OPENING STATEMENT

Dr. Harvey Alter  
Chamber of Commerce of the U.S.  
Washington, D.C.

Society has been burying its wastes in organized landfills at least since ancient Rome. Sometimes buried well — sometimes not.

Because of this, about 10 years ago, the Bureau of Solid Waste Management started Mission 5000 to “close the dumps” — 5000 of them. Remember? Since then, we have still been trying to enforce closing the dumps, but have more closely defined “dump.” The joint failure of segments of the private and public sectors to achieve this is disgraceful.

Society will likely continue burying its wastes in organized landfills for some time to come. There will always be wastes from society’s activities and burying is still the most effective way of disposing of certain wastes.

An understatement is that there is opposition to landfills. There is no shortage of land in this country. However, there is a political shortage of acceptable sites. We must solve siting problems by making larger land masses politically acceptable.

If we do not solve the problem, and secure properly designed and operated sites, there will be midnight dumping and hazards to public health.

One of the obstacles toward this goal is a polarization of viewpoints between segments of the public and private sectors. At one end of the spectrum, is the philosophy that a regulatory agency knows what is best and proper.

At the other end of the spectrum is the continuous opposition to such omniscience. In between, there must be environmental and health goals, but with operators given the technological and economic freedom to choose the best methods of achieving the goals. Overall, there must be regulations founded in science and technology — not founded on wishful thinking. I hope some of our panelists will address this aspect of proper solid waste management.

We are meeting today just a few days after EPA has issued what has been described as “the most complex set of regulations” ever issued by a government agency. My copy is printed on both sides of the paper and is 5 in. high. Mr. Beck of EPA called it EPA’s “best shot” for a cradle to grave control. Of course, the regulations have been criticized by both environmentalists and industry spokespeople.

As long as there is such disagreement as to the technical basis, and to the completeness (or not) of regulation, there is going to be disagreement as to the legal aspects of solid waste management. These differences must be reconciled or all of us will be spending our time arguing about the regulations, and who is right, rather than what is right. All the effort will go to argument — not to proper solid waste disposal. I hope the panelists will address themselves to this polarized and antagonistic way of doing business that has evolved.

Finally, I remind the audience of engineers that
our panel is all lawyers. Please consider whether they are appropriately taking into account the technology of disposal in their views. If not, you will have an opportunity to question them.

PUBLIC ACCEPTANCE OF HAZARDOUS WASTE FACILITIES

Statement by

Marc E. Gold
Wolf, Block, Schorr and Solis-Cohen
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The problem of gaining public acceptance of hazardous waste disposal facilities lies not in the technical abilities of the society, but in the public perception of the risks associated with such facilities. The techniques to be used in convincing the public that hazardous waste disposal facilities are not time-bombs, but are merely industrial operations that can be controlled and monitored include the following:

1. The disposal company and the regulator must establish their credibility as trustworthy, honest and capable of performing their duties.
2. The disposal company must not appear to have a closed mind or have obtained agency approval before informing the public.
3. Public education programs must be sponsored presenting the technological developments, monitoring techniques, analysis sophistication and operating procedures of hazardous waste disposal projects. Also, the consequences of not having disposal facilities must be stressed.
4. All facts regarding the record of the company proposing to site a facility and the facility itself must be presented. Even negative facts must be exposed and dealt with openly.
5. Community compensation programs should be developed and not presented as bribes so that the tangible benefits of the proposal are clearly presented.

In essence, the keys to siting a facility are: openness; honesty; effective public education; extensive meetings with the regulators, local elected officials and interested citizen’s groups; community compensation programs and a lot of luck.

HAZARDOUS WASTE LITIGATION AND THE HAZARDOUS WASTE PROBLEM

Presentation by

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In October 1979 the Land and Natural Resources Division established a new section to deal with the problems of hazardous waste. The section’s mission was to provide the legal resources necessary to take legal action where required to compel the clean-up of existing and abandoned hazardous waste dump sites and to defend and enforce the anticipated program for monitoring and permitting the future generation, transportation, storage and disposal of hazardous waste pursuant to the Resource Conservation and Recovery Act. The section includes thirteen lawyers and six paralegals, and while the creation of a new section of this size represented a substantial addition of resources to the hazardous waste problem, it is, nonetheless, an infinitesimal quantity compared to the size of the real problem.

It is the goal of the Department of Justice to establish a partnership between itself and the Environmental Protection Agency within the Federal Government and between the Federal Government and the state governments in an effort to move swiftly and effectively to deal with this most serious environmental problem. My purpose today is to give you a very brief review of how this new section intends to operate and some idea of the places where we anticipate serious problems and what we hope can be done about them.

The Hazardous Waste Section has begun with several innovative and far-reaching approaches to Department of Justice litigation. First, it is our intent to seek the limits of legal authority to move against existing and abandoned hazardous waste dump sites at the earliest possible time. Thus, our thirteen lawyers are working on the most imaginative and far-reaching interpretations of the Resource Conservation and Recovery Act. This decision to use the law innovatively is motivated by the extremely serious nature of the hazardous
operate at this level as the number of hazardous waste problem. We cannot afford to be timid in seeking solutions. In addition, it is our feeling that if a hazardous waste dump exists and we discover that legal authority that we hoped existed to deal with the problem is not adequate, Congress will respond with additional legislation. A second innovative aspect of our approach to the hazardous waste problem is that the Department of Justice is getting involved in the litigation at the earliest possible date with the Environmental Protection Agency. This means that Department of Justice lawyers work with the EPA Hazardous Waste Task Force in Washington and the ten EPA regional offices to develop cases almost from the date on which the site is initially identified as a possible hazardous waste dump. This permits a type of coordinated litigation which has not previously existed in many areas of federal litigation. It assures that at the earliest time the Justice Department perspective on how the litigation should be handled and the information needed for it are communicated to the client agency, thus avoiding the substantial delay inherent in a process in which the Justice Department becomes involved only after the agency has essentially prepared what it believes is needed for a lawsuit to be brought. This early involvement by the Justice Department also enables us to be aware at an early date of the state involvement with respect to any particular site, the need, if any, for federal involvement, the potential for state assistance with respect to litigation involving a particular site, and the assurance that federal and state involvement are properly coordinated.

Obviously this ambitious program is going to produce an enormous strain on the existing resources and you will not be surprised to know that it is my intent to seek additional resources so that the Hazardous Waste Section can continue to operate at this level as the number of hazardous waste dump sites requiring legal action increases. But that will only be a small part of the increased demands on the Hazardous Waste Section. With the anticipated implementation of the Resource Conservation and Recovery Act permit program during 1980, the Hazardous Waste Section will take on an additional and extremely important responsibility. We will then become responsible for bringing actions to enforce EPA imposed standards as well as defending the regulations themselves. In conjunction and consultation with those states to which permitting authority is delegated, we will also be involved in enforcement actions where state permits have been granted and violated. All of this work will not eliminate or even significantly reduce our previous responsibilities, since the permitting aspects of the Resource Conservation and Recovery Act are addressed to future dumping activities and our present work focuses on trying to clean up the mistakes of the past through the provisions of the Resource Conservation and Recovery Act which authorize litigation to eliminate an imminent and substantial endangerment to the public or the environment.

In our litigation with respect to abandoned sites and in our anticipated litigation implementing the Resource Conservation and Recovery Act program, the focus will be upon all of those responsible for the hazard created by the improper disposal of toxic wastes. Thus, we will not only sue the owner of the dump site but also the one responsible for transporting the wastes to the site and those who have generated the wastes. In an ultra-hazardous activity there is no room for hyper-technical legal distinctions between levels of culpability. All those who benefited from and participated in the creation of the problem must be strictly liable for correcting the damage their actions or inactions have caused.

Our litigation is also not intended to wait until the consequences of improper waste disposal are causing an adverse impact on the public or the environment. The provisions of the Resource Conservation and Recovery Act clearly intend that litigation and relief be based upon an anticipated danger. This assures that hazardous wastes are controlled before the public or the environment are seriously damaged and it substantially reduces the cost of remedial action by getting to the clean-up problem before the hazardous wastes have been substantially dispersed in the environment.

Having discussed our program for dealing with abandoned and existing sites and our anticipated program for dealing with future hazardous waste dumping, you might assume that we have the problem well in hand. Unfortunately that is not the case. Despite the substantial improvements that are certain to occur as the result of the implementation of the Resource Conservation and Recovery Act, nonetheless substantial gaps exist in the law. The two most significant are: (1) the absence of any serious criminal liability for those who engage in reckless endangerment of human life by the disposal of hazardous waste; and (2) the absence of a large sum of money to move swiftly to clean up hazardous waste dumps.
rather than waiting until litigation has been successfully completed.

There are two important legislative proposals on Capitol Hill now that are designed to be responsive to both of these problems. Both of them, however, are in serious trouble as a result of substantial pressures from the Chemical Manufacturers Association and the chemical industry.

The legislative deficiencies in the area of criminal penalties are apparent if one examines the existing Resource Conservation and Recovery Act which provides for nothing more serious than a $25,000 fine and a one year jail sentence for a first time offender who operates a hazardous waste dumping activity without a permit. We are already aware of situations in which the health and safety of thousands of people are being placed at risk everyday as a result of grossly irresponsible midnight dumping activities. The continuing threat of deadly cyanide gas escaping from the Pittston mine in Pittston, Pennsylvania as a result of the midnight dumping of wastes through a borehole into an abandoned coal mine is ample evidence of the need to do something more than a light slap on the wrist for those ultimately found to be responsible for that potential catastrophe. Thus, we have sought legislation that would assure that a person who recklessly creates a substantial endangerment to the public health or environment or who knowingly and willfully violates a provision of the Resource Conservation and Recovery Act should be guilty of a felony, subject to a more severe fine and prison term than provided under existing law.

Existing federal law is now behind where many of the states are and we feel that without such a felony it would be difficult for us to mobilize the federal government’s investigative resources to identify those truly responsible for these serious environmental problems and to bring them to justice.

A second and equally significant deficiency in the existing law is the inability of the federal government when it has identified a hazard to move swiftly to correct the problem. Such swift action is only possible if a superfund of money is available which can be used as needed to clean up the hazardous dump situation leaving time-consuming litigation to a later day.

Superfund legislation, however, has met the full brunt of chemical industry objections for here, for the first time, the industry is being asked as a whole to contribute to the fund of money needed to clean up the serious hazards which now exist as a result of past actions of that industry. The industry complaint that such assistance does not fairly apportion every dollar and cent to the most responsible party must ring hollow to those who live adjacent to abandoned hazardous waste dumps where fire hazards, toxic fumes, water well pollution and worse are a daily problem. To that much larger segment of the public, they properly see the chemical industry as that industry which produced the hazardous waste which now cause the problems which these people suffer.

The chemical industry effort to tap the federal treasury for the cost of cleaning up the dumps and thus assessing the entire American public for a problem created essentially by a single industry is an invitation to industries in the future to act irresponsibly, confident that when the problems they create get out of hand the federal government will not seek reimbursement from the industry but rather seek reimbursement from the general public. It is the position of the Department of Justice and of this administration that superfund legislation which places the financial burden on the industry which has gained the financial benefit of the activities which have created the problems which these people suffer.

The Hazardous Waste Section is fighting a losing battle against an environmental problem whose proportions are growing arithmetically as our knowledge of the extent of the hazard increases. State resources are also being strained beyond their capabilities. Hopefully, this year we will see legislative action which will provide us with the tools needed to fully cope with the hazardous waste problem.

Statement of

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Sanitary landfills, in some instances, have failed to meet the needs of a nation sensitive to environmental impacts. The consequence of this failure has resulted in political actions by way of legislation presently embodied in the Resource Recovery Act of 1976 (RCRA), which seeks to upgrade by outlawing open dumping and by encouraging states to adopt standards in accordance with
federal guidelines for the creation and operation of sanitary landfills. In addition, it seeks alternate methods of solid waste disposal, chiefly through resource recovery.

The federal government, as well as many states, recognize that resource recovery is merely a companion to a sanitary landfill and that landfills are absolutely vital for the foreseeable future. The literature, as well as the industry, accepts this conclusion without challenge.

In urban areas it is most difficult to establish a sanitary landfill due to the immense pressures of environmental groups and the shortage of available property and sensitivity of the legislators who quickly respond to their constituents when the question is raised, "It might be necessary, but why here?" by attempting to block or legislating against the proposed landfill. Needless to say, economic considerations require that the sanitary landfill be in somewhat close proximity with generators of solid waste. In such a setting, site selection for a new landfill is becoming increasingly difficult. Therefore, the existing facilities assume a greater and more important role in the evolving process of solid waste disposal.

The more difficult problems in site selection of a new landfill or compliance in respect to existing landfills is the impact of these landfills on surface and underground water. The Federal Pure Water Act, 33 U.S.C. 1251 et seq and the imminent danger provisions of RCRA, 42 U.S.C. 6973, are the statutes which most directly bear upon this problem.

Wetlands have heretofore been the sites most often selected for sanitary landfills. In fact, in one eastern state, eighty-five percent of the existing landfills were in marshlands or abandoned sand and gravel pits. Nationwide, it is estimated that twenty-five percent of all landfills are presently located in wetlands. These landfills, to continue operation, must attempt to comply with the Federal Pure Water Act and must not run afoul of the imminent danger provisions of RCRA. Needless to say, in the selection of a new landfill site, one must avoid these areas since the problems are severe, and in some cases, one could not hope to meet the criteria required of the Federal Pure Water Act at all. Section 1311 of the Pure Water Act prohibits the discharge of any pollutants into navigable waters or tributaries thereof except in compliance with certain sections of Title 33. Without the necessity of relying on legalisms best

reserved for discussions in other forums, a sanitary landfill at or near wetlands or near tributaries of a navigable stream raises the following questions:

A. Can the sanitary landfill be so designed as to prevent the discharge of any pollutant?

B. Can one obtain a NPDES permit for any escaping pollutant? And if so, what industry standards exist, and in addition, is the nature of the discharge by a landfill of such inconsistency that realistic parameters cannot be defined?

Failure to comply with the mandates of the Pure Water Act carries with it the potential of severe penalties, both civil and criminal, and in addition, injunctive relief may be sought that may entail substantial expenditures. Existing landfills situated in wetlands are most directly affected by the legislation hereinbefore referred to, and make their continuing operation extremely perilous or requires the expenditure of vast amounts of money in an attempt at compliance, which cannot be assured.

Aside and apart from the problems above discussed, the imminent danger provisions of RCRA have clear application if the landfill is located over an aquifer. Needless to say, if the aquifer over which such landfill is located, is utilized for drinking water purposes, the danger is obvious. It might be said at this point that whatever engineering design may be employed to protect such an aquifer from intrusion by leachate, it is doubtful that any engineering firm would ever warrant or certify that the natural or artificial barriers between the leachate and such an aquifer are fail-proof. As a consequence, a substantial risk must be borne by the operator: A risk that one of normal prudence may be unwilling to assume, or if willing to assume it for a price, the consumer may be unwilling to pay it.

In conclusion, present legislation has thrust upon the operators of existing landfills a burden of such magnitude that prudence may require the operators to cease operation due to the potential risk, especially in wetlands. In addition, permits to start a new landfill are presently difficult to obtain.

Legislation is, therefore, required to either excuse landfill operators of liability in the event that the landfill site is approved and certain operating criteria are met, or to place an upper limit on their liability. If the law is strictly enforced or outer limits of liability not prescribed, our newer technology of resource recovery may lose its most necessary companion — the sanitary landfill.
Outline of Statement of

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Chemical Manufacturers Association (CMA)
Washington, D.C.

I. CMA/Industry Activities
   A. Actively supported RCRA.
   B. Vigorously participated in RCRA regulation development and associated litigation.

II. EPA Regulations
   A. Signed May 2, 1980 — approximately 6 in. of paper—printed on both sides.
   B. Outstanding effort, but very complex since responding to 7 linear ft of comments; Incomplete regulatory program since this is phased program.
   C. Future Industrial Activity — will comment on interim final regulations and will play a role should litigation of regulations occur. Industry will litigate where regulations are technically unsound and/or contrary to the law.
   D. Areas of concern: Although several significant points, may be rectified as a result of further regulatory action.

1. Performance standards versus design/operation standard — without approach will stifle flexibility and necessary innovative technology. Do not want to be tied down to 1980 technology.

2. Siting — issue not addressed in statute or regulations; need future locations or will shut industry down or encourage questionable disposal practices; hopefully RCRA implementation will help soften public perception.

E. Significant Civil and Criminal penalties for failure to notify and continue operation, fail to comply with interim status requirements, and fail to meet permit requirements.

F. 1. Enforcement. CMA favors active enforcement program against those facilities that are in violation of the law or may be creating a hazard to public health.
  2. We have reservations with cases that are technically unsound or highly speculative in nature as to responsible parties.

G. CMA activities — e.g. seminars on RCRA for members of the Hazardous Waste Response Center to assist EPA and States solve abandoned site problems, model state site legislation.