

Court Approves EPA Settlement with 82 Passaic River Potentially Responsible Parties

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The Diamond Alkali Superfund site in Newark, New Jersey, which includes the 17-mile Lower Passaic River Study Area, may be one of the country's most expensive and hotly contested Superfund Sites. The remedy for the dioxin-contaminated river may cost as much as \$2 billion when it is completed. The Newark site has been the subject of litigation for years, most involving the Occidental Chemical Company (OxyChem), the successor to Diamond Alkali, which made Agent Orange and other dioxin-containing materials at the site starting in the 1940s. The latest development in this decades-long saga came on December 18, 2024, when Judge Madeline Cox Arleo of the United States District Court for the District of New Jersey [approved a consent decree](#) between the Environmental Protection Agency (EPA) and 82 potentially responsible parties (PRPs) that includes a \$150 million cash-out settlement, notwithstanding vehement opposition from OxyChem.

The Diamond Alkali site has been on the National Priorities List since 1984 after the EPA and New Jersey regulators found high levels of dioxins, pesticides, and other hazardous substances in soil and groundwater at Diamond Alkali's Newark site and in Passaic River sediments. Over the years, EPA identified OxyChem and over 100 other PRPs, all of whom were allegedly responsible for the discharge of hazardous substances to the Passaic River. While EPA has identified eight contaminants of concern (COCs) at the site, the Court found that "of those COCs, dioxin is, 'by an overwhelming margin,' the most toxic." This was a significant finding, as very few PRPs could be tied to dioxin discharges.

The EPA initiated a non-binding and voluntary allocation process in 2017 to facilitate settlements and cleanup of the river. While many PRPs agreed to participate in this effort, OxyChem declined. The parties negotiated an allocation methodology, supplied significant material (including briefs and expert reports) for consideration by a neutral, third-party allocator, reviewed Facility Data Reports for themselves and other PRPs, and commented on the Allocation Recommendation Report (the Report). The Report was then considered by EPA as it negotiated the terms of a consent decree with the PRPs. While the Report assigned the overwhelming share of responsibility for the site to OxyChem, during the consent decree negotiations, EPA took several steps which resulted in an increased share of responsibility for the PRPs, thus reducing OxyChem's potential exposure. These steps included using an alternative allocation methodology, eliminating consideration of culpability and cooperation as allocation factors, and adding a premium of 100% to estimated future costs for cash-out parties. Other revisions were made after the comment period, including removal of certain

parties from the consent decree, and adding a reopener if remedy costs exceed a certain amount.

In its 47-page decision, the District Court found that the consent decree was fair, reasonable, and furthered the Comprehensive Environmental Response, Compensation and Liability Act's (CERCLA) objectives, notwithstanding a massive challenge from OxyChem (The Court noted that OxyChem "spills ample ink" challenging the allocation in its 777 pages of comments and 24,000 pages of exhibits). The Court rejected claims that the settling parties conspired against OxyChem; the neutral had a conflict of interest; the Report was a non-binding allocation report prepared in violation of CERCLA § 122; and the consent decree was substantively unfair.

There seems to be little doubt that OxyChem will appeal, so the saga will continue. But this is an important milestone that, in the Court's words, will further the cleanup of the Passaic River.

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