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FOR INCLUSION IN THE ADMINISTRATIVE RECORD

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VIA FEDERAL EXPRESS

August 28, 1992

Ms. Sheila Sullivan
Remedial Project Manager
U.S. EPA, (HSRM-6J)
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77 W. Jackson Street
Chicago, IL 60604-3590

Cheryl L. Allen
Community Relations
Coordinator
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RE: Skinner Landfill Superfund Site
West Chester, Ohio

Dear Ms. Sullivan and Ms. Allen:

Pursuant to Section 300.430(f)(3)(C) of the National Oil and Hazardous Substance Pollution Contingency Plan ("NCP"), as promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act, ("CERCLA") 42 U.S.C. 9601 et seq., and on behalf of the Skinner Landfill PRP Group, we are submitting for inclusion into the Skinner Landfill Administrative Record the attached comments to U.S. EPA's proposed Interim Remedial Measures for the Skinner Landfill Superfund Site.

Thank you for your attention to this matter, and please do not hesitate to contact the undersigned if you have any questions.

Very truly yours,

Charles R. Dyas, Jr.

cc: Jim Van Der Kloot, U.S. EPA
Joseph Dufficy, U.S EPA
John Breslin, Esq., U.S. EPA
Kathy Fox, OEPA, SWDO
Union Township Trustees
Butler County Commissioners
Rep. John A. Boehner
Chris Wunnenberg
Skinner Landfill PRP Representatives

BEFORE
THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION V
OFFICE OF SUPERFUND
CHICAGO, ILLINOIS

IN THE MATTER OF THE PROPOSED INTERIM REMEDY FOR THE SKINNER LANDFILL SUPERFUND SITE, WEST CHESTER, OHIO	: : : : :	<u>COMMENTS FOR THE</u> <u>ADMINISTRATIVE RECORD</u>

In accordance with section 117 (a)(2) of the Comprehensive Environmental Response, Compensation and Liability Act, (CERCLA), 42 USC 9601 et seq., Chemical Leaman Tank Lines, The Dow Chemical Company, Ford Motor Company, Formica Corporation, G E Aircraft Engines, Monsanto Company, Morton International, OXY USA Inc., and Velsicol Chemical Corp. (the Skinner Landfill PRP Group) have prepared comments for submission to the United States Environmental Protection Agency, Region V, Office of Superfund ("U.S. EPA" or the "Agency") concerning the Interim Remedy proposed for the Skinner Landfill Superfund Site located in West Chester, Ohio. The Skinner Landfill PRP Group asks that its comments, together with the supporting and referenced documents submitted or referred to herein, be made part of the Administrative Record with respect to the Site. The Skinner Landfill PRP Group provides these comments to the U.S. EPA's Interim Remedy proposal without waiving any prior comments and/or objections relating to U.S. EPA's handling of the July 29, 1992 public meeting, (see letter of August 12, 1992 attached hereto). Furthermore, the Skinner Landfill PRP Group does not waive any right or opportunity to submit further comments or objections regarding future or past activities at the Site.

A. INTRODUCTION

On August 11, 1992, U.S. EPA provided representatives of the Skinner Landfill PRP Group with notice that the Agency has adopted a revised schedule for the selection of the remedy at the Skinner Landfill Superfund Site ("Skinner Landfill" or the "Site"). The U.S. EPA's notice indicates that the Agency is currently proposing an Interim Remedy for the Site. Selection of a final remedial action plan will be postponed indefinitely. U.S. EPA seeks public comments on the Interim Remedial Measures for the Skinner Landfill on or before August 31, 1992.

The Interim Remedial Measures proposed by U.S. EPA for the Skinner Landfill include the installation of a fence around the inactive landfill and buried lagoon as well as the installation of an alternative water supply for an unidentified number of residences on or adjoining the Site which may be potentially affected by site contamination. U.S. EPA representatives have confirmed that the Interim Remedial Measures proposed by the Agency will include the fencing of approximately 15 acres of the facility which would consist of the inactive landfill area and buried lagoon. The U.S. EPA representatives further stated that installation of an alternative water supply to on-site or adjoining residences is still being evaluated and that no conclusions will be reached until it can be determined if any residences may be affected by contaminants from the Site.

The Skinner Landfill PRP Group presently concurs with the Agency's proposed Interim Remedial Measures for the Skinner Landfill Superfund Site within the bounds of the comments elaborated herein, and hereby reserves the right to make additional comments or objections if further substantive data supports a change of position.

B. DISCUSSION:

1. The Proposed Interim Remedial Measures Appear to be Generally Consistent with CERCLA and the NCP

U.S. EPA's recent decision to propose Interim Remedial Measures at the Skinner Landfill and delay developing a final remedial plan is consistent with CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan. ("NCP"). (40 C.F.R. Part 300). Section 300.430(a) of the NCP states as follows:

> EPA expects to use institutional controls such as water use and deed restrictions to supplement engineering controls as appropriate for short and long-term management to prevent or limit exposure to hazardous substances, pollutants, or contaminants. Institutional controls may be used during the conduct of the remedial investigation/feasibility study (RI/FS) and implementation of the remedial action and where necessary, as a component of the completed remedy.

The preamble to the revised NCP states that:

> Proposed Section 300.430(e)(3)(ii) directed that, as appropriate, one or more alternatives shall be developed that are based on engineering controls, such as containment that prevents exposure to hazardous substance and, as necessary, institutional controls which limit human activities at or near facilities, to protect the health and environment and to assure continued effectiveness of response. (55 Federal Register 8706, March 8, 1990).

The preamble further states that:

> EPA believes, however, that institutional controls have a valid role in remediation and are allowed under CERCLA (e.g., Section 121(d)(2)(B)(ii) appears to contemplate such controls). (55 Federal Register 8706, March 8, 1990).

U.S. EPA's decision to institute Interim Remedial Measures at the Site, which include the institutional controls of fencing and, if necessary, an alternative water supply, may be viewed as the initial step towards a final remedial action at the Skinner Landfill

Site and may be incorporated into the final remedial plan. Furthermore, U.S. EPA's proposed Interim Remedial Measures at the Skinner Landfill appear to be consistent with the implementation of institutional controls as set forth in the U.S. EPA's Feasibility Study ("FS") and Proposed Plan for the Skinner Landfill. (Feasibility Study Section 3.4.2.7, at page 3-29; Proposed Plan Section VI(A), (B) at page 12). The Feasibility Study's Summary of Remedial Alternative Capital Costs set forth in Appendix IX indicates that the implementation of the Institutional Controls would cost $166,100.00. The Feasibility Study further states that: "Institutional actions would be taken to minimize the potential for exposure of the general public to site contaminants."

Therefore, based upon current information, U.S. EPA's proposal to implement the institutional controls of fencing and alternative water supply appears to be generally consistent with CERCLA and the NCP subject to the comments set forth herein.

2. Fencing is Supported by the Skinner Landfill PRP Group.

U.S. EPA's proposal that fencing be installed to surround the 15 acres comprised of the inactive landfill and buried waste lagoon area is the appropriate procedure for delineating the "facility" and/or "site" subject to further remedial measures as prescribed by the Agency. CERCLA and the NCP set forth the definition of "facility" to mean:

> (A) Any buildings, structure, installation, equipment, or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) Any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. §9601(9); 40 CFR §300.5.

It is clear from the judicial interpretation of the term "facility", pursuant to CERCLA and the NCP, that this term only includes those places where hazardous substances come to be located. *United States v. Conservation Chemical Company*, 619 F.Supp. 162, 184-85 (D.C. Mo. 1985).

The Agency's proposal to erect fencing around the 15 acre inactive landfill and buried waste lagoon appears to meet the standards for delineating the "facility" or "site". Moreover, this proposal is consistent with the Skinner Landfill PRP Group's view that potential contamination at the Site is localized within the inactive landfill and buried waste lagoon. In support of the Agency's position that only the 15 acres of the inactive landfill and the buried waste lagoon represent the area of the site subject to fencing, the analytical results of the FS at Section 1.3.4 state that:

> The results of chemical analyses completed on samples collected during the Phase II RI confirm that the buried waste lagoon is the <u>primary source</u> of contaminants at the Skinner site. (Emphasis applied).

Furthermore, the FS in Section 1.3.3 ("Contaminant Sources"), states that the buried waste lagoon is the largest and most significant <u>known</u> source of contaminants on the property. Section 1.3.3 of the FS further proceeds to state that:

> The most recently active landfill area is also suspected as a source of contamination. However, this area has not been thoroughly investigated as part of the Phase II RI, nor previous studies due to ongoing landfill operations at the time of the studies.

The aforestated sections of the FS clearly indicate that the Agency believes that the buried waste lagoon is, and the inactive landfill may be, the principal sources of contaminants. These statements further support the conclusion that the "facility" or "site"

is the 15 acre tract comprising the inactive landfill and buried waste lagoon which should be the extent of the area subject to the institutional control of fencing.

Any decision by the Agency to expand the defined "facility" or "site" beyond these identified 15 acres would be inconsistent with CERCLA and the NCP and therefore arbitrary and capricious and subject to a successful judicial challenge. Courts have recognized that a facility extends only to where the hazardous substance is located. See *United States v. Bliss*, 667 F.Supp. 1298, 1305 (E.D. Mo. 1987); *United States v. Stringfellow*, 661 F. Supp. 1053, 1059, (C.D. Cal. 1987); *United States v. NEPACCO*, 810 F.2d at 742.43 (8th Cir. 1986). Furthermore, this interpretation is consistent with the definition of "on-site" as established in the NCP which defines "on-site" as follows: the "areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action." 40 C.F.R. §300.5. At this time, the Skinner Landfill PRP Group concurs with the Agency's decision to install fencing surrounding the delineated "facility" or "site" identified as the 15 acres comprised of the inactive landfill and buried waste lagoon.

3. Provision of Alternative Water Supply Without Data Establishing the Presence of or Threat of Contamination Would Be Arbitrary and Capricious

a. Provision of Alternative Water Based Upon Proven Contamination May Be Consistent With The NCP

U.S. EPA's Interim Remedy calls for the provision of an alternative water supply to certain residences "that are potentially affected by site contamination." A representative of the U.S. EPA has stated that alternative water will be supplied if the Agency determines

that residences near the Site may be affected by contaminants from the Site.

As stated in Part B, Section 1, institutional controls, such as controlling the use of water to prevent or limit exposure to hazardous substances, pollutants, or contaminants, are anticipated by the NCP. See, NCP, Section 300.430(a). Therefore, if U.S. EPA's proposal for an Interim Remedy means that the Agency will take steps to determine which residences may be affected by contaminants and then supply alternative water to only those residences demonstrated to be subject to present or future contamination, such actions may be consistent with the NCP.

b. Provision of Alternative Water Based on Current Data Showing No Contamination Would Be Arbitrary and Capricious

If, the Agency's proposal includes the provision of water to residences whose supplies are shown to be neither contaminated nor threatened by contamination, such an action would be arbitrary and capricious and inconsistent with CERCLA or the NCP. Current technical data that EPA has compiled for the Skinner Landfill in the RI/FS indicate that there is no threat to off-site well water at this time. There is no technical evidence presented in the Remedial Investigation, Baseline Risk Assessment or Feasibility Study that indicates that any residences near the Site need to be connected to the Butler County public water supply. The Phase II Remedial Investigation report states:

> In summary, essentially no impact to area residential wells was observed in the samples collected (emphasis added).

Phase II Remedial Investigation Report at page 80.

With respect to off-site water supplies, the Phase II Remedial Investigation report states:

> The results of the Phase II Remedial Investigation indicate that there is limited potential for significant off-site migration of contaminants from the Skinner site (emphasis added).

Phase II Remedial Investigation Report at page 103.

It is unclear whether U.S. EPA's proposal that alternative water be supplied to residences that "are potentially affected by Site contamination" envisions provision of alternative water even without evidence establishing a present or future adverse effect on the residence's water supply. If there were no data establishing the presence or threat of contamination to water supplies on or near the Skinner Landfill, it would be arbitrary and capricious for the Agency to recommend the provision of alternative water to residences on or near the Site.

The plain language of section 113(j) of CERCLA states that judicial review of U.S. EPA's remedy decision in CERCLA cases is based upon a review of the administrative record and an analysis of whether U.S. EPA's decision was arbitrary and capricious or otherwise not in accordance with the law:

> (2) Standard -- In considering objections raised in any judicial action under this Act, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with the law.

Sections 113(j)(2) of CERCLA, 42 U.S.C. § 9613(j)(2). Federal courts have consistently reviewed environmental remedies formulated under CERCLA on the basis of an arbitrary and capricious test. In re Acushnet River v. New Bedford Harbor, 722 F. Supp. 888 (D. Mass. 1989); United States v. Bell Petroleum Servs., Inc., 718 F. Supp. 588 (W.D. Tex. 1989); United States v. Seymour Recycling Corp., 679 F. Supp. 859 (S.D. Ind. 1987).

Recently, the Sixth Circuit agreed that the standard of fairness, reasonableness and consistency with the statute, coupled with the arbitrary and capricious standard, is the proper test in reviewing U.S. EPA's selection of a remedy. United States v. Akzo Coatings, Inc., 23 Chem. W. Litig. Rptr. 536 (6th Cir. 1991). The Akzo court also stated that it must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. at 547 (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (applying the arbitrary and capricious test of the Administrative Procedure Act, 5 U.S.C. § 706(a)(A)).

It is in light of the foregoing standard that one must review U.S. EPA's proposed Interim Remedy. Were U.S. EPA to finally decide that alternative water must be supplied even to residences where contamination is not shown or threatened, such a decision would be arbitrary and capricious inasmuch as it would be neither fair, reasonable, nor consistent with the statute.

c. A Sole Source Aquifer Does Not Underlie the Site

In addition to focusing on Site characteristics, at the July 29, 1992 public meeting, the Ohio EPA Site Coordinator expressed concern about the possible contamination of a drinking water aquifer, stating that there is a sole source aquifer under a substantial portion of the Skinner Landfill Site. However, as recently acknowledged by U.S. EPA, this Ohio EPA official spoke in error. The Ohio-Kentucky-Indiana (OKI) Regional Council of Governments has confirmed that the Mill Creek sub-basin is not included in the Great Miami Valley Sole Source Aquifer System. In addition, as shown by borings, the soil and bedrock materials underlying the Site do not contain any productive water-bearing zones.

Instead, these soils contain significant amounts of clay and silt, and the bedrock consists of thinly interbedded limestone and shale. Neither of these materials is recognized within the geologic community as comprising an aquifer. Therefore, the Agency should not consider the possible contamination of a drinking water aquifer as a reason for supplying alternative water.

d. Skinner Landfill PRP Group May Provide Supplements To Its Comments If New Information Is Received

As the foregoing establishes, the known Site characteristics indicate that there is no present threat of contamination to off-site well water presented by the Site. Thus, based on current data, it would be arbitrary and capricious to supply alternative water to residences not threatened with contamination or having no demonstrable contamination. If, however, new or additional data establish that residential wells may be affected by Site contamination, the Skinner Landfill PRP Group may provide additional comment at that time and may conclude that provision of water is necessary and consistent with the NCP and CERCLA. The Skinner Landfill PRP Group specifically reserves its right to supplement these comments upon receipt of analytical results of water sampling and/or any other pertinent studies performed by U.S. or Ohio EPA.[1]

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[1] Additional information may reveal that U.S. and/or Ohio EPA's prior regulatory oversight regarding public water supply and/or hookups to nearby residents was inadequate, and thereby may have exacerbated the present U.S. EPA proposal for providing the alternative water supply at or near the site. If this is the case, then the cost of supplying the alternative water supply may not be a recoverable response cost, or, in the alternative, may unreasonably increase the response costs and therefore is not consistent with the NCP or CERCLA.

C. CONCLUSION

U.S. EPA's recently announced proposal to implement an Interim Remedy at the Site, which would include fencing and the provision of an alternative water supply to certain unidentified residences, may be consistent with CERCLA and the NCP. Because the Proposed Plan contains very little detailed information concerning the Interim Remedy, the Group can only comment using the current information presented in the RI/FS and Proposed Plan. Fencing of the 15 acre buried waste lagoon and inactive landfill appropriately delineates the Site by encompassing the source of contamination. Any decision by the EPA to expand the Site beyond the identified 15 acres would not be supported by Site data. Such a decision would be inconsistent with both CERCLA and the NCP, and therefore, arbitrary and capricious and subject to challenge.

Although current Site data shows no impact to residential wells, the EPA's Interim Remedy calls for a determination of whether there is a potential threat of contamination to residential wells near the Site. Should the EPA determine that a potential threat of contamination exists, providing an alternative water supply may be consistent with CERCLA and the NCP. In the absence of any demonstrataed contamination or threat of contamination to residential wells, any Interim Remedy requiring the provision of an alternative water supply would be arbitrary and capricious. The Skinner Landfill PRP Group reserves the right to supplement this comment upon receipt of the Work Plan for the Interim Remedy and any other pertinent reports, data, and other information, which would more specifically delineate the extent of the Interim Remedy and the basis for implementing such actions.

Respectfully submitted,

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