NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION'S RESPONSE TO PUBLIC COMMENTS REGARDING PROPOSED JUDICIAL CONSENT ORDER RESOLVING CLAIMS AGAINST SOLVAY SPECIALTY POLYMERS USA, LLC

Background

On June 28, 2023, 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") announced a proposed settlement to resolve the State's action against Solvay Specialty Polymers USA, LLC ("Solvay") for releases of hazardous substances, pollutants, and contaminants from Solvay's manufacturing facility located at 10 Leonard Lane, West Deptford (the "Site") 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. On that same date, the Department posted on a dedicated webpage (https://dep.nj.gov/solvay/), information related to the proposed settlement, including the proposed Judicial Consent Order (the "JCO") and its appendices and exhibits. Following that announcement, on August 7, 2023, the State formally published notice of the proposed settlement in the *New Jersey Register*, beginning a public comment period of 60 days, to close on October 6, 2023. *See* 55 N.J.R. 1747(a) (Aug. 7, 2023).

The Department acknowledges and extends its appreciation to all commenters for their submissions during the public comment period; all comments were carefully considered. In total, the Department received 15 comments from municipal and other government entities, non-governmental organizations, private companies, and individuals. These comments ranged in format and length (from email submissions of several lines to thirty-plus-page memoranda), raising a variety of issues for the Department's consideration.

Notably, the Department received comments from seven municipalities—including Bellmawr, East Greenwich, Gloucester City, National Park, Paulsboro, West Deptford, and Woodbury—whose drinking water supplies are alleged to have been impacted by releases of PFAS from the Site.[1] Following receipt of these municipalities' comments, representatives of the Department corresponded, participated in telephone calls, held video conferences, and/or met in-person with representatives from each of these municipalities, receiving further information and their perspectives regarding various terms of the proposed JCO. The Department wishes to express its thanks to these municipalities for their time and effort to discuss many important issues related to the proposed settlement.

After carefully considering all the comments received, the Department has determined that the proposed JCO should be modified in certain respects. These modifications are further discussed below. With these modifications, the Department has determined that the proposed JCO is fair,

[1] While the Department also received comments from Carneys Point, its drinking water supply is not alleged to have been impacted by the Site, and Carneys Point's comments makes no assertion otherwise. Nevertheless, the comments are in the form of a thirty-plus-page memorandum. The Department notes that identical comments in the form of a thirty-plus-page memorandum were initially submitted by an organization called the Environmental Compliance Brigade. The Environmental Compliance Brigade's comments were submitted by a lawyer who founded that organization. That same lawyer submitted Carneys Point's comments. The Department responds herein to those submissions as a single set of comments given the fact that they are identical.

reasonable, consistent with the purposes of the New Jersey Spill Compensation and Control Act (the "Spill Act"), and in the public interest. Accordingly, the Department has filed a motion in the Superior Court, Law Division, Gloucester County, that seeks judicial approval of the proposed JCO, as modified.

Under the proposed settlement, Solvay will make a payment of $101.05 million to fund Remedial Projects (which will be prioritized for the purpose of reimbursing and/or paying the costs of installing, operating, and maintaining treatment for certain municipalities' impacted Public Supply Wells), $75 million for Natural Resource Damages, and $3.78 million for the Department's previously incurred costs in connection with the Site. Additionally, Solvay is required to conduct Remediation Activities to remediate on-Site and certain off-Site areas and establish a Remediation Funding Source ("RFS") in the amount of $214 million to ensure there are adequate funds available to complete those Remediation Activities.

This response addresses the comments received on the settlement by topic. Capitalized terms have the meaning as defined by the proposed 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. Comments from private individuals that raised issues unique to them and not related to the terms of the settlement are not addressed below.

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

Response to Public Comments Received

Solvay's PFAS Remediation Obligations Under the JCO

1. **COMMENT**: The Department received a comment asking if the requirement that Solvay establish a Classification Exception Area ("CEA") using monitoring wells to establish a boundary of where PFNA, PFOA, and Alternative PFAS[2] exceeds applicable groundwater standards means that Solvay will be required to monitor PFAS in groundwater only rather than remediate groundwater.

   RESPONSE: The requirement for Solvay to establish a CEA does not mean Solvay will not be required to remediate PFAS in groundwater. CEAs are established to provide notice that the constituent standards for a given aquifer classification are not met in a localized area due to natural water quality or anthropogenic influences, and that designated aquifer uses are suspended in the affected area for the term of the CEA. The intent of such action is to ensure that the uses of the aquifer are restricted until standards are achieved.

   The aquifer present in the affected area is a Class II-A groundwater, the primary designated use of which is provision of conventionally treated potable groundwater that meets all the standards stipulated by the New Jersey Safe Drinking Water Act regulations (N.J.A.C. 7:10-12.1 *et seq.*). The JCO addresses the restriction on the designated potable water use by requiring Solvay to treat, or otherwise fund the

[2] "Alternative PFAS" refers collectively to Bifunctional Surfactants or "BFS" and Monofunctional Surfactants or "MFS." *See* Paragraphs 3(a), (c), and (u) of the JCO.

treatment of, potable water from impacted community public water systems, and by ensuring that owners of other impacted wells are offered testing and treatment.

Separate and apart from Solvay's requirement to establish a CEA, and in addition to any treatment of drinking water, Paragraph 14(a) of the JCO also requires Solvay to remediate PFNA, PFOA, and Alternative PFAS in groundwater migrating via a direct groundwater pathway from the Site.

2. **COMMENT**: The Department received a comment stating that the proposed JCO does not include a timeframe by which the investigation and treatment of PFNA, PFOA, and Alternative PFAS in drinking water pursuant to Paragraphs 15 and 16 must begin, nor does it specify penalties associated with failing to meet such deadlines.

   RESPONSE: The proposed JCO does include timeframes by which the investigation and treatment of PFNA, PFOA, and Alternative PFAS in drinking water pursuant to Paragraphs 15 and 16 must begin, as well as penalties for failing to meet these deadlines. The Department refers the commenter to Paragraphs 33(d) and (e) of the JCO, which require Solvay to submit a receptor evaluation for PFNA, PFOA, and Alternative PFAS within 120 days of the Effective Date and a Revised Remedial Investigation Work Plan for potable wells pursuant to Paragraphs 15 and 16 within 90 days of the Effective Date, respectively. The Department further refers the commenter to Paragraph 38, which establishes penalties for failing to comply with any deadlines for Remedial Investigation Work Plans, Remedial Investigation Reports, Remedial Action Work Plans, and Remedial Action Reports set by Paragraph 33.

3. **COMMENT**: The Department received a comment requesting that the Revised Remedial Investigation Work Plan for potable wells referenced in Paragraphs 15 and 16, which is required to be submitted within 90 days of the Effective Date, be made public and further subject to public notice and comment. The comment also questioned "if the 90-day requirement is reasonable considering that not all contaminated wells will have been sampled or mapped by that time."

   RESPONSE: Interested members of the public will have the opportunity to review the Revised Remedial Investigation Work Plan for potable wells through several mechanisms. Documents submitted to the Department are available to the public, subject to applicable restrictions, pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 *et seq.* To facilitate the public availability of information regarding the settlement, the Department also anticipates posting various reports submitted by Solvay to the Department's dedicated Solvay settlement webpage, which may be accessed at https://dep.nj.gov/solvay/. Any interested parties with questions or concerns about remediation documents made available through the Open Public Records Act or posted on this webpage may contact the Department. Finally, Paragraph 33(a) of the JCO requires Solvay to submit a revised Public Participation Plan to the Department within 60 days of the Effective Date, which will provide additional opportunity for community input on potable well sampling and treatment under the settlement.

Additionally, the Department believes that the timeframe for submission of the Revised Remedial Investigation Work Plan is appropriate. The commenter is correct that not all contaminated wells will have been sampled or mapped by the time Solvay is required to submit the Work Plan because the purpose of a Remedial Investigation Work Plan is to set forth the plan to investigate the extent of contamination. The Revised Remedial Investigation Work Plan for potable wells required by the JCO will put in place procedures for the location and sampling of wells qualified under the settlement. The Department believes it is important to begin the work to locate and sample these wells in a timely fashion so that wells eligible for treatment under the settlement can be identified and treated.

4. **COMMENT**: The Department received a comment stating there may be circumstances where, instead of installing and/or maintaining a Point of Entry Treatment ("POET") system for a private well that exceeds a threshold as provided under Paragraphs 15c and 16a, connecting the property to a public water system would be a more viable long-term solution.

   RESPONSE: There are a variety of factors that must be considered before a property is connected to a public water system, including whether the well owner would approve of the connection, the feasibility of the connection, and the associated costs. The terms of the JCO do not prevent the implementation of such an alternative in appropriate circumstances upon the agreement of the relevant parties.

5. **COMMENT**: The Department received a comment stating that the requirement in Paragraph 16(c)(iii) for Solvay to offer to provide treatment for any Public Supply Well where MFS is detected above the MFS Groundwater Standard and/or BFS is detected above the BFS standard should specify the form of treatment required and that such form of treatment should be subject to approval of the municipality owning the Public Supply Well.

   RESPONSE: Paragraph 16(c)(iii) of the JCO states that the treatment for MFS and/or BFS must be "sufficient to reduce the concentration of MFS to the MFS Groundwater Standard and to reduce the concentration of BFS to the BFS Groundwater Standard." The Department does not believe the JCO should require that one specific type of treatment technology be used for all wells because there are various reasons why a certain type of treatment technology may be most appropriate for a particular water system. Regardless of treatment type, the requirement remains that it must be sufficient to reduce the concentration of MFS and/or BFS in drinking water to applicable standards. The Department will retain oversight of the Remediation Activities required by the JCO and expects both Solvay and the Department to consult the owner of a Public Supply Well eligible for treatment pursuant to Paragraph 16(c) regarding the type of treatment best suited for that well. Moreover, the New Jersey Safe Drinking Water Act and its implementing regulations establish rules applicable to the construction and modification of all public community water systems in New Jersey, including a

permitting process that requires the participation of the entity that owns and/or operates the public water system. *See, e.g.*, N.J.A.C. 7:10-11.5.

6. **COMMENT**: The Department received a comment (not from the Township of West Deptford) questioning the source of funding under the settlement to be used for treating certain of West Deptford's community water system wells that exceed applicable thresholds, and the commenter suggested that the settlement agreement "does not say" where those funds are "supposed to come from."

   RESPONSE: The Department disagrees with the commenter. Solvay's obligation to provide sufficient funding for the treatment of West Deptford's community water system wells is found in Paragraph 15(e) of the proposed JCO, and is thus a Remediation Activity within the meaning of the settlement agreement. *See* Paragraph 10 of the JCO. Solvay is obligated to fund all Remediation Activities, including the treatment of West Deptford's wells as required by Paragraph 15(e). *See* Paragraph 6 of the JCO. As explained in the response to Comment No. 7, Solvay, in furtherance of its obligations under Paragraph 15(e), will be funding certain reserve accounts maintained by West Deptford to provide for costs related to the treatment of its wells.

7. **COMMENT**: West Deptford submitted a comment requesting that Paragraph 15(e) contain more specificity with respect to Solvay's remediation requirements concerning the town's public water system, and that dedicated accounts be established for the town to receive funds to be used towards costs related to treatment of its impacted wells.

   RESPONSE: Following receipt of West Deptford's comments, the Department, West Deptford, and Solvay worked cooperatively to further specify the manner in which Solvay would coordinate with West Deptford to provide sufficient funding to ensure wells exceeding the West Deptford Thresholds are addressed.

   Those efforts resulted in Solvay reaching two agreements with West Deptford, an "Agreement Regarding West Deptford Supply Well No. 8" ("Well 8 Agreement") and an "Agreement Regarding Prepayment of Certain Capital Costs and Other Costs Relating to West Deptford Public Water Supply Wells No. 3, 4, and 5" ("Wells 3, 4, and 5 Agreement"). The Well 8 Agreement will create a special reserve fund to be maintained by West Deptford into which Solvay will place payments to be used for treatment system operation and maintenance costs for Well No. 8. The Wells 3, 4, and 5 Agreement will create a special reserve fund to be maintained by West Deptford into which Solvay will place payments for Well Nos. 3, 4, and 5.

   It is the Department's understanding that these agreements between Solvay and West Deptford address West Deptford's comments on Paragraph 15(e) to the town's satisfaction.

8. **COMMENT**: The Department received a comment questioning the basis for the Expanded Area Thresholds that trigger Solvay's obligation to investigate and treat drinking water

outside of West Deptford, which is when: "(i) PFNA is detected above 13 ppt; (ii) MFS is detected above the MFS Groundwater Standard; (iii) BFS is detected above the BFS Groundwater Standard; and/or (iv) PFOA is detected above 14 ppt but only if that detection is also accompanied by a detection of PFNA above 6.5 ppt or by a detection of MFS and/or BFS above detection limits[.]" *See* Paragraph 3(m) (footnote omitted). The commenter suggests that the PFOA trigger, specifically, "allows Solvay to avoid remediating contamination that its operations has caused."

RESPONSE: The Department believes the Expanded Area Thresholds reflect and are consistent with the types and relative proportions of PFAS released from the Site. Historical information and sampling data demonstrate that PFNA was the primary PFAS released from the Site over the course of Solvay's operations. PFNA is the primary component of the manufacturing processing aid used at the Site, Surflon®. The Department believes that the elevated presence of PFNA in the environment at and around the Site largely is attributable to the Site's operations. Solvay also used and released Alternative PFAS at and from the Site.

The Department acknowledges that Solvay additionally is responsible for the release of PFOA at and from the Site. However, Solvay used far less of this type of PFAS compared to PFNA, and, as a general matter, the Department is aware of other sources of PFOA found in the environment. In recognition of these circumstances, the Expanded Area Threshold for PFOA is intended to require Solvay to remediate PFOA that is more likely to be associated with the Site, such as PFOA that is co-located with PFNA and/or Alternative PFAS. The Department believes that the Expanded Area Threshold for PFOA appropriately holds Solvay responsible for remediating PFOA released from the Site.

9. **COMMENT**: The Department received a comment questioning the purpose of Paragraph 19 of the proposed JCO, including as it may relate to any potential overlapping PFAS contamination emitted from the DuPont/Chemours Chambers Works facility.

   RESPONSE: Paragraph 19 of the proposed JCO provides that if Solvay, in the course of conducting its step-out drinking water testing pursuant to the terms of the settlement, identifies a well that is already or will be receiving treatment for PFAS as a result of action taken or to be taken by a third party that is potentially responsible for such PFAS, Solvay may bring this to the Department's attention, and the Department will review the circumstances surrounding the treatment of such well, and consider whether Solvay's obligations under the settlement should be adjusted or remain in place. The purpose of this provision is to address situations where the terms of the settlement would result in duplicative, and thus unnecessary, remediation obligations, because another potentially responsible party is remediating or is about to remediate that well. The Department retains sole discretion in determining whether Solvay's obligation should be altered in any such circumstance.

10. **COMMENT:** The Department received comments comparing, on the one hand, Solvay's obligations under the proposed settlement to investigate and perform remedial actions for

PFAS based on a "direct groundwater pathway from the Site" to, on the other hand, its obligations to address PFAS via air emissions. Comments suggested that the settlement does not adequately address the air pathway from the Site, which is alleged to have impacted a large area.

RESPONSE: The Department believes that the settlement agreement adequately addresses impacts from PFAS air emissions from the Site based on a number of considerations.

Preliminarily, demonstrating the seriousness and extent of PFAS contamination in off-Site areas that is attributable to transport via an air pathway is significantly more difficult than it is for a more direct pathway, such as groundwater. Both in regulatory exchanges and the litigation, the parties have disagreed regarding the scope and extent of PFAS contamination resulting from air emissions from the Site. Continued litigation as to where these PFAS emissions traveled and caused contamination would be extremely time-consuming and expensive, and—as with any litigation—a favorable outcome would not be guaranteed. Indeed, the parties would continue to argue over, among other things, alternative sources of PFAS to the environment throughout the impacted area. Thus, rather than continuing to engage in disputes with Solvay regarding the air pathway and its impact, the Department prioritized the treatment of drinking water that may have been impacted by air emissions of PFAS from the Site and secured through the settlement funding for testing and treatment of drinking water over a wide area.

Among other things, the settlement requires Solvay to conduct step-out potable water sampling at significant distances from the Site, as set forth in Paragraphs 15 and 16 of the proposed JCO. Solvay must begin by sampling the wells listed in Appendices A and B to the proposed JCO, provide treatment of wells found to exceed relevant thresholds, and then continue stepping out between 1,000 and 1,250 feet of wells with exceedances. Notably, this 1,000 to 1,250-foot step-out sampling and treatment protocol covers significantly more distance than is otherwise required under New Jersey's regulations. *See* N.J.A.C. 7:26E-1.11(a)(6) (requiring a 500-foot step-out). This protocol will result in extensive sampling and treatment of wells exceeding criteria at a significant distance from the Site. Critically, Solvay is required to conduct this protocol and treat eligible wells *despite any dispute it may have otherwise raised over the source of PFAS in a given well*.

Additionally, the Department obtained from Solvay funding for the costs to install, operate, and maintain treatment for the Public Supply Wells listed in Appendix C of the JCO, including in Bellmawr, Brooklawn, East Greenwich Township, Gloucester City, Greenwich Township, National Park, Paulsboro, Westville, and Woodbury City. These substantial funds, in the tens of millions of dollars, will also go towards addressing PFAS impacts to drinking water alleged to have occurred via an air pathway. Finally, Solvay's payment of Natural Resource Damages is based in part on impacts alleged to have occurred via air emissions. The Department, therefore, believes the air emission pathway is being sufficiently accounted for in this settlement.

Conversely, the Department does not believe it would have been possible or preferable to reach a settlement that required an iterative assessment of the air pathway and its potential impact; such an approach would have delayed any meaningful relief, including for the treatment of drinking water. The parties were likely to continue to engage in time-consuming and costly litigation over what Solvay's remedial obligations should be at increasing distances from the Site. The settlement prioritizes addressing impacts from the air pathway through drinking water treatment, even where Solvay continues to dispute that it was the source of the contamination.

11. **COMMENT**: The Department received a comment regarding a provision in the settlement providing that Solvay is not obligated to delineate soil specifically for Alternative PFAS until soil remediation standards for MFS and BFS are established, and asking "why does NJDEP not use the MFS Groundwater Standard and BFS Groundwater Standard for soil remediation in the interim until soil remediation standards are established?"

    RESPONSE: The Department intends to move forward with establishing soil remediation standards for MFS and BFS, resulting in their incorporation into the JCO, consistent with Paragraph 13(b) of the proposed JCO. Use of a groundwater standard as a soil remediation standard for MFS and BFS in the meantime, however, would be inappropriate. Generally, standards for groundwater are not directly applied to soils because of differences in exposure pathways and in the methods used to sample, measure, and quantify the amount of a contaminant in groundwater as compared to soil.

    Importantly, pursuant to the terms of Paragraph 13(b) of the proposed JCO, even before MFS and BFS soil remediation standards are established, Solvay must also collect and test soil for MFS and BFS during any soil delineation of PFNA and PFOA. This requirement will produce valuable data regarding the presence of MFS and BFS while the Department works to establish new soil remediation standards.

12. **COMMENT**: The Department received a comment stating that because Little Mantua Creek and the Main Ditch flow into the Delaware River and are also connected by groundwater flow, those bodies of water should not be remediated separately from the Delaware River, and, further, that separating those bodies of water from the Delaware River for purposes of the settlement would be "artificial."

    RESPONSE: As discussed below, the Department has reserved its claims against Solvay related to the Delaware River. A remediation of the Delaware River would involve many more parties in addition to Solvay and various types of contaminants. The Department believes Little Mantua Creek and the Main Ditch can and should be addressed prior to any remediation in the Delaware River, even if they have a relationship to the River. In this action, the Department sought to obtain relief for natural resources located entirely within New Jersey, including surface water bodies such as Little Mantua Creek and the Main Ditch. Requiring Solvay to remediate Little Mantua Creek and the Main Ditch, which abut the Site, is consistent with that goal.

13. **COMMENT**: The Department received a comment stating that the environmental media specified in Remediation Activities in the proposed JCO—groundwater, soil, surface water, sediment, and porewater in certain locations—are not inclusive of all potentially impacted media, including crops, food such as dairy products, fish, and other aquatic life, wildlife, dust including household dust, and biosolids from sewage sludge from treatment facilities such as the Gloucester County Utilities Authority ("GCUA").

    RESPONSE: The Department believes that, together, the Remediation Activities, Remedial Projects, and Natural Resource Damages will benefit and address additional environmental media, including in off-Site areas. As Solvay conducts the Remediation Activities, its remediation of groundwater, soil, surface water, sediment, and porewater will remove PFAS from the environment and decrease continued exposure to other types of media. Additionally, Remedial Projects funding provided by Solvay may be used to address various media in off-Site areas not otherwise covered by the Remediation Activities. In fact, the potential Remedial Projects specifically include remedial investigations and actions related to Solvay's discharges to GCUA, and off-Site placement or disposal of any PFAS-containing wastes, which would include biosolids. *See* Paragraph 26(f)-(g) of the JCO. Finally, Natural Resource Damages restoration projects may address and/or benefit further natural resources and areas in the vicinity of the Site.

PFAS Remediation Standards

14. **COMMENT**: The Department received a comment suggesting the settlement should not use New Jersey's current PFNA and PFOA maximum contaminant levels ("MCLs") as thresholds for providing drinking water treatment, but instead use U.S. EPA's proposed lower PFNA and PFOA MCLs that are not finalized.

    RESPONSE: The Department believes it is most appropriate to use New Jersey's current PFNA and PFOA MCLs rather than U.S. EPA's proposed, but not yet final, MCLs. U.S. EPA has indicated that it expects to finalize its proposed MCLs in early 2024. Critically, under the settlement, once U.S. EPA's PFNA and/or PFOA MCLs are finalized, those new levels will be incorporated into the requirements of the settlement consistent with the circumstances set forth in this section, which are discussed further below.

15. **COMMENT**: The Department received a comment stating that the six-year timeframe during which more stringent remediation standards are incorporated into the requirements of the settlement agreement should be longer.

    RESPONSE: The Department believes the proposed JCO includes a reasonable timeframe for incorporating more stringent remediation standards that are finalized, to the extent appropriate, in the future. Pursuant to Paragraph 22 of the proposed JCO, Solvay will be required to remediate environmental media and drinking water consistent with any new, more stringent remediation standards for PFNA, PFOA, Alternative PFAS, and cC604 that are finalized within six years of the Effective Date. The Department believes that six years is an appropriate timeframe to allow

for the finalization of new, more stringent standards by U.S. EPA and/or the Department, given the current pace of regulatory activity. The Department is committed to adopting and/or finalizing new, more stringent standards, to the extent appropriate, during this timeframe.

Remedial Projects

16. **COMMENT**: The Department received comments asserting that the funding provided under the settlement for Remedial Projects is insufficient.

RESPONSE: The Department's goal was to obtain through the settlement as much funding as possible for Remedial Projects, particularly for the installation of and operation and maintenance of treatment for the Public Supply Wells listed on Appendix C that have experienced exceedances of the PFNA MCL and are located within the vicinity of the Site. The Department believes it has obtained substantial funding toward these projects, resulting in more relief than any individual municipality or impacted party likely could have obtained through its own efforts or through litigation against Solvay.

To inform its settlement position, the Department undertook a thorough analysis of the potential costs of the Remedial Projects. For example, to estimate the potential costs to install, operate, and maintain treatment for the Public Supply Wells listed in Appendix C, the Department used models developed by the U.S. Environmental Protection Agency for costing PFAS treatment technologies. The Department inputted available data on PFAS concentrations previously found in the wells, along with other relevant available information about the capacity of the wells and the associated drinking water systems. The Department generated estimates of capital costs for constructing treatment systems, as well as operation and maintenance costs for such systems for 30 years, which was then discounted to present value. In addition to using these models, the Department also considered actual cost information previously received from certain municipalities concerning their impacted wells and systems. These estimates informed the Department's negotiations with Solvay in reaching the settlement agreement.

The Department used these estimates and the information it received from municipalities to obtain substantial funds from Solvay as a key aspect of the settlement. Solvay intensely disputed its responsibility for many of these projects, but has agreed to provide these funds as consideration for reaching a broader settlement agreement. Given the risks inherent with litigation, a recovery by the Department of the magnitude achieved in the proposed settlement for these Remedial Projects through continued litigation would have been uncertain.

The Department believes the amount of funding obtained is supported by current estimates as well as accounting for some uncertainty. The Department considered all information submitted by commenters and none of the information received altered the Department's view in this regard.

Moreover, the Department, as well as municipalities and other parties, retains claims against additional potentially responsible parties that are alleged to have contributed to PFAS pollution in this region, including but not limited to Arkema. Furthermore, public water systems may be eligible to collect sums through nationwide water provider class settlements reached with the 3M Company and various DuPont and Chemours entities.

17. **COMMENT**: The Department received a comment stating that New Jersey law requires the Remedial Projects payment to be in the form of a "dedicated Remediation Trust Fund Agreement." Relying on *Dragon v. New Jersey Dept. of Environmental Protection*, 405 N.J. Super. 478 (App. Div. 2009), the commenter asserted that the Department has no discretion to alter the requirements of New Jersey law by contract.

    RESPONSE: The Department disagrees that the *Dragon* case is applicable here. In *Dragon*, the Appellate Division found that the Coastal Area Facility Review Act ("CAFRA") did not authorize the Department's approval of a homeowner's construction project through a settlement agreement because the Department did not have the express or implied power to deviate from CAFRA's formal permitting process. Here, the Department's decision to enter into a settlement that includes a cash payment for the Remedial Projects is entirely consistent with New Jersey law.

    First, the Spill Act *expressly* authorizes the Department to bring an action in Superior Court against a party who has failed to comply with the Act for "the costs of any investigation, cleanup or removal, and for the reasonable costs of preparing and successfully litigating an action." *See* N.J.S.A. 58:10-23.11u(b)(2). Indeed, the Department sought these very costs from Solvay in its Complaint. Consistent with the Spill Act, the settlement secures significant funding for the Department for the costs of certain investigation, cleanup, and removal activities (*i.e*., the Remedial Projects), *in addition to* an agreement by Solvay to perform specific remediation backed by a Remediation Funding Source.[3]

    Second, the Legislature has granted the Department broad powers to protect the health, safety, and welfare of New Jersey's citizens under the Spill Act and other environmental laws. *See, e.g., Marsh v. N.J. Dep't of Envtl. Prot.*, 152 N.J. 137, 149 (1997) ("The Legislature has long reposed a broad measure of discretion in the DEP to administer the Spill Act."). New Jersey courts have long recognized that such powers include the responsibility "to determine the primary course of action to be taken against persons who damage or threaten the environment" and the discretion to decide "what solution will best resolve a problem on a state or regional basis . . . ." *Twp. of Howell v. Waste Disposal, Inc*., 207 N.J. Super. 80, 95-96 (App. Div. 1986).

[3] The Department's responses to comments suggesting that the settlement's provisions regarding the Remediation Funding Source are contrary to New Jersey law are addressed under the heading "Remediation Funding Source ("RFS")".

The Department's decision to accept a cash payment for the Remedial Projects therefore is consistent with both express and implied powers granted to it by the Legislature.

18. **COMMENT**: Concerns were raised that the JCO gives the Department too much discretion to use the funds for various Remedial Projects, with the possible result that the Department may determine not to use the funds for reimbursing and/or paying for the treatment, operation, and/or maintenance costs for those Public Supply Wells listed in Appendix C. Municipalities requested that the terms of the proposed JCO be modified to memorialize the Department's commitment to prioritizing the reimbursement and/or payment of these costs.

    RESPONSE: The Department considered it critical to any settlement with Solvay that the Department obtain substantial funding for the treatment, operation, and maintenance of Public Supply Wells alleged to have been impacted by the Site. When the Department announced the proposed settlement, the Department stated its commitment to use the Remedial Projects funds to address such Public Supply Wells. While the proposed JCO provides the Department with discretion in using the funds across potential categories of projects in order to maintain flexibility to allocate funds where they are most needed, the Department's intent has always been to prioritize use of the funds for the purpose of addressing these Public Supply Wells.

    After considering the comments received, and engaging in productive discussions with several of the impacted municipalities, in order to memorialize this commitment, the Department has modified the JCO to reflect that it will be prioritizing the use of the funds for the reimbursement and/or payment of reasonable and appropriate costs of treatment, operation, and maintenance of the Public Supply Wells listed on Appendix C.

19. **COMMENT**: One impacted municipality sought clarification as to whether funds provided for Public Supply Wells listed on Appendix C may include reimbursement for costs previously incurred by municipalities *prior to* the Effective Date, and, if so, that this be explicitly stated in the proposed JCO.

    RESPONSE: The Department confirms that funds may be used for the reimbursement of reasonable and appropriate costs previously incurred by municipalities prior to the Effective Date. Pursuant to the municipality's request, the proposed JCO has been modified to clarify that this is the case.

20. **COMMENT**: The Department received a comment requesting that the Department's discretion to use the funds be limited to within the area impacted by the Site.

    RESPONSE: The Department has modified the proposed JCO to reflect that the Department maintains discretion to use funds to address PFAS contamination related to the Site.

21. **COMMENT**: National Park submitted a comment stating that its exclusion from the settlement for the purposes of receiving funds for the treatment of its public water system renders the settlement unfair, inequitable, and inappropriate because other similarly situated municipal-owned public water systems are receiving funds to address PFNA.

    RESPONSE: The Department thanks National Park for its comment, which led to extensive discussions between the Department, National Park, and Solvay. The Department initially did not include National Park in its settlement with Solvay because, at the time the settlement was reached, National Park had its own litigation pending against Solvay related to PFNA in its public water system. *See Borough of National Park v. Solvay Specialty Polymers USA, LLC, et al.*, Docket No. 1:21-cv-9725 (D.N.J.).

    After the State's settlement was announced, however, National Park contacted the Department to request that National Park be included in the Department's settlement. The Department then engaged in significant negotiations with Solvay and National Park to reach a resolution that would incorporate National Park into the JCO, including the payment of additional Remedial Project funds by Solvay for purposes of treating, operating, and maintaining treatment systems for National Park's Public Supply Wells. The Department has modified the proposed JCO to reflect the resolution reached by the parties. The Department appreciates the parties' good faith efforts to reach this resolution.

22. **COMMENT**: The Department received comments requesting information regarding when and how the Department will disburse the Remedial Projects funds to municipalities with Public Supply Wells listed on Appendix C or that may subsequently be impacted.

    RESPONSE: Following the Court's approval of the settlement, the Department will post information on its dedicated settlement webpage (https://dep.nj.gov/solvay/) regarding the process as to how municipalities that own and/or operate the Public Supply Wells in Appendix C and other interested parties may apply for the Remedial Projects funding. The Department anticipates asking municipalities and other parties to submit documentation concerning the costs they have incurred or expect to incur in the future so the Department may evaluate its allocation and disbursement of the Remedial Projects funds.

    Consistent with the modified JCO, the Department will prioritize the reimbursement and/or payment of reasonable and appropriate costs of treatment, operation, and maintenance of the Public Supply Wells listed on Appendix C that experienced PFNA MCL exceedances and are located within the vicinity of the Site. The Department will ask about any alternative funding already received or anticipated to be received by a municipality, so that Remedial Projects funding can be best preserved and deployed.

23. **COMMENT**: The Department received a comment stating that Paragraph 26(d) is silent as to the time period that the funds for the treatment and maintenance for East Greenwich Public Supply Well # 3 is meant to address.

RESPONSE: To develop the costs for the treatment and maintenance for East Greenwich Public Supply Well # 3, the Department used the actual costs of constructing the treatment system based on information provided to the Department by East Greenwich. The Department further estimated the costs to operate and maintain that system for a time period of 30 years. This time period is commonly used for environmental cost estimation purposes and is consistent with standard engineering practices.

Adjusted Direct Oversight

24. **COMMENT**: The Department received comments stating the Site should remain in Direct Oversight rather than "adjusted oversight with an LSRP."

    RESPONSE: To be clear, after the Effective Date, the Site will remain in Direct Oversight. While the Department, through the settlement, has agreed to adjust certain Direct Oversight requirements for the Site, the Site will remain in Direct Oversight and Solvay's LSRP must still submit remediation documents to the Department for review and approval. *See* Paragraphs 29 and 33.

    To the extent that the commenter is stating that the circumstances presented here do not warrant adjusting any of the requirements of Direct Oversight, the Department respectfully disagrees. The Department believes that the proposed settlement with Solvay is in the public interest and protective of the public health and safety and the environment, given the commitments, funding, and other relief that is provided through the agreement. In the event Solvay fails to comply with the requirements of the JCO, there are multiple provisions reinstituting Direct Oversight requirements that have been adjusted, and otherwise penalizing Solvay for non-compliance. *See* Paragraphs 38 and 39 of the JCO.

25. **COMMENT**: The Department received a comment asking how adjusting the Direct Oversight requirements for the Site via the proposed JCO would impact the Department's review and/or approval process for the revised public participation plan to be submitted by Solvay.

    RESPONSE: Under Paragraph 33(a) of the proposed JCO, Solvay is required to submit a revised public participation plan to the Department "for review and approval" within 60 days of the date the settlement is finalized. The Department remains responsible for ultimately approving the public participation plan under the proposed JCO. *See* Paragraphs 29 and 33(a) of the JCO. The JCO provides that the Department will make good faith efforts to provide comments or approve the public participation plan within 120 days of receipt. *See* Paragraph 34 of the JCO. In its review, the Department will rely on its most recent guidance related to public participation plans, as referenced by the commenter and available at: https://www.nj.gov/dep/srp/guidance/srra/direct_oversight_pp_plan.pdf.

Remediation Funding Source ("RFS")

26. **COMMENT:** The Department received a comment suggesting that the proposed JCO will allow Solvay to avoid complying with the Industrial Site Recovery Act ("ISRA") as it relates to a restructuring of its direct and indirect parent companies in 2023.

    RESPONSE: The JCO does not excuse Solvay from complying with ISRA in the event that the restructuring of Solvay's parent companies does trigger ISRA's requirements. Rather, the JCO permits Solvay to refer to its obligations under the JCO in its ISRA submissions and to otherwise meet ISRA's requirements to complete remediation and post an RFS. More specifically, the JCO: (1) permits Solvay to attach the settlement agreement to the form it must submit to the Department under ISRA; and (2) confirms that Solvay's obligation to establish an RFS pursuant to the JCO would satisfy its obligation to establish an RFS pursuant to ISRA.

27. **COMMENT**: The Department received a comment taking the position that, because Solvay has previously failed to comply with various Department enforcement actions and deadlines, Solvay cannot fund a portion of the RFS Amount with a self-guarantee, as allowed under the proposed settlement. The comment asserts that this would be contrary to New Jersey law, primarily N.J.S.A. 58:10C-27.

    RESPONSE: The Department assumes that the comment refers to N.J.S.A. 58:10C-27(c)(4), which provides that for sites subject to direct oversight by the Department, "the person responsible for conducting the remediation shall establish a remediation funding source other than a self-guarantee." N.J.S.A. 58:10C-27(c)(4).

    However, the Department is authorized to "modify the direct oversight requirements of [N.J.S.A. 58:10C-27(c)] for a contaminated site if the [D]epartment makes a written determination that the modification is in the public interest and protective of the public health and safety and the environment." N.J.S.A. 58:10C-27(g)(2). To do so, the Department must "publish its written determination and the proposed modification to the requirements of direct oversight, including the reasons for its determination, on the [D]epartment's Internet website" 60 days prior to modification. *Id.* The Department must also "solicit and accept public comments on the proposed modification for a period of at least 30 days after the date of publication" and "consider the public comments received during the comment period prior to making a modification" to the requirements of direct oversight. *Id.*

    The Department has complied with these requirements and directs the commenter to the "Notice to Receive Interested Party Comments on Proposed Judicial Consent Order and Notice to Receive Interested Party Comments on Proposed Modifications to the Direct Oversight Requirements in the Matter of NJDEP v. Solvay Specialty Polymers USA, LLC" ("Notice"), which was published on the Department's website on July 6, 2023 and in the New Jersey Register on August 7, 2023. The Department also directs commenters to Section X (Paragraphs 29-43) of

the proposed JCO, entitled "Adjusted Direct Oversight," which was posted to the Department's website on June 28, 2023. The Notice and proposed JCO are both available at https://dep.nj.gov/solvay. The Department has provided its written determinations, the proposed adjustment to direct oversight, and the reasons for its determination based on the unique circumstances of this particular case including the significant commitments and protections obtained through the proposed JCO. The Department determined that the settlement would be in the public interest and protective of public health and safety and the environment. The Department has carefully considered all comments received during the public comment period prior to determining to move forward with the proposed JCO, including the adjustment of the current direct oversight requirements contained within.

28. **COMMENT**: The Department received a comment stating that Solvay's ability to fund a portion of the RFS Amount using a surety payment bond "satisfactory to the Department" pursuant to Paragraph 7(c) of the JCO is inconsistent with New Jersey law, which requires that "the surety company issuing the bond must be a company that is listed as an acceptable surety on federal bonds in United States Treasury Department Circular 570." N.J.S.A. 58:10B-3(i).

    RESPONSE: The Department disagrees with the commenter's interpretation of the settlement agreement in this regard. The Department will not consider the bond satisfactory unless it complies with New Jersey law.

29. **COMMENT**: The Department received a comment stating Solvay's parent company would not be allowed to post a self-guarantee for the Site under the regulations because Solvay is currently financially independent from its parent company, pursuant to N.J.A.C. 7:26C-5.8(b), and the terms of the settlement agreement allow Solvay's direct or indirect parent to post a self-guarantee under Paragraph 8(e) of the proposed JCO.

    RESPONSE: The Department disagrees with the commenter's interpretation of the settlement agreement in this regard. Paragraph 8(e) of the proposed JCO specifically states that any self-guarantee must be provided *in accordance with* N.J.A.C. 7:26C-5.8.

Release, Covenant Not To Sue, and Contribution Protection

30. **COMMENT**: The Department received a comment taking the position that the Department is not authorized to provide a release, covenant not to sue, or contribution protection through a settlement before remediation is completed.

    RESPONSE: The Department disagrees with the commenter, and notes that the commenter has provided no legal support for this proposition.

    Rather, relevant authorities confirm the Department's approach as taken through this settlement. For example, the Spill Act provides that anyone "who has resolved his liability to the State for cleanup and removal costs, including the payment of compensation for damage to, or the loss of, natural resources, or for the restoration of natural resources, and (i) has received a final remediation document, *or* (ii) 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 or the final remediation document, as the case may be." N.J.S.A. 58:10-23.11f(a)(2)(b) (emphasis added). Contribution protection may thus be provided through a settlement with the State and does not depend on receipt of a final remediation document or remediation otherwise having been completed.

The Department further wishes to address the commenter's suggestion that the release, covenant not to sue, and/or contribution protection are being provided in exchange for monetary payments only. That is not the case. Solvay is making a Settlement Payment of $101.05 million for Remedial Projects, $75 million for Natural Resource Damages, and $3.78 million for the Department's previously incurred costs, in addition to its commitment to conduct Remediation Activities and establish $214 million in financial assurance in the form of an RFS to ensure those Remediation Activities are completed. Solvay's failure to conduct the Remediation Activities as required or meet any of the other obligations under the settlement will subject it to enforcement by the Department.

31. **COMMENT**: The Department received a comment stating that Solvay should remain "liable for claims for contribution for Natural Resource Damages to the fullest extent permitted under law."

    RESPONSE: Through this settlement, the Department seeks to resolve its claims for Natural Resource Damages against Solvay for the sum of $75 million. The Spill Act provides that anyone 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 or final remediation document, as the case may be." N.J.S.A. 58:10-23.11f(a)(2)(b). New Jersey's Legislature sought to encourage settlements by providing contribution protection to settling defendants in order to induce them to reach agreements with the State. Based on Solvay's resolution of the Department's claims for Natural Resource Damages, it is entitled to contribution protection under the New Jersey Spill Act.

32. **COMMENT**: One commenter stated that Solvay should not be provided with contribution protection on the Effective Date, because "Solvay may not fully delineate and remediate offsite areas for many years. This allows Solvay [to] strategically delay remediation of offsite areas while third-party site owners may be required to investigate and remediate contamination that was actually caused by Solvay. The NJDEP should add additional protections in the proposed settlement to mitigate this potential outcome."

    RESPONSE: The Department does not believe modification of the proposed JCO is warranted based on the hypothetical scenario in the comment because there are already sufficient protections in the JCO. Solvay is required to perform Remediation Activities under a schedule put in place through the terms of the settlement that will prevent undue delay in investigation and remediation that is required by the settlement. *See* Paragraphs 33, 34, and 36 through 38 of the JCO.

33. **COMMENT**: The Department received a comment from a municipality asking that Paragraph 48 be revised "to provide that in cases where Solvay is permitted to assert cross-claims or counter-claims against a State or local government entity or a State or local quasi-government entity, that the State or local government entity or local quasi-government entity similarly be permitted to assert cross-claims or counter-claims against Solvay."

    RESPONSE: Paragraph 48 of the proposed JCO reflects Solvay's agreement not to pursue any claims against a State or local governmental or quasi-governmental entity for contribution, except when Solvay is named as a defendant in litigation involving a State or local governmental or quasi-governmental entity. This Paragraph is intended to limit what claims Solvay may or may not pursue; it does not restrict the claims of third parties. For that reason, the Department believes the requested revision is unnecessary.

34. **COMMENT**: The Department received a comment stating that the settlement should contain re-openers for the $75 million for Natural Resource Damages and $100 million for Remedial Projects, to ensure that, in the event that certain costs are higher than anticipated, the settlement is fair and adequate. The commenter also stated that the settlement should be amended to make clear that the $214 million amount for the RFS is an initial estimate and may be increased.

    RESPONSE: The Department disagrees that re-openers are necessary with respect to the amounts being paid for Natural Resource Damages and Remedial Projects. The Department believes it is a better course to maximize its recovery today, which would not be possible if it required re-openers. This resolution allows the Department access to substantial immediate funds that can be allocated to restoration and Remedial Projects, including treatment of drinking water, in the near future.

    With respect to the RFS amount, the Department disagrees that the proposed JCO requires any further clarity that the RFS amount may be increased based on revised estimates of remediation costs in the future. Paragraph 9 of the JCO explicitly states that the RFS amount may increase as a result of annual cost reviews.

35. **COMMENT**: The Department received a comment expressing concern that Solvay will not be required to remediate discharges of all PFAS from the Site under the settlement, including any discharges of PFAS that may occur after the Effective Date. The commenter referenced "a Third Generation of PFAS generated by Solvay's new process."

    RESPONSE: The Department's settlement with Solvay is focused on specific types of PFAS—PFNA, PFOA, MFS, and BFS—that were discharged prior to the Effective Date. The settlement concerns these specific PFAS because they were the primary types of PFAS discharged from the Site and are subject to regulation and years of evaluation by the Department.

With respect to any discharges of any type of PFAS occurring after the Effective Date, the Department has retained all authority to address such discharges. *See*, *e.g.*, Paragraphs 3(k) and 51 of the JCO.

Notably, there have been several developments that have occurred while the litigation has been pending that are intended to reduce future discharges of PFAS from the Site. In 2021, Solvay announced that it was ceasing its use of PFAS-containing fluorosurfactants at the Site and elsewhere. Additionally, in 2023, the Department imposed new requirements in Solvay's NJPDES permit, No. NJ0005185, including technology-based effluent limitations on any discharges of PFNA and PFOA.

Additionally, the Department felt it was important to include in the JCO a requirement that Solvay undertake an evaluation of the continued presence and discharge of any PFAS within and from its ongoing Site operations. Thus, to the extent that any PFAS is formed or present during Solvay's current process, Solvay will be required to evaluate this, report the results of its evaluation to the Department within 12 months of the Effective Date, and meet with the Department to discuss any additional measures that may be appropriate to mitigate discharges of such PFAS.

The Department will continue to investigate future discharges from the Site that occur after the Effective Date and will address such discharges as necessary to protect human health, safety, and the environment.

Delaware River Claims

36. **COMMENT**: One commenter asked why the Delaware River was not included in the settlement agreement.

RESPONSE: When the State filed its case against Solvay in November 2020, it included a statement in its complaint that it would seek to reserve its claims related to the Delaware River. *See* the State's Complaint at Paragraph 226. The State focused the case on natural resources located exclusively in New Jersey so that the case would proceed efficiently, putting the State in the position to obtain meaningful relief (including treatment of drinking water for the benefits of its citizens) in the near term.

In December 2022, the Court granted the State's request to reserve its Delaware River claims. (LCV20224269023.) The Court recognized that including the Delaware River in the litigation would likely result in prolonging the case, due to, among other reasons, the size and complexity of the River, the multiple other trustees (Pennsylvania, Delaware, New York, and the United States) responsible for protecting the River, and the many actors that have contributed to pollution of the River over time.

Pursuant to Paragraph 46 of the proposed JCO, the State retains the ability to bring Delaware River Claims in the future in a manner consistent with the Court's December 2022 order and the settlement agreement.

37. **COMMENT**: The Department received a comment objecting to the requirement that any future lawsuit or administrative action against Solvay for Delaware River Claims must involve multiple sites and other potentially responsible parties. The commenter stated this provision "unduly limits the Department's future discretion and should be eliminated. Should NJDEP determine that Solvay is the sole, or primary contributor to the Delaware River, NJDEP should retain the ability to act against Solvay alone."

    RESPONSE: The Department disagrees that this requirement is an unreasonable limitation on any future lawsuit or administrative action against Solvay for Delaware River Claims. As recognized by the Court in its opinion granting the State's request to reserve its Delaware River Claims, many actors have contributed to pollution of the Delaware River. The requirement contained in the JCO reflects that reality.

38. **COMMENT**: The Department received a comment objecting to the proposed JCO's requirement that a Natural Resource Damages Assessment ("NRDA") be completed before the Department can file Delaware River Claims for Natural Resource Damages against Solvay. The commenter suggested that such a requirement is not appropriate if there are no current plans by a trustee to conduct a NRDA. The commenter also suggested this requirement may excuse Solvay from "delineat[ing] the extent of its contamination of the river and the river basin by releases from its facility in West Deptford."

    RESPONSE: The Department disagrees that this requirement is inappropriate if there are no current plans by a trustee to conduct an NRDA. The Department believes that it would be beneficial to conduct an NRDA before filing any natural resource damage claims against Solvay for damages to the Delaware River given the complexity of the Delaware River. Further, the requirement to perform an NRDA is limited to a specific section of the Delaware River, from miles 79 through 105. Moreover, similar requirements on the Department bringing Natural Resource Damages claims for surface water bodies has been incorporated into other Department settlements approved by the State's courts.

    Additionally, the requirement to conduct an NRDA does not relate to Delaware River Claims against Solvay that concern remediation (including delineation of contamination) as opposed to natural resource damages.

39. **COMMENT:** "To the extent the language in paragraphs 46 and 47 of the [proposed Judicial Consent Order] 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 46 and 47, which concern any future lawsuit or administrative action brought by the Department against Solvay for Delaware River

Claims, are not intended to limit or waive any rights or defenses of third parties with respect to the Delaware River.

Settlement Payment

40. **COMMENT**: The Department received comments asking if it will provide more information regarding the bases for the payments and other amounts negotiated through the settlement. One commenter asserted that there is currently insufficient information available on these amounts that would allow the public to assess whether the settlement is fair and reasonable.

    RESPONSE: The Department is required to establish that the settlement, including the payments and amounts negotiated, is fair, reasonable, and in the public interest at the time it seeks the Court's approval of the proposed JCO. The Department is providing 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 and remediation Solvay has agreed to undertake through the proposed settlement, and also has taken into account other factors such as litigation risks and the significant benefit of obtaining relief now (*e.g.*, obtaining immediate agreed upon remediation and treatment of drinking water for tens of thousands of people living in the region) as opposed to potential relief years from now, which would be by no means guaranteed if the State were to continue to litigate the case. After careful consideration, the Department determined that the settlement is fair, reasonable, and in the public interest.

41. **COMMENT**: The Department is using an unlawful "secret escrow account" to hold settlement proceeds.

    RESPONSE: The Department disagrees, and believes the commenter fundamentally misunderstands the purpose of the Escrow Account.

    Pursuant to Paragraph 4 of the proposed JCO, within 45 days of the Effective Date, Solvay must place the Settlement Payment into an Escrow Account. *See* Paragraph 4 of the JCO. The purpose of the Escrow Account is to hold the Settlement Payment until the outcome of any appeals of the settlement, if any, are resolved. This purpose is made clear in Paragraph 5 of the proposed JCO, which states the funds must remain in the Escrow Account until the JCO becomes final and non-appealable. Further, this paragraph provides that, if the JCO is overturned on appeal such that the JCO is void and of no effect, the funds in the Escrow Account shall be returned to Solvay. This is a standard provision that addresses uncertainty related to potential appeals of the trial court's determinations by placing a settlement payment into a third-party escrow account pending the outcome of any such appeals (if any). The Department has used escrow accounts before for this very purpose in connection with settlements approved by New Jersey courts.

    If and when the settlement is final after any appeals (if any) have been exhausted, the funds from the Escrow Account will be paid to the Department. The escrow

agent will have no further control over the funds and may only provide them directly to the Department. The Department will deposit, maintain, and/or use the funds in compliance with the terms of the settlement agreement and applicable law.

Miscellaneous

42. **COMMENT:** One commenter accuses the Department's Outside Counsel of "manipulate[ing] the terms and conditions of the Solvay Settlement Agreement."

    RESPONSE: All of the outside counsels' litigation efforts, from the filing of the action to the negotiation of the JCO, were undertaken under the supervision of the Division of Law and the Department. Representatives of the Division of Law and the Department directly participated, along with Outside Counsel, in the negotiation of the JCO. Ultimate approval of the terms of the JCO was subject to the review of the Attorney General's Office and the Commissioner of the Department in consultation with Division of Law and Department staff.

43. **COMMENT**: The Department received a comment asserting that the New Jersey Constitution permits no more than 10 percent of Natural Resource Damages recoveries to be used to pay the Department's outside counsel fees.

    RESPONSE: Preliminarily, payment of outside counsel's legal fees in this matter is governed by the terms of a retention agreement between the State and outside counsel, under which payment of costs and fees is contingent upon successful recovery. Legal fees contemplated under the contract are paid on a contingency fee basis and are controlled by R. 1:21-7, which requires the Court to find such fees "reasonable" in light of all the circumstances of the case and fully consistent with the Rules of Professional Conduct. *See N.J. Society for Environmental and Economic Development, et al. v. Bradley M. Campbell, et al.*, MER-L-343-04, June 17, 2004 Order Regarding Special Counsel Issues and Transferring Remaining Issues to the Appellate Division (J. Sabatino); *Ingram v. Cty. of Camden*, No. CV 14-5519, 2022 WL 3704629, at *3 (D.N.J. Aug. 26, 2022); *Ehrlich v. Kids of N.J.*, 338 N.J. Super. 442 (App. Div. 2001); RPC 1.5.[4] Contingency arrangements are not unusual in cases brought by public entities. Litigation is expensive, and it requires significant capital. Without employing outside counsel under contingency arrangements, the State would have to front the costs of litigation, depleting its limited financial resources.

    Regarding the commenter's statement regarding the New Jersey Constitution, the Department disagrees. Article VIII, Section II, paragraph 9 of the New Jersey Constitution, as amended ("the Amendment"), governs how NRD settlement proceeds placed in a special account in the General Fund are spent. The Amendment applies a 10% limit on money appropriated from the Fund going toward "administrative costs of the State or its departments, agencies, or

[4] The commenter also proffered a calculation of Outside Counsel's fees which was ill-informed. Outside Counsel will make an application to the Court regarding their fees consistent with R. 1:21-7

authorities" for purposes of restoring damaged or lost natural resources of the State. This 10% limit specifically applies to administrative overhead costs incurred by the Department in running the Office of Natural Resource Restoration. Legal costs, such as attorney's fees for pursuing NRD cases, are addressed in a different part of the Amendment and are not subject to this limit.

44. **COMMENT**: One comment asserts that there are certain "essential terms" missing from the settlement such that the settlement cannot be binding, pursuant to *Cumberland Farms, Inc. v. New Jersey Department of Environmental Protection*, 447 N.J. Super 423 (App. Div. 2016).

    RESPONSE: The Department considers the circumstances of *Cumberland Farms, Inc. v. New Jersey Department of Environmental Protection* to be entirely different from those here. *Cumberland Farms* concerned the enforceability of an email sent to Department employees with a draft settlement agreement seeking to resolve natural resource damages that included numerous redlines, strikeouts, and blanks. Further, the draft agreement was never finalized and approved by the Department's management or Commissioner, and no agreement was ever released for public comment. Here, a proposed settlement was prepared, agreed to by the Parties, and released for public comment. The Department's position is thus that the Court may approve the settlement in the form it will be presented, after which time it may become binding under applicable law.

    None of the "terms" referenced by the commenter change that outcome. It is commonplace for agreements to include certain associated documents to be prepared at a later date. That does not render the agreement non-binding or unenforceable. Notably, the commenter referred to the fact that that a standard escrow agreement and the form of the letters to be sent to private well owners regarding their eligibility for sampling and/or treatment were not attached to the agreement. Though not required to do so, the Department submitted these documents as exhibits to the proposed modified JCO when it was submitted to the Court.