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Minister

Ministry
of the
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February 24, 1986

Mr. F. Henry Habicht II
Assistant Attorney General
Lands and Natural Resources Division
Department of Justice
Washington, D.C. 20503
U.S.A.

Subject: U.S. v. Hooker Chemicals and Plastics Corporation
(Hyde Park Landfill) DJ Ref. 90-7-40

Dear Mr. Habicht:

The Ontario Ministry of the Environment has evaluated the Stipulation on Requisite Remedial Technology Program filed by EPA/State and Occidental with the Court. We are providing to you, our response to that Stipulation.

At the outset, I would emphasize a fundamental point. The Ministry continues to maintain that removal of the contaminated material is the best and only permanent solution to the Hyde Park problem.

We recognize that the parties are not prepared at this time, however, to adopt this remedy without first attempting the other proposed solutions. I note that the parties and the Court have not ruled out excavation and other source elimination options from consideration as requisite remedial technology.

In the event that the short-term plan identified in the proposed RRT Stipulation is implemented, we have found the following shortcomings in that plan:

1. The proposed source control methods will be effective in removing mobile contaminants only. Immobile contaminants (solids, adsorbed chemicals) will likely be unaffected by source control unless enhanced recovery techniques such as recirculation are used;
2. The NAPL plume containment systems requires additional testing to ensure purging of NAPL from the bedrock. The use of recirculated APL in the purging system will reduce its effectiveness;
3. The entire APL plume will not be contained by the APL plume containment system and therefore the risk of future contaminant discharges is present. Flux monitoring of the APL plume

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by using wells both inside and outside the plume does not provide an accurate representation of contaminant flux to the river.

4. The Intermediate Formation studies do not define the lower limit of the contaminant plumes as required by the Settlement Agreement nor will they be useful in monitoring contamination below the Rochester Formation;
5. The Gorge Face Seep Program will need the installation of monitoring wells inside the APL plume near the gorge face to monitor and ensure the effectiveness of the APL plume containment system in preventing contaminant discharges to the Niagara River.

The Ministry evaluated the Stipulation for consistency with the original Decree. In its 1982 opinion, the Court determined that RRT was "necessarily loosely defined" and based on numerous considerations. The overall goal of the Decree, to protect against endangerment to human health and the environment, was to be achieved through utilization of this RRT concept.

We have evaluated the Stipulation to determine whether it is consistent with current EPA policy on the proper standard for clean-up of hazardous waste sites under Superfund. It is our opinion that Section 10.3(b) is inconsistent with EPA policy. Section 300.68(i)(1) of EPA's National Oil Spill and Hazardous Substances Pollution Contingency Plan (NCP) provides that unless EPA demonstrates that one of five exceptions applies, the remedy selected for a Superfund site must be one "that attains or exceeds applicable or relevant and appropriate Federal public health and environmental requirements that have been identified for the specific site" 40 C.F.R. 300.68(i)(1). "Applicable" requirements are those which would be legally applicable if the remedial action were not undertaken pursuant to Superfund 40 C.F.R. 300.6. "Relevant and appropriate" requirements are those which are designed to apply to problems sufficiently similar to those encountered at Superfund sites that their application is appropriate. Ibid.

Section 10.3(b) of the Stipulation addresses the clean-up levels to be enforced at the Hyde Park landfill. It provides that, in reassessing those levels to provide adequate protection for the environment, endangerment to the environment shall be defined as occurring only when there is a violation of a numerical standard or parameter in a Federal, State, or International requirement "which is generally applicable to the Niagara River or Lake Ontario and which would be otherwise enforceable against OCC."

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By this language, the Stipulation includes only "applicable" requirements, and excludes "relevant and appropriate" requirements. EPA has not demonstrated that the Hyde Park landfill falls within one of the exceptions to 40 C.F.R. 300.68(i)(1). Consequently, Section 10.3(b) appears to be inconsistent with EPA policy in the NCP.

By omitting relevant and appropriate requirements from consideration, EPA may ignore clean-up standards in those requirements which are more stringent than, or have no counterparts in, applicable requirements. The Province of Ontario therefore believes that Section 10.3(b) does not provide adequate protection to the environment from chemical migration from the landfill.

EPA should clarify Section 10.3(b) of the Stipulation to make explicit that both applicable and relevant and appropriate requirements must be considered. Alternatively, if the agreement is not so clarified, Ontario requests that EPA find that it is not in the public interest.

Ontario requests that EPA find that the proposed Stipulation is not in the public interest because it is inconsistent with EPA's NCP. Ontario further requests that EPA require the parties to promptly initiate good faith negotiations to modify the Stipulation to provide that both applicable and relevant and appropriate requirements must be considered in setting any future clean-up levels to provide adequate protection against endangerment to the environment.

Yours truly,

Original signed by Jim Bradley

Jim Bradley,
Minister