

85-6130

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA and THE STATE OF NEW YORK,

Plaintiffs-Appellees,

THE PROVINCE OF ONTARIO, CANADA, and the MINISTER OF
THE ENVIRONMENT OF THE PROVINCE OF ONTARIO, CANADA,

Plaintiffs-Intervenors-
Appellants,

v.

HOOVER CHEMICAL & PLASTICS CORP., HOOVER CHEMICAL CORP.,
OCCIDENTAL PETROLEUM INVESTMENT CO., OCCIDENTAL PETROLEUM
CORP., and THE CITY OF NIAGARA FALLS ("S" Area landfill),

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of New York

BRIEF FOR APPELLANTS

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Ontario Brief in Appeal from Affirmed Approval.

ARGUMENT

I

THE SETTLEMENT AGREEMENT MUST BE FAIR, REASONABLE, CONSISTENT WITH PUBLIC POLICY AND IN THE PUBLIC INTEREST

The standards applicable to judicial review of settlement agreements are generally stated in broad terms. The typical formulation is that settlements should be approved unless they contain "provisions that are unreasonable, unlawful, or against public policy." Kirkland v. New York State Department of Correctional Services, 711 F.2d 1117, 1129 (2d Cir. 1983). In making this determination, "[t]he primary concern is with the substantive terms of the settlement * * *." Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982). The reviewing court has "a limited duty to inquire into the technical terms and the factual disputes underlying the proposed settlement." United States v. Hooker Chemicals & Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1983) (Hyde Park Landfill).

In addition to these general requirements, special considerations are present when a case involves federal environmental statutes affecting the public interest, rather than only the private interests of the parties to the agreement. In such cases, the court should consider whether the proposed decree adequately protects the public interest. Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983); United States v. Ketchikan Pulp Co., 430 F. Supp. 83, 85 (D. Alaska 1977); United States v. Seymour Recycling Corp., 554 F. Supp. 1334, 1337 (S.D. Ind. 1982). In particular, the decree must "reflect concern for the problems for which Congress has

enacted the various environmental statutes" (United States v. Hooker Chemicals & Plastics Corp, *supra*, 540 F. Supp. at 1072) and "must be consistent with the public objectives sought to be attained by Congress" (Williams v. Vukovich, 720 F.2d 909, 923 (6th Cir. 1983)). Thus, "the focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interest of each party to the settlement." Citizens for a Better Environment v. Gorsuch, *supra*, 718 F.2d at 1125.

On appeal, the district court's approval of a settlement should be upheld unless it constituted an abuse of discretion. Berkman v. City of New York, 705 F.2d 584, 597 (2d Cir. 1983). However, "[e]ven when the standard is abuse of discretion, review for errors of law is plenary," and this includes erroneous legal interpretation of the terms of a settlement agreement. Donovan v. Roberts, 752 F.2d 1170, 1177-1178 (7th Cir. 1984).

II

THE DISTRICT COURT'S APPROVAL OF THE AGREEMENT SHOULD BE REVERSED OR, IN THE ALTERNATIVE, VACATED AND THE CASE REMANDED FOR RECONSIDERATION BECAUSE THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE AGREEMENT PERMITS FUTURE REMEDIAL OPTIONS AT THE S-AREA LANDFILL OTHER THAN CONTAINMENT

The district court held that "[a] successful containment program which prevents migration [of chemicals] away from the landfill * * * is consistent with current public policy." *Op.*, p. 45, J.A. 1485. In reaching this conclusion, the court expressed its sensitivity to "today's strong bias against further depositing of hazardous chemicals into landfills" and acknowledged that "new developments in environmental policy are [not]

irrelevant in determining whether a settlement should be approved." Id. at 49, J.A. 1489. Nonetheless, the court was unwilling to require the immediate implementation of a remedy requiring the removal and destruction of the Landfill's chemicals. The court acknowledged that "[i]t may well be that a containment program would be legally insufficient at a site where excavation and incineration are possible, practicable and safe -- even if more costly," but it found that application of that alternative at the Landfill does not presently meet these criteria. Id. at 50, J.A. 1490.

The district court then made the following statement (ibid.):

Finally, it should be noted that the concept of "Requisite Remedial Technology" is very flexible. If the containment program now proposed does not work, RRT must correct the defect. Excavation and incineration are not excluded from the realm of possible future alternative solutions if they become necessary.

Thus, the district court's approval of the Agreement rested in large part on its belief that future remedial options beyond containment are available under the RRT provisions of the Agreement and that those options could include excavation and incineration of the Landfill's chemicals.

While the Province believes that excavation and incineration provide a more viable option even in the short-term than indicated by the district court, the Province is not challenging the court's contrary finding in this appeal. Rather, the Province contends that the district court's interpretation of the Agree-

ment as allowing such remedies in the future is clearly erroneous. As we show below, the Agreement does not require Hooker to install anything more than a perpetual containment system at the Landfill, regardless of whether permanent remedies are developed in the future which are more protective, practicable and cost-effective. Indeed, as we also show, even in the event the Site Containment System fails, the Agreement does not require Hooker to undertake a genuinely permanent remedy. Rather, it merely requires the company to take some unspecified remedial measures which are directed at the chemicals that have migrated from the failing containment system. We further show that these aspects of the Agreement are clearly contrary to the policies expressed in federal statutes which preclude perpetual reliance on impermanent remedial actions. Ontario believes that, even if a remedy does not exist at the present time which will satisfy public policy, then provision must be made in the Agreement for its eventual attainment through new and developing technology. At a minimum, a settlement agreement cannot, as here, preclude the implementation of such technology.

We emphasize that our argument is based on the plain language of the Agreement. It is that Agreement which defines the obligations of the parties and which will govern all actions at the Landfill for the indefinite future. Future disputes will be resolved not by how the parties hope the remedial systems will operate or by how they think those systems will operate, but by how they have elected to define their obligations in the Agreement. The parties to the Agreement are extremely sophisticated, they bargained at great length over its terms, and they entered

into an extremely detailed and carefully crafted Agreement. It is therefore essential to examine the Agreement with great care to define precisely what it does and does not require.

Because the district court's legal analysis of the Agreement was seriously flawed and because that flaw relates to a major assumption underlying the court's approval of the Agreement, the court's decision should be reversed and the Agreement should be disapproved. At the very least, the lower court's decision should be vacated and the case remanded to that court for reconsideration. There is a substantial possibility that the district court's decision would have been different if it had correctly understood the Agreement. As we have shown above, the court acknowledged that public policy strongly discourages the landfilling of hazardous waste. It approved such a course here because other genuinely permanent remedial options for the Landfill, such as excavation and incineration, were not presently feasible and because it believed the Agreement allows the implementation of such options in the future. If the district court had correctly interpreted the Agreement as providing that such options cannot be required to be adopted in the future, despite their availability and feasibility, and that containment is the only remedy for the Landfill even if it subsequently does not work effectively, the court's decision might well have been different.

A. THE AGREEMENT ESTABLISHES A PERPETUAL LANDFILL CONTAINMENT SYSTEM AS THE FINAL AND ONLY REMEDIAL ACTION AT THE LANDFILL

In essence, the Agreement establishes a perpetual Containment System for the Landfill's chemicals and precludes imposition

of any remedy beyond containment. This is evident from several aspects of the Agreement.

First, as the district court recognized, "Hooker's major obligation will be met if it can prevent the off-site migration of chemicals." Op., p. 44, J.A. 1484. The Agreement provides that, so long as the various monitoring programs detect no off-site migration, Hooker is considered to be in compliance with the Agreement. See pp. 10-11 supra.

Second, while the drain tile collection system may remove some portion of the Landfill's chemicals, the Agreement contains no performance standard which requires Hooker to collect any, let alone all, of the chemicals, not even within the 35-year duration of the Agreement. The United States' own expert, Dr. Pinder, admitted that he could not quantify what proportion of chemicals would be collected. Tr. IIIB 7, J.A. 1098. He also admitted that, even under the best conditions, 10% of the NAPL in the Landfill, or about 2,500 tons (5 million pounds) would remain. Tr. IIIA 68, J.A. 1078.^{1/} Furthermore, he admitted that this calculation was based on his own conceptual design of the system and that Hooker may design a different system. Tr. III B 20, J.A. 1111. Indeed, Hooker took the position at the hearing that, unlike Dr. Pinder, it would not be concerned if no NAPL were collected and removed from the Landfill in five years. Tr. IIIB 18-19, J.A. 1109-1110. If no NAPL is collected, no provision in the Agreement is violated and no remedial action by Hooker is re-

^{1/}This calculation is based on the fact that 40% of the 63,000 tons of chemicals deposited in the Landfill is estimated to consist of NAPL. Op., p. 4, J.A. 1444. Thus, 25,200 tons of this amount are NAPL, and 10% of this figure is 2,520 tons.

quired. Thus, the Site Containment System is required to do nothing other than its title states -- to contain the Landfill's chemicals within its boundaries. As long as the system meets this requirement, the Agreement is satisfied, and no further obligation is or can be imposed upon Hooker with respect to the thousands of tons of hazardous chemicals at the Landfill.

Therefore, assuming the design and operation of an effective Site Containment System, it is highly probable that the system will have to operate in perpetuity. As the Province's expert testified (Tr. IIIB 114, J.A. 1204) and the district court acknowledged (Op., p. 41, J.A. 1481), any NAPL which remains in the Landfill will retain its dangerous properties for hundreds of years. As a result, the Site Containment System will have to operate for the same period of time to contain this threat. While the Agreement provides that Hooker's obligation to operate and maintain its Containment System might be extended indefinitely, it is highly doubtful that Hooker and its guarantor will maintain their corporate existence and their financial and logistical capability to maintain the system for such an enormous period of time.

Moreover, the required duration of the Site Containment System makes its failure all the more likely. The system relies on hydraulic gradients, not physical barriers, thereby requiring far more human intervention and maintenance than a normal landfill containment system. Thus, it is an active, not a passive, containment operation. Hooker can never close the system and simply walk away from it. Rather, it will have to operate the

system continuously and actively for hundreds of years, as will the governmental parties should Hooker and its guarantor pass from existence. Given the transitory nature of most human institutions, it is practically inevitable that the day will come when the Containment System will no longer be maintained. For that reason, the perpetual Containment System called for by the Agreement cannot rationally be viewed as a genuine permanent remedy for the Landfill.

Third, and most important, if the Site Containment System does fail, the Agreement does not require Hooker to do more than patch up the system. Thus, if the various monitoring systems detect the off-site migration of chemicals, Hooker's first obligation under the Agreement is to modify the operation of the Containment System to prevent further migration. Addendum II, paras. B(1)(f)(1), B(2)(1)(i), B(2)(e)(i), J.A. 195, 197, 200. If that action is ineffective, Hooker must then assess and implement RRT. *Id.*, paras. B(1)(g), B(1)(1)(ii), B(2)(f), J.A. 195, 197, 200. However, that RRT obligation is extremely limited. Hooker need only install RRT to remedy chemicals which have left the site. Addendum I, para. B(6)(a)-(c), J.A. 110-112. Indeed, the definition of RRT expressly provides that Hooker has no obligation to contain or collect chemicals within the Containment System. *Id.*, para. B(6)(c), J.A. 112. See p. 11, *supra*. Consequently, the Site Containment System is the one and only permissible method of containing and collecting chemicals at the Landfill. Requisite Remedial Technology, which the district court described as "a crucial component of this settlement" (Op., p. 14, J.A. 1454), only comes into play at the Landfill itself

when the Containment System fails, and it then only requires that Hooker take remedial action directed at the chemicals which have migrated from the Landfill.

As a result, in the event the Containment System fails repeatedly and never achieves the design and containment objectives in the Agreement, Hooker cannot be required to excavate and remove chemicals from or implement any other permanent remedy at the Landfill, even if the technology for such a remedy meets the RRT standards in the Judgment (i.e., that it is necessary to prevent endangerment to human health and the environment and is cost-effective). Judgment, para. 4, J.A. 72. While the district court suggested otherwise (Op., p. 50, J.A. 1490), the Agreement flatly precludes such a remedy since, in the event of Containment System failure, Hooker is only required to undertake RRT, since the Agreement expressly provides that Hooker is not required "to study or implement [RRT] to contain or collect chemicals" within the Containment System (Addendum I, para. B(6)(c), J.A. 112), and since excavation or any other permanent remedy would clearly require the collection of chemicals within the Containment System. In other words, while the district court held that, under the Agreement, a failed Site Containment System can lead to the imposition of a genuine permanent remedy at the Landfill, such as the excavation and incineration of the hazardous chemicals, the end result under the Agreement of a failed Containment System is, in fact, a perpetually leaking Landfill supplemented by off-site RRT.

This conclusion is further reinforced by a provision of the

Agreement which states that "nothing in this Judgment shall require Hooker to remove, replace, or interfere with the operation of the Industrial Intake Pipes or the power towers adjacent thereto." Addendum II, para. B(6)(d), J.A. 210. Based on the testimony of Hooker's expert, Mr. Rovers, the district court found that it was impossible to excavate chemicals from the Landfill without relocating these structures. Op., p. 47, J.A. 1487.

In sum, under the Agreement, regardless of whether the Site Containment System is effective, Hooker cannot be required to undertake any remedial action at the Landfill other than containment. Thus, the Agreement relies entirely on a containment remedy which is untried and untested in the real world and which is rife with scientific uncertainty.^{8/} It relies on this system to be effective for hundreds of years and precludes its replacement with any other remedial technology, even if technology is developed that is more effective and less costly and, indeed, even if the system proves a complete failure. Thus, ten, thirty or a hundred years from now, when science will undoubtedly have made major advances in this area, S-Area will be frozen in time, wedded to a technology which may be ineffective, out-of-date and perpetually hazardous.

^{8/}Dr. Shifrin, the United States' expert on the Containment System, made clear that the Agreement contemplates the possibility that its only remedial system will not be effective by stating that, in implementing the monitoring program, "[t]he question that we will be asking is, is the site containment system effective." Tr. IB 28, J.A. 738.

B. PUBLIC POLICY PROHIBITS ADOPTION OF A PERPETUAL LANDFILL CONTAINMENT SYSTEM AS THE FINAL REMEDY AT DANGEROUS HAZARDOUS WASTE SITES

It is, of course, well established that public policy is to be found in the Constitution, acts of the legislature and the decisions of the courts, Building Service Union v. Gazzam, 339 U.S. 532, 537-538 (1949). In this case, the statutes most directly defining public policy and the public interest are the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601, et seq., and the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901, et seq. Both of these statutes were enacted to address the problems raised by the disposal of hazardous chemical waste, including past disposal practices.

1. Under CERCLA, All Remedial Actions Must Be Consistent With Eventual Permanent Remedial Action

In CERCLA, as described by the court in United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 110, 112 (D. Minn. 1982), "Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal." This statute therefore is particularly instructive as to the public policy which should apply where, as here, a settlement agreement between the United States and a private party proposes to remedy a hazardous waste disposal site which has released toxic chemicals into the environment.

CERCLA contains two separate provisions governing responses to be taken at a hazardous waste site. One is the "removal" response. "Removal," as defined in Section 101(23), 42 U.S.C.

9601(23), refers to actions which must be taken quickly. According to the Senate report on a bill containing this same language, "'removal' refers to actions which must proceed without delay upon discovery of a release, discharge or disposal or threat thereof." S. Rep. No. 848, 96th Cong., 2d Sess. 54 (1980).^{9/}

The other CERCLA response calls for "remedy" or "remedial action." In contrast to "removal" action, "remedial action" is defined as "those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment" (emphasis added). Section 101(24), 42 U.S.C. 9601 (24).^{10/} The Senate report explains that the terms "remedial action" and "remedy" refer to actions which "must be consistent

^{9/}This report is on S. 1480, the Environmental Emergency Response Act, which ultimately became CERCLA. This Senate bill, with some amendments not relevant here, was passed by the Senate and adopted by the House. See 126 Cong. Rec. H 11773-11802 (daily ed., Dec. 3, 1980).

^{10/}Section 101(24) lists a variety of remedial actions which may be taken at the site of a release of hazardous substances. These include temporary measures, such as storage or confinement, and permanent measures, such as neutralization, excavation and incineration. The section's inclusion of temporary measures must be read in the light of its purpose which is to provide a "permanent remedy" that will "prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment" (emphasis added). In other words, the temporary remedial measures identified in Section 101(24) are not intended to be the final remedy at a waste site. This is made clear by the Senate Report which, as noted in the text below, states that, although a remedial action which does not constitute a "permanent remedy" is permitted, it must not be inconsistent with the permanent remedy which CERCLA requires to be eventually applied at waste sites. S. Rep. No. 848, supra, p. 51.

with eventual permanent remedial action if additional actions will be necessary at a later date to obtain a permanent remedy" (emphasis added). S. Rep. No. 848, supra, p. 51. The report also states that, in contrast to "removal" actions, "remedial action" refers to a "potentially more costly, long-lasting response which may include the construction of major facilities and which must often be preceded by considerable study, investigation, planning and engineering before the appropriate actions can be determined." Id. at 54.

Congressional discussions on the bills which ultimately became CERCLA uniformly assumed that the bills called for permanent remedies at waste disposal sites which threaten public health or the environment and that those remedies would eliminate those sites forever as sources of endangerment. Representative James Florio, sponsor of the House bill, introduced it by pointing out that "the goals of the legislation are to eliminate unsafe inactive hazardous waste sites and to remove hazardous waste threats to public health and the environment in a cost effective manner."^{11/} 126 Cong. Rec. H9155 (daily ed., Sept. 19, 1980). Throughout the debates on the bills, terms implying permanent solutions to the problems caused by abandoned and inactive waste sites were used, such as "remove" (id. at H9165), "eliminate" (ibid.), and particularly "clean up" (126 Cong. Rec. H9155, 9157, 9160, 9163, 9164, 9168, 9175, 9176-9178, 9203, 9203

^{11/} Among the goals cited in the House bill was to "accelerate the elimination of the presence of any unsafe hazardous waste disposal sites." H.R. 7020, Section 4(4). See also H. Rep. No. 1016, Part I, 96th Cong., 2d. Sess. 25 (1980).

(daily ed. Sept. 19, 1980); H9439, 9447, 9460, 9468, 9471, 9474
(daily ed. Sept. 23, 1980); H11787, 11791, 11793, 11798, 11799
(daily ed. Dec. 3, 1980); S10578 (daily ed. Aug. 1, 1980); S12916
(daily ed. Sept. 18, 1980); S13364 (daily ed. Sept. 24, 1980);
S14131 (daily ed. Sept. 30, 1980); S14964, 14971, 14973, 14977,
14982, 15003, 15005, 15007, 15008 (daily ed. Nov. 24, 1980)).
Representative Harsha stated to the House that in passing its
bill "all but 11 of you have already established the record that
you are for a strong, good properly executed cleanup bill, a bill
that will eliminate these toxic wastes." 126 Cong. Rec. H11791
(daily ed. Dec. 3, 1980).

Indeed, a consistent opponent to the measures eventually
adopted, then Representative David Stockman, underscored the
permanent remedy and elimination aspect of CERCLA in his criti-
cism of the House bill:

The intent of Superfund should have
been to ensure containment of hazar-
dous waste within the disposal site.
Such containment could be achieved
at a fraction of the cost of 'com-
plete waste removal and redispasal
at secured facilities' * * *."

H. Rep. No. 1016, supra, p. 73 (dissenting views of Representa-
tives Stockman and Loeffler).^{12/} In spite of this criticism, in

^{12/} Representative Stockman had earlier expressed concern that the
definition of hazardous waste disposal site in the House bill
would include "every municipal landfill, every rubbish pile," and
that EPA would be able to "investigate, monitor, dig up and clean
up every one of the thousands, tens of thousands and hundreds of
thousands of sites * * *." 126 Cong. Rec. H9471 (daily ed. Sept.
23, 1980). Representative Stockman clearly understood that
"clean up" was intended to mean permanent measures, such as
digging up and eliminating.

enacting CERCLA Congress emphasized permanent clean up, not containment, as the remedy for these sites.

In sum, CERCLA demonstrates that Congress intended not only immediate emergency responses to be taken at hazardous waste sites which are menacing the public health and the environment, but also permanent remedies which will ensure that the sites never again pose a threat to health or the environment.

2. Current Federal Policy, as Expressed in the 1984 RCRA Amendments, Is That Landfills and Other Containment Systems Cannot Provide a Permanent Long-Term Remedy for Managing Hazardous Waste

During the debates on CERCLA in 1980, members of Congress expressed doubts about the efficacy of landfills, even those constructed in conformity with existing regulations. Representative Solomon cited the example of the Army's disposal of radioactive wastes in "a deep concrete disposal facility," which nonetheless leaked within two years. 126 Cong. Rec. H9205 (daily ed. Sept. 19, 1980). Representative Florio, sponsor of the House bill, expressed agreement with the goal of developing technology "for more appropriate disposal" and denied that the legislation had any "bias" toward landfill disposition. 126 Cong. Rec. H9470 (daily ed. Sept. 23, 1980).

This Congressional concern over the use of landfills as a waste disposal method culminated in 1984 with the enactment of the Hazardous and Solid Waste Amendments. Pub. L. 98-616, 98 Stat. 3221. Section 101(a)(1) of the Amendments amends the findings of Congress in Section 1002(b) of RCRA, 42 U.S.C. 6901(b), by adding a paragraph (7) which states:

certain classes of land disposal facilities are not capable of

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certain classes of land disposal facilities are not capable of

assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes * * *.

In Section 301(a), the Amendments add a number of subsections to Section 3004 of RCRA, 42 U.S.C. 6924, which impose various conditional and unconditional prohibitions on the landfilling of certain categories of hazardous wastes.

First, the Amendments add to Section 3004 a subsection (c)(1) which prohibits completely the landfilling of "bulk or noncontainerized liquid hazardous waste or free liquids contained in hazardous waste * * *."

Second, the Amendments add to Section 3004 a subsection (c)(2) which directs the Administrator of EPA to promulgate regulations which minimize the landfilling of "containerized liquid hazardous waste" and the presence of "free liquids in containerized hazardous waste to be disposed of landfills."

Third, the Amendments add subsections (d) and (e) to Sections 3004. Under these subsections, the land disposal,^{13/} including the landfilling, of seven categories of hazardous wastes^{14/} is prohibited, unless "the Administrator determines the

^{13/}Land disposal," when used with respect to hazardous wastes, is defined in a new subsection (k) as including "any placement of such hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave."

^{14/}The new subsection (d) covers five categories of hazardous wastes which have been listed or identified pursuant to Section

prohibition of one or more methods of land disposal of such waste is not required in order to protect human health and the environment for as long as the waste remains hazardous * * *." In making this determination, the subsections direct the Administrator to take the following factors into account:

- (A) the long-term uncertainties associated with land disposal,
- (B) the goal of managing hazardous waste in an appropriate manner in the first instance, and
- (C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous wastes and their hazardous constituents.

Both subsections go on to state that a method of land disposal may not be determined to be protective of human health or the environment unless:

it has been demonstrated to the
Administrator, to a reasonable de-

3001 including wastes containing halogenated organic compounds in total concentration greater than or equal to 1000 mg/kg. Some 88% of the wastes deposited at the landfill were halogenated organic compounds (specifically, chlorinated hydrocarbons). Fogel Aff., Table 2, J.A. 386; Tr. IA 117-118, J.A. 700-701.

The new subsection (e) covers two categories of hazardous wastes. They are (1) dioxin-containing wastes numbered F020, F021, F022, and F023 (as referred to in the proposed rule published by the Administrator of EPA in the Federal Register for April 4, 1983); and (2) the wastes numbered F001, F002, F003, F004, and F005 in the regulations promulgated by the Administrator under Section 3001 of RCRA and codified at 40 C.F.R. 261.31, as those regulations were in effect on July 1, 1983. Both dioxin-containing wastes and other hazardous wastes listed in EPA's regulations have been identified at S-Area. See Affidavit of Samuel Fogel, Table 3, J.A. 387. Among the dioxin-containing wastes listed by EPA in the April 4, 1983, Federal Register (see 48 Fed. Reg. 14524-14525) and present in S-Area are hexachlorobenzene, tetrachlorobenzene and pentachlorobenzene. Among the hazardous wastes listed in 40 C.F.R. 261.31 and present in S-Area are carbon tetrachloride, methylene chloride, tetrachloroethylene, toluene, trichloroethylene and numerous forms of chlorobenzene.

gree of certainty, that there will be no migration of hazardous constituents from the disposal unit * * * for as long as the wastes remain hazardous.

The prohibitions in subsections (d) and (e) are fully applicable to hazardous wastes contained in landfills for which remedial action has been taken pursuant to the CERCLA. Paragraph (3) of both subsections provides that, 48 months after the enactment of the Amendments, the subsections shall apply "to any disposal of contaminated soil or debris resulting from a response action taken under section 104 or 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 or a corrective action required under this subtitle" (i.e., subtitle C of RCRA, "Hazardous Waste Management," 42 U.S.C. 6921-6934).

Finally, the Amendments add a subsection (j) to Section 3004 of RCRA. It prohibits the "storage" of a hazardous waste which is prohibited from one or more methods of land disposal under the section or under regulations promulgated pursuant to the section, unless the storage "is solely for the purpose of the accumulation of such quantities of hazardous waste as are necessary to facilitate proper recovery, treatment or disposal." "Storage" is defined in Section 1004(33) of RCRA, 42 U.S.C. 6903(33), as the "containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal" -- i.e., in a manner which does not involve the placement of the wastes "into or on any land or water so that such * * * waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters" (Section 1003(3), 42 U.S.C. 6903(e)).

The House report on the Amendments stresses the need to limit sharply the use of land disposal for hazardous wastes. The report states that the legislation is intended "to ensure that land disposal is used only for those wastes for which it can reasonably be anticipated to be protective of human health and the environment in the very long term, even if there are no treatment alternatives." H. Rep. No. 198, 98th Cong., 1st Sess. 30 (1983).

During the debate on the House bill (H.R. 2867), there were frequent references to the failure of landfilling to provide a safe and permanent disposal method. For example, Representative Florio, chairman of the committee reporting out the bill, called reliance on land disposal "a short-sighted approach since it is virtually impossible to build a land disposal facility that can contain waste for as long as the waste threatens public health." 129 Cong. Rec. H6500 (daily ed. Aug. 4, 1983). During the same discussion, Representative LaFalce stated (*id.* at H6512):

H.R. 2867, and amendments thereto, does away, I believe, with the presumption that the landfill disposal of hazardous wastes is protective of human health and the environment. As we have seen over and over again at hazardous waste sites throughout the country, we cannot guarantee -- scientifically or politically -- that the hazardous wastes disposed of in the ground will remain safely segregated from the environment for extended periods of time.

Other members of the House stated that "continued reliance on land disposal of hazardous wastes is a dangerous policy which threatens the health of Americans now and in the future" (Repre-

sentative Frenzel) and that "there is no such thing as a 'safe' hazardous waste landfill" (Representative Fauntroy). Id. at H6511.

The Senate report on S. 757 states that "several amendments with significant policy implications are included to bring implementation of the Act [i.e., RCRA] closer to the original intent of the Congress." S. Rep. No. 284, 98th Cong., 1st Sess. 5 (1983). The report continues (id. at 6):

Land disposal of hazardous wastes has been the least expensive and, therefore, most widely used method of managing hazardous waste. It is undisputed that the problems of the present are a direct result of the disposal practices of the past. Unfortunately, these practices are continuing. Particularly troublesome are landfills and surface impoundments of highly toxic, mobile, persistent wastes and wastes that have the potential to bioaccumulate.

* * *

Reliance on land disposal should be minimized and land disposal, particularly landfills and surface impoundments, should be the least favored method for managing hazardous wastes.

The report further states (id. at 13):

Where treatment and recovery options are or will become available, there is no reason to accept the residual risk associated with land disposal facilities, even those meeting state-of-the-art standards.

The Senate report describes the assessment which must be undertaken by the Administrator before any land disposal method can be used to manage a hazardous waste. The Administrator may

allow a waste to be placed in a land disposal facility or unit only if he determines that, "to a reasonable degree of certainty," no migration of the toxic, mobile or bioaccumulative constituents of the waste "will occur from the disposal unit * * * for as long as the waste remains hazardous." Ibid. The report explains that (id. at 15):

The Administrator is required to find that the nature of the facility and the waste will assure that migration of the wastes will not occur while the wastes still retain their hazardous characteristics in such a way that would present any threat to human health and the environment. Absent such a finding, the waste in question is to be banned from that type of disposal. [emphasis added]

Thus, RCRA unequivocally establishes a public policy in the United States against the landfilling of hazardous wastes.^{15/} This policy is based upon a Congressional finding that landfills, including those using the most advanced state-of-the-art technology, simply are not capable of containing hazardous wastes,

^{15/}The Congressional policy contained in the 1984 amendments was recently described by EPA (50 Fed. Reg. 23250, May 31, 1985):

The Hazardous and Solid Waste Amendments of 1984 [HSWA], enacted on November 8, 1984, impose substantial new responsibilities on those who handle hazardous waste. In particular, the amendments focus on the land disposal of hazardous wastes. Recognizing that land disposal technology cannot guarantee perpetual containment of all waste constituents, Congress has added provisions designed to minimize reliance on land disposal. [emphasis added]

and therefore cannot be depended upon to protect health and the environment over the long-term. And the policy is implemented through an outright ban on the landfilling of hazardous wastes in bulk and noncontainerized liquid form and through a presumption that the landfilling of hazardous wastes in other forms (especially if the wastes contain highly mobile, toxic, persistent or bioaccumulative constituents) will not provide the degree of protection of human health and the environment which Congress demands -- a presumption which will be overcome only by a strong showing that landfilling the waste will in fact protect health and the environment for as long as the waste remains hazardous.

3. The Current Position of the Environmental Protection Agency Reflects a Policy Prohibiting the Long-Term Use of Landfills as a Method of Managing Hazardous Wastes

The public policy regarding remedial actions for hazardous waste disposal sites is also reflected in agency regulations and in agency actions and pronouncements which are designed to carry out statutory policies and directives.

Even before the enactment of the 1984 RCRA amendments, EPA, the agency charged by Congress with administering the country's hazardous waste laws, had decided to strengthen the restrictions on the disposal of hazardous wastes in landfills or on land. 49 Fed. Reg. 5854-5859 (Feb. 15, 1984). In summarizing the reasons for its decision, the agency stated (*id.* at 5854):

[T]he Agency believes that further restrictions on the land disposal of hazardous waste may be necessary. It is difficult to assure the containment of most wastes and their constituents for extended time periods. As a result, the regulation of hazardous waste land disposal must proceed from the assump-

tion that hazardous waste constituents and by-products will eventually migrate into the environment at some unknown rate and concentration.
[emphasis added]

Thus, over eight months before the 1984 RCRA amendments EPA acknowledged that landfills and other methods of land disposal cannot be relied upon to provide a permanent solution for the disposal of many hazardous wastes and that, even with the most advanced land disposal technology, hazardous wastes "will eventually migrate into the environment" from those facilities.^{16/}

* * *

For the reasons above, we submit that public policy in the United States today is that a "permanent remedy" is to be provided at inactive hazardous waste sites which have released

^{16/}This position of EPA is fully shared by the Congressional Office of Technology Assessment (OTA) which has done extensive work in the area of hazardous waste management, including a recent lengthy study of waste control strategies. OTA, Superfund Strategy (March 1985). In testimony before the House Subcommittee on Investigations and Oversight on March 13, 1984, OTA stated (Statement of Joel S. Hirschhorn, Senior Associate, OTA, p. 6):

From its previous work and ongoing studies, OTA has concluded that land disposal of hazardous wastes cannot assure the long-term protection of public health and the environment. Land disposal technology for hazardous waste is fundamentally flawed and the historical record provides ample evidence of this. While the most toxic wastes will remain dangerous for many decades -- perhaps forever -- the critical elements of land disposal facilities cannot be assured to function effectively for such long times. Natural and synthetic liners for landfills leak eventually and leachate collection systems will become clogged.

significant amounts of hazardous substances into the environment. At the same time, current public policy no longer accepts long-term landfilling as a reliable or acceptable method of containing or controlling hazardous wastes and is moving instead toward the adoption of an outright ban or severe restrictions on the landfilling of many such wastes.^{17/} Public policy therefore prohibits reliance on a perpetual landfill containment system as a permanent remedy for an inactive waste site which has already caused substantial environmental contamination and continues to pose a threat of serious endangerment to health and the environment. Since it is precisely such a containment system which the Settlement Agreement in this case establishes as the cornerstone of the remediation effort at the S-Area Landfill, we submit that the Agreement runs counter to public policy and must be disapproved.

^{17/}This public policy is also reflected in state court decisions concerning hazardous waste sites. For instance, in Village of Wiltonville v. SCA Services, Inc., 86 Ill. 2d, 426 N.E.2d 824, 839 (1981), the Supreme Court of Illinois affirmed a lower court's finding that a chemical waste disposal site was a public nuisance. The remedy ordered was "to remove all toxic waste buried [at the site], along with all contaminated soil found at the disposal site as a result of the operation of the landfill." This permanent abatement remedy was ordered in the face of EPA's opposition to the excavation and its suggestion that containment remedies, such as a low permeability cap, a leachate collection system and counterpumping of contaminated ground water, would be adequate. 426 N.E.2d at 839. Similarly, in Wood v. Picillo, 433 A.2d 1244, 1247 (1982), the Supreme Court of Rhode Island ruled that a chemical dump site constituted a public nuisance. The abatement remedy ordered was not only an injunction against further disposal operations but also the removal of all chemicals and contaminated soil from the site to a licensed disposal facility.

III

THE DISTRICT COURT'S APPROVAL OF THE SETTLEMENT AGREEMENT SHOULD BE REVERSED BECAUSE THE COURT ABUSED ITS DISCRETION IN FAILING TO RECOGNIZE THAT THE AGREEMENT PROVIDES NO PROTECTION AGAINST THE MIGRATION OF S-AREA CHEMICALS TO CANADA AND IS THEREFORE INCONSISTENT WITH PUBLIC POLICY

The record in this action establishes that there is the potential for NAPL migration toward Canada. While there are no firm data indicating that such migration has or has not occurred at this time, there are tentative signs that it has. These include samples of NAPL found in a well and a treatment plant tunnel in the bedrock to the south of the Landfill. Morris Aff., para. 32, J.A. 409; Tr. 1B 109-110, J.A. 819-820. Furthermore, the geologic formations to the south of the Landfill would allow NAPL to flow in the direction to the bedrock under the Niagara River. Faust Aff., para. 34, J.A. 317.

Ontario contended at the hearing that the Agreement does not adequately address this potential migration. The district court held that the Agreement is sufficient to protect Ontario's interests because it contains provisions which require Hooker to conduct additional testing for bedrock NAPL contamination and must develop an RRT proposal if such "contaminants are in the bedrock and pose a danger." Op., pp. 42-43, J.A. 1482-1483.

In reaching this conclusion, the district court failed to address a major argument raised by the Province, namely that Hooker's obligation to develop such an RRT proposed is only triggered by a finding of "human endangerment," and thus does not arise if there is only endangerment to the Canadian environment (such as aquatic or terrestrial wildlife or vegetation), and that the potential for this RRT obligation being triggered does not

exist throughout the duration of the Agreement but only during its very early years. In these respects, the Agreement provides less protection to the Canadian than the American side of the Niagara River and is inconsistent with a treaty, an international agreement, and federal statutes according equal protection to both public health and the environment. Furthermore, as a practical matter, these limitations on Hooker's obligation to address the migration of chemicals to Canada result in the Agreement providing no protection at all to the health of Canadian citizens.

A. THE AGREEMENT DOES NOT PROVIDE ANY SUBSTANTIAL PROTECTION TO CANADIAN CITIZENS OR THE CANADIAN ENVIRONMENT FROM THE MIGRATION OF S-AREA CHEMICALS TO CANADA

Under the Agreement, Hooker must assess "whether non-aqueous phase chemicals have migrated from the Landfill Site into the Bedrock beneath the Niagara River" and "the extent, if any, of human endangerment by such non-aqueous phase chemicals." Addendum I, para. B(6)(b), J.A. 110. If the parties or the court determine that such human endangerment exists, Hooker must initiate a study to assess what RRT, if any, is required to address these chemicals. Ibid.

In contrast, if NAPL contamination is found in the overburden or bedrock on the U.S. side of the Niagara River, Hooker is required to conduct a RRT study to address those chemicals, regardless of whether human endangerment has been found to exist. Addendum I., para. B(6)(a), J.A. 110. Furthermore, the Agreement provides that, in evaluating RRT to address such NAPL contamination, the "goal [is] to protect against endangerment to human

health and the environment in the S-Area/Treatment Plant Area * * *" (emphasis added). Judgment, para. 4(a), J.A. 72. In fact, a standard based solely on "human endangerment" is not used anywhere in the Agreement to trigger the requirement that Hooker study RRT or undertake remedial action, except where the Agreement addresses the potential migration of NAPL under the Niagara River to Canada.

This aspect of the Agreement is inadequate to protect Ontario's interests. As the district court recognized in its order granting Ontario's motion to intervene in this action, Ontario's "paramount interests [are] the prevention of the migration of chemicals into Lake Ontario and into the regional aquifer on the Canadian side of the Niagara River." 101 F.R.D. 444, 448.

The Agreement provides no protection against the threat of NAPL contamination to the Canadian environment, such as aquatic or terrestrial wildlife or vegetation. Even if Hooker were to determine that NAPL is in the bedrock under the Niagara River and is migrating toward Canada and that a significant number of wildlife or amount of the vegetation on the Canadian side may be destroyed by the NAPL, it has no obligation under the Agreement to take any remedial action.

Furthermore, as a practical matter, the "human endangerment" standard provides no protection to the health of Canadian citizens. The bedrock on the Canadian side of the Niagara River is currently not used to any appreciable extent as a source of drinking water by Ontario residents. Tr. IA 48, J.A. 632. However, with an expanding population, the Province may seek to develop that resource in the future, which must be viewed as the

hundreds of years that S-Area chemicals may remain in the environment. The "human endangerment" standard provides no protection for these future citizens because Hooker's obligation to assess human endangerment is extremely limited in time. The Agreement requires Hooker to make this determination regarding sub-River bedrock contamination and its human endangerment only once. Addendum I, para. B(6)(b), J.A. 110. While the exact date of this determination is not specified in the Agreement, the Agreement requires that it be initiated and completed "expeditiously" in conformity with a schedule to be submitted by Hooker and approved by the parties or the court. Judgment, para. 6(b), J.A. 74.^{18/} At the latest, it is reasonable to expect that Hooker will make this determination in the next few years, before the bedrock on the Canadian side of the river is used as a source of drinking water.

Thus, even if Hooker were to determine today or in the near future that NAPL is in the bedrock under the river and is migrating (or has already migrated) to Canada, the Agreement's requirement for a "human endangerment" determination would preclude Hooker from being required to study or implement RRT to remedy the situation. Furthermore, the one-shot nature of Hooker's determination precludes any such obligation from arising in the intermediate or distant future, even if human endangerment should then actually exist.

^{18/} Hooker must submit that schedule for review by the governmental parties within 60 days after the Agreement becomes effective. Judgment, para. 6(b), J.A. 74. The deadline for submission of the schedule is therefore July 17, 1985.

B. PUBLIC POLICY REQUIRES THAT THE AGREEMENT ADEQUATELY ADDRESS THE POTENTIAL MIGRATION OF S-AREA CHEMICALS TO CANADA

The Agreement's failure to provide any remedy for the migration of S-Area NAPL in the bedrock to Canada is inconsistent with the public policy reflected in a treaty, an international agreement, and federal statutes. That policy evidences an unmistakable intent and commitment of the United States to prevent and to provide a remedy for injury to the Canadian environment which stems from the discharge of hazardous substances and other contaminants in the United States and their transboundary migration to Canada.

In Article IV of the Boundary Waters Treaty of 1909, the United States and Canada agreed that "waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." 36 Stat. 2450. In the Great Lakes Water Quality Agreement of 1978, the United States reaffirmed the rights and obligations of the parties to the Boundary Waters Treaty and "in particular their obligation not to pollute boundary waters * * *." Great Lakes Agreement, Introduction, 30 U.S.T. 1383, 1384, T.I.A.S. No. 9257. The United States also reaffirmed its intent "to prevent further pollution of the Great Lakes Basin Ecosystem * * *."^{19/} Ibid. And it further stated that it is United States "policy" that "[t]he discharge of toxic substances in toxic amounts be prohibited and the discharge of

^{19/}The Great Lakes Basin Ecosystem includes all water within the drainage basin of the St. Lawrence River at or upstream from the point it becomes the boundary between the United States and Canada. Great Lakes Agreement, Art. I, para. (g).

any or all persistent toxic substances be virtually eliminated."^{20/} Id., Art. II, para. (a).

Federal statutes also reflect a public policy with respect to international or transboundary pollution. Section 111(l) of CERCLA, 42 U.S.C. 9611(l), authorizes a foreign claimant to assert a claim against the Superfund.^{21/} Claims which can be made against the Superfund are to recover costs incurred in responding to the release of hazardous substances from a waste site (see Section 111(a)(2)) and damages for injury to or destruction or loss of natural resources (Sections 111(a)(3), 111(b)).^{22/} Thus, in providing a claim against the Superfund to foreign claimants, not only has Congress acknowledged that a foreign environment can be harmed by the migration of hazardous substances from landfill sites like S-Area, but it also has taken care to ensure that such harm is remedied. This provision of CERCLA shows that it is the policy of the United States to protect the environment of foreign countries from injury caused by the migration of hazardous chemicals from inactive waste

^{20/}Toxic substances are defined to include both substances which can directly cause death of or other physical harm in any organism and those which can do so through concentration in the food chain or in combination with other substances. Great Lakes Agreement, Article I, para. (v). Thus, low concentrations of potentially toxic chemicals are covered by this statement of policy.

^{21/}The so-called Superfund is the Hazardous Substance Response Fund established by CERCLA, Section 201, 42 U.S.C. 9631.

^{22/}Under Section 112(a) of CERCLA, 42 U.S.C. 9612(a), any claimant to the Superfund must first present his claim to the owner or operator of the facility from which hazardous substances have been released. Thereafter, he may file suit or present a claim to the Superfund.

sites.^{23/}

None of these authorities distinguishes between the protection of human health and protection of the environment. On the contrary, they expressly provide protection for both. Article IV of the Boundary Waters Treaty protects against "injury of health or property" from pollution. 36 Stat. 2450. The Great Lakes Agreement establishes the General Objective that the waters of the Great Lakes System be "free from materials * * * that * * * will produce conditions that are toxic or harmful to human, animal or aquatic life." Article III (a).

In CERCLA, the standard "public health or welfare or the environment" occurs repeatedly. E.g., Sections 101(23), 101(24), 102(a), 104(a)(1), 104(c)(1), 104(c)(4), and 106(a), 42 U.S.C. 9601(23), 9601(24), 9602(a), 9604(a)(1), 9604(c)(1), 9604(c)(4), and 9606(a). Similarly, in RCRA, the standard "health and the environment" is used throughout the statute. E.g., Sections 1003(3), 1003(4), 1004(5), 3002, 3003(a), 3004, and 7003. 42 U.S.C. 6902(3), 6902(4), 6903(5), 6922, 6923(a), 6924 and 6973.

^{23/}Other bases of federal policy in the area of international pollution are Executive Order 12114 and the Clean Water Act. Executive Order 12114 requires all federal agencies taking major federal actions to consider the effect of those actions on the environment of a foreign nation. In Section 310 of the Clean Water Act, 33 U.S.C. 1320, Congress has established a procedure for the abatement of international water pollution. Under this section, if the Administrator of EPA is apprised of pollution which endangers the health or welfare of persons in a foreign country, he may convene a special board which is authorized to make findings and recommendations regarding abatement of the pollution. Thus, the Clean Water Act clearly evidences both a Congressional recognition that a foreign environment may be harmed by water pollution originating in the United States and a federal policy to put an end to such pollution.

There is no provision in RCRA or CERCLA which refers only to human health or "human endangerment." On the contrary, in both statutes, Congress determined that hazardous wastes pose a direct and immediate threat to the environment, as well as to human health, and that the threat to the environment, standing alone, is sufficiently serious to warrant remedial action. See S. Rep. No. 988, 94th Cong., 2d Sess. 3, 26 (1976).

For these reasons, public policy requires that Hooker be required to remedy the migration of S-Area chemicals to Canada if it is determined, either in the short or long term, that remedial action is needed to protect the health of Ontario residents or the Ontario environment from endangerment. Because the Agreement fails to provide this level of protection to Ontario, it is inconsistent with public policy. The district court therefore abused its discretion in approving the Agreement without requiring any modification to provide adequate protection to Ontario interests.

CONCLUSION

For the foregoing reasons, appellants respectfully submit: with respect to the first issue addressed above, that the decision of the court below should be reversed and the Settlement Agreement disapproved unless and until it is revised to ensure that a genuine permanent remedy is applied to the S-Area Landfill or, in the alternative, that the decision below should be vacated and the case remanded to the district court with instructions to reconsider whether the Agreement should be approved even though it does not require Hooker to install any remedial technology beyond a containment system at the S-Area Landfill, if that

system subsequently is ineffective; and, with respect to the second issue addressed above, that the decision of the court below should be reversed and the Agreement disapproved unless and until it is revised to require that, over the life of the Agreement, Hooker test for hazardous chemicals which have migrated from the Landfill in the bedrock under the Niagara River to Canada and, on the basis of such testing and during that period, to determine whether any chemicals which are discovered pose a threat to the Canadian environment or to the health of Canadian citizens.

Respectfully submitted,

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