NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION'S RESPONSE TO PUBLIC COMMENTS REGARDING PROPOSED JUDICIAL CONSENT ORDER RESOLVING CLAIMS AGAINST ARKEMA INC.

Background

On May 6, 2024, the New Jersey Department of Environmental Protection, its Commissioner, and the Administrator of the New Jersey Spill Compensation Fund (together, the "Department" or the "State") reached a proposed settlement to resolve the State's action against Arkema Inc. ("Arkema") in the matter of *N.J. Dep't of Envtl. Prot., et al. v. Solvay Specialty Polymers USA, LLC, et al.*, Docket No. GLO-L-1239-20. The State sued Arkema for releases of hazardous substances, pollutants, and contaminants from the manufacturing facility located at 10 Leonard Lane, West Deptford (the "Site"), which Arkema previously owned. Arkema and its predecessor companies took ownership of the property in 1970 and operated the facility until 1990 before selling it to Solvay Specialty Polymers USA, LLC ("Solvay"), the other defendant named in the State's case. The State's settlement with Solvay (the "Solvay JCO") was proposed in June 2023 and became effective March 1, 2024.

On June 3, 2024, the Department published a dedicated webpage (https://dep.nj.gov/arkema/) containing information related to the proposed settlement with Arkema and attaching the proposed Judicial Consent Order ("Proposed Arkema JCO"). Also on June 3, 2024, the State formally published notice of the proposed settlement in the New Jersey Register, beginning a public comment period of 60 days, which closed on August 2, 2024. *See* 56 N.J.R. 1047(a) (June 3, 2024).

Under the terms of the Proposed Arkema JCO, Arkema will pay the Department a total of $33,950,000, which includes $12,700,000 for Natural Resource Damages and $21,250,000 to fund Remedial Projects, including funds to treat drinking water impacted by per- and polyfluoroalkyl substances ("PFAS") discharged from the Site. Arkema will also establish and maintain, for at least 18 years, a Reserve Fund of $75 million in the form of a letter of credit and/or a self-guarantee to provide additional financial backing to ensure that the remediation activities associated with the Site (defined as "Remediation Activities" in the Solvay JCO) will be completed. The Department and Arkema agreed to minor modifications to the Proposed Arkema JCO to allow for funding to be made immediately available for Remedial Projects in impacted communities.

The Department received comments, including from Solvay, the Paulsboro Refining Company, and the U.S. Navy. After carefully considering all the comments received, the Department has determined that the Proposed Arkema JCO, as modified, is fair, reasonable, consistent with the purposes of the New Jersey Spill Compensation and Control Act (the "Spill Act"), and in the public interest.

This response addresses the comments received on the Proposed Arkema JCO, organized by topic. Capitalized terms have the meanings ascribed to them in the Proposed Arkema JCO. Where comments shared similar subjects or issues, they were grouped together and responded to collectively. Comments have been paraphrased unless they appear in quotations.

The Department extends its gratitude to all those who have participated in this process.

RESPONSE TO PUBLIC COMMENTS RECEIVED

Contribution Protection

1. COMMENT: It is unfair, bad public policy, and against the purpose and intent of the Spill Act to allow Arkema to obtain contribution protection. The Spill Act is designed to encourage early settlement, and allowing later-settlors to obtain contribution protection will discourage future settlements. The Department should modify the contribution protection provisions of the Proposed Arkema JCO so as to permit Solvay to assert a contribution claim against Arkema.

RESPONSE: Solvay submitted this comment. Under the Spill Act, a person who "has entered into an administrative or judicially approved settlement with the State[] *shall not be liable* for claims for contribution regarding matters addressed in the settlement." N.J.S.A. 58:10-23.11f(a)(2)(b) (emphasis added). This provision is not limited to the first party to settle in any given litigation, nor is it within the Department's discretion to decline to provide contribution protection.

In addition to recognizing the need to comply with the statute, the Department disagrees that the terms of the Proposed Arkema JCO will discourage future potentially responsible parties from working with the Department to resolve their potential liability through settlement. Parties to prospective settlement negotiations consider numerous factors specific to the particular facts and circumstances of any litigation. Those facts and circumstances may include, for example: the duration of each defendant's ownership or operation of a site; the proportion of harm attributable to each defendant; any history of noncompliance by each defendant; and the potential risks associated with litigation. All of these case-specific factors, and many others, can inform the Department's and each defendant's decision to enter into a settlement agreement. *See, e.g.*, *New Jersey Dep't of Env't Prot. v. Exxon Mobil Corp.*, 453 N.J. Super. 588, 627 (Law Div. 2015), *aff'd*, 453 N.J. Super. 272 (App. Div. 2018) ("[S]ettlement terms must be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP has done."). The Commenter's assertion that providing Arkema with contribution protection would deter potential settlors in future cases is unpersuasive.

The inclusion of contribution protection in the Proposed Arkema JCO is consistent with the Spill Act and in the public interest. Among other things, the additional funds the Department will obtain through a settlement with Arkema will provide further funding to test and treat water sources in the communities affected by the contamination at and from the Site.

The Department therefore believes that the Proposed Arkema JCO is in the public interest and aligns with the purpose and intent of the Spill Act. Considering the benefits to public health and the environment available under the Proposed Arkema JCO, the Department declines the Commenter's request to modify the contribution protection provisions of the Proposed Arkema JCO.

2. COMMENT: The Arkema JCO cannot provide contribution protection related to discharges for which Arkema has not agreed to conduct or fund remediation (i.e., non-PFAS contaminants). The Proposed Arkema JCO should be amended to specifically delineate Arkema's liability so that the

Settlement does not disproportionately afford Arkema protection from its share of liability relating to the Site. Releasing Arkema from liability and affording it contribution protection without requiring proper action or payment is against the public interest.

RESPONSE: The Proposed Arkema JCO would provide $21.25 million to fund Remedial Projects, including treatment of public supply wells, testing and treatment of private wells, remedial investigations and remedial actions for discharges of PFAS or discharges to the Gloucester County Utilities Authority ("GCUA"), and any other purposes the Department finds are related to environmental impacts "for which Arkema may be in any way responsible in relation to the Site." Proposed Arkema JCO at ¶¶ 9-10, 3(g). Though the Department intends to prioritize Remedial Projects funding for PFAS-related drinking water contamination, Arkema's settlement payments would be available for the Department's broader efforts "related to addressing environmental impacts from Discharges," not limited to PFAS discharges. Proposed Arkema JCO at ¶10.

The Proposed Arkema JCO also establishes a Reserve Fund, which would become available to the Department if Solvay fails to complete its required remediation activities and the Remediation Funding Sources ("RFSs") established under the Solvay JCO become unavailable. Proposed Arkema JCO at ¶¶11-18. Contribution protection to the extent allowed by the Spill Act is therefore appropriate.

Finally, Arkema has also committed to pay $12.7 million to resolve the Department's claims for injury to the State's natural resources. These funds would be allocated in accordance with the New Jersey Constitution's Natural Resource Damages Amendment, N.J. Const. amend. VIII, § II, ¶9.

Despite this Comment's arguments to the contrary, the Proposed Arkema JCO acknowledges that Arkema is agreeing to provide funding not only to address its own discharges, but also for remediation of discharges that were caused by its successor at the Site: Solvay. The Solvay JCO, entered in March 2024, similarly acknowledges that Solvay will likely pay for or remediate discharges caused by Arkema. The Spill Act imposes joint and several liability for all those persons "in any way responsible" for hazardous substances discharged at a Site. N.J.S.A. 58:10-23.11g(c)(1). As a result, both JCOs for the Site appropriately contain language acknowledging that each responsible party will be addressing contamination that was caused by the other.

The Department is left unconvinced that modification of the Proposed Arkema JCO is necessary to ensure Arkema is paying its fair share of remediation costs and natural resource damages. Further, as discussed in the response to Comment 1, the Department does not have the discretion to withhold contribution protection from any settling party under the Spill Act.

3. COMMENT: Arkema owes Solvay reimbursement for ISRA remediation undertaken because the 1997 agreement between Arkema, Solvay, and the Department expired in 2010. Granting contribution protection related to any obligations Arkema had to conduct ISRA Remediation or reimburse Solvay for the ISRA Remediation under the 1997 Agreement is counter to the public interest.

RESPONSE: Solvay submitted this comment. Solvay cites Paragraph 24 of the Proposed Arkema JCO (now Paragraph 28 in the modified Proposed Arkema JCO) as an improper grant of contribution protection. That paragraph states:

> Plaintiffs, acting in all of their capacities…fully and forever release, covenant not to sue, and agree not to otherwise take administrative action or civil action against Arkema … for any and all causes of action and theories of liability, including joint and several liability, arising out of or relating to Discharges set forth in the Complaint, or any other state or federal causes of action…that were brought or could have been brought by Plaintiffs, arising out of any allegations in the Complaint.…[T]his paragraph applies to all claims that were brought or could have been brought arising out of or relating to (i) the 1997 Agreement, or (ii) or any remedial obligations arising out of ISRA, including ISRA Case Nos. 89231 and 90205, or Site Remediation PI No. 015010.

Proposed Arkema JCO at ¶28. The Department declines to modify this paragraph, which concerns the Department's covenants not to sue under ISRA and the 1997 Agreement. It is not a grant of contribution protection. The Department takes no position on the contractual obligations between Arkema and Solvay, or whether funds are purportedly owed to Solvay under the 1997 Agreement.

Further, the Spill Act's contribution protection provision does not bar Solvay from pursuing funds from Arkema through other legal mechanisms, as "[n]othing in this [contribution protection] subsection shall affect the right of any party to seek contribution pursuant to any other statute or under common law." N.J.S.A. 58:10-23.11f(a)(2)(b); *New Jersey Dep't of Envtl. Prot. v. Occidental Chem. Corp.*, No. A-2036-17 (App. Div. 2021) (quoting N.J.S.A. 58:10-23.11f(a)(2)(a) to determine that "[t]he Legislature went further to ensure private entity dischargers were not prevented from seeking other recourse in the courts.").

4. COMMENT: The Proposed Arkema JCO's provision of contribution protection in Paragraph 33 would "take" Solvay's right to contribution from Arkema, in violation of the United States and New Jersey Constitutional provisions against governmental "taking" of property without just compensation. Further, the Proposed Arkema JCO, as drafted, interferes with Solvay's active litigation against Arkema, which seeks contribution.

RESPONSE: Solvay submitted this comment.

Contribution protection has been common practice nationwide for more than thirty years, both under the Spill Act and under its federal analog, CERCLA. *See* N.J.S.A. 58:10-23.11f(a)(2)(b); 42 U.S.C. § 9613(f)(2).[1] Indeed, contribution protection was part of the Solvay JCO entered by the Court in March 2024, preventing other potentially responsible

[1] The contribution provisions (including contribution protection) were added to CERCLA in 1988 and to the Spill Act in 1991. *See* Pub.L. No. 99-499 (codified primarily at 42 U.S.C. §§ 9601-9675 (1988)); *New Jersey Senate Environmental Quality Committee Statement*, Senate, No. 2657 and Assembly, No. 3659-L.1991, c. 372.

parties, including Arkema, from initiating any future contribution actions against Solvay under the Spill Act or CERCLA.

The Department does not believe that the contribution protection provided in either the Solvay JCO or in the Proposed Arkema JCO constitutes a taking in violation of the New Jersey or United States Constitutions. Federal courts that have considered this question in the CERCLA context have concluded that there is no unconstitutional taking because the formal judicially approved settlement process[2] affords parties sufficient procedural safeguards. *See United States v. Keystone Sanitation Co.*, 1996 WL 33410106, at *7 (M.D. Pa. Apr. 29, 1996); *Waste Mgmt. of Pennsylvania, Inc. v. City of York*, 910 F. Supp. 1035, 1040 (M.D. Pa. 1995). Other federal courts have found no constitutionally protected interest in contribution that could support a takings claim. *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 n.6 (1st Cir. 1990).

The comment further asserts that the Proposed Arkema JCO would interfere with Solvay's "reasonable investment-backed expectations" and would therefore constitute a compensable taking. *See Exxon Mobil*, 453 N.J. Super. 588, 647 (citing *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 212 (1986)). But the Department disagrees that such expectations were reasonable here. *See Englewood Hosp. & Med. Ctr. v. State*, 478 N.J. Super. 626, 648 (App. Div. 2024) (quoting *Nekrilov v. City of Jersey City*, 45 F. 4th 662, 674-75 (3d Cir. 2022 (stating that "investment-backed expectations are reasonable only if they take into account the power of the state to regulate in the public interest.")).

The Department further believes that the benefits provided for in the Proposed Arkema JCO are in the public interest and declines to stay its submission of the Proposed Arkema JCO for approval in deference to Solvay's pending crossclaims.

Sufficiency of Payments

5. COMMENT: NJDEP should provide the public with more information, including its methodology for choosing settlement values, total costs estimated to be necessary to address PFAS in the area, and an estimate of the proportion of PFAS contamination that is attributable to Arkema. This would allow the public to adequately judge the fairness and sufficiency of the Settlement.

RESPONSE: The Department will be required to establish that the Proposed Arkema JCO, including the payments for Natural Resource Damages and Remedial Projects as well as the establishment of the Reserve Fund, is fair, reasonable, and in the public interest at the time it seeks the Court's approval of the proposed JCO. The Department will provide relevant information to meet that standard in its application to the Court.

The Department, for purposes of this response, states that it evaluated the substantial payments Arkema has agreed to provide through the proposed settlement in light of numerous factors, including Arkema's proportionate contribution to and responsibility for contamination at and from the Site, the inherent risks of continuing litigation, and the benefit to the public of

[2] CERCLA mentions potential takings claims only in connection with administrative (not formal judicially approved) settlements, and only clarifies how and what relief could be afforded if a court were to determine that a taking would occur. *See* 42 U.S.C. § 9657.

obtaining assured immediate relief as opposed to potential relief after years of continued litigation.

The Department believes that Arkema's payment of $12.7 million in Natural Resource Damages, $21.25 million toward Remedial Projects, and its establishment of a Reserve Fund adequately and fairly reflect Arkema's proportionate responsibility. Further, Arkema has agreed to provide the Remedial Projects payment to the Department immediately after the Court's approval and entry of the Proposed Arkema JCO. The immediate availability of these funds supports the public interest by allowing the Department to promptly provide aid to communities most affected by the contamination from the Solvay Site.

The Department received comments to the Solvay JCO when it was first proposed that voiced similar concerns regarding the adequacy of payments made under that agreement. The Proposed Arkema JCO will further ensure that adequate funding is available for treatment and remediation—including for water sources that are not covered under the Solvay JCO—and to compensate the public for injury to the State's natural resources. After careful consideration, the Department has determined that the settlement is fair, reasonable, and in the public interest.

Reserve Fund

6. COMMENT: The Reserve Fund is not a Remediation Funding Source ("RFS") as defined by statute and regulation and is illusory as structured in the Proposed Arkema JCO. The Reserve Fund does not require Arkema to contribute funding to Solvay's remediation efforts at the Site and "under no circumstances would [the Reserve Fund] be available to remediate non-PFAS Arkema discharges from the Facility."

RESPONSE: The Department acknowledges that the Reserve Fund created under the Proposed Arkema JCO would not be an RFS as defined by the Brownfield and Contaminated Site Remediation Act ("Brownfield Act"). *See* N.J.S.A. 58:10B-3. The terms of the Proposed Arkema JCO are clear that it is not the parties' intent to create an RFS. Proposed Arkema JCO at ¶11. The Reserve Fund is, however, "established for the purpose of providing further assurance that the Remediation Activities [as defined by the Solvay JCO] will be completed." *Id.*

The Comment is correct that under the Brownfield Act, the Department "may not require any other financial assurance by the person responsible for conducting the remediation other than that required in this section." N.J.S.A. 58:10B-3(b) (enumerating permissible forms that an RFS can take).

The Brownfield Act recognizes, however, that there are circumstances in which "the person required to establish the remediation funding source fails to perform the remediation as required," N.J.S.A. 58:10B-3(g), in which case the Department will be obligated to take over the remediation. *Id.* "In order to finance the cost of the remediation the department may make disbursements from the [RFS], or, *if sufficient moneys are not available from those funds*, from the remediation guarantee fund." *Id.* (citing N.J.S.A. 58:10B-20) (emphasis added). The Remediation Guarantee Fund is a special revolving fund managed by the Department, which collects administrative surcharges and various other costs in order to operate as a backup funding source when these dire circumstances arise. N.J.S.A. 58:10B-20. Drawing upon the

Remediation Guarantee Fund is not a desirable circumstance, as it would deplete the Department's own reserves and consume resources that would otherwise be available for use at other contaminated sites.

The Reserve Fund negotiated in the Proposed Arkema JCO is therefore designed to operate as a safeguard that would allow the Department to draw on funds from Arkema instead of from its own rainy-day fund. Proposed Arkema JCO at ¶18 (detailing circumstances in which the Department may access the Reserve Fund). This follows the Spill Act's purpose of securing funding from responsible parties and allows for the Department's Remediation Guarantee Fund to be available for other projects and remediation as needed. The Department believes that it is in the public interest to prepare and protect against these circumstances should they arise.

The Department "must normally be free to determine what solution will best resolve a problem on a state or regional basis given its expertise and ability to view those problems and solutions broadly." *New Jersey Dep't of Env't Prot. v. Exxon Mobil Corp.*, 453 N.J. Super. 272, 294 (App. Div. 2018) (quoting *Howell Township v. Waste Disposal, Inc.*, 207 N.J. Super. 80, 95-96 (App. Div. 1986)). The Department negotiated a Reserve Fund with Arkema that will be maintained for at least 18 years. The Department believes that this Reserve Fund will provide a significant layer of protection for the affected communities and aligns with the text and purpose of the Brownfield Act and Spill Act. The Department therefore disagrees with the Comment's contention that the Reserve Fund is "illusory" or against the public interest.

7. COMMENT: The Reserve Fund should be modified to allow access by Solvay in order to fund or reimburse the ongoing remediation of the Site on a pro-rata basis.

RESPONSE: Solvay submitted this comment. The Department declines to modify the language of the Proposed Arkema JCO to allow Solvay to access the Reserve Fund. Solvay is bound by the terms of the agreement it entered into with the Department in the Solvay JCO. The fact that the Reserve Fund would not be accessed unless the RFS established by Solvay is unavailable does not alter Solvay's rights or obligations under the Solvay JCO. The Reserve Fund provides a necessary guarantee to the Department that remediation will not stall even in circumstances where Solvay's RFS is unavailable.

Because of the importance of these funds to the protection of human health and the environment, the Department further declines to seek modification of the agreement that would transfer Reserve Fund payments to Solvay instead of the Department. The Department is required to access Solvay's RFS, to the extent possible, before turning to the Reserve Fund, which operates as a safety net. Proposed Arkema JCO at ¶¶17-18.

The Reserve Fund will not serve its purpose as an additional layer of protection if it can be accessed as reimbursement to Solvay for ongoing remediation costs. The Reserve Fund is designed to benefit the public, and the public interest is not served by the re-allocation of funds between Solvay and Arkema. It is therefore appropriate for the Reserve Fund to be exclusively accessible to the Department.

8. COMMENT: NJDEP should not cap Arkema's contributions to the Reserve Fund. Because of the uncertainty surrounding the contamination at the Site, the Reserve Fund should be able to increase in

the same way that the Solvay JCO allowed for the RFS to be increased. Reopeners are necessary in case the costs of remediation are higher than anticipated or in case Arkema discharged contaminants that are not explicitly covered by the JCO.

RESPONSE: The Reserve Fund is not an RFS and is not intended to fully fund the cost of remediation at the Site. *See* Response to Comment 6. As the Commenter notes, the RFSs established under the Solvay JCO can increase if the costs of remediation are higher than anticipated. The Reserve Fund operates as an additional layer of protection, but can only be accessed under the specific circumstance in which the Solvay RFSs are unavailable. Proposed Arkema JCO at ¶18. The Reserve Fund is intended as further assurance that these activities will be completed, allowing the Department to conserve its limited resources.

The Department acknowledges that in the litigation and settlement contexts, there remains a degree of uncertainty. The Department nevertheless believes that the Proposed Arkema JCO will ensure significant additional funding for treatment of drinking water in the communities affected by the Site, as well as provide funding for natural resource restoration and an additional layer of protection to ensure the Remediation Activities are completed effectively and efficiently.

In response to the Comment's additional concern that there may be contamination not covered by the Proposed Arkema JCO as currently structured, the Department points the Commenters to the Remedial Projects payment. Arkema has agreed to provide funding for drinking water treatment and testing, as well as funding to potentially address non-PFAS discharges from the Site.

Delaware River Reservation

9. COMMENT: The restrictions on future claims for the Delaware River in Paragraph 25 of the Proposed Arkema JCO (now Paragraph 29 of the modified Proposed Arkema JCO) should be eliminated. There is a possibility that the Department will determine that this site is the sole, or primary, site involved in Delaware River PFAS contamination, and the Department should not be required to include multiple responsible parties.

RESPONSE: The Department disagrees that this requirement is an unreasonable limitation on any future lawsuit or administrative action against Arkema for Delaware River Claims. There are a substantial number of sources of pollution to the Delaware River. The requirement to include multiple parties and sites in any future Delaware River litigation is not unreasonable. As noted in the Solvay JCO response to comments and as recognized by the Court in its opinion granting the State's request to reserve its Delaware River Claims, many actors and sites have contributed to pollution of the Delaware River. The requirement contained in the Proposed Arkema JCO reflects that reality.

10. COMMENT: Future claims for the Delaware River should not include a Natural Resource Damage Assessment ("NRDA") as a precondition. While a NRDA would be beneficial, it should not be required. Further, allowing Arkema (and Solvay) to comment on any future NRDA affords them more rights than typical PRPs.

RESPONSE: The Department agrees with the Commenter that a NRDA would be beneficial considering the complexity that would be inherent in pursuing Delaware River claims. As in the Solvay JCO, the Proposed Arkema JCO's term requiring a NRDA is limited to a specific section of the Delaware River, from miles 79 through 105. Proposed Arkema JCO at ¶29(b).

The Department further believes that allowing Arkema and Solvay to participate in the form of comments on a finding of potential liability will encourage amicable and efficient resolution of natural resource damages claims in accordance with the public interest and Department policy to encourage collaborative resolution of potential natural resource damages liability.

11. COMMENT: "To the extent the language in paragraphs 25 and 26 of the draft consent decree can be construed to limit or waive any rights or defenses available to the United States Navy, the Navy objects to such language."

RESPONSE: Paragraphs 25 and 26 (now Paragraphs 29 and 30 of the modified Proposed Arkema JCO), which concern any future lawsuit or administrative action brought by the Department against Arkema for Delaware River Claims, are not intended to limit or waive any rights or defenses of third parties with respect to the Delaware River.

Miscellaneous

12. COMMENT: One Commenter, who received specific written notice of the Proposed Arkema JCO, asserts that it is not connected to environmental contamination covered by the Proposed Arkema JCO, including but not limited to PFAS contamination.

RESPONSE: The Department appreciates this comment and clarifies that the letters issued by the Department in connection with the publication of a settlement agreement for public comment are required under the Spill Act, *see* N.J.S.A. 58:10-23.11e2, and are not intended to convey or represent that the Department has made any determination regarding the recipients' connection to the environmental contamination that is covered by the Proposed Arkema JCO.