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CONFIDENTIAL SETTLEMENT COMMUNICATION

May 24, 2016

Juan M. Fajardo
Assistant Regional Counsel
New Jersey Superfund Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866

Re: Lower Passaic River/OU-2 Remedial Design: Statement of Work Issues

Dear Juan:

As noted in my prior letter to you of May 17, 2016, this letter provides a partial list of unanswered questions from the May 12th OU-2 Remedial Design Statement of Work ("SOW") meeting held at U.S. EPA Region 2's offices with my clients: Occidental Chemical Corporation ("OxyChem"), Maxus Energy Corporation ("Maxus"), and Tierra Solutions, Inc. ("Tierra").

Based on our discussions during that meeting, we understand that Region 2 is willing to provide additional information on the following topics. Note that this list is not an exhaustive list of the open issues. It does not include a number of important issues we anticipate will be discussed in future negotiations. Rather, it reflects our sense of the topics for which Region 2 could provide near-term information that would assist us in preparation of our initial comments to the draft SOW.

1. ***SOW Section 1.4 - Performance Standards***

   a) Will Region 2 allow the Remedial Design Performing Party(ies) ("Performing Party") to participate in the development of the Performance Standards?

   b) How will Region 2 account for and recover the costs it incurs for the development of the Performance Standards?

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2. ***SOW Section 3.2(b)(6) – Pre-Design Investigation Modeling Analysis***

   a) Does Region 2 have an expectation for which model(s) would be used during the Pre-Design Investigation?

   b) If so, please specify which model(s).

   c) If not, will the Performing Party have an opportunity to propose a model(s)?

3. ***SOW Section 3.3(e) – Remedial Design Work Plan Modelling***

   a) Does Region 2 have an expectation for which model would be used during the Remedial Design?

   b) If so, please specify which model(s).

   c) If not, will the Performing Party have an opportunity to propose a model(s)?

4. ***SOW Section 3.3(g) – Navigational Dredging/Work Plan for Congressional Deauthorization***

   a) Does Region 2 consider the requested actions, and costs incurred, related to this effort consistent with CERCLA and the National Contingency Plan?

   b) Why is Region 2 requiring the Performing Party to undertake this action as a Statement of Work Item?

   c) How does Region 2 intend to address the reality that the Performing Party will have no control over the actions and timeframes necessary to accomplish this task?

   d) Is Region 2 willing to agree that the Performing Party will not be at risk of stipulated penalties if this work is not completed within the required time schedules?

   e) Does EPA have an estimate or expectation of the time period necessary to accomplish the requested channel deauthorization?

5. ***SOW Section 3.5 – Sediment Processing Facility Site Selection***

   a) From our discussions during out May 12th meeting, it is our understanding that Region 2 expects the Performing Party to develop a Site Selection Plan which, when implemented, will result in the development of a short-list of potential site locations which could be purchased/leased for siting the Sediment Processing Facility during the Remedial Action. Is our understanding correct?

   b) How does Region 2 intend to address our concern that, given the current scarcity of suitable locations within the Lower 8 Mile Study Area, it is likely that each such short-listed site location will require unique design and engineering plans?

   c) If our understanding in this regard is incorrect, please advise us of Region 2's thoughts regarding this requirement and in general terms the actions Region 2 envisions will be required to achieve compliance with this particular requirement.

6. ***SOW Section 5.5 - Certification of Deliverables***

   a) How broadly will Region 2 apply this requirement?

   b) What specific documents will Region 2 required this certification?

7. ***Remedial Design Performance Standards/Dispute Resolution***

   a) Why are the Remedial Design Performance Standards not subject to dispute resolution?

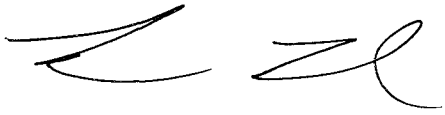
On one final note, as you, Sarah Flanagan and I discussed yesterday, we would like to have further discussion regarding the status of information and communications to be exchanged between my clients and Region 2 during our negotiations regarding the draft AOC and SOW for the remedial design. As we have discussed, certain other parties have already misused correspondence between Region 2 and my clients to inaccurately suggest that Region 2 had made determinations regarding the relative liabilities of parties or financial responsibility for the remedial design. For documents that will be made public in response to FOIA requests, the prospect of potential future litigation between my clients and other parties responsible for the LPRSA will mandate careful scrutiny to ensure that no such

communications could be used against my clients in litigation, adding further difficulties to the negotiation process.

While my clients recognize that Region 2 has certain obligations under the Freedom of Information Act, in our experience communications associated with settlement negotiations of this nature are often treated as confidential settlement communications not subject to FOIA, and for good reason. Ensuring that our communications with Region 2 are not amenable to being taken out of context and misused by other parties will make negotiations more cumbersome, increase related transaction costs, and may lead to miscommunications during negotiations. While we recognize the need to keep negotiations moving and have provided this letter notwithstanding the open issues on this point, we believe that further discussion of the status of materials exchanged during settlement negotiations is important.

We would appreciate a response to these items at your earliest convenience, which will allow us to finalize our initial response to the draft SOW. Thank you for your consideration of these requests. Please do not hesitate to contact me at any time should you have any questions; I am available to discuss this letter at your convenience.

Very truly yours,



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cc: Nicoletta M. DiForte, USEPA
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Brian Donohue, USDOJ
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