



United States Department of the Interior



FISH AND WILDLIFE SERVICE

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In Reply Refer To:

To: Brian Donohue, Esq., Senior Attorney, Environmental Enforcement Section,
Environment and Natural Resources Division, U.S. Department of Justice

Catherine Adams Fiske, Esq., Senior Counsel, Environmental Enforcement
Section, Environment and Natural Resources Division, U.S. Department of
Justice

Through: Mark Barash, Esq., Senior Attorney, Northeast Region, Office of the Solicitor,
U.S. Department of the Interior

David Gately, Esq., Attorney-Advisor, Northeast Region, Office of the Solicitor,
U.S. Department of the Interior

From: Clay Stern, Lead Administrative Trustee Representative, New Jersey Field Office,
U.S. Fish and Wildlife Service, U.S. Department of the Interior *Clay Stern*

Subject: Interim Settlement and Crediting Agreement Between the Federal Natural
Resource Trustees and the BASF Corporation Concerning Early Restoration at the
BASF Riverfront Project in East Newark, New Jersey

The Federal Natural Resource Trustees, the U.S. Department of the Interior ("DOI") and the National Oceanic and Atmospheric Administration ("Federal Trustees"), for the Diamond Alkali Superfund Site and the Berry's Creek Study Area, reviewed the public comments received on the Interim Settlement and Crediting Agreement Between the Federal Natural Resource Trustees and the BASF Corporation Concerning Early Restoration at the BASF Riverfront Project in East Newark, New Jersey ("Agreement"), understanding that this public comment review process must be completed by the Federal Trustees for the Agreement to receive final approval, allowing the East Newark Riverfront Park Project ("Project") to move forward. The Federal Trustees have concluded that the comments received were in favor of the Agreement, as none of the comments raised concerns or criticism of the Agreement itself but instead focused on aspects of Project design, which the Federal Trustees considered to be positive responses to the Agreement since the Agreement must go into effect in order for the Project to be completed.

Since no negative public comments were received on the Agreement after a 30-day public comment period, the Federal Trustees found no basis to revise the previous agency approvals of

the Agreement provided to the U.S. Department of Justice ("DOJ"). Therefore, as Lead Administrative Trustee, DOI, on behalf of the Federal Trustees, strongly supports DOJ providing its final approval of the Agreement allowing the Agreement to go into effect and the Project to move forward. The Federal Trustees' responses to comments are attached and should be included with the fully executed Agreement.

If you have any questions, please contact me at clay_stern@fws.gov. Thank you very much for your attention to this matter.

Attachment: (1)

The Forwarded Comments Below are for the Attention of: The Assistant Attorney General,
Environment and Natural Resources Division.

----- Forwarded message -----

From: **Marcha Johnson** <marcha.johnson@gmail.com>

Date: Fri, Jul 1, 2022 at 9:01 PM

Subject: E. Newark Riverside Park comments

To: <Tom.brosnan@noaa.gov>

Dear Mr. Brosnan, I tried to send these comments to [Daarp.noaa.gov](https://daarp.noaa.gov) this afternoon, but the message bounced back, Would you kindly forward them to the appropriate person? Thank you,

Marcha

July 1, 2022

Dear Dept. of Justice staff and others involved in East Newark Riverfront Park,

Thank you for inviting public comments on the proposed design. I am an ecological restorationist and landscape architect with a special interest in urban water edges with contaminated soil in the NY/NJ region. Here are some comments on the illustrated design published on the website [Darrp.noaa.gov/EastNewarkRiverfrontPark](https://daarp.noaa.gov/EastNewarkRiverfrontPark), and a few suggestions for improving this riverside design.

Observations about the design:

- 1) The interface of the park with the Passaic R. appears to be a hardened edge, effectively fragmenting new greenspace and constructed wetlands from the river water and its aquatic species. There are two basic concerns with this approach:

- a) While the planned work could sequester Agent-Orange contaminated soil behind a fixed wall and underwater pavement, marine infrastructure has an average life expectancy of 20-

40 years, about the same time when the company's responsibility for cleanup will be over. When the wall begins to degrade, and sea level is higher than it is now, the park will likely need to be rebuilt to avoid further toxic contributions to the river, however higher water will make reconstruction much more difficult. This plan as I understand it, is a temporary solution with very little habitat actually restored in the river and apparently no plan for the moment 30 years in the future when a new approach will be urgent.

b) Because the hard edge is a long straight line (in plan view), currents will move unimpeded and rapidly along the wall. Animals or people who slip and tumble into the water will be swept downstream, and swift water with few places to hold on will likely be inhospitable to river species. Ice scour is an infrequent but powerful force that can contribute to degrading this kind of in-water infrastructure.

2) The pool and wetlands seem to be intended as shoreline habitat restoration, however, because they are separated from the river, they are likely to serve only a subset of the potential Passaic R. populations which could make use of them for spawning, feeding, resting and/or shelter. There also appears to be scant vegetative cover around the edge of the pool, making it less likely for some birds to choose to use the area because they will be open to views of recreational users including their dogs.

Suggestions :

The proposed facilities for public recreation will be appreciated by the community; much less attention seems to have been given to natural processes and non-human users of the space. Here are a few ways to improve the design as river-edge habitat.

- Adding a bird blind at the pool/wetland border would help, so the birds are not as startled by the rest of the park activities.

- Since the river bottom will have been paved over to prevent further mixing of contaminated sediments, some mechanisms for accreting new cleaner sediments above the paved surface would help to rebuild something of the former benthic environment. These could include depressions in the underwater pavement to collect mud and simulate underwater ridges; structures such as reefballs, gravel bars or oyster castles to create texture and cavities for organisms to attach to, or occupy.

- If the plan view of the water edge were more serpentine, patterned along the shapes of the original, natural river's edge, it would be more scenic and also recreate some of the functions of micro coves, inlets and shallow pockets which were displaced by filling.
- Without compromising any armoring functions, the site would be more habitat friendly with some soft geotechnical fabrics, fuzzy ropes, eel mops, textured surfaces and steps or terraces built on the riverside of the park's hard edge

Respectfully submitted,

Marcha Johnson, PhD, ASLA



**Comments on Natural Resources Damage Assessment and Restoration
East Newark Riverfront Park Interim Settlement and Crediting Agreement
July 7, 2022**

Since its inception, the CAG has maintained a strong interest in the restoration of natural resources in and adjacent to the river. Over the course of its activities, it has continuously expressed a strongly held concern that the planning and implementation of natural resources restoration be proactive and fully integrated into the decision-making regarding cleanup of the river. In 2010, we included values directly related to natural resource restoration, including:

- Make all decisions in light of a long-term goal to eventually return the river to a fishable, swimmable condition
- Restore the Passaic to a living river and a viable natural resource, with coordinated short and long-term efforts to conduct wetlands, habitat, and wildlife restoration
- Place a high priority on locating natural resource restoration activities in the local communities that have been directly affected by the long-term pollution of the river

The CAG is very excited to see this first significant activity to conduct a Natural Resource Recovery project and is hopeful that it will be seen through to fruition and applaud the Trustees for taking advantage of this opportunity for immediate action. Cleaning up the property and creating new public space and access to the river is highly desirable. It appears that the NRDA has taken many important things into consideration: cost of the project, continued to hold responsible parties for their full obligation rather than write off that obligation because of their building of this park, and that the park will need to be managed and maintained once it is built and the responsible party has committed 30 years of support after the parks opens.

Overall, we are hopeful that many more activities are possible and that they will be developed in a coordinated and connected manner to restore natural resources and access to those natural areas throughout the region. We realize that not all actions will be directly benefitting those most impacted by the contamination, but are hopeful that additional efforts will be more proximate to contamination and hope that they can be planned and implemented in direct collaboration with the imminent cleanup activities. We feel strongly that coordinating natural resource restoration efforts directly with cleanup is the most efficient and effective way of ensuring that these efforts are actually conceived and completed.

Although public participation was built into the Natural Resources Damage Assessment process, a significant portion of the process and many aspects of the assessment and park design are done before public vetting or input. There may be good reasons for this

for many parts of the program, but it is the CAGs opinion that once developing and presenting information on a restoration project, the community should be much more deeply involved in identifying what has been denied them the many decades they haven't had access to the river and what types of facilities, parks, natural space, and wildlife restoration is appropriate for them. Not that the public would be the final decider, but should have as much of a say in the development of the idea as the responsible party and government agencies that put the plan together.

Good public participation suggests that early conversations are conducted to discuss the interests and values of the public being impacted. Specifically, some of the early public involvement was done with significant pieces of information missing about the who, what, why and how the project was being put together. The requirements of what needed to be included in the project by the Trustees and legal requirements for restoration, there were decisions made about what could fit into the footprint of the final plan. The community did not have a chance to weigh on what they may have wanted to trade off that would reflect their hoped for use of the space.

The design is laudable in that includes many things ranging from natural areas to passive recreation to active use areas. Five acres is a sizeable piece of land, but there are times in which it feels there is too much wedged into the space. As referenced above, because the community wasn't involved in early design of the project, it is hard to know whether anything could or should be eliminated to focus on uses that would be more desirable. It's almost as though the design include everything and the kitchen sink so that it would be hard for anyone to be against it.

The CAG strongly supports the development of new parks along the Passaic River. We are also excited to see more done sooner rather than later, the communities lining the Passaic River have been harmed by their lack of access to the river and the condition that much of the post-industrial vacant land that lines the river. As more work is considered, we hope that you will collaborate with all involved agencies to help create an overall network of parks, trails, greenspaces, and natural habitats throughout the Passaic corridor.

Again, the CAG is grateful for your efforts and strongly supports this project.

RESPONSE TO PUBLIC COMMENTS

ADMINISTRATIVE SETTLEMENT: INTERIM SETTLEMENT AND CREDITING AGREEMENT BETWEEN THE FEDERAL NATURAL RESOURCE TRUSTEES AND BASF CORPORATION CONCERNING EARLY RESTORATION AT THE BASF RIVERFRONT PROJECT ("EAST NEWARK RIVERFRONT PARK")

July 29, 2022

Under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.*, an administrative settlement, entitled "Interim Settlement and Crediting Agreement Between the Federal Natural Resource Trustees and BASF Corporation Concerning Early Restoration at the BASF Riverfront Project" (the "Crediting Agreement") was published for public comment on June 7, 2022 (87 Fed. Reg. 34720). At the conclusion of the public comment period, and pursuant to Section XX (B) of the Crediting Agreement, the Department of Justice reserved the right to withdraw from the Crediting Agreement if, upon consideration of public comments received, the United States ". . . concludes that this Agreement is inappropriate, improper, inadequate, or otherwise not in the best interests of the public." Two comments were received during the 30-day public comment period, as summarized below. This is the response to those comments.

In addition to the 30-day public comment period, the United States provided additional public outreach opportunities for the public. For example, the Federal Trustees and NOAA, in conjunction with the Department of Justice ("DOJ"), issued a press release, along with a Factsheet about the terms of the Crediting Agreement (in English, Spanish, and Portuguese); published a "Frequently Asked Questions" document, further explaining the Crediting Agreement, including a description of the proposed Park; and the Trustees maintained a website with accessible information for the public. Moreover, the Trustees, DOJ and BASF Corporation held a Virtual Public Meeting, as well as an Open House in the Borough of East Newark, to provide the public with information on the Crediting Agreement and the proposed East Newark Riverfront Park. Two sets of written comments were received; one from a member of the public with proposals for project design and the second from the Passaic River Community Advisory Group ("CAG") also responding to park design concepts.

The Federal Trustees have reviewed the comments received on the BASF Interim Crediting and Settlement Agreement, noting that this Agreement must be finalized before the East Newark Riverfront Park Project can move forward. The Trustees have concluded that the comments received were in favor of the Crediting Agreement, as none of the comments raised concerns or criticism of the Agreement itself, but focused on aspects of project design. Since no negative public comments were received on the Crediting Agreement, the Federal Trustees find no basis to revise the previous agency approvals provided to DOJ, and recommend and urge DOJ to affirm the Agreement.

RESPONSE TO PUBLIC COMMENTS

ADMINISTRATIVE SETTLEMENT: INTERIM SETTLEMENT AND CREDITING AGREEMENT BETWEEN THE FEDERAL NATURAL RESOURCE TRUSTEES AND BASF CORPORATION CONCERNING EARLY RESTORATION AT THE BASF RIVERFRONT PROJECT ("EAST NEWARK RIVERFRONT PARK")

Comment 1: From Marcha Johnson, PhD, ASLA (.pdf attached)

Response to Comment 1:

Thank you for your interest in the East Newark Riverfront Park Project and the Interim Settlement and Crediting Agreement. Since your comments focus on possible ways to enhance specific design elements of the Park's conceptual design, we receive your comments as a positive response on the Crediting Agreement. This is because the finalization of the Crediting Agreement is required to allow the Park project to move forward into the design and permitting stage.

Meanwhile, your thoughtful proposals relating to project concepts and design have been forwarded to Park planners for future consideration. All Park planning -- including the proposals you raise -- must be coordinated with the ongoing remedial designs of the U.S. Environmental Protection Agency ("EPA") for the Passaic River cleanup, while also meeting State permitting and related requirements. Any proposal that conflicts with EPA's remedial plans or State requirements would not be able to be considered. Since consultation and permitting can be a long process, the Trustees are not in a position, at this time, to suggest that your specific proposals will become part of a final project design. This said, we appreciate your effort and expertise in outlining alternative design concepts and suggestions. As mentioned, your proposals will be taken into consideration by Park planners. We thank you for your comments, as well as your support of this Project and the Crediting Agreement.

Comment 2: Comments by the Passaic Community Advisory Group (.pdf attached)

Response to Comment 2:

Thank you for your interest in the East Newark Riverfront Park Project and the Interim Settlement and Crediting Agreement. We specifically thank you for your encouraging and positive affirmation of the Park Project, which includes the Crediting Agreement. Finalization of the Crediting Agreement is required to allow the Park proposal to move forward into the design and permitting stage.

As part of your comments, the CAG noted a desire for earlier input on the Park's conceptual design. In this case, the Trustees and the Department of Justice were limited in their ability to share specific details regarding the Park Project because we were engaged in confidential settlement negotiations. However, we understand your concern about the importance of public involvement and as circumstances allow, we are committed to inviting earlier public participation in planning natural resource restoration projects in the future.

RESPONSE TO PUBLIC COMMENTS

ADMINISTRATIVE SETTLEMENT: INTERIM SETTLEMENT AND CREDITING AGREEMENT BETWEEN THE FEDERAL NATURAL RESOURCE TRUSTEES AND BASF CORPORATION CONCERNING EARLY RESTORATION AT THE BASF RIVERFRONT PROJECT ("EAST NEWARK RIVERFRONT PARK")

In this case, the Trustees took opportunities to include the public in the project planning process to the extent that we were able. Even under the constraints of the confidentiality of settlement negotiations, the Trustees published a Draft Early Restoration Plan and Environmental Assessment in December 2020, seeking thirty days of public comment on the proposed East Riverside Park Project. This Early Restoration Plan outlined the natural landscaping components that could be used in Park planning -- to include forested areas, pollinator gardens, grasslands, and low wetlands, while creating public access to the Passaic River. The Trustees also discussed possible design alternatives that had been considered, but were not recommended -- and the reasoning behind those proposed decisions. The Trustees received public comment on the Early Restoration Plan, and after due consideration, the Trustees published responses to these comments in July 2021. Meanwhile, Trustee representatives attended monthly CAG meetings and provided a short presentation to the CAG on the design elements outlined in the Early Restoration Plan and responded to questions from the CAG members. Trustee representatives also provided periodic updates to the CAG, within the limits of settlement confidentiality. That being said, the Trustees understand the need and value of maximally involving the community earlier in the process, as you point out.

In the meantime, we are happy to receive future recommendations and feedback from the CAG on the Park project, as design and construction moves forward. Again, we thank you for your comments, as well as your support of this Project and the Crediting Agreement.