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II. Hyde Park Landfill: The Scope of the Problem

A. The Setting

The Hyde Park landfill is situated in the extreme northwest corner of the Town of Niagara, New York, in an industrial complex on the fringe of a residential area. It is bounded on the north by the boundary line between the Towns of Niagara and Lewiston, on the east by undeveloped property, on the south by TAM Ceramics, Inc., and on the west by the Niagara Steel Finishing Company, Home Oil Company, and a monument works owned by the Paonessa family.¹ Grief Brothers, Inc. to the north, and a New York Power Authority right-of-way also bound the site. (See Figure 1.)

The site is approximately 15 acres in size. Surface water from the site drains to the Bloody Run Creek which flows from the northwest corner of the landfill. Bloody Run Creek ultimately flows down the Niagara Gorge face and empties into the Niagara River.

The Hyde Park landfill is only about 2000 feet from the Niagara Gorge and 2400 feet from the Niagara River, which flows into Lake Ontario.²

In 1953, Hooker Chemicals and Plastics Corp. (hereinafter "Hooker") discontinued disposing of its wastes at the Love Canal landfill, in the City of Niagara Falls, New York, and moved its disposal operations to the Hyde Park site, which it had just purchased.

From 1953 to August, 1974, Hooker disposed of more than 80,000 tons of chemical wastes in the Hyde Park landfill.³ The most toxic wastes buried in the landfill include an

- 8 -

estimated 200 tons of dechlorane (Mirex) residues, 5600 tons of C-56 (hexachlorocyclopentadiene) and C-56 derivatives, 16,500 tons of chlorobenzenes, 1700 tons of chlorotoluenes, and 2000 tons of BHC (Lindane). Hooker has also admitted that polychlorinated biphenyls (PCBs) were buried at the site and they have been found in leachate samples.⁴

The most significant waste buried at the Hyde Park landfill is the 3300 tons of trichlorophenol still bottoms containing an estimated 2000 pounds of dioxin (the 2,3,7,8-TCDD isomer), the most toxic chemical ever synthesized by man. The dioxin deposit is believed to be the largest in the world.⁵ Dioxin has been detected in Bloody Run sediment.⁶

The chemicals buried at Hyde Park are extremely dangerous and *are known to have* with adverse effects on human health and the environment. Dioxin is acutely toxic at low doses, and causes cancer, birth defects, mutations, and fetal death in laboratory animals. One additional cancer case per million people can be expected by exposure to just .000000046 micrograms per litre (ppb) of dioxin.⁷ Other chemicals buried at Hyde Park, such as lindane, tetrachloroethylene, benzene, and Mirex, are known carcinogens.

These chemicals were deposited directly on top of the bedrock. There was no preparation of the site or consideration of the geology or hydrogeologic characteristics of the site prior or during the 22 years of waste disposal at Hyde Park.

An understanding of the geology and hydrogeology of the site is key both in terms of determining where the contaminated ground water (leachate) is travelling and whether it is possible to contain the wastes 'in situ' or look to other remedial strategies.

The Hyde Park landfill is situated on a thin glacial till deposit (overburden) which overlies dolomite bedrock of the Lockport formation. This Lockport Dolomite contains significant amounts of ground water that moves in vertical fractures and through horizontal bedding planes. These bedding planes can extend for miles, and act as virtual pipelines able to move contaminated ground water (leachate) toward the Niagara Gorge. The Lockport Dolomite overlies a Rochester Shale formation which is less permeable than the dolomite but can still transmit ground water toward the Gorge. Below the Rochester Shale there is a formation of interlayered sandstone, limestone, and shale which is similar to the Lockport Dolomite in terms of its hydraulic characteristics. This, in turn, overlies the Queenston Shale formation.

The most significant environmental and health implications of the Hyde Park landfill is the fact that presently 80,000 tons of toxic wastes are slowly leaching out through the Lockport Dolomite zone and below and finding their way into the Niagara River and Lake Ontario. The approximately 4 million Canadians and 1.5 million Americans who take their drinking water from these sources, and those who use the water for fishing, recreation, and industrial uses, are threatened by this leaky landfill.

III. The Nature of the Law Suit

The Hyde Park landfill received very little public or governmental attention until 1978. It was in 1978 that Occidental Petroleum Corporation, Hooker's parent company, attempted to acquire the Mead Corporation, a paper producer. Mead's efforts to avoid being taken over (which were ultimately successful) included investigating and publicizing Occidental's potential liability to lawsuits and clean up expenses relating to Hooker's landfill operations, including Hyde Park.⁸ Several consultants, including Dr. Edward Kleppinger,⁹ were retained by Mead to examine Hooker's landfill sites. The Hyde Park site, and its link to Niagara River pollution was revealed at this time.

It was only after these revelations by Mead Corporation, that the ~~United States~~ ^{for the administration}, ~~on behalf of the U.S. Environmental Protection Agency~~ ^{on behalf of the United States} (hereinafter "EPA") decided to initiate a civil action against Hooker. The suit was launched on December 20, 1979 against Hooker Chemicals and its parent companies pursuant to:

- (a) Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6973 for injunctive relief concerning an imminent and substantial endangerment to health and the environment;
- (b) The common law of nuisance, for injunctive relief concerning the escape of hazardous chemicals wastes from Hyde Park into the Niagara River and the escape of hazardous chemical wastes from the Hyde Park landfill into the environment where citizens of the U.S. have come and continue to come in contact with those wastes;

- (c) Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, for injunctive relief;
- (d) Section 309 of the Clean Water Act, 33 U.S.C. 1319, for injunctive relief and penalties for violation of the Clean Water Act;
- (e) Section 504 of the Clean Water Act.¹⁰

In their request for a mandatory permanent injunction, the United States asked the Court to require Hooker to install and maintain various monitoring programs and leachate collection systems in perpetuity.

New York State was initially joined as a defendant in the law suit as a result of a motion by Hooker on June 11, 1980. However, the State subsequently brought its own motion before the Court and was realigned as a plaintiff on September 11, 1980. The Towns of Lewiston and Niagara were also joined as defendants on July 11, 1980.¹¹

On January 19, 1981, the United States, New York State, Hooker, and the other parties entered into a proposed settlement agreement which they put before the U.S. Federal District Court in Buffalo for ratification by Judge John Curtin.

The Court has limited powers regarding a settlement agreement placed before it for ratification. It can either approve the agreement as it is constituted or disapprove the agreement. If the Judge disapproves the settlement, he can suggest to the parties that if certain modifications are made, he would ratify the agreement. However, the Court cannot amend or rewrite the agreement in any way.

Indeed, the proposed settlement agreement stipulates that any modifications proposed prior to the entry of the judgment shall require the written consent of each party. If the parties do not consent to any proposed modifications within ten days after the Court submits the modifications to them, the ^{agreement} judgment will be void, and all previously-filed stipulations will not apply.¹²

IV. The Proposed Settlement Agreement

This section will outline the main features of the proposed settlement agreement which is currently before the Court for ratification.

According to the settlement agreement itself, the Court is required to review any agreement and be satisfied that the terms and conditions are reasonable and adequate to "protect against endangerment" to human health or the environment in and about the Hyde Park landfill and the Bloody Run drainage area.¹³

A. Who is Bound?

The United States, New York State, Hooker, the Town of Lewiston, and the Town of Niagara are the parties to this agreement. Paragraph 5 provides that the agreement will not affect the rights of persons or entities who are not parties to the action.¹⁴

However, Hooker's compliance with the agreement would constitute a complete defence to any future actions brought by the governmental parties for migration or discharge of chemicals from the site, where the parties knew or could have reasonably anticipated that the problem could occur.¹⁵

This, in effect, means that if the terms of the agreement themselves do not provide for the major plume of contaminants to be detected and properly remedied, Hooker's compliance with the agreement constitutes a complete defence to any future actions every being brought by the governmental parties.

B. The Goal of the Agreement

The settlement agreement sets out containment, monitoring, and maintenance programs for the landfill site with the avowed goal of protecting against endangerment to human health and the environment in the Hyde Park - Bloody Run area. An environmental health and safety plan is also to be implemented during construction activities associated with the containment program.

A number of remedial measures which Hooker ^{would be required to} must undertake are specified in the agreement. These include:

- capping the landfill and perimeter areas;¹⁶
- installation of a tile drain system to remove chemicals migrating through the overburden;¹⁷
- installation of a barrier collection system of purge wells ^{to a maximum depth of 15 feet below the Lockport Dolomite} to collect contaminated groundwater;¹⁸
- use of activated carbon and other waste water treatment to remove the organics and metals from the wastewater;¹⁹
- a surface clean up of the area 4 feet on either side of the centre line of Bloody Run Creek where it intersects the Gorge face and 10 feet on either side at the shore area where Bloody Run flows into the Niagara River;²⁰
- the capping or excavation of a specified area in the Bloody Run drainage basin.²¹

The agreement also provides for the use of indicator chemicals to delineate the aerial and vertical extent of the chemical migration from the landfill in the overburden and Lockport Dolomite zone.²² If chemicals are found to be in excess of certain "plume definition levels" areas of the Lockport Dolomite not dealt with by the technologies

outlined above, then studies are to be initiated to determine what "requisite remedial technology" is required.

Monitoring wells are also required to measure the effectiveness of the barrier-collection system of purge wells. The agreement provides that the bedrock barrier collection system shall be deemed effective if the monitoring wells down gradient of the purge wells measure less than 10% of chemical loading calculated to be present in the up gradient wells.²³ There are provisions for the termination of any of the barrier systems if over a period of four consecutive years, specified indicator chemical parameters have not been detected at more than 10 mg/l in liquids collected by such systems.²⁴

C. Requisite Remedial Technology

Under certain conditions set out in the agreement, Hooker is required to examine and employ "Requisite Remedial Technology" (hereinafter "RRT").

Remedial technology is defined as "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".²⁵

In determining whether a remedial technology is requisite, various factors are to be weighed. These include (1) the nature of the endangerment to human health and the environment which remedial technology is designed to address, (2) the extent to which application of remedial technology would reduce such endangerment and⁽³⁾ the economic costs required to apply the remedial technology. Hooker

may not have to employ RRT if the Court determines, among other things, that "it would be arbitrary and capricious to require Hooker to bear the costs incurred in applying such technology".²⁶

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Hooker is required to use RRT to address aqueous phase liquid contamination in the overburden and in the Lockport Bedrock zone, which is not dealt with by the required barrier collection system of purge wells. RRT will also have to be employed in relation to non-aqueous phase liquids anywhere in the overburden and Lockport Dolomite zones.²⁷

The technologies to be examined are:

1. a tile drainage system to collect non-aqueous phase liquids up to 15 feet below the top of the Lockport Bedrock zone;
2. a grout curtain wall designed to prevent the migration of non-aqueous phase liquids from the site;
3. grouting through controlled fractures to contain non-aqueous phase liquids in the bedrock;
4. a system to remove non-aqueous phase liquids directly from the landfill site; and
5. a purge well system designed to ¹¹correct liquids ~~correct~~ migrating from the landfill site to the top of the Rochester Shale zone.²⁸ X

D. The Payment and Guarantee

The only specific monetary provision in the proposed agreement is the requirement for Hooker to pay \$1,500,000 to the State of New York primarily for the cost of (a) supervision of the implementation of the agreement, and (b) development of technology and remediation programs to address environmental problems associated with the generation and disposal of chemical wastes.²⁹ In addition, Hooker's parent company, Occidental Petroleum Corporation, is to sign a guarantee for a maximum of \$10,000,000 to be paid in the event that Hooker becomes insolvent or cannot perform its obligations pursuant to agreement.³⁰ This \$10 million guarantee is only a fraction of the estimated cost of even partially cleaning up ^{of} the site.³¹

E. Public Reaction to the Settlement

According to a Department of Justice regulation,³² any proposed consent decree of judgment involving the discharge of pollutants must be made available for public comment for a period of 30 days before being entered and made final by a Court. On February 5, 1981, public notice of the settlement agreement was placed in the Federal Register.³³ The comment period, which would have ended on March 9, 1981, was extended until March 20, 1981.

On February 10, 1981, the Court heard a presentation by the parties setting out the elements of their proposed settlement. Then, on February 12, 1981, the Court issued an order requiring the parties to comment on a number of issues. These included:

1. Whether the Court should appoint an expert to advise it on the technical issues raised in the settlement;

2. Whether 'requisite remedial technology' and other terms have been used in other environmental settlements;
3. Under what circumstances might relocation of individual homeowners take place;
4. How would the site be maintained after the 35 year period envisioned by the judgment.³⁴

In addition, because of the extraordinary public interest in this case, the Department of Justice held a public hearing on Thursday, February 19, 1981. A transcript of this meeting was submitted to the Court. Among the groups submitting comments were the College Heights Property Owners' Association, the Niagara County Citizens' Alliance, and the Ecumenical Task Force. The first two groups consist of residents of the City of Niagara Falls and Town of Niagara and residents in the vicinity of the landfill site. Both groups are represented by Attorney, Lewis Steele, and have filed motions to intervene as parties to the action. Judge Curtin has still not ruled on these motions.³⁵

The Ecumenical Task Force, represented by Buffalo Attorney, Barbara Morrison, was granted amicus curiae status on March 20, 1981.³⁶ The Ecumenical Task Force is a multi-denominational organization dedicated to the resolution of environmental and public health problems in western New York originating from chemical and/or radioactive contamination.

A joint response to the Court order of February 12, 1981 was filed in the Court on March 17, 1981 by Hooker, U.S. EPA, and New York State.³⁷ Their answers to the Court's questions stated:

1. A Court appointed expert would be impractical prior to the entry of judgment and cause undue delay.³⁸
2. Requisite remedial technology was chosen specifically *because* since it had no prior legal history.
3. Relocation of individual homeowners could be required:
 - (a) if the air borne particulate studies to be implemented under the agreement show that there is an endangerment to human health and the environment; and
 - (b) if air borne particulates resulting from remedial activities pose a danger to human health.
4. The parties believe the 35 year maintenance period is appropriate but, under the settlement agreement, it may be extended to meet the goal of the agreement, i.e. to protect against endangerment to human health and the environment.

Finally, on April 3, 1981, the U.S. and New York filed a joint response document to over 133 public comments with the Court.³⁹

V. CELA's Involvement in the Case - The Role of the
Amicus Curiae

A.

On May 4, 1981, Anne Wordsworth, researcher with Pollution Probe, approached the Board of Directors of the Canadian Environmental Law Association (CELA) with a request for assistance in obtaining amicus curiae status for Probe and Operation Clean-Niagara in U.S. District Court in Buffalo.⁴⁰ CELA agreed to take the case.

On May 7, 1981, CELA wrote to Judge Curtin indicating our intention to bring a motion for our clients to appear as amicus curiae in the Hyde Park case. We noted that the proposed settlement agreement had far-reaching international implications which had not been addressed. We stated that the Niagara River, as an international water body shared by the U.S. and Canada, is covered by the 1978 Great Lakes Water Quality Agreement and that the proposed settlement agreement may be in breach of the purpose and certain objectives of the Great Lakes Water Quality Agreement.

On May 12, 1981, Pollution Probe and Operation Clean-Niagara held a press conference outlining their concerns with the proposed settlement agreement and calling on both the federal and provincial government to protect the integrity of the Niagara River. Specifically, a letter sent by Probe to federal Minister of the Environment, John Roberts, on the same day asked the federal government, on behalf of Canadian citizens who are dependent on the Great Lakes for their water supply, to intervene in the U.S. Court and to press for much more stringent financial and technical conditions in the agreement.⁴¹

Both the letter and the press conference stressed the fact that the government had a moral responsibility to become involved in the case, and that it was shocking that the Agreement had not even been reviewed by the Canadian government. Finally, Probe and Operation Clean-Niagara announced that, with CELA's assistance, they were going to seek amicus curiae status in the U.S. Courts.

B. The Motion for Amicus Curiae

On May 29, 1981, a motion was brought by Barbara Morrison, before Judge Curtin, asking for an order that the author be allowed to appear pro hac vice ("for this occasion") in the Court to argue a motion to allow Pollution Probe and Operation Clean-Niagara to appear as amici curiae.⁴² The Court allowed Ms. Morrison's motion, and permitted the author to argue the specifics of the motion for Pollution Probe and Operation Clean-Niagara to appear jointly as amici curiae in the Hyde Park proceedings.

1. Amicus Curiae - Defined

Traditionally, an amicus curiae or "friend of the Court" is:

"...one who, as a stander-by, when a judge is in doubt or mistaken in a matter of law, may inform the Court. He is only heard by leave, and for the assistance of the Court, upon a case before it...[The practice is] to allow an attorney, or other person, to appear as a friend of the Court in a case, to act as an adviser of the Court, and to make suggestions as to matters appearing upon the record, or in matters or practice."⁴³

Generally, U.S. courts are more familiar with, and have been more receptive to, amicus curiae applications than in Canada, where the courts have been more restrictive in allowing amicus curiae participation.⁴⁴

An amicus curiae is not a party to an action and is therefore not accorded the rights usually associated with party status. For example, an amicus cannot subpoena witnesses, obtain discovery, order the service of documents,⁴⁵ and has no right of appeal.

As contrasted to a party intervenor,⁴⁶ an amicus curiae does not have a direct interest in the suit, only a general interest in the outcome of the litigation. An intervenor will therefore be bound by the Court's judgment - whereas an amicus is only bound by the precedent of the case.

The extent of amicus participation in proceedings is entirely within the discretion of the Court. The function of an amicus is to call the Court's attention to law or facts or circumstances in a matter that may otherwise escape its consideration.⁴⁷ The practice is usually to allow an amicus to file a written brief with the Court. While generally an uncommon occurrence, amicus curiae may, with permission of the Court, introduce evidence and present oral argument.

2. The Contents of the Motion

The written memorandum and oral arguments made by CELA for the granting of amicus curiae status included the following points:

- the implications of the proposed settlement on the Niagara River and Lake Ontario, international boundary waters, have not been addressed by the terms and conditions of the settlement agreement;
- Pollution Probe and Operation Clean-Niagara are in a unique position to bring to the Court's attention

the impact of the proposed settlement on Canadian public health and the environment and to advise it on matters relating to international law, equity, and policy;

- the Ecumenical Task Force (amicus curiae) and the proposed intervenors have not addressed the Canadian public interest and the impact of the agreement on international boundary waters and therefore, Probe and Operation Clean-Niagara represent an interest which has not been raised before the Court;
- Pollution Probe and Operation Clean-Niagara through their technical advisory committees and through the support offered by the Canadian government have the expertise to address the novel and complex issues raised by the proposed settlement agreement;
- case law establishes that leave to file an amicus curiae brief should be granted where complex and novel issues have been raised by the parties.(48) This agreement is precedent-setting in establishing remedial technologies for hazardous waste landfill sites, and also complex, which the Court recognized in its consideration of the appointment of an expert to advise it on the difficult technical issues raised in the settlement;
- the request for amicus curiae status will not inconvenience the Court and will not cause undue delay. Probe only became aware on May 1, 1981 that the settlement regarding the Hyde Park landfill had been proposed by the parties and was before the Court for ratification. Probe and Operation Clean-Niagara had also been unaware that a public comment period existed. It was argued that the short time necessary to file an amicus brief would be minimal in relation to the importance of ratifying an agreement that will ensure that the public interest is being protected.

Hooker filed a memorandum and argued in opposition to CELA's motion for amici status. Hooker argued that Pollution Probe and Operation Clean-Niagara did not represent a special interest in the proceeding; that they were raising old issues which had already been addressed and that their participation would not assist the Court in

its review of the proposed agreement and would only delay the determination.⁴⁹ Hooker's attorneys also argued orally before the Court that matters of international law and policy were not matters which came within the Court's jurisdiction.

Judge Curtin, in granting the motion allowing Pollution Probe and Operation Clean-Niagara to appear as amici curiae in the Hyde Park landfill case, specifically noted that international matters would be best dealt with "in another forum". The amici were given until June 30, 1981 to file a brief.

3. The Role of the Canadian Government

On May 15, 1981, John Roberts, federal Minister of the Environment, responded to the letter sent to him by Pollution Probe, urging the government to intervene in the Hyde Park case. Mr. Roberts stated that he "shared the concerns which have been expressed that the provisions contained in the settlement do not appear adequately to prevent the leaching of highly toxic chemicals into the Niagara River".⁵⁰ However, he went on to say that there were limits on the extent to which he could appropriately intervene in a matter before a U.S. Court, but that the government was taking direct action by way of a diplomatic note and also by raising the matter with Ann Gorsuch, the new Administrator of EPA.

Finally, Mr. Roberts stated that Environment Canada's technical assistance would continue to be available and that he hoped that the government's action would "complement and support your own in meeting our common objective of ensuring that there is no further degradation of the Niagara River and that the long-term integrity of the River is protected

for Canadians and Americans".⁵¹

This letter was filed by CELA in the Buffalo Court as part of the motion for amicus curiae status. It was used primarily to show that Pollution Probe and Operation Clean-Niagara had the support of the Canadian government in their amicus application and further that technical support would also be given to the two groups.

This technical support would [✓]probe to be key in enabling ^X the two environmental groups, with limited resources of their own, to proceed on the case.

While a number of diplomatic notes had been sent by Canada to the U.S. government concerning the pollution of the Niagara River,⁵² a note specifically dealing with the proposed Hyde Park settlement agreement was sent to the U.S. government on May 21, 1981.⁵³ The note stated that the Canadian government was concerned about the adequacy of the proposed settlement agreement and wanted to be satisfied that "all reasonable and practical means are being undertaken to present the release into the Great Lakes system of any toxic materials pursuant to the objectives of the Great Lakes Water Quality Agreement".⁵⁴

The note asked for: (1) a meeting between the two governments regarding the Hyde Park case, (2) an inventory of all waste disposal sites with a possible impact on the Great Lakes, and (3) consultation prior to decisions being taken on disposal or containment measures regarding sites in the Great Lakes area known or suspected to contain dioxin or other toxic substances.⁵⁵

VI. The Amicus Brief

A. Summary of the Amicus Brief

After the motion for amicus curiae was granted, it was decided that, although the Ecumenical Task Force and Pollution Probe and Operation Clean-Niagara had distinct concerns as amici in the case, there were a number of fundamental issues and technical matters which were of common concern to both the American and Canadian groups.⁵⁶ A request was therefore made and subsequently granted by Judge Curtin for permission to file a joint amicus brief.⁵⁷

The joint amicus brief, filed on June 30, 1981, included affidavits from Grant Anderson, consulting hydrogeologist and partner in the firm of Gartner Lee Associates Ltd., Ontario; Dr. Douglas Hallett, research scientist and chemist with Environment Canada; Dr. Edward Kleppinger, chemist and private consultant with expertise in the area of hazardous waste control, Washington, D.C.; and Dr. James Allen, environmental toxicologist and pathologist.⁵⁸

The brief concluded that the agreement was fundamentally defective and unable to accomplish its intended purpose of providing protection for human health and the environment. Further, the remedial strategy was conceived in partial ignorance of the hydrogeologic conditions of the Hyde Park site.

- The Lockport Dolomite underlying the landfill is highly permeable with vertical fractures and horizontal bedding plains acting as conduits for the ground water to reach the Niagara Gorge and enter the Niagara River.

- Hooker's consultants' (Conestoga-Rovers) data indicates that chemicals have been deposited directly on top of the permeable bedrock and that the wastes have already contaminated the bedrock aquifer to the depth of 50 feet and at least 500 feet beyond the site within the aquifer.
- Ground water velocities in the bedrock are about 10,000 times faster than in the glacial till soils.

In addition, the potential quantity of leachate outflow into the rock could be at least 200 times greater than outflow through the clay till soils.

- If the ground water flow is not accurately determined, a monitoring or purge well system will not be correctly designed and contaminants will by-pass the wells. The parties, in the agreement, focus their attention on controlling ground water flow in the overburden and not in the bedrock, even though they knew since 1979 that contaminants had migrated deeply into the rock and beyond the Hooker site.
- Mr. Anderson estimated that contaminants could reach the Niagara River in as little as a one year period.
- Further, Dr. Hallett estimated that if as little as one shovelfull (3 pounds or 1200 grams) of dioxin were to reach the Niagara River over a period of six months, the present levels of TCDD would rise to a level that would jeopardize the survival of certain species of wildlife.
- Dr. Hallett, Dr. Kleppinger, and Mr. Anderson are all in agreement that the removal of the wastes followed by destruction or reburial in a properly designed site is the only option that will effectively control further migration from the site.(59)

The amicus brief also dealt with the issue of the standard of review that the Court must use in determining whether to ratify the agreement. It was submitted that the remedial

strategy proposed would not eliminate the "imminent hazard" which precipitated the litigation and that the terms and conditions of the agreement were not reasonable and adequate to resolve the issues raised in the action and would not constitute appropriate programs to restore and protect the environment.⁶⁰

The amicus brief also argued that no presumption of agency expertise should attach to U.S. EPA and New York State, due to the fact that the data itself reveals that the remedial program cannot work.⁶¹

Arguments were also made that delay in rendering a decision is a 'red herring' in that section 3013 of the Resource Conservation and Recovery Act (RCRA) and provisions under the Comprehensive Environmental Response, Compensation, and Liability Act (superfund) would provide authority for the public agencies to require the kind of testing and monitoring specified in the agreement, even without pending litigation.

The brief also stated that the proposed agreement would not adequately protect the Niagara River from contamination and would result in breaches of international obligations under the 1909 Boundary Waters Treaty and 1978 Great Lakes Water Quality Agreement.⁶²

The brief concluded with the recommendation that the settlement agreement should not be approved as presently constituted, or in the alternative, that a fact-finding hearing should be held to ascertain the validity of the representations made by the parties.

On July 10, 1981, Judge Curtin issued an order directing the parties to "explain their positions and whether the

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requisite remedial technology will accomodate the problems raised by amicus".⁶³ The Judge further noted that, because of the nature of the material in the landfill and the government's duty to protect the public interest, he was not concerned about the charges contained in the "well-drawn" amicus brief.

B. The Parties' Response

*in respect to certain
issues*

All three major parties filed separate, and often contradictory, responses to the amicus brief.

1. New York State

The major argument contained in the New York State response document was that, while they agreed with amici that there was bedrock contamination, Requisite Remedial Technology, even though not specified in the agreement, would contain and isolate any chemical contamination found in deep bedrock.⁶⁴ As will be discussed below,⁶⁵ amici maintains that the agreement does not include any requirement that any remedial action take place below the Rochester Shale and underlying strata (i.e. those layers below the Lockport Dolomite) where amici contend that chemicals are presently moving toward the Niagara Gorge and into the Niagara River.

New York State also argued that there is no need to excavate, if technology can be applied to contain the wastes on site, which they maintained they would be able to do. Affidavits from Dr. Kernan Davis, a geologist, and Mr. Paul Counterman, an engineer, formed part of New York's response. Mr. Counterman noted that he had "known of the presence of non-aqueous phase organic chemicals in observation well 18-79 roughly 500 feet

from the landfill site and 50 feet into the bedrock".⁶⁶
He also noted that excavation and reburial would be a
technology which could and should be included in RRT.⁶⁷

2. The United States of America

The United States' response to the amicus brief argued that the proposed agreement guarantees the clean-up result sought by amici. As was the case in the New York document, the U.S. admits that all parties have recognized throughout the negotiations that the upper portion of the Lockport Formation is permeable and that there is no natural barrier beneath the landfill to prevent the vertical migration of chemical wastes.⁶⁸ On the issue of excavation, the U.S. asserted that excavation was not at this time feasible or desirable and should not be considered unless the remedies provided in the proposed agreement prove to be ineffective. The U.S. brief also asserted that at a minimum, 1,860,000 tons of soil and 870,000 tons of rock would have to be removed.⁶⁹ The amici position is that rock removal would not be necessary... *paradigm?*

The U.S. response also argued that any commitment to specified technology, beyond that already in operation or provided for in the proposed agreement is premature in the absence of the studies and information required by the proposed agreement.⁷⁰ Affidavits from Dr. Benjamin Mason, soil scientist, David Twedell, hydrogeologist,⁷¹ Richard Johnston, hydrogeologist with the U.S. Geological Survey (USGS), Alfred Lindsey and Russell Wyer, Engineer, were also included.

3. Hooker Chemicals

Hooker also acknowledged in its response brief that it was well aware that the Lockport Dolomite bedrock beneath the landfill was fractured and that it contained both vertical and horizontal ground water flow. Hooker also stated that, under the vector bedrock survey program, well drilling must containe ^{issue} until no contamination is found at any depth in the approximately 100 feet thick Lockport Bedrock zone.⁷² [It is important to note that Hooker, in ^{its response brief} the above statements, notes the limitations of the survey program and RRT. First of all, as amici maintain, there is no requirement for survey and subsequent remedial action below the Lockport Dolomite. Secondly, the concept of "no contamination" is linked to the finding of no indicator chemicals above certain set limits. As the leachate is extremely dilute, the detection limits set do not preclude chemicals from continuing to migrate from the site in minute, but still toxic, quantities.]

On the issue of excavation, Hooker clearly stated that it "will not be voluntarily associated with any remedial effort which includes such a plan".⁷³ Further, it noted that the December 19, 1979 complaint by the U.S. which launched the law suit only called for in situ remedies and not for excavation. Hooker stated that "had the government pressed for waste removal proposal along the lines proposed by amici (i.e. excavation)" Hooker would have immediately rejected settlement as a viable option in this case.⁷⁴

4. Comment

[→]
Amici's position, as elaborated below,⁷⁵ is that the parties knew enough from the existing data to do an

analysis of the extent of the problem, including the velocity, quantities, and direction of ground water flow, in order to be able to recommend bottom line technologies to be specified in the agreement. Further, amici contend that the emphasis for clean-up in the agreement is on the overburden and top 15 feet of the Lockport Dolomite, ^{rather than the lower rock strata where chemicals have already migrated.} It is also clear from the response briefs that all parties knew of the migration of chemical-laden ground water at least 500 feet from the site and 50 feet below the site, at the time of negotiation, yet these chemicals were not specifically addressed in the settlement agreement, except by the RRT concept. There is nothing in the agreement which compels any testing or remedial measures to be taken below the Rochester Shale.

C. The Judge's Order

It is clear that Judge Curtin did not regard the parties' submissions as adequate to deal with amici's concerns. Therefore, on August 7, 1981, in a precedent-setting move, he ordered a fact-finding hearing to take place in September 1981, at which time the governmental parties and Hooker would be required to present testimony in order to explain the various elements of the settlement in the simplest language possible.

The Court stated that, as a Court of equity, it had to be satisfied that the settlement it is asked to enforce meets at least some minimal standards.⁷⁶ In an 8 page appendix to the Order, Judge Curtin set out approximately 80 questions for the parties to answer, including definitions of various terms used in the agreement, as well as specific questions concerning mapping;⁷⁷ containment;⁷⁸ treatment; and monitoring.

Finally, the Order provided that amici would have the right to cross-examine the parties' experts and present limited testimony of their own.⁷⁹ The proposed intervenors were also given leave to participate in the hearings to the same extent as amici.⁸⁰

What about our post-hearing submission which precedes this & which best summarizes our position?

VIII. The Twedell Fraud

On November 30, 1981, all counsel of record in the Hyde Park matter were summoned to Judge John Curtin's chambers. At that time, we were served with a Motion, supporting affidavits, and a Memorandum by the United States government asking to withdraw the testimony and affidavit of David Bruce Twedell. David Twedell, an employee of JRB Associates, Inc. Virginia, had been retained by the U.S. government as their sole hydrogeologist to provide technical advice and to participate in the negotiation sessions with Hooker which led to the signing of the proposed agreement on January 19, 1981. Mr. Twedell also had filed in July, 1981, an affidavit in response to the amicus Brief and, as well, had appeared as a government witness in the fact-finding hearings on September 10-11, 1981.

"Dr." Twedell, according to his resume filed with the Court on March 17, 1981, and his testimony during the fact-finding hearing, indicated that he had received a B.S. and Ph.D in geology from the University of Houston, Clear Lake, Texas. According to the affidavit of Robert Morgan, filed with the Court on November 19, 1981, EPA received allegations that Twedell did not possess a Ph.D as had been represented to the Court. The government's preliminary investigation revealed that Mr. Twedell only had a B.A. degree in Physical Science from the University of Houston, which he received in 1979. The Government noted that the allegations had been referred to the Department of Justice's Criminal Division and Office of Professional Responsibility for further investigation.

However, the Government while stating that Mr. Twedell's misrepresentations were "an extremely serious matter", in its motion asked the Court to:

1. withdraw Twedell's testimony and affidavit from the record in this case; and
2. sign the settlement agreement as presently constituted as it did not "stand or fall on the basis of Mr. Twedell's technical assistance and testimony".

The U.S. government's arguments for asking the Court to enter the proposed agreement included:

- . Mr. Twedell was only one of 21 scientists who lent their expertise to the negotiations on behalf of the federal government;
- . none of the technical requirements of the settlement were the sole product of Mr. Twedell's advice and recommendations;
- . Twedell's evidence did not differ substantially from amici's witness, Grant Anderson;
- . Twedell's testimony was cumulative of other witnesses (e.g. Davis and Johnston);
- . Twedell's hydrogeologic evaluations were merely preliminary in nature and that additional studies to be undertaken pursuant to the agreement will either substantiate or refute advice given by Twedell;
- . EPA has committed itself to replacing Mr. Twedell with competent and qualified experts to aid in the evaluation of data as expeditiously as possible.

Amici filed a Memorandum, and an affidavit, by Grant Anderson in opposition to the United States' motion to withdraw the testimony and affidavit of David Bruce Twedell.

Amici argued that the obliteration of Twedell's testimony from the public record would prejudice amici and the public interest it represents.

The following arguments were made:

- . David Twedell was the sole hydrogeologist for the government team responsible for evaluation and interpretation of data supplied by Hooker Chemical. Not

one of EPA's "21" experts was capable of providing expertise or technical assistance in the field of hydrogeology, the key discipline involved in determining where chemical migration is taking place. Further, according to his retainer, David Twedell was deemed to be one of "the only people currently qualified to assist EPA in these particular negotiations". In addition, EPA memos showed that one of Twedell's tasks was to "ensure that clean up measures adequately address agency environmental concerns".

- . While the State and Federal negotiating team never, in 20 months, perceived Twedell's lack of capability, amici were aware from the beginning that:
 - (a) the governmental parties misunderstood the basic hydrogeology of the site and had failed to properly interpret the data provided by Hooker;
 - (b) during cross-examination of Mr. Twedell, amici specifically advised this Court that the witness was unable to read data commonly used in the field;
 - (c) irrespective of the competence of any future experts enlisted post-settlement, the defects and omissions in the agreement itself will preclude implementation of proper studies and effective remedial action;
 - (d) the key issue here is whether Twedell's input in fact obscured the real issues and impeded the government's ability to negotiate a competent agreement and to properly protect the public interest.

Amici also advised the court that JRB Associates Inc. had known as of July 13, 1981 that David Twedell did not possess a Ph.D in geology. Amici noted that it was disturbing that JRB Associates, which provides 85% of its consulting time to governmental agencies may have withheld the information about Twedell's lack of credentials from U.S. EPA and permitted Twedell to ^{be put} come forward as a witness.

Further, amici noted that every material objection to the proposed agreement raised by amici remained in contention

between the parties and amici. These major issues in contention include: the ability of the Rochester Shale to transmit water; its ability to serve as a pathway for chemical migration from the landfill; and the ability of the monitoring system to quantify contaminants escaping beneath the landfill and measure what amounts of contaminants can be recovered under the proposed remediation strategy.

Finally, amici opposed the Motion to withdraw the testimony of Twedell and argued that it be left on the record to further rebut the U.S. government claim that it is entitled to a "presumption of agency expertise".

Amici requested that the Court deny the U.S. government's Motion and, instead, accord Twedell's testimony zero weight; recall Twedell to the Court to answer questions; bring Mr. Flanagan of JRB Associates to clarify when JRB informed EPA regarding Twedell's falsified credentials; and have the government place on the record all documents regarding fraudulent information submitted by Twedell. Most importantly, amici requested the Court to disapprove the proposed Agreement as it is currently constituted.

Both New York State and Hooker Chemicals replied to amici's memorandum opposing the U.S. government's motion to strike Twedell's testimony. New York State's response consisted solely of an affidavit of Kernan Davis in which he stated that he did not rely on Twedell's data, but formed his own opinions based on his experience in interpreting hydrogeologic data. He tried to characterize amici's argument as turning on the definition of "hydrogeologist". Hooker's response document argues that Twedell's testimony ^{was} is completely cumulative and did not compromise the integrity of the governmental review process.

IX. The U.S. Post-Hearing Reports

On February 19, 1982, the United States government filed with the Court a report done by West Coast Technical Service (WCTS) outlining the results of EPA chemical sampling at the Niagara Gorge face. The government also filed a hydrogeologic report by Morris Maslia and Richard Johnston entitled "Simulation of Ground Water Flow in the Vicinity of Hyde Park Landfill, Niagara Falls, New York" (hereinafter "Maslia/Johnston Report").

Amici were given leave by the Court to submit a response to these reports and on March 12, 1982 filed a technical review by Grant Anderson evaluating the usefulness and validity of the Maslia/Johnston Report; comments on the adequacy of the simulation model by Richard Jackson (Hydrogeologist/Environment Canada); and a critique of the WCTS analytical testing report prepared by Dr. Douglas Hallett.

A. The Maslia/Johnston Report

The Maslia/Johnston Report made the following conclusions regarding ground water flow patterns below the Hyde Park landfill site:

- a ground water divide exists east of the landfill, indicating that all ground water originating near or flowing beneath the landfill will flow toward and discharge in the gorge;
- the time required for ground water to move from the landfill to the gorge is approximately 5-8 years in the upper Lockport Dolomite and 7 years in the lower Lockport Dolomite. Real velocities are highest in the upper unit of the Lockport, ranging from about 1.5 to 4.8 feet per day.

- 80% of the groundwater reaching the gorge face is from the Lockport Dolomite;
- the model is only valid to the point where the ground water intercepts "open" vertical joints or rubble.

However, according to the review by Grant Anderson, the model as prepared misrepresents hydrogeologic conditions in the area of the Hyde Park landfill and is invalid. Specifically:

1. The model does not simulate actual field conditions as previously measured by the Parties. The model was therefore never calibrated.
2. The assumptions plugged into the model were in direct contradiction to the field data as measured and presented to the Court. The most significant erroneous assumptions plugged into the model which destroy its validity are:
 - (a) zero infiltration of ^{ve}precipitation through the landfill's ^{cap}clay into the chemical wastes;
 - (b) extremely high horizontal hydraulic conductivity vs. very low vertical conductivity in the lower Lockport Dolomite and Rochester Shale which contributes to ground water flowing from the entire thickness of the Lockport Dolomite formation at the gorge face;
 - (c) no groundwater flows vertically downward through the bottom of the Rochester Shale.

In reality, as Grant Anderson points out in his report, it was acknowledged during the fact-finding hearings in 1981 that:

1. The clay cap is, in fact, permeable and does allow infiltration of approximately 6" ^{per year} through the cap into the 15 acre landfill. There is also an acknowledged ground water mound within the Hyde Park

What does this mean?

landfill. The Maslia/Johnston model simulation shows the opposite configuration - a ground water valley. As a result of this incorrect assumption, the computer plotted ground water flowing laterally through the rock into the chemicals, rather than showing the actual vertical flow system.

2. The testimony of experts for the parties and amici showed that the Gorge face, within the Dolomite formation, is with rare exception, dry and devoid of seepage. However, the Maslia/Johnston model, by assuming a ratio of horizontal to vertical hydraulic conductivity in the lower Lockport Dolomite and Rochester Shale at 1000:1, concludes that ground water is discharging from the entire thickness of the Lockport Dolomite. There ^{was} is, therefore, no attempt to calibrate the model with actual field conditions at the Gorge. *This sounds to be a weakening point?? (even though it is not!)*
3. As described in testimony, the bedrock layers below the Rochester Shale are more permeable than the Rochester Shale. Maslia/Johnston's assumption that no flow would occur through the bottom of the Rochester Shale contradicts actual data and chemical testing results presented by amici which indicated movement of contaminated groundwater downward through and below the Shale into the whirlpool sandstone formation approximately 300 feet below ground surface. Also, by placing a no-flow boundary at the bottom of the Rochester Shale, there is a resultant bias of greater velocity and quantity of lateral flow in the Lockport Dolomite.
4. Further, when actual field water level measurements are plotted onto the Maslia/Johnston Figure it is also clear that calibration never occurred. Even in the upper layers (where ground water behavior is not in contention between the parties and amici), there is no replication of actual field data.

In addition, Mr. Anderson concludes that:

1. Maslia/Johnston's calculation of 5-7 years for water to move from the landfill to the Gorge through the Lockport Dolomite is biased by assuming 10 feet of clay exists below the chemicals on top of the Lockport Dolomite. In actual fact, chemicals are in direct contact with the dolomite and using Maslia/Johnston's own velocity ranges, dissolved chemicals would reach

the Gorge in 1 to 3½ years. This does not differ significantly with Mr. Anderson's contention that chemicals would reach the Gorge face in less than one year.

2. Chemicals will move through the Rochester Shale. The importance of this movement should not be undermined by assuming impermeability based upon inability to pump significant quantities of water from a domestic well. Tests done by Gartner Lee Associates show that groundwater movement does occur through the Rochester Shale. Further, the chemical analysis showing the presence of indicator chemicals from the Hyde Park landfill substantiates that the Rochester Shale does not form a lower boundary for chemical movement.
3. Finally, nothing in the Maslia/Johnston Report alters his position that the proposed settlement agreement is ~~biased~~ based on a fundamental misunderstanding of the groundwater flow system by the parties. As such, the ill-conceived studies provided for in the agreement will preclude the formulation of a proper remedial strategy at the site.

Amici also argued that it was ironic that, at the same time the parties were telling the Court, during the fact-finding hearing, that inadequate data precluded determination of velocity, direction, and quantity of ground water flow in the lower geologic strata, that Johnston was preparing his model based on the available data and his earlier 1964 study on regional ground water. Further, neither the Court, amici, nor the public were advised that such a study was being undertaken.

Amici contended that the Maslia/Johnston report constituted attempt by the U.S. government to justify, post negotiation and post hearing, the hydrogeologic premises of its proposed agreement.

B. The WCTS Analytical Testing Report (Gorge face samples)

On October 22, 1981, EPA collected ground water and sediment samples from four locations at the Niagara Gorge as well as a sample 7,000 feet downstream at the point where Bloody Run enters the Niagara River. These samples were split with Hooker Chemicals, and the EPA samples sent to West Coast Technical Service Inc. for analysis. While EPA acknowledged that there were low parts per trillion concentrations of trichlorophenol, chlorinated benzenes and PCBs at the Gorge face, it argued that these concentrations were ~~no~~⁺ significantly different from the concentrations detected in the downstream or ambient samples. The United States also argued that the 'isomer' of PCB detected in the EPA sediment samples (PCB 1260) is not the same isomer of PCB as had been detected at the Hyde Park landfill. X

Dr. Douglas Hallett, in his critique of the WCTS Report, found that no valid data had been provided which altered the previous conclusions of amici. He found that WCTS did not use accepted EPA protocols or any substitute protocols accepted in the scientific community and that a majority of sampling results were rendered unusable because of excessive interference, or inadequate recovery due to improper or inadequate protocols.

Dr. Hallett also noted that the WCTS laboratory incorrectly reported many samples showing non-detectable levels of particular chemicals when, in fact, problems with recovery rate were caused by gross interference precluded any scientifically justifiable conclusion as to absence or presence of those particular materials. B X

Dr. Hallett also noted that the testing equipment utilized by WCTS is incapable of testing for the presence or absence

of dioxin in environmental samples. As far as other specific chemicals, Dr. Hallett noted that:

- X ambient*
1. The 2,4,6 isomer of Trichlorophenol found by EPA, is indicative of Hyde Park leachate in that seepage. Ambient 2,4,6 trichlorophenol could not account for the presence of this chemical in ground water at this point.
 2. Mr. Elder is incorrect when he says that the concentration of PCBs found in sediment samples was not significantly different from the concentrations in the downstream sample. According to the WCTS data itself, there were no PCBs detected at the control location. Further, the statement that PCB 1260 is not the same isomer of PCB that has been detected in the Hyde Park landfill cannot be supported scientifically. Further, Dr. Levins (Hooker's chemist) testified that there could be many unanalyzed isomers of PCBs in Hyde Park landfill for which no data or records exist.

Amici concluded that the recent reports submitted by the U.S. government reinforce the position that the agreement, as it is constituted, must be rejected by the Court since it will not prevent the continued migration of chemical leachate through the underlying rock to the Gorge face and into the Niagara River.