



Legislation Details (With Text)

**File #:** 19-1428      **Version:** 1      **Name:** Tolling Agreement - Diamond Alkali Superfund Site  
**Type:** Resolution      **Status:** Adopted  
**File created:** 9/9/2019      **In control:** Law  
**On agenda:** 9/24/2019      **Final action:** 9/24/2019  
**Title:** Dept/ Agency: Law  
Action: ( ) Ratifying (X) Authorizing ( ) Amending  
Type of Service: Agreement with Governmental Entity  
Purpose: To execute a Tolling Agreement for the benefit of the United States Environmental Protection Agency, which would toll the statute of limitations for the recovery of certain response costs incurred by the agency, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") in connection with certain removal activities conducted at Diamond Alkali Superfund Site.  
Entity Name: United States Environmental Protection Agency  
Entity Address: U.S. Environmental Protection Agency, Region 2, 290 Broadway, 17th Floor, New York, New York 10007  
Contract Amount: N/A  
Funding Source: N/A  
Contract Period: Tolling statute of limitations February 15, 2021  
Contract Basis: ( ) Bid ( ) State Vendor ( ) Prof. Ser. ( ) EUS  
( ) Fair & Open ( ) No Reportable Contributions ( ) RFP ( ) RFQ  
( ) Private Sale ( ) Grant ( ) Sub-recipient (X) n/a  
Additional Information:

**Sponsors:** Council of the Whole

**Indexes:**

**Code sections:**

Date	Ver.	Action By	Action	Result
9/24/2019	1	Municipal Council	Adopt	Pass

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**Additional Information:**

**WHEREAS**, the purpose of this Resolution is to authorize the execution of a Tolling Agreement, in the form attached hereto, for the benefit of the United States Environmental Protection Agency (“USEPA”) by allowing the statute of limitations for the recovery of certain response costs incurred by USEPA pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), for removal activities undertaken by USEPA at the Diamond Alkali Superfund Site, including the real property located at 80-120 Lister Avenue within the City of Newark, the Lower Passaic River Study Area, and the aerial extent of contamination (the “Site”), to be tolled until February 15, 2021; and

**WHEREAS**, the City is the current owner of certain real property (Block2438, Lots 1, 14, 58, 59, 57, 19, 31, 56, and 34) located at 80-120 Lister Avenue, Newark New Jersey which is part of the Diamond Alkali Superfund Site; and

**WHEREAS**, the Diamond Alkali Superfund Site (“Site”) not only includes 80-120 Lister Avenue, but also includes the Lower Passaic River Study Area, and the aerial extent of the contamination area; and

**WHEREAS**, information indicates that the Site, which spans across several counties in the State of New Jersey, has been used for numerous industrial operations since the American Industrial Revolution; and

**WHEREAS**, over the years, those industries discharged waste into the Passaic River resulting in vast contamination; and

**WHEREAS**, in 1983, the United States Environmental Protection Agency (“USEPA”) sampled and discovered dioxins determined to have originated from the Diamond Alkali Company, a pesticide and chemicals manufacturer which operated in the 1950s and 1960s; and

**WHEREAS**, the USEPA then requested that further study be conducted; and

**WHEREAS**, the USEPA, in conjunction with the New Jersey Department of Environmental Protection (“NJDEP”), initiated a series of investigations and cleanup activities, as well as engaged the Diamond Alkali Company and its successors in interest; and

**WHEREAS**, in 1984, as a result of the investigations, the Site was placed on the National Priorities List (“NPL”); and

**WHEREAS**, due to the geographical vastness and complexity of the anticipated remedial work, the USEPA separated the Passaic River and the affected areas into four (4) Operable Units (“OU”s); and

**WHEREAS**, OU1 consists of the Lister Avenue Property, OU2 comprises the Lower 8.3 Miles of the Passaic River, OU3 comprises the 17-Mile Lower Passaic River Study Area (“LPRSA”), and OU4 comprises the Newark Bay Study Area; and

**WHEREAS**, the following Contaminants of Concern (“COC”s) were discovered during the

investigations, among others: dioxins and furans, PCBs, mercury, DDT, copper, dieldrin, PAHs, and lead; and

**WHEREAS**, the USEPA issued a Record of Decision (“ROD”) for OU1, the Lister Avenue property, on or about September 30, 1987; and

**WHEREAS**, since that time, the USEPA has engaged in additional investigations and cleanup activities; and

**WHEREAS**, based on the dispersion of the contaminants throughout the River, the USEPA expanded the Site to include the entire seventeen (17) Mile Lower Passaic River, which area comprises the LPRSA; and

**WHEREAS**, based on sampling of the LPRSA, the bulk of the contaminated sediment located at the Lower 8.3 miles of the River (OU2) the USEPA determined OU2 had to be addressed first; and

**WHEREAS**, in order to effectuate a remedial plan for OU2, a Remedial Investigation and Focused Feasibility Study (“RI/FFS”) was conducted; and

**WHEREAS**, on or about March 3, 2016, the USEPA issued a ROD for OU2 which selected as a remedy bank to bank dredging and the implementation of an engineered cap; and

**WHEREAS**, the implementation of the ROD is estimated to cost \$1.38 billion (“Removal Costs”); and

**WHEREAS**, Occidental Chemical Corporation (“OCC”), a successor in interest to Diamond Alkali Company, is undertaking the remedial design for OU2 and is expected to complete the design in 2020; and

**WHEREAS**, on or about March 31, 2016, USEPA sent the City, as well as certain other public entities including the Passaic Valley Sewerage Commission, a Notice of Potential Liability with respect to OU2; and

**WHEREAS**, to date, the USEPA has sent Notices of Potential Liability to over one hundred (100) private entities, many of which have joined a Cooperating Party Group (“CPG”); and

**WHEREAS**, various lawsuits have been filed over the years relating to the contamination of the Site; and

**WHEREAS**, the USEPA considers the City to be a PRP under CERCLA, 42 U.S.C. §9607(a)(1), and under CERCLA, 42 U.S.C. §9607(a)(1)(A), any one PRP may be held responsible for all such Removal Costs; and

**WHEREAS**, certain PRP’s, including the City, have been engaging in good faith settlement negotiations with USEPA in order to resolve their alleged liability; and

**WHEREAS**, the USEPA has requested that the City and all of the other PRPs execute a Tolling Agreement which would extend any statute of limitations that could arguably apply to USEPA’s claims for the Removal Costs; and

**WHEREAS**, the statute of limitations on USEPA's claims for the Removal Costs will not begin to run until a Record of Decision ("ROD") is issued, after the completion of the Remedial Investigation/Feasibility Study, which is currently being conducted by one of the other PRPs, at its sole cost; and

**WHEREAS**, the statute of limitations on USEPA's claims for the Removal Costs arguably began to run upon the issuance of the ROD on or about March 3, 2016; and

**WHEREAS**, as a part of the good faith discussions with the USEPA, the other PRPs have already signed Tolling Agreements with the USEPA extending the statute of limitations which could apply against the USEPA's claims for Removal Costs; and

**WHEREAS**, the purpose of this Resolution is to authorize the execution of a Tolling Agreement, in the form attached hereto, for the benefit of the USEPA by allowing the statute of limitations for the recovery of certain Removal Costs incurred by USEPA at the Property, pursuant to the CERCLA for removal activities undertaken by USEPA, to be tolled until February 15, 2021; and

**WHEREAS**, the law supports the liberal application of the statute of limitations in favor of the government including where a Remedial Investigation/Feasibility Study is conducted in connection with a removal action; and

**WHEREAS**, a PRP that settles its liability with USEPA is not liable for contribution claims under 42 U.S.C. §9622(h)(4); and

**WHEREAS**, the City wishes to promote the good faith settlement discussions with USEPA and the other PRPs in order to resolve this matter expeditiously and with finality such that the City is not subject to potential costly litigation.

**NOW, THEREFORE, BE IT RESOLVED BY THE MUNICIPAL COUNCIL OF THE CITY OF NEWARK THAT:**

1. The Mayor and/or his designee, the Corporation Counsel, is authorized to execute the Tolling Agreement in the form attached hereto as **Exhibit A**, which allows the statute of limitations for the recovery of certain Removal Costs incurred by USEPA at the Property, pursuant to the CERCLA for removal activities undertaken by USEPA, to be tolled until February 15, 2021.
2. The Mayor and/or his designee shall place a copy of the executed Tolling Agreement on file in the Office of the City Clerk.
3. No expenditure of City funds is required with the execution of the Tolling Agreement.

4. This Resolution shall take effect immediately.

#### **STATEMENT**

This Resolution authorizes the execution of a Tolling Agreement in the form attached hereto for the benefit of the United States Environmental Protection Agency (“USEPA”) by allowing the statute of limitations for the recovery of certain response costs incurred by USEPA pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) for removal activities undertaken by USEPA in connection with the Passaic River, to be tolled until February 15, 2021.