

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

United States of America,  
The State of New York, and  
Urban Development Corporation- Plaintiff(s)  
Love Canal, Inc.

v.

Occidental Chemical Corporation,  
The City of Niagara Falls, New York, and The Board of Education  
of The City of Niagara Falls  
(Love Canal Landfill), Defendants(s)

Civil Action No.  
79-990 (JTC)

PLEASE take notice of the entry of a CONSENT DECREE on  
3/18/96, of which the within is a copy, and entered 3/19/96  
upon the official docket in this case. (Document No.136)

Dated: Buffalo, New York  
March 19, 1996

RODNEY C. EARLY, Clerk  
U.S. District Court  
304 U.S. Courthouse  
68 Court Street  
Buffalo, New York 14202

Enclosure

TO:

Lois J. Schiffer  
Steven R. Baer  
Steven Novick  
Lewis M. Barr  
Patrick H. NeMoyer  
Steven A. Herman  
John H. wheeler  
Jeanne M. Fox  
George A. Shanahan  
✓ Mark Barash  
Thomas H. Truitt  
Steven K. Yablonski  
Paul B. Zuydhoek  
George Berger  
Martin B. Wasser

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,  
THE STATE OF NEW YORK, and  
URBAN DEVELOPMENT CORPORATION-  
LOVE CANAL, INC.,

Plaintiffs,

v.

OCCIDENTAL CHEMICAL CORPORATION,  
THE CITY OF NIAGARA FALLS, NEW YORK,  
and THE BOARD OF EDUCATION  
OF THE CITY OF NIAGARA FALLS  
(Love Canal Landfill),

Defendants.

Civil Action No.  
79-990 (JTC)

CONSENT DECREE BETWEEN  
THE UNITED STATES OF AMERICA AND  
OCCIDENTAL CHEMICAL CORPORATION

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UNITED STATES OF AMERICA,  
THE STATE OF NEW YORK, and  
URBAN DEVELOPMENT CORPORATION-  
LOVE CANAL, INC.,

**v.**

OCCIDENTAL CHEMICAL CORPORATION,  
THE CITY OF NIAGARA FALLS, NEW YORK,  
and THE BOARD OF EDUCATION  
OF THE CITY OF NIAGARA FALLS  
(Love Canal Landfill),

**Defendants.**

Civil Action No.  
79-990 (JTC)

## I. BACKGROUND

1. The United States of America, on behalf of the Administrator of the United States Environmental Protection Agency (EPA) and the Director of the Federal Emergency Management Agency (FEMA), commenced this action on December 20, 1979 and filed Amended Complaints on June 18, 1980 and January 17, 1984 (Complaints), against Occidental Chemical Corporation (OCC) and affiliated companies seeking, inter alia, injunctive relief under Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. § 9606, Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973, Section 13 of the Rivers

and Harbors Act of 1899, 33 U.S.C. § 407, and Section 504 of the Clean Water Act, 33 U.S.C. § 1364, and reimbursement of response costs under Section 107 of CERCLA, 42 U.S.C. § 9607, Section 7003 of RCRA, 42 U.S.C. § 6973, and Section 504 of the Clean Water Act, 33 U.S.C. § 1364, arising out of the disposal by OCC of wastes from the production of chemicals and the release of hazardous substances at the Love Canal Landfill in Niagara County, New York. The original Complaint and First Amended Complaint also made claims for injunctive relief and reimbursement of response costs based on the common law of nuisance, for injunctive relief and civil penalties under Section 309 of the Clean Water Act, 33 U.S.C. § 1319, and for injunctive relief under Section 1431 of the Safe Drinking Water Act, 42 U.S.C. § 300(i). The Complaints also named, for purposes of relief only, the City of Niagara Falls, the Board of Education of the City of Niagara Falls, and the Niagara County Health Department. OCC filed cross-claims against the City of Niagara Falls, the Board of Education of the City of Niagara Falls, the Niagara County Health Department and a counterclaim against the United States for contribution and indemnification (Counterclaim). A cross-claim also was filed against OCC by the City of Niagara Falls. In negotiations regarding the settlement of this action, the United States, on behalf of the federal trustees for natural resources, has also asserted Natural Resource Damages claims arising out of releases from the Love Canal Site.

2. On April 28, 1980, the State of New York (the State) and UDC-Love Canal, Inc. served OCC with a complaint in an action in the Supreme Court of the State of New York, Niagara County, asserting various common law claims of public and private nuisance and restitution and compensation for damages for injury to the air, land and water resources of the State, and for punitive damages arising from OCC disposal activities at the Love Canal Landfill. This proceeding was stayed upon a motion by OCC.

3. Upon motion by OCC, the State was ordered to be joined in this action, and the State filed a complaint in this matter on September 18, 1980, asserting the same claims previously asserted in the State Supreme Court action. The State subsequently filed a Supplemental and Amended Complaint on January 17,

1984, amending the claims previously asserted and adding claims pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, for the recovery of response costs and further remediation at the Love Canal Site. OCC filed a counterclaim against the State for contribution and indemnification.

4. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Love Canal Site on the National Priorities List by publication in the Federal Register (47 Fed. Reg. 58476 (Dec. 30, 1982) (proposed rule), 48 Fed. Reg. 40658 (Sept. 8, 1983) (final rule), 40 C.F.R. Part 300, Appendix B).

5. As a result of acknowledged disposal at the Love Canal Landfill of wastes, including waste from the production of chemicals, during the 1940s and 1950s, on February 23, 1988 (as amended May 12, 1988), the United States District Court for the Western District of New York (the Court) determined that OCC is strictly, jointly and severally liable as defined in CERCLA Section 107, 42 U.S.C. § 9607 (United States v. Hooker Chemicals & Plastics Corp., 680 F. Supp. 546). OCC alleges that the United States, acting through the United States Army and other agencies, also is a liable party under CERCLA with regard to releases or threats of release from the Love Canal Site and the United States denies liability. OCC's Counterclaim was tried to the Court and was sub judice as of the date of lodging of this Decree.

6. On September 19, 1989, the Court approved a Partial Consent Decree in this action, and Modification No. 1 thereto, pursuant to which OCC has undertaken the processing, transport and temporary storage of sewer and creek sediments and other wastes excavated from the area around Love Canal and is obligated to provide for their thermal destruction or other permanent treatment. The obligations of the parties under that Partial Consent Decree are not affected by this Decree.

7. On June 6, 1990, the Court granted the motion of Niagara County for summary judgment and dismissed the cross-claim of OCC against the County in this action.

8. On August 28, 1990, four companies previously named as

Defendants in this action: Occidental Petroleum Corporation, Oxy Chemical Corporation, Occidental Chemical Holding Corporation, and Occidental Petroleum Investment Company (Occidental Companies), pursuant to a Stipulation, guaranteed that OCC would perform any Judgment, Order or Decree within 90 days from due demand therefor. In consideration of and subject to said Guarantee, the United States dismissed with prejudice all causes of action set forth in its Complaints against the Occidental Companies. Thus, in the event of the failure of OCC to make the payments required under this Decree, the Occidental Companies otherwise released pursuant to the August 28, 1990 Guarantee are responsible for such payments.

9. On March 17, 1994, the Court, after trial, issued a Decision and Order (United States v. Hooker Chemicals & Plastics Corp., 850 F. Supp. 993) which concluded that the State of New York had failed to establish its claim against OCC for punitive damages.

10. On July 1, 1994, the Court entered a Consent Judgment between the State of New York and OCC resolving the State's remaining claims against OCC and OCC's counterclaim against the State.

11. The purpose of this Consent Decree (Decree) is to resolve, except as provided in Sections IX, X and XI, all claims:

(a) made by the United States against OCC in the Complaints, and all claims for Natural Resource Damages pursuant to Section 107 of CERCLA or any other provisions of law, relating to the disposal, release, or threat of release at or from the Love Canal Site of wastes, including waste from the production of chemicals, through the reimbursement of Response Costs pursuant to Section VI herein, OCC's commitment to reimburse the costs detailed in Section VII herein, and the payment of Natural Resource Damages pursuant to Section VIII herein; the affirmative obligation on the part of OCC to the United States to comply with the requirements of Section 5 of the Consent Judgment between the State of New York and Occidental

Chemical Corporation, entered on July 1, 1994; and OCC's commitment to perform other obligations as detailed in this Decree; and

(b) by OCC against the United States under the Counterclaim through the reimbursement of Response Costs pursuant to Section VI herein.

12. The United States and OCC agree, and this Court by entering this Decree finds, that this Decree has been negotiated by the Parties in good faith, arms-length negotiations; that settlement of this matter will avoid prolonged and complicated litigation between the Parties; and that this Decree is fair, reasonable, and in the public interest. Payments will be for reimbursement of response costs and are compensatory in nature. No amounts are being paid for, or are in lieu of, fines or penalties imposed under CERCLA or any other State or Federal law.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

## **II. JURISDICTION**

13. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over OCC. OCC consents to and shall not challenge entry of this Decree or this Court's jurisdiction to enter and enforce this Decree.

## **III. PARTIES BOUND**

14. This Decree is binding upon the United States and upon OCC and its successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of OCC under this Decree.

## **IV. DEFINITIONS**

15. Unless otherwise expressly provided herein, terms used in this Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Decree or in any appendix attached hereto, the



following definitions shall apply:

(a) "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.;

(b) "Consent Decree" or "Decree" shall mean this Consent Decree and any attached appendix and table;

(c) "Day" shall mean a calendar day. In computing any period of time under this Decree, where the last day for performance would otherwise fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day;

(d) "DOI" shall mean the United States Department of Interior and any successor departments or agencies of the United States;

(e) "DOJ" shall mean the United States Department of Justice and any successor departments or agencies of the United States;

(f) "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States;

(g) "FEMA" shall mean the Federal Emergency Management Agency and any successor departments or agencies of the United States;

(h) "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substances Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a);

(i) "Love Canal Partial Consent Decree" means the Partial Consent Decree approved in this action by the Court on September 19, 1989, and Modification No. 1 thereto;

(j) "NOAA" shall mean the National Oceanic and Atmospheric Administration, an agency of the United States Department of Commerce, and any successor departments or agencies of the United States;

(k) "Natural Resource Damages" shall mean damages, including costs of damages assessment, recoverable under Section 107 of CERCLA or any other provisions of law, for injury to, destruction of, or loss of any and all natural resources resulting from a release of hazardous substances from the Site. No amounts to be paid pursuant to this Decree are for, or in lieu of, fines or penalties imposed under CERCLA or any other State or Federal law;

(l) "OCC" shall mean Occidental Chemical Corporation, its successors and assigns;

(m) "Operation and Maintenance" or "O&M" shall mean the operation and maintenance activities described in the State Consent Judgment and appendices thereto, consisting of: operation of the Love Canal leachate collection system and treatment plant; maintenance and repair of the cap over the Love Canal Landfill, the leachate collection system, the treatment plant, related facilities, and the monitoring system; and monitoring the effectiveness of the remediation of the Love Canal Site;

(n) "Paragraph" shall mean a portion of this Decree identified by an arabic numeral or an upper or lower case letter;

(o) "Parties" shall mean the United States and OCC;

(p) "Plaintiff" or "United States" shall mean the United States and all departments, agencies, or instrumentalities of the United States, including EPA, FEMA, DOJ and all federal trustees for natural resources under CERCLA or any other provisions of law;

(q) "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901 et seq. (also known as the Resource Conservation and Recovery Act);

(r) "Response Costs" shall mean all costs that the United States has incurred or will incur for response actions at or in connection with the Site (as defined below), except for the costs defined in Section VII;

(s) "Section" shall mean a portion of this Decree identified by a roman numeral;

(t) "Site" shall mean, for purposes of this Decree only: (1) the Love Canal Superfund Site, encompassing approximately 70 fenced acres, which includes the Love Canal Landfill, (2) the Love Canal Emergency Declaration Area (EDA), as defined by Section 312 of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, including the 93rd Street School Site, except that portion of the EDA which may be the subject of Civil Action No. 79-987 (102d Street Landfill Site), and (3) those portions of the sewers and creeks at which remedial actions have been taken pursuant to the 1985 and 1987 EPA Records of Decision relating to the sewers and creeks in the vicinity of Love Canal, all of which are located in the City of Niagara Falls and the Town of Wheatfield, New York, as depicted on the map included as Appendix A; and

(u) "State Consent Judgment" means the "Consent Judgment Between the State of New York and Occidental Chemical Corporation" entered in this action July 1, 1994.

**V. COVENANT BY OCC TO PERFORM OBLIGATIONS  
UNDER THE STATE CONSENT JUDGMENT**

16. OCC covenants with the United States that it will perform the obligations imposed upon it under Section 5 of the State Consent Judgment. Thus,

OCC's obligations to the United States under this Decree include, inter alia, the obligation to perform the Operation and Maintenance activities described in the State Consent Judgment and Appendices thereto. The United States may enforce OCC's obligation to perform O&M under the State Consent Judgment, including any changed or additional obligations resulting from modification of Section 5 of the State Consent Judgment, subject to OCC's rights to dispute resolution, as described in this Section.

17. The United States shall have access to all property to which OCC has the legal capacity to grant the United States access at all times necessary to oversee OCC's O&M activities and to take samples relating to soil, groundwater and air conditions at, beneath, or near the Site.

18. The resolution of any disputes arising with respect to the obligations assumed pursuant to this Section shall be performed as follows: Any party, after first attempting to resolve any dispute informally, may move the Court to resolve such dispute. In its motion, the moving party shall describe the nature of the dispute and shall include a proposal for its resolution. In any such dispute, OCC shall have the burden of demonstrating that its position is consistent with this Consent Decree.

#### **VI. REIMBURSEMENT OF PAST RESPONSE COSTS BY OCC AND THE UNITED STATES**

##### **19. Reimbursement by OCC**

(a) Subject to Section XVI, OCC shall make four payments to the United States, the first payment to be made within 90 days of entry of this Decree by the Court and the next three payments annually thereafter on the anniversary of the initial payment. Each payment will consist of \$32,250,000 plus Interest on that amount from August 1, 1995, to the date of payment, with Interest to be compounded annually on October 1. There shall be no Interest penalty for prepayment.

(b) All payments shall be made by FedWire Electronic Funds Transfer (EFT) to the DOJ account in accordance with

current EFT procedures, referencing USAO File Number 79V1618-001, the EPA Region and Site Spill ID Number 02-05, and DOJ Case Number 90-5-1-1-1229, for subsequent transfer by the United States Attorney to the EPA Hazardous Substance Superfund (79.05%) and to the United States on behalf of FEMA (20.95%). Instructions for the routing of the EFT payments shall be provided to OCC by the Financial Litigation Unit of the United States Attorney's Office in the Western District of New York following entry of the Decree. Any payments received by the DOJ after 4:00 p.m. Eastern Time shall be credited on the next business day. OCC shall send notice to EPA and DOJ that each payment has been made in accordance with Section XIII (Notices).

20. Reimbursement by the United States

(a) Within a reasonable time after the effective date of this Decree, the United States shall cause a total of \$8,000,000 to be transferred for reimbursement of the EPA Hazardous Substance Superfund (79.05% or \$6.324 million) and to the United States on behalf of FEMA (20.95% or \$1.676 million) in accordance with established procedures. Any requirement in this Decree for the payment or obligation of funds by the United States shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require the obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, and 1511-1519. In any case where the payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the time established for the payment or obligation of such funds shall be appropriately adjusted. The United States shall notify OCC of payment pursuant to Section XIII.

(b) All payments by the United States to FEMA under this Decree shall be payable to FEMA and shall be sent or delivered to:

Federal Emergency Management Agency  
Office of Financial Management  
Room 726  
500 C Street, S.W.  
Washington, DC 20472  
Attn: Gary D. Johnson  
Chief Financial Officer

**VII. REIMBURSEMENT OF CERTAIN COSTS**  
**INCURRED AFTER AUGUST 1, 1995**

21. In addition to the payments set forth in Section VI, OCC shall reimburse the United States for the following categories of costs, including indirect costs, incurred after August 1, 1995, through payments to the Superfund in accordance with instructions to be provided by EPA, the first payment to be made within 90 days after entry of this Decree:

(a) The United States shall present annual statements of, and OCC shall reimburse the United States for, costs in the following two categories, except that OCC's obligation to pay is limited to a combined and aggregate lifetime total of \$195,000 for both categories (although this limitation does not apply to any costs incurred pursuant to the Reopener Provisions in Section X):

(1) all costs incurred by the United States for payroll, travel, supply, contractor and equipment expenses in the oversight of the activities of the Love Canal Area Revitalization Agency (LCARA) pursuant to the cooperative agreement between LCARA and EPA; and

(2) all costs incurred by the United States for payroll, travel, supply, contractor

and equipment expenses in providing continued information services to the community concerning the Site.

(b) OCC shall reimburse the United States for all costs incurred by the United States for oversight of OCC's performance of O&M pursuant to the terms of the State Consent Judgment. EPA oversight shall include, but shall not be limited to, the performance of five year reviews pursuant to Section 121(c) of CERCLA (42 U.S.C. § 9621(c)). Because the State of New York is the lead agency for oversight of O & M pursuant to the terms of the State Consent Judgment, it is anticipated that the United States' oversight costs will not exceed \$2,500 per year, absent unusual or unanticipated circumstances.

(c) OCC shall reimburse the United States for all costs incurred by the United States through a cooperative agreement with the State of New York for the decommissioning of monitoring wells at Love Canal. It is anticipated that the United States' share of the cost of decommissioning monitoring wells will not exceed \$195,000, absent unusual or unanticipated circumstances.

(d) OCC shall reimburse the United States for 45 percent of Department of Justice Environmental Enforcement Section costs, Environmental Protection Agency (EPA) Region II Regional Counsel costs, and EPA Headquarters costs incurred with respect to this action between August 1, 1995 and the date of the entry of this Consent Decree by the Court, such reimbursement not to exceed a combined and aggregate total of \$125,000 for all such costs.

(e) OCC shall reimburse the United States for all costs of enforcing the terms of this Decree against OCC.

(f) The resolution of any disputes arising with respect to

the reimbursement of costs pursuant to this Section shall be performed as follows: Any party, after first attempting to resolve any dispute informally, may move the Court to resolve such dispute. In its motion, the moving party shall describe the nature of the dispute and shall include a proposal for its resolution. In any such dispute, OCC shall have the burden of demonstrating that its position is consistent with this Consent Decree.

**VIII. PAYMENTS BY OCC IN SATISFACTION OF  
NATURAL RESOURCE DAMAGES CLAIMS**

22. Subject to Section XVI, within 90 days of the effective date of this Consent Decree, OCC shall pay to the United States \$375,000 for Natural Resource Damages in settlement of litigation and not as a fine or penalty, or payment in lieu of any fine or penalty, imposed under CERCLA or any other State or Federal law. Such payment shall be made by FedWire Electronic Funds Transfer (EFT) to the DOJ account in accordance with current EFT procedures, referencing USAO File Number 79V1618-001, the EPA Region and Site Spill ID Number 02-05, and DOJ Case Number 90-5-1-1-1229 and DOI Account Number 14X1618, for subsequent transfer by the United States Attorney to DOI. The United States Attorney shall forward the payment to:

Chief, Division of Finance  
U.S. Fish and Wildlife Service  
4401 North Fairfax Drive  
Arlington, VA 22203

Any payments received by the DOJ after 4:00 p.m. Eastern Time shall be credited on the next business day. OCC shall send notice to DOI that such payment has been made to:

Mark Barash  
Office of the Regional Solicitor  
United States Department of Interior  
One Gateway Center, Suite 612  
Newton Corner, MA 02158-2868

and shall reference Account Number 14X1618 and state that the payment is for



Natural Resource Damages with respect to the Love Canal Site. A copy of the notice letter shall be sent by OCC to the United States as provided in Section XIII.

**23. Disbursement of Funds**

(a) All funds paid pursuant to this Section for Natural Resource Damages arising from the Site shall be held by the Department of the Interior in an interest bearing account in its Natural Resource Damage Assessment and Restoration Fund, with said monies only to be spent in conformity with the terms of this Decree and the procedures set forth in a Memorandum of Agreement to be entered into between the DOI and NOAA, which shall provide for the DOI to undertake activities authorized by this Decree upon the advice and comment of NOAA.

(b) Funds paid pursuant to this Section for Natural Resource Damages shall be available and utilized for the restoration and assessment of trust resources at or affected by the Site as determined by the Supervisor, United States Fish and Wildlife Service, New York Field Office (the Supervisor). None of the funds paid to DOI as Natural Resource Damages pursuant to this Section of this Decree shall be available for any uses or expenditures unless such are directly related to the restoration or assessment of trust resources at or affected by the Site. DOI will undertake a restoration project or projects with the Supervisor giving preferential review to a creek restoration or enhancement project in Niagara County. The Supervisor shall provide reasonable opportunity for OCC to comment on restoration activities undertaken pursuant to this Decree prior to selection.

**IX. FAILURE TO MAKE TIMELY PAYMENT**

**24. Interest on Late Payments.** In the event that any payments required by this Decree are not received when due, Interest shall continue to accrue on the unpaid balance through the date of payment.

25. Stipulated Penalties

(a) If any amounts to be paid by OCC under Section VI of this Decree are not paid within five days of the required date, OCC shall pay to EPA as a stipulated penalty, in addition to the Interest required by this Section, \$7,500 per violation per day that each such payment is late and such penalties shall accrue through the date of payment of the amount due under Section VI.

(b) Stipulated penalties are due and payable to the EPA Hazardous Substances Superfund within 30 days of the date of the demand for payment of the penalty. All payments to EPA under this Paragraph shall be made by certified or cashier's check made payable to the EPA Hazardous Substances Superfund and shall be sent or delivered to:

EPA Region II, Attn: Superfund Accounting  
Site ID 02-05  
P.O. Box 360188M  
Pittsburgh, PA 15251

All payments shall indicate that the payment is for stipulated penalties and shall reference the name and address of the party making payment, the EPA Region and Site Spill ID Number 02-05, USAO File Number 79V1618-01, and DOJ Case Number 90-5-1-1-1229. Copies of checks paid pursuant to this Paragraph, and any accompanying transmittal letters, shall be sent to EPA and DOJ as provided in Section XIII (Notices) and to:

Accounting Operations Section  
Financial Management Branch  
United States Environmental Protection Agency  
290 Broadway, 29th Floor  
New York, NY 10007-1866

26. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Decree.

#### **X. COVENANTS NOT TO SUE BY PLAINTIFF**

27. In consideration of the payments made by OCC under the terms of Sections VI and VIII of this Decree, and except as specifically provided in this Section (Reopener Provisions and Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against OCC and releases OCC, its contractors and employees (to the extent they may be liable in their capacity as contractors or employees) for (1) all claims or causes of action made in the Complaints for Response Costs, restitution, damages, Interest or penalties relating to the Site, and (2) any claim for Natural Resource Damages pursuant to Section 107 of CERCLA or any other provisions of law arising from the disposal, release, or threat of release at or from the Love Canal Site of wastes, including waste from the production of chemicals. These covenants not to sue are conditioned upon the payments by OCC under Sections VI and VIII. These covenants not to sue extend only to OCC and do not extend to any other person, except that the covenant not to sue and release in subparagraph (2) above extends also to the Occidental Companies identified in Paragraph 8.

28. Response Action Reopener Provisions. Notwithstanding any other provision of this Decree, the United States reserves, and this Decree is without prejudice to, the right to seek to compel OCC (A) to perform further response actions relating to the Site or (B) to reimburse the United States for additional costs of response relating to the Site, if:

(a) conditions at the Site which were not previously known to the United States are discovered after the entry of this Decree; or

(b) information is received after the entry of this Decree, and these previously unknown conditions or this new information (together with any other relevant information known at the time of entry of this Decree), indicate that the response actions taken or selected by the United States prior to August 1, 1995 are not protective of human health and the environment under federal law

in effect at the time the reopener is asserted.

In the event that the United States seeks to reopen under this Section, OCC expressly reserves any and all rights, claims and defenses that it has or may have in the future and may assert as a defense that such conditions: (A) were caused by the gross negligence of the United States, the State of New York operating under a cooperative agreement with the United States, or their contractors in the design, construction, operation or maintenance of Site remedial facilities, OCC having the burden of proving such gross negligence; or (B) resulted solely from the disposal activities of any person or entity other than: (1) OCC or its predecessors; (2) a person or entity disposing of hazardous substances on property owned or leased or licensed for use by OCC at the time of disposal; or (3) a person or entity disposing of hazardous substances owned or possessed by OCC. The United States will not seek to compel OCC to implement newly-developed remedial technologies under this paragraph, unless the United States can show that response actions taken or selected by the United States prior to August 1, 1995 are not protective of human health and the environment under federal law in effect at the time the reopener is asserted.

29. For purposes of the preceding paragraph, the information previously received by and the conditions known to the United States shall include only that information in and those conditions set forth in the United States Administrative Record for this Site, all information obtained by the United States in the discovery conducted by the parties in this action prior to the date of lodging of this Decree with the Court, all information provided to the United States by the State of New York relating to the Love Canal Site prior to the date of lodging of this Decree with the Court, the trial record of this action, and all information filed with the Court in this action prior to the date of lodging of this Decree with the Court.

30. Natural Resource Damages Reopener Provisions. Notwithstanding any other provision of this Decree, the United States, on behalf of its natural resource trustees, reserves the right to seek recovery of Natural Resource Damages, based on:

(a) conditions with respect to the Site, unknown to the United States at the date of lodging of this Decree, that result in

releases of hazardous substances subsequent to the date of lodging of this Decree, which releases contribute to injury to, destruction of, or loss of natural resources; or

(b) information received after the date of lodging of the Decree which, together with other relevant information, indicates that there is injury to, destruction of, or loss of natural resources, of a type that was unknown, or of a magnitude greater than was known to the United States at the date of lodging of this Decree.

Subpart (b) of this reservation does not apply to injuries arising from the release, prior to the date of lodging of this Decree, of dioxin or any of the chemicals set forth in the attached Table, from the Site.

31. Reservation of Rights by United States. The covenant not to sue set forth in this Section does not pertain to any matters other than those expressly specified. The United States reserves, and this Decree is without prejudice to, all rights against OCC with respect to all other matters, including but not limited to:

(a) claims based on a failure by OCC to meet a requirement of this Decree;

(b) claims based on a failure by OCC to meet its obligations under: (i) the Love Canal Partial Consent Decree; and (ii) Section 5 of the State Consent Judgment;

(c) claims for costs as described in Section VII;

(d) criminal liability;

(e) claims arising from future releases of hazardous substances caused by OCC at this Site after the date of lodging of this Decree; and

(f) claims asserted in Civil Action No. 79-987 (JTC) relating to the 102d Street Landfill Site.

#### **XI. COVENANT NOT TO SUE BY OCC**

32. OCC covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with

respect to Response Costs or Natural Resources Damages covered by this Decree including, but not limited to:

(a) any direct or indirect claim relating to the Site for reimbursement from the Hazardous Substances Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

(b) any claim arising out of response actions at the Site for which the Response Costs were incurred; and

(c) any claim, relating to the Site, against the United States, including any department, agency, or instrumentality of the United States, pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, or any other provision of law, and OCC further covenants not to sue and releases the United States from all claims against the United States stated in its counterclaim filed in this matter, except as reserved in this Section.

33. Nothing in this Decree shall be deemed to constitute approval or pre-authorization of a claim within the meaning of section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

34. OCC reserves, and this Decree is without prejudice to, all rights against the United States and any other party or person under CERCLA for costs that may be sought from OCC by the United States pursuant to the rights reserved by the United States in paragraphs 28, 30 and 31(c). Any claim by OCC against the United States that the United States contests on the basis that it is not liable under CERCLA, or any other provisions of law, with respect to costs incurred or to be incurred, shall be determined by this Court upon a review of the transcript and exhibits introduced or identified during the Phase I trial in this case. The amount of liability, if any, of the United States shall be determined in a separate proceeding at which additional evidence may be introduced. The law governing such liability and such determination of an amount shall be CERCLA as the statute was in effect during the trial and

subsequent case law applicable thereto.

## **XII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

35. Nothing in this Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Decree. The Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which either party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

36. The Parties agree, and by entering this Decree this Court finds, that OCC, its successors and assigns, the Occidental Companies as described in paragraph 8, and departments, agencies and instrumentalities of the United States are entitled, as of the effective date of this Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Decree. The matters addressed in this Decree (except as specifically provided in Section X) are:

(a) all claims by the United States against OCC in the Complaints, all Natural Resource Damages claims arising out of releases from the Love Canal Site, and the affirmative obligation on the part of OCC to the United States to comply with Section 5 of the State Consent Judgment; and

(b) all claims by OCC against the United States in the Counterclaim.

37. OCC agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Decree, it will notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. OCC also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Decree, it will notify EPA and DOJ in writing, within 10 days of service of the complaint or claim upon it. In addition, OCC shall notify EPA and DOJ, within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related

to this Decree.

### **XIII. NOTICES**

38. Whenever, under the terms of this Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Decree with respect to the United States, EPA, DOJ, and OCC, respectively.

#### **As to the United States or DOJ:**

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice (DJ # 90-5-1-1-1229)  
P.O. Box 7611  
Washington, DC 20044-7611

#### **As to EPA:**

John H. Wheeler  
Senior Attorney  
Office of Enforcement and Compliance Assurance 2272  
United States Environmental Protection Agency  
Waterside Mall; 401 M Street, SW  
Washington, DC 20460

George A. Shanahan  
Assistant Regional Counsel  
New York/Caribbean Superfund Branch  
United States Environmental Protection Agency  
290 Broadway, 17th Floor  
New York, NY 10007-1866

#### **As to OCC:**

J. Alan Mack  
Associate General Counsel  
Occidental Chemical Corporation  
Occidental Tower  
P.O. Box 809050  
Dallas, TX 75380



#### **XIV. RETENTION OF JURISDICTION**

39. This Court shall retain jurisdiction of this matter for the purpose of enforcing the terms of this Decree and resolving all disputes thereunder.

#### **XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

40. This Decree shall be lodged with the Court for a period of 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding this Decree disclose facts or considerations which indicate that this Decree is inappropriate, improper, or inadequate.

41. If for any reason this Court should decline to approve this Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used in any litigation.

#### **XVI. EFFECTIVE DATE**

42. The effective date of this Decree shall be the date upon which it is entered by the Court. If any appeal from the entry of this Decree is filed, and that appeal is still pending as of the date that the first payment is required by Sections VI and VIII, or if the time to appeal has not expired, OCC's obligation to make the payments required by those Sections is modified as follows:

(a) On or before the date that the first payment is required by Sections VI and VIII, OCC shall establish an escrow account (the Escrowee) on behalf of the United States for the payments required by those Sections and shall make such payments to the Escrowee. The Escrowee shall invest all available funds in three month United States Treasury securities, at the highest prevailing interest rate available for such securities. The balance of such funds which cannot be so invested shall be deposited in federally-insured interest-bearing commercial bank accounts. Such funds and accrued interest shall be continually reinvested until such time as any appeal is resolved. If the appeal is still pending as of the date OCC is required to make any

subsequent payment under this Decree, each such payment shall likewise be made to the Escrowee and be invested or reinvested as appropriate. The Escrow agreement between OCC and the escrow agent shall provide that the escrow agent shall submit to the jurisdiction and venue of the United States District Court for the Western District of New York in connection with any litigation arising out of the Escrow agreement. OCC shall notify the United States in writing of the creation and funding of the Escrow as each payment is made. This notice shall be sent by hand or by overnight courier service to:

Chief, Environmental Enforcement Section  
DJ # 90-5-1-1-1229  
Environment and Natural Resources Division  
U.S. Department of Justice  
1425 New York Avenue, N.W.  
Washington, DC 20005.

OCC shall be responsible for all fees, costs and charges of the Escrowee, and those amounts shall not be deducted from the principal or interest owed from the escrow account to the United States.

(b) All funds paid to the Escrowee by OCC shall remain in escrow and may not be withdrawn by any person, except to make the payments required by Sections VI or VIII, or unless a final judicial determination is made that the Decree will not be approved and entered. If that event occurs, all sums in escrow, together with all earned and accrued interest, shall be returned to OCC and Escrowee shall be discharged of any further obligation to the United States for the amount escrowed.

(c) If any amounts are paid in escrow, and subsequently the appeal is resolved without disturbing entry of the Decree, or if the time to take such appeal has expired and no appeal has

been taken, upon maturity, all such funds and accumulated interest shall be paid as provided in Sections VI and VIII. For the period of the escrow, interest accrued on the treasury bills and insured commercial accounts so held shall be in lieu of any Interest otherwise required to be paid by OCC under this Decree.

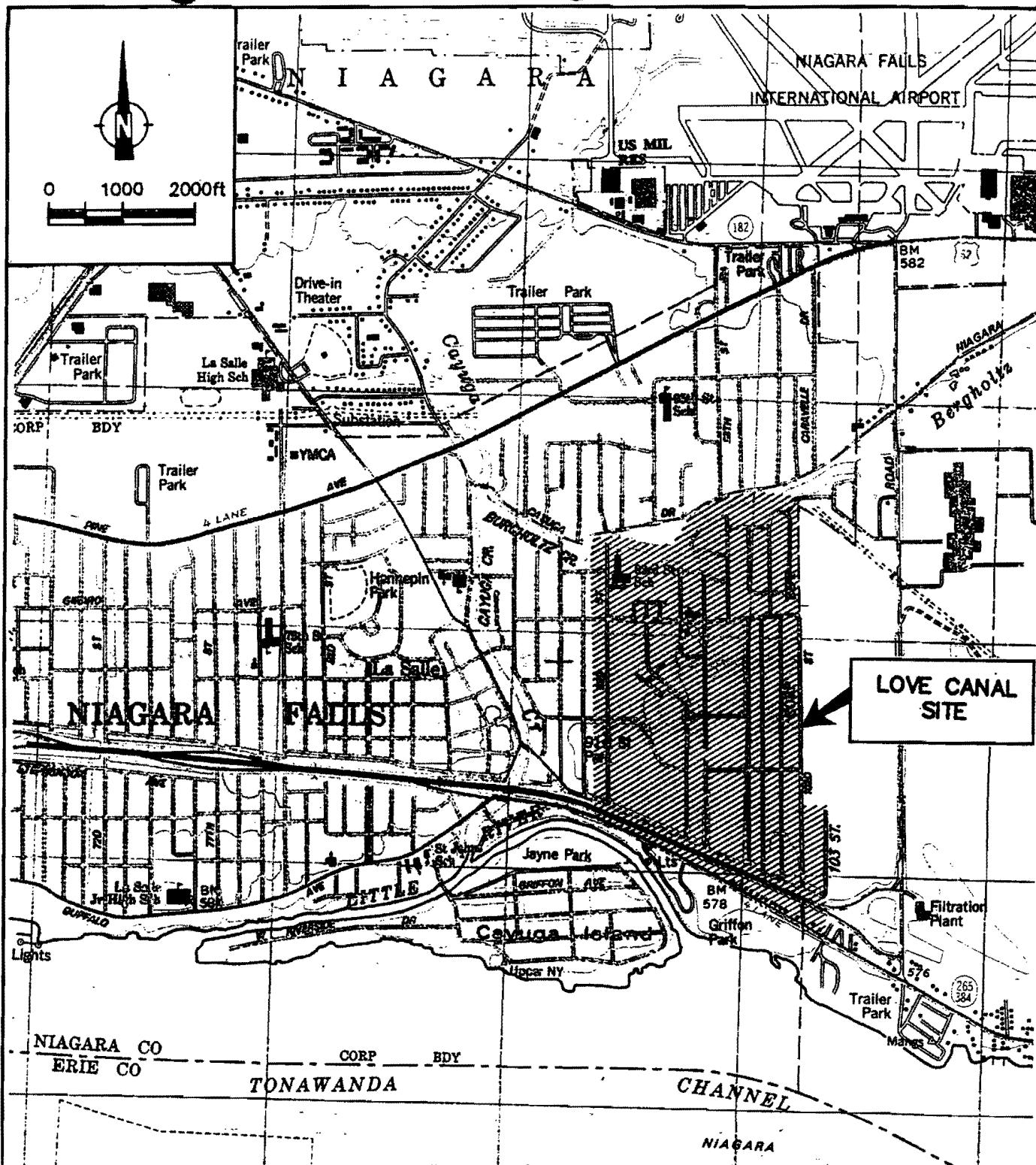
**XVII. SIGNATORIES/SERVICE**

43. The undersigned representative of OCC and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice certifies that he or she is authorized to enter into the terms and conditions of this Decree and to execute and bind legally such Party to this document. This Decree may be signed in counterpart.

44. OCC hereby agrees not to oppose entry of this Decree by this Court or to challenge any provision of this Decree, unless the United States has notified OCC in writing that it no longer supports entry of the Decree.

SO ORDERED THIS 12<sup>th</sup> DAY OF MARCH, 1996

  
\_\_\_\_\_  
JOHN T. CURTIN  
United States District Judge



SOURCE: USGS QUADRANGLE MAP (TONAWANDA WEST, N.Y.)

# LEGEND



LOVE CANAL SITE INCLUDES THOSE PORTIONS OF THE SEWERS AND CREEKS AT WHICH REMEDIAL ACTIONS HAVE BEEN TAKEN PURSUANT TO THE 1985 AND 1987 EPA RECORDS OF DECISION RELATING TO THE SEWERS AND CREEKS IN THE VICINITY OF LOVE CANAL.

CONSENT DECREE BETWEEN THE UNITED STATES OF AMERICA AND OCCIDENTAL CHEMICAL CORPORATION  
LOVE CANAL SITE MAP


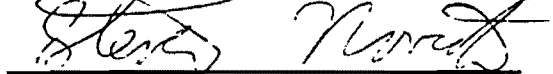
**CRA**

The Parties herein, through their undersigned representatives, who are authorized to enter into this Decree on their behalf, sign as follows:

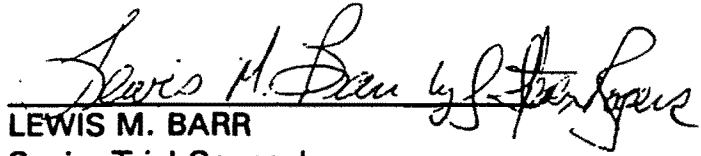
FOR THE UNITED STATES OF AMERICA

Date: *December 20, 1995*

  
\_\_\_\_\_  
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Assistant Attorney General

  
  
\_\_\_\_\_  
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PATRICK H. NeMOYER  
United States Attorney

Date: *Dec 21, 1995* by: *Martin J. Littlefield per SGB*  
MARTIN J. LITTLEFIELD

Assistant United States Attorney  
Western District of New York  
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Date: 12/19/95



**STEVEN A. HERMAN**

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**JOHN H. WHEELER**

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Date:

*Dec. 18, 1995*

  
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Date:

12/18/95

A handwritten signature in dark ink, appearing to read 'Mark Barash', written over a horizontal line.

MARK BARASH

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United States Department of the Interior  
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Suite 612  
Newton Corner, MA 02158-2868

FOR OCCIDENTAL CHEMICAL CORPORATION:

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and

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and

PHILLIPS NIZER BENJAMIN  
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George Berger  
Martin B. Wasser  
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Dated: *December 11, 1995* By: *Steven K. Yablonski*  
STEVEN K. YABLONSKI  
Attorneys for Defendant  
Occidental Chemical Corporation

TABLE 1

LOVE CANAL CHEMICAL LIST

benzene  
benzoic acids and chlorobenzoic acids  
benzyl chlorides  
chlorinated benzenes  
chlorinated C1, C2 and C3 compounds

chlorinated naphthalenes  
chlorinated parafins  
chlorinated phenols  
chlorinated toluenes  
chromium

dodecylmercaptans  
hexachloro and pentachloro butadiene  
hexachlorocyclohexanes  
inorganic antimony compounds  
inorganic arsenic compounds

inorganic cadmium compounds  
inorganic lead compounds  
methylbenzenes  
methylphenols  
octachlorostyrene

polychlorinated dibenzodioxins and furans  
polynucleararomatics  
toluene  
xylenes