

EX-13

Today
Please return - H

Hyde Park

This is Lou Steele's comment on Settlement.

*Shows how much a young, solo practitioner can influence
major cases. H*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

Plaintiffs,

v.

HOOVER CHEMICALS & PLASTICS CORP.;
OXY CHEMICAL CORPORATION; HOOVER
CHEMICAL CORPORATION; OCCIDENTAL
PETROLEUM CORPORATION; THE TOWN OF
LEWISTON; THE TOWN OF NIAGARA,
(Hyde Park Landfill)

Defendants.

Civil Action No. 79-989

U.S. DISTRICT COURT
W.D. OF N.Y.

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FILED

NIAGARA COUNTY CITIZENS ALLIANCE FOLLOW-UP COMMENTS ON
THE JANUARY 19, 1981 STIPULATION AND JUDGMENT APPROVING
SETTLEMENT AGREEMENT

OUTLINE OF COMMENTS

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Niagara County Citizens Alliance¹ Follow-up Comments
On January 19, 1981 Stipulation and Judgment Approving
Settlement Agreement

- I. SO THAT ANY ADOPTED CONSENT DECREE APPROPRIATELY REFLECTS THE PREFERENCE OF THOSE CITIZENS MOST AFFECTED, THE COURT SHOULD (1) PUBLISH NOTICE OF THE "CITIZEN SUITS" SECTIONS OF THE CLEAN WATER ACT AND OF THE RESOURCE CONSERVATION AND RECOVERY ACT, AND (2) FORMALLY INQUIRE FROM ALL (POTENTIALLY AFFECTED PERSONS WHETHER THEY WISH TO TAKE ADVANTAGE OF THOSE STATUTORY OPPORTUNITIES TO DIRECTLY INFLUENCE THE SHAPE OF ANY ADOPTED BLOODY RUN/HYDE PARK LANDFILL CONSENT DECREE

As we will make clear below, we are concerned about the scope and focus of the proposed consent decree. But first, it occurs to us that the scope and focus of the existing proposed consent decree, quite naturally, reflects the scope and focus of the current parties to the lawsuit.

The only private party to this lawsuit is Hooker/Occidental. The residents in the immediate Hyde Park landfill/Bloody Run drainage basin area are not parties. Employees, or their union organizations, working within the immediate area are not parties. Finally, non-residents and non-employees who because of their activities or life patterns may still be affected by the Hyde Park landfill and/or the Bloody Run drainage basin are not parties.

The United States Department of Justice explained at the Court's February public hearing that such private persons were not included as parties to the lawsuit because of the limitations of the relevant statutes. This is not the case. The government has filed this lawsuit pursuant to the Clean Water Act (33 U.S.C. 1251 et. seq.) and the Resource Conservation and Recovery

1 The Niagara County Citizens Alliance is a voluntary membership association and is composed primarily of residents of the City of Niagara Falls, and the Town of Niagara. Membership of The Niagara County-Citizens Alliance also includes residents of the Hyde Park landfill and Bloody Run drainage basin area. Niagara County Citizens Alliance has at the present time upwards of thirty (30) members.

Act (42 U.S.C. 6901 et. seq.). Both of these statutes include Citizen Suit sections. In the circumstances here, these citizen suit sections allow citizens possessing "an interest which is or may be adversely affected" by Hooker's actions to intervene-as-a-matter-of-right as party plaintiffs in this lawsuit.

The problem is that all potentially affected persons are not aware of these most relevant statutory sections. Because of this, we request the Court to publish notice of the existence of these citizen suit sections and to inquire whether any (potentially) affected persons wish to take advantage of such statutory opportunities. We believe that such Court action would act to effectuate citizen participation in this lawsuit and by so doing would insure that citizen preferences are taken into appropriate account in the shaping of any adopted consent decree. Further, such judicial action and the resulting citizen participation would be clearly consistent with the intent of Congress in making available the citizen suit sections of the Clean Water Act and of the Resource Conservation and Recovery Act.

Some might argue that the exclusion of these vitally affected and critically important persons from the form and substance of the consent decree may be justified because of the existence of other and adequate remedies under law. We do not accept the legal reasoning behind any such contention. [More importantly, we believe that the government's statements at the Court's public hearing indicate that it has forgotten that government has an inherent responsibility to look at and care for the health, safety, and well-being of its people.] We believe that in cases such as these the government's responsibility or focus of concern should not be confined to the physical land and space upon which people live and work. Rather, we believe that government has an independent and specific responsibility to look at and care for its people. We believe that the proposed consent decree

has ignored this governmental responsibility. We believe that it should not ignore such a basic obligation and we Ask the Court to act so that it will not continue to do so.

II. BECAUSE THE EVIDENTIARY AND TECHNOLOGICAL MATERIAL WHICH SHAPED THE CONTOURS OF THE PROPOSED CONSENT DECREE HAS NOT BEEN MADE PUBLIC, THE AFFECTED PERSONS AND OTHER INTERESTED PARTIES ARE NOT ABLE TO ADEQUATELY ANALYZE AND ASSESS THAT DECREE

The purpose of the comment period that we are responding to is to receive public comment on the adequacy of the proposed Bloody Run consent decree dated January 19, 1981.

The first point that we must make is that this opportunity for public comment has lost much of its potential for gathering relevant and substantive public comment. This is because our comments must of necessity be highly speculative in part. More specifically, none of the individuals or groups providing comment to the Court and to the Justice Department has seen or has been privy to the full range of technological and evidentiary material which has shaped the contours of the proposed Bloody Run consent decree. Consequently, we can not know whether the 150-plus pages of the proposed consent decree are consistent with our preferences.

III. TO IMPROVE THE PUBLIC COMMENT PROCESS, THE COURT SHOULD ORDER PUBLICATION OF THE FULL RANGE OF EVIDENTIARY AND TECHNOLOGICAL MATERIAL THAT GAVE RISE TO THE CONTOURS OF THE PROPOSED CONSENT DECREE

This realization of the inherent weakness of the public comment process leads us to request that the Court make available to the Bloody Run community and to the other persons living on the Niagara Frontier the full range of technological data and evidentiary material which lies behind the structure of the proposed consent decree. We believe that if you do this, we (as well as other

affected individuals or groups) would be better able to communicate to the Court whether or not we believe that the proposed consent decree is, as it stands, sensible, necessary, workable and/or efficient.

IV. OUR STUDY OF THE PROPOSED CONSENT DECREE AND THE FEDERAL GOVERNMENT'S AMENDED COMPLAINT, RAISE SERIOUS CONCERNS REGARDING THE ADEQUACY OF THE PROPOSED DECREE

In spite of this limitation, we have taken the opportunity to participate in the Court's public comment process. To do so, we have read the proposed consent decree in its entirety. We have also read the federal government's amended complaint dated June 18, 1980. In the absence of the ability to comprehensively judge the adequacy of the consent decree through an analysis of its evidentiary and technological basis, our perspective in viewing the proposed consent decree must be shaped in great measure by what our government has told us in that amended complaint.

As a result of our reading of these two documents, we do have concerns and we do wish to share them with the Court.

A. First, In Spite Of The Government's Allegations Of Continuing Danger To Bloody Run Area Residents And Workers, The Consent Decree Makes Inadequate Provisions For Industrial And Residential Relocation

The government tells us that Hooker's waste continues to enter the Bloody Run drainage basin through broken berms, from the surface of the landfill, and from migrating leachate. United States Government's amended complaint (hereinafter referred to as amended complaint) at 24, paragraphs (hereinafter cited as para.) 16 and 17.

2/ The government tells us that the migration of hazardous waste contaminants through subsurface waters beneath the Hyde Park landfill site continues to occur. Amended complaint at 17, para. 25.

The government tells us that the continuing action of the chemicals dumped within the Hyde Park landfill continue to cause the enlargement of cracks in the bedrock beneath the landfill. Amended complaint at 17, para. 26.

The government tells us that hazardous chemical contaminants continue to migrate through the atmosphere. Amended complaint at 17, para. 27.

Further, the government tells us that the Bloody Run drainage basin area contains, among other hazardous chemicals, measureable amounts of Dioxin, Benzene Hexachloride (Lindane), Tetrachloroethylene, and Trichloroethylene. Amended complaint at para. 19 at 10, 11, 13, 14.

More specifically, the government tells us that Dioxin has been identified in Bloody Run area sediment; that Benzene Hexachloride (Lindane) has been found in Bloody Run water and stream bed samples; that Tetrachloroethylene has been identified in Bloody Run water as well as along the course of the Bloody Run drainage system; and finally, that Trichloroethylene has been identified in Bloody Run area water. Amended complaint at 10-14.

Most importantly, the government has told us that the "official EPA water quality criterion for the protection of human health" for Dioxin, Benzene Hexachloride, Tetrachloroethylene, and Trichloroethylene is ZERO. Amended complaint at 10, para. 19A(3); 11, para. 19B(4); 13, para. 19C(2); and 14, para. 19D(2).

Further, we know that there are nine families living within 1000 feet of the Bloody Run drainage basin and three industrial firms employing more than 350 workers just adjacent to the Hyde Park landfill. Map #1, which appears as Appendix 1 to this memorandum locates each of these identified sites.

Finally, the government has told us that medical examinations of residents in the area near the Hyde Park landfill and medical studies of workers in nearby industries indicate the presence of the kind of physical disorders associated with the chemicals disposed of in the Hyde Park landfill. Amended complaint

at 18, para. 29,

1. The consent decree makes no provision at all for industrial relocation and promises residential relocation only when consent decree-related remedial activities create additional dangers to residents

It is important to bring to the Court's attention that in spite of the apparent, continuing migration of toxic substances out of the Hyde Park landfill and from the Bloody Run drainage basin and into the surrounding residential and industrial area, the proposed consent decree provides little in the way of protection of the health, safety, and well-being of individuals living and working in the Hyde Park landfill/Bloody Run drainage basin area. More particularly, it is our understanding, after a close look at the consent decree, that in spite of the apparent presence of toxic chemicals in the Bloody Run area, at levels significantly above the official EPA water quality criterion for the protection of human health, and despite government statements of their continuing migration onto land adjacent to the Hyde Park Landfill and Bloody Run Creek, the proposed consent decree makes no provision for any relocation of residents unless the remedial activities called for by the consent decree create additional danger. Furthermore, the decree makes no provision at all for the relocation of area industrial firms and their employees under any circumstances. Amended complaint at V-15-22. Is this not true?

2. If the government has told us the truth in its amended complaint, any adopted consent decree must provide opportunities for permanent residential and industrial relocation

We believe that if the government is telling the people the truth in its amended complaint and that if the Hyde Park landfill is still leaching and emitting dangerous particulates and if the Bloody Run drainage basin continues to be polluted at levels above the official EPA water safety criterion, then there should be no question that the residents within the Bloody Run drainage basin (and perhaps beyond) and the industrial facilities adjacent to the Hyde Park landfill should be permanently relocated.

3. In the alternative, any adopted consent decree should allow residents and workers within the Hyde Park/Bloody Run drainage basin area to petition the Court at any time during the life of the consent agreement regarding implementation of all activities and responsibilities called forth by that decree

Those who will be most clearly and certainly affected by the implementation of the proposed consent decree are the residents and employees of the Hyde Park Landfill/Bloody Run drainage basin area. Consequently, in the alternative, we ask the Court to consider restructuring the proposed consent decree so that it provides a full opportunity for those persons to petition the Court at any time with respect to the future responsibilities under any adopted decree of any of the parties to the decree.

- B. For Two Reasons, Any Adopted Consent Decree Must Include Specific Guarantees Of Comprehensive Medical Studies Of All Those Residents And Workers Whose Health May At Any Time Since 1953 Have Been Affected By Living And/Or Working In Proximity To The Hyde Park Landfill/Bloody Run Drainage Basin Area

In a closely related area, we wish to bring to the Court's attention that the government's amended complaint demanded that Hooker

conduct or pay for complete medical studies of all workers residents within a one mile radius of the Hyde Park landfill who worked or resided in the area from 1953 until the present to determine the extent to which any person may experience adverse health effects; undertake or pay for a health monitoring program which will track past and present workers and residents who resided or worked within a one mile radius of the Hyde Park landfill and the offspring of those workers and residents for their lifetimes

Amended complaint at 28. This request does not appear in the proposed consent decree. We urge its reinstatement. Further, we think it important that any testing protocols be adopted in consultation with individuals to be tested and their legal and expert representatives.

1. The chemicals which are present in the Hyde Park landfill and which have been migrating out of that landfill are chemicals which adversely affect human health

In support of this request, we note that the government has explained to us that the chemicals present in the landfill and which have migrated out of the landfill in the past may "adversely affect human health". Amended complaint at 10, para. 19. More specifically, Dioxin "is one of the most potent toxins known to science. It is acutely toxic at low doses; it causes cancer, birth defects, mutations, fetal deaths in laboratory animals, and can be fatal to children and adults". Amended complaint at 10, para. A (1). Benzene Hexachloride (both isomers) "...are acutely toxic and are carcinogenic. They have also been implicated in causing liver disease. They induce chemical poisoning symptoms, and adverse central nervous system disorders, including convulsions and epileptic form seizures." Amended complaint at 11, para. B (2). Tetrachloroethylene "...exhibits effects on the central nervous system and is also a carcinogen. Its

Its effects include depression, nausea, and in a high exposure, unconsciousness and death. Exposure...also causes liver disfunction." Amended complaint at 13 para. 19 (c) (1). Trichloroethylene "...is a potent central nervous system depressant and can cause severe neurological symptoms such as dizziness, loss of appetite and loss of motor coordination. It produces liver damage at sufficient exposure levels and causes cell mutations and cancer". Amended complaint at 14, para. 19 (d) (1). Benzene "...is a carcinogen and is highly toxic. Exposure to (it) may result in intoxicification, blood chemistry changes, fatigue, anorexia, and other central nervous system disorders." Amended complaint at 14, para. 19 (E) (1). Hexachlorobenzene "...is a carcinogen. There is no safe level of human exposure. It is toxic to the central nervous system, kidney, and the liver." Amended complaint at 15, para. 20 (A). Toluene "...exhibits effects on the central nervous system... and in sufficient doses causes narcosis, addiction, and blood chemistry deficiencies." Amended complaint at 15, para. 20 (B). Tetrachlorobenzene "...is toxic to the liver and kidney." Amended complaint at 15, para. 20 (C). Chlorobenzene "...is toxic to the central nervous system, ...is a strong narcotic and is associated with liver and kidney damage." Amended complaint at 15, para. 20 (D). Phenol "...is acutely toxic to humans ...and acts upon the central nervous system. The predominate acute reaction upon exposure ... is sudden collapse and unconsciousness...Kidney and liver functions are impaired upon prolonged exposure." Amended complaint at 15-16, para. 20 (E).

2. National Institute of Occupational Safety and Health (NIOSH) studies have identified Dioxin, Lindane and Mirex in the workplace environment of three industrial facilities adjacent to the Hyde Park landfill; in addition, private medical consultants have suggested that worker health has been adversely affected by these and other chemicals

In addition, National Institute of Occupational Safety and Health investigations have revealed that Dioxin, Mirex, and Lindane have been detected in the three industrial facilities adjacent to the Hyde Park landfill. We have included for your information copies of relevant newspaper articles which appeared in the Niagara Gazette and some of the reports on which these articles were based. This material appears as Appendix 2 to this memorandum. Further, a medical consultant's report on the health of the employees of these industries has concluded that "history and medical symptoms provide convincing evidence that workers... are experiencing hazardous exposures to toxic and carcinogenic chemicals." We have included a copy of this report as Appendix 3 to this memorandum.

C. The Acceptable Soil Survey Levels, Plume Determination Levels, And Treated Effluent Discharge Levels Agreed Upon By the Parties To The Proposed Consent Decree Are Inconsistent With Existing United States Environmental Protection Agency Health Protection Standards

The parties to the proposed consent decree have agreed on acceptable soil survey levels, plume definition levels and effluent discharge treatment levels. Proposed consent decree at I-2, I-10, and I-27. Many of these agreed upon levels appear to be inconsistent with a proper regard for the public's health, safety and well-being. More specifically, the government has told us that there are no safe levels for exposure to particular, itemized chemicals. Amended complaint at 10-15. The government points out that the "official EPA water quality criterion" for Dioxin, Benzene Hexachloride, Trichloroethylene, Tetrachloroethylene, Benzene, and Hexachlorobenzene is zero. However, the proposed consent decree would allow positive amounts of Benzene Hexachloride, Tetrachloroethylene (proposed consent decree at I-10, I-27), Trichloroethylene (proposed consent decree at I-27) and Hexachlorobenzene (proposed consent decree at I-2) in defining the geographical boundary of land areas to be capped, in defining the contours of the aqueous

waste plumes, or in defining the allowable characteristics of effluent discharges from the leachate collection system.

Moreover, a further comparison of the allowable concentration levels (the "standards") contained within the proposed consent decree indicates that that document is inconsistent with the established official EPA water quality criterion for other chemicals as well. The specific chemicals include Hexachlorocyclohexane (Lindane), and hexachlorobutadiene (C-46). Further, analysis reveals that the consent decree's allowable limits of particular chemicals frequently are even greater than the range of "interim target risk levels" established by the United States Environmental Protection Agency. Table 1, below provides this information in tabular form.

<u>Chemical Substance</u>	<u>Std in Proposed Consent Decree</u>	<u>United States E.P.A. Human Health Standards</u> <u>For Max Human Protection</u>	<u>Interim Target Risk Levels</u>	<u>Source For Fed Standard</u>
hexachlorobenzene	100 ppb ¹	0	.0125-1.25 ppt	44 F.R.56642
hexachlorocyclopentadiene (C56)	10 ppb ^{2,3}	n.a.	1 ppb	44 F.R.15955
hexachlorocyclohexane(Lindane)	10 ppb ^{2,3}	0	16-54 ppt	44 F.R.56652
hexachlorobutadiene(C-46)	10 ppb ³	0	.0077-.77ppb	44 F.R.15954
tetrachloroethylene	10 ppb ³	0	.02-2 ppb	44 F.R.15966
trichloroethylene	10 ppb ³	0	.21-21 ppb	44 F.R.15969

1. standard established for soil survey level
2. standard established for plume definition level
3. standard established for effluent discharge treatment level

TABLE 1: The proposed consent decree is inconsistent with
United States Environmental Protection Agency
Human Health Standards

Under these circumstances, we request that the government fully explain the above specified inconsistencies. Furthermore, we would ask the government to tell us the rationale for setting the allowable levels for the particular chemicals at the specific positive values chosen.

Finally, we understand that the consent decree allows the continuation of the same positive effluent discharge levels over time. Because technology is not constant over time but in fact changes, we believe that any adopted consent decree should provide that the acceptable positive effluent levels would be reduced in accordance with changes in technology over time.

D. Any Adopted Consent Decree Should Mandate That Hooker Have Perpetual Responsibility And Liability For Maintaining, Sampling, And Monitoring The Hyde Park Landfill/Bloody Run Drainage Basin Areas

Further, we are concerned about the duration of Hooker's responsibility under the proposed consent decree. As we understand it, the proposed consent decree mandates only a 35 year period of time for Hooker responsibility and liability. Proposed consent decree at IV-2. We are aware that under specified, vague circumstances ("...a satisfactory showing...than (an) extension is necessary to effectuate the purposes and goals of this judgement.") this 35 year time period can be expanded by the discretionary action of the Court. Proposed consent decree at III-2. We note, however, that this represents a basic shift from the position the government adopted in its amended complaint. That document, at pages 28 and 30 mandated that Hooker perpetually monitor, sample, and maintain the site.

We believe that it should be clear and accepted from the outset that there can be no guarantee that the potential problems associated with the Hyde Park Landfill and with the Bloody Run drainage basin will last for a short 35 year period. Consequently, we believe that any adopted consent decree should mandate

Hooker's perpetual responsibility and liability for monitoring, sampling, and maintaining the Hyde Park landfill and Bloody Run drainage Basin areas.

- E. While Hooker Should Be Financially Responsible For The Initial Development And Ongoing Implementation Of The Hyde Park/Bloody Run Area Remedial Plan, An Entity Completely Independent Of Hooker Should Exercise The Day-To-Day Operational Responsibility Over That Plan

We are concerned that the proposed consent decree would place too much reliance on Hooker. We are aware that the terms of the proposed consent decree place great and awesome weight on Hooker's good faith and honest judgement. More specifically, the proposed consent decree places in Hooker's lap the responsibility for the initial development and ongoing implementation of the proposed consent decree's containment, monitoring, and maintenance programs and its environmental health and safety plan. Under the historical circumstances here, we believe that it would be more sensible if the proposed consent decree were to give the entire responsibility for developing and implementing the proposed consent decree's remedial activities to a Hooker-funded but independently owned, managed, and operated entity.

- F. The Proposed Consent Decree Does Not Adequately Deal With The Potential Of Governmental Inattention, Inaction Or Resource Scarcity

1. The burden of governmental inattention, inaction, or resource scarcity must not be placed on the people

We are concerned that the proposed consent decree places the burden of governmental inattention, inaction, or resource scarcity on the people of the Bloody Run drainage basin and the Hyde Park landfill area. More specifically, in section after section (totalling more than 30), of the proposed consent

decree, unless the government responds to a Hooker initiative, motion, protocol, idea, plan, suggestion, or study, whatever is proposed by Hooker, must be adopted by the Court. See proposed consent decree; especially at 10, para. 6 (d) (i); 12, para. 7 (c)(i), I-20, I-4 and 5, at I-16-21, para. C (7), (8), and (9). See also proposed consent decree at I-5, I-7, I-9, I-12, I-17, I-23, I-24, I-26, I-29, I-30, I-33, I-35, I-37, I-40, I-43, I-44, I-46, I-47, I-48, II-6, II-7, II-8, II-9, II-12, III-2, V-2, V-14, V-16, V-18, and V-20.

The health and well-being of our community should not in any way, nor under any circumstances, subsidize governmental inattention, inaction, or the scarcity of financial resources. For this reason, the inclusion of such clauses within the proposed consent decree is inappropriate. We ask the Court to modify the clauses identified above as well as all others like it so that (1) when the government fails to respond to any Hooker action required by any adopted consent decree, Hooker is mandated to notify the Court of such government inaction, and (2) upon such notification by Hooker, the Court must order the government to so respond.

2. Any adopted consent decree can guard against the potential of such governmental inaction, inattention, and resource scarcity by inclusion of a pledged commitment by the State and Federal governments to fund their consent decree-related activities

The proposed consent decree places a great degree of responsibility upon the government. In such a context, we are especially aware of the increasing pressures that government faces to reduce expenditures, modify costs, and efficiently allocate scarce resources. This pressure is sure to continue over time.

These kinds of pressures, however, should not be allowed to foil what

would otherwise be the effective implementation of any final Hyde Park landfill/Bloody Run consent decree. To insure that tightening fiscal and budgetary circumstances will not inhibit the government's ability to execute faithfully and to fulfill its responsibilities under any agreed upon consent decree, we urge the Court to insist that any approved consent decree contain a pledge by the State of New York and the United States government that throughout the course of the implementation of the consent decree these parties will allocate the full amount of fiscal and program resources necessary to carry out their responsibilities under that adopted consent decree.

G. The Proposed Consent Decree Should Hold Hooker Responsible For Stopping The Migration Of Chemical Contaminants From The Hyde Park Landfill And Into The Bloody Run Drainage Basin Area

Finally, we respectfully call the Court's attention to pages II-11 and II-12 of the proposed consent decree. According to our reading of this section of the monitoring program, the proposed consent decree severely limits the circumstances under which Hooker would be responsible for guaranteeing the effectiveness of the decree's mandated remedial program. (This section would, apparently, provide that if the remedial actions undertaken by Hooker according to the terms of the consent decree are ineffective in stopping the migration of chemical contaminants from the Hyde Park landfill into the Bloody Run drainage basin area, that Hooker retains responsibility to deal with such a continuing problem only if (1) such continued migration violates applicable statutes or regulations and (2) the government can meet the burden of proof applicable in a de novo proceeding for any requested relief. It is unclear why this should be so.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Lewis Steele". The signature is fluid and cursive, with a large initial "L" and a stylized "S".

Lewis Steele, Attorney For

NIAGARA COUNTY CITIZENS ALLIANCE

March 13, 1981
714 Buffalo Avenue
Niagara Falls, New York 14303