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Sediment Update: A Summary of the Procedural Status of a Collection of Sites

By Mark Myers, Drew Pearsall, Brian Freeman, and Megan Baroni – July 23, 2015

Contaminated sediment sites are a lightning rod for lengthy investigation and expensive remediation. Based on the size and scope of these sites, they are ripe for litigation with multiparty involvement. This article summarizes the procedural status of a number of important sediment sites around the country.

Lower Duwamish

Flowing through an industrial corridor south of Seattle, the lower five miles of the Duwamish River (Lower Duwamish) were designated a federal Superfund site and listed on the National Priorities List by the United States Environmental Protection Agency (EPA) in September 2001. The Lower Duwamish was also listed by the Washington Department of Ecology as a cleanup site under Washington's Model Toxics Control Act in 2002. The listing was based on the presence of volatile organic compound (VOC) plumes, polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (cPAHs), arsenic, and other metals in the Lower Duwamish.

Subsequently, the EPA and the Washington Department of Ecology entered into a memorandum of understanding identifying the EPA as the lead agency for in-waterway cleanup actions and the Washington Department of Ecology as the lead agency for upland pollution source control. After nine years of monitoring and testing, the Remedial Investigation Report was issued in 2010, followed by the release of the feasibility study in 2012. In 2013, the EPA released its proposed cleanup plan, which received more than 2,300 public comments. Finally, in December 2014, the EPA released its record of decision (ROD) identifying in detail the cleanup plan for the Lower Duwamish.

The ROD outlines a plan that is expected to cost \$342,000,000 and that, combined with upland pollution source control activities, will result in the removal of 90 percent of the pollution found in the Lower Duwamish. Specifically, the ROD calls for the following remediation activities to accomplish this goal:

- active remediation on 177 acres of the 441-acre Superfund site;
- 105 acres of dredging leading to the removal of approximately 960,000 cubic yards of material;
- 24 acres of sediment caps to be placed throughout the Lower Duwamish where there exists sufficient depth for a cap;
- 48 acres of enhanced natural recovery through the placement of six to nine inches of clean material (sand) on the sediment; and
- 235 acres of monitored natural recovery whereby contamination levels are expected to be reduced over time through the migration of cleaner upstream sediment.

The Lower Duwamish Waterway Group—consisting of the City of Seattle, King County, the Port of Seattle, and Boeing—entered into an administrative consent order with the EPA and the Washington Department of Ecology in December 2000 and will be the primary entities responsible for implementing the cleanup.

Currently, there is no pending litigation regarding the Lower Duwamish cleanup. Cleanup actions identified in the EPA's ROD are expected to commence in the near future and are expected to last until 2030.

Portland Harbor

Situated near downtown Portland, Oregon, a 10-mile portion of the Willamette River was designated a federal Superfund site and listed on the National Priorities List by the EPA in December 2000. Known as Portland Harbor, the site extends from river mile 2 near Sauvie Island to river mile 11.8 near the Broadway Bridge. The basis for the listing pertains to the existence of heavy metals (including lead, zinc, copper, arsenic, and cadmium), PCBs, cPAHs, dioxins, and pesticides (including DDT) being found in the Willamette River.

The EPA and the Oregon Department of Environmental Quality (DEQ) have entered an agreement regarding cleanup actions along Portland Harbor that makes the EPA the lead agency for in-water cleanup actions while DEQ is the lead agency for upland source cleanup actions. However, both the EPA and DEQ work with six local tribal governments and the Portland Harbor Natural Resource Trustee Council to help formulate a cleanup plan. After years of monitoring and testing, the Draft Final Remedial Investigation Report (part of the Remedial Investigation/Feasibility Study (RI/FS)) was released in August 2011. A proposed cleanup plan was expected to follow in 2014 but has been delayed. The EPA now expects to release its proposed cleanup plan for Portland Harbor in 2016. Currently, there is no specific time table set for the EPA to release its ROD.

In August 2014, the Lower Willamette Group, a group of potentially responsible parties (PRPs) that have agreed to either conduct the RI/FS or contribute financially, challenged section 7 of the EPA's draft Final RI/FS. Specifically, the group challenged the EPA's decision to exclude certain outlier sample data from data sets used for calculating sediment concentrations as well as the methodology adopted by the EPA for excluding the data. On March 24, 2015, the EPA issued its opinion finding that the Lower Willamette Group must

incorporate changes the EPA made to section 7 into the Final RI/FS,
complete background threshold values for 23 identified contaminants using the same methodology adopted by the EPA for determining other background concentrations, and
submit to EPA background calculations for 23 identified contaminants within 30 days of the decision.

Public comment continues in anticipation of the EPA preparing its proposed cleanup plan for the Portland Harbor site in 2016. Currently, 98 parties are participating in a private allocation proceeding that may culminate in settlements or commitments to perform remedies (or both) after the EPA issues the ROD.

Passaic River

The Passaic River sediment Superfund site dates back at least to 1984, when the EPA listed the former Diamond Alkali manufacturing plant site on the banks of the Passaic on the National Priorities List due to high levels of dioxin—specifically, 2,3,7,8-tetrachlorodibenzo-*p*-dioxin (2,3,7,8-TCDD), the most potent dioxin congener. The plant, located about 3.5 miles upriver from the Passaic's confluence with Newark Bay, had manufactured Agent Orange, DDT, and other pesticides and herbicides for about 20 years until closure in 1969.

Initially focused on the upland site, investigations soon identified significant impacts in adjacent Passaic River sediments. Initial investigations of the lower six miles of the Passaic by Diamond Alkali parties identified significant transport of 2,3,7,8-TCDD as well as various other non-dioxin contaminants, both downriver and, because of tidal influence, upriver. Consequently, the EPA again enlarged the site to include the entire 17.4 miles of the Lower Passaic River, from Dundee Dam at river mile 17.4 to Newark Bay at river mile 0.

After the EPA's Remedial Investigation (RI) efforts quickly ran through its original \$10 million estimate and associated funds provided by certain PRPs, the EPA issued additional General Notice Letters (GNLs) to approximately 140 parties to date. In early 2007, several dozen of those GNL recipients and the Diamond Alkali parties formed a Cooperating Parties Group (CPG) and agreed to take over the RI/FS under EPA oversight for the entire 17.4 miles. Less than one month later, however, the EPA issued a draft Focused Feasibility Study (FFS) identifying bank-to-bank dredging as the effective final remedy for the lower eight miles of the river. Since then, the RI/FS and the FFS efforts have proceeded on separate but parallel tracks.

While these studies have proceeded, removal actions at certain "hot spots" have taken place, or at least begun. In 2012, certain Diamond Alkali parties removed 40,000 cubic yards of the most heavily contaminated sediments immediately adjacent to the former Diamond Alkali plant. Removal of a further 160,000 cubic yards has not yet been implemented. In 2012–2014, the CPG (now without the Diamond Alkali parties) removed and capped some 16,000 cubic yards of material at a "hot spot" that had been identified by the CPG's ongoing RI work.

In April 2014, the EPA issued the FFS, along with an RI and Proposed Plan (PP) that recommended bank-to-bank dredging and capping of the entire lower 8 miles of the River. By the EPA's estimate, this would require removal of 4.3 million cubic yards of contaminated sediments. The EPA estimates that the project could be completed in five years, at a cost of \$1.73 billion. Following a public comment period last year, the EPA is working toward the release of a ROD later in 2015.

Meanwhile, in early 2015, the CPG completed the RI/FS (at a total cost of well over \$100 million), and the EPA is now reviewing the draft RI/FS report. The draft report is not publicly available at present. However, it is expected to call for dredging across the entire 17.4-mile lower river, targeting areas with contamination that is vulnerable to erosion or other contaminant migration.

To date, the Passaic River matter has unfolded largely in the administrative realm of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). However, in 2005 the New Jersey Department of Environmental Protection filed suit in state court under the state Spill Act against the Diamond Alkali parties and various affiliates. The suit spawned third-party actions against over 300 public- and private-sector parties, with the potential for an order of magnitude more. After several years of complex motions practice and relatively limited discovery, the case ultimately yielded three major settlements, all

without admission of liability. While subject to potential future liability triggers and reservations, the settlement payments totaled over \$355 million, with payments by Diamond Alkali parties totaling about 90 percent of that amount.

Woonasquatucket River—Centredale Manor Restoration Project

The Centredale Manor Restoration Project (CMRP) is a nine-acre site in North Providence, Rhode Island, encompassing a portion of the Woonasquatucket River. In 1996, dioxin was first identified in fish collected from the Woonasquatucket River. Since that time, other contaminants have been discovered, including VOCs, semi-VOCs, PCBs, and metals. While there are a number of contaminants present at the CMRP, the primary contaminant is dioxin, specifically 2,3,7,8-TCDD. The CMRP was listed on the National Priorities List in 2000.

The contamination is alleged to have originated from operations that took place at a peninsula in the Woonasquatucket River from about the mid-1940s until about 1970. At various points during that time, two companies—Metro-Atlantic, Inc., and New England Container Company, Inc. (NECC)—operated a chemical company and a drum reconditioning company, respectively. Over the years, the EPA has issued notice letters to a number of PRPs, including Emhart Industries, Inc., the successor to Metro-Atlantic; NECC; a number of alleged customers of NECC; and the current property owners. Certain PRPs have implemented a number of removal actions over the past 15 years, both on the peninsula and within the waterway.

In 2006, Emhart sued NECC under CERCLA and state law. The case proceeded against NECC until 2011, when Emhart sued the United States for its alleged involvement in sending drums to the site for reconditioning by NECC. The cases were consolidated, and the United States brought its claims against both parties under CERCLA. A number of additional PRPs, mainly alleged former customers of NECC, were also added to the case, but the case against these PRPs was stayed pending the outcome of the liability determinations for Emhart and NECC.

In 2012, while the litigation was pending, the EPA issued the ROD. The remedy, which is estimated at about \$100 million, includes dredging the majority of contaminated sediment and floodplain soil, disposal in an upland confined disposal facility, and placement of soil cover within a forested wetland adjacent to the river.

The litigation proceeded, and as a result of a mediation that took place in February 2015, NECC was able to reach an ability-to-pay settlement with the United States. The consent decree was noticed, and the public comment period ended on May 18. Emhart also dismissed its case against NECC in May 2015.

The trial between Emhart and the United States began on May 18, 2015, and is expected to last 8 to 12 weeks. The litigation has been divided into phases: The first phase will focus on Emhart's liability, the second phase will focus on the remedy and determination of response costs, and the third phase will focus on the liability of any other party remaining in the case.

Newtown Creek

Newtown Creek, which forms the border between Brooklyn and Queens, has been at the center of New York City's industrial activity since the mid-1800s. More than 50 refineries were located along the banks of Newtown Creek, including oil refineries, petrochemical plants, fertilizer and glue factories, and coal yards. It remains an active industrial area today. Numerous hazardous substances have been detected in Newtown Creek, including pesticides, metals, PCBs, and VOCs. Newtown Creek was listed on the National Priorities List in 2010.

The EPA has identified six PRPs for Newtown Creek: BP America, Inc.; the Brooklyn Union Gas Company d/b/a National Grid NY; Exxon Mobil Corporation; Phelps Dodge Refining Corporation; Texaco, Inc. (collectively known as the Newtown Creek Group); and the City of New York. These parties entered into an Administrative Order on Consent in 2011 to perform the RI/FS. This work is currently under way in phases. The parties completed Phase I, which involved surveying, surface water and sediment sampling, air monitoring, ecological studies, and modeling. The Phase II study will include additional surface water and sediment sampling, background sampling, and a groundwater study. The EPA anticipates identifying additional PRPs that can contribute to the investigation and, ultimately, the remediation.

In addition to the EPA administrative action, the State of New York sued Exxon Mobil in 2007 in relation to the history of oil spills in the Greenpoint section of Brooklyn. Exxon Mobil ultimately settled the case for \$25 million in 2010. The settlement set aside \$19.5 million for Environmental Benefits Projects in Greenpoint and requires Exxon Mobil to expand and speed up its remediation.

Conclusion

Sediment sites in the CERCLA program have increased from a few anomalies to some of the most complex and potentially costly sites on the National Priorities List. Efforts to apply the typical CERCLA liability tools to sediment sites have raised a host of difficult and controversial issues. Given the many long-industrialized urban waterways in the country, the sites above and others bear close watching in this new frontier of CERCLA activity.

Keywords: environmental litigation, sediment, contamination, remediation, potentially responsible party

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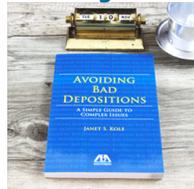
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