



Legislation Details (With Text)

File #: 19-1495 **Version:** 1 **Name:** Tolling Agreement: Occidental Chemical Corporation

Type: Resolution **Status:** Adopted

File created: 9/19/2019 **In control:** Law

On agenda: 10/8/2019 **Final action:** 10/8/2019

Title: Dept/ Agency: Law
Action: ☐ Ratifying ☒ Authorizing ☐ Amending
Type of Service: Agreement with Governmental Entity
Purpose: Execution of Tolling Agreement with Occidental Chemical Corporation to Extend the Statute of Limitations Period for Cost Recovery, Contribution, and Declaratory Relief in Connection with an Administrative Settlement Agreement and Order on Consent for Remedial Design Concerning Activities Conducted at the Diamond Alkali Superfund Site
Entity Name: Occidental Chemical Corporation
Entity Address: 5005 LBJ Freeway, Dallas, Texas 75215
Contract Amount: N/A
Funding Source: N/A
Contract Period: N/A
Contract Basis: ☐ Bid ☐ State Vendor ☐ Prof. Ser. ☐ EUS
☐ Fair & Open ☐ No Reportable Contributions ☐ RFP ☐ RFQ
☐ Private Sale ☐ Grant ☐ Sub-recipient ☐ n/a
Additional Information:
Tolling statute of limitations until July 31, 2021.

Sponsors: Council of the Whole

Indexes:

Code sections:

Date	Ver.	Action By	Action	Result
10/8/2019	1	Municipal Council	Adopt	Pass

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WHEREAS, the purpose of this Resolution is to authorize the execution of a Tolling Agreement in the form attached hereto for the benefit of Occidental Chemical Corporation (“OCC”), by allowing the statute of limitations for certain cost recovery, contribution, and declaratory relief pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), for costs incurred and to be incurred by OCC in connection with an Administrative Settlement Agreement and Order on Consent for Remedial Design (2016 ASAO) between OCC and the United States Environmental Protection Agency (“USEPA”), with respect to the Diamond Alkali Superfund Site, which consists of the real property located at 80-120 Lister Avenue within the City of Newark, the Lower Passaic River Study Area, and the areal extent of contamination (the “Site”), to be tolled until July 31, 2021; and

WHEREAS, information indicates that since the American Industrial Revolution, the Site, which spans across several counties in the State of New Jersey, has been used for numerous industrial operations, which industries discharged waste into the Passaic River, resulting in vast contamination over the years; and

WHEREAS, in 1983, the 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 60s; and

WHEREAS, upon the discovery of dioxins, 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 comprises 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 USEPA identified the following main Contaminants of Concern (“COC”s) during the investigations: dioxins and furans, PCBs, mercury, DDT, copper, dieldrin, PAHs, and lead; and

WHEREAS, based on the finding that the bulk of the contaminated sediment was located at the Lower 8.3 miles of the River, the USEPA determined to address OU2 first; 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 estimated to cost \$1.38 billion; and

WHEREAS, OCC, a successor in interest to Diamond Alkali Company, entered into the 2016 ASAO with USEPA for the remedial design of 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 indicating that the USEPA considers the City to be a Potentially Responsible Party ("PRP"), and could therefore hold the City responsible for all Removal Costs under 42 U.S.C. §9607 (a)(1); 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, certain PRPs, including the City, have been engaging in good faith settlement negotiations with USEPA in order to resolve their alleged liability; and

WHEREAS, OCC initiated litigation captioned Occidental Chemical Corporation v. 21st Century Fox America, et al., No. 2:18-cv-11273-MCA-JAD, in the United States District Court for the District of New Jersey (the "Litigation"), against approximately 120 defendants for cost recovery, contribution, and declaratory relief under CERCLA for, *inter alia*, costs incurred and to be incurred in connection with the 2016 ASAOC; and

WHEREAS, the three-year statute of limitations pursuant to 42 U.S.C. §9613(g)(3)(B) on OCC's claims for contribution arguably began to run on September 30, 2016, the dated OCC and USEPA entered into the 2016 ASAOC; and

WHEREAS, in managing the Litigation, the Court previously set a deadline for the Defendants to the Litigation to file third-party complaints against the public entities, including the City, but that the deadline has been postponed; and

WHEREAS, information indicates that the Court will likely order a new deadline by which Defendants to the Litigation may file third-party complaints against the public entities in the near future; and

WHEREAS, the Court will further likely order that if the Defendants in the Litigation do not file against the public entities by the deadline, OCC will have the opportunity to file an amended complaint naming the City and other public entities as Defendants in the Litigation; and

WHEREAS, the City and OCC wish to avoid litigation in favor of a good faith settlement discussion in order to settle this matter expeditiously and with finality such that the City is not subject to costly litigation.

NOW, THEREFORE, BE IT RESOLVED BY THE MUNICIPAL COUNCIL OF THE CITY OF NEWARK, NEW JERSEY, 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**.
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. 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 Occidental Chemical Corporation ("OCC") by allowing the statute of limitations for certain cost recovery, contribution, and declaratory relief pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for costs incurred and to be incurred, by OCC in connection with an Administrative Settlement Agreement and Order on Consent for Remedial Design (2016 ASAO) between OCC and the United States Environmental Protection Agency ("USEPA") with respect to the Passaic River, to be tolled until July 31, 2021.