

# Agent Orange's Other Legacy—a \$12 Billion Cleanup and a Fight Over Who Pays

The owner of a New Jersey manufacturing site is using the U.S. bankruptcy process, creditors allege, in a bid to escape liability

Dec. 3, 2018 10:20 a.m. ET

The Ironbound neighborhood of Newark, N.J., has been revitalized. The tree-lined river that runs beside it has not.

Half a century ago, the herbicide Agent Orange was manufactured along the banks of the Passaic River. Poison hosed off factory floors drained into the waterway, where it sank to the bottom and became toxic sludge. The estimated cost of [cleaning it up](#) and compensating for environmental damage could run as high as \$11.8 billion.

Who will pay the bill? That's now a question for a federal bankruptcy court in Delaware. And its answer could determine whether other companies with billions of dollars in environmental liabilities can use the U.S. bankruptcy system to avoid them.



Dioxin pollution in the Passaic River in Newark, N.J., dates back to the Vietnam era, when Agent Orange was manufactured on its banks. Photo: Mark Kauzlarich for The Wall Street Journal

YPF SA, an Argentine state oil company, took over the Agent Orange site in 1995 as part of its acquisition of Maxus Energy Corp., an oil-and-gas company. Over the years, YPF sold off Maxus's oil-and-gas holdings, then [put the unit into bankruptcy](#) in 2016. YPF says it isn't responsible for covering the cost of the cleanup. And the bankrupt subsidiary, it says, has no money to pay for it.

Other interested parties, including another company that shares the liability, are up in arms over the maneuver. They say the subsidiary was a puppet company emptied of value and left to take the fall for the Passaic River. Creditors sued YPF in June, alleging [it improperly bled Maxus dry](#), intending to use its subsidiary's bankruptcy filing to ditch its cleanup obligations.

YPF, for its part, accuses its critics of the same sin. According to YPF's lead lawyer, James F. Conlan of Sidley Austin LLP, the lawsuit is an attempt by

Maxus's largest creditor, Occidental Chemical, which shares the liability, to avoid being stuck with the cleanup bill itself. He says YPF will "strongly defend against the lawsuit." YPF's bid to have the case thrown out is scheduled for argument on Dec. 18 in bankruptcy court.

Many other companies are [watching the case](#), none more closely than the 100 or so the Environmental Protection Agency says may share responsibility for polluting the Passaic with byproducts from the manufacture of paints, pesticides and other chemical products. If YPF doesn't pay, billions of dollars of Agent Orange cleanup costs would fall first to other companies, and then, possibly, taxpayers.



The estimated cost of cleaning up the Passaic River and compensating for environmental damage could run as high as \$11.8 billion. Photo: Mark Kauzlarich for The Wall Street Journal

Since 1980, federal law has made it difficult for U.S. companies to escape paying for environmental contamination. In recent years, some companies have used chapter 11 of the bankruptcy code to minimize environmental

liability, says Joshua Macey, a research fellow at Cornell Law School who co-wrote a paper on the topic to be published by the Stanford Law Review.

Coal-mining companies have reduced their environmental obligations in bankruptcy proceedings. In 2015 and 2016, [Alpha Natural Resources Inc.](#), [Arch Coal Inc.](#) and [Peabody Energy Corp.](#) persuaded state regulators to reduce the amount the companies had committed to reclaim mines by nearly \$1.9 billion during their bankruptcy cases. Those obligations rose again for the latter two companies when they emerged from bankruptcy, illustrating how tough it is to shake off environmental costs completely.

The dioxin pollution in the Passaic River dates back to the Vietnam era, when the U.S. military used Agent Orange to kill Vietnamese crops and vegetation. Demand for the toxic herbicide ran high. A company called Diamond Alkali, whose name was later changed to Maxus Energy, manufactured it in a factory along the river.

Workers spoke of factory floors so slick with Agent Orange byproducts that it was treacherous to walk, according to a 1992 New Jersey court decision in a lawsuit Diamond filed against dozens of insurance companies, seeking coverage for the environmental damage. A lethal Agent Orange byproduct called dioxin flowed into trenches that emptied into the Passaic, the workers said in court papers.

The tidal river carried dioxin upstream and down, tainting a 17-mile stretch of riverbed in one of New Jersey's most populous areas. The contaminants reached to Newark Bay and other waterways, according to the Environmental Protection Agency, which has designated the area a Superfund site. To this day, crabs and fish from the river are too contaminated for human consumption.



During the Vietnam War, the U.S. military used Agent Orange to kill Vietnamese crops and vegetation. Photo: U.S. Department of Defense/Associated Press

In 1983, New Jersey declared the Passaic River site a state of emergency. The EPA sent crews in biohazard suits into the Ironbound neighborhood to test for dioxin on streets and in yards.

The looming potential liability for the pollution hung over much of the deal making that followed.

In 1986, Occidental Chemical, a unit of [Occidental Petroleum Co.](#) that is widely known as OxyChem, bought the chemicals business then owned by Diamond. Concerned about the Agent Orange liability, it didn't buy any part of the Newark site, but it still was liable as a successor owner of the business. As part of the deal, it got indemnity from Diamond, meaning that it would have to be reimbursed for any money spent on cleanup.

In 1995, YPF bought the rest of the company, which had changed its name to Maxus Energy, for \$750 million, eager to own its prized oil-and-gas assets in Bolivia, Venezuela, Ecuador, Indonesia and the U.S. Along with those holdings came the Agent Orange factory site in Newark and its liabilities.

The risk of a multibillion-dollar environmental liability didn't weigh heavily in the deal, according to documents cited in the current lawsuit by creditors. Shortly after the purchase, however, a Maxus lawyer warned that the contamination carried "the potential for total destruction of the company it had just purchased," the lawsuit said.

According to the suit, it wasn't long before YPF executives recognized that costs associated with the Passaic cleanup were a threat. YPF developed a legal strategy with an endgame that included bankruptcy, according to YPF memos that surfaced in litigation brought by the New Jersey Department of Environmental Protection against YPF, Maxus and OxyChem.



The Ironbound neighborhood of Newark, N.J., borders the contaminated river. Photo: Mark Kauzlarich for The Wall Street Journal

The plan was called “Project Jazz” for a New York nightclub where the company and its lawyers worked out final details, creditors said in their lawsuit. YPF would sell off Maxus’s oil-and-gas assets over an extended period, mostly to itself or to a big shareholder. That is what happened, depleting Maxus of valuable assets and revenues and leaving it dependent on its parent and loaded with Agent Orange liabilities.

For the bankruptcy strategy to work, YPF had to keep Maxus alive for years after the last significant transaction, waiting out the period when creditors were allowed to challenge the deals, the company’s lawyers advised in a later memo.

The state of New Jersey sued Maxus and OxyChem in 2005, accusing both companies of delaying the cleanup. [New Jersey reached settlements](#) with Maxus, YPF and OxyChem that covered the \$220 million the state had spent

cleaning the Passaic, but the settlement didn't cover the cost of finishing the job.

The claim filed by the EPA in Maxus's bankruptcy case says remaining cleanup costs could exceed \$6.3 billion. The EPA pegged the natural-resource damages at \$5.5 billion, bringing the total bill for what Agent Orange did to the Passaic River to \$11.8 billion.

“The Passaic is hard because the contamination is so heavy, it's so close to where people live, and the polluters have fought EPA every step of the way,” says Judith Enck, a former EPA regional administrator.

## **Toxic Corporate Saga**

The battle over liability for contamination caused by Agent Orange is complicated by a maze of corporate entities.

### **1951–69**

Agent Orange, DDT and other toxic products are manufactured on the banks of New Jersey's Passaic River at a site owned by Diamond Alkali.

### **1983**

High concentrations of toxic Agent Orange byproduct dioxin are discovered at the site. The company is now called Diamond Shamrock.

### **1986–87**

Diamond Shamrock sold its chemicals business to Occidental Chemical but kept the contaminated site, and later changed its name to Maxus Energy.

### **1995**

Argentina's state-run oil company, YPF, acquired Maxus Energy.

## 2016

Maxus Energy declared bankruptcy. Occidental Chemical assumed prime responsibility for the cleanup. YPF disclaimed any liability.

## 2018

Led by Occidental Chemical, creditors of Maxus Energy sued YPF, alleging Maxus Energy was stripped of assets before filing for bankruptcy as a means of discharging its environmental obligations.

In 2016, the EPA [laid out its plan](#) for cleaning up an 8-mile stretch of the Passaic, with an estimated cost of \$1.4 billion. That cost would fall first upon Maxus and OxyChem, and later, perhaps on other businesses identified as potentially liable. Up to that point, Maxus had been handling the cleanup work on OxyChem's behalf. Months later, Maxus filed for bankruptcy—the final step of Project Jazz.

Maxus claimed it had spent \$755 million over the years on cleanup, but didn't have the money either to finish the job or to reimburse OxyChem for what it has to spend, as stipulated in their deal years earlier. That left OxyChem on the hook for the entire Passaic cleanup—except for what it can collect by suing other businesses that put the river to industrial use.

Similar bankruptcy maneuvers haven't worked in the past. In a 2013 decision, a New York bankruptcy court determined that Kerr-McGee Corp. [had fraudulently “acted to free substantially all” their valuable oil-and-gas assets “from 85 years of environmental and tort liabilities”](#) by shifting them out of its [Tronox](#) Inc. unit, which filed for bankruptcy.

Four months after the bankruptcy judge ruled Kerr-McGee could be liable for up to \$14 billion in environmental damages, the company's parent settled for \$5 billion. It didn't respond to a request for comment.

Creditors led by OxyChem sued YPF in June, alleging it had improperly

drained Maxus of assets. The creditors are seeking \$14 billion from YPF—an amount that includes the cost of cleaning up the Passaic River and other alleged abandoned waste sites across the U.S.

Mr. Conlan, YPF’s lead lawyer, says OxyChem is spinning a sinister narrative about ordinary business decisions YPF made during the last 30 years.



An excavator in North Newark Bay dredges material as part of a cleanup effort. Photo: Mark Kauzlarich for The Wall Street Journal

At a bankruptcy court hearing in late 2016, David Gordon, a lawyer for the EPA, opposed YPF’s effort to end its exposure, saying the stakes for public health and safety are “tremendous.” The federal government will lead a cleanup of the Passaic Superfund site that will take 20 to 30 years to complete, he said.

At a hearing last year, New Jersey lawmakers called for an investigation into whether Maxus’s bankruptcy was an attempt to evade Passaic River cleanup

costs. OxyChem lawyer Frank Parigi said at the hearing that YPF's bankruptcy strategy threatens to set a dangerous precedent.

Other companies—foreign or domestic—would see YPF's scheme as a viable option to manage their balance sheets, which will harm American citizens, communities and corporations as well as state and federal government agencies," he said.

After the hearing, YPF issued a statement accusing OxyChem of pursuing "pointless litigation."

YPF has moved to have the Maxus creditors' suit dismissed, on the grounds that time has run out for the creditors to challenge the deals that stripped out the valuable assets. If the bankruptcy court rules in YPF's favor, the share of cleanup costs becomes heavier for OxyChem and other companies that did business on the river, potentially spurring more court fights.

OxyChem this summer sued other companies identified by the EPA as a "potentially responsible party" for polluting the Passaic, including [U.S. Steel Corp.](#) The lawsuit seeks to collect a portion of the cleanup costs. U.S. Steel, which built warships along the river in World War II, didn't respond to requests for comment.

Ultimately, taxpayers may have to pay for the cleanup if the companies involved don't have enough money to cover it. At the end of 2017, OxyChem's parent, Occidental Petroleum, was holding \$457 million in reserve for environmental fixes at 34 Superfund sites, according to a regulatory filing. The Passaic cleanup accounted for a large share of that reserve.

One part of the Agent Orange legacy has been cleaned up. The plant where the toxic herbicide was manufactured now is a gravel lot.



A concrete cap and gravel top are part of the cleanup of the site where Agent Orange was manufactured. Photo: Mark Kauzlarich for The Wall Street Journal

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*Appeared in the December 4, 2018, print edition as 'Agent Orange Tests Polluter-Pays Rule.'*