

NRD SETTLEMENTS AND CREDIT MECHANISMS: *THE PASSAIC RIVER EXAMPLE*



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Joint & Several Liability Concerns Drive the Analysis

THE CERCLA SETTLEMENT STANDARD OF REVIEW



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 (and New Jersey Spill Act) 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



NRD SETTLEMENTS

- 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 NRD Assessment, Quantification and Allocation is necessary to get to a defensible NRD Settlement?**



COMPLEX SYSTEMS AND NRD ASSESSMENTS

- 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



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).
- So ... change the scope of Contribution Protection

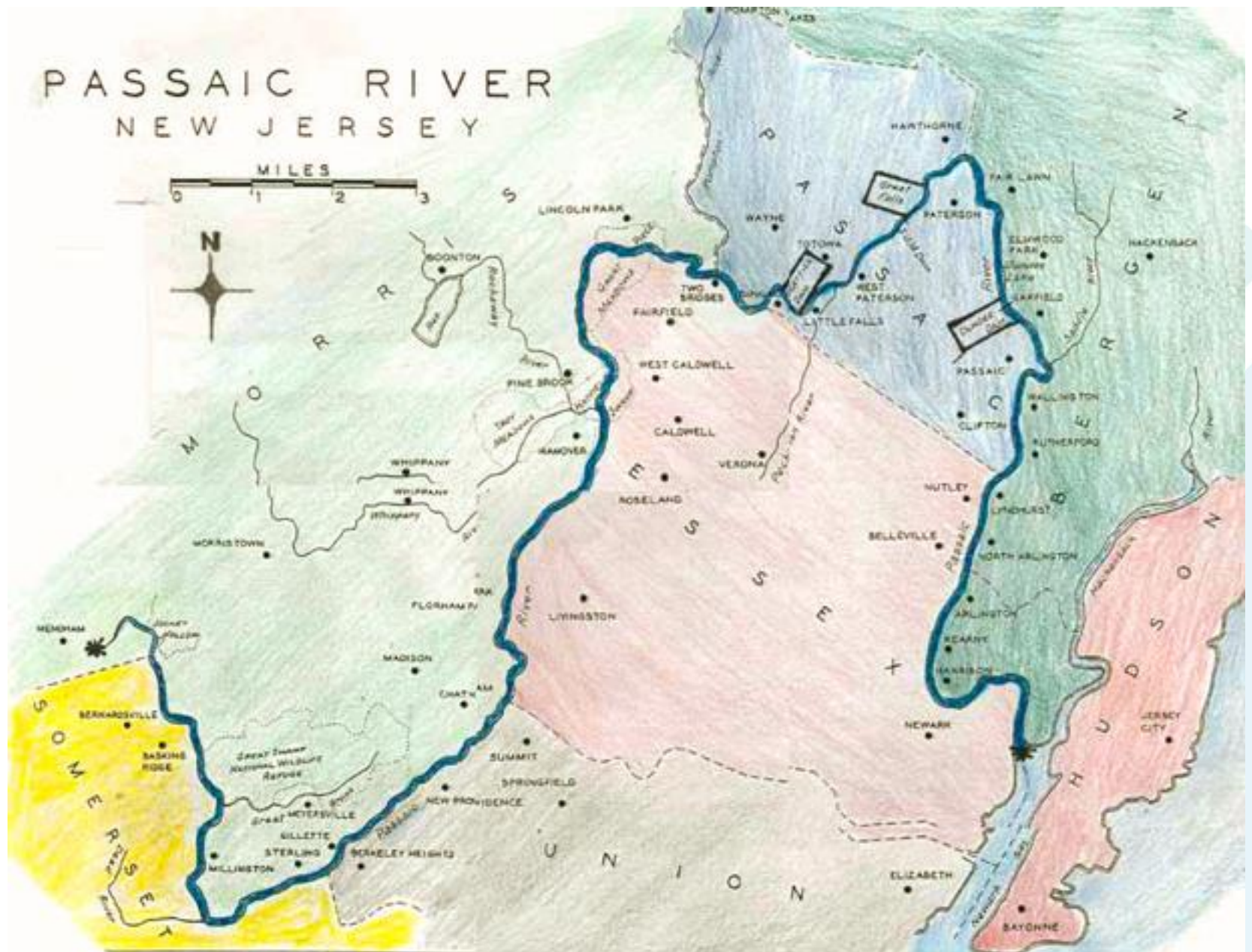


*New Jersey Department of Environmental Protection, et al. v.
Occidental Chemical Corporation, et al.*

THE PASSAIC RIVER LITIGATION



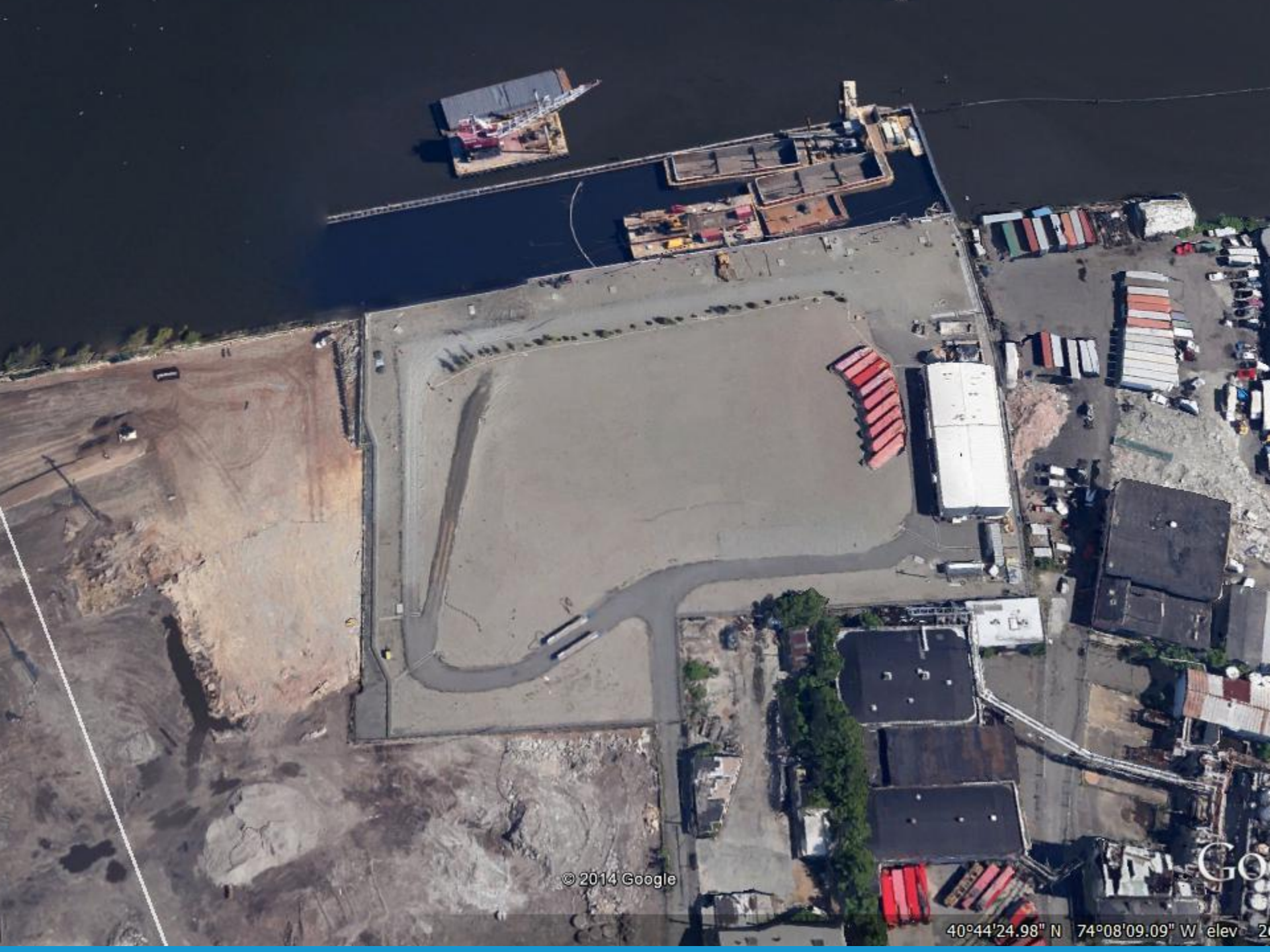
PASSAIC RIVER NEW JERSEY







EXCLUSION ZONE



© 2014 Google

40°44'24.98" N 74°08'09.09" W elev 2

10-29-76

5-50

GS-VDUW

“WHEREAS, the **potential threat [of the dioxins] is of such magnitude** that the coordinated efforts of local, regional and State agencies must be taken immediately to insure the protection of the public health and welfare.... I, Thomas H. Kean, Governor of the State of New Jersey ... **do hereby declare a state of emergency.**” Executive Order 40, June 1, 1983.

THE EFFORTS TO STRAND THE LIABILITIES



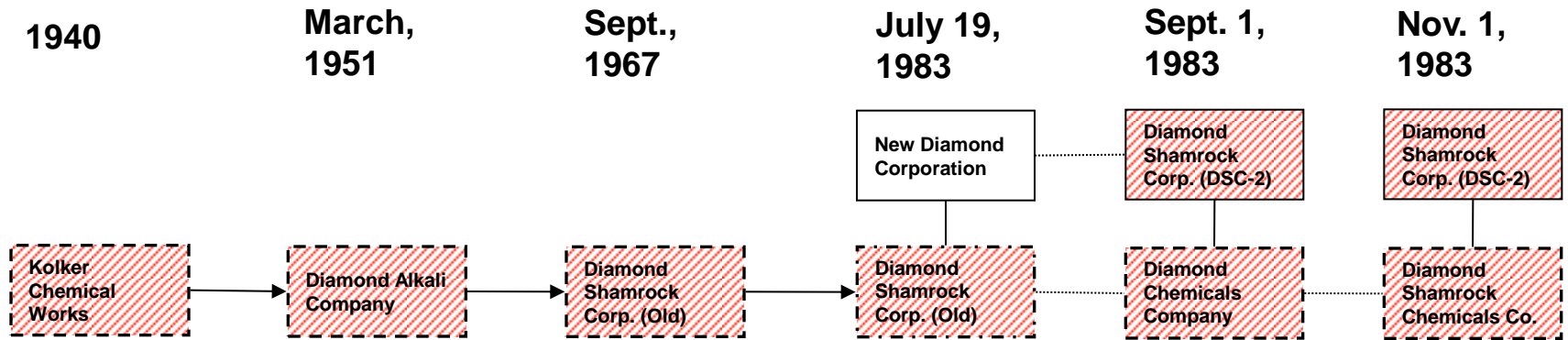
THE DEFENDANTS SEE THE PROBLEM....

- Internal documents reveal that the defendants understood the size and scope of the problem
- Estimated billions for the remediation of river
- Decided in the 1980's to
 - “Own the Science” of dioxins
 - Co-opt the EPA process
 - Deploy “Smoke Screen” of pointing at third-parties
- July 19, 1983 – create new parent company
- 1984-87 – Corporate restructurings to isolate liabilities
- 1992 – Lose insurance coverage case (1993 Supreme Court)
- 1995-98 – Move key oil & gas assets overseas



Plaintiffs' Second Amended Complaint

Alleged History of Lister Site Ownership & Corporate Structure: 1940 - 1983



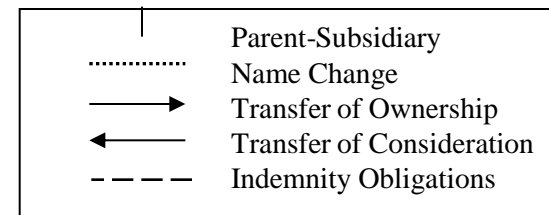
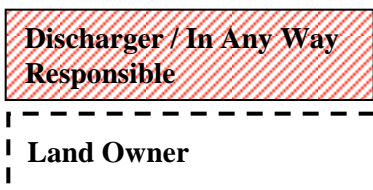
Production Era



June 1, 1983: Executive Order 40

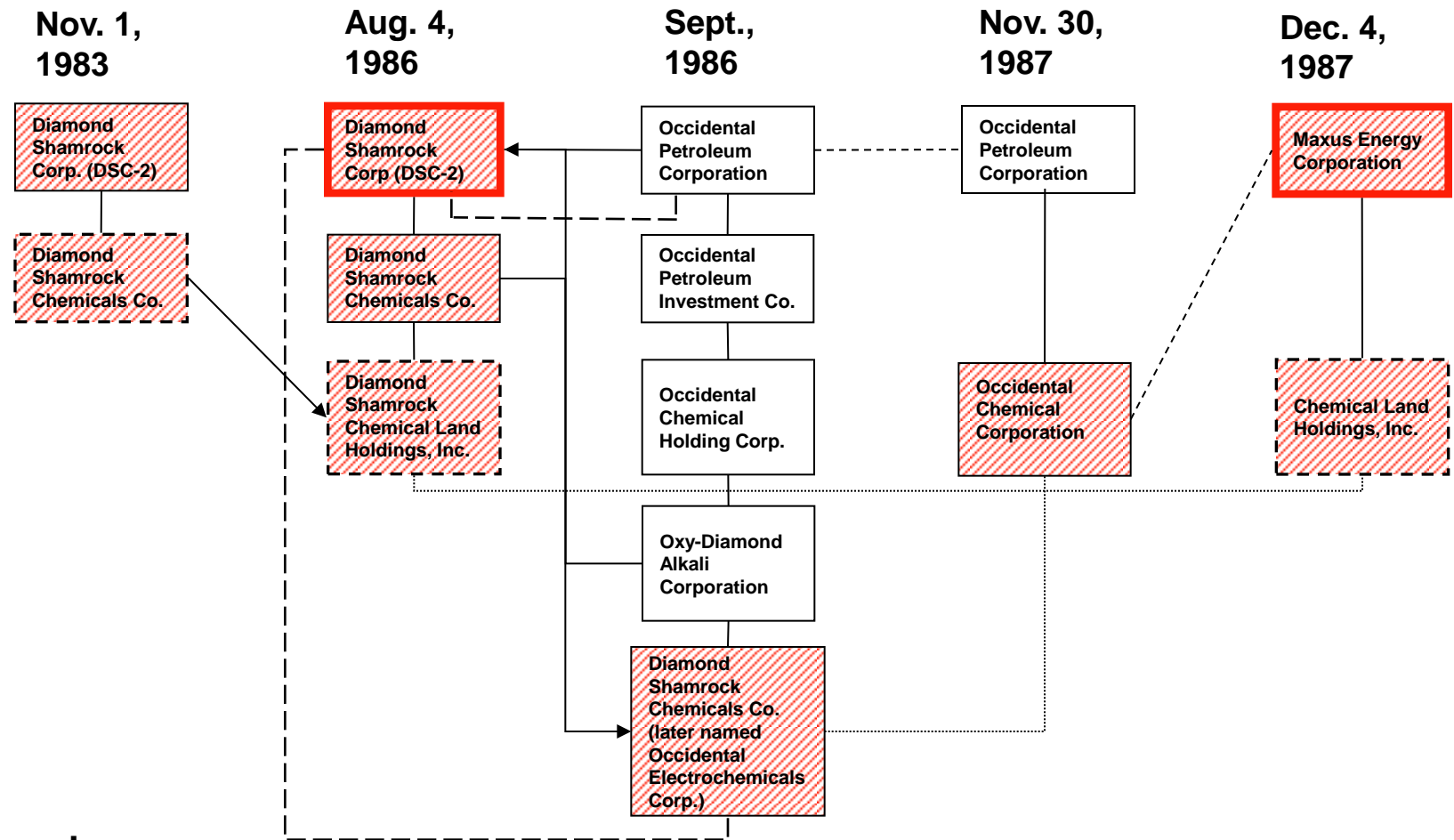
Discharges

Legend



Plaintiffs' Second Amended Complaint

Alleged History of Lister Site Ownership & Corporate Structure: 1983 – 1987



Legend

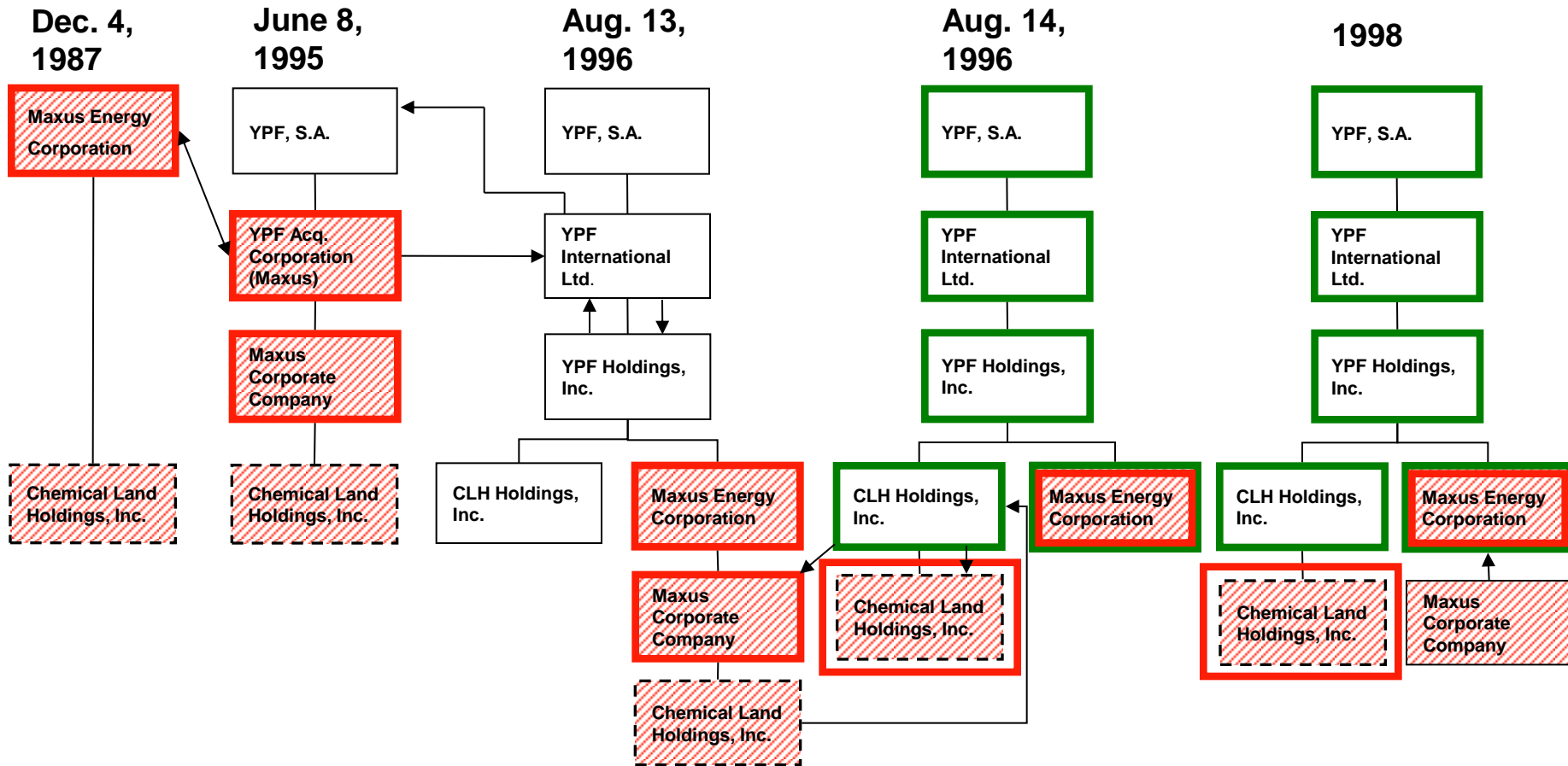
- Discharger / In Any Way Responsible
- Land Owner

Contractual Assumption of Environmental Liabilities

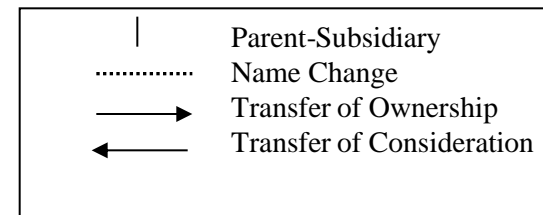
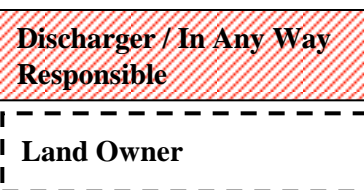
- |— Parent-Subsidiary
- Name Change
- Transfer of Ownership
- ← Transfer of Consideration
- - - Indemnity Obligations

Plaintiffs' Second Amended Complaint

Alleged History of Lister Site Ownership & Corporate Structure: 1987 – 1998

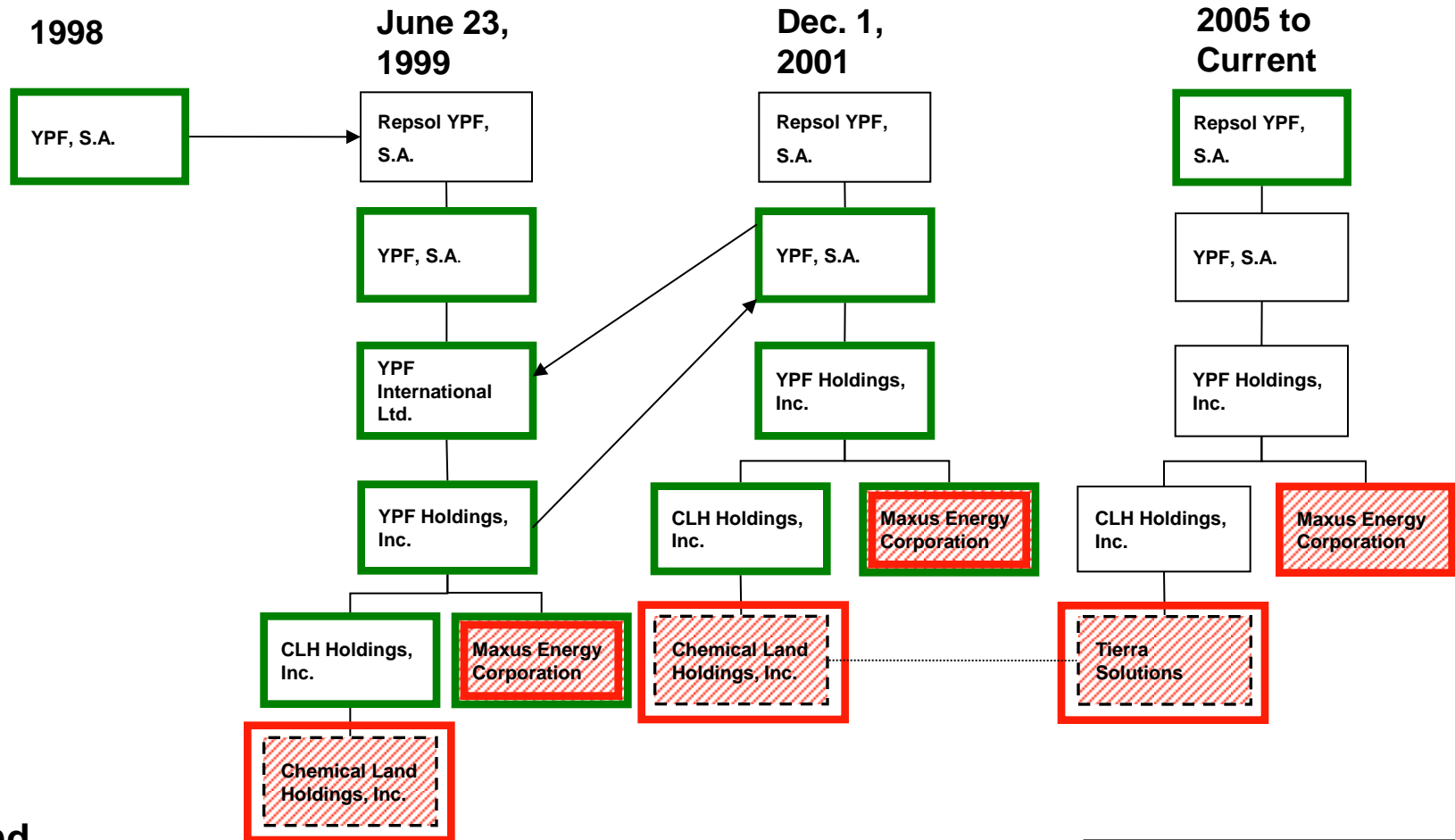


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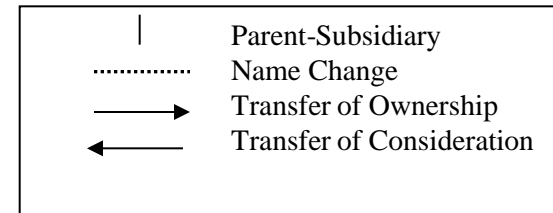
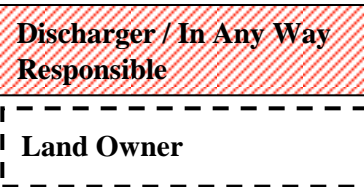


Plaintiffs' Second Amended Complaint

Alleged History of Lister Site Ownership & Corporate Structure: 1998 – Current



Legend



Focusing on the Risk

THE STATE DECIDES TO ACT



Sunday Star-Ledger

7WX12

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 pot-

STATE'S 2005 DIRECTIVE & LITIGATION

- Source Control Dredge Plan & Directive
- NJDEP filed Litigation against Diamond Entities and Parent Companies seeking:
 - Past Costs
 - Declaratory Relief for Future State Costs
 - Economic Damages
 - Disgorgement and Punitive Damages
 - NRD Assessment Costs
 - Fraudulent Transfers & Alter Ego Findings
 - Attorneys Fees and Litigation Costs



KEY LITIGATION BATTLES & MILESTONES

- Removal based upon Federal Preemption
- Federal Court Motions to Dismiss the State's Claims
- Motions to Dismiss for Lack of Personal Jurisdiction
- State Court Motions to Dismiss the State's Claims
- Joinder of 300 Third-Parties
 - State's Claims against Third-Parties Reserved
 - State's Claims for Natural Resource Damages Reserved
- Attempts to kill the State's litigation
 - Political Pressures & Tactics
 - Third-Party Practice
- Argentina's Repatriation of YPF & the Foreign Sovereign Immunities Act Issues



DEFENDANTS POURED RESOURCES & LAWYERS INTO THE LITIGATION

First-Tier Defendants

- Andrews & Kurth
- Vinson & Elkins
- Drinker Biddle & Reath

- Archer & Greiner
- Gable Gotwals
- Munger, Tolles & Olson

Foreign Parent Companies

- Bracewell & Guiliani
- Greenbaum, Rowe, Smith & Davis
- DLA Piper
- Kirkland & Ellis
- Weil Gotshal & Manges
- Chadbourne & Parke



THE STATE'S APPROACH

- Discovery & Privilege Battles
 - 35,000 **Page** Privilege Log
 - Experts & Publications to “Own the Science”
 - “Common Interests” of the Foreign Defendants
- Dismiss the Counterclaims against the State
- Summary Judgment Against OCC
- Summary Judgment Against Tierra
- Summary Judgment Against Maxus
- Neutralize the Third-Parties: Contribution Protection
- Amazing Expert Team
- Creative Damages Models



SETTLEMENT OF THE PASSAIC RIVER LITIGATION



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NRD Credit Mechanisms and other methods to Encourage
Early Restoration

THE THIRD-PARTY SETTLEMENT



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 for NRD with reopener:
 - 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

- “Matters Addressed” for the purpose of providing protection to the Settling Third-Party Defendants from contribution claims for Natural Resources Damages sought under applicable state and federal law is 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
- Encouraged Maxus/Repsol/YPF \$130 Million Settlement and another \$10 Million in Restoration Funds



An Opportunity for Economic Revival & Environmental
Restoration

WHY SETTLE FOR CREDITS AND ESCALATORS?



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



THE DOMINOES FALL...

- Settlement with 300 Third-Party Defendants ('13)
- Settlement with Repsol/YPF/Maxus Parties ('13)
 - \$130 Million from Repsol and YPF for all past costs
 - \$10 Million in NRD down payment/restoration
 - High/Low concept, the indemnities, and intentional conduct
- OCC Loses Challenges to Settlements at both the Trial Court & Appellate Divisions (facing November 2014 Trial Date)
- Settlement with OCC ('14)
 - \$190 Million in Damages
 - \$50 Million in NRD Restoration Projects
 - Up to \$400 Million in protection against State FFS Costs
- Hundreds of Millions in anticipated Economic Activity



April 10, 2014

THE REMEDY



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FOCUSED FEASIBILITY STUDY

- On April 10, 2014, the EPA FFS Remedy Released
- One of the largest Superfund remedies ever proposed
- Bank-to-bank dredging of the lower 8-miles
- Depths determined by 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 \$1.4 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.

An Opportunity for Economic Revival

RESTORATION OF THE PASSAIC



JACKSON GILMOUR & DOBBS, PC

BRIDGE BETWEEN ENVIRONMENT AND THE ECONOMY

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



Passaic Riverfront Park



NJ PAC

Phase II
Acquisition of 11.5 ac
of Additional Parkland

Phase III
Parkland Development
of 11.5 ac

Phase IV
Park Acquisition &
Development
West of Jackson St.

Phase I
Parkland Development
of 8.5 ac

Legend

Passaic Riverfront Park



-  Priority Land Acquisition Area
-  Future Passaic Riverfront
-  Existing Open & Public Space

Passaic Riverfront Park

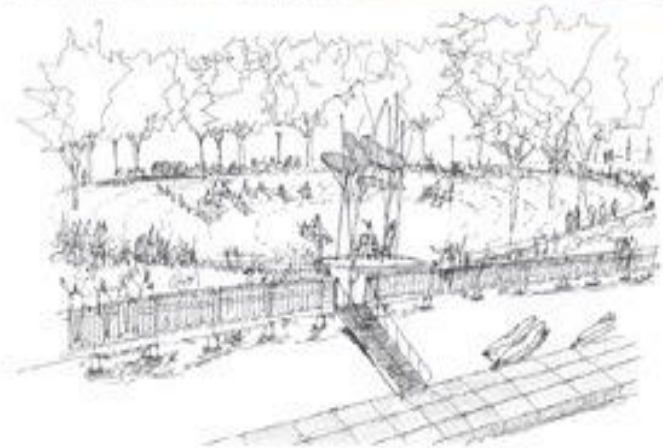
Priority Acquisition Properties

- 1) Palmer Industries Inc. (3.57 Acres)
Block 2442, Lot 3
3.57 Acres
- 2) ORFAC Property Management (2.32 Acres)
Block 2442, Lot 2
2.32 Acres
- 3) RAR Development (5.53 Acres)
Block 2473, Lots 1 & 2
Block 2025, Lot 20
Block 2473.01, Lot 4

Legend

-  Tax Parcels
-  Existing Open Space





PICNIC LAWN, PERFORMANCE PAVILION, BOARDWALK, AND FLOATING BOAT DOCK



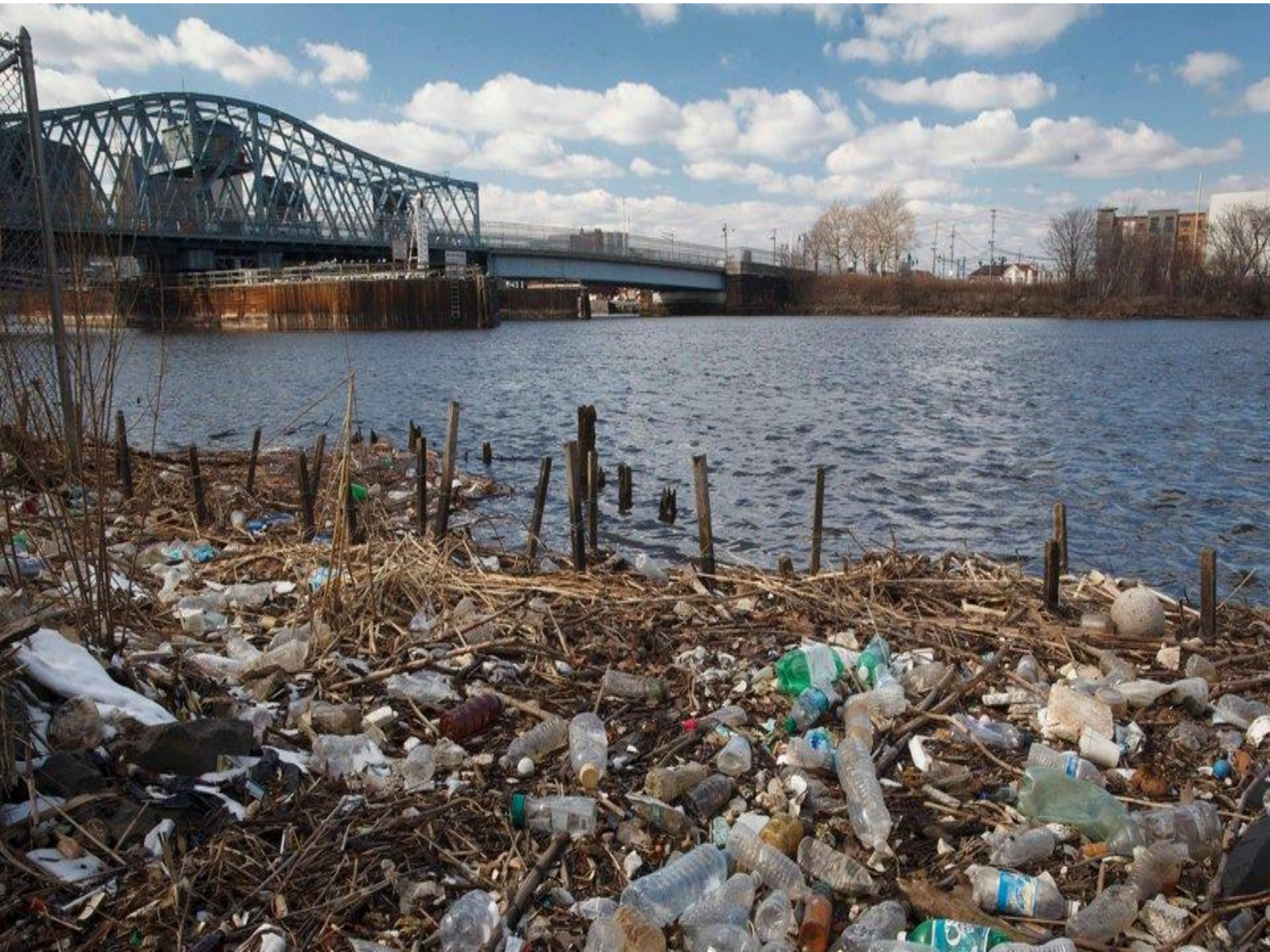
OVERLOOK AND OSPREY ROOK











Newark 2014 returns to its river!



Download the full 2014 Newark
Riverfront Event Calendar!

NORTH
WARD
WALKS
TO THE WATER

CENTRAL
WARD
WALKS
TO THE WATER

UNION
EST

WATER FOR AMERICA
ON 10











A photograph of three people practicing yoga in a grassy park meadow. On the left, a man with a white beard and a white turban sits in a meditative pose on a blue mat. In the center, a woman in a red long-sleeved shirt and black pants sits on a blue mat. On the right, a woman in a black and white patterned tank top and black pants sits on a pink mat. The background features a line of trees, several tall stadium-style light poles, and a clear blue sky with light clouds. The overall scene is peaceful and outdoorsy.

RIVERFRONT YOGA

MONDAYS 6-7PM AT THE
RIVERFRONT PARK MEADOW WITH
NEWARK YOGA MOVEMENT!

NEWARK PADDLE DAYS 2015

KAYAK ON THE PASSAIC RIVER

SUN, JULY 19TH @ 10AM

SAT, AUG. 8TH @ 10AM

FREE RESERVATIONS CONTACT: (201) 341-8311 OR
NEWARKBOATTOURS@GMAIL.COM

18+

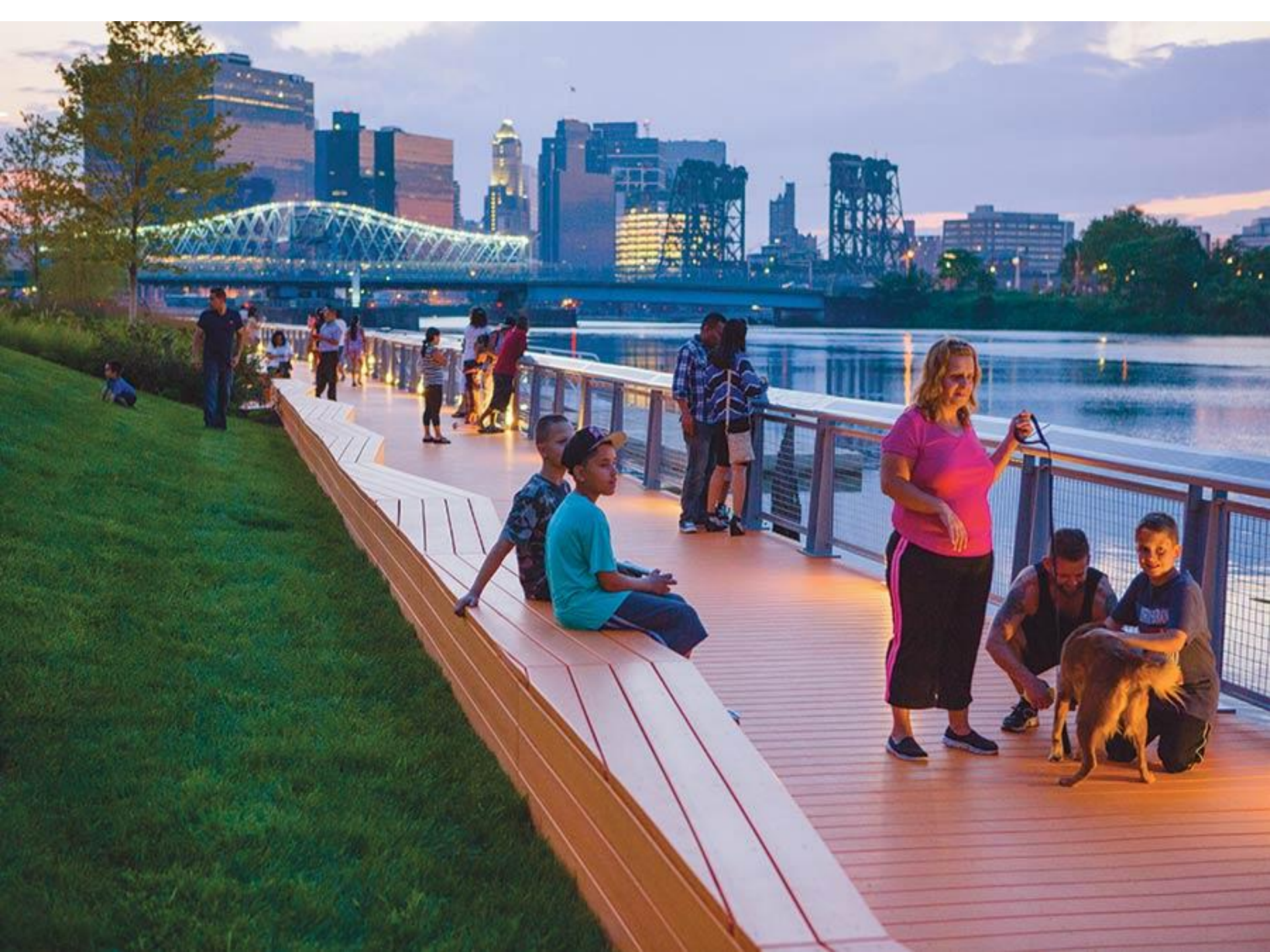


NEWARK
RIVERFRONT
REVIVAL



NEWARK
RIVERFRONT
REVIVAL





2015: NEWARK RIVERFRONT PARK IS HONORED WITH THE EPA SMART GROWTH AWARD

- Award given annually for creative, sustainable initiatives that better protect the health and environment of our communities while strengthening local economies.
- The 2015 award is presented to projects in three categories: Plazas, Parks, and Public Places; Corridor or Neighborhood Revitalization; and Built Projects.
- Riverfront Park was honored in the **Category: Plazas, Parks, and Public Places**



2015 EPA AWARD FOR RIVERFRONT PARK

“Riverfront Park fulfills a decades-long movement to reclaim the Passaic riverfront for the people of Newark, N.J. Situated on the cleaned-up site of a former metal smelting plant, the park provides Newark’s **only public access to the river and outdoor recreational space** for a neighborhood where the amount of green space dedicated for use as parks is far below the national average. The 19-acre park is the result of a public engagement process that included more than 6,000 people. It is expected to attract new economic development, particularly to downtown Newark, and will eventually be part of a string of riverfront parks and trails that will stretch for five miles.”



Work Begins On \$8M Newark Waterfront Park Project Near Passaic River (October 11, 2016 Expansion)

Newark's Riverfront Park will have a boardwalk, walkway system, a fitness zone, an overlook with seating and a bikeway, officials say.



