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Wednesday, October 15, 2014

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

RE: Occidental Settlement

Dear Sir or Madam,

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

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

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

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

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

### **The Settlement Is Not Fair**

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

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

### **The Settlement Is Not Reasonable**

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Conclusion**

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

Sincerely,

Helen Henderson  
American Littoral Society

Laurie Stauhs Howard  
Passaic River Coalition

William S. Kibler  
Raritan Headwaters Association

Debbie Mans  
NY/NJ Baykeeper

Doug O'Malley  
Environment New Jersey

Bill Sheehan  
Hackensack Riverkeeper

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

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

**Congress of the United States**  
**House of Representatives**

October 15<sup>th</sup>, 2014

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NJDEP  
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P.O. Box 420, Mail Code 401-06Q  
Trenton, NJ 08625-0420

Dear Sir or Madam,

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

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

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

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

Sincerely,

Bill Pascrell, Jr.  
Member of Congress