

Toby's

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

Plaintiffs,

Civil No. 79-989

vs.

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).

Defendants.

MEMORANDUM IN SUPPORT OF A REQUEST
FOR AMICI CURIAE STATUS

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

8 York Street, 5th Floor South
Toronto, Ontario M5J 1R2

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This memorandum is respectfully submitted in support of motion by Barbara Morrison, on my behalf, for Pollution Probe and Operation Clean-Niagara to appear as amici curiae with respect to proposed Hyde Park landfill settlement agreement. This memorandum should be read in conjunction with the affidavits of TOBY VIGOD, ANNE WORDSWORTH, and MARGHERITA HOWE. We would urge the Court, for the reasons enumerated below, to grant the motion for amici curiae status.

INTRODUCTION

We have reviewed in detail the comments of the Ecumenical Task Force and the Niagara County Citizens' Alliance. The questions and issues raised by these comments are of importance for judicial scrutiny prior to the decision being made. However, they do not address matters involving the Canadian interest and the adequacy of the proposed settlement agreement to protect international boundary waters and Canadian public health.

Approximately four million Canadians, almost one sixth of Canada's population, as well as over one million Americans, use Lake Ontario and the Niagara River for drinking water, fishing, recreation, industrial and related uses all of which may be damaged if this settlement proves inadequate.

POINT I

POLLUTION PROBE AND OPERATION CLEAN-NIAGARA SHOULD BE GRANTED AMICI CURIAE STATUS AS THEY REPRESENT A PUBLIC INTEREST THAT THE PROPOSED SETTLEMENT AGREEMENT HAS NOT EXAMINED

The function of an amicus curiae is to call the Court's attention to law, facts or circumstances that may otherwise escape its consideration. Kemp v. Rubin, 64 N.Y.S. 2d 510 (Sup. Ct. 1946)

We would submit that the implications of the proposed settlement on international boundary waters, specifically the Niagara River and Lake Ontario, have not been addressed by the terms and conditions of the settlement agreement nor by the initial comments of proposed intervenors. Pollution Probe and Operation Clean-Niagara are in a unique position to bring to the Court's attention the impact of the proposed settlement on Canadian public health and environment, and to advise it on matters relating to international law, equity and policy.

Both Pollution Probe and Operation Clean-Niagara are non-profit organizations that represent the public interest in environmental issues. Both have demonstrated a continued interest in the integrity of the Niagara River and Lake Ontario. Furthermore, the Canadian federal government has indicated its support for the application of these two groups to appear in this case as amici curiae, and have offered to provide technical expertise to review the proposed settlement agreement.

The Court in Robinson v. Lee, 122 F.1010, affirmed 25 S.Ct. 180, 196 U.S. 64, 49 L. Ed. 338, allowed the intervention of an amicus curiae for the purpose of a full and complete presentation of questions of general or public interest involved in the proceedings. (See also Colmes v. Fisher, 271 N.Y.S. 379, 151 Misc. 222 (Sup.Ct. 1934)) We would submit that the proposed settlement must meet the goal of ensuring that public health and the environ-

ment are protected. It is not clear that this will be the case, as the short and long-term environmental impacts on international boundary waters and Canadian public interest have not been examined.

The implications of the proposed settlement on the Boundary Waters Treaty, 1909, and the 1978 Canada - U.S. Great Lakes Water Quality Agreement have also not been addressed.

POINT II

POLLUTION PROBE AND OPERATION CLEAN-NIAGARA HAVE THE EXPERTISE TO ADDRESS THE NOVEL AND COMPLEX ISSUES RAISED BY THE PROPOSED SETTLEMENT AGREEMENT THAT JUSTIFIES THEIR BEING GRANTED AMICI CURIAE STATUS.

Where complex and novel issues are raised by the parties, leave to file a brief amicus curiae should be granted. Skandia America Reinsurance Corp. v. Schenck, 441 F. Supp 715 (S.D. N.Y. 1977)

This agreement will be precedent setting in establishing remedial technological and financial responsibilities at landfill sites containing hazardous wastes.

The Court has already recognized the complexity of the agreement in its consideration of the appointment of an expert to advise it on the difficult technical issues raised in the settle-

ment. Furthermore, the parties, in recommending against the appointment of a sole expert witness at this time, did so because they considered that in order to review and assess the remedial program, the Court would have to appoint a large interdisciplinary team of experts. Pollution Probe and Operation Clean-Niagara, through their technical advisory committees and through the support offered by the Canadian government, have the technical and legal expertise to assist the Court in the complex issues regarding the Canadian public interest.

The Court in Straaser v. Dorley, 432 F. 2d 567 (1st Cir. 1970) clearly recognizes that the acceptance of amicus curiae briefs is within the sound discretion of the court. However, while it does state that a district court should go slowly in accepting briefs, it also recognizes that in situations where amicus has a special interest that justifies his having a say, or where existing counsel may need supplementary assistance amicus curiae status should be granted.

The Court in In Re Grondin's Estate, 100 A.2d 160 (Sup. Ct. N.H. 1953) held that amicus curiae briefs are not to be discouraged particularly in non-adversary proceedings of this nature.

In these non-adversarial proceedings, where all counsel for the parties urge this court to adopt the settlement as proposed, it is to the Court's advantage and in the public interest

to receive additional facts and information which can then be weighed and evaluated along with the initial presentations before a final decision is made.

POINT III

THE REQUEST BY POLLUTION PROBE AND OPERATION CLEAN-NIAGARA FOR AMICI CURIAE STATUS WILL NOT INCONVENIENCE THE COURT IN LIGHT OF ALL THE CIRCUMSTANCES

Pollution Probe only became aware on May 1, 1981 that a settlement regarding the Hyde Park landfill had been proposed by the parties and was before this Court for ratification.

Pollution Probe and Operation Clean-Niagara were unaware that a public comment period existed. Once Pollution Probe and Operation Clean-Niagara had an opportunity to review the settlement in May, it became evident that issues of relevance to Pollution Probe and Operation Clean-Niagara were not being adequately addressed. Before this time, it was the understanding of Pollution Probe and Operation Clean-Niagara that the remedies sought in the original action were being pursued by the Plaintiffs in the case.

Due to the fact that the problems at the Hyde Park landfill site have been continuing for several years and that the proposed remedial measures will also take time to implement, the short

delay necessary to file an amicus brief is minimal in relation to the time factors involved in this case and the importance of ratifying an agreement that will ensure that the public interest is being protected.

POINT IV

THE GRANTING OF AMICUS CURIAE STATUS IS ENTIRELY WITHIN THE DISCRETION OF THE COURT AND SHOULD BE GRANTED TO POLLUTION PROBE AND OPERATION CLEAN-NIAGARA AS THEY REPRESENT AN INTEREST WHICH HAS NOT BEEN RAISED BEFORE THIS COURT

Participation in the hearing by amicus curiae is subject entirely to the discretion of the Court. Dawes v. Silberman, 65 N.Y.S. 2d 902 and In Re Perry, 83 Ind. App. 456, 148 N.E. 163.

In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae. Colmes v. Fischer supra.

Pollution Probe and Operation Clean-Niagara are the only organizations who would be addressing the adequacy of the agreement in terms of its impact on Canadian public health and environment and international waterways. Furthermore, while the Canadian Government will not itself intervene, it wants to ensure that there is no further degradation of the Niagara River and that the long-term integrity of the River is protected. The Canadian Government has expressed concern over the presence of dioxin in

Lake Ontario. Dioxin contaminated wastes have been buried in substantial quantities in the Hyde Park landfill site. Serious international ramifications may result if the proposed settlement is incapable of containing off-site migration into international waters of chemicals such as this.

It is Pollution Probe's and Operation Clean-Niagara's concern that the surface or groundwater migration of toxic chemicals into the Niagara River and Lake Ontario, or their deposit through incineration or other disposal activities, must be completely eliminated by this settlement agreement.

It is therefore respectfully requested that the Motion for Pollution Probe and Operation Clean-Niagara to appear as amici curiae be granted.

Respectfully submitted,

Toby Vigod

TOBY VIGOD
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

May 22, 1981

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

BARBARA MORRISON
Jay, Klaif and Morrison
Attorney for amicus curiae

