. However, if EPA does use federal funds, under CERCLA, the State could be asked to provide up to 10% of the costs of any remedy publicly funded under the federal Superfund. Under current estimates, the State's FFS share could amount to approximately \$173 million, which would be completely funded by OCC under the terms of the Consent Judgment.

B. The Passaic River Litigation

Almost nine years ago, in December 2005, DEP brought the Passaic River Litigation seeking:

. . . reimbursement of any and all cleanup and removal costs the State of New Jersey has incurred, and all such costs that the State of New Jersey will incur, alone and working in conjunction with federal agencies, associated with Defendants' discharge of TCDD into the Newark Bay Complex. The State also seeks compensatory damages, punitive damages, declaratory relief, and equitable relief as set forth herein.

The State is not seeking, and this Complaint should not be characterized as asserting a claim for, natural resource damages, including the loss of use of the State's natural resources, although the State does seek the costs of an assessment of the natural resources damaged or destroyed by Defendants' discharges. The Court has reserved, by way of its Order dated April 24, 2012, the State's right to bring claims for natural resource damages for the Passaic River and/or other parts of the Newark Bay Complex in the future.

(Pls.' 4th Am. Compl., ¶¶ 5, 6.) Additionally, because EPA was the lead governmental agency directing the investigation and cleanup of the Passaic River and the entire Diamond Alkali Superfund Site under the federal Superfund process, the State did not seek through the litigation to require a different or inconsistent remedy.

C. The Prior Settlements

On December 12, 2013, the court approved and entered the Third-Party Consent Judgment. The Settled Third-Party Defendants collectively paid the State \$35.4 million, including approximately \$7 million for natural resource restoration. The Third Parties were sued by Maxus, not DEP, and DEP never asserted any claims against any of the Third-Party Defendants in the Passaic River Litigation.

That same day, the court also approved and entered the RYM Settlement Agreement. The RYM Settlement Agreement resolved the direct liability of the RYM Parties to the State for their connection to the Lister Property and DSCC, and, because of Maxus's indemnity to OCC, the RYM Settlement Agreement also resolved portions of OCC's liability. In exchange for \$130 million in cash consideration, including over \$10 million for NRD restoration, DEP agreed to

cap the ultimate exposure of Repsol, YPF and/or YPFI at an additional \$400 million. The State agreed to reduce a future judgment that it might obtain against OCC for certain obligations to no more than \$400 million, but only to the extent OCC succeeded in obtaining and collecting on a judgment against those particular Settling Defendants for OCC's liabilities to the State. Additionally, due to the indemnity between Maxus and OCC,⁵ the RYM Settlement Agreement was structured so that OCC's liability to the State for past costs was largely resolved.

Importantly, DEP's resolution of its claims against the Repsol/YPF Defendants left the legally responsible defendant, OCC, strictly, jointly and severally responsible for the future cleanup and removal costs and for the economic damages caused by OCC and its predecessors. Accordingly, in the RYM Settlement Agreement, the State reserved its claims against OCC for future cleanup and removal costs, and, to the extent predicated by certain intentional or distinct conduct by OCC, economic damages, disgorgement damages, punitive and exemplary damages and NRD. The State's reserved claims against OCC will be resolved by the OCC Consent Judgment.

D. OCC Consent Judgment Settlement Process and Terms

The prior settlements were approved by the court in December 2013 and affirmed on appeal. In the spring of 2014, the State and OCC renewed settlement discussions and agreed to a term sheet in June 2014. After further negotiations, on August 21, 2014, OCC executed the proposed Consent Judgment. Notice of the proposed OCC Consent Judgment was published on September 15, 2014, for the purpose of obtaining public comments. The key terms of the OCC Consent Judgment are set forth below.

1. OCC's guarantees to pay future cleanup costs

OCC has guaranteed payment of certain future costs of the State, including any department or agency. First, in the event EPA chooses to use public funds to pay for the FFS remedy, OCC has agreed to pay the State's FFS share up to \$400 million. Second, OCC has agreed to pay all of the State's future cleanup costs for or at the Lister Property, and it has also agreed to pay all of the State's future cleanup costs connected with the Newark Bay Complex, provided the State demonstrates a nexus between such future cleanup costs and discharges from the Lister Property.

2. The cash payments

Under the OCC Consent Judgment, OCC will pay the State a total of \$190 million, \$50 million of which is designated as the NRD Payment and will be applied to restoration projects primarily intended to address lost human use services for natural resources in the Newark Bay Complex. The remaining \$140 million in settlement funds will be applied to the State's remaining past costs (incurred since the prior settlements), which total \$5,392,635.54, and to the State's claims for economic damages. These economic damages were sustained by the State

⁵ In 1986, after the Diamond Alkali Superfund Site was added to the NPL, OCC purchased DSCC and its ongoing chemicals business from Maxus. Maxus agreed, in the 1986 Stock Purchase Agreement ("SPA") between the companies, to indemnify OCC for certain environmental liabilities associated with DSCC and the Lister Site.

through lost tax revenues.

E. The Reserved Claims and the NRD Payment

1. The reserved claims

Although the State is resolving significant claims brought against OCC in the Passaic River Litigation, the State reserves certain claims against OCC in the OCC Consent Judgment in order to protect the State's interests if future environmental issues require additional litigation. In addition to the claims for future cleanup and removal costs discussed above, the State reserves claims related to any upland sites around the Newark Bay Complex, claims related to geographical areas outside the Newark Bay Complex, claims for certain navigation costs, and claims for future cleanup and removal costs not otherwise paid by OCC.

The OCC Consent Judgment and the prior settlements were designed to complementarily advance the major goals of the Passaic River Litigation. However, DEP retains its enforcement authority to address future discharges and ongoing threats to human health and the environment and its authority for investigation and oversight in the Newark Bay Complex. DEP will also continue to support EPA as part of the Diamond Alkali Superfund process.

2. NRD Payment

The State did not assert any claims for NRD in the Passaic River Litigation, except for the costs of a Natural Resource Damages Assessment ("NRDA"). Nonetheless, OCC has agreed to pay \$50 million to be applied to restoration projects for damaged natural resources of the Newark Bay Complex, and the State has agreed to "seek to diligently plan, design, implement and complete such restoration projects" (OCC Consent Judgment, ¶25). The exact projects that will be selected and implemented will be determined by DEP at a later date and are not being considered as part of the settlement approval process.

DEP is one of several trustees who have responsibility for protecting and preserving the public's interest in affected natural resources. The State's federal partners are co-trustees of the natural resources in the Passaic River and Newark Bay Complex, and the federal trustees have been evaluating the damages to the Newark Bay Complex independent of the Passaic River Litigation. The full amount of damages to the natural resources in the Newark Bay Complex has not yet been assessed and likely will not be assessed for some years. Indeed, under CERCLA the federal NRD trustees cannot bring an NRD claim until a remedy is selected for the Diamond Alkali Superfund Site. Accordingly, any final assessment and action by the federal trustees may be years from now.

That \$50 million from the OCC Consent Judgment is being applied to restoration projects now is a huge victory for the Passaic River, the Newark Bay Complex and the people of New Jersey. Instead of waiting for years for the natural resource damages to be assessed, claims against potentially responsible parties to be resolved and restoration projects to be designed, the State will secure a total of over \$67.4 million to begin to compensate the public for lost recreational uses. The citizens of the affected communities, who have for too long been deprived of the full use of the River and the many ecological benefits provided by a non-polluted and healthy ecosystem, will begin to see the improvements to the environment and uses of these

natural resources now, instead of having to wait many more years. Additionally, federal guidance and economic studies establish that, by investing in these restoration and human-use projects now, there will be an annual magnified impact through economic redevelopment, direct, indirect and induced economic activity, and the time value of money. With time, the State believes that the \$50 million NRD restoration investment provided by the Consent Judgment will grow many times over the initial amount.

Importantly, the \$50 million NRD Payment does not bind the federal trustees or prevent them from recovering additional NRD from OCC from the first dollar above the \$50 million being invested by the State now. OCC has agreed that the claims of the federal NRD trustees are coextensive with the State's interests and remain intact, and any recoveries under the federal NRD process must be applied to the exact same resources and impacted areas. Moreover, the State remains committed to working with the federal trustees on a full assessment of the NRD for the Passaic River and Newark Bay. When the State and federal trustees are permitted to act under the federal process, the State has reserved all of its rights to pursue, alongside the federal trustees, the entire NRD for the Newark Bay Complex.

F. The Comments Received by DEP

DEP received comments on the OCC Consent Judgment from two distinct groups.⁶ First, DEP received comments from and on behalf of concerned New Jersey citizens, including several non-profit organizations and U.S. Congressman Pascrell (See Ex. 1.) Most of these comments question why all or most of the \$190 million in recovered damages is not being applied to the cleanup of the Passaic River or restoration projects. Others suggest, if the OCC Consent Judgment is approved, that certain identified projects should be funded with the NRD payment negotiated by the State. Second, DEP received comments from Settled Defendants raising legal issues and/or questions regarding the intersection of the proposed OCC Consent Judgment and the two prior settlements. (See Ex. 2.) For convenience of the reader, the comments are summarized and organized topically.

In developing the OCC Consent Judgment and evaluating the public comments, DEP considered (i) its statutory authority and responsibility under the Spill Act and other statutes, (ii) its administrative expertise, (iii) the extensive Administrative Record, (iv) the risk and expense of continued litigation against OCC, (v) the procedural and substantive status of the litigants, (vi) the goals of the State in initiating the Passaic River Litigation, (vii) the substantial recoveries and benefits obtained for the State, and (viii) the consistency of the OCC Consent Judgment with the prior two settlements. After considering all of these factors and the comments submitted, DEP believes the proposed OCC Consent Judgment is fair, reasonable, consistent with the purposes of the Spill Act and in the public interest.

⁶The comments to the OCC Consent Judgment are attached to this response to comments and are numbered Exhibits 1 and 2.

**COMMENTS FROM NON-PARTIES
TO THE PASSAIC RIVER LITIGATION**

Comments were sent by Ms. Joann S. Ramos, a New Jersey taxpayer and resident; the Citizens Advisory Committee of the New York – New Jersey Harbor & Estuary Program; Hackensack Riverkeeper and NY/NJ Baykeeper, for themselves and on behalf of a group of other organizations comprising the American Littoral Society, Environment New Jersey, Passaic River Coalition and Raritan Head Waters; United States Congressman Bill Pascrell, Jr., representing the 9th District of New Jersey; the Passaic River Coalition;⁷ the New Jersey League of Conservation Voters; Ironbound Community Corporation; the Sierra Club, New Jersey Chapter; and the Passaic River Boat Club. (See Ex. 1.) Comments received concern the following topics:

Comments regarding the impacts to the Passaic River community due to the extensive environmental damage done to the Passaic River

The commenters state that their organizations, constituents and members have suffered from decades of pollution of the Passaic River and that many citizens have lost the full economic and recreational use of the River.

Response:

DEP agrees and recognizes the important role that these organizations and their constituents and members play in the communities affected by the pollution of the Passaic River and appreciates their involvement in the process over several years of litigation. In its capacity as chief enforcement agency of New Jersey's environmental laws and as trustee for the State's natural resources, DEP shares the concerns expressed by these commenters regarding the damage to the Passaic River and other natural resources caused by OCC's discharges of hazardous substances into the river. DEP is committed to continuing to work with its federal partners and the public to assure that the Passaic River is cleaned up and that the citizens of New Jersey are fully compensated for the injuries to the public's natural resources. However, DEP does not believe rejection of the settlement will benefit the public or affected communities. Rather, approval of the settlement will bring the affected communities closer to achieving their long-standing goals of restoring the Passaic River to productive use.

⁷The Passaic River Coalition, while a signatory to the letter submitted by Hackensack Riverkeeper and NY/NJ Baykeeper, also submitted separate comments "regarding the question of an adequate accounting for and estimation of Natural Resource Damages" under the OCC Consent Judgment.

Comments concerning the adequacy of the settlement funds stemming from misconceptions about the objectives of the Passaic River Litigation

The commenters challenge the adequacy and use of the \$190 million in settlement funds to be paid by OCC, and the percentage of those funds designated for cleanup of the Passaic River and Newark Bay and/or for natural resource restoration.

Response:

However well-intentioned, many of the comments appear to be based upon several misconceptions about the scope and goals of the Passaic River Litigation and the respective roles of DEP and the federal agencies responsible for remediation and restoration at the Diamond Alkali Superfund Site. DEP filed the Passaic River Litigation in 2005 to accomplish four stated goals: (1) to recover its past costs, including more than \$100 million that State agencies had spent from taxpayers' dollars investigating the hazardous substances discharged from the Lister Property into the Passaic River; (2) to obtain a judgment that any future costs that the State might incur would be the obligation of the polluters, and not the taxpayers of New Jersey; (3) to recover the State's economic damages, namely the State's lost income and sales tax revenues associated with the decrease in economic activity caused by discharges from the Lister Property; and (4) to recover the State's costs of the litigation. In conjunction with the prior settlements, all of these objectives will be achieved by the entry of the proposed OCC Consent Judgment.

First and foremost, to clarify, what the State did not seek to obtain through the Passaic River Litigation were funds to perform or pay for an independent cleanup of the Passaic River. Under federal law, EPA is the lead environmental agency responsible for investigating and selecting a remedy for the Passaic River. EPA will, in collaboration with DEP, select the remedy for cleaning up the Passaic River and Newark Bay. In April of this year, EPA announced a proposed remedy for the lower eight miles of the Passaic River (known as the FFS remedy) at an estimated cost of \$1.7 billion. At most Superfund sites, EPA enters into agreements with the responsible parties that require the polluters, and not the public, to pay cleanup costs. EPA has already identified over 70 companies, including OCC, as contributors to the pollution of the Passaic River. The funds obtained through the OCC Consent Judgment should not be used to subsidize those parties who contaminated the River and who are responsible for its cleanup under CERCLA. However, in the event that EPA spends federal money towards the cleanup of this section of the Passaic River, the proposed settlement provides that OCC, and not the taxpayers of New Jersey, will pay the State's share of these costs, and the State may pursue other responsible parties as well. Also, DEP was not seeking NRD in the Passaic River Litigation, and any potential NRD claims that could have been brought were reserved by court order. The NRD claims will not be pursued until the federal and State trustees can assess the full extent of NRD following adoption of a cleanup plan by the EPA, as required by federal law. Thus, the assertions that all recoveries in the litigation should be applied to a cleanup and restoration of the Passaic River overlook the goals and purposes of the Passaic River Litigation and the resulting settlements and confuse the respective roles of DEP and EPA.

In addition to achieving the original goals of the litigation, the three settlements together will begin restoration efforts in and around the affected communities by providing for the infusion of \$67.4 million in restoration projects. These projects will benefit the citizens of the

affected communities, who have for too long been deprived of the full use of the river and the many ecological and recreational services provided by a non-polluted and healthy ecosystem.

Comments regarding the NRD Payment and OCC's Liability for NRD to the Passaic River and Newark Bay

Several comments question the adequacy of the amount of the settlement funds being applied to NRD.

Response:

To be clear, the settlement between OCC and DEP is not a final resolution of OCC's liability for NRD, but only a down payment on the total NRD to which the public is entitled. Both the State of New Jersey and designated federal agencies share responsibility for administering and protecting the public's natural resources, including the pursuit of compensation for damages to, destruction of, and loss of use of those resources.⁸ The NRD process will likely take many more years. The complexities of evaluating the damage to the natural resources of the Passaic River posed legal and scientific challenges that were not ripe for inclusion in the Passaic River Litigation. Accordingly, in 2005, DEP determined that it was legally necessary and in the public interest to defer pursuing its NRD claims in the litigation until it could coordinate this effort with its partner federal trustees after the final selection of the cleanup remedy by EPA.

Despite the reservation of its NRD claims in the litigation, instead of waiting many more years for any NRD funding, the State has decided to apply \$50 million of the settlement funds to projects designed to begin the restoration of these damaged natural resources and lost human use. These funds, put to use now, will provide enormous benefits for the affected community by providing for earlier restoration projects and increased economic activity long before the lengthy federal process is completed. OCC remains liable to the federal trustees for any additional NRD caused by OCC's discharges to the Passaic River. And, because federal law requires that any money recovered by the federal trustees must be spent on restoration in the affected state, any future recovery from OCC will also be applied to restoration in the affected communities. Because the trusteeship is shared and co-extensive, the State's covenant not to sue OCC for additional NRD will not limit the amount of damages ultimately paid by OCC or the amount that will be applied towards restoration. Moreover, because the State can pursue NRD claims against all other parties responsible for hazardous substances and NRD in the Newark Bay Complex, the State intends to work in conjunction with its federal co-trustees to ensure the full and complete natural resource damages assessment and restoration of the Passaic River. The \$67.4 million in NRD restoration projects that the State has secured through the three Passaic River settlements is not a final settlement or resolution of any NRD liability; it is simply a down-payment.

⁸The State and several federal agencies are co-trustees of the natural resources in the Passaic River and Newark Bay Complex, although the trustees have agreed in this instance that groundwater is a State natural resource. (See 3/20/03 Memorandum of Agreement between State and Federal Trustees at p. 6, part of Administrative Record.) The Administrative Record includes an estimation of damages to groundwater under the Lister Property at \$214,965.

Comments regarding the allocation of the Settlement Funds by the Legislature

Several commenters questioned the allocation of the settlement funds, charging that the proposed OCC settlement was based not upon the merits of the case but rather budgetary concerns.

Response:

Due to deference and federalism concerns in an EPA-controlled Superfund Site, the State did not file the Passaic River Litigation to recover natural resource damages or money for an independent cleanup of the Passaic River. The litigation was brought to recover the State's past costs, ensure a guarantee for any future costs of the State and pursue the damages suffered by the State. Without the proposed OCC Consent Judgment and the prior settlements, the past costs paid out of the State's general fund would never have been recovered; lost tax revenues would never have been recouped through the recovery of economic damages; and future costs would have to be paid out of tax dollars from the State's general fund. The past costs – due to the contamination at the Lister Property and the Passaic River – were paid by the State out of the State's revenues; the costs of the litigation were paid through the appropriation of funds provided by the citizens of New Jersey; the potential future costs of cleanup under the federal Superfund process would have become an obligation not only of residents living near the polluted waters of the Passaic, but of all of the citizens of New Jersey; and the economic damages sought by the State and recovered in this settlement with OCC were due to diminished State tax revenue. Accordingly, the recoveries from the Passaic River Litigation will appropriately offset these past and potential future losses from the State's revenue and compensate the State for its expenditures.

In addition to claims for past costs, the proposed Consent Judgment will compensate the State for economic harm caused by OCC. These claims were made under both the common law and the New Jersey Spill Act. Because of the contamination of the Passaic River, the State believed that the geographic area near the Lister Property had sustained economic consequences due to delayed development or underdevelopment and that these damages had resulted in loss of income and sales tax revenue for the State. Although the State has never before recovered these types of damages in a case like the Passaic River Litigation, it believed that both the common law and the New Jersey Spill Act would support these claims. The State retained an economist to collect data that would allow for a reasonable estimation of these damages, taking into account uncertainty, litigation risk and other potential causes of economic underdevelopment in the neighborhoods close to the Lister Property. The extensive data collected is included with the Administrative Record. Based on preliminary analyses using this data, the State determined that a reasonable estimate of the State's past economic damages of well over \$100 million could be supported in the event the Passaic River Litigation proceeded to trial. After negotiations with OCC, the State was able to obtain a settlement amount of \$190 million for its claimed damages, and the State decided that allocating \$50 million to NRD projects was appropriate. DEP's consideration of the merits of the proposed settlement and the decision to seek judicial approval were not influenced by budgeting decisions, but rather a carefully measured decision that the proposed settlement was in the best interests of New Jersey's citizens and the environment.

Moreover, the ultimate disposition and use of any settlement funds lies within the discretion of the Executive and Legislative Branches. As noted in the comments, the Legislature has exercised that discretion by appropriating settlement funds received in FY 2015 to the uses specified in the FY 2015 budget, which is now law that the DEP cannot change. The OCC Consent Judgment states that the State's allocation of settlement funds to specific damage categories (other than NRD as discussed above) will not be binding on the final use of the settlement funds by the Executive and Legislative Branches.

Finally, the State wants to assure the commenters that the designation of funds for restoration projects was not influenced by or based upon the FY 2015 budget language. The amount of settlement funds designated for restoration was determined through lengthy negotiations with OCC and after careful consideration from the State.

Comments requesting disapproval

Several commenters have asked DEP to reject the proposed settlement because either the settlement amount is inadequate or because not enough money is being directed towards restoration to compensate the communities served by the Passaic River.

Response:

DEP respectfully disagrees with these commenters. First, the Passaic River Litigation was not brought in order to recover funds to independently remediate the river or restore the damaged natural resources, as discussed in the responses above. EPA is leading the CERCLA efforts. However, the recovery of all past costs not covered by the prior two settlements; OCC's commitment to pay other State cleanup costs at the Lister Property and throughout the Newark Bay Complex; the recovery of substantial economic damages; the reimbursement to the State of attorney fees, expert fees and all other costs of the litigation; and the NRD down-payment of \$50 million demonstrate that this settlement is a significant accomplishment for the citizens of the State.

If the settlement is not approved, as several commenters request, and the State must proceed with continued litigation and trial, the State will have to commit many more millions of dollars to continue funding the litigation and will have to assume the litigation risk associated with proving its damages claims. Additionally, since NRD claims are reserved and would not be part of the continuing litigation, none of the \$50 million from the proposed OCC Consent Judgment currently dedicated for restoration would be put to work in the impacted communities. Any damages ultimately awarded in a trial would be for the economic damages and other compensatory and punitive damages sought in this litigation, and nothing would be recovered for restoration of the Passaic River and the Newark Bay Complex. Based upon all of these considerations, the proposed settlement serves the public interest, and DEP has determined to seek judicial approval of the OCC Consent Judgment.

DEP remains steadfast in its resolve to work with EPA to clean up the Passaic River and has secured, through this settlement, OCC's guarantee to fund the State's share of the future costs if there is a publically-funded cleanup. DEP is also committed to work cooperatively with federal natural resource trustees to ensure that the citizens of New Jersey who have lost the use

of the river because of the pollution will obtain every measure of compensation and restoration that the law allows. Unfortunately, it is a reality that the pursuit of these two goals – remediation and restoration – under applicable federal law is likely to take many more years, due to persistent opposition by potentially responsible parties and a regimented NRD assessment process that leaves little room for early restoration. The proposed settlement with OCC and the recoveries under the prior settlement will, however, jump-start the restoration in and around the Passaic River and Newark Bay. Rejecting the settlement would impede and delay any progress towards accomplishing the goals expressed and undercut the concerns raised in the comments.

Comments concerning use of the NRD Payment for particular projects

Several comments identified restoration and riverbank improvement projects that could be funded through the \$50 million dedicated to NRD restoration.

Response:

If the settlement is approved by the court, DEP will diligently seek to identify and select appropriate restoration projects, with stakeholder input, that will benefit the affected communities. Such projects have not been identified at this time; however, DEP has committed to use the funds for restoration projects primarily intended to address lost human use services. (OCC Consent Judgment, ¶ 25.) Such projects may include improved access to the Passaic River and Newark Bay and other projects designed to improve human access and use of the natural resources in and around the Passaic River and Newark Bay and may necessarily involve coordination with the impending remediation of the Passaic River. The State appreciates the suggestions and the positive support for the proposed settlement and restoration opportunities.

COMMENTS FROM MAXUS, TIERRA, YPF AND REPSOL

Comments received from Maxus Energy Corporation (“Maxus”) and Tierra Solutions, Inc. (“Tierra”); YPF, S.A. (“YPF”), YPF International, S.A., YPF Holdings, Inc., and CLH Holdings (together, the “YPF Settling Defendants”); and Repsol, S.A. (“Repsol”) (See Ex. 2.) Comments received concern the following topics.

Comments by Maxus, Tierra and the YPF Defendants concerning Paragraph 20 of the OCC Consent Judgment

The comments address Paragraph 20 of the proposed OCC Consent Judgment which provides that, if entered, the OCC Consent Judgment is binding upon Plaintiffs and OCC and applies to Maxus, Tierra, the Repsol-YPF Defendants and Third-Party Defendants pursuant to Section XIV of the OCC Consent Judgment.

Response:

Paragraph 20 of the OCC Consent Judgment provides that “pursuant to Section XIV, [the OCC Consent Judgment] applies to Maxus, Tierra, the Repsol-YPF Defendants, the Third-Party Defendants, and, to the extent provided by law and equity, any non-parties and non-settling parties.” (OCC Consent Judgment, ¶ 20.) Nearly identical provisions are contained in the RYM Settlement Agreement and Third-Party Consent Judgment. (See RYM Settlement Agreement, ¶ 18; Third-Party Consent Judgment, ¶ 17.) Section XIV of the proposed OCC Consent Judgment sets forth the effect of the OCC Consent Judgment on non-parties to the agreement, specifically contribution protection addressed by the OCC Consent Judgment and provided by operation of law. The contribution protection and “matters addressed” in the proposed OCC Consent Judgment are set forth in detail in Paragraph 65, specifically including those claims for which contribution protection is not provided. (See OCC Consent Judgment, ¶ 65.)

Comments by Maxus, Tierra and YPF Settling Defendants regarding Paragraph 21.1(d) of the proposed OCC Consent Judgment

The comments address whether DEP or OCC is aware of any entities that are Affiliates of OCC pursuant to Paragraph 21.1(d) of the OCC Consent Judgment.

Response:

DEP is currently unaware of any entities that would meet the definition of an OCC Affiliate under Paragraph 21.1(d) of the proposed OCC Consent Judgment, and OCC has indicated that it is not aware of any such entity.

Comments from Maxus, Tierra, YPF Settling Defendants and Repsol regarding Paragraph 26 of the OCC Consent Judgment

The comments raise concerns regarding the significance of OCC's characterization in Paragraph 26 of the OCC Consent Judgment of its payments, assurances and obligations in the ongoing indemnification dispute between OCC and Maxus.

Response:

If the proposed OCC Consent Judgment is approved by the court, the only claims remaining in the Passaic River Litigation will be OCC's Cross-Claims against the RYM Defendants (and any other claims between or among those parties). The RYM Settlement Agreement contains several provisions that limit the terms of any settlement that the State may enter with OCC that relate to the RYM Parties' claims or defenses against OCC, although those provisions are subject to DEP's right to settle within the caps of the RYM Settlement Agreement. (RYM Settlement Agreement, ¶¶ 33, 55.) Consistent with the State's commitments made to the RYM Parties, and in order to avoid any potential inconsistency with the RYM Settlement Agreement, the State and OCC agreed that the terms of the OCC Consent Judgment do not limit the RYM Parties' claims or defenses against OCC and that the Consent Judgment is neutral with respect to any indemnity-related issues between the RYM Parties and OCC. (OCC Consent Judgment, ¶ 74.)

The comments raise concerns about the potential effect that OCC's characterization of its payments and assurances in Paragraph 26 of the proposed OCC Consent Judgment may have on the pending and any future litigation between OCC and the RYM Parties and/or otherwise involving the Maxus/OCC indemnity dispute. In Paragraph 26, OCC states that (i) it has agreed to pay the \$190 million in settlement funds and assure payments of Future Cleanup and Removal Costs "as costs, losses and liabilities incurred by OCC as a result of OCC's acquisition of DSCC," (ii) none of its payments are attributable to punitive damages, penalties or disgorgement claims, and (iii) "OCC intends to comply with its duties and obligations, if any, as indemnitee under the SPA or common law." These declarations by OCC are of a nature common in settlement agreements and it is clear throughout the OCC Consent Judgment that indemnity or allocation issues are not being presented to the court in connection with Plaintiffs' motion to approve the settlement. Rather, the State and OCC have agreed through the provisions in the Consent Judgment that these unilateral statements are not precedential in the ongoing indemnity litigation and are not evidentiary as to an allocation between OCC and Plaintiffs.

Paragraph 25 sets forth Plaintiffs' application of the settlement funds, which includes the \$50 million NRD Payment, approximately \$5,392,635.54 for past costs not covered by the prior settlements, and the remaining \$134,607,364.46 for Economic Damages. Plaintiffs do not take a position on whether any of the settlement funds should be attributable to any particular claim or damage, including claims for disgorgement damages, punitive damages or penalties, for purposes of the indemnity dispute between OCC and Maxus or the other RYM Parties. (OCC Consent Judgment, ¶ 74.) Furthermore, beyond the NRD Payment, the State is not restricting its use or application of the settlements funds. (OCC Consent Judgment, ¶ 25.) Such allocation by Plaintiffs is similar to the allocation made in Paragraph 24 of the RYM Settlement Agreement.

In order to make clear the State's intention to avoid weighing in on the indemnity dispute between OCC, Maxus and/or the RYM Parties, the proposed OCC Consent Judgment specifically provides in Paragraph 74 that:

- a. Nothing in this Consent Judgment shall be interpreted to be determinative of or binding on the rights, obligations and/or defenses of the parties to the indemnity contained in the SPA [the OCC/Maxus Stock Purchase Agreement, which contains the indemnity agreement at issue] under the SPA;
- b. Nothing in this Consent Judgment shall be interpreted to alter or modify the rights and obligations of the parties to the SPA under the SPA;
- c. Nothing in this Consent Judgment determines the amount of any indemnity obligation of Maxus to OCC, including, but not limited to, under the August 24, 2011 Order;
- d. OCC's claim that Maxus must indemnify OCC for obligations arising under this Consent Judgment should not be decided in connection with the entry of the Consent Judgment and will be decided at a later date and in a separate hearing or track in the Passaic River Litigation between OCC and Maxus or otherwise;

...

- h. This Consent Judgment should be read together with the RYM Settlement Agreement and the Third-Party Consent Judgment, and the Parties intend that the provisions of this Consent Judgment do not breach the terms of the RYM Settlement Agreement or Third-Party Consent Judgment and should be interpreted as consistent therewith;

...

- k. Nothing in this Consent Judgment limits Maxus's, Tierra's or the Repsol-YPF Defendants' Claims against OCC related to the Newark Bay Complex/Diamond Alkali Superfund Process (other than statutory contribution protection as provided in Paragraph 65 above) or Maxus's, Tierra's and the Repsol-YPF Defendants' defenses to OCC's Claims related to the Newark Bay Complex/Diamond Alkali Superfund Process against them; and
- l. This Consent Judgment does not provide OCC with contribution protection against Claims brought by Maxus, Tierra and the Repsol-YPF Defendants to recover amounts they paid or caused to be paid to Plaintiffs under the RYM Settlement Agreement or for Future Cleanup and Removal Costs paid by Maxus, Tierra or the Repsol-YPF Defendants (other than statutory contribution protection attendant to OCC's direct payment of future remedial costs).

(OCC Consent Judgment, ¶ 74.) Further, OCC's obligations under the Consent Judgment are not contingent upon the success of its indemnity claims, Cross-Claims or contribution claims or the allocation of any settlement funds within or among such claims against the RYM Parties. (OCC Consent Judgment, ¶61.) Collectively, all the above-described provisions establish that OCC's allocation in Paragraph 26 or any other provision in the Consent Judgment should not place either the RYM Parties or OCC at a disadvantage in the pending or any future litigation between those parties and that the proposed OCC Consent Judgment is intended to remain neutral as to the indemnity and related claims between them.

Comments from Maxus, Tierra and YPF Settling Defendants regarding Paragraph 34 of the OCC Consent Judgment

The comments request that DEP confirm that Paragraph 34 does not modify or restrict the obligations of the State or any other person from providing information required by any court rule, court order or state or federal law.

Response:

Paragraph 34 of the proposed OCC Consent Judgment provides that Plaintiffs shall not disclose to any person any information developed by Plaintiffs or OCC regarding OCC's Cross-Claims and Counts 6 through 8 of the Plaintiffs' Fourth Amended Complaint in the Passaic River Litigation unless compelled by applicable law or court order. The paragraph does not modify or otherwise restrict any obligation that the State or any other entity has to provide information as required by any applicable court rule, court order or state or federal law.

Comments by Maxus and Tierra regarding Paragraph 36 of the proposed OCC Consent Judgment

The comment requests that DEP confirm that Paragraph 36 of the OCC Consent Judgment does not impose any new performance obligations upon Maxus and Tierra.

Response:

Paragraph 36 of the proposed OCC Consent Judgment requires that any future demands for performance under the Consent Judgment or Upland Orders be communicated to "OCC and, unless otherwise directed in writing by OCC, OCC's indemnitor(s), Maxus and/or Tierra, in accordance with past practices of DEP." This provision only addresses the communication procedure for future performance demands under the OCC Consent Judgment and Upland Orders. DEP confirms that it does not by itself create or impose any new performance obligations upon Maxus and Tierra, and Paragraph 74(e) makes clear that nothing in the Consent Judgment is intended to "give rise to any new or additional direct liability to Plaintiff by Maxus or Tierra." Further, DEP confirms that Paragraph 36: (i) does not authorize Plaintiffs or any other person or entity to demand that Maxus or Tierra fulfill any of OCC's obligations under the proposed Consent Judgment; (ii) does not impose any obligations on Maxus or Tierra that are not otherwise contained in a prior administrative order, consent decree and other enforcement document or as otherwise required by law; (iii) does not authorize Plaintiffs or any other person or entity to require Maxus and/or Tierra, under the terms of the OCC Consent Judgment, to perform any work, take any action, reimburse any person or entity or make any payment; and

(iv) is only intended to reference Plaintiffs' past practice of communicating directly with Maxus and/or Tierra as indemnitors or designated representatives of OCC.

Comments by Maxus, Tierra, YPF Settling Defendants and Repsol regarding Paragraph 40 of the OCC Consent Judgment

The comments request that DEP confirm the application of the caps in the RYM Settlement Agreement to OCC's obligations under the OCC Consent Judgment.

Response:

Section X of the RYM Settlement Agreement provides caps on certain exposure to Plaintiffs' claims should certain conditions be met. (See RYM Settlement, ¶¶ 36-43.) The particular applications of the caps and the conditions are set forth in the RYM Settlement Agreement. The prior protections of the RYM Settlement Agreement notwithstanding, in the proposed OCC Consent Judgment, OCC independently agreed to pay the State's future FFS Share and any other costs of the State associated with discharges from the Lister Property. (See OCC Consent Judgment, ¶¶ 39-42.) OCC also agreed not to seek reimbursement or recovery from Repsol, YPF or YPFI for the portion, if any, of the State's FFS share above the applicable cap in the RYM Settlement Agreement (up to an additional \$400 million). (OCC Consent Judgment, ¶ 40.) This agreement limits the exposure of Repsol, YPF and YPFI to claims or awards for the State's FFS share above the caps set forth in the RYM Settlement Agreement. (*Id.*) In addition to the added protection of Repsol, YPF and YPFI, Paragraph 40 of the OCC Consent Judgment does not impact the application of the Caps set forth in the RYM Settlement Agreement, and Plaintiffs remain obligated to reduce the amounts they are entitled to recover from OCC above the caps to the extent required by the RYM Settlement Agreement (if the conditions with regard to application of the Caps set forth in the RYM Settlement Agreement are previously met).

Comments from Maxus, Tierra, YPF Settling Defendants and Repsol regarding Paragraph 63 of the OCC Consent Judgment

The comments raise concerns about the potential effects of OCC Consent Judgment Paragraph 63 on the future litigation between the RYM Defendants and OCC.

Response:

Paragraph 63 of the OCC Consent Judgment provides that "no facts or potential liability have been established in the Passaic River Litigation regarding OCC's alleged liability for OCC Distinct Conduct." As used in this provision, the term "established" is intended to mean "adjudicated." While some evidence related to OCC Distinct Conduct was introduced in the litigation during motion practice, none of that evidence was used to adjudicate or establish OCC's alleged liability for OCC Distinct Conduct. Likewise, there has been no judicial finding or adjudication in the Passaic River Litigation absolving OCC of liability for OCC Distinct Conduct. Paragraph 74(d) also makes it clear that it will be up to the RYM Parties and OCC to adjudicate these facts and liability issues in their pending or future litigation. Consequently, Paragraph 63 is simply reciting a statement of fact that should have no bearing on the litigation between the RYM Defendants and OCC.

Comment from Maxus and Tierra regarding Subparagraphs 74(a) through (d) of the OCC Consent Judgment

The comment requests that DEP confirm that Subparagraphs 74(a) through (d) are not intended to allocate the settlement amounts between indemnifiable claims and non-indemnifiable claims or create a finding on indemnity-related issues.

Response:

Subparagraphs 74(a) through (d) of the OCC Consent Judgment make it abundantly clear that any indemnity-related issues between the RYM Parties and OCC “should not be decided in connection with the entry of the Consent Judgment and will be decided at a later date and in a separate hearing or track in the Passaic River Litigation between OCC and Maxus or otherwise.” Consequently, DEP confirms that these provisions are not intended to allocate any or the entire settlement amount being paid by OCC, or OCC’s obligations with respect to the State’s future cleanup costs, between conduct or liability that falls within the scope of any indemnity obligation of Maxus to OCC and conduct or liability that might fall outside of the scope of any indemnity obligations of Maxus to OCC. Likewise, DEP confirms that approval of the proposed OCC Consent Judgment does not constitute a finding as to whether the settlement amount being paid by OCC is reasonable for the purposes of any indemnity claims by OCC against other parties in the case. As Paragraph 74 establishes, other than the fact that OCC settled the State’s claims for \$190 million and other obligations set forth in the OCC Consent Judgment, the OCC Consent Judgment is intended to be neutral as to the indemnity dispute between OCC and Maxus and the RYM Parties.

Comments by Maxus, Tierra and YPF Settling Defendants regarding Paragraph 82 of the proposed OCC Consent Judgment

The comments request clarification on the intent of Paragraph 82 of the proposed OCC Consent Judgment for the purposes of the indemnity issues between OCC and the RYM Parties.

Response:

Paragraph 82 of the OCC Consent Judgment provides that “the Parties shall jointly request that the court find that this Consent Judgment is fair and reasonable as to all terms.” DEP has determined that the proposed OCC Consent Judgment is fair, reasonable, consistent with the purposes of the Spill Act and in the public interest. However, there is a difference between the standard of reasonableness for the purpose of approving the OCC Consent Judgment and the standard of reasonableness for the purpose of determining the indemnity-related issues in the future litigation between OCC and the RYM Parties. Consequently, in connection with OCC’s indemnity claims, approval by the court of the proposed OCC Consent Judgment is not intended to constitute a finding as to whether the settlement amount being paid by OCC is reasonable for the purposes of adjudicating the indemnity claims by OCC against other parties in the case, or to be evidentiary as to that issue. (See OCC Consent Judgment, ¶ 74.) That issue is reserved for determination in the litigation between the RYM Parties and OCC. (Id.)

MODIFICATIONS TO THE OCC CONSENT JUDGMENT

Based on DEP's review of the proposed OCC Consent Judgment, DEP is making the following revisions to Paragraphs 21.2 and 48 of the OCC Consent Judgment to clarify that OCC's obligations, if any, to EPA or other federal partners are not impacted by the Consent Judgment, and to correct certain citations.

21.2. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § ~~1906~~ 9601 et seq.

48. Nothing in this Consent Judgment shall mitigate or limit (i) OCC's obligations to perform response actions under the Upland Orders, or (ii) Plaintiffs' or the State of New Jersey's right or ability, if any, to enforce the Upland Orders against OCC; provided, however, that OCC's obligations to the State of New Jersey, if any, regarding the Lister Property or Upland Orders may be satisfied under the terms of this Consent Judgment.

Exhibit 1

From: RAMOS, JOANN S [<mailto:JOANN.S.RAMOS@CBP.DHS.GOV>]
Sent: Wednesday, October 08, 2014 12:54 PM
To: DEP PassaicSettlement
Subject: Occidental Settlement

I read in the Star Ledger that the third and final Passaic River settlement was recently agreed upon. Occidental agreed to pay \$190 million for polluting the Passaic River with cancer causing contaminants. However, only \$50 million is to be applied to the River - the remaining \$140 million will go directly into the State General Fund, as per the FY2014-2015 Budget.

I'm sure I am not the only New jersey taxpayer and resident to be outraged. I believe that 100% of the settlement money should go towards the cleanup and restoration of the River. Communities have waited long enough.

Sincerely,

Joann Ramos
Iselin, NJ

CITIZENS ADVISORY COMMITTEE

of the New York – New Jersey
Harbor & Estuary Program

To: Office of Record Access, NJ Department of Environmental Protection

Cc: Management Committee and Policy Committee of the NY-NJ Harbor & Estuary Program
Honorable Sebastian P. Lombardi, J.S.C.
Honorable Christopher Christie, Governor of New Jersey
NJDEP Commissioner Robert Martin
NJDEP Deputy Commissioner David Glass

From: Co-Chairs of the Citizens Advisory Committee of the New York-New Jersey Harbor & Estuary Program

Re: Occidental Settlement

Date: October 14, 2014

Office of Record Access
NJDEP
Attn: Passaic Occidental Comments
P.O. Box 420, Mail Code 401-06Q
Trenton, NJ 08625-0420

Dear Sir or Madam,

The Citizens Advisory Committee (CAC) of the New York New Jersey Harbor & Estuary Program (HEP) writes to oppose the settlement agreement between New Jersey DEP (NJDEP) and Occidental Chemical Corporation. The damage done to the Passaic River and to New Jersey residents who live in its watershed is immense and Occidental's role in this destruction is significant. The proposed \$190,000,000 settlement, if dedicated to improving the river and offsetting the damage caused to the environment and to New Jerseyans, would mark a substantial victory for the state. However, the State directs that Natural Resource Damages (NRD) and cost recoveries in excess of \$50,000,000 default to the State General Fund. This means that \$140 million will go into the State's general fund-which does nothing to restore the river or compensate the specific citizens who suffered injury.

The Spill Compensation and Control Act was passed in 1977 to protect and preserve the State's lands and waters and promote the health, safety and welfare of the people of New Jersey; that the tourist and recreation industry dependent on clean waters and beaches is vital to the economy of this State. Under the Act, the State is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction. N.J.S.A. 58:10-23.11a. We believe that this settlement is not in the public interest, does not further the goals of the Spill Act, does not satisfy the State's trust obligations and should not be approved. Additionally, NJDEP has already collected past costs for legal and administrative fees on this case under the prior judicially approved settlements under the same litigation. Any additional resources arising from a settlement must be spent on projects that will restore or protect the natural resources.

We urge NJDEP, trustee of the lands and waters of the state, to reject this settlement. Using a specific injury to a powerless minority to collect millions of dollars to offset a budget deficit is inappropriate and unjust. If the Department does not reject the settlement, it should amend it so that the full \$190,000,000 is dedicated to offsetting the damages inflicted by Occidental Chemical Corporation.

Citizens Advisory Committee Co-Chairs

Meredith Comi, NY/NJ Baykeeper ✧ meredith@nynjbaykeeper.org ✧ 732-888-9870
Rob Buchanan, Village Community Boathouse ✧ avironvoile@gmail.com ✧ 917-656-7285

The fate of this settlement is important for the entire region since there are other potential natural resources damage settlement cases in both states. We urge the State of New Jersey to set the standard for the region that the settlement monies be used entirely for improving natural resources and offsetting the damages caused to the environment.

The Citizens Advisory Committee (CAC) of the New York New Jersey Harbor & Estuary Program (HEP) is an advisory committee established to support and advocate for the HEP, a national estuary program. The CAC is an official committee of the Management Committee first convened by the US Environmental Protection Agency, Region II; NY State Department of Environmental Conservation; and NJ Department of Environmental Protection for the HEP and Bight Restoration Programs.

The purpose of the CAC is to: 1) provide guidance and advice to the Management Committee on Program decision-making on behalf of the diverse stakeholders in the NY-NJ Harbor Estuary and NY Bight; 2) promote public awareness and understanding of the Program's issues, goals, and recommendations; 3) assist the Management Committee in developing and implementing the Comprehensive Conservation and Management Plan (CCMP) as required by Section 320 of the Water Quality Act of 1987.

Sincerely,

The Citizens Advisory Committee, New York-New Jersey Harbor & Estuary Program.

This letter has been adopted by the HEP CAC following procedures established in its bylaws (<http://www.harborestuary.org/pdf/CAC%20Bylaws-Revision-Jun-03-11-F.pdf>). CAC members who have voted in support of this letter include (but not limited to):

Meredith Comi, NY/NJ Baykeeper, NJ co-chair, Citizens Advisory Committee of the NY-NJ Harbor & Estuary Program
Rob Buchanan, Village Community Boathouse, NY co-chair, Citizens Advisory Committee of the NY-NJ Harbor & Estuary Program

Shino Tanikawa, New York City Soil and Water Conservation District, NY alternate co-chair, Citizens Advisory Committee of the NY-NJ Harbor & Estuary Program

Donald Chesley

Dr. Merryl Kafka, NYSMEA

Harvey Morginstin, PE-Ret. Secretary Passaic River Boat Club

Manuel Russ

In addition, this letter has been endorsed by non-voting CAC members and non members, including:

David L. Burg President, WildMetro

Morton Orentlicher

NOTE: The New York-New Jersey Harbor & Estuary Program is a partner program and its members occasionally have conflicting positions on regulatory and management issues. One of the Program's roles is to facilitate the exchange of ideas and to work towards resolution of these issues. The opinions of individual agencies or committees do not necessarily reflect the opinion of the Program as a whole.

The Citizens Advisory Committee provides guidance and advice to the New York-New Jersey Harbor & Estuary Program Management Committee on Program decision making on behalf of the diverse stakeholders in the region. Its membership and meetings are open to all interested parties in the region that use, or have concerns about, the New York-New Jersey Harbor Estuary and New York Bight. The Citizens Advisory Committee is the only body in the New York-New Jersey Harbor & Estuary Program that can adopt official positions on issues and topics. These official Citizens Advisory Committee positions are adopted by a majority vote of Citizens Advisory Committee members. Citizens Advisory Committee positions do not necessarily reflect the opinion of the New York-New Jersey Harbor & Estuary Program or its members and partners.



Hackensack Riverkeeper
231 Main Street
Hackensack, NJ 07601
201-968-0808
www.hackensackriverkeeper.org

NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735
732-888-9870
www.nynjbaykeeper.org

Wednesday, November 5, 14

Office of Record Access
NJDEP
Attn: Passaic Occidental Comments
P.O. Box 420, Mail Code 401-06Q
Trenton, NJ 08625-0420

RE: Occidental Settlement

Dear Sir or Madam,

American Littoral Society, Environment New Jersey, Hackensack Riverkeeper, NY/NJ Baykeeper, Passaic River Coalition, and Raritan Head Waters write to oppose the settlement agreement between New Jersey DEP (NJDEP) and Occidental Chemical Corporation, docket no. ESX-L-9868-05 (PASR). It pains us to do so. In our role as environmental watchdogs, our organizations have consistently supported NJDEP in its suit against Occidental. We believe that the damage done to the Passaic River and to New Jersey residents who live in its watershed is massive. We also believe that Occidental's role in this destruction is gross and inarguable. We also believe that the proposed \$190,000,000 settlement, if dedicated to improving the river and offsetting the damage caused to the environment and to New Jerseyans, would mark a substantial victory for the state. That is not what this settlement will do.

We believe that Occidental should pay to *remedy* the damage it has caused to the State of New Jersey, and particularly the residents most directly affected by the pollution. A specific injury demands a specific remedy.

A payment from Occidental is appropriate to accomplish two important policies: First, it must remove the economic advantage that Occidental enjoyed as a result of its illegal behavior. While certainly not as much as we believe is required, a \$190,000,000 penalty should act as a deterrent to future wrongdoing.

Second, it must heal the injuries caused by Occidental's wrongdoing. Directing \$140,000,000 to the State's General Fund does nothing to restore the river or to compensate the specific New Jerseyans who suffered injury. We believe that this settlement is not in the public interest, does not further the goals of the Spill Act, does not satisfy the State's trust obligations and should not be approved.

Before a settlement becomes enforceable, a court reviews the settlement to confirm that it is fair, reasonable and consistent with the underlying statutory objectives. Judicial approval is necessary to ensure that the settlement is fair to the parties, but also that it is in the public interest. The court serves the indispensable function of ensuring that the public trust is protected. Although the court's review is deferential, it cannot merely "rubber stamp" the decree. A consent decree is more than a contract between the parties—it is a judicial act. United States v. Atlas Minerals & Chemicals, Inc., CIV. A. 91-5118, 1994 WL 171668 (E.D. Pa.) A court should approve entry of a consent decree when it is satisfied that the decree is fair, reasonable, and consistent with the Constitution and the mandate of law. United States v. Kramer, 19 F. Supp. 2d 273, 280 (D.N.J. 1998) The standard to be applied "is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objective of the governing statute." United States v. Kramer, 19 F. Supp. 2d 273, 280 (D.N.J. 1998)

The Settlement Is Not Fair

Our State's legislature declared in the Spill Act "that the State is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction." N.J.S.A. 58:10-23.11a. As trustee, you have the fiduciary duty to protect the interests of the citizens. The destruction of the Passaic River has caused decades of withering damage to some of the most vulnerable communities in the state. This settlement arbitrarily caps Natural Resource Damages (NRD) at \$50,000,000, and puts the vast majority of the settlement into the general fund. You are using a specific injury to a powerless minority to collect millions of dollars to paper over deficit spending that benefits many of the most powerful and wealthy citizens. This is not an appropriate action for a fiduciary.

Furthermore, as discussed below, the New Jersey Budget directs that all NRD and cost recoveries in excess of \$50,000,000 default to the State General Fund. Consequently, unless future Consent Judgments specifically earmark money for NRD, the entirety of the settlement will go directly to the General Fund. In effect, the first \$50,000,000 of this settlement could represent all of the NRD for *the entire state for the entire fiscal year* (July 1, 2014 – June 30, 2015). Thus, this settlement has unforeseeable impacts well beyond NRD on the Passaic River. It has the potential to impact environmental recoveries in unforeseen places until at least next July.

The Settlement Is Not Reasonable

The State's position is, apparently, that \$50,000,000 in Natural Resource Damages is sufficient to completely discharge Occidental's liability for natural resource damages, and that \$140,000,000 is needed to make the state whole for "Past Cleanup and Removal Costs" and "Economic Damages reserved against (Occidental)." Consent Judgment at 22. No explanation is provided to justify these numbers. Additionally, NJDEP has already collected past costs under the prior judicially approved settlements under the same litigation.

You intend to resolve "All Claims against OCC for Natural Resource Damages and Natural Resource Damage Assessment Costs, now or in the future, associated with Covered Discharges or the past investigation thereof." Consent Judgment at 25. The Consent Judgment, then, marks

a final agency action the court should review under the New Jersey Administrative Procedure Act to ensure that it is not arbitrary, capricious or contrary to law. The State's decision that \$50,000,000 is sufficient payment to account for all of Occidental's known and unknown responsibility for Natural Resource Damages is arbitrary and capricious.

The State offers no justification for the \$50,000,000 limitation, but it is – in a coincidence we literally cannot believe – the *exact* amount the State can now recover for Natural Resource Damages under the New Jersey Budget. Page 70 of the State's budget reads

Except as otherwise provided in this act and notwithstanding the provisions of any other law or regulation to the contrary, the first \$50,000,000 in natural resource, cost recoveries and other associated damages recovered by the State ... shall be deposited into the Hazardous Discharge Site Cleanup . . . Recoveries in excess of the amounts appropriated pursuant to this paragraph, consistent with the terms and conditions of applicable settlement agreements or court rulings, shall be deposited in the General Fund as general State revenue.

We believe that the state selected \$50,000,000 because that is the number in the budget, not because it is an accurate accounting of the Natural Resource Damages caused by Occidental's behavior. As such, it has no relation to actual Natural Resource Damages, and is arbitrary and capricious, and thus not in accordance with law.

We had relied on New Jersey to represent the interests of the citizens affected by the Passaic River contamination, but the new budget creates a conflict of interest. At this point, Occidental has incentive to settle to escape potential liability, the State has incentive to settle to maximize the positive effect on the current State Budget; neither has specific incentive to protect the interests of vulnerable populations along the lower Passaic River . In this \$190 million settlement, only \$50 million is apparently going to improving the river; \$140 million is going to paper over state budget shortfalls. What is that \$140million supposed to be remedying?

The Settlement Is Not Faithful To the Objective Of The Governing Statute

The Spill Compensation and Control Act was passed in 1977 to protect and preserve the State's lands and waters and promote the health, safety and welfare of the people of New Jersey; that the tourist and recreation industry dependent on clean waters and beaches is vital to the economy of this State. Under the Act, the State is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction. N.J.S.A. 58:10-23.11a. Because you are acting as trustee in this Consent Judgment, you should hold yourself to the high standard normally required of a fiduciary.

The Legislature intended "to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharges." N.J.S.A. 58:10-23.11a

The Legislature declared "that many former industrial sites in the State remain vacant or underutilized in part because they have been contaminated by a discharge of a hazardous substance; that these properties constitute an economic drain on the State and the municipalities in which they exist; that it is in the public interest to have these properties cleaned up sufficiently so that they can be safely returned to productive use; and that it should be a function of the Department of Environmental Protection to facilitate and coordinate activities and functions designed to clean up contaminated sites in this State." N.J.S.A. 58:10-23.11a

In Sum, the legislature appointed the state as trustee of the lands and waters of the state, established rules for the proper transport, storage and disposal of hazardous chemicals and prioritized the rapid clean up of spills to protect and compensate injured citizens and businesses.

Twenty-six percent of the sum in the Consent Judgment will go to accomplish the objectives of the Spill Act, the other seventy-four percent however, will go to support general state budget priorities. It will pay state employees, fill potholes, fund pensions and schools. All of these are noble, and they are why we pay state taxes. They are not, however, why we settle environmental litigation.

Conclusion

We ask that NJDEP reject this settlement because it is arbitrary, capricious, unjust and because it should not be approved by a reviewing judge. If the Department does not reject the settlement, it should amend it so that the full \$190,000,000 is dedicated to offsetting Natural Resource Damages.

Sincerely,

Helen Henderson
American Littoral Society

Laurie Stauhs Howard
Passaic River Coalition

William S. Kibler
Raritan Headwaters Association

Debbie Mans
NY/NJ Baykeeper

Doug O'Malley
Environment New Jersey

Bill Sheehan
Hackensack Riverkeeper

Cc: Honorable Sebastian P. Lombardi, J.S.C.

BILL PASCRELL, JR.
9TH DISTRICT, NEW JERSEY

2370 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-5751
(202) 225-5782 FAX

ROBERT A. ROE FEDERAL BUILDING
200 FEDERAL PLAZA, SUITE 500
PATERSON, NJ 07505
(973) 523-5152
(973) 523-0637 FAX

<http://pascrell.house.gov>
bill.pascrell@mail.house.gov



COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON HEALTH
COMMITTEE ON THE BUDGET

Congress of the United States
House of Representatives

October 15th, 2014

Office of Record Access
NJDEP
Attn: Passaic Occidental Comments
P.O. Box 420, Mail Code 401-06Q
Trenton, NJ 08625-0420

Dear Sir or Madam,

On behalf of my constituents and the communities along the polluted Passaic River, I am writing to oppose the settlement agreement between New Jersey DEP (NJDEP) and Occidental Chemical Corporation, docket no. ESX-L-9868-05 (PASR).

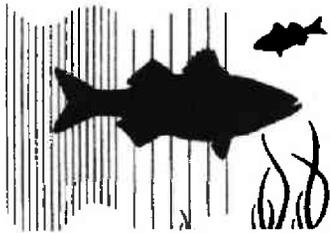
Polluters and responsible parties, not the taxpayers, must be the ones who pay for the full cleanup and restoration of the Passaic River. This was the very justification for the instigation of this litigation in the first place. Unfortunately, the State of New Jersey is planning on spending just \$67 million of the total \$355.4 million in settlements they have reached to date, including just \$50 million of the \$190 million in this proposed settlement, on future restoration projects. This means that less than 20 percent of the total settlement will be going to communities alongside the Passaic River. This paltry amount is disrespectful to the communities that have been devastated by this legacy of pollution.

Questions still remain as to why the state chose to settle this litigation for almost \$200 million less than the \$530 million in total they were originally anticipating. As you may know, the language inserted into the state's budget allows the state to transfer any recovered funds in excess of \$50 million to the state general fund. You should examine whether or not this settlement was agreed to prematurely by the state in order to secure revenue to plug a \$1.6 billion budget shortfall. Settlement decisions should be driven by the facts of the case and the injury to the victims who live alongside the Passaic River, not the state's fiscal condition.

Simply put, reallocating any settlement funds to the State General Fund is taking from the communities alongside the river that live everyday with the legacy of this contamination. I ask that you reject this settlement or, at the very least, insist it is amended to ensure that one-hundred percent of the settlement money is dedicated towards the restoration of the Passaic River.

Sincerely,

Bill Pascrell, Jr.
Member of Congress



PASSAIC RIVER COALITION

at Willow Hall

330 Speedwell Avenue, Morristown, NJ 07960
Phone: (973) 532-9830
Fax: (973) 889-9172

15 October 2014

Office of Records Access
NJ Department of Environmental Protection
Attn: Passaic Occidental Comments
P.O. Box 420, Mil Code 401-06Q
Trenton, NJ 08625-0420

Re: Occidental Settlement

Dear Commissioner Martin:

The Passaic River Coalition is a signatory to a separate letter submitted by the Hackensack Riverkeeper and NY/NJ Baykeeper. We submit these additional comments regarding the question of an adequate accounting for and estimation of Natural Resource Damages under this settlement.

The Passaic River Coalition (PRC) was formed in 1969 and through the last 45 years has been actively engaged in advocating for the water resources of the Passaic River Basin and those who depend on, use and are affected by these resources. In 1980, we began work with municipalities along the east bank of the Lower Passaic River to encourage public use and enjoyment of a river infamous for industrialization and pollution. With the assistance of NJDEP grant funding, the PRC developed three plans (1982, 1984 and 1987) for the Passaic River Restoration Project, with recommendations for new and improved parks and river access from Dundee Dam to Harrison. In the roughly 30 years since, the PRC has worked with the eight local municipalities and others to secure the funding and project plans necessary to implement the recommended projects. The PRC recently drafted a new plan for the same area that builds on prior planning and implementation efforts and provides new recommendations for action. This draft plan is under review by the project area municipalities and will be provided to the NJDEP upon its completion.

During this entire period, use of the Passaic River in this reach has been hindered by the existence of sediments contaminated by dioxin from the Diamond Alkali Company site at Lister Avenue in Newark, and by other contaminants from a variety of sources. Many types of public facilities and riverbank improvements that were recommended by the PRC could not be implemented because they would require disturbance of river sediments, such as for docks, boat ramps, fishing piers and riverbank modifications to improve riparian ecosystems and aesthetic enjoyment of the river. Other river improvements that would improve public use and enjoyment of the river, such as removal of derelict barges and docks, would also disturb the sediments. The contaminated sediments have also slowed the potential for redevelopment that would require riverbank modification, including associated public walkways. Finally, the contaminated sediments pose a risk to areas within the flood plains of the river, when sediment mobilization from fluvial and storm surge flooding can result in the deposition of contaminants on the upland areas.

The PRC examined current land values along the river throughout the project area, from the Red Bull Arena area to Dundee Dam. It is clear that the residential areas closest to the industrialized areas have

significantly lower property values, on a per acre basis, than those further up the river. The economic shadows cast by the contamination problems in the river are significant and long-lived.

We argue that the proposed \$50 million settlement for Natural Resources Damages does not properly address the impacts summarized above. Unfortunately, we find absolutely no information available on the record regarding the derivation of this amount. The legal issues associated with this issue are addressed in the Riverkeeper/Baykeeper letter and we will not repeat them here. The PRC is not able to provide an alternative valuation for Natural Resources Damages, as such an effort is beyond our financial resources, especially in the short time during which this proposed settlement has been opened for public comment. The NRD calculations associated with this pollution problem should have been provided for public involvement and comment long ago. "Open government" requires such public dialogue, so that the public can understand the basis for this government action.

In the absence of any justification from NJDEP for the value, and given the limited time available for developing an alternative approach, the PRC notes for the record the types of restoration actions to which NRD settlement funds should be applied, which we argue are likely to cost far more than the \$50 million proposed in the Occidental settlement. General restoration categories include but are not limited to the following:

1. **Public Use and Enjoyment of the River:** The PRC's restoration plans from the 1980's and the new plan to be released in 2014 provide a number of recommendations for public use and enjoyment of the river that have been stymied due to river contamination and other reasons. As noted in the PRC's comments to USEPA regarding the Focused Feasibility Study (enclosed), a major concern is that a capping remedy could prevent recreational improvements that require riverbank and in-river facilities. The PRC stated in those comments: "The cleanup design must incorporate provisions for creation and maintenance of docking facilities, boat ramps and other access points. Similar to the ecosystem issues discussed above, from a recreational boating perspective a project that results in a clean but inaccessible river is an unacceptable result." However, even if USEPA's final remedy does allow for such improvements, they will inevitably be more costly due to the special efforts required in the design, permitting, engineering and construction of such facilities. In addition, the municipalities have suffered for decades due to the lack of such facilities, and therefore it is entirely appropriate that NRD funds from this settlement be used for such purposes.

In-river and riverbank improvements are not the only issue here. Contamination of this entire reach of the river also has deprived the public of enjoyment of the river from the upland areas. With the assumption that the Superfund cleanup will be successful, NRD funds should be used to compensate the public for decades of lost enjoyment, through the acquisition and improvement of riverbank parks with appropriate amenities that will draw people to the river and allow an interaction between the people and their river.

2. **Ecological Improvements:** As noted in the PRC's comments to USEPA regarding the Focused Feasibility Study, another major concern is that a capping remedy does not restore the historic ecological functions of the river. The substrate will be unnatural, as will the contours. The PRC stated in those comments: "A project that cleans up sediment contamination while destroying the viability of the river as a functioning ecosystem is not an appropriate management approach. The proposed plan should have ecological targets, not just targets for contaminant levels in mobile sediments or fish tissue." However, we recognize that USEPA may approve a Record of Decision using the capping method. NRD funds should be available to create viable habitats within the river channel and along the riverbank areas that are compatible with the

final remedy but recreate at least some habitat values. The scientific, design, permitting and construction costs will be high, but are entirely appropriate for use of NRD funds.

3. **Lower Passaic River Restoration Project**: The NRD funds should also be available to provide State and local matching funds to projects identified by the U.S. Army Corps of Engineers and its partner agencies through this project, as relevant to the Passaic River from Dundee Dam to Newark Bay.
4. **Upland Economic Restoration in Riparian Areas**: The municipalities and land owners along the Lower Passaic River have suffered decades of economic damages from the lack of a clean river. We do not advocate direct financial compensation to municipalities or private landowners for these past damages. Rather, we recommend that NRD funds be made available to help provide enhanced public access and open space amenities (beyond the levels required through local development reviews or State permits) that would be near to or part of redevelopment projects and existing neighborhoods along the river. In this manner, the general public would gain benefits from the use of the NRD funds, the private interests would benefit indirectly from enhanced aesthetics within or near their projects, and the municipalities will benefit from enhanced property values within the redevelopment projects and nearby neighborhoods.

Based on the comments provide in this letter and in the Riverkeeper/Baykeeper letter, we strongly recommend:

- NJDEP should release for public consideration and comment the calculations by which the \$50 million NRD claim was determined;
- NJDEP should modify the settlement agreement such that the NRD portion of the settlement be determined through a public process and the final NRD portion of the settlement be determined and approved by the court only after that process (thus triggering that portion of the State budget language regarding a limitation on the deposit of settlement funds into the General Fund be "consistent with the terms and conditions of applicable settlement agreements or court rulings");
- The nature of projects acceptable for use of the NRD funds be made public prior to finalization of the NRD portion; and
- The resulting NRD portion should be no less than the \$50 million originally proposed.

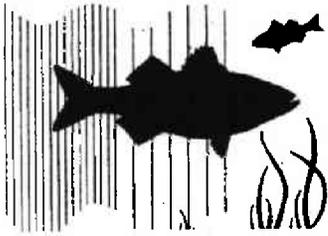
Thank you for your consideration of these comments.

Sincerely,



Laurie Stauhs Howard, Chair

Enclosure: Passaic River Coalition Comments on the Lower Passaic Cleanup Plan for RM 0 to 8.3, 20 August 2014, to Alice Yeh, USEPA



PASSAIC RIVER COALITION

at Willow Hall

330 Speedwell Avenue, Morristown, NJ 07960

Phone: (973) 532-9830

Fax: (973) 889-9172

20 August 2014

Submitted by email to: PassaicLower8MileComments.Region2@epa.gov

Alice Yeh, Remedial Project Manager
Environmental Protection Agency
290 Broadway, 19th Floor
New York, New York 10007-1866

Re: Passaic River Coalition Comments on the Lower Passaic Cleanup Plan for RM 0 to 8.3

Dear Ms. Yeh:

The Passaic River Coalition (PRC) has been actively involved in the Lower Passaic River area for several decades, working with local municipalities to achieve parks acquisition and improvements, debris removal, and economic improvements. Our efforts have been focused on the east bank from Harrison to Garfield, but we have also worked closely with west bank municipalities, the Passaic Valley Sewerage Commissioners and all affected counties. We have been actively engaged as stakeholders in the Lower Passaic River Superfund site and its various Operable Units since the beginning of the process, and on multiple occasions, most recently 14 November 2012, we have provided extensive comments to the U.S. Environmental Protection Agency (USEPA) National Remedy Review Board (NRRB), regarding the Lower Passaic River Restoration Project.

USEPA has now proposed a selected alternative for the lower 8.3 miles of the river. The Proposed Plan has been summarized by USEPA as "capping with dredging for flooding & navigation with off-site disposal of dredged materials" consisting of the following core elements:

- Removal of 4.3 million cubic yards of contaminated sediment, bank-to-bank, by dredging the river bottom from Newark Bay to the Belleville/Newark border;
- Sediment dewatering locally to prepare the material for transport by rail for further off-site treatment and/or disposal;
- Allowing 5.4 million cubic yards of contaminated sediment to remain and be capped to effectively eliminate the movement of sediment and its availability to contaminate the food chain;
- Capping all dredged areas bank-to-bank to protect against erosion or other physical disturbance, while reducing flooding potential and accommodating and protecting the integrity of the federal navigation channel in the 2.2 mile area of the river closest to Newark Bay; and
- Monitoring of water, air and wildlife during construction to evaluate and reduce potential releases of contaminants to the environment.

The PRC recognizes that USEPA has invested considerable time and effort in getting to this major step, as have the Cooperating Parties Group, members of the Community Advisory Group, and many experts and stakeholders. We are faced with a recognition that 30 years of process in tandem with specific cleanup projects (e.g., 80-120 Lister Avenue Cleanup Project; RM 10.9 Cleanup Project) have both

reduced the contamination in specific areas and spread the contamination across much larger areas than originally existed or recognized. We only need to look at the sediments that have filled the lower navigation channel since its last dredging circa 1983 to recognize the cost of delays. Further delays will exacerbate the remaining problem, but significant issues remain with the proposed plan. We do not want to allow “the ideal” to be the enemy of “the good” but we also recognize that the proposed plan does not promise a completely satisfactory result for several reasons. Our recommendation is that USEPA move forward in a manner that allows the shortcomings of the current approach to be addressed in an adaptive manner over time, but with assurances that the resulting work is truly beneficial.

The following issues are of greatest concern to the PRC, and should be addressed through improvements to the proposed plan, during the design and implementation process, or as parallel efforts. Our comments here are stated in general terms. In the interests of brevity, we will not repeat the detailed technical analysis of our prior comments to the NRRB.

The Lower Passaic River as an Ecosystem

The Lower Passaic River from Dundee Dam to Newark Bay has a long history of industrial, commercial and residential use, disruption by highway development, etc. Still, the Lower Passaic is not a ditch – it remains an important ecosystem and must be addressed as such. The PRC must question the ecological viability of a river that, subsequent to dredging, is armored from bank to bank. What plants will be able to grow in such a substrate? What fish species will be viable given the likely limitations on plant growth? A project that cleans up sediment contamination while destroying the viability of the river as a functioning ecosystem is not an appropriate management approach. The proposed plan should have ecological targets, not just targets for contaminant levels in mobile sediments or fish tissue.

Therefore, the proposed plan should be improved to incorporate ecological restoration in tandem with the sediment cleanup process, so that the river is both cleaner and more ecologically functional and sustainable. The final plan should have specific and aggressive ecological objectives in terms of bank habitat, emergent and submerged aquatic vegetation, areas for fish propagation and protection, and shellfish habitat. Achieving these objectives will likely require a much more sophisticated approach to the dredging and capping process, so that the appropriate substrate for ecosystem development is in place.

The ecological objectives should be closely linked to ecosystem function of the river bank and adjacent upland areas. A river ecosystem is not limited to the submerged area, but depends highly on the riparian area as well. Providing these targets will also provide opportunities for integrated Natural Resource Damage projects regarding the riparian habitat that is outside of any dredging areas.

Sustainable Remedies Are Necessary

The PRC has several concerns regarding the extent to which the proposal plan maximizes sustainable approaches to ecosystem improvements. As a nation, we must be more cognizant of sustainability as a fundamental concept of societal well-being.

1. Relationship to Other Operable Units of the Superfund Site

The proposed plan focuses on the lower 8.3 miles as the reach with the highest contaminant levels. We acknowledge the purpose of this targeting, but we also recognize that the Lower Passaic River is an interconnected whole. Isolation of one reach from the upstream and downstream reaches is not possible. Cleanup of an entire river section is fundamentally different from the vast majority of Superfund sites, which are stable sites with far less interaction beyond their borders. Contaminated sediments will continue to be mobilized by floods, tides and storm surge during the entire design and

implementation process, within the lower 8.3 miles and from both upstream and downstream areas. The inevitable result is cross-contamination and recontamination during and after the project. However, delaying action until approved plans exist for the remaining areas of concern also is problematic, as the entire situation will only deteriorate further.

Therefore, the PRC recommends that USEPA move toward proposal and adoption of cleanup plans for the remaining Operable Units (RM 8.3 to Dundee Dam; upper Newark Bay) so that implementation of these segments overlaps with implementation for the current segment, to the maximum extent possible. We understand from the Cooperating Parties Group that their RI/FS will be completed by the end of 2014, providing information that should, if comprehensive, provide sufficient information on the upstream and downstream Operable Units to serve as the basis for EPA decisions regarding those areas. The RI/FS should also provide useful information to refine the proposal plan for RM 0 to 8.3. The less time that transpires between completion of the initial project and the remaining segments, the better the river will be.

2. Dredged Materials Management

The proposed plan envisions “off-site” disposal of the dredged materials. The PRC has previously objected to the concept of transferring the Passaic River’s problem to someone else’s backyard. Disposal of these materials in distant landfills is the antithesis of sustainability. We also reject the concept of Contained Aquatic Disposal as a solution, unless used for cleaned sediments – it would move the problem rather than solve it. Rather, the PRC continues to believe strongly that dredged materials should be processed in a manner that allows for beneficial reuse, at locations that are both safe for the public and environment and provide local jobs. Presentations from EPA indicate that the cost of decontamination and beneficial reuse is not significantly different from that of off-site disposal. We note that decontamination facilities should be at a location well removed from residential neighborhoods in the area to avoid environmental justice issues.

3. Permanent Cap Maintenance

A design that requires perpetual maintenance in an uncontrollable environment is not a permanent solution. Unlike many brownfield properties where a cap can be visually inspected at any time and is within a controlled setting, the proposed cap would be within a river that routinely floods (e.g., Hurricane Irene) and is subject to major storm surge (e.g., Hurricane Sandy). There is no means by which the river can be controlled; these are natural events and exert major stress forces on the river bottom and banks. We should never underestimate the ability of natural forces to disrupt artificial structures. Routine visual inspection of the cap will not be feasible, as it would be at least several feet below the surface. These issues are in addition to the problem discussed above, regarding the ecological impacts of using an armored river bottom instead of a more natural substrate.

The PRC concludes that our society lacks the governance mechanisms to ensure perpetual maintenance of a non-visible cap that is subject to major physical stresses due to natural conditions. There is every reason to believe that maintenance will become a low priority in the foreseeable future, with resulting degradation of the cap. The use of a cap should be minimized through improved clean-up options. Where a cap cannot be avoided, however, the project plan should incorporate a mechanism with a permanent source of funding (i.e., a “sinking fund”) with a separate corporate structure so that the maintenance system is no longer dependent on the responsible parties and also cannot be interfered with by governmental agencies that might want to divert the funds to other uses.

4. Use of the River

The Lower Passaic River has been used historically for freight movement by barge and small ship, though that traffic has declined a great deal over the years. While the river's industrial past is unlikely to repeat, other uses of the navigation channel are possible as the river recovers, from personal watercraft to larger boats, ferries and the like. We can't know what the future will bring, and therefore some navigability of the river should be maintained so that potential uses may be accommodated. That being said, the most likely boat traffic in the future will be pleasure craft. If a choice must be made between improving the river ecosystem and maintaining a channel for freight traffic, the PRC would choose the former. In addition, we note that any navigation channel in the Lower Passaic is necessarily linked with navigation channels in Newark Bay and must be addressed as a network, likely requiring additional dredging.

Ancillary to the navigation channel are the necessary dock and access facilities. The cleanup design must incorporate provisions for creation and maintenance of docking facilities, boat ramps and other access points. Similar to the ecosystem issues discussed above, from a recreational boating perspective a project that results in a clean but inaccessible river is an unacceptable result.

Worst First

While the reach from RM 0 to 8.3 may have the highest level of contaminants, it is highly unlikely that all areas are equally contaminated. Further, it will be impossible to address all parts of the reach simultaneously, to avoid problems with staging, barge traffic, etc. To the extent feasible while avoiding inefficiencies and recontamination or cross-contamination, the areas at highest risk of affecting human health and ecosystem integrity should be addressed first, to more quickly eliminate the worst problems. These may involve the most contaminated sediments, but also could involve areas with highly mobile sediments. Addressing "worst first" is similar to the approach already taken in the river at the Lister Avenue site and RM 10.9.

The Lower Passaic River as Part of a Broader River System and Economy

A fundamental problem with the Superfund program as a whole is that it does not effectively engage the broader context of issues affecting or affected by the site. It views the issue through the lens of the "contaminated site" without recognizing that, in this instance, the Lower Passaic River is affected by the entire upstream river basin. Sediments and contaminants move down the river continually. As noted in our 2012 comments to the NRRB, the Harbor Estuary Program's focus on a regional sediment management approach is critical to ultimate success of this Superfund project. Unfortunately, complementary actions that could be taken to improve the viability of the Lower Passaic cleanup are not addressed in the project plan. USEPA needs to envision approaches (perhaps in collaboration with other federal agencies) that could be used in this manner. Again, the proposed cleanup plan need not be delayed, as both the cleanup and efforts to reduce sediment movement from upstream area could proceed in parallel.

Likewise, the project should be fully cognizant of the economic context of Lower Passaic River municipalities. A project of this nature should be integrated with economic planning and redevelopment actions so that the region gains the maximum benefit for the expenditures involved. The PRC does not envision increasing the project costs, necessarily, but rather investing time and effort on thinking beyond the confines of the Superfund cleanup itself. The purpose of the cleanup is not just to meet a standard, but to improve the river to the benefit of society. Integration with redevelopment, social objectives and neighborhood improvements can provide significant leverage. To the extent that Natural Resource Damage funds are available, they can be used to facilitate additional improvement

projects that address this need for broader integration. A narrow view of the purpose for this cleanup project will damage the potential benefits unnecessarily.

Integration of Actions

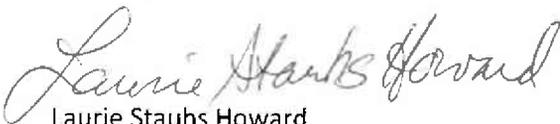
Experience with the RM 10.9 cleanup shows clearly that the number and condition of the bridges over the Lower Passaic River pose a major constraint on the speed (and therefore cost) of implementation. With bridges this old, we should be certain that Murphy's Law will apply – what can go wrong will go wrong – along with the corollary that it will go wrong at the worst possible times. Given the experience with RM 10.9, EPA's anticipated 5 year schedule to remove 4.3 million cubic yards at a cost of \$1.7 billion seems overly optimistic.

Rather than hope for the best, USEPA and the owners of these bridges should assume the worst and plan for it. Integration with transportation system improvements will be critical. Targeted bridge improvements might substantially reduce the likelihood of project delays. USEPA and others should consider whether a combination of NJDOT funds and cleanup project funds could be used to achieve cleanup cost reductions. Other Superfund projects have required the construction of access roads and other transportation improvements to make the project possible and cost-effective. A similar argument is appropriate here. We may find that spending more in one area reduces costs even more in another.

Conclusions

Action is certainly needed. The Lower Passaic River communities and public interests have waited far too long for comprehensive action, as beneficial as the initial cleanup projects may have been. The PRC strongly urges USEPA to improve the proposed plan using two general approaches. First, incorporate decision and design improvements that address as many of the issues discussed above as is feasible without extensive delay of project startup. Second, immediately move to design and implementation of cleanup plans for the other segments, further improvements to the project plan within the RM 0 to 8.3 reach that can be incorporated through adaptive management planning, and integration of the Lower Passaic River Superfund Site actions with broader river basin management to reduce the potential for recontamination of the Lower Passaic due to sediment movement from the non-tidal river.

Sincerely,



Laurie Stauhs Howard
Chair

October 15, 2014

Office of Record Access
NJDEP
Attn: Passaic Occidental Comments
P.O. Box 420, Mail Code 401-06Q
Trenton, NJ 08625-0420

Re: Occidental Chemical Corporation Settlement with NJDEP

Dear Sir or Madam,

Ironbound Community Corporation (ICC) is a 45-year-old community based non-profit in the Ironbound section of Newark, NJ and sits as the co-chair of the Community Advisory Group for the Passaic River superfund site. We have been long time advocates for the full clean up and restoration of the Passaic River. We submit the following comments regarding the recent settlement, Docket No. ESX-L-9868-05 (PASR), between the New Jersey Department of Environmental Protection Agency (NJDEP) and Occidental Chemical Corporation (OCC).

While we support the State in their pursuit to hold OCC accountable for damages to the Passaic River and upholding the polluter pays model, we cannot support the bulk of the settlement money going to the State's General Fund and therefore request that the settlement be denied by the NJDEP or at the very least amended to ensure that the full \$190,000,000 go to the communities from whom the river was stolen and the river itself.

As you may know, the Ironbound is home to Occidental Chemical Corporation's Diamond Alkali Shamrock facility, which dumped the extremely toxic Agent Orange throughout our community and directly into the Passaic River for decades before being shut down and dioxin permanently entombed on site. We are therefore well versed in the environmental and public health damages caused by this company. The current terms of the \$190,000,000 settlement which awards \$140,000,000 to State general fund, and a mere \$50,000,000 to Natural Resource Damages (NRD), furthers the injustices towards our community, is wholly insufficient for the restoration of the river, and sets a dangerous precedent for future NRD funds.

For decades, our community lived with the active illegal dumping of chemicals into the Passaic River resulting in this precious resource being stolen from our community. With such a small percentage of the settlement money we are ensuring a legacy of natural resource damages being made available for restoration.

Environmental justice communities, like Newark, rely on NRD and Spill Act funds to address the environmental impacts caused by industry. In the



Ironbound
COMMUNITY CORPORATION

**Administration &
Community Organizing**
179 Van Buren Street
Newark, NJ 07105
973.589.3353
fax 973.589.3637

www.ironboundcc.org

info@ironboundcc.org

Children's Center
1 New York Avenue
Newark, NJ 07105
973.589.6873
fax 973.589.2479

Community Center
432 Lafayette Street
Newark, NJ 07105
973.465.0947
fax 973.465-0275

**Family Success Center
West**
317 Elm Street
Newark, NJ 07105
973.465.0555
fax 973.589.9505

**Family Success Center
East**
29-31 Cortland Street
Newark, NJ 07105
973.344.5949
fax 973.344.0397

Early Head Start Center
St. Casmir's School
380 E. Kinney St.
Newark, NJ 07105
973.466.3053
fax 973.446.3190

case of the Passaic, we rely on these funds to bring life back to the river. The NJ Spill Compensation and Control Act (Spill Act N.J.S.A 58:10-

23.11 et seq) was enacted to ensure a swift response to environmental contamination. The legislature enacted this law to ensure the protection and preservation of our land and waters and to promote the health and safety and welfare of the people of NJ. According to this act:

The State has the fiduciary obligation to seek restitution when any of the State's natural resources are injured or otherwise impaired as a result of a discharge of hazardous substances. (4.II Cleanup and Removal Costs under the Spill Act) In addition to the common law claims that may secure restitution for natural resource damages or permits recovery of natural damages and the costs of assessing those damages.

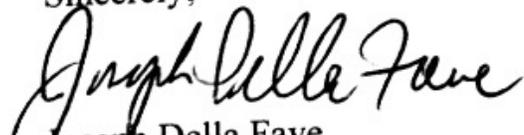
If OCC was found to be liable for \$190 million for their damages to the Passaic River, then that money should go back to the resource that was damaged and the communities that were impacted, to make our communities whole again. There is no justification for how the State determined this small amount to be sufficient to address the damages and restoration of the Passaic River. There is no breakdown with regards to how the \$140 million is being allocated.

OCC contributed to the pollution in the river and in our community and therefore should be responsible for fully restoring the river and addressing damages to river adjacent communities. This settlement should set a necessary precedent to hold polluters accountable. NJ, like many states, has an industrial legacy that has left a wake of contaminated natural resources. Current guidance from the budget rules caps the Natural Resource Damages (NRD) at \$50 million for future actions that the state takes in going after the polluters for NRD. These abandoned sites leave an economic drain on NJ. We need to aggressively go after responsible parties to clean up **THEIR** mess and ensure that the money goes back to the impacted communities.

Finally, we are concerned that the current guidance from the consent agreement states that the State will be responsible for plan, design, and implementation for the restoration projects. To ensure that the little amount of money does go back to the impacted community, there should be a participatory planning and design process as well as a commitment to ensure additional community benefits around jobs and job training opportunities.

Given the current guidelines of the settlement, we request that the NJDEP reject the settlement as it is written. If the settlement is not rejected it should be amended so that the full \$190,000,000 is dedicated to Natural Resource Damages.

Sincerely,


Joseph Della Fave
Executive Director



**SIERRA
CLUB**
FOUNDED 1892

NEW JERSEY CHAPTER

145 West Hanover St., Trenton, NJ 08618
TEL: [609] 656-7612 FAX: [609] 656-7618

www.SierraClub.org/NJ



Office of Record Access
NJDEP
ATTN: Passaic Occidental Comments
PO Box 420
Mail Code: 401-06Q
Trenton NJ 08625-0420

October 15, 2014

Re: NJDEPV Occidental Chemical Docket Number: ESX-L-9868-05 Passaic River

Dear Commissioner Robert Martin,

The Sierra Club opposes the \$190 million settlement for the Occidental Settlement for the Passaic River clean up. Of the \$190, \$140 million is being diverted to general funds not going to clean up the River, restore the River, or help communities along the River. Another \$6 million could be diverted to pay for lawyer fees. That leaves somewhere between \$50 and \$44 million for environmental programs. This is penny on the dollars going to communities and programs to help the people who have been impacted. This is taking blood money from the people who have been devastated from 40 years of toxic pollution. We believe that the amount of money in the settlement is significantly less than what it should be. The settlement with Occidental should have at least been \$2 billion. This settlement should be rejected and the DEP should seek larger damages. Whatever money comes from this should go back to people and communities along the River, not to balance the budget.

This money is going to be used to fund everything except helping the people who have been impacted from the pollution in the River. Instead of this going for health studies, environmental restoration, and cleaning up pollution in the River it will be going to help to balance the budget. The people of Newark have been impacted by the pollution now they will be impacted by the money being taken away. This creates terrible precedent for other toxic sites and Superfund Sites in New Jersey.

This is only a settlement for one part of the contamination site with more still left to be collected. This money is coming from the state and towns. Polluters like CLH Holdings, Maxus Energy, and Tierra Solutions still need to pay for the damage and pollution they have caused. Dioxin an extremely harmful chemical has been dumped into the Passaic River and Newark Bay. This contamination poses risks to both human health and the marine ecosystem. This is yet another example of polluters getting away with contaminating our environment.

Under both state and federal law, companies that discharge toxic chemicals into the environment that cause a loss of public use are assessed with Natural Resource Damages. The public fisheries, aquatic ecosystems, wetlands, rivers, and estuaries belong to all of us. When a company contaminates and prevents the use of that resource they have to pay damages. Since this site has contaminated the river, bay, impacted fisheries up and down the east coast that loss of resources and damages is quite substantial.

Sierra Club: For Our Families, For Our Future



**SIERRA
CLUB**
FOUNDED 1892

NEW JERSEY CHAPTER

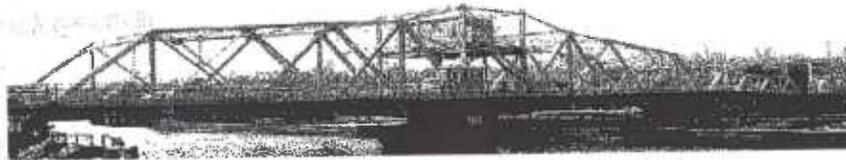
145 West Hanover St., Trenton, NJ 08618
TEL: [609] 656-7612 FAX: [609] 656-7618
www.SierraClub.org/NJ

Pollution from this plant has gone on for far too long. This is a sell out and not enough money to do what is supposed to be done. The Agent Orange from this plant not only hurt people and destroyed the environment in Vietnam, but people here in Newark. This cleanup is critical and needs funding to be done thoroughly and properly to improve the health of residents and the environment surrounding the Passaic River and Newark Bay. \$190 million does not make up for the impact of the people of Newark.

People of Newark and along the Passaic River had to live with this horrific toxic pollution for far too long. Any money coming into the state should go to benefiting the people impacted by the site. The money should be used for health studies, to create parks, cleaning up contaminated sites, planting trees, bike paths and access to water ways. This money should be going to benefit them not balancing the budget. We oppose this settlement because we believe it is too little too late and not going where it should be going.

Sincerely,

Jeff Tittel
Director of the New Jersey Sierra Club



The Passaic River Boat Club

Founded 2006

www.PassaicRiverBoatClub.com

Bringing Recreational Boating Back to the Passaic River

56 Hyde Road
Bloomfield, NJ 07003

October 17, 2014

John Jay Hoffman
New Jersey Attorney General
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 080
Trenton, NJ 08625

Dear Mr. Hoffman:

Congratulations on receiving \$190,000,000.00 settlement against the polluters of the Passaic River. From the newspapers I understand that about \$50,000,000.00 of these funds will be used for restoration.

The members of the Passaic River Boat Club requests that if only 10% of the \$50 million is dedicated to riverbank improvements the public will see and be able to enjoy something tangible for all the court expense, time and effort spent by your good office.

USEPA is now planning the implementation of their plan to restore the lower 8 miles of the Passaic River. This will include an installed cap, bank to bank on the upper six miles of the 8 mile stretch. Once installed, no further improvements will be allowed on the shore line. The remaining section of the Passaic River will most probably also be capped.

The time to fix and improve the shoreline infrastructure is before these caps are installed.

Our request is that top priority be given to provide **visible** infrastructure improvement by the addition of floating docks and boat launches on the Passaic River.

The State of New Jersey Boat Ramp at Nutley, property of the NJDEP, as recorded in the Essex County Hall of Records and on NJDOT maps should have top priority for improvement. This is the only boat ramp on the west shore of the tidal section of the river and it ends in mud at low tide. Because of this the ramp is not used by trailer boaters. Lack of a dock makes use by paddle boaters risky. The ramp could be easily restored to 24/7 use by dredging about 200 cubic yards and the installation of floating docks and dock access ramps.

Harrison Red Ball Stadium, Minish Park, Newark Bears Stadium, Kearny Park and The NJ Ramp at Nutley should all be equipped with floating docks and access gangways similar to the now finished Riverbank Park in the Ironbound Section of Newark. These facilities will enhance the public's access to the water and boaters, both motor and paddle, access to the land. Additionally the Minish Park design included a walkway from NJPAC to the Park over Route 21. Funds should be provided to complete the Park.

Please do not spend these funds on yet another study. Do something that the public can see and enjoy **now, before the moratorium on improvement falls.**

I request that this letter be added to the "Public Comments" on the settlement.

Very truly yours,



Harvey Morginstin, PE-Ret.
Secretary, Passaic River Boat Club

Exhibit 2

Law Offices

105 College Road East
P.O. Box 627
Princeton, NJ
08542-0627

609-716-6500 phone
609-799-7000 fax
www.drinkerbiddle.com

*A Delaware Limited
Liability Partnership*

CALIFORNIA
DELAWARE
ILLINOIS
NEW JERSEY
NEW YORK
PENNSYLVANIA
WASHINGTON DC
WISCONSIN

October 14, 2014

Via Electronic Mail, Regular Mail and Hand Delivery

Office of Record Access
NJDEP

Attn: Passaic Occidental Comments
PO Box 420, Mail Code 401-06Q
Trenton, NJ 08625-0420
PassaicSettlement@dep.state.nj.us

**RE: Occidental Settlement
NJDEP v. Occidental Chemical Corp., et al.,
Docket No. ESX-L-9868-05 (PASR)**

Dear Sir or Madam:

This firm represents Maxus Energy Corporation (“Maxus”) and Tierra Solutions, Inc. (“Tierra”) in connection with the above-referenced matter. I write on behalf of Maxus and Tierra to provide comments to the proposed Consent Judgment memorializing the settlement between the Plaintiffs and Occidental Chemical Corporation (“OCC”) in the above-referenced matter that was published in the New Jersey Register on September 15, 2014.

Maxus and Tierra’s comments seek clarification and confirmation on various provisions of the proposed Consent Judgment, as follows:

Paragraph 20

Paragraph 20 of the proposed Consent Judgment states that it applies to Maxus and Tierra pursuant to Section XIV. As neither Maxus nor Tierra is a signatory to the proposed Consent Judgment, that document cannot be binding on either of them. If the signatories to the proposed Consent Judgment take the position that it is binding on non-signatories Maxus and Tierra, those non-signatories object to the proposed Consent Judgment on the ground that attempting to apply it and make it binding on non-signatories is ultra vires. Similarly, to the extent the signatories to the proposed Consent Judgment take the position that Section XIV as referenced in Paragraph 20 provides contribution protection to OCC from claims by Maxus or Tierra (other than statutory contribution protection attendant to OCC’s direct payment of future remediation costs), then Maxus and Tierra object to Paragraph 20 on the ground that it violates Paragraph 55 of the Court Approved Settlement Agreement entered on December 12, 2013 (the “RYM Settlement Agreement”). If, however, Plaintiffs confirm in their response to these comments that the

*Jonathan I. Epstein,
Partner responsible for
Princeton Office*

Established 1849

October 14, 2014

Page 2

intent of Paragraph 20 is simply and solely to acknowledge that protection will be provided to OCC as may be authorized by statute or common law from (a) contribution actions brought by any person or entity other than the RYM Settlement Agreement defendants for “matters addressed”,¹ and (b) contribution actions brought by Maxus and Tierra solely attendant to OCC’s direct payment of future remediation costs in accordance with the RYM Settlement Agreement, then Maxus and Tierra have no objection to Paragraph 20.

Paragraph 21.1(d)

Sub-paragraph 21.1(d) of the proposed Consent Judgment has the effect of potentially providing a release to an unnamed entity. If any of the parties to the proposed Consent Judgment is aware of the existence of any such entity, that entity should be identified and the public provided with an opportunity to comment on the release provided to that entity. To the extent, however, that the Plaintiffs represent in their response to these comments that after a diligent investigation they are unaware of the existence of any such entity and that OCC has represented that after a diligent investigation it too is unaware of any such entity, Maxus and Tierra have no objection to this Sub-paragraph 21.1(d).

Paragraph 26

Paragraph 26 of the proposed Consent Judgment states that

“OCC agrees to pay the Settlement Funds...as costs, losses and liabilities incurred by OCC as a result of OCC’s acquisition of DSCC, including, but not limited to, DSC-1/DSCC’s Discharges of Hazardous Substances at or from the Lister Property. OCC does not agree to pay, allocate or attribute any portion of the Settlement Funds under this Consent Judgment to punitive damages, penalties, or ‘disgorgement damages’.”

If this provision is precedential, binding on Maxus or Tierra, constitutes an agreement by the State as to allocation of liability or allocation of the settlement payment among the various claims by the State against OCC for which OCC is receiving a release and/or is intended to be evidentiary as to such an allocation, Maxus and Tierra object to this provision on the ground that it violates Paragraphs 33 and 55 of the RYM Settlement Agreement. To the extent, however, that the Plaintiffs confirm in their response to these comments that Paragraph 26 is a unilateral statement by OCC, is of no precedential effect, is not binding on Maxus or Tierra, does not represent an agreement by the State as to allocation of liability or allocation of the settlement payment among the various claims by the State against OCC for which OCC is receiving a release and/or is not intended to

¹ As set out in Paragraph 65(a) of the Consent Judgment.

October 14, 2014

Page 3

be evidentiary as to such an allocation, Maxus and Tierra do not object to Paragraph 26 of the proposed Consent Judgment.

The inclusion of this statement in Paragraph 26 of the proposed Consent Judgment also raises the question of whether, in presenting the proposed Consent Judgment to the Court, the Plaintiffs or OCC will be seeking a ruling as to allocation of liability or allocation of the settlement payment among the various claims by the State against OCC for which OCC is receiving a release. If this is the case, Maxus and Tierra object to this proposed Consent Judgment not only on the ground that it violates Paragraph 33 of the RYM Settlement Agreement but also on grounds of due process. Maxus and Tierra are entitled to discovery in order to present to the Court their position with respect to allocation of liability with regard to OCC's settlement payments. To the extent that either of these issues will be before the Court in connection with the Plaintiffs' motion seeking approval of this proposed Consent Judgment, Maxus and Tierra request that such a motion not be filed until after discovery on these complicated issues is completed. To the extent, however, that the Plaintiffs confirm in their response to these comments that these issues will not be presented to the Court in connection with the Plaintiffs' motion for approval of the proposed Consent Judgment, Maxus and Tierra do not object to this paragraph in the proposed Consent Judgment.

Finally, Paragraph 26 states that

“In connection with its negotiation and entry of this Consent Judgment, OCC intends to comply with its duties and obligations, if any, as indemnitee under the SPA or common law.”

It is Maxus and Tierra's understanding that the Consent Judgment does not and is not intended to in any way address the issue of whether OCC has complied with its duties and obligations as indemnitee under the SPA or common law. If this understanding is incorrect, Maxus and Tierra object to Paragraph 26 of the proposed Consent Judgment as in violation of Paragraphs 33 and 55 of the RYM Settlement Agreement. To the extent, however, that the Plaintiffs confirm in their response to these comments that this understanding is correct, Maxus and Tierra have no objection to Paragraph 26 of the proposed Consent Judgment.

Paragraph 34

If Paragraph 34 of the proposed Consent Judgment modifies or otherwise restricts any obligation that the State or any other entity has to provide information as required by any Court Rule, Court Order, or State or Federal law, Maxus and Tierra object to this paragraph as unlawful and ultra vires. If, however, the Plaintiffs confirm in their response to these comments that this paragraph does not modify or otherwise restrict any obligation that the State or any other entity has to provide information as required by any

October 14, 2014

Page 4

Court Rule, Court Order, or State or Federal law, then Maxus and Tierra have no objection to Paragraph 34 of the proposed Consent Judgment.

Paragraph 36

Paragraph 36 of the proposed Consent Judgment states that

“For any demand for performance under this Consent Judgment or the Upland Orders, Plaintiffs shall communicate with OCC and, unless otherwise directed in writing by OCC, OCC’s indemnitor(s), Maxus and/or Tierra, in accordance with past practices of DEP.”

If the signatories to the proposed Consent Judgment take the position that this provision authorizes Plaintiffs or any other person or entity to demand that Maxus or Tierra fulfill any of OCC’s obligations under the proposed Consent Judgment or any other enforcement document, that the proposed Consent Judgment imposes any obligations on Maxus or Tierra that are not otherwise contained in a prior administrative order, consent decree, or other enforcement document, or that the proposed Consent Judgment authorizes the Plaintiffs or any other person or entity to require Maxus and/or Tierra to perform any work, take any action, reimburse any person or entity or make any payment, then Maxus and Tierra object to Paragraph 36 of the proposed Consent Judgment. To the extent, however, that the Plaintiffs confirm in their response to these comments that this provision (i) does not authorize the Plaintiffs or any other person or entity to demand that Maxus or Tierra fulfill any of OCC’s obligations under the proposed Consent Judgment or any other enforcement document, (ii) does not impose any obligations on Maxus or Tierra that are not otherwise contained in a prior administrative order, consent decree, or other enforcement document, (iii) does not authorize Plaintiffs or any other person or entity to require Maxus and/or Tierra to perform any work, take any action, reimburse any person or entity or make any payment and (iv) was only intended to reference Plaintiffs’ past practice, if any, of communicating directly with Maxus and/or Tierra with regard to the performance of investigatory or remedial work under existing administrative orders, consent decrees and other enforcement documents relating to the 80 Lister Avenue Superfund Site, then Maxus and Tierra have no objection to Paragraph 36 of the proposed Consent Judgment.

Paragraph 40

Paragraph 40 of the proposed Consent Judgment contains language that may be interpreted as ambiguous with regard to the impact of the Consent Judgment on the State’s obligation to cap liability against OCC in accordance with Section X of the RYM Settlement Agreement. If the Plaintiffs’ confirm in their response to these comments that Paragraph 40 of the Consent Judgment does not impact the application of the Caps set forth in the RYM Settlement Agreement and that the Plaintiffs remain obligated to reduce

October 14, 2014

Page 5

the amounts they are entitled to recover from OCC to the extent required by the RYM Settlement Agreement (if the conditions with regard to application of the Caps set forth in the RYM Settlement Agreement are met), Maxus and Tierra have no objection to this paragraph in the proposed Consent Judgment.

Paragraph 63

Paragraph 63 of the proposed Consent Judgment states, in part, that “no facts or potential liability have been established in the Passaic River Litigation regarding OCC’s alleged liability for OCC Distinct Conduct.” Certainly discovery has produced evidence that supports such liability and/or the State is aware of some basis for its claims asserted against OCC in the Passaic River Litigation with regard to OCC’s alleged liability for OCC Distinct Conduct. Therefore, for this statement to be accurate it must be understood to mean only that to date there has been no judicial finding or adjudication in the Passaic River Litigation that OCC is liable for OCC Distinct Conduct. If the Plaintiffs confirm in their response to this comment that this is the meaning of this statement and that, by the same token, there has been no judicial finding or adjudication in the Passaic River Litigation absolving OCC of liability for OCC Distinct Conduct, Maxus and Tierra have no objection to this statement. If this confirmation is not forthcoming, however, Maxus and Tierra object to this statement as inaccurate, and it should be stricken.

Paragraph 74(a) through (d)

To the extent that Paragraphs 74(a) through (d) are intended to confirm that the proposed Consent Judgment (i) does not allocate the settlement amount being paid by OCC between conduct that falls within the scope of any indemnity obligation of Maxus to OCC and conduct that falls outside the scope of any indemnity obligations of Maxus to OCC and (ii) that approval of the proposed Consent Judgment will not constitute a finding as to whether the settlement amount being paid by OCC is reasonable for purposes of any indemnity claims by OCC against other parties in the case, Maxus and Tierra have no objection to these paragraphs. To the extent, however, that the Plaintiffs in their response to these comments cannot confirm this application of Paragraphs 74(a) through (d), Maxus and Tierra request that the proposed Consent Judgment be amended to include language that makes this clear.

Paragraph 82

Paragraph 82 of the proposed Consent Judgment states that the parties will request that the Court find the Consent Judgment fair and reasonable as to all terms. It is Maxus and Tierra’s understanding based on reading this language in the context of the entire proposed Consent Judgment, and particularly (but not solely) Paragraphs 22 and 74.c and d., that the request that the Court find the proposed Consent Judgment fair and reasonable as to all terms applies only to whether it is fair and reasonable as to the Plaintiffs, and that

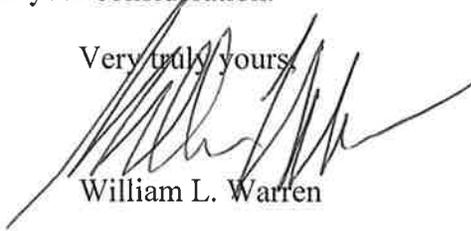
October 14, 2014

Page 6

the Consent Judgment approval motion will not result in an adjudication or determination with regard to whether the settlement amount being paid by OCC is reasonable for the purpose of enforcing its indemnity claims under the SPA/common law and is not evidentiary as to this issue. If this understanding is incorrect, Maxus and Tierra object to this paragraph on the ground that it violates Paragraph 33 of the RYM and also on grounds of due process as Maxus and Tierra have not had an opportunity to conduct the discovery necessary adequately to present these issues to the Court. To the extent, however, that the Plaintiffs confirm in their response to these comments that this understanding is correct, Maxus and Tierra have no objection to this paragraph.

Maxus and Tierra submit the above comments without prejudice to their rights in the above-referenced matter. Thank you for your consideration.

Very truly yours,



William L. Warren

WLW

cc: The Hon. Judge Marina Corodemus (Ret.)
Phil Cha, Esq.
David B. Hird, Esq.
Scott R. Rowland, Esq.
Oliver S. Howard, Esq.
Diane P. Sullivan, Esq.
Lindsay A. Brown, Esq.
Thomas J. Hall, Esq.
Andrew E. Skroback, Esq.
William J. Jackson, Esq.
Michael Gordon, Esq.
(Via Electronic Mail)

Weil, Gotshal & Manges LLP

1300 Eye Street NW, Suite 900
Washington, DC 20005-3314
+1 202 682 7000 tel
+1 202 857 0940 fax

David B. Hird
+1 (202) 682-7175
david.hird@weil.com

BY E-MAIL

October 14, 2014

Office of Record Access
NJDEP
Attn: Passaic Occidental Comments
P.O. Box 420, Mail Code 401-06Q
Trenton, NJ 08625-0420

Re: Occidental Settlement

Dear Sir or Madam:

On behalf of our client Repsol, S.A. (“Repsol”), we are submitting these Comments on the proposed Consent Judgment between the New Jersey Department of Environmental Protection (“NJDEP”) and Occidental Chemical Corporation (“OCC”).

As NJDEP is aware, Repsol is a co-defendant with OCC in *NJDEP v. Occidental Chemical Corp.*, Docket No. L9868-05 (Superior Court, Essex County) (the “Passaic River Litigation”). Repsol previously settled NJDEP’s¹ claims against in a Settlement Agreement approved by the Court on December 13, 2013 (“Settlement Agreement”). But Repsol remains a defendant against cross-claims asserted by OCC in the Passaic River Litigation. As part of the Settlement Agreement, NJDEP made certain commitments to Repsol and the other Settling Defendants² concerning the terms upon which NJDEP would be able settle with OCC in the future. Specifically, NJDEP agreed in Paragraph 55 of the Settlement Agreement that it would not enter into any settlement with OCC “that would limit Settling Defendants’ Claims against OCC . . . or Settling Defendants’ defenses against OCC’s Claims.” Also, in Paragraphs 36-43 of the Settlement Agreement, NJDEP agreed, subject to specified conditions, to reduce any judgment or settlement it obtains against OCC with respect to certain of NJDEP’s claims to \$400 million.

¹ For purposes of convenience, the term “NJDEP” will be used to refer to all Plaintiffs in that action collectively.

² Unless otherwise noted, capitalized terms shall have the same meaning as in the Settlement Agreement between NJDEP and Repsol.

It is not Repsol's intention to oppose approval of NJDEP's Consent Judgment with OCC. Rather, Repsol is concerned that OCC may try to interpret several provisions of the Consent Judgment in a manner that would be inconsistent with our Settlement Agreement and would limit Repsol's claims and defenses against OCC. Therefore, Repsol submits these Comments to request from NJDEP a clarification of those Consent Judgment provisions so that a clear record is established that these provisions do not impinge on Repsol's claims and defenses or limit Repsol's rights under the Settlement Agreement.

1. Paragraph 26 of the Consent Judgment

The first two sentences of Paragraph 26 provide:

OCC agrees to pay the Settlement Funds under Paragraph 23 and to pay or assure payments of Future Cleanup and Removal Costs under Paragraphs 39, 41 and 42 as costs, losses and liabilities incurred by OCC as a result of OCC's acquisition of DSCC, including, but not limited to, DSC-1/DSCC's Discharges of Hazardous Substances at or from the Lister Property. OCC does not agree to pay, allocate or attribute any portion of the Settlement Funds under this Consent Judgment to punitive damages, penalties, or "disgorgement damages."

Each of these two sentences could be misconstrued by OCC to limit Repsol's claims against OCC and Repsol's defenses against OCC's claims in a manner that would breach NJDEP's promise in Paragraph 55 of the Settlement Agreement.

As NJDEP is aware, there are at least two separate potential bases for OCC's Spill Act liability as a Discharger of Hazardous Substances in the Passaic River: (1) OCC's liability due to its acquisition of and merger with the company formerly known as Diamond Shamrock (DSC-1/DSCC), which had owned and operated the Lister Property for several years; and (2) OCC's independent liability as an operator of the Lister Property in 1976 and 1977 and after September 1987, and other independent actions by OCC resulting in Discharges of Hazardous Substances into the Passaic River. In the Passaic River Litigation, OCC has claimed that it is entitled to indemnification from co-defendant Maxus Energy Corporation ("Maxus") under the agreement through which OCC acquired Diamond Shamrock for those liabilities that OCC incurred by virtue of that acquisition and its subsequent merger with Diamond Shamrock. Also, OCC has claimed that Repsol – a former indirect parent of Maxus – is vicariously liable for Maxus' indemnification obligations to OCC. Repsol has denied that it has any responsibility to OCC for Maxus' indemnifications obligations to OCC. But, Repsol and the other Settling Defendants also contend that Maxus' indemnification agreement does not cover OCC's Spill Act liability based on its own actions as an operator of the Lister Property or its independent Discharges of Hazardous Substances in the Passaic River ("OCC Distinct Conduct" as that term is used in the Settlement Agreement).

There is also a separate issue about the scope of Maxus' indemnification obligation to OCC. Repsol and other Settling Defendants contend that that the Maxus indemnity would not cover OCC's liability to NJDEP based on Diamond Shamrock's deliberate, intentional or reckless conduct ("OCC/DSCC Deliberate Conduct" as that term is defined in the Settlement Agreement), and would not cover OCC's obligations to pay punitive or exemplary damages or penalties to NJDEP.

At this point in time, the Court has not yet decided what portion of OCC's Spill Act liability is attributable to its acquisition of and merger with Diamond Shamrock and what portion is attributable to OCC's independent actions, including those as an operator of the Lister Property. Similarly, the Court has not yet ruled on whether Maxus' indemnity obligation covers OCC's liability for OCC/DSCC Deliberate Conduct or for punitive damages and penalties. Repsol would expect these issues to be resolved in the course of the Track IV proceedings in the Passaic River Litigation involving OCC and the Settling Defendants, after each side presented evidence and arguments in support of its position.

Repsol is concerned, however, that OCC may try to rely on the first two sentences of Paragraph 26 to make potential arguments that these issues are no longer part of the Track IV proceedings. OCC may try to argue that the language of the first sentence stating that "OCC agrees to pay the Settlement Funds . . . as costs, losses and liabilities incurred by OCC as a result of OCC's acquisition of DSCC [Diamond Shamrock]," means that all of the money OCC is paying to NJDEP is covered by the Maxus indemnity, and none of the money paid is attributable to OCC's independent liability as an operator of the Lister Property and for other Discharges into the Passaic River. Similarly, Repsol is concerned that OCC may try to argue that the language in the second sentence of Paragraph 26, that "OCC does not agree to pay, allocate or attribute any portion of the Settlement Funds under this Consent Judgment to punitive damages, penalties, or 'disgorgement damages,'" means that none of the money OCC is paying to NJDEP is going to satisfy claims for punitive damages or penalties, or claims based on OCC/DSCC Deliberate Conduct.

Repsol believes that these potential arguments would be wrong under the terms of the Consent Judgment itself. In Paragraph 28 of the Consent Judgment, OCC agrees to settle its liability to NJDEP for all of its Discharges in the Passaic River, both as a result of its acquisition of and merger with Diamond Shamrock, and as a result of its independent operation of the Lister Property. Moreover, Paragraph 28 further provides that OCC is settling its liability to NJDEP for disgorgement damages, and punitive and exemplary damages. Because OCC's payments are being made to resolve OCC's direct liability as an operator of the Lister Property, and to resolve claims made by NJDEP for disgorgement and exemplary and punitive damages, therefore, at least some portion of the settlement funds should be attributed to these types of liabilities. Further, Paragraph 74(c) provides that "[n]othing in this Consent Judgment determines the amount of any indemnity obligation of Maxus to OCC," and Paragraph 74(d) provides that OCC's claim against Maxus for indemnification is not resolved by the entry of the Consent Judgment." These provisions reflect that the attribution of settlement payments to the different types of

claims against it is still an issue for the Court to resolve when it determines the scope of the Maxus indemnity as part of the Track IV litigation.

Also, these potential arguments would be inconsistent with the provisions of the Settlement Agreement. Under Paragraph 28 of the Settlement Agreement, NJDEP agreed not to assert claims against OCC for economic damages, natural resource damages, disgorgement damages, or punitive damages, except for those claims based on OCC/DSCC Deliberate Conduct or OCC Distinct Conduct. In Paragraph 19.36 of the Settlement Agreement, "OCC/DSCC Deliberate Conduct" was defined to mean "fraudulent and intentional conduct" by Diamond Shamrock, and the terms "fraudulent" and "intentional" were further defined. In Paragraph 19.37 of the Settlement Agreement, "OCC Distinct Conduct" was defined to encompass OCC's independent activities as a Discharger into the Passaic River. Thus, after the Court's entry of the Settlement Agreement, a substantial portion of the claims that NJDEP could pursue against OCC – including all of its claims for natural resource damages and economic damages – must be based either on "OCC/DSCC Deliberate Conduct" or "OCC Distinct Conduct," and therefore such claims would likely fall outside of Maxus' indemnification obligations to OCC.

Finally, if OCC's potential arguments concerning Paragraph 26 of the Consent Judgment were correct, NJDEP would have breached its promise to Repsol and the other Settling Defendants in Paragraph 55 of the Settlement Agreement that it would not enter into any settlement "that would limit Settling Defendants' Claims against OCC . . . or Settling Defendants' defenses to OCC's Claims." An interpretation of Paragraph 26 that attributed none of OCC's payment to OCC's direct liability as an operator of the Lister Property or to NJDEP's claims for punitive damages would certainly limit Repsol and the other Settling Defendants' claims and defenses in litigation with OCC.

Accordingly, Repsol asks NJDEP to confirm that Paragraph 26 of the Consent Judgment does not mean that funds to be paid by OCC in settlement are all attributable to OCC's liability based on its acquisition of and merger with Diamond Shamrock, and that no portion of those payments is attributable to OCC's independent Spill Act liability as an operator of the Lister Property or its other actions resulting in discharges of hazardous substances to the Passaic River. Rather, it is the province of the Court to determine in the course of the Track IV proceedings how much of the money OCC is paying is attributable to OCC's liability due to its merger with Diamond Shamrock and how much of the money is attributable to OCC's independent liability as an operator of the Lister Property and as a direct Discharger into the Passaic River.

Similarly, Repsol asks NJDEP to confirm that Paragraph 26 of the Consent Judgment does not mean that none of the funds paid by OCC in settlement are attributable to NJDEP's claims for disgorgement damages, punitive or exemplary damages, or penalties. Rather, it is the province of the Court to determine in the course of the Track IV proceedings how much of the money to be paid by OCC is attributable to these categories of NJDEP's claims.

2. Paragraph 63 of the Consent Judgment

The final sentence of Paragraph 63 of the Consent Judgment reads “[a]dditionally, the Parties agree that no facts or potential liability have been established in the Passaic River Litigation regarding OCC’s alleged liability for OCC Distinct Conduct.” The term “OCC Distinct Conduct” is defined in Paragraph 21.39 of the Consent Judgment to have the same meaning as that term has in Paragraph 19.37 of the Settlement Agreement, where the term is defined to refer to OCC’s independent operation of the Lister Property before its acquisition of Diamond Shamrock, and the operation of the Lister Property after OCC’s merger with Diamond Shamrock.

Repsol understands this sentence to mean that, although OCC is settling NJDEP’s claims against it based on OCC Distinct Conduct, OCC is denying that it has that liability, and the Court has not as yet decided whether OCC would be liable because of OCC Distinct Conduct or how extensive that liability would be when compared with OCC’s liability based on its acquisition of and merger, with Diamond Shamrock. If this is the correct meaning, Repsol has no problem with the sentence.

Repsol is concerned, however, that OCC may rely on this sentence to argue that the Court has somehow decided that OCC is not liable under the Spill Act based on OCC Distinct Conduct, or that the question whether OCC has liability based on OCC Distinct Conduct is no longer an open issue for the Court to decide in the context of the Track IV proceedings. Such an interpretation would limit Repsol’s claims against OCC and its defenses against OCC’s claims in breach of Paragraph 55 of the Settlement Agreement.

Accordingly, Repsol asks NJDEP to confirm that this final sentence of Paragraph 63 of the Consent Judgment should be read to mean that the issue whether OCC is liable under the Spill Act based on OCC Distinct Conduct is still an open issue for the Court to resolve in the course of the Track IV proceedings.

3. Paragraph 40 of the Consent Judgment

Paragraph 40 of the Consent Judgment addresses a possible future contingency. Under Paragraph 39, OCC has agreed to pay the State of New Jersey’s 10% share of a federal CERCLA cleanup in the Focused Feasibility Area (“State FFS Share”). Paragraph 40 addresses the possible situation in which the amount of the State FFS Share, together with the \$190 million in settlement funds paid by OCC, exceeds \$400 million. Under Paragraphs 36-43 of the Settlement Agreement, NJDEP agreed to reduce any judgment or settlement amount it obtained against OCC with respect to certain claims to \$400 million, if certain conditions are met, so that OCC could not recover more than \$400 million against Repsol and certain other Settling Defendants with respect to those claims.

Office of Record Access
October 14, 2014
Page 6

Repsol understands Paragraph 40 of the Consent Judgment to mean that, if the necessary conditions are met, NJDEP will not seek to recover from OCC more than \$210 million (in addition to the \$190 million paid under the Consent Judgment) for the State FFS Share, and would instead try to recover amounts above \$210 million from third parties other than OCC or Repsol and the other Settling Defendants. Further, Repsol understands that OCC, Repsol and the other Settling Defendants would be protected by the covenant not to sue contribution protection provisions in the Settlement Agreement (Settling Defendants and OCC) and Consent Judgment (OCC) with respect to the full amount of the State's FFS Share above \$210 million. Please confirm that this interpretation of Paragraph 40 is correct.

* * *

In conclusion, Repsol will not object to the entry of this Consent Judgment, provided that NJDEP confirms in its response to these Comments that NJDEP's understanding of Paragraphs 26, 40, and 63 of the Consent Judgment is consistent with the meanings set forth above.

Sincerely,



David B. Hird
Counsel to Repsol, S.A.

direct tel (202) 974-5740
askroback@chadbournel.com

October 15, 2014

Via Electronic and Overnight Mail

Office of Record Access
New Jersey Dept. of Environmental Prot.
Attn: Passaic Occidental Comments
PO Box 420, Mail Code 401-06Q
Trenton, NJ 08625-0420
PassaicSettlement@dep.state.nj.us

Re: Occidental Settlement in *NJDEP v. Occidental Chemical Corp., et al.*, Docket
No. ESX-L-9868-05

Dear Sir/Madam:

On behalf of YPF, S.A. (“YPF”), YPF International, S.A. (“YPFI”), YPF Holdings, Inc., and CLH Holdings (together, the “YPF Settling Defendants”), I write in connection with the above-referenced litigation to comment on the proposed Consent Judgment memorializing the settlement between the 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 (collectively, “Plaintiffs”) and Occidental Chemical Corporation (“OCC”) and its affiliates in the above-referenced matter, which was published in the New Jersey Register on or about September 15, 2014. As you know, the YPF Settlement Defendants reached a settlement with Plaintiffs that was approved by the Court after public comment on December 12, 2013 (the “RYM Settlement Agreement”).

In light of the complexity of the proposed Consent Judgment and its potential interplay with the Court approved RYM Settlement Agreement, the YPF Defendants respectfully request clarification and affirmative confirmation of the meaning of various provisions of the proposed Consent Judgment, as follows:

I. Paragraph 20

Paragraph 20 of the proposed Consent Judgment states in part that, “pursuant to Section XIV”, the Consent Judgment “applies to Maxus, Tierra, the Repsol-YPF Defendants...” The YPF Defendants are a subset of the “Repsol-YPF Defendants,” as defined. Because the YPF Defendants are not signatories to the proposed Consent Judgment, and were not involved in its negotiation, that document cannot be binding on them. If the

signatories to the proposed Consent Judgment take the position that it is binding on non-signatories, including the YPF Defendants, we object on the ground that any attempt to apply the proposed Consent Judgment to and make it binding on non-signatories is beyond the power of the signatories and the Court.

Similarly, to the extent the signatories to the proposed Consent Judgment take the position that Section XIV (as referenced in Paragraph 20) provides contribution protection to OCC from claims by the YPF Defendants other than statutory contribution protection attendant to OCC's direct payment of future remediation costs, then the YPF Defendants object to Paragraph 20 on the ground that it violates Paragraph 55 of the RYM Settlement Agreement approved by the Court.

On the other hand, if Plaintiffs confirm in their response to these comments that the intent of Paragraph 20 is simply and solely to acknowledge that protection will be provided to OCC as may be authorized by statute or common law from (a) contribution actions brought by any person or entity other than the RYM Settlement Agreement defendants for "matters addressed," as discussed in Paragraph 65(a) of the proposed Consent Judgment, and (b) contribution actions brought by the RYM Settlement Agreement defendants solely related to OCC's direct payment of future remediation costs in accordance with the terms of the RYM Settlement Agreement, then the YPF Defendants have no objection to Paragraph 20.

II. Paragraph 21.1(d)

Sub-paragraph 21.1(d) of the proposed Consent Judgment has the effect of potentially providing a release to an unnamed entity. If any of the parties to the proposed Consent Judgment is aware of the existence of any such entity, that entity should be identified and the public should be provided with an opportunity to comment on the release provided to that entity. However, to the extent that the Plaintiffs represent in their response to these comments that they are unaware of the existence of any such entity after a diligent investigation, and that OCC has represented that it too is unaware of any such entity after a diligent investigation, the YPF Defendants have no objection to Sub-paragraph 21.1(d).

III. Paragraph 26

Paragraph 26 of the proposed Consent Judgment provides that:

"OCC agrees to pay the Settlement Funds ... as costs, losses and liabilities incurred by OCC as a result of OCC's acquisition of DSCC, including, but not limited to, DSC-1/DSCC's Discharges of Hazardous Substances at or from the Lister Property. OCC does not agree to pay, allocate or attribute any portion of the Settlement Funds under this Consent Judgment to punitive damages, penalties, or 'disgorgement damages.'"

In light of other provisions in the proposed Settlement Agreement, including Paragraphs 25, 65(a) and 74, it is our understanding that the above is merely a unilateral statement of OCC and without any potential effect on the RYM Settlement Agreement defendants.

However, if Paragraph 26 is precedential, binding on any of the RYM Settlement Agreement defendants, constitutes an agreement by the State as to allocation of liability or allocation of the settlement payment among the various claims by the State against OCC for which OCC is receiving a release and/or is intended to be evidentiary as to such an allocation, the YPF Defendants object to this provision on the ground that it violates Paragraphs 33 and 55 of the RYM Settlement Agreement and potentially the due process rights of its signatories.

To the extent that the Plaintiffs confirm in their response to these comments that Paragraph 26 is a unilateral statement by OCC only, is of no precedential effect, is not binding on any of the RYM Settlement Agreement defendants, does not represent an agreement by the State as to allocation of liability or allocation of the settlement payment among the various claims by the State against OCC for which OCC is receiving a release and/or is not intended to be evidentiary as to such an allocation, the YPF Defendants do not object to Paragraph 26 of the proposed Consent Judgment.

IV. Paragraph 34

The YPF Defendants object to this paragraph as unlawful and ultra vires only if Paragraph 34 of the proposed Consent Judgment modifies or otherwise restricts any obligation that the State of New Jersey or any other entity has to provide information as required by any Court Rule, Court Order, or State or Federal law. If the Plaintiffs confirm in their response to these comments that this paragraph does not modify or otherwise restrict any obligation that the State or any other entity has to provide information as required by any Court Rule, Court Order, or State or Federal law, then the YPF Defendants have no objection to Paragraph 34 of the proposed Consent Judgment.

V. Paragraph 40

Paragraph 40 of the proposed Consent Judgment contains language that could possibly be interpreted as ambiguous regarding the impact, if any, of the Consent Judgment on the State's obligation to cap liability against OCC in accordance with Section X of the RYM Settlement Agreement. If the Plaintiffs confirm in their response to these comments that Paragraph 40 of the Consent Judgment does not impact the application of the Caps as set forth and defined in the RYM Settlement Agreement, and that the Plaintiffs remain obligated to reduce the amounts they are entitled to recover from OCC to the extent required by the RYM Settlement Agreement (if the conditions with regard to application of the Caps set forth in the RYM Settlement Agreement are met), then the YPF Defendants have no objection to

Paragraph 40 of the proposed Consent Judgment. Otherwise, the YPF Defendants must object to the extent that the proposed Consent Judgment violates the RYM Settlement Agreement.

VI. Paragraph 63

Paragraph 63 of the proposed Consent Judgment states, in part, that “no facts or potential liability have been established in the Passaic River Litigation regarding OCC’s alleged liability for OCC Distinct Conduct.” Discovery conducted to date in the Passaic River litigation has produced evidence that supports such liability. In addition, the State must certainly be aware of some basis for the claims it asserted against OCC in the Passaic River Litigation with regard to OCC’s alleged liability for OCC Distinct Conduct. Therefore, for this statement to be accurate, it must be understood to mean only that, to date, there has been no judicial finding or adjudication in the Passaic River Litigation that OCC is liable for OCC Distinct Conduct, as that term is defined. If the Plaintiffs confirm in their response to this comment that this is the meaning of this statement, and that it is also conversely true and correct that there has been no judicial finding or adjudication in the Passaic River Litigation absolving OCC of liability for OCC Distinct Conduct, then the YPF Defendants have no objection to this statement. The YPF Defendants only object to this statement as inaccurate, and request that it be stricken, if this understanding is not confirmed in the State’s response.

VII. Paragraph 82

Paragraph 82 of the proposed Consent Judgment states that the parties will request that “the Court find this Consent Judgment is fair and reasonable as to all terms.” It is the understanding of the YPF Defendants based on reading this language in the context of the entire proposed Consent Judgment, including Paragraphs 22 and 74 (c) and (d), that the request that the Court find the proposed Consent Judgment fair and reasonable as to all terms applies only to whether it is fair and reasonable as to the Plaintiffs, and that Plaintiff’s motion to approve the proposed Consent Judgment will not result in an adjudication or determination with regard to whether the settlement amount being paid by OCC is reasonable for the purpose of enforcing any indemnity claims OCC may have under the SPA or at common law, and is not evidentiary as to this issue. If this understanding is incorrect, the YPF Defendants must object to this paragraph on the ground that it violates Paragraph 33 of the RYM Settlement Agreement and on grounds of due process. However, the YPF Defendants have no objection to this paragraph if and to the extent that the Plaintiffs confirm in their response to these comments that this understanding is correct.

* * *

The YPF Defendants respectfully submit these comments without prejudice to their rights in the above-referenced matter. We are hopeful that each of these points can and will

be clarified and addressed by the State in its response to public comments. Many thanks for your time and consideration.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Andrew Skroback", with a long, sweeping horizontal line extending to the right.

Andrew Skroback

Attachment B

JOHN J. HOFFMAN
 ACTING ATTORNEY GENERAL OF NEW JERSEY
 Richard J. Hughes Justice Complex
 25 Market Street, PO Box 093
 Trenton, New Jersey 08625-0093
 Attorney for Plaintiffs

FILED

JUL 22 2014

Sebastian P. Lombardi, J.S.C.

By: John F. Dickinson, Jr.
 Deputy Attorney General
 Attorney I.D. No. 001441982
 (609) 984-4863

JACKSON GILMOUR & DOBBS, PC
 3900 Essex Lane, Suite 700
 Houston, Texas 77027

GORDON & GORDON
 505 Morris Avenue
 Springfield, New Jersey 07081

By: William J. Jackson, Special Counsel
 (713) 355-5000

By: Michael Gordon, Special Counsel
 Attorney I.D. No. 010561980
 (973) 467-2400

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

SUPERIOR COURT OF NEW JERSEY
 LAW DIVISION - ESSEX COUNTY
 DOCKET NO. ESX-L9868-05 (PASR)

Civil Action

**ORDER ON THE APPROVAL PROCESS
 FOR THE PROPOSED OCC FINAL
 CONSENT JUDGMENT**

Plaintiffs,

v.

OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) and CLH HOLDINGS,

Defendants.

THIS MATTER, having come before the Court on application of counsel for 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 (collectively, "Plaintiffs") and Defendant Occidental Chemical Corporation ("OCC");

WHEREAS, counsel for Plaintiffs and Defendant OCC have agreed to a confidential Term Sheet setting forth a settlement framework to resolve the claims between them; and

WHEREAS, if approved, the OCC Consent Judgment and related orders shall request a dismissal of Plaintiffs' claims against OCC; and

WHEREAS, the Track VIII parties having agreed, after consultation with and approval of the Special Master, and the Court having considered the matter,

IT IS on this 22nd day of July, 2014,

ORDERED that, on or before August 7, 2014, counsel for Plaintiffs and OCC shall advise the Special Master and the Court whether they have reached final agreement on a proposed Consent Judgment so that the attorneys for OCC shall recommend formal approval by OCC; and it is further

ORDERED that, if approved, OCC shall have executed the Consent Judgment on or before August 15, 2014; and it is further

ORDERED that on or before August 21, 2014, the Plaintiffs shall submit notice of the proposed Settlement Agreement to the New Jersey Register for September 15, 2014 publication and post the proposed Consent Judgment and Administrative Record on the NJDEP website; and it is further

ORDERED that after the close of the thirty-day public comment period on October 15, 2014, Plaintiffs shall review all comments and prepare a response document; and it is further

ORDERED that if Plaintiffs determine that they have received no comments that warrant rejection of the Consent Judgment, Plaintiffs shall file a motion to dismiss all of Plaintiffs' claims against OCC and enter an Order approving the Consent Judgment, on or before November 10, 2014; any person opposing the motion filed by Plaintiffs shall file its papers on or before December 1, 2014; and reply briefs shall be filed on or before December 10, 2014; and it is further

ORDERED that a hearing on the motion to dismiss Plaintiffs' claims and enter an Order approving the Consent Judgment shall be conducted on December 16, 2014; and it is further

ORDERED that until further order of the Court, all proceedings and requirements in this action involving Track VIII are hereby stayed; and as provided by CMO XX and CMO XXII, other than depositions to preserve testimony or other matters approved by the Court, all Track II and Track IV discovery is stayed until further Order of the Court; and it is further

ORDERED that this Order shall be served upon all parties, Liaison Counsel for former Third-Party Defendants and posted forthwith on CT Summation.

A handwritten signature in black ink, reading "Sebastian P. Lombardi", written over a horizontal line.

Honorable Sebastian P. Lombardi, J.S.C.

JOHN J. HOFFMAN
 ACTING ATTORNEY GENERAL
 OF NEW JERSEY
 Richard J. Hughes Justice Complex
 25 Market Street, PO Box 093
 Trenton, New Jersey 08625-0093
 Attorney for Plaintiffs
 By: John F. Dickinson, Jr.
 Deputy Attorney General
 Attorney I.D. No. 001441982
 (609) 984-4863

FILED
 SEP 30 2014
 Sebastian P. Lombardi, J.S.C.

RECEIVED
 SEP 29 2014
 Sebastian P. Lombardi, J.S.C.

JACKSON GILMOUR & DOBBS, PC
 3900 Essex Lane, Suite 700
 Houston, Texas 77027

GORDON & GORDON
 505 Morris Avenue
 Springfield, New Jersey 07081

By: William J. Jackson, Special Counsel
 (713) 355-5000

By: Michael Gordon, Special Counsel
 Attorney I.D. No. 010561980
 (973) 467-2400

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

SUPERIOR COURT OF NEW JERSEY
 LAW DIVISION - ESSEX COUNTY
 DOCKET NO. ESX-L9868-05 (PASR)

Plaintiffs,
 v.

Civil Action

**CONSENT ORDER
 AMENDING JULY 22, 2014 ORDER
 ON THE APPROVAL PROCESS
 FOR THE PROPOSED OCC FINAL
 CONSENT JUDGMENT**

OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) and CLH HOLDINGS,

Defendants.

THIS MATTER, having come before the Court on application of counsel for 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 (collectively, "Plaintiffs") and Defendant Occidental Chemical Corporation ("OCC"); and

WHEREAS, OCC has executed a proposed Consent Judgment on August 20, 2014; and

WHEREAS, if approved, the Consent Judgment and related orders shall request a dismissal of Plaintiffs' claims against OCC; and

WHEREAS notice of the proposed Consent Judgment was published in the New Jersey Register and the proposed Consent Judgment and Administrative Record were posted on the NJDEP website on September 15, 2014; and

WHEREAS the Plaintiffs and OCC have jointly requested that OCC be provided with the right to file a brief in support of Plaintiffs' motion to dismiss all of its claims against OCC and enter an Order approving the Consent Judgment, with approval of the Special Master, and the Court having considered the matter,

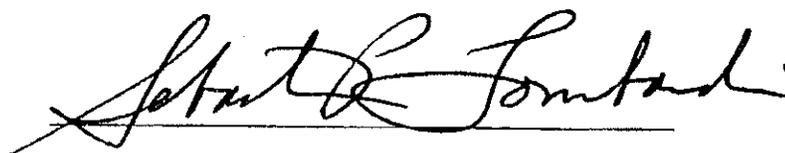
IT IS on this 30 th day of ~~October~~ ^{SEPTEMBER}, 2014,

ORDERED that the July 22, 2014 Order on the Approval Process for the Proposed OCC Final Consent Judgment is modified as follows:

If Plaintiffs determine that they have received no comments that warrant rejection of the Consent Judgment, and file a motion to dismiss all of Plaintiffs' claims against OCC and enter an Order approving the Consent Judgment pursuant to the July 22, 2014 Order on the Approval Process for the Proposed OCC Final Consent Judgment, OCC shall file its brief and any supporting certification in support of Plaintiffs' motion on or before November 10, 2014, and shall file its reply brief on or before December 10, 2014; and it is further

ORDERED that, except as modified herein or by prior Court Order, all provisions of the July 22, 2014 Order on the Approval Process for the Proposed OCC Final Consent Judgment remain in full force and effect; and it is further

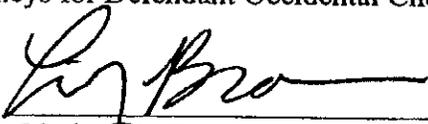
ORDERED that this Order shall be served upon all parties, Liaison Counsel for former Third-Party Defendants and posted forthwith on CT Summation.



Honorable Sebastian P. Lombardi, J.S.C.

Consented to as to form, substance and entry:

ARCHER & GREINER, P.C.
Attorneys for Defendant Occidental Chemical Corporation

By: 
Lindsay A. Brown, Esq.

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs

By:



John F. Dickinson, Jr., Esq.
Deputy Attorney General