

Avtex Fibers, Front Royal, VA

A Corporate, Demographic, and Environmental Analysis



Avtex Fibers, Front Royal, VA - Viewed from the North

*Compiled by the Environmental Background Information Center
Draft - 12/12/01*

Introduction

Avtex Fibers is a shuttered rayon fiber plant located on the South Fork of the Shenandoah River in Front Royal, Virginia, approximately 90 to 100 miles upstream from the water supply intakes for the nation's Capitol. Operations at the plant, for the better part of 70 years have resulted in massive contamination of soil, surface water, and groundwater water at, under, and around the site. The plant site covers 440 acres, and is bisected North to South with a railroad spur. Records indicate that contamination has migrated in groundwater to the other side of the river, contaminating an additional (approximately) 60 acres.



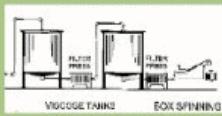
Avtex Fibers Front Royal plant was listed by the EPA as a potential toxic site in 1980, proposed as a national priority list superfund site in 1984 and put on the final list in 1986. Analysis of samples collected at the site has found organics, phenols, and metals (including arsenic and lead) in ground and surface water. Soil has been found to be contaminated with PCBs. The extent of contamination has required large scale demolition of on-site structures, excavation, removal of barrels, removal of contaminated soil, on-site destruction of unstable chemicals (with explosives), pumping and treatment of groundwater, improvements in existing water treatment and sludge treatment plants, perpetual surface and groundwater monitoring, and deed restrictions. While a number of parties have been tapped for the costs of cleanup of this site, records indicate that the lion's share has been borne by FMC Corporation.

The Avtex property has been slated for redevelopment. When finally restored, the property is to be used as a scenic recreational park with hotel accommodations and business facilities. This "brownfields" project will serve as a test of government's and industry's ability to remediate a spectacularly contaminated environment so it can be used safely and productively.

There are several road blocks to success. The first is that the operators and the Environmental Protection Agency may be inclined to gloss over an inadequate cleanup effort in favor of lowering cleanup costs. The degree to which they may succeed in this is directly dependant on the level of citizen involvement in the final cleanup plan and implementation. Without the presence of a vigilant grassroots, the Avtex clean-up could set a dangerous precedent for selling the public on inadequately rehabilitating other abandoned toxic waste sites. If what happens at Avtex amounts to the sweeping of toxic waste under the carpet, then all of America is at risk.

Avtex Fibers Interpretation

Manufacturing Era (1940 - 1989)




Plant Construction and Periods of Ownership

AMERICAN VISCOSE CORPORATION
World's Largest Producer of Rayon Yarn + Lurex Fiber, Ltd., SELLING AGENTS



FMC worldwide



Age of Rayon - Manufacturing Process & History




Manufacturing Lifestyle






Rayon's Many Uses - Defense Industry and Everyday Objects

EDAW



www.avtexfibers.com

Background

According to the web site www.avtexfibers.com, the Avtex Fibers Front Royal, VA site...

is situated in the foothills of the Blue Ridge Mountains. During the 1920s, the site was primarily used for agriculture with orchards along the Shenandoah River and field crops towards the inland areas. In the late 1930s plant construction was initiated with fiber manufacturing operations beginning in 1940. Over the course of 49 years, the plant was used to manufacture fibers such as rayon, polyester, and polypropylene. In 1989, all manufacturing operations were permanently shut down.

American Viscose is described as the original owner of the facility. FMC Corporation purchased the facility from American Viscose in 1963, and sold it to Avtex Fibers in 1980. More on this is found below, following a discussion of the demographic composition of the area in which this facility is located.

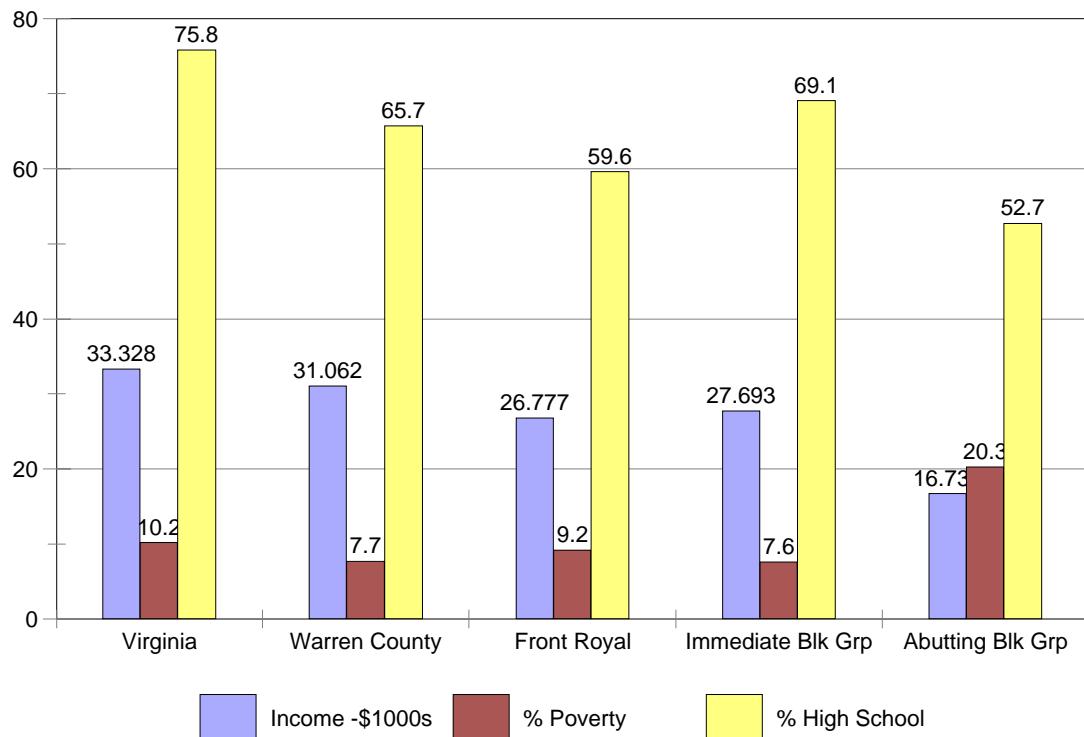
Demographic Composition of Warren Cty, Front Royal, and Areas Adjacent to Avtex

The community of Front Royal, VA (pop 13589) is located in the center of Warren County, VA (pop 31584). The Avtex facility is located nearly in the center of the county.

| | Front Royal | | | Warren County | | | Virginia | | |
|------------|-------------|-------|-----------|---------------|-------|-----------|----------|---------|-----------|
| | 1990 | 2000 | %Increase | 1990 | 2000 | %Increase | 1990 | 2000 | %Increase |
| Persons | 11880 | 13589 | 14.4 | 26142 | 31584 | 20.8 | 6187358 | 7078515 | 14.4 |
| % Black | 8.4 | 8.9 | 0.5 | 4.9 | 4.8 | -0.1 | 18.8 | 19.6 | 0.8 |
| % White | 90.7 | 88.3 | -2.4 | 94.3 | 92.7 | -1.6 | 77.4 | 72.3 | -5.1 |
| % Hisp | 1.1 | 2.1 | 1 | 0.9 | 1.6 | 0.7 | 2.6 | 4.7 | 2.1 |
| % Minority | 9.9 | 13 | 2.1 | 6.3 | 8.4 | 2.1 | 24 | 29.9 | 5.5 |

In 2000, Front Royal, VA was 88.3 % white, down 2.5% from 1990, while the towns' population has increased by 14.4% since then. Although the city of Front Royal itself has a higher percentage of minorities (based on 2000 statistics) than Warren County as a whole, neighborhoods around the facility are whiter than the city and the county. In terms of income, educational attainment, and poverty rates, based on 1990 statistics, the census block group containing the facility is better off than the city as a whole, with rates of poverty similar to the county and educational attainment better than the county as a whole. However, in census block groups immediately adjacent to the one containing the facility, rates of educational attainment and income are substantially lower and poverty rates are substantially higher than the city, county and state. These rates may have changed over the period from 1990 to 2000, but that cannot be determined at this time. Economic data from the 2000 census will not become available until mid 2002.

All in all, the structure of the community around the shut facility suggests a history in which people living in the area immediately next door to the facility were better positioned to take advantage of economic benefits which did not accrue to neighborhoods just slightly farther



away. Those slightly more distant neighborhoods are more likely to contain minority residents.

The History of the Avtex Facility's Ownership

American Viscose, the original owner of the Avtex Front Royal facility, sold the plant in 1963 to the Fortune 500 conglomerate, FMC (Food Machinery Corp.) FMC, incorporated on August 10, 1928 as the John Bean Manufacturing Co., and became the Food Machinery Corporation shortly after going public. FMC was spawned out of Food Machinery in 1961, in light of its growing diversification, including its purchase of the above mentioned American Viscose, a rayon and cellophane manufacturer, in 1963, and Link-Belt, producer of equipment for power transmission and bulk-material handling, in 1967.

In 1976, after losing \$45 million in two years (approximately \$20 million per year on sales of about \$200 million), FMC sold its fibers division to FMC Vice President John N Gregg, who established Avtex Fibers Inc in a \$200 million leveraged buyout.¹ The leveraged buy-out between Gregg and a venture capitalist was reportedly worth “more than \$60 million.”² Gregg is reported to have ended up with a 70% interest in the new company.³

After relocating its San Jose headquarters to Chicago in 1972, FMC sold such slow-growing businesses as its pump and fiber divisions in 1976, its semiconductor division in 1979, its industrial packaging division in 1980, its Niagara Seed Operation in 1980, and its Power Transmission Group in 1981. Further expansion included a 1979 joint venture with Freeport Minerals in a Nevada gold mine, in manufacture of Bradley armored personnel carriers through a 1980's contract with the US Army, and in production of lithium through its 1985 acquisition of Lithium Corp. of America. In a 1986 anti-takeover move, FMC gave employees a larger stake in the company. In 1992, FMC bought Ciba-Geigy's flame-retardants and water-treatment businesses, and combined its defense operations with Harsco as United Defense.⁴

Superfund Site Chronology:

In October 1984, among the 244 new sites proposed by the US EPA for inclusion in the Superfund National Priorities list (NPL), was the Avtex Fibers Front Royal plant's chemical disposal area. Superfund designation authorizes the EPA to order cleanup of hazardous waste

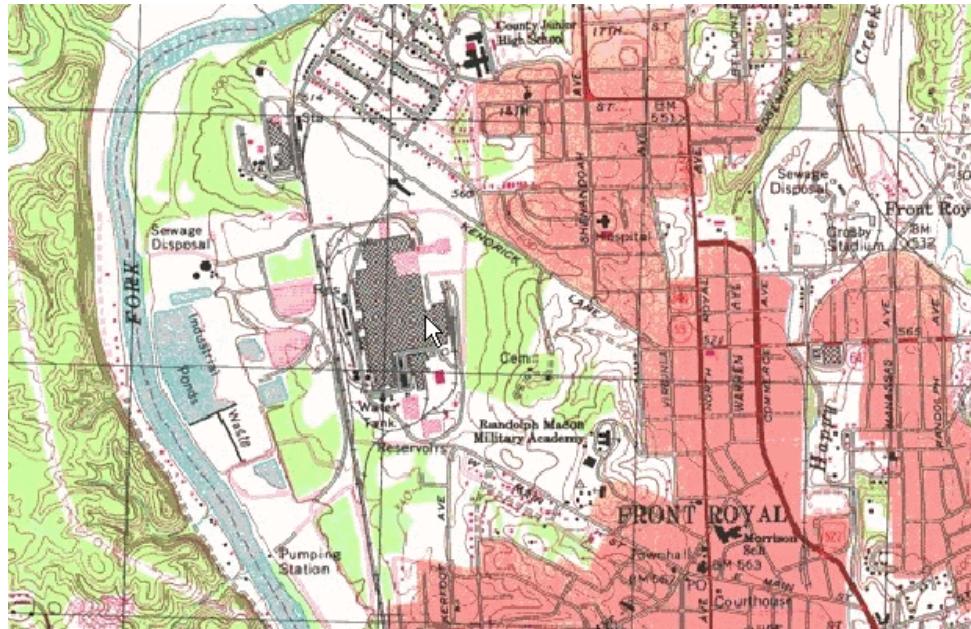
¹See Malcolm Gladwell, “Just What's Behind the Avtex Closing?; Critics Say Company Dug Its Own Grave,” The Washington Post, November 21, 1988. For more on Gregg, see Thomas M. Rohan, “His Yarn Takes Different Twists,” Industry Week, June 28, 1982, and “Avtex steps out in style with specialty fibers,” Chemical Week, May 16, 1984.

² Peter W. Bernstein, “Who Buys Corporate Losers,” Fortune, January 26, 1981, Chemical Week of November 9, 1988 states a figure of \$45 million for the buy-out.

³ See Chemical Week, “Stitching sales together,” July 7, 1976, for info on the sale.

⁴ See Hoover's Company Profile Database, American Public Companies, 2001.

sites; which, in the case of a site like Avtex, would make its current and previous owners liable for the multimillion-dollar cleanup.⁵ Four years later, in October 31, 1988, Avtex, citing financial troubles and pressure from competitors and creditors shut down its Front Royal site, thus idling 1,300 workers, without severance packages or continued medical insurance.⁶



Gregg attributed the closing to the high cost of Canadian and U.S..wood pulp and caustic soda, the main ingredients for making rayon, and Avtex's competitors' (BASF Fibers and Courtaulds Fibers) access to cheaper pulp from South Africa, which made it possible for them to undercut Avtex's prices. In reality, Avtex, already having been forced to pay more than \$750,000 to buy at least 23 polluted properties across the Shenandoah River, faced an array of environmental and regulatory problems⁷. The plant was plagued with millions in fines for various environmental, health and safety violations, and an "unsustainable" \$30 million (\$40 million, according to Gregg) required to meet standards promulgated by the state attorney general.

Indeed, the suspicion within the industry was that the "competitive" problem lay with Avtex's growing environmental liabilities. According to some sources, the company had fallen behind textile-industry environmental and worker safety standards, partly because of the heavy debt load carried by the company since its acquisition from FMC Corp. Substantial reductions in the company's spending had been made to pay for the deal, and to bring to profitability the group of four additional money-losing textile mills brought by Gregg from FMC. Gregg is reported to have said, in 1976: "For a \$200 million operation with more than 800 employees, \$15 million for corporate overhead can't be excessive. But it was just too much for us to make a profit, so we cut it to \$ 7.5 million."

⁵ See "EPA add sites to Superfund priorities list," U.P.I., October 3, 1984.

⁶Alice Agoos, "As Rayon Booms, Avtex, The Market Leader, Falls," Chemical Week, November 9, 1988.

⁷ Washington Post, November 13, 1988.

The shutdown was followed, astonishingly, by a financial bailout from the National Aeronautics and Space Administration and the Pentagon (figures variously cited are \$38, \$39 and \$43 million). Avtex seems to have been the only company that made the rayon material needed by NASA in order to mold the nozzles on the space shuttle's solid fuel rocket booster and by the Air Force for some of its missiles. Reports contend that Avtex's closure would have left NASA with only enough carbon yarn for a year's worth of space shuttle flights, which forced it to keep the plant open until another year's worth of yarn could be manufactured.

What made the bailout especially problematic was the Avtex mill's antiquated condition and dismal environmental and safety records. But for its critical "national security" role, the site was far more plausibly a candidate for immediate closure.⁸ The Department of Defense, the Department of the Air Force, and the National Aeronautics and Space Administration all participated in the bail-out, in addition to Morton Thiokol, Inc., the prime contractor on the space shuttle program.⁹

Though NASA officials declared that settling the firm's regulatory troubles was not a condition of the bailout, the bailout certainly helped Gregg pay for the long overdue environmental bill. By November 21, 1988, the Front Royal rayon mill was running at full capacity again with its 1,300 employees back on the job.

Federal documents uncovered in 1997 by the state's environmental agency would reveal that the \$43 -or so million bailout had been engineered by Colin Powell, the national security adviser during the Reagan administration.¹⁰ Powell had convened a high-level federal task force in November 1988 to rescue Avtex, despite warnings about the plant's ongoing, potentially "catastrophic" damage to the environment. Even after the plant's re-opening and continued concern about its long-term health effects, Sen. John Warner (R-Va.) had declared, following a closed meeting with representatives from the Defense Department, NASA, the EPA, the Justice Department, the Department of Transportation and Virginia state agencies, that keeping the plant running was a matter of national security.¹¹

In 1997, FMC, now a responsible party in the Superfund clean-up, sued the federal government for a "knowing violation" of environmental laws, demanding that the government share cleanup costs for the Avtex Fibers site in Front Royal, having condoned a catastrophe in the making through the operation of the rayon firm.

⁸ Malcolm Gladwell, "Just What's Behind the Avtex Closing?; Critics Say Company Dug Its Own Grave," Washington Post, November 21, 1988.

⁹ Hopkins v. United States, No. 3:97CV147, E.D. Va. Feb. 28, 1997, National Environmental Enforcement Journal, March 1997.

¹⁰ George Archibald, "Powell bailout of polluter has Allen preparing suit; Toxic waste dumped in Virginia river," The Washington Times, February 20, 1997.

¹¹ Malcolm Gladwell, "Just What's Behind the Avtex Closing?; Critics Say Company Dug Its Own Grave," Washington Post, November 21, 1988.

Keeping the Plant Open in the Face of Litigation, Worker Safety Issues and Contamination

According to the Washington Post,¹² State Water Control Board regional engineer William Kregloe queries as to why so many people were buying water treatment from Culligan for their wells, led state officials to inspect those wells in 1982. They pumped out water that “smelled like sulfur and looked like weak tea.” Avtex Fibers thus came under fire for dumping hazardous chemicals into unlined pits that polluted ground water on both sides of the Shenandoah's South Fork. In addition, a State Department of Labor and Industry inspection in 1986, following three deaths from plant accidents, revealed numerous violations of worker safety rules.

On November 2, 1988, two days after the announcement of the plant's closure, State Attorney General Mary Sue Terry sued Avtex, demanding \$19.7 million for environmental damage caused by river and ground water pollution. The suit was not dropped after the firm's reopening, as the state sought to work out a consent order. Avtex claimed to be doing its utmost in dealing with environmental issues/hazards, pointing to yearly expenditures of about \$3 million to clean up ground water, and its implementation of various water treatment systems, including a plant processing 11 million gallons of wastewater per day.¹³ FMC Corp, as Avtex's previous owner, acknowledged its financial responsibility for cleaning up its share of the hazardous waste.

According to the Washington Post, citizen complaints went back many years. For instance, local resident Ronald Nagi approached FMC about “bad” well water at his home across the River from Avtex in 1969, and was rebuffed. Although Avtex had bought out many property owners in two subdivisions with polluted wells across the river, others had been unable to reach settlements. Joe Magnone, a retired Arlington teacher owning 39 undeveloped lots, reportedly sued Avtex in 1984 in Warren County Circuit Court, claiming \$152,000 in actual damages and \$1 million in punitive damages because pollution publicity had made his property worthless.¹⁴ EPA officials supervising the site predicted that clean-up would take between 10 and 30 years to complete.

The state's lawsuit accused Avtex of repeatedly discharging untreated wastewater into the Shenandoah's South Fork and violating its water discharge permit 1,968 times since 1980.¹⁵ The state Air Pollution Control Board was also investigating Avtex for violations. As for occupational hazards, state documents cited Avtex for 1,921 violations of state health and safety laws during the previous year. Avtex had repeatedly breached a consent order (signed in April 1988) to remedy violations, according to Virginia's commissioner of labor and industry. In September, after the roof began to move in one part of the plant, the state threatened Avtex with a lawsuit, thus forcing it to agree to repairs by December 3, 1988.

¹²D'Vera Cohn and Peter Pae, “In Avtex Case, Need for Jobs Outmuscles Fear of Hazards,” Washington Post, November 13, 1988.

¹³ (ibid)

¹⁴ (ibid)

¹⁵ (ibid)

However, Avtex had not agreed to make vital structural repairs in another area of the plant or to install a ventilation system to lower dangerous levels of carbon disulfide, a chemical instantly fatal in large doses and linked to heart and circulatory problems with chronic exposure. Avtex workers were supposed to wear respirators in areas where carbon disulfide was a danger, but many did not, according to state inspectors.

In December 1986, shift supervisor Clarence Conard, who was not wearing a mask, died from overexposure to carbon disulfide and hydrogen sulfide. According to state records, Avtex was later fined \$2,160 for failure to provide respirators, among other violations. State regulators only became aware of the plant's widespread structural problems and dangerous levels of carbon disulfide in 1987, prior to which comprehensive plant inspections had not been conducted.

In early July 1989, after months of negotiations that failed to yield a voluntary cleanup agreement with Avtex and FMC Corp, EPA ordered Avtex to clean-up contaminated ground water in the area at an estimated cost of more than \$9 million. It had been determined that contaminated residues from the rayon-manufacturing process had seeped into ground water, appearing in residents' wells, because of leaks in three viscose wastewater basins designed to hold the leftover chemicals. Avtex was ordered to remove and treat remaining wastewater in the three basins and to back-pump ground water through the plant's wastewater treatment facility until it was clean.

The firm also faced costs of correcting the numerous other environmental, health and safety violations found at the aging plant during state inspections.¹⁶ According to the agreement, hammered out a week or so later between FMC and Avtex on implementing the directive and managing the clean-up, Avtex undertook the planning of the clean-up project with FMC making certain guarantees as to the performance of the project and the adequacy of financial backing.¹⁷

Women's Wear Daily reports that Avtex was fined \$990,000 in late July 1989 by Virginia court Judge Markow for continuing to pollute a Potomac tributary; a fine suspended on condition that plant repairs be completed by February 1990. The company was cited for 99 violations—albeit, not deliberate, of the state water permit since January 1989.¹⁸

¹⁶ See Sandra Evans, "EPA Orders Avtex to Clean Up Water; Rayon Manufacturer's Chemicals Seeping Into Front Royal Wells," Washington Post, July 7, 1989; and William Snoddy, "Avtex cleanup talks yield little; Avtex Fibers Inc. current and former owners discuss who should pay cost of pollution cleanup and control mandated by Virginia" WWD (Women's Wear Daily,) July 10, 1989, Vol. 158, No. 4: 15.

¹⁷ See Robert LaRussa, "Avtex, former owner OK splitting cleanup cost; cleanup of water pollution mandated by the Environmental Protection Agency," WWD (Women's Wear Daily), July 21, 1989, Vol. 158, No. 13: 15.

¹⁸ Robert LaRussa, "Virginia judge fines Avtex, then puts the bill on hold; man-made fibers manufacturer, Avtex Fibers Inc., fined for pollution damages," WWD (Women's Wear Daily), July

Notwithstanding federal government action on ground water contamination, Virginia's suit against the company was the third in a series of the state's demands that Avtex be found in contempt of court and penalized \$2.1 million for violating terms of a December 2, 1988 consent decree. The decree -- which settled the \$19.7 million lawsuit filed by the state against Avtex--, required Avtex to immediately comply with state water pollution laws. The company admitted to violating its discharge permit limits, while averring that the problems could not have been anticipated. Repairs had been made to stop further pollution, but the 50-year-old plant was deteriorating internally. That year, Avtex had violated the requirements of its permit on at least 99 days.

Avtex officials also asserted that it was technologically impossible for them to devise a plan to stop polluting the air with carbon disulfide within 12 months, in accordance with the state air pollution control board's order.¹⁹

On November 10, 1989, Virginia's state water control board, after revoking the facility's wastewater discharge permit for polluting the Shenandoah River with highly toxic PCB's (polychlorinated biphenyls) an oil based chemical used in electrical transformers as a coolant and insulator, finally ordered closure of Avtex's Front Royal rayon plant, State environmental officials had traced the pollution to PCB spills from the plant's electrical transformers and failure to clean up contamination after a 1985 transformer explosion. Richmond circuit court judge Markow ruled, on November 27, 1989, that Avtex probably had been discharging PCB's into the river every day since 1983. The Washington Post also mentions a Virginia criminal investigation against Avtex for possibly deliberately dumping PCB's.²⁰

Avtex Fibers was fined \$6.15 million for pollution of the river by its now-closed rayon plant: \$3 million as penalty for "serious and significant" PCB pollution of the river in violation of Federal law and its state discharge permit, a \$1.15 million fine for violating orders not to discharge PCB's and other contaminants into the Shenandoah, a pending \$2 million fine to be paid immediately to the town of Front Royal and Warren County. Avtex was also ordered to pay for whatever cleanup measures were required (state and environmental officials had been supervising the cleanup of PCB's, contaminated groundwater, and the removal of tons of toxic chemicals, including 370 tons of explosive carbon disulfide since the shutdown).

Government officials announced, in turn, that enough fiber had been stockpiled to last until another manufacturer was certified. Long-term cleanup of the property (expected to take at least a decade) would be paid for, in part, by FMC Corp., and the Federal government, if Avtex was

31, 1989, Vol. 158, No. 19: 7.

¹⁹ See "Avtex plans lay-offs at troubled rayon unit; Avtex Fibers Inc.," Chemical Marketing Reporter, July 10, 1989, Vol. 236, No. 2: Pg. 3.

²⁰ See D'Vera Cohn, "Avtex's Legacy: Big Cleanup Bills, Questions; Abrupt Shutdown Criticized as Environmentally Irresponsible," The Washington Post, November 19, 1989.

financially unable to do so. The company claimed to be unable to pay for the clean-up without incoming revenue given the plant shutdown.

The state ordered Avtex not to remove property from the site, and the Federal government, for its part, seized the factory, filing a lien on the factory for \$40 million, the maximum cost of clean-up.²¹ In February 1990, following a spill of a million gallons of PCB-contaminated water into the Shenondah River, the EPA ordered FMC to take over the operation of the plant as part of the clean-up, having nearly exhausted its \$2 million Avtex budget.

Legal Wrangling over Federal Liability

Avtex Fibers filed for reorganization under chapter 11 bankruptcy court, on February 6, 1990, listing more than \$3 million in debts.²² Filed papers excluded the \$6 million fine imposed by a Virginia Circuit Court for PCB dumping and the \$40 million lien against the facility by the EPA. The total amount of debt to the company's leading creditor, Exxon Chemical Co., amounted to \$498,768.50.²³ The filing, however, would protect the company from its creditors while it devised a plan to repay its debts.

Meanwhile, 60 acres and several stories of decaying plant, were steeped with acids, mercury, lead, PCB's, asbestos, contaminated with carbon disulfide, a yellowish explosive material that causes nerve damage; hills of coal ash, moonscape-like land created by waste sulfides; and 200 acres of chemically loaded lagoons and sludge pools right on the bank of the river remained unattended.

In February 1992, a U.S. District Court determined that the federal government could be held partially liable for the cleanup of a hazardous waste site under the Superfund Act. It maintained that if a public agency controls or operates a facility during the time when pollutants are being released, it can be held jointly and severally liable for cleanup costs as "owner or operator" of the facility.²⁴ The case, which introduced the issue of responsibility for contamination going back to when the Avtex rayon plant had been controlled by the War Production Board during World War II, pitted FMC against the U.S. Commerce Department, as the successor agency to the War Production Board, in the U.S. District Court for the Eastern District of Pennsylvania in Philadelphia.

²¹ "Avtex fined record amount by a judge in Richmond, Va; Avtex Fibers Inc. fined for pollution violations," Chemical Marketing Reporter, November 27, 1989, Vol. 236, No. 22: 5.

²² See D'Vera Cohn, "Avtex Seeks Chapter 11 Protection; Company Lists \$ 3.3 Million Debt," Washington Post, February 10, 1990.

²³ Anne D'Innocenzia, "Avtex Fibers has filed Chapter 11 petition," WWD (Women's Wear Daily), February 20, 1990.

²⁴ Mark A. Hofmann, "Court holds U.S.liable for Superfund cleanup," Business Insurance, March 2, 1992.

Even though the plant had been owned by American Viscose during the war years, it was considered a "war plant" and, thus, "subject to maximum control by the government." FMC Corp, which had purchased the Front Royal site from American Viscose in 1963 and sold it in 1976 to Avtex Fibers-Front Royal Inc, acknowledged partial responsibility for clean-up, but sued the Commerce Department for a contribution, arguing that it was owner, operator or arranger under Superfund law.²⁵

FMC had already succeeded in suing its insurers over coverage for cleanup costs.²⁶ The California Supreme Court ruled that the cost of cleaning up polluted property constitutes "damages" as the word is used in comprehensive general liability policies, and that FMC should be granted coverage whenever policy language is ambiguous. In October 1992, the U.S. Department of Commerce agreed to pay at least 8 percent of the clean-up costs incurred by FMC Corp; a share which could increase to 26 percent, depending on the outcome of appeals to be filed by the Department.²⁷

On December 27, 1993, a 3d Circuit panel held the US government responsible for up to \$78 million in cleanup costs for its takeover of the Avtex rayon site during World War II (including a manufacturing plant, 23 waste disposal basins and landfill areas). Upholding the 1992 lower court decision, Judge Greenberg found that the government was aware that hazardous wastes, including carbon disulfide, sulfuric acid, and zinc, were being disposed of in large quantities.

Wastes were placed in large unlined basins located on-site and, as waste basins were filled, new ones were dug. From 1942 through 1945, at least 65,600 cubic yards of viscose waste were placed in the on-site basins.²⁸

The Third Circuit Court considered that the government had "substantial control" over the facility and had "active involvement in the activities" there — in fact, it had become so involved with the plant activities that it effectively operated the plant along with American Viscose: it determined what product was to be produced, the level of production, the price of the product, and to whom the product would be sold.²⁹ American Viscose, ex-owner of the Front Royal

²⁵ FMC Corp. vs. United States Department of Commerce, et al., United States District Court for the Eastern District of Philadelphia, 786 F. Supp..

²⁶ See Business Insurance, November 26, 1990.

²⁷ (*ibid.*).

²⁸ Shannon P. Duff, "U.S. Held Liable For WWII Factory; 3rd Circuit Issues Ruling in \$ 78 Million Cleanup Action," The Legal Intelligencer, December 7, 1993; and Shannon P. Duffy, "U.S. Held Liable for \$ 78M In WWII Factory Cleanup," Pennsylvania Law Journal, December 13, 1993.

²⁹ See FMC CORPORATION v. UNITED STATES DEPARTMENT OF COMMERCE, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 29 F.3d 833; 1994 U.S.App..

facility, had been ordered by the WPB to convert its facility to production of high tenacity rayon instead of regular textile rayon.

The United States was thus found to be directly and entirely responsible for introducing a new manufacturing process at the Front Royal facility, which generated hazardous substances that were disposed of on-site. Moreover, the US had implemented the required plant conversion by leasing government-owned equipment and machinery and contracting with a third party to install the equipment at the Front Royal plant. The initial 8 percent allocation of clean-up costs as government liability rose to 26 percent of the cleanup costs in a tentative settlement.

In February 1994, the federal government, claiming that it could face massive liability for cleanups at former war production sites, asked the 3rd U.S.Circuit Court of Appeals in Philadelphia to reconsider. The court's November decision had overturned the government's claim of immunity from cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act.³⁰ In March 1994, the Court of Appeals vacated its 1993 ruling, when the majority of the court's 12 judges voted to rehear the 2-1 decision made in FMC Corp. v. Department of Commerce.

On March 3, 1997, Virginia Attorney General James S. Gilmore III filed a \$1.5 million lawsuit to make four federal agencies and two private corporations pay up to \$100 million in cleanup costs stemming from an environmental disaster at the old Avtex Fibers plant near Front Royal. The suit named as defendants the Department of Defense, the Department of Commerce, the Air Force and the National Aeronautics and Space Administration (NASA). It also included FMC Corp., which operated the rayon plant from 1963 to 1976, and Thiokol Corp, which contracted with NASA for the manufacture of booster rockets used in the space shuttle program.³¹ Though not named as a defendant, the National Security Council was also involved through its 1988 decision to fund \$44 million to bail out and restart the site.

The suit asked a federal judge to declare that, under the federal Superfund cleanup law, the agencies are responsible for cleanup costs at the plant, requiring defendants to reimburse Virginia the \$1.2 million it spent on the cleanup. The suit accused the federal government of keeping Avtex in business-- even offering a \$46 million bailout in 1988--, while aware of the plant's pollution of rivers, soil and underground water with toxic chemicals. The EPA, by then, had already spent \$27 million to clean up the site -- treating, recycling and removing 8,000 tons of contaminated soil, 2,000 tons of chemicals, 241,000 gallons of flammable and acidic chemicals and 3,000 bags of asbestos.

³⁰ PAUL KEMEZIS, "Federal Government Seeks Rehearing In Key Cleanup Case," Environment Week, February 10, 1994.

³¹ Andrew Cain, "Gilmore sues for Superfund costs," The Washington Times, March 4, 1997.

By 1997, the FMC Corp had treated a billion gallons of wastewater.³² But controversy surrounded the hiring of Mike McKenna, policy director and spokesman for the Department of Environmental Quality. McKenna was forced to resign on January 10, 1997 after his memo urging a campaign to discredit Gov. George Allen's environmental critics was publicized by the law firm Baise and Miller. Basie and Miller represented the former operator of the Avtex Fibers plant.³³

In October 1997, FMC Corp., NASA, the Defense Department, the Air Force and the Commerce Department formally agreed to reimburse the state all of its \$1.1 million past costs (from 1989 to 1997), with payment to be divided equally between the corporation and the government (\$ 541,000 each). In addition, EPA agreed to provide the Commonwealth approximately \$175,000 in Superfund cost credits to be used at any Superfund site of the state's choice as a dollar for dollar match in lieu of reimbursing the legal fees of Virginia's outside legal counsel. This settlement guaranteed that the Commonwealth would not spend any of its own funds on future clean-up costs.

In November, 1997, demolition began, as part of a projected two years and \$33 million of work to take down about half the most contaminated buildings. The rest of the site clean-up was expected to stretch well into the next century with the final cleanup bill topping \$100 million.

In July 1999, the U.S. EPA, the U.S. Department of Justice and FMC Corporation reached a settlement regarding completion of the cleanup at the Avtex Fibers Superfund site. FMC agreed to conduct final clean-up activities -- estimated at \$63 million -- at the site under the oversight of the EPA and the Virginia Department of Environmental Quality. FMC would also reimburse the EPA \$9.1 million -- out of \$27 million -- for costs associated with the property. FMC's expenditures to date, an estimated \$20 million on cleanup activities, would be added to the \$63 million clean-up expense.³⁴

As part of the cleanup plan, expected to take seven years, FMC agreed to address remaining building decontamination and demolition issues; disposal of demolition debris, sludge, liquids

³² See Peter Finn, "Pollution Landmark Demolished in Va.; Smokestack Was Part of Superfund Site," The Washington Post, November 12, 1997.

³³ See Andrew Cain "Allen warns DEQ to avoid ex-spokesman," The Washington Times, April 3, 1997; "Virginia: Former Enviro Official Represents Polluter," Greenwire, April 2, 1997; Spencer S. Hsu, "Former Va. Environmental Official Hired by Major Polluter's Law Firm," The Washington Post, April 02, 1997.

³⁴ See Calvin R. Trice, "Cleanup Plan Set At Largest Toxic Site," The Richmond Times Dispatch, July 10, 1999; "Press Release- US agencies and FMC Corp reach settlement at Avtex Fibers Superfund site," Week In Review; Chemical Business Newsbase, July 11, 1999; David J. Freeman And Gregory R. Belcamino, "In the Courts," The Brownfields Report, July 15, 1999; "Liability for Large Virginia Superfund Site Determined by FMC Regulators," Hazardous Waste News, July 19, 1999, No. 29, Vol. 21.

and other wastes; removal of above-ground and underground tanks; removal of hazardous substances in certain buildings' basements; continued waste water treatment; control of erosion and sedimentation on the site; and clean up of some 220 acres of waste lagoons, basins and waste disposal units. EPA had already dismantled more than 740,000 square feet of building space at the site, and other past cleanup activities had addressed water quality degradation, removed tons of hazardous substances, and decontaminated buildings.³⁵

To settle prior lawsuits brought by FMC, a number of federal agencies agreed to pay FMC about one-third of its cleanup costs.³⁶

The Richmond Times article cites work completed by June 1999 at the toxic waste site.

- Removed: 2,000 tons of chemicals and 44 million pounds of scrap metal and equipment for recycling.
- Treated: 241,000 gallons of flammable and acidic chemicals and nearly 992,000 gallons of waste water.
- Disposed of: nearly 900 tons of hazardous and non-hazardous chemical waste and 3,000 bags of asbestos.
- Demolished: 17 acres of buildings and the Polymer Plant Loading Dock.
- Drained: 33 large-capacity storage tanks, then treated and/or disposed of 770,000 gallons of hazardous and non-hazardous liquids taken from tanks.
- Dug up: and closed 22 hazardous carbon disulfide stockpiles.
- Designed: and operated waste-water treatment system to protect the Shenandoah River from untreated discharges.
- Treated off site: and disposed of 2,879 drums of waste.³⁷

Soon after FMC's agreement to spend \$63 million over a seven year period in the clean-up, it received various grant offers and promises, including the following: (1) an EPA grant of up to \$100,000 for use at the former Avtex site (EPA Administrator Carol Browner had named it as a grant recipient under a new pilot program to help communities restore toxic waste sites) and (2) a US Soccer Foundation declaration that it would donate planning and design work for as many as 10 soccer fields to be built on the site.³⁸

³⁵ Calvin R. Trice, "Cleanup Plan Set At Largest Toxic Site," The Richmond Times, July 10, 1999.

³⁶ Glenn Hess, "FMC Agrees to Clean Up Avtex Site For \$ 63 MM," Chemical Market Reporter, July 26, 1999.

³⁷ Calvin R. Trice, "Cleanup Plan Set At Largest Toxic Site," The Richmond Times, July 10, 1999.

³⁸ Justin Blum, "Grants to Aid Superfund Site Cleanup," The Washington Post, July 24, 1999.

Redevelopment plans, as of August 1999, envision the Avtex property as a waterfront business and recreation park with a hotel and conference center, industrial park, homes, a nature preserve, walking trails, a boat landing, and public recreation area. The community soccer complex alone was expected to cover about 25 acres and include 10 to 12 playing fields. North American Realty Advisory Services, was hired by the Warren County Economic Development Authority (EDA) to create the plan to place the Avtex site into productive new use.

On November 23, 1999, a Federal Bankruptcy Court judge in Reading, PA, cleared the way for the Front Royal/Warren County EDA to acquire the site for redevelopment, approving the transfer of property from the bankruptcy trustee, subject to the ratification of the prospective purchaser agreement, by town and county as liability protection to the community from any past problems at the site.³⁹ The contract called for an immediate payment of \$60,000 (at closing), with the next payment due to Anthony H. Murray Jr., the bankruptcy trustee, in 5 years, when the properties are sold in the redeveloped park. A \$2 million payment to FMC would also be due once redevelopment is underway.

3 % of the net proceeds from the 20 year build-out project (expected to amount/add up to \$500,000) are to be apportioned to the bankruptcy trustee, and the rest to be split between the EPA and FMC Corp. as reimbursement, after repaying EDA for administrative and marketing costs and the cost of securing liability insurance for the property's redevelopment. The EDA would be able to keep 10 percent of the net proceeds (around \$50,000).⁴⁰

Conclusion

The history of the Avtex site offers no evidence that any confidence can be placed in either the regulatory agencies or the facility operators. The evidence does clearly suggest that the operation and clean up of this plant will be done with little to no regard for public health and safety. While we are willing to be proved wrong about this, we know for certain that a vigilant public is the only sure way to force a safe and adequate cleanup. Superfund is characterized by years of incompetent administration by federal regulators both before and after the fact of contamination, protracted litigation by “potentially responsible parties” at superfund sites and longstanding claims that the cleanup program “never worked” because of protracted litigation by these parties. This tortious history, combined with heavy lobbying by industry, has led some legislators to abandon joint and several liability. President George W. Bush has proposed shifting the burden of future cleanup costs onto the shoulders of the public, effectively seeking to gut the principle that the “polluter must pay.” Only an informed active citizenry can prevent polluters from getting off the hook for the messes they leave.

³⁹ Michele Sullivan, “Judge OKs transfer of Avtex property,” The Warren Sentinel, December 02, 1999.

⁴⁰ See United States Environmental Protection Agency, Region III, In the Matter of: Avtex Fibers Superfund Site, Docket No.: Cerc-PPA-99-07, Agreement and Covenant not to Sue the Industrial Development Authority of the Town of Front Royal and the County of Warren, D/B/A Economic Development Authority, Et Al.