

Truax Landfill Part III: DNR issues consent orders to city and county, Superfund negotiated behind closed doors

The Truax Landfill saga was based on reviews of old newspaper stories (from NewspaperArchive.com), publicly available government reports, and hundreds of government reports and communications obtained through open records requests. Given the many missing, withheld and/or incomplete public records—and numerous internal communications that were not written and therefore off the public record—there are a variety of unknowns and gaps in this story, and uncertainties about the accuracy of various details. Citations are removed. If you have questions about this history, know about details I didn't include, and/or are interested in sources for any of specific points in the story, please email mariapowell@mejo.us.

More Oscar Mayer wells contaminated, Superfund on the horizon

In April 1986, DNR wrote a letter to Oscar Mayer to notify the company that water from faucets inside the factory, which received water from four company wells, were contaminated with significant levels of PCE and/or TCE. A well on the southern part of the property closer to Commercial Avenue, Well #3, had the highest levels.¹ Oscar Mayer officials assured DNR that these wells were not used for drinking water but only for “sanitation/cleaning and non-contact cooling water” and that drinking water fountains and any other potable water at the company was provided by the Madison Water Utility.

DNR wrote city engineer Dave Benzschawel in July 1987, to inform him that the Truax Landfill was included on the agency’s “initial inventory of sites or facilities which may cause or threaten to cause environmental pollution” which the state was required by section 144.442(4)(a) to maintain. The criteria for inclusion in the inventory were “sites with documented exceedances of groundwater standards, surface water quality standards or air pollution standards” and “sites that may threaten to cause environmental pollution because of location, physical characteristics or waste type as determined by the Department.” All the sites on the initial inventory would be ranked by January 1988 using the Wisconsin hazard ranking system, which would determine “if a particular site or facility presents a substantial danger to the public health and welfare or the environment.” If the rank was high enough, it would be eligible for repair under the state’s Environmental Repair Fund “if potential responsible party clean-up or federal Superfund monies are not obtained.”^{2,3}

At the end of 1987, the Dane County Corporation Counsel wrote to the county executive: “It is also possible that DNR will nominate this landfill to the National Priority List (NPL) with the consequence that there will be federal dollars for the overhaul cleanup of the landfill. Toxic leachate,

¹ Well #2-TCE 4 & 5.8 (two samples); Well #3-TCE-20; Well #4-ND; Well #5-PCE 13, TCE 2.3. (Oddly, vinyl chloride was not quantified.) The PCE and TCE levels did not exceed existing standards at the time—45 µg/L for TCE (EPA) and 20 µg/L for PCE (state health advisory level). DNR warned, however, that the EPA had recently proposed a Maximum Contaminant Level (MCL) for public water supplies of 5 ug/L for TCE and that for PCE, “there are indications that this advisory number may also be lowered” (and they were subsequently). DNR concluded: “Since the wells in question are reportedly used for non-potable activities, these standards are not applicable and are mentioned for informational purposes only.” The current standard for PCE is 5 µg/L and the proposed standard for TCE is 0.5 µg/L.

² Characteristics considered included the size of the site, depth to groundwater, the surface and underlying soils, the distance to the nearest public or private water supply, population within ¼ mile of the site or facility, waste characteristic and volume, and proximity to protected natural resources.”

³ In 1991, DNR staff filled out an “environmental repair fund” scoring form for “WANG Truax” which included the landfill as well as the other contaminated areas in Truax Field and the base. It received a very high score (indicating that it was very contaminated).

not methane, is the costly aspect of the cleanup and it is only for leachates that Superfund dollars will be available...”

City and county remain at an impasse

Mayor Sensenbrenner’s office continued to negotiate financial costs with the county executive, but neither budgeted any money for the landfill. On October 5, 1987, County Executive Barry proposed an agreement to the mayor, but the city attorney advised him not to accept it. In November 1987 and again in November 1988, Sensenbrenner cut Truax landfill funding from the city budget.⁴

The city-county battles continued to play out in the newspapers. In a March 1988 Cap Times column, the city argued that just as the county has benefitted from the “good that has come” from the transfer of the city land to the county for the airport in the early ‘70s, it also had to accept the “bad”—the groundwater pollution and methane problems-- that have surfaced since then. The county countered that “the site was a *city* dump in years gone by and the problems, therefore, were caused by the city. Thus, it’s the city’s responsibility to clean it up.” A Madison attorney proposed that instead of going through costly lawsuits, the city and county should submit their differences to the American Arbitration Association to settle the dispute. The Cap Times called this “a much better idea than continuing a battle—through the courts or otherwise—that probably will have no end” and “meanwhile, the problems at the landfill site continue to worsen.”

In a more strongly worded State Journal article around the same time, acting county executive Rod Matthews said the city’s refusal to deal with the Truax pollution “is not only a question of pollution at Truax, but also of cooperation with Dane County on other fronts,” and “this issue isn’t going to go away with the next county executive.” He asked Mayor Sensenbrenner to agree to negotiate with American Arbitration Association guidance, but didn’t receive a reply. “The city doesn’t want to admit anything,” Matthews was cited. “They think to open the issue up to any kind of discussion would perhaps force them to play some role in resolving the problem.” He cynically predicted that the problem would get worse no matter how the arbitration issue was resolved.

City tries to hand off investigations to the U.S. military

The city also tried to deflect costs as much as possible to the U.S. military, which shared responsibility for the landfill. In 1987 and 1988, the city had several meetings with the U.S. Army Corps of Engineers, hoping they would take the lead on groundwater investigations and cleanup at the landfill, sewage plant and other parts of Truax Field. “Early data fingerprints upstream (DOD) fuel spills, etc. and downstream soil contamination of heavy metals at Burke STP (sewage treatment plant),” Benzchawel said. “If we’re lucky the Department of Defense and Corps of Engineers will

⁴ In January, 1988, Bernard Saley, who worked for the city for 44 years, wrote a memo on his recollections of hazardous waste dumping at the site (described earlier). The city was likely beginning to gather information on what happened while it owned the landfill, in order to assess how much it might have to pay for cleanup.

spend a significant amount of money, but we wouldn't expect them to pay all of it.”⁵ The military study could also, he speculated, “lead to funding of more investigations or remedial actions.”⁶

Military officials ultimately said they would take the lead on investigations of certain areas, but not others, “due to the DOD limited involvement” at these sites—and were only willing to allot a relatively small amount of funding for this. In April 1988, the U.S. Army Corps of Engineers agreed to spend about \$8,000-10,000 to study the burn pit and oil storage areas at the airport, as well as the old landfill and sewage plant, because the U.S. Air Force and Air National Guard had used the landfill for solvent and fuel disposal—and the military had operated the former Burke sewage plant during the war. However, this small budget would not include anything for remediation.

Meanwhile, the city was well aware of its responsibilities for some of the burn pit contamination. According to the Army Corp of Engineers, the burn pit was created in the early 1950s by the Department of Defense, but was also used by city and county fire departments through 1987. “A site at Truax,” Benschawel wrote, “was used heavily by the Madison Fire Department until 1986 for practice in putting out fires... fuel and solvents were set afire, and what did not ignite soaked into the ground and may also be responsible for some of the contamination.” The Madison Fire Department “was one of the first fire-fighting crews to use this area. Apparently, the City Fire Department provided fire protection at the air field when it was operated by the City and even for a while after the County took over in 1973.” Given this, he wrote, “[w]e may be some liability for clean-up in this area.”

Envirodyne: Former Truax Landfill, Burke plant, burn pits contaminated enough for Superfund

Envirodyne's draft results were shared internally in 1988 and the final report was released in 1989.⁷ A plethora of toxic metals, petroleum compounds, chlorinated and fluorinated compounds and many other hazardous substances were found in soils, groundwater, and surface water in all these areas—which the report collectively referred to as “Truax Field.” Contaminants included mercury, lead, chromium, cadmium, tetrachloroethylene, trichloroethylene, vinyl chloride, methylene chloride, 1, 1, 1-trichloroethane, trichlorofluoromethane, petroleum hydrocarbons, and “numerous fluorinated organics”—many exceeding “maximum contaminant levels” or “maximum contaminant level goals.”⁸

⁵ By this time, the article reported, all five Oscar Mayer wells were contaminated and the company claimed they were no longer used by the company except for cooling purposes. It's not clear if this is correct.

⁶ It is quite a stretch to argue that soil contamination at the Burke sewage treatment plant came from the burn pits and oil storage tanks at the airport about a half mile to the north. This argument was likely put forward by the city to justify asking the military to pay for the investigations.

⁷ Envirodyne, “Engineering Report Contamination Evaluation” Truax Field, Madison Wisconsin (March 1989). The report said “The Department of the Army is responsible for administration of the Defense Restoration Program (DERP). The objective of this program is to identify and remedy environmental problems at facilities formerly owned and operated by the DOD.

⁸ Eight of the ten groundwater wells, all downgradient of the landfill, former wastewater treatment plant, and burn pit, exceeded “maximum contaminant levels” or “maximum contaminant level goals” for one or more of the following: chromium, cadmium, mercury, lead, trichloroethylene, vinyl chloride, and/or xylene. A shallow well downgradient of the former sewage plant had levels of chromium, lead, and cadmium over these levels. Monitoring wells downgradient of the landfill contained a variety of metals, petroleum hydrocarbons, volatile organics, and chlorinated compounds.

An alarming stew of contaminants was also found at the Dane County airport burn pit (fire-training area) directly adjacent to Starkweather Creek—a similar mix as those found in the landfill and sewage plant areas, with even heavier concentrations of petroleum hydrocarbons from burning fuels and other substances. Soils at the burn pit, the report said, had “numerous organic chemicals present in fuels or solvents” (including several chlorinated compounds such as PCE and TCE and their breakdown products) and elevated levels of petroleum hydrocarbons. Groundwater there had similar contamination. Not unexpectedly, standing water in a ditch near the burn pit, which drained to the creek, also contained “organics present in fuels or solvents,”⁹ and investigators reported that a strong solvent odor was apparent during well development and sampling.

Envirodyne scored Truax Field high enough on the Hazard Ranking System (HRS) to be considered under Superfund. The score was high primarily based on levels of trichloroethylene (TCE) in deep groundwater wells (including Oscar Mayer’s) and petroleum hydrocarbons in surface water—but other contaminants found throughout Truax Field contributed as well.

DNR finally threatens city and county with consent order

An April 29, 1989 DNR memo confirmed receipt of the Envirodyne report and noted that a copy was sent to Dave Benzschawel. Handwritten notes on the memo said the report showed “a highly contaminated well near the fire training area with 800 yds of contaminated soils” and visible “oily area.” Further, it also noted, “had (have?) explosives storage on Truax grounds”—presumably referring to the munitions bunkers in the landfill. The report’s alarming results, it seems, finally prompted the department to draft a consent order to the city and county; the draft order was attached to the memo.¹⁰

The draft wasn’t in the files with the memo, and apparently was not finalized and sent to the city and county at that time. But about six months later, DNR wrote an internal “secondary enforcement” memo. “We believe that the groundwater contamination and dangerous methane gas migration may be occurring” at the landfill and “the failure of the parties to take action would constitute violations of sections NR508.04 and NR 140.01, Wis Adm Codes.” To date, it noted, “no official ‘enforcement’ actions” had occurred since September 1984, when DNR sent a “warning letter.” Under “extenuating circumstances” the memo explained the reasons nothing had happened: “[T]he City does not want to take action because they transferred the site to the County after

Trichloroethylene was identified in Oscar Mayer wells. Soils were tested at 12 locations and contaminants were detected in most of them. Contaminants included petroleum hydrocarbons, lead and “numerous organic chemicals.” In sediments in a “decantation pond” at the former plant, Envirodyne found petroleum hydrocarbons, organic solvents (including methylene chloride, 1, 1, 1-trichloroethane, trichlorofluoromethane, and toluene). In a sediment sample from the ditch that drained from the former sewage treatment area to Starkweather Creek, the same hazardous substances were detected, as well as “unidentified organics” and elevated levels of mercury and lead. Tetrachloroethylene and petroleum hydrocarbons were found in surface water in this ditch. Soil samples from a sludge drying bed contained many of the same compounds and “numerous fluorinated organics” (which very likely included PFAS, but methods didn’t specifically test for them in the 1980s). The report noted that samples from the sludge drying cells had “varying levels of organic chemicals and indicated that solvents may have been present in the sludges disposed of” there.

⁹ Tetrachloroethylene, methylene chloride, benzene, toluene, 1, 2-transdichloroethylene, thiobismethane

¹⁰ A November 1990, Carol McCurry from DNR asked the Wisconsin Air National Guard who is responsible for burn pits: https://mejo.us/wp-content/uploads/2020/02/1990.11.29.CEVRDM-74074-v1-Comments_from_WDNR_to_WI_ANG_on_Site_Investigation_Report_.pdf

closure—the County does not want to take action because they did not own/operate the site while it was active.” To attempt ending this impasse—which at that point had gone on for over five years, DNR planned to draft a “Special Order” requesting that an in-field conditions report, a closure plan and a gas extraction plan be submitted.

Six months later, in December 1989, DNR’s enforcement specialist finally wrote to the city and county. “It is the Department’s belief that there are several environmental problem areas, including inadequate monitoring of the landfill impact, inadequate landfill closure and maintenance and landfill contamination of the groundwater, that must be addressed,” it stated. The Department “is interested in issuing an enforcement order requiring you to “undertake specific measures for that purpose.”

Also, as DNR outlined in the letter, the agency had physically inspected the landfill in 1988 and found several problems, including settling in low areas where surface water was collecting and draining through the site cover, “a major settling crack along the entire western edge of the landfill where strong gas odors were evident” and “inadequately designed or nonexistent groundwater monitoring wells surrounding the landfill.” The entire landfill, DNR concluded, had “potentially inadequate cover and “erosion gullies on the eastern side slopes.” Further, the landfill monitoring program and hazardous air contaminations collection and combustion systems (or lack thereof) were inadequate to “determine the extent of any potential hazards to public health, safety, welfare, or the environment” and assure compliance with existing laws. The bunkers in the landfill, DNR noted, “appeared active.”¹¹ A draft consent order was attached to the letter, and the agency proposed a meeting with the city.

Truax Landfill Steering Committee of potentially responsible parties (PRPs) agrees to try to avoid adverse publicity—and Superfund

Following the receipt of the report and DNR letter with the draft consent order, the city formed the “Truax Landfill Steering Committee,” made up of city, county, Oscar Mayer, Kraft, and MMSD officials, attorneys, and environmental consultants. In January, 1990 the group met. The “common goals” listed included “avoid site being designated a Superfund site” and “avoid adverse publicity,” as well as “permit development at air park” and “keep costs to a minimum.” Meeting notes indicate that the group made special efforts to please—or not offend—the most powerful and well-resourced actor on the committee, Oscar Mayer & Company. Under a heading in the minutes, “proposal for Oscar Mayer’s commitment and involvement,” notes say the potentially responsible parties agreed to share information from “in-house studies” and issue a “joint press release on cooperation and goals.”

In February 1990, a Capital Times reporter named Joe Schoenmann somehow got wind of the Envirodyne report and asked DNR for a copy of it. According to internal notes by Barb Gear, she told him “we only have 1 copy” and she didn’t have it--another department did. Schoenmann

¹¹ 1988 internal DNR notes from this inspection said: “Side slopes steep. 2:1? Around army bunkers (bunkers appear active).” The 1989 HRS ranking document says: “Explosives not known to be present. However, they may be stored in the active National Guard facilities adjacent to the landfill.” The 1989 HRS ranking document notes: “Materials buried in landfill not specifically known.”

said the Cap Times would pay for another copy. Having noticed the report's Hazardous Ranking Score, he asked how sites get nominated for Superfund and whether DNR had given the site a score. Gear explained to him that the Army Corps gave them only 1 copy of the report "for our information not for our review and response." Even more strangely, Gear's notes indicate that this single copy was being passed around and at times apparently nobody could find it; one log entry said "our copy of Truax report disappeared from file area!" Eventually, the department made copies of different versions of the report after it was "reassembled," for reasons that weren't explained.^{12,13,14,15}

Presumably the Cap Times reporter was successfully thwarted from his story by DNR's refusal to share a copy of the report. Newspaper stories published shortly after this, likely based on press releases from the Steering Committee, were framed as if little was known yet about Truax Field contamination, and responsible parties were being proactive and cooperative in investigating it. The Envirodyne study and its Superfund rating, the highly contaminated burn pits, and nuclear munitions bunkers in the landfill were not mentioned at all. Further, in local news stories based on these press releases, the hazardous nature of the wastes in the landfill was downplayed by referring to them as "garbage" primarily from residents and businesses.

For instance, a March 1990 Wisconsin State Journal piece by Tim Kelley, "Old dump study costs to be split," reported that the city Board of Estimates approved a budget amendment to pay for half of the \$400,000 cost to "determine how severely garbage underneath the Dane County Regional Airport has poisoned area ground water." The landfill wastes, according to the article, included "ash from open-air garbage burning, as well as raw garbage from city homes and businesses." Mayor Soglin told the reporter that the city was "embarking on a long commitment here to solve these problems," and the county would also contribute funds. Madison taxpayers, meanwhile, would have to contribute up to \$3 million a year starting in 1991. City officials said they "hoped" to get funds later from the U.S. military and Oscar Mayer, who used the landfill for dumping and burning, but hadn't asked them yet because this would delay the investigations.

The article included only a slight hint of what the city and other responsible parties knew about the contamination problems. It vaguely referred to a "city study" (presumably the 1984 landfill leachate study) that found that "leaking waste already has contaminated area groundwater and may be poisoning nearby Starkweather Creek." But the types of toxic contamination found then were not

¹² A sticky note on Barb Gear's call log from Janet Battista said the Dames & Moore consultant had the report and gave it to a DNR staff for copying and "the report is now being reassembled."

¹³ The Envirodyne report was buried until we found it in spring 2018 in a review of old DNR Burke sewage plant records. Oddly, it wasn't in the Truax Landfill files—it was in the Appendix at the end of a very long 2002 Burke Environmental Site Assessment. The version there did not include the full Superfund scoring form with the calculations that led to the HRS ranking. We learned in 2021 that the version with the full Superfund ranking was placed in the "spills" file, but not other files. We canned the report and asked DNR to put it on the BRRTS site for the Truax Landfill.

¹⁴ [2016 Ramboll ESA report](#) for Oscar Mayer property says Truax Landfill was listed on HRS in 1994:

¹⁵ Though the Envirodyne report maps depicted a very odd-shaped gap in the middle of the landfill—where Camp Woodchuck was located—it didn't mention it or the nuclear rocket bunkers at all. At that point, the bunkers were still there, but it is unclear what was stored in them. (1985 Truax field landfill inventory notes in DNR file mentions abandoned military bunkers).

mentioned, nor were the much more damning and disturbing results in the recent Envirodyne study.^{16,17}

In the midst of the landfill debacles, explosive methane problems grew

Concerns about methane gas buildup under city landfills had been increasing since the 1980s and the city passed several ordinances requiring landfill gas monitoring and “gas migration control” at buildings near landfills. City monitoring at Truax landfill from late 1983 through March 1984 indicated that “a pocket of landfill gas” was migrating from the landfill to the northwest. City engineering staff concluded, however, that the gas would “vent itself” through the sandy soils before reaching any properties to the west.

As with the groundwater contamination issue, the city and county haggled contentiously throughout the 1980s about who was responsible to pay for methane control systems at the landfill. The county was unhappy that city ordinances required developers of projects within 1,000 feet of the landfill to provide special protection against methane, because this slowed down development at the site.

In early 1988, the county offered to split the estimated \$300,000 cost of methane controls 50-50 with the city. The acting county executive at the time, Rod Matthews, even offered that the county would cover a bit more, because the county wanted to correct the methane problem as soon as possible so it could “proceed to develop land near the landfill site.”

The gas problem nearly blew up—literally—in 1990. In August, the city wrote to the airport, notifying them of high methane levels and requiring immediate ventilation of buildings just to the west of the landfill, which were primarily business and industrial storage facilities, including Oscar Mayer’s plastics resin storage facility (highly toxic materials). The city also recommended that all tenants of buildings be contacted to find out if they had explosive and/or flammable chemicals stored in their buildings, and advised that “it would also be beneficial if you could ban or convince tenants not to store gasoline in these buildings.”¹⁸ The city said it would monitor landfill gas in the buildings twice a week “until the situation was rectified.” Nothing was mentioned in these communications about the military’s munitions storage bunker in the middle of the landfill (though the city was well aware of it).

A little over a week later, the city engineer and Fire Department wrote to the county demanding that warehouses adjacent to the landfill be evacuated because methane had reached explosive levels beneath them. Benzschawel explained to reporters that the unlined landfill was on top of sandy permeable soils, which “allowed the gas to migrate much farther than the state-of-the-

¹⁶ Presumably this was the city’s 1984 Truax Landfill leachate study

¹⁷ On April 27, 1990, Barb Gear said she asked colleague Marie Stewart where she sampled Starkweather Creek. Stewart said north of Anderson Road, in culvert. “She told me there have been some spills of antifreeze in ditches on the airport. The County is working on this. It’s pretty contaminated up by the terminal.”

¹⁸ As described in an earlier chapter, for some time, in addition to storing saran pellets on site, Oscar Mayer stored some of its plastic “resins” in a building along Packers leased from Dane County, just west of the Truax landfill. In May 1981, a fire broke out in the company’s Packers Avenue resin storage building and spread to the adjacent Badger Sheet Metal building next to it, destroying both buildings and causing a significant fish kill. Nobody ever identified the cause of the fire.

art landfill today” and increases in heat and humidity had “caused expansion and growth of the underground methane cloud.”

At the DNR’s request, thirty-six homes west of Packers were checked by the Fire Department, but no problems were found according to news reports. Residents whose homes were tested told the State Journal that though all of the attention “gets you to wondering....we’re not too much up in arms over it as long as we know the firemen are keeping close tabs on it.”

Though never discussed publicly, hazardous chemicals in vapors emanating from contaminated groundwater were also emitted from the landfill’s methane extraction systems (including benzene and vinyl chloride). On July 13, 1990, DNR wrote to the city outlining requirements for hazardous air contaminant control from the landfill, and a subsequent DNR consent order in 1992 included air monitoring requirements.¹⁹

DNR consent order issued, PRPs bluff Superfund public engagement requirements

On May 25, 1990, DNR issued the first official consent order to the city and the county, requiring both entities to initiate landfill groundwater investigations and submit plans for additional monitoring within seven months. The draft order went through several iterations, with extensive internal DNR discussions and some input from the city and county.^{20,21}

In addition to landfill monitoring, the order required that the city and county evaluate water quality in private wells “within 1,200 feet of the estimated limits of the fill.” The Madison Department of Public Health sent a letter to residents living near Truax Field, letting them know that the City and County had found “shallow groundwater contamination in the area immediately surrounding” Truax Field. The department offered free testing to anyone who had their own private drinking water well.²²

Superfund discussions continued behind closed doors. Linda Clifford, special counsel for Dane County, raised further concerns about complying with components in the Superfund “National Contingency Plan” (NCP) after looking into the statutory requirements and developing case law.²³ On August 6, 1990, she wrote to the PRPs: “Our deliberations over the last half-year largely have assumed that any litigation to distribute clean-up costs as between members of the steering committee and/or others would take place within the framework of the Comprehensive Environmental Response and Compensation and Liability act of 1980 (“CERCLA”) and the Superfund Amendments and Reauthorization Act of 1986 (“SARA”) 42 U.S.C. sec 9601 et seq.

¹⁹ In November, 1990 the county proposed the Truax landfill and Burke sewage sites as a possible site for a new jail.

²⁰ Another entry in Gear’s log on April 27, 1990 from Ron Curtis said “I found that D & M proposed consent order doesn’t address haz air contaminant control., while our Dec. 1, 1989 draft did. I thought we should mention it—maybe pursue separately from order.” A May 14, 1990 entry said Bill Scott, a lawyer in Milwaukee was “working on the tank farm and burn pit” and “asked questions about the geology and water supply wells in the Truax area.” The consent order issued on May 23, 1990 doesn’t seem to include requiring hazardous air contaminant control.

²¹ The consent order states that “The following information was provided to the Department by Dane County and the City of Madison: The landfill originally was excavated by the United States Department of Defense (DOD) in the 1930s or 1940s.” According to numerous records located in the course of this research, this is incorrect.

²² The September 1990 Truax site investigation report says according to the USGS there were 22 private wells near the Truax base that could have been affected by the contaminants there. It’s not clear whether any of these were within the 1200 foot radius of the landfill.

²³ [National Contingency Plan](#)

(“Superfund”). Under Superfund, responsible persons shall be liable for all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; and any other necessary costs of response incurred by any other person consistent with the national contingency plan.” (highlighting in her original). “Thus, to recover clean-up costs from other PRPs in a private cost-recovery action, a plaintiff has the burden of proving that the clean-up costs were incurred “consistent with the national contingency plan.” The purpose of the consistency requirement is to encourage quality, cost-effective clean-up jobs. Costs not incurred consistent with the plan are not recoverable under CERCLA.”²⁴

In September 1990, Clifford sent the Landfill Steering Committee a report about NCP requirements related to public engagement, including conducting “interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns and information needs and to learn how citizens would like to be involved in removal or remedial efforts.” They were also supposed to develop a “formal community relations plan.” According to the regulations, a “community relations” plan means “a program to inform and encourage public participation in the Superfund process and to respond to community concerns.”

After reviewing the NCP report, Benzchawel raised concerns about the “strict guidelines ... regarding the opportunity of input from the public at a formal hearing before remediations are proposed and/or selected.” He knew they had already installed landfill gas extraction system without any public input. Clifford advised the committee on how to show they met these requirements. We found no evidence that they had done so. Under “proposed compliance,” Clifford wrote, “Compliance has been substantially achieved by continual involvement of the City and County executive offices and appearances at city council and county board and governmental committee meetings. We should continue to raise this question at public informational meetings...to determine whether local residents would like to be further involved in the process.” They quickly scheduled a public meeting on October 3.

A very small article appeared in the Wisconsin State Journal on the same day as the meeting. The meeting was described as being “about a series of ventilation wells proposed to remove methane gas from beneath the closed Truax landfill.” A county supervisor explained that “[t]he resolution of the gas problem has been one of my main activities over the last six years” (in other words, admitting that these discussions/decisions had been ongoing for a long time already without public meetings; the interim gas extraction system had already been installed). Further, not only did the article give the public almost no notice for the meeting, it did not mention the significant contamination at the landfill, groundwater and surface water contamination, and the fact that it was being handled under Superfund.

²⁴ Clifford shared “Private Cost Recovery Actions Under CERCLA: The Impact of the Consistency Requirements,” by Daniel M. Steinway as “an excellent summary of the developing issues surrounding the requirement of compliance with the National Contingency Plan.” About a month later, the city’s counsel, Peter Peshek, again wrote the committee about compliance with the NCP and “what role it would play in the committee’s Truax Landfill cleanup goals.” He referred to a case in the Federal District Court for the Eastern District of North Carolina that involved “private cost recovery action” and “substantial compliance with the NCP,” and noted that “this is one of the areas that I have expressed prior concern about.” See: <https://law.justia.com/cases/federal/district-courts/FSupp/702/1229/2252623/>

On October 4 1990, Clifford again wrote to the Steering Committee. “In addition to the public hearing conducted on October 3, 1990,” she said, “there are several additional aspects of public participation that, as a matter of caution, we should undertake to comply substantially with the National Contingency Plan.” Responsible parties should establish a public repository with administrative records from the Truax Landfill site and provide the public with 30 days to review it and provide public comment. Clifford advised that they place Truax Landfill files at the “a local Sherman branch library” on the eastside (this would be Lakeview Library), and place a notice in the paper about it with details on how the public could comment. Public comments, she said, should be sent to DNR and “a designated member of the steering committee such as Dames & Moore.” Implicitly recognizing that they were bluffing meeting these NCP requirements (at the last minute), Clifford acknowledged that “the interim gas extraction measure might be completed before the comment period expires.”

It’s unknown if the “Truax Landfill file” was placed at local libraries and/or if the public submitted any comments. The community likely had no idea that landfill file was in the library; most people not see little notices in the paper--and even if they did, they were provided little/no context for understanding the importance of the issue to them and their families. Not surprisingly, there was no evidence of any public engagement or citizen comments about the landfill in government records.

City concludes the landfill doesn’t pose risks to groundwater, and Oscar Mayer wells can be used as “pump-and-treat!”

In May 1990, city staff interviewed former owners and operators of the landfill, compiling details about specific types of materials and chemicals that had been dumped there over the decades, and who dumped them (summarized earlier). Curiously, by the end of the year, the city concluded that the landfill didn’t pose risks to city groundwater after all—a complete about-face from its warnings in previous years, when its own studies showed that landfill leachates were encroaching on City Well #7 and contamination had already reached Oscar Mayer’s wells.

In another bizarre twist, the city decided to embrace the fact that Oscar Mayer wells were sucking in the contaminant plumes as a solution rather than a problem. In December 1990, a memo from an assistant city attorney to Mayor Soglin claimed that the landfill leachates did not pose a risk to groundwater, in part, because “OM wells act as in-place deep pump and treat.” Presumably Oscar Mayer was included in this new strategy, given that it would assure that their wells would become even more contaminated. The same memo claimed that the landfill leachates wouldn’t affect the deep groundwater because “clay separates the site from deep aquifer.” This was an obviously nonsensical claim, given that contamination had already reached Oscar Mayer’s wells over 700 feet deep; clearly the clay had not stopped it from getting there.

By this point, the city had been discussing using Oscar Mayer wells for treating the plume for some time. In early June of that year, David Benzschawel wrote to the city attorney. “It is important to start a discussion of the ‘Oscar Mayer well option’ now because the DNR Bureau of Wastewater—Municipal Industrial Permits is reviewing Oscar’s permit and may require monitoring. We would need to justify this option and we need to bring in the Water Utility early in case they

have to research the practicality of supplying Oscar's with the makeup water. We also need to get the DNR involved in permitting issues related to the surface water discharge of the pump & treat wells at Oscar's."

In fact, city engineers knew that Oscar Mayer wells had served as *de facto* protection for their wells for years before this. A March 12, 1985 DNR memo with minutes from a meeting with the City of Madison about local landfills noted that Benzchawel said that "groundwater flows toward the Oscar Mayer wells to the southwest..." which pumped 4.5 million gallons a day at that time. Because Well 7 was only used in the summer and only pumped 1.5 million gallons per day, he opined that "there was little chance of contamination as long as Oscar Mayer is pumping its wells at such a great rate."

In August 1990, a set of articles in The Capital Times reported that eight of Madison's municipal drinking water wells were contaminated—a surprise to city officials, who didn't think contamination would make it to its very deep wells. The article highlighted landfills in particular as sources of contamination. Dane county "has more active landfills than any other Wisconsin county and nearly as many abandoned dumps--130 of them, and probably many more--as Milwaukee County. Many of these dumps are slowly leaking cancer-causing chemicals into the sandstone and limestone aquifers from which the Madison Water Utility draws some 31 million gallons of water each day." The Truax landfill was called out. "The Truax site ... poses a threat to two Madison city wells"—Well 7 and Well 15, on Madison's northeast side.²⁵

Mayor is assured there is no problem; DNR thinks otherwise and asks for more investigations

In addition to arguing that Oscar Mayer pumping would protect Well 7, the December 1990 memo from the assistant city attorney to the mayor said an "in-field conditions report" (IFCR) claimed that the landfill was "not bad actor from Ground Water standpoint" because there were "No serious PALS or EG exceedances" and "No large quantities of bad leachate from LF."

The rosy conclusions reported to the mayor were clearly premature. We never found the city's "in-field conditions report," but DNR's June 1991 assessments of the report noted several major gaps and recommended more wells and long-term groundwater sampling.²⁶ A memo written by DNR's Barb Gear highlighted uncertainties about how the geology under the landfill confounded their understanding of how groundwater (and contamination in it) would move beneath it—and more wells were required to assess this. "Geology is highly variable near this landfill," she wrote. "The landfill appears to be located directly over a buried bedrock "drop off" not unlike the bluffs in the driftless area west of Madison. A thick clay layer, found below the southern half of the landfill,

²⁵ Notably, it also said "Madison's deep, high-capacity wells draw in water for miles around, making it nearly impossible to identify the source of a particular contaminant. The same phenomenon raises the possibility that city wells could eventually draw in some of the agricultural chemicals, including atrazine and nitrates, that already are plaguing surrounding rural areas—as well as water from Madison area lakes, which are barely suitable these days for swimming, much less drinking." "...the powerful wells suck water from the lakes into the ground water and toward the wells. The lakes, some scientists believe, could be the source of some of the contaminants already getting into city water," including chloride.

abuts the steep bedrock valley walls somewhere below the middle of the landfill. This abrupt lateral change in geology seems to affect greatly the groundwater flow near the landfill.”

The Phase I investigations, Gear’s memo said, indicated that what they assumed was “downgradient” (to the south) could be wrong--the water may be instead going to the north and northwest. “The highly variable geology, heavy groundwater pumping and other waste sources in the area compound interpretation of groundwater flow directions,” she noted. Given this, she advised, “we also need more wells to determine groundwater quality and to determine where the contamination we suspect exists actually is.” Not all areas, she stressed, had been “adequately evaluated”—especially those that were “downgradient” of the landfill. “In other words,” she concluded, “the question is not “Is there contamination” but “Where is it?”

DNR issued another consent order in August, asking (among other things) for more monitoring wells north and northwest of the landfill to determine groundwater flow direction. Conflicting with the assurances to the mayor earlier in the year, the order said groundwater standards had been exceeded in wells near the landfill, but the cause of these exceedances “has not been determined at this time.”

City and county continue attempt deflecting entire problem to DoD—DoD pushes back

The PRPs continued to lobby the Department of Defense to contribute more to the investigation efforts. In September 1990, the county executive and mayor wrote a joint letter to the U.S. Army Corps of Engineers. They pointed to areas used by the military at the airport property north of the landfill as being the main sources of groundwater contamination. “Based on our consultant’s initial review, it is apparent that the most serious groundwater contamination is coming not from the landfill but upgradient from the jet fuel storage tanks and the burn pit areas formerly used by the Department of Defense” and the March 1989 Envirodyne report had also confirmed that, they wrote.²⁷ Given this, the letter went on to explain why it was “imperative” that the Corps get involved immediately to investigate and remediate the burn pit and oils storage areas and “coordinate those efforts with our efforts at the landfill...”

The bottom line was clearly money. As the letter explained, “the Department of Defense must become involved to relieve the municipalities from an unfair financial burden which they have sustained only by virtue of the DNR order. We understand there already is \$200,000 in DERP funds proposed to be budgeted for this site for 1990-91 and, in view of our urgent needs, should be dedicated to this site promptly. The City, the County, and the other PRPs have strived to avoid litigation in favor of a cooperative approach to addressing these problems responsibly and effectively. If we cannot count on the Department’s prompt cooperative, however, we will have little choice but to effect the Department’s participation through legal redress under the Comprehensive Environmental Restoration and Compensation Liability Act (CERCLA).”

Notes from a PRP meeting at the end of 1990 said the Army Corps had admitted using the burn pit and agreed that it was “an environmental problem.” But it also would “research the involvement of other PRPs (possibly Air National Guard, Madison Fire Dept., etc) and negotiate

²⁷ The 1989 Envirodyne report actually named all of them—the city, the county, and the military as having substantially used the burn pits.

some cost sharing arrangement for cleanup.” Its involvement in the other contaminated areas was “less clear” but the DoD agreed it would participate in PRP negotiations “as at any Superfund site.”

On April 10, 1991, Linda Clifford wrote to Senators Herb Kohl and Kasten asking them to put pressure on the DoD to get funds from the Defense Environmental Restoration Program for Formerly Used Defense Sites (DERP/FUDS) established under the 1986 Superfund Amendment and Reauthorization Act to investigate four areas at Truax Field: the former landfill, sewage plant, burn pit, and jet fuel storage area.

The DNR followed up on April 26, 1991, asking the U.S. Army Corps of Engineers to do more soil and groundwater testing at two of these areas--the contaminated fire training area (burn pit) and jet fuel storage area.²⁸ In August, the Department of Defense wrote to the county’s attorney Linda Clifford, letting her know that the Omaha District of the U.S. Army Corps of Engineers had contracted with a consultant to investigate these areas “to verify the presence of groundwater contamination in the water table aquifer and delineate the horizontal extent of the plume or plumes present in this area.” Presumably the DoD, as before, wasn’t willing to investigate the former landfill and/or sewage plant. The consultants, Tracer Research Corporation, would be taking 80 groundwater samples from the two identified areas and analyzing them for chlorinated solvents and total petroleum hydrocarbons. Upon receipt of the final report, the Truax Landfill Committee (PRPs) were to be briefed.²⁹

The Tracer Research Corporation results were sent to Clifford on January 28, 1992. The soil gas survey methodology TRC used was intended to be preliminary—a precursor to further more extensive studies; the report noted that “The soil gas survey is not intended to be a substitute for conventional methodology but rather to enable conventional methodologies to be used efficiently.” Still, significant (and in some cases alarming) levels of chlorinated compounds and/or “total volatile hydrocarbons” were found. The report concluded: “The isoconcentration contours for total hydrocarbons indicate possible source areas for subsurface contamination in the center of the Fire Training Pit and to the north of the Swanson cul-de-sac [near the fuel storage area]. Further investigations are needed to better define the source and extent of subsurface contamination.”

About a month later, on behalf of the PRPs, Linda Clifford sent Congressman Scott Klug a “briefing paper” on the four contaminated sites at Truax Field, including the burn pit, and asked for his assistance in getting Department of Defense funding for further investigating and remediating them. She explained that “the Department of Defense has resisted any contribution to the landfill cleanup until such time as it determines its ultimate liability for the entire project. This leaves the City, County, and other local PRPs with a severe cash flow burden as it fronts the investigation and cleanup costs. We seek prompt DoD funding. We need help with authorization language in the appropriate legislative/budgetary vehicle.”

²⁸ Notes from the June 1991 PRP meeting say “we discussed generally the need to do PRP research on the burn pit. It was unclear who actually should perform the research since this otherwise would be a DOD-led investigation. We agreed to keep this on the agenda of things to do.”

²⁹ In Barb Gear’s call log, lots of back and forth about lost wells and abandoning wells, including Kaufmann’s wells, later in 1991. The PRPs wanted to abandoned 20 wells. October 21, 1991 The city was trying to get the UW as PRP for old wells that Kaufmann installed as a grad student. They encountered wells that were probably the Army Corp wells.

There is no evidence that any further investigations were ever done at the Darwin burn pit after the 1991 Army Corps testing--until PFAS (which wasn't known about in 1991) was sparsely investigated in soils and groundwater there and another burn pit at the airport in 2020. None of the other contaminants found in the 1989 and/or 1991 Army Corps studies (PCE/TCE, vinyl chloride, metals, petroleum compounds, etc) were tested in the more recent investigations. Most problematically, *no remediation has been done at the burn pits to date*. As they have for decades, the city, county, and military continue to point fingers as to who is responsible and who should pay.^{30,31}

Continued in Part IV...

³⁰ This report was buried. We first found out about it when we discovered the 1991 ACE letter to Clifford.

³¹ The county downplayed its responsibility for the problem as well. In February 1992, a county memo said "The burn pit excavation will affect the county, but the vast majority of burn pit use was by the military, followed by the City of Madison, with lesser use by the county since 1975."