

SETTLEMENT OF SEDIMENT CASES: ***THE PASSAIC RIVER EXAMPLE***



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UNIQUE DIFFICULTIES OF LITIGATING & RESOLVING SEDIMENT SITES



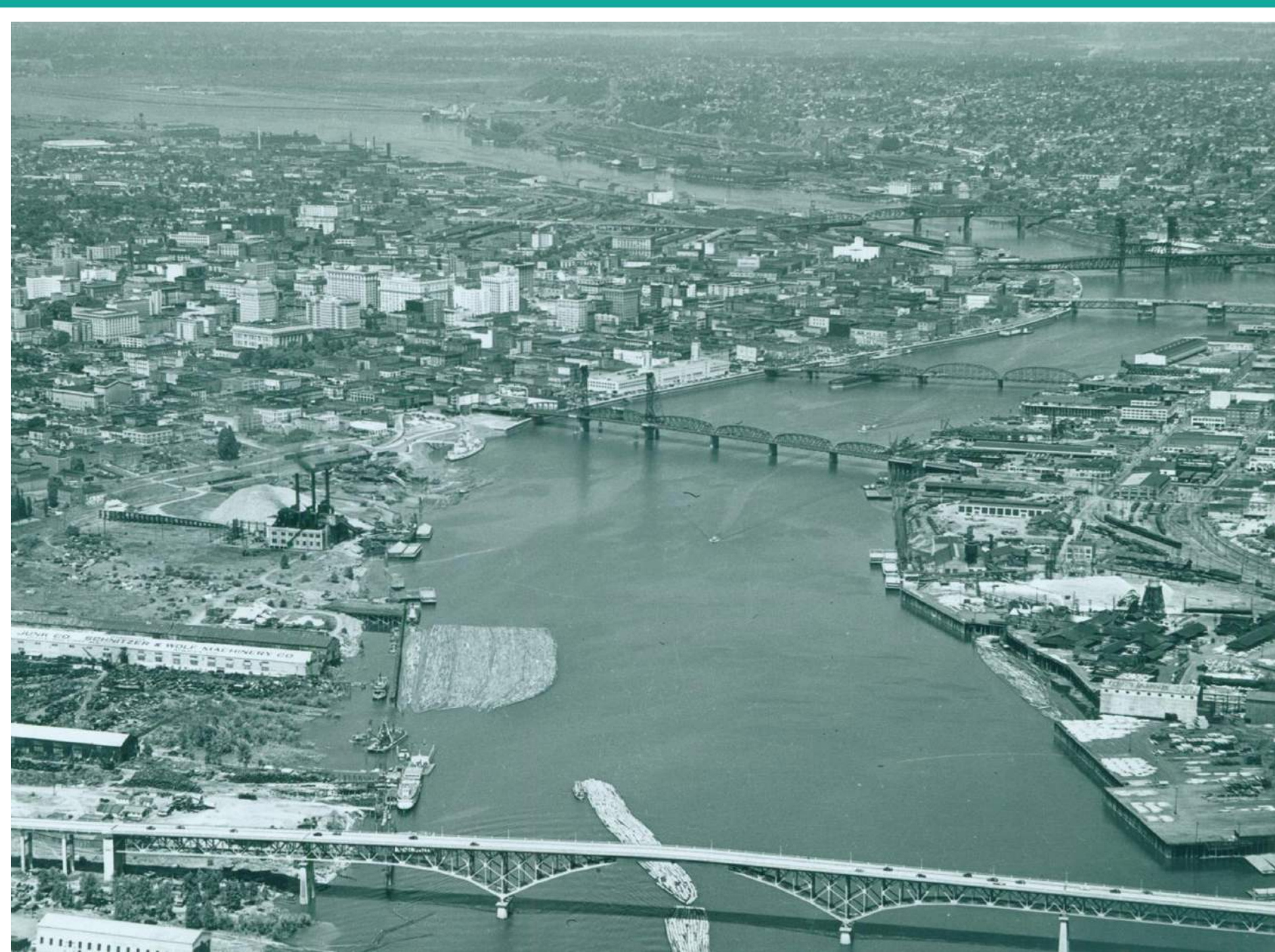
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COMPLEXITY OF SEDIMENT SITES

- Multiple Responsible Parties & COCs
- Risk Based Cleanup: Human and Ecological
- Chemical Processes, Volumes, Mass Loading, & Fingerprinting of the COCs Driving Risk
- Fate & Transport of COCs into the River
- Bathymetric Data and Dredging Issues
- Hydrodynamics, Deposition, and Scour Zones
- Secondary Risk Drivers & Remedy Cost Drivers
- Orphan Shares, Sources and Liabilities









10-29-76

5-50

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COMPLEX SYSTEMS AND SEDIMENT SITES

- One PRP or Pristine Environment is *rare*
- Complex Sites like the Passaic River
 - Hundreds of COPCs
 - Hundreds (or Thousands) of PRPs
 - Hundreds of Years of Discharges
 - Physical Impacts and Societal Development
 - Baseline Determination stacked over Centuries
 - Injury Evaluation & Damages Quantification
- “Some difficulties” with calculating both the denominator and numerator



Joint & Several Liability Concerns Drive the Analysis

THE CERCLA SETTLEMENT STANDARD OF REVIEW



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TYPICAL COMPLETE CERCLA SETTLEMENT

- Some level of certainty as to
 - total removal and/or remediation costs
 - the settling party's "share"
- Government provides Covenant Not to Sue
- Contribution Protection
 - from the claims of all non-settling PRPs
- Dollar-for-Dollar/Pro Tanto Credit
 - Settlement Activates a statutorily-defined credit mechanism reducing non-settling parties' liability by the dollar amount of the settlement



JOINT & SEVERAL LIABILITY ISSUES

- CERCLA & State equivalents provide pro tanto credit mechanism (rather than pro rata)
- Non-settling parties bear the risk that the Government is settling for too little
- Thus, the non-settling parties could face a disproportionate share of costs later
- Government's settlement value is evaluated via rational basis/arbitrary & capricious standard
- Places a quantification & allocation burden onto the Government that is otherwise absent



PRO TANTO CREDIT GIVES THIRD-PARTIES **STANDING**

- The reason non-settling parties have the right to challenge is precisely because they may have joint & several liability for damages in excess of the settlement. See, e.g.,
 - U.S. v. Aerojet Gen. Corp., 606 F.3d 1142, 1152 (9th Cir. 2010)
 - In Matter of Bell Petroleum Servs., Inc., 3 F.3d 889, 908 (5th Cir. 1993) (where there is a basis for divisibility of harm and, thus no joint and several liability, § 113(f)(2) (establishing the dollar-for-dollar settlement credit scheme for joint & several liability) was inapplicable).
- Non-settling Parties may intervene to stop your settlement!



COMPLEXITY OF RESOLVING SEDIMENT SITES

- Consent Judgment must be reviewed and entered by the court in order for contribution protection to apply to the settling PRP.
- As a result, non-settling PRPs can come forward and object to a settling defendant's attempt to settle out of all of its liability for too little or on unfair terms.
- It is incumbent upon the settling parties to demonstrate that the settlement is “fair, reasonable, adequate, and consistent” with the governing statute (e.g., CERCLA or OPA).
- If they are unable to do so, the settlement will fail.



NRD SETTLEMENTS ARE THE SAME!

- Courts have consistently applied the same standard of review to NRD settlements as other CERCLA remediation settlements.
- Courts tend to treat NRD settlements with more deference and only reject complete NRD settlements (and full contribution protection) where the Court is not provided with a mathematical basis to estimate injury and allocation
- How much Assessment, Quantification and Allocation is necessary to get to a defensible NRD Settlement?



SEDIMENT SITES

- The Problem:
 - Net result can be gridlock
 - Endless study and analysis
 - One entrenched or disproportionately exposed PRP can block other settlements
 - The States or federal actors do not have the resources to defend decisions with imperfect information
- The Solution:
 - Change the scope of contribution protection



Settlements Built Around Reopeners and Limited Contribution Protection

THE PASSAIC RIVER LITIGATION



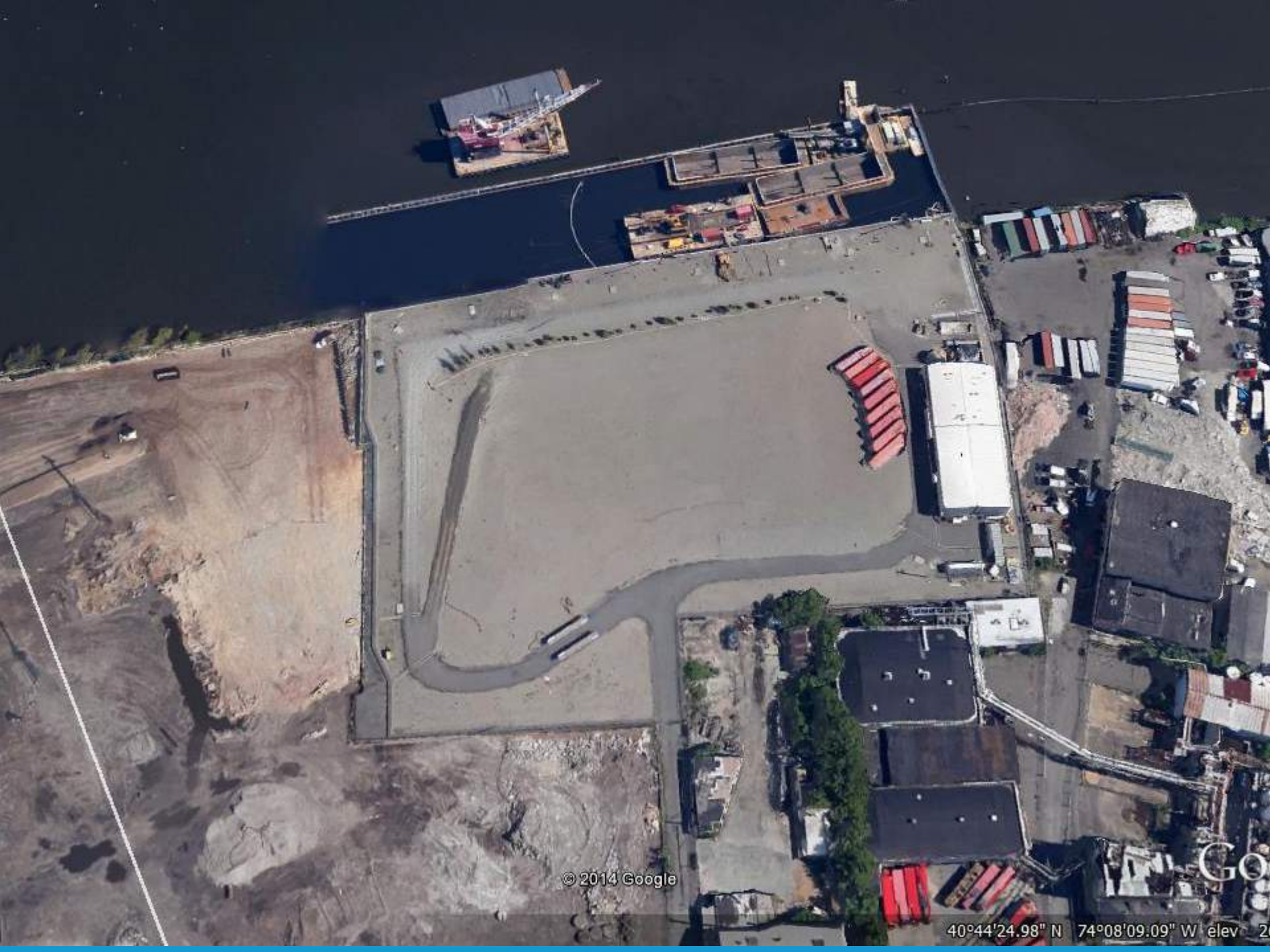
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PASSAIC RIVER NEW JERSEY









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40°44'24.98" N 74°08'09.09" W elev 2

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Legend

- Phase 1 Removal
- Phase 2 Removal
- Re navigational Channel
- VRAC Navigational Channel
- Other Sites



0 300 600 1,200 Feet

SCALE: 1" = 300'

Phases 1 and 2



DANGER!



**DO NOT CATCH!
DO NOT EAT!**

BLUE CLAW CRABS
IN THESE WATERS MAY CAUSE
CANCER

AND MAY HARM BRAIN DEVELOPMENT
IN UNDER AND YOUNG CHILDREN

PFLIGRO!



**NO LOS PESQUE!
NO LOS COMA!**

LOS CARACANOS DE TIRAZAS AZULES
EN ESTAS AGUAS PUEDEN CAUSAR
CANCER

Y PUEDEN AFECTAR EL DESARROLLO
CEREBRAL EN NIOS Y NIOS PEQUEOS

Sunday Star-Ledger

7WK12

FINAL EDITION

TODAY'S FORECAST: A beautiful day,
with lots of sunshine.



at 7 A.M.
73°

at 2 P.M.
89°

at 7 P.M.
85°

DETAILS,
PAGE 38

AUGUST 6, 2006

\$1.25

WWW.NJ.COM

THE NEWSPAPER FOR NEW JERSEY

As dioxin spreads through state waterways, the DEP accuses
two firms of intentionally avoiding a long-mandated cleanup

THE LONG, POISONOUS WAIT



ED MURRAY/THE STAR-LEDGER

Richard Jack, left, and Andrew Willner of New York-New Jersey Baykeeper waded into the Passaic River, which has been tainted with dioxin. Signs, right, in Riverbank Park in Kearny warn people not to eat crabs from the river.

BY ALEXANDER LANE
STAR-LEDGER STAFF

In 1992, a New Jersey appellate court handed down a famously scathing opinion.

For almost two decades ending in 1969, a three-judge panel found, the Diamond Shamrock Chemicals Co. had rel-

stepped up complaints that the companies' studies are scientifically unsound, and have been carefully designed to help the companies avoid the potential \$1 billion cost of removing their toxic waste from the river. They say federal officials, under intense pressure from lobbyists, have allowed the companies to postpone a cleanup perhaps indefinitely, and structure it so taxpayers will shoulder much of



Ironbound, is covered in cement now, and topped with not-

STATE'S 2005 DIRECTIVE & LITIGATION

- Source Control Dredge Plan and Directive
- Litigation against Diamond-Related Entities and Parent Companies seeking:
 - Past Costs under Spill Act
 - Declaratory Relief for Future Costs under Spill Act
 - Economic, Disgorgement and Punitive Damages
 - NRD Assessment Costs
 - Fraudulent Transfer and Alter Ego Claims
 - Attorneys Fees and Litigation Costs
- NRD Claims and Third-Party Claims were Reserved



FOCUSED FEASIBILITY STUDY

- On April 10, 2014, the EPA FFS Remedy Released
- One of the largest Superfund remedies proposed
- Bank-to-bank dredging of the lower 8-miles
- Depths incorporate flooding impacts and navigational uses
- 4 Million cubic yards of contaminated sediments to be dredged, pressed, dried and shipped out of State for disposal
- Accompanied by a 2-foot cap of the river bottom
- Estimated to cost \$1.7 Billion ++



Reprinted from

The New York Times

Opinion

April 15, 2014

A Cleanup Plan for a Toxic River

By THE EDITORIAL BOARD

The inventory of pollutants at the bottom of the Passaic River, which meanders for 90 miles through northern New Jersey, is long and truly frightening. More than a century of industrial activity has deposited PCBs, pesticides and other contaminants into sediment that, in some places, is 15 feet deep. Among the worst of the poisons is dioxin, generated in part by a plant in Newark that produced Agent Orange and other deadly pesticides during the 1960s.

Now, after years of study, the Environmental Protection Agency has proposed a cleanup plan for a dangerously fetid eight-mile stretch from Belleville to Newark. This will be no small task. The agency calls it the largest cleanup in the 33-year history of the federal Superfund law, with a projected cost of \$1.7 billion that puts it in roughly the same range as General Electric's cleanup of the PCB's in the upper Hudson River.

The E.P.A.'s plan is ambitious, necessary, long overdue and definitely good news for those who believe that humans should again enjoy this once-thriving waterway. It also shows that Superfund, in which

Congress has shown steadily declining interest, still matters when it comes to the long and difficult battle against industrial leftovers. The cleanup has bipartisan support in New Jersey, including from Gov. Chris Christie, a Republican, and Democratic members of Congress.

If approved, after a 60-day public comment period, the project would involve bank-to-bank dredging to remove 4.3 million cubic yards of contaminated sediment, after which the river bed would be capped. The task would take at least five years, and — according to Judith Enck, the agency's regional administrator — it would mean excavating enough contaminated mud to fill New Jersey's MetLife Stadium, twice over.

Under the law, so-called responsible parties — companies that polluted the river — will be required to foot the bill. These include corporations like Honeywell International, Pfizer, Tiffany and others that either polluted the river themselves or acquired companies that did so in the past.

Needless to say, some of the companies are not pleased. One group of 67 companies calling themselves

the Cooperating Parties Group has complained that the federal plan would take decades, not five years, would disrupt commercial activity and deny public access to the river. The group's alternative plan is to clean "hot" spots along 17 miles of the river, a plan that E.P.A. finds insufficient to remedy the most polluted areas downstream.

Company representatives have also suggested a fish exchange — a program that would allow people to swap contaminated fish caught in the Passaic for healthy ones. (Catching crabs in parts of the lower river is prohibited, and people are warned not to eat the fish they catch.)

Instead of proposing such diversions as fish swaps, the cooperating companies should face up to their full responsibilities. Meanwhile, the E.P.A. should step up its efforts to identify other businesses that appear to be hiding from their duty to clean up the mess left by their predecessors. It is well past time to rehabilitate one of America's oldest industrial dumping grounds.

NRD Credit Mechanisms and other methods to Encourage
Early Restoration

THE THIRD-PARTY SETTLEMENT



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THE PASSAIC THIRD-PARTY ISSUES

- NRD and Third-Party Claims were reserved
- Limited scope of information on Third-Parties
- NRD for the Passaic and NBC not yet assessed
 - No “Denominator”
- No Allocation for remediation, much less NRD
 - No “Numerator”
- FFS not yet issued: LONG time horizon
- Per capita settlements with 265 Third-Parties Defendants (\$195,000/\$95,000)



PARTIAL SETTLEMENT CREDIT

- Aprx. \$7 Million applied to NRD
- Covenant Not to Sue; reopener triggered on:
 - A formal NRD Assessment has been completed under applicable law or regulations,
 - A trustee determination of Settling Third-Party Defendants' liability for Natural Resource Damages; and
 - The collective liability established of all Settling Third-Party Defendants for Natural Resource Damages exceeds \$7 Million (twenty percent (20%) of the Settlement Funds).



LIMITED SCOPE OF CONTRIBUTION PROTECTION

- The State provided protection to the Settling Third-Party Defendants from contribution claims for Natural Resources Damages sought under applicable state and federal law up to the amounts collectively paid
- 20% of Settlement Value (Aprx. \$7 Million)
- Avoids pro tanto problem of giving non-settling defendants standing to challenge
- Removed the leverage of the hold outs
- Set the stage for resolution of the entire case



RESULTS OF THE STATE'S LITIGATION

- Following settlement with 300 Third-Party Defendants
- \$130M Settlement with Repsol/YPF/Maxus Parties
- \$190M Settlement with Occidental Chemical Corp.
- Together, the three settlements resulted in:
 - **\$355.4 Million** in Past Costs & Damages
 - **\$67.5 Million** in Local Restoration Projects
 - **\$400 Million** in protection against State FFS Costs
 - **Hundreds of Millions** in anticipated Economic Activity
 - Protection and reopeners for all other future State costs subject to OCC Motion for Summary Judgment
- An unqualified victory for the State and public



An Opportunity for Economic Revival & Environmental
Restoration

WHY SETTLE FOR CREDITS AND ESCALATORS?



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PUBLIC BENEFITS OF EARLY RESTORATION

- Early Ecological Restoration
 - Cuts the Injury Chain
 - Ecological Restoration and Services Recovery
 - Restoring the Resource IS the priority
- Investment in Human Use Projects
 - Direct and Indirect Economic Activity
 - Multipliers in the Economy
 - Induced Economic Activity and Regional Economic Revitalization
- Interest & Discount Rates



ADVANTAGES TO RESPONSIBLE PARTIES

- Early resolution cuts off service losses and the compounding rate of growth (mitigates damages).
- Moreover, early restoration projects have more value to PRPs because of the time value of money:
 - create additional rates of return either in terms of DSAYs for ecological projects; or
 - in terms of direct and indirect economic activity and induced effects in the economy.
- Avoids huge transactional costs
- **Allows for partial (or total) resolution with imperfect information and a compounding ROR**



An Opportunity for Economic Revival

RESTORATION OF THE PASSAIC



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BRIDGE BETWEEN ENVIRONMENT AND THE ECONOMY

- Direct link between the economy and the environment in the river, bay and port cases
- Beneficial impacts on local political bodies and the local community reaction to the Passaic
 - Surveyed local governments and communities
 - Evaluated future uses of the Passaic River
 - Incorporated into Remedy and Restoration Plans
- The Federal NRDA Process
- **Break the Paradigm & Act to Encourage Immediate Redevelopment and Investment**







12-3 pm

park at Raymond Blvd and Somme St and walk to left towards the big orange sticks.

NEWARK RIVERFRONT ORANGE PARTY JUNE 14, 2014

GRATIS Y ABIERTO
AL PÚBLICO
GRÁTIS E ABERTO
AO PÚBLICO
FREE & OPEN TO
THE PUBLIC

COME DOWN NECK & WEAR ORANGE TO
CELEBRATE NEWARK'S NEW ORANGE BOARDWALK!

On Saturday, June 14, come connect with your river at the Third Annual Newark Walks to the Water & River Day!

10 am Walk to the Water meets at City Hall front steps, 920 Broad Street, to walk with the Malcolm X. Shabazz Marching Band and others to the water's edge.

12:30 pm Orange Party at Orange Sticks with fun & free activities for all ages including boat rides, demonstrations of Capoeira, Double Dutch, Zumba and yoga, arts & crafts, facepainting, kite flying, Sewer-in-a-Suitcase and other environmental education games, a drum circle, and more!

3-5 pm River Performances featuring Newark talent & culture in dance & song!

DON'T FORGET TO WEAR ORANGE!



**NEWARK
RIVERFRONT
REVIVAL**



**National
Endowment
for the Arts**



**Friends of
Riverfront Park**

www.newarkriver.wordpress.com

To RSVP or learn more
(201) 341-8311

newarkriverfront@gmail.com
@newarkriverfrnt

Newark 2014 returns to its river!

A vibrant outdoor event at the Newark Riverfront. In the foreground, a large crowd of people, including children in traditional costumes, sits on a grassy area. In the middle ground, a group of performers in white outfits is on a stage. The background features a river, a large stadium, and a clear blue sky. The text 'Newark 2014 returns to its river!' is overlaid in large, yellow, stylized letters.

Download the full 2014 Newark
Riverfront Event Calendar!



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