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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

Plaintiffs,

v.

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

Defendants.

Civ. Action No. 79-989

MEMORANDUM IN SUPPORT OF MOTION TO WITHDRAW
TESTIMONY AND AFFIDAVIT OF DAVID BRUCE TWEDELL
AND TO ENTER THE PROPOSED STIPULATION AND
JUDGMENT APPROVING SETTLEMENT AGREEMENT

I. INTRODUCTION

On December 20, 1979, the United States filed suit in this Court for injunctive and other relief concerning an imminent and substantial endangerment arising from chemical wastes deposited by Hooker Chemicals and Plastics Corporation at the Hyde Park landfill in the Town of Niagara, New York.

On January 19, 1981, a Stipulation and Judgment Approving Settlement Agreement ("proposed Settlement") was lodged with the Court.

By order dated February 12, 1981 the Court requested the parties to submit their views concerning six issues of concern to the Court relating to the proposed Settlement. */

On March 17, 1981, the parties submitted a joint response to the Court's order containing, inter alia, a list of experts who had participated in the formulation of the proposed Settlement and their resumes. Among the experts listed by the federal government was "Dr. David Twedell." Mr. Twedell's resume, which had been provided to EPA by Mr. Twedell's former employer, JRB Associates, Inc., indicated that Mr. Twedell had received B.S. and PhD in geology from the University of Houston.

On June 30, 1981, amici curiae submitted a memorandum and affidavits in opposition to the proposed Settlement. On July 29, 1981, the United States' submitted a reply brief and

*/ The issues which concerned the Court in its February 12, 1981 order were:

(1) whether an expert witness should be appointed by the Court pursuant to Rule 706 of the Federal Rules of Evidence; (2) whether the terms "requisite," "requisite remedial technology," and "appropriate remedial technology" had been used in other environmental settlements and litigation; (3) what action could be taken by the court in the event local governmental bodies refused to issue permits necessary to effectuate the settlement; (4) questions concerning easements and condemnation proceedings; (5) relocation of individual homeowners; and (6) maintenance of the landfill following expiration of the proposed settlement's thirty-five (35) year term.

five (5) affidavits in support of its position that the objections of amici were speculative and without merit and urged entry of the proposed Settlement.

One of the affidavits submitted by the United States was a sworn affidavit by David Twedell. In this affidavit, Mr. Twedell refers to himself as "Dr. David Twedell" and states that he is "a hydrologist by profession, with a Bachelor of Science and doctoral degrees in geology from the University of Houston, Clear Lake, Texas." Twedell Affidavit at 1.

In its order of August 12, 1981, the Court ordered the parties to present evidence concerning the adequacy of the proposed Settlement. During the months of September-October 1971, the Court heard eight (8) days of testimony and argument from the proponents and opponents of the proposed Settlement. The proponents of the proposed Settlement presented eleven witnesses including two chemists, a geologist, two hydrogeologists, two engineers, two health experts and an environmental scientist and submitted in excess of 100 exhibits.

On September 10-11, 1981, the government presented the testimony of David Twedell in support of its position that the proposed Settlement should be entered (T. 362-582).

As requested by the Court, counsel for the government proffered the expert qualification testimony concerning Mr. Twedell (T. 363-65). The government represented, inter alia, that Mr. Twedell had received a Bachelors degree in geology in 1975, a

doctorate in geology in 1979 from the University of Houston, and had taken other courses in hydrogeology and fluid mechanics (T. 363). The government based its representations on information obtained from Mr. Twedell's resume and during a series of interviews for the purpose of preparing Mr. Twedell's testimony for the September 9-11, 1981 hearing. Affidavit of Michael Elder at 3.

On November 19, 1981, EPA received allegations that Mr. Twedell did not possess a PhD as had been represented to the Court and the government. Affidavit of Robert C. Morgan at 5-6. EPA notified the Justice Department and a preliminary investigation was begun to verify Mr. Twedell's educational background. Affidavit of Michael Elder at 3. The government's preliminary investigation has revealed that official records maintained by the University of Houston do not substantiate Mr. Twedell's claim that he holds a PhD in geology from that institution. Affidavit of Michael Elder at 3; Affidavit of Robert C. Morgan at 5.

Although the government's investigation of this matter has not been completed, sufficient information has been obtained to cast serious doubt on the accuracy of Mr. Twedell's representation that he holds a PhD in geology.

*/ The allegations received by EPA have been referred by the Justice Department to its Criminal Division and Office of Professional Responsibility for further investigation. Affidavit of Michael Elder at 4. [An investigation to determine whether the criminal provisions of any statute have been violated will be conducted by the Criminal Division.]

While no allegations have been made and no information has been received which suggests that Mr. Twedell's testimony contained any (misrepresentations) concerning the substance of the proposed Settlement, the government nevertheless believes that it is appropriate to withdraw Mr. Twedell's affidavit and testimony from the record in this case.

However, for the reasons stated below and in the attached affidavits, the government submits that even without Mr. Twedell's affidavit and testimony, the record in this case is sufficient to support the entry of the proposed Settlement.

II. ARGUMENT

THE PROPOSED STIPULATION AND JUDGMENT APPROVING SETTLEMENT AGREEMENT IS REASONABLE AND ADEQUATE TO PROTECT PUBLIC HEALTH AND THE ENVIRONMENT AND SHOULD THEREFORE BE ENTERED

Assuming that the Court permits the government to withdraw the testimony and affidavit of Mr. Twedell, the only issue before the Court is whether the proposed Settlement should be entered. The legal standard controlling this determination is clear and undisputed. In United States v. Ketchikan Pulp Co., 430 F.Supp. 83 (D. Alaska 1977), the court reviewed extensively the legal requirements governing the settlement of environmental litigation involving the government. The Court stated "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. The same standard governs the entry of consent decrees in other areas of the law in which the public interest is implicated. See, e.g., United States v. City of Alexandria, 614 F.2d 1358, 1362 (5th Cir. 1980) (civil rights) ; United States v. Automobile Manufacturers Association, Inc., 307 F. Supp. 617, 621 (C.D. Cal. 1969), appeal dismissed, 397 U.S. 248 (1970) (anti-trust). Amici Curiae concede that the standard of reasonableness urged by the proponents of the proposed Settlement, i.e., the proposed Settlement must be reasonably adequate to protect the public interest, is controlling. Brief of Amici Curiae at 16-21 (June 30, 1981); T. 1836. */

While the federal government regards the alleged misrepresentations by Mr. Twedell concerning his educational status as an extremely serious matter warranting the withdrawal of his testimony and affidavit from the record in this case and further investigation for possible criminal violations, the proposed Settlement does not stand or fall on the basis of Mr. Twedell's technical assistance and testimony or the merits of the controversy concerning his qualifications. Mr. Twedell was one of twenty-one (21) scientists who lent their expertise to the Hyde Park Settlement negotiations on behalf of the federal government. Response of March 17, 1981 at 3-4; Miller Affidavit at 2-3.

*/ Although the proposed intervenors urge substantial modifications of the proposed Settlement, neither set of intervenors appear to support Amici's position that the agreement should be rejected (T. 1976-77, 1829).

* Although Mr. Twedell was the only hydrogeologist representing the federal government at negotiating sessions with Hooker, his interpretations of hydrogeologic data were consistent with the opinions and recommendations of the other experts and the presence of the State of New York's technical experts served as a check on the correctness of his technical evaluations. Morgan Affidavit at 2-4. Moreover, Mr. Twedell did not provide any of the chemical analyses, core samples, well logs, water elevation levels or other raw data used by EPA as a basis for its negotiating positions and the formulation of the technical details of the proposed Settlement. */ Morgan Affidavit at 3. While the government does not minimize or discount the role of Mr. Twedell's professional advice in the formulation of settlement proposals at the staff level, it is clear that none of the technical requirements of the proposed Settlement were the sole product of Mr. Twedell's advice and recommendation. As the Court has recognized, the proposed Settlement was the result of the work of a number of experts and not simply the technical evaluations made by Mr. Twedell (T. 529).

*/ Although he did not provide any of the raw data in this case, Mr. Twedell did supervise drilling crews who sunk monitoring wells during EPA's Love Canal sampling program.

Review of the negotiating process at supervisory levels at EPA and the Department of Justice confirms the integrity of the federal government's consideration and approval of the proposed Settlement. Dr. W. Lamar Miller, Acting Technical Director of EPA's Office of Waste Programs Enforcement, reviewed and approved all technical decisions as they were made during the negotiations (T. 47). Dr. Miller was briefed at least daily while negotiations were in progress (T. 48). Following the tentative agreement reached by the staff level negotiators on September 19, 1980, the proposed Settlement was reviewed by the Assistant Attorney General of the Land and Natural Resources Division and the Acting Assistant Administrator for Enforcement and Regional Administrator of EPA. These supervisory level approvals were made independent of any advice and recommendations made by Mr. Twedell. Miller Affidavit at 3-4.

The proposed Settlement was also independently reviewed by the State of New York both at the staff level and at the highest levels of state government. While the conclusions of the State geologist, Mr. Kernan Davis, concerning the hydrogeology of the landfill were similar to those of Mr. Twedell, they were arrived at independently and merely serve to confirm that the integrity of the proposed Settlement has not been compromised by Mr. Twedell's apparent misrepresentations concerning his educational status.

Moreover, the federal government has never contended that it possesses a complete understanding of the hydrogeology of the Hyde Park landfill site. Reply Brief of the United States at 9, 11, 15-16, 18 (July 29, 1981). As the Court has recognized (T. 410), the approach taken by the government has been to negotiate a settlement that would provide for the collection of comprehensive information concerning the landfill site and the chemicals deposited there prior to the installation of remedial programs. Testimony of Lamar Miller at 43-47. [Thus, any preliminary evaluations and opinions provided by Mr. Twedell will be confirmed or refuted by the comprehensive surveys and studies required by the proposed Settlement.]

- A. The Withdrawal of Mr. Twedell's Testimony and Affidavit Should Have No Effect on This Court's Determination Concerning Entry of the Proposed Settlement Insofar as It is Cumulative of Other Evidence and Not Substantially Disputed by the Opponents.

The information provided by David Twedell in his direct testimony and Affidavit concerning the Hyde Park landfill and the proposed Settlement was cumulative of other evidence in the ~~record~~ and, moreover, does not differ substantially from the testimony of the Settlement opponents' expert, Grant Anderson. Mr. Twedell's affidavit states that there is a downward movement of groundwater from the overburden to the

bedrock and that the Lockport Formation beneath the landfill site will not serve as a bottom seal to prevent chemical migration. This is the conclusion of every expert familiar with the landfill site, see, e.g., Testimony of Paul Counterman at 637; Grant Anderson at 1522; Frank Rovers at 1257-58, 1311. Mr. Twedell's affidavit acknowledges that the highly fractured upper portion of the Lockport Formation can act as a conduit for chemical migration to the Niagara River, as asserted by the Settlement opponents. Amici Brief at 4; Testimony of Grant Anderson at 1449-50. Mr. Twedell's affidavit further states that a hydraulic containment system in the overburden and upper fifteen (15) feet of the bedrock is required by the proposed Settlement to cut off chemical migration in the overburden and highly fractured portion of the bedrock. Twedell Affidavit at 4. Other testimony of record fully describes the containment systems set forth in the proposed Settlement. See, e.g., T. 632-40, 686-88, 1241-44, 1297-1301, 926-28.

Mr. Twedell's affidavit also contains the conclusion that the probable direction of groundwater flow from the landfill site is to the north, northwest, and southwest, i.e., towards the Niagara River. Twedell Affidavit at 5. During his testimony, Mr. Twedell elaborated upon his affidavit emphasizing that while there was a possibility of some variation to the west and southwest, the basic direction of groundwater flow was to the northwest (T. 502-507).

As the Court pointed out during the testimony of both Mr. Twedell and Mr. Anderson, (T. 519, 1472), there is little dispute between the experts concerning the general direction of groundwater flow from the landfill to the northwest. See, e.g., Testimony of Kernan Davis at 280-1; Frank Rovers at 1258. Mr. Anderson agreed with the Court's assessment, although he also noted a southerly component to the flow of groundwater (T. 1472). Given this similarity of testimony, Mr. Twedell's affidavit and testimony concerning the probable direction of groundwater flow is clearly not an indispensable element of the case for entry of the proposed Settlement. Moreover, as discussed below, any uncertainties in this regard will be resolved by the comprehensive surveys and studies required by the proposed Settlement, and as Mr. Twedell acknowledged, the containment systems may have to be adjusted accordingly (T. 398).

The remainder of Mr. Twedell's affidavit emphasises the lack of a complete data base and the need to acquire the information required by the proposed Settlement. Twedell Affidavit at 5-6. The opponents' expert, Grant Anderson, who had studied records pertaining to the site for a period of months and whose knowledge of the site was much less extensive than any of the other experts who gave testimony concerning

geology and hydrogeology, (was the only hydrogeologist who felt sufficiently comfortable with the information at hand to prescribe a complete remedy for the site.) Like Twedell, the remaining experts acknowledged the need for comprehensive data gathering prior to implementation of a complete remedial program. See, e.g., Kernan Davis at 292, 317-18; Paul Countermand at 1099, 636-37; Frank Rovers at 1312, 1316, 1357.

Twedell's testimony at the hearing was likewise cumulative and virtually undisputed by the other evidence of record. A portion of Mr. Twedell's testimony consisted of stating that he agreed with the testimony of prior witnesses, e.g., Kernan Davis' testimony concerning the use of water elevation data (T. 376) and the testimony of Lamar Miller and Robert Morgan concerning how aqueous phase and non-aqueous phase chemicals behave in the environment (T. 377).

Mr. Twedell also gave his opinion concerning the probable route of migration of aqueous phase contamination, i.e., downward through the overburden and into the highly fractured upper portion of the Lockport dolomite and thence outward to the northwest and the Niagara River (T. 397-398). His testimony in this regard is not only similar to that of other witnesses, see, e.g., testimony of Kernan Davis at 281-83; Robert C. Morgan at 215-16, and to the position of Amici, Amici Brief at 4 (June 30, 1981), it will be

verified or refuted by the surveys and studies required by the proposed Settlement. See Paragraphs C(2)-(6) of Addendum

I. Mr. Twedell acknowledged that his preliminary findings needed to be confirmed by an adequate data base (T. 379-80, 398).

Mr. Twedell also gave his opinion concerning the ability of the Rochester shale formation beneath the landfill to transmit water (T. 399-400). Mr. Twedell's testimony in that regard relied heavily on Richard Johnston's testimony and study (T. 399) and his own observations of rock cores (in the Niagara Falls area. This testimony was confirmed not only by Mr. Johnston (T. 237-38), but also by Kernan Davis (T.293-95) and Frank Rovers (T. 1303, 1307-08) and was not directly disputed by Mr. Anderson. */ In any event, as Hooker acknowledges in its post-hearing submission, Hooker's Memorandum In Support of Court Approval of Settlement Agreement at 5, the conclusions of the experts will be confirmed by permeability testing of the Rochester Shale in the event that Requisite Remedial Technology is required to address contamination of the lower bedrock. Paragraph C(8)(f) of Addendum I.

*/ Mr. Anderson conceded that his experience with the Rochester Shale was not at the landfill site, but rather in Canada on top of the Niagara Escarpment (T. 1519). Mr. Anderson admitted he had no evidence concerning chemical migration through the Rochester Shale at the site (T. 1599).

The remainder of Mr. Twedell's direct testimony was devoted to describing in general terms a tile drain system and a purge well system (T. 380-86). Mr. Twedell stated that these are proven techniques which could successfully be applied to conditions at the landfill. Id. He acknowledged that these technologies could not be expected to collect non-aqueous chemicals in the bedrock (T. 383) and off-site aqueous contamination (T. 388) and that Requisite Remedial Technology would be necessary (T. 388-91). Mr. Twedell also acknowledged the possibility that a tile drain and purge well system might prove to be ineffective and that Requisite Remedial Technology might eventually have to be implemented in the overburden and upper portion of the Lockport Formation (T. 390-391). It was emphasized that Mr. Twedell's testimony was conceptual (T. 384, 386) and that Mr. Counterman and others would address the application of these technologies to the site (T. 384).

The use of the technologies generally explained by Mr. Twedell at the landfill site was the subject of exhaustive testimony by Mr. Counterman (see, e.g., T. 632-40, 649, 686-88, 1103, 1126), Mr. Rovers (T. 1241-44, 1272-3, 1298-1301, 1315, 1325, 1356, 1358) and Dr. Mason (T. 926-28, 951). Moreover, the efficacy of these technologies, if properly installed, was conceded by the Settlement opponent's experts. Testimony

of Grant Anderson at 1528, 1588; Report of Robert Rickles, "Costs Estimates of Remedial Technologies for the Hyde Park Landfill Site" at 2, 12.

Given the conceptual nature of Mr. Twedell's testimony, which was virtually undisputed by the opponents, and the wealth of other evidence of record concerning these technologies as applied to the landfill site, the withdrawal of Mr. Twedell's testimony does not significantly alter the state of the record on these points.

* The primary concerns of the Settlement opponents during their cross-examination of Mr. Twedell was that he was not competent to provide hydrogeologic interpretations of data (T. 530, 534, 537) and that he would be the federal government's primary expert for the purpose of evaluating such data during the implementation of the proposed Settlement (T. 529-30, 534-35). Both concerns have been fully addressed.

Inasmuch as the federal government has withdrawn Mr. Twedell's testimony and affidavit and will not permit him to participate further in the Hooker litigation, Miller Affidavit at 4, the opponents' challenge to Mr. Twedell's expertise is moot.

Moreover, as was pointed out during the hearing (T.725-26), and as stated by Mr. Miller in his affidavit, Miller Affidavit at 4, EPA's Ada, Oklahoma and Las Vegas, Nevada Environmental Monitoring Systems Laboratories and the United States Geologic

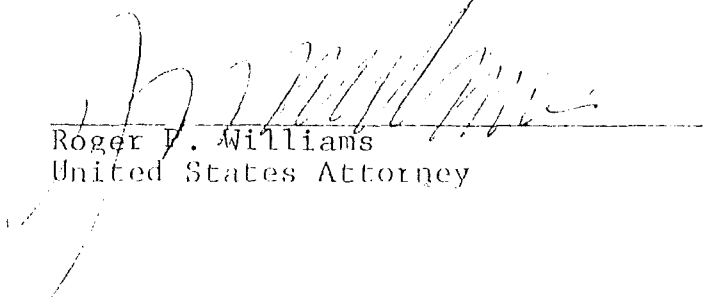
Survey will assist EPA in its evaluation of data received pursuant to the Settlement. Moreover, EPA has committed to replace Mr. Twedell with competent and qualified experts to aid in the evaluation of data as expeditiously as possible. Miller Affidavit at 4. Thus, to the extent that the alleged misrepresentations concerning Mr. Twedell's qualifications have prejudiced the implementation of the proposed Settlement, that prejudice has been cured by the federal government's prompt handling of this matter.

III. CONCLUSION

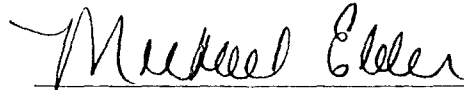
For the reasons stated above, the United States respectfully submits that the testimony and Affidavit of David Twedell should be withdrawn, and that on the basis of the remaining record in this case the proposed Stipulation and Judgment Approving Settlement Agreement should be entered.

Respectfully submitted,

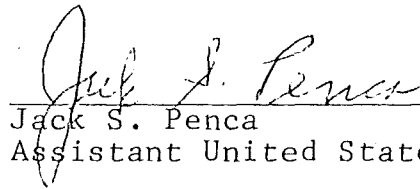
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United States Attorney

A handwritten signature in cursive script, reading "Michael Elder".

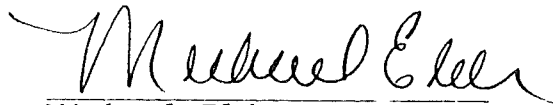
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A handwritten signature in cursive script, reading "Jack S. Penca".

Jack S. Penca
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Withdraw Testimony and Affidavit of David Bruce Twedell and to Enter the Proposed Stipulation and Judgment Approving Settlement Agreement, memorandum and Affidavits in support thereof were hand delivered to counsel of record on this 30th day of November, 1981.


Michael Elder