U.S. Department of Justice

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JCC:FB
90-11-3-289

Washington, D.C. 20530

March 16, 1992

Clerk of the Court
United States District Court for
the Eastern District of Michigan
140 Federal Building
600 Church Street
Flint, Michigan 48502

Re: United States v.
BASF-Inmont, et al., Civ. No. 91-CV-40230-FL

Dear Mr. Clerk:

I am enclosing for filing an original and two copies of the United States' Motion for Entry of Proposed Consent Decree, and a supporting memorandum. There are two copies of the exhibits and attachments to the Memorandum.

Would you please return a stamped copy of the Motion in the enclosed envelope.

Yours truly,

Frank Bentkover, Attorney
Environmental Enforcement Section
Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 91-CV-40230-FL
	)	
BASF-INMONT CORPORATION, et al.	)	Judge Newblatt
	)	
Defendants.	)	
	)	

MOTION OF THE UNITED STATES OF AMERICA
FOR ENTRY OF PROPOSED CONSENT DECREE

The United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), respectfully moves this Court for entry of the proposed Consent Decree ("Decree") that was lodged in this action on July 18, 1991.

Entry of the Decree is authorized under Section 122 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), 42 U.S.C. § 9622. The proposed settlement between the United States and thirty-five settling defendants provides for performance of a remedial design and remedial action at the Metamora Landfill Site in Lapeer County, Michigan.

In support of this Motion, the plaintiff states:

1. On July 18, 1991, the United States filed this action against the settling defendants under CERCLA, to obtain injunctive relief to implement the remedy selected by EPA in its Records of Decision ("RODs") dated September 30, 1986 and September 28, 1990, and as modified by the Explanation of

Significant Differences ("ESD") published September 4, 1991, for the Metamora Landfill Site. The Complaint alleges that settling defendants are liable for injunctive relief under Section 106(a) of CERCLA, 42 U.S.C. §§ 9606(a), as persons who arranged for the disposal or treatment of hazardous substances at a facility, or accepted hazardous substances for transport to disposal or treatment facilities selected by such persons, and from which there was a release or threatened release which causes the incurrence of response costs.

2. On July 18, 1991, the United States also lodged with this Court, pursuant to Section 122 of CERCLA, 42 U.S.C. § 9622, a proposed Consent Decree to which the United States and settling defendants have agreed.

3. The proposed Consent Decree provides for performance by the settling defendants of the remedial design and remedial action at the Site and reimbursement to the United States of future oversight costs incurred by the United States.

4. The remedial action selected by EPA, based on the Administrative Record supporting the two RODs and the ESD, comports fully with CERCLA. In accordance with Section 121 of CERCLA, 42 U.S.C. § 9621, the remedy will meet all applicable and relevant or appropriate requirements promulgated under federal and state laws. It will protect human health and welfare and the environment. It complies with CERCLA's preference for remedies that utilize permanent and innovative technologies, and is cost effective. Based on EPA's Administrative Record, the remedy is

not arbitrary, capricious, or otherwise not in accordance with law.

5. In accordance with Sections 117 and 122 of CERCLA, 42 U.S.C. §§ 9617 and 9622, and 28 C.F.R. § 50.7, the United States published in the Federal Register, 56 Fed. Reg. 36845 (Aug. 1, 1991), a notice that the proposed consent decree was lodged with the Court, and soliciting public comment for a period of 30 days. The United States extended the public comment period to September 30, 1991 in a second notice. 56 Fed. Reg. 42756 (Aug. 29, 1991).

6. The Department of Justice received about fifty comments to the consent decree, most questioning features of the remedy selected by EPA. These comments are contained in Attachment B to the Memorandum of the United States in Support of this Motion. In addition to the United States' Memorandum, EPA has prepared a Reply to Comments, Attachment A, which responds to seventy-three points raised by the commenters.

7. Section 122 of CERCLA, 42 U.S.C. § 9622, provides that the Attorney General may withdraw or withhold consent to a proposed settlement if any comments disclose facts or considerations that indicate the proposed settlement is inappropriate, improper, or inadequate. The United States has carefully reviewed the comments, and concluded that they do not disclose facts or considerations that indicate the proposed settlement is inappropriate, improper, or inadequate. The United States believes that the Consent Decree is fair, reasonable, in

the public interest, and consistent with the purposes of CERCLA. EPA's selection of a remedy for the site was not arbitrary and capricious, based on the administrative record.

WHEREFORE, for these reasons and as set forth in the accompanying Memorandum, the United States requests that this Court enter the proposed Consent Decree as a final judgment.

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 91-CV-40230-FL
BASF-INMONT CORPORATION, et al.	)	
	)	
Defendants.	)	
	)	

PROOF OF SERVICE

The undersigned certifies that a copy of the MOTION OF THE UNITED STATES FOR ENTRY OF PROPOSED CONSENT DECREE was served upon the following attorney by U.S. mail, postage pre-paid, on the 16th day of March 1992, addressed to:

James Thompson
Pepe & Hazard
Goodwin Square
Hartford, Connecticut 06103-4302

Frank Bentkover

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. BASF-INMONT CORPORATION, et al. Defendants.	Civil Action No. 91-CV-40230-FL Judge Newblatt

MEMORANDUM BRIEF OF THE UNITED STATES
IN SUPPORT OF
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UNITED.STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
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Plaintiff,	)	
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v.	)	Civil No. 91-CV-40230-FL
	)	
BASF-INMONT CORPORATION, et al.	)	Judge Newblatt
	)	
Defendants.	)	
	)	

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF
MOTION FOR ENTRY OF PROPOSED CONSENT DECREE

I. INTRODUCTION

The United States respectfully asks this Court to enter the Consent Decree between the United States and thirty-five settling defendants. This settlement provides for the settling defendants to undertake at their expense, a comprehensive and effective remedy for the Metamora Landfill Site in Lapeer County, Michigan. The major features of this Consent Decree provide for the settling defendants to:

1) Complete the incineration of over 10,000 drums of hazardous waste and additional contaminated soils at an incinerator to be installed at the Site under EPA approval, and in compliance with all applicable federal and state laws, including the Federal and Michigan Clean Air Acts, RCRA, Michigan Act 64 and TSCA;

2) Remediate contaminated groundwater at the site by installing and operating a network of groundwater extraction wells to pump up and then treat contaminated groundwater;

3) Install a Michigan Act 64 hazardous waste landfill cover, five feet thick, over the Landfill to prevent infiltration of precipitation and reduce future migration of contamination, and a gas collection system to capture and burn off-gases from waste in the Landfill; and

4) Sample and analyze soils at the Site, submit a report on alternatives to remediate the contaminated soils, and to implement the remedial action selected by EPA.

The United States Environmental Protection Agency ("EPA") has found that this remedy will protect human health and the environment. EPA has estimated the cost of the remedy provided by the Consent Decree at approximately $50 million.

However, during the public comment period for this Consent Decree, the United States received about fifty comments (Attachment B), mostly from local residents, objecting mainly to EPA's choice of a remedy for Metamora. EPA has prepared a Reply to Comments ("RC") (Attachment A) which provides answers to seventy-three issues raised by these comments. The United States' Memorandum will discuss only the more important issues going to the entry of the Consent Decree.

EPA selected high temperature incineration (normally average temperatures of 1,800 - 2,200 degrees F.) at the site, which would destroy 99.9999% of the PCBs and 99.99% of the organic hazardous wastes in the thousands of excavated drums of hazardous waste now stacked up at the Site. The administrative record provides abundant support for EPA's conclusion that there was insufficient capacity available at eligible off-site incinerators, and that prompt treatment of this waste required the option of incinerating it at the Site. The Consent Decree specifically requires the on-site incinerator to comply with every applicable health and environmental law and regulation, including the Federal and Michigan Clean Air Acts, the Resource Conservation and Recovery Act, Michigan Act 64 and the Toxic Substances Control Act.

Nevertheless, many commenters ask this Court to reject the Consent Decree. Although they raise numerous procedural and technical points, their basic objection is that the incineration will take place at the Site instead of a location far away. While this sentiment is understandable, it does not provide a basis to reject a well thought-out remedial action, designed by an expert administrative agency, and which is amply supported by the administrative record. EPA's remedy decision is to be upheld unless it is arbitrary and capricious, based on the information contained in the administrative record. Section 113(j) of CERCLA, 42 U.S.C. § 9613(j)(1) and (2); United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1425 (6th Cir. 1991). The Court should enter this Consent Decree.

II. Legal Background

A. CERCLA's Enforcement Provisions

Congress directed the President, through CERCLA, to administer a federal program to secure "prompt and effective response to problems of national magnitude resulting from hazardous waste disposal." United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). CERCLA grants the President broad authority and discretion in carrying out this program. The President has generally delegated this authority to EPA.[1]

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[1] Exec. Order 12,580, 3 C.F.R. 1987 Comp. 193 (1988); reprinted in 42 U.S.C. § 9615 (West Supp. 1988).

Under CERCLA, EPA has two primary methods available to secure cleanup of hazardous waste sites. See generally Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380 (5th Cir. 1989). First, for sites listed on the NPL, EPA can undertake response actions[2] under CERCLA Section 104, 42 U.S.C. § 9604, using money from the Hazardous Substances Superfund (the "Fund"). See id. at 2, n.2. EPA can then sue to recover its response costs from responsible parties pursuant to Section 107, 42 U.S.C. § 9607. Under Section 107(a)(1)-(4), responsible parties include present and past site owners and operators and specified categories of generators and transporters of hazardous substances. E.g., United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1500-01 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988); United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988), cert. denied, 109 S. Ct. 3156 (1989). Liability to EPA under Section 107(a), is both strict and joint and several where the environmental harm is indivisible. Monsanto, 858 F.2d 160; O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989), cert. denied, 110 S. Ct. 1115 (1990). Second, as an alternative to Fund-financed cleanup and cost recovery under Section 107, the Agency can require responsible parties to undertake response actions themselves, pursuant to Section 106. 42 U.S.C. § 9606. To that

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[2] Response actions generally include short-term "removal" actions and more permanent "remedial actions." "Removal" and "remedial action" are defined in Section 101(23) and (24) of CERCLA. 42 U.S.C. § 9601(23) and (24).

end, EPA can issue administrative orders requiring cleanup or it can seek, through the Attorney General, judicial injunctive relief from responsible parties. Id. Entities held liable to EPA under Sections 106 or 107 have a statutory right to contribution against other liable parties. 42 U.S.C. § 9613(f)(1). Further, entities that satisfy their liability to EPA receive statutory contribution protection from non-settling entities. 42 U.S.C. § 9613(f)(2).

A fundamental prerequisite to either method of securing cleanup is the selection of the appropriate "response" action for the particular conditions at the contaminated site. CERCLA Section 121(a) authorizes EPA to select the appropriate remedy, and Section 104(b)(1) authorizes EPA to undertake any studies and investigations it deems "necessary or appropriate" to evaluate site conditions and to analyze alternative response actions. 42 U.S.C. § 9621(a) and 9604(b). The National Contingency Plan ("NCP"), 40 C.F.R. Part 300 and 55 Fed. Reg. 8813 (Mar. 8, 1990), which EPA promulgated as a regulation under CERCLA § 105, 42 U.S.C. § 9605, guides the United States' response activities. The NCP identifies methods to investigate the environmental and health problems posed by contamination at a site and identifies criteria to determine necessary response actions.

After a site has been placed on the National Priorities List ("NPL"),[3] the NCP prescribes a three-step administrative process

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[3] The NPL, 40 C.F.R. Part 300, App. B, also promulgated as an EPA rule pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, (continued...)

to select the appropriate remedy. First, EPA conducts or oversees performance by responsible parties or a State of a Remedial Investigation and Feasibility Study ("RI/FS"), which is an in-depth scientific and engineering study of the environmental conditions at the site and potential cleanup alternatives.[4] Second, pursuant to Section 117(a) of CERCLA, potentially responsible parties ("PRPs"), the State, and the public may comment on the proposed cleanup plan. 42 U.S.C. § 9617(a). Finally, EPA evaluates and responds to the comments it receives, and selects a cleanup alternative which it announces in an administrative decision document called the Record of Decision ("ROD")[5]. Judicial review of EPA's remedy decision is limited to

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[3](...continued)
lists those hazardous waste sites at which the release of hazardous substances presents the greatest threat to public health, welfare, and the environment. See, e.g., Eagle-Picher Industries, Inc. v. U.S. EPA, 759 F.2d 922 (1985).

[4] The RI involves data collection and site characterization to determine the nature and extent of contamination. Activities during the RI typically include sampling and monitoring of the soil, groundwater, and air at and near the site. In addition to determining the need for remedial action, the RI assesses the extent to which contaminants have migrated from the site and the need for remedial action to control such migration. The FS identifies and evaluates alternative remedial actions. The FS typically includes EPA's recommendation for specific remedial action. See generally 40 C.F.R. § 300.68(d).

[5] The RI/FS and related comments and materials considered by EPA in selecting a remedy are maintained in an administrative record that is available to the public. 42 U.S.C. § 9613(k).

the administrative record on an arbitrary and capricious standard. 42 U.S.C. § 9613(j)(1) and (2).[6]

B. CERCLA's Settlement Provisions

A fundamental goal of the CERCLA enforcement program is to facilitate voluntary settlements in order to expedite remedial actions and minimize litigation. In the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. § 9601 et seq.), Congress recognized the importance of entering into negotiations and reaching settlements with PRPs to allow them to conduct or finance response actions at hazardous waste sites. Unique among this nation's environmental laws, CERCLA, as amended, includes extensive provisions for private potentially responsible parties to perform remedial actions under Section 106. Section 122(a) affords the United States the discretion to enter into an agreement with any person to perform response action at a site. 42 U.S.C. § 9622(a). Section 122 authorizes EPA and the Department of Justice to conduct settlement negotiations, defines the scope of any covenant not to sue that a settlement may provide, and provides for public comment on proposed settlements. Id. § 9622. In addition, Section 122(d) requires that settlements involving implementation of remedial actions must be embodied in judicial consent decrees, subject to Court approval. Id. § 9622(d).

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[6] United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1425 (6th Cir. 1991); see also Florida Power & Light v. Lorion, 470 U.S. 729, 744 (1985).

Section 122 also addresses certain kinds of settlements for EPA costs incurred at a given site. Specific statutory authority for de minimis settlements is set forth in Section 122(g). Id. § 9622(g). Whenever the EPA Administrator determines that it would be practicable and in the public interest, Section 122(g)(1) authorizes him to enter into an "expedited final settlement" if the settlement involves a minor portion of the response costs at the facility, and, in the Administrator's judgment, the amount of the hazardous substances and the toxic or other hazardous effects of these substances contributed by the settling party are minimal in comparison to the other hazardous substances at the facility. 42 U.S.C. § 9622(g)(1). E.g., United States v. Cannons Engineering Corp., 720 F. Supp. 1027 (D. Mass. 1989), aff'd, 899 F.2d 79 (1st Cir. 1990).

In Section 122 settlements, the United States may provide a settlor with a covenant not to sue regarding its liability for conditions at a site. 42 U.S.C. § 9622(c), (g)(2). Once a settlement is finalized between a PRP and the United States, that PRP is protected by operation of law from liability to any other PRPs that may seek contribution from the settlor. 42 U.S.C. § 9613(f)(2); e.g., United States v. Rohm & Haas, 721 F. Supp. 666, 699-700 (D.N.J. 1989), appeal dismissed, No. 89-6005 (3d Cir., Feb. 28, 1990); In re Acushnet River & New Bedford Harbor Litigation, 712 F. Supp. 1019, 1032 (D.Mass. 1989); City of New York v. Exxon Corp., 697 F. Supp. 677, 683 (S.D.N.Y. 1988).

III. Statement of Facts

A. Background of the Consent Decree

The Metamora Landfill Site is located in Lapeer County, Michigan, approximately one-half mile northeast of the Village of Metamora, and twenty miles east-southeast of Flint, Michigan. The Landfill began operations in 1955 as a privately owned, unregulated open dump, and was licensed in 1969 to receive general refuse. It accepted both municipal and industrial waste until it was closed in 1980. (Ex. 5, ROD II, pp. 1-2)

After drums containing hazardous substances were discovered at the site in 1981, the Michigan Department of Natural Resources ("MDNR") conducted a magnetometer survey which indicated that as many as 35,000 drums, some containing liquid waste, might be present in five disposal areas around the site. The survey estimated that areas one and four contained about 74% of the drums buried at the Site. (Id.) In September 1984, the Site was placed on the National Priorities List.

MDNR completed a Phased Feasibility Study of the site in August 1986, and U.S. EPA issued a Record of Decision ("ROD I") for Operable Unit One on September 30, 1986. This ROD concerned the initial cleanup or source-control phase at the site. It evaluated in detail five options for dealing with the waste in areas one and four of the Site which were estimated to hold about 74% of the drums at the Site. These options included no action,

placement of the waste in an on-site RCRA[7] landfill, placement in an off-site RCRA landfill, excavation of the waste and incineration at an off-site incinerator, and a combination of off-site incineration and landfilling. (Ex. 2, ROD I, pp. 7-12)

The ROD rejected the on-site landfill because the geology of the Metamora site was not a good location for a hazardous waste landfill, and because landfilling did not utilize any treatment to reduce the waste's volume, toxicity or mobility. The ROD also rejected an off-site landfill, and the combination using off-site landfilling, because of limited available capacity and a failure to treat the waste. The ROD selected excavation of areas one and four and incineration at an off-site incinerator. It found that although the most expensive remedy (estimated at $41.5 million), incineration was most protective of public health and the environment. Incineration also significantly reduced the volume, toxicity, and mobility of the wastes, and was consistent with EPA's preference for permanent remedies. (Id., pp. 10-12)

The ROD Summary, pp. 5-7, also considered incinerating the waste on-site, but found that the length of time to go through Michigan permitting requirements, including preparation and review of the application and operating license, and to construct the incinerator, would delay the remedy by about two years.

The design for this remedy was done between February 1987 and March 1988, and the remedial action then commenced.

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[7] A landfill in compliance with the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq., and regulations promulgated thereunder.

Approximately 25,000 drums were excavated from areas one and four, and 10,000 drums were incinerated off-site, most at an incinerator in Deer Park, Texas. However, MDNR and EPA found that there was a shortage of incineration capacity which could handle the type of hazardous wastes from Metamora. Land Disposal Restrictions (40 CFR Part 268) which prevented disposal in landfills of a wide variety of hazardous wastes, resulted in a great increase in demand for incineration. This caused a shortage of available capacity at incinerators, and sharply higher incineration prices. This was coupled with the discovery at Metamora of many more drums and thousands of tons of contaminated soils needing incineration. The result was that thousands of drums were excavated and stacked up at Metamora, with no off-site capacity available to burn them at appropriate incinerators. Several hundred drums were even returned from incinerators which could not handle the wastes. (Ex. 6, Explanation of Significant Differences, pp. 5-6)

While the drums and contaminated soils were being excavated and incinerated, a Remedial Investigation ("RI") of remaining contamination at the site, and a Feasibility Study ("FS") of alternatives to deal with the contamination, had been started. The RI was completed in March 1989, and the FS was completed in April 1990. These investigations found that groundwater in the upper aquifer at the site was contaminated by thirty-four organic and twelve inorganic chemicals that migrated from the drum areas and the landfill. This groundwater contamination extended at

least 550 feet from the northern boundary of the site to as much as 2,500-3,500 feet from the boundary. Also, soils directly beneath the drum areas, and soils mixed with the drums, contained high concentrations of chemicals. There were seeps of leachate around the landfill, and twelve organic chemicals were detected in affected soils. (Ex. 5, ROD II, pp. 4-5, Tables 1, 2)

EPA published notice of the completion of the RI/FS and proposed plan, solicited public comment and held a meeting to receive comments from the local public. EPA then issued a second Record of Decision ("ROD II") on September 28, 1990. This ROD considered seven alternatives for dealing with the contaminated groundwater at the site, and three alternatives for dealing with the Landfill contents. EPA then thoroughly evaluated the alternatives according to nine criteria set out in the National Contingency Plan ("NCP"), 40 CFR § 300.430(e)(9)(iii), which incorporate factors required by Section 121 of CERCLA, 42 U.S.C. § 9621, to be considered by EPA in the remedy selection process. (Ex. 5, ROD II Summary, pp. 15-20)

Based on this evaluation, EPA selected remedies for the groundwater contamination and for the Landfill. For the groundwater, EPA selected a) installation and operation of a network of groundwater extraction wells designed to capture all contaminated groundwater; b) treatment of the extracted groundwater by precipitation/flocculation, air stripping, and recharge back into the shallow aquifer; and c) monitoring of the groundwater to detect any hazardous substances. For the

Landfill, EPA selected the installation of a cover over the landfill which complies with Michigan Act 64 requirements for RCRA hazardous waste landfills, and which would reduce future contaminant migration by preventing infiltration of precipitation. EPA also selected the installation of a passive gas collection system to capture and burn off-gases generated by the decomposition of waste in the Landfill. In addition, ROD II selected the installation of fencing, and the use of institutional controls to limit use of groundwater and future use of the Site. (Ex. 5, ROD II, p.1; ROD II Summary, pp. 19-20)

EPA specifically found that this remedy meets the requirements of CERCLA -- that it is protective of human health and the environment, attains all ARARs of Federal and State environmental laws, is cost effective, utilizes permanent solutions and alternative treatment technologies to the maximum extent practicable, and satisfies CERCLA's preference for remedies that employ treatment that reduces toxicity, mobility or volume as a principal element. (Ex. 5, ROD II, p.2; ROD II Summary, pp. 21-24). EPA estimated the capital cost of the remedy at $7.95 million, and the total present value of the remedy including annual operating and maintenance expenses, at $19.4 million. (Ex. 5, ROD II Summary, p. 20)

B. The Consent Decree

EPA then notified potentially responsible parties, pursuant to Section 122(e) of CERCLA, 42 U.S.C. § 9622(e), of the completion of the ROD and invited them to submit a proposal to

undertake the remedial action. Negotiations with EPA then commenced. These negotiations to implement ROD II's remedy, which included a cover over the Landfill, eventually came to encompass the completion of incineration of wastes required by ROD I. The excavation and incineration of wastes from areas one and four had ground to a halt, yet had to be completed before a landfill cover required by ROD II could be installed.

EPA and the thirty-five settling defendants reached an agreement for the defendants to perform the remedy selected by ROD II. The agreement also called for settling defendants to complete the stalled excavation and incineration of hazardous wastes which the United States had been previously funding. Attached to the Consent Decree is a Scope of Work ("SOW") which outlines the basic features of the work that settling defendants are committed to perform. The SOW provided settling defendants the option of incinerating these wastes at an incinerator to be erected at the Site, under the approval of EPA. The SOW specifically required that this on-site incinerator must be able to destroy 99.99% of principal organic hazardous wastes and 99.9999% of PCBs. (SOW, Appendix 2, pp. 3-4) The SOW, pp. 4-5, also required that this incinerator must comply with the substantive requirements[8] of applicable statutes and regulations, and that emissions from the incinerator must comply with applicable substantive requirements of the federal Clean Air Act

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[8] CERCLA § 121(e)(1), 42 U.S.C. § 9621(e)(1), provides that federal, state or local permits are not required for portions of the remedial action conducted entirely onsite.

and the Michigan Air Pollution Acts. The SOW, p. 6, also required that the incinerator be removed upon completion of incineration at the Site.

In addition to performing the incineration from ROD I, and the groundwater treatment and landfill cover from ROD II, the settling defendants also agreed to do what a contemplated ROD III would have required -- remediation of residual, contaminated soil at the Site. The defendants agreed to sample and analyze soils at the Site and report the findings to EPA, and then submit a report on alternatives to remediate the contaminated soils, and finally to implement the remedial action selected by EPA. (SOW, pp. 10-11)

Also, because ROD II had selected a remedy that resulted in hazardous substances remaining at the Landfill, paragraph 19 of the Consent Decree required, pursuant to § 121(c) of CERCLA, 42 U.S.C. § 9621(c), that EPA review the remedial action every five years to assure that human health and the environment were being protected. If EPA finds that additional response action is appropriate, EPA reserved the right to act pursuant to Sections 104 or 106 of CERCLA.

Although the Consent Decree provides for settling defendants to take over future remedial activities at the Metamora Landfill, it leaves open for future settlement or litigation, one important issue. Paragraph 64, the covenant not to sue by the United States, specifically excludes liability of the settling defendants for reimbursement of the United States' past response

costs at the site. These costs, which include Superfund moneys spent by MDNR in remediating the site, were last estimated at about $30 million.

C. The Explanation of Significant Differences

After the Consent Decree was lodged with the Court on July 18, 1991, the United States published a notice of the settlement in accordance with 42 U.S.C. § 9622(i) and 28 C.F.R. § 50.7. (56 Fed. Reg. 36845 (Aug. 1, 1991)), and solicited public comment for a period of 30 days. The United States extended the public comment period for an additional 30 days to September 30, 1991. 56 Fed. Reg. 42756 (Aug. 29, 1991). U.S. EPA also issued an Explanation of Significant Differences ("ESD") pursuant to 42 U.S.C. § 9617(c), and published notice of the ESD in the Lapeer County Press on September 4, 1991. EPA also held two public meetings in August - September, 1991 in Metamora, where it explained the Consent Decree and need for the ESD, and heard oral comments and answered questions. (Ex. 6, ESD, p. 8) The public thus had ample opportunity to review the Consent Decree, the administrative record and the ESD, and to submit fifty comments or briefs to the United States.

EPA gave a well-reasoned explanation in the ESD for permitting incineration at the Landfill, under a plan to be approved by EPA. EPA explained that since ROD I was issued, a number of factors demonstrated the desirability of the option of on-site incineration. Because of Land Disposal Restrictions (40 CFR Part 268), which were fully implemented in August 1990,

many wastes which had been disposed of in hazardous waste landfills were now required to be incinerated. The ESD, § 5.0, explained that:

> Available off-site incinerator capacity was drastically reduced during the midst of a heavy excavation period at Metamora. This resulted in the inability to transport Metamora wastes to an off-site incinerator. Approximately 10,000 drums in temporary storage containers remain staged on site awaiting off-site incineration. Since September 1990, shipment of drums off-site has stopped altogether. In addition, approximately 700 drums have returned from off-site facilities due to an inability of these vendors to incinerate Metamora wastes.

This conclusion was supported by letters in the administrative record from 1990-91, between MDNR and its contractor, Chemical Waste Management, Inc., which express MDNR's unhappiness over the lack of shipments of Metamora waste to off-site incinerators. One letter from MDNR, dated February 4, 1991 (Ex. 7) stated that:

> This letter is to express my continuing concern at the lack of drum waste being shipped off the Metamora Landfill site by Chemical Waste Management (CWM). Since suspension of excavation work in mid-December 1990, little, if any, drum shipments off-site have occurred. As you have noted, CWM has had difficulty in contacting disposal facilities with adequate incineration capacity to handle the Metamora drum waste. This is clearly demonstrated by the fact that approximately 10,000 drums remain staged on-site awaiting disposal. In addition, recent Land Ban regulations have resulted in lower capacity numbers at disposal facilities that can handle the Metamora waste.[9]

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[9] The availability of off-site incineration capacity has not improved since then. U.S. EPA's Reply to Comments, Responses 31, 50-51, states that there are currently only three such facilities in the United States that are in compliance with all RCRA and TSCA regulations, and could thus accept PCB wastes from Metamora in accordance with CERCLA § 9621(d)(3), 42 U.S.C. § 9621(d)(3), and EPA's off-site policy (Ex. 9). However, two of these facilities have refused to accept Metamora waste because

(continued...)

The ESD stated two additional reasons for permitting on-site incineration. Many more drums were discovered at the site than had been estimated by the 1986 ROD, and the cost of off-site incineration had greatly increased. The ESD, p. 6, also stated:

> Unless a change in the remedial action at Metamora is implemented, the drums and soils currently staged on-site, along with unexcavated drums and soils, will remain on-site indefinitely. The original concerns expressed in the 1986 ROD against a mobile on-site incinerator, untimely destruction of waste and long administrative delays are no longer valid. The incineration of the drums and soils in an expedited manner can best be accomplished by on-site incineration.

Because of an amendment to CERCLA, Section 121(e)(1), 42 U.S.C. § 9621(e)(1), an on-site incinerator was now not required to go through lengthy state permitting procedures, and thus could be completed much more quickly than when it was considered by ROD I.

EPA went on to find that "on-site incineration has been demonstrated to be a safe and proven technology at many Superfund sites similar to Metamora," and that the "on-site incineration of hazardous waste will be required to comply with all substantive State and Federal rules and regulations." These ARARs included requirements of RCRA, Michigan Act 64, TSCA, the Clean Air Act and the Michigan Air Pollution Control Act. (Ex. 6, ESD, pp. 6-7).

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[9](...continued)
the waste's lead content exceeded the limits in the incinerators' operating permits.

IV. ARGUMENT

A. The Law and Public Policy Favor Settlements

"Public policy strongly favors settlements of disputes without litigation." Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir.), cert. denied, 429 U.S. 862 (1976). As the court in Aro stated:

> Settlement agreements should . . . be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before overburdened courts, and to the citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute.

531 F.2d at 1372. See also Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (upholding entry of Consent Decree under the Clean Water Act), cert. denied sub nom, Union Carbide Corp, et al. v. Natural Resources Defense Counsel, Inc., et al., 467 U.S. 1219 (1984).

The consent decree is a "highly useful tool for government agencies," for it "maximizes the effectiveness of limited law enforcement resources" by permitting the government to obtain compliance with the law without lengthy litigation. United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975); see also Securities and Exchange Commission v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984) ("use of consent decrees encourages informal resolution of disputes, thereby lessening the risks and cost of litigation"); United States v. Hooker Chemicals & Plastics Corp., 540 F. Supp. 1067, 1080 (W.D.N.Y. 1982) (approving CERCLA decree will save "considerable time, money and

effort in litigation"); Moch v. East Baton Rouge Parish School Board, 533 F. Supp. 556, 559 (M.D. La. 1980) (consent decree is "a useful tool for federal governmental agencies who are charged with enforcing particularly the civil rights laws . . . since the government itself may avoid the risks as well as the cost of full scale litigation").

The public policy in favoring settlements of government claims by consent decree is particularly applicable in CERCLA enforcement actions. The Sixth Circuit recently stated:

> Moreover, we are faced with a presumption in favor of voluntary settlement. That presumption is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field.

United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1436 (6th Cir. 1991).

In CERCLA, Congress authorized the President to:

> . . . arrange for the removal of, and provide for remedial action relating to [a] hazardous substance . . . or take any other response measure consistent with the national contingency plan . . . When the President determines that such action will be done properly and promptly by . . . any . . . responsible party, the President may allow such person to carry out the action . . . .

42 U.S.C. § 9604(a)(1) (Emphasis supplied).

An explicit statutory goal of the CERCLA enforcement program is to facilitate voluntary settlements in order to expedite remedial actions and minimize litigation. In the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. § 9601 et seq.),

Congress recognized the importance of reaching settlements with potentially responsible parties ("PRP"s) to allow them to conduct or finance response actions at hazardous waste sites:

> Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation.

42 U.S.C. § 9622(a) (emphasis supplied).

Voluntary settlements are generally preferable to litigated cleanups for a number of reasons. First, it is preferable for PRPs, rather than the federal government, to undertake and finance the remediation of hazardous waste sites. While CERCLA authorizes the financing of government clean-ups through the Hazardous Substance Superfund (the Fund), 42 U.S.C. § 9611(a), the resources available through the Fund are limited and cannot finance the remediation of all of the many hazardous waste sites nationwide. Rather, the Fund is intended to finance clean-up "if the site has been abandoned, if the responsible parties elude detection, or if private resources are inadequate." New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2d Cir. 1985). Thus,

> spending precious Superfund monies on a site when there are responsible parties ready and willing to spend private monies to accomplish the same result would hardly be an effective use of government resources.

United States v. Conservation Chemical Co., 628 F. Supp. 391, 403 (W.D. Mo. 1985).

Second, while Section 106 authorizes the United States to seek an injunction compelling responsible parties to clean up a

hazardous waste site, voluntary clean-up under a consent decree avoids potentially disproportionate transaction costs and enables a more timely response to the hazards posed by hazardous wastes. See United States v. Hooker Chemicals, supra 540 F. Supp. at 1079 ("Weighing strongly in favor of the approval" of a CERCLA decree "is the fact that the plan can be implemented immediately").

As the trial court observed in United States v. Cannons Engineering Corp., 720 F. Supp. 1027 (D. Mass. 1989), aff'd, 899 F.2d 79 (1st Cir. 1990):

> If the pending proposed Consent Decrees are not approved it would, at a minimum, likely be several years before plaintiffs recover anything in this action. In the interim, the Superfund would have to bear the costs of cleaning up the . . . sites . . . Thus, during the pendency of this action, less money would be available for other hazardous waste sites throughout the country.

720 F. Supp. at 1039. See Conservation Chemical Co., supra, 628 F. Supp. at 402-03 (rejection of a negotiated voluntary clean-up plan and consequent further litigation or use of Superfund monies and resultant procedures "might lengthen the process and delay implementation of the remedy").

Further, clean-up of a hazardous waste site is a technically complex undertaking. Site remediation conducted pursuant to a mutually agreed-upon cleanup plan and schedule in a consent decree is less likely to require intervention and supervision by the court. In the event problems do arise, a consent decree, through its dispute resolution provisions, affords the parties ready access to the court for resolution of disputes.

> Because of the consensual nature of the decree, voluntary compliance is rendered more likely, and the government may have expeditious access to the court for the appropriate sanctions if compliance is not forthcoming.

United States v. City of Jackson, supra 519 F.2d at 1152, n. 9.

B. The Standard for Review of the Consent Decree is Whether It Is Fair, Reasonable, and Consistent With the Goals of CERCLA

Review of a consent decree is committed to the informed discretion of the trial judge. United States v. Hooker Chemical & Plastics Corp., 776 F.2d 410, 411 (2d Cir. 1985) ("test for affirmance [of CERCLA consent decree]. . . is abuse of discretion" [bracketed material supplied]). This discretion should be exercised to further the strong policy favoring voluntary settlement of litigation. Id. (in CERCLA cases there is a "well-established policy of encouraging settlements"). See also Citizens for a Better Environment v. Gorsuch, supra 718 F.2d at 1126 ("trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate"); United States and Missouri Coalition for the Environment v. Metropolitan St. Louis Sewer District, Civil No. 88-543C(4) (E.D. Mo. July 13, 1990) (stating that "standard of review of consent decrees has been articulated as whether the decree is fair, reasonable, and adequate," trial court approved Clean Water Act decree), citing Van Horn v. Trickey, 840 F.2d 604, 606 (8th Cir, 1988), quoting from Grunin v. International

House of Pancakes, 513 F.2d 114 (8th Cir. 1975), cert. denied, 423 U.S. 864 (1975).

Although a consent decree, as a judicial act, requires approval, "the court's role is a limited one." Harris v. Pernsley, 654 F. Supp. 1042, 1049 (E.D. Pa. 1987), aff'd, 820 F.2d 592 (3d Cir. 1987), cert. denied, 484 U.S. 947 (1987).

> The court may either approve or disapprove the settlement; it may not rewrite it. See Armstrong v. Board of School Directors, 616 F.2d 305, 315 (7th Cir. 1980); In re Real Estate Title and Settlement Services Antitrust Litigation, MDL Docket No. 633, Slip Op. at 29 (E.D. Pa. June 10, 1986) (Van Artsdalen, J.).

654 F. Supp. at 1049. The controlling criterion is reasonableness and fairness, not what might have been agreed upon, nor what the district court believes might have been the optimal settlement.

> [S]ettlement of any litigation . . . is basically a bargained exchange between the litigants. . . [T]he judiciary's role is properly limited to the minimum necessary to protect the interests of . . . the public. Judges should not substitute their own judgment as to the optimal settlement terms for the judgment of the litigants and their counsel.

Armstrong v. Board of School Directors, 616 F.2d 305, 315 (7th Cir. 1980). See SEC v. Randolph, supra 736 F.2d at 529 (district court should not condition approval of decree "on what it considered to be the public's best interest. Instead, the court should have deferred to the agency's decision that the decree is appropriate and simply ensured that the proposed judgment is reasonable" [emphasis in original]).

Where a court is reviewing a consent decree to which the government is a party, the balancing of competing interests

affected by a proposed consent decree "must be left, in the first instance, to the discretion of the Attorney General." United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981), cert. denied, 454 U.S. 1083 (1981); see also Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961) ("sound policy would strongly lead us to decline . . . to assess the wisdom of the Government's judgment in negotiating and accepting the . . . decree . . . in the absence of bad faith or malfeasance"); United States v. Associated Milk Producers, Inc., 534 F.2d 113, 117 (8th Cir.), cert. denied sub nom National Farmers' Organization, Inc. v. United States, et al., 429 U.S. 940 (1976) (Attorney General must retain discretion in "controlling government litigation and in determining what is in the public interest").

The principle of deference to a settlement agreed to by the government is particularly important where the consent decree has been negotiated by the Justice Department on behalf of a federal administrative agency "specially equipped, trained and oriented in the field." United States v. National Broadcasting Co., 449 F. Supp. 1127, 1144 (C.D. Cal. 1978). In other words,

> Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved . . . [T]he courts should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment. [Bracketed material supplied.]

SEC v. Randolph, supra 736 F.2d at 529. This is particularly true in a CERCLA case:

> Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sit at the table.

United States v. Cannons Engineering Corp., supra 899 F.2d at 84.

Congress and the courts have identified three factors for a court to consider in reviewing a proposed CERCLA settlement. The legislative history for the 1986 amendments to CERCLA indicates that a court's role in reviewing a Superfund settlement is to "satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." H.R. Rep. No. 253, Part 3, 99th Cong., 1st Sess. 19 (1985). United States v. Cannons Engineering Corp., supra 899 F.2d at 85 ("Reasonableness, fairness, and fidelity to the statute are, therefore, the horses which district judges must ride").

The Sixth Circuit Court of Appeals recently reaffirmed this standard: "When reviewing a consent decree, a court need only 'satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve.'" United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1424 (1991). It also stated that "[i]n evaluating the decree, it is not our function to determine whether this is the best possible settlement that could have been obtained, but only whether it is fair, adequate and reasonable." Id. at 1436.[10]

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[10] The three-part test of (1) fairness, (2) reasonableness, and (3) consistency with CERCLA's goals, is similar to the three-part test the courts used in evaluating settlements under CERCLA, prior to the 1986 amendments. United States v. Conservation Chemical Co., supra 628 F. Supp. at 400 (W.D. Mo. 1985) (reciting these same standards in pre-SARA CERCLA cases); United States v. Seymour Recycling Corp., 554 F. Supp. 1334, 1337-38 (S.D. Ind. 1982) (reciting same standards).

1. The Consent Decree Is Fair, Reasonable And Consistent with the Goals of CERCLA

(a). The Consent Decree is fair. The settlement was reached after extended and intensive arms-length negotiations between the United States and the settling defendants. Negotiations resulted in an agreement under which the parties who generated or transported hazardous waste responsible for the contamination of the Site will perform the remedial action for the Site, which EPA estimates will cost approximately $50 million, and reimburse the EPA for its future oversight costs in connection with the Site. Plainly, this settlement replenishes and conserves the Superfund. As stated by the court in Cannons Engineering, "a party should bear the cost of the harm for which it is legally responsible." Id. at 87.

(b). The Consent Decree is reasonable. The settlement promotes the overriding public interest expressed in CERCLA of "facilitat[ing] agreements . . . that are in the public interest and consistent with the [NCP] in order to expedite effective remedial actions and minimize litigation." 42 U.S.C. § 9622(a). The Decree provides for implementation of the remedial action by the hazardous waste generators and transporters. The remedy was selected by EPA in its two RODs and ESD, and meets CERCLA's cleanup standards as set forth in the ROD and the Decree.

In accordance with Section 121 of CERCLA, 42 U.S.C. § 9621, the remedy will meet all applicable and relevant or appropriate requirements promulgated under federal and state laws. It will protect human health and welfare and the environment. It

complies with CERCLA's preference for remedies that utilize permanent and innovative technologies. It is cost effective. Based on EPA's Administrative Record, the remedy is not arbitrary, capricious, or otherwise not in accordance with law. An effective remedial action will take place if the Decree is entered. See United States v. Conservation Chemical Co., 628 F. Supp. 391, 402 (W.D. Mo. 1985) (rejection of settlement would delay clean-up and is, therefore, not acceptable). Moreover, the settlement provides for reimbursement of EPA's future oversight costs, which further protects the public from having to assume these additional costs.

Further, by settling this case, the parties avoid delay that would result from litigation, and more expeditiously clean up the Site. In exchange for their performance of the remedy and payments under the Decree, settling defendants receive a covenant not to sue, as set forth in the Decree. In view of the above, the Court should determine that the Decree is reasonable. As the Court stated in United States v. Seymour Recycling Corp., supra, 554 F. Supp. at 1339:

> There is a public interest in encouraging parties to come forward first in an effort to settle enforcement cases. This is consistent with the general policy favoring the compromise of claims.

(c). The Consent Decree meets the requirements of CERCLA and is consistent with the statute's purposes. In keeping with provisions of Section 122 of CERCLA intended to promote settlement of CERCLA cases, the Decree provides for a cleanup of the Metamora Site by responsible parties, preserving the

Superfund for use at other abandoned sites where cleanups can only be accomplished through the expenditure of Superfund monies. The remedy was selected in accordance with CERCLA's procedural requirements and will meet state and federal cleanup standards. Finally, the settlement achieves Congress's purposes under Section 122 of CERCLA and furthers the public policy favoring voluntary settlement without extensive litigation and expenditure of resources.

2. The ESD Complies With The Requirements of CERCLA and the NCP

Some commenters claim that when EPA agreed to a Consent Decree which permitted Metamora waste to be incinerated on-site at Metamora, that EPA erred by issuing an ESD instead of amending ROD I. EPA, however, followed the requirements of CERCLA and the NCP when it continued to require the same treatment technology -- incineration, but permitted the site of incineration to change.

CERCLA § 117(c), 42 U.S.C. § 9617(c), provides for the publication of an ESD, after adoption by EPA of a final remedial action plan:

> (3) if any settlement or consent decree under section 9606 of this title or section 9622 of this title is entered into,
>
> and if such action, settlement, or decree differs in any significant respects from the final plan, the President or the State shall publish an explanation of the significant differences and the reasons such changes were made.

CERCLA does not specifically make any provision for amending a ROD. U.S. EPA, however, promulgated regulations as part of the National Contingency Plan, 40 CFR Part 300, which do provide for

a ROD amendment and explain when an ESD or ROD amendment is used. 40 CFR § 300.435(c)(2) states:

> (2) After the adoption of the ROD, if the remedial action or enforcement action taken, or the settlement or consent decree entered into, differs significantly from the remedy selected in the ROD with respect to scope, performance, or cost, the lead agency . . . shall either:
>
> (i) Publish an explanation of significant differences when the differences in the remedial or enforcement action, settlement, or consent decree significantly change but do not fundamentally alter the remedy selected in the ROD with respect to scope, performance, or cost. . . .
>
> (ii) Propose an amendment to the ROD if the differences in the remedial or enforcement action, settlement, or consent decree fundamentally alter the basic features of the selected remedy with respect to scope, performance, or cost. . . .

(Emphasis added.) Thus, if a consent decree "significantly changes" the remedy, an ESD is appropriate, but if the decree "fundamentally alters" the remedy, a ROD amendment is used.

In the preamble to the NCP, EPA explained the distinction between these two standards: "the appropriate threshold for amending a ROD is when a fundamentally different approach to managing hazardous wastes at a site is proposed." 55 Fed. Reg. 8771 (Mar. 8, 1990). EPA illustrated what would "fundamentally alter the remedy specified in the ROD (i.e., change the selected technology) . . . ." Id. at 8772 (emphasis added).

EPA further explained in its Interim Final Guidance on Preparing Superfund Documents, June 1989, what constitutes a fundamental alteration of the remedy requiring a ROD amendment: "Where the negotiations result in a fundamental change being

proposed to the overall remedy in the ROD (e.g., from incineration to bioremediation) and not just a component of the remedy . . . ." (Ex. 8 at 8-10). The Guidance later gave two examples, which were also changes in the treatment technology. One was a change in the remedy from an unidentified innovative technology to a different one -- thermal destruction (incineration). A second was a change in the remedy from thermal destruction to a biological treatment process. Id. at 8-16, 17. Such a change in the overall remedy did not occur at Metamora; there was only a change in a component of the remedy. Also, the remedy's technology did not change, which is why an ESD was appropriate to document the change in the location of the incineration site.

There is also support in the administrative record for EPA's considered decision that changing the site of incineration, while keeping the same treatment technology, constituted a "significant change," but not a "fundamental alteration," of the remedy. EPA's Office of Solid Waste and Emergency Response, Wash., D.C., considered the issue at Metamora and advised EPA Region V:

> We determined that an Explanation of Significant Differences is the appropriate documentation for this post-ROD change. The change is considered significant because incineration will now occur on-site rather than off-site, and waste quantities have increased. We do not consider this change to be fundamental because the treatment method will remain the same.

(Exhibit 9) This reflects EPA's reasoning in the NCP Preamble and the Interim Final Guidance that a change in treatment technology would be considered "fundamental" and require an

amendment to the ROD. As EPA explained in the ESD, p. 5, there was a "significant" difference between the remedy in ROD I and the Consent Decree because there was a change in "the location of the incinerator unit." In EPA's view, "the treatment technology of incineration has not been changed . . . ." (Ex. 6, ESD, p. 7).

Although EPA issued an ESD, the United States still accorded the public a right of review and comment equivalent to that under a ROD amendment. Thus, even if a ROD amendment might, arguendo, have been appropriate, members of the public were not deprived of a right to have EPA consider their comments about on-site incineration before a decision was made to seek entry of this Consent Decree. CERCLA § 117(a), 42 U.S.C. § 9617(a), requires EPA to provide the public with a reasonable opportunity to submit written and oral comments, and an opportunity for a public meeting, regarding a ROD's proposed plan. There is no similar right of public comment for an ESD. CERCLA § 117(c), 42 U.S.C. § 9617(c); 55 Fed. Reg. 8771 (Mar. 8, 1990). Nevertheless, EPA held two public informational meetings in August and September 1991 in Metamora, where it explained the Consent Decree, and heard oral comments and answered questions. (RC, #28) The United States extended the public comment period for a second thirty days, giving the public ample time after lodging of the Decree and issuance of the ESD to comment. This is evidenced by the large number of comments received by the Department of Justice during the comment period.

The Consent Decree, p. 52, specifically provides that the "consent of the United States is subject to the public notice and comment requirements of Section 122(i) of CERCLA and 28 CFR 50.7." This permitted the United States to consider the public's comments to the Decree and the ESD, and to withdraw from the settlement if comments disclosed information that the settlement was inappropriate, improper, or inadequate. Thus, the United States has had the same opportunity to evaluate comments before deciding to seek entry of this Consent Decree as it would have had if it had put out a proposed amended ROD for public comment. The United States has carefully considered the comments received in this case. It continues to believe that this is a fair and reasonable settlement which should be entered by the Court.

Finally, EPA was not required in an ESD to evaluate the change of location of incineration by the nine criteria of 40 CFR 300.430(e)(9). EPA's Interim Final Guidance on Preparing Superfund Documents, specifically states that this is appropriate for a ROD amendment (Ex. 8, p. 8-18), but nowhere requires it for an ESD (Id., pp. 8-14-16). An EPA Guidance, Guide to Addressing Pre-ROD and Post-ROD Changes, (Ex. 10, p. 4), which was placed in the administrative record, specifically states that a new nine criteria analysis is not required for an ESD.

EPA's decision that an ESD was appropriate in this proceeding is entitled to substantial deference. EPA's decision involved its interpretation of its own regulations -- the NCP, and is also an informal agency action which is entitled to the

"arbitrary and capricious" standard of review. The review of informal agency actions was explained at length by the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Camp v. Pitts, 411 U.S. 138 (1973); and Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985). In Overton Park, the Supreme Court explained the deferential nature of the "arbitrary and capricious" standard of review:

> [The reviewing court] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency.

401 U.S. at 416 (emphasis added). Thus, such agency decisions "are entitled to a presumption of regularity." Id. at 415.

In technical and scientific areas, such as the response and remedial decisions in this case, courts recognize decision making as the primary responsibility of agencies. See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976)(en banc), cert. denied, 426 U.S. 941 (1976). It is well settled that courts should defer to agency judgments which are uniquely within an agency's area of expertise. E.g., Sunshine State Bank v. Federal Deposit Ins. Corp., 783 F.2d 1580 (11th Cir. 1986).

Also, in this case EPA's Office of Solid Waste and Emergency Response and EPA Region V interpreted the meanings of "significant" and "fundamental" in EPA's own regulations, the NCP, in determining that an ESD was appropriate. (Ex. 9) It is well-established that an agency's construction of its own

regulations is entitled to substantial deference. Martin v. OSHRC, 111 S. Ct. 1171, 1175-76 (1991); Navistar Int'l Transportation Corp. v. United States, 858 F.2d 282, 286 (6th Cir. 1988), cert. denied, 490 U.S. 1039 (1989). EPA's decision to use an ESD was not arbitrary and capricious, and involved a reasonable interpretation of the NCP; it should not be overturned by this Court.

3. The Consent Decree Complies With ARAR Requirements of CERCLA

The Township brief, pp. 36, 52-53, claims that the Consent Decree and ROD fail adequately to identify ARARs for the remedy and for on-site incineration, and thus fail to comply with EPA regulations. This is erroneous.

ARARs are standards, requirements, criteria or limitations in federal environmental law, or of state environmental law that have been identified to EPA by the State, that are "applicable, relevant and appropriate" to the hazardous substances or contaminants at the site. CERCLA § 121(d)(2)(A), 42 U.S.C. § 9621(d)(2)(A). CERCLA requires that a remedial action under Section 106 secure a level of control for each hazardous substance or contaminant that at least attains ARARs. Id.

ROD II, pp. 14-15, specifically cites the major ARARS, referring to the analysis in the FS. The ROD specified major ARARs for groundwater to be the Federal Safe Drinking Water Act and Rules of Michigan Act 307. For containment of the landfill wastes, EPA also selected Rules of Michigan Act 307, Michigan Act 64, and Land Disposal Regulations. Also, the ESD, p. 7, which is

a part of the administrative record for this site, specifically found that an on-site incinerator must comply with all ARARs, including RCRA, TSCA, the Clean Air Act and the Michigan Air Pollution Control Act. The SOW, attached to the Consent Decree, conforms to the ESD. It specifically required that an on-site incinerator must be able to destroy 99.99% of principal organic hazardous wastes and 99.9999% of PCBs. The SOW also required that the incinerator must comply with the substantive requirements of applicable statutes and regulations, and that emissions from the incinerator must comply with applicable substantive requirements of the federal Clean Air Act and the Michigan Air Pollution Acts. (SOW, pp. 3-5)

The commenters do not show that the incinerator will not be subject to, or meet, all relevant ARARs. Instead, they claim there is some technical defect in the ESD and Consent Decree which require this Court to reject the decree. There is no such defect. EPA was not required to amend the ROD to reflect additional ARARS that might be needed as a result of moving incineration from off-site to on-site. The Preamble to the NCP states that if a new ARAR becomes necessary "because the existing ARAR is no longer protective," and causes a significant change in the remedy, that an ESD is appropriate. (55 Fed. Reg. 8772, Mar. 8, 1990). Similarly, EPA's Interim Final Guidance on Preparing Superfund Documents, June 1989, p. 8-15 (Ex. 6), indicates that a difference in "performance (e.g., technology, ARARs, and timing)" can be documented by an ESD. Thus, the

administrative record, through the ROD and ESD, properly identifies ARARs for on-site incineration.

The comment of Citizens United, pp. 4-5, also claims that EPA failed to select the Michigan Environmental Protection Act ("MEPA"), Mich.Comp.Laws Ann. § 691.1202, as an ARAR. However, for a state environmental law to be an ARAR, it must have "been identified to the President by the State in a timely manner." CERCLA § 121(d)(2)(A), 42 U.S.C. §9621(d)(2)(A); see United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1440 (6th Cir. 1991) (state ARAR must be "timely identified"). The MDNR submitted a Feasibility Study for Metamora to EPA, April 1990, and designated ARARS there, but did not select MEPA. (Ex. 4, Tables 2-2, 2-3, 2-4). Nor has MDNR identified MEPA to EPA at any later time. (RC, # 6) Thus MEPA cannot be an ARAR for this remedial action.

There was also good reason for MDNR not to identify MEPA as an ARAR. MEPA contains no "promulgated standard, requirement, criteria, or limitation." CERCLA § 121(d)(2)(A), 42 U.S.C. § 121(d)(2)(A); see United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1440 (6th Cir. 1991). Section 691.1202(1) merely provides that "any person . . . may maintain an action in the circuit court . . . for the protection of the air, water and other natural resources and the public trust therein from

pollution, impairment or destruction."[11] It sets out no environmental standard or requirement.

The Sixth Circuit Court of Appeals stated that:

> MEPA is supplementary to existing administrative and regulatory procedures provided by law. . . It specifically authorizes the court to determine the validity, applicability, and reasonableness of any standard for pollution or pollution control equipment set by state agency and to specify a new or different pollution control standard if the agency's standard falls short of the substantive requirements of MEPA.

Her Majesty The Queen v. City of Detroit, 874 F.2d 332, 337 (6th Cir. 1989) (emphasis in original). Thus, under MEPA, a state court might set a new standard only after a trial to determine the "validity, applicability, and reasonableness" of existing standards, and of any affirmative defense. Under CERCLA § 121(d)(2)(A), the state standard must already be "promulgated" when EPA selects a remedy. Thus MEPA cannot be an ARAR.

For similar reasons, Michigan Act 52, requiring municipal solid waste incinerator ash to be disposed in a monocell, does not apply. As Citizens United's comment, p. 5, admits, the standard applies only to municipal solid waste incinerator ash, not the ash from the high-temperature hazardous waste incinerator to be used at Metamora. Also, ash from the Metamora incinerator

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[11] Section 691.1203(1) provides the defendant with an affirmative defense:

> that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction.

must pass the TCLP test of RCRA, 40 CFR 261.24, to show that it will not leach any contaminant under severe conditions, and is thus not a toxic, hazardous waste. In addition, this ash will be placed under a hazardous waste landfill cap, which will prevent precipitation from contacting the ash. Thus, Act 52 is not applicable, relevant and appropriate to Metamora. See 40 CFR § 300.400(g)(2). Furthermore, MDNR has never identified Act 52 as an ARAR; thus it cannot be an ARAR. (See RC # 73)

Citizens United's brief, p. 5, also claimed that the ROD fails to cite the Michigan groundwater quality standards of Act 245, Part 22. As EPA's Reply to Comments, #7, states, ROD I did not select Part 22 as an ARAR, but noted that Michigan had concluded that the remedial action at Metamora would attain the standards of Part 22. (Ex. 5, ROD II, p. 15). The ROD stated that the issue was pending before the Sixth Circuit in AKZO, and would be reassessed after the case was decided. EPA's reply #7 states that based on the December 1991 decision in Akzo, Act 245, Part 22, "is an ARAR at the Metamora site."

4. EPA Has Complied With the Community Relations Requirements of the NCP

The Township of Metamora has submitted a lengthy brief based in large part on claims that EPA did not comply with various provisions of the NCP, 40 CFR Part 300, relating to community relations. (Township Brief, pp. 24-29, 34-44, 59). EPA has, however, complied with provisions of the NCP which were in effect during the period.

EPA and MDNR have made an extensive effort to advise the community of activities at Metamora and to receive public comments. Beginning as early as 1980, there have been numerous meetings, at least sixteen fact sheets about site activities were mailed to interested residents, and a repository was set up at the Metamora branch library, under 40 CFR § 300.430(c)(iii), to provide public access to documents and data regarding the site. Public comment periods were held for the 1986 and the 1990 RODs, and two meetings were held with the public in August - September 1991 on the remedial action contained in the Consent Decree. In addition, after publishing notice of the Decree in the Federal Register, the United States extended the normal thirty day comment period for an additional thirty days to allow additional time for comment. The public submitted fifty comments during this period which the United States has carefully evaluated. (RC, # 28)

The Township's claim that the public should have been allowed to participate in technical discussions with EPA while EPA was involved in settlement discussions is not supported by the 1990 NCP. 40 CFR § 300.430(c)(4) specifically gives EPA discretion in this matter. It states that EPA "may" conduct such discussions, and the Preamble to the NCP states that "[t]he rule does allow for technical discussions . . . ." (55 Fed. Reg. 8768, Mar. 8, 1990) (emphasis added). EPA clearly was not required to hold technical discussions while it was engaged in complex negotiations with the settling defendants. Similarly,

although Congress provided in CERCLA for community participation in the settlement process through the opportunity to comment on a consent decree during the thirty day notice period, CERCLA § 122(i), Congress did not provide for the public to be a participant in negotiations between the United States and settling defendants. EPA nevertheless did diligently engage in community relations activities prescribed by CERCLA regarding this Consent Decree.[12]

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[12] The Township has also erroneously cited provisions of the NCP which became effective on April 9, 1990, (55 Fed. Reg. 8666, Mar. 8, 1990), after EPA selected the remedy of incineration in ROD I in 1986. However, in enacting The Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Congress recognized in Section 113(k)(2)(C), 42 U.S.C. § 9613(k)(2)(C), that the administrative record in completed and ongoing response actions may not meet the new regulatory requirements to be promulgated by EPA pursuant to the new Section 113(k)(2)(A), (B). Congress stipulated that "[u]ntil such regulations . . . are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public." (emphasis added)

The community relations section of the former version of the NCP merely required that a community relations plan be developed and implemented, that feasibility studies be provided for public review and comment for at least 21 days, that the ROD address the public comments, and that the public be given an opportunity for comment on a consent decree in accordance with 28 CFR 50.7. 40 CFR § 300.67 (7-1-88 ed.). The Township has made no showing that EPA did not comply with regulations then in effect.

Moreover, the community relations requirement of the new NCP, 40 CFR § 300.430(c)(2), cited by the Township, does not apply to ROD II. That regulation specifically refers to the time "prior to commencing work for the remedial investigation." The Remedial Investigation for ROD II was completed in March 1989, long before this provision became effective.

5. De Minimis Settlement Was Not Required

A group of potentially responsible parties that believes they qualify as "de minimis" parties has submitted a comment[13] requesting that the Court not enter the Consent Decree until the United States reaches a de minimis settlement with them pursuant to Section 122(g) of CERCLA. However, (1) these parties never made a good faith "de minimis" offer to EPA during the time allotted by CERCLA to negotiate a consent decree, (2) nor was there a basis for EPA to conclude that they met the de minimis requirements of CERCLA, and (3) EPA has full discretion to decide when and if it is appropriate to make a de minimis settlement.

As EPA notes in its Reply to Comments, # 23, EPA sent out special notice letters to 117 PRPs, including some commenters, inviting them to submit a good faith proposal. However, CERCLA § 122(e)(2), 42 U.S.C. § 9622(e)(2), provides that the period to negotiate a settlement lasts for 120 days. EPA states that these parties did not approach EPA until after the period had expired, and EPA had reached agreement with the settling defendants. Indeed, the commenters' letter, p. 3, notes that five major PRPs had already executed the Consent Decree by the time the de minimis parties discussed a settlement with them. The commenters do not suggest that they made a good faith proposal to EPA within the statutory period. They have no basis to ask this Court to withhold entry of the Consent Decree.

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[13] Letter dated September 27, 1991, from the Metamora De Minimis PRP Group Steering Committee.

Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1), also makes it clear that EPA has full discretion in deciding whether to enter into a de minimis settlement: "Whenever practicable and in the public interest, as determined by the President . . . ." (emphasis supplied). Moreover, even if EPA wishes to exercise that discretion, Congress, in Section 122(g)(1)(A), required EPA to find for "generator" defendants such as the commenters, that:

> (A) Both of the following are minimal in comparison to other hazardous substances at the facility:
>
> (i) The amount of the hazardous substances contributed by that party to the facility.
>
> (ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

Yet the commenters admit the paucity of available data which would show their relative contributions of waste to Metamora. Section 122(g)(1), however, requires that EPA be able to find that such "generator" defendants are in fact de minimis. EPA has issued an Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA, 52 Fed. Reg. 24333 (June 30, 1987) (Ex. 11), which reiterates this requirement of CERCLA for de minimis settlements:

> . . . as a general rule, de minimus settlements should not be concluded prior to completion of a PRP search . . . or prior to such time as the Agency is confident that adequate information about the extent of each settling party's waste contribution to the site has been discovered.

Id. at 24336. (emphasis supplied)

The Agency's discretion in fashioning settlements has also been recognized in analogous case law.

> Section 122(a) of CERCLA expressly provides that a "decision of the President to use or not to use the procedures [set forth in §122] is not subject to judicial review." 42 U.S.C. §9622(a). We read this provision as applicable to the EPA's decision not to enter into a settlement with a particular PRP. Indeed, we know of no authority, and none has been cited to us, which permits us to compel any litigant, much less the United States to settle a lawsuit with a particular defendant.

Rohm & Haas, 721 F. Supp. at 1040. EPA simply was not obliged to settle with commenters on their terms.

Nevertheless, EPA's response to the comment states that in future negotiations regarding reimbursement for EPA's past costs at the Site, EPA would be prepared to discuss the appropriateness of de minimis settlements. The commenters should not, meanwhile, be able to hold hostage this settlement, or delay the prompt implementation of the remediation of the Metamora Landfill Site.

C. Judicial review of the remedy selected by EPA and implemented in the proposed settlement must be based on the administrative record, applying the arbitrary and capricious standard.

Most of the comments submitted on the proposed Consent Decree really challenge the remedy selected by EPA in the RODs and ESD, upon which the Decree is based. No party to this action has challenged EPA's remedy selection. Nevertheless, in light of these critical comments, the government will demonstrate to the Court that EPA's selection of a remedy for the Metamora site is not "arbitrary and capricious."

By express statutory direction, the scope of judicial review of EPA's selection of a remedy for a CERCLA site is limited to

the agency's administrative record, and the agency's decision is to be upheld unless it was arbitrary and capricious:

> (1) Limitation In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. . . .
>
> (2) Standard In considering objections raised in any judicial action under this chapter, 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 law.

(Emphasis supplied). Section 113(j) of CERCLA, 42 U.S.C. § 9613(j)(1) and (2).

Courts have held that these unambiguous provisions mean precisely what they say, i.e. that EPA's remedy decision is to be upheld unless it is arbitrary and capricious, based on the information contained in the administrative record. United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1425 (6th Cir. 1991) ("We must respect Congress' intent that the President develop such decrees, and that the courts review them on the administrative record under an arbitrary and capricious standard."); United States v. Northeastern Pharmaceutical & Chemical Co. ("NEPACCO"), 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); United States v. Seymour, 679 F. Supp. 859, 861, 863-64 (S.D. Ind. 1987) (plain language requires that judicial review of a remedial decision under CERCLA must be based on the administrative record, applying the arbitrary and capricious standard); United States v. Rohm & Haas, 669 F. Supp.

672, 680-81 (D.N.J. 1987) (review of EPA response actions on record satisfies due process requirements).[14]

As recently stated by the Court of Appeals for the Sixth Circuit in United States v. Akzo Coatings of America, Inc.:

> Ours should not be the task of engaging in a de novo review of the scientific evidence pro and con on each proposed remedy in the hazardous substance arena. The federal courts have neither the time nor the expertise to do so, and CERCLA has properly left the scientific decisions regarding toxic substance cleanup to the President's delegatee, the EPA administrator and his staff. "When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential." Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 103 (1983).

949 F.2d at 1424.

1. EPA's Selection of the Remedy for the Metamora Site is Not Arbitrary or Capricious

Commenters have raised four major criticisms of the remedy selected by EPA and embodied in the Consent Decree: a) EPA's decision in the ESD and Consent Decree to permit incineration of waste at the Site; b) EPA's decision to treat by incineration only the most concentrated areas of hazardous waste -- Areas 1 and 4, while permitting the remaining waste to remain, but under

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[14] These decisions are consistent with the well-established administrative law principle that the "arbitrary and capricious" standard governs the review of final agency actions. Such review is limited to the record compiled by the agency in support of that action. See Florida Power and Light v. Lorion, 105 S. Ct. 1598, 1607 (1985) (confining review to the administrative record is a "fundamental principle" of judicial review); Camp v. Pitts, 411 U.S. 138, 142 (1973) (reviewing court not "free to hold de novo hearing"); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (review is to be based on administrative record and, where "necessary . . . some explanation").

a RCRA hazardous waste cover and with a groundwater pump and treat system to treat contamination; c) the Consent Decree and SOW's general description of the remedial action, with detailed engineering designs to be submitted and approved by EPA later during the design stage; and d) EPA's decision to allow the settling defendants to manage the remedial action.

a. On-Site Incineration
Is Not Arbitrary and Capricious

Although disagreeing with EPA's decision, no commenter has even tried to demonstrate that based on the administrative record, EPA was arbitrary and capricious in permitting incineration to take place at the Site. Nevertheless, as explained in detail above at pp. 15-18, the ESD, and EPA's Reply to Comments (# 1-3, 31, 50), EPA's decision was not only not arbitrary and capricious, but perfectly sound. Off-site incinerators lacked capacity to handle the sudden increase in demand when Land Disposal Restrictions (40 CFR Part 268) prevented many hazardous wastes from being disposed of in landfills. Correspondence between MDNR and its contractor demonstrated their inability to arrange incineration off-site. Id. As a result, about 10,000 drums of waste that had been excavated at Metamora had to be stored there because there was no off-site incineration capacity available to handle it. Moreover, about 700 drums had been returned to Metamora by incinerators that were unable to incinerate these wastes because of their lead content.

When EPA selected off-site incineration in ROD I, it expected that incineration off-site would proceed much more quickly than on-site because the latter would need to go through a two-year period of state administrative permit proceedings and incinerator construction. However, when CERCLA was amended so that permits were not required for on-site activities,[15] incinerating waste at the Site became the fastest way to remediate the Site.

The ESD, p. 5, concluded that:

> Unless a change in the remedial action at Metamora is implemented, the drums and soils currently staged on-site, along with unexcavated drums and soils, will remain on-site indefinitely. The original concerns expressed in the 1986 ROD against a mobile on-site incinerator, untimely destruction of waste and long administrative delays are no longer valid. The incineration of the drums and soils in an expedited manner can best be accomplished by on-site incineration.

EPA went on to find that "on-site incineration has been demonstrated to be a safe and proven technology at many Superfund sites similar to Metamora," and that the "on-site incineration of hazardous waste will be required to comply with all substantive State and Federal rules and regulations." (Also see RC # 44, 45) These ARARs included requirements of RCRA, TSCA, the Clean Air Act and the Michigan Air Pollution Control Act. (ESD, pp. 6-7)

EPA's decision to permit the transfer of incineration of waste to the Site thus cannot be termed arbitrary and capricious, based upon the administrative record.

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[15] CERCLA § 121(e)(1), 42 U.S.C. § 9621(e)(1).

b. Leaving Waste in Areas 2, 3 and 5 Is Not Arbitrary and Capricious

No commenter has shown that based on the administrative record, EPA was arbitrary and capricious in its selection of a remedy for the Landfill. EPA's Reply to Comments, No. 65, notes that EPA has followed its own Guidance and CERCLA in choosing to incinerate wastes from drum areas 1 and 4, which were estimated to contain 74% of the drums at the Site, while leaving remaining drums buried in areas 2, 3 and 5. EPA's Guidance, Conducting Remedial Investigation/Feasibility Study for CERCLA Municipal Landfill Site, (Ex. 12), states that at sites involving municipal landfill waste, removal of contaminated soils should generally be limited to "hot spots," or to smaller landfills containing less than 100,000 cubic yards. By contrast, Metamora contains an estimated 1-1.5 million cubic yards. EPA also notes in Reply #65 that excavation of all of the waste at Metamora would have cost approximately $200 million. (Also see Ex. 5, ROD II, Attach. 2, p. 3; Ex. 4, FS, Table 4-5)

Congress specifically provided in CERCLA § 121(a), 42 U.S.C. § 9621(a), dealing with the selection of remedial action, that EPA should select remedies "which provide for cost-effective response." Also see, United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1418 (6th Cir. 1991) ("Under CERCLA, Congress expressed its preference for thorough yet cost-effective remedies at hazardous waste sites.") This preference

for cost-effective remedies is reflected in the NCP, which provides that in screening remedial alternatives:

> The costs of construction and any long-term costs to operate and maintain the alternatives shall be considered. Costs that are grossly excessive compared to the overall effectiveness of alternatives may be considered as one of several factors used to eliminate alternatives.

40 CFR § 300.430(e)(7)(iii).

EPA also notes that besides excavating the hot spots containing an estimated 74% of the drums, it had required installation over the Landfill of a Michigan Act 64 hazardous waste cap, consisting of 3 feet of low permeability clay, a 1 foot drainage layer and 1 foot of topsoil. This will prevent infiltration of precipitation, thus preventing further production of leachate which might contaminate the groundwater. In addition, a security fence will surround the Landfill.

Finally, Congress contemplated that EPA would select remedies that resulted in some hazardous waste remaining at a site after completion of the remedial action. In such a case, Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), requires that EPA review the remedial action every five years to assure that human health and the environment were being protected. Thus, paragraph 19 of the Consent Decree provides that if EPA finds in its five year review that additional response action is appropriate, EPA reserved the right to act pursuant to CERCLA §§ 104 and 106.

EPA has thus followed the mandates of Congress and EPA's own Guidance in selecting the remedy for the Landfill. EPA's selection of a remedy which balances thoroughness, compliance

with ARARS, and cost-effectiveness, and is based upon the administrative record, was not arbitrary and capricious.

c. Permitting Settling Defendants to Conduct the Remedial Action Was Not Arbitrary and Capricious

Although some commenters criticize EPA for reaching a settlement which allows defendants, instead of EPA, to carry out the remedial action, EPA was following the wishes of Congress. Under CERCLA, the President is authorized to

> . . . arrange for the removal of and provide for remedial action relating to [a] hazardous substance . . . or take any other response measure consistent with the national contingency plan . . . When the President determines that such action will be done properly and promptly by . . . any . . . responsible party, the President may allow such person to carry out the action. [Emphasis supplied.]

42 U.S.C. § 9604(a)(1). Congress also recognized the importance of reaching settlements with PRPs to allow them to conduct or finance response actions at hazardous waste sites:

> Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation.

42 U.S.C. § 9622(a) (emphasis supplied).

The Sixth Circuit Court of Appeals recently reiterated this concern of Congress: "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1418 (6th Cir. 1991) (emphasis supplied).

As EPA states in its Reply to Comments, Comments 54-55, Defendants will not themselves perform the remedy. They will select, with EPA's approval, qualified architects or engineers to do the technical design for the remedy, and then to actually supervise the remedial work. (Consent Decree, ¶ 10). EPA will also maintain oversight of the remedial action. EPA and Michigan have assess to the site at all times to monitor work, verify data, obtain samples, inspect and copy records, and assess compliance with the Consent Decree. (Id., ¶ 22) EPA must review and approve all plans for the remedial action. (Id., ¶¶ 13, 14). Moreover, MDNR will receive these plans and have an opportunity to comment on them. (Id.) In addition, the defendants are required to submit monthly and annual progress reports to EPA on past and scheduled future activities. (Id., ¶¶ 27, 30)

EPA has specifically found in the Consent Decree, p. 4-5, that: "the work required under the Consent Decree will be done properly by Settling Defendants and that Settling Defendants are qualified to implement the remedial action . . . ." Thus, EPA has followed the requirements of CERCLA in permitting defendants to carry out the remedial action under the oversight of EPA.

d. The Consent Decree Properly Left Remedial Design to the Future

Several comments have complained that the SOW does not provide sufficiently detailed plans and specifications for the remedial action. As EPA has explained in the RC, # 33, the ROD and SOW are intended to outline the work to be done, while the

details are filled in later during the remedial design phase. The SOW, pp. 11-14, requires settling defendants to submit for approval by U.S. EPA, several detailed plans, including the Incineration Work Plan, the Waste Excavation and Handling Plan, the Soil Characterization Work Plan, the Remedial Design/Remedial action (RD/RA) Work Plan, and design specifications to be submitted to U.S. EPA for approval at 30%, 90%, and 100% design completion.[16] Only after EPA approves a design and plan does the related work take place.

The Sixth Circuit Court of Appeals recently rejected a similar attack on EPA's decision to gather data on the effectiveness of the remedy of soil flushing during the remedy's design and implementation. United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1432-33 (6th Cir. 1991). It noted the importance of a prompt start on response activities, and EPA's ability and intention to obtain sufficient data on the remedy. Id. The court cited with approval the following statement in United States v. Cannons Engineering Corp., 899 F.2d 79, 88 (1st Cir. 1990): "[I]t would disserve a principal end of

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[16] The Incineration Work Plan outlines site preparation, waste handling, incinerator operations, trial burn, ash management, compliance monitoring and close out of the incinerator. The Waste Excavation and Handling Plan outlines drum handling, segregation, storage, demobilization, sampling and analysis, quality assurance, health and safety, spill control, erosion control, data management and air monitoring. The Soil Characterization Work Plan outlines the field investigation of the soils, the development of alternatives, a quality assurance plan and treatability studies. The Remedial Design/Remedial Action (RD/RA) Work Plan gives a broad base of landfill and groundwater components of the remedy that are further defined in the design specifications at 30%, 90% and 100% design completion.

the statute -- achievement of prompt settlement and a concomitant head start on response activities -- to leave matters in limbo until more precise information was amassed."

In the Metamora Consent Decree, EPA has set out in the SOW a comprehensive set of design plans for the remedial action that must be submitted to and approved by EPA. EPA's decision to reach this settlement and move forward with remedying the Metamora Landfill Site, while giving itself the right to approve all design plans, is not arbitrary and capricious.

V. CONCLUSION

For all the reasons set forth above, the United States urges this Court to find that EPA's selection of a remedial action for the Metamora Site is not "arbitrary and capricious" and that the Consent Decree requiring the implementation of that remedy is "fair, reasonable and in furtherance of the goals of CERCLA." The United States requests that the Court enter the proposed Consent Decree.

Respectfully submitted,

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REPLY TO THE ATTENTION OF

The foregoing Reply to Comments constitutes the response of the United States Environmental Protection Agency to comments received on the Consent Decree in the matter of United States v. BASF-Inmont Corporation, et al., Civil No. 91-CV-40230-FL.

Linda M. Nachowicz
U.S. EPA Remedial Project Manager

METAMORA CONSENT DECREE
REPLY TO COMMENTS

This Reply to Comments was developed to respond to comments received during the public comment period regarding the Consent Decree/Scope of Work for the Metamora Landfill site located in Metamora, Michigan. The comment period, which was extended for an additional thirty days, ran from August 1, 1991 through September 30, 1991. Only those comments or portions of comments relating to the proposed Consent Decree/Scope of Work have been addressed. The comments are summarized in this Reply to Comments since similar comments were received from several commenters. A list of commenters precedes each comment.

1. Commenters
Mark Richardson
Jan Herrick
Steven P. Rowe
Metamora Concerned Citizens Assoc.
Township of Metamora

Comment #1: The Remedy of On-Site Incineration did not go through the Alternatives Analysis as Required by Law.

Response #1: The feasibility of incineration was carried through the alternatives analysis, and off-site incineration was ultimately selected as the remedy of choice in the 1986 Metamora Record of Decision (ROD I at page 11) (Exhibit 2). The 1986 Phased Feasibility Study (Exhibit 1) performed a detailed analysis of 5 proposed remedial alternatives. These were a no action alternative, on-site RCRA Subtitle C Disposal, off-site RCRA subtitle C Disposal, Off-site Incineration and a combination of off-site disposal and off-site incineration. See Phased Feasibility Study at pages 43-61. The ROD at page 11 and Phased Feasibility Study at page 62 rejected the no action alternative because this alternative would provide no reduction in the migration of wastes to the underlying aquifer. The ROD at pages 10 and 11 and Phased Feasibility Study at page 62 also rejected the on and off-site disposal options because of CERCLA's preference for remedies that employ treatment which permanently and significantly reduces the volume, toxicity or mobility of hazardous substances. Incineration at an off-site location was selected because the Phased Feasibility Study concluded that "Incineration is a treatment technology which thermally oxidizes and destroys volatile and semi-volatile organic compounds and PCBs in the soils, sludges, and drums." See Phased Feasibility Study at page 40.

There were two reasons why incineration at the Site was not selected in the 1986 ROD. First of all, in 1986 the drums in areas 1 and 4 had not been excavated, and U.S. EPA was concerned that the hazardous waste in the drums would continue to contaminate the underlying aquifer (See page 6 of 1986 U.S. EPA Record of Decision). In order to reduce the extent of contamination and the future cost of remediating the groundwater, it was essential to remove the source of contamination (areas 1 and 4) as soon as possible. In addition, in 1986, a permit was required by Michigan Act 64 prior to construction of the on-site incinerator. This process would have included a lengthy administrative review. This permit requirement would have contributed to significantly delaying the remedial action by an estimated 21-27 months at the site (See page 5 of 1986 U.S. EPA ROD). At the present time, almost all of the drums in areas 1 and 4 have been excavated and are staged on site, eliminating the groundwater threat. In addition, because of the amendments to CERCLA, effective after the date of the 1986 ROD, no permits are required for remedial actions conducted entirely on-site, so long as the substantive requirements of the permitting statute are met. (See Section 121(e)(1) of CERCLA).

The Superfund process provides a variety of mechanisms for modifying a remedial action subsequent to the selection of a remedy in a ROD. Depending upon the degree of modification, a selected remedy can be modified by placing documents in the Administrative Record, issuing an Explanation of Significant Differences (ESD) or Amending the ROD. In this particular case, the change in the location of incineration from an off-site to an on-site location merits the issuance of an ESD (Exhibit 6), which was published by U.S. EPA on September 4, 1991. Use of an ESD does not require a detailed analysis of the modified remedial action. (See Guide to Addressing Pre-ROD and Post-ROD Changes, Publication 9355.3-02FS-4, Document 34 of Update 3 of the Administrative Record, at page 4) (Exhibit 10).

2. Commenters

Mark Richardson
Patricia Marvin
Lapeer County Board of Commissioners
Jan Herrick
Metamora Concerned Citizens Assoc.

Comment #2: The change from off-site to on-site incineration requires a ROD amendment not an ESD. Public input has not been provided for.

Response #2: Section 117(c) of CERCLA states, in part, that whenever any settlement or Consent Decree under Section 106 or Section 122 is entered into, and if such settlement or decree differs in any significant respect from the final plan, the President shall publish an explanation of the significant differences in a major local newspaper of general circulation.

The U.S. EPA has done that here. A notice of availability of the ESD (Exhibit 6) was published in the Lapeer County Press on Sept. 4, 1991. As far as public participation is concerned, the only difference between an ESD and a ROD amendment is that a ROD amendment requires a public comment period and an opportunity for a public meeting. However, in this case, the public was given a sixty (60) day period within which to comment on the remedy proposed in the Consent Decree, and U.S. EPA participated in two public meetings to discuss the remedy outlined in the Consent Decree. Moreover, the Consent Decree, p. 52, specifically provides that the "consent of the United States is subject to the public notice and comment requirements of Section 122(i) of CERCLA and 28 CFR 50.7." This permitted the United States to consider the comments and withdraw from the settlement if comments disclosed information that the settlement was inappropriate, improper, or inadequate. Therefore, the public has been provided an opportunity for the same level of participation as they would have received if a ROD amendment been issued.

40 CFR § 300.435(c)(2)(i) provides that U.S. EPA shall publish an Explanation of Significant Differences when the differences in the remedial or enforcement action, settlement, or consent decree significantly change but do not fundamentally alter the remedy selected in the ROD with respect to scope, performance or cost. U.S. EPA has issued guidance entitled "Guide to Addressing Pre-ROD and Post-ROD Changes" (document 34 of update 3 of the Metamora administrative record) (Exhibit 10) on when to use a ROD amendment and when to issue an ESD when the remedy selected in a ROD later changes. That guidance was followed in this case. This guidance states that an ESD is to be used when a "significant change" is made to the remedy after the signing of the ROD. A ROD amendment is to be used when a "fundamental change" is made to the remedy after the signing of the ROD.

Additional guidance on this issue, entitled "Interim Final Guidance on Preparing Superfund Decision Documents", OSWER Directive 9355.3-02 (Exhibit 8), gives examples to illustrate when a change is "significant" and when a change is "fundamental". Example 3 in Exhibit 8-2 of the Guidance provides an example of when a change in remediation requires an ESD. This example involved a change in one aspect of the same overall groundwater remedy. In the example, the groundwater was still pumped out of the ground and treated in each method, but the manner in which the groundwater was treated changed. Instead of running the extracted groundwater though an air stripping tower, the groundwater would pass through a packed carbon column.

In contrast, both examples contained in Exhibit 8-4 of modifications requiring a ROD amendment change the overall remedial technology. In one example, the remedy was fundamentally altered from thermal destruction to bioremediation,

and in the other from thermal destruction to In-situ Vitrification. Bioremediation is a process by which organic contaminants are broken down on the molecular level by micro-organisms. These specially designed micro-organisms "feed" on the contaminants, thus breaking them down into naturally occurring compounds. In-situ Vitrification involves the destruction of organic contaminants by passing high voltage through an electrode grid, thus reducing the grid into a molten material that will solidify into a glass block. Both bioremediation and In-situ Vitrification are very different remedial technologies than thermal destruction, as opposed to the difference between on and off-site incineration. U.S. EPA does not consider the change in location of incineration from off-site to on-site to be a change of the overall treatment technology similar to that illustrated in Exhibit 8-4. Therefore, U.S. EPA believes that the change in location of incineration was "significant" but not "fundamental," and therefore it was appropriate to issue an ESD and not a ROD amendment to document the change.

The ESD should describe significant differences between the remedy as presented in the ROD and the action now proposed, summarizing the differences in scope, performance (e.g., technology, ARARs, and timing), or cost between the original and modified remedy.

As explained in the Metamora ESD at pages 5-6 (Exhibit 6), the difference in time to execute on and off-site incineration was a key factor in changing the location. Off-site incineration can no longer remediate the site in a timely fashion due to difficulties in implementation (namely lack of capacity). The scope of the modified remedy is unchanged, the technology is still incineration and the substantive technical standards of the environmental laws governing the off-site facilities also apply to the modified remedy. As stated before, whether incineration is performed on-site or off-site, it is still considered the same technology and therefore not a fundamental change in remedy.

3. Commenters

Mark Richardson	Robert Eady
Teresa Grabill	Mr. & Mrs. Robert Kahle

Comment #3: U.S. EPA has treated On-site Incineration as a Different Remedy than Off-site Incineration, as evidenced in the 1986 ROD, and therefore a ROD Amendment was required.

Response #3: No conclusions should be drawn from whether or not a ROD evaluates both on and off-site incineration. While in instances U.S. EPA has differentiated between on and off-site incineration, in others U.S. EPA has treated on and off-site

incineration as the same technology, which is demonstrated in a number of RODs (e.g. Fort Wayne Reduction (Exhibit 13) and Ninth Avenue Dump RODs (Exhibit 14)). Many RODs leave the option of on or off-site incineration to the design phase of the project when cost, ability to bid, and implementation difficulties can be determined with greater accuracy. When the Metamora ROD (Exhibit 2) was written in 1986, the Agency was well aware of the time delay that would be encountered if on-site incineration was selected. With this information then available, it was reasonable to make the distinction between on and off-site incineration at the time the ROD was written. The 1986 ROD treated on-site and off-site incineration separately to demonstrate that the time to execute on-site incineration would not be favorable for the site at that time. The points presented in the 1986 ROD regarding on-site incineration do not question the feasibility of the technology itself, merely the time to complete it. It is also important to remember that although several alternatives are brought forward for detailed analysis, this does not mean that they are all "fundamentally" different from one another.

Drum disposal areas 1 and 4 represented a significant source of contamination to the groundwater that required prompt action in order to slow (prevent) further contamination to the aquifer, thereby reducing the time and cost necessary for groundwater remediation. The lengthy permitting process required for an on-site incinerator in 1986 would have delayed the start of the excavation of drum areas 1 and 4, which would have continued the degradation of groundwater.

Presently, the situation is reversed. Although most of the excavation is complete, because of the lack of available capacity at eligible off-site incinerators, the inability to ship drums off-site for incineration presents a potential risk posed by the storage of 10,000 drums on-site. Conversely, due to the enactment of SARA, which eliminates administrative requirements of the Michigan permitting law, on-site incineration can now be implemented more expeditiously.

4. Commenters

Mark Richardson
Metamora Concerned Citizens Assoc.

Comment #4: The Consent Decree should not be entered because the administrative record fails to assure that all ARAR's will be complied with.

Pages 4 and 5 of the SOW require that incineration activities will be carried out in accordance with the substantive requirements of applicable statutes and regulations. In addition, the ESD contained in the Administrative Record (Exhibit

6) also states that incineration activities will comply with ARARs. ARARs concerning the groundwater and landfill portions of the remedy are contained in the 1990 ROD also found in the Administrative Record (Exhibit 5).

Section V of the Consent Decree specifically states "All activities undertaken by the Settling Defendants pursuant to this Consent Decree shall be undertaken in accordance with the requirements of all applicable federal and state laws, regulations and permits, as required by CERCLA." (See Consent Decree, pp. 9-10). U.S. EPA and MDNR will review all plans submitted by the Settling Defendants to assure that all federal and state laws and regulations are complied with during the remedial action.

5. Commenters
Citizens United

COMMENT #5: The ESD is seriously flawed because it fails to assure that all ARARs will be met.

Response #5: The ESD at page 7 (Exhibit 6) specifically states that "the on-site incineration of hazardous waste will be required to comply with all substantive State and Federal rules and regulations," (i.e. ARARs). ARARs are requirements that are applicable, relevant and appropriate to hazardous substances at the site, and must be attained by the remedial action. The ESD goes on to identify RCRA, Michigan Act 64, TSCA, CAA and Michigan APCA as ARARs the on-site incinerator will have to meet.

6. Commenters
Citizens United

COMMENT #6: The Consent Decree should not be entered because the RODs fail to cite the Michigan Environmental Protection Act ("MEPA") as an ARAR.

Response #6: Section 121(d)(2)(A)(ii) of CERCLA provides that a promulgated state environmental or facility siting law that is more stringent than a federal law, and timely identified by the State, will be considered an ARAR. MDNR, which prepared the Feasibility Study for this site, did not identify MEPA as an ARAR for the site. Nor did MDNR identify MEPA as an ARAR when commenting on the ESD. Also, MEPA contains no promulgated standard, requirement, criteria or limitation applicable to the site. Therefore, MEPA is not an ARAR for this site.

7. Commenters
Citizens United

COMMENT #7: **The Metamora RODs do not acknowledge that Michigan groundwater quality standards (Act 245 Part 22) apply.**

Response #7: When the 1990 ROD (Exhibit 5) was issued, the Sixth Circuit Court of Appeals had not yet rendered an opinion on the issue of whether or not Act 245 Part 22 was an ARAR under CERCLA. Based upon this uncertainty, the 1990 ROD stated both U.S. EPA's and the State of Michigan's positions on the issue of whether Act 245 Part 22 was an ARAR. The ROD stated at page 15 that U.S. EPA's position that Act 245 Part 22 is not an ARAR would be reassessed when the Sixth Circuit had reached its decision. The Sixth Circuit has recently decided that Act 245 Part 22 was an ARAR in the case of United States v. Akzo Coatings of America, 949 F.2d 1409 (6th Cir. 1991). Based upon the reasoning provided by the Sixth Circuit in the Akzo case, and because the Settling Defendants will be reinjecting the treated groundwater back into the aquifer, U.S. EPA believes that Act 245 Part 22 is an ARAR at the Metamora site. However, as the 1990 ROD indicated on page 15, the remedial action selected in that ROD complies with the requirements of Act 245 Part 22.

8. Commenters
Stuart A. Batterman
Alex Sagady
American Lung Assoc.
Norman Hughes

COMMENT #8: **Using ash as fill material for the landfill is inadvisable due to potential and likely problems of groundwater and air pollution. The disposal does not comply with MDNR ARARs.**

Response #8: Use of the ash as fill material will comply with ARARs. It is legal and safe to use ash that passes the RCRA Toxicity Characteristic Leaching Procedure (TCLP) test as fill material to be placed under the Landfill cap. The TCLP is a standard test that is conducted on a substance to determine if it should be considered a hazardous waste having the characteristic of toxicity under the RCRA regulations (40 CFR 261.24). If the ash has passed the TCLP test, it has been shown not to leach any of its toxic contaminants under the severest of conditions (as required by the test). Despite the fact that this ash is no longer a characteristic hazardous waste, it will be placed under a Michigan Act 64 hazardous waste landfill cap, providing more stringent protection than that obtained with a Michigan Act 641 solid waste landfill cap. This will further eliminate a potential direct contact and groundwater threat.

9. Commenters
Stuart A. Batterman

COMMENT #9: Use of a passive landfill gas extraction plan does not comply with ARARs.

Response #9: The draft Clean Air Act regulations to which the commenter refers were not promulgated by U.S. EPA or the State of Michigan when the ROD was issued. Thus, they are not considered ARARs for this site. According to 40 CFR 300.430(f)(1)(ii)(B), ARARs freeze at the time of ROD signature, meaning that the regulations in effect at the time the ROD was signed will be followed throughout the Remedial Action. As stated in § 121(d)(2)(A)(ii) of CERCLA, before a state environmental regulation can be considered an ARAR, it must be promulgated by the State. The State of Michigan concurred with the 1990 ROD (Exhibit 5), finding it fully protective of human health and the environment and in full compliance with their ARARs. The ROD was brought forward for public comment for 45 days during the summer of 1990. No public comment was received on an active versus a passive gas collection system during the public comment period. The Settlement set forth in the Consent Decree/SOW in no way alters the remedy selected in the ROD signed in 1990.

Additionally, should it later be discovered that a passive landfill gas extraction plan is insufficient to deal with any gas emanating from the landfill, there are mechanisms in the Consent Decree (the 5 Year Review and Additional Work Provisions) which would allow U.S. EPA to require the Settling Defendants to implement an active landfill gas extraction system, should that be necessary.

10. Commenters
Robert Klauka Metamora Concerned Citizens Assoc.

COMMENT #10: The SOW says that the Settling Defendants shall propose an air monitoring program for systems' operations and air emissions in compliance with ARARs. The Village of Metamora objects that these capacities be left solely to the defendants.

Response #10: Selecting the air monitoring program is not left solely to defendants. The SOW at page 5 specifically states that emissions from the on-site incinerator shall meet the criteria set forth in the Clean Air Act and those substantive requirements set by the Michigan Air Pollution Acts 345 and 348. Under the SOW, the Settling Defendants are to propose an air monitoring program for systems operations and air emissions in compliance with the ARARs. This program shall be subject to U.S. EPA approval, after opportunity for review and comment by MDNR.

Emission levels are not set by the Settling Defendants but by those standards set forth in the Clean Air Act and Michigan Act 348.

11. Commenters

Citizens United	Robert Eady
Jan Herrick	Petition submitted by Robert Kahle
Robert Kahle	Dennis Callahan
Janet Millerschin	Clifton and Deloris Payne
Rev. Peter Stazen II	Larry and Patricia Salk
Susan Coney	

COMMENT #11: The on-site incinerator is exempt from licensing requirements. Local and state controls are to be pre-empted.

Response #11: All substantive requirements of Michigan incinerator permit regulations must be met by the on-site action. In other words, the same technical requirements that are found in the permit regulations have to be achieved by an on-site incinerator at the Metamora Landfill. Only administrative requirements of the permitting process are omitted by the Superfund Amendments and Reauthorization Act (SARA) of 1986. Under section 121(e) of CERCLA, as amended, state or local permits for on-site activities on Superfund sites are not required. This has the effect of expediting cleanups, since a typical permit process can take a substantial period of time. U.S. EPA has determined that a mobile incinerator at the Metamora site will greatly quicken the cleanup and be fully protective of public health and the environment.

12. Commenters

Al Howard, Chief, Environmental Response Division, Michigan Department of Natural Resources

COMMENT #12: A clearly defined implementation schedule for on-site incineration should be incorporated into the Consent Decree to establish target dates for on-site incineration demonstration and implementation, as well as a date when off-site disposal options will be implemented if on-site fails.

Response #12: Schedules for implementation of on-site incineration will be established in the related work plans, subject to the approval of U.S. EPA and with an opportunity for review and comment by MDNR. Stipulated penalties will be tied directly to the dates found in these plans. The schedule found at the end of the SOW outlines the time tables for each plan's submittal. Several of these plans, including the Incineration Work Plan, have already been submitted, and the Environmental

Response Division of MDNR has not made any objections to the schedules contained therein.

13. Commenters
Robert Klauka

COMMENT #13: The Settling Defendants will identify time frames for all tasks and any major interim milestones. This allows defendants free and unsupervised scheduling. Is there no control?

Response #13: All proposed schedules are subject to U.S. EPA approval, with an opportunity for review and comment by the MDNR. If a schedule is unacceptable, it will be rejected or modified by U.S. EPA. Paragraph 11, page 14 of the Consent Decree provides for the attached SOW to be an enforceable part of the Consent Decree for completion of the RD/RA. The schedule found on pages 27-29 of the SOW provides a timeframe for the submission of deliverables for the project. Within these plans, that are approved by U.S. EPA, schedules for the completion of tasks and major milestones are provided for.

14. Commenters
Vanderkloot & Haynes

COMMENT #14: Under the Consent Decree U.S. EPA will review the progress of the clean-up only once every 5 years.

Response #14: U.S. EPA will review the progress of the cleanup on a continuous basis, not once every five years. As discussed in comment 54, U.S. EPA oversight personnel will be present during on-site activities. In addition, U.S. EPA must review and approve all plans outlining the remedial action to be undertaken at the site. As part of the review process, the MDNR will be given an opportunity to review and comment on plans prepared for the site. Paragraph 27 of the Consent Decree also requires the Settling Defendant to prepare and provide to the United States written monthly progress reports to report to U.S. EPA all activity being undertaken at the site.

The reference in the Consent Decree to the 5 year review provision reflects § 121(c) of CERCLA's requirement that any remedial action which leaves hazardous substances at a site must be reviewed every 5 years to assure that human health and the environment are being protected by the remedial action being implemented. This 5 year review is in addition to all oversight and review provisions provided in the Consent Decree and described above.

15. Commenters
Robert Klauka

COMMENT #15: **U.S. EPA is concerned about fly ash, yet the SOW is not specific about its solution. Terms such as "shall be determined and detailed during the remedial design" allows for the use of the dispute resolution to cause delays.**

Response #15: The approved Incineration Work Plan requires that the on-site incinerator will have to comply with 40 CFR 264.343(2)(c) regarding stack particulate emissions. This requires that the incinerator must not emit particulate matter in excess of 180 mg/dry standard cubic meter when corrected for the amount of oxygen in the stack gas.

There is a mechanism in the Consent Decree to provide for the expeditious settlement of disputes. Further, all undisputed work proceeds even if a dispute arises between the parties.

16. Commenters
Jan Herrick

COMMENT #16: **The Consent Decree permits purification of groundwater to end after 10 years if Settling Defendants determine further purification is technically impracticable from an engineering prospective.**

Response #16: The Consent Decree requires the Settling Defendants to achieve all ARARs, including groundwater ARARs. Pursuant to CERCLA § 121(d)(4)(C), U.S. EPA may select a remedial action that does not attain the level equivalent to such ARARs if it is technically impracticable from an engineering perspective to achieve that level. The Consent Decree and SOW therefore allow the Settling Defendants the opportunity to petition U.S. EPA to waive compliance with one or more clean-up standards contained in the SOW, based on technical impracticability after 10 years of operation of the groundwater extraction system.

Groundwater pump and treat systems may operate for a number of years and yet show some contaminant levels which display an asymptotic behavior, i.e. coming close to, but never quite reaching the clean-up standard. In this situation, it may be appropriate to consider modifying a clean-up standard. Any such waiver of a standard must be approved by U.S. EPA, with an opportunity for review and comment by MDNR.

Additionally, the Consent Decree in paragraph 12(b)(4), makes it clear that any technical impracticability waiver is subject to U.S. EPA's periodic review requirement, so that any technical

impracticability waiver must still result in a remedy for the Site which is protective of human health and the environment.

17. Commenters
Robert Klauka

COMMENT #17: What will U.S. EPA do if defendants claim technical impracticability?

Response #17: The Consent Decree at page 14 provides that after a minimum of ten years of operation of the groundwater extraction system, the Settling Defendants may petition U.S. EPA to waive compliance with one or more clean-up and performance standards, based upon a demonstration that achievement of such clean-up and performance standard is technically impracticable from an engineering perspective. Should Settling Defendants submit such a petition, U.S. EPA will review and consider the information in the Petition and will make a determination, in accordance with applicable laws and regulations and the entire administrative record, whether compliance with any of the Clean-up and Performance Standards should be waived, and what alternative Clean-up and Performance Standards, or other protective measures shall be established.

18. Commenters
Citizens United
Leo and Ann Derderian
Linda Stenz

COMMENT #18: No bonding, and limited insurance is required in this agreement. Also the Settling Defendants can claim business confidentiality.

Response #18: Section XX of the Consent Decree requires that the Settling Defendants must provide financial security, in the form of audited financial statements which satisfy the substantive requirements of 40 CFR 264.145 of the RCRA regulations, in an amount sufficient to assure completion of the Work at the Site. The RCRA financial assurance regulations cited in the Consent Decree are the same financial assurance regulations that an operating hazardous waste treatment, storage or disposal facility would have to meet. By requiring the Settling Defendants to satisfy the same requirements as an operating hazardous waste facility, U.S. EPA believes that the Settling Defendants will demonstrate that they have the financial capability to complete the work at the Site. In addition, the Settling Defendants at this Site include some of the largest companies in the nation, such as General Motors Corporation, Ford Motor Company, Chrysler, BASF, and Sea Ray Boats. These companies have agreed, jointly and severally, to perform the Work required by the Consent

Decree. The United States is confident that the group of Settling Defendants has the financial capability to perform whatever remedial action is necessary at the Site.

The Consent Decree (Section XX) also requires that the Settling Defendants purchase and maintain in force, for the duration of the remedial action, comprehensive general liability and automobile insurance with limits of one million dollars, combined single limit, to cover any accidental injuries that may occur during remediation of the site. This insurance policy, combined with the financial net worth of the Settling Defendants, reasonably assures that there will be sufficient monies available should there be any accidental injuries at the Site.

Section 104(e)(7) of CERCLA and 40 CFR Section 2.203(b) allow businesses an opportunity to claim that certain information to be submitted to U.S. EPA is entitled to confidential treatment. The proposed Consent Decree in this case simply allows the Settling Defendants to exercise their statutory and regulatory rights in asserting business confidentiality. It should be noted however, that pursuant to Section 104(e)(7)(F) of CERCLA and paragraph 47 of the Consent Decree, information acquired or generated in performance of the work under the Consent Decree may not be claimed as confidential by the Settling Defendants.

19. Commenters
Jan Herrick
Janet Millerschin
Linda Stenz

COMMENT #19: The Consent Decree permits all records to be destroyed in 21 years.

Response #19: The Consent Decree contains adequate assurances that all records will be maintained as long as reasonably necessary. The Consent Decree, paragraph 45, states that the Settling Defendants shall make available to U.S. EPA and shall retain the "records" until 6 years following the third "five year review" conducted for the Facility pursuant to Section 121(c) of CERCLA. It further states that after this period of document retention, Settling Defendants shall notify the U.S. Department of Justice and the U.S. EPA at least 90 days prior to the destruction of any such documents, and upon request by U.S. EPA, Settling Defendants shall relinquish custody of the documents to U.S. EPA.

In addition, throughout the remedial design and the remedial action, the U.S. EPA will be obtaining copies of data and reports produced during the RD/RA, which will remain on file at U.S. EPA and/or MDNR as appropriate. Certain specific documents may be placed in the Administrative Record.

20. Commenters
Jan Herrick

COMMENT #20: **The Consent Decree provides that the Settling Defendants shall hold U.S. EPA harmless for all claims or causes of action arising from the acts or omission of the Settling Defendants. U.S. EPA is not liable for the actions of Settling Defendants.**

Response #20: Under the terms of the Consent Decree, it is the obligation of the Settling Defendants to implement the remedial actions selected for the site. Therefore, it is appropriate that the Settling Defendants indemnify and hold harmless the United States from any or all claims or causes of action arising from the acts or omissions of the Settling Defendants and their agents.

21. Commenters
Jan Herrick

COMMENT #21: **Under the terms of the Consent Decree, the SOW may be amended without formal procedures as required by a ROD amendment.**

Response #21: The mechanisms provided at pages 18-19 in the Consent Decree for amending the SOW would be in addition to any statutory or regulatory requirements that U.S. EPA would need to fulfill for a modification to the remedial action. For instance, if an amendment of the SOW would result in a fundamental alteration of the basic features of the remedy selected in the ROD, U.S. EPA would issue a ROD amendment, in addition to amending the SOW pursuant to the terms of the Consent Decree.

22. Commenters
Jan Herrick

COMMENT #22: **Settling Defendants reserve their rights under the Consent Decree to sue non-settling defendants.**

Response #22: Paragraph 69 of the Consent Decree does nothing more than recognize the Settling Defendants' statutory right provided in CERCLA § 113(f)(1) to seek contribution from any other person who is liable under § 107(a).

23. Commenters
Metamora De Minimis PRP Group

COMMENT #23: The Consent Decree should not be entered until a De Minimis Settlement is incorporated into the Consent Decree.

Response #23: Upon issuance of the ROD in September of 1990 (Exhibit 5), U.S. EPA contacted approximately 117 PRPs, notifying them of their potential liability at the site and offering them the opportunity to negotiate with U.S. EPA for a privately funded clean-up of the site. And as the commenters note, many of the commenting companies participated in the negotiations which resulted in the proposed Consent Decree now lodged with the Court. Throughout these negotiations, U.S. EPA repeatedly expressed to the PRPs its position that negotiations would have to conclude within the 120 day negotiation moratorium provided in § 122(e)(2)(A) of CERCLA so that clean-up activities could quickly resume at the site. See Special Notice Letter to Metamora PRPs at page 3 (Exhibit 34). Despite these repeated statements by U.S. EPA to the commenters, a request for a de minimis settlement was not made to U.S. EPA until well after the 120 day negotiation period had ended, and well after a proposed settlement had been reached.

In addition, Section 122(g)(1) of CERCLA makes it clear that EPA has full discretion in deciding whether to enter into a de minimis settlement: "Whenever practicable and in the public interest, as determined by the President . . . ." Moreover, even if EPA wishes to exercise its discretion, Congress in Section 122(g)(1)(A), required EPA to find for persons such as the commenters, that they were in fact de minimus parties. Yet the commenters admit the paucity of available data which would show their relative contributions of waste to Metamora. EPA's Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA, 52 Fed. Reg. 24333, 24336 (June 19, 1987) (Exhibit 11), reiterates this requirement of CERCLA for de minimus settlements.

Because the Consent Decree was a partial settlement which does not include reimbursement of the U.S. EPA's response costs incurred at the site, U.S. EPA hopes to resume negotiations to recover the approximately 30 million dollars which it has spent at the site. At such settlement negotiations, U.S. EPA would review and consider a timely request for an appropriate de minimis settlement which is in compliance with CERCLA and EPA policy.

24. Commenters

Jan Herrick — Metamora Concerned Citizens Assoc.

COMMENT #24: **The Consent Decree does not grant the community any standing to participate in dispute resolution, receive regular reports on on-site activities, receive reports of emergency events, dispute the implementation of a Certificate of Completion, or perform oversight functions.**

Response #24: U.S. EPA followed the provisions of CERCLA and the National Contingency Plan (NCP) regarding community participation in negotiating and lodging the Consent Decree in this case. 40 CFR Section 300.435(c) outlines the community relations requirements during Remedial Design and Remedial Action at a Superfund site. U.S. EPA has complied with, and will continue to comply with, these requirements during the Remedial Design and Remedial Action at this site.

Under the terms of the Consent Decree, any dispute regarding the Consent Decree is to be settled amongst the signatories to the Consent Decree or by the Court as necessary. Updates on RD/RA activities will be provided to the public through fact sheets, news releases and progress reports, as appropriate and necessary. Pursuant to 40 CFR 300.435(c)(3), after completion of the final engineering design, U.S. EPA will issue a fact sheet and provide, as appropriate, a public briefing prior to the initiation of the remedial action.

U.S. EPA does not permit the public to participate in actual on-site oversight activities at a CERCLA hazardous waste site due to health, safety and security concerns. U.S. EPA is required to oversee the Settling Defendant's activities during the RD/RA. In this instance, the United States Army Corps of Engineers (U.S. ACE) will provide oversight activities for U.S. EPA.

The public may be permitted to view activities occurring on-site in a limited capacity when reasonable, appropriate and approved in advance by the U.S. EPA. Similarly, the public is at anytime free to submit any concerns or suggestions that they have to U.S. EPA.

25. Commenters

Citizens United	Robert Eady
Linda Stenz	Petition submitted by Robert Kahle
Dennis Callahan	Elizabeth Miller
Rev. Peter Stanzen II	Larry and Patricia Salk

COMMENT #25: **The commenters assert that they were not allowed to take part in the negotiation process. Public notice was not given on the Consent Decree and**

comments on the 1986 and 1990 RODs were deleted from the record.

Response #25: Congress, in enacting CERCLA, set out an elaborate scheme for public and PRP participation in the Superfund process. U.S. EPA has followed that process in this case. U.S. EPA provided the public with an opportunity to comment and conducted a public meeting each time it presented a proposed plan for remedial action for this site. All comments that were received on the 2 proposed plans during their respective comment periods or during the public meetings have been responded to in the responsiveness summary attached to each ROD (Exhibits 2 and 5), and have been incorporated into the Administrative Record.

Only potential parties to a consent decree, including those who received special notice letters pursuant to CERCLA Section 122(e), participate in the negotiations. When negotiations were completed and a consent decree was agreed upon, the decree was lodged and public notice was given by publication in the Federal Register, pursuant to Section 122(i) and 28 CFR 50.7. The notice preceded a 60 day public comment period, which included a thirty day extension of the required comment period. Also see the response to Comment # 28. The United States has thus fully complied with the public notice provisions of CERCLA prior to entry of a Consent Decree.

26. Commenters
Dennis Callahan

COMMENT #26: The Consent Decree/SOW alleges that this new plan was published in media of general circulation, but it was not published.

Response #26: The Consent Decree at page 3 states that "pursuant to Section 117(b) of CERCLA, 42 U.S.C. §6917(b), U.S. EPA has provided public notice of adoption of the final remedial action plan set forth in the ROD, including notice of the ROD's availability to the public for review". This means that notice of U.S. EPA's issuance of both ROD's were published in the Lapeer County Press. In addition, the modification permitting an option of on-site incineration was presented in the ESD (Exhibit 6) in accordance with Section 117(c) of CERCLA, and notification to the public of the issuance of the ESD was placed in the Lapeer County Press on September 4, 1991, concurrent with the comment period on the Consent Decree. Notice that the Consent Decree was lodged and available for review was placed in the Federal Register on August 1 and August 29, 1991.

27. Commenters
Jean Hoelzle

COMMENT #27: U.S. EPA has violated Title III of SARA, concerning the "citizen's right to know."

Response #27: Title III of SARA, known as the "Emergency Planning and Community Right-to-Know Act", 42 U.S.C. § 11001 et seq., provides that owners and operators of facilities that store hazardous substances in amounts exceeding those set by the Act notify certain state and local agencies of that fact, and provide material safety data sheets for all stored hazardous substances. Under Title III, the community is given access to all such material. U.S. EPA has not violated this Act in providing a cleanup at the Metamora Site.

28. Commenters
Metamora Concerned Citizens Assoc.

COMMENT #28: U.S. EPA has not complied with community relations requirements at this site.

Response #28: U.S. EPA has complied with all community relations requirements for this site. Pursuant to 40 CFR § 300.430(c)(2), a formal Community Involvement Plan (CIP) (Exhibit 15) was prepared for this site. The CIP at page 5 indicates that MDNR staff met with local residents as early as 1980 to discuss their concerns at the site. The CIP at page 6 also reveals that in March of 1984, MDNR and Michigan Department of Public Health (MDPH) staff met with local residents to again discuss their concerns at the site. At that time, the MDNR officials suggested that a Citizen's Information Committee be established. Once this committee was established, MDNR had several meetings with this committee to discuss the site. See CIP at pages 6-7.

A site repository was established by the MDNR at the Metamora branch of the Lapeer County Library in compliance with 40 CFR §300.430(c) (iii) to provide the citizens with access to documents and data regarding the site. At least sixteen fact sheets were mailed to interested residents informing them of activities being undertaken at the site during a period of May 1985 to January 1991. See Administrative Record Index attached to the 1990 ROD (Exhibit 5).

Prior to the 1986 ROD issuance (Exhibit 2), a public meeting was held with concerned citizens to discuss proposed remedial actions contemplated for the site. A public comment period was also conducted prior to U.S. EPA's issuance of the 1986 ROD. A proposed plan was issued in July of 1990 informing area residents of U.S. EPA's plan for remedial action for the groundwater and landfill. A public comment period was held on this proposed plan

from July 12, 1990 to August 28, 1990. See page 1 of Attachment 2 of the 1990 ROD (Exhibit 5). In addition, a public meeting on this proposed plan was held on August 1, 1990, and a copy of the transcript from this public meeting has been included in the Administrative Record for this site. A sixty day comment period was also provided to accept public comments on the proposed Consent Decree involving the proposed remedial action for this site. Also see response to Comment # 25. U.S. EPA has also participated in two informational meetings, in August and September of 1991, to discuss the proposed remedial action contained in the Consent Decree with local officials and residents.

29. Commenters
Citizens United
William and Donna Redmon

COMMENT #29: Testimony has been provided to MDNR and U.S. EPA regarding the additional dumping of drums in the landfill, and commenters have asked for owners, transporters, etc. to be deposed.

Response #29: In selecting a hazardous waste landfill cap as part of the remedial action for the site, U.S. EPA has assumed that hazardous waste has been disposed of in the landfill. However, as stated earlier, given the size and volume of the landfill, it would be infeasible to do anything other than cap the landfill. See also response to comment number 65.

30. Commenters

Mr. & Mrs. Robert Kahle	Patricia Marvin
Clifton and Deloris Payne	William and Donna Redmon
Robert Klauka	Ronald Barnard

COMMENT #30: Once this incinerator begins operating, it will become a permanent facility.

Response #30: The Superfund statute, 42 U.S.C. § 9621(e)(1), states that no permit is required where the remedial action is conducted entirely on-site. Therefore, no permit is required only for the on-site incineration of on-site wastes. The incinerator would need a permit for off-site wastes. It must be remembered that the Settling Defendants who have agreed to implement the remedy at the site are not in the incineration business, and U.S. EPA and the Settling Defendants are only interested in remediating the Metamora site as expeditiously and efficiently as possible. In addition, page 6 of the SOW provides for demobilization of the on-site unit. Once the job is completed at Metamora, the incinerator would be dismantled and used at another site.

31. Commenters

Stuart A. Batterman	Citizens United
Rev. Peter Stanzen II	Ronald and Debbie Stallings
Susan Coney	Alex Sagady

COMMENT #31: The claim that off-site capacity is unavailable at RCRA licensed waste facilities to process waste at the Metamora site has not been justified.

Response #31: In Section 5 of the ESD (Exhibit 6), pages 5-8, U.S. EPA documented its decision to change the location of the incinerator from off-site to on-site. The basis for this decision, as described in the ESD, was the inability of U.S. EPA and MDNR to find off-site incineration facilities willing and/or able to accept the Metamora waste. There are many documents in the Administrative Record for this site which substantiate U.S. EPA's and MDNR's inability to procure qualified, off-site incinerators willing to accept the Metamora wastes. An MDNR letter dated April 10, 1990 (Document 3 of Update #3 to the Administrative Record) (Exhibit 16) expresses MDNR's serious concern about the lack of approved incineration capacity for the Metamora drummed waste. Letters reiterating MDNR's concern about the lack of incineration capacity for the Metamora drummed waste are also found in documents 4, 11 and 12 of update #3 of the Administrative Record (Exhibits 7, 17, and 19). Also in the Administrative Record (Document #9 of Update 3) (Exhibit 18) is a letter from Chemical Waste Management, Inc., the contractor at the site performing the excavation and off-site disposal of the drummed waste, wherein Chemical Waste Management states that "the demand for incineration services is greater than existing capacity." Finally, Appendices I, II and III of the public comment submitted by the law firm of Pepe & Hazard (Exhibits 20, 21 and 22) contain memoranda prepared by MDNR staff which state that there was insufficient off-site incineration capacity to handle all of the Metamora drummed waste, even if every off-site incinerator took no other waste but the drums from Metamora, a highly unlikely scenario, and that this situation was not likely to improve.

Currently, nationwide only 11 off-site incineration facilities are eligible to accept Superfund waste. (Also see responses to comments 49-51). Many of these facilities have indicated that the waste contents from Metamora exceed predetermined limits set by their permits and therefore these facilities have rejected the Metamora waste. In addition only three of these eleven have a TSCA permit which is required to incinerate the PCB waste found at Metamora. Two of these three have previously rejected the Metamora waste, and the third did not have its RCRA permit at the time Metamora wastes were being shipped.

In addition to the problem of finding off-site facilities willing or able to accept the Metamora waste, off-site incineration demand has increased significantly as a result of the recent land ban regulations that require treatment of hazardous waste prior to disposal.

32. Commenters
Jan Herrick
Congress of the United States

COMMENT #32: No explanation is given as to why the factors which mitigated against on-site incineration at the time of the original ROD are no longer valid.

Response #32: The ESD, part of the Administrative Record for the Site (Exhibit 6), documents the reasons why the remedy was changed from off-site to on-site incineration. Pages 4, 5 and 6 of the ESD clearly state the circumstances that came about during the remedial action and how they impact the remedy chosen in 1986. (See also, Responses to Comment 1, 2 and 31).

33. Commenters

Stuart A. Batterman	William and Donna Redmon
Anne Sousanis	Steven Rowe
Susan Coney	Metamora Concerned Citizens Assoc.

COMMENT #33: The Statement of Work and other documents do not provide the detail and completeness needed to ensure the safety of on-site incineration.

Response #33: The RODs (Exhibits 2 and 5) and the Statement of Work (SOW) (attachment 2 to the Consent Decree) are general documents, which function to outline work required to be performed. The design phase of the project, which has not yet been completed, is intended to develop specific details of the remedy. The SOW requires submittals that contain detailed information regarding the remedial design for approval by U.S. EPA. These plans include the Incineration Work Plan, the Waste Excavation and Handling Plan, the Soil Characterization Work Plan, the Remedial Design/Remedial action (RD/RA) Work Plan, and the design specifications to be submitted to U.S. EPA for approval at 30%, 90%, and 100% design completion. The Incineration Work Plan outlines site preparation, waste handling, incinerator operations, trial burn, ash management, compliance monitoring and close out of the incinerator. The Waste Excavation and Handling Plan outlines drum handling, segregation, storage, demobilization, sampling and analysis, quality assurance, health and safety, spill control, erosion control, data management and air monitoring. The Soil Characterization Work Plan outlines the field investigation of the soils, the

development of alternatives based on the data, a quality assurance plan and treatability studies. The Remedial Design/Remedial Action (RD/RA) Work Plan gives a broad base of landfill and groundwater components of the remedy that are further defined in the design specifications at 30%, 90% and 100% design completion. It is important to remember that all remedial action conducted at the Metamora Landfill site must meet all substantive federal and state environmental requirements.

34. Commenters

Citizens United	Jan Herrick
Robert Kahle	Dennis Callahan
Patricia Marvin	Mr.& Mrs. McIlvride
Larry and Patricia Salk	Linda Stenz

COMMENT #34: There are no defined safety precautions nor plans included in this proposal.

Response #34: U.S. EPA has approved an Emergency Response Contingency plan for this site, and has provided a copy of this plan to the local community via the site repository and by providing a copy of this plan to the Village of Metamora President. This plan outlines procedures to be followed in the event of a release that would require an on or off-site response. U.S. EPA has also approved a Health and Safety Plan for this site (Appendix C of the Waste Excavation and Handling Plan). The health and safety plan describes how site activities should be conducted in order to prevent injury and exposure to hazardous materials. The Health and Safety Plan has also been provided to the local community via the site repository.

35. Commenters

Stuart A. Batterman	Leo Derderian
Linda Stenz	Jean Hoelzle
Steven Rowe	Ronald Stallings

COMMENT #35: The monitoring and reporting guidelines for stack emissions, ambient air concentrations, fugitive emissions and soils deposition specified in the SOW are insufficient in their scope, detail and frequency of required activities.

Response #35: As page 5 of the SOW indicates, emissions from any on-site incinerator must meet the criteria set forth in the Clean Air Act and those substantive requirements set by Michigan Air Pollution Acts (MAPA) 345 and 348. Achievement of the emissions limits must be verified in the manner required of incinerators by U.S. EPA and State of Michigan regulations. Specific monitoring details will comply with the applicable laws and be described in

the project plans, including the Trial Burn Plan, outlined in the SOW.

36. Commenters
Stuart A. Batterman
Jean Hoelzle

COMMENT #36: Other than 5 year old information, no air monitoring data appears available. A continuous air monitoring program is needed to characterize worker and community exposures.

Response #36: All during the prior excavation activity, which was halted in December of 1991, air sampling was conducted. This data is in the possession of the MDNR and is available for review. A continuous air monitoring program is required by the SOW to monitor the volatile organic compounds (VOCs) concentrations to ensure the safety of workers and the community. Exclusion zone boundaries (the boundaries in which work requiring personal protective clothing is required) and site boundaries will be monitored daily as described in the Air Monitoring Plan contained within the Waste Excavation and Handling Plan developed pursuant the SOW, page 12. During the past excavations, several measures were taken to reduce air emissions. At the close of each work day, foams were applied to the excavation face to reduce the VOC emissions. During sifting operations of contaminated soils, hoods were constructed to capture escaping volatiles. Also, basic meteorological data was collected daily and recorded in the site log. The use of similar measures will again be utilized if needed. See also, response to Comment 35.

37. Commenters
Citizens United
Ronald and Debbie Stallings

COMMENT #37: The Settlement does not provide new information about environmental impacts nor require any additional tests or definition of off-site contamination.

Response #37: Over a period of seven years, the Metamora Landfill site has undergone a Site Investigation (Exhibit 23), Phased Feasibility Study (Exhibit 1), Remedial Investigation (Exhibit 3) and Feasibility Study (Exhibit 4). Pursuant to these investigations, U.S. EPA and MDNR installed 33 groundwater monitoring wells at the site, and sampled and analyzed groundwater on 5 different occasions, resulting in 119 groundwater samples. In addition, U.S. EPA and MDNR have conducted surface, leachate/contaminated and subsurface soil sampling, surface water and sediment sampling, and air sampling.

This involved 20 soil borings, 76 soil samples, 5 surface water samples, 6 sediment samples and 3 leachate/contaminated soil samples as well as continuous air monitoring. These investigations served to characterize the site and provide information on the contamination and how it might be remediated.

Based on this information, the RODs (Exhibits 2 and 5) and SOW were developed. However, the Statement of Work (SOW) at page 6 clearly outlines that sampling of existing wells will take place to indicate changes in current conditions. The SOW at page 7 goes on to require the complete definition of groundwater contamination which will be accomplished in the pre-design hydrogeological study. This will include the installation of additional monitoring wells and studies of aquifer characteristics, including flow components. Once the definition of the contaminant plume has been established, the Settling Defendants are <u>required</u> to remediate groundwater to the clean-up levels at the point of compliance (site boundary) and all points beyond. See SOW at page 8. In U.S. EPA's opinion, the cleanup plan outlined in the Scope of Work does address all contamination at the site, and reflects the selection of a remedy consistent with the National Contingency Plan and CERCLA.

<u>38. Commenters</u>

Robert Eady	Citizens United
Teresa Grabill	Michael Keller
Jean Hoelzle	

COMMENT #38: No site specific studies of the toxic waste were performed as required under CERCLA.

<u>Response #38:</u> Several site-specific studies on the Metamora Site were developed as required by CERCLA. In fact, several million dollars have been spent on RI/FS studies. In 1985-86, the Site Investigation Report (Exhibit 23) and the Phased Feasibility Study (Exhibit 1) were completed. Based on these reports, U.S. EPA reached a decision on a remedial action plan for areas 1 and 4 of the site, which is embodied in the 1986 ROD (ROD #1) (Exhibit 2). In 1989-90, the Remedial Investigation (Exhibit 3), including surface and subsurface soil sampling, surface water sampling, 4 rounds of groundwater sampling, etc., and the Feasibility Study (Exhibit 4), which examined a wide variety of remedial options, screening out methods of remediation inappropriate for wastes found at the Metamora site, were completed. Notice of completion of the RI/FS and a proposed plan for the remedy was published on or about July 12, 1990 and upon considering public comment, the ROD (ROD #2) (Exhibit 5) was signed on September 28, 1990. All above mentioned reports and comments are available in the Administrative Record for the site.

In addition, the Pre-Design Hydrogeological Investigation will be performed as part of this settlement to further characterize the nature and extent of groundwater contamination currently found at the site prior to groundwater remediation.

39. Commenters
Patricia Marvin — Metamora Concerned Citizens Assoc.
Township of Metamora

COMMENT #39: There have not been site specific studies done regarding the applicability of an on-site incinerator at the Metamora Landfill.

Response #39: Under the CERCLA program, the Remedial Investigation (Exhibit 3) is done of the site, to analyze what contamination exists at the site, in what concentrations, and where the contamination is or is likely to migrate. Based on this site specific characterization, a technology is selected to remedy the contamination at the site.

As stated in previous responses, the design phase of a project is intended to look at specific details of the remedy. At this site, a mobile incinerator will be used. The Dispersion Modeling referred to by one of the commenters would be impossible to undertake without first knowing specific design parameters of the incinerator unit, such as stack height and diameter, pollution control equipment, exit velocity, feed rate and exit temperature. All of these parameters vary with each potential contractor's equipment. After a contractor is selected, the dispersion modeling as well as the impact of emissions is studied, using data from waste to be burned and specific characteristics of the incinerator, on a site specific basis as required by Michigan Act 348. If the results of the design phase reveal significant issues of implementation for on-site incineration, U.S. EPA would re-evaluate the use of this technology or the use of the specific mobile incinerator being considered.

As the Administrative Record demonstrates in update #4, documents 3-11, the Metamora drummed waste has been successfully and safely incinerated at several off-site facilities. There is no reason to believe that the Metamora waste could not be safely and successfully incinerated on-site.

40. Commenters
Stuart A. Batterman
Mike & Ruth Keller

COMMENT #40: The rugged topography at the site portends poor dispersion for effluents from on-site incineration.

Response #40: According to the topographic map (included in the Administrative Record as Figure 4-1 of the RI) (Exhibit 3) available to U.S. EPA, the Metamora Landfill site is located in an area of topographic highs. In fact, portions of the site are identified as the highest elevation in the county. In addition, the incinerator's proposed location is in an area topographically high compared to the topography of the rest of the site and the area surrounding the site. Therefore, dispersion of the incinerator off-gas will not be limited by drastic changes in terrain elevations. Operation of the on-site incinerator will comply with all substantive requirements of the Michigan and federal Clean Air Acts. Ambient air monitoring will be performed at the site boundary to ensure that air emissions do not exceed established limits. In addition, modeling is required under Michigan Act 348 to ensure the proper dispersion of effluents from the incinerator.

41. Commenters
Rev. Peter Stazen II
Ronald and Debbie Stallings

COMMENT #41: The proposed on-site incinerator fails to take into account the number of chemicals yet to be identified. What happens when unknowns are ignited and how can it handle benzene and toluene?

Response #41: Before material is incinerated, it is carefully analyzed, as required by the SOW, to determine specific parameters to maximize the efficiency of the unit. Therefore, unknowns are identified prior to burning. The type of incinerator to be used at this site will burn at an average temperature of 1800 to 2200°F in the secondary chamber, and have a destruction removal efficiency (DRE) rate of 99.99% for RCRA principal organic constituents and 99.9999% for PCBs, for nearly complete destruction of organic contaminants. Benzene and toluene are organic contaminants which an incinerator can easily destroy at these temperatures. Benzene and toluene are not only contaminants found at the site, but are also commonly found in many fuels such as diesel, gasoline, and jet fuel which are burned every day, at a temperature and efficiency far less than that of a hazardous waste incinerator.

42. Commenters
American Lung Assoc.

COMMENT #42: On-site incineration at the Metamora Site may result in mercury and chlorinated dioxin/furan emissions into the air.

Response #42: 40 CFR 264.343, adopted by reference in the Michigan regulations, provides for a DRE of 99.9999% for Dioxins. Incineration activity conducted at the Metamora site will comply with this regulation. The on-site incinerator must also comply with Michigan ARARs, which set a limit on the amount of mercury released into the atmosphere based on characteristics of the incinerator such as stack height, incinerator size, pollution control equipment, etc. The incinerator will be required to meet the substantive requirements of any other relevant promulgated regulations.

43. Commenters
Robert Klauka

COMMENT #43: The SOW says limited stockpiles of material to be incinerated shall be maintained, if necessary. The explanation indicates intent to excavate only enough material to supply burn capacity. What if a major delay with incineration occurs? Will the excavation be delayed also?

Response #43: Page 4 of the SOW does allow for a limited stockpile of soils to be incinerated. In this section, the SOW is merely trying to anticipate the possibility of excavation proceeding more rapidly than incineration. In the event that this occurred, measures would be taken to properly store excess material until it is ready for incineration. The SOW is pointing out that stockpiling is acceptable if it is limited and maintained in accordance with existing and future waste handling plans as approved by U.S. EPA. Leaving this option open allows excavation to proceed should delays occur with the incinerator.

44. Commenters

Citizens United	Larry & Patricia Salk
Mike & Ruth Keller	Petition submitted by Robert Kahle
Teresa Grabill	Robert Eady

COMMENT #44: The commenters are fearful of the on-site portable incinerator option and question its safety. The 1986 ROD ruled out on-site incineration because it had real environmental impacts.

Response #44: Page 6 of the 1986 ROD did refer to environmental impacts resulting from the selection of on-site incineration. However, the 1986 ROD did not suggest any environmental problem or impact from on-site incineration itself. The environmental impacts referred to related to the delay in incinerating the waste because of the length of time it was then expected to take to obtain a state permit and then build the incinerator. The selection of off-site incineration does not mean that an off-site

incinerator is safer (1986 ROD, p. 6). Time was a key factor in not choosing an on-site incinerator. In 1986, off-site incineration was considered to offer an immediate response that would mitigate continued groundwater contamination by reducing the time and cost needed to restore the aquifer. Currently, it is taking far longer to incinerate off-site than predicted in the ROD, greatly weakening the argument against on-site incineration.

On-site incineration will occur safely under proper operating conditions. These conditions will be constantly monitored to ensure the utmost efficiency of the incinerator. This, in combination with the strict environmental regulations governing emissions from these facilities, limits the exposure to any hazardous substance. U.S. EPA believes that on-site incineration is the best alternative available at this time to handle the hazardous waste found at the Metamora site. On-site incineration, constructed and operated under applicable regulations, will present far less risks than the risks associated with the storage of many thousands of drums of hazardous wastes on-site for any period of time.

45. Commenters

Citizens United	Susan Debash
Thaddeus Grudzien	Jan Herrick
Sharon Jones	Robert Kahle
The Knollwood Clinic	Mr.& Mrs. McIlvride
Helen Morse	Rev. Peter Stanzen II
Linda Stenz	Patrick Weaver
Ronald Barnard	Vanderkloot & Haynes

COMMENT #45: Mobile incinerators are not safe. What happens if the incinerator is noncompliant?

Response #45: A mobile incinerator, properly constructed, operated and maintained, provides a safe technology for hazardous waste remediation. The Administrative Record for this site contains many documents that reveal that on-site incineration has been selected and implemented at numerous sites across the nation. The Administrative Record contains the RODS from the LaSalle Electric Utilities site (Exhibit 28), the Rose Township site (Exhibit 26), the Laskin Poplar site (Exhibit 25), the Crab Orchard site (Exhibit 24), and the Springfield Township site (Exhibit 27). At each of these sites, the remedy of on-site incineration was selected. In addition, document 33 of Update 3 of the Administrative Record (Exhibit 29) indicates that on-site incineration has been selected in over 51 sites across the nation. Document 1 of Update 3 of the Administrative Record (Exhibit 30) states that the trial burn for the on-site incinerator at the LaSalle Electric Utilities site in LaSalle, Illinois complied with all ARARS and achieved a destruction removal efficiency greater than 99.9999%.

Document 16 of Update 3 of the Administrative Record (Exhibit 31) discusses use of an on-site incinerator at the Bog Creek Farm Superfund site, and indicates that an on-site temporary incinerator was installed and successfully operated to incinerate the volatile, semi-volatile and heavy metals found at the site. In addition, Document 31 of Update 3 of the Administrative Record (Exhibit 36) states at page 4 "A substantial body of trial burn results and other quality assured data exists to verify that incinerator operations remove and destroy organic contaminants from a variety of waste matrices to the parts per billion or even the parts per trillion level, while meeting stringent stack emission and water discharge requirements." Documents 22, 23, 24, 25, 26, 27, 28 and 30 of Update 3 of the Administrative Record all contain examples of the successful use of incineration. (Exhibits 32 and 37).

The selection of an incinerator for the site will depend on its proven, safe performance during demonstrations at other sites. The mobile incinerator selected will have controls to monitor compliance with emissions specifications. The controls and inspections will monitor operating performance standards such as temperature, oxygen, carbon monoxide, particulates, hydrochloric acid, nitrogen oxides and conditions of the incinerator such as the shredder, kiln feeder, burner, and speed, kiln refractor, kiln seals, ash gates, particulate scrubber, etc. to ensure that it is operating within the range of parameters specified by U.S. EPA, with input from the MDNR.

An on-site incinerator still has to meet all technical requirements of applicable or relevant and appropriate state and federal laws and regulations. Therefore, state and federal environmental laws will be complied with. Emission and operating limits set by state and federal environmental laws are requirements designed around a one in a million excess cancer risk, to provide for protection of human health and the environment. The incinerator will be run pursuant to federal and state standards and the emissions from the incinerator will be monitored to ensure that they meet federal and state air quality requirements. See also, Document 31 of Update 3 of the Administrative Record which states at page 1 "Mobile/transportable incinerators exhibit essentially the same environmental performance as their stationary counterparts."

The operation of an incinerator is closely monitored at many points. If an operation measurement deviates from the standards required by law, an alarm will sound so an operator (or a computer in some systems) can adjust the controls to correct the problems. Other instruments continuously monitor the emission levels of constituents to ensure that the incinerator's allowable emissions levels are not exceeded. If the incinerator is not in compliance with critical parameters, it will not operate.

46. Commenters
American Lung Assoc.

COMMENT #46: Trained technical personnel should be on-site at all times of incinerator operation.

Response #46: The Consent Decree requires compliance with all applicable State and Federal Environmental Statutes. 40 CFR § 264.16, adopted by reference in the Michigan regulations, requires that all personnel must be successfully trained so that they can perform their duties in a way that assures the facility's compliance with the requirements of RCRA. This regulation will be complied with in this case.

47. Commenters
Michael L. Miller, Citizens of Houston
Dean Bedford

COMMENT #47: On-site incineration is safe, and eliminates potential hazards of shipping waste across the U.S. I feel it is appropriate that the citizens of Michigan deal with their hazardous wastes in their own state and stop exporting their problems.

Response #47: U.S. EPA agrees that on-site incineration is a safe and effective technology and that risks due to shipping will be eliminated.

48. Commenters
Linda Stenz Teresa Grabill
Susan Coney

COMMENT #48: The distillation process would be suitable for much of the identified waste in soils and also superior to incineration.

Response #48: U.S. EPA considered resource recovery technologies, including filtration and distillation in the Phased Feasibility Study (page 42), and determined that distillation could not be used on the types of wastes found at Metamora. Metamora wastes are mainly solids and sludges, which reduces the feasibility of this technology. If Metamora wastes were put through the distillation process, there would still be a significant amount of waste product that would require disposal, most likely by incineration. In addition, many of the drums disposed of at Metamora were the end product of a chemical recycling process, which would indicate that the majority of usable material has already been removed.

49. Commenters
Citizens United

COMMENT #49: Why can't the solution be for each PRP to remove its drums from the site.

Response #49: MDNR and U.S. EPA tried to move the drums off-site to a thermal destruction facility and were unable to do so in the time estimated in the 1986 ROD. (See also, Response to Comment 31). Since the agencies can no longer implement this remedy in a timely manner, MDNR and U.S. EPA were forced to consider on-site incineration. A further limitation is CERCLA Section 9621(d)(3) and U.S. EPA's off-site disposal policy (Exhibit 33, OSWER Directive 9834.11). These require that in a remedial action involving the transfer of hazardous substances off-site, the hazardous substances must be transferred to a facility that is in compliance with RCRA, TSCA and applicable state requirements. Thus, PRPs would face the same lack of available capacity found by U.S. EPA and MDNR. In addition, CERCLA, as amended, emphasizes permanent treatment technologies.

In addition, not all the drums on site are labeled and can be attributed to any one PRP. So even if one PRP came and took the drums attributed to it, a large number of drums would remain on-site. Superfund law dictates that one or all of the PRPs (joint and several liability) are responsible for the entire remedy, including the proper disposal of all the drums, since the harm at the site is indivisible. U.S. EPA, by its ROD (Exhibit 2) and ESD (Exhibit 6), has selected the use of an on-site incinerator as the approach that the PRPs may take to properly dispose of the drums.

50. Commenters
Jean Hoelze

COMMENT #50: Why was the Missouri Incinerator site which had agreed to take the hazardous waste not approved?

Response #50: Since this letter did not identify the Missouri facility referred to, it is difficult to answer the question. In order for a facility to accept hazardous waste from a Superfund site, it must be in compliance with RCRA and/or TSCA, and it must be in compliance with U.S. EPA's off-site policy. There was a Treatment, Storage, Disposal (TSD) facility in Missouri that did take a small amount of the Metamora waste for a short period of time. However, this facility was found to have violated 15 RCRA regulations, including leaking drums in its warehouse, Land Disposal Restrictions violations, failure to place volatile waste in a closed containment tank, failure to maintain and operate the

facility to minimize the possibility of fire, explosion or/and unplanned sudden or non-sudden release of hazardous waste, failure to take precautions to prevent accidental ignition of ignitable waste etc.,and therefore was not in compliance with its RCRA permit. Hence, this facility could no longer accept Metamora waste.

51. Commenters
Dennis Callahan

COMMENT #51: The U.S. EPA has operating facilities much like that proposed for the Metamora Landfill site operating at this time in Illinois and Indiana. Why isn't the Metamora waste taken there?

Response #51: Since this letter did not specify a particular facility, it is difficult to answer the question. U.S. EPA does not own and operate commercial incineration facilities. Chemical Waste Management does operate facilities in Illinois, but those facilities are currently not in compliance with RCRA. As stated earlier, in response to comment #49, the U.S. EPA off-site policy (OSWER 9834.11) mandates that a commercial incinerator must be in full compliance with all relevant U.S. EPA standards and permit requirements in order to be eligible to receive Superfund hazardous waste. Not only must a facility return to compliance, but all enforcement actions pending against a facility must be resolved, before it is again eligible to receive Superfund waste.

Regarding other Superfund sites using on-site incineration as part of their Remedial Action, U.S. EPA cannot send Metamora waste to such temporary incinerators, which lack a permit to burn off-site waste. Similarly, the on-site incinerator at Metamora cannot accept waste from outside the Site without obtaining a permit to do so.

52. Commenters
Robert Klauka

COMMENT #52: The U.S. EPA does not have control over incinerator maintenance.

Response #52: U.S. EPA oversight personnel will be inspecting the facility and will monitor any maintenance. Maintenance activities will be carried out according to the specifications of the incinerator contractor, those required under law, and as outlined in operation and maintenance plans approved by U.S. EPA after review and comment by MDNR. Repairs or replacements will be completed in accordance with the U.S. EPA approved Incineration Work Plan.

53. Commenters
Robert Klauka

COMMENT #53: Will U.S. EPA be on site during the trial burn?

Response #53: U.S. EPA and/or a representative (U.S. Army Corp of Engineers) will be on-site during the trial burn.

54. Commenters

Citizens United	Leo and Ann Derderian
Robert Eady	Petition submitted by Robert Kahle
Robert Kahle	Dennis Callahan
Larry and Patricia Salk	Susan Coney
Vanderkloot & Haynes	

COMMENT #54: The clean-up is to be done by polluters. There is inadequate oversight.

Response #54: Section 122(a) of CERCLA authorizes U.S. EPA to reach settlements with PRP's such that these PRP's perform response actions. Section 104(a) also authorizes EPA to allow PRPs to conduct response actions. This is consistent with the Congressional intent that persons responsible for Superfund sites bear the cost and responsibility for remedying the contamination.

U.S. EPA oversight of remedies implemented by private parties is required, and is rigorous, to ensure full compliance with the Consent Decree, including all other applicable or relevant and appropriate environmental standards. U.S. EPA oversight personnel will be present to monitor on-site activities. In addition, U.S. EPA must review and approve all plans outlining the remedial action to be undertaken at the site. As part of the review process, the Michigan Department of Natural Resources will be given an opportunity to review and comment on plans prepared for the site. The Consent Decree further requires the Settling Defendants to submit monthly progress reports indicating the work completed at the site, the activities scheduled to take place the following month, any delays or problems encountered at the site, changes in personnel, and information gathered during the reporting period. (See SOW at page 24). See also, responses to comments 14 and 53.

55. Commenters
Township of Metamora

COMMENT #55: There has been no demonstration that the PRPs can do the work at the site.

Response #55: It is not the PRPs themselves that will undertake the remedial activity at the site. Under the terms of Paragraph 10a of the Consent Decree, the PRPs must select a qualified professional architect or engineer to conduct the remedial design work at the site. Such a selection is subject to approval by U.S. EPA after providing the State a reasonable opportunity for review and comment.

The Settling Defendants are utilizing the services of Conestoga & Rovers Inc. to act as the Settling Defendant's engineer for remedial design. U.S. EPA has approved this selection and has found their work to date satisfactory.

Upon completion of the remedial design, the Settling Defendants are required by the terms of Paragraph 10b of the Consent Decree to select a qualified professional engineer or other appropriate qualified professional to direct and supervise the remedial action at the site. Such a selection is also subject to U.S. EPA approval, after providing the State a reasonable opportunity for review and comment.

56. Commenters
Ronald Barnard
Norman Hughes

COMMENT #56: Wastes from other sites are being brought to Metamora.

Response #56: Presently, a county waste transfer station, which collects municipal waste for disposal at other sites, operates on a portion of the site. It is possible that the commenter has witnessed wastes taken to that station. However, with respect to drums of hazardous waste at the site, U.S. EPA maintains a log of drums excavated, staged or shipped from the site. In addition, any drum that returns to the site as a result of rejection from an off-site facility is accompanied by a manifest which indicates that the drum originated from the Metamora Site. These records demonstrate that off-site wastes have not been accepted or stored at the Metamora Landfill Site as part of the Superfund action.

57. Commenters

Stuart A. Batterman	Leo and Ann Derderian
Ronald and Debbie Stallings	Linda Stenz
Susan Coney	Dennis Callahan
	Metamora Concerned Citizens Assoc.

COMMENT #57: Site security is inadequate. Activities at the site that are unrelated to cleanup should be examined in order to improve security. These

deficiencies should be addressed immediately and before new activity begins.

Response #57: With the suspension of excavation activities, the decreased presence of State and contractor personnel increased the burden of site security placed on the security guard. Recently, a second security guard was added, plus additional personnel on evenings and weekends. A site security trailer has been installed, and preparations are being made for the installation of telephone and electrical service to the drum storage pad area. Additional fencing and barbed wire for the staging pad is also being explored. An Emergency Response/ Contingency Plan and Site Security Plan have been prepared by the Settling Defendants for implementation at the site and have been approved by U.S. EPA.

Once remediation activities begin at the site, all other activities unrelated to the clean-up will be isolated as necessary.

58. Commenters
Jean Hoelzle

COMMENT #58: Water has not been monitored for the past 10 years.

Response #58: See response to comment #37 regarding prior groundwater monitoring. Groundwater from the monitoring wells was last sampled in 1988 and groundwater sampling will resume, shortly after entry of the Consent Decree, as part of the interim groundwater monitoring program described in the SOW, section F. This groundwater monitoring program provides for field analysis of samples to include groundwater elevation, pH, temperature, and specific conductivity. Laboratory analysis performed will include U.S. EPA's target analyte list (TAL) for inorganics and U.S. EPA's Target Compound List (TCL) for organics. At the outset, all usable existing monitoring wells (approximately 30-40) will be sampled. See SOW at page 6. Based on the results of this baseline sampling, Settling Defendants shall propose, for U.S. EPA approval, a list of wells to be sampled and analyzed for selected site-specific analytes on a biannual basis until implementation of the Post Construction Groundwater Monitoring Program. See SOW at page 6. In addition to this Interim Groundwater Monitoring Program, Settling Defendants will install, sample, and analyze additional groundwater monitoring wells as part of the Pre-Design Hydrogeologic Investigation. See SOW at page 7.

The Michigan Department of Public Health monitors residential wells in the area on an annual basis and has not detected any contaminated wells. In addition, the SOW attached to the Consent

Decree provides that as part of the Interim Groundwater Monitoring Program, the Settling Defendants shall conduct or reimburse a recognized government agency for residential well sampling at those residences within and adjacent to the groundwater plume. Residential sampling under this plan is to be conducted on an annual basis for the same parameters as specified in the interim groundwater monitoring program until such time as the groundwater extraction system is fully operative and effectively containing groundwater requiring remediation.

59. Commenters
Mr. & Mrs. Jerry DeLong
Dennis Callahan
Linda Stenz

COMMENT #59: No one in this county is trained or equipped to handle an incident, should this occur.

Response #59: The County of Lapeer is not required to respond to emergency situations that would require equipment, training and direct contact with the hazardous waste. The contractor will be equipped and trained to deal with such emergencies on-site. If an emergency does occur, State and Federal agencies such as those dispatched by the National Response Center and the U.S. EPA would respond. As discussed in response to Comment #34, plans have been approved, as part of the Incineration Work Plan, regarding emergency contingencies. These plans are currently being reviewed by the public.

60. Commenters
Robert Klauka

COMMENT #60: Is residential groundwater sampling performed once a year often enough?

Response #60: Annual sampling is the frequency recommended by the Agency for Toxic Substances and Disease Registry (ATSDR). See also response to Comment #58.

61. Commenters
Stuart A. Batterman
Linda Stenz

COMMENT #61: Faster and more complete groundwater remediation would be accomplished by the phased integrated use of several technologies. Vacuum extraction in addition to capping the landfill would better protect the groundwater.

Response #61: In the Feasibility Study (Exhibit 4), U.S. EPA examined many different remediation technologies, including soil vapor extraction, for the landfill. U.S. EPA selected a remedy that best complied with CERCLA and the nine criteria of the NCP. The FS at Table 4-5 screened out soil vapor extraction due to the non-homogeneity of the fill materials.

As stated above, U.S. EPA has provided mechanisms in the Consent Decree (the 5 year review and Additional Work Provisions) which would allow U.S. EPA to require additional technologies and enhanced use of technologies described in the Scope of Work should U.S. EPA determine that such additional work is needed to achieve the performance and cleanup standards selected for the site.

62. Commenters
Citizens United
Dennis Callahan

COMMENT #62: Design details of the groundwater treatment system are to be defined by the Settling Defendants. There are fears that this remedy will expedite downward migration of contaminants. Commenters also fear implementation of this plan will destroy private property.

Response #62: As discussed earlier, specific details are always left to the design phase of the project which will be conducted by the Settling Defendants with U.S. EPA oversight.

Groundwater pump and treat systems are designed to contain contamination plumes and have been shown to do so. The groundwater pump and treat system for the Metamora site will be specifically designed to intercept contaminated groundwater and prevent contaminants from moving horizontally or vertically beyond the present contamination boundaries. Generally, contaminated water is extracted, treated to clean-up levels, as set by the U.S. EPA with opportunity for review and comment by the MDNR, and injected back into the aquifer. At the site, there is a confining clay layer between the upper contaminated aquifer and the deep aquifer. Extraction wells are placed within the plume, and if a breach or break in the confining clay layer is present, water would be drawn upward from the deeper aquifer into the shallow aquifer. Therefore, contaminants present in the upper contaminated aquifer should not reach the deep aquifer.

Before the extraction or reinjection wells can be installed, Settling Defendants must obtain access or easements to off-site properties. Additionally, U.S. EPA will require all such properties to be properly maintained and restored.

63. Commenters
Dennis Callahan

COMMENT #63: U.S. EPA stated at the public meeting that groundwater was proceeding vertically at a rate of 0.11 feet per day, but no provisions have been made to guard this main source of drinking water.

Response #63: There seems to be a misunderstanding concerning downward migration of contamination in the shallow aquifer. The RI (Exhibit 3) states that 0.11 is the gradient and not the velocity of groundwater. Gradient or slope (the degree of inclination of the water table) is just one component that is used to calculate vertical groundwater velocity. Using the equation for velocity given in the RI, the vertical velocity is approximately 1 foot per year. Thus, it would take 175 years before the bedrock aquifer, the source of drinking water, would be threatened. The pump and treat operations will be instituted long before that time, thus eliminating the problem before it reaches the current drinking water aquifer. In addition, there is an aquitard or clay barrier between the two aquifers, further restricting downward migration of the shallow aquifer to the bedrock aquifer.

64. Commenters
Robert Klauka

COMMENT #64: Would it not be prudent to implement the hydrogeologic investigation before any major work is done?

Response #64: The hydrogeologic investigation will begin prior to major work that will impact the groundwater, such as groundwater extraction. In addition, groundwater studies described in previous responses, have already been performed as part of the RI (Exhibit 3). Incineration and excavation activities, which will not be impacting the aquifer, will be occurring simultaneously with the hydrogeologic study. This allows the work to be completed in a more time efficient and effective manner.

65. Commenters

Mark Richardson	The Knollwood Clinic
Mike & Ruth Keller	Mr & Mrs. Jerry DeLong
Robert Eady	Sharon Jones
Ronald Barnard	Petition submitted by Robert Kahle
Robert Kahle	Dennis Callahan
Patricia Marvin	Elizabeth Miller
Rev. Peter Stazen II	William and Donna Redmon

Don Smith
Patrick Weaver

Linda Stenz
Susan Coney

COMMENT #65: The ROD for operable unit two fails to comply with the law by failing to select an appropriate Landfill remedy.

Response #65: After extensive remedial investigation, U.S. EPA selected a group of remedies for the site. These include fencing of the site, institutional controls, excavation and on-site incineration, capping of the landfill, groundwater extraction and treatment and residual soil treatment. These remedial technologies, as a whole, upon implementation, will allow for protection of human health and the environment at the Site.

The landfill remedy selected for the Site is consistent with remedies at similar sites across the state and throughout the country. The cap that will be placed over the Metamora landfill is a Michigan Act 64 hazardous waste cap consisting of 3 feet of low permeability clay, a 12 inch drainage layer and 12 inches of topsoil. The cap will prevent the infiltration of precipitation which will prevent the further production of leachate, a potential groundwater contamination source.

Metamora is not unique in its landfill volume and contents. Old landfills that operated before the institution of more rigorous or comprehensive environmental regulations not only accumulated hazardous material but also an extremely large amount of municipal waste. A Michigan Act 64 hazardous waste landfill cap is the proper regulatory approach in reducing risk posed by a landfill that accepted hazardous waste. Because of the distinct possibility that hazardous wastes are present in the landfill, an Act 64 hazardous waste landfill cap was chosen for the Metamora Landfill in lieu of a solid waste cap, which is used on landfills that accepted only municipal waste.

It is not practical or prudent to excavate a landfill the size of Metamora. Not only does the volume of waste cause difficulties in excavation, but the build-up of methane gas within a landfill of this age and size would pose an unacceptable risk if the landfill were to be excavated. Methane is easily ignitable, and in large quantities could cause an explosion releasing hazardous substances into the air.

The Remedial Investigation (Exhibit 3) focused on determining if the landfill itself was contributing contamination to the site. The RI found the leachate produced by the landfill contained a variety of hazardous substances that would potentially contaminate soils and ultimately groundwater. The feasibility study (Exhibit 4) conducted by the MDNR looked at several remedial alternatives for the landfill, including excavation. This alternative was screened out in the FS at Table 4-5,

however, due to the large amount of landfilled wastes and the high cost (approximately $200 million) of excavation of the landfill. U.S. EPA guidance ("Conducting Remedial Investigation/Feasibility Studies for CERCLA Municipal Landfill Sites," Feb. 1991, EPA/540/P-91, § 4.2.3-4.2.3.1) (Exhibit 12) states that removal of contaminated soils at municipal landfill sites is generally limited to hot spots (such as drum disposal areas 1 and 4 at Metamora) or, when practicable, to landfills with a low to moderate volume of waste (e.g., less than 100,000 cubic yards). There is an estimated 1 to 1.5 million cubic yards of waste at Metamora. U.S. EPA in selecting the remedy for this site, did address the hot spots on the site by excavating and incinerating drum areas 1 and 4, estimated to contain 74% of all drummed material.

As the FS stated at Table 4-5, the off-site treatment and/or disposal option would present great difficulties and risks in excavation, transport and proper disposal as well as high Operation and Maintenance costs. Removing the waste to a licensed hazardous waste disposal facility would not be feasible because of the large volume of municipal waste. In addition, the potential health risk under this alternative is not eliminated, but is transferred elsewhere.

It should also be remembered that capping of the Landfill was selected by U.S. EPA as the appropriate remedial action by the 1990 ROD (Exhibit 5). Prior to the selection of this remedial option, U.S. EPA provided the statutorily mandated public comment period on the proposed remedy. U.S. EPA received very few citizen comments on this remedy, and none suggested that the landfill should be completely excavated. Therefore, this settlement provides a significant benefit by having Settling Defendants, rather than the United States, finance and implement the landfill remedy. The hazardous waste cap for the landfill is estimated to cost over $10 million.

66. Commenters

Citizens United
Robert Eady
Robert Kahle
Mr & Mrs. Jerry DeLong
Sharon Jones
Petition submitted by Robert Kahle
Metamora Concerned Citizens Assoc.

COMMENT #66: The proposed "clean-up" leaves more than 75% of the hazardous material in place, does neither define nor clean up pollution that already has taken place and adds significant risk to those already extant.

Response #66: The Consent Decree involves the completion of excavation and incineration for drum areas 1 and 4, removing what

has been estimated as 74% of all drummed material. The Consent Decree also requires the implementation of the remedy selected in the 1990 ROD for operable unit two -- remediation of the contaminated aquifer and a Michigan Act 64 hazardous waste landfill cap (Exhibit 5). The wastes within the landfill will be contained instead of excavated as explained in response to comment #65 above. The Consent Decree further requires the remediation of residual soils. The SOW at page 10 requires that the Settling Defendants sample and analyze all soils currently staged on site, all soils excavated from Drum Area 1 and all associated soils remaining in Drum Area 1. After sampling is completed, the Settling Defendants are required to submit to U.S. EPA a Soil Sampling Report for U.S. EPA approval, showing the results of all soil sampling. Settling Defendants shall also submit to U.S. EPA a Soil Remedial Alternatives Report proposing feasible technologies to remediate the contaminated soils. The terms of the settlement also require the Settling Defendants to implement the remedial action chosen by U.S. EPA for the residual soils.

Routine air monitoring of the work areas and the property boundary will ensure that any fugitive emissions, whether from excavation or incinerator activities, will be quickly discovered and mitigated thus reducing risk to nearby residents. Any remedy involving the handling of hazardous waste contains some risk, but the risk posed by taking no remedial action is clearly unacceptable and poses more of a long term environmental threat than the proposed remedial action contained in the Scope of Work.

67. Commenters
Citizens United Township of Metamora

COMMENT #67: U.S. EPA failed to completely investigate drum disposal areas 2, 3 and 5.

Response #67: U.S. EPA did investigate areas 2, 3 and 5. The magnetometer survey described at page 6 of the Site Investigation Report (Exhibit 23), identified 5 metallic anomalies at the Metamora site. Areas 2, 3 and 5 were determined to be deep within the landfill. As discussed in comment 65 of this responsiveness summary, excavation, which would be the only way to determine the nature of these metallic readings, would not be considered an acceptable approach to investigate or remediate so large a landfill. In addition, the magnetometer survey estimated the bulk of the drums were located in areas 1 and 4. Subsequent excavation of drums in areas 1 and 4 has shown the number of drums estimated by the magnetometer survey to have been a reasonable one. U.S. EPA's approach in its excavation of only areas 1 and 4 is consistent with the guidance on "Conducting Remedial Investigation/Feasibility Studies for CERCLA Municipal Landfill Sites". (Exhibit 12)

68. Commenters
Citizens United
Thaddeus Grudzien

COMMENT #68: We propose that all the fill areas on-site be excavated, relocating the non-hazardous material in an appropriately lined cell.

Response #68: As mentioned above, the risks in excavating the landfill are far greater than those posed by capping it (please refer to above response #65). The alternative of placing the landfill waste into a constructed RCRA containment cell was examined in the FS (Exhibit 4). However, this alternative was screened out in Table 4-5 of the FS due to the large amount of landfilled wastes, difficulties controlling leachate during excavation and the uncontrolled release of landfill gas to the ambient air in addition to the exorbitant cost of this remedial alternative.

69. Commenters
American Lung Assoc.

COMMENT #69: A commercial hazardous waste landfill would provide greater assurances of environmentally sound disposal of low/no BTU metallic waste compared to attempts at on-site incineration.

Response #69: The drummed waste at Metamora contains organic compounds which are tainted with metals. Therefore all drummed waste is not of low/no BTU value. In addition, the 1986 ROD at page 11 (Exhibit 2) screened out off-site disposal in a RCRA Landfill due to limited capacity of off-site landfills, and the lack of permanent treatment as a component of the remedy. Finally, the Land Disposal Restrictions of RCRA would prevent the untreated land disposal of Metamora wastes because the wastes at Metamora are characteristic hazardous wastes under RCRA.

70. Commenters
Robert Klauka

COMMENT #70: Will gasses from the landfill venting/collection system be tested, will they be flammable or contaminated or will they smell.

Response #70: A venting system is designed to control the release of gas that naturally builds up within a landfill. Generally, gasses are directed to the surface through piping at which point the gasses will be destroyed using a flaring system that will essentially burn them off. Air monitoring will ensure

that any fugitive emissions leaving the site are detected immediately. The system may have some odor to it, but it should be considerably less than the present situation without the venting/collection system in place.

71. Commenters
Township of Metamora

COMMENT #71: The Consent Decree does not refer to Area 4 of the Site even though the 1986 ROD required excavation and incineration of areas 1 and 4.

Response #71: The Consent Decree makes no reference to remedial activity in area 4 of the site because all excavation has been completed in that area. The drums have either been incinerated off-site or are staged on-site awaiting destruction.

72. Commenters
Township of Metamora

COMMENT #72: The Consent Decree was arbitrary and capricious in its references to documents contained in the Administrative Record.

Response #72: When the preface of the Consent Decree (pages 1-4) referenced some documents contained in the Administrative Record, it did so only to give the reader of the Consent Decree a brief description of the Superfund activities which had been undertaken at the site. These references were meant to provide nothing more than a brief historic overview of activities undertaken at the site.

73. Commenters

COMMENT #73: The proposed use of incinerator ash as fill material at the landfill is contrary to the standards of the Michigan Solid Waste Management Act.

Response #73: The Michigan Solid Waste Management Act is not an ARAR for this site. MDNR did not designate this Act as an ARAR for the remedial action. It is not applicable, because the Act's requirements for incinerator ash disposal refer to municipal incinerator ash, and not hazardous waste incinerator ash. The Act's Regulations dealing with municipal incinerator ash are also not appropriate for this site, since a hazardous waste landfill cap will be placed over the landfill. See response to comment #65. In addition, the ash from the Metamora hazardous waste incinerator must pass the TCLP test before being placed in the

landfill, unlike ash from municipal incinerators. See response to comment #8. Thus, it would not be appropriate to also require that the standards in the Michigan Solid Waste Management Act dealing with municipal ash be required for the on-site incinerator ash placed under the cap.