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August 15, 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 Intervenor's Motion for an Award of Costs 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 OF STATE OF NEW YORK IN
RESPONSE TO INTERVENORS' MOTION FOR AN AWARD
OF COSTS, INCLUDING ATTORNEYS' FEES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, et al.,	:	
Plaintiffs,	:	
-vs-	:	CIV-79-989C
	:	(Hyde Park Landfill)
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CORPORATION, et al.,	:	
Defendants.	:	
	:	

-----X

MEMORANDUM OF LAW BY STATE OF NEW YORK IN
RESPONSE TO INTERVENORS' MOTION FOR AN AWARD
OF COSTS, INCLUDING ATTORNEYS' FEES

This is the response of New York State to the motion of Intervenor College Heights Property Owners' Association and Niagara County Citizens' Alliance for an award of costs, including attorneys' fees, under 33 U.S.C. 1365(d).

In their Memorandum and Affidavits, Intervenor's attorneys, Lewis Steele and David Seeger, have focused on the issue of a right to attorneys' fees. This memorandum will therefore do the same.

The State recognizes and supports the intention of the Clean Water Act to provide for attorneys' fees and costs in appropriate circumstances to a party in litigation under the Act. The question for the Court is whether, under the facts and circumstances presented in this case, such an award should be made. While Intervenor's motion is directed against the

defendant Hooker Chemicals & Plastics Corp., the State has an obligation, as a plaintiff in the action, to consider the facts and the law, and to make a response.

THE CLEAN WATER ACT, 33 U.S.C. § 1365(d),
PROVIDES FOR LITIGATION COSTS AND ATTORNEYS'
FEES TO BE AWARDED TO ANY PARTY TO AN
ENFORCEMENT ACTION UNDER APPROPRIATE CIRCUMSTANCES.

With regard to litigation costs, including attorneys' fees, the Clean Water Act provides that

"The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate."

33 U.S.C. § 1365(d).

Such an award, if "appropriate," could therefore be awarded to an intervenor granted intervention status as of right in an action, such as the one here, brought pursuant to 33 U.S.C. § 1365(d).

Authorization for an award of attorneys' fees in environmental litigation under the Clean Water Act is one of many legislative exceptions to the usual "American rule" under which attorneys' fees are assumed by the party incurring them, without regard to the issue of who won or lost the case. See Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975).

In providing these legislative exceptions to the general rule, Congress has sought, in the field of environmental legislation, to advance the public interest. As one court noted early on, the possibility of an award of attorneys' fees may encourage private citizens and groups to bring meritorious actions under citizens' suit provisions, especially where federal or state enforcement resources are insufficient or where the government itself is violating the law. Natural Resources Defense Council (NRDC) v. EPA, 484 F.2d 1331, 1337 (1st Cir. 1973). Encouraging the achievement of statutory goals, acknowledging the important role of "private watchdog" citizens' groups, and aiding the early interpretation of novel and complex environmental statutes are some of the Congressional goals which the attorneys' fees provisions foster. Id. at 1338.

THE SUPREME COURT HAS HELD THAT "APPROPRIATE CIRCUMSTANCES" REQUIRE SOME SUCCESS ON THE MERITS

Unlike most legislation providing for attorneys' fees, the party seeking an award of attorneys' fees under the Clean Water Act need not have entirely prevailed in the action and need not have been entirely successful. Ruckelshaus v. Sierra Club, ____ U.S. ____, 51 U.S.L.W. 5132 (July 1, 1983). However, in interpreting what would be an "appropriate" occasion for an award of fees, the Court in Ruckelshaus held, over a vigorous dissent, that an award was only "appropriate" if the party

seeking it had obtained "some degree of success on the merits" of its claim. Id. U.S.L.W. at 5136.*

Other than stating that "appropriate" means "some success," Ruckelshaus does not decide whether other criteria which courts looked to in the past are still applicable. The only guidance Ruckelshaus offers this court in determining Intervenor's motion is that it notes that "some success" does not mean "trivial success on the merits, or purely procedural victories." Id. U.S.L.W. at 5134, footnote 9.

BASED ON RUCKELSHAUS, IN ORDER TO AWARD ATTORNEYS' FEES, THE COURT MUST AT LEAST DETERMINE WHETHER INTERVENOR OBTAINED SOME SUCCESS ON THE MERITS OF ITS CLAIMS.

Because of the circumstances of Intervenor's claims, it is not entirely clear how or whether they have in fact had "some success" under the Ruckelshaus standard.** The circumstances of this case are somewhat unusual in the light of prior case law in which attorneys' fees have been sought under environmental statutes. Generally, such awards have been sought against the federal government by plaintiffs who have brought

*While the case considered by the Court actually involved relevant provisions of the Clean Air Act, the Court noted that the provisions under scrutiny were basically identical to provisions in many other environmental statutes, including 33 U.S.C. § 1365(d), and stated that its ruling was applicable to all such statutes. Id. 51 U.S.L.W. at 5132, footnote 1.

**Nor have Intervenor's had an opportunity to brief this point, since their Motion was made before the Ruckelshaus decision came down.

direct citizens' suits to challenge governmental action or inaction. See, e.g., Ruckelshaus v. Sierra Club, supra; Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982), NRDC v. EPA, supra. Here, however, a lawsuit had been brought against a private defendant by the federal and State governments in their capacity as enforcers of environmental laws against private violators. Moreover, intervenor applied to intervene after a Settlement Agreement resolving all issues in the pending litigation had been lodged by the parties with the Court.

As noted by the Court in granting intervention in its decision approving the Settlement Agreement,

"The petitions [for intervention] made clear that the purpose for intervention was to contest the validity of the consent decree, to challenge the settlement and to present the citizens' objection to the consent decree."

U.S.A. v. Hooker Chemicals & Plastics Corp., 540 Fed. Supp. 1067, 1082 (W.D.N.Y. 1982).

The State agrees with the Court that the participation of all the Intervenor and Amici in the court hearings held in this case was welcome, useful, and in accordance with the goals of the nation's environmental statutes to encourage citizen participation, Id. at 1083. By keeping the public informed, as well as providing a forum for Intervenor's and Amici's objections, the court-ordered hearing permitted a full airing of the purposes, effects and terms of the Agreement.

While this may constitute "some success," the question for the Court is whether, having ordered the entry of the Settlement Agreement "over the objections of the intervenors,"

Id. at 1083, it should now grant one group of Intervenor attorneys' fees for their participation in the process.

The State does not believe that a blanket rule should be applied here regarding awards of attorneys' fees to Intervenor who participate in court hearings regarding a settlement of this type or who pursue their own claims challenging the resolution by settlement of a significant environmental action brought by the governments. The Court should rather look to the specifics of this case, and of the allegations made by Intervenor, to determine if an award is appropriate here.

THE SPECIFICS OF INTERVENORS'
CLAIMS FOR ATTORNEYS' FEES

Mr. Steele's list of specific facts which he asserts entitle him to an award of attorneys' fees must be evaluated in light of the standards set by the courts and the kinds of circumstances which have been deemed to provide a basis for an award in the past. Following the standards enunciated in Ruckselshaus, supra, Intervenor must be prepared to define the nature of their "success" on the merits of their claims. While Intervenor's specifics do suggest the number and range of issues which are of interest to them in this case, it is unclear whether, singly or together, these examples rise to the level of the kinds of litigation activities which have been deemed to entitle parties to fees under environmental statutes. In

addition, Mr. Steele's particulars bear close scrutiny, since in many instances he has significantly overstated his case.

1. Intervention Status (pp. 23-24 of Memorandum of Law)

It should be noted that there was no opposition to Intervenors' motion to intervene by either governmental plaintiff in this action. Intervenor has cited no cases to support his proposition that being granted intervention itself constitutes a sufficient basis for an award of attorneys' fees under the Clean Water Act.

2. Alleged "Modifications" to the Settlement Agreement (pp. 25-33 of Memorandum of Law)

Mr. Steele alleges that his participation in the hearing led to certain "de facto" "modifications" to the Settlement Agreement. In fact, there were no modifications made to the Settlement Agreement, de facto or otherwise; it was approved by the Court exactly as it was lodged by the parties.

As noted above, the purpose of the Hyde Park hearing was to inform the public concerning the details of the Agreement, and to give the Intervenors and Amici the opportunity to offer their objections to the approval of the Agreement. Mr. Steele's intricate and detailed recounting of the hearing transcript essentially does no more than confirm that the parties to the Agreement, and the challengers to it, carried out the objectives of the hearing.

a. The Leachate Storage Lagoons

The record shows that it was the State, in the direct examination of Paul Counterterman, which first addressed the question of the storage lagoons. (Tr. 644-647). The issue was further raised by Hooker in its direct examination of Frank Rovers (Tr. 1266-1272).

While the hearing may have clarified for Mr. Steele the intention of the Agreement to eliminate the lagoons, once other storage facilities are in place (Hyde Park Settlement Agreement, Addendum I, subpar. E(8)), it is not at all apparent from the case law that such a clarification by the parties in this context is the kind of activity that entitles Mr. Steele to an award of attorneys' fees.

b. Overburden Tile Drain System

The record recited by Mr. Steele here shows only that, in response to questions by the Court (Tr. 427) and by the State (Tr. 636), the governmental parties' witnesses explained what the decree said. In fact, the Court itself, not Intervenor, elicited the explanation regarding the depth of the tile drain and did so in the midst of cross-examination by Intervenor's counsel on a completely different issue, namely, the effectiveness of the current drain system (Tr. 427).

c. Excavation as an RRT

It was and remains the view of the State that no relevant technology or methodology can be excluded from

consideration in the Requisite Remedial Technology studies undertaken pursuant to the decree. No such technology is excluded in the decree. Concerns in this regard were indeed raised at the hearing, and were addressed by the parties. It is worth noting that it was Amici, not Mr. Steele, who primarily focussed on this issue, including the presentation of expert witnesses. (See, e.g., Tr. 30-31, 1838, 1966-67, as well as testimony of Grant Anderson and Robert Rickels). Mr. Steele presented no witnesses, on this or any other issue of concern in the hearing.

d. Another Swale Location

Intervenor brought a "wet area" to the attention of the parties. However, Mr. Steele's characterization of the import of this suggestion in his memorandum and affidavit is at odds with the facts and the very document he cites therein. (See Memorandum, pp. 32-33, Steele Affidavit, pars. 22-33, and Exhibit H thereto, letter from William Walsh to Lewis Steele, May 5, 1982). Mr. Walsh's letter, on p. 2, makes quite clear that, by the terms of the Settlement Agreement itself, the area of concern to Mr. Steele will already be addressed. This is hardly a "modification," or the addition of a "fifth swale," as Mr. Steele asserts.

3. Purchase of Homes (pp. 34-37 of Memorandum)

The State is not a party to any discussions between individual property owners in the Hyde Park area and Hooker

regarding purchase of homes, and therefore cannot comment on the reasons Hooker may have for determining to purchase any homes or whether its reasons were such that attorneys' fees in this action should be considered.

4. "Filling Out the Record" (pp. 37-50)

Mr. Steele claims a right to attorneys' fees for "filling out the record" in the hearing. As stated above, the very purpose of the hearing was to explain and describe the Agreement and to provide Intervenors with the opportunity for elucidation, comment and challenge.

With regard to Mr. Steele's particulars, the following should be noted:

a. Dr. Schneiderman: Martin Schneiderman was presented by the State as its witness on the issue of health effects and environmental exposures. The State offered to present this witness in response to some general questions by the Intervenors regarding that issue, raised in discussions among counsel outside the hearing (Tr. 721-722). Mr. Steele presented no such witness of his own and it is difficult to see how the presentation by the State of Dr. Schneiderman's testimony gives rise to a claim for attorneys' fees for Mr. Steele.

b. Bloody Run: Mr. Steele raises several points in the Memorandum of Law, on pp. 41-44. A reading of the record at the pages referenced in his Memorandum, (see, e.g., 759-764, 990-992, 996-1001, 1007-1011) unfortunately leads the reader to

the conclusion that cross-examination confused the record here to a point where it is difficult to determine what the claim for attorneys' fees is based on. Even postulating that a clearer record existed on the points of concern to Mr. Steele, the question remains whether the mere eliciting of the terms of the Agreement would provide a basis for an award of attorneys' fees here.

c. Residential Well Water: As Dr. Stasiuk testified (Tr. 892-894), the New York State Department of Health (DOH) found no evidence of chemicals in the residential well water; however, data collected by other parties showed trace levels of contaminants. DOH advised that the wells be shut due to high levels of bacterial contamination, not because of any chemical contamination. Mr. Berger elicited these remarks on cross-examination. Whether this is a basis for an award of attorneys' fees is not at all evident from the existing case law.

d. Existing Data Regarding Hyde Park

Mr. Steele demonstrates a lack of understanding of the premise of the Settlement in suggesting that the existing data is not taken into account by the parties. The data existing at the time of the Agreement showed that there was a significant environmental hazard in the Hyde Park-Bloody Run Area; that is precisely why lawsuits were brought by the federal and State governments, which culminated in this Agreement. The Agreement

starts from the known facts. Since the existing data was not all-encompassing, the Agreement doesn't rely entirely upon it but rather requires Hooker to conduct surveys and studies in a comprehensive fashion to determine the extent of chemical contamination from the landfill.

e. TAM Ceramics Data

While the State has no first-hand knowledge of the details of Mr. Steele's FOIA request to EPA, the factual arguments Mr. Steele advances here might, under existing case law, be more applicable to a waiver of document reproduction costs under FOIA than to a claim for attorneys' fees here.

5. Activities Subsequent to the Approval of the Settlement Agreement

Since the approval of the Settlement Agreement, Mr. Steele has taken an active, almost daily, interest in the implementation of the decree. However, Mr. Steele has not articulated the legal basis for his assertion that an award of litigation costs, including attorneys' fees, is appropriate for activities which have primarily involved him in personal verbal or written petitions to the governments and participation in some governmental review processes. Moreover, some of the allegations made in his Memorandum and Affidavit as to his actual role bear close scrutiny.

a. Community Relations Plan

As noted to the Court on a previous occasion in the affidavit of Michael Cavanaugh, a citizen participation specialist in the New York State Department of Environmental Conservation, dated September 27, 1982 (copy annexed hereto as Exhibit A), the plans for a community relations program for Hyde Park predated Mr. Steele's motion for clarification of status. In fact, such a plan is "part of an ongoing effort by the DEC to develop citizen participation programs in connection with remedial projects undertaken at inactive remedial hazardous waste sites." Affidavit, par. 3. For example, there is currently, and has been for some time, a community relations plan for Love Canal, contrary to the assertions in Mr. Steele's memorandum, p. 52. See, e.g., Exhibit B hereto, letter from Norman H. Nosenchuck to Joseph Spatola, April 27, 1983.

The Hyde Park community relations plan was not instituted for Mr. Steele or as a result of Mr. Steele's motion. The State solicited comments from the public and from Mr. Steele as to the outlines of a plan. See Cavanaugh Affidavit, pars. 8, 9. Mr. Steele initially refused to give any comments to the State. See Cavanaugh Affidavit, par. 9. Pursuant to the Court's order of October 5, 1982, the State sent its draft plan to the parties for comment; Mr. Steele did respond at that time. Some of Mr. Steele's comments, which

were primarily directed to the role of Intervenorors, not the public at large, were addressed in the plan. See Exhibits C and D hereto, letters, Lewis Steele to Mary Ellen Burns, October 8 and October 14, 1982. Whether Mr. Steele's limited participation in the process is the kind of activity which gives rise to an award of attorneys' fees has never been addressed in the case law.

b. Past Particulate Migration Study

The Department of Health released a draft of its proposed study protocol on September 10, 1982, when it was ready to be disseminated. See Exhibit E, Affidavit of E. Marta Sachey, dated August 24, 1982, and previously submitted as part of the State's Response to Intervenorors' Motion for Clarification. Though Mr. Steele may believe he and his experts are the sole or primary reviewers of this draft, the facts do not bear him out. As noted in the affidavit of Dr. Robert Huffaker, dated March 29, 1983 and submitted to the Court with attached exhibits on March 31, 1983 (relevant portions annexed as Exhibit F), the draft was distributed to many individuals, including Mr. Steele, and including other experts. Dr. Huffaker's March 29, 1983 affidavit sets forth the considerations of the Department of Health in determining thereafter to re-review its draft. Whether the initial determination to include Mr. Steele and his experts in the

review process gives rise to an award for attorneys' fees in this case is not an issue addressed in the case law to date.

c. Air Monitoring Program

In response to the expressed concerns of the Intervenor, the State carried out voluntary mechanical air monitoring for organic vapors at the Survey Site during the installation of wells into the landfill itself, from November 8-12, 1983. See Exhibit G, relevant portions of affidavit of Dr. G. Anders Carlson, March 11, 1983, submitted to the Court that date.

However, on several occasions, Mr. Steele brought his concerns regarding monitoring to the Court's and parties' attention through various formal motions. In an order dated July 13, 1983, the court, in essence, denied Mr. Steele's motions without prejudice. Whether, under the circumstances, Mr. Steele is entitled to attorneys' fees for these activities is not at all evident from the case law.

CONCLUSION

Regardless of the outcome of this motion, certain facts cannot be disputed. It is beyond question that Intervenor in this case have performed an important and useful

role, one which the environmental statutes, with their regard for citizen participation, encourage, and one which this Court has recognized. U.S.A. v. Hooker Chemicals & Plastics Corp., supra. In participating in the hearing held in this matter and in submitting written arguments to the Court, Mr. Steele, Amici and the other Intervenor have raised objections, probed and questioned, elicited comments, and asserted their concerns. Their participation in an advocacy process has enabled the Court and the governmental parties to carry out their obligations to insure that citizens' groups as well as the public at large are fully advised and have had a full opportunity to be heard.

It is likewise beyond question that there is a useful and vital role to be performed by the public during the lengthy and complicated process of State and federal oversight of Hooker's implementation of the decree.

There are assuredly occasions when an award of attorneys' fees to an Intervenor in an environmental enforcement action in which the governmental parties have reached a tentative settlement with the defendant, is entirely "appropriate" under the law. The Court must determine whether

in the facts of this case, and of this particular motion, such
an award should properly be made here.

Dated: New York, New York
August 15, 1983

Respectfully submitted,

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

A handwritten signature in cursive script, reading "Mary Ellen Burns", written over a horizontal line.

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