

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

Plaintiffs,

- vs -

NOTICE OF MOTION

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

Civil No. 79-989

Defendants.

SIR(S) :

PLEASE TAKE NOTICE that upon the annexed Affidavits of BARBARA MORRISON, sworn to the 18th day of May, 1981; TOBY VIGOD, sworn to the 18th day of May, 1981; ANNE WORDSWORTH, sworn to the 18th day of May, 1981; and MARGHERITA HOWE, sworn to the 19th day of May, 1981, the undersigned will move this Court at the United States Courthouse in Buffalo, New York, as soon as counsel can be heard, for an Order permitting Pollution Probe and Operation Clean-Niagara to jointly intervene in this proceeding as amici curiae, with the right to submit a written brief together with such other additional relief as to this Court may seem just and proper; and for an Order permitting attorney TOBY VIGOD to appear before this Court pro hac vice, pursuant to Rule 3(H) of the United States District Court-Western District, so that she may be heard by the

Court with respect to this motion.

Dated: Buffalo, New York
May 19, 1981

Respectfully submitted,

BARBARA MORRISON
Jay, Klaif & Morrison
1032 Ellicott Square
Buffalo, New York 14203
(716) 856-6300

Local Counsel For:
TOBY VIGOD
Barrister and Solicitor
Canadian Environmental Law
Association
8 York Street
5th Floor South
Toronto, Ontario M5J 1R2
(416) 366-9717

Solicitor for amici curiae
Pollution Probe and
Operation Clean-Niagara

TO: RICHARD J. ARCARA
United States Attorney
Western District of New York
By: JACK S. PENCA

ROBERT ABRAMS
Attorney General of the State of New York
By: MARCIA J. CLEVELAND
Assistant Attorney-in-Charge
Environmental Protection Bureau

CAROL DINKINS
Assistant Attorney General
Land and Natural Resources Division
U.S. DEPARTMENT OF JUSTICE

DAVID K. FLOYD
Phillips, Lytle, Hitchcock, Blaine & Huber

LOUIS NIZER
Phillips, Nizer, Benjamin, Krim & Ballon

THOMAS H. TRUITT
Wald, Harkrader & Ross

EDWARD P. JESELLA, JR.
Attorney for the Town of Lewiston, New York

ROBERT PAUL MERINO
Attorney for the Town of Niagara, New York

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(Hyde Park Landfill),

Defendants.

AFFIDAVIT IN SUPPORT
OF REQUEST FOR
AMICUS CURIAE STATUS

STATE OF NEW YORK)
COUNTY OF ERIE) ss.:
CITY OF BUFFALO)

BARBARA MORRISON, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before this Court.
2. I am submitting this Affidavit in support of a motion seeking permission for TOBY VIGOD to appear pro hac vice before this Court to argue all matters pertaining to a motion for intervention of Pollution Probe and Operation Clean-Niagara as amici curiae, and all related matters which may later be heard by this Court should such status be granted.
3. MS. VIGOD is a barrister and solicitor duly admitted to practice in the Province of Ontario.

4. MS. VIGOD is a staff attorney with the Canadian Environmental Law Association which represents Pollution Probe and Operation Clean-Niagara, both of which groups seek status as amici curiae in this proceeding. Therefore MS. VIGOD is best able to represent the interest of these groups and wishes leave of the Court to do so.

BARBARA MORRISON

Sworn to before me this
18th day of May, 1981.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
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AFFIDAVIT IN SUPPORT
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(Hyde Park Landfill),

Defendants.

STATE OF NEW YORK)
COUNTY OF ERIE) ss.:
CITY OF BUFFALO)

TOBY VIGOD, being duly sworn, deposes and says:

1. I am a lawyer duly admitted to practice law in the Province of Ontario and am employed by the Canadian Environmental Law Association in Toronto, Ontario. I have been retained as legal counsel for Pollution Probe and Operation Clean-Niagara. I am submitting this Affidavit in support of a motion by Pollution Probe and Operation Clean-Niagara to appear as amici curiae in these proceedings.

2. The Canadian Environmental Law Association (hereinafter "CELA"), founded in 1970, is a non-profit, public interest, environmental law organization committed to the enforcement and improvement of environmental laws. CELA is primarily government funded and operates as a legal

aid clinic. CELA is the only public interest organization exclusively practicing environmental law in Eastern Canada.

3. CELA has been involved in water quality and toxic waste issues through civil, criminal and administrative hearings; appearances before Canadian Federal and Provincial Standing Committees; legal research and consulting work; and through publications in national and international law journals. CELA has technical and legal expertise available from its Board of Directors as well as its staff lawyers and researchers.

4. CELA was retained by Pollution Probe and Operation Clean-Niagara for the specific purpose of reviewing the adequacy of the terms of the proposed Hyde Park Landfill settlement as it would impact on the Canadian public interest by affecting boundary waters. CELA seeks to ensure that the agreement does not violate principles of international law and equity.

5. The original action was brought to abate existing and prevent future impairment of public health and the environment, including the deterioration of water quality of the Niagara River.

6. The Court should assure itself of the technical and financial adequacy of the proposed settlement to prevent the migration of toxic chemicals from the site into international boundary waters.

7. It is the position of Pollution Probe and Operation Clean-Niagara that there exists a significant Canadian public interest in the technical and financial adequacy of the proposed settlement as it affects the integrity of water quality in the Niagara River and Lake Ontario. They have concluded that the proposed settlement will result in irreparable

damage to the water quality in international boundary waters downstream from the Hyde Park Landfill site.

8. Pollution Probe and Operation Clean-Niagara with their experience and resources in water quality and toxic waste matters and the support of the Canadian Government, are in a unique position to bring to the attention of this Court concerns about the Niagara River and Lake Ontario ecosystems.

9. Pollution Probe and Operation Clean-Niagara therefore seek to submit a brief on the issues raised herein, by a date deemed reasonable by this Court. In addition, Pollution Probe and Operation Clean-Niagara seek to participate in any further proceedings, evidentiary or otherwise, to the extent that this Court, in its discretion, determines that such participation would protect the Canadian public interest.

Toby Vigod

TOBY VIGOD

Sworn to before me this
14th day of May, 1981.

Barbara Morrison

BARBARA MORRISON
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1983

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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STATE OF NEW YORK)
COUNTY OF ERIE) ss.:
CITY OF BUFFALO)

I, ANNE WORDSWORTH, a resident of the City of Toronto, Province of Ontario, Canada, hereby swear as follows:

1. I am a director of environmental research at Pollution Probe Foundation, 12 Madison Avenue, Toronto, and my responsibilities include water quality investigation and policy analysis.

2. Pollution Probe Foundation (hereinafter "Probe"), was incorporated in February of 1971 under the laws of the Province of Ontario and is a non-profit public interest corporation registered with the Department of National Revenue as a charitable foundation (Registration No. 0384750-53-13).

3. Probe's Board of Directors incorporates expertise from the

business and academic communities. The Board, which serves pro bono, advises and directs the public interest work of the Foundation.

4. Probe's environmental activities include scientific and policy research and investigation, as well as public education with respect to the nature and extent of the deterioration of the environment and the availability of remedial technologies that could prevent such deterioration.

5. Probe staff have addressed toxic waste and, specifically, water quality issues for the past three years; participated in numerous professional and educational conferences; and appeared at major waste disposal hearings in Ontario. In addition, Probe was requested to provide testimony before the Legislative Assembly of Ontario Standing Committee on Resource Development respecting the disposal of Liquid Industrial Waste.

6. Probe has an ongoing Toxic Waste Project evaluating the potential for the recovery and re-use of industrial waste generated by small and medium sized businesses. Probe established a Toxic Waste Advisory Committee in 1979 which includes representatives from the Canadian federal and provincial governments, industry and universities, to provide expert advice and assistance in accomplishing the goals of the project.

7. In 1979, Probe participated in the New York State Administrative hearings involving an application by a major hazardous waste disposal firm for modifications to its State Pollutant Discharge Elimination System permit ("SPDES"). The permit modifications addressed the

source, volume and concentration of numerous chemicals to be discharged into the Niagara River.

8. On May 1, 1981, while attending an environmental conference at the University of Buffalo, I was first advised that a settlement of U.S. et al. v. Hooker et al. (Civil No. 79-989, Hyde Park Landfill) had been proposed by the major parties to the action and was before this Court for ratification.

9. After extensive review and evaluation of the proposed settlement with scientific and technical experts, including an official from the Canadian Federal Department of the Environment (the equivalent of the U.S. Environmental Protection Agency), Probe has concluded that the settlement as proposed is inadequate to prevent the migration of toxic chemicals from the Hyde Park site into the Niagara River, or to eliminate the emission of airborne contaminants that also increase the levels of toxic chemicals in the Niagara River and Lake Ontario.

10. It is Probe's position that the damage that has already occurred would continue and increase from the leaching of dioxin and other highly toxic wastes over the hazardous lifetime of the chemicals, that is, in perpetuity, if the proposed settlement is implemented without modification.

11. I have also reviewed the comments on the proposed settlement agreement prepared for this Court by the Ecumenical Task Force of the Niagara Frontier, and share many of the concerns raised in that document. However, that document did not address the short and long-term impacts of toxic chemical migration into international boundary waters

nor the acute and chronic effects on the Canadian aquatic ecosystem, drinking water and public health.

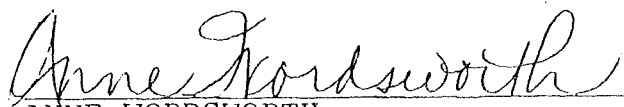
12. The Niagara River flows into Lake Ontario. Upon information and belief, four million Canadians take their drinking water from Lake Ontario. In addition, millions of Canadian citizens catch and/or consume fish from Lake Ontario.

13. On May 12, 1981, I sent a letter to The Honourable John Roberts, Canadian Minister of the Environment, expressing our extreme concern over the proposed terms of the Hyde Park settlement, as it affects the Canadian public interest. (See letter annexed hereto as Exhibit "A").

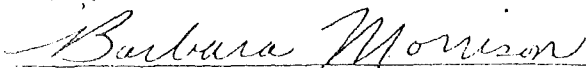
14. On May 15, 1981, the Honourable John Roberts, Canadian Minister of the Environment, replied to our letter, through our counsel, stating the government's support for this application and offering technical expertise of his Department to assist in reviewing the proposed settlement. (See letter annexed hereto as Exhibit "B").

15. Three other U.S. et al., v. Hooker et al., actions involving Love Canal, "S" area, and the 102nd Street Dump are pending before this Court and each will address many of the same material issues. Therefore, resolution of the Hyde Park case will be precedent setting and will establish what will constitute viable remedial technology and adequate financial and custodial responsibility.

16. This Affidavit is made in support of an Application to appear as amicus curiae.


ANNE WORDSWORTH

Sworn to before me this
18th day of May, 1981.



BARBARA MORRISON
Notary Public, State of New York
Qualified in Erie County

My Comm. Expires March 30, 1983

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

Plaintiffs,

- v s -

AFFIDAVIT

HOOKER CHEMICALS & PLASTICS CORP.;
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Defendants.

STATE OF NEW YORK)
COUNTY OF ERIE) ss.:
CITY OF BUFFALO)

BARBARA MORRISON, being duly sworn, deposes and says:

1. During April and early May of 1981, I made requests pursuant to the New York Freedom of Information Law (FOIL) of the New York Department of Environmental Conservation (DEC) for hydrogeologic and chemical testing data pertaining to the Hyde Park Landfill site.

2. In May, I was informed by James Wilding, an engineer at Region 9 of DEC, that the information I had received constituted the complete records of all testing data previously requested.

3. On June 8, 1981, I asked Lorelei Borland, Assistant Attorney General, New York State, for additional assurance that I had, in fact, received all existing data requested pursuant to FOIL.

4. On June 12, 1981, I received a telephone call from Lorelei Borland, wherein she advised me that additional data did in fact exist, and that she had authorized DEC personnel to release it.

5. The material was picked up from DEC as soon as it was copied on June 15, 1981, and immediately reproduced so it could be forwarded to the appropriate consultants.

6. After review of the documents and discovery that a number of our consultants were unreachable or unavailable to review the additional data immediately upon receipt, on June 17 I conferred with Toby Vigod of the Canadian Environmental Law Association, and with Anne Wordsworth who has been extensively involved in coordination of our amicus brief. It was agreed that these documents were new and crucial and must be analyzed by our experts and incorporated into their findings.

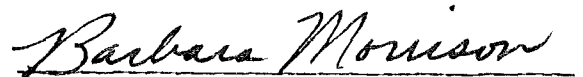
7. In the morning of June 17, 1981, I contacted Lorelei Borland and advised her of the untenable situation which had been created by the failure of DEC under the supervision of the Attorney General's Office to timely release these materials. I advised her that Jim Wilding indicated on June 12, 1981, that the materials had previously been deemed confidential but were now releasable. I advised Ms. Borland that (1) those materials were properly discoverable under FOIL and (2) that even if the State believed otherwise, I should not have been informed that all testing data had, in fact, been received, so that motions for Court examination and release of that data, if appropriate, could have been brought.

8. Ms. Borland advised me that the materials were never confidential but that DEC and the Attorney General were "unaware" that they were contained in their respective files, and that failure to earlier release the documents was merely an oversight.

9. The data at issue comprises 49 pages of observation well installation details, water elevations, well recovery test results including soil permeability calculations, boring logs taken by Conestoga-Rovers (for Hooker) between September 7, 1978, and January 29, 1980, maps depicting boring locations, chemical analysis results for Hyde Park bedrock wells, and a comparison of MCB/MCR, trichlorophenol and dioxin analysis.

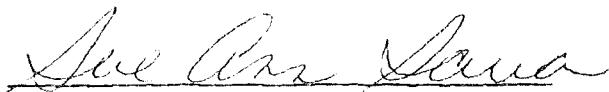
10. The data enumerated above contains highly significant and material information of which we previously had no knowledge, either of its existence or its contents. Inclusion of this data in a number of our main affidavits and in the body of the brief is absolutely necessary in order to properly fulfill our function as amicus.

11. Because of the nature of the case, our amicus brief is a highly technical and analytical document. The new data integrally affects the evaluation of the settlement agreement by our experts. Because of the importance of incorporating this material into our experts' reviews, we need a minimum of one (1) additional week in which to file our brief.



BARBARA MORRISON

Sworn to before me this
18th day of June, 1981.



SUE ANN SARRA
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1983,

May 12, 1981

Hon. John Roberts
Minister
Environment Canada
Ottawa, Ontario
Canada

Dear Mr. Roberts:

We wish to bring to your attention the catastrophic implications of the proposed settlement agreement between Hooker Chemicals and Plastics Corp. and the U.S. Environmental Protection Agency that is on the verge of ratification. We are asking you, on behalf of Canadian citizens who are dependant on the Great Lakes for their water supply, to intervene in the United States Court and to press for much more stringent financial and technical conditions in the agreement.

The settlement agreement attempts to provide controls on the hazardous wastes buried at the Hyde Park landfill site in Niagara, New York. This site contains over 80,000 tons of highly toxic chemicals, including an estimated almost 2,000 pounds of dioxin (the TCDD isomer) according to documents filed in U.S. Court.

After reviewing the settlement agreement, Pollution Probe has come to the conclusion that the containment systems and the liability provisions placed on Hooker Chemical Company are appallingly inadequate. We do not believe that the Niagara River or Lake Ontario under the terms of this agreement would be successfully protected from the eventual migration of highly toxic chemicals, especially dioxin, known to be deposited at the site. In fact, implementation of the agreement as it now stands may substantially increase the risk to the environment and to public health, particularly as it affects those Canadians downstream from the site who take their drinking water from the Niagara River and Lake Ontario.

We are concerned that ratification of this agreement will allow Hooker Chemical to absolve themselves of responsibilities to public and environmental health that will arise in the future from this site. Certainly the Canadian

...2

Exhibit "A"

government should oppose the acceptance of this agreement without significant modifications, and without detailed scrutiny of the technical arrangements by Canadian experts in the fields of law, hydrogeology and engineering.

Since your government recently expressed considerable distress over the dioxin contamination in the Great Lakes, we feel it is imperative that the government examine the pathways for contamination that are left open by the agreement.

The two most disturbing aspects of the agreement that we feel are potentially injurious to Canadian interests are: 1.) the appropriateness and viability of the containment technology, and 2.) the duration and financial obligations placed on Hooker Chemical Company.

1.) We have serious doubts about the capabilities and the effectiveness of the containment program as it is set out in the agreement. We believe the whole approach of relying on containment as a strategy to protect the environment is ill-advised. Where chemicals of such serious toxicity are involved, we believe that the only viable and reasonable method of dealing with these wastes is complete destruction.

Given that containment has been chosen as a strategy, the attempt to control and contain these wastes must be accompanied by a commitment to the indefinite monitoring and treatment of leachate collected at the site. This is not even being suggested by the agreement. In addition, even if containment did offer some promise of limiting the migration of chemicals from this site, the Hyde Park landfill has no bottom that could reasonably be expected to contain the wastes. The Barrier collection system as it has been designed certainly will not guarantee the interception of wastes at this site.

There is a lack of clarity surrounding the provisions for the treatment of the leachate collected by the containment system. These provisions could result in the further distribution of hazardous chemicals, such as dioxin, into the environment.

First, the incinerator at Niagara Falls owned by Hooker Chemical Company cannot meet efficiency regulations and should not be accepted as an option for destruction. Its use in the past is already suspected of distributing airborne contaminants into the atmosphere which have come to rest in the Great Lakes.

Secondly, the agreement seems to allow Hooker the option of treating leachate at the Niagara Falls Sewage Treatment plant. This plant, as your Department well knows, has been incapable of properly treating chemical wastes since the breakdown of its carbon bed system. Its use in its present condition would be an imminent hazard to both public health and the environment.

Thirdly, the agreement does not provide for the storage of leachate at the site beyond the two lagoons already in use. The safety and ability of these lagoons to handle the volumes of leachate currently being collected at the site has never been proven, and with an expanded collection system, its capacity could be strained to a dangerous level.

2.) The duration and amount of financial responsibility imposed on Hooker Chemical are not adequate for the degree of care and the time period that relying on containment will entail. It appears that liability for treatment and monitoring expires after 35 years or 5 or 10 million dollars, whichever comes first. Yet the cost of treating the leachate currently generated on the site, even without the addition of the new collector system, is estimated at \$300,000 per year.

Hooker's financial commitment would be expended quickly at this rate just on the present system, thereby consuming the limited funds available for the treatment and monitoring necessary for containment. Hooker should not be given an expiry date for its obligations since there is no guarantee that the problems would not become even more costly and unmanageable after these obligations are finished.

In short, we urge you to take the issues raised in this letter very seriously, and to consider the possible consequences of not acting at a time when it is still possible to create safeguards for the future.

We believe the Canadian government has a responsibility to act in this particular matter, and we believe intervention is the only possible action that could be effective in protecting the integrity of the Niagara River. If you wish any further information or support from us, please call.

Yours truly,

Anne Wordsworth
on behalf of Pollution Probe
(416) 978-7152

c.c. Dr. Robert Slater



MAY 15 1981

Ms. Toby Vigod
Counsel
Canadian Environmental Law Association
5th Floor South, 8 York Street
Toronto, Ontario
M5J 1R2

Dear Ms. Vigod:

U.S. vs Hooker Chemicals et al
(Hyde Park Landfill) Civil Action 79-989

I have received the letter from Ms. Anne Wordsworth of Pollution Probe requesting my intervention in the matter of the settlement agreement between the Hooker Chemical and Plastics Corporation and the United States Environmental Protection Agency, now pending ratification. I understand CELA will be acting on behalf of Pollution Probe and Operation Clean-Niagara in seeking amicus curiae standing before the U.S. court and I am therefore replying to you at her request.

I share the concerns which have been expressed that the provisions contained in the settlement do not appear adequately to prevent the leaching of highly toxic chemicals into the Niagara River and Lake Ontario.

As you know, there are limits on the extent to which I can appropriately intervene in a matter before the U.S. courts. The Canadian Government, however, is taking action directly with the U.S. Government in the form of a diplomatic note formally conveying its concern and requesting that the matter be reviewed by the Environmental Protection Agency. I also intend to raise the matter with the new Administrator of EPA, Ann Gorsuch, if I am able to see her when I am in Washington next week.

I hope that this action will complement and support your own in meeting our common objective of ensuring that there is no further degradation of the Niagara River and that the long-term integrity of the River is protected for Canadians and Americans. You may be assured that the technical assistance of my Department in this matter continues to be fully available.

Yours sincerely,

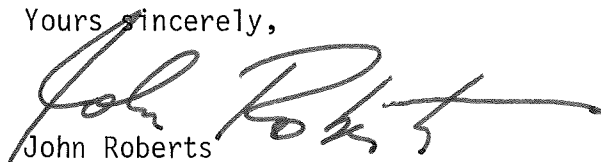

John Roberts
Ottawa, Canada
K1A 0H3

EXHIBIT "B"
TO WORDSWORTH AFFIDAVIT