



**Maxus Energy Corporation**

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November 4, 2011

***BY ELECTRONIC MAIL AND FEDERAL EXPRESS***

Marianne Ortiz Lodin  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
Office of Environmental Accountability  
61 Forsyth Street, S.W  
Atlanta, Georgia 30303  
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**RE: Black Leaf Chemical Site, 1391 Dixie Highway in Louisville, KY**

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Dear Ms. Ortiz Lodin:

Thank-you for your e-mail dated October 31, 2011, and for spending the time with me to provide basic background information relating to the Black Leaf Chemical Site, located at 1391 Dixie Highway in Louisville, KY (the "Site"). In your e-mail you state that, based on information provided by Occidental Chemical Corporation ("OCC"), the EPA has reason to believe that Maxus Energy Corporation ("Maxus") is a potentially responsible party ("PRP") at the Site and, accordingly, that EPA anticipates sending Maxus a General Notice Letter ("GNL") under the Comprehensive Environmental Response, Cleanup and Liability Act ("CERCLA"). For the reasons set forth in this letter, Maxus is not a PRP at the Site and, consequently, issuing a GNL to Maxus would be inappropriate.

As you note in your e-mail, a GNL and information request have previously been sent to OCC. That GNL alleged that OCC may be liable under section 107(a) of CERCLA as a previous owner and/or operator of the Site based on information that Diamond Alkali Company owned and/or operated the Site between 1957 and 1959. As explained below, there is no question that OCC is the successor in interest of Diamond Alkali Company, so, if the evidence implicates Diamond Alkali as a PRP, OCC would be the appropriate recipient of a GNL for that exposure.



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Since we are not privy to the information provided to EPA by OCC, we do not know what information or representations may underlie EPA's contention that Maxus itself is a PRP. Be that as it may, as explained below, any such contention is unsustainable. To the extent Diamond Alkali engaged in activities at the Site that gave rise to CERCLA liability, the decisive question is where the liabilities of Diamond Alkali have come to rest today? The answer to that question is straightforward and beyond dispute. OCC is the legal successor of Diamond Alkali, which certainly includes environmental liabilities of this nature. Maxus's only conceivable nexus is as a party that agreed – in 1986, long after Diamond Alkali's alleged activities at the Site ceased, and solely in the context of selling the stock of Diamond Alkali's to OCC – to indemnify OCC for certain historic liabilities associated with Diamond Alkali's previous operations. As explained below, even assuming those indemnification responsibilities apply to OCC's exposure at this Site, any such indemnification responsibility (which extends to OCC alone) does not make Maxus a PRP in its own right.

The facts that establish this position are summarized below.

- Diamond Alkali was incorporated in Delaware in 1928.
- Diamond Alkali continued operating under that name until 1967, when it merged with Shamrock Oil & Gas Company. The resulting corporation was named Diamond Shamrock Corporation (“DSC-I”). Thereafter, DSC-I's operations were not confined to the chemicals business alone, but to various energy-related businesses as well. And, from then until 1983, these various lines of business were carried forward by “divisions” within DSC-I. Though each division had a relatively distinct area of responsibility, all assets and liabilities associated with the combined lines of business (including the liabilities of the prior chemical operations of Diamond Alkali) resided in a single corporate entity, namely, DSC-I.
- This single-entity's corporate structure remained in place until 1983, when an oil company known as Natomas Company became available for acquisition. As part of the decision to acquire Natomas, a new corporate structure was adopted effective September 1, 1983. In essence, the new corporate structure converted the various operating divisions into separately incorporated subsidiaries, with an overarching stock holding company, which is the corporation now known as Maxus. The basic components of this reorganization are as follows:
  - In July 1983, a new non-operating stock holding company was formed. This holding company was initially named New Diamond Corporation. Shortly thereafter, the holding company's name was changed to Diamond Shamrock Corporation, which is referred to as “DSC-II,” to distinguish the holding company from the operating company (i.e., DSC-I) previously known by the same name.
  - Meanwhile, the historic operating company DSC-I (previously, Diamond Alkali) was renamed Diamond Shamrock *Chemicals* Company (“DSCC”), the name of which was selected to indicate that, going forward, DSCC would concentrate on the longstanding chemicals business. The other lines of businesses (especially the energy-related businesses of recent vintage) were to become the focus of other newly formed corporations, all of which would be subsidiaries of the newly formed stock holding company, DSC-II.

- To implement this concept, through a series of assignment and assumption agreements, pursuant to which (1) DSCC assigned to each newly formed subsidiary all assets associated with that subsidiary's particular active line of business, and (2) each subsidiary agreed to assume any and all liabilities associated with the assigned assets. Naturally, assets and liabilities relating to the ongoing and prior operations of the chemicals business (including any liabilities associated Diamond Alkali's historic operations and discontinued businesses) remained with DSCC, the undisputed corporate successor of DSC-I.
- Three years later, in 1986, DSC-II sold 100% of DSCC's stock to OCC. Immediately thereafter, DSCC's name was changed to Occidental Electrochemicals Corporation ("OEC"), and OEC was then merged into OCC. Thus, there is no question, and OCC has repeatedly and freely acknowledged in judicial and regulatory proceedings, that OCC is the successor by merger of the single corporate entity that over the course of time was named Diamond Alkali, DSC-I, DSCC, and OEC. The most recent decision holding OCC to be the successor to Diamond Alkali occurred in a trial court decision granting a motion of the State of New Jersey for summary judgment on that issue in July of 2011 in *State of New Jersey v. Occidental Chemical Corporation, et. al.* (Case No. L-9865-05).
- Maxus's sole conceivable nexus with any site owned and operated by Diamond Alkali arises from the 1986 Stock Purchase Agreement ("SPA") with OCC. In that document, DSC-II (which changed its name to Maxus in 1987) agreed to indemnify OCC for certain historic liabilities, including certain environmental liabilities associated with Diamond Alkali's prior operations. Those indemnification responsibilities are subject to certain limitations. Maxus is evaluating in good faith whether there is an obligation for DSCC for the site and whether, as a consequence, there is an indemnification responsibility that covers OCC's exposure in this particular instance. Maxus will promptly inform OCC of the results of its evaluation.

In sum, the facts demonstrate that OCC alone is the corporate successor of Diamond Alkali, and that Maxus's sole obligation, if any, is a private indemnification responsibility owed solely to OCC, its contracting party in the SPA. The indemnity does not alter the character of OCC as successor to Diamond Alkali. Consistent with the rule in other areas of the law, CERCLA liability does not extend to indemnitors of PRPs, anymore than such liability extends to a PRP's insurers. *See Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 342, 343 (7th Cir.1994).


I would note as well that Maxus has a long history of working cooperatively with OCC to address liabilities at sites where EPA and relevant state agencies have alleged a Diamond Alkali nexus. Indeed, Maxus is working diligently to investigate whether such an approach is appropriate at this Site, as well. Such cooperation, however, is simply to facilitate resolution of what is and remains an OCC liability.

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Under the circumstances, any decision by EPA to issue a GNL to Maxus could only be based on demonstrably incorrect assumptions. Even if a GNL is issued but remains unenforced, it has consequences for the entity that receives it. EPA tracked Diamond Alkali to its proper corporate successor and issued the GNL to OCC on that basis. Enforcement action against Maxus would be wholly inappropriate. Thus, assuming EPA has any questions about the contours of the indemnity agreement, it should seek to resolve those questions iteratively in the first instance, by use of its information requesting authority, before making a reflexive decision to issue a GNL to Maxus.

Thank you again for your courteous assistance and for your time in reviewing this matter. If I can provide any further information to assist you in evaluating the matters set forth in this letter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Gonzalez", followed by the text "on behalf of" written in a cursive style.

Javier Gonzalez  
Vice President and General Counsel