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ARTICLE/PRESENTATION: The 20th Anniversary of Love Canal: Lessons Learned: Conference Held at University at Buffalo, October 8 & 9, 1998: Industrial Policy Since Love Canal

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BIO:

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SUMMARY:

... The time period in which the Superfund statute was passed was an emotional one. ... Third, there was a high degree of concern about the implications of the new liability scheme that was being talked about and which was eventually implemented by Superfund. ... Indeed, just several weeks ago, as I was involved in cost recovery Superfund litigation, I found myself writing a brief describing the industry standards and practices for hazardous waste disposal throughout the 50s, 60s, 70s, and 80s. ... During the course of the litigation, Hooker Chemical Corporation maintained that its disposal practices were in advance of industry and government concern about the environment. ... To further illustrate this point about the nature of past disposal practices, the court referred to a New York State Department of Environment Conservation and Active Hazardous Waste Disposal report which discussed a site, adjacent to a school, owned by the New York State Department of Health where spent solvents were poured down a pipe and into a disposal pit. ... How was it getting into their homes? How could the landfill have contaminated the air within people's homes? Certainly, inhalation would be another common form of exposure that would be of great concern. ...

TEXT:

[*293] The time period in which the Superfund statute was passed was an emotional one. There were three main types of reactions that occurred. First, industry reaction, in general, was one of skepticism about the claims of personal injury, harm or property damage. Second, there was a real sense of outrage at the reaction to industry that was created by the Love Canal situation. People who had viewed themselves as responsible, caring members of the community were now seen as outlaws. Third, there was a high degree of concern about the implications of the new liability scheme that was being talked about and which was eventually implemented by Superfund. I think that, over the years, industry has become resigned to public perceptions about the issues of hazardous waste disposal and the political capital that can be made by politicians from responding dramatically to those concerns. However, these three elements, skepticism, outrage and concern, still color the response to these issues.

Prior to 1978, industrial waste disposal practices, demonstrated across the country and especially in New York State, were very primitive. However, they were entirely legal. While Love Canal was in use, waste disposal was an open and, some would say, notorious activity. There was nothing to hide because nobody was doing anything wrong. That

was certainly the feeling of the company at the time, as well as the feeling of the company throughout the course of the litigation.

Indeed, just several weeks ago, as I was involved in cost recovery Superfund litigation, I found myself writing a brief describing the industry standards and practices for hazardous waste disposal throughout the 50s, 60s, 70s, and 80s. In 1982, the waste disposal regulations covering the disposal of industrial hazardous waste in New York State were one and a one-half pages long. No "L [*294] J" collection systems were required; two feet of dirt thrown over the top of the landfill was deemed adequate cover. That would have been about ten years after Love Canal. During the course of the litigation, Hooker Chemical Corporation maintained that its disposal practices were in advance of industry and government concern about the environment. The State of New York and the federal government brought claims against Hooker and Occidental before Superfund was passed; those cases were amended to include the Superfund causes of action. One of the claims the State of New York made was that Occidental or Hooker should be held liable for punitive damages as a result of their disposal practices at Love Canal. At a very basic level, it's hard to imagine someone being guilty of the extreme conduct that requires the imposition of punitive damages when there were 1,600 waste sites of a similar nature in western New York. Nevertheless, the State pursued that claim. In 1994, the ruling District Court wrote in its decision about Hooker's actions at Love Canal, in terms of the disposal practices: "The overwhelming weight of evidence given by experts in the field of solid waste disposal during the relevant time period shows that Hooker comported with, and often exceeded the standards demanded by statute, proposed by health and other government officials, or followed by others in the industry."

So imagine yourself, a law-abiding citizen, finding yourself being castigated for practices that were entirely legal and ahead of industry standards at the time you were engaged in them. I think your response to that kind of attack would be one of anger or outrage.

To further illustrate this point about the nature of past disposal practices, the court referred to a New York State Department of Environment Conservation and Active Hazardous Waste Disposal report which discussed a site, adjacent to a school, owned by the New York State Department of Health where spent solvents were poured down a pipe and into a disposal pit. This activity occurred over a period of years. Even though the soil was considered "very dense," high levels of solvents were discovered in a monitoring well located on the school property. Evidently, when the Health Department began disposal around 1950, it believed that the solvents could be disposed of safely in this tight soil. In 1971, the State found it had made a [*295] mistake; some solvents had seeped out of the well. The comparison with what occurred at Love Canal is very striking.

Entirely legal practices were made the subject of a very draconian liability scheme. What do we do with hazardous wastes today? We bury them in the ground. Twenty years after Love Canal, the principal form of disposal of hazardous waste chemicals is land disposal. Certainly, the disposal occurs in facilities that are engineered to more exacting standards than a place like the Love Canal. Nevertheless, as you've heard here today, people oppose the incineration of these wastes and certainly oppose the disposal of these wastes in streams and waterways, which was the way to do it before land disposal. Hence, twenty years later, land disposal is still the preferred method of disposal.

Another reason for skepticism about the health claims at Love Canal was knowledge. When Love Canal burst upon the scene the human health effects of chronic exposures to low levels of toxic chemicals were not only unknown, but also not a significant area of industry or scientific concern. Most data and all safeguards were directed to acute and intensive exposures of the type to be expected of industrial workers or the kind of catastrophic events, which while rare, certainly adversely impact nearby residents.

Coming out of a period of post-war growth, experimentation and progress, the prevailing view was that chemicals were produced to enhance the standard of living by increasing agricultural production, decreasing disease, and otherwise developing products which would make our lives better. Indeed, many of the chemicals that were found in the homes surrounding Love Canal at the time the analytical work was done were common constituents of everyday household or consumer products. Not the least among them were such items as nail polish, which contains toluene.

Another common unfortunate pollutant in households is cigarette smoke, which contains polycyclins, aromatic hydrocarbons, carbon monoxide and formaldehyde. Also, shampoo for head lice, still on the market today, contains lindane. How could people be claiming that Love Canal was the source of pollutant chemicals in their homes by virtue of the household products they use?

[*296] Another reason for the source of skepticism was the ambiguous mechanism for the delivery of toxic chemicals. Everyone at Love Canal was on a public drinking water supply. Nobody ingested these chemicals through the drinking water. How was it getting into their homes? How could the landfill have contaminated the air within people's homes? Certainly, inhalation would be another common form of exposure that would be of great concern. There really weren't any answers to these questions. But as facts became available, it became clear that there were problems involved with trying to match health effects with alleged exposures.

Principally, there were no scientific mechanisms for matching health effects with alleged exposures. The science of measuring chemicals in air and water was very primitive at the time. Originally, the first level of air testing done in the basements of the first ring of homes at Love Canal showed higher levels of chemicals than the second or third ring of homes. One plausible explanation for the decreasing levels of concentrations of chemicals was, as propounded by some, decreasing contamination as one moved outward from the Canal.

Another equally plausible and more scientific explanation was that when chemicals in the first ring of homes were measured, the equipment used was more crude, and the scientists less technically equipped to do the testing. In those situations, the results that get reported tend to be higher. As equipment and sophistication improved, levels closer to reality began to emerge in the readings. Nevertheless, there were still no signs to link the very small levels with any kind of health effect. The other problem that emerged was in testing the air. When the air in the homes was tested there were no controls on the data collected in the basements. The basements were not emptied of common household products that could cause cross-contamination of the equipment and the analytical sampling devices were not secured against tampering. I know that it verges on the incredible for me to suggest to you that people tampered with these testing devices, but it was known to have occurred.

Health studies were completed and some hysteria ensued. However, none of these health studies ever demonstrated a connection between the chemicals of Love Canal and the illnesses that were [*297] reported. There was no evidence of increased rates of cancer, respiratory ailments, nervous disorders, liver damage, or any other human ailment among residents of Love Canal. There was never any credible scientific evidence that inhabitants of Love Canal experienced higher rates of genetic damage, miscarriage, or birth defects than any other population in the United States. This is the result of subsequent analysis of the data that was collected. For the purposes of my talk, what it means is that the initial skepticism that people in industry felt about these claims appeared to be borne out by the scientific data. Nevertheless, we still hear about a correlation between health effects and low levels of exposure; even though the mechanism for exposure and the actual levels of exposure is unknown, and there were no demonstrated health effects shown from all the studies conducted.

The tenants who lived in a low-income housing project directly to the west of the Canal were not included in a number of the health studies done, certainly not the early studies. There was a reason. They were not excluded out of discrimination against their low-income status, but their low-income status was a factor. The Love Canal area used by the federal government for purposes of declaring a disaster was the same area delineated by statute by the State of New York to define the area for which property tax relief would be given to surrounding property owners who were complaining principally about declining housing values, as a result of their proximity to Love Canal. So it began as an effort by the State of New York to give property tax relief to home owners to encourage them to stay in their homes around Love Canal. The tenants were excluded from this area originally, because they did not pay property taxes.

The call for forms of liability to redress these grievances was considered virtually draconian at the time. I am not aware of any other time in our jurisprudence that we combined retroactive, strict joint and several liability for actions taken by any individual or corporation without any type of reasonable defense. The rule of law became: if a corporation

or business deposited hazardous waste in a landfill, they could, and would, be held liable for the total cost of the cleanup, regardless of the amount deposited. It was a terrific liability scheme [*298] in the sense that it was almost impossible for the government to misidentify and hold companies liable for cleanup at inactive hazardous waste sites.

Given that liability scheme, which some may think was fair and deserving, it's not surprising that sentiments of this type were expressed by Dr. Elizabeth Whelan in a book called *Toxic Terror*. n1 Dr. Whelan is the Executive Director of the American Council on Science and Health. These extreme words provide the more extreme view of this picture:

[Love Canal] serves well as the focal point for an expose of the questionable, indeed, immoral and dishonest tactics of those individuals who term themselves "environmentalists" but are in fact mostly a group of anti-corporation, anti-technology advocates. Love Canal is a classic story of half truths, distorted historical facts, unprecedented media exaggeration and misguided government intervention, all of which caused substantially more human upset and misery than did even the most toxic of Hooker's chemicals. In dealing with Love Canal, the environmentalists and their colleagues in the media and the government, acted about as ethically as someone falsely crying fire in a crowded theater. n2

Acknowledging the extreme view, I think that it is not too difficult to see why rational discourse on these topics was impossible for a very long time. The gulf between industry on the one hand, and government and environmentalists on the other hand, has been extremely wide and deep from the outset. Even environmentalists do not count government on their side of the equation. In some instances, environmentalists classify government as no better or no worse than [*299] industry. Industry tends not to view itself as "being in bed" with government; ironically, it probably views the alliance in exactly the opposite way.

So what has industry's response been to the passage of Superfund statute, which has truly set the tone and tenor of cleaning these inactive hazardous waste sites? I don't think there's any question. The response has been two-fold. Externally, it opposes the statute. Internally, it tries to control the cost imposed by the statute. I think it's very important to differentiate between past waste disposal practices, which Love Canal resulted from, and current activities, in terms of production, generation, and disposal of waste created by production. After 1980, most major corporations did not engage in the illegitimate land-filling of hazardous waste that created Love Canal, largely because statutes were passed and enforced that prohibited this method of disposal.

In general, larger corporations responded first to the proposed controls by seeking compliance. Fines for criminal and civil enforcement actions were quite high and the external costs imposed by the statutes and the government encouraged industry to comply. Smaller companies and individual businesses, lacking the luxury of sufficient dollars to comply with the law, did not necessarily fall into step quite as quickly. A recent article appeared on the front page of the Buffalo News regarding the deadline for the removal of underground storage tanks. It described how businesses were given ten years to comply with the statute because it was so costly and onerous to do so. Many small business owners, like many early large corporations, believed themselves to be above the law but have slowly come into compliance.

In terms of the Superfund statute the situation is different. New inactive hazardous waste sites are no longer being created and most of the very serious sites are being discovered and dealt with under the current liability scheme. My personal opinion is that industry's efforts to lobby for legislative changes or reform of the Superfund statute are probably largely misguided in the sense that it's not a growing problem; their resources might be better spent dealing with regulation of ongoing practices. Nevertheless, they continue to [*300] challenge the statute in court and lobby for exemptions to the liability scheme. The exception created for lenders has been successful. Banks have been held liable at Superfund sites and only recently are they able to get exempted from the statute. However, people, like scrap dealers, have not. There are other industry groups, like scrap dealers, who don't believe they should be covered by the Superfund statute. I suspect that they will never be successful in getting removed or exempted from liability, no matter how long they try. So, while there is this continuing effort to mold the statute, I think most companies now are trying to control the costs associated with dealing with this problem. In 1995, government numbers have estimated the cost of Super Fund to private corporations at \$ 11.3 billion.

One-third of the costs attributed to cleanup are related to transactions costs. Corporations are essentially trying to minimize transaction costs. They are looking at remedial, available technologies that permanently deal with the problem of waste disposal in less expensive and more innovative methods. Looking at the different kinds of models to control legal costs, we find standardized forms or approaches in Superfund litigation. Many companies prefer alternative dispute resolution, as if a lot of lawyers in a room arguing without rules will somehow be cheaper, faster and more efficient than a bunch of lawyers in the room arguing under the rules set down by the federal courts. The other effort is spent trying to control remediation costs. There are not many technologies that can be applied. The question is how to get through that process as efficiently as possible so that costs are not astronomical or inappropriate.

Even though the sites have been largely identified, I think that it is worth pointing out a couple of things about Love Canal and the situation today. First, the remediation put into effect at Love Canal was effectuated within two years. The remedial fix proposed is essentially in operation today. On the other hand, since Superfund has been passed, I would venture that not one Superfund site in this country was cleaned up in two years. When I spoke of skepticism of the problem and the process, you will understand me when I tell you that I'm currently working on two Superfund sites, both of which were part of the original National Priority List (NPL). One has just [*301] completed its five-year remedy implemented by the government. After fifteen years it was determined that the fix chosen was compounding the problem instead of solving it. The other site is a landfill that went on the NPL in 1980 and has still not been fully characterized. That means we don't know what the remedy is going to be, so we don't know that it's going to be put in place. Operations at the landfill closed around 1978. So the chosen process has not worked necessarily well in terms of expeditiously cleaning up these sites. However, I do think it has worked very well in terms of finding people to pay for the costs of cleanup. Generally the corporations in municipalities where the landfills have been used by the corporations pay the costs of cleanup. This is a general construct of practices between then, Love Canal, and now.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Hazardous Wastes & Toxic Substances CERCLA & Superfund Enforcement Cleanup
 Costs Environmental Law Hazardous Wastes & Toxic Substances CERCLA & Superfund Cleanup
 Standards Environmental Law Hazardous Wastes & Toxic Substances CERCLA & Superfund Hazardous Substance
 Superfund

FOOTNOTES:

n1 ELIZABETH M. WHELAN, TOXIC TERROR (1985).

n2 *Id.* at 90.