

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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THE UNITED STATES OF AMERICA,	:	
THE STATE OF NEW YORK,	:	
	:	
Plaintiffs,	:	
	:	Civil Action
-v.-	:	No. 79-989C
	:	(Hyde Park Landfill)
HOOKER CHEMICALS & PLASTICS CORP.;	:	
OXY CHEMICAL CORPORATION; HOOKER	:	
CHEMICAL CORPORATION; OCCIDENTAL	:	
PETROLEUM INVESTMENT CO.; OCCIDENTAL	:	
PETROLEUM CORPORATION; THE TOWN OF	:	
LEWISTON; THE TOWN OF NIAGARA,	:	
	:	
Defendants.	:	

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State of New York's Response to Motion
for Clarification of Responsibilities
of the Parties to the Hyde Park
Settlement Agreement

Plaintiff-Intervenor College Heights Property Owners Association (hereinafter "Intervenor") has moved the Court for an order clarifying the responsibilities of the parties to the Stipulation and Judgment Approving Settlement Agreement in the above-entitled matter, approved by the Court in its Decision & Order of April 30, 1982.*

In its motion, Intervenor requests an order instructing Hooker, the United States and the State of New York

*Richard Berger, Counsel for Plaintiff-Intervenor Norman Martelli, filed an Affidavit in support of this motion on August 13, 1982.

to provide Intervenor with copies of all materials exchanged, free of charge. As set forth in the Affidavit of Lorelei Borland, attached hereto as Exhibit A, the State has agreed to do so. Intervenor moves the Court to enter an order requiring that Intervenor receive notice of any meetings to be held between two or more parties. This issue is being addressed in the community relations plan being developed by EPA/State (See Exhibit A, ¶ 30). The State of New York recognizes the importance of keeping the public fully apprised of the details of and the process of the implementation of the Hyde Park Settlement Agreement.]

Intervenor also moves for an order granting Intervenor the right to participate in any meetings held between two or more parties. There is no provision in the Settlement Agreement, or in the Court's Order of April 30, 1982, addressing the question of attendance by Intervenor at meetings between the signatory parties to the Settlement Agreement relating to implementation of the Settlement Agreement. (See Decision and Order, pp. 34-35). If the Court determines that such attendance should be permitted, we respectfully suggest that any representative of Intervenor be appropriate to the nature of the meeting. Thus, if the subject of a meeting relates to technical aspects of plans, specifications and protocols, and involves only technical representatives of the signatory

parties, the representative designated by Intervenor association should be a technical representative, or designee other than an attorney. In the event that a meeting relating to implementation of the Settlement Agreement necessitates the attendance of attorneys, it would then be appropriate for counsel for Intervenor to attend.

Counsel for Intervenor makes two factual allegations in his Affidavit and Supplemental Affidavit. Counsel alleges that Hooker, the United States of America, and the State of New York have taken actions which are in violation of the Settlement Agreement. Thus, counsel alleges that efforts made by the parties to expedite work required by the Settlement Agreement by making specified submissions sooner than required by the Settlement Agreement, and by reducing the time frame for review of such submission by EPA/State, is contrary to the provisions of the Settlement Agreement. As is fully set forth in the Affidavit of Lorelei Borland, there has been no modification of the Settlement Agreement and the parties are proceeding expeditiously.

In his Supplemental Affidavit filed on August 16, 1982, counsel for Intervenor also alleges that the State has failed to timely commence an environmental sampling program in the Bloody Run Area. The Affidavit of Marta Sachey, of the New York State Department of Health, attached hereto as Exhibit B,

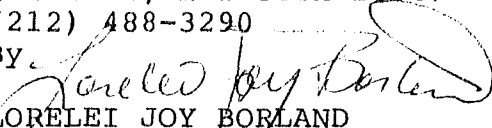
demonstrates that the Department of Health is proceeding to fulfill its commitment, and that counsel for Intervenor has been and will be kept fully apprised of the status of this project. As counsel for Intervenor has stated (Supplemental Affidavit, ¶ 30), the program to be implemented is a complex one. The Department of Health is taking every precaution to insure that the environmental sampling program is a meaningful one.

As set forth in the two Affidavits attached hereto, the State of New York is fully enforcing the terms of the Settlement Agreement, in order to ensure that the purpose to protect against endangerment to human health and environment is achieved as soon as possible.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Plaintiffs
Two World Trade Center
New York, New York 10047
(212) 488-3290

By:


LORELEI JOY BORLAND
Assistant Attorney General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

-----X

THE UNITED STATES OF AMERICA, :
THE STATE OF NEW YORK, :

Plaintiffs, :

-v.-

AFFIDAVIT

HOOKER CHEMICALS & PLASTICS CORP.; :
OXY CHEMICAL CORPORATION; HOOKER :
CHEMICAL CORPORATION; OCCIDENTAL :
PETROLEUM INVESTMENT CO.; OCCIDENTAL :
PETROLEUM CORPORATION; THE TOWN OF :
LEWISTON; THE TOWN OF NIAGARA, :

Civil No. 79-989C

Defendants. :

-----X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

LORELEI JOY BORLAND, being duly sworn, deposes and
says:

1. I am lead counsel for the State of New York in
the above-entitled matter.*

2. On April 30, 1982 this Court entered a Decision
and Order approving a proposed Stipulation and Judgment
Approving Settlement Agreement (hereinafter "Settlement
Agreement").

*Effective August 30, 1982, due to my resignation as an
Assistant Attorney General, Mary Ellen Burns will be lead
counsel in this matter.

Exhibit A

3. Pursuant to the terms of the Settlement Agreement, defendant Hooker is required to implement a remedial program designed to protect against endangerment to human health and the environment in the Hyde Park Bloody Run Area (§ 4 of the Settlement Agreement).

4. The Settlement Agreement provides that its effective date is one day after any appeal must be filed (Settlement Agreement, § 14). The effective date was therefore July 1, 1982.

5. The Settlement Agreement provides that the remedial program be carried out in specific phases (see April 30 Order, p. 14), within certain time frames, and as expeditiously as possible after the effective date of judgment (Settlement Agreement, § 6).

6. Pursuant to § 6 of the Settlement Agreement, Hooker is required to complete certain survey and study activities described in subparagraphs B(1)(a)-(c)(iv) and G(1)(a)-(c) or H(1)(a)-(c) of Addendum I within 300 days after plans, specifications and protocols required for such activities are deemed consistent with all appropriate terms and conditions of the Settlement Agreement. Similarly, the Settlement Agreement requires that surveys and studies described in subparagraph C(1)-(7) be completed within 360 days after such a determination is made.

7. Submission of plans, specifications and protocols is governed by §§ 6 and 7 of the Settlement Agreement. For the survey and study activities described in paragraph 6, supra, Hooker is required to submit appropriate documents within 60 days of the effective date of Judgment. (Settlement Agreement, § 6(f)). EPA/State have 60 days thereafter to notify Hooker if they consider the submission to be inconsistent with any term or condition of the Settlement Agreement (Settlement Agreement, § 7(f)).

8. Paragraph 6(a) of the Settlement Agreement provides that Hooker shall initiate the specified portions of paragraphs B, C and G or H, within 120 days of the effective date of judgment. However, no such work may be initiated by Hooker until EPA/State determines that Hooker's submission is consistent with all appropriate terms and conditions of the Settlement Agreement (§ 7(a)).

9. Within 60 days of such determination by EPA/State, Hooker is required to solicit bids, award contracts and authorize the specified activity (Settlement Agreement, § 7(d)).

10. If the parties adhere to the time frames specified in the Settlement Agreement, plans, specifications and protocols to implement the designated portions of §§ B, C. and G or H would be due to be submitted to EPA/State on September 1, 1982. EPA/State notification to Hooker would be required by

November 1, 1982. If the submission were deemed to be consistent with all appropriate terms and conditions of the Settlement Agreement, completion of these activities specified in ¶¶ B, G or H would be required by September 1, 1983, and the activities specified in ¶ C by November 1, 1983.

11. If the submission by Hooker were deemed to be inconsistent with any appropriate terms or conditions of the Settlement Agreement, the work would not commence until disputed issues were resolved by the parties or the Court (Settlement Agreement, ¶ 7(b)).

12. Actual remedial work cannot commence until the surveys and studies specified in ¶¶ B, C and G or H have been completed.

13. On or about June 15, pursuant to the requirement of the Settlement Agreement, ¶ 6(a), that Hooker proceed as expeditiously as possible, counsel for Hooker informed me that they would be prepared to submit the plans, specifications and protocols necessary to commence the surveys and studies designated in Settlement Agreement, ¶ 6(a), on or about July 1, 1982.

14. Counsel for Hooker indicated that, if the EPA/State review process were completed in August, Hooker was prepared to commence the survey and study work in September. I was informed that the surveys and studies would take approximately three months to complete, and that the work could

not be performed once the ground had frozen, which usually occurs in the Niagara Falls area about November 15. For this reason, counsel for Hooker asked whether it would be possible for EPA/State to complete their review of Hooker's submission within 30 days, rather than the 60 days set forth in the Settlement Agreement.

15. I consulted with representatives of the New York State Department of Environmental Conservation (DEC) and EPA to ascertain whether an adequate review of Hooker's submission could be completed within 30 days. I was informed that, by concentrating resources on this work, a thorough review could be completed within 30 days.

16. During a telephone conversation with Joseph Slack, P.E. of DEC, Mr. Slack confirmed the statement by Hooker's counsel, and agreed that it would not be possible to proceed with the surveys and studies once the ground had frozen.

17. On June 23, 1982, counsel for Hooker, EPA and the State signed a letter reflecting the intent of the signatory parties to act as expeditiously as possible in submitting the necessary documents, reviewing the submission and commencing work. The letter also acknowledged the fact that work could not be performed while the ground was frozen.

18. The purpose of reducing the time for submissions and review is to expedite the actual remedial work in the Hyde Park-Bloody Run area. If Hooker's submissions are deemed by EPA/State to be consistent with all appropriate terms and conditions of the Settlement Agreement, and Hooker commences work in September, the surveys and studies will be completed in November, 1982. Based upon the results of these surveys and studies, Hooker can make appropriate submissions of necessary plans, specifications and protocols for the actual remedial work, which can be implemented during the summer of 1983.

19. If Hooker, EPA and the State utilized all the time permitted pursuant to ¶¶ 6 and 7 of the Settlement Agreement, surveys and studies would not be required to be completed until the fall of 1983, and actual remedial work could not commence until the summer of 1984, a one-year delay.

20. Pursuant to ¶ 13 of the Settlement Agreement, Hooker, EPA and the State have designated Program Coordinators, and alternates, as follows:

State of New York

Norman H. Nosenchuck, P.E.
Director
Division of Solid Waste
Department of Environmental Conservation

Alternate: Joseph Slack, P.E.
Supervisor, Implementation Section
Division of Solid Waste,
Department of Environmental Conservation

Environmental Protection Agency

Joseph Spatola
Air & Waste Management Section
U.S. Environmental Protection Agency

Alternate: Julia Schwartz
Ecology and Environment, Inc.

Hooker Chemicals & Plastics Corp.

John Nichter
Operations Manager
Special Environmental Programs

Alternate: Norman A. Repstock

The Program Coordinators are responsible for implementing the Settlement and for all communication between the parties.

21. Although the Settlement Agreement only provides for written submissions between Hooker and EPA/State, to facilitate the submittal and review process, meetings were held on June 22 and June 24, 1982, to permit technical personnel from Hooker, EPA and the State to discuss the outlines of Hooker's proposed submission. On July 9, Hooker made its written submission during the course of a meeting between technical personnel, at which issues raised were further discussed. On August 2, after a preliminary technical review by EPA/State, another technical meeting was held with technical representatives from Hooker. The EPA/State written response to Hooker's submission was made on August 9, 1982. The EPA/State response noted several areas in which the Hooker submission was not in accordance with all appropriate terms and conditions of the Settlement Agreement. There have, therefore, been numerous

telephone conversations between project coordinators, and another technical meeting is scheduled for August 27, 1982.

22. Although there were attorneys present at the initial meetings in June, subsequent meetings have been attended only by engineers, chemists and other technical personnel. The issues involved are highly technical, and cannot reasonably be addressed or commented upon without a substantial level of expertise. For this reason, counsel for EPA/State and Hooker have determined that the most efficient and effective method of implementing the Settlement Agreement is to allow the technical personnel to address the technical issues among themselves.

23. In the event that a dispute arises with respect to Hooker's submission and the EPA/State response, it may become necessary for counsel to meet.

24. Pursuant to paragraph 20 of the Settlement Agreement, and to oral representations made to the Court by EPA and the State, written submissions by Hooker and written responses by EPA/State are made available for inspection and copying immediately upon receipt by the DEC Region 9 office in Buffalo, New York.

25. The State and EPA are in the process of developing a community information plan, to facilitate communications relating to implementation of the Agreement.

This plan is designed to insure that citizens in the vicinity of the Hyde Park landfill are provided access to all data generated as a result of the Agreement, informed of the schedule of survey, monitoring and construction activities before such activities commence, informed of the choice of Requested Remedial Technology and the reasons for that choice, and informed of other appropriate matters.

26. The community relations plan has not yet been finalized because of the need to devote resources to review of Hooker's first submission, so that the surveys and studies can commence as quickly as possible, thereby expediting the actual remedial work.

27. Written notice was sent to all counsel for Amici Curiae and to counsel for Intervenor on July 21, 1982, informing counsel of the filing of Hooker's submissions and of their availability for inspection.

* → 28. The State has agreed that copies of all submissions and responses by the originating parties will be made available to counsel for Intervenor free of charge. ←

Sworn to before me this
26th day of August, 1982

Mary Ellen Burns
A.A.G. of the State of N.Y.

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

: CIVIL ACTION

: NO. 79-989C

VS.

HOOKER CHEMICALS AND PLASTICS CORP.; OXY
CHEMICAL CORPORATION; HOOKER 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

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

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

Joseph C. Brennan
NOTARY PUBLIC
ALBANY COUNTY
NY COMM. EXPI. 3/30/84

STATE OF NEW YORK



DEPARTMENT OF HEALTH

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

DAVID AXELROD, M.D.
Commissioner

June 4, 1982

Lewis Steele, Esq.
714 Buffalo Avenue
Niagara Falls, NY 14303

Re: Hyde Park Particulate Migration Study

Dear Mr. Steele:

The Department of Health appreciates the concerns of the citizen groups you represent and other residents regarding a study of particulate migration from the Hyde Park landfill site. Currently our agency is in the process of developing the protocol for such study.

We will provide you with a copy of the preliminary draft of the protocol for review and comment when it is completed. With regard to your specific query concerning which residences will be tested, at this time it is impossible to give you a definitive response. The protocol will set forth the study's objectives and how they are to be accomplished and will include items such as the methodology for selecting residential and non-residential sampling sites.

Sincerely,

A handwritten signature in cursive script that reads "Marta Sachey".

E. Marta Sachey
Attorney

cc: Dr. Axelrod
Dr. Haughie
Ms. Borland

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

....., being duly sworn, deposes and
that he is in the office of the Attorney General
State of New York, the Attorney for herein. On the
day of, 19, he served the annexed upon the following named persons:

Attorney in the within entitled by depositing a true and correct copy thereof, pro
enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at TWO WO
TRADE CENTER NEW YORK, N.Y. 10047 directed to said Attorney at the address within the State designated by
for that purpose.

Sworn to before me this

..... day of, 19

.....
Assistant Attorney General of
the State of New York

Sir: Please take notice that the within is a true copy of duly filed and entered in the office of the Clerk of County, on the day of , 19

Yours, etc.,
ROBERT ABRAMS,
Attorney General,

Attorney For

Office And Post Office Address
Two World Trade Center, New York, N.Y. 10047
To Esq.

Attorney for

Sir: Please take notice that the within

will be presented for settlement and signature herein to the Hon. one of the judges of the within named Court, at

in the Borough of City of New York, on the day of 19 , at M.

Dated, N.Y., , 19

Yours, etc.
ROBERT ABRAMS,
Attorney General,

Attorney For

Office And Post Office Address
Two World Trade Center, New York, N.Y. 10047
To Esq.

Attorney for

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
and THE STATE OF NEW YORK,

Plaintiffs,

-against-

HOOVER CHEMICALS & PLASTICS
CORP., et al.,

Defendants.

STATE OF NEW YORK'S RESPONSE
TO MOTION FOR CLARIFICATION
and AFFIDAVIT

ROBERT ABRAMS,
Attorney General

Attorney for.....**Plaintiffs**.....

Office And Post Office Address
Two World Trade Center, New York, N.Y. 10047
Tel. 212-488-3295
Personal service of a copy of

within.....

is admitted this.....*day of*

.....19