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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, vs. 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.	Civil Action No. 79-989

HOOKER'S MEMORANDUM
IN SUPPORT OF
COURT APPROVAL OF SETTLEMENT AGREEMENT

October 14, 1981

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COURT APPROVAL OF SETTLEMENT AGREEMENT

This Memorandum is respectfully submitted on behalf of Hooker Chemicals & Plastics Corp. (hereinafter "Hooker"), in support of Court approval of the "Stipulation and Judgment Approving Settlement Agreement", filed January 19, 1981 (hereinafter "Settlement Agreement").

For the reasons described below, we submit that the record before the Court is complete and fully supports the Court's approval and execution of the Settlement Agreement.

1. The Record in This Proceeding is Complete and Addresses All Issues Raised by the Court, by Opponents of the Settlement Agreement and by the Public.

Since the Settlement Agreement was filed on January 19, 1981, an enormous record has been developed in this proceeding. Development of the record culminated in seven days of hearings in September and October which included the testimony of 15 witnesses, the marking of over 100 exhibits and the taking of nearly 2,000 transcript pages. These hearings were held to address inquiries by the Court concerning the Settlement Agreement. (See Court Order of August 7, 1981.) Specifically, the Court inquired about the technical aspects of the Settlement Agreement through questions divided in four general categories:

A. Mapping (especially "fingerprint" chemicals)
B. Containment (especially requisite remedial technologies)
C. Treatment
D. Monitoring

In the paragraphs below, we review the testimony at the hearings concerning these subject areas to the extent that significant issues have been raised relating thereto.

A. MAPPING

"Mapping" refers to the identification, through soil surveys and "vector" survey groundwater analyses, of the extent of chemical migration from the landfill and the Bloody Run area to the surrounding environment.

The Court's August 7 order and the hearings focused on two issues relating to mapping -- (a) whether the "fingerprint" chemicals would properly define the extent of migration and potential remediation and (b) the extent to which chemicals have migrated to date.

Indicator Chemicals: Concerning "fingerprint" or indicator chemicals, the record is fulsome. Dr. Lamar Miller, Director of the Technical Division of EPA's Office of Hazardous Waste Enforcement, testified that the use of indicators to identify areas of contaminants is a proper and well-established technology. He also described the considerations that lead to the selection of indicator chemicals specified in the Settlement Agreement. (Tr. 52-55.) Three other experts testified to the same effect.[1/]

1/ Dr. Benjamin Mason, a soils engineer and consultant to EPA, detailed why the chemicals selected are appropriate for the geologic environment in the Hyde Park-Bloody Run area (Tr. 912-931), while Dr. William Stasiuk, Associate Director of the Division of Environmental Health of the State Department of

[Footnote continued on following page.]

Dr. Hallett, a Canadian chemist, concurred with the other experts that traces would be left by migrating chemicals and that use of indicator chemicals would define the extent of chemical migration from the landfill.2/

In light of the testimony of four experts and the concessions of Dr. Hallett that "mapping" will accomplish its purpose, we submit that no credible objections can be raised to the use of indicator chemicals under the Settlement Agreement.

Extent of Migration: Concerning the extent of chemical migration, issues have been raised about the direction of flow and migration of chemicals in the overburden and bedrock in the Hyde Park-Bloody Run area. With regard to the overburden, there is unanimity that chemical migration is sharply downward and that, laterally, chemicals move very slowly, if at all. (Mason, Tr. 950; Counterman, Tr. 975-76; Levins, Tr. 1150-51; Anderson, Tr.

[Footnote continued from previous page.]

Health, explained the use of indicator chemicals in conjunction with the air monitoring discussed in Addendum V of the Settlement Agreement. (Tr. 794-804; 840-842; 851-857; 873-884.) Dr. Philip Levine, an expert in environmental chemistry with Hooker's consultant, Arthur D. Little, Inc., testified that migrating chemicals would leave a "finite trace" which would be detected during the mapping process. (Tr. 1137-1148; 1198-1208.)

2/ Specifically, although critical of the indicator chemical concept generally, Dr. Hallett agreed with the Miller-Levins testimony concerning the solubility, adsorptive capacity and movement of TCDD and the indicator chemicals, and he also agreed that chemicals migrating from the landfill in the groundwater would leave "trails" (Tr. 1682-688; 1692-94; 1703-05.) Most significantly, Dr. Hallett conceded that the mapping under the Settlement Agreement would identify the extent of TCDD migration and that remediation activities in the area defined by the mapping would encompass all TCDD contamination. (Tr. 1690-94.)

1455-56.) Concerning bedrock migration, there is extensive testimony by experts familiar with the Hyde Park-Bloody Run area that groundwater flow is to the northwest in the Lockport dolomite and that the Rochester Shale beneath it is quite impermeable. (Davis, Tr. 280-84, 295; Twedell, Tr. 397-401; Johnston, Tr. 236-38; Rovers. Tr.1257-59, 1302-04.) The lone dissenter in this regard is Mr. Grant Anderson, a Canadian hydrologist, relying on incomplete data relating to the Hyde Park landfill.3/

Whatever the merits of Mr. Anderson's hypotheses concerning the velocity, direction, and extent of groundwater flow and chemical migration, these issues reflect no deficiencies in the Settlement Agreement. As shown on Figure 6 of the Settlement

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3/ As he has obtained more data, Mr. Anderson's opinions about the nature of groundwater flow increasingly converged with those of the other witnesses. Mr. Anderson not only abandoned claims that groundwater flows eastward from the landfill, but revised his description of alleged southerly flow. (Tr. 1563, 1615-616.)

Mr. Anderson also sponsored the introduction of the exhibit purporting to show selected chemical concentrations in seepage water and soil found at the Niagara River Gorge face northwest of the landfill. (Tr. 1509-510.) The complete results, however, showed minute traces (in the low parts per trillion range) of PCBs and several pesticides - many of which were never commercially manufactured by Hooker. (Tr. 1608-609.) When asked to explain how finding only such trace concentrations could be reconciled with his hypotheses about the rate of bedrock groundwater flow, Mr. Anderson replied that the bottom of the landfill was "tight", and the groundwater flow was essentially free of Hyde Park contaminants, with most chemicals having flowed via surface runoff to the Bloody Run basin. (Tr. 1645.) Indeed, Mr. Anderson testified that the bottom of the landfill was tighter than the clay-covered top of the landfill. (Tr. 1571.)

Agreement, survey wells are to be drilled to the top of the Rochester Shale along ten vectors emanating in all directions from the landfill -- including vectors reaching the Niagara River Gorge face. (See Paragraph C(2) of Addendum I.) To the extent that the assessment of Requisite Remedial Technology to address lower bedrock chemical migration requires that additional data be gathered (e.g., permeability testing with regard to the Rochester Shale), Paragraph C(8)(f) of Addendum I provides for that contingency. Thus, the vector bedrock survey and any necessary follow-up data-gathering will resolve any outstanding uncertainties relevant to the Settlement Agreement concerning the nature and direction of chemical migration from the landfill via groundwater flow in the bedrock.

B. CONTAINMENT

The Containment Program, as described in Addendum I of the Settlement Agreement, essentially consists of three components. The first is the maintenance of those remedial measures already in place, i.e., the existing tile drain collection system around the landfill, the reconstructed lagoons to store collected liquids, the clay cap and contouring at the site, and the security fencing around the landfill and the Bloody Run basin. (Tr. 1240-41.) The second component consists of those aspects of the Containment Program about which sufficient data exists to conclude that the information is sufficient to define specific remedial technologies to be utilized. The third component consists of "mapping" off-site chemical

migration and assessing whether, and to what extent, additional remedial activity is required.[4/]

There is no record evidence that the technologies already implemented or those specified in the Settlement Agreement are inappropriate to remedy the areas they address.[5/] The only significant objection to the Containment Program consists of the Amici's frontal challenge to the very concept of in situ containment and their proposal that more than 500,000 cubic yards of landfill wastes be excavated. (Tr. 1544, 1574-76.) However, under their proposal, chemicals which have already migrated beneath the landfill would remain to be addressed by an extensive purge well system, while the new location for the wastes[6/] would also require

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4/ The Settlement Agreement refers to such additional remediation as "Requisite Remedial Technology" and specifies the procedures and criteria applicable thereto. (See ¶¶ 4(b), 4(c) of the Settlement Agreement and ¶¶ C(8) and C(9) of Addendum I.) Through these provisions, the Agreement recognizes the practical impossibility of determining whether additional remedial activities are appropriate until the extent of chemical migration and the availability of proven technology to address such migration has been established. See Joint Response to Court Order of February 12, 1981 (pp. 9-14), dated March 17, 1981.

5/ Indeed, the only suggestion that Mr. Anderson expressed in this regard was that the Overburden Barrier-Collection Systems be installed below the overburden water table. (Tr. 1588-590.) Given the extent of hydrogeologic expertise available to EPA, the State and Hooker, and the pre-construction review procedures provided in the Settlement Agreement (¶¶ 6, 7), Mr. Anderson's concerns in this regard will certainly be accommodated.

6/ We understand the Amici to propose that the excavated wastes be landfilled; no expert testimony proposed incineration of these wastes. In view of the uncontradicted testimony of EPA's Donald Oberacker, the incineration of these wastes cannot be seriously considered. (Tr. 671-673, 675.)

a pumping system. (Tr. 1580.)[7/]

Significantly, the Amici presented no witnesses who have been involved in excavation of the nature and quantity of wastes that would be required in any excavation of the Hyde Park landfill. (Tr. 1548, 1764-65.) Nor have they addressed such fundamental concerns as to the location where the wastes should be moved or the risks to nearby workers and residents inherent in such action. In the face of these concerns, EPA consultant Dr. Benjamin Mason concluded that excavation should not "in good conscience" be undertaken, while Mr. Frank Rovers testified that such action would be "irresponsible." (Mason, Tr. 1058; Rovers, Tr. 1373-74.)

It may satisfy certain parochial Canadian interests to propose relocating the Hyde Park landfill since those interests are not responsible to those put at risk -- both environmentally and economically -- by such a proposal. However, the responsibilities of this Court -- and those of EPA, the State, and Hooker -- are far broader. Hooker's position in this regard is long-standing and unambiguous: Hooker will not voluntarily be associated with any remedial effort which includes the Amici's ill-considered plan to excavate the Hyde Park landfill or any other

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7/ Mr. Anderson has not calculated how long the purge wells at Hyde Park would have to be operated under his proposal -- only that the duration would be "something less than in perpetuity" (Tr. 1577.) In this regard, another Amici witness conceded that, if such purge wells were operated for 100 years, the cost of excavation (which he estimated to be in excess of $200 million) would be "substantially higher" than an in situ remedy. (Tr. 1760, 1771.)

proposal so fundamentally at odds with the principles of in situ containment reflected in the Settlement Agreement.

C. TREATMENT

The third area of inquiry encompassed in the Court's Order of August 7, 1981, concerned the treatment of liquids collected by the Containment Program.[8/] The only apparent issue relating to the treatment process concerns the reconstructed storage lagoons. In this regard, the uncontradicted testimony of Mr. Frank Rovers demonstrated that the bottom and sides of the lagoons have been securely lined with clay and that the surface of the lagoon is covered to prevent airborne environmental dispersion. (Rovers, Tr. 1245-47, 1269-71, 1283-84.) Further, Dr. Stasiuk testified that, even prior to installation of the surface cover, air quality in the area was satisfactory. (Tr. 804.)

D. MONITORING

The final area described in the Court's August 7 Order is monitoring. The Monitoring Program is described in Addendum II of the Settlement Agreement.

8/ Under that program, liquids will be pumped to storage facilities adjacent to the landfill and later transported to treatment facilities for incineration (or, in the alternative, secure landfilling). The on-site storage facilities will initially consist of covered lagoons reconstructed in 1978 but, pursuant to Paragraph D(8) of Addendum I of the Settlement Agreement, Hooker will replace the lagoons with above-ground storage tanks (Tr. 1271.)

The EPA/State's Response to the Court's Order, dated September 4, 1981, contains a comprehensive discourse in this regard (pp. 42-49), and no expert testimony at the hearings proposed any modifications to the Monitoring Program. Furthermore, the selection of monitoring frequency and indicator chemicals was the subject of extensive testimony by Dr. Philip Levins. (Tr. 1137-153, 1159-61, 1168-78, 1199-208.) To the extent that issues have been raised concerning the selection of indicator chemicals for the Monitoring Program, they were fully addressed in testimony concerning "mapping." (See above, pp. 2-3.)

In sum, the voluminous record makes clear that the Settlement Agreement comprehensively addresses all technical issues relating to mapping, containment, treatment and monitoring and will meet its explicit goal: to protect human health and the environment in the Hyde Park-Bloody Run area.

II. The Settlement Agreement Reflects a Good-Faith Multi-disciplinary Resolution of This Lawsuit and Should Be Approved.

The Settlement Agreement before the Court is the product of ten months' discussions involving Hooker and the four government entities which are parties to this proceeding. After seven long days of extensive testimony in this proceeding, there can be no doubt that the government officials and governmental and industry consultants who participated in fashioning the Settlement Agreement are individuals of extensive experience, multi-disciplinary expertise, and manifest dedication to protecting human health and the

environment. These individuals have fully considered the comments filed by various citizens and citizen groups and they continue to fully support implementation of the Settlement Agreement. In these circumstances, it is well-settled that a "factual presentation to support every decision" reached by the parties is not required;[9] nor should the Court engage in "an unrestricted evaluation of what relief would best serve the public."[10] Rather, issues concerning the Settlement Agreement should be addressed "on the basis of legal principles regulating judicial review of settlement agreements."[11] In this proceeding, the Amici and the applicants for intervention have been presented an opportunity greater than that to which they are legally entitled to challenge the efficacy of the Settlement Agreement. Despite that opportunity, they have failed to meet their burden, i.e., to demonstrate that the Settlement Agreement is unlawful or unreasonable under applicable principles.

9/ United States v. Ketchikan Pulp Co., 430 F. Supp. 83, 86 (D. Alas. 1977), citing, Patterson v. Newspaper & Mail Deliverers' Union of N.Y. & Vicinity, 514 F.2d 767, 771 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976).

10/ United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981).

11/ Airline Stewards Local 550 v. American Airlines, 527 F.2d 960, 963 (7th Cir.), cert. denied, 439 U.S. 876 (1978). The legal principles have been extensively discussed in prior Hooker filings in this proceeding. See Memorandum of Points and Authorities in Opposition to Petition to Intervene (pp. 24-27), dated April 3, 1981, and Hooker's Response to Court Order of July 10, 1981, (pp. 17-22), dated July 24, 1981.

We believe that the Settlement Agreement reflects a carefully considered, good-faith solution to technically complex issues and that it contains sufficient flexibility to assure its successful application to all reasonable contingencies.

Certainly, there is no doubt that the technical vernacular and technologies contained in the Settlement Agreement "do not yield gently" to understanding by those not trained in geology, chemistry, engineering and the like. However, we are confident that, in the nine months since the Settlement Agreement was submitted, its provisions have been clarified and its merit has become manifest.

CONCLUSION

Accordingly, we urge the Court to promptly approve and execute the Settlement Agreement.

October 14, 1981.

Respectfully submitted,

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