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July 24, 1981

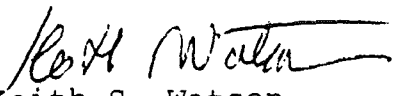
John K. Adams, Clerk
U.S. District Court
604 U.S. Courthouse
Buffalo, New York 14202

Re: United States, et al. v. Hooker Chemicals &
Plastics, et al., Civil Action No. 79-989
(Hyde Park Landfill)

Dear Mr. Adams:

I enclose for filing in the above-captioned matter,
on behalf of Hooker Chemicals & Plastics Corp., Hooker's Re-
sponse to the Court Order of July 10, 1981. This matter is
before Judge John T. Curtin.

Sincerely yours,


Keith S. Watson

KSW/bjw
Enclosure

cc: Judge John T. Curtin (w/enclosure)
Counsel of record for all parties
and amici (w/enclosure)

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

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 79-989

HOOKEE'S RESPONSE TO COURT ORDER OF JULY 10, 1981

On behalf of Hooker Chemicals & Plastics Corp. ("Hooker"), we respectfully respond to the Court's order of July 10, 1981. That order solicited the positions of the parties concerning the objections raised by the amicus curiae brief filed on June 30, 1981, by the Ecumenical Task Force, Pollution Probe, and Operation Clean-Niagara ("amici").

As discussed more fully below, Hooker believes that the amici's objections are fully addressed by the Stipulation and Judgment Approving Settlement Agreement, filed January 19, 1981 ("proposed Judgment"), and that the proposed Judgment should be executed by the Court without further delay.

INTRODUCTION

In their brief, the amici urged the Court to disapprove the proposed Judgment in this matter which has been submitted by Hooker and four governmental parties and executed by governmental officials representing the U.S. Environmental Protection Agency, the New York State Department of Health, and the New York State Department of Environmental Conservation. The amici assert that the proposed Judgment incorrectly assumes that the Lockport dolomite bedrock beneath the Hyde Park landfill site provides an impermeable "bottom" and that, without this "bottom," chemicals (particularly 2,3,7,8-tetrachlorodibenzo-para-dioxin ["TCDD"]) will migrate through such bedrock to the Niagara River and Lake Ontario. Accordingly, the amici conclude, the Hyde Park wastes should be removed and re-entombed in a clay-bottomed vault.

As we show below, the entire argument of the amici is founded on the inaccurate premise that the Containment Program relies on the Lockport dolomite bedrock to provide an impermeable "bottom" beneath the site. To be sure, neither the amici nor their consultants participated in the extensive dialogue among numerous experts that led to the proposed Judgment. However, merely reading the proposed Judgment reveals that the signatories did not rely on the bedrock to provide a "bottom," but rather included a number of provisions to address chemical migration

in the bedrock beneath the site. Those provisions include an extensive survey of bedrock chemical migration, the installation of a bedrock barrier-collection system, and the utilization of requisite remedial technology to address any unresolved bedrock chemical migration issues.

In these circumstances, the alternative removal plan proposed by the amici is clearly unnecessary. Further, as we discuss in Section II below, the affidavits filed by the amici also demonstrate their removal plan to be wholly ill-considered and unsupported -- environmentally, technically, legally, and economically. That plan cannot be taken seriously and Hooker will not be voluntarily associated with any remedial effort which includes such a plan.

Accordingly, as discussed in Section III below, the objections of the amici do not require an evidentiary hearing, and we believe that the public interest would be best served by the expeditious execution and implementation of the proposed Judgment.

I. THE PROPOSED JUDGMENT DOES NOT ASSUME THAT BEDROCK PROVIDES AN IMPERMEABLE "BOTTOM" BENEATH THE LAND-FILL AND FULLY ADDRESSES BEDROCK CHEMICAL MIGRATION.

The proposed Judgment contains a detailed 52-page Containment Program. Through this Containment Program, the proposed Judgment addresses issues relating to airborne particulate

dispersion, clean-up of the Bloody Run creek bed and the Niagara River Gorge face, capping and securing the landfill, treatment and disposal of liquid wastes, and past, present and potential future migration of contaminants via surface waters, groundwater in the soil (i.e., overburden), and groundwater in the bedrock. The amici focus their objections on only one aspect of the Containment Program -- whether the proposed Judgment adequately addresses contaminants migrating via groundwater in the Lockport dolomite bedrock beneath the Landfill toward the Niagara River.

The concerns of the amici relating to such groundwater flow are addressed in two affidavits. One of the affidavits is by Dr. Edward Kleppinger, a chemist.^{1/} We understand Dr.

^{1/} In his affidavit, Dr. Kleppinger states that he is a "chemist by education." (Kleppinger Affidavit, ¶ 3.) Nowhere in the nine paragraphs describing his background does Dr. Kleppinger mention any training or experience in geology or engineering -- the crucial disciplines in assessing groundwater flow and in designing remedial programs. Indeed, Dr. Kleppinger's opinions appear to rest not on his training or expertise, but rather on a telephone conversation with Richard Johnston, a geologist who studied the Niagara Falls area in 1964 and whose knowledge about the Hyde Park landfill appears to consist solely of Dr. Kleppinger's oral representations to him. (Id. at ¶¶ 40-42.)

Dr. Kleppinger's affidavit makes passing reference to his involvement in previous litigation against Occidental Petroleum Corporation, of which Hooker is a wholly-owned subsidiary. (Id. at ¶ 10.) In that litigation, Dr. Kleppinger and others were hired by attorneys for the Mead Corporation in legal action seeking to block a merger of the two companies.

Kleppinger to believe that the Lockport dolomite bedrock beneath the Hyde Park landfill is "fractured," that the groundwater collection systems have been "misplaced," and that therefore the systems will not intercept contaminants migrating from the landfill. (Kleppinger Affidavit, ¶¶ 23, 31, 32.)^{2/}

A second affidavit to the same effect is filed by Grant Anderson, who states that he is a "hydrogeologist by profession." (Anderson Affidavit, ¶ 3.) The thrust of Mr. Anderson's concern is that the groundwater flow system "cannot be accurately analyzed from the data" he has reviewed and that Hooker's consultant "should have drilled more holes around the site, through the site, and adjacent to the site" (Id. at ¶¶ 29, 31.) Despite his professed lack of data, Mr. Anderson nevertheless opines that contaminants are migrating from the landfill into the bedrock groundwater and believes such contaminants "have already moved 50 feet below the rock surface," 500 feet northwest of the site. (Id. at ¶ 52.)

Footnote continued --

X Dr. Kleppinger and his colleagues filed affidavits in that litigation alleging Occidental had misrepresented the extent of its environmental liabilities, including those relating to Hyde Park. Occidental denied the allegations and they were never adjudicated. Although Occidental decided not to pursue its merger efforts, certain aspects of the case continue to be litigated. See Mead Corporation v. Occidental Petroleum Corp., No. 78-241 (S.D. Ohio). In these circumstances, there are serious questions whether Dr. Kleppinger can be deemed an "independent" consultant. (See Amici Brief, p. 16.)

^{2/} Dr. Kleppinger's affidavit (¶¶ 56-69) also includes a discussion of Hooker remedial efforts at Montague, Michigan

Footnote continued --

According to the amici, the Kleppinger and Anderson affidavits reveal a fundamental error "in the interpretation of the hydrogeologic character of the site" by the signatories to the proposed Judgment. (Amici Brief, p. 4.) Furthermore, according to the amici, the signatories have "focus[ed] their attention on controlling groundwater flow in the overburden" and make "no absolute commitment to undertake any remedial work in the bedrock." (Id. at p. 6.)

The proposed Judgment wholly refutes these allegations. Paragraph 2(b) of the proposed Judgment recognizes that "[g]roundwater at the Landfill Site occurs in both the Overburden and Lockport Bedrock Zone" and that

in the Lockport Bedrock Zone, groundwater occurs in fractures or joints which are parallel to the bedding planes, in other fractures or joints which cut across the bedding planes approximately at right angles to the bedding, and in cavities formed by the solution of minerals from the rock.

Footnote continued --

pursuant to a consent decree entered by a Michigan state court. That remedial plan, addressing a site located hundreds of miles from Hyde Park in a wholly different geologic environment, is totally irrelevant to the merits of the proposed Judgment. See also ¶ 20, Response to Public Comments on Stipulation and Judgment Approving Settlement Agreement, (filed April 3, 1981) ("Response to Public Comments"). However, Dr. Kleppinger's ad hominem allegation (Kleppinger Affidavit, ¶ 68) that Hooker is "out of compliance" with its Montague remedial plan cannot stand unrefuted; no court has held, or has even been asked to hold, that Hooker is out of compliance with the remedial plan contained in the Michigan consent decree and Hooker vigorously

Footnote continued --

Thus, the signatories of the proposed Judgment, like the amici, are well aware of the fact that the Lockport dolomite bedrock immediately beneath the Hyde Park landfill is fractured and that it contains both vertical and horizontal groundwater flow.

The crucial fallacy in the amici position is their misconception that the signatories to the proposed Judgment relied upon the Lockport Bedrock as an impermeable "floor" to contain the migration of chemicals from the landfill via bedrock groundwater flow. Had amici or their consultants participated in the exhaustive discussions involving experts from EPA, the State, and Hooker, their misconceptions would have been quickly dissipated. However, the fact that the signatories to the proposed Judgment did not rely upon the Lockport Bedrock to provide an impermeable "bottom" is amply evidenced by the many provisions in the proposed Judgment which address issues relating to chemical migration via groundwater flow in the bedrock.

Groundwater flows are significant because groundwater is the mechanism by which chemicals may migrate in overburden and bedrock. Accordingly, Paragraph C(1) of Addendum I of the proposed Judgment provides that, prior to remedial activity,

Footnote continued --

denies the allegation. To complete the record in this regard, attached hereto as Attachment I is Hooker's response to the letter from a State of Michigan official which was appended to Dr. Kleppinger's affidavit as "Attachment D."

Hooker will undertake an extensive survey program to determine "the areal and vertical extent" of chemical migration from the Landfill Site "in the Overburden and the Lockport Bedrock Zone." As shown on Figure 6 of the proposed Judgment, survey wells are to be drilled through the Lockport Bedrock Zone along ten vectors emanating in all directions from the Landfill.

Under the vector bedrock survey program, well drilling must continue until no contamination is found at any depth in the approximately 100-foot thick Lockport Bedrock Zone. (See Paragraph C(2) of Addendum I.) } Thus, the vector bedrock survey will resolve any outstanding uncertainties concerning the nature and direction of chemical migration from the Landfill via groundwater flow in the bedrock. 4

In addition to resolving any uncertainties relating to bedrock groundwater flows beneath the landfill, the vector bedrock survey will permit identification of potential paths of future migration. Remedial efforts to address such future potential migration in the uppermost aquifer of the Lockport Bedrock are described in Paragraph D(3) of Addendum I, which sets out the design criteria for a "Bedrock Barrier-Collection System." [As described in Paragraphs D(4) and D(5) of Addendum I, the design of the Bedrock Barrier-Collection System will take account of the data collected during the aforementioned vector bedrock survey and during "pump tests" made pursuant

to Paragraph C(6) of Addendum I of the proposed Judgment.^{3/}
If, based on analyses of survey and pump tests data, it is determined that a system of purge wells satisfies specified design criteria for the Bedrock Barrier-Collection System, Paragraph D(4) provides for the installation of such a purge well system. If such purge wells do not satisfy the design criteria, Paragraph D(5) requires Hooker to propose a containment system, using "Requisite Remedial Technology," which will satisfy the design criteria.

It should be emphasized that the areal location of the Bedrock Barrier-Collection System to be installed is not specified in the proposed Judgment. Rather, the locations shown on Figures 11 and 12 are "conceptual" in nature, as both Paragraph D(3) of Addendum I and the titles of these Figures make clear. The actual areal location of the system will be determined only after analysis of data collected from the vector survey and pump tests described above.

In these circumstances the objections of Messrs. Kleppinger and Anderson that the Bedrock Barrier-Collection System will be ineffective, because of "misplacement" or otherwise, are clearly answered by the proposed Judgment. Under

^{3/} Pump tests will determine inter alia "flow characteristics" and the "capacity of wells to affect the flow" of groundwater containing chemicals in the Lockport Bedrock Zone. (See Paragraph C(6) of Addendum I.)

the proposed Judgment, both the design and location of the Bedrock Barrier-Collection System will take account of data to be collected.

The proposed Judgment also calls for the invocation of "Requisite Remedial Technology" in those situations where the Bedrock Barrier-Collection System does not adequately address either the past migration of Hyde Park chemicals in the bedrock or future potential paths of migration. Paragraph C(7)(b) of Addendum I provides that, if data collected pursuant to the aforementioned bedrock vector survey reveals chemical migration "in the regions of the Overburden and of the Lockport Bedrock Zone not addressed by Paragraph D" (i.e., the Barrier-Collection Systems), Hooker shall initiate a study to "determine what Requisite Remedial Technology, if any, is required" to address the situation. Under Paragraphs C(8) and C(9) of Addendum I, the study will be reviewed by EPA/State, discussed by the parties, and if the parties agree about the need for additional remedial action, a stipulation to such effect will be filed and action initiated. If the parties do not agree, the dispute resolution provisions of the proposed Judgment will be triggered and the issue resolved by the Court as described in Paragraphs 4(c) and 4(d) of the proposed Judgment. Under these provisions, the Court may require Hooker to initiate remedial action utilizing "Requisite Remedial Technology" where such action is necessary to protect public health and the environment.

In short, to the extent that the data collected pursuant to the proposed Judgment demonstrates chemical migration from the Landfill Site anywhere in the Lockport Bedrock Zone which endangers public health and the environment, such migration is fully addressed by the terms of the proposed Judgment. These provisions completely belie the assertion of the amici that the proposed Judgment ignores bedrock contamination issues or that Hooker is not committed to identifying and addressing issues concerning bedrock contamination.

In view of the fact that the proposed Judgment addresses chemical migration in the Lockport dolomite bedrock, the concerns raised by the amici about the presence of TCDD in Lake Ontario appear moot. However, to be fully responsive to the Court's order, we briefly show below that this concern of the amici is both overstated and inappropriate to a consideration of the merits of the Containment Program of the proposed Judgment.

The amici acknowledge that "it is impossible to predict the effects of dispersing the chemicals from the Hyde Park landfill site." (Amici Brief, p. 11.) Nevertheless, their brief then proceeds to engage in a spate of such predictions wholly unsupported by the affidavits they cite. In this regard, it is interesting to compare the emotion-laden rhetoric of the amici brief with the statements of their consulting toxicologists,

Douglas Hallett^{4/} and James Allen.

The Hallett and Allen affidavits are both concerned with the chemical TCDD. Although expressing concern about TCDD contamination,^{5/} Dr. Hallett states that TCDD concentrations in Lake Ontario Herring Gulls have decreased at least ten fold in the last decade and, in fact, are "being cleared from the ecosystem." (Hallett Affidavit, Exhibit B, p. 9.)^{6/} Dr. Hallett also devotes several paragraphs of his affidavit to speculation about possible sources of the TCDD found in Lake Ontario Herring Gulls. The Hallett affidavit does not allege that TCDD has been detected in groundwater beneath the Hyde Park landfill site or

4/ Dr. Hallett is an employee of the Canadian Government, but his statements on behalf of the amici are not made "as a representative or employee of the Canadian Government." (Hallett Affidavit, ¶ 2.)

5/ The Hallett affidavit (id. at ¶ 36) is also critical of the proposed Judgment for using trichlorophenol (TCP) as a "surrogate chemical" for TCDD for air monitoring. This criticism is refuted by an earlier paragraph of Hallett's own affidavit which acknowledges that the source of TCDD found at Hyde Park is Hooker's "production of 2,4,5-trichlorophenol" (id. at ¶ 28) (emphasis added). In fact, Dr. Hallett relies on this very "surrogate" in assessing TCDD trends in Lake Ontario. (See Id. at ¶¶ 8, 10.) The other objections to the air monitoring program which the amici raise (Amici Brief, pp. 30-32) appear founded on the unverified letter of an equipment supplier (see Appendix I of Amici Brief) and, in any event, are completely addressed by the Response to Public Comments, supra, at ¶¶ 61, 102-04.

6/ Specifically, Dr. Hallett reports that from 1971 to 1980, TCDD concentrations "decreased throughout this period from 800-1,300 ng/kg [i.e., parts per trillion] in the early 1970's to 68 ng/kg in 1980." (Hallett Affidavit, Exhibit B, p. 9.) Indeed Dr. Hallett believes that TCDD levels in Lake Ontario gulls and fish "will likely decline to the 'baseline' level" within 5-7 years. (Id.)

even in the waters of the Niagara River. In addition, Dr. Hallett expressly recognizes that incineration of municipal garbage and application of herbicides are possible sources of TCDD; indeed, Dr. Hallett acknowledges the "hypothesis" that TCDD is an "ubiquitous contaminant," i.e., that TCDD is a multi-source chemical found throughout the environment. (Id. at pp. 7-9.)

Dr. Allen's affidavit also focuses on TCDD, in the context of results of tests involving TCDD injections performed on non-human primates. Dr. Allen makes no effort whatsoever to relate these results to human beings or to the efficacy of the Containment Program, and none are readily apparent.

Whatever the merits of the toxicological hypotheses relating to TCDD proposed by Drs. Hallett and Allen, they are irrelevant to the merits of the proposed Judgment. According to the amici's own consultant, TCDD levels in Lake Ontario have fallen ten fold in the last decade, TCDD is "being cleared" from the ecosystem, and TCDD concentrations are shortly expected to decline to the "baseline" level. Thus, the matter is being resolved without reference to the proposed Judgment. Moreover, because the Containment Program of the proposed Judgment fully addresses all sources of chemical migration from the Hyde Park landfill, implementation of the proposed Judgment can only hasten the day when such resolution is achieved.

II. REMOVAL OF WASTES FROM THE HYDE PARK
LANDFILL SHOULD NOT BE SERIOUSLY CONSIDERED.

Perhaps the most startling suggestion of the amici is their proposal that Hyde Park wastes should be "remove[d] and re-entomb[ed]" in a secure clay vault. (Amici Brief, p. 3.) This extreme proposal is based solely on the Kleppinger-Anderson hypothesis that groundwater flow in bedrock beneath the site is not adequately addressed in the program and that the resulting migration will cause environmental harm to the Niagara River and Lake Ontario. Even without reference to such unsupportable assertions, the very suggestion that the Hyde Park landfill site and its chemical wastes can simply be "dug up and carted away" as an expedient and responsible solution to such a highly technical problem evidences the inadequacy and naivete of amici's analysis. It is obvious to Hooker that amici and their consultants have not given the same thoughtful attention to this matter as the multitude of experts who labored for over one year in developing the Containment Program of the proposed Judgment.

For example, it is not at all clear what materials the amici propose to remove from the Hyde Park landfill. At Hyde Park, approximately 80,000 tons of waste were landfilled in a 15-acre site over a 22-year period. The proposed Judgment recognizes that the wastes are intermingled with the surrounding soil and, according to the Anderson affidavit, waste residues

have migrated at least 50 feet below the surface of the bedrock. (Anderson Affidavit, ¶ 52.) In these circumstances, removing Hyde Park wastes as the amici propose would encompass not only 80,000 tons of disposed waste but also enormous volumes of soil and bedrock to a depth of at least 50 feet into bedrock. The amici proposal is completely silent as to how all of this material would be removed, where this material would be redeposited, whether local government permits could be obtained for a new site, how long such a procedure would take, what the cost effectiveness of such a program would be, or how digging up and transporting this material would impact on nearby employees, residents, and the environment.

The amici thus do not offer a shred of evidence that removal, transportation, and redeposition is either technically or legally feasible, cost effective, or environmentally responsible.^{7/} These deficiencies are exemplified by the contradictions of Dr. Kleppinger's affidavit. That document proposes removal of the wastes to a "clay vault (even adjacent to this site) . . . with a properly prepared clay bottom" (Kleppinger Affidavit, ¶ 37); however, three pages later the document (id. at ¶ 52) concedes

^{7/} We understand from the Amici Brief (p. 3) that they do not press the contention that Hyde Park wastes should be removed and destroyed via incineration. Accordingly, it is unnecessary to discuss Dr. Hallett's statements concerning the incineration of mirex and TCDD (see Hallett Affidavit, ¶¶ 43-50), to challenge Dr. Hallett's manifest lack of expertise in this area, or to explain Hooker's technical and environmental objections to any such plan.

It is important to recognize that clay is not impermeable. It is simply less permeable than other materials such as sand. Clay will transmit significant amounts of water when the area of clay is extensive and when the hydraulic head across the clay is significant.

In other words, by Dr. Kleppinger's own admission, the "clay vault" which he and the amici propose would not be impermeable and, therefore, any new site in the area would also appear to require extensive collection, maintenance and monitoring systems. The amici do not explain how the conflicting statements in the Kleppinger affidavit can be reconciled.

Finally, it should be noted that in the complaint which initiated the instant action, the government's proposed relief was grounded on in situ remedial efforts. See ¶ 80A, Complaint for Injunctive Relief, Restitution, and Civil Penalties (filed December 19, 1979 by the United States). Had the government pressed for waste removal proposals along the lines proposed by the amici, Hooker would have immediately rejected settlement as a viable option in this case -- and would not have devoted considerable resources since December, 1979, in seeking to resolve this action short of litigation. The brief of the amici adds nothing new to this issue, but rather merely confirms Hooker's resolve not to be voluntarily associated with any remedial effort which includes a technically and environmentally ill-considered plan to remove Hyde Park wastes.

III. THE PROPOSED JUDGMENT AS PRESENTED IN THE RECORD BEFORE THE COURT IS SUFFICIENT FOR COURT REVIEW AND APPROVAL AND DOES NOT REQUIRE ANY FURTHER PROCEEDINGS.

The Court has received for its review and approval the proposed Judgment. The amici, citing the alleged inadequacies in the remedial program, urge the Court to reject the proposed Judgment as failing to meet appropriate standards of reasonableness and lawfulness, to appoint an expert consultant,^{8/} and to conduct a "fact-finding" hearing. As discussed above, the amici's objections to the proposed Judgment on technical grounds are not well founded. [Equally significant, however, is amici's failure to set forth the proper legal standards to guide the Court in reviewing the reasonableness and lawfulness^{9/} of the proposed Judgment.]

^{8/} The amici propose the appointment of Richard Johnston, a geologist employed by the U.S. Geological Society. (Amici Brief, p. 27.) The parties have previously explained why they believe the appointment of any expert at this time to be unnecessary and potentially counter-productive. See Response to Court Order of February 12, 1981, pp. 1-9 (filed March 17, 1981).

^{9/} We understand the amici to challenge the lawfulness of the proposed Judgment only insofar as it relates to a 1909 Boundary Waters Treaty and a 1978 Great Lakes Water Quality Agreement between the United States and Canada. (Amici Brief, pp. 33-35.) This challenge is frivolous. [The Canadian Government is not a party to this action and there is no evidence that it believes the proposed Judgment to be unlawful.] Indeed, a joint United States-Canada report by the International Joint Commission specifically stated it was "pleased to note" submission of the proposed Judgment (see Response to Public Comments, supra, at ¶ 54). In any event, as the Court itself noted at the May 29 hearing in this matter (Tr. at (22)), this is not the appropriate forum to resolve alleged international treaty violations; such matters should be addressed and resolved through the U.S. Department of State and its counterpart in Ottawa.

There is, of course, a clear federal judicial policy favoring the voluntary settlement of litigation -- especially in cases involving complex technical, legal, and factual issues. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 469 F. Supp. 836, 846 (N.D. Ill. 1979), aff'd, 616 F.2d 1006 (7th Cir. 1980); Patterson v. Newspaper & Mail Deliverers' Union of New York & Vicinity, 514 F.2d 767, 771 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976). Accordingly, in areas of important public policy questions, a proposed decree upon consent "carries with it a presumption of validity and is overcome only if [the] decree contains provisions which are unreasonable, illegal, unconstitutional, or against public policy." United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980); Williamsburg Fair Housing Committee v. New York City Housing Authority, 450 F. Supp. 602 (S.D.N.Y. 1978). As a result, in those areas of the law where important public policy considerations are involved, such as environmental, antitrust, and civil rights laws, the courts have articulated specific standards to be applied in the review of settlement.

In their brief (pp. 14, 21), the amici allege that "there are no cases setting standards for review of environmental consent decrees,"^{10/} and they therefore refer the Court to "other

^{10/} The environmental case of Village of Wilsonville v. SCA Services, Inc., discussed by the Amici Brief (pp. 21-24), is wholly inapplicable since it did not involve a proposed settlement. On the contrary, the defendant's remedial plan in that case was opposed by the State of Illinois Attorney General, the County, and the municipal government. Here all governmental parties are signatories to the proposed Judgment.

fields such as antitrust and civil rights law" where public interest concerns are also important.^{11/} In fact, at least one court has extensively considered the standard for reviewing environmental consent decrees. In United States v. Ketchikan Pulp Co., 430 F. Supp. 83 (D. Alas. 1977), the court received a proposed settlement between EPA and the defendant which was challenged by environmentalist intervenors. The court extensively considered the judicial standard of review in such circumstances and concluded that "the appropriate standard is that the court should determine whether the decree adequately protects the public interest and is in accord with the dictates of Congress." Id. at 86, citing Patterson v. Newspaper & Mail Deliverers' Union of New York & Vicinity, supra. Although the Ketchikan court recognized its obligation to review carefully the proposed settlement and not to act as "a rubber stamp," it held its role was not to explore all of the legal and factual issues as if the matter were being heard at trial. Thus, the court ruled that in reviewing an environmental settlement, "it is not necessary to hear all of the evidence" or even to "require a factual presentation to support every decision reached by the government." Id.

^{11/} The Amici Brief (pp. 17, 20) cites two cases in support of the proposition that the Court must take into consideration the interests of non-parties in deciding whether the proposed Judgment is in the public interest. The first, Traffic Executive Ass'n - E.R.R. v. The Long Island R.R., 627 F.2d 631

Nor are there any different standards of judicial review of settlements in the fields of civil rights and antitrust law to which the amici refer the Court. In a civil rights case involving settlement of employment discrimination litigation, the Seventh Circuit has held that the matter "must be decided on the basis of legal principles regulating judicial review of settlement agreements." Airline Stewards Local 550 v. American Airlines, 573 F.2d 960, 963 (7th Cir.), cert. denied, 439 U.S. 876 (1978). Cf. SEC v. General Host Corp., 439 F. Supp. 105, 109 (S.D.N.Y. 1977) ("Court must accept the consent decree 'as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.'"). Another court has ruled, in reviewing the settlement terms of a housing discrimination case, that it should not "inquire into precise

Footnote continued --

(2d Cir. 1980), involved the special circumstances of a proposed class settlement in which there were no governmental parties to protect the public interest. The court in that case expressly recognized the broad discretion of the trial judge in reviewing such settlements, holding that "[a] district judge's order approving or disapproving a proposed class settlement will not be overturned on appeal unless there is a clear showing of abuse of discretion." Id. at 633 (emphasis added).

The amici similarly rely on an antitrust case, United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), aff'd in part and dismissed in part, 397 U.S. 248 (1970), in suggesting that the court may properly consider in reviewing the adequacy of the proposed Judgment whether the rights of third parties are "jeopardized." In that case, the court found the decree to have no adverse impact on non-parties seeking to intervene because the decree in no way affected the rights

Footnote continued --

legal rights of parties" and that "the strong policies favoring the settlement of . . . cases overrides any but the most powerful objections to the propriety of the consent decree." United States v. American Institute of Real Estate Appraisers, 442 F. Supp. 1072, 1074 (N.D. Ill. 1977); see also Metropolitan Housing Development Corp. v. Village of Arlington Heights, supra, at 847.

This same standard applies in the antitrust field to which amici refer the Court. Courts are statutorily required to review proposed antitrust settlements to assure consistency with the "public interest." See 15 U.S.C. § 16(b)-(h). The Ninth Circuit recently held in United States v. Bechtel Corp., 648 F.2d 660 (9th Cir. 1981), that in satisfying this mandate, the district court must, of necessity, take cognizance of the fact that the governmental parties have also been entrusted with responsibility for protecting the public interest. As the court stated:

We cannot agree that a district court should engage in an unrestricted evaluation of what relief would best serve the public.

The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in

Footnote continued --

of such entities to prosecute their own claims. Id. at 621. In the same manner, the parties to the proposed Judgment have specifically protected the legal rights of non-parties by providing in Paragraph 5 of the proposed Judgment that the "Judgment shall neither create nor affect the rights of persons or entities who are not parties to this action."

protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree.

Id. at 666 (citations omitted) (emphasis added). Similarly, in reviewing a proposed antitrust settlement, a court in this Circuit rejected the request of amici for an evidentiary hearing, holding that the "government is nowhere required to provide the court with materials which might be necessary or appropriate at a trial on the merits," and that in light of the filings made during the public comment process, "an evidentiary hearing and the substantial preparation that it would entail would simply delay the entry of the final judgment without any commensurate benefit to the court or public." United States v. Agri-Mark, Inc., 512 F. Supp. 737, 740 (D. Vt. 1981).

In short, neither environmental case law, nor any other public policy cases to which amici refer the Court, support the amici's request for a fact-finding hearing. Where as in the present case, the hydrogeologic, engineering, and environmental issues raised by amici in support of this request were thoughtfully considered by the signatories to the proposed Judgment and are reflected in the proposed Judgment itself, such a hearing would merely delay execution and implementation of the proposed Judgment without "any commensurate benefit" to the Court or the public. We therefore urge the Court to deny the amici request for a fact-finding hearing and to execute the proposed Judgment without further proceedings.

CONCLUSION

The objections raised by the amici are fully addressed by the proposed Judgment. Further proceedings are therefore unnecessary. We believe that it is in the public interest for the proposed Judgment to be executed without further delay and we respectfully urge the Court to do so.

Respectfully submitted,

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By Keith S. Watson
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July 24, 1981



345 THIRD STREET, BOX 728, NIAGARA FALLS, NEW YORK 14302, PH

June 26, 1981

Howard A. Tanner, Director
Department of Natural Resources
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<u>Item</u>	<u>Page</u>	<u>Paragraph</u>	<u>Requirement</u>
52	14	XVA	Submit Plans and Specifications for a groundwater purge system.

Dear Mr. Tanner:

This is to acknowledge your letter of June 8, 1981 on the above requirement. In your concluding paragraph of this letter you indicated that the demonstration period required by the Consent Judgement began as of April 8, 1981 based on the purge well system approved in your letter of that date. However, your letter and approval of April 8, 1981 was predicated upon six conditions which we cannot completely accept. The demonstration period required by the Consent Judgement is for Hooker's plans and specifications for a purge well system and not the DNR's. Thus we take exception with your statement that the demonstration period has begun.

As Hooker indicated in the letter of June 1, 1981 to R. J. Courchaine, some of the conditions of your April 8, 1981 letter were acceptable to Hooker, and it was suggested that the differing technical points could hopefully be resolved at a meeting on the technical issues. It is hoped that this letter will resolve the remaining issues relating to the purge well design and demonstration.

The specific conditions in your letter of April 8, 1981 are reviewed below with Hooker's specific reasons for acceptance or rejection. It should be recognized that Hooker is concerned with developing the most cost effective method of designing and demonstrating the purge well system, as required by the Consent Judgement. Hooker recognizes certain assumptions have been made in the design of the purge well system. We take issue with the statement that they are incorrect assumptions until they are possibly proven to be incorrect by field demonstration. We can appreciate the MDNR's concern in minimizing the assumptions, but to attempt to completely eliminate any assumptions is unrealistic and prohibitively expensive.

In addition the Consent Judgement anticipated that the system will be based on assumptions and then demonstrated to prove the correctness of the assumptions.

In reference to the conditions of your letter of April 8, 1981:

Howard A. Tanner, Director
Department of Natural Resources

June 26, 1981
Page 2

1. Hooker agrees to conduct a pump test on each of the three (3) purge wells for a minimum of three (3) days with the rest of the purge system shut down.
2. The cone of influence of each individual purge well shall be demonstrated by measurement of groundwater levels in observation wells during the test period.
3. Observation wells shall be located around each purge well using existing or new wells as indicated for purge well Pc on Figure 1.
4. Requirements for materials of construction were accepted as specified by the DNR and as indicated in our letter of June 1, 1981 to R. J. Courchaine.
5. Observation wells will be screened to the bottom of the aquifer.
6. Following the testing of the individual wells, the entire system will be operated and field tested in conjunction with the carbon treatment system pursuant to the 18 month demonstration period specified in the Consent Judgement. Water table measurements around the purge well system will be measured to demonstrate the hydraulic impact of the purge well system on the contaminated groundwater as monitored according to our plan as submitted to W. Walker on November 15, 1980 and modified by R. J. Courchaine's letter of April 23, 1981 and my letter of June 1, 1981.

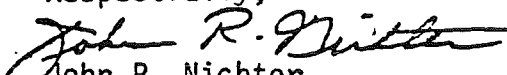
Before a demonstration of the purge well system can begin, there must be agreement on the method for monitoring the effectiveness of the demonstration.

The hydraulic monitoring of the purge well system will be a good measure of the effectiveness of the purge well system. However, the Consent Judgement requires that chemical monitoring also be utilized to demonstrate the effectiveness of the purge well system. Hooker will monitor the quality of the groundwater entering White Lake with the three (3) monitoring wells, WW-7, GM-3 and Pa as shown in W. Walker's report of November 18, 1980. We consider these wells, installed on land as specified in the Consent Judgement, to be better situated for chemical monitoring of the quality of the water entering White Lake than the MW wells (stab wells). The stab wells are installed in to the sediment of the lake, and we would expect these well samples as well as the water of White Lake to exhibit a considerably delayed response to the clean groundwater entering White Lake.

We request that the DNR approve Hooker's purge well design and monitoring system as described above and in previous submissions to permit the purge well demonstration to begin.

If you or your staff have questions on the above submission, please call me at 716/278-7003.

Respectfully,


John R. Nichter
Operations Manager
Special Environmental

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Hooker's Response to Court Order of July 10, 1981, was mailed, postage prepaid, to counsel for all parties to this action, this 24th day of July, 1981.

Keith S. Watson
Keith S. Watson

One of the Attorneys for
Hooker Chemicals & Plastics Corp.