

Agent Orange in Newark: Time for a New Beginning[†]

*Tirza S. Wahrman **

The effects of Agent Orange on Vietnam veterans and the Vietnamese population remain a painfully debated subject. Recently, the discovery of Agent Orange waste in port sediments in the New York-New Jersey Harbor has called attention to the impact of the substance on our own shores.¹ A now-idle plant in the Ironbound section of Newark was once the largest Agent Orange producer in the United States.²

On March 30, 1998, residents of the Newark community, representatives from the City of Newark and the state and federal governments, and various academics came together at Seton Hall University School of Law to turn a fresh page for the City of Newark. Though it was an unusually warm day and the air conditioning was working badly, all present agreed on our common purpose: to stop talking and to take action to remedy Newark's environmental woes.

Sadly, Newark is home to numerous hazardous waste sites.³ Most seriously, dioxin contamination from the Diamond Alkali Agent Orange plant remains in Newark's soil and in its river, the Pas-

[†] Editor's note: The symposium that gave rise to this article occurred on March 30, 1998. At that time, the United States Environmental Protection Agency (EPA) was still considering how the dioxin contamination at the Diamond Alkali Superfund Site would be remedied. Prior to the publication of this journal, however, the EPA gave final approval to a 1990 consent decree, which permits the on-site burial of dioxin waste at the Diamond Alkali site. See Tom Johnson, *Dioxin Site in Newark to be Sealed Underground*, STAR-LEDGER (Newark), Aug. 5, 1998, at 15.

* A.B., Barnard College, 1978; J.D., Yale Law School, 1981. The author is an environmental attorney with the Port Authority of New York & New Jersey. The views expressed herein are solely the author's. The author wishes to acknowledge the support of Seton Hall University School of Law and Professor Marc Poirier.

¹ See <<http://www.epa.gov/r02earth/superfund/sedsamp.htm>> (visited July 21, 1998).

² See generally, Ellen K. Silbergeld, et al., *Dioxin at Diamond: A Case Study in Occupational/Environmental Exposure*, in TOXIC CIRCLES 55 (Helen E. Sheehan & Richard P. Wedeen eds., 1993).

³ See <<http://www.epa.gov/superfund.nj.newark-newark>> (visited Feb. 27, 1998) (detailing over 70 active sites in Newark).

saic.⁴ The Passaic River, covering parts of northeastern New Jersey and southeastern New York, drains almost 935 square miles,⁵ and is New Jersey's second largest river, stretching some eighty-five miles from the Bernardsville Mountains to empty into the Newark Bay.⁶ The City of Newark and the Passaic River are both under-appreciated resources. In order for Newark's renaissance to succeed, the city must take a frank look at its environmental conditions.

THE DIAMOND ALKALI SUPERFUND SITE

My first introduction to Newark was not a happy one. Four years ago, with a Port Authority colleague, I visited the Diamond Alkali Superfund Site. The sediment at this site has been linked to contamination in the Port Authority's shipping channels.⁷ Between 1948 and 1969, Diamond Alkali, also known as Diamond Shamrock Corp., and its successor corporations, Maxus, Inc. and Occidental Chemical (Diamond Alkali),⁸ produced approximately 800 tons of 2,4,5-T,⁹ a major component of Agent Orange, at the 80 Lister Avenue facility.¹⁰ This production represented roughly fifteen percent of the total output of 2,4,5-T in the United States.¹¹

Diamond Alkali's corporate policy was particularly notorious, even compared to other producers of Agent Orange. The company's reckless attitude was well-documented in *Diamond Shamrock Chemical Co. v. Aetna*,¹² in which the court refused to allow Diamond Alkali to recover insurance proceeds for the property damage it

⁴ See Richard F. Bopp, et al., A Major Incident of Dioxin Contamination: Sediments of New Jersey Estuaries, 25 ENVTL. SCI. TECH. 951, 951 (1991).

⁵ See NEW YORK/NEW JERSEY HARBOR SPILL RESTORATION COMMITTEE, NATURAL RESOURCE RESTORATION PLAN FOR OIL AND CHEMICAL RELEASES IN THE NEW YORK/NEW JERSEY HARBOR ESTUARY 33 (1996).

⁶ See JAMES & MARGARET CAWLEY, EXPLORING THE LITTLE RIVERS OF NEW JERSEY 125 (1993).

⁷ See Memorandum from Rick Sinding to Scott Wiener, New Jersey DEP, May 26, 1993 (hereinafter Sinding Memorandum) (regarding Port Newark-Elizabeth Dredging Project), filed in *Clean Ocean Action v. York*, 861 F. Supp. 1203 (D.N.J. 1994).

⁸ See <<http://www.oxychem.com/html/overview.html>> (visited Feb. 27, 1998). Occidental Chemical or OxyChem is the sixth largest chemical operation in the United States, with annual sales of some five billion dollars. See *id.* OxyChem is the country's largest merchant marketer of chlorine and caustic soda, the number one producer of chrome chemicals and the second largest producer of sodium silicates. See *id.*

⁹ The chemical 2,4,5-T is 2,4,5 trichlorophenoxy acetic acid.

¹⁰ See Bopp, *supra* note 4, at 951.

¹¹ See *id.*

¹² 258 N.J. Super. 167, 609 A.2d 440 (App. Div. 1992).

caused. The court described in chilling detail that: "A number of former plant employees testified concerning Diamond Alkali's waste disposal policy, which essentially amounted to 'dumping everything' into the Passaic River."¹³ Additionally, dichlorodiphenyltrichloroethane (DDT) was produced at the plant until about 1959.¹⁴ As the court related, so much DDT waste was directed into the river that a mid-river "mountain" of DDT was created.¹⁵ "Employees were directed to surreptitiously wade into the river at low tide and 'chop up' the deposits so that they would not be seen by passing boats."¹⁶

My Port Authority colleague and I viewed the results of this environmental irresponsibility at the Diamond Alkali site. As we looked around us, staring at the 105,000 tons of dioxin-contaminated debris contained in hundreds of decaying boxcars¹⁷ beside the still, shallow waters of the Passaic, I had to ask myself: "How could a site like this exist just ten miles from the posh Short Hills Mall?" Frankly, it struck me then as very strange, and it still does.

WHY IS NEWARK HOME TO THE SITE AFTER OTHER DIOXIN-CONTAMINATED SITES HAVE BEEN REMEDIATED?

Spurred by my visit to the Diamond Alkali site, I began reading about Newark, and became intrigued by the city. John Cunningham has described the many faces of Newark.¹⁸ Newark's first inhabitants, the Lenape Indians, came to settle on the shores of the Passaic River because of the river's rich resources — the fish, clams, and oysters, which long ago abounded in the Passaic.¹⁹ In the 1660s, some disgruntled Puritans from New Haven, Connecticut, moved in on the Native Americans who had called Newark home.²⁰ Newark, originally called New Ark,²¹ remains a city with deep religious roots whose churches and synagogues reflect the diversity of its early inhabitants.

¹³ See *id.* at 183-84, 609 A.2d at 448.

¹⁴ See *id.* at 183, 609 A.2d at 448.

¹⁵ See *id.*

¹⁶ *Id.* at 183-84, 609 A.2d at 448.

¹⁷ The 105,000 ton figure is based on a meeting I had with Sharon Jaffess, the Project Manager on the site, at the EPA Region II's headquarters in New York City. The amount of material does not appear in the consent decree entered into by Diamond Alkali and the United States. See generally *United States v. Occidental Chem. Corp.*, No. 89-5064-JWB, 1990 EPA Consent LEXIS 210 (D.N.J. Nov. 19, 1990).

¹⁸ See generally JOHN T. CUNNINGHAM, *NEWARK* (1988).

¹⁹ See *id.* at 19.

²⁰ See *id.* at 18.

²¹ See *id.* at 23.

Newark was, and is, a remarkable cultural and musical center, boasting such artists as Sarah Vaughn, Philip Roth, Whitney Houston, and Paul Simon. Newark was a mecca for black musicians in the '20s, '30s and '40s, when the doors of other cities were shut tight. Newark was also home to the remarkable Justice William Brennan and to the prolific inventor Thomas Edison. All were Newark's sons and daughters.

Newark remains a great transportation hub — home to the Newark Airport, Port Newark, and New Jersey Transit. Furthermore, Newark was an early manufacturing center, home to industries as varied as tanneries and furniture makers. Newark has a long, proud legacy of industrial operations dating back to before the Civil War.²²

Newark, however, is also a troubled city, still suffering from the bitter aftermath of the 1967 riots and struggling to shake a violent image.²³ In the last thirty years, the city lost thirty percent of its population and became one of the poorest cities in the country.²⁴ Today, signs of hope abound in this once-thriving town, but a genuine revival must include Newark's waterfront. In light of the recent Third Circuit decision in *Chester Residents Concerned for Quality Living v. Seif*,²⁵ the imperative of treating similar environmental situations alike grows more urgent.

In 1983, the Diamond Alkali site became one of the first Superfund sites in the nation. Then-Governor Thomas Kean came to the Ironbound and promised action.²⁶ Fifteen years later, the tons of material remaining from the Agent Orange plant and the other contaminated debris around the site lie untouched. A 1990 consent decree permits the on-site "containment" of the dioxin waste for all material above 1 parts per billion (ppb).²⁷ Some material on the site is contaminated with dioxin levels of 50,000-70,000 ppb and continues to leach into the river, according to senior United States Environmental Agency (EPA) officials.²⁸ The site lies in a flood zone and the

²² See *id.* at 125.

²³ See *id.* at 314-28.

²⁴ See ROBERT YARO ET AL., THE THIRD REGIONAL PLAN, REGIONAL PLAN ASSOCIATION (1992).

²⁵ 132 F.2d 925 (3d Cir. 1997) (holding that a citizens group can maintain a cause of action under Title VI of the Civil Rights Act of 1964 to challenge the discriminatory siting of an environmentally undesirable facility) *cert. dismissed*, No. 97-1620, 1998 WL 477242 (U.S. Aug. 17, 1998).

²⁶ See Silbergeld, *supra* note 2, at 66.

²⁷ See *United States v. Occidental Chem. Corp.*, No. 89-5064-JWB, 1990 EPA Consent LEXIS 210 (D.N.J. Nov. 19, 1990).

²⁸ Public Meeting with Bill McCabe, EPA Community Advisory Council, Newark,

run-off during inclement weather goes directly into the river.²⁹ In the ten years that followed the consent decree, the site was, for the most part, idle.³⁰ The little work that was performed includes Diamond Alkali employees placing a thin geotextile fabric on the exposed soil. The fabric cover has failed to prevent continued leaking into the Passaic.³¹

The 1990 consent decree calling for the containment of dioxin on site is inconsistent with current technology that allows for destruction of the contaminated material. A recent study completed by the General Accounting Office confirms that the preferred remedy at dioxin- and polychlorinated bipheyl (PCB)-contaminated sites is incineration.³² At the former Hercules Agent Orange plant in Jacksonville, Arkansas, dioxin-contaminated material was incinerated off-site, away from the residents of the town.³³ Similarly, some 265,000 tons of dioxin-contaminated soil at Times Beach, Missouri, were destroyed after the residents were relocated at the government's expense.³⁴ Surely, the entombment of the dioxin material at the Newark plant cannot be an adequate solution.

WHEN WILL THE REMEDIATION OF THE LOWER PASSAIC RIVER BEGIN?

Few residents of New Jersey are aware that Diamond Alkali is undertaking a remedial investigation of a small stretch of the Passaic River that abuts the plant. The investigation is now four years old, but completion is still several years away.³⁵ Compared to the other rivers that flow into the New York Harbor, the Passaic has some of the highest pollutant loadings of dioxin, PCBs, lead, zinc, and copper,³⁶ but public awareness of this contamination is comparatively low. For example, there is an active discussion of environmental

New Jersey (June 29, 1998).

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See UNITED STATES GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/RCED 96-13, EPA HAS IDENTIFIED LIMITED ALTERNATIVES TO INCINERATION FOR CLEANING UP PCB AND DIOXIN CONTAMINATION, (1995).

³³ See generally Vertac, Inc., Record of Decision, EPA-ID ARD000023440, March 13, 1998, available in WESTLAW, ERD-COMB Database (describing status of the Agent Orange plant after remediation was completed).

³⁴ See Silbergeld, *supra* note 2, at 55.

³⁵ Interview with Rich Caspe & Sharon Jaffess, EPA, in New York City (June 11, 1998).

³⁶ See NEW YORK/NEW JERSEY HARBOR SPILL RESTORATION COMMITTEE, NATURAL RESOURCE RESTORATION PLAN FOR OIL AND CHEMICAL RELEASES IN THE NEW YORK/NEW JERSEY HARBOR ESTUARY 16 (1996).

dredging to relieve the problem of PCB discharges in the Hudson River.³⁷ Public awareness of the Hudson's plight is high, with volumes of studies and data available for review.³⁸ Such an awareness is lacking with respect to the Passaic. There are sixteen repositories where information on the Hudson River can be accessed. In contrast, our attempts to access the database on the Passaic River before this symposium were unsuccessful.³⁹ In New York, the State University is studying the effects of airborne PCBs being released from the mud flats each time water levels change on the Hudson.⁴⁰ No such study is being conducted on the Passaic, though it has the highest dioxin levels ever measured.⁴¹

We who call New Jersey home must begin to define community in broader terms than we do currently. We who practice environmental law know that the Agent Orange wastes on Lister Avenue and in the sediment of the Passaic have serious impacts in the neighborhood and many miles beyond.

³⁷ See JOSHUA CLELAND, SCENIC HUDSON, INC., ADVANCES IN DREDGING CONTAMINATED SEDIMENT (1997) (describing how 23 of 25 rivers in designated Superfund sites have been remedially dredged by the responsible parties).

³⁸ See, e.g., *PCB Problem in Hudson Not Going Away*, ENVIRONMENTAL COMPLIANCE IN NEW YORK, May 1997 (referring to three-volume report recently released by the EPA).

³⁹ See <<http://www.epa.gov/region02/superfun/sedsamp.htm>> (describing Passaic River sediment data) (visited Mar. 19, 1998).

⁴⁰ See Vertac, Inc. Record of Decision, *supra* note 33.

⁴¹ See Sinding Memorandum, *supra* note 7.