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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BOB MARTIN
Commissioner

September 30, 2013

Re: Comments Concerning Proposed Consent Judgment and Settlement Agreement
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:

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The New Jersey Department of Environmental Protection (the "Department") is in receipt of your comments concerning the proposed settlement in the above-named matter with certain Third-Party Defendants, which was published for public comment in the New Jersey Register on May 6, 2013, and the proposed settlement with certain Defendants, which was published for public comment in the New Jersey Register on July 1, 2013. 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 Settlements in the Passaic River Litigation
2) Attachment B – The Order of the Hon. Sebastian P. Lombardi, J.S.C. setting forth the schedule for briefing and hearing on judicial approval of the proposed settlements

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

State of New Jersey
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RESPONSE OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION TO COMMENTS RECEIVED ON PROPOSED SETTLEMENTS IN THE PASSAIC RIVER LITIGATION

On May 6, 2013, the Department of Environmental Protection ("DEP" or the "State") published a proposed Third-Party Consent Judgment in the New Jersey Register 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), in the Superior Court of New Jersey, Law Division, Essex County, the Passaic River Litigation. The proposed Third-Party Consent Judgment, if approved and entered, will result in the dismissal of 261 Third-Party Defendants (the "Settling Third-Party Defendants"). The Settling Third-Party Defendants were not sued by DEP in the Litigation but have collectively agreed to pay DEP $35.4 Million to resolve or reduce certain liabilities and claims asserted against them, to assist in the restoration of the Passaic River and surrounds, and in order to be dismissed from the Litigation.[1]

On July 1, 2013, DEP also published a proposed Court Approved Settlement Agreement ("Repsol/YPF Settlement Agreement") in the New Jersey Register. The Repsol/YPF Settlement Agreement, if approved and entered, resolves various claims asserted by the State against Repsol, S.A. ("Repsol"), YPF, S.A. ("YPF"), YPF International, S.A. ("YPFI"), YPF Holdings, Inc., CLH Holdings, Inc., Maxus International Energy Company, Maxus Energy Corporation ("Maxus"), and Tierra Solutions, Inc. ("Tierra") (collectively, the "Settling Defendants"). In the Repsol/YPF Settlement Agreement, the Settling Defendants agree to pay DEP $130 Million in order to satisfy the State's substantial past costs and invest in restoration now, in exchange for the State's agreement to limit the Settling Defendants' potential future exposure to some of the State's damages and future costs at another $400 Million.

DEP received comments on these two settlements from three distinct groups.[2] First, DEP received comments on the Third-Party Consent Judgment and the Repsol/YPF Settlement Agreement from three non-profit organizations, all of whom support the settlements. (See Ex. 1.) Second, DEP received 13 sets of comments to the Repsol/YPF Settlement Agreement from Third-Party Defendants raising legal issues and/or questions regarding the intersection of the two settlements. (See Ex. 3-15.) Accordingly, DEP has analyzed and responds to the comments on these two settlements together. Finally, DEP received comments to the Repsol/YPF Settlement

[1] A list of the Settling Third-Party Defendants is included as an exhibit to the Third-Party Consent Judgment.
[2] The comments to both settlements are attached to this response to comments and are numbered Exhibits 1-15.

Agreement from Occidental Chemical Corporation ("OCC"),[3] which has already been adjudicated liable for the intentional discharges of Agent Orange, dioxins and other hazardous substances from the Lister Site.[4] (See Ex. 2.) OCC chose not to participate in the pending settlements; accordingly, the DEP must and will pursue OCC for the State's future remediation costs, past and future economic damages suffered by the State directly or through assignments, natural resource damages, and all punitive damages found appropriate by a jury, that are associated with OCC/DSCC's deliberate and notorious pollution of the Passaic River. Following the pending settlements if approved, the only claims and parties remaining in the Passaic River Litigation are related to OCC's liabilities.

These settlements – together recovering $165 Million and dismissing almost 270 litigants – represent a significant step toward achieving the State's goals for the Passaic River and finally finishing the Passaic River Litigation.

A. Contamination of the Passaic River

The Passaic River is one of the most polluted waterways in the country and one of the worst dioxin sites in the world. From the 1940s until 1969, OCC's predecessor, DSCC, manufactured DDT, Agent Orange, and other pesticides and herbicides at its agricultural chemical plant located at 80 Lister Avenue in Newark ("Lister Site"). During that time, OCC/DSCC intentionally and regularly dumped production waste and off-specification product, specifically including a congener of dioxin known as "TCDD," into the Passaic River. DEP, the United States Environmental Protection Agency ("EPA"), and other regulatory agencies around the world have determined that TCDD is one of the most toxic chemicals ever developed by humans, is extremely harmful to human health and the environment, and can cause adverse health effects (including cancer and reproductive damage) at very low concentrations. Dioxin concentrations in the Passaic River fish and crabs are among the highest reported in any known scientific literature and are considered unsafe for human consumption. Because of the TCDD and other hazardous substances that OCC/DSCC discharged into the Passaic River, DEP has been forced to impose and enforce fishing and crabbing bans for more than 25 years. Despite DEP's efforts, however, the fish and crabs are known to be harvested and consumed by a segment of the population of New Jersey.

TCDD and other hazardous substances discharged by OCC/DSCC from the Lister Site have migrated throughout the Passaic River (below the Dundee Dam) and Newark Bay Complex, creating one of the most contaminated waterways in the world. In addition to the imminent and substantial danger that TCDD and other hazardous substances discharged by OCC/DSCC poses

[3] 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 practices and environmental condition and, in 1987, knowingly merged DSCC into itself. On February 7, 2012, OCC stipulated in the Consent Order on Track III Kolker-Era Issues that DSC-1 is the successor to Diamond Alkali Organic Chemicals Division, Inc., Kolker Chemical Works, Inc. and various related entities, that they all discharged hazardous substances into the Passaic River for decades, and that DSC-1 is "strictly, jointly and severally liable under the Spill Compensation and Control Act…" for all of the past and future costs at issue. Accordingly, as used herein "OCC/DSCC" refers to OCC, DSCC/DSC-1, and their predecessors in interest at the Lister Site.

[4] See July 19, 2011 Order Partially Granting Plaintiffs' Motion for Summary Judgment Against OCC, Maxus and Tierra.

to human and animal populations, the presence of TCDD in the sediment continues to impact commerce, industry, navigation, and dredging and has significantly damaged the ecosystem and natural resources of the Passaic River and the State of New Jersey.

Twenty years ago, the New Jersey Superior Court, Appellate Division, reviewed the Lister Site plant operations and held that OCC/DSCC's actions in discharging TCDD and other hazardous substances into the Passaic River between the 1940s and 1960s "constituted intentional conduct with the corresponding intentional injury inextricably intertwined." Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, 258 N.J. Super. 167 (App. Div. 1992). The Court found that OCC/DSCC knew "the nature of the chemicals it was handling," and then that "they were being continuously discharged into the environment." Id. at 211. Former plant workers testified under oath that OCC/DSCC's waste policy amounted to "dumping everything" into the Passaic River and that employees were directed to wade surreptitiously into the Passaic River at low tide and "chop up" the mountains of chemicals in the River so they would not be seen by passing boats. Id. at 184. Based upon its examination of the record, the Court found that OCC/DSCC "intentionally and knowingly discharged hazardous pollutants with full awareness of their inevitable migration to and devastating impact upon the environment." Id. at 197. Today, extremely high concentrations of TCDD remain in the sediments of the Passaic River, are migrating throughout Newark Bay, and continue to be a threat to human health and the environment.

In 1983, dioxin contamination was discovered at the Lister Site and across the Ironbound section of Newark. Governor Thomas H. Kean issued Executive Order 40 authorizing DEP, on an emergency basis, to take immediate action to protect the public health and environment. DEP secured the site and was responsible for overseeing cleanup. The EPA added it to the federal National Priorities List in 1984 as one of the most contaminated sites in the country, and EPA later became the lead government agency responsible for overseeing the cleanup. The Diamond Alkali Superfund Site is more broadly defined to include the Lister Site itself and the areal extent of the dioxins (including 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.

In 1986, after the Diamond Alkali Superfund Site was added to the NPL, OCC purchased DSCC and its ongoing chemicals business from Maxus. As part of the transaction, OCC/DSCC sold the Lister Site to Tierra, which was created to hold the property while it was being remediated, with both parties having knowledge of the extensive contamination of the property. Also, as part of the transaction, Maxus agreed to indemnify OCC for certain environmental liabilities associated with DSCC and the Lister Site in the 1986 Stock Purchase Agreement ("SPA") between the companies. The next year, OCC merged DSCC into itself and became the legal successor for the Lister Site discharges. DEP has obtained a judgment in the Passaic River Litigation that OCC is liable for all past and future cleanup and removal costs associated with the hazardous substances discharged from the Lister Site.

DEP is currently working with EPA to finalize a Focused Feasibility Study Report for the Lower Eight-Miles of the Lower Passaic River ("FFS") that will address contaminated sediments in the lower section of the Passaic River. The last public draft version of the FFS was issued in 2007, and the revised final draft of the FFS is anticipated to be released in December 2013 or early 2014. The FFS and the data and studies referenced in the administrative record indicate

that hazardous substances discharged by OCC/DSCC from the Lister Site, including TCDD, are the primary drivers of anticipated cleanup cost within the FFS Area. After the FFS is issued, it is anticipated that a proposed plan for the remediation of the lower eight miles of the Passaic River will be issued by EPA in cooperation with DEP. The 2007 draft of the FFS provided remedy alternatives projected, at that time, to cost between $863,000,000 and $2,272,000,000. The costs estimates in the FFS are based on net present value, and actual costs may vary when the selected remedial alterative is implemented. Additionally, the cost estimates in the FFS are for comparison purposes when evaluating the available remedial alternatives and are intended to provide an accuracy of +50 to -30 percent. (USEPA RI/FS Guidance (1988)). Actual costs of a selected remedy may vary.

Future costs anticipated to be incurred by DEP in the implementation of the selected FFS remedy are unknown. Under the Comprehensive Environmental Response, Compensation and Control Act, ("CERCLA") 42 U.S.C. §§ 9601 to 9675, the State could be asked to provide up to 10% of the costs of any remedy publicly funded under the federal Superfund, and be asked to secure a disposal location for the hazardous substances.

B. The Passaic River Litigation

Almost eight years ago, in December 2005, DEP brought the Passaic River Litigation to recover all of the costs and damages the State and public incurred as a result of the intentional discharges from the Lister Site, to obtain a declaratory judgment that OCC is responsible for all of the State's future cleanup and removal costs associated with the hazardous substances discharged from the Lister Site, and to recover the costs and fees incurred by DEP in prosecuting the Passaic River Litigation. When the Litigation was brought, the State reserved its claims for natural resource damages against OCC and all others.

As part of the Passaic River Litigation, the State also pursued claims against Maxus and Tierra related to the hazardous substances discharged from the Lister Site. Also, the State pursued claims against Repsol and YPF (and its subsidiaries YPFI, YPF Holdings, Inc., CLH Holdings, Inc., and Maxus International Energy, Inc.), Maxus and Tierra (collectively, the "Repsol/YPF Defendants"), alleging fraudulent transfers, alter ego, and breaches of fiduciary duties arising from Maxus's alleged liabilities for damages related to the Passaic River (the "Fraudulent Transfer Claims"). Repsol, YPF and their subsidiaries other than Maxus/Tierra were not alleged to be directly responsible as dischargers under the Spill Act, only vicariously liable for the environmental liabilities of Maxus. OCC later filed cross-claims similar to DEP's Fraudulent Transfer Claims. The Repsol/YPF Settlement Agreement does not seek to limit OCC's cross-claims, and the Repsol/YPF Defendants continue to deny the allegations set forth therein.

During the course of the Passaic River Litigation, the Court entered three judgments as to OCC, Maxus and Tierra that substantially inform both of the pending settlements. First, the Court ruled that OCC is the direct successor by merger to DSCC and is responsible for all cleanup and removal costs associated with the hazardous substances discharged from the Lister Site and into the Newark Bay Complex. (July 19, 2011 Order Partially Granting Plaintiffs' Motion for Summary Judgment Against OCC, Maxus and Tierra.) Accordingly, OCC has been adjudicated a "discharger" under the Spill Act, and found strictly, jointly and severally liable for

the State's past and future cleanup and removal costs associated with the hazardous substances discharged from the Lister Site. (Id.)

The Court also found that Maxus must indemnify OCC for certain environmental liabilities at issue pursuant to the express terms of the 1986 Stock Purchase Agreement whereby OCC acquired DSCC from Maxus. (August 24, 2011 Order Granting OCC's Motion for Partial Summary Judgment Against Maxus.) Important to any analysis of the pending settlements, the Court ruled that Maxus was not directly responsible to the State as the successor to – or "mere continuation" of – DSCC or Diamond Shamrock Corporation-1 (DSC-1).[5] (May 21, 2012 Order Granting In Part and Denying In Part Plaintiffs' Motion for Partial Summary Judgment Against Maxus.) The Court also found that, with knowledge of the contamination, Tierra purchased the Lister Site from OCC in order to facilitate OCC's purchase of the chemicals business from Maxus. (August 24, 2011 Order Granting Plaintiffs' Motion for Partial Summary Judgment Against Tierra.) The Court thus found Tierra "in any way responsible" under the Spill Act for the cleanup and removal costs associated therewith. (Id.) Finally, the Court also held that Maxus is liable as the alter ego of Tierra for those costs that Tierra may be required to bear as the owner of the Lister Site. (May 21, 2012 Order Granting In Part and Denying In Part Plaintiffs' Motion for Partial Summary Judgment Against Maxus.) Maxus and Tierra contested, and have stated their intention to appeal, the Court's ruling as to their direct responsibility under the Spill Act, especially in-so-far as the ruling holds Tierra strictly, jointly and severally responsible for all cleanup and removal costs associated with hazardous substances that were discharged off-site before Tierra purchased the Lister Site in the mid-1980's.

With regard to the Fraudulent Transfer Claims against the Repsol/YPF Defendants, DEP had been actively litigating those claims for many years. For almost three years, the State litigated – and ultimately prevailed upon – the initial motions to dismiss filed by several of the Repsol/YPF Defendants contesting the jurisdiction of the Courts of New Jersey, though the foreign defendants will be permitted to address these issues again by motion or at trial on the merits. The State devoted significant resources to experts and fees associated with the Fraudulent Transfer Claims – and was in the process of preparing its experts and taking dozens of depositions around the globe – when the Republic of Argentina repatriated YPF and took control of the majority of YPF's stock from its then parent company, Repsol YPF, S.A. DEP filed a motion seeking emergency relief severing the Fraudulent Transfer Claims from the remainder of the Passaic River Litigation upon learning that YPF had arguably become an instrumentality of a foreign sovereign, but the Court rejected DEP's motion in that regard. Instead, the Court ordered a stay of the claims against the Repsol/YPF Defendants while Repsol and YPF could obtain separate counsel in the Litigation, recognizing the uncertainties and strains arising from the repatriation of YPF by the Republic of Argentina. That stay remains in effect.

During this period of Court-ordered stay, and following years of intense litigation and the expenditure of millions of dollars on necessary experts, fees and costs associated with pursuing the claims against the Repsol/YPF Defendants, DEP resolved its differences with the

[5]The Court found that OCC paid over $400 Million for an ongoing chemicals business and that it succeeded to the Lister Site liabilities as a matter of law when it purchased and then merged DSCC into itself. Thus, the Court found that it was OCC, not Maxus, which succeeded to the liabilities at issue in the Passaic River Litigation.

Repsol/YPF Defendants under the terms of the Repsol/YPF Settlement Agreement. Under the terms of the Repsol/YPF Settlement Agreement, the State will recover all of its past costs associated with investigating the cause, extent and impacts associated with OCC/DSCC's discharges of hazardous substances from the Lister Site, and the State's substantial fees and costs associated with the pursuit of the Fraudulent Transfer Claims and the rest of the Passaic River Litigation. In reaching these settlements, DEP recognized and factored in the substantial remaining litigation costs and fees necessary to pursue the Fraudulent Transfer Claims, both the litigation and collection risks associated with those claims, the overarching need to resolve the years-long discovery and litigation with the Repsol/YPF Defendants, the substantial payment received from these parties, and the right to finally try its damage claims against OCC after nearly eight years of litigation.

C. Settlement Process and Terms

Third-Party Consent Judgment

Despite DEP's repeated efforts to prevent joinder of Third-Party Defendants and keep the litigation focused on OCC/DSCC's discharges of TCDD and related hazardous substances into the Passaic River, Maxus and Tierra were ultimately allowed to join and file Third-Party Complaints against approximately 300 Third-Party Defendants on February 4, 2009. Maxus and Tierra alleged that the Third-Party Defendants were liable in contribution to Maxus and Tierra for the costs and damages incurred, and to be incurred, by Maxus and Tierra in remediating contamination related to OCC/DSCC's discharges of hazardous substances into the Newark Bay Complex. Additional third-party claims were alleged against certain public entities under the New Jersey Environmental Rights Act, Passaic Valley Sewerage Commissioners Statutes, and for nuisance and breach of the public trust. DEP did not join in the claims against the Third-Party Defendants, and the Court reserved any and all claims DEP and the State of New Jersey may have against current Third-Party Defendants arising from or related to the Newark Bay Complex, as well as claims against any future third- or fourth-party defendants during the pendency of, and after the conclusion of, this litigation. The addition of the Third-Party Defendants greatly complicated the litigation, and the burdens on the Court, Special Master, State, and local governmental entities were substantial.

After years of bogging down the Passaic River Litigation and consuming enormous public resources, DEP and certain Third-Party Defendants began settlement discussions with the objective of settling the liabilities of the Third-Party Defendants and having them dismissed from the Passaic River Litigation. To the credit of the participating Third-Party Defendants, those discussions resulted in the development of the Third-Party Consent Judgment. Under the terms of the Third-Party Consent Judgment, the Settling Third-Party Defendants will collectively pay the State $35.4 Million and assign certain economic damage claims to the State. The Settling Third-Party Defendants are retiring, and will also receive a covenant not to sue and contribution protection under the Spill Act for, the State's past cleanup and removal costs and certain future cleanup and removal costs. The Settling Third-Party Defendants are also contributing toward the restoration of the Passaic River and will receive a Natural Resource Damages ("NRD") credit equal to 20% of the settlement funds (approximately $7 Million). If entered, the Third-Party Consent Judgment will result in the dismissal of all claims asserted in the Passaic River Litigation against the Settling Third-Party Defendants, subject to the State's reservation of

certain claims against the Settling Third-Party Defendants, including, but not limited to, claims for NRD and future cleanup and removal costs. Those reservations were subject to certain thresholds, particularly within the FFS Area, based upon the fact that the majority of the risk, and thus the remedy, within the FFS Area is driven by TCDD and the hazardous substances intentionally discharged by OCC/DSCC.

Repsol/YPF Settlement Agreement

After the Third-Party Consent Judgment was released for public comment, DEP began mediated settlement discussions with OCC, Repsol, YPF, Maxus and Tierra. After initial participation, OCC chose not to participate meaningfully in global settlement negotiations. DEP, Repsol, YPF, Maxus and Tierra were left to develop a settlement structure that would resolve many of the State's claims with the Settling Defendants, while recognizing the contractual relationship between Maxus and OCC, and thus was intended to also benefit OCC. In consideration of Maxus's indemnity obligations to OCC, DEP and the Settling Defendants developed a "high-low" settlement that resolves DEP's claims against the Settling Defendants and certain claims against OCC, but leaves open the possibility that the Settling Defendants may pay more. Under the terms of the Repsol/YPF Settlement Agreement, the Settling Defendants agreed to pay the State $130 Million to be applied first to past cleanup and removal costs and then as a credit against their own NRD, if any, but not that of OCC. The Agreement also caps the Settling Defendants' future liability for certain claims at $400 Million in the event OCC is successful in its claims against Repsol and/or YPF and YPFI and collects from those entities.

Importantly, DEP's resolution of its claims against the Repsol/YPF Defendants leaves the legally responsible and recalcitrant defendant, OCC, strictly, jointly and severally responsible for the future cleanup and removal costs associated with the Lister Site and for the damages caused by OCC and its predecessors. OCC has been adjudicated the "discharger" from the Lister Site, and the State intends to require that OCC pay the future costs and all of the damages associated with such discharges. Accordingly, the State has reserved its claims for future remediation costs against OCC (the subject of the State's existing judgment under the Spill Act), and the State has reserved all of its claims for economic damages, natural resource damages and punitive damages under the Spill Act, common law and/or all other avenues available to the State. While the liabilities of the other Repsol/YPF Defendants, besides Tierra, were derivative of Maxus's alleged indemnity liability, OCC's liability to the State is direct, as it is the legal successor to DSCC. Importantly, OCC has contractually allocated its liability with Maxus through the indemnity agreement negotiated as part of the 1986 Stock Purchase Agreement whereby OCC acquired DSCC from Maxus. Thus, the settlement with the Repsol/YPF Defendants expressly recognizes that Maxus has a continuing indemnity obligation to OCC and does not impact or impair that obligation or ruling in any way.

The Repsol/YPF Settlement Agreement resolves any direct liability of the Settling Parties to the State for their connection to the Lister Site, but it does not resolve their liability as to OCC. Importantly, Maxus's liability under the indemnity is not affected in any way and is not subject to the caps established in the Repsol/YPF Settlement Agreement. In exchange for the $130 Million cash consideration, DEP has agreed to cap the ultimate exposure of Repsol, YPF and/or YPFI at an additional $400 Million, which would be effectuated by the State's agreement to reduce its judgment against OCC to no more than $400 Million to the extent OCC succeeds in

obtaining and collecting on a judgment against these Settling Defendants for OCC's liabilities to the State.

Thus, the Repsol/YPF Settlement Agreement is not in a "traditional" form of agreement precisely because of the indemnity agreement and contractual allocation of responsibilities between OCC and Maxus/Tierra. When OCC chose not to participate in settlement negotiations with DEP and the Repsol/YPF Defendants, OCC essentially dictated the structure of DEP's settlement. As discussed below, because OCC and Maxus/Tierra agreed how to allocate their responsibilities for the same discharges and site, the State cannot and should not reallocate those responsibilities as between those parties. If the indemnity fails for whatever reason, that is a matter of contract between Maxus and OCC. If OCC's indemnity claim succeeds, Maxus is liable. Further, if OCC is also successful in its claims against Repsol, YPF and/or YPFI, some or all of the State's potential recovery against OCC will be subject to the caps agreed to with Repsol, YPF and YPFI, and any judgment against OCC must be reduced. Accordingly, though it rejected the opportunity to settle with DEP, OCC has received substantial benefits from the Repsol/YPF Settlement Agreement.

D. The Reserved Claims and Future Costs

The inter-related proposed settlements with the Third-Party Defendants and the Repsol-YPF Defendants were designed to complement each other in order to advance a major goal of the Passaic River Litigation: ensuring that the State and public would not have to pay any share of a publicly-funded remediation of the Diamond Alkali Superfund Site. The settlements recognize and address three separate components of the Diamond Alkali Superfund Site – the Lister property itself, the FFS Area (the approximately eight miles of the Lower Passaic immediately adjacent to the Lister Site and most impacted by OCC/DSCC's discharges), and geographical areas subject to EPA's Superfund process that are outside of the eight miles comprising the FFS Area, including the remainder of the lower Passaic River and Newark Bay. DEP's authority to enforce the continuing obligations of OCC, Maxus and Tierra with respect to the Lister Site itself under current administrative orders, consent decrees, or judgments is expressly recognized and reserved in the Settlement Agreement.

Regarding both the FFS Area and areas within the Diamond Alkali Superfund Site but outside of the FFS Area, both proposed settlements contemplate a layering of potential liability for the State's future cleanup and removal costs, if any. A proposed remedy for the lower eight miles of the Passaic River is expected to be publicly released by EPA in December 2013 or early 2014. Current estimates for this cleanup have ranged from $800 Million to $4 Billion. It is the EPA policy, supported by DEP, that the polluter pays for the cleanup. If the EPA is unable to reach a satisfactory agreement with the polluters to fund the cleanup, it may initiate a publicly funded cleanup under CERCLA. Under CERCLA, the local State share would be approximately 10% of the total costs of a publicly funded cleanup. 42 U.S.C. § 9604. It is anticipated that the EPA, as is its usual practice, will work with the potentially responsible parties to develop a remedy that would be funded by those parties. However, one of the goals for bringing the Passaic River Litigation was to ensure that, in the unlikely event there is a publicly funded remedy in the FFS Area, the State's share of any such cleanup would be paid by the polluter – OCC – and not the public.

It is also important to note that while DEP did not assert in the Passaic River Litigation any claims for NRD, except for the costs of a Natural Resource Damages Assessment ("NRDA"), DEP is but one of several trustees who have responsibility for protecting and preserving the public's interest in affected natural resources. While DEP specifically reserved these potential claims against the direct Defendants and Third-Party Defendants by court order dated April 24, 2012, both settlements address certain NRD obligations of the settling parties.

The Third-Party Consent Judgment sets forth a process for addressing the NRD liability of the Third Party Defendants to the State and provides for a modest credit against DEP's claims for NRD, and the Repsol/YPF Settlement Agreement reserves the State's right to pursue OCC for OCC's share of NRD. The two settlements do not retire NRD claims of any federal trustee, including the federal trustees' rights to seek funding for an NRDA.

E. The Comments Received by DEP

The majority of the comments received were submitted by entities that have been sued as Third-Party Defendants by Maxus and Tierra in the Passaic River Litigation. The Third-Party Defendants entered a separate Third-Party Consent Judgment to resolve certain portions of their liability with DEP and seek to be dismissed from the Passaic River Litigation, accordingly. The comments of the Third-Party Defendants focus primarily upon the intersection of the Third-Party Consent Judgment and the Repsol/YPF Settlement Agreement, requiring that the State consider both settlements together. The other comments were received from OCC, the remaining defendant and entity responsible for discharging Agent Orange, dioxins, DDT and various other pesticides and hazardous substances into the Passaic River for decades, and from public interest groups.

Reponses to the comments are grouped according to the subject matter of the comments and the entity providing the comment(s).[6] The responses addressed below have been grouped as follows: (a) comments received from non-parties; (b) comments received from OCC, and (c) comments received from Third-Party Defendants. For convenience of the reader, the comments are summarized and organized based upon identical or similar issues. In developing the settlements and evaluating the comments received thereto, 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) risk and expense of continued litigation against the settling parties, (v) the procedural and substantive status of the litigants both prior to and following the entry of the proposed settlements, (vi) the potential costs and risks of continued litigation with the remaining parties, (vii) the goals of the State in initiating the Passaic River Litigation, and (viii) the substantial recoveries and benefits obtained for the State.

[6]Except as otherwise set forth herein, the terms defined in the Third-Party Consent Judgment and Repsol/YPF Settlement Agreement shall have the same meaning when capitalized and used herein.

COMMENTS FROM NON-PARTIES
TO THE PASSAIC RIVER LITIGATION

Comments regarding use of settlement funds by DEP and the State for both the Third-Party Consent Judgment and Repsol/YPF Settlement Agreement

Comments were received for both the Third-Party Consent Judgment and the Repsol/YPF Settlement Agreement concerning how the State will use the settlement funds and whether portions will be used for natural resource restoration or cleanup of the Passaic River and Newark Bay. The comments are otherwise supportive of entry of both settlements. The comments were sent by the NY/NJ Baykeeper, the Hackensack Riverkeeper, and the Ironbound Community Corporation. (See Ex. 1.)

Response:

DEP appreciates the commenters' recognition of DEP's "perseverance and persistence" in pursuing the Passaic River Litigation for nearly eight years against those responsible for the pollution of the River, and the fact that the commenters support the proposed settlements. The commenters state that their organizations 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. DEP does not disagree. DEP recognizes the important role that their organizations and members play in the communities affected by the pollution of the Passaic River.

DEP brought this lawsuit in order to secure funding for a potential State share of any cleanup, to ensure that the citizens of New Jersey would not have to pay for any eventual cleanup of the River, to recover the State's substantial past investigation costs, to recover the costs of litigation, and to recover certain categories of damages from the parties sued by the State. Because remediation of the Diamond Alkali Superfund Site is being investigated under CERCLA with the EPA as the project lead, the two pending settlements and the judgments previously obtained by the State assure that most of these goals have been or will be achieved, while the Passaic River Litigation will continue against OCC, the party responsible for the TCDD contamination and other Lister Site discharges.

The issue of the disposition and use of any settlement funds is within the discretion of the Executive and Legislative Branches and is not an element for consideration in determining whether the pending settlements should be approved. However, it is important to note that since the discovery of dioxin at the Lister Site, the State has significantly funded the efforts undertaken by DEP and DOT to evaluate Passaic River contamination, study the impact of that contamination on human health and the environment, issue consumption advisories and act to protect the public, analyze impacts and disposal options for contaminated sediments dredged from the Newark Bay Complex to maintain commerce, and pursue the parties responsible for this contamination. As of July 1, 2013, the State's past costs and fees totaled $148,054,313.30. It is therefore appropriate in the first instance that settlement funds received from parties tied to contamination of the Passaic River be used to reimburse the State such costs.

Beyond reimbursement for all of these expenditures, the two pending settlements provide for another approximately $17 Million in recoveries from the settling parties. In order to effectuate the terms of the settlements and the NRD credits provided therein, the State is committed to applying these additional funds to reducing the natural resource damages done to the Passaic River and surrounds.

Moreover, DEP has reserved natural resource damages and will continue to seek all appropriate future costs, and damages from OCC. While the proposed Repsol/YPF Settlement Agreement does provide the Settling Defendants with an NRD credit against their own NRD liability and covenant not to sue from DEP, it does not settle OCC/DSCC's NRD liability nor does it resolve any potential federal trustee NRD claims against any Settling Defendants or Settling Third-Party Defendants.

In sum, it must be recognized that the Passaic River Litigation is not an isolated lawsuit, nor is it the only remedy that addresses the health and safety of the impacted communities, the cleanup of contaminants in the Newark Bay Complex, or the restoration of natural resources. There continues to be an ongoing federal process to develop a strategy for cleaning up the contamination in the Newark Bay Complex. The Phase I removal of some 40,000 cubic yards of highly-contaminated sediments just outside of the Lister Site, the ongoing removal of contaminated sediment by at river mile 10.9 in Lyndhurst, and the recent opening of Riverfront Park are just some examples of the progress being made under this multi-pronged approach. These settlements and the ongoing litigation against OCC will ensure that the polluters, and not the public, will pay for the remediation of Passaic River

COMMENTS FROM OCCIDENTAL CHEMICAL CORPORATION

Comment 1(a) regarding the State's costs and damages sought in the Passaic River Litigation

The commenter requests information regarding the amounts and types of damages sought by the State in the Passaic River Litigation and resolved by the Repsol/YPF Settlement Agreement. The comment does not cite to any document in the administrative record or lack thereof, but requests that DEP identify with specificity the costs incurred (or that will be incurred in the future) and the damages sustained in connection with discharges from the Lister Site. The commenter also requests that DEP provide information regarding the amount of costs and damages attributable to each category of costs and damages covered by the Repsol/YPF Settlement Agreement. (See Ex. 2.)

Response:

For decades, OCC/DSCC and its predecessors intentionally discharged vast quantities of Agent Orange, dioxins, DDT and other hazardous substances at the Lister Site and from the Lister Site into the Passaic River. Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Company, 258 N.J. Super. 167 (App. Div. 1992). OCC bought DSCC after the nature of the dioxin contamination had been discovered, after the Governor of New Jersey declared a public health crisis and a state of emergency, and after the Lister Site had been designated on the National Priorities List as one of the worst contaminated sites in the country. Accordingly, when OCC purchased DSCC (and its ongoing chemicals business) from Maxus for over $400 Million, OCC negotiated for a reduced price for DSCC, and it demanded an indemnity from Maxus. It received both.

The environmental liabilities at issue in the Passaic River Litigation are the subject of Maxus's indemnity, as already established by the Court. (August 24, 2011 Order Granting OCC's Motion for Partial Summary Judgment Against Maxus.) Hence, OCC and Maxus have "vertical privity" with regard to the Lister Site, that is, OCC, Tierra and Maxus share responsibility for the same discharges at the same site due to their contractual relationship with each other, and they have allocated their own responsibility for those liabilities via an indemnity agreement in the Stock Purchase Agreement whereby OCC purchased DSCC. DEP recognized and honored that agreement in the Repsol/YPF Settlement Agreement. But, DEP does not have to allocate legal responsibility between OCC and OCC's indemnitor in order to resolve its claims against Maxus and the other Settling Defendants. Further, the cases and comments cited by OCC concerning Tierra's and Maxus's liability may apply to an allocation among joint tortfeasors at different sites, as will likely be the case between OCC and third-parties responsible for other sites and discharges throughout the Newark Bay Complex. However, the Repsol/YPF Settlement Agreement requires no such allocation.

The administrative record and the discovery in the Passaic River Litigation clearly set forth the damages alleged by DEP, specifically identifying past cleanup and removal costs claimed by DEP. In addition to the record developed for the settlement, OCC has served and received extensive discovery conducted in the Passaic River Litigation concerning damages claimed by DEP, including several detailed damages disclosures and written damages discovery under Case Management Orders III, V, VII, XII, XVII. Reponses to such discovery were

included in the administrative record and are otherwise available to OCC as a party in the Passaic River Litigation.

The damages sought by DEP and resolved by the Settlement Agreement are clearly set forth in the Repsol/YPF Settlement Agreement and supported by the record. Under the terms of the Repsol/YPF Settlement Agreement, the State is due to receive $130 Million shortly after its approval and entry by the Court. (Repsol/YPF Settlement Agreement at ¶ 21.) The Repsol/YPF Settlement Agreement further provides that when determining any credit for the Settling Defendants, the $130 Million in settlement funds shall be applied first to retire the State's past cleanup and removal costs and second as a credit to NRD. (Repsol/YPF Settlement Agreement at ¶¶ 24 and 63(c).) In addition to the language of the Repsol/YPF Settlement Agreement, the case management order attached to the Repsol/YPF Settlement Agreement, which the parties will seek to have the Court enter, provides that the settlement funds would be applied to the State's past cleanup and removal costs and NRD. (Repsol/YPF Settlement Agreement Case Management Order, ¶ 4.)

As clearly set forth in the administrative record and DEP's damages disclosures, the State's past costs total $148,054,313.30 with litigation costs as of July 2013. Finally, there is no requirement under the Spill Act or common law that DEP must compare the total damages to each Settling Defendants' proportionate liability, especially when the Settling Defendants are paying as a group for claims distinct from those asserted against OCC. Also, any allocation of settlement funds and past cleanup and removal costs must account for the settlement funds to be paid to the State as part of the Third-Party Consent Judgment.

Comment 1(b) regarding Settling Defendants' allocated share of liability

The commenter requests that the DEP provide the basis for determining the share of liability allocable to the Settling Defendants. (See Ex. 2.)

Response:

Although the Repsol/YPF Settlement Agreement requires Repsol and YPF (or Maxus) to each pay $65 Million for a combined $130 Million, the settlement is contingent on payment of the entire settlement amount. (Repsol/YPF Settlement, ¶ 24.) DEP negotiated the settlement with all of the Settling Defendants and considers the payment of the settlement funds holistically; it is immaterial how much is paid by any particular Settling Defendant as long as Settling Defendants collectively satisfy the payment obligation. This is particularly true because the Settling Defendants are or were related entities with common ownership. The comment also fails to identify any precedent or authority for the requested fair share allocation amount related to settling co-defendants, as to their liability to the State.

Moreover, because OCC and its predecessors sold the Lister Site to Tierra so that OCC could acquire the chemicals operations of DSCC, OCC, Maxus and Tierra's liability was allocated among them by contract. While OCC often cites DEP to Tierra's Spill Act liability for off-site contamination as the subsequent purchaser of the Lister Site from OCC/DSCC, DEP must recognize the litigation risks of such argument on appeal and the fact that: (i) OCC/DSCC sold Tierra the Lister Site after most, and possibly all, discharges occurred; (ii) OCC obtained an

indemnity from Tierra's parent, Maxus, for such liabilities; and (iii) Tierra presents a substantial collection risk for any final judgment.

Even if DEP were required under the Spill Act to allocate the liability that Tierra acquired when it acquired the Lister Site from OCC with knowledge of the contamination (which under the Spill Act's joint and several liability scheme, it does not), in DEP's discretion, Tierra's independent responsibilities are adequately resolved under the particular facts of this case. First, Tierra's liability to the State was created by OCC's demand that it would not acquire the Lister Site when it knowingly acquired DSCC. Hence, DSCC (now OCC) transferred the Lister Site to Tierra right before – and in order to facilitate – OCC's acquisition of DSCC and its very profitable chemicals business. Maxus's indemnity to OCC in the SPA contemplated that title to the Lister Site was transferred from OCC's predecessor (DSCC) to Maxus's subsidiary (Tierra) and that Maxus would indemnify OCC from certain related environmental liabilities. Under these facts, OCC's suggestion that Spill Act liability has to be allocated between OCC and Tierra or Maxus is circular, unsupportable and self-serving.

Second, unlike OCC/DSCC's operations on the Lister Site, Tierra acquired the property to facilitate and during the ongoing stabilization and later remediation of preexisting discharges. Tierra did not own the property when most, if not all, of the discharges into the Passaic River occurred, and TCDD had already spread into other parts of the Newark Bay Complex by the time Tierra acquired the property. Thus, any comparison between Tierra's ownership and OCC/DSCC's ownership and operation of the Lister Site and as the actual and intentional discharger, is inappropriate.

Third, unlike typical "Spill Act" settlements, the Repsol/YPF Settlement Agreement is structured as a "high-low" agreement. Repsol, YPF and YPFI are resolving the Fraudulent Transfer Claims and the costs and fees associated therewith, as well as the environmental liabilities of their subsidiaries and related entities. When OCC refused to participate in negotiations with the State and the Settling Defendants, however, it became incumbent upon the settling parties to pay on behalf of OCC to retire certain of DEP's claims against OCC. Therefore, OCC is receiving 100-percent credit for the resolved claims, as the Settling Defendants and Third-Party Defendants have together paid and retired all of the State's $148 Million in claims for past costs and fees, including the State's claims against OCC for those same costs and fees.

Moreover, as to the claims that the State reserved against OCC, the Repsol/YPF Settlement Agreement recognizes the Maxus indemnity to OCC and leaves that indemnity obligation wholly in place. For any amount that the State may recover from OCC in the future, OCC is free to pursue the entirety of such recovery from Maxus. If the claim is indemnified, Maxus will be obligated to pay it. Hence, as to Maxus and its indemnity obligations, OCC's rights are untouched, and it is better off as a result of the Repsol/YPF Settlement. Moreover, recognizing that OCC will eventually pursue Repsol, YPF and YPFI for fraudulent transfers and related claims if the State is successful, the Repsol/YPF Settlement Agreement also provides that, if OCC is successful in recovering on such claims, the State will reduce its own judgment against OCC on its reserved claims to no more than $400 Million in additional recoveries. The Repsol/YPF Settlement Agreement simply operates as a traditional "high-low" agreement, whereby the settling parties agreed to pay the State $130 Million now in exchange for the State's

agreement to cap their ultimate exposure at no more than $530 Million. Thus, if OCC is successful in its claims against Repsol, YPF and/or YPFI, OCC will obtain the benefit of the caps the State placed on its own recovery, in addition to the complete benefit OCC has received for the $130 Million in settlement funds already paid to the State. Finally, OCC has always had the opportunity to acknowledge its responsibility for cleaning up its discharges to the Newark Bay Complex and may seek contribution in any future federal action from other dischargers for all of the amounts OCC expends to clean up the Newark Bay Complex.

Comment 1(c) regarding how settlement funds will be allocated among damages sought in the Passaic River Litigation

The commenter requests that DEP allocate the settlement funds between past and future cleanup and removal costs, economic damages, NRD and any other damages sought in the Passaic River Litigation.

Response:

Although the settlement funds are applied to retire claims for past cleanup and removal costs and then to NRD, the State is not restricted in the Settlement Agreement in its future use of those funds. Appropriation of money within the State is reserved to the Legislative Branch and is not an element for consideration in determining whether the pending settlement with the Settling Defendants should be approved.

OCC may seek a settlement credit afforded it by statute, including N.J.S.A. 58:10-23.11f.a.(2)(b), and common law. As set forth in the Repsol/YPF Settlement Agreement, the settlement funds are being applied to retire the State's past costs, for which OCC is receiving a covenant not to sue, and then to the NRD liability of the Settling Defendants. OCC will also receive the same credit all other dischargers receive for NRD to the extent the settlement funds are applied to NRD because there can be no double recovery by the State. However, the payment of the settlement funds by the Settling Defendants for NRD is not on behalf of OCC and does not reduce OCC's individual NRD liability, except to the extent it is otherwise entitled to a dollar-for-dollar reduction in the total NRD similar to the credit received by all other dischargers.

OCC correctly points out that, subject to certain enumerated reservations, the State will resolve its differences with the Settling Defendants and that the settlement funds are allocated to reimburse all of the State's past costs and, beyond that, as a credit against the Settling Defendants' NRD. The "matters addressed" by the Settlement Agreement are clearly defined in Paragraphs 19.28 and 63. Settling Defendants are paying a significant sum of money to resolve the claims against them, while DEP must continue to pursue OCC as the direct successor to DSCC and, as a matter of law, the actual discharger at the Lister Site. As such, OCC may seek a settlement credit as provided by New Jersey law, including a dollar-for-dollar credit under the Spill Act and a proportionate credit under common law. Under common law, the amount of the actual settlement funds is irrelevant, as the non-settling party may receive a credit equal to the settling parties' proportionate share as determined by the court. Thus, any allocation of the settlement funds to common law claims, as the comment suggests, would likely reduce the settlement credit OCC may receive under the Spill Act. Accordingly, the concerns OCC raises

about the fairness and reasonableness of the allocation of the settlement funds are unwarranted. Also, the settlement funds would not be applied to future cleanup and removal costs, as those costs are uncertain and have been reserved against the actual discharger at the Lister Site. If OCC, as the discharger, is unable to satisfy its adjudicated liability, DEP retained its enforcement authority to pursue certain claims against the Settling Defendants. Additionally, OCC continues to have an indemnity claim against Maxus for any future cleanup and removal costs it may be required to pay DEP.

Finally, the fact that DEP did not assert NRD claims in the Passaic River Litigation does not preclude DEP from settling some or all of its NRD claims. Parties regularly settle claims that are not brought in litigation, but that could have been sought in the same or future litigation. As set forth in detail above, DEP believes that the settlement funds reasonably compensate the State of New Jersey for the damage categories resolved by the Repsol/YPF Settlement Agreement, including NRD and NRDA costs, if any, due to the nature of the Settling Defendants' connection to the site and their relationship with OCC. Furthermore, Maxus continues to have potential liability for NRD under the indemnity agreement, and OCC's rights thereunder are not impaired. NRD recoverable by federal trustees are preserved, and the State should not be denied the benefits of the settlement, which are strongly favored by the Spill Act, because of a lack of a NRDA.

Comment 2 regarding navigation and DOT costs

The commenter raises concerns about the State's past cleanup and removal costs incurred by the New Jersey Department of Transportation and the basis for the State's claim for such costs. (See Ex. 2.)

Response:

Navigation costs, or costs incurred by the State of New Jersey through the DOT, were properly sought and included in the definition of "Cleanup and Removal Costs." The costs incurred by DOT and its Office of Maritime Resources directly relate to contaminated sediments in the Newark Bay Complex and the efforts to mitigate the damage caused by dioxin and other hazardous substances that OCC/DSCC discharged into the Newark Bay Complex. Specifically, New Jersey responded to the crisis caused by dioxin-contaminated sediments by commencing a series of complex studies and projects aimed at addressing contaminated sediments and restrictions on ocean disposal of dredge material. These efforts have included funding and administration of pilot and demonstration projects and studies designed to improve management of contaminated dredged materials in the Newark Bay Complex, working with EPA and the United States Army Corps of Engineers as part of the Focused Feasibility Study, developing beneficial uses for contaminated dredge material, developing sediment decontamination technologies, and addressing and eliminating contamination of sediments at the sources. These response efforts were necessary to mitigate the damage caused by contaminated sediments in the Newark Bay Complex, particularly, sediments contaminated with dioxin.

The Spill Act defines cleanup and removal costs to specifically include "all direct costs associated with a discharge, . . . , incurred by the State or its political subdivisions or their agents . . . in the: (1) removal or attempted removal of hazardous substances, or (2) taking of reasonable

measures to prevent or mitigate damage to the public health, safety or welfare, including but not limited to, public and private property, shorelines, beaches, surface waters, water columns and bottom sediments, soils and other affected property . . . . N.J.S.A. 58:10-23.11b (emphasis added). All of the "navigation costs" or DOT costs were incurred to prevent and/or mitigate the damages caused to the public and the waters and sediments of the Newark Bay Complex. Accordingly, the costs are properly categorized as "cleanup and removal costs" and recoverable under the Spill Act. The Spill Act further grants DEP the right to bring a civil action to enforce the Act and recover cleanup and removal costs from dischargers, such as OCC. N.J.S.A. 58:10-23.11u. Although the Settling Defendants dispute their liability for DOT or navigation costs, (see Repsol/YPF Settlement Agreement ¶ 19.8), they agreed to resolve the State's claims for such costs, including claims for such costs against OCC. It certainly is not appropriate for OCC to refuse to negotiate or participate in settlement discussions and then to question a settling party's assessment of a claim and their decision to resolve it.

Additionally, as the comment notes, under the Spill Act, OCC may be entitled to a dollar-for-dollar credit for the cleanup and removal costs paid by the Settling Defendants. The amount of settlement funds allocated to "navigation costs" is set forth in the administrative record. The settlement funds paid by the Settling Defendants are retiring the State's claim for those costs, and OCC is receiving a covenant not to sue for all past cleanup and removal costs. This is a significant benefit to OCC and likely provides a larger benefit to OCC than if the claims were resolved under common law, with OCC receiving a pro rata credit. Given that the only established liability for the Settling Defendants is Tierra's Spill Act liability as the owner of the Lister Site after the mid-1980's (and Maxus as the alter ego of Tierra), it is very possible that OCC would receive no credit for the settlement funds if left to a common law pro rata credit, and DEP would be able to seek additional compensation under the Spill Act for the "navigation costs" or DOT costs at trial.

Comment 3 regarding the limits of contribution protection under the Repsol/YPF Settlement Agreement.

The commenters raise concerns about Paragraph 63 of the Repsol/YPF Settlement Agreement and whether the contribution protection provided by the Spill Act extends to claims beyond Cleanup and Removal Costs and NRDs. (See Ex. 2.)

Response:

Contribution protection is provided for Economic Damages, Disgorgement Damages and Punitive Damages to the extent provided by the Repsol/YPF Settlement Agreement and recoverable under the Spill Act or other New Jersey statutes providing contribution protection, if any. To the extent contribution is sought under common law and the Joint Tortfeasors Contribution Law, a settlement with the plaintiff bars any claim for contribution against the settling party. Verni v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 207 (App. Div. 2006).

Comment 4(a) regarding the covenant not to sue provided for OCC

The commenter raises concerns about the basis for the covenant not to sue provided to OCC and the interactions between Paragraphs 28 and 29 of the Repsol/YPF Settlement Agreement. (See Ex. 2.)

Response:

Paragraphs 28 and 29 of the Repsol/YPF Settlement Agreement provide certain covenants not to sue to OCC with certain reservations set forth in those paragraphs. One of those covenants includes past cleanup and removal costs, (see Repsol/YPF Settlement Agreement at ¶ 28(a)), while claims for future cleanup and removal costs are preserved. (See id. at ¶¶ 29(a-c).) A portion of the settlement funds to be paid as part of the Repsol/YPF Settlement Agreement would retire the State's past cleanup and removal costs, which would no longer be sought against OCC, as DEP may not obtain a double recovery. Under the July 19, 2011 Summary Judgment, OCC was found liable for all "past cleanup and removal costs," the very claims that would be retired by the Repsol/YPF Settlement Agreement, and "future cleanup and removal costs," which are reserved in Paragraph 29(a-c). Accordingly, there is no inconsistency with Paragraphs 28(a) and 29(k). Further, there is no basis under the Repsol/YPF Settlement Agreement or in the litigation to release or absolve OCC from liability under current administrative orders or consent decrees. To the extent OCC is obligated to DEP under current administrative orders or consent decrees, it must remain obligated to DEP, although DEP may not recover under those orders or decrees damages it recovers in the litigation. As set forth below, providing a covenant not to sue OCC is consistent with the Spill Act and with DEP's authority to resolve liability for discharges of hazardous substances to the environment.

Comment 4 (b) regarding contribution protection provided to OCC for certain claims

The commenter raises concerns about the basis for providing contribution protection under N.J.S.A. 58:10-23.11f.a(2)(b) to OCC and the basis for limiting the contribution protection for OCC.

Response:

Through its contribution protection provision, the Spill Act provides a mechanism to encourage early settlements with DEP. That serves to reduce the burdens on the State's limited resources by encouraging private parties to assume responsibility for cleanup and removal costs and contaminated sites. Spill Act settlements often provide a settling party protection for predecessors, successors, subsidiaries, affiliates, indemnitors or insurers, and other related entities. Many settlements could not be achieved without such coverage, especially when some, but not all, dischargers are willing to participate in a settlement with the State.

The Repsol/YPF Settlement Agreement, if approved by the Court, would be entered by Maxus to resolve claims against it and to resolve claims against its indemnitee, OCC. Pursuant to the SPA, Maxus agreed to indemnify OCC for certain claims related to the Lister Site. By entering into the Repsol/YPF Settlement Agreement, Maxus will resolve certain claims brought by DEP against OCC, including retiring claims for past cleanup and removal costs and certain other costs and fees. Moreover, as the surviving entity of the OCC/DSCC merger, OCC is

DSCC, the former subsidiary of Maxus. OCC is therefore an identified and specifically named third party beneficiary for certain provisions of the Repsol/YPF Settlement Agreement, including contribution protection to the extent OCC is entitled to indemnity under the SPA. (See Repsol/YPF Settlement Agreement ¶ 63.) Accordingly, the Repsol/YPF Settlement Agreement makes clear that contribution protection is provided to OCC to the extent OCC is entitled to indemnity under the SPA. (Id. ¶ 63(a).) Because Maxus is resolving certain claims on OCC's behalf and because OCC is a party to the litigation in which the settlement will be entered, it is not necessary for OCC to execute the Repsol/YPF Settlement Agreement in order to receive the benefits provided by the agreement.

Additionally, the contribution protection provided to OCC is only for matters addressed in the Repsol/YPF Settlement Agreement. OCC's potential liability to the Settling Defendants and the Settling Defendants' liability to OCC, if any, are not matters addressed by the settlement and therefore all such claims between OCC and the Settling Defendants would be reserved.

Comment 5 regarding Maxus's obligation to OCC under the Stock Purchase Agreement

The commenter raises concerns about Maxus's obligation under the Repsol/YPF Settlement Agreement to indemnify OCC and Maxus's efforts to obtain certain releases on behalf of OCC. (See Ex. 2.)

Response:

DEP is not a party to the SPA and provides no comment to the extent of any contractual or indemnity obligation of Maxus under the SPA. However, the Repsol/YPF Settlement Agreement specifically recognizes Maxus's indemnity obligations to OCC and makes clear that nothing in the agreement "shall require Maxus or Tierra to breach any defense or indemnity obligation they may have to OCC under the SPA." (Repsol/YPF Settlement Agreement ¶ 60.) Hence, the Repsol/YPF Settlement Agreement provides a cap on the potential ultimate exposure of Repsol, YPF and YPFI of up to $530 Million in exchange for their payment of $130 Million now, all of which enures to OCC's benefit. Under the terms of the Repsol/YPF Settlement Agreement, OCC may pursue Maxus for any and every claim that the State reserved against OCC. Thus, it is incorrect to state that Maxus negotiated for itself something that it did not obtain for OCC. To the extent covered under the indemnity, Maxus's and OCC's liability remains co-extensive. Also, to the extent Maxus is required to use its best efforts to seek releases and other agreements benefiting OCC, it should be noted that the Repsol/YPF Settlement Agreement provides OCC with certain covenants not to sue and contribution protection. (Id. at ¶¶ 28, 29 and 63.) Despite many opportunities and repeated requests to do so, OCC chose not to participate in settlement discussions that could have resulted in additional protection to OCC or a complete resolution of the Passaic River Litigation, but that would have required OCC to meaningfully contribute to such a settlement as the actual discharger at the Lister Site. Also, to the extent OCC wishes to waive the benefits provided it in the covenants not to sue and contribution protection, it should inform DEP, Maxus and the Court in writing of its waiver of those provisions of the Repsol/YPF Settlement Agreement.

Comment 6 regarding the Spill Fund

The commenter raises concerns about uses of funds from the New Jersey Spill Fund, claims paid by the Spill Fund concerning the Newark Bay Complex and what other appropriations were made from the Spill Fund. (See Ex. 2.)

Response:

DEP has not identified any unreimbursed third party claims approved and paid by the Spill Fund. The Legislature appropriated a total $12 Million for direct and indirect legal and consulting costs associated with the Passaic River Litigation from the New Jersey Spill Compensation Fund for fiscal year 2008-2009 ($6 Million) and 2009-2010 ($6 Million). Each subsequent appropriation has directed that any recovery from the Passaic River Litigation will reimburse the New Jersey Spill Compensation Fund in the amount not to exceed $12,000,000. The 2013-2014 New Jersey budget appropriation and previous budget appropriations can be found at http://www.state.nj.us/treasury/omb/publications/14budget/index.shtml.

COMMENTS FROM THIRD-PARTY DEFENDANTS IN THE PASSAIC RIVER LITIGATION

Comments regarding contribution protection provided to OCC pursuant to the Repsol/YPF Settlement Agreement

The comments address DEP's ability to provide contribution protection to OCC pursuant to N.J.S.A. 58:10-23.11f.a(2)(b). The comments were received from Garfield Molding Co., Inc. (see Ex. 3), and McKesson Corporation, McKesson Envirosystems Co., and Safety-Kleen Envirosystems Co. (see Ex. 9).

Response:

Through its contribution protection provision, the Spill Act provides a mechanism to encourage early settlements with DEP. This serves to reduce the burdens on the State's limited resources by encouraging private parties to assume responsibility for cleanup and removal costs and sites. Spill Act settlements often provide a settling party protection for predecessors, successors, subsidiaries, affiliates, indemnitors or insurers, and other related entities. Many settlements could not be achieved without such coverage, and the Settling Third-Party Defendants likewise insisted upon such protection, which was incorporated in the definitions of "Settling Private Third-Party Defendant" and "Settling Public Third-Party Defendant" in the Third-Party Consent Judgment.

The Repsol/YPF Settlement Agreement, if approved by the Court, would be entered by Maxus to resolve claims against it and to resolve claims against its indemnitee, OCC. Pursuant to the SPA, Maxus agreed to indemnify OCC for certain claims related to the Lister Site. The Court has already ruled that Maxus must indemnify OCC for certain cleanup and removal costs sought under the Spill Act in the Passaic River Litigation. (August 24, 2011 Order Granting OCC's Motion for Partial Summary Judgment Against Maxus.) By entering into the Repsol/YPF Settlement Agreement, Maxus will resolve certain claims brought by DEP against OCC, including retiring claims for past cleanup and removal costs and certain other costs and fees. OCC is therefore an identified and specifically named third party beneficiary for certain provisions of the Repsol/YPF Settlement Agreement, including contribution protection to the extent OCC is entitled to indemnity under the SPA. (See Repsol/YPF Settlement Agreement at ¶ 63.) Because Maxus is resolving certain claims on OCC's behalf, and because OCC is a party to the litigation in which the settlement will be entered, it is not necessary for OCC to execute the Repsol/YPF Settlement Agreement in order for its terms to be effective. Furthermore, the contribution protection provided to OCC is consistent with the contribution protection and covenants not to sue provided to certain affiliated persons and entities in the Third-Party Consent Judgment.

The case cited in the comment, Dragon v. New Jersey Department of Environmental. Protection, 405 N.J. Super. 478, 493-98 (App. Div. 2009), did not involve the Spill Act or a settlement for cleanup and removal costs and damages suffered by the public. Rather, it addressed a challenge from a neighboring property owner to a DEP settlement with a permit applicant, who was seeking permission to tear down and reconstruct a private residential oceanfront house in a coastal zone. The court found that DEP had approved the reconstruction

without issuing the permit required by the Coastal Area Facility Review Act (CAFRA), none of the express statutory exceptions to the permitting requirements under CAFRA applied, and DEP failed to follow its own rules. None of these findings implicate this proposed settlement under the Spill Act, where the very purposes of the legislation are being fulfilled through the proposed settlements, as opposed to being circumvented, as in the case cited.

Finally, the commenters misunderstand the purpose and application of N.J.S.A. 58:10-23.11f.a(2)(b). By requiring that DEP expressly intend to release a party from liability, that section of the Spill Act simply abrogated the outdated common law doctrine that settlement with one joint tortfeasor released all joint tortfeasors to the same extent. The provision operates as a restriction on parties that would attempt to take the benefit of another's settlement (an *unintended* third-party beneficiary, for example). The provision is not intended, nor can it be properly construed, to preclude contribution protection and covenants not to sue for associated or related entities like OCC, which are expressly identified by DEP and intended beneficiaries of a settlement.

Comments regarding Timing of the Entry of the Third-Party Consent Judgment and Repsol/YPF Settlement Agreement

The comments address the timing for entry of the proposed Third-Party Consent Judgment and the Repsol/YPF Settlement Agreement and request that the Third-Party Consent Judgment be presented before the Repsol/YPF Settlement Agreement despite the significant benefits to the Settling Third-Party Defendants by the latter agreement. The Repsol/YPF Settlement Agreement provides that it will be presented to the court contemporaneous with or immediately before the Third-Party Consent Judgment. The comments object to this timing even though it was designed to benefit the Settling Defendants and conserve State and judicial resources. The comments were received from Eric Rothenberg, Counsel for certain Private Third-Party Defendants (see Ex. 4), Gibbons P.C. Counsel for certain Private Third-Party Defendants (see Ex. 5), Legacy Vulcan Corp. (see Ex. 8), McKesson Corporation, McKesson Envirosystems Co., and Safety-Kleen Envirosystems Co. (see Ex. 9), Bayer Corporation and STWB Inc., (see Ex. 11) John Scagnelli for certain Public Third-Party Defendants (see Ex. 14), Borough of Hasbrouk Heights, Borough of Totowa, and Borough of Woodland Park (see Ex. 13), and Peter J. King, Liaison Counsel for various Public Third-Party Defendants (see Ex. 15).

Response:

The Court has set the schedule for the joint submittal of both settlements and the associated briefing and oral argument. Because both settlements seek to resolve claims in the Passaic River Litigation, DEP evaluated the comments received holistically, including comments suggesting rejection of the Third-Party Consent Judgment due to the procedure for submitting the Repsol/YPF Settlement Agreement to the Court. While the Third-Party Consent Judgment was negotiated prior to the Repsol/YPF Settlement Agreement, both settlements mutually address the State's cleanup and removal costs associated with the discharges of hazardous substances into the Newark Bay Complex, as well as damages suffered by the public as a result of those discharges. Neither settlement can be considered in isolation. Many of the comments made by Settling Third-Party Defendants go to the interaction between the two settlements and how their terms can be reconciled or rejected, further requiring this holistic approach.

Logistically, the settlements should be considered by the Court simultaneously, with the Court having the opportunity to consider how both settlements will affect the Passaic River Litigation and the claims of all parties. Additionally, as part of the Repsol/YPF Settlement Agreement, the Settling Defendants agreed not to object to or challenge the Third-Party Consent Judgment, including the dismissal, with prejudice, of Maxus's and Tierra's claims asserted against the Settling Third-Party Defendants. (Repsol/YPF Settlement Agreement at ¶ 50.) A provision allowing the Settling Defendants an opportunity to submit comments and challenge the Third-Party Consent Judgment in the event the Repsol/YPF Settlement Agreement was not approved by the Court, (see id.), is necessary to avoid undue prejudice to the Settling Defendants and is not an undue burden on the Settling Third-Party Defendants. The agreement not to challenge the Third-Party Consent Judgment and timing considerations provides a substantial benefit to the Settling Third-Party Defendants and will likely result in a significant cost savings and streamlined process for all parties. The Settling Third-Party Defendants should be supportive of efforts to reduce the litigation costs of all parties and preserve judicial resources, both goals of the Third-Party Consent Judgment and Repsol/YPF Settlement Agreement. Furthermore, the order of entry of the Repsol/YPF Settlement Agreement and Third-Party Consent Judgment would have no effect on the contribution protection provided by both agreements, if they are ultimately entered by the Court.

Comments regarding the Natural Resource Damage covenant not to sue and credits

The comments address Natural Resource Damages covenants not to sue provided to the Settling Defendants and the credit provided for NRD. The comments note that a full NRDA for the Newark Bay Complex has not been completed and the total NRD for the Newark Bay Complex has not been established. The comments also question why parties paying $95,000 - $195,000 did not receive the same covenant not to sue for NRD as parties paying $130 Million, and request that the terms of the Repsol/YPF Settlement Agreement be revised to match the terms negotiated for the Third-Party Consent Judgment. The comments were received from Eric Rothenberg, Counsel for certain Private Third-Party Defendants (see Ex. 4), Gibbons P.C. Counsel for certain Private Third-Party Defendant (see Ex. 5), Lee Henig-Elona, counsel for certain Private Third-Party Defendants (see Ex. 6), Kinder Morgan Liquids Terminals LLC (see Ex. 7), McKesson Corporation, McKesson Envirosystems Co., and Safety-Kleen Envirosystems Co. (see Ex. 9), Bayer Corporation and STWB Inc. (see Ex. 11) and John Scagnelli for certain Public Third-Party Defendants (see Ex. 14).

Response:

DEP is the designated trustee under federal and state law for natural resources owned, managed, held in trust or otherwise controlled by the State of New Jersey. DEP is authorized to bring and resolve claims for compensation for damage or destruction of natural resources under the Spill Act, other New Jersey statutes and common law, and CERCLA. In exchange for $130 Million, the Repsol/YPF Settlement Agreement seeks to resolve liability for the Settling Defendants for, among other liability, NRD and NRDA costs for the Newark Bay Complex. (Repsol/YPF Settlement Agreement at ¶ 25.) DEP's NRD claim against OCC, the successor to DSCC, the actual discharger, is reserved.

Repsol, YPF, and their foreign affiliates are not alleged to be directly liable for any discharge to the Newark Bay Complex. The Court previously entered interlocutory orders finding Tierra liable based solely on its status as the current owner of the Lister Site and Maxus liable as Tierra's alter ego, but NRD liability was not briefed or at issue (as the claims were not included in the suit) in that Order. The Court rejected Maxus's direct liability as a successor of DSCC, but instead found OCC the legal successor and, as such, strictly, jointly and severally liable under the Spill Act. Thus, given the facts of the case and attenuated relationship to the direct natural resource impacts of active discharges from the Lister Site, DEP believes that the settlement funds reasonably compensate the State of New Jersey for the damages resolved by the Repsol/YPF Settlement Agreement, including NRD and NRDA costs. The risk and expense of continuing the litigation against the Settling Defendants and the potential to recover the State's damages from OCC, the party directly responsible for the discharges from the Lister Site, must also be considered when evaluating the Repsol/YPF Settlement Agreement. Also, the comments are founded upon the fact that NRD liability under the Spill Act and CERCLA is joint and several, leading the commenters to express concern about their liability exposure if the Settling Defendants are not paying an appropriate amount for the resolution of NRD liability. DEP does not consider this a significant issue with respect to the pending settlements. Because the State's NRD claims against OCC are reserved and the federal trustee claims remain unaffected as well, any concern over contribution protection, credits, or third party exposure to disproportionate NRD liability is unfounded.

Comments to the Repsol/YPF Settlement Agreement also identify that a full NRDA has not been conducted for the Newark Bay Complex. There is no requirement under the Spill Act or other New Jersey authority that requires a NRDA assessment be completed before NRD claims can be resolved. Furthermore, many of the entities identifying the absence of a NRDA were given the opportunity to conduct a NRDA in response to DEP Directive Number 2003-01, Natural Resource Injury Assessment and Interim Compensatory Restoration of Natural Resources, and failed to conduct an assessment or provide funding for an assessment.

The Repsol/YPF Settlement Agreement addresses all natural resources owned, managed, held in trust or otherwise controlled by the State of New Jersey under state or federal law. The agreement, however, makes clear that it does not resolve NRD liability to any federal natural resource damage trustee. (Repsol/YPF Settlement Agreement at ¶ 63(e).) Furthermore, like the Third-Party Consent Judgment, the Repsol/YPF Settlement Agreement is not intended to cover costs incurred or reimbursed by EPA or the federal trustees, and the contribution protection provided by DEP is not intended to apply to EPA or the federal trustees. Furthermore, although the Repsol/YPF Settlement Agreement includes DEP's covenant not to sue the Settling Defendants (but not OCC) for NRD, and provides that a portion of the settlement funds will be applied as a credit against NRDs that are owed or may be owed by the Settling Defendants, none of the settlement funds are specifically earmarked for particular projects that can be considered NRD restoration or compensation. There is no authority cited for modifying the "Matters Addressed" based on the allocation of settlement funds, and doing so would be inconsistent with the Third-Party Consent Judgment. In the future, if any of these settlement funds are considered for use in connection with any particular restoration project or other purpose that could be characterized as compensation for injury to natural resources within the Newark Bay Complex, DEP intends to following its practice of consultation with its co-trustees prior to any final decision.

Finally, the comments identify no basis to modify the Repsol/YPF Settlement Agreement to match the negotiated language from Paragraph 26(j) to the Third-Party Consent Judgment. Resolution of any State claims for NRD associated with discharges from any third party site have been reserved, subject to the credit and conditions set forth in the proposed Third-Party Consent Judgment, while NRD associated with OCC/DSCC discharges from the Lister Site have been reserved against OCC.

Comment regarding Paragraph 53 of the Repsol/YPF Settlement Agreement

The comment concerns Paragraph 53 of the Repsol/YPF Settlement Agreement and a subsequent federal action between some of the Settling Defendants and the Settling Third-Party Defendants. In particular, the comment suggests that reservations by the Settling Defendants of certain claims somehow undermines the contribution protection provided by the Third-Party Consent Judgment. The comment was received from Gibbons, PC, Counsel for certain Private Third-Party Defendants. (See Ex. 5.)

Response:

Paragraph 53 of the Repsol/YPF Settlement has no impact upon the contribution protection provided by the Third-Party Consent Judgment, if entered, or the dismissal of claims that would result from the entry of the dismissal order attached thereto. In Paragraph 53, Settling Defendants agree to bring any future claims with respect to the Diamond Alkali Superfund Process in federal court, unless no federal jurisdiction exists. This agreement by Settling Defendants is consistent with the similar agreement of Settling Third-Party Defendants in Paragraph 36(b) of the Third-Party Consent Judgment. Additional language in Paragraph 53 makes clear that the agreement not to pursue claims under the Spill Act is not intended to preclude the Settling Defendants from seeking an offset in the event others pursue Spill Act contribution claims against them, notwithstanding the contribution protection provided to the Settling Defendants. The extent that Settling Defendants might have such a claim, if any, is not addressed. This agreement by Settling Defendants has no effect on the Third-Party Consent Judgment, or the dismissal of claims or contribution protection provided thereby. The Dismissal Order attached to and made part of the proposed Third-Party Defendant Consent Judgment provides that the Third-Party Complaints and all claims brought against the Third Party Defendants shall be dismissed with prejudice. DEP intends to cooperate with the Settling Third-Party Defendants to have the dismissal order entered by the Court.

Finally, the Spill Act only provides dischargers a right of contribution and does not provide dischargers "direct" actions as the comment suggests. See N.J.S.A. 58:10-23.11f.a(2).

Comment regarding Paragraphs 50, 53 and 63 of the Repsol/YPF Settlement Agreement

The comment concerns Paragraphs 50, 53 and 63 of the Repsol/YPF Settlement Agreement and the effect, if any, on the contribution protection provided to the Settling Third-Party Defendants in the Third-Party Consent Judgment. The comments were received from Gibbons, PC, Counsel for certain Private Third-Party Defendants. (See Ex. 5.)

Response:

The contribution protection provided by the Third-Party Consent Judgment is not impacted or undermined by the Repsol/YPF Settlement Agreement. In Paragraph 50 of the Repsol/YPF Settlement Agreement, the Settling Defendants agreed not to challenge the Third-Party Consent Judgment. (Repsol/YPF Settlement Agreement at ¶ 50.) Paragraph 50 further provides that the Settling Defendants' agreement not to challenge the Third-Party Consent Judgment should not be construed as a waiver of any argument in federal court regarding the extent of contribution protection for federal claims. (Id.) The extent of contribution protection for federal claims is not addressed or affected by the provision. The Settling Defendants' agreement not to challenge the Third-Party Consent Judgment is a considerable benefit to the Settling Third-Party Defendants, and the Settling Defendants should not be unduly prejudiced for providing such a benefit to the Settling Third-Party Defendants.

Issues raised regarding Paragraph 53 of the Repsol/YPF Settlement Agreement are addressed in response to the previous comment regarding Paragraph 53.

Paragraph 63(c) of the Repsol/YPF Settlement Agreement makes clear that Settling Defendants are not releasing any claims under federal law, except as against the State of New Jersey as provided by Paragraphs 51 and 52. (Id. at ¶ 63.) Paragraph 63(c) further provides that Settling Third-Party Defendants and any other person or entity may pursue federal claims against the Settling Defendants except to the extent the Settling Defendants have contribution protection. A nearly identical provision is set forth in Paragraph 39(c) of the Third-Party Consent Judgment.

Comments regarding the geographic scope of the covenants not to sue provided by the Repsol/YPF Settlement Agreement

The comments concern the geographic scope of the covenants not to sue provided to certain Settling Defendants and the differences in the definitions of "Newark Bay Complex" in the Repsol/YPF Settlement Agreement and Third-Party Consent Judgment. The comments were received from Gibbons, PC, Counsel for certain Private Third-Party Defendants (see Ex. 5), McKesson Corporation, McKesson Envirosystems Co. and Safety-Kleen Envirosystems Co. (see Ex. 9), and Bayer Corporation and STWB Inc. (see Ex. 11).

Response:

The comments correctly note that Repsol, YPF and their related foreign affiliates were sued under certain alter ego, fraudulent transfer and vicarious liability theories for damages associated with Maxus. As described in detail above, the Court previously entered an interlocutory order finding that OCC is the legal successor to DSCC. The order was included in the record developed by DEP. Based on the interlocutory order and because, if approved, the

Repsol/YPF Settlement Agreement would resolve certain claims for alter ego, fraudulent transfer and other vicarious liability theories, DEP has agreed to look first to OCC, as the adjudicated legal successor, for any damages associated with DSCC. (Repsol/YPF Settlement Agreement at ¶ 46.) If OCC is unable to satisfy a judgment, DEP has reserved its ability to pursue Repsol, YPF and certain related entities. (Id. at ¶ 26(e) and 46.) In short, the Repsol/YPF Settlement Agreement simply followed the Court's prior rulings in agreeing to look to OCC, as the direct legal successor by merger, for DSCC liabilities. If responsible, presumably OCC will then tender such claims or liabilities to Maxus under the terms of the indemnity provided in the SPA. Also, any claims not associated with DSCC or direct liability for discharges by Repsol, YPF or certain other entities are not addressed by Paragraph 25(i).

The comments also note that the definitions of the "Newark Bay Complex" differ in the Repsol/YPF Settlement Agreement and Third-Party Consent Judgment. The differences are intentional and may result in a broader or narrower geographical scope depending on the circumstances. The Settling Defendants' association with a single site along the Passaic River differs substantially from the Settling Third-Party Defendants' association with hundreds of sites throughout the Newark Bay Complex and surrounding area, and DEP considers the differences in the definitions necessary and appropriate.

Comments from Reichhold, Inc. seeking to reserve comments and questions to the Repsol/YPF Settlement Agreement.

Reichhold, Inc. provided comments that on its face state that "Reichhold does not have any comments, as such, pertaining to the Settlement Agreement that are not likely to have been or will be presented by others." Riechhold, Inc. also indicates that it has a number of questions, but none are specified. (See Ex. 10.)

Response:

No actual comment or question about the Repsol/YPF Settlement Agreement was included in comments submitted by Reichhold, Inc. DEP provides no response regarding the process for approval of the Repsol/YPF Settlement Agreement before the Court and Reichhold, Inc.'s possible waiver or non-waiver of any issue. Issues regarding the process for presenting the Repsol/YPF Settlement Agreement to the Court will be directed by the Court and Special Master.

Comments from Troy Corporation referencing other comments submitted by Third-Party Defendants.

The comments reference non-specific comments from other Third-Party Defendants. (See Ex. 12.)

Response:

No actual comment or question about the Repsol/YPF Settlement Agreement was included in comments submitted by Troy Corporation. Furthermore, the Repsol/YPF Settlement

Agreement has no effect on the protection provided by the Third-Party Consent Judgment, if the consent judgment is approved by DEP and entered by the Court.

Comments supporting a global settlement of the Passaic River Litigation and Paragraph 53 of the Repsol/YPF Settlement Agreement.

The comment provides support for the Third-Party Consent Judgment and Repsol/YPF Settlement Agreement and references Paragraph 53 of the Repsol/YPF Settlement Agreement and dismissal of all claims against the Settling Public Third-Party Defendants. The comments were received from the Borough of Hasbrouck Heights, the Borough of Totowa, and the Borough of Woodland Park. (See Ex. 13.)

Response:

The comments on benefits of settlement and policy considerations are noted and appreciated by DEP. The Repsol/YPF Settlement Agreement and the Third-Party Consent Judgment provide a significant opportunity for the State of New Jersey to resolve certain claims regarding one of the most contaminated sites in New Jersey. One of the key benefits of the Repsol/YPF Settlement Agreement to Settling Third-Party Defendants, including public entities, is the agreement by Maxus and Tierra to refrain from challenging the Third-Party Consent Judgment and the dismissal order included therein. If approved by DEP and entered by the Court, the Third-Party Consent Judgment and dismissal order will result in the dismissal, with prejudice, of all claims brought by Maxus/Tierra against the Settling Third-Party Defendants as addressed by the dismissal order. The dismissal would include all claims recoverable under state law covered by the dismissal order, whether direct or indirect or for contribution or otherwise. Paragraph 53 of the Repsol/YPF Settlement Agreement provides, in part, that future claims by the Settling Defendants regarding hazardous substances in the Newark Bay Complex will be brought in federal court to the extent federal jurisdiction exists. This agreement by Settling Defendants is consistent with the similar agreement of Settling Third-Party Defendants in Paragraph 36(b) of the Third-Party Consent Judgment.

Exhibit 1

Via email PassaicSettlement@dep.state.nj.us and Regular US Mail

July 30, 2013

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

Re: Proposed Consent Judgment in the Matter of NJDEP, et al., v. Occidental Chemical Corporation, et al., Docket No. ESX-L9868-05 (PASR)

To Whom it May Concern:

Please accept these comments on the above referenced matter on behalf of NY/NJ Baykeeper ("Baykeeper"). Baykeeper works to protect, preserve and restore the Hudson-Raritan Estuary, which includes the lower Passaic River.

We applaud NJDEP's perseverance and persistence in pursuing claims against the companies responsible for the pollution of the lower Passaic River. For too long, those companies have turned their back on their legal and moral obligations to clean and restore the River.

We support the settlement with Repsol/YPF, however, we object to the use of any portion of the settlement by the State of New Jersey as General Revenue under the FY2014 Budget, rather than back into the cleaning up and restoring the Passaic River as was the original intention of the lawsuit.

The Governor's FY2014 Budget includes the following language:

> Notwithstanding the provisions of any law or regulation to the contrary, an amount not to exceed $12,000,000 of cost recoveries from litigation related to the Passaic River cleanup are appropriated to the New Jersey Spill Compensation Fund and any remaining recoveries, not to exceed $40,000,000 shall be deposited in the General Fund as State revenue, subject to the approval of the Director of the Division of Budget and Accounting. (Governor Christie's FY2014 Budget at D-129. See also S3000.)

As stated in the public notice, the Repsol/YPF have agreed to settle any alleged liability to the NJDEP for past cleanup and removal costs, future cleanup and removal costs, the costs of a Natural Resource Damages Assessment and economic and other damages by payment of $130,000,000.

Our organization and our members have suffered from decades of pollution of the River. The money recovered from those responsible for polluting the River should be directed and limited to the cleanup and restoration of the River. The State represents its citizens in this matter as the trustee of the natural resource and, in particular, those citizens who

have lost full economic and recreational use of this precious River for decades. Any recovery of funds from those responsible for polluting the River should be directed to cleaning up the River.

But the State's subsequent sweeping of a portion of the settlement into the general coffers as a one-off to balance the budget does not keep within the spirit of the agreement and violates the fundamental principle that clean up and restoration should be the first priority for the use of these funds. While the NJ Spill Compensation Fund will be reimbursed $12,000,000, this is primarily for past attorney costs borne by the state in litigation the case, not for cleanup or restoration purposes.

Further, the proposed consent judgment does not include money for natural resource damages, requiring a formal Natural Resource Damage Assessment (NRDA) to be completed before this claim can be resolved. Therefore, at least some portion of the monies collected from this settlement must be specifically allocated to complete the NRDA so that the State and Federal Trustees may move forward to pursue and collect further reimbursement for its loss of natural resources because of the pollution of the River. Without such an allocation, the NRDA claim will remain open and unresolved.

The entities that agreed to this proposed consent judgment did so with an understanding of how the money they would be paying would be spent. To now slide it over to fill a gap in the State's general budget, to be spent in some unknown way, is not honest to the spirit of the agreement and further victimizes the Passaic River.

Thank you for your attention to this matter. I may be reached at Debbie@nynjbaykeeper.org or 732-888-9870 x2 if you have questions.

Sincerely,

Deborah A. Mans
NY/NJ Baykeeper
Baykeeper & Executive Director

cc: Hon. Sebastian F. Lombardi, Jr., Judge of the Superior Court of New Jersey, Essex County
Regional Administrator Judith Enck, UEPA, Region 2
Open Letter

DEP Passaic3PStlmt

From: Debbie Mans <debbie@nynjbaykeeper.org>
Sent: Wednesday, July 03, 2013 3:32 PM
To: DEP Passaic3PStlmt
Cc: debbie@nynjbaykeeper.org
Subject: Commnets on Proposed Consent Judgment in the Matter of NJDEP v. Occidental Chemical Corp., Docket No. ESX-L9868-05(PASR)

Hackensack Riverkeeper • Ironbound Community Corporation • NY/NJ Baykeeper

Via email passaic3pstlmt@dep.state.nj.us

July 3, 2013
Office of Record Access
NJDEP
Attn: Passaic 3rd Party Settlement Comments
P.O. Box 420, Mail Code 401-06Q
Trenton, NJ 08625-0420

Re: Proposed Consent Judgment in the Matter of NJDEP, et al., v. Occidental Chemical Corporation, et al., Docket No. ESX-L9868-05 (PASR)

To Whom it May Concern:

Please accept these comments on the above referenced matter on behalf of NY/NJ Baykeeper, Hackensack Riverkeeper and Ironbound Community Corporation (the "Organizations"). Our organizations work to protect, preserve and restore the Hudson-Raritan Estuary, which includes the lower Passaic River.

We applaud NJDEP's perseverance and persistence in pursuing claims against the companies responsible for the pollution of the lower Passaic River. For too long, those companies have turned their back on their legal and moral obligations to clean and restore the River.

We support the settlement with third-party defendants brought into the case by Maxus Energy Corporation and Tierra Solutions, Inc., however, we object to the use of the majority of the settlement by the State of New Jersey as General Revenue under the FY2014 Budget, rather than back into the cleaning up and restoring the Passaic River as was the original intention of the lawsuit.

The Governor's FY2014 Budget includes the following language:

> Notwithstanding the provisions of any law or regulation to the contrary, an amount not to exceed $12,000,000 of cost recoveries from litigation related to the Passaic River cleanup are appropriated to the New Jersey Spill Compensation Fund and any remaining recoveries, not to exceed $40,000,000 shall be deposited in the General Fund as State revenue, subject to the approval of the Director of the Division of Budget and Accounting. (Governor Christie's FY2014 Budget at D-129. See also S3000.)

As stated in the public notice, the Settling Third-Party Defendants and affiliated entities have agreed to settle any alleged liability to the NJDEP for past cleanup and removal costs, future cleanup and removal costs, the costs of a Natural Resource Damages Assessment and economic and other damages by payment of approximately $35,300,000 to NJDEP.

Our organizations and our members have suffered from decades of pollution of the River. The money recovered from those responsible for polluting the River should be directed and limited to the cleanup and restoration of the River. The State represents its citizens in this matter and in particular, those citizens who have lost full economic and recreational use of this precious River for decades. Any recovery of funds from those responsible for polluting the River should be directed to cleaning up the River.

But the State's subsequent sweeping of a portion of the settlement into the general coffers as a one-off to balance the budget does not keep within the spirit of the agreement and violates the fundamental principle that clean up and restoration should be the first priority for the use of these funds. While the NJ Spill Compensation Fund will be reimbursed $12,000,000, this is primarily for past attorney costs borne by the state in litigation the case, not for cleanup or restoration purposes.

Further, the proposed consent judgment does not include money for natural resource damages, requiring a formal Natural Resource Damage Assessment (NRDA) to be completed before this claim can be resolved. Therefore, at least some portion of the monies collected from this settlement should be specifically allocated to complete the NRDA so that the State may move forward to pursue and collect further reimbursement for its loss of natural resources because of the pollution of the River. Without such an allocation, the NRDA claim will remain open and unresolved.

The entities that agreed to this proposed consent judgment did so with an understanding of how the money they would be paying would be spent. To now slide it over to fill a gap in the State's general budget, to be spent in some unknown way, is not honest to the spirit of the agreement and further victimizes the Passaic River.

Thank you for your attention to this matter. I may be reached at Debbie@nynjbaykeeper.org or 732-888-9870 x2 if you have questions.

Sincerely,

Deborah A. Mans
NY/NJ Baykeeper
Baykeeper & Executive Director

Capt. Bill Sheehan
Hackensack Riverkeeper
Riverkeeper & Executive Director

Ana Baptista
Ironbound Community Corporation

cc: Hon. Sebastian F. Lombardi, Jr., Judge of the Superior Court of New Jersey, Essex County

Deborah A. Mans, Baykeeper & Executive Director
NY/NJ Baykeeper
52 W. Front Street
Keyport, NJ 07735
732.888.9870 ext. 2
732.888.9873 fax
Website: www.nynjbaykeeper.org

Exhibit 2

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COUNSEL

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1100 ONEOK Plaza
100 West Fifth Street
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July 30, 2013

Via Email and United States Mail

Mr. Bob Martin, Administrator
New Jersey Department of Environmental Protection
Office of Record Access
Attn: Passaic Repsol/YPF Settlement Comments
P.O. Box 420, Mail Code 401-06Q
Trenton, New Jersey 08625-0420

Re: Repsol/YPF Settlement

Dear Mr. Martin,

Pursuant to *N.J.S.A.* 58:10-23.11e2 and the public notice published at 45 *N.J.R.* 1661(a), Occidental Chemical Corporation ("OCC") submits the following comments to the above-referenced settlement agreement (the "Settlement Agreement") relating to the case of *NJDEP v. Occidental Chemical Corp., et al.*, Case No. ESX-L-9869-05, in the Superior Court of New Jersey, Law Division: Essex County (the "Litigation").

OCC is in a unique position with respect to the Settlement Agreement. As you know, on August 24, 2011, the Honorable Sebastian P. Lombardi, J.S.C., entered a partial summary judgment in the Litigation requiring one of the Settling Defendants,[1] Maxus Energy Company ("Maxus"), to indemnify OCC for any costs, losses and liabilities that may be incurred by OCC in the Litigation as a result of OCC's acquisition of Diamond Shamrock Chemicals Company ("DSCC"). Maxus is also contractually obligated to use its best efforts to obtain OCC's release from these liabilities. Further, OCC has filed cross-claims against all of the other Settling Defendants, asserting their liability for these matters as well. Although the Settlement Agreement—to which OCC is not a party—purports to resolve some of Plaintiffs' claims against OCC, it also purports to specifically preserve others and to substantially limit OCC's ability to

[1] Capitalized terms used in these comments and not otherwise defined have the meanings given to them in the Settlement Agreement.

pursue its cross-claims against the Settling Defendants. For example, the parties to the Settlement Agreement presume to limit by agreement the preclusive effect of the Court's determination that it has personal jurisdiction over the foreign Settling Defendants, despite the fact that the ruling also established personal jurisdiction for purposes of OCC's still-existing cross-claims. Therefore, OCC has numerous, serious objections to the Settlement Agreement and it reserves the right to raise them with the Court as contemplated by the April 25, 2013 Order.[2] It is not required to make any such objections in this comment process and does not waive its right to do so with the Court or otherwise. OCC will limit its comments here only to those issues on which it seeks clarification and/or further information from Plaintiffs.

1. The Amount of Costs and Damages Sought and Allocation Thereof.

Under the Spill Compensation and Control Act (the "Spill Act"), a party that has resolved its liability to the State for cleanup and removal costs and/or Natural Resource Damages ("NRDs") and has entered into a judicially approved settlement with the State shall not be liable for claims of contribution regarding matters addressed in the settlement. *N.J.S.A.* 58:10-23.11f.a.(2)(b). Non-settling parties are entitled to offset their common Spill Act liability only by the dollar amount of the settlement, rather than offsetting it by the pro rata share of the settling party's actual liability. *Id.* Thus, it is critically important that the settlement amount fairly represents the Settling Defendants' share of liability.

In the Settlement Agreement, Plaintiffs have covenanted not to sue the Settling Defendants for all claims related to the discharges of hazardous substances to the Newark Bay Complex. In exchange for payment of $130 million by certain of the Settling Defendants, Plaintiffs have agreed to forgo claims for the following costs and damages against all of the Settling Defendants:

- Past Cleanup and Removal Costs (including natural resource damage assessment costs);
- Future Cleanup and Removal Costs in the FFS Area (and up to $70.8 million in Future Cleanup and Removal Costs outside the FFS Area);
- NRDs;
- Economic Damages;
- Disgorgement Damages;
- Punitive Damages;
- Attorneys' fees and litigation costs; and
- Penalties under the Spill Act, Water Pollution Control Act (the "WPCA"), and other statutory and common law causes of action.

[2] In his April 25, 2013 Order on the Approval Process for the Proposed Settlement Agreement, Judge Lombardi ordered that after Plaintiffs have received all public comments, and if they have determined that none of the comments warrant rejection of the Settlement Agreement, Plaintiffs and Settling Defendants shall file motions with the Court for approval and implementation of the Settlement Agreement. At that time, the Court will set a briefing schedule that will permit any party to the action, including OCC, to file papers opposing those motions.

The fairness and reasonableness of paying $130 million to resolve these claims cannot be evaluated based on the information currently available. Specifically, Plaintiffs must provide additional information on three key issues.

(a) Plaintiffs must provide information regarding the costs and damages sought in the Litigation.

The administrative record contains conflicting information regarding the ***past*** Cleanup and Removal Costs allegedly incurred by Plaintiffs, and the estimates for ***future*** Cleanup and Removal Costs vary widely. Under Judge Lombardi's case management order, discovery has not yet occurred regarding any of the claimed costs and damages. Thus, the record contains no information whatsoever with respect to the amounts of any economic, disgorgement or punitive damages sought by Plaintiffs. Finally, Plaintiffs ***have not even asserted*** claims for NRDs in the Litigation.

Consequently, without more information regarding the total costs and damages alleged by Plaintiffs, it is impossible to determine whether $130 million represents a fair apportionment of liability to the Settling Defendants. Indeed, courts considering similar settlements between governmental agencies and responsible parties have rejected such settlements where, as here, the agency failed to articulate the amount of costs and damages it was seeking.[3] Accordingly, OCC requests that Plaintiffs identify with specificity the costs they allegedly have incurred (or will incur in the future) and the damages they allegedly have sustained in connection with discharges from the Lister Site. OCC further requests that Plaintiffs provide information regarding the amount of their purported costs and damages attributable to each category of costs and damages covered by the Settlement Agreement.

(b) Plaintiffs should identify their basis for determining the share of liability allocable to the Settling Defendants.

Under the Settlement Agreement, Plaintiffs would covenant not to sue ***all*** of the Settling Defendants, but only Repsol, YPF, and maybe Maxus are obligated to pay. Notably, Tierra—which Judge Lombardi already has found to be a Spill Act liable party—receives a covenant not to sue for virtually all claims sought by Plaintiffs, but it is not required to pay anything toward the Settlement Funds. The Settlement Agreement fails to indicate how Plaintiffs determined the Settling Defendants' respective share of the purported liability and how much (if any) each Settling Defendant should pay. OCC asks that Plaintiffs identify the basis for their determination that the settlement amount fairly represents the Settling Defendants' individual and collective share of costs and damages sought by Plaintiffs.

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[3] *See, e.g., United States v. Montrose Chem. Corp.*, 50 F.3d 741, 746-47 (9th Cir. 1995) ("[T]he proper way to gauge the adequacy of settlement amounts to be paid by settling PRPs is ***to compare the proportion of total projected costs to be paid by the settlors with the proportion of liability attributable to them***, and then to factor into the equation any reasonable discounts for litigation risks, time savings, and the like that may be justified.") (emphasis in original); *Ariz. Dep't of Envt'l Quality v. Acme Laundry & Dry Cleaning Co.*, 2009 WL 5170176, at *2 (D. Ariz. Dec. 21, 2009) ("We cannot evaluate the fairness and reasonableness of the parties' proposed consent decree at this time because they have not provided a preliminary estimate of the natural resource damages at issue."); *Dep't of Planning & Natural Res. v. Century Alumina Co.*, 2008 WL 4693550, at *3-7 (D.V.I. Oct. 22, 2008) (court could not evaluate fairness of settlement "without an estimation of the total response costs").

(c) Plaintiffs should specify how the settlement amount will be allocated among the types of damages.

Similarly, it is not apparent how the $130 million settlement amount will actually be allocated among the various categories of costs and damages that the settling parties purport to resolve in the Settlement Agreement. Paragraph 24 appears to provide a vague description of the intended allocation:

> Settlement Funds shall first be applied to Plaintiffs' Claims for Past Cleanup and Removal Costs, to the extent recoverable under CERCLA, and then applied as a credit against any [NRDs] owed or that may be owed in the future by Settling Defendants (but not OCC) . . . . Notwithstanding any allocation credit given to the Settling Defendants, this Paragraph does not control any internal allocation or use that Plaintiffs or the State of New Jersey may make with respect to the Settlement Funds received.

This paragraph presents a host of issues.

First, the purported allocation of the Settlement Funds to Past Cleanup and Removal Costs and NRDs (if any) is—on its face—illusory. Although the Settlement Agreement attempts to define how the Settlement Funds should be allocated for purposes of the credit received by the Settling Defendants, it expressly recognizes that Plaintiffs may not use those funds in that manner. In other words, the allocation of the Settlement Funds is a legal fiction to determine the amount of credit provided to the Settling Defendants, and it expressly contemplates that the Settlement Funds may not actually go toward Past Cleanup and Removal Costs or NRDs or any effort to remediate the Newark Bay Complex. Because the settlement purports to compensate for alleged cleanup and removal costs and/or alleged impacts to natural resources, the public is entitled to know how Plaintiffs will actually apply the Settlement Funds in the Newark Bay Complex.

Second, the provision states that the Settlement Funds, in certain circumstances, are to be "applied as a credit against any Natural Resource Damages owed or that may be owed in the future by Settling Defendants (but not OCC) . . . ." This can be interpreted to mean that any credit applied toward a future NRD claim benefits only the Settling Defendants and not non-settling parties, such as OCC. This is flatly inconsistent with the Spill Act, which requires that non-settling parties receive credit in an amount equal to the settlement value. *See N.J.S.A.* 58:10-23.11f.a.(2)(b). Thus, this is surely not Plaintiffs' intent and should be clarified.

Third, in the Settlement Agreement, Plaintiffs agree not to sue the Settling Defendants for all the claims listed above, including "all Claims for Discharges to the Newark Bay Complex which Plaintiffs brought or could have brought against Settling Defendants in the Passaic River." The Agreement also purports to give the Settling Defendants contribution protection relating to all of these claims. Yet Paragraph 24 purports to allocate the Settlement Funds only to Past Cleanup and Removal Costs and possibly NRDs. Thus, according to this paragraph, the Settling Defendants are receiving a covenant not to sue for numerous claims for which they paid ***nothing***. This raises serious fairness and reasonableness concerns, since the Settlement Agreement

contemplates that such claims—for which Plaintiffs are receiving nothing from Settling Defendants—will be pursued against OCC.

Moreover, if this "allocation" were approved, then OCC and other non-settling defendants arguably would be deprived of any credit for Future Cleanup and Removal Costs, economic damages, disgorgement damages, and punitive damages, despite the fact that they would also be prohibited from seeking contribution from the Settling Defendants for those claims. This result is inconsistent with *N.J.S.A.* 58:10-23.11f.a(2)(b), which provides, in part, that a settling party "shall not be liable for claims for contribution regarding matters addressed in the settlement" provided that the settlement "shall reduce the potential liability of [a non-settling party] . . . by the amount of the . . . settlement."

Finally, as noted above, Plaintiffs have not asserted claims for NRDs in this action and may not ever assert such claims. Thus, the allocation of any part of the Settlement Funds as a credit to Settling Defendants for a yet-to-be asserted claim instead of toward claims actually asserted in the Litigation is patently unreasonable since such allocation effectively prevents OCC from obtaining a credit, for which it is statutorily entitled, against claims it currently faces.

The fairness and reasonableness of the Settlement Agreement cannot be ascertained without the information and clarification of the intent of the Settlement Agreement requested herein.

2. Navigation Costs

Paragraph 19.8 of the Settlement Agreement defines Cleanup and Removal Costs to include the costs of evaluating and developing navigation in the Newark Bay Complex ("Navigation Costs"). There is no legal authority that suggests such costs are recoverable as Cleanup and Removal Costs under the Spill Act.

Further, as discussed above, Paragraph 24 provides that the Settlement Funds shall first be applied to Plaintiffs' Claims for Past Cleanup and Removal Costs . . . ." Therefore, by including Navigation Costs in the definition of Past Cleanup and Removal Costs, the settling parties are inflating the value of Past Cleanup and Removal Costs, which will result in an allocation of a larger percentage of the Settlement Funds toward such costs than is permissible under the Spill Act.

Moreover, under the various common law claims asserted by Plaintiffs, a non-settling defendant typically would be entitled to a pro rata credit (*i.e.*, the non-settling defendants would receive a credit based on the percentage of fault ultimately allocated to the settling defendants rather than the amount actually paid by those defendants), assuming the non-settling defendant can prove the liability of the Settling Defendants. Therefore, the categorization of damages as either Spill Act damages (*i.e.*, Cleanup and Removal Costs or NRDs) or common law damages could have a significant impact on the settlement credit afforded to the non-settling defendants.

Therefore, OCC asks that Plaintiffs clarify the basis for categorizing Navigation Costs as Cleanup and Removal Costs, and identify the amount of their alleged costs attributable to such Navigation Costs.

3. Purported Limits on Contribution

Paragraph 63 of the Settlement Agreement purports to provide Settling Defendants with contribution protection against "all Claims for Discharges to the Newark Bay Complex which Plaintiffs brought or could have brought against Settling Defendants in the Passaic River," including Economic Damages, Disgorgement Damages and Punitive Damages. However, it is unclear whether the contribution protection provided by the Spill Act was intended to extend to claims beyond Cleanup and Removal Costs and NRDs. OCC requests that Plaintiffs identify any authority under which it is extending the purported contribution protections, especially with regard to the non-Spill Act claims.

4. The Legal Basis for "Benefits" Allegedly Granted to OCC in the Settlement Agreement

In the Settlement Agreement, Plaintiffs appear to covenant not to sue OCC on certain types of claims, and the Settlement Agreement purports to give OCC protection from contribution claims that may be brought by third parties. Although OCC has no objection to receiving such benefits, the Plaintiffs should provide additional information regarding the scope and basis of those provisions.

(a) Covenant not to sue

In Paragraph 28, Plaintiffs appear to covenant not to sue OCC for Plaintiffs' Past Cleanup and Removal Costs within the Newark Bay Complex, as well as claims for economic damages, disgorgement, punitive or exemplary damages and NRDs unrelated to "OCC/DSCC Deliberate Conduct" or "OCC Distinct Conduct" as those terms are defined in the Agreement. However, Paragraph 29.k. excludes from this covenant "OCC's liability or obligation, if any, under current . . . judgments. . . ." The purported exclusion of judgments in Paragraph 29.k. could be misinterpreted to negate the covenant not to sue in Paragraph 28, since the Court entered partial summary judgment on July 19, 2011, holding that OCC is a Spill Act liable party. Please clarify whether this was the intended effect of this provision and if it was not, then please ensure that the exclusion in Paragraph 29.k. will be modified to remedy this issue. Moreover, insofar as "administrative orders" or "consent decrees" also place obligations on OCC for the claims purportedly resolved in Paragraph 28, such orders and decrees must also be removed as exclusions.

In addition to the apparent internal inconsistencies in the Settlement Agreement itself, the Spill Act also provides a potential hurdle to the covenant not to sue OCC. The Spill Act provides that a settlement "shall not release any other person from liability for cleanup and removal cost who is not a party to the settlement." *N.J.S.A.* 58:10-23.11f.a(2)(b). As noted above, OCC is not a party to the Settlement Agreement. Therefore, please confirm that, under the Spill Act, Plaintiffs may enter into an enforceable covenant not to sue OCC and provide the authority Plaintiffs relied upon in entering into such a covenant.

(b) Contribution Protection

Paragraph 63.a. purports to provide OCC protection from contribution claims that may be brought against it by third parties. However, *N.J.S.A.* 58:10-23.11f.a(2)(b) grants contribution protection only where a party has "resolved his liability to the State for cleanup and removal costs . . ." ***and*** entered "into an administrative or judicially approved settlement with the State . . . ." Again, OCC is not a party to this settlement. Accordingly, please identify the basis for Plaintiffs' conclusion that the Settlement Agreement and proposed consent judgment will provide contribution protection to OCC that is valid and enforceable against third parties.

Assuming that OCC is eligible for contribution protection, please clarify Plaintiffs' basis for imposing limitations on that protection. Paragraph 63.a. grants OCC contribution protection only "from any and all contribution Claims by persons ***other than the Settling Defendants***. . . ." In fact, Paragraph 55 states, "no settlement between Plaintiffs and OCC shall provide OCC with contribution protection against Claims brought by any of the Settling Defendants to recover amounts they paid or caused to be paid to Plaintiffs under this Settlement Agreement." In addition, Paragraph 60 states, "Settling Defendants reserve any rights to assert Claims for the Settlement Funds against OCC, including (but not limited to) rights and Claims under the Spill Act or CERCLA." Such a carve-out is inconsistent with *N.J.S.A.* 58:10-23.11f.a(2)(b), which does not limit contribution protection in any way.

Accordingly, please clarify Plaintiffs' basis for extending contribution protection to OCC, as well as the basis for imposing limitations on that protection.

5. Maxus' Obligations to OCC

As noted above, Judge Lombardi has entered partial summary judgment in the Litigation requiring Maxus to indemnify OCC for ***any*** costs, losses and liabilities that may be incurred by OCC in the Litigation as a result of OCC's acquisition DSCC. His ruling was based not only on OCC's clear contractual right to indemnification under the 1986 Stock Purchase Agreement ("SPA"), but it also recognized the preclusive effect of a final judgment in Texas enforcing the same indemnification provision against Maxus. Despite these rulings, Maxus and the other Settling Defendants have failed to resolve all of Plaintiffs' claims against OCC in the Settlement Agreement.

In addition to its indemnification provisions enforced by Judge Lombardi and the Texas courts, the SPA also requires Maxus to use its best efforts to obtain a full release for OCC from Plaintiffs' claims against it to the extent those claims are based on OCC's acquisition of DSCC. Specifically, Section 12.11(a) provides:

> [Maxus] shall . . . use its . . . best efforts to obtain at the earliest practicable date . . . any amendments, novations, ***releases***, waivers, consents or approvals necessary to have each of the DSCC companies

released from its obligations and liabilities under the Historical Obligations.[4]

(Emphasis added.) OCC is not aware of any efforts (best or otherwise) by Maxus to obtain these releases for OCC, although Maxus and the other Settling Defendants demonstrated that they ***could*** obtain such releases by doing so for themselves.

The Settlement Agreement thus appears to be in direct violation of Judge Lombardi's Order, as well as Maxus' obligations under the SPA, because it purports to resolve all of the claims against Maxus and its affiliated parties but seeks to leave OCC exposed to potential liability to Plaintiffs. Public policy concerns should prevent parties, especially arms of the State, from knowingly entering into an agreement by which one of the contracting parties is breaching a prior agreement and/or violating a court order. *See Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington*, 388 N.J. Super. 103, 124 (App. Div. 2006), *overruled on other grounds*, 194 N.J. 223, 254 (N.J. 2008) ("Courts may refuse to enforce agreements between private parties that violate public policy. When the agreement is between a private party and a public entity, the result is no different."). Please provide information regarding whether Plaintiffs have considered these issues and, if so, the basis for your decision to enter into the agreement despite its apparent conflict with Judge Lombardi's Order.

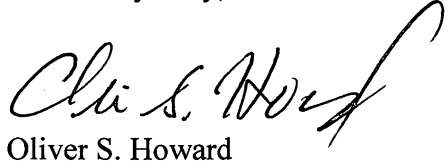
6. Claims Against the Fund

Paragraph 10 of the Settlement Agreement states that Plaintiff Administrator alleges that he has certified or may certify claims made against the Spill Compensation Fund ("Spill Fund") concerning discharge of hazardous substances at or from the Lister property and/or into the Newark Bay Complex, and, further, has approved or may approve other appropriations for the Newark Bay Complex.

Please identify the claims that have been filed against the Spill Fund concerning discharges at or from the Lister property and/or into the Newark Bay Complex and which of those claims have been paid by the Spill Fund. In addition, please identify what, if any, "other appropriations" have been approved for the Newark Bay Complex.

We appreciate your consideration of these comments and look forward to your response.

Yours very truly,



Oliver S. Howard
For the Firm

[4] Judge Lombardi already has found that this Litigation arises from an "Historical Obligation" of DSCC as defined in the SPA.

Exhibit 3

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July 31, 2013

VIA E-MAIL (PASSAICSETTLEMENT@DEP.STATE.NJ.US) AND U.S. MAIL

Office of Records Access
NJDEP
Attn: Passaic Repsol/YPF Settlement Comments
P.O. Box 420, Mail Code 401-06Q
Trenton, NJ 08625-0420

Re: ***Comment on Proposed Settlement Agreement in the Matter of NJDEP et al. v. Occidental Chemical Corporation, et al., Docket No. ESX-L9868-05 (PASR), as Noticed in the New Jersey Register on July 1, 2013***

Dear Sir or Madam:

We submit this comment on behalf of Garfield Molding Co., Inc. on the proposed settlement agreement between Plaintiffs and Defendants YPF, Repsol, Maxus, and Tierra, and affiliated entities ("Proposed Settlement Agreement").

N.J.S.A. 58:10-23.11f.a(2)(b) provides: "The settlement [between the State and a person who has discharged a hazardous substance] shall not release any other person from liability for cleanup and removal costs who is not a party to the settlement . . ." Contribution protection can be granted only where a party "has resolved his liability to the State for cleanup and removal costs . . ." and entered "into an administrative or judicially approved settlement with the State . . ." The Proposed Settlement Agreement attempts to provide contribution protection to Occidental, who is not a party to the Proposed Settlement Agreement and who the State alleges has independent liability for discharges from the Lister Avenue Site. *See, e.g.,* Paragraph 62 ("[U]nder Paragraphs 28, 29 and 63, OCC shall be entitled to the protection under the Plaintiffs' covenant not to sue and to contribution protection.").

The Spill Act expressly prohibits providing contribution protection to a non-settling party, such as Occidental. Any attempt to provide this protection would be *ultra vires. See, e.g., Dragon v. New Jersey Dep't of Envtl. Protection,* 405 N.J. Super. 478, 493-98 (App. Div. 2009) (holding that NJDEP could not agree to a settlement in a permit appeal case when the settlement would contradict New Jersey statutes). Therefore, pursuant to the Spill Act, the Proposed Settlement Agreement cannot provide contribution protection to Occidental.

Sincerely,

Stephen W. Miller
Attorney for Garfield Molding Co., Inc.

SWM/apf

Exhibit 4

O

O'MELVENY & MYERS LLP

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July 31, 2013

VIA E-MAIL (PASSAICSETTLEMENT@DEP.STATE.NJ.US) AND U.S. MAIL

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

Re: ***Comments on Proposed Settlement Agreement with Settling Defendants (including attached Schedules and Exhibits) in the Matter of NJDEP, et al. v. Occidental Chemical Corporation, et al., Docket No. ESX-L9868-05 (PASR), as Noticed in the New Jersey Register on July 1, 2013 ("Proposed Settlement Agreement")***

Dear Sir or Madam:

I write as Liaison Counsel to certain private Third-Party Defendants, as identified on the attached Exhibit A ("Commenting Parties"), in *NJDEP, et al. v. Occidental Chemical Corporation*, et al., Docket No. ESX-L9868-05 (PASR) (the "Action"), to provide their comment in the referenced matter. Certain of the Commenting Parties may provide additional comment under separate cover. Please note that this comment is not offered in my capacity as coordinating counsel (or Liaison Counsel) to the Joint Defense Group of Third-Party Defendants.

These comments are occasioned by the State's July 1, 2013 posting of the Proposed Settlement Agreement with certain Settling Defendants in the Action ("Settlement Agreement"), as required under the Court's April 25, 2013 Process Order on the Approval Process for the Proposed Settlement Agreement("Process Order"). Significant discrepancies exist between the Proposed Settlement Agreement and the Proposed Third-Party Defendant Consent Judgment posted on May 6, 2013 as required under the Court's January 24, 2013 Consent Order on the Approval Process for the Proposed Consent Judgment ("Proposed Third-Party Consent

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Judgment"), such that the Commenting Parties are now compelled to offer the following comments and proposed modifications to the Proposed Settlement Agreement to assure equitable treatment for all settling parties in the Action.

1. Timing for Entry of Consent Judgment

The Court's January 24, 2013 Consent Order on the Approval Process for the Proposed Consent Judgment ("January 24, 2013 Order") provides that, following 60 day notice and comment, the Third-Party Consent Judgment is to be brought before the Court for Entry absent comments "that warrant rejection of the Consent Judgment", January 24, 2013 Order at p 4. The Consent Judgment itself reiterates that, absent such comments, the Consent Judgment is to be promptly entered: "Upon conclusion of the public comment process, Plaintiffs shall promptly submit this Consent Judgment, including the Dismissal Order and Case Management Order, to the Court for Entry" (see, Proposed Third-Party Consent Judgment at paragraph 54). Plaintiffs are obligated to use their "best efforts" in the regard (see, Proposed Third-Party Consent Judgment at paragraph 60). The expectation of prompt Entry was further confirmed to the Court by State and Third-Party Defendants Liaison Counsel in their presentation of the settlement to the Court on March 26, 2013 and all parties understood that the subject settlement would be independent of any separate settlement undertakings between the State and the Original Party Defendants.

The Proposed Third-Party Defendant Consent Judgment was posted for comment in the New Jersey Register on May 6, 2013 and, no comments which warrant rejection of the Proposed Consent Judgment having been received during the 60-day comment period which concluded on July 6, 2013 Accordingly, the Third-Party Defendant Liaison Counsel, on July 10th jointly requested that the State promptly, and within not later than 30 days, submit the Proposed Third-Party Defendant Consent Judgment and attachments to the Court for Entry (copy of letter attached). The Third-Party Defendant Liaison Counsel expect that the State will now submit the Proposed Third-Party Defendant Consent Judgment, and accompanying Dismissal Order and Case Management Order to the Court for Entry, and, indeed, over 230 of their constituents have been advised that the required settlement payment of $35.4 million will be tendered and will terminate ongoing expense for this long-standing litigation.

Given these circumstances and this procedural history, the Third-Party Defendant Liaison Counsel were alarmed to find that paragraph 50 of the Proposed Settlement Agreement provides that, "in the event that the Agreement is not presented to the Court" or later overturned, disapproved or modified on appeal, the State will "reopen the public comment period concerning the Third-Party Consent Judgment" and/or "withdraw the Consent Judgment from the Court's consideration" for an unspecified period of time. This provision flies in the face of the Court's January 24, 2013 Order, the requirement in the Proposed Third-Party Defendant Consent Judgment and the representations by the State to the Court at the March 26, 2013 hearing that the Proposed Third-Party Defendant Consent Judgment would be promptly entered, independent of any separate settlement undertakings between the State and the Original Party Defendants. We

therefore ask that offending language in paragraph 50 of the Proposed Settlement Agreement be removed.

2. Natural Resource Damages

Plaintiffs have advised that the State's Natural Resource Damages ("NRDs") for the Newark Bay Complex, while not yet the subject of a formal assessment, could reach as much as $950 million, see, Alexander Lane, *Jersey Asks Polluters for $950 Million*, The Star Ledger (Newark), Oct. 29, 2003, at 13. Given the very dramatic size of this potential liability, Plaintiffs were not prepared to provide a complete release for State NRDs in the Proposed Third-Party Consent Judgment, but rather agreed to a partial settlement of the Third-Party Defendants eventual share of State NRD liability in consideration for the noted $35.4 million payment: The Third-Party Defendants received an NRD release equal to 20% of that settlement amount, with the understanding that the Third-Party Defendants could remain liable for NRD's in excess of that amount, (see Proposed Third-Party Defendant Consent Judgment, paragraph 25 (j)).

This approach is consistent with the general practice of deferring complete NRD settlements until an NRD assessment has been completed. *See, United States v. Montrose Chem. Corp. of California*, 50 F.3d 741, 747 (9th Cir. 1995); *Arizona ex rel. Arizona Dep't of Envtl. Quality v. ACME Laundry & Dry Cleaning Co., Inc.*, CV-09-01919-PHX-FJM, 2009 WL 5170176 (D. Ariz. Dec. 21, 2009); *compare United States v. Se. Pennsylvania Transp. Auth.*, 235 F.3d 817, 825 (3d Cir. 2000) (approving a NRD settlement in part because "if [NRDs] turn out to be 'significantly greater' than the $5.3 million estimate, the consent decree does not prevent EPA from pursuing the [settlors] for the excess").

Indeed, the State has acknowledged that an NRD assessment is likely a predicate to resolution of State NRDs in this case in its February 9, 2011 motion to the Court seeking reservation of the State's NRD claim ("Motion"):

> "Plaintiffs are not seeking NRD in the Second Amended Complaint because such claims are more effectively and efficiently brought in this case after completion of an assessment, so that the injured resources can be fully identified ,and the cost of restoring the resources (and the value of their loss where they cannot be immediately restored) can be accurately calculated..." Motion at pp. 4-5.

Inexplicably, the Plaintiffs have, in the Proposed Settlement Agreement, suggested that the Settling Defendants should be able to secure a complete release of State NRDs, even before any NRD assessment is prepared, in consideration for their $130 million settlement payment, (see Settlement Agreement, paragraph 25(g)). Yet most or all of the $130 million dollar settlement is committed to the reduction of Plaintiffs' past costs under the terms of the Proposed Settlement Agreement, (see Settlement Agreement, paragraph 24). In other words, and absent any further payment from non-settling defendants, Third-Party Defendants could now remain

almost exclusively exposed to a further liability of the estimated $950 million using the prior State NRD estimate.

We see no basis by which the Third-Parties Defendants should be so penalized and ask the State to revise the Proposed Settlement Agreement so that paragraph 25(g) is qualified by reservations, and a total NRD reservation identical to that set forth in the Proposed Third-Party Consent Judgment is added to paragraph 26 as follows:

> "j. Natural Resource Damages, but only after and to the extent that:
>
> a formal Natural Resource Damage Assessment has been completed under applicable law or regulations,
>
> a trustee determination of Settling Defendants' liability for Natural Resource Damages has been made pursuant to a procedure that allows for participation by Settling Defendants; and
>
> the collective liability established in an administrative or judicial proceeding of all Settling Defendants for Natural Resource Damages exceeds twenty percent (20%) of the aggregate of the Settlement Funds. Settling Parties reserve all rights in any such proceeding.
>
> Cleanup and Removal Costs actually paid or incurred (not including unpaid future obligations) by the State of New Jersey under this Section shall include all Cleanup and Removal Costs paid or incurred (not including unpaid future obligations) by the State of New Jersey regardless of whether such costs are recovered from or advanced or reimbursed by any person not a Settling Defendant (except that such costs paid in settlement of liability of a Defendant that is an agency or department of the State of New Jersey shall not be included); provided, however, that there shall never be any double recovery by the State of New Jersey against any Settling Defendant for the Matters Addressed herein. Settling Defendants reserve all rights and defenses in any action by Plaintiffs under this Section."

Nothing herein is intended as an admission of liability, waiver of rights to furnish individual party comments, nor a waiver of rights to provide further group comment.

We appreciate the opportunity to make these comments and welcome the opportunity to discuss the same with the State.

Sincerely,

Eric Rothenberg
for Exhibit A Private Third-Party Defendants

cc: Liaison Counsel for Parties of Record (via e-mail)
Honorable Sebastian P. Lombardi, J.S.C.
The Honorable Judge Marina Corodemus (Retired)

Att.

EXHIBIT A

July 31, 2013 Commenting Parties
AGC Chemicals Americas, Inc.
Alden-Leeds, Inc.
Associated Auto Body
Atlas Refinery, Inc.
Automatic Electro-Plating Corp.
Belleville Industrial Center
B-Line Trucking
Borden & Remington Corp.
CWC Industries, Inc.
Dundee Water Power and Land Company
Fort James Corporation
Foundry Street Corp.
Houghton International Inc.
Hudson Tool & Die Company, Inc.
Innospec Active Chemicals LLC
Inx International Ink Co.
MI Holdings, Inc.
National Fuel Oil, Inc.
N L Industries, Inc.
Prysmian Communications Cables and Systems USA LLC
Reckitt Benckiser, Inc.
Rexam Beverage Can Company
Royce Associates, a Limited Partnership
S&A Realty Associates, Inc.
Tate & Lyle Ingredients Americas LLC
The Dial Corporation
The Okonite Company, Inc.

ATTACHMENT TO JULY 31, 2013 LETTER TO OFFICE OF RECORD ACCESS, NJDEP

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July 10, 2013

VIA E-MAIL AND FEDERAL EXPRESS

The Honorable Judge Marina Corodemus (Ret.)
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Michael Gordon, Esq.
Gordon & Gordon, PC
505 Morris Avenue
Springfield, NJ 07081

Re: ***NJDEP v. Occidental Chemical Corp. et al.*, Docket No ESX-L-9868-05 – Request for Entry of Third-Party Settling Defendant Consent Judgment**

Your Honor and Counsel:

Pursuant to this Court's January 24, 2013 Consent Order on the Approval Process for the Proposed Consent Judgment ("Order"), the Plaintiffs and Settling Third-Party Defendants appeared before the Court on March 26, 2013 and presented their Consent Judgment (with attached Schedule and Exhibits) in settlement of this matter, together with attestation as to execution by most of the Settling Third-Party Defendants (signatures being held in escrow for presentation to the Court at the time of Entry). Further to the Order (and the Court's March 26th bench order), the Consent Judgment was posted to CT, the NJDEP web site and published in the New Jersey Register on May 6th, 2013 for 60 day comment. No comments in opposition were received as of July 5, 2013, the expiration of the 60-day comment period.

†In association with Tumbuan & Partners

The Order requires Plaintiffs to bring the Consent Judgment before the Court for Entry if "Plaintiffs determine that they have received no comments that warrant rejection of the Consent Judgment". Accordingly, and no comment having been received, we ask that the Plaintiffs now formally present the Consent Judgment, Case Management Order (in the form set forth in Exhibit D) and Dismissal Order (in the form set forth in Exhibit C) before the Court for Entry on a "schedule to be provided by the Special Master and approved by the Court". We note, in this regard, that paragraph 54 of the Consent Judgment provides in its entirety: "Upon conclusion of the public comment process, Plaintiffs shall promptly submit this Consent Judgment, including the Dismissal Order and Care Management Order, to the Court for entry" (emphasis added). We therefore ask that Plaintiffs move for Entry of the Consent Judgment and Dismissal Order (as a Rule 4:42-1(c) final order) without delay and not later than 30 days from the date of this letter.

We thank you in advance for your cooperation and assistance. We would be glad to meet with you and the Special Master to expedite finalization and Entry of the subject Consent Judgment at your earliest convenience.

[Remainder of page intentionally left blank]

The Undersigned are making this submission on behalf of Settling Third-Party Defendants:

THE JOINT DEFENSE GROUP SETTLING THIRD-PARTY DEFENDANTS

By: _____
David Erickson, Esq.
Coordinating Counsel for the Joint Defense Group of Settling Third-Party Defendants

By: _____
Eric B. Rothenberg, Esq.
Coordinating Counsel for the Joint Defense Group of Settling Third-Party Defendants

PRIVATE THIRD-PARTY SETTLING DEFENDANTS

By: _____
Lee Henig-Elona, Esq.
Liaison Counsel for Private Settling Third-Party Defendants

PRIVATE THIRD-PARTY SETTLING DEFENDANTS

By: _____
Eric B. Rothenberg, Esq.
Liaison Counsel for Private Settling Third-Party Defendants

PUBLIC THIRD-PARTY SETTLING DEFENDANTS

By: _____
Peter J. King, Esq.
Liaison Counsel for Public Settling Third-Party Defendants

PUBLIC THIRD-PARTY SETTLING DEFENDANTS

By: _____
John M. Scagnelli, Esq.
Liaison Counsel for Public Settling Third-Party Defendants

PASSAIC VALLEY SEWERAGE COMMISSIONERS

By: _____
Michael D. Witt, Esq.
Counsel for Settling Third Party Defendant Passaic Valley Sewerage Commissioners

cc: All Counsel of Record (via electronic posting)

Exhibit 5

GIBBONS

Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102-5310
Direct: (973) 596-4511 Fax: (973) 639-8320
whatfield@gibbonslaw.com

July 31, 2013

VIA E-MAIL (PassaicSettlement@dep.state.nj.us) AND REGULAR MAIL

Office of Record Access
NJDEP
Attn: Passaic Repsol/YPF Settlement Comments
PO Box 420, Mail Code 401-06Q
Trenton, NJ 08625-0420

Re: Repsol/YPF Settlement
NJDEP, et al. v. Occidental Chemical Corporation, et al.
Docket No. ESX-L9868-05 (PASR)

Dear Sir or Madam:

We write as counsel to certain private Third-Party Defendants[1] in the referenced litigation to submit comments on the proposed Repsol/YPF Settlement of certain claims in that litigation. The Department provided public notice of, and invited comments on, the proposed Repsol/YPF Settlement on July 1, 2013. *See* 45 N.J.R. 1661(a) (July 1, 2013).

There is an inherent conflict between the proposed Repsol/YPF Settlement and certain provisions of the pending Third-Party Consent Judgment, for which the public comment period has already closed. *See* 45 N.J.R. 1184(b), 1186 (May 6, 2013). The conflict significantly undermines the Third-Party Consent Judgment, which was negotiated and deemed complete well before the proposed Repsol/YPF Settlement.

I. The Proposed Repsol/YPF Settlement Undermines the Finality of the Third-Party Consent Judgment By Reserving Claims That the Third-Party Plaintiffs May Assert in a Subsequent Federal Action

The Third-Party Consent Judgment provides that

> this Consent Judgment shall be *void and of no effect* if the Court fails to (i) dismiss all of the Third-Party Plaintiffs' claims in the Third-Party Complaint against all Settling Third-Party Defendants, including [claims for] costs allegedly incurred or to be incurred for investigation, removal and remediation of Discharges of Hazardous Substances in the Newark Bay Complex; (ii) approve and enter the Dismissal Order in the form attached as Exhibit C or

[1] The parties submitting these comments are ITT Corporation, Benjamin Moore & Company, Givaudan Fragrances Corporation, Ashland Inc. (on its own behalf and on behalf of its wholly-owned subsidiary Ashland International Holdings, Inc.), Tiffany and Company, Hoffmann-La Roche Inc., Mallinckrodt LLC (formerly known as Mallinckrodt Inc.), The Dial Corporation, Gordon Terminal Service Co. of New Jersey, Inc., National-Standard LLC, Innospec Active Chemicals LLC, and MI Holdings, Inc.

> in materially the same form as attached, [wherein] contribution protection is provided and claims are barred as set forth in this Consent Judgment and the Dismissal Order; and (iii) approve and enter the Case Management Order in the form as attached as Exhibit D or in materially the same form as attached.

Third-Party Consent Judgment ¶ 57 (emphasis added). Exhibits C (form of Dismissal Order) and D (form of Case Management Order) are attached hereto.

Several provisions of the proposed Repsol/YPF Settlement threaten to render the Third-Party Consent Judgment ineffectual. In paragraph 53 of the proposed Repsol/YPF Settlement, the Third-Party Plaintiffs reserve all state law claims not subject to contribution protection and preserve them for a potential future federal action unless state law requires such matters to be pled exclusively in a state court. Proposed Repsol/YPF Settlement ¶ 53. In addition, under the proposed Repsol/YPF Settlement, the State does not provide contribution protection for claims related to removal, investigation and remediation costs by the Third-Party Plaintiffs; indeed, the State appears to agree they are reserved. *Id.*

Paragraph 53 of the proposed Repsol/YPF Settlement is in direct conflict with the Third-Party Consent Judgment. Under the Third-Party Consent Judgment, all claims pled, including the Third-Party Plaintiffs' direct claims for investigation, removal, and remediation costs, are to be dismissed with prejudice. Order of Dismissal, Exhibit C to Third-Party Consent Judgment, ¶ 2. Under paragraph 53 of the proposed Repsol/YPF Settlement, however, these claims are preserved if the Third-Party Plaintiffs take the position that their direct claims are not subject to contribution protection or that state law requires them to be filed in state court. The end result is that the Third-Party Plaintiffs could try to file (or append to federal claims) state law claims for removal, investigation and remediation costs in federal court, even though those claims were pled in the pending litigation and the Third-Party Consent Judgment and the Dismissal Order attached to it specifically require all state law claims to be dismissed with prejudice. If paragraph 53 in the proposed Repsol/YPF Settlement controls, then there can be no settlement under the Third-Party Consent Judgment because *all* of the Third-Party Plaintiffs claims against the Third-Party Defendants are not being dismissed with prejudice.

II. The Proposed Repsol/YPF Settlement Undermines the Contribution Protection Granted to the Settling Third-Party Defendants in the Third-Party Consent Judgment

The Third-Party Consent Judgment provides protection from contribution actions for, *inter alia*, past and future cleanup and removal costs of the Plaintiffs and any other person (including the Third-Party Plaintiffs) sought under State law; past cleanup and removal costs of the Plaintiffs sought under CERCLA or other federal law; future cleanup and removal costs of the Plaintiffs up to certain amounts sought under CERCLA or other federal law; natural resource damage assessment costs; and natural resource damages up to certain amounts sought under State and federal law. Third-Party Consent Judgment ¶ 39(a)(i)-(vi). This broad contribution

protection, a critical feature of the Third-Party Consent Judgment, is also undermined by the proposed Repsol/YPF Settlement.

First, in paragraph 50 of the proposed Repsol/YPF Settlement, the Third Party Plaintiffs "reserve the right to challenge in federal court *any* allegation or claim that the Third-Party Defendant Consent Judgment provides the Settling Third-Party Defendants with contribution protection as to *any* federal claim, and neither this Settlement Agreement nor the fact that the Settling Defendants [Third-Party Plaintiffs] did not challenge the Third-Party Consent Judgment shall waive or impede such rights." Proposed Repsol/YPF Settlement ¶ 50 (emphasis added).

Second, in paragraph 53 of the proposed Repsol/YPF Settlement, the Third-Party Plaintiffs reserve the right to assert Spill Act claims in the nature of an offset if any of the Third-Party Defendants assert Spill Act claims against them, regardless of whether such Spill Act claims were asserted in the litigation or could have been asserted in the litigation. This provision undermines the contribution protection provided in the Third-Party Consent Judgment by purporting to preserve as offsets Spill Act claims that were to be dismissed with prejudice under the Third-Party Consent Judgment.

Finally, paragraph 63(c) of the proposed Repsol/YPF Settlement expressly states that the Settlement Agreement and Dismissal Order "shall not be a release of or a compromise of any Claims . . . under CERCLA or other federal law." Proposed Repsol/YPF Settlement ¶ 63(c). It goes on to state:

> Any Settling Defendant and any person or entity not a Party to this Settlement Agreement (including Third-Party Defendants) may assert Claims under CERCLA or other federal law against any person or entity, including Settling Defendants, and such Claims are not intended to be barred by CERCLA § 113(f)(2), except as specifically provided in Subparagraph (a) herein . . .

Id. The effect of this provision is to deprive the Third-Party Defendants of the benefit of a pro tanto reduction in future CERCLA damage claims asserted by the State in the event it sues the Third-Party Defendants.

III. The Administrative Record Does Not Support the Broad Geographic Scope of the Release Granted by the Proposed Repsol/YPF Settlement

In the proposed Repsol/YPF Settlement, the Plaintiffs covenant not to sue YPF, Repsol, and their related foreign affiliates under certain alter ego, fraudulent conveyance, or vicarious liability theories for damages and costs "with respect to any geographic area in New Jersey outside the Diamond Alkali Superfund Site at which OCC is liable as successor to DSC-1/DSCC, in whole or in part." *See* Proposed Repsol/YPF Settlement ¶ 25(i). Such a broad release for sites and impacts anywhere in New Jersey outside the Diamond Alkali Superfund Site is not supported by the administrative record.

A resolution of Spill Act liability to the State for cleanup and removal costs requires evidence that (1) the person discharged a hazardous substance; and (2) the State incurred cleanup and removal costs. *See* N.J.S.A. 58:10-23.11f.a(2)(b) ("A person who has discharged a hazardous substance or is in any way responsible for the discharge of a hazardous substance who has resolved his liability to the State for cleanup and removal costs . . . ."). The administrative record in support of the proposed Repsol/YPF Settlement does not contain evidence of discharges or the resulting impacts at DSC-1/DSCC sites outside the Diamond Alkali Superfund Site. The administrative record also lacks any evidence that the Plaintiffs incurred cleanup and removal costs as a result of impacts related to DSC-1/DSCC sites outside the Diamond Alkali Superfund Site. It thus falls far short of the well established requirement that the administrative record must contain evidence that provides the basis for the agency's decision. *See, e.g.*, *In re Vey*, 124 N.J. 534, 544 (1991).

The proposed Repsol/YPF Settlement also provides the Settling Defendants a covenant not to sue and contribution protection for certain costs and claims "associated with Discharges of Hazardous Substances . . . to the Newark Bay Complex," but the definition of Newark Bay Complex may be construed as inconsistent with the same defined term and scope of release in the Third-Party Consent Judgment. *See* Proposed Repsol/YPF Settlement ¶¶ 25, 63. These provisions are similar to those found in the Third-Party Consent Judgment, except that wording of the respective definitions of "Newark Bay Complex" (and therefore the respective scopes of the releases) appear to differ between the two documents. *Compare* Proposed Repsol/YPF Settlement Agreement ¶ 19.33 *with* Third-Party Consent Judgment ¶ 18.20. The Third-Party Consent Judgment defined "Newark Bay Complex" as follows:

> 'Newark Bay Complex' shall mean (i) the lower 17 miles of the Passaic River, (ii) Newark Bay, (iii) the Arthur Kill, (iv) the Kill Van Kull, (v) to the extent investigated for remediation as part of the Diamond Alkali Superfund Process, the lower reaches of the Hackensack River and as may be further extended by U.S. EPA in the Diamond Alkali Superfund Process, and (vi) to the extent investigated for remediation as part of the Diamond Alkali Superfund Process, any adjacent waters and sediments of (i) through (v).

Third-Party Consent Judgment ¶ 18.20. Compared to the version of this definition in the Consent Judgment, the definition in the proposed Repsol/YPF Settlement adds a reference to the Lister Property; adds a parenthetical that the Passaic River includes but is not limited to the FFS Area; adds to investigations "by or at the direction of U.S. EPA or the DEP"; adds "now or in the future" to the Diamond Alkali Superfund Process; and adds "other media." Proposed Repsol/YPF Settlement ¶ 19.33. These changes may or may not result in substantive differences from the Third-Party Consent Judgment. However, to the extent the definitions are different at all, the differences should not result in any difference between the two settlements in terms of the geographic coverage of their respective releases. The two settlements resolve different aspects

of the same litigation, stemming from the same complaint. Accordingly, the geographic scope of the settlements also should be the same.

IV. The Release for Natural Resource Damages in the Proposed Repsol/YPF Settlement Is Neither Authorized Nor in the Public Interest

The proposed Repsol/YPF Settlement provides the Settling Defendants a complete release for State natural resource damages ("NRDs") in the Newark Bay Complex. *See* Proposed Repsol/YPF Settlement ¶ 25(g). Yet the Plaintiffs have not yet performed an assessment of the extent of State NRDs in the Newark Bay Complex. As a result, the extent of State NRDs in the Newark Bay Complex is completely unknown, although the Plaintiffs have previously stated that they could be as high as $950 million. *See* Alexander Lane, *Jersey Asks Polluters for $950 Million*, The Star-Ledger (Newark), Oct. 29, 2003, at 13. Giving the Settling Defendants a complete release for NRDs before assessing the scope and magnitude of such damages is not in the public interest.

The Plaintiffs should not provide a complete release for State NRDs without first identifying the State NRDs that have been assessed and providing such information in the record. *See United States v. Montrose Chem. Corp. of California*, 50 F.3d 741, 747 (9th Cir. 1995); *Arizona ex rel. Arizona Dep't of Envtl. Quality v. ACME Laundry & Dry Cleaning Co., Inc.*, CV-09-01919-PHX-FJM, 2009 WL 5170176 (D. Ariz. Dec. 21, 2009); *compare United States v. Se. Pennsylvania Transp. Auth.*, 235 F.3d 817, 825 (3d Cir. 2000) (approving NRD settlement in part because "if [NRDs] turn out to be 'significantly greater' than the $5.3 million estimate, the consent decree does not prevent EPA from pursuing the [settlors] for the excess"). It is not in the public interest for the Plaintiffs to provide a complete State NRD release to parties connected to the largest polluter in the Newark Bay Complex when the Plaintiffs have not assessed or quantified the total amount of state NRDs. It is also inequitable, in that the State NRD trustees may later seek to impose upon the settling Third-Party Defendants liability for NRDs for which YPF, Repsol, Maxus, or Tierra are responsible, leaving the settling Third-Party Defendants with little or no recourse in contribution against those entities. That is to say, under the approach reflected in the proposed Repsol/YPF Settlement, which requires the Settling Defendants to pay $130 million, the settling Third-Party Defendants could be exposed to further liability for the rest of the State NRDs, which could approach $950 million.

The proposed Repsol/YPF Settlement may be misconstrued as providing a release and possible contribution protection from potential claims by *federal* natural resource trustees as well. "Natural Resource Damages" are defined as damages "that are recoverable by any New Jersey state natural resource trustee." Proposed Repsol/YPF Settlement ¶ 19.31. However, the covenant not to sue and contribution protection provisions could be read as purporting to provide a release for both State and federal NRDs. *See id.* ¶¶ 25(g), 63(a)(v) ("Natural Resource Damages associated with the Newark Bay Complex under applicable state and federal law, with respect to Settling Defendants only."). Any attempt by Plaintiffs to provide contribution protection for federal NRD claims is *ultra vires*, inequitable, and not supported by the administrative record. There is no evidence in the administrative record to support such a broad

NRD release. Such a broad release also would not be permitted under the current agreement between the federal and State natural resource trustees, which provides that "[n]o Trustee is authorized to enter into any settlement on behalf of any other Trustee." *See* Memorandum of Agreement ("MOA") among the State of New Jersey, National Oceanic and Atmospheric Administration Regarding Natural Resource Damage Assessment and Restoration for the Diamond Alkali Superfund Site and Environs, at 7. Even if a party could contend that the proposed Repsol/YPF Settlement resolved federal natural resource damage claims on behalf of the federal trustees, the MOA makes clear that it simply could not settle these federal claims.

Finally, the Proposed Settlement Agreement provides for an allocation of Settlement Funds applied to Plaintiffs' Claims for Past Cleanup and Removal Costs and to Natural Resource Damages, but it does not specify what that allocation will be. *See* Proposed Repsol/YPF Settlement ¶¶ 24, 63(e). The Plaintiffs cannot limit settlement funds to any particular category of damages unless they remove from "Matters Addressed" in the settlement any category which does not receive an allocated amount of Settlement Funds.

V. The Third-Party Consent Judgment Should Be Entered Before the Proposed Repsol/YPF Settlement Or Both Should Be Entered Simultaneously

The Third-Party Consent Judgment was negotiated well before the proposed Repsol/YPF Settlement and should be promptly entered. The Court's January 24, 2013 Consent Order on the Approval Process for the Proposed Consent Judgment ("Order") provides that, following 60-day notice and comment, the Third-Party Consent Judgment is to be brought before the Court for entry after the Plaintiffs determine that they have received no comment "that warrants rejection of the Consent Judgment." Order at 4. The Consent Judgment itself reiterates that, absent substantive comment, the Consent Judgment is to be *promptly* entered: "Upon conclusion of the public comment process, Plaintiffs shall promptly submit this Consent Judgment, including the Dismissal Order and Case Management Order, to the Court for Entry." *See* Third-Party Consent Judgment ¶ 54. The expectation of prompt entry was further confirmed to the Court by State and Third-Party Defendants Liaison Counsel in their presentation of the settlement to the Court on March 26, 2013, and all parties understood that approval and entry of the Third-Party Consent Judgment would be independent of any separate settlement undertakings between the State and the Original Party Defendants. Accordingly, the Proposed Consent Judgment's entry should not be dependent on any other agreement including the proposed Repsol/YPF Settlement.

The proposed Third-Party Defendant Consent Judgment was posted for comment in the New Jersey Register on May 6, 2013 and, no substantive comment having been received during the 60-day comment period, which concluded on July 5th, the Third-Party Defendant Liaison Counsel on July 10 asked the State to promptly move for entry. We reiterate our support for entry of the Proposed Consent Judgment independent of and prior to entry of the proposed Repsol/YPF Settlement.

The proposed Repsol/YPF Settlement requires that it be entered first, or contemporaneously with the Third-Party Consent Judgment. Proposed Repsol/YPF Settlement

¶ 50. If the proposed Repsol/YPF Settlement is entered first, it may modify the Third-Party Consent Judgment and significantly alter a number of key terms of the settlement that the settling Third-Party Defendants reached after extensive negotiations. For example, as set forth above, the settling Third-Party Defendants may be denied the contribution protection for which they negotiated. It would also be inconsistent with the Court's clear direction regarding the entry of the Third-Party Consent Judgment and with the understanding of the parties to the Third-Party Consent Judgment. The timing provision in paragraph 50 of the proposed Repsol/YPF Settlement should therefore be deleted or, at a minimum, amended to provide that it will be entered contemporaneously with, and not before, the Third-Party Consent Judgment.

Conclusion

For all of the foregoing reasons, there are significant conflicts between the proposed Repsol/YPF Settlement and the earlier-negotiated and earlier-finalized Third-Party Consent Judgment. The proposed Repsol/YPF Settlement must be clarified, by way of an amendment, a side agreement, or a clarifying order, to provide that in the event of a conflict between the Repsol/YPF Settlement and the Third-Party Consent Judgment, the Third-Party Consent Judgment, and the Dismissal Order entered pursuant thereto, will govern these issues. Without such a clarification, the proposed Repsol/YPF Settlement threatens to render the Third-Party Consent judgment null and void.

Sincerely,

Susanne Peticolas	John H. Klock	William S. Hatfield	Camille V. Otero
Director	Director	Director	Director

Enclosures

Exhibit 6

LEE HENIG-ELONA
LHENIG-ELONA@GORDONREES.COM
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GORDON & REES LLP

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WWW.GORDONREES.COM

July 31, 2013

VIA E-MAIL (PassaicSettlement@dep.state.nj.us)
AND U.S. MAIL

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

Re: ***Comments on Proposed Defendant Settlement Agreement (with attached Schedules and Exhibits) in the Matter of NJDEP, et al. v. Occidental Chemical Corporation, et al., Docket No. ESX-L9868-05 (PASR), as Noticed in the New Jersey Register on July 1, 2013 ("Proposed Settlement Agreement")***

Dear Sir or Madam:

I write as Liaison Counsel to certain private Third-Party Defendants, as identified on the attached Exhibit A ("Commenting Parties"), in *NJDEP, et al. v. Occidental Chemical Corporation, et al.*, Docket No. ESX-L-9868-05 (PASR) (the "Action"), that wish to provide comment to the proposed Settlement Agreement among the State and certain Defendants.

These comments are occasioned by the State's July 1, 2013 posting of the proposed Settlement Agreement with certain Settling Defendants in the Action, as required under the Court's April 25, 2013 Process Order on the Approval Process for the proposed Settlement Agreement ("Process Order"). The Commenting Parties herein are concerned with the discrepancy between the proposed Settlement Agreement and the proposed Third-Party Defendant Consent Judgment posted on May 6, 2013 ("Proposed Third-Party Consent Judgment"). The Commenting Parties request modifications to the Proposed Settlement Agreement to assure equitable treatment for all settling parties in the Action and to protect non-settling parties, for the reasons set forth herein. The Commenting Parties are concerned with the inequitable treatment of the State's claim for Natural Resource Damages.

While not yet the subject of a formal assessment, Plaintiffs have advised that Natural Resource Damages ("NRDs") for the Newark Bay Complex could reach as much as $950 million. See, e.g., Alexander Lane, *Jersey Asks Polluters for $950 Million*, The Star Ledger (Newark), Oct. 29, 2003, at 13. Given the enormity of this potential liability, Plaintiffs were not prepared to provide a complete release for NRDs in the Proposed Third-Party Consent Judgment.

Instead, the State agreed to a partial settlement of the Third-Party Defendants' eventual share of NRD liability in consideration for the noted $35.4 million payment: Third-Party Defendants received an NRD release equal to 20% of their settlement amount with the understanding that the settling Third-Party Defendants would remain liable for NRDs in excess of that amount. (See, Consent Judgment, paragraph 25 (j)). Of course, non-settling Third-Party Defendants are not accorded any NRD protection.[1]

This approach is consistent with the prior practice of deferring complete NRD settlements until an NRD assessment has been completed. *See, United States v. Montrose Chem. Corp. of California*, 50 F.3d 741, 747 (9th Cir. 1995); *Arizona ex rel. Arizona Dep't of Envtl. Quality v. ACME Laundry & Dry Cleaning Co., Inc*., CV-09-01919-PHX-FJM, 2009 WL 5170176 (D. Ariz. Dec. 21, 2009); *compare United States v. Se. Pennsylvania Transp. Auth.*, 235 F.3d 817, 825 (3d Cir. 2000) (approving a NRD settlement in part because "if [NRDs] turn out to be 'significantly greater' than the $5.3 million estimate, the consent decree does not prevent EPA from pursuing the [settlors] for the excess").

Indeed, in this Action, the State has acknowledged that it was necessary to perform a robust NRD assessment as predicate to resolution of NRD claims. In its February 9, 2011 motion to the Court seeking reservation of the States NRD claim ("Motion"), the State asserted:

> "Plaintiffs are not seeking NRD in the Second Amended Complaint because such claims are more effectively and efficiently brought in this case after completion of an assessment, so that the injured resources can be fully identified, and the cost of restoring the resources (and the value of their loss where they cannot be immediately restored) can be accurately calculated." Motion at pp. 4-5.

Inexplicably, the Plaintiffs have, in the Proposed Settlement Agreement, suggested that the Settling Defendants should be able to secure a <u>complete</u> release of NRDs (even before any assessment is complete) in consideration for their $130 million settlement payment, (see, paragraph 25(g)). Without payment from non-settling defendant Occidental Chemical Corporation, settling and non-settling Third-Party Defendants would remain exposed to further liability of the estimated $950 million using the prior State estimate (and assuming all settlement funds are used to satisfy the State's past cost claims). We see no basis by which Third-Party Defendants should be so penalized and ask the State to revise the Proposed Settlement Agreement to mirror the Third-Party Consent Judgment so that paragraph 25(g) is qualified by reservations, and a total NRD reservation is added to paragraph 26 as follows:

> *"j. Natural Resource Damages, but only after and to the extent that:*
>
> *(1) a formal Natural Resource Damage Assessment has been completed under applicable law or regulations,*

[1] Although not accorded any protection, the Proposed Settlement Agreement should not unfairly prejudice the non-settling parties.

(2) a trustee determination of Settling Defendants' liability for Natural Resource Damages has been made pursuant to a procedure that allows for participation by Settling Defendants; and

(3) the collective liability established in an administrative or judicial proceeding of all Settling Defendants for Natural Resource Damages exceeds twenty percent (20%) of the aggregate of the Settlement Funds. Settling Parties reserve all rights in any such proceeding.

Cleanup and Removal Costs actually paid or incurred (not including unpaid future obligations) by the State of New Jersey under this Section shall include all Cleanup and Removal Costs paid or incurred (not including unpaid future obligations) by the State of New Jersey regardless of whether such costs are recovered from or advanced or reimbursed by any person not a Settling Defendant (except that such costs paid in settlement of liability of a Defendant that is an agency or department of the State of New Jersey shall not be included); provided, however, that there shall never be any double recovery by the State of New Jersey against any Settling Defendant for the Matters Addressed herein. Settling Defendants reserve all rights and defenses in any action by Plaintiffs under this Section."

Nothing herein shall be taken as a waiver of rights to provide further comment.

We appreciate the opportunity to make this comment and welcome the opportunity to discuss the same with parties and the Court.

Very truly yours,

Lee Henig-Elona

LEE HENIG-ELONA

cc: Liaison Counsel for Parties of Record (via e-mail)
Honorable Sebastian P. Lombardi, J.S.C.
The Honorable Judge Marina Corodemus (Retired)

Attachment A to Comment Letter – July 31, 2013

1. IMTT – Bayonne
2. Bayonne Industries
3. Campbell Foundry Company
4. Cosan Chemical Corporation
5. CasChem, Inc.
6. Passaic Pioneers Properties Company
7. Spectraserv, Inc.
8. CBS Corporation
9. Norpak Corporation
10. Precision Manufacturing Group, LLC
11. GenTek Holding LLC
12. Elan Chemical Company, Inc.
13. Philbro, Inc.
14. Harrison Supply Company
15. Coltec Industries
16. Deleet Merchandising Corporation
17. Prentiss Incorporated
18. CS Osborne & Co.
19. Goodrich Corporation for Hilton Davis Corporation, improperly named as Emerald Hilton Davis
20. Goodrich Corporation for Kalama Specialty Chemicals Inc.
21. Seton Company
22. Siemens Water Technologies Corp.
23. Veolia ES Technical Solutions, LLC
24. WAS Terminals Corporation
25. WAS Terminals, Inc.
26. EM Sergeant Pulp & Chemical Co.
27. Curtiss-Wright Corporation
28. Eden Wood Corporation
29. Kearny Smelting & Refining Corp.
30. Superior MPM LLC
31. Wiggins Plastics, Inc.
32. FER Plating, Inc.
33. Miller Environmental Group, Inc.
34. Clean Earth of North Jersey, Inc.
35. GJ Chemical Co., Inc.
33. Thomas & Betts Corp.
34. Vitusa Corp.
35. Como Textile Prints, Inc.
36. Hexion Specialty Chemicals, Inc. n/k/a Momentive Specialty Chemicals Inc.

Exhibit 7

Saul Ewing LLP

Andrea A. Lipuma
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ALipuma@saul.com
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Our File: 356987.00002

July 31, 2013

VIA E-MAIL (PASSAICSETTLEMENT@DEP.STATE.NJ.US) AND US MAIL

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

Re: ***Comments on Proposed Settlement Agreement in the Matter of NJDEP et al. v. Occidental Chemical Corporation, et al., Docket No. ESX-L9868-05 (PASR), as Noticed in the New Jersey Register on July 1, 2013***

Dear Sir or Madam:

On behalf of Kinder Morgan Liquids Terminals LLC, ("Kinder Morgan") and its related corporate entities, we submit the following comments to the proposed settlement agreement between Plaintiffs and Defendants Maxus Energy Corporation, Tierra Solutions, Inc., Repsol, S.A., YPF, S.A. and affiliated entities ("Proposed Settlement Agreement"). These comments address natural resource damages ("NRD") issues raised by the Proposed Settlement Agreement.

The Proposed Settlement Agreement provides the settling Defendants with a complete release and contribution protection for State NRD claims in the Newark Bay Complex. *See* Proposed Settlement Agreement, Paragraph 25(g) and Paragraph 63. The language of the Proposed Settlement Agreement may be misconstrued as also providing a release and contribution protection from potential claims by federal natural resource trustees. The Proposed Settlement Agreement provides that the matters addressed and released include NRDs "under applicable state and federal law" and that contribution protection is granted to the settling Defendants for such NRD claims. *See* Paragraph 63(a)(v).

If Plaintiffs are attempting to provide a release and contribution protection for federal NRD claims, that action is *ultra vires*, arbitrary and capricious, inequitable and not supported by the administrative record. There is no evidence in the administrative record to support such a broad NRD release. Moreover, such a broad release also would not be permitted under the agreement between the federal and state natural resource trustees, which provides that "[n]o

Trustee is authorized to enter into any settlement on behalf of any other Trustee." *See* Memorandum of Agreement among the State of New Jersey, National Oceanic and Atmospheric Administration Regarding Natural Resource Damage Assessment and Restoration for the Diamond Alkali Superfund Site and Environs, at p. 7. Even if a party could contend that the Proposed Settlement Agreement resolved federal natural resource damage claims on behalf of the federal trustees, the MOA makes clear that the Proposed Settlement Agreement could not settle these federal claims. Therefore, Kinder Morgan objects to the complete NRD release and contribution protection given to the Settling Defendants.

Kinder Morgan has other questions and potential objections to the Proposed Settlement Agreement which it hopes will be resolved as the Department responds to the comments made by the other parties to the litigation. Kinder Morgan reserves the right to raise its concerns and objections with the Court at the appropriate time in the approval process.

We look forward to receiving clarification from the Department. Thank you for your attention to this matter.

Very truly yours,

Andrea A. Lipuma

AAL/dl
Enclosure

Exhibit 8

NORTON ROSE FULBRIGHT

July 31, 2013

Via E-Mail
(passaicsettlement@dep.state.nj.us)
and U.S. Mail

Mr. Bob Martin, Administrator
New Jersey Department of
Environmental Protection
Office of Record Access
Attn: Passaic Repsol/YPF Settlement Comments
P. O. Box 420, Mail Code 401-06Q
Trenton, NJ 08626-0420

Fulbright & Jaworski LLP
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Re: Comments of Legacy Vulcan Corp. to the Proposed Defendant Settlement Agreement (with attached Schedules and Exhibits) in the Matter of *NJDEP, et al. v. Occidental Chemical Corporation, et al.*, Docket No. ESX-L9868-05 (PASR), as Noticed in the New Jersey Register on July 1, 2013

Dear Sir or Madam:

Legacy Vulcan Corp. ("Vulcan"), a private third-party Defendant in the *NJDEP, et al. v. Occidental Chemical Corporation, et al.*, Docket No. ESX-L9868-05 (PASR) (the "Action"), submits these comments on the Proposed Defendant Settlement Agreement published in the New Jersey Register on July 1, 2013 between certain "Settling Defendants" and the New Jersey Department of Environmental Protection ("DEP"), its Commissioner, and the Administrator of the New Jersey Spill Compensation Fund (collectively, the "State" or "Plaintiffs"). Vulcan's comments at this time are limited to the timing and approval processes for the Proposed Defendant Settlement Agreement and the previously filed "Third Party Consent Judgment."

Vulcan is one of many Third-Party Defendants with whom the State has entered into a settlement agreement for claims raised in the Action, the terms of which are embodied in a proposed Third-Party Consent Judgment signed by the parties. The Third Party Defendant settlement terms were submitted for public comment on May 6, 2013, and no substantive comments were received during the 60-day comment period which concluded on July 6, 2013.

The parties agreed in the Third Party Consent Judgment that: "Upon conclusion of the public comment process, Plaintiffs shall promptly submit this Consent Judgment, including the Dismissal Order and Case Management Order, to the Court for Entry." Proposed Third-Party Consent Judgment, ¶ 54. On July 10, 2013, Third-Party Defendant Liaison Counsel jointly presented the Consent Judgment and attachments to

the Court and State for entry. The Third-Party Defendants reasonably expect that the Third-Party Consent Judgment, Dismissal Order and Case Management Order will be promptly submitted to the Court for approval, per the terms of the settlement agreement. This expectation was confirmed to the Court by the State and Third-Party Defendants Liaison Counsel in their presentation of the agreement to the Court on March 26, 2013. All parties understood that the settlement would be independent of any separate settlement undertakings between the State and the Original Party Defendants.

Vulcan notes that the Proposed Defendants Settlement Agreement could potentially interfere with the timing and entry of the Third-Party Consent Judgment, which could effectively nullify covenants agreed to by the State. Specifically, Paragraph 50 of the Proposed Defendants Settlement Agreement provides that "in the event that the Agreement is not presented to the Court" or later overturned, disapproved or modified on appeal, the State will "reopen the public comment period concerning the Third-Party Consent Judgment" and/or "withdraw the [Third-Party] Consent Judgment from the Court's consideration" for an unspecified period of time. The potential consequence of Paragraph 50 of the Proposed Defendants Settlement Agreement could nullify the express terms of the agreement between the State and the Third-Party Defendants, including Vulcan, who are parties to the Third-Party Consent Judgment.

Vulcan understands that the State has represented that both settlements will be presented to the Court for approval and entry at the same hearing in September 2013. The State has also represented to the settling Third-Party Defendants and to the Court that the Third-Party settlement is independent of the Proposed Defendants Settlement Agreement, which was clearly reached at a later date. Therefore, to the extent that the Proposed Defendants Settlement Agreement is not approved, or is subsequently reversed or vacated, Vulcan objects to any provision in the Proposed Defendants Settlement Agreement, including Paragraph 50 in particular, that purports to delay or reverse approval of the Third-Party Consent Judgment, or alter the rights of Vulcan under the terms of its settlement agreement with the State.

Because it is not known at this time whether the terms of Paragraph 50 will in fact result in a breach of Vulcan's rights under its settlement with the State, Vulcan submits these comments for the record. Vulcan reserves its rights to withdraw the submitted comment and to further comment and/or formally object as necessary to protect its interests.

Very truly yours,

Eddie Lewis

Edward Lewis

/jnb

Exhibit 9

EDGCOMB LAW GROUP

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San Francisco, California 94104
415.692.8140 direct
415.399.1885 fax
mjenkins@edgcomb-law.com

July 31, 2013

VIA E-MAIL (PASSAICSETTLEMENT@DEP.STATE.NJ.US) AND U.S. MAIL

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

Re: ***Comments on Proposed Settlement Agreement in the Matter of NJDEP et al. v. Occidental Chemical Corporation, et al., Docket No. ESX-L9868-05 (PASR), as Noticed in the New Jersey Register on July 1, 2013***

Dear Sir or Madam:

We submit this comment on behalf of Setlting Third Party Defendants McKesson Corporation, McKesson Envirosystems Co., and Safety-Kleen Envirosystems Co. (collectively "McKesson") on the proposed settlement agreement between Plaintiffs and Defendants YPF, Repsol, Maxus, and Tierra, and affiliated entities ("Proposed Settlement Agreement"). These comments address flaws in the agreement that will result in unfair and inequitable treatment of McKesson should the Proposed Settlement Agreement be approved by the Plaintiffs and entered as proposed.

1. Natural Resource Damages

The Proposed Settlement Agreement will provide Settling Defendants with a complete release for natural resource damages ("NRDs") in the Newark Bay Complex. *See* Proposed Settlement Agreement, Paragraph 25(g). The Plaintiffs have agreed to this complete release despite not having performed a NRD assessment on the extent of NRDs in the Newark Bay Complex. At this time, the extent of NRDs over which the state natural resource trustees have jurisdiction in the Newark Bay Complex are unknown. Providing a complete release to the Settling Defendants without identifying the potential scope of natural resource damages for which they may be liable is not in the best interests of the public or the State of New Jersey.

Plaintiffs should not provide a complete NRD settlement and release for NRDs without identifying the NRDs that have been assessed, and without providing such information in the record. *See United States v. Montrose Chem. Corp. of California*, 50 F.3d 741, 747 (9th Cir. 1995); *Arizona ex rel. Arizona Dep't of Envtl. Quality v. ACME Laundry & Dry Cleaning Co., Inc*., CV-09-01919-PHX-FJM, 2009 WL 5170176 (D. Ariz. Dec. 21, 2009); *compare United States v. Se. Pennsylvania Transp. Auth.*, 235 F.3d 817, 825 (3d Cir. 2000) (approving a NRD settlement in part because "if [NRDs] turn out to be 'significantly greater' than the $5.3 million estimate, the consent decree does not prevent EPA from pursuing the [settlors] for the excess"). It is not in the public interest for the Plaintiffs to provide a complete NRD release to parties connected to the largest polluter in the Newark Bay Complex when the Plaintiffs have not assessed or quantified the total amount of NRDs. It is further not in the public interest because it may inequitably disadvantage Settling Third-Party Defendants , should the state trustees seek to later impose liability for NRDs for which YPF, Repsol, Maxus, or Tierra are responsible, leaving little or no recourse in contribution against those entities. .

In addition, the Proposed Settlement Agreement may be misconstrued as providing a release and possible contribution protection from potential claims by federal natural resource trustees as well. "Natural Resource Damages" are defined by the Proposed Settlement Agreement as damages "that are recoverable by any New Jersey state natural resource trustee." Paragraph 19.31. However, the covenant not to sue and contribution protection provisions could be read as purporting to provide a release for both state and federal NRDs. *See* Paragraph 25(g); Paragraph 63(a)(v) ("Natural Resource Damages associated with the Newark Bay Complex under applicable state and federal law, with respect to Settling Defendants only."). Any attempt by Plaintiffs to provide contribution protection for federal NRD claims is *ultra vires*, inequitable, and not supported by the administrative record. There is no evidence in the administrative record to support such a broad NRD release. Such a broad release also would not be permitted under the current agreement between the federal and state natural resource trustees, which provides that "[n]o Trustee is authorized to enter into any settlement on behalf of any other Trustee." *See* Memorandum of Agreement among the State of New Jersey, National Oceanic and Atmospheric Administration Regarding Natural Resource Damage Assessment and Restoration for the Diamond Alkali Superfund Site and Environs, at p. 7. Even if a party could contend that the Proposed Settlement Agreement resolved federal natural resource damage claims on behalf of the federal trustees, the MOA makes clear that the Proposed Settlement Agreement could not settle these federal claims.

Finally, the Proposed Settlement Agreement provides for an allocation of Settlement Funds applied to Plaintiffs' Claims for Past Cleanup and Removal Costs and to Natural Resource Damages, but it does not specify what that allocation will be. *See* Paragraph 24, Paragraph 63(e). Plaintiffs cannot limit settlement funds to any particular category of damages unless they

remove from "Matters Addressed" in the settlement any category which does not receive an allocated amount of Settlement Funds.

Accordingly, McKesson objects to the complete NRD release to the Settling Defendants as arbitrary, capricious, and not in the public interest.

2. Geographic Scope of Release

The Proposed Settlement Agreement provides a covenant not to sue YPF, Repsol, and their related foreign affiliates under certain alter ego, fraudulent conveyance, or vicarious liability theories for damages and costs "with respect to any geographic area in New Jersey outside the Diamond Alkali Superfund Site at which OCC is liable as successor to DSC-1/DSCC, in whole or in part." *See* Paragraph 25(i). A broad release for sites and impacts anywhere in New Jersey outside the Diamond Alkali Superfund Site is not supported by the administrative record.

To resolve liability to the State for cleanup and removal costs, the Spill Act requires evidence that (1) the person discharged a hazardous substance; and (2) the State incurred cleanup and removal costs. *See* N.J.S.A. 58:10-23.11f.a(2)(b) ("A person who has discharged a hazardous substance or is in any way responsible for the discharge of a hazardous substance who has resolved his liability to the State for cleanup and removal costs . . . ."). The administrative record in support of the Proposed Settlement Agreement does not contain evidence of discharges or the resulting impacts at DSC-1/DSCC sites outside the Diamond Alkali Superfund Site. The administrative record also does not contain evidence that Plaintiffs incurred cleanup and removal costs as a result of impacts related to DSC-1/DSCC sites outside the Diamond Alkali Superfund Site.

The administrative record must contain evidence that provides the basis for the agency's decision. *See, e.g.*, *In re Vey*, 124 N.J. 534, 544 (1991). The administrative record in support of the Proposed Settlement Agreement does not provide the basis for a covenant not to sue for cleanup and removal costs resulting from impacts at DSC-1/DSCC sites outside of and not reaching the Diamond Alkali Superfund Site.

In addition to the insufficiency of the record, Settling Third-Party Defendants cannot know the potential impact of this release because they do not know the locations involved. Plaintiffs have not provided a list of potentially released sites, yet seek to provide a release for those sites and any impacts outside the Diamond Alkali Superfund Site. It is impossible to evaluate the fairness and legal propriety of a settlement that covers unknown sites and impacts throughout all of New Jersey. The covenant not to sue for cleanup and removal costs for

discharges at DSC-1/DSCC sites outside of and not reaching the Diamond Alkali Superfund Site should be stricken.

The Proposed Settlement Agreement also provides Settling Defendants a covenant not to sue and contribution protection for certain costs and claims "associated with Discharges of Hazardous Substances . . . to the Newark Bay Complex," but the definition of Newark Bay Complex may be construed as inconsistent with the same-defined term and scope of release in the Settling Third-Party Defendants' Consent Judgment. *See* Proposed Settlement Agreement, Paragraphs 25, 63. These provisions are similar to the Proposed Third-Party Consent Judgment, except that wording of the respective definitions of "Newark Bay Complex" (and therefore the respective scopes of the releases) appear to differ between the two documents. *Compare* Proposed Settlement Agreement Paragraph 19.33 *with* Proposed Third-Party Consent Judgment Paragraph 18.20. The Proposed Third-Party Consent Judgment defined "Newark Bay Complex" as follows:

> 'Newark Bay Complex' shall mean (i) the lower 17 miles of the Passaic River, (ii) Newark Bay, (iii) the Arthur Kill, (iv) the Kill Van Kull, (v) to the extent investigated for remediation as part of the Diamond Alkali Superfund Process, the lower reaches of the Hackensack River and as may be further extended by U.S. EPA in the Diamond Alkali Superfund Process, and (vi) to the extent investigated for remediation as part of the Diamond Alkali Superfund Process, any adjacent waters and sediments of (i) through (v).

Proposed Third-Party Consent Judgment Paragraph 18.20. Compared to the version of this definition in the Consent Judgment, the Proposed Settlement Agreement definition adds a reference to the Lister Property; adds a parenthetical that the Passaic River includes but is not limited to the FFS Area; adds to investigations "by or at the direction of U.S. EPA or the DEP"; adds "now or in the future" to the Diamond Alkali Superfund Process; and adds "other media." Proposed Settlement Agreement Paragraph 19.33. These changes may or may not result in substantive differences from the Proposed Third-Party Consent Judgment. However, to the extent the definitions are different at all, the differences should not result in any different geographical coverage of the releases provided by the Plaintiffs in either settlement. Both settlements resolve the same litigation brought by the Plaintiffs' complaint. Accordingly, the geographic scope of the settlements also should be the same.

3. <u>Contribution Protection for Occidental</u>

N.J.S.A. 58:10-23.11f.a(2)(b) provides: "The settlement [between the State and a person who has discharged a hazardous substance] shall not release any other person from liability for

cleanup and removal costs who is not a party to the settlement . . . ." The Proposed Settlement Agreement attempts to provide contribution protection to Occidental, who is not a party to the Proposed Settlement Agreement and who the State alleges has independent liability for discharges from the Lister Avenue Site. *See, e.g.*, Paragraph 62 ("[U]nder Paragraphs 28, 29 and 63, OCC shall be entitled to the protection under the Plaintiffs' covenant not to sue and to contribution protection.").

The Spill Act expressly prohibits providing contribution protection to a non-settling party, such as Occidental. Any attempt to provide this protection would be *ultra vires*. *See, e.g.*, *Dragon v. New Jersey Dep't of Envtl. Protection*, 405 N.J. Super. 478, 493-98 (App. Div. 2009) (holding that NJDEP could not agree to a settlement in a permit appeal case when the settlement would contradict New Jersey statutes). Therefore, pursuant to the Spill Act, the Proposed Settlement Agreement cannot provide contribution protection to Occidental.

4. Timing for Entry of Consent Judgment

The Court's January 24, 2013 Consent Order on the Approval Process for the Proposed Consent Judgment ("Order") provides that, following 60-day notice and comment, the Proposed Third-Party Defendant Consent Judgment is to be brought before the Court for entry after the Plaintiffs determine that they have received no comment "that warrants rejection of the Consent Judgment." Order, at 4. The Consent Judgment itself reiterates that, absent substantive comment, the Consent Judgment is to be promptly entered: "Upon conclusion of the public comment process, Plaintiffs shall promptly submit this Consent Judgment, including the Dismissal Order and Case Management Order, to the Court for Entry." *See* Proposed Third-Party Consent Judgment, Paragraph 54. The expectation of prompt entry was further confirmed to the Court by State and Third-Party Defendants Liaison Counsel in their presentation of the settlement to the Court on March 26, 2013 and all parties understood that approval and entry of the Third-Party Consent Judgment would be independent of any separate settlement undertakings between the State and the Original Party Defendants.

The Proposed Consent Judgment between Plaintiffs and Settling Third-Party Defendants was independent of any agreement between Plaintiffs and any other party, including Defendants. Accordingly, the Proposed Consent Judgment's entry should not be dependent on any other agreement.

The Proposed Third-Party Defendant Consent Judgment was posted for comment in the New Jersey Register on May 6, 2013 and, no substantive comment having been received during the 60-day comment period which concluded on July 5th, the Third-Party Defendant Liaison Counsel, on July 10th asked the State to promptly move for entry. Settling Third-Party

Defendants support entry of the Proposed Consent Judgment independent of the Proposed Settlement Agreement.

We appreciate the opportunity to make this comment and welcome the opportunity to discuss the same with the parties and the Court.

Sincerely,

EDGCOMB LAW GROUP

By_____
MARYLIN JENKINS
Of Counsel

Defendants support entry of the Proposed Consent Judgment independent of the Proposed Settlement Agreement.

We appreciate the opportunity to make this comment and welcome the opportunity to discuss the same with the parties and the Court.

Sincerely,

EDGCOMB LAW GROUP

By_____
MARYLIN JENKINS
Of Counsel

MICHAEL P. MCTHOMAS PLLC

By_____
Michael P. McThomas
Local Counsel for Settling Third Party Defendants McKesson Corporation, McKesson Envirosystems Co., and Safety-Kleen Envirosystems Co.

Exhibit 10

FLASTER GREENBERG
ATTORNEYS AT LAW • A PROFESSIONAL CORPORATION

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MARTY M. JUDGE, ESQ.
Member of the NJ & PA Bar
Direct Dial: (856) 382-2259
E-Mail: marty.judge@flastergreenberg.com

July 31, 2013

VIA E-MAIL (PassaicSettlement@dep.state.nj.us) AND REGULAR MAIL

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

Re: **Repsol/ YPF Settlement**
NJDEP et al. v. Occidental Chemical Corporation et al.
Docket No. ESX-L9868-05 (PASR)

Dear Sir or Madam:

This firm represents Third-Party Defendant Reichhold, Inc. ("Reichhold") in connection with the above-captioned litigation. Reichhold is one of numerous Third-Party Defendants who have, along with the Plaintiffs, entered into the Proposed Settlement Agreement and Proposed Third-Party Defendant Consent Judgment posted on May 6, 2013 as required under the Court's January 24, 2013 Consent Order on the Approval Process for the Proposed Consent Judgment ("Proposed Third-Party Consent Judgment").[1]

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[1] Reichhold is a participant in the Proposed Third-Party Consent Judgment through its being named in the Third-Party Complaint as to the so-called "Reichhold Doremus Avenue Site" (see Third-Party Complaint B, ¶¶ 2503-2527), the so-called "Bayonne Barrel and Drum Site" (see id. at ¶¶ 3087-3118 and 3200-3202), and a small remaining portion of the so-called "Reichhold Elizabeth Site") (see id. at ¶¶ 2528-2543). Reichhold was originally also named in the Third-Party Complaint as to the so-called "Reichhold Albert Avenue Site" (see id. at ¶¶ 2490-2502), but during the course of the litigation all claims against Reichhold were dismissed, with prejudice, as to the entirety of the "Reichhold Albert Avenue Site" and the entirety of the "Reichhold Elizabeth Site," excluding only "contribution claims pertaining to alleged current damages or injury to Natural Resources located within and/or extending from the Morses Creek (a tidal stream, 20-40 feet wide in the vicinity of the Reichhold Elizabeth Site) and the nearby salt marsh that may have originated from historical contamination migration from source areas at the Reichhold Elizabeth Site." See Judge Lombardi's Order Correcting Order Granting Dismissal With Prejudice Of

Reichhold is presently awaiting application before the Court for approval of that settlement. If approved by the Court, Reichhold's settlement contemplates entry of a proposed Order of Dismissal (attached as Exhibit C to the Proposed Third-Party Consent Judgment) that would, *inter alia*, dismiss ***all*** remaining claims pleaded against Reichhold in the within litigation with prejudice. Reichhold would not have entered into this proposed settlement without assurance from the Plaintiffs that it will receive this consideration, together with all of the other promises and considerations set forth in the Proposed Third-Party Consent Judgment.

On July 1, 2013, Plaintiffs posted the Proposed Settlement Agreement with certain Settling Defendants in the Action ("Settlement Agreement"), as required under the Court's April 25, 2013 Order On The Approval Process For The Proposed Settlement Agreement ("April 25 Process Order"). Under the State's notice of posting of the Settlement Agreement, written comments, if any, are to be submitted by today, July 31, 2013.

At present, Reichhold does not have any comments, as such, pertaining to the Settlement Agreement that are not likely to have been or will be presented by others. However, it is clear that, under the April 25 Process Order, a party is not prejudiced if it chooses not to raise any comments during the present, administrative only comment period. Specifically, the April 25 Process Order provides that after Plaintiffs have received all public comments, and if they have determined that none of the comments warrant rejection of the Settlement Agreement, Plaintiffs and Settling Defendants shall then file motions with the Court for approval and implementation of the Settlement Agreement. At that time, the Court will set a briefing schedule that will permit any party to the action to file papers opposing those motions. Consequently, Reichhold hereby reserves any and all objections, if any, that it may have with respect to the Settlement Agreement for presentation to the Court during such time following the present comment period that Plaintiffs have, in fact, decided to proceed with motions directed to the Court to approve that settlement.

However, Reichhold does have a number of questions regarding the meaning and intent of the Plaintiffs and the Settling Defendants in proposing to enter into the Settlement Agreement which, as Reichhold understands a number of parties have already noted, and still other parties may additionally be pointing out, is in various respects unclear, ambiguous, susceptible of multiple interpretations, and possibly inconsistent with certain provisions of the Proposed Third-Party Consent Judgment to which Reichhold, itself, is a signatory. Without the need to exhaustively list all such questions as they have been or are anticipated to be raised by others, Reichhold notes that it would be impossible for it to take a position one way or another as to the

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Certain Contribution Claims As To Third Party Defendant Reichhold, Inc. Based On Prior Settlements With Plaintiffs, filed May 2, 2011.

acceptability of the proposed Settlement Agreement with the Direct Defendants anyway, unless and until all of these questions regarding the meaning and intent of that document have been responded to by the Plaintiffs. Reichhold understands that is precisely what the present comment period is supposed to accomplish, as the April 25 Process Order expressly states that, "after the close of the thirty-day public comment period on July 31, 2013, Plaintiffs shall review all comments and prepare a response document."

Without waiver of any of its rights, Reichhold awaits its receipt and review of that "response document" to determine whatever final position it may take with respect to the proposed Settlement Agreement between the Plaintiffs and certain of the Direct Defendants.

Very truly yours,

FLASTER/GREENBERG P.C.

Marty M. Judge

Cc: Liaison Counsel for Parties of Record (via e-mail)
Honorable Sebastian P. Lombardi, J.S.C.
Special Master, Honorable Marina Corodemus (Retired)

Exhibit 11

COUGHLIN DUFFY LLP

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TIMOTHY I. DUFFY, ESQ.
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July 31, 2013

VIA E-MAIL (PASSAICSETTLEMENT@DEP.STATE.NJ.US) AND U.S. MAIL

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

Re: ***Comments on Proposed Settlement Agreement in the Matter of NJDEP et al. v. Occidental Chemical Corporation, et al., Docket No. ESX-L9868-05 (PASR), as Noticed in the New Jersey Register on July 1, 2013***

Dear Sir or Madam:

On behalf of our clients, Bayer Corporation ("Bayer") and STWB Inc. ("STWB"), we submit these comments on the proposed settlement agreement between Plaintiffs and Settling Defendants YPF, Repsol, Maxus, and Tierra, and affiliated entities ("Proposed Settlement Agreement"). These comments address flaws in the Proposed Settlement Agreement that will result in unfair and inequitable treatment of Bayer and STWB should it be approved by the Plaintiffs and entered as proposed. Our comments are as follows:

Comment 1. Natural Resource Damages

The Proposed Settlement Agreement will provide Proposed Settling Defendants with a complete release for state natural resource damages ("NRDs") in the Newark Bay Complex. *See* Proposed Settlement Agreement, Paragraph 25(g). The Plaintiffs have agreed to this complete release despite not having performed a state NRD assessment on the extent of state NRDs in the Newark Bay Complex. At this time, the extent of state NRDs over which the state natural resource trustees have jurisdiction in the Newark Bay Complex is unknown. Providing a complete release to the Settling Defendants without identifying the potential scope of natural resource damages for which they may be liable is not in the best interests of the public or the State of New Jersey.

Plaintiffs should not provide a complete state NRD settlement and release for state NRDs without identifying the state NRDs that have been assessed, and without providing such information in the record. *See United States v. Montrose Chem. Corp. of California*, 50 F.3d 741, 747 (9th Cir. 1995); *Arizona ex rel. Arizona Dep't of Envtl. Quality v. ACME Laundry & Dry Cleaning Co., Inc.*, CV-09-01919-PHX-FJM, 2009 WL 5170176 (D. Ariz. Dec. 21, 2009); *compare United States v. Se. Pennsylvania Transp. Auth.*, 235 F.3d 817, 825 (3d Cir. 2000) (approving a NRD settlement in part because "if [NRDs] turn out to be 'significantly greater' than the $5.3 million estimate, the consent decree does not prevent EPA from pursuing the [settlors] for the excess"). It is not in the public interest for the Plaintiffs to provide a complete state NRD release to parties connected to the largest polluter in the Newark Bay Complex when the Plaintiffs have not assessed or quantified the total amount of state NRDs. It is further not in the public interest because it may inequitably disadvantage Settling Third-Party Defendants should the state trustees seek to later impose liability for state NRDs for which YPF, Repsol, Maxus, or Tierra are responsible, leaving little or no recourse in contribution against those entities.

In addition, the Proposed Settlement Agreement may be misconstrued as providing a release and possible contribution protection from potential claims by federal natural resource trustees as well. "Natural Resource Damages" are defined by the Proposed Settlement Agreement as damages "that are recoverable by any New Jersey state natural resource trustee." Paragraph 19.31. However, the covenant not to sue and contribution protection provisions could be read as purporting to provide a release for both state and federal NRDs. *See* Paragraph 25(g); Paragraph 63(a)(v) ("Natural Resource Damages associated with the Newark Bay Complex under applicable state and federal law, with respect to Settling Defendants only."). Any attempt by Plaintiffs to provide contribution protection for federal NRD claims is *ultra vires*, inequitable, and not supported by the administrative record. There is no evidence in the administrative record to support such a broad NRD release. Such a broad release also would not be permitted under the current agreement between the federal and state natural resource trustees, which provides that "[n]o Trustee is authorized to enter into any settlement on behalf of any other Trustee." *See* Memorandum of Agreement among the State of New Jersey, National Oceanic and Atmospheric Administration Regarding Natural Resource Damage Assessment and Restoration for the Diamond Alkali Superfund Site and Environs, at p. 7. Even if a party could contend that the Proposed Settlement Agreement resolved federal NRDs on behalf of the federal trustees, the MOA makes clear that the Proposed Settlement Agreement could not settle these federal claims.

Finally, the Proposed Settlement Agreement provides for an allocation of Settlement Funds applied to Plaintiffs' Claims for Past Cleanup and Removal Costs and to Natural Resource Damages, but it does not specify what that allocation will be. *See* Paragraph 24, Paragraph 63(e). Plaintiffs cannot limit settlement funds to any particular category of damages unless they remove from "Matters Addressed" in the settlement any category which does not receive an allocated amount of Settlement Funds.

Accordingly, Bayer and STWB object to the complete state NRD release to the Settling Defendants as arbitrary, capricious, and not in the public interest.

Comment 2. Geographic Scope of Release

The Proposed Settlement Agreement provides a covenant not to sue YPF, Repsol, and their related foreign affiliates under certain alter ego, fraudulent conveyance, or vicarious liability theories for damages and costs "with respect to any geographic area in New Jersey outside the Diamond Alkali Superfund Site at which OCC is liable as successor to DSC-1/DSCC, in whole or in part." *See* Paragraph 25(i). A broad release for sites and impacts anywhere in New Jersey outside the Diamond Alkali Superfund Site is not supported by the administrative record.

To resolve liability to the State for cleanup and removal costs, the Spill Act requires evidence that (1) the person discharged a hazardous substance; and (2) the State incurred cleanup and removal costs. *See* N.J.S.A. 58:10-23.11f.a(2)(b) ("A person who has discharged a hazardous substance or is in any way responsible for the discharge of a hazardous substance who has resolved his liability to the State for cleanup and removal costs . . . ."). The administrative record in support of the Proposed Settlement Agreement does not contain evidence of discharges or the resulting impacts at DSC-1/DSCC sites outside the Diamond Alkali Superfund Site. The administrative record also does not contain evidence that Plaintiffs incurred cleanup and removal costs as a result of impacts related to DSC-1/DSCC sites outside the Diamond Alkali Superfund Site.

The administrative record must contain evidence that provides the basis for the agency's decision. *See, e.g., In re Vey*, 124 N.J. 534, 544 (1991). The administrative record in support of the Proposed Settlement Agreement does not provide the basis for a covenant not to sue for cleanup and removal costs resulting from impacts at DSC-1/DSCC sites outside of and not reaching the Diamond Alkali Superfund Site.

In addition to the insufficiency of the record, Settling Third-Party Defendants cannot know the potential impact of this release because they do not know the locations involved. Plaintiffs have not provided a list of potentially released sites, yet seek to provide a release for those sites and any impacts outside the Diamond Alkali Superfund Site. It is impossible to evaluate the fairness and legal propriety of a settlement that covers unknown sites and impacts throughout all of New Jersey. The covenant not to sue for cleanup and removal costs for discharges at DSC-1/DSCC sites outside of and not reaching the Diamond Alkali Superfund Site should be stricken.

The Proposed Settlement Agreement also provides Settling Defendants a covenant not to sue and contribution protection for certain costs and claims "associated with Discharges of Hazardous Substances . . . to the Newark Bay Complex," but the definition of Newark Bay Complex may be construed as inconsistent with the same-defined term

and scope of release in the Settling Third-Party Defendants' Consent Judgment. *See* Proposed Settlement Agreement, Paragraphs 25, 63. These provisions are similar to the Proposed Third-Party Consent Judgment, except that wording of the respective definitions of "Newark Bay Complex" (and therefore the respective scopes of the releases) appears to differ between the two documents. *Compare* Proposed Settlement Agreement Paragraph 19.33 *with* Proposed Third-Party Consent Judgment Paragraph 18.20. The Proposed Third-Party Consent Judgment defined "Newark Bay Complex" as follows:

> 'Newark Bay Complex' shall mean (i) the lower 17 miles of the Passaic River, (ii) Newark Bay, (iii) the Arthur Kill, (iv) the Kill Van Kull, (v) to the extent investigated for remediation as part of the Diamond Alkali Superfund Process, the lower reaches of the Hackensack River and as may be further extended by U.S. EPA in the Diamond Alkali Superfund Process, and (vi) to the extent investigated for remediation as part of the Diamond Alkali Superfund Process, any adjacent waters and sediments of (i) through (v).

Proposed Third-Party Consent Judgment Paragraph 18.20. Compared to the version of this definition in the Consent Judgment, the Proposed Settlement Agreement definition adds a reference to the Lister Property; adds a parenthetical that the Passaic River includes but is not limited to the FFS Area; adds to investigations "by or at the direction of U.S. EPA or the DEP"; adds "now or in the future" to the Diamond Alkali Superfund Process; and adds "other media." Proposed Settlement Agreement Paragraph 19.33. These changes may or may not result in substantive differences from the Proposed Third-Party Consent Judgment. However, to the extent the definitions are different at all, the differences should not result in any different geographical coverage of the releases provided by the Plaintiffs in either settlement. Both settlements resolve the same litigation brought by the Plaintiffs' complaints. Accordingly, the geographic scope of the settlements also should be the same.

Comment 3. Timing for Entry of Consent Judgment

The Court's January 24, 2013 Consent Order on the Approval Process for the Proposed Consent Judgment ("Order") provides that, following 60-day notice and comment, the Proposed Third-Party Defendant Consent Judgment is to be brought before the Court for entry after the Plaintiffs determine that they have received no comment "that warrants rejection of the Consent Judgment." Order, at 4. The Consent Judgment itself reiterates that, absent substantive comment, the Consent Judgment is to be promptly entered: "Upon conclusion of the public comment process, Plaintiffs shall promptly submit this Consent Judgment, including the Dismissal Order and Case Management Order, to the Court for Entry." *See* Proposed Third-Party Consent Judgment, Paragraph 54. The expectation of prompt entry was further confirmed to the Court by State and Third-Party Defendants Liaison Counsel in their presentation of the settlement to the

Court on March 26, 2013 and all parties understood that approval and entry of the Third-Party Consent Judgment would be independent of any separate settlement undertakings between the State and the Original Party Defendants.

The Proposed Consent Judgment between Plaintiffs and Settling Third-Party Defendants was independent of any agreement between Plaintiffs and any other party, including Defendants. Accordingly, the Proposed Consent Judgment's entry should not be dependent on any other agreement.

The Proposed Third-Party Defendant Consent Judgment was posted for comment in the New Jersey Register on May 6, 2013 and, no substantive comment having been received during the 60-day comment period which concluded on July 5th, the Third-Party Defendant Liaison Counsel on July 10th asked the State to promptly move for entry. Settling Third-Party Defendants support entry of the Proposed Consent Judgment independent of the Proposed Settlement Agreement.

Comment 4.

We are in receipt of the letter by the Gibbons firm dated July 31, 2013, setting forth comments on behalf of its various clients. We join in those comments set forth in Section I and II thereof and adopt them as if fully set forth herein.

Finally, we have other concerns that have been raised in comments and objections submitted by various parties. It is our hope and expectation that those issues will be addressed by the New Jersey Department of Environmental Protection and the parties involved. Moreover, Bayer and STWB reserve their rights to raise their concerns with the Court and object at the appropriate time during the approval process.

We appreciate the opportunity to make these comments and welcome the opportunity to discuss the same with the parties and the Court.

Very truly yours,

COUGHLIN DUFFY LLP

Timothy I. Duffy
Attorneys for Third-Party Defendants
Bayer Corporation and STWB Inc.

Exhibit 12

Mark P. Fitzsimmons
202 429 8068
mfitzsim@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

Steptoe
STEPTOE & JOHNSON LLP

July 31, 2013

VIA E-MAIL (PassaicSettlement@dep.state.nj.us) AND
REGULAR MAIL

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

Dear Sir or Madam:

This firm represents Troy Corporation in the above captioned matter. Troy was one of many Third Party Defendants which entered into a settlement with Plaintiffs NJDEP, et al. to resolve any and all potential liability as asserted in the litigation. Troy has expected that the settlement that it entered into go forward on the terms that were agreed to by all parties to the settlement, in accordance with the orders of the Court, and not something less than that. Troy continues to hold that position. Nonetheless many comments have been submitted by other settling Third Party Defendants that raise serious questions with regard to the potential effect of the Repsol/YPF settlement on the Third Party Settlement. Troy shares the concerns as delineated in all the Third Party Comments, and hereby joins in them. It requests that DEP seriously consider and respond to these comments, and that it take no action that denigrates the terms of the Agreement with Third Parties, that it has already agreed to.

Sincerely.

Mark P. Fitzsimmons

MPF/pk
cc: Honorable Sebastian P. Lombardi, J.S.C.
The Honorable Judge Marina Corodemus (Retired)

Exhibit 13

COFFEY & ASSOCIATES

COUNSELLORS AT LAW

A PROFESSIONAL CORPORATION

310 SOUTH STREET
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973--539-4500

FAX 973-539-4501
EMAIL GJC@COFFEYLAW.COM

GREGORY J. COFFEY
DIRECT DIAL 973-539-4582

July 31, 2013

VIA E-MAIL AND REGULAR MAIL
Office of Record Access
NJDEP
P.O. Box 420
Mail Code 401-06Q
Trenton, New Jersey 08626-0420

Re: Repsol/YPF Settlement
Comments to Proposed Settlement Agreement

Dear Madam or Sir:

This firm represents the Borough of Hasbrouck Heights, the Borough of Totowa, and the Borough of Woodland Park (hereinafter referred to as "Certain Settling Municipalities") in connection with the above referenced matter. We are writing at this time to provide comments to the proposed Court Approved Settlement Agreement memorializing the settlement in the above action that was published in the New Jersey Register on July 1, 2013. We applaud the good faith efforts of the State of New Jersey, the New Jersey Department of Environmental Protection (collectively referred to herein as the "State Plaintiffs") and the settling defendants to expeditiously resolve this vexatious and costly litigation. Through the comments set forth below and for the reasons that follow, we seek to confirm and obtain clarification from the State Plaintiffs on the operation of certain provisions within the proposed Court Approved Settlement Agreement and its impact on the proposed Third-Party Defendant Consent Judgment.

We fully support the State Plaintiffs' good faith efforts to negotiate and implement a global settlement of the claims asserted in the Passaic River Litigation with the Tierra/Maxus and Repsol/YPF defendants. Although we take no position as to the adequacy of the amount of the settlement, we note that public policy interests strongly favor settlement of complex environmental disputes over the prospect of continuing and costly litigation. Settlements in complex environmental disputes, such as the case at bar, conserve the resources of the courts, the litigants, and the taxpayers and should be upheld whenever equitable and policy considerations so permit. *United States v. Cannons Eng'g Corp.*, 899 *F.2d* 79, 84 (1st Cir. 1993); *Equal Employment Opportunity Comm'n v. Hiram Walker & Sons, Inc.*, 768 *F.2d* 884, 889 (7th Cir. 1985). The policy of encouraging

settlements has particular force, where, as here, a government actor committed to the protection of the public interest has engaged in the construction of the proposed settlement and where the government actor is specially equipped, trained, and oriented in the field. *Cannons Eng'g Corp.*, *supra*, 899 *F.2d* at 84. We recognize that the settlement embodied in the proposed Court Approved Settlement Agreement represents some level of compromise between the settling parties, but the proposed settlement also serves to eliminate the inherent risks involved in continued and protracted litigation and to reduce the delays in implementing a remedy. Support for the State's settlement approach is further buttressed by the public policy articulated by the State Legislature and the well-established guidance documents promulgated by both the DEP and the federal Environmental Protection Agency for the settlement of complex, multi-party CERCLA and Spill Act litigations. In short, the benefits that a global settlement presents outweigh the vexatious and undue burdens that the parties would continue to incur in prosecuting and defending these claims through trial in this matter. For all of these reasons, we fully support the efforts undertaken by the State and the settling defendants to resolve the claims in this case.

In addition, we further endorse the use of the proposed Court Approved Settlement Agreement as a practical mechanism that serves to confirm the extinguishment of not only the Spill Act and direct claims for contribution asserted against the Settling Municipalities in this action, but also Tierra/Maxus' alleged claims arising under the PVSC Statute, the Environmental Rights Act, and common law nuisance. In particular, Paragraph 53 of the proposed Court Approved Settlement Agreement contains the following provision:

> Except in Other Actions, unless a Claim arises solely under a State law requiring a filing in a state court, Settling Defendants agree to assert any Claims against the Settling Third-Party Defendants that arise in whole or in part as a result of Discharges of Hazardous Substances into the Newark Bay Complex in federal court.

Pursuant to the intent and purpose of the proposed Third-Party Defendant Consent Judgment, we interpret the above provision in Paragraph 53 of the presently proposed Court Approved Settlement Agreement to mean that any and all claims, Spill Act and non-Spill Act, both direct and indirect, and those for contribution and otherwise that have been or could have been asserted against the Settling Municipalities in this State Action by the Settling Defendants are dismissed and extinguished on the basis that such claims represent alleged costs properly asserted pursuant to CERCLA in federal court. By virtue of the fact that CERCLA confers exclusive federal subject matter jurisdiction upon the federal courts, we interpret the above provision contained in Paragraph 53 as a full dismissal and extinguishment of all claims brought in the State Action against the Settling Municipalities. We fully endorse this approach and through this comment, respectfully request the State Plaintiffs to confirm our interpretation of Paragraph 53.

Finally, we write to highlight the apparent inconsistency between Paragraph 50 of the proposed Court Approved Settlement Agreement and the timing provisions for the Third-Party Consent Judgment set forth in the January 24, 2013 Consent Order entered by the Court. The Court endorsed and the following timeline of events for approval and entry of the Third-Party Defendant Consent Judgment.

A. All third-party defendants shall advise of their intent to proceed and enter the Consent Judgment by March 23, 2013;

B. If the participating approval threshold is reached by March 23, 2013, the State shall notify the Court that the threshold has been reached and the administrative process shall begin. Importantly, to the extent any third-party defendant chooses not to participate in the Consent Judgment by March 23, 2013, the identities of such opt-out parties will be provided to the Court and the Special Master, the stay will be lifted as to those parties, and discovery will re-commence immediately;

C. By April 12, 20913, the State shall strive to publish the proposed Consent Judgment in the New Jersey Register by May 6, 2013 with a 60-day public comment period and make available the administrative record to the public;

D. Within fourteen days of publication of the proposed Consent Judgment, the State, the settling third-party defendants, and the Tierra-Maxus Defendants shall meet with the Special Master to discuss the judicial process for approval of the Consent Judgment including the establishment of a briefing schedule;

E. After expiration of the public comment period on or around July 5, 2013, the State shall consider all comments received and prepare responses thereto to arrive at a final agency decision; and

F. If the State Plaintiffs determine that they have received no comments that warrant rejection of the Consent Judgment, Plaintiffs and Settling Third-Party Defendants shall file motions to enter the Consent Judgment.

The timeline and lodging process set forth in the Court's January 24, 2013 Consent Order are wholly independent of any settlement initiatives by and between the State Plaintiffs and the Defendants. Even so, Paragraph 50 of the proposed Court Approved Settlement Agreement compelling the State Plaintiffs to reopen the public comment period and withdraw the Third-Party Consent Judgment from Court consideration seemingly imposes a new timeline and process for comment and approval of that Consent Judgment based upon the success or non-success of the settlement by and between the State Plaintiffs and Settling Defendants. The linkage between the success of a settlement agreement between the State Plaintiffs and the direct Settling Defendants and the timing for comment and approval of the Third-Party Consent Judgment is apparently inconsistent with the Court's January 24, 2013 Consent Order. To the extent such inconsistencies exist, we

respectfully request clarification from the State Plaintiffs in connection with Paragraph 50 of the proposed Court Approved Settlement Agreement.

We circulate these comments in good faith and without prejudice to the Certain Settling Municipalities' rights in this matter. We appreciate the opportunity to share our comments to the proposed Court Approved Settlement Agreement and are available to discuss these issues with you.

Thank you again for your kind consideration of this matter.

Very truly yours,

COFFEY & ASSOCIATES

Gregory J. Coffey

GJC:
cc: All Counsel (via CT Posting)

Exhibit 14

JOHN M. SCAGNELLI | Partner | Chair, Environmental and Land Use Law Group
jscagnelli@scarincihollenbeck.com

July 31, 2013

VIA E-MAIL (PASSAICSETTLEMENT@DEP.STATE.NJ.US) AND U.S. MAIL

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

Re: ***Comments on Proposed Settlement Agreement with Settling Defendants (including attached Schedules and Exhibits) in the Matter of NJDEP, et al. v. Occidental Chemical Corporation, et al., Docket No. ESX-L9868-05 (PASR), as Noticed in the New Jersey Register on July 1, 2013 ("Proposed Settlement Agreement")***

Dear Sir or Madam:

I write as Liaison Counsel to certain members of the Third-Party Defendant Public Entity Group, as identified on the attached Exhibit A ("Commenting Parties"), in *NJDEP, et al. v. Occidental Chemical Corporation*, et al., Docket No. ESX-L9868-05 (PASR) (the "Action"), to provide comment in the referenced matter.

These comments are occasioned by the State's July 1, 2013 posting of the Proposed Settlement Agreement with certain Settling Defendants in the Action ("Settlement Agreement"), as required under the Court's April 25, 2013 Process Order on the Approval Process for the Proposed Settlement Agreement("Process Order"). Significant discrepancies exist between the Proposed Settlement Agreement and the Proposed Third-Party Defendant Consent Judgment posted on May 6, 2013 as required under the Court's January 24, 2013 Consent Order on the Approval Process for the Proposed Consent Judgment ("Proposed Third-Party Consent Judgment"), such that the Commenting Parties are now compelled to offer the following comments and proposed modifications to the Proposed Settlement Agreement to assure equitable treatment for all settling parties in the Action.

1. Timing for Entry of Consent Judgment

The Court's January 24, 2013 Consent Order on the Approval Process for the Proposed Consent Judgment ("January 24, 2013 Order") provides that, following 60 day notice and comment, the Third-Party Consent Judgment is to be brought before the Court for Entry absent comments "that warrant rejection of the Consent Judgment", January 24, 2013 Order at p 4. The

Consent Judgment itself reiterates that, absent such comments, the Consent Judgment is to be promptly entered: "Upon conclusion of the public comment process, Plaintiffs shall promptly submit this Consent Judgment, including the Dismissal Order and Case Management Order, to the Court for Entry" (see, Proposed Third-Party Consent Judgment at paragraph 54). The expectation of prompt entry was further confirmed to the Court by State and Third-Party Defendants Liaison Counsel in their presentation of the settlement to the Court on March 26, 2013 and all parties understood that the subject settlement would be independent of any separate settlement undertakings between the State and the Original Party Defendants.

The Proposed Third-Party Defendant Consent Judgment was posted for comment in the New Jersey Register on May 6, 2013 and, no comments which warrant rejection of the Proposed Consent Judgment having been received during the 60-day comment period which concluded on July 6, 2013, the Third-Party Defendant Liaison Counsel, on July 10th jointly requested that the State promptly, and within not later than 30 days, submit the Proposed Third-Party Defendant Consent Judgment and attachments to the Court for entry (copy of letter attached). The Third-Party Defendant Liaison Counsel expect that the State will now submit the Proposed Third-Party Defendant Consent Judgment, and accompanying Dismissal Order and Case Management Order to the Court for entry, and, indeed, over 230 of their constituents have been advised that the required settlement payment of $35.4 million will be tendered and will terminate ongoing expense for this long-standing litigation.

Given these circumstances and this procedural history, the Third-Party Defendant Liaison Counsel were alarmed to find that paragraph 50 of the Proposed Settlement Agreement provides that, "in the event that the Agreement is not presented to the Court" or later overturned, disapproved or modified on appeal, the State will "reopen the public comment period concerning the Third-Party Consent Judgment" and/or "withdraw the Consent Judgment from the Court's consideration" for an unspecified period of time. This provision flies in the face of the Court's January 24, 2013 Order, the requirement in the Proposed Third-Party Defendant Consent Judgment and the representations by the State to the Court at the March 26, 2013 hearing that the Proposed Third-Party Defendant Consent Judgment would be promptly entered, independent of any separate settlement undertakings between the State and the Original Party Defendants. We therefore ask that offending language in paragraph 50 of the Proposed Settlement Agreement be removed.

2. Natural Resource Damages

Plaintiffs have advised that the State's Natural Resource Damages ("NRDs") for the Newark Bay Complex, while not yet the subject of a formal assessment, could reach as much as $950 million, see, Alexander Lane, *Jersey Asks Polluters for $950 Million*, The Star Ledger (Newark), Oct. 29, 2003, at 13. Given the very dramatic size of this potential liability, Plaintiffs were not prepared to provide a complete release for State NRDs in the Proposed Third-Party Consent Judgment, but rather agreed to a partial settlement of the Third-Party Defendants eventual share of State NRD liability in consideration for the noted $35.4 million payment: The Third-Party Defendants received an NRD release equal to 20% of that settlement amount, with the understanding that the Third-Party Defendants could remain liable for NRD's in excess of that amount, (see Proposed Third-Party Defendant Consent Judgment, paragraph 25 (j)).

This approach is consistent with the general practice of deferring complete NRD settlements until an NRD assessment has been completed. *See, United States v. Montrose Chem. Corp. of California*, 50 F.3d 741, 747 (9th Cir. 1995); *Arizona ex rel. Arizona Dep't of Envtl. Quality v. ACME Laundry & Dry Cleaning Co., Inc.*, CV-09-01919-PHX-FJM, 2009 WL 5170176 (D. Ariz. Dec. 21, 2009); *compare United States v. Se. Pennsylvania Transp. Auth.*, 235 F.3d 817, 825 (3d Cir. 2000) (approving a NRD settlement in part because "if [NRDs] turn out to be 'significantly greater' than the $5.3 million estimate, the consent decree does not prevent EPA from pursuing the [settlors] for the excess").

Indeed, the State has acknowledged that an NRD assessment is likely a predicate to resolution of State NRDs in this case in its February 9, 2011 motion to the Court seeking reservation of the State's NRD claim ("Motion"):

> "Plaintiffs are not seeking NRD in the Second Amended Complaint because such claims are more effectively and efficiently brought in this case after completion of an assessment, so that the injured resources can be fully identified, and the cost of restoring the resources (and the value of their loss where they cannot be immediately restored) can be accurately calculated..." Motion at pp. 4-5.

Inexplicably, the Plaintiffs have, in the Proposed Settlement Agreement, suggested that the Settling Defendants should be able to secure a complete release of State NRDs, even before any NRD assessment is prepared, in consideration for their $130 million settlement payment, (see Settlement Agreement, paragraph 25(g)). Yet most or all of the $130 million dollar settlement is committed to the reduction of Plaintiffs' past costs under the terms of the Proposed Settlement Agreement, (see Settlement Agreement, paragraph 24). In other words, and absent any further payment from non-settling defendants, Third-Party Defendants could now remain almost exclusively exposed to a further liability of the estimated $950 million using the prior State NRD estimate.

We see no basis by which the Third-Parties Defendants should be so penalized and ask the State to revise the Proposed Settlement Agreement so that paragraph 25(g) is qualified by reservations, and a total NRD reservation identical to that set forth in the Proposed Third-Party Consent Judgment is added to paragraph 26 as follows:

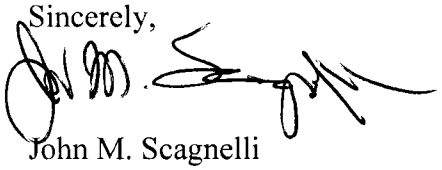
> "j. Natural Resource Damages, but only after and to the extent that:
>
> a formal Natural Resource Damage Assessment has been completed under applicable law or regulations,
>
> a trustee determination of Settling Defendants' liability for Natural Resource Damages has been made pursuant to a procedure that allows for participation by Settling Defendants; and
>
> the collective liability established in an administrative or judicial proceeding of all Settling Defendants for Natural Resource

> Damages exceeds twenty percent (20%) of the aggregate of the Settlement Funds. Settling Parties reserve all rights in any such proceeding.
>
> Cleanup and Removal Costs actually paid or incurred (not including unpaid future obligations) by the State of New Jersey under this Section shall include all Cleanup and Removal Costs paid or incurred (not including unpaid future obligations) by the State of New Jersey regardless of whether such costs are recovered from or advanced or reimbursed by any person not a Settling Defendant (except that such costs paid in settlement of liability of a Defendant that is an agency or department of the State of New Jersey shall not be included); provided, however, that there shall never be any double recovery by the State of New Jersey against any Settling Defendant for the Matters Addressed herein. Settling Defendants reserve all rights and defenses in any action by Plaintiffs under this Section."

Nothing herein is intended as an admission of liability, waiver of rights to furnish individual party comments, nor a waiver of rights to provide further group comment.

We appreciate the opportunity to make these comments and welcome the opportunity to discuss the same with the State.

Sincerely,



John M. Scagnelli
Liaison Counsel for Exhibit A Third-Party
Defendant Public Entity Group Members

Cc: Liaison Counsel for Parties of Record (By Case Vantage)
Honorable Sebastian P. Lombardi, J.S.C. (By Regular Mail and Case Vantage)
The Honorable Judge Marina Corodemus (Retired) (By Case Vantage)

EXHIBIT A

July 31, 2013 Commenting Parties

Borough of East Newark
Borough of Fanwood
Borough of North Haledon
Borough of Roselle
City of Bayonne
City of East Orange
City of Elizabeth
City of Hackensack
City of Jersey City
City of Linden
City of Newark
City of Paterson
City of Union City
Housing Authority of the City of Newark
Jersey City Municipal Utilities Authority
Joint Meeting of Essex & Union Counties
Linden Roselle Sewerage Authority
Passaic Valley Sewerage Authority
Port Authority of NY and NJ
Rahway Valley Sewerage Authority
Township of Hillside
Township of Irvington

Exhibit 15

KING AND PETRACCA

ATTORNEYS AT LAW

51 GIBRALTAR DRIVE – SUITE 2F

MORRIS PLAINS, NEW JERSEY 07950-1254

PETER J. KING
MATTHEW R. PETRACCA*

OF COUNSEL
JOSEPH GATENARO, JR.
MEDEA B. GHILLEMI*
NATASHA Z. MILLMAN*
* ALSO MEMBER OF N.Y. BAR

973-998-6860

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A PARTNERSHIP OF LIMITED LIABILITY COMPANIES

WRITER'S E-MAIL:

pjk@kingpetracca.com

July 31, 2013

Office of Record Access
New Jersey DEP
Attn: Passaic YPF/Repsol Settlement
P. O. Box 420 – Mail Code 401-06Q
Trenton, NJ 08625-0420

Re: *NJDEP, et al v. Occidental Chemical Corporation, et al*
Docket No. ESX-L-9868-05 (PASR)
Comments on Proposed Settlement Agreement with Settling Defendants (including attached Schedules and Exhbits)

Dear Sir or Madam:

Please be advised that I serve as Liaison Counsel to various Third Party Defendant Municipal Entities as per attached Addendum A (the "Third Party Defendants"). These parties were named in *NJDEP, et al v. Occidental Chemical Corporation, et al.*, Docket No. ESX-L-9868-05 (PASR) (the "Action").

Please be further advised that said Third Party Defendants join in with comments made in John M. Scagnelli, Liaison Counsel for Various Third-Party Defendant Public Entity Group Members, as put forth in his July 31, 2013 letter to you and will not repeat those comments at length herein. We adopt those comments as they relate to the timing for entry of the Consent Judgment and Natural Resource Damages.

In addition, based upon the fact that the Third Party Defendants are still incurring certain costs, there is an urgency that the matter be resolved as expeditiously as possible. The longer this settlement is delayed, the municipalities and the taxpayers of the State of New Jersey will incur continued costs for litigation which, based upon the dire economic climate in this State, is unduly burdensome for many municipal entities.

Nothing contained herein shall be construed as a waiver of any rights to provide further comments or express further arguments for or against the above-captioned Settlement.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

PETER J. KING
Liaison Counsel for Various Third Party Defendant Municipal Entities on attached Addendum A

PJK:wlc
Enclosure
C: Liaison Counsel for Parties of Record (*By Case Vantage)*
Honorable Sebastian P. Lombardi, J.S.C. (*By Case Vantage/Regular Mail)*
Honorable Judge Marina Corodemus (Retired) *(By Case Vantage)*
Municipal Joint Defense Group (*By Email)*
J:\CLIENT FOLDERS\Lower Passaic\MUNICIPAL JOINT DEFENSE GROUP\Office of Record Access Let1_7.31.13 re Settlement.doc

ADDENDUM A
NOTICE OF DESIGNATION OF LIAISON COUNSEL ON BEHALF OF THE FOLLOWING 56 MUNICIPALITIES:

Bayonne Municipal Utility Authority
Belleville Township
Berkeley Heights Township
Bloomfield Township

Carteret Borough
Cedar Grove Township
Clark Township
Clifton (City)
Cranford Township

East Rutherford Borough
Elmwood Park Borough

Fair Lawn Borough
Franklin Lakes Borough

Garfield (City)
Garwood Borough
Glen Ridge Borough
Glen Rock Borough

Haledon Borough
Harrison (Town)
Hasbrouck Heights Borough
Hawthorne Borough
Hillside Township

Kearny (Town)
Kenilworth Borough

Little Falls Township
Lodi Borough
Lyndhurst Township

Maplewood Township
Millburn Township
Montclair Township
Mountainside Borough

New Providence Borough
Newark (City) Housing Authority
North Arlington Borough
North Caldwell Borough
Nutley (Town)

Passaic (City)
Prospect Park Borough

Rahway (City)
Ridgewood Village
Roselle Park Borough
Rutherford Borough

Saddle Brook Township
Scotch Plains Township
South Hackensack Township
South Orange Village Township
Springfield Township
Summit (City)

Totowa Borough

Union Borough

Wallington Borough
Westfield (Town)
West Orange Township
Woodbridge (Town)
Wood-Ridge Borough
Wyckoff Township

ATTACHMENT B

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, REPSOL YPF, S.A., YPF, S.A.; YPF HOLDINGS, INC. and CLH HOLDINGS, INC., Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ESSEX COUNTY DOCKET NO.: ESX-L-9868-05 (PASR) CIVIL ACTION CASE MANAGEMENT ORDER XVIII Schedule for hearing and motion(s) regarding two pending settlement agreements.

FILED
SEP 18 2013
Sebastian P. Lombardi, J.S.C.

THIS MATTER, having come before the Court on case management conference called by the Court, having been informed by the Appointed Special Master, Hon. Marina Corodemus (Ret.) that a proposed settlement agreements exists 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 ("Plaintiffs") and certain third-party private and public defendants ("Third-Party Defendant Proposed Settlement") of which the parties now seek Court approval.

LIKEWISE, the Court having been informed that a proposed settlement exists between Plaintiffs and Maxus Energy Corporation, Tierra Solutions, Inc., Respol, YPF, S.A., YPF, HOLDINGS, Inc., and CLH Holdings Inc., (Original-Party Proposed settlement.) of which the parties now seek Court approval. This Court hereby issues the following schedule:

1. **SEPTEMBER 30, 2013:**
No later than September 30, 2013, the New Jersey Department of Environmental Protection shall release and publish "responses" to comments of both the Third-Party Defendant Proposed Settlement AND the Original-Party Proposed Settlement.

2. **OCTOBER 28, 2013:**
No later than October 28, 2013, the New Jersey Department of Environmental Protection may move and file before this Court, by way of direct application, a motion and brief seeking approval of both the Third-Party Defendant Proposed Settlement AND the Original-Party Proposed Settlement.

3. **NOVEMBER 5, 2013**
No later than November 5, 2013, any and all parties in support of either Settlement must file respectively their briefs and certifications.

4. **November 20, 2013**
No later than November 20, 2013, Original Defendant Occidental Chemical Corporation ("OCC") may choose to cross-move or oppose but must do so by November 20, 2013.

5. **DECEMBER 2, 2013 and December 6, 2013**
No later than December 2, 2013, Plaintiff and any other party who filed in support of Settlement and having received opposition or cross motion may file a response to said opposition or cross motion. No later than December 6, 2013, OCC may file a reply to the cross motion.

6. **DECEMBER 12-13, 2013**
The Court shall hear oral argument in accordance with the briefing schedule set forth herein. No party will be recognized for oral argument without having followed and filed the prescribed documents contained within this order.

ALL papers filed with accordance with this Court shall also be timely filed on CT SUMMATION.

SO ORDERED:

HON. SEBASTIAN P. LOMBARDI, J.S.C.

DATE: 9/18/13