

B(c)(i)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

Plaintiffs,

vs.

Civil No. 79-989

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

Defendants.

HOOKEE'S MEMORANDUM IN RESPONSE TO
GOVERNMENT'S MOTION TO WITHDRAW TESTIMONY

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

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

Plaintiffs,

v.

HOOKEER CHEMICALS & PLASTICS CORP.;
OXY CHEMICAL CORPORATION; HOOKEER
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

HOOKEER'S MEMORANDUM IN RESPONSE TO
GOVERNMENT'S MOTION TO WITHDRAW TESTIMONY

This memorandum is submitted on behalf of Hooker Chemicals & Plastics Corp. ("Hooker"), in response to the Government's Motion to Withdraw Testimony and Affidavits of David Twedell and the pleadings filed in reply thereto by three Amicus Curiae ("Amici") and the Applicants for Intervention ("Applicants") in this proceeding.

[In summary, Section I of this memorandum notes the absence of any disagreement about the weight to be accorded the Twedell testimony and affidavits. Rather, Applicants and Amici have simply utilized the instant motion as a pretext to reiterate their technical objections to the Settlement Agreement which have been addressed

repeatedly in the record before the Court. Such arguments have little relevance to the testimony which the United States proposes to withdraw. Indeed, as shown in Section II, Twedell's testimony is clearly cumulative and the record before the Court -- containing literally thousands of pages of testimony and written submissions from the parties and numerous expert consultants -- is complete without the testimony.

In Section III, we show that the Amici are plainly wrong in their assertions that no hydrogeologic experts participated in the settlement negotiation process or that Mr. Twedell's modest role in that process compromised the integrity of that process and efficacy of the Settlement Agreement.

Despite the cumulative and duplicative nature of Mr. Twedell's testimony and role in the negotiation process, Amici and Applicants suggest that the Government's motion somehow rehabilitates the viability of the same technically discredited and unworkable alternatives which they presented at last fall's hearing -- significant delay, further unnecessary review and, most distressingly, extended litigation in the hopes of someday excavating the entire contents of the site. Hooker vigorously disagrees. We believe that the parties are entitled to know now whether they should prepare to implement the Settlement Agreement or litigate this action and that the only appropriate course for the Court is as clear-cut today as it was before the United States moved to withdraw the Twedell testimony: the Settlement Agreement should be approved.

I. There is No Practical Disagreement Concerning the Appropriate Disposition of Mr. Twedell's Testimony and Affidavits.

Through its motion, the United States proposes to withdraw the testimony and affidavits of David Twedell, provided at hearings in this matter last fall, in light of recently-discovered evidence that Mr. Twedell misrepresented his academic credentials. [The Applicants "concur" that the testimony and affidavits should be withdrawn.] (Applicants' Response, p. 11.) Amici oppose withdrawing the Twedell testimony and affidavits, but they agree that both should be accorded "zero weight" (Amici Memorandum, p. 19) (- precisely the weight that the testimony and affidavits would be accorded if they were withdrawn as the United States has proposed.)

II. Mr. Twedell's Testimony Was Cumulative and the Record Without That Testimony Fully Supports Court Approval of the Settlement Agreement.

The memorandum accompanying the Government's motion shows in painstaking detail that the subject matters covered by the Twedell testimony were duplicative and cumulative, i.e., that the record is complete even in the absence of the Twedell testimony.

The Applicants and Amici rhetorically disagree with the United States concerning the Twedell testimony, but their prolix papers provide no substantiation of their rhetoric. Specifically, in support of their position that there were subjects as to which the Twedell testimony was not cumulative, the Applicants' Response (p. 3) makes reference only to "overburden and

sump" testing, surveys of "streams, or overland surface drainage channels," and "perpetual monitoring" programs, while Amici's Memorandum (p. 11) cites only the permeability of the Rochester Shale and "[t]he monitoring system['s] capab[ility] of measuring the effectiveness of the bedrock Purge wells"

The reference to these subject areas, in fact, supports the position of the United States that the Twedell testimony is purely cumulative. The Twedell testimony barely touched on the subjects of soil tests, surveys or monitoring;^{1/} rather, a

1/ For example, with regard to monitoring the effectiveness of the bedrock purge wells, the Amici cite only Tr. 551, which contains the following Twedell testimony:

A. For the bedrock system, the system will be designed to reach -- to collect a hundred percent of the -- of the material that is passing within its -- the aqueous material that's passing within its -- within its realm of --

Q. Its cone?

A. Its cone of influence.

Q. Okay. So --

A. The --

Q. I'm sorry.

A. I think that the -- if the system does not collect at least ninety percent, then that level will then trigger us into moving into another -- having to go and look at other RRT that will meet that -- that requirement that we're trying to get.

✓ Not only is this testimony general and disjointed, the cross-examiner appears to have confused or equated the monitoring program to assess the operational effectiveness of the bedrock purge wells with the surveys and studies that are to be undertaken prior to their construction. (Tr. 552-53.) On

Footnote continued --

number of other governmental witnesses provided extensive testimony in these areas, e.g., Messrs. Miller, Counterman, and Mason. Indeed, the principal objections of Amici and the Applicants relating to surveys and monitoring concerned indicator chemicals -- a subject area not addressed at all by Mr. Twedell. (See Hooker's Memorandum in Support of Court Approval of Settlement Agreement, dated October 14, 1981, pp. 2-3, 8-9, attached hereto.) Thus, the proposed withdrawal of the Twedell testimony is wholly unrelated to the issue of soils testing, surveys, and monitoring raised and re-argued by the Applicants and Amici.

Likewise, the proposed withdrawal of the Twedell testimony does not affect the Rochester Shale permeability issues raised by Amici and re-argued at length by Grant Anderson in an affidavit filed with the Amici's Memorandum. Mr. Anderson's affidavit consumes ten paragraphs discussing the Rochester Shale

Footnote continued --

the other hand, other witnesses testified in detail as to the monitoring program's operation and adequacy. (Miller, Tr. 115-129; Counterman, Tr. 673-642, 689-691, 1011-1029; and Mason, Tr. 925-928, 949-950.)

The testimony of Amici's own witness, Mr. Anderson, on the subject of the purge well monitoring program is merely conclusory -- perhaps as the result of a failure on his part to distinguish between the purge well monitoring program and the pre-construction surveys and studies provided in the Settlement Agreement. (Tr. 1531-1537.) It is clear that Mr. Anderson's fundamental objection is not to the monitoring program but to the Settlement Agreement's performance standard of purge well effectiveness -- an objection which Mr. Anderson conceded was based upon a level of professional training that he himself did not possess. (Tr. 1578, 1586-87.)

permeability issue (See Anderson affidavit, ¶¶ 13-23).^{2/} Significantly, however, none of the paragraphs mentions the Twedell testimony, while the testimony of Messrs. Davis, Johnston and Rovers is repeatedly cited. Thus, it is clear that Mr. Anderson's disagreement about the Rochester Shale's permeability is not with Mr. Twedell but with Messrs. Davis, Johnston, and Rovers -- individuals whose hydrogeologic expertise and extensive experience in studying bedrock formation in the Hyde Park - Bloody Run Area and its immediate environs were not challenged at the hearing and are not subject to credible dispute.^{3/}

2/ The crucial fallacy in the Amici's position is Mr. Anderson's refusal to acknowledge that the Settlement Agreement provides for testing of Rochester Shale permeability in appropriate circumstances. Clearly such testing is not required if the "mapping" surveys, pursuant to Addendum I (¶ C) of the Settlement Agreement (i.e., testing throughout the Lockport Bedrock to the top of the Rochester Shale), reveal that Hyde Park chemical migration has not reached Rochester Shale.

As Hooker pointed out in its Memorandum dated October 14, 1981 (pp. 4-5), if the results of the surveys and the subsequent assessment of Requisite Remedial Technology require that additional data relating to the permeability of Rochester Shale be gathered, Paragraph C(8)(f) of Addendum I provides for that contingency. The fundamental error with Mr. Anderson's analysis of the Rochester Shale permeability issue lies not with his technical disagreement with three experts, but with his continued misreading of the Settlement Agreement -- an area in which he neither claims nor exhibits any expertise.

3/ Mr. Anderson's belated and partisan efforts to disparage the expertise and experience of Messrs. Johnston, Davis and Rovers are wholly inappropriate and should be stricken. (See Anderson affidavit, ¶¶ 7-11.) The record is clear that each of these three experts is academically trained and professionally accomplished in the area of groundwater flow in geologic formations and -- unlike Mr. Anderson -- each has worked extensively in the Hyde Park - Bloody Run Area or in the vicinity. (Davis, Tr. 264-67; Johnston, Tr. 228-30; Rovers, Tr. 1233-38.)

Accordingly, we agree with the United States that the Twedell testimony is completely cumulative. [It is well-settled that the admission of cumulative expert testimony later deemed to be incompetent is harmless error -- even in litigation before a jury. See Tropea v. Shell Oil Co., 307 F.2d 757, 763 (2d Cir. 1962). In these circumstances, the trial court is not required to re-try the case or to decide the case against the party sponsoring the excluded testimony. (Rather, the Court should proceed by deciding the matter on the existing record absent the excluded testimony. See United States v. 396 Corp., 264 F.2d 704, 709 (2d Cir.), cert. denied, 362 U.S. 817 (1959); see also Reid v. Quebec Paper Sales & Transportation Co., 340 F.2d 34, 38 (2d Cir. 1965).

In short, neither the Applicants nor Amici have substantiated their challenge to the well-documented position of the United States that the Twedell testimony is cumulative.

Footnote continued --

Indeed, in papers filed June 30, 1981 (Brief of the Ecumenical Task Force of the Niagara Frontier, Inc. Amicus Curiae and Pollution Probe, Operation Clean-Niagara Amici Curiae, p. 27), the Amici proposed Mr. Johnston as a court-appointed expert. Accordingly, we vigorously dispute the argument that the views of Mr. Anderson -- who possesses no advance academic degree and no professional experience in this geographical area -- should be deemed dispositive and that contrary expert opinions should be disregarded.

III. Mr. Twedell's Participation in the Settlement
Negotiation Process Does Not Require Rejection
of the Settlement Agreement.

As the United States advised the Court, through affidavits accompanying the Government's motion, the United States has thoroughly reviewed Mr. Twedell's role in the settlement negotiations, and it has amply documented the nature of his role. Its conclusion is that Mr. Twedell's participation did not compromise the integrity of the governmental review process and that it does not otherwise require rejection of the Settlement Agreement. The Applicants and Amici offer no cogent rationale in support of their contrary position in this regard.

The hypothesis inherent in the pleadings of the Applicants and Amici is that Mr. Twedell's presence in the negotiation process somehow enhances their technical objections to the Settlement Agreement and that it also somehow diminishes the expertise, the time-consuming efforts, and the good faith of Messrs. Miller, Morgan, Mason, Davis, Rovers, Levins, and all of the other experts who participated in the negotiation and careful review of the Settlement Agreement. Such a position is, of course, pure sophistry.

Another fallacious premise reflected in the arguments of the Applicants and Amici is that the Settlement Agreement is fatally defective simply because the United States, the State of New York and Hooker did not each have the same specific academic disciplines represented on their respective negotiating teams. This ignores the fact that the United States and the

State are co-plaintiffs in this action and have co-extensive statutory obligations to protect public health and the environment in the Hyde Park - Bloody Run Area. Hooker has demonstrated a similar commitment in this regard and, in addition, because the Settlement Agreement requires an extensive monitoring program to assure the continued effectiveness of the various containment systems, Hooker has every economic incentive to properly design and operate the remedial technologies.

It should be emphasized that the settlement negotiation participants included Kernan Davis, a State of New York geologist experienced in groundwater flow, specifically in the vicinity of the Hyde Park - Bloody Run Area, and Frank Rovers, an independent consultant retained by Hooker with extensive experience in hydrogeology on behalf of both government and industry. (Davis, Tr. 246-65; Rovers, Tr. 1233-35; see also fn. 3 at p. 6, supra, contrasting the expertise and experience of Messrs. Davis and Rovers with that of Mr. Anderson.) In addition, the Federal governmental team, with its ability to draw upon numerous technical resources, encompassed sufficient expertise in related technical areas (such as chemistry, soil science, and engineering) to provide appropriate peer review of Messrs. Davis and Rovers. (See, e.g., Amici Memorandum Exhibit A.)

In his affidavit, Mr. Anderson criticizes the hydrogeologic expertise available to the negotiating teams, citing their failure to conclude on the basis of field observations that Hyde Park chemicals have migrated to the Niagara River Gorge

face. In the first place, Mr. Anderson's criticism is illogical since those with related areas of expertise, such as chemistry and soils science, would appear as capable as a hydrogeologist in evaluating field evidence of chemical migration. Second, despite observations at the Gorge face on a number of occasions by EPA, State and Hooker multi-disciplinary experts,*only Mr. Anderson reported field evidence of Hyde Park chemical migration at the Gorge face. Amici's own laboratory analyses of Gorge face seepage samples subsequently revealed only environmentally-insignificant traces of chemicals of uncertain origin, thus failing to confirm Mr. Anderson's hypothesis about the extent of Hyde Park chemical migration.^{4/} Accordingly, references to the Gorge face field observations do not substantiate Amici's argument that the parties negotiating the Settlement Agreement lack appropriate expertise in hydrogeology or any other relevant discipline.

In short, despite their protestations, the Applicants and Amici have failed to demonstrate that the exhaustive process of developing the Settlement Agreement and the expertise and good faith of all of the experts who worked on the remedial programs have failed to address their technical concerns. The record did not support the protestations of the Applicants and

^{4/} See Hooker's Memorandum dated October 14, 1981, at p. 4 fn. 3. To the extent uncertainties remain concerning this issue, EPA has agreed to collect and analyze samples from the Gorge face. (Tr. 1917.)

* See testimony of Messrs. Morgan (Tr. 167-170; 209-218); Davis (Tr. 249; 254); and Rovers (Tr. 1304-1310).

Amici before the proposed withdrawal of the Twedell testimony and does not support them today.^{5/}

IV. Conclusion

In assessing the state of the record before the Court, we believe that great weight should be accorded the status and nature of this proceeding. A Settlement Agreement has been submitted for judicial review and approval, and over the last twelve months voluminous public hearings, pleadings, affidavits, and testimony have been proffered to the Court to assist its understanding and evaluation of the submission. [We believe the state of the record, even without Mr. Twedell's testimony, permits judicial resolution of this matter at this time.^{6/})

^{5/} Specifically, with reference to the technical concerns of Mr. Anderson -- the only individual relied on by Amici in the area of geology or groundwater flow -- Mr. Anderson summarized his testimony by listing four alleged deficiencies of the Settlement Agreement: (1) no Rochester Shale testing; (2) inadequate installation of the overburden collection system; (3) no Gorge face seepage sampling; and (4) failure to excavate the entire contents of the landfill. (Tr. 1540-45.) The first objection has been repeatedly addressed, including in fn. 2 and 3 at pp. 5-6, supra. The second was abandoned on cross-examination (Tr. 1588-90); the third, discussed in fn. 4 at p. 10, supra, is currently being addressed by EPA (Tr. 1917); and the fourth objection has been totally discredited as environmentally and economically irresponsible (Tr. 1058; 1337; 1548; 1764-65).

^{6/} The inquiry proposed in Amici's Memorandum (p. 19) concerning Mr. Twedell and his ex-employer has no discernable relevance to the Court's review of the Settlement Agreement and therefore provides no basis for delaying final action on the Settlement Agreement. The Amici's proposal also ignores the representations of the Government's motion that the matter is now subject to a criminal investigation by appropriate federal authorities. Likewise, Applicants' proposal (Response, p. 9)

We have previously discussed the legal standards governing the review of settlement agreements presented for judicial approval. As the applicable case law makes clear, a presumption of validity attaches to such agreements, i.e., the court's role is not to review all the data considered by the parties, but rather simply to assure itself "that the government has not breached its duty to the public in consenting to the decree."^{7/}

Unlike the Applicants and Amici, we do not propose to utilize the Government's motion as a pretext to re-argue whether the Settlement Agreement satisfies these legal standards. Suffice it to conclude that the most recent arguments of the Amici and Applicants crystallize the respective positions as follows:

- A. Reject the Settlement Agreement, litigate the action and excavate the contents of the Hyde Park landfill to some unknown location, as Amici propose;

Footnote continued --

to refer this matter to an extra-judicial expert panel is unnecessary, given the extensive record developed over the past 12 months, and would only serve further to delay any remedial program. In addition, the forum proposed by the Applicants would presumably consider the same data which has been presented to the Court, and would not have before it the complete data base which will be produced once the Settlement Agreement is implemented.

^{7/} United States v. Bechtel Corp., 649 F.2d 660, 666 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3433, 3438 (U.S. Dec. 1, 1981) (No. 81-521). See generally Hooker's Memorandum dated October 14, 1981, pp. 9-10.

- B. Delay action on the Settlement Agreement and convene evidentiary hearings before a technical panel, as the Applicants propose; or
- C. Approve the Settlement Agreement and thus provide for a complete data base and expeditious remedial action, as the parties to this action propose.

We submit that the appropriate course is as clear-cut today as it was before the United States moved to withdraw the Twedell testimony. Accordingly, we urge the Court to promptly complete its review and execute the Settlement Agreement.

Respectfully submitted,

Thomas H. Truitt, Esq.
Keith S. Watson, Esq.
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

Louis Nizer, Esq.
George Berger, Esq.
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
40 West 57th Street
New York, New York 10019
(212) 977-9700

David K. Floyd, Esq.
William G. Gisell, Jr., Esq.
PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER
3400 Marine Midland Center
Buffalo, New York 14203
(716) 847-8400

By: David K. Floyd

Attorneys for Defendant
Hooker Chemicals & Plastics Corp.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Hooker's Memorandum in Response to Government's Motion to Withdraw Testimony, was mailed postage prepaid, to counsel for all parties to this action, this 15th day of January, 1982.

A handwritten signature, appearing to be "S. J. Lloyd", is written over a horizontal line.

One of the Attorneys for
Hooker Chemicals & Plastics Corp.

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER

ATTORNEYS AT LAW

3400 MARINE MIDLAND CENTER

BUFFALO, NEW YORK 14203

(716) 847-8400

January 15, 1982

CHARLES G. BLAINE
EDWARD L. ROBINSON
JOHN K. KIMBALL
WILLIAM L. RIETH
SHERWOOD S. CADWELL
DAVID K. FLOYD
IRVING D. BROTT, JR.
JOHN F. DONOVAN
GERARD R. HAAS
MARVIN H. MASON
FREDERICK G. ATTEA
PAUL B. ZUYDHOEK
PHILIP S. TOOMEY
ROBERT MICHAEL GREENE
MARTIN F. IDZIK
FRANK A. VALENTI
EDWARD S. BLOOMBERG
RAYMOND H. SEITZ
PAUL F. JONES

ALEXANDER C. CORDES
WILLIAM A. BAIN, JR.
JOHN K. MCCORMICK
WILLIAM J. O'CONNOR, JR.
ROBERT M. SPAULDING
RICHARD G. BIRMINGHAM
CHARLES RYAN DESMOND
EDWARD M. GRIFFITH, JR.
HEINO M. PRAHL
WALDRON S. HAYES, JR.
ARTHUR M. SHERWOOD
THOMAS M. BARNEY
ALLEN R. BIVENS
JAMES H. WATZ
HUGH M. JONES
JOSEPH S. MOGAVERO
MARK W. HAMBERGER
JOHN C. SPITZMILLER
ALICE J. KRYZAN

JAMES A. LOCKE

SOLOMON J. STONE
PAUL V. JOLLEY
FRANCIS V. COLE
WILLIAM E. LYTLE
ROBERT M. HITCHCOCK
ARTHUR J. PIER
OF COUNSEL

TELECOPIER
(716) 852-6100
WRITER'S DIRECT DIAL
(716) 847- 7060

JAMESTOWN OFFICE:
307 FIRST NATIONAL BANK BLDG.
JAMESTOWN, NEW YORK 14701
(716) 664-3908

Hon. John T. Curtin
United States District Court
U. S. Court House
Buffalo, New York 14202

Re: United States v. Hooker Chemicals
(Hyde Park Landfill 79-789)

Dear Judge Curtin:

We enclose a Memorandum in response to the motion by the United States to withdraw the testimony of Mr. Twedell on behalf of Hooker Chemicals, together with a certificate of service of copies upon the attorneys for the others involved.

Very truly yours,

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER

By

David K. Floyd

KKz
Enc.

cc: Jack A. Penca, Esq.
Lorelei Borland, Esq.
Barbara Morrison, Esq.
Stanley Grossman, Esq.
Lewis Steele, Esq.
Robert Merino, Esq.
Edward Jesella, Jr., Esq.