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OUR REFERENCE:

9 June, 1981

Ms. Toby Vigod,
Counsel,
Canadian Environmental
Law Association,
8 York Street,
5th Floor,
Toronto, Ontario.
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Dear Ms. Vigod:

In your letter of 3 June, 1981, you asked me to review certain paragraphs of an agreement of settlement and compromise providing for a guarantee, and a form of guarantee attached as addendum IV to that agreement.

The first point I note is that the definition of liability is rather unusually restricted. Liability is not the cost to Hooker of performing the containment, monitoring and maintenance required under the settlement. Rather, it is the cost of performing after the Federal District Court for the Western District of New York has found that Hooker or its authorized successor "cannot perform or cause to be performed its obligations pursuant to the judgement due to its insolvency or like financial condition." The practical significance of this definition is that there is no liability until a court has found that Hooker is insolvent or similarly disabled financially. Hooker could consistently fail to perform its obligations for a host of other reasons without triggering the guarantee.

A second implication of the unusual definition of liability is that Occidental's liability only arises following a demand by the EPA supported by a determination of the designated court. I have no professional knowledge of the delays now routine in the designated court but if its calendar is similar to those of the Ontario courts the practical delays that might be experienced before a competent demand could be made on the guarantee might be very considerable.

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The provisions of paragraph 8 provide protection against a re-organization of governmental agencies in New York State during the period of the guarantee which might result in the disappearance of the EPA but perhaps would not equally extend to a court which succeeds the Federal District Court for the Western District of New York. Rather than designating that court quite so specifically, the guarantee ought, perhaps, to refer to the court of competent jurisdiction at the time action is taken.

The guarantee is expressed in constant dollars and will therefore erode considerably through the operation of inflation over a 35 year period. It would be desirable if some method could be devised and incorporated in the settlement for inflating the maximum at some rate approximating the general rate of inflation in New York State.

The reference to modification could be strengthened. Since the guarantee expresses a maximum amount, "modification" can only refer sensibly to an increase in that amount. I do not like to appear unduly sensitive to groundless suspicions but see no reason why the neutral term such as modification should be used when the only sensible effect of paragraph 6 is and ought clearly to be to increase the liability of Occidental if ordered by the court of competent jurisdiction. Certainly if the verb is strengthened the possibility of dispute over its intended meaning at some later time is greatly diminished.

There are several matters not touched on by the agreement. Perhaps only one needs to be referred to in the text itself but the others certainly require attention. I refer to a provision selecting the appropriate law to govern the relations of the parties and adequate evidence of the corporate power of Occidental to grant this guarantee, of the due exercise of that corporate power in the authorization of signing officers to execute and deliver it as the binding obligation of Occidental and some form of legal opinion from some practitioner competent in the law chosen to govern the guarantee to the effect that the statute of limitations or other prescriptive enactment capable of applying to the guarantee will not preclude action until some time after the 35th year (making due allowance for a discovery period following the actual termination of the guarantee period).

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I can see nothing on which to comment in the report of EWK Consultants Inc. and would be grateful if you would regard that part of the problem as lying beyond your enquiry to me. It certainly is no part of my competence to express an opinion on whether the guarantee effectively meets the risks outlined by the consultant.

Finally, you enquire whether response No.74 to comment NO.74 indicates a maximum of \$10 million or \$15 million. It appears to me that the agreement and the response coincide. As I understand paragraph 5 of the agreement it places a limit of \$10 million upon the guarantee obligations of Occidental but imposes two qualifications. The first qualification is that the \$10 million may be reduced to \$5 million upon the completion of the construction associated with the Containment Program described in the judgment. The second qualification is that either the \$5 million or the \$10 million can be increased upon the order of the court under paragraph 6. What the guarantee does not do is indicate the effect upon either maximum of a payment prior to the completion of the construction activities. For example, assuming that Hooker were to become insolvent prior to the completion of the construction activities and Occidental were to pay \$5 million towards the completion of the construction, would there still be \$5 million of guarantee left following construction, or would the guarantee have expired?

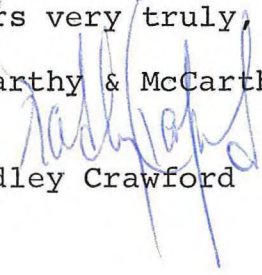
I trust the foregoing comments cover the points that concern you. I would like to discuss with you the form and content of the affidavit to which you refer before attempting to come to any conclusion on whether I might be able to assist you with such a document.

I would also like to know whether you have retained us or whether I am requested to volunteer my time.

Please contact me again so that we may discuss the problems further.

Yours very truly,

McCarthy & McCarthy,


Bradley Crawford

BC:AM