

# Status of Lower Passaic River and Berry's Creek Study Area Cleanup and Litigation

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## Lower Passaic River

One of the largest and likely most expensive Superfund sites is located in New Jersey and is known as the Diamond Alkali Superfund Site. The Diamond Alkali Site includes the former Diamond Alkali manufacturing facility located at Lister Avenue in Newark, also known as Operable Unit (OU) 1, the lower 8.3 miles of the Passaic River (OU2), the full 17 miles stretch of the Passaic River known as the Lower Passaic River Study Area (LPRSA) (OU3), and the Newark Bay Study Area and extent of contamination therefrom (OU4). Given the extent of contamination and the complexities of the various portions of the site, USEPA separated the LPRSA into the OUs to be addressed separately, with separate considerations.

The initial attention of USEPA was to address contamination in the LPRSA, which originated as a result of production of DDT and other chemical products at the manufacturing facility at OU1. The facility was operated by Diamond Shamrock Chemical Company, or its predecessors in interest, which were ultimately merged into Occidental Chemical Corporation. Sampling conducted by the state of New Jersey and USEPA at and near OU1 and in the Passaic River revealed high levels of dioxin. The site was listed on the National Priority List in 1984.

The USEPA has issued general notice letters to potentially responsible parties (PRPs), that have allegedly contributed to contamination at the site. This list of PRPs includes corporations as well as the Passaic Valley Sewerage Commission, municipalities and Occidental. A subset of the PRPs, known as the Cooperating Parties Group (CPG), formed to undertake and fund substantial work required in the LPRSA.

Certain removal and interim remedial actions have been undertaken with regard to several of the OUs. For example, at OU1, pursuant to an administrative consent order, sediment adjacent to the manufacturing facility was found to have the highest levels of 2, 3, 7, 8-TCDD.

This required the removal of over 200,000 cubic yards of contaminated sediments from the river adjacent to this facility. Phase 1 of this work was completed in 2012 with the removal of 40,000 cubic yards of sediment. Phase 2, which required the removal of 160,000 cubic yards, was not undertaken and will be addressed as part of the remedy for OU2.

In 2014, at River Mile 10.9, a removal action was undertaken to dredge and cap contaminated material at a mudflat near Lyndhurst. The CPG undertook and completed the 10.9 Removal Action and has been undertaking the remedial investigation/feasibility study for OU3.

With regard to OU2, USEPA developed a focused feasibility study for the lower 8.3 miles of the river. Thereafter, USEPA issued a record of decision on March 4, 2016, which selected a remedy for the sediments of OU2, that includes an engineer cap and removal of approximately 3.5 million cubic yards of contaminated sediment from the lower 8.3 miles to address eight contaminants of concern (COCs). The estimated cost of this remedy is \$1.38 billion. Occidental has agreed to perform the design for the OU2 remedy.

There are a number of complicating issues surrounding the remediation of the LPRSA, including the bankruptcy of Tierra Solutions, Inc. and Maxus Energy Corporation, Occidental's indemnitors. Additionally, the state of New Jersey initiated litigation in the matter known as *New Jersey Department of Environmental Protection v. Occidental Corporation*.<sup>1</sup> Thereafter, USEPA entered into settlement agreements with a limited number of PRPs who are alleged to have a limited nexus to the release of COCs for OU2. Additionally, USEPA initiated an allocation process as part of its proposed settlement framework for implementation of the OU2 remedy. A limited number of PRPs were invited to participate in that allocation process, which is currently ongoing.

Finally, in July 2018, Occidental filed a lawsuit in the U.S. District Court for the District of New Jersey against

approximately 120 defendants seeking contribution and costs recovery of various costs it alleges it incurred related to the actions in the LPRSA under CERCLA.

### **Berry's Creek Study Area**

In addition to the Lower Passaic River cleanup, another extensive and expensive cleanup in New Jersey is at the Ventron/Velsicol Superfund Site. The Ventron/Velsicol Site is located in the boroughs of Wood-Ridge and Carlstadt. OU1 of the Ventron/Velsicol Site consists of the upland portion of the site where several companies (FW Burke & Company, Inc.; Woodridge Chemical Corp.; Velsicol Chemical Corporation and Ventron Corporation) operated a mercury processing facility from 1929 until 1974, as well as surrounding properties. The site underwent a remedial investigation and feasibility study and the record of decision (ROD) for OU1 was executed on Oct. 30, 2006. Site preparations for construction of the OU1 remedy began in 2008 and were completed by Dec. 2010. The first five-year review for the OU1 remedy was issued on Sept. 25, 2017.

USEPA determined that contamination occurred not only to on-site soils and groundwater but to off-site sediments and surface water as well. The Ventron/Velsicol Site's off-site areas include the Berry's Creek Study Area (BCSA) referred to as OU2. BCSA is a vast watershed area, which feeds into the Newark Bay via the Hackensack River. The BCSA is divided into a number of areas including Upper Berry's Creek (UBC), Middle Berry's Creek (MBC) and major tributaries, which include Peach Island Creek and Ackermans Creek.

BCSA will be remediated in a phased approach starting with areas of high contaminant concentrations and areas considered the source of downstream contamination. In Sept. 2018, the USEPA issued the ROD for an interim action for the BCSA. The USEPA has identified a number of areas where there is contaminated waterway sediment, which continues to move downstream to other areas of the BCSA. By addressing the source area contained in the waterways as well as the Upper Peach Island Creek (UPIC) Marsh, it will remove the high concentrations of contaminants within the sediments and significantly reduce the spreading of the contaminants downstream. The contaminants of concern for this interim action are polychlorinated biphenyls (PCBs), mercury, methylmercury and chromium. The ROD proposes long-term monitoring to evaluate the overall effectiveness of this cleanup effort. The estimated pres-

ent value of the 30-year interim remedy is \$332 million and consists of the removal of 432,500 cubic feet of sediment, which will be replaced with backfill to isolate any remaining contaminated sediments.

It is expected that additional remedies will be sought in the future, including a final remedy on the sediments in UBC and MBC, as well as remedies for the marshes, Lower Berry's Creek and Berry's Creek Canal.

### **Common Insurance Coverage Issues**

Separate and apart from the Lower Passaic River and BCSA cleanup issues, and Lower Passaic River litigation issues, are the associated insurance coverage issues, which have spawned their own litigation. A critical factor is the large time span (early 1900s through 1986 for Lower Passaic River and 1929 through 1986 for BCSA) during which potential coverage may be triggered. The fact that coverage in the early 1900s may be implicated undoubtedly results in lost or missing policies issues and whether the insured or insurer has the burden of establishing the issuance of policies and the policies' terms and exclusions, and whether such burden is satisfied. Additionally, coverage questions revolve around what types of coverage are triggered (*i.e.*, general liability, environmental impairment liability, or pollution liability policies), and which state's law should be applied.

There are a number of potential defenses and exclusions to be considered as well: the number of occurrences; various types of pollution exclusions; the owned property exclusion; and whether the costs claimed should be characterized as defense costs versus indemnity costs. Once the coverage block has been established, the most litigated issue then becomes the appropriate allocation of coverage over the period of exposure. This involves consideration of uninsured policy periods, insolvent insurers, SIRs/deductibles, impairment/exhaustion of limits, and concurrent coverage.

Given the costs expended, and/or estimated costs to be expended, by USEPA and private parties thus far for OU1, OU2, and OU3 of the Lower Passaic River, and the cleanup estimate for OU2 of BCSA, and future costs to address the entire Diamond Alkali and Ventron/Velsicol Superfund Sites, the only certainty is that litigation, both as to liability and coverage, will likely continue for years to come. ■

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## Endnote

1. Docket No.: ESX-L-9698-05 (PASR) (N.J. Super. Ct.).