

ATTACHMENT A



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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

¹A list of the Settling Third-Party Defendants is included as an exhibit to the Third-Party Consent Judgment.

²The 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

³In 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 alternative 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

⁵The 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.

Responses 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.

⁶Except 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. Responses 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.” Reichhold, 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.