

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

Plaintiffs,

v.

Civil Action No. 79-989

HOOKEER CHEMICALS & PLASTICS CORP.;
OXY CHEMICAL CORPORATION; HOOKEER
CHEMICAL CORPORATION; OCCIDENTAL
PETROLEUM INVESTMENT CO.; OCCIDENTAL
PETROLEUM CORPORATION; THE TOWN OF
LEWISTON; THE TOWN OF NIAGARA,
(Hyde Park Landfill)

Defendants.

RESPONSE TO COURT ORDER OF FEBRUARY 12, 1981

Submitted by:

United States of America
State of New York
Hooker Chemicals & Plastics Corp.

March 17, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

Plaintiffs,

v.

HOOKER CHEMICALS & PLASTICS CORP.;
OXY CHEMICAL CORPORATION; HOOKER
CHEMICAL CORPORATION; OCCIDENTAL
PETROLEUM CORPORATION; THE TOWN OF
LEWISTON; THE TOWN OF NIAGARA,
(Hyde Park Landfill),

Defendants.

Civil Action No. 79-989

RESPONSE TO COURT ORDER OF FEBRUARY 12, 1981

By its order, dated February 12, 1981, the Court solicited the views of the parties concerning six issues relating to the "Stipulation and Judgment Approving Settlement Agreement" filed on January 19, 1981 (hereinafter "Settlement Agreement"). The following paragraphs set out the responses to that order by plaintiffs United States ("EPA") and the State of New York ("State") and by defendant Hooker Chemicals & Plastics Corp. ("Hooker").

1. Appointment of Expert Under Rule 706

The Court has solicited our views concerning the appointment of an expert witness by the Court under Rule 706 of the Federal Rules of Civil Procedure. For the reasons stated below, EPA, the State, and Hooker believe that the appointment

of an expert witness at this juncture is impractical and would unduly delay initiation of the remedial activities. However, following entry of the Judgment, the appointment of an expert under Rule 706 may be appropriate to assist the Court in resolving any disputes among the parties concerning the implementation of the Settlement Agreement.

(a) Impracticality: The Hyde Park - Bloody Run remedial program is not the design of a single person or single discipline. While geologists understand the stratigraphy of the landfill site, hydrologists are needed to explain the flow of groundwater. Whereas chemists are required to formulate the specific chemical parameters needed to monitor the effectiveness of the leachate collection system, engineers are needed to design that very same system. In fact, the program set forth in the Settlement Agreement is the result of the composite input of no fewer than 44 technical advisers and consultants from government and industry with expertise in the fields of engineering, hydrology, chemistry, medicine, toxicology, and geology. Many of these experts have extensive experience in working in the unique geologic environment of Niagara County and have analyzed and reviewed extensive soil, core, and groundwater samples from the Hyde Park - Bloody Run Area. In order to appreciate fully the scope and commitment of this technical effort, the resumes of the experts listed below, each of whom was involved in formulating the Hyde Park program, are attached (Exhibit A).

UNITED STATES

<u>Name</u>	<u>Affiliation</u>	<u>Discipline(s)</u>
Dr. Vilma Hunt <i>2/28/77</i>	EPA, Deputy Administrator for Health Research	Dentistry (Environmental Health)
Dr. W. Lamar Miller <i>1/27/77</i>	EPA, Acting Director, Technical Division, Office of Hazardous Waste Enforcement	Organic Chemistry (Environ- mental Treatment and Control)
Dr. Roger Cortesi	EPA, Associate Deputy, Assis- tant Administra- tor for Health Research	Physics (Health Research)
Russel Wyer	EPA, Acting Director, Hazardous Site Control Division and Chairman of Chlorinated Dioxin Work Group	Civil Engineering
William Librizzi <i>2/28/77</i>	EPA, Director of Surveil- lance and Analysis Divi- sion - Region 6	Engineering
Robert C. Morgan	EPA	Environmental Science
Dr. Frode Ulvedal	EPA	Physiology (Health Effects)
Paul des Rosiers	EPA	Chemical, Civil and Environ- mental Engineering
Kevin Burger	EPA	Environmental Science (Monitoring)

<u>Name</u>	<u>Affiliation</u>	<u>Discipline(s)</u>
David Cesareo	EPA	Sanitary Engineering (Monitoring)
Dr. Joseph Laforanara	EPA	Chemistry (Chemistry of Hazardous Chemicals)
Gordon Olson	EPA	Industrial Engineering
Dr. Charles Plost	EPA	Chemistry
Dr. Charalingayya Hiremath	EPA	Biochemistry
Dr. Michael Kilpatrick	EPA	Chemical Engineering
Dr. Bernard Dudenbostel	EPA	Analytical Chemistry
Dr. Benjamin Mason	GEOMET (60)	Soil Science
Robert Koch	GEOMET	Meteorology
Dr. David Twedell	JRB (60)	Geology
Roger Wetzel	JRB	Civil Engineering (Waste Treatment and Disposal)
Dr. Sidney Paige	JRB	Environmental Science and Engineering (Treatment and Disposal of Toxic Chemicals)

NEW YORK STATE

<u>Name</u>	<u>Affiliation</u>	<u>Discipline(s)</u>
Dr. David Axelrod	Commissioner, Department of Health	Medicine (Public Health)
John I. Beecher	DEC	Chemical Engineering
Dr. Gordon Anders Carlson, Jr.	DOH	Environmental Engineering (Environmental Health)
Paul R. Counterman	DEC	Environmental Engineering (Hazardous Wastes)
Kernan Davis	DEC	Geology
Dr. Glenn E. Haughie	Director, Office of Public Health, DOH	Medicine (Public Health)
Dr. Leo J. Hetling	DOH	Environmental Engineering (Environmental Health)
Robert H. Huffaker	DOH	Public Health
Dr. Carl Stephen Kim	DOH	Biophysics (Chemistry, Toxicology, Environ- mental Health)
John C. McMahon	DEC	Engineering (Environ- mental Engineering)
David L. MacPherson	DEC	Civil Engineering (Air Pollution)
Sandra M. Stanish	DOH	Microbiology (Environ- mental Health)
Dr. William N. Stasiuk, Jr.	DOH	Environmental Engineering (Environmental Health)

HOOKER CHEMICALS & PLASTICS CORP.

<u>Name</u>	<u>Affiliation</u>	<u>Discipline(s)</u>
Dr. Joan B. Berkowitz	Vice President, Chemical Systems Section, Arthur D. Little, Inc.	Environmental Chemistry (Solid/Hazardous Waste Disposal)
Henry E. Haley	Vice President and Group Leader, Arthur D. Little, Inc.	Chemical and Metallurgical Engineering, Analytical and Environmental Chemistry
Dr. Philip L. Levins	Vice President and Manager, Analytical and Environmental Chemistry Section, Arthur D. Little, Inc.	Analytical Chemistry, Air and Water Pollution Analysis
Donald H. Haycock	Senior Partner, Conestoga-Rovers & Associates	Civil Engineering (Solid/Hazardous Waste Control Systems)
Frank A. Rovers	Senior Partner, Conestoga-Rovers & Associates	Civil Engineering (Solid/Hazardous Waste Disposal, Hydrogeologic Engineering)
Ron Schwark	Partner, Conestoga-Rovers & Associates	Civil Engineering (Solid/Hazardous Waste Control Systems)
Joseph R. Kolmer	Director, Waste Management, Woodward-Clyde Consultants	Geological Engineering (Solid/Hazardous Waste Disposal, Groundwater Engineering)
James Wm. Smith	Woodward-Clyde Consultants	Structural and Economic Geology

<u>Name</u>	<u>Affiliation</u>	<u>Discipline(s)</u>
Jay A. Cull	Program Manager, Special Environ- mental Situations, Hooker Chemicals & Plastics Corp.	Chemical Engineering
John R. Nichter	Operations Man- ager, Waste Containment Pro- grams, Hooker Chemicals & Plastics Corp.	Chemical Engineering

We do not believe that any single court-appointed expert witness could be proficient in all of the technical disciplines required, just as none of the parties could have relied on an expert from a single discipline to formulate the program reflected in the Settlement Agreement. Therefore, our view is that appointment of an expert at this time would be impractical.

(b) Delay: The parties in this case have spent over twelve months in collecting and evaluating the raw data, designing, reviewing, critiquing, and ultimately resolving the various technical elements involved in the Hyde Park remedial program. The Settlement Agreement itself provides one of the most comprehensive and technically advanced remedial programs ever undertaken to address environmental conditions resulting from the disposal of chemical wastes.

In order to review and assess the efficacy of the instant remedial program, the Court itself would have to appoint a large interdisciplinary team of experts and coordinate

their work. Before any responsible assessment could be made by such a group of experts, many of the same steps would have to be repeated, differences resolved and a report rendered. In the unlikely event that the report differed materially from the remedial program contained within the Settlement Agreement and one or more of the parties disagreed with that report, there would have to be some procedure to resolve differences. All the while, the parties would be unable to commence the necessary construction work to contain the landfill and the public would thereby be deprived of one of the principal benefits of the settlement, a prompt remedial solution.

(c) Dispute Resolution Following Approval: In the course of implementing the Hyde Park remedial program, specific technical questions may arise which require resolution by the Court. Indeed, the procedures set forth in the Settlement Agreement pertaining to dispute resolution are designed to facilitate resolution by the parties themselves or, failing that, to narrow the specific issues presented to the Court. The parties therefore specifically provided in the Settlement Agreement (§ 19 [p. 29]) that any party may petition the Court, pursuant to Rule 53 of the Federal Rules of Civil Procedure, to refer such complex technical issues to a master. The Court would at that time be aware of a particular expert to review the matter.

A master appointed under Rule 53 is required to conduct a separate hearing and thereafter make a formal recommendation to the Court. In certain situations, the Court may

find it more appropriate and expeditious to decide the matter before it without resort to Rule 53. Nevertheless, issues of a technical nature may arise in the course of such proceeding for which the Court desires expert assistance. In those circumstances, where the parties disagree about a specific issue involving only one technical discipline, the appointment of an expert witness could well be appropriate. Such circumstances, of course, are clearly distinguishable from the circumstances at this juncture in which there are no technical issues in dispute among the parties and where a multi-disciplinary program has been proposed to the Court.

2. Requisite Remedial Technology

As the Court's Order noted, the term "Requisite Remedial Technology" is frequently utilized in the Settlement Agreement. Specifically, procedures for determining what Requisite Remedial Technology, if any, is required to address particular circumstances are described in Paragraph 4 of the Judgment and Paragraphs C(8)-(9) of Addendum I; and the circumstances in which the Requisite Remedial Technology issue may be raised are identified in 13 different provisions of Addenda I, II, and V. (See pp. I-7, I-9, I-17-18, I-23, I-29, I-30, I-33; II-8, II-12; V-14, V-15, V-18, and V-19.)

All of the technologies described in the Settlement Agreement and the plans and specifications submitted pursuant to Paragraph 7 of the Judgment are to be utilized in connection with remedial programs which have been designed, and have as a

goal, to protect against endangerment to human health and the environment in the Hyde Park - Bloody Run Area. To place the term "Requisite Remedial Technology" in context, it should be emphasized that most remedial technologies which Hooker must undertake are specified by the Settlement Agreement and, if effective, do not require reference to the Requisite Remedial Technology concept. These include the technologies applicable to (a) barrier-collection systems, capping, and closure of the Hyde Park landfill and areas adjacent to its perimeter; (b) clean-up, excavation and/or capping of the Bloody Run basin and the Gorge area clean-up; (c) treatment and disposal of collected materials; (d) monitoring and maintenance of the remedial program; and (e) health and safety procedures during construction activities associated with the program.

The parties recognized, however, that it is not practical at this juncture to specify technologies in two circumstances: First, where Hooker is obligated to conduct surveys to determine the extent of migration from the Hyde Park landfill, if any, in the Overburden and Lockport Bedrock Zone (see pp. I-7, I-9, I-17, I-19), it would be premature to specify what technologies, if any, are required until the surveys are completed and the data therefrom is analyzed. Second, where Hooker is required under the Settlement Agreement to utilize specified technologies, the parties established contingency procedures for defining alternate technologies in the event that the specified technologies do not meet the design or operating effectiveness criteria set out in

the Settlement Agreement. (See pp. I-23, I-29-30, I-33; II-8, II-12; V-14-15, V-18 and V-19.) These procedures take account of the practical impossibility of designing programs to address undefined conditions. In addition, by not "locking in" the parties to a specified technology, they permit utilization of technical advances and innovations which may occur between the date of entry of the Judgment and the time when a determination is made pursuant to the provisions of Addendum I, Subparagraph C(9) as to whether Requisite Remedial Technology should be applied.

To deal with the two foregoing circumstances in which a given technology cannot be specified at the present time, the term "Requisite Remedial Technology" has been utilized in the Settlement Agreement. Similar terms, such as "best available technology" or "best practicable technology" (see Section 301 of the Clean Water Act, 33 U.S.C. § 1331), were not chosen in order to avoid inappropriate analogies being made to existing case law, i.e., the term "Requisite Remedial Technology" was chosen specifically because it had no prior legal history. We are unaware of any case law interpreting this term and know of only one other proposed consent judgment which utilizes the term. See United States, et al. v. Occidental Petroleum Corporation et al., No. S-79-989 MLS (E.D. Cal., filed February 6, 1981) (attached hereto as Exhibit B). It should be noted that since the California case and the Hyde Park case were negotiated

separately and concerned unique environmental issues, the definition and procedures governing the term Requisite Remedial Technology are similar but not identical.

{ As a matter of EPA policy, all of the federal consent judgments entered to date which relate to groundwater contamination from chemical waste landfills^{*/} have included provisions for (a) surveying the extent of chemical migration from the landfill using test methods and protocols acceptable to EPA, (b) studying to what extent remedial efforts should be undertaken in light of the data generated by the survey, and (c) resolving disputes concerning such remedial efforts under a standard of review which EPA considers favorable. Indeed, compared with most other consent judgments in this area, the surveys, studies, dispute resolution procedures, and other technical provisions of this Settlement Agreement contain a unique degree of detail.

{ Paragraph 4 of the Hyde Park Settlement Agreement defines the term "Requisite Remedial Technology." Under Paragraph 4(a) the term "Remedial Technology" refers to "engineering and construction practices used or accepted for use in landfill containment projects or other industrial projects which are applicable to the materials and hydrogeologic conditions found at the Landfill Site." This definition does not require a technology

*/ See, e.g., United States v. Gulf Coast Lead Co., No. 80-1127-CIV-T-K (M.D. Fla.); United States v. Energy Systems Co., No. WDA81-1006 (W.D. Ark.); United States v. North Eastern Pharmaceutical & Chemical Co., No. 80-3066-CU-SW (W.D. Mo. Sept. 3, 1980), attached hereto as Exhibit C.

to be currently in use, but excludes those technologies which are merely theoretical or which are not accepted for use. "Remedial" technologies may include other industrial technologies which are adaptable to conditions at the Hyde Park landfill.

In determining whether a given Remedial Technology should be deemed "Requisite" under particular circumstances, the parties have stipulated in Paragraph 4(b) that the following factors are to be considered:

- 
- (1) the nature of the endangerment to human health and the environment;
 - (2) the extent to which application of the remedial technology would reduce such endangerment or otherwise benefit human health or the environment; and
 - (3) the economic cost required to apply the remedial technology.

Under the Settlement Agreement, Hooker is obligated to initiate a study concerning whether and to what extent the application of Requisite Remedial Technology is required to address one of the two aforementioned circumstances, i.e., the results of off-site surveys or the failure of a specified technology to meet the Settlement Agreement's design or operating effectiveness criteria. Paragraph C(8) of Addendum I specifies the extensive data which must be included when such a study is submitted to EPA and the State. In Paragraph C(9) of Addendum I,

procedures and time schedules are set out for the parties to resolve among themselves any disputes which they may have concerning Requisite Remedial Technology. If the parties are unable to resolve any disputes in this regard, the matter may be brought to the Court for resolution under the standards and considerations described in Paragraph 4(c) of the Settlement Agreement.^{*/}

3. Local Permits

The remedial programs set out in the Settlement Agreement will take place in the Town of Niagara (where the Hyde Park landfill is located), in the Town of Lewiston (where Bloody Run is located), and in the City of Niagara Falls (where Hooker intends to treat liquids collected by the containment program). Some of Hooker's obligations under the Settlement Agreement appear to require permits from the applicable local jurisdictions.

It is possible to delineate in only a general manner the kinds of disputes regarding the issuance of local permits

^{*/} Paragraph 4(c) provides as follows:

- (c) Hooker shall be required to apply the Requisite Remedial Technology proposed by EPA/State in accordance with the terms and conditions of this Judgment, unless, upon the evidence, the Court determines:
 - (i) that application of such technology is unnecessary to satisfy the goal described in subparagraph (a); or
 - (ii) that, considering the factors described in subparagraphs (a) and (b), it would be arbitrary and capricious to require Hooker to bear the economic costs incurred in applying such technology.

which may reach the Court, as well as the nature of the action the Court may take in response. Further refinement is possible only in the circumstances of an actual dispute which may arise in the future. The parties anticipate that every effort will be made to resolve such disputes without resort to the Court.

Paragraph 8 of the Settlement Agreement sets out a specified three-phase procedural mechanism to this end.

First, Hooker is required to use "its best efforts on a timely basis" to obtain all of the authorizations it needs from private or public entities to carry out its obligations under the Settlement Agreement. Where Hooker's unjustifiable failure to do so delays or prevents the performance of its obligations under the Settlement Agreement, the provisions of Paragraph 8(a), (b), (c), and (f) may be invoked.

Second, if Hooker's "best efforts" to obtain necessary local permits are unsuccessful, EPA, the State and the Towns of Lewiston and Niagara are required to use their best efforts to assist Hooker in obtaining all such local permits.

Third, if the best efforts of all the parties are unsuccessful, any party may petition the court seeking appropriate relief. That relief could include the joinder of additional parties pursuant to Rules 19 and 21 of the Federal Rules of Civil Procedure. We do not anticipate that Hooker will be denied local permits to implement its obligations under the Settlement Agreement. If such circumstances arise, however, it is our view that the Court has ample legal authority to assure effectuation of the

Settlement Agreement since the Court possesses subject matter jurisdiction over the Settlement Agreement and has, or could obtain jurisdiction over all affected entities.^{*/}

The Settlement Agreement contains one other significant provision applicable to the local permit issue, i.e., where the terms of a permit conflict with those of the Settlement Agreement. Under Paragraph 8(d)(2), any party may petition the Court where a permit is issued with conditions which are not required by federal and state statutes and regulations and such conditions are inconsistent with, or materially different from, the terms and conditions of the Settlement Agreement. In resolving issues raised by such a petition, the Court may require modification of the terms and conditions contained in the permit, require modification of the Judgment to take account of such terms and conditions, or provide such other relief, if any, which the Court deems appropriate to resolve the issues raised by the petition.

It should also be noted that Paragraph E(9)(c) of Addendum I contains comparable, but not identical, provisions specifically applicable to permits required for the treatment

^{*/} See, e.g., 28 U.S.C. § 1651 (Court "may issue all writs necessary or appropriate in aid of [its jurisdiction] and agreeable to the usages and principles of law"); Rule 70, Fed. R. Civ. P. (judicial power to enforce judgments, including authority to divest title); Advisory Committee Note re Rule 19, Fed. R. Civ. P., 39 F.R.D. 88, 91 (joinder appropriate to avoid "partial or 'hollow' rather than complete relief").

or disposal of materials collected pursuant to Paragraph E of Addendum I.

4. Easements

The procedures for obtaining easements required for the performance of Hooker's obligations under the Settlement Agreement are similar to those for obtaining local permits as discussed above.

First, Hooker must use its best efforts to obtain such easements. Second, if Hooker is unsuccessful, the EPA, the State and the Towns are required to use their "best efforts, consistent with their legal authority (recognizing that as a matter of law [the parties] have the power of eminent domain)," to assist Hooker in obtaining such easements.

All of the governmental parties to the Settlement Agreement have the power of eminent domain. While it is not now possible to predict with certainty whether and under what particular circumstances eminent domain might be used, it is helpful to delineate briefly some of the general procedures followed when the power of eminent domain is invoked. Rule 71A of the Federal Rules of Civil Procedure sets forth the federal district court procedures governing the condemnation of property. The New York Eminent Domain Procedure Law (McKinney 1979) sets forth the procedural requirements for the other governmental parties' use of eminent domain. Under the EDPL, prior to a condemnation, the condemnor is required to hold a public hearing to present and

explore the nature and scope of an acquisition proposed in connection with a public project. EDPL §§ 201-203. Thereafter, the condemnor shall make a determination concerning such acquisition. Any person aggrieved by this determination may seek judicial review by the Appellate Division of the Supreme Court, in the judicial department embracing the county wherein the proposed acquisition is located. EDPL § 207.

Claims concerning compensation for property acquired by eminent domain are within the exclusive jurisdiction of the New York State Court of Claims where the State is the condemnor, and, if one of the Towns is condemnor, within the jurisdiction of the Supreme Court in the judicial district where the property is located. Thus, unless the condemnor is the United States, the only appropriate forum for condemnation proceedings is a New York State court.

The question as to which party would ultimately pay for rights of easement in the event that the power of eminent domain were invoked is not explicitly addressed by the Settlement Agreement. EPA and the State believe that Hooker should reimburse the condemnor for reasonable compensation paid to a condemnee for any such condemnation. Hooker believes that the question should be addressed on a case-by-case basis in light of extant circumstances.

5. Relocation of Individual Homeowners

The Settlement Agreement contemplates that as the

program proceeds there are three situations in which relocation of certain individual homeowners in the Hyde Park - Bloody Run Area could be required.

(a) Present Relocation: EPA and the State have examined the data collected to date concerning health impacts on the Hyde Park - Bloody Run Area.^{*/} EPA and the State have determined that there is at present insufficient data from which to conclude that relocation of residents in such area is required. The State Department of Health intends to undertake a program to sample and analyze airborne particulate (dust) for certain chemicals from residential properties to which dust from the Hyde Park landfill could have migrated in the past. The State is committed to the initiation of this program no later than 60 days following the Court's approval of the Settlement Agreement.

In the event that the results of the study, or evidence from any other source, show airborne particulates have migrated from the Hyde Park landfill in the past and it is determined that such migration constitutes an endangerment to human health and the environment, Paragraph M of Addendum I requires Hooker to "initiate corrective action as soon as

^{*/} The data includes soil, core, water and particle samples and health studies. Various portions of this data were gathered by EPA, the State, Hooker and the National Institute of Occupational Safety and Health. A discussion and analysis of this data will be provided to the Court as part of the government responses to public comments received pursuant to 28 C.F.R. § 50.7.

possible to clean up such particulates and take other appropriate actions incident thereto which are required to protect human health and the environment." In these circumstances, and absent stipulation of the parties concerning relocation, EPA and the State could petition the Court to order the relocation of certain residents of the Hyde Park - Bloody Run Area as one of the "actions incident" under this paragraph.

(b) Relocation Prior to Initiation of Construction Activity: The second circumstance relating to relocation concerns residential properties which will abut the construction area as defined in the Settlement Agreement. Paragraph L of Addendum V provides that during the time construction activities preclude the residential use of property, its residents will be relocated. The paragraph also describes safety and security measures that Hooker must undertake during such relocation and the environmental criteria which must be satisfied before residents may reoccupy their homes following such relocation.

Based on preliminary construction plans being developed by Hooker, Hooker believes that, in lieu of implementing the temporary relocation provisions of Paragraph L, it would be more expeditious and therefore in the public interest for it to purchase one or more of the properties upon which substantial construction is likely to occur. To that end, Hooker proposes to offer to purchase these properties for their present fair market value as established by independent appraisal (without

consideration given to conditions which the construction activities set out in the Settlement Agreement are designed to address).

(c) Relocation During Construction Activity:

The third circumstance relating to the relocation of residents concerns the possibility of airborne particulate migration resulting from remedial activities in the Hyde Park - Bloody Run Area. At the outset it should be emphasized that the provisions of the Safety and Health Plan set out in Addendum V have been designed, and will be vigorously enforced, to minimize the risks of any such particulate migration. Prior to beginning construction, Hooker is required to demonstrate by a field test that Hooker's suppression procedures are capable of preventing airborne particulate migration. (Addendum V, ¶ G[6]) To assure this objective, ambient air monitoring stations will be placed at representative locations outside the perimeter of the construction area. The number and locations of the monitoring stations will be based on best available information, including the Bloody Run Options Evaluation (Addendum I, Paragraph F), and will be subject to review by EPA and the State.

If analysis of dust from any two of these monitoring stations show an excursion of dust containing chemicals at levels over specified concentration levels, Addendum V provides that Hooker, after immediately notifying EPA and the State, may be required to survey the residential and commercial properties in the vicinity of these monitoring stations in order to confirm the presence of dust containing chemicals in excess of

the specified levels on the properties. If EPA, the State, and Hooker agree, or if the Court finds, that such migration of dust particles has resulted from Hooker's construction activities, Paragraph J(5)(c) of Addendum V requires Hooker to take all necessary corrective action to clean up the dust particles. This paragraph explicitly provides for the possibility of relocation during the clean-up activities. However, relocation is not required if it is determined that relocation is unnecessary to protect against endangerment to human health.

6. Duration of the Maintenance Program

Paragraph F of Addendum III provides that the operation and maintenance activities undertaken pursuant to the Settlement Agreement shall continue for a period of 35 years. The only exception concerns operation of the barrier-collection systems, or components thereof, where the period may be shortened if Hooker satisfies certain specified criteria. Paragraph G provides for an extension of the Maintenance Program beyond 35 years where EPA/State establishes to the Court that the extension is necessary to effectuate the purposes and goals of the Judgment, i.e., to protect against endangerment to human health and the environment.

The selection of a 35-year expiration date for this Settlement Agreement is consistent, with, but more stringent than, existing statutes and regulations. The regulations issued by the Environmental Protection Agency pursuant to the Resource

Conservation and Recovery Act of 1976 (RCRA) require that owners and operators of certain hazardous waste treatment, storage, and disposal facilities provide post-closure care for 30 years. (40 C.F.R. § 265.117)

Although the landfill itself will, of course, exist at the end of 35 years, the remedial action and monitoring activities will ensure that there will be no endangerment to human health and the environment. If monitoring, which must continue for three years after termination of liquid collection activities, shows that chemicals are still migrating from the landfill site and thus causing an endangerment to human health and the environment, EPA and the State would invoke the provisions of Paragraph G to seek an extension. In effect, therefore, maintenance of the landfill site by Hooker will continue as long as necessary to protect against endangerment to human health and the environment.

In sum, the parties believe that the 35-year maintenance period is an appropriate one, but to ensure adequate protection of human health and the environment, the Settlement Agreement has provided sufficient flexibility to extend the program if necessary to accomplish that goal.

Through this submission the undersigned have sought to be fully responsive to the questions contained in the Court's order of February 12, 1981, and thus to assist the Court in its review of the Settlement Agreement. However, it should be noted that the foregoing responses merely summarize certain portions of the Settlement Agreement and are not intended to alter or modify any terms or conditions of that Agreement.

Respectfully submitted,

UNITED STATES OF AMERICA

By: Jack Penca
Jack Penca
Assistant United States
Attorney
Western District of New York
U.S. DEPARTMENT OF JUSTICE

By: William Walsh
William Walsh
Attorney Advisor
Hazardous Waste Task Force
U.S. ENVIRONMENTAL PROTECTION
AGENCY

Dated: March 17, 1981

STATE OF NEW YORK

By: Lorelei Joy Borland
Lorelei Joy Borland *msb*
Assistant Attorney General
of the State of New York

By: Mary Ellen Burns
Mary Ellen Burns
Assistant Attorney General
of the State of New York

Dated: 3/17/81



City of Niagara Falls

NEW YORK 14302

OFFICE OF THE CITY MANAGER
CITY HALL

October 14, 1981

RECEIVED

OCT 21 1981

JOHN T. CURTIN
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF NEW YORK

The Honorable John T. Curtin
United States District Court
68 Court Street
Buffalo, New York 14202

Dear Judge Curtin:

Until recently the City of Niagara Falls has been confident that the USEPA and the DEC would see that its interests were safeguarded in the Hyde Park Landfill Settlement. Now, after analyzing the Hyde Park Landfill Settlement and attending your hearings, I am writing to express certain concerns that the City of Niagara Falls has with regard to the proposed settlement.

As you must realize, the Hooker Landfill site is contiguous with the City of Niagara Falls. Primary concerns are:

1. Underground migration of synthetic organic chemicals into the City facilitated by utility trenches
2. Potential air pollution due to both gaseous and particulate matter, now and during the proposed remedial work
3. Sewer contamination through infiltration by landfill chemicals in both aqueous and non-aqueous phases
4. Potential sewer contamination through disposal activities during remedial work
5. Transport of hazardous materials on City streets during the remedial work
6. Incineration of landfill leachate at Hooker's Niagara Falls plant site
7. Potential health hazards and property value declines in adjacent areas of Niagara Falls

The Honorable John T. Curtin

October 14, 1981

Of these, four can be singled out for special note. First, Section I, page 26, states that "Hooker may dispose of untreated aqueous phase liquids directly to a municipal waste water treatment system.....under certain conditions." Since the City's Waste Water Treatment Plant's carbon absorption process has never functioned, this could mean that aqueous phase liquids would flow directly into the Niagara River. This would be unacceptable, of course. The settlement agreement, however, only envisions disposal in the case where the City's treatment plant is functioning properly. However, this could still mean that aqueous products would pass through the City's sewers on their way to the Waste Water Treatment Plant. The City has not been consulted on these matters to date. This is unacceptable for several reasons:

1. The north side interceptor is constructed in unlined bedrock offering a migration route for hazardous material through Lockport dolomite
2. During heavy rains a bypass at the Gorge pumping station would channel wastes directly into the river rather than through the Waste Water Treatment Plant
3. Contaminants might escape from the system through seepages, backups, etc.
4. Presence of toxins might either complicate or render impossible regeneration of carbon, necessitating costly landfill disposal
5. Contaminants may affect quality of Waste Water Treatment Plant sludge and make disposal more difficult and costly.

Second, the possibility has arisen that Hooker will try to dispose of non-aqueous leachate in a residue incinerator at its Buffalo Avenue property that is not being upgraded.

As you may be aware, there are currently only two incinerators in all the United States licensed by EPA to incinerate PCB's. Hooker's residue incinerator is twenty years old and hazardous emissions are a possible result of leachate incineration. Even with state-of-the-art equipment (small, modular, European incinerators) stringent emission controls are essential. It is questionable whether the DEC will have enough staff and resources for effective monitoring of such an incineration process. If this is the case, location of such an incinerator within the City may be dangerous to residents' health.

Third, tests at TAM Ceramics indicate contamination of City sewers. The settlement does not speak to the City sewer contamination nor remedial work necessary to clean up this contamination. The settlement should provide for proper testing of City sewers and promise remedial action in the case of contamination, either by clean-up or rebuilding. As a point of comparison, Superfund monies are now planned for remedial work to eliminate sewer contamination due to the Love Canal. Similar levels of contamination may be found in the Hyde Park Landfill area, and remedial action should be planned for this eventuality.

The Honorable John T. Curtin

October 14, 1981

Fourth, the settlement makes no provision for financial compensation for Niagara Falls residents living nearby, should there be health problems or loss of property values due to the landfill. This is a serious omission.

Finally, the hearings revealed the existence of numerous technical documents that might give the City better information with which to review the settlement. The City would be grateful for a list of these documents presented during the course of the public hearings.

Although the City does not wish to intervene in the hearing processs, I hope you will consider these concerns when evaluating the effectiveness and comprehensive-ness of the Hyde Park Settlement. The expression of these concerns comes at a late date, but the City only became fully sensitized to the relevant issues during the course of your hearings.

Sincerely,



William L. Sdao
City Manager

mcg