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ROBERT ABRAMS
Attorney General

STATE OF NEW YORK
DEPARTMENT OF LAW
TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047
TELEPHONE: 212-488-3295

MARCIA J. CLEVELAND
Assistant Attorney General
In Charge
Environmental Protection Bureau

August 15, 1983

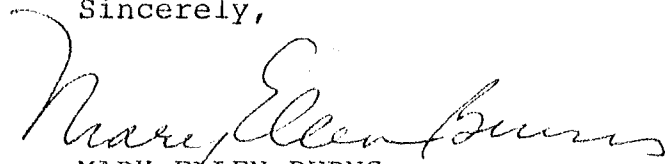
Clerk
United States District Court
for the Western District
of New York
68 Court Street
Buffalo, New York 14202

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

-----X

UNITED STATES OF AMERICA, et al., :

Plaintiffs, :

-vs- :

CIV-79-989C
(Hyde Park Landfill)

HOOKER CHEMICALS & PLASTICS :

CORPORATION, et al., :

Defendants. :

-----X

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

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

MARY ELLEN BURNS
Assistant Attorney General
of Counsel
2 World Trade Center
New York, New York 10047
Tel.: 212-488-5123

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 Intervenors 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 Intervenors' 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 Intervenor's 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 Intervenor 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 Counterman, 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 Intervenor, 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 Intervenor's 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 in dark ink. The signature is positioned above a horizontal line.

MARY ELLEN BURNS
Assistant Attorney General
Two World Trade Center
New York, New York 10047
Tel.: 212-488-3295

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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THE UNITED STATES OF AMERICA
THE STATE OF NEW YORK,

Plaintiffs,

- v. -

HOOKEE CHEMICALS & PLASTICS CORPS.,
OXY CHEMICAL CORPORATION; HOOKEE
CHEMICAL CORPORATION; OCCIDENTAL
PETROLEUM INVESTMENT CO.; OCCIDENTAL
PETROLEUM CORPORATION; THE TOWN OF
LEWISTON; THE TOWN OF NIAGARA,

Defendants:

AFFIDAVIT
Civil No. 79-989C

(HYDE PARK)

-----X

STATE OF NEW YORK)
COUNTY OF ALBANY) SS:

MICHAEL CAVANAUGH, being duly sworn, deposes and says:

1. I am a Citizen Participation Specialist, in the
Division of Environmental Education of the New York State
Department of Environmental Conservation ("DEC").

2. I am responsible for the development and supervision of
the State's Hyde Park Community Relations Plan designed to keep
the public informed of the process of the implementation of the
Hyde Park Settlement Agreement.

3. The Hyde Park Community Relations Plan is a part of an
ongoing effort by the DEC to develop citizen participation
programs in connection with remedial projects undertaken at
inactive hazardous waste sites. DEC is presently administering
and developing such programs for sites remediated pursuant to the
federal "Superfund" (the Comprehensive Environmental Response

EXHIBIT A

Compensation and Liability Act of 1980) and for sites targeted for clean-up pursuant to the recently enacted State "Superfund" (Chapter 857 of the Laws of 1982).

4. I have been assigned to the Division of Solid Waste of the Department of Environmental Conservation specifically to develop the Hyde Park Community Relations Plan. In developing this plan, I work closely with Norman Nosenchuck, P.E., the State Hyde Park Program Coordinator and the Director of the Division of Solid Waste and Joseph Slack, P.E., the Alternate State Program Coordinator.

5. The purpose of the Hyde Park Community Relations Plan is to establish and maintain a system of making information available to the public and receiving public comments and concerns.

6. In order to achieve its stated purpose, the Hyde Park Community Relations Plan, as presently formulated, includes the following activities:

- a. compilation of a mailing list of residents, local officials and interested environmental groups;
- b. establishment of local depositories for documents;
- c. identification and contact of key groups to ascertain specific concerns and information needs;
- d. preparation and distribution of a newsletter providing summaries of completed actions and publishing schedules of future activities and notices of significant events, availability of documents and any public meetings;

- e. preparation of Public Service Announcements and posters indicating where to obtain information about the Hyde Park Site;
- f. hold individual or small group meetings to help establish communications;
- g. receipt of public comments and concerns; responsiveness summaries shall be incorporated into the newsletter.

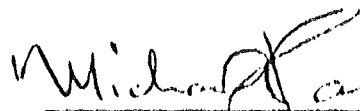
7. Items (a) through (d) of the above list have been initiated. The local depositories of documents have been established at the Region 9 Office of the DEC, 584 Delaware Avenue, Buffalo, New York and the EPA Office at Ecology and Environment, 706 9th Street, Niagara Falls, New York. It is anticipated that the first newsletter will be distributed in late October, 1982.

8. On September 7 and 8, 1982, together with another DEC Citizen Participation Specialist, I met in Niagara Falls with several representatives of local government and citizens groups in order to learn specific concerns and to explore various ways of establishing communications. These meetings were held with the chairperson and members of the Niagara County Environmental Management Council's Toxics Committee, and with Mr. Richard Berger, Esq. I also spoke with Ms. Toby Vigod to inform her of the Community Relations Plan and to ask if she would like to meet to discuss the concerns of her group. We have not yet met due to schedule conflicts.

9. On September 2, 1982, while scheduling the meetings in Niagara Falls, I telephoned Mr. Lewis Steele to ask him if he or

any of his clients would like to meet with us. Mr. Steele informed me that the concerns of his clients were addressed in his pending litigation, that he did not wish to speak with me, and that I should not speak to any of his clients in the Hyde Park area nor send them any informational materials. When I asked him to provide a list of his clients in order to comply with his request, he declined to do so.

10. In developing and implementing the Hyde Park Community Relations Plan, the DEC has been and will continue to cooperate with EPA.

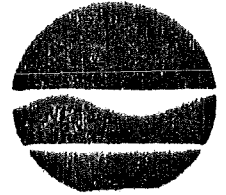

Michael Cavanaugh
Citizen Participation Specialist

Sworn to before me this
27th day of September, 1982



MITCHELL CONORKI, JR.
Notary Public, State of New York
Qualified in Albany County
No. 01-6604360
Commission Expires March 30, 1984

~~SECRET~~
New York State Department of Environmental Conservation
50 Wolf Road, Albany, New York 12233



Henry G. Williams
Commissioner

Joseph Spatola, Ph.D.
Program Coordinator
United States Environmental
Protection Agency
26 Federal Plaza
New York, NY 10007

APR 27 1983

Dear Dr. Spatola:

We have recently hired a Citizen Participation Specialist (Ms. Anita Gabalski) to administer the Department's Love Canal Community Relations Program. Ms. Gabalski will also be involved with the Hyde Park Landfill community relations program as time permits.

We are in the process of establishing a public information office and document depository at 9820 Colvin Boulevard (previously the United States Environmental Protection Agency (EPA) public information office). The office will serve as the Department of Environmental Conservation's (DEC) document depository for both the Love Canal and Hyde Park projects. It will become the main point of public access to project information and an important means of gathering the public's views, reactions and concerns.

It would better meet the needs of the public, streamline and improve both projects' community relations programs and be economically advisable to combine the EPA Hyde Park public information office with the DEC public information office. The present system of maintaining a separate DEC and EPA office will be confusing to the public, require the maintenance of duplicate document files and necessitates more staff, equipment, and the maintenance of two offices.

Would you please discuss this proposal in more detail with Mr. Joseph Slack of my staff. I trust that an arrangement can be worked out that will benefit both EPA and DEC but most of all the public.

Sincerely,

Norman H. Nosenchuck, P.E.
Director, Division of Solid Waste
State Hyde Park-Bloody Run Area
Program Coordinator

cc: A. Carlson
M.E. Burns ✓

EXHIBIT B

October 8, 1982
714 Buffalo Avenue
Niagara Falls, New York 14303

Ms. Mary Ellen Burns, Esq.
Assistant Attorney General
New York State Law Department
Environmental Protection Bureau
2 World Trade Center
Forty-seventh Floor
New York, New York 10047

Re: Hyde Park Landfill-area
Community Relations Plan

Dear Ms. Burns:

I have reviewed the formulation of the EPA/STATE Community Relations Plan as it appears in paragraph 6 of the September 26, 1982 Affidavit of Mr. Michael Cavenough.

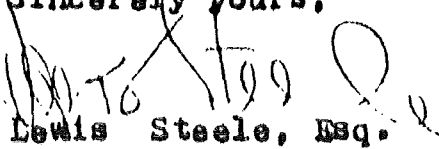
The inclusion of the activities labeled "a" through "e" as elements of a Hyde Park neighborhood community relations plan seem generally appropriate and sensible. With respect to the specific suggestions listed there, I would request the following:

- o please place Robert Sugarman and me on the mailing list of residents, local officials, and interested environmental groups;
- o it is appropriate that the community relations plan specify the establishment and maintenance of a local depository for Hyde Park-related documents located in Niagara Falls, New York;
- o provision in the EPA/STATE newsletter for a column by the College Heights Property Owners Association;
- o Mr. Sugarman and I should receive copies of any newsletters as well as copies of any general written communications directed to the residents of the College Heights neighborhood; and
- o Mr. Sugarman and I should be notified if EPA/STATE wishes to solicit meetings with members of the College Heights Property Owners Association.

In addition to these suggestions, it is appropriate for the Community Relations Plan to include additional specific provisions to insure that EPA/STATE will (1) keep the residents of the Hyde Park neighborhood fully informed of the progress of the implementation of the Hyde Park settlement agreement, and (2) provide the residents of the Hyde Park neighborhood with a full opportunity to comment on and contribute meaningfully to the Hyde Park settlement agreement. These additional elements appear as attachment #1 to this letter.

I will send you additional material for inclusion into the Community Relations plan as the material is developed.

Sincerely yours,


Lewis Steele, Esq.

cc: Helen Askey, President
College Heights Property Owners Ass'n.

Robert Sugarman

ATTACHMENT ONE

I. EPA/STATE WILL KEEP THE RESIDENTS OF THE COLLEGE HEIGHTS AND ADJACENT AREAS FULLY INFORMED ON THE PROGRESS OF THE IMPLEMENTATION OF THE HYDE PARK LANDFILL SETTLEMENT AGREEMENT BY:

- o timely* informing the College Heights Property Owners Association (hereafter referred to as Association) of the exchange and/or submission of all documents and materials required by and/or related to the Hyde Park settlement agreement (hereafter referred to as Agreement);
- o providing the Association in a timely* fashion with copies of all correspondence between Occidental Chemical Corporation (and its successors in interest), its contractors and consultants and EPA/STATE (including correspondence between Counsel for those parties) relative to the implementation of the Hyde Park settlement agreement;
- o upon request, providing the Association with copies of any agency record, document, or piece of material (including correspondence) related to and/or prepared in accordance with the Hyde Park Settlement Agreement without charge;
- o making appropriate legal and technical personnel available to meet with members, representatives, consultants to, and designees of the Association to discuss the status of the implementation of the Agreement; and
- o notifying the Association within three (3) days of EPA/STATE notification by Occidental (or its successors in interest) that an event has occurred which delays or prevents, or leads Occidental to anticipate delays or prevention of, Occidental's compliance with any appropriate terms or condition of the Agreement.

*in the context here, timely means within three days of receipt or completion.

II. EPA/STATE WILL PROVIDE THE RESIDENTS OF THE COLLEGE HEIGHTS AND ADJACENT AREAS WITH A FULL OPPORTUNITY TO COMMENT ON AND CONTRIBUTE MEANINGFULLY TO THE IMPLEMENTATION OF THE HYDE PARK SETTLEMENT AGREEMENT BY:

- o providing the Association with timely* and advance notification of tentative and final scheduling arrangements implementing the terms and conditions of the Agreement;
- o providing the Association with timely* and advance notice of the time periods EPA/STATE establishes to receive submissions by Occidental, its consultants or contractors, made in connection with and/or required by the Agreement;
- o providing the Association with timely* and advance notice of EPA/STATE (tentative) deadlines to complete EPA/STATE submissions required by and/or done in accordance with the Agreement;
- o keeping the Association fully and completely informed of and about all issues that arise as a result of the EPA/STATE review of submissions by Occidental, its consultants and contractors, required by and/or related to the Agreement;
- o upon its request, making available to the Association appropriate EPA/STATE technical and legal personnel for in-person meetings to discuss all issues which arise out of the implementation of the Agreement;
- o providing the Association with an opportunity to submit verbal and written comments to EPA/STATE on all submissions, review documents, matters and questions arising out of the implementation of the Agreement; and
- o providing a written response to all Association comments, supra, as soon as possible after their receipt and prior to (1) making any determination that submitted plans, specifications, and protocols or other studies or analyses created in accordance with the terms of the Agreement are consistent with all appropriate terms and conditions of the Agreement, or (2) stipulating with Occidental to this effect.

*in the context here, timely means within three days of receipt or completion

Letter to Joe & Mary

October 14, 1982
714 Buffalo Avenue
Niagara Falls, New York 14303

Mary Ellen Burns, Esq.
Environmental Protection Bureau
New York State Department of Law
47th Floor
2 World Trade Center
New York, New York 10047

Dear Ms. Burns:

I am submitting two additional items to be added to EPA/STATE's Community Relations plan.

First, recent and continuing experience with Mr. Joseph Slack, New York State's Alternate Program Coordinator for the Hyde Park landfill remedial project suggests that scheduling difficulties and/or other responsibilities and obligations may on occasion preclude EPA/STATE representatives from traveling to western New York to meet with representatives and/or designees of the College Heights Property Owners Association to discuss problems, issues, and concerns that arise with respect to the implementation of the Hyde Park settlement agreement. When this occurs, and in order to ensure that College Heights and adjacent area residents have a full opportunity to comment on, and contribute meaningfully to, the settlement agreement, it would be necessary for appropriate representatives and/or designees of the College Heights Property Owners Association to travel directly to Albany, New York City, or Washington, D.C. to make sure that such meetings can and do take place.

Under these circumstances, and so that practical scheduling difficulties and other employment responsibilities will not interfere with the ability of the Hyde Park-area neighborhood residents to protect their health and safety interests during the implementation of the settlement agreement, it would be appropriate for the EPA/STATE Community Relations plan's budget to include an allocation for "citizen participation/relations activities", including monies for items such as necessary citizen travel.

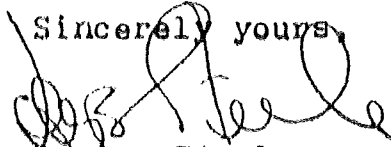
Second, on at least one occasion this year, in-place remedial systems at the Hyde Park landfill site have malfunctioned and/or been otherwise rendered inoperative. Importantly, in the winter-1982 Pumphouse-fire incident, the landfill's residential neighbors first learned of the landfill malfunction and emergency through the newspaper. Further, it was not until several days after the incident, that the landfill's residential neighbors received even the semblance of a

complete accounting of the emergency's cause, extent, and resolution.

With these considerations in mind, it is appropriate that the EPA/STATE Community Relations plan provide for governmental action in response to problems, malfunctions, emergencies, or other untoward events, circumstances, or conditions that may develop at the landfill site. More particularly, it is appropriate for the Community Relations plan to specifically commit EPA/STATE to (1) immediately notify the public (including the newsmedia and the College Heights Property Owners Association) when either becomes aware of an operational problem or unexpected condition at the Hyde Park landfill (site), (2) keep the public (including the newsmedia and the Association) fully informed and appraised of both the status of that operational problem or condition and its health and safety implications, and (3) provide an after-the-fact full and complete public report detailing (a) the scope and implications of the problem, (b) the causes of the problem, and (c) the steps which EPA/STATE and Hooker will take to prevent the recurrence of the problem.

If you have any questions or comments about these additional items, please do not hesitate to contact me at (716) 284-2644.

Sincerely yours,



Lewis Steele

cc: Robert Sugarman
Helen Askey, President
College Heights Property Owners Association

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

Plaintiffs

: CIVIL ACTION

: NO. 79-989C

vs.

:

HOOKEE CHEMICALS AND PLASTICS CORP.; OXY
CHEMICAL CORPORATION; HOOKEE CHEMICAL
CORPORATION; OCCIDENTAL PETROLEUM INVEST-
MENT CO.; OCCIDENTAL PETROLEUM CORPORATION;
THE TOWN OF LEWISTON; THE TOWN OF NIAGARA,
[HYDE PARK LANDFILL]

:

AFFIDAVIT OF

:

E. MARTA SACHEY

:

:

Defendants.

STATE OF NEW YORK)

) ss

COUNTY OF ALBANY)

E. MARTA SACHEY, being duly sworn, deposes and says:

1. I am an attorney with the New York State
Department of Health [hereinafter the Department] assigned to
the above-captioned case and as such am familiar with the facts
and circumstances surrounding the Department's involvement in
the implementation of the Hyde Park Settlement Agreement
including the Department's activities relating to the study of
past particulate migration from the Hyde Park landfill site.

Exhibit B

EXHIBIT E

2. I make this affidavit in response to the supplemental affidavit, dated August 16, 1982, of Lewis Steele in support of the College Heights Property Owners Association motion for clarification of responsibilities under the Hyde Park Settlement Agreement and, more specifically, to that portion of the affidavit concerning the study of past particulate migration from the Hyde Park landfill site.

3. On May 20, 1982 Lewis Steele telephoned deponent requesting that he be given an opportunity to review and comment on the Department's protocol for its past particulate migration study. By letter of June 4, 1982, a copy of which is annexed, Lewis Steele was advised that the Department would provide him with a copy of the preliminary draft of the past particulate migration study protocol for review and comment when it was completed.

4. The Department of Health is committed to undertake a study of past particulate migration from the Hyde Park landfill site and has accordingly devoted resources to develop and implement such a study; the Department appreciates the importance of this study under the terms of the Hyde Park Settlement Agreement [Addendum I, para. M, pp. I-51-52] and for residents near the landfill.

5. As is correctly pointed out in paragraph 30 of Lewis Steele's supplemental affidavit, the study is a "complex one"; formulation of the study protocol has required rigorous scientific thought and extensive internal Department review is virtually completed. The next step before finalization of the protocol is to obtain scientific peer review from other State and federal agencies.

6. Because of the complexity of the study and the Department's desire to develop a scientifically rigorous approach, it is taking longer than initially anticipated to formulate and implement the study.

7. Detailed below is a chronology, not exhaustive, of the Department's continuing efforts in formulating the study protocol, communicated to deponent by Department personnel actively involved in the formulation of the protocol.

a. May 12, 1981: The Department contacts New York University Medical Center's Institute of Environmental Medicine, Laboratory for Environmental Studies (hereinafter New York University) requesting a meeting to discuss New York University acting as a consultant for evaluation of available historical meteorologic data for the Niagara Frontier.

b. May 16, 1981: Department personnel meet with representatives from the New York University for preliminary discussion of evaluation of historical meteorologic data.

c. June , 1981: The Department receives draft proposal and report from the New York University regarding development of the study's sampling procedures, meteorologic data analysis scheme and available analytical capability.

- d. October 10, 1981: The Department makes initial consultive contact with NIOSH regarding its role as a consultant for the study protocol.
- e. October 22, 1981: Department personnel meet with NIOSH (National Institute for Occupational Safety and Health) representatives to discuss development of sampling and analytical techniques for study.
- f. November 10, 1981: An Internal Department meeting is held to discuss development of analytical methods for the study.
- g. November 11, 1981: Dust samples from the Albany, N.Y. area are collected by Department personnel to be used in developing analytical methods for the study.
- h. November 12 & 13, 1981: The Department receives analytical data from NIOSH for review.
- i. November 16, 1981: Department personnel meet with representatives of New York University to discuss details of the meteorological data evaluation.
- j. November 17, 1981: The Department requests the State Department of Environmental Conservation, Division of Air to carry out computer simulation of particulate dispersion from Hyde Park landfill.
- k. November 18, 1981: The Department's Center for Laboratories and Research submits an outline for the analytical protocol development.
- l. November 23, 24, 30, 1981: Department personnel conduct field survey of Hyde Park area for preliminary evaluation of potential sampling locations.
- m. December 3, 1981: The Department purchases meteorologic computer tapes for the Niagara Falls International Airport from the National Climatic Center.
- n. January, 1982: The Department's Center for Laboratories and Research receives dust samples from Niagara Falls residence to be used in the development of analytical methods for the study.

o. January, 1982 to May, 1982: Drafts of proposed introductory letter and resident questionnaire to be used in the study are internally reviewed and redrafted.

p. February, 1982: The Department's Center for Laboratories and Research receives more dust samples to be used in the development of analytical methods.

q. April 1, 28, 1982: The Department's Center for Laboratories and Research and Bureau of Toxic Substances Assessment meet to assess study's project management and discuss all elements of the study.

r. May, 1982: Department personnel conduct search of published literature on indoor air quality and dust deposition rates in the Niagara Frontier.

s. May 3, 1982: Department personnel meet with representatives from New York University to review progress on analysis of Niagara Frontier meteorologic data.

t. June, July 1982: The Department develops a risk and exposure assessment for the study.

u. July, 1982: The Department develops an outline for the study protocol.

v. July, 1982: The Department conducts literature search on environmental stability of potential analytes for study.

w. August 9, 1982: The Department receives first-run results of computer dispersion modelling from the Department of Environmental Conservation, Division of Air.

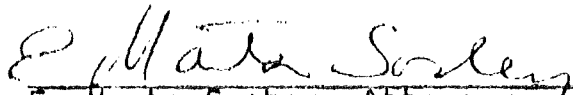
x. August 10, 1982: A proposed draft of study protocol distributed to Department personnel for internal review.

y. August 11, 1982 to August 20, 1982: Department personnel submit comments on proposed study protocol.

7. As evidenced by the foregoing, since at least May, 1981, the Department has been engaged in on-going activities necessary for the formulation of a scientifically sound protocol for the study of past particulate migration from the Hyde Park landfill site. Such activities have included development of analytical methods, internal review, consultation with outside experts, and procurement of data from outside sources.

8. Those Department personnel responsible for formulating the study protocol have advised deponent that a preliminary draft will be forwarded to Lewis Steele, in addition to other State agencies (DEC, DOL) and federal agencies (EPA, NIOSH) for review and comment no later than September 10, 1982.

9. As soon as the aforesaid review is completed, the Department will begin to implement the study protocol.


E. Martha Sachey, Attorney
New York State Department of Health
Bureau of Legal Affairs

Sworn to before me, this
24th day of August, 1982.


NOTARY PUBLIC
Schenectady County
My Comm. Exp. 5/30/84

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, et. al.,	:	CIV-79-989C
Plaintiffs,	:	(Hyde Park
v.	:	Landfill)
HOOKEr CHEMICALS & PLASTICS	:	AFFIDAVIT OF
CORPORATION, et. al.,	:	DR. ROBERT H.
Defendants.	:	HUFFAKER

STATE OF NEW YORK)
COUNTY OF ALBANY) ss:

DR. ROBERT H. HUFFAKER, being duly sworn, deposes and says:

1. I am the Associate Director of the Office of Public Health of the New York State Department of Health [hereinafter the Department] and in that capacity am responsible for the Department's Bureau of Toxic Substances Assessment's activities. This Bureau is responsible for designing and implementing the Department's study of past particulate migration from the Hyde Park landfill. As such, I am involved in the Department's efforts to design a protocol for such a study and am familiar with the facts and circumstances surrounding these efforts.

EXHIBIT F

2. I make this Affidavit in response to this Court's Order of March 9, 1983 in which the State of New York was ordered to show cause why the aforementioned study cannot be completed as soon as possible.

3. As set forth in the "Response to Public Comments on the Stipulation and Judgment Approving Settlement Agreement", submitted to the Court in April, 1981, the Department is committed to undertake a study of past particulate migration from the Hyde Park landfill site and has accordingly devoted and intends to continue to devote its resources to design and implement such a study.

4. The Department wishes to design a study that will yield scientifically valid and useful information. The criteria used in developing the study, including the designation of appropriate samples and sampling locations, will be selected to serve this end. The Department also considers outside scientific peer review of the study protocol appropriate and necessary for the development of a well designed study. Such review by outside scientists provides a mechanism for rigorous evaluation of a study's design before implementation of the study and is frequently sought in the development of protocols.

5. As is more specifically indicated below, the Department has been engaged in a continuing effort to formulate a study protocol. We estimate that implementation of the study, namely, field sampling, can begin in August, 1983.

6. The Court was apprised of the Department's activities in formulating the study protocol through August 20, 1982 by affidavit, dated August 24, 1982 (annexed as Exhibit A) which was submitted to the Court in the context of a motion for clarification of the responsibilities of the parties to the Hyde Park Settlement decree brought by plaintiff-intervenor. The Court also was advised that a draft study protocol would be forwarded to State and Federal agencies and plaintiff-intervenor's attorney no later than September 10, 1982 for review and comment.

7. As indicated in a cover letter and distribution list of September 10, 1982 (annexed as Exhibit B), a draft study protocol was sent to various governmental agencies, private organizations whose evaluation of the protocol was deemed appropriate to seek, and plaintiff-intervenor's attorney.

8. As a result of the foregoing, the Department received a combination of written and verbal comments on the draft study protocol from approximately sixteen individuals outside the Department, who represented various Federal and State agencies, universities, and plaintiff-intervenor. The last of these comments was received on October 26, 1982.

9. During this period and thereafter, the Department began the process of reviewing and assessing the comments that were received. Included in the comments was a recommendation that the services of a consulting statistician be secured to address issues concerning the study protocol provisions for

sample selection and data analysis. On November 5, 1982, the Department requested the assistance of statisticians from the State University of New York at Albany. To date there have been four meetings with the consulting statisticians, the first meeting being November 8, 1982 and the most recent March 16, 1983.

10. During the period in which the Department was receiving and assessing comments on the draft study protocol, the study protocol became the subject of media attention. (See exhibit C; October 22, 1982, "Researchers term dump study flawed," Buffalo Gazette.) This development raised a concern among Department scientists about whether the integrity of the study, as formulated at that time, could be jeopardized due to the possibility of bias of the study group resulting from public dissemination of the specifics of the study protocol.

11. Due to a combination of the merit of the comments generated by outside scientific review of the draft study protocol and the concern of whether the study might be jeopardized as a result of the media attention the draft protocol received, the Department determined that further assessment of the study protocol was advisable and that it would be appropriate to seek further outside review. By letter of December 31, 1982 (annexed as Exhibit D) the Department

requested the federal Department of Health and Human Services' Centers for Disease Control's assistance to review the draft protocol and to recommend improvements in the study design or alternate approaches to the study. Subsequent written communications between the Centers for Disease Control and the Department are annexed as Exhibits E, F and G. A representative for the Centers for Disease Control has advised that the Center would be willing to provide Department staff assistance in formulating a study protocol. Meetings between the Department and the Center have been scheduled for May 10 and 11, 1983, the first dates representatives from the Center can meet with the Department.

12. We estimate that field sampling can begin in August, 1983. This estimate is based upon the following projected time requirements:

1. April, 1983: Exchange of study protocol drafts and recommendations with Centers for Disease Control/formulation of revised draft study protocol.
2. May 10, 11, 1983: Meetings with Centers for Disease Control to finalize draft study protocol.
3. May 16, 1983 to June, 1983: Distribution of protocol for outside peer review/time for reviewers to comment.
4. June, 1983 to July 1983: Department assessment of reviewers' comments/finalization of study protocol.
5. August, 1983: Preparation for field sampling/implementation of study protocol.

13. The Department anticipates that the original draft study protocol, which was previously distributed for the purpose of securing outside peer review, will undergo major changes or be completely redesigned which will make further peer review appropriate and necessary. In the context of that process, the Department feels that it is appropriate to provide plaintiff-intervenor's attorney with a copy of the revised study protocol, as was done with the previous protocol, for the purpose of providing plaintiff-intervenor the opportunity to secure expert review and to comment to the Department.

14. The Department is requesting the Court's guidance and assistance in setting limitations on plaintiff-intervenor's use and dissemination of the revised study protocol and other material that may be provided relevant to the study protocol. Specifically, the Department believes that plaintiff-intervenor's use and dissemination of the revised study protocol and other material relevant to the study protocol must be limited to the purposes for which these materials are provided, to wit, to provide plaintiff-intervenor the opportunity to secure expert scientific review and to comment to the Department. Absent such limitations, Department scientists are very concerned that their ability to conduct a scientifically valid study would be compromised. A crucial element in any scientific study, as in the Hyde Park study, is the avoidance of any bias in the subjects of the subgroup from whom data or information are collected. Such bias can result,

for example, from study subjects' prior knowledge about the specific purposes or particulars of the design of a study that conscious or unconscious modification of their responses or the data collected may occur.

15. We are available to address any questions the Court may have.

Dr. Robert H. Huffaker
Dr. Robert H. Huffaker

Suscribed and sworn to me this 29th
day of March, 1983

E. Marta Sachey
NOTARY PUBLIC

E. MARTA SACHEY
NOTARY PUBLIC, State of New York
No. 4646961
Qualified in Albany County
Commission Expires March 30, 1985

STATE OF NEW YORK
DEPARTMENT OF HEALTH OFFICE OF PUBLIC HEALTH

TOWER BUILDING • THE GOVERNOR NELSON A. ROCKEFELLER EMPIRE STATE PLAZA • ALBANY, N.Y. 12237

DAVID AXELROD, M.D.
Commissioner

GLENN E. HAUGHIE, M.D.
Director

September 10, 1982

Dear :

Enclosed is a draft copy of our plan of study and protocols for assessing the impact of past particulate migration from the Hyde Park Landfill to the surrounding residential areas. The study is an outgrowth of the Settlement Agreement which was negotiated between Hooker Chemicals & Plastics Corp. (now Occidental Chemical Corp. - OCC) and the State and Federal Governments for remediation of the Hyde Park Landfill. The present study is designed to determine if contaminated dust at a level which would constitute a human endangerment exists in the residential neighborhood and if such dust does exist whether it migrated from the Hyde Park Landfill.

I would like you to review and evaluate the study and protocols for its scientific and technical content and merit. It is my intent to send the introductory letters on September 28, 1982 to the residents who will be selected so that field work may begin early in October. With this schedule, I would appreciate your major comments by telephone no later than September 20, 1982 and your written comments received by September 24, 1982.

You may reach me by phone at 518-473-8427. If I am not immediately available, you may contact either Mr. Al Wakeman or Dr. John Hawley.

Sincerely,

G. Anders Carlson, Ph.D.
Chief, Special Studies Section
Bureau of Toxic Substance
Assessment

GAC:sm

Enc.

cc: Dr. Huffaker
Dr. N. Kim

*Part of
Exhibit F*

Distribution

Mr. Joseph L. Slack, P.E.
Supervisor
Implementation Section
New York State Department of
Environmental Conservation
Room 401
50 Wolf Road
Albany, NY 12233

Mary Ellen Burns
Assistant Attorney General
Bureau of Environmental Protection
Department of Law - 47th Floor
Two World Trade Center
New York, NY 10047

Mr. Norman H. Nosenchuck, P.E.
Director
Division of Solid Waste
New York State Department of
Environmental Conservation
Room 209
50 Wolf Road
Albany, NY 12233

Mr. Lewis Steele, Esq.
1714 Buffalo Avenue
Niagara Falls, NY 14303

Mr. Joseph Spatola
Air & Waste Management Section
United States Environmental
Protection Agency
Room 1009
26 Federal Plaza
New York, NY 10278

Philip J. Landrigan, M.D., M.Sc.
Director
Division of Surveillance, Hazard
Evaluations and Field Studies
Robert A. Taft Laboratory
4676 Columbia Parkway
Cincinnati, Ohio 45226

Mr. Donald Barns
Dioxin Work Group
Science Advisor to Assistant Administrator
Office of Pesticides and Toxic Substances
Mail Code (TS 788)
401 M. Street S-W
Washington, D.C. 20460

Dr. Rao
Department of Environmental
Conservation
Room 136
50 Wolf Road
Albany, NY 12233

Mr. R. Charles Morgan, WH 527 F
Office of Waste Program Enforcement
499 S. Capitol Street, S.W.
Washington, D.C. 20460

Dr. Theodore Knelp
New York University Medical Center
P.O. Box 817
Tuxedo, NY 10987

Ms. Julia Schwartz
Ecology and Environment
195 Sugg Road
Buffalo, NY 14225

Dr. Lloy
New York University Medical Center
P.O. Box 817
Tuxedo, NY 10987

Mr. John Kominsky
Industrial Hygienist
Robert A. Taft Laboratory
4676 Columbia Parkway
Cincinnati, Ohio 45226

Exhibit B - page 2

part of
Exhibit F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ. No. 79-789C
(Hyde Park Landfill)

-----x
UNITED STATES OF AMERICA and STATE OF
NEW YORK,

Plaintiffs,

-against-

HOOKE CHEMICALS & PLASTICS CORP., et al.

Defendants,
-----x

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

G. Anders Carlson, being duly sworn, states:

1. I am Chief of Special Studies in the New York State Department of Health's Bureau of Toxic Substance Assessment and am the Department's coordinator relating to matters concerning implementation of the Hyde Park Consent Decree. I have been employed by the New York State Department of Health in this and similar capacities for three and one-half years. I hold Doctor of Philosophy and Master of Science degrees in Environmental Engineering and a Bachelor of Science degree in Civil Engineering.

2. In my position, I supervise Department personnel who are responsible for overseeing the Occidental Chemical Corporation's implementation of and compliance with the Health and Safety Program during activities at Hyde Park required under the Hyde park Consent Decree

3. I make this affidavit to describe for the Court the air monitoring of survey activities at the Hyde Park Landfill which the Department of Health undertook from November 8-12, 1982 and to discuss other concerns. The air monitoring described here represents the entire extent of air monitoring carried out to date by the Department. EPA and its subcontractor, Ecology and Environment, have conducted other air monitoring during the Hyde Park survey activities. On information and belief, a description and the results of that monitoring will be presented by EPA to the Court.

HEALTH AND SAFETY PLAN

4. It is useful, before detailing the Department's air monitoring work, to describe how the Health and Safety Plan for the survey activity at the site has evolved.

5. On July 9, 1982, Occidental Chemical Corporation (OCC) submitted to the United States Environmental Protection Agency and the State of New York (EPA/State) its proposed plans, specifications and protocols for the Surveys

EXHIBIT G

and Studies set forth in Addendum I of the Hyde Park Judgement and Agreement. OCC's proposed Health and Safety Plan for Surveys and Studies was included in a document entitled "Hyde Park Quality Assurance Project Plan, Appendix C, Specifications and Protocols for the Soil and Aquifer survey Program Hyde Park-Bloody Run".

6. EPA, the State and OCC, through meetings and correspondence, exchanged comments on OCC's entire submission, including the Health and Safety Plan. On October 4, 1982, EPA/State, by letter to OCC, stated that there was general agreement between EPA/State and OCC on OCC's Health and Safety Plan.

7. The approved Health and Safety Plan did not include the elements detailed in Appendix V of the Judgement because in discussions with OCC, EPA/State determined that the Survey and Study Activity did not constitute Special Construction Activities.

8. On October 8, 1982, OCC began field work using the Health and Safety Plan approved by EPA/State. This work is ongoing and includes installation of overburden survey wells, bedrock survey wells and landfill monitoring wells.

9. Since initiation of the survey work, experience with actual field conditions has resulted in certain necessary modifications of the plan which were approved in the field by field personnel whom I supervise.

10. On October 28, 1982 the court determined that, based on the then-existing facts, installation of wells was not a Special Construction Activity as defined in Addendum V of the Judgement and as such did not require the extensive air monitoring described in that Addendum. The State of New York, thereafter, voluntarily carried out air monitoring for organic vapors during the installation of the monitoring wells into the landfill itself. The monitoring was carried out from November 8 to 12, 1982 during the installation of wells OW33-82, OW34-82, OW35-82, OW36-82 and OW37-82.

11. The air monitoring was accomplished using a General Electric Toxic Vapor Meter (TVM) which responds to total halogenated organic vapors at a detection level of 0.1 parts per million (ppm). The instrument was manually calibrated at the start of each day's monitoring and then run in a mode which provided an automatic periodic calibration. Sample probes were set up fifty feet upwind and fifty feet downwind of a given drilling operation (attachment 1). Raw data from the TVM was plotted with a continuous strip chart recorder.

12. The fifty foot perimeter was established as the zone within which all personnel were required to use self contained breathing apparatus. Outside the fifty foot perimeter cartridge respirators were used when chemical odors were present at the fifty foot perimeter.

13. At each site, background (upwind) monitoring preceded all other monitoring. This was done to determine if there were any vapors in the ambient air to which the TWM might respond. When background monitoring was completed, the instrument was switched to sample from the downwind probe. The protocol specified that if organic vapors were detected by the TWM at a level above the most recent background measurement a second background observation would be made and then the downwind level checked. If the downwind level remained elevated above background, OCC was to be notified and was to take appropriate corrective steps.

14. Attachment 2 is an example of a segment of the strip chart record and the type of data recorded. On the left hand side of the chart (with the line of black dots and numbers from 11 to 24) is a discontinuous line which is the trace of the base line below the detection level of the instrument. The intermittent trace (indicated in brackets) represents the automatic calibration checks. The time period represented by the trace is equivalent to about thirteen hours.

15. At no time during the installation of the landfill monitoring wells did the TWM detect and record concentrations of organic vapors at a level greater than or equal to 0.1 ppm.

16. On occasion, odors characteristic of Hyde Park chemicals were detected by personnel from the Department of Health at the 50 foot perimeter, but were not concurrently detected by the TWM.

17. The TWM's ability to respond to chemicals characteristic of the Hyde Park Landfill was checked by placing the instrument's probe over an open sample bottle which contained materials from the Landfill. The concentration recorded by the TWM was at the instrument's maximum level of 100 ppm. This demonstrated that the instrument is capable of responding to the chemicals in question if sufficient quantities are present (greater than 0.1 ppm).

18. The conclusion drawn from this monitoring activity is that at no time did organic vapors, released during installation of the landfill monitoring wells, migrate beyond the fifty foot perimeter in high enough concentrations to impact any part of the community around the Hyde Park Landfill.

19. The workers at the site, and particularly those carrying out the drilling operations were fully protected. The workers used self-contained breathing apparatus and protective clothing.

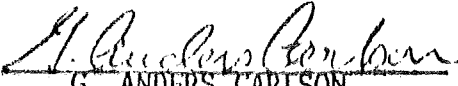
RECOMMENDATIONS FOLLOWING MARCH 9, 1983 INCIDENT

20. As set forth in Sandra Stanish's affidavit of March 11, 1983, during the drilling of vector well F-6 on March 9, 1983, a release of a

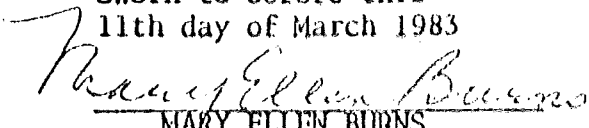
gaseous material, possibly methane, was experienced when drilling was nearing completion at a depth of 120 to 130 feet. This discharge continued for approximately 3 1/2 hours at which time the State made specific recommendations and as detailed in the affidavit of Sandra Stanish, the State directed OCC to: 1) cap the well, 2) periodically monitor the well site with an explosimeter until the well was capped, 3) notify the Fire and Police Departments and 4) patrol the site throughout the evening hours. It was also recommended that OCC take samples for analysis of the constituents of the gas escaping from the landfill. Some of these activities were not carried out as expeditiously as possible, a fact of concern to the State. We are also concerned that OCC's full preparedness to respond effectively and efficiently to unanticipated situations such as this needs to be more developed.

21. Because of these facts and concerns, the Department of Health will recommend to the State Coordinator that OCC be required to undertake the following:

- a) That OCC periodically monitor drilling with an explosivity meter and be prepared to respond efficiently and effectively if explosive conditions are encountered in the future,
- b) That OCC have equipment immediately available to the working site for collection of gas samples for constituent analysis if the conditions described above are encountered,
- c) That OCC define specific response and notification procedures that it will follow should this or similar types of situations arise in the future and,
- d) That OCC reaffirm its commitment to implement the specific requirements of Appendix C as modified (pg. 31F) which state, in part, that "in the event of significant release of toxic or hazardous vapors from any drilling, the source of such vapors shall be immediately capped or covered with fill".


G. ANDERS CARLSON

Sworn to before this
11th day of March 1983


MARY ELLEN BURNS
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 1983, a copy of the foregoing Response was served by first class, postage prepaid, on the following counsel:

JACK PENCA, ESQ.
Assistant United States
Attorney
United States Courthouse
Court and Franklin Streets
Buffalo, New York 14202

MICHAEL ELDER, ESQ.
U.S. Department of Justice
Division of Land and Natural
Resources
Room 1258
9th and Pennsylvania Avenues
Washington, D.C. 20530

DAVID K. FLOYD, ESQ.
PHILLIPS, LITTLE, HITCHCOCK,
BLAINE & HUBER
3400 Marine Midland Center
Buffalo, New York 14203

THOMAS H. TRUITT, ESQ.
KEITH WATSON
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

LOUIS NIZER, ESQ.
MARTIN WASSER, ESQ.
PHILLIPS, NIZER, BENJAMIN
KRIM & BALLON
40 West 57th Street
New York, New York 10019

BENJAMIN N. HEWITT, ESQ.
PHELPS, GRAY, MANSOUR & HEWITT
800 United Office Building
Niagara Falls, New York 14302

ROBERT P. MERINO, ESQ.
749 Seventh Street
Niagara Falls, New York 14301

RICHARD BERGER, ESQ.
GROSSMAN, LEVINE AND CIVILETTO
8612 Buffalo Avenue
Niagara Falls, New York 14304

LEWIS STEELE, ESQ.
649 Rainbow Boulevard
Niagara Falls, New York 14303

ROBERT SUGARMAN
SUGARMAN & DENWORTH
North American Building
Suite 510
121 South Broad Street
Philadelphia, Pa. 19107 -

BARBARA MORRISON, ESQ.
JAY, KLAIF & MORRISON
1032 Ellicott Square
Buffalo, New York 14203

TOBY VIGOD, ESQ.
CANADIAN ENVIRONMENTAL LAW
ASSOCIATION
8 York Street
5th Floor South
Toronto, Ontario M5J 1R2

Assistant Attorney General

