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March 24, 1983

Clerk
United States District Court
for the Western District
of New York
68 Court Street
Buffalo, New York 14202

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

Dear Sir or Madam:

I have enclosed for filing the Memorandum of the State of New York in response to the Court's Order of January 18, 1983 in the above-referenced action, as well as a certificate of service on all parties. Thank you.

Sincerely,


MARY ELLEN BURNS
Assistant Attorney General

MEB:ra

Encl.

cc: All Counsel of Record
Hon. John T. Curtin

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, et al., :

Plaintiffs, :

-vs-

: CIV-79-989C
: (Hyde Park Landfill)

HOOKER CHEMICALS & PLASTICS :

CORPORATION, et al., :

Defendants. :

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MEMORANDUM OF LAW BY STATE OF NEW YORK IN
RESPONSE TO COURT'S ORDER OF JAN. 18, 1983

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Plaintiffs

MARY ELLEN BURNS
Assistant Attorney General
of Counsel

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UNITED STATES OF AMERICA, et al., :
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Plaintiffs, :
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-vs- : CIV-79-989C
:(Hyde Park Landfill)
HOOKER CHEMICALS & PLASTICS :
CORPORATION, et al., :
:
Defendants. :
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MEMORANDUM OF LAW BY STATE OF NEW YORK IN
RESPONSE TO COURT'S ORDER OF JAN. 18, 1983

The State's concern, as a plaintiff in this action, is to see that the remedial work set forth in the Settlement

Agreement approved by the Court is effectively and efficiently carried forward, that the terms of the Agreement are abided by, and that persons affected by the Agreement are fairly and justly treated. The State is not a party to the negotiations which have taken place between defendant Hooker Chemicals & Plastics Corp. ("Hooker") and the nine property owners whose property Hooker has offered to purchase. The adversary nature of our legal system recognizes "cases and controversies" as the appropriate vehicles for invoking the judicial decision-making power. This principle acknowledges that it is the parties closest to a dispute who have the opportunity and the impetus to make the most cogent and forceful arguments, thereby focusing the issues and providing a court with the facts and the views with which to arrive at a sound resolution. Here, it is the homeowners and Hooker who can, in the first instance, best suggest to the Court how the issues separating them can be resolved.

The interests of all parties would be best served by an efficient resolution of this matter. Certainly, if a way can be found to resolve all issues expeditiously in front of this Court, as the Intervenor's motion in effect urges, that route would be welcomed by the State.

RESPONSES TO THE COURT'S QUESTIONS

QUESTION 1: What jurisdiction does the Court have to construe the meaning of the Settlement Agreement and the Hooker commitment letter offering to purchase the nine homes for the parties involved in plaintiff's motion?

 This Court has continuing jurisdiction over the Settlement Agreement by virtue of its jurisdiction of the claims asserted by the governmental plaintiffs in this action. In the exercise of that jurisdiction, it may properly construe the terms of the Settlement Agreement for persons affected thereby.

 However, the College Heights Property Owners Association, the movant here, is not necessarily the appropriate party in interest; rather, the six individual property owners whose property rights are at issue should undoubtedly be before the Court in order for the Court to determine the issues raised by the motion. The Court has the power to join such parties, under Rule 19 of the Federal Rules of Civil Procedure. The Settlement Agreement recognizes this authority in Paragraph 8(d)(1) of the Judgment. Without such joinder, the Court may be in the position of being able to order Hooker to take certain actions with respect to the property owners, but not vice versa.

 The property owners, by bringing on this motion, evidence an apparent willingness to be joined and hence bound by any Court determination of the issue of standards, valuation and

other property damage. It is to be hoped that the Intervenor, in its response papers, will address the issue of its status before the Court. Hooker, of course, is bound by any determination of the issues because it is a party in this action and a signator to the Agreement.

The Court assuredly has the power to construe the terms of the Settlement Agreement as they might apply here, as well as to construe any commitments made to the Court. Under the Judgment, Par. 8(d), Hooker is obligated to use its "best efforts" to obtain all access or rights of way necessary to carry out its obligations pursuant to the Judgment. In determining what constitutes "best efforts," the Court could determine, if the facts warranted, that purchase was more appropriate than, for instance, some temporary easement; that certain standards for purchase should be used and, even, that a certain valuation on the property constituted an appropriate purchase price. In determining a valuation, the Court could take into account the question of other property damage, and what was a fair and reasonable offer of purchase. Alternatively, the Court could determine that "best efforts" did not require purchase of homes, although Hooker's letters of March 24, 1981 and June 9, 1982 certainly suggest that "best efforts" do require purchase. It would seem, therefore, that the Court has authority to determine all the factual issues

regarding valuation of the homes raised by the Intervenor's motion papers.

The Court has other authority in addition to interpreting provisions of the Settlement Agreement. The Court's continuing jurisdiction encompasses its equitable power to insure that the relief obtained in this action--the remediation contemplated by the Settlement Agreement--is enabled to go forward.*

Hooker's commitment to purchase certain homes in the Hyde Park Landfill area, set forth initially in its March 24, 1981 letter to the Court, may well be construed as a statement by Hooker that the purchase of these homes and the use of this property is necessary to carry out the terms of the Hyde Park remedial program.

The Court's discretion, in exercising its traditional equity practice, extends to ordering injunctive relief to achieve compliance with the requirements of the Clean Water Act, 33 U.S.C. § 1251 et seq. See Weinberger v. Romero-Barcelo, _____ U.S. _____, 102 S.Ct. 1798 (1982), and cases cited therein; U.S. v. Price, No. 82-5030, slip. op. at 10 et seq. (3rd Cir., Sept. 14, 1982). Thus, if it determines that the purchase of these homes is necessary to effectuate the Agreement, the Court may order Hooker to do so. Likewise,

*It is appropriate and necessary, in any case in which the government seeks remedies, in the public interest, for environmental pollution, for a court to be able to order access to private property, consistent with due process requirements, in order to effectuate a proper cleanup.

if the Court determines that the failure of Hooker and the homeowners to reach an agreement endangers the effectuation of remedial relief, it may act to order some resolution.

If the Court does not find power under the Agreement or in its equity powers, there is some very limited authority to suggest that, presented with a proper request, the Court may make an order to purchase property here based upon the All Writs Act, 28 U.S.C. § 1651.* Although most cases under this Act have arisen in the very different context of an appellate court's protection of its jurisdiction by issuance of a writ to a lower court, at least one case has recognized the power of a district court to issue an order to a private party to take an action. Stern v. South Chester Tube Co., 390 U.S. 606 (1968).

As another potential basis for jurisdiction, the Court might determine that the property owners here have, in effect, raised an issue appropriate for the Court's exercise of ancillary jurisdiction, and that a homeowner's action in federal court seeking relief against Hooker for property damage and to purchase homes is the appropriate vehicle for resolving the dispute. See Freeman v. Howe, 24 How. (65 U.S.) 450 (1860). This result would cause delay while a proper action was filed.

*"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and precepts of law." 28 U.S.C. 1651(a).

In the end, it is most clear that the Court can construe the Settlement Agreement and the "best efforts" provision in determining whether Hooker's actions have comported with the Agreement and can, if it determines as a factual matter that such efforts encompass attempts to purchase property, determine appropriate standards and even a valuation. It is also clear that the Court's powers in equity give it authority to effectuate the terms of the judgment by appropriate means, including determining the facts regarding the purchase and property damage.

QUESTION 2: What jurisdiction exists for the Court to set a value on the property owners' homes? Concomitantly, what authority exists for the Court to determine the various factors (e.g., the elements of fair market value, or the existence of the landfill, or damages) in determining the value of the homes?

As set forth in response to Question 1, the Court's authority to construe the Settlement Agreement, as well as its traditional equity powers, provide jurisdiction.

QUESTION 3: What is the relationship of Hooker's purchase offer to the Settlement Agreement's requirement of "best efforts" on the part of Hooker? What effect does this have on the homeowners?

As set forth in response to Question 1, "best efforts" is a good faith requirement to do what is necessary to obtain

the property rights and authorizations required to carry out the Judgment. Hooker's letters of March 24, 1981 and June 9, 1982 state its belief that the actual purchase of property is necessary to effectuate the cleanup required by the Judgment. What constitutes a fair and reasonable offer by Hooker to purchase is, as noted above, arguably within the Court's power to decide, if the parties (Hooker and the homeowners) cannot. The effect this has on the homeowners is that they are given the opportunity to sell their property. The question is whether they are obliged to do so; i.e., whether the Court, having made a determination on price, could in fact order a sale. Unless the homeowners are properly before the Court, the answer to that question is "no."

QUESTION 4: If Hooker does not exert its "best efforts," what sanctions, if any, are available?

Paragraph 8(f) of the Judgment sets forth the sanctions for Hooker's failure to comply with the provisions of the Judgment; namely, monetary penalties. The Court may be petitioned for "other appropriate relief," under the last sentence of Par. 8(d)(1) of the Judgment, in the event Hooker fails to use best efforts.

QUESTION 5: Is Hooker free to disregard any determination by this Court of the value of the properties? Could Hooker proceed to litigate this issue elsewhere?

Hooker, as a party to this action and a signator to the Agreement, would not be free to disregard the Court's

determination. Whether it could litigate the action elsewhere, as plaintiff or defendant (for instance, in defending the homeowners' state court action) must await the event before an appropriate response can be given. Presumably, if this Court made a determination, some collateral estoppel might apply, but this is speculative right now.

QUESTION 6: Are the homeowners free to reject Hooker's purchase offer?

Since the homeowners are not parties to this action and since it is therefore not clear what jurisdictional basis exists at this time to force them to sell, they would seem to be free to reject any offer by Hooker. This is the most troublesome aspect of the issue before the Court.

QUESTION 7: What effect would the homeowners' rejection of Hooker's purchase offer have on the Settlement Agreement and Hooker's remedial efforts undertaken pursuant to the Agreement?

The scope of contamination is not yet known, so it is unclear what the full effect on remedial work would be. Hooker has stated that it requires this property in order to carry out the Agreement effectively (for use as staging areas, etc.) It is fair to predict that if Hooker and the homeowners cannot soon

reach agreement on the purchase of homes, the ability to undertake certain remedial work may well be affected.

QUESTION 8: Are the homeowners free to disregard any determination by this court of the value of the properties? Could the homeowners proceed to litigate this issue elsewhere?

As noted in response to Question 6, the current answer to the first inquiry appears to be yes, since the homeowners are not before the Court. The homeowners have raised property damage claims and sought relocation and a valuation placed on their property in their State Court action. Askey et al. v. Hooker Chemicals & Plastics Corp. et al., Sup. Ct. Niagara Co. (Complaint attached as Exhibit 4 to Hooker's response dated Jan. 6, 1983). Whether they could litigate the issues fully there depends in large part upon how this Court decides those issues.

QUESTION 9: If the court finds the homeowners unreasonable in refusing to accept a purchase offer, what sanctions, if any, are available?

As long as the homeowners are not before the Court, there do not appear to be any.

QUESTION 10: If the Court finds the homeowners unreasonable in refusing to accept Hooker's purchase offer, what suggestions do the United States and the State of New York have to obtain transfer and title to the properties?

Since the homeowners and Hooker may both be willing to have a third party--i.e., the Court--determine the issue, it should be possible to reach some mutually acceptable agreement whereby Hooker buys and the owners sell, or, if no agreement is possible, the Court determines that some action less than sale will achieve the desired end (e.g., some compensation to the homeowners to obtain a right of access). If that route proves unavailing, the governments will have to assess what appropriate measures to take. Until the situation arises, it is not possible to evaluate what actions would be necessary or useful.

QUESTION 11: If the Court is empowered to resolve all or part of the issues presented, to what extent, if any, would the homeowners be barred from raising these issues in State Court?

Presumably some sort of collateral estoppel might apply to some issues. However, until the occasion presents itself, it is not possible to respond more fully.

QUESTION 12: May the Court appoint a master to resolve these questions?

Under Rule 53 of the Federal Rules of Civil Procedure, a master could be appointed. The Settlement Agreement contemplates such a possibility in Par. 19 of the Judgment. It would seem that a master would be most useful to determine precise valuations and property damages, rather than to

determine what constitutes Hooker's best efforts, or what is required to best effectuate the Judgment. The Court, which is familiar with the complex technical issues involved herein, would most efficiently determine those preliminary matters.

QUESTION 13: Would the parties be entitled to a jury trial on these issues?

On the issue of valuation, the parties, since they may be so entitled under the most comparable procedure, Rule 71A(b) of the Federal Rules of Civil Procedure, would probably be entitled to a jury trial. On the issue of property damages, a jury trial seems guaranteed by the Seventh Amendment to the U.S. Constitution. Under State law, no trial by jury is had in the analogous condemnation proceedings. N.Y.S. Eminent Domain Procedure Law § 501. Trial by jury for property damages is, of course, provided. N.Y.S. Civil Practice Laws and Rules § 1401.

QUESTION 14: If the Court does not have jurisdiction over this matter, what suggestions do the parties have to resolve the issues presented?

It is urged that the Court take jurisdiction, especially if it finds a way to bind the homeowners as well as Hooker to its determinations. If the Court concludes it does not have jurisdiction, the State would wish in the first instance to hear the suggestions of the homeowners and Hooker,

as the critical parties involved in the dispute, before commenting further.

CONCLUSION

The above constitutes the response of the State to the Court's order of Jan. 18, 1983. The State reiterates its belief that the effectuation of the Judgment favors an early and expeditious resolution to the dispute between Hooker and the homeowners.

Dated: New York, New York
March 24, 1983

Respectfully submitted,

ROBERT ABRAMS
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 1983, a copy of the foregoing Response was served by first class, postage prepaid, unless otherwise indicated, on the following counsel:

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