

PASSAIC RIVER FAQ

1. Why should residents of New Jersey oppose EPA’s proposed settlement in the Passaic River?

The EPA’s proposed settlement is a sweetheart deal for 85 polluters who would pay a minor amount and walk away, and a bad deal for New Jersey residents. By allowing 85 companies off the hook for future liability—even if it is determined that EPA’s original cleanup cost estimates were too low—the settlement pins a disproportionate share of those costs on taxpayer-funded New Jersey entities and municipalities and a small handful of companies who did not cause the settling companies’ pollution. The EPA’s settlement process has already delayed cleanup that OxyChem offered to start in January 2022, and EPA has not committed even one dime of the settlement proceeds to the actual cleanup work in the river.

Additional information about who would pay for the cleanup if the proposed settlement is approved can be found [here](#).

2. Why does OxyChem think local communities will be responsible to pay for the cleanup? What grounds does EPA have to make local entities and municipalities pay for the pollution caused by corporations?

Under the Superfund law, entities such as public sewer systems that transport or discharge hazardous chemicals into the Passaic River have liability as “transporters” and “arrangers.” The 85 settling companies have for years sought to shift their liability to the Passaic Valley Sewerage Commission (“PVSC”) and New Jersey municipalities. In 2017, those companies objected to EPA’s decision not to include PVSC and municipalities in its “allocation” process because, the companies said: “in an equitable allocation, PVSC and the Municipalities should be ascribed among the highest share of all PRPs...”¹

Applying the allocation formula utilized in the proposed settlement to the data the settling parties submitted about discharges from PVSC and several municipalities would yield a liability of 30% of the contamination in the Passaic for PVSC and those cities.

3. If the court rejects the settlement, what is the best course of action to begin the cleanup?

OxyChem’s [June 2022 offer](#) to perform a comprehensive cleanup of the Passaic River is still on the table. Work could take place efficiently, in logically sequenced steps on the upper and lower parts of the river, so long as EPA agrees it will not stand in the way of OxyChem’s pursuit of costs from other potentially responsible parties.

4. How did EPA determine the terms of the proposed settlement?

EPA and the settling companies have (thus far) refused to share with the public, the Court, or with OxyChem how it arrived at settlements with the individual companies. Nor will EPA divulge the amount that each defendant is paying.²

What we do know is that EPA engaged a former EPA employee, David Batson, to conduct the [allocation](#). As part of this allocation process, Batson relied on self-reported, self-interested accounts of the settling companies’ own activities. EPA has posted Batson’s Final Allocation Report on its [website](#). The report contains numerous flaws, serious mathematical and scientific errors, and fails to account for important evidence OxyChem has uncovered in its own lawsuit against some of the settling companies.

EPA deliberately excluded PVSC and New Jersey municipalities from its allocation process but allowed the settling companies to submit arguments about PVSC’s liability—all of which were submitted in PVSC’s absence. The settling parties blamed PVSC and municipalities for 30% or more of the contamination caused by the transportation and discharge of PCBs, mercury, and lead into the river.

5. Why didn’t OxyChem participate in the allocation process?

As OxyChem and other parties told EPA at the outset, EPA lacks the authority under federal law to engage an allocator to conduct the process that occurred here.

The Superfund law is clear that only courts have the authority to allocate liability, not EPA. While EPA can perform non-binding allocations of responsibility for settlement purposes, these cannot be used in court for any purpose. OxyChem objected to the proposed allocation process on this basis, and also because it was concerned that EPA commissioned Batson to make findings of responsibility based on a limited evidentiary record that was submitted in secret, with the affected party having both no knowledge of what was said about it and no opportunity to challenge its accuracy. In addition, OxyChem was concerned that self-reported information by the participating parties was not supplied under penalty of perjury or with meaningful, enforceable requirements that the information was accurate and complete, as would be required in a federal court-conducted allocation under the Superfund Law.

¹ Oct. 24, 2017 letter from David R. Erickson to Eric Wilson, EPA Region 2.

² See OxyChem Comment Letter to EPA and DOJ at pp 6, 31.

6. Why should New Jersey residents be concerned about the Batson Report findings?

The Batson Report contains numerous errors of fact and does not include the type of evidence that would be required in court to consider in determining each party's true liability and allocation of responsibility. OxyChem has found evidence that parties did not provide complete or accurate information to the allocator or EPA. The Batson Report also includes findings about the role of PVSC and municipalities in Passaic River contamination, even though those entities were excluded from the allocation process.

- The Batson Report reflects serious mathematical errors, including an error that alone overstates by a thousand times OxyChem's alleged responsibility for the presence of dioxin in the Passaic River.
- EPA's open disregard for the protections of due process and reliable evidence allowed the participating parties to game the system. As part of its pending litigation, OxyChem learned that several parties failed to provide accurate or complete information about the nature and amount of their discharges of chemicals into the Passaic River, creating additional and [serious inaccuracies](#) in the Batson Report.
- The two prior courts that have reviewed Batson's allocation reports found them to be "contrived" and "unreliable." In each instance, the reviewing court performed its own allocation and upended Batson's proposed allocation. See the chart below.

MATTER	BATSON'S PROPOSED ALLOCATION	COURT'S ALLOCATION
<i>El Paso Natural Gas Company, LLC v. United States</i>	Batson's client: 13.23% Opposing party: 86.77%	Batson's client: 65% Opposing party: 35%
<i>Columbia Falls Aluminum Company LLC v. Atlantic Richfield Company</i>	Batson's client: 30% Opposing party: 70%	Batson's client: 65% Opposing party: 35%
Passaic River	Batson participants: 0.1% Opposing party: 99.9%	

7. Is OxyChem's settlement offer legally justifiable? What grounds does OxyChem have to be able to seek contribution for the Passaic cleanup costs?

OxyChem's settlement offers to EPA are legally justifiable under [federal Superfund law](#). The Superfund law incentivizes voluntary cleanup offers like OxyChem's, which save taxpayer funds and accelerate cleanups. The Superfund law does this by affording parties who are willing to step up and perform the actual cleanup work the right to pursue, at their own expense, recovery of cleanup costs from other parties. OxyChem's offers are fully in line with the statute as Congress designed it and comply fully with its terms.³

In contrast, what EPA has done in the proposed settlement is legally unjustifiable.

- EPA has refused an offer of a full, voluntary cleanup by OxyChem in favor of a minor cash offer to pay its own costs, delaying the cleanup in the process.
- EPA has sought to allocate liability for cleanup costs itself, ignoring that Congress specifically and repeatedly denied EPA authority to do so. Congress has empowered only courts, not EPA, to allocate liability for cleanup costs at Superfund sites.⁴ Congress has been unequivocal on this point: EPA is not authorized to allocate responsibility for cleanup costs.⁵

³"The theory underlying Superfund's liability scheme was, and is, that the Government should obtain the full costs of cleanup from those it targets for enforcement, and leave remaining costs to be recovered in private contribution actions between settling and non-settling parties." 132 Cong. Rec. S14,903 (daily ed. Oct. 3, 1986) (statement of SARA floor manager Sen. Stafford).

⁴See 42 U.S.C. §9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.")

⁵When Congress means to authorize an agency to adjudicate responsibility, it does so by statute. See 15 U.S.C. §78d-1(a) (SEC), 7 U.S.C. §18 (CFTC), and 30 U.S.C. §§901-944 (Department of Labor). No part of CERCLA authorizes EPA to adjudicate responsibility for Superfund cleanup costs.

8. Is EPA following the practice and guidance it has employed in other Superfund cases?

No. EPA's actions in this settlement contradict its own guidance about how these types of settlements should be approached. EPA's settlement guidance says explicitly:

"As a guideline, the Agency will negotiate only if the initial offer from PRPs [Potentially Responsible Parties] constitutes a substantial proportion of the costs of cleanup at the site, or a substantial portion of the needed remedial action. *Entering into discussions for less than a substantial proportion of cleanup costs or remedial action needed at the site, would not be an effective use of government resources.*" (emphasis added)⁶

9. Is the risk that substantial liability will fall to PVSC and New Jersey municipalities just a "scare tactic" by OxyChem?

No. The truth about EPA's settlement should scare New Jersey taxpayers. OxyChem is simply educating New Jersey taxpayers and officials about the settlement, which EPA and the Department of Justice filed on a Friday afternoon days before Christmas in 2022, and originally provided only a 45-day comment period. OxyChem had to request a more meaningful comment period for itself and the public.

The financial risk that EPA has created for PVSC and municipalities is an inevitable outcome of EPA's allocation process, the resulting Batson Report, and EPA's proposed settlement, if it is approved.

- PVSC acknowledged this risk in its March 22, 2023, letter to the U.S. Department of Justice, explaining that its "principal concern with the Consent Decree is that it exposes the public, vis-à-vis PVSC and its 48 municipal constituent members which share PVSC's funding obligations (collectively 'MCMs'), to catastrophic monetary risk which they cannot satisfy because of their lack of resources."⁷
- PVSC explained that taxpayers face this "catastrophic monetary risk" because the "Settling Parties' \$150 million payment constitutes a small fraction of total response activity costs" for the cleanup, and those companies would be forever protected from any lawsuits or claims filed by PVSC and the municipalities seeking additional funds for the cleanup.
- Additionally, the Borough of Hasbrouck Heights acknowledged that the proposed settlement "creates a circumstance whereby Hasbrouck Heights and the other similarly situated municipalities will find themselves exposed to undue exposure to future liability..."⁸

10. Didn't EPA order OxyChem to begin designing the remedy for the cleanup of the upper 9 miles of the Passaic River?

Yes, but EPA's order came over a year after OxyChem offered to perform more work than EPA has ordered. In March 2023, EPA ordered OxyChem to design EPA's selected interim remedy, which is the plan for implementing the cleanup, but did not order it to perform the actual cleanup. [OxyChem's offer](#) to EPA in January 2022 included both designing the interim remedy and performing the cleanup in the upper 9 miles of the River. The offer was conditioned on EPA allowing OxyChem to continue to pursue contribution from other parties that are liable for discharges to the river. EPA refused, delaying the cleanup by more than a year.

11. Why did OxyChem file a lawsuit seeking recovery of costs in March 2023?

By ordering OxyChem to design EPA's selected interim remedy for the upper 9 miles of the Passaic River, EPA triggered a process that allowed OxyChem to bring a cost recovery action under CERCLA seeking a judgment requiring parties responsible for the release of hazardous substances to the river to pay the costs of this work. On March 24, 2023, OxyChem [filed claims](#) under section 107 of CERCLA seeking recovery of costs it has already incurred and will incur to design EPA's selected interim remedy.

In that action, OxyChem sued companies EPA identified as responsible for discharges of eight contaminants of concern (COCs), six of which—PCBs, lead, mercury, PAHs, copper, and dieldrin—are not associated with OxyChem's predecessor but *are* associated with the settling parties, many of whom are customers of PVSC. Based on the *evidence the settling parties submitted* showing that PVSC was a large transporter and discharger of hazardous substances into the Passaic River, OxyChem had no choice but to also assert a claim against PVSC for those costs.

⁶EPA CERCLA Settlement Policy Memo, Lee M. Thomas, December 1984 at p 5.

⁷March 21, 2023 letter from G. Tramontozzi (PVSC) to Assistant Attorney General, U.S. Dept. of Justice.

⁸March 22, 2023 letter from G. Coffey (counsel to Borough of Hasbrouck Heights) to Assistant Attorney General, U.S. Dept. of Justice.

12. The settling parties say that the dioxin produced by OxyChem’s predecessor is the primary contaminant and therefore it should be fully responsible for the cleanup of all eight contaminants of concern (COCs). Isn’t OxyChem asking others to pay for contamination OxyChem needs to clean up?

No, OxyChem intends to clean up its fair share of Passaic River contamination and only asks that other companies do the same.

EPA has acknowledged that OxyChem itself is not responsible for polluting the river, but OxyChem has still stepped up to clean up its predecessor’s fair share of COCs. The COCs for which OxyChem has responsibility are dioxin and DDT. An EPA-sponsored study identified at least one other distinct source of dioxin in the river for which OxyChem has no responsibility, and ongoing discovery in OxyChem’s pending action has identified several other dioxin sources for which OxyChem also is not responsible. Many other parties, including NJ government entities, also discharged dioxin and DDT as well as the other six COCs identified by EPA, including PCBs, mercury, and lead, for which OxyChem has no responsibility at all. EPA has noted all eight COCs are driving the need for the cleanup and that PCBs and mercury in the Passaic River, along with dioxin, pose unacceptable risks to human health.

EPA’s findings and statements confirm that removing dioxin alone will not remedy the river’s contamination or eliminate the environmental and health hazards it contains. EPA identified eight COCs because it found the river contamination with all of them was “ubiquitous.” EPA has also stated that removing only the dioxin from the river will not address the risks from other contaminants and would be “replacing one problem with another.”⁹

There is [no justification](#) or legal precedent to support EPA’s claim that OxyChem must remediate the PCBs, PAHs, DDT, mercury, lead, copper, and dieldrin discharged by other parties without those parties paying their fair share. Nevertheless, OxyChem offered last year to perform the comprehensive cleanup of all the COCs without delay, while it simultaneously pursues the other parties for their fair share of cleanup costs in court.

13. How have previous Superfund settlements that EPA has arranged in New Jersey worked?

EPA’s own guidance specifically says the purpose of settling is to secure a commitment by responsible parties to implement or fund *all or most* of the cleanup. The below survey of Superfund settlements in New Jersey shows that when EPA follows its model—and obtains settlements that fund all or most of a cleanup—those settlements *typically do* work, in no small part because they leave the performing parties free to pursue contribution from parties that are not performing or paying their fair share of the costs.

In this case, EPA has abandoned its prior practice and instead has chosen to settle for less than 10% of the total estimated cleanup cost, while not designating any funds to the actual cleanup. The proposed settlement departs from the “enforcement first” scheme mandated by the Superfund law and embodied in EPA’s longstanding approach to Superfund cleanups.

YEAR	SITE	PERCENTAGE OF REMEDY COST FUNDED UNDER SETTLEMENT	REMEDY COMPLETED BEFORE CONSENT DECREE?	TYPE OF SETTLEMENT
2015	American Cyanamid Superfund Site	100%	No	PRPs perform remedy
1994	Caldwell Trucking Superfund Site	100%	No	PRPs perform remedy
1990	Lone Pine Landfill Superfund Site	100%	No	PRPs perform remedy
2006	SJ Clothing Company / Garden State Cleaners Superfund Site	100%	No	EPA cost recovery
2014	Cornell-Dubilier Superfund Site	80%	Partial	EPA cost recovery
1998	Helen Kramer Landfill Superfund Site	77%	Yes	EPA cost recovery
2021	Michelin Powerhouse Superfund Site	75%	Yes	EPA cost recovery
2021	Unimatic Manufacturing Corp. Superfund Site	50%	No	<i>de minimis</i> (inability to pay)
1989	Lipari Landfill Superfund Site	4.4%	No	<i>de minimis</i>

⁹Nov. 14, 2005 letter from A. Steinberg, Regional Administrator EPA Region 2 to NJDEP Commissioner Campbell.