

1 THE COURT: Swear her in.

2 (Witness sworn.)

3 THE CLERK: Be seated, please.

4 MR. STEWART: Your name is Janet McGilray?

5 THE WITNESS: Yes.

6 THE REPORTER: Excuse me, I'm sorry. I need to get her
7 name, please.

8 MR. STEWART: Spell your name.

9 THE WITNESS: MacGillivray, M-a-c-G-i-l-l-i-v-r-a-y.

10 MR. STEWART: I murdered it.

11 DIRECT EXAMINATION

12 BY MR. STEWART:

13 Q You are a lawyer?

14 A Yes.

15 Q And you were trained in environmental sciences?

16 A Yes.

17 Q Got a master's degree in that?

18 A I have a master's degree in environmental law --

19 Q -- environmental law?

20 A -- with a focus on environmental health.

21 Q You worked for a while at -- on a summer intern
22 with DOJ?

23 A Yes.

24 Q In the Crime Section?

25 A Yes. As an honors --

1 Q -- in Washington --

2 A -- yes.

3 THE REPORTER: I'm sorry, as what?

4 THE WITNESS: As an honors clerk.

5 Q And then you had a fellowship and got your extra
6 degree, and then you went to work for Superfund?

7 A Yes. EPA Region II.

8 Q Region II?

9 A Yes.

10 Q What did you do in that capacity of Region II in
11 the Superfund?

12 A I was in the office of regional counsel as a
13 Superfund lawyer in the New Jersey Superfund Division.

14 Q After you left EPA, you became involved in
15 Riverkeepers, did you not?

16 A Yes.

17 Q And in Riverkeepers, tell us just a little bit
18 about that organization. What are y'all assigned to do
19 there in your Riverkeeper organization in New York?

20 A Riverkeeper is an environmental advocacy
21 organization, and I am the senior project attorney for the
22 Hudson River Superfund Site.

23 Q And that is a PCB --

24 THE COURT: Keep your voice up so I can hear you --

25 MR. STEWART: Yeah. Speak into the mike --

1 THE COURT: -- or maybe pull the microphone closer to
2 you.

3 MR. STEWART: Yeah, pull the mike to you and speak up.

4 Q Ms. MacGillivray, that was a Superfund site
5 dealing with PCBs on the Hudson; is that right?

6 A Yes. Yes.

7 Q Tell me, if you would, please, ma'am, if you
8 became familiar as a result of your work with Riverkeepers
9 about this consent -- order on consent that was entered in
10 connection with the Anniston PCB site?

11 A Yes. My work on the Hudson River Superfund Site
12 requires that I keep very much abreast of the issues related
13 to other PCB sites in the country. And I became keenly
14 aware of the Anniston consent degree that was, I think,
15 approximately March 25th, is when I first read it.

16 And my impression was actually that it was -- and my
17 interest in it was catapulted, because I felt it was
18 actually unfair, unreasonable and inconsistent with CERCLA.

19 THE COURT: I'm sorry. You found it to be unfair,
20 unreasonable, and what else?

21 THE WITNESS: And inconsistent with CERCLA.

22 Q Now, did you notice anything unusual about this as
23 compared to what was done at the Hudson River site?

24 A Yes. This consent degree appears to be an example
25 of what is now being called an NPL equivalent to an

1 NPL-caliber site. And on the Hudson River, we have NPL
2 status.

3 And I believe that a closer examination of the consent
4 decree would lead me to understand how this community was
5 not being treated fairly, as I looked at how other
6 communities with PCB exposures were being treated.

7 Q Does that listing as a National -- or NPL site
8 free up money that enables the EPA to do data gathering,
9 testing, modeling, that type thing?

10 A Yes. I mean, in essence, Congress decided in
11 response to Luft Canal (phonetic) and other very seriously
12 contaminated sites in 1980, to address this by giving the
13 federal government the authority and the resources,
14 primarily, to directly respond to releases of hazardous
15 substances that may impact or endanger with regard to the
16 environment.

17 And the money, the access to what's called the
18 Superfund or trust, enables the government to do just that.
19 If you're not --

20 THE COURT: If you will slow down just a little so my
21 court reporter can get every word you say, I would be most
22 appreciative.

23 THE WITNESS: Okay.

24 THE COURT: All right.

25 Q Go ahead.

1 A It's my firm belief that without the resources to
2 back up the tools that are provided by CERCLA, that the
3 government is not able to have full force of the statute
4 behind it to negotiate the cleanups which have to be --

5 THE COURT: Will a curriculum vitae of this witness be
6 provided?

7 MR. STEWART: It can be. Yes, sir, Judge. I certainly
8 can. I don't have one here with me, but I would be glad to
9 provide it, and a resume related to her professional and
10 work history.

11 THE COURT: All right.

12 Q Ms. MacGillivray, in connection with a TAG grant
13 in a Superfund listed site, or NPL listed site, would the
14 TAG grant be handled like it is in this particular order on
15 consent where the defendant selects the person who's going
16 to serve as a technical representative for the people who
17 get the TAG grant? You understand that to be the case here.
18 Is that the way it works on the Hudson?

19 A No. It's -- no, it's not. It's handled by EPA.

20 Q That person is an independent person speaking for
21 the community and the TAG grant in connection with --

22 A Yes. It's meant to involve the community and all
23 interested stakeholders in decisions that relate to their
24 community on these issues.

25 Q And does that gives them right to review data and

1 things like that, modeling, and that type thing?

2 A Yes.

3 Q Does the polluter up there select the people to
4 whom the TAG grant is given?

5 A No.

6 Q They can be people who have been adverse to them
7 in the past and who have testified against them and done
8 things like that, is that --

9 A True. Yes.

10 Q And does it provide for ATSDR to do health
11 studies, money for ATSDR to do --

12 A -- yes.

13 Q -- health studies?

14 A Yes.

15 Q They say they can't do it in this consent decree,
16 does it provide for it on the Hudson?

17 A To my knowledge, NPL listing triggers ATSDR's
18 involvement and money to back up that involvement on the
19 NPL-listed sites.

20 Q You mean giving that up, you're giving up treble
21 damages and that stuff up --

22 THE REPORTER: I'm sorry?

23 Q -- circumstances, are you not -- giving up treble
24 damages, the enforcement provisions of that statute?

25 MR. COX: That's a legal conclusion, Your Honor.

1 THE COURT: Sustained.

2 MR. STEWART: I'll withdraw that.

3 Q Let me ask you if you have talked to anyone at the
4 Washington office about this Anniston NPL -- Anniston
5 site?

6 A Yes, I have.

7 Q Have you talked to them about this consent
8 decree?

9 A Yes, I have.

10 Q And who was that?

11 A Marianne Horinko.

12 Q And when -- Marianne who?

13 A Horinko. H-o-r-i-n-k-o.

14 Q And when did you talk to her?

15 A On April 8th, 2002.

16 Q And what was her position?

17 A I was there with other individuals expressing
18 great concern over the administration's approach to
19 Superfund; and NPL-caliber listings; Mega sites being
20 addressed differently, those are sites above \$50 million;
21 enforcement authority by EPA; and generally concern over the
22 developments for the program.

23 I asked her specifically regarding Anniston, why isn't
24 this site NPL listed?

25 Q What did she say as to your question as to why

1 this wasn't an NPL-listed site?

2 A Because the PRP did not want it to be listed.

3 Q Because the PRP does want it to be listed; is that
4 what you said?

5 A Yes.

6 THE COURT: She said the PRP?

7 THE WITNESS: The Potentially Responsible Party, or
8 Monsanto, Solutia-Pharmacia.

9 THE COURT: I'm sorry, I didn't understand you.

10 MR. STEWART: PRP is the Potentially Responsible Party
11 at this site. That would be Solutia-Pharmacia, Judge.

12 THE COURT: And who was this --

13 THE WITNESS: Marianne Horinko is the assistant
14 administrator of OSWER, which is the Office of Solid Waste
15 and Emergency Response, at EPA headquarters.

16 Q She's the chief administrative assistant to -- one
17 of the chief administrative assistants to Mrs. Whitman?

18 A Yes.

19 Q Secretary Whitman?

20 A Administrator Whitman.

21 Q Administrator Whitman. No question in your mind
22 that she understood your question --

23 MR. WEINISCHKE: Your Honor, I object.

24 THE COURT: The objection is sustained.

25 MR. STEWART: All right. I'll go on, Judge.

1 Q Have you received any calls from anybody else from
2 the government in connection with this Anniston site
3 recently?

4 A Yes.

5 Q Who from?

6 A From Bill Weinischke.

7 Q When did you receive those calls?

8 A Friday, January 17th.

9 Q And can you tell --

10 THE COURT: From Bill who?

11 THE WITNESS: Bill Wein- --

12 MR. STEWART: -- Bill Weinischke.

13 MR. WEINISCHKE: Who is me, Your Honor.

14 Q And what was the substance of Mr. Weinischke's
15 call to you, Ms. MacGillivray?

16 A He called to discuss my coming to testify here
17 today.

18 Q What did he say to you about your coming here to
19 testify today, Ms. MacGillivray?

20 A He told me that I was doing a disservice to the
21 community if I were to come and oppose the entry of this
22 consent decree.

23 Q It was a what?

24 A A disservice to the community, not in their
25 interest if I were to come here and oppose this consent

1 decree.

2 Q What else did he say to you about your coming here
3 to testify in connection with this matter here today?

4 A He suggested that I speak with a colleague of his
5 who had been affiliated -- is affiliated with my
6 organization, Riverkeeper, on who could attest to his
7 vehemence in terms of protecting the environment and doing
8 the right thing.

9 Q And did he --

10 THE COURT: So he was really vouching for himself,
11 rather than giving a veiled threat to you?

12 MR. STEWART: Well --

13 THE COURT: Well, how did you perceive it?

14 THE WITNESS: I was rather stunned by the call, and it
15 was actually one of several.

16 THE COURT: Did you feel that you were being implicitly
17 asked not to come to testify -- or explicitly?

18 THE WITNESS: Well, I -- we -- he wanted to tell me why
19 my comments -- I had filed comments in response to the March
20 consent decree -- and wanted to demonstrate to me why the
21 comments that I had written with Heather White of the
22 Environmental Working Group had been addressed in their
23 response.

24 THE COURT: Are those comments in the record?

25 MR. STEWART: Yes, they are. They are in the record,

1 and the response --

2 THE COURT: I'll make them dispositive, and will make
3 her comments the amici's next exhibit.

4 MR. STEWART: All right, Judge. That will be 43, I
5 think, Judge.

6 Q Ms. MacGillivray, did he say --

7 THE COURT: Are you going to ask anything else
8 different than what she said in her comments? Because your
9 time has expired and we've got to give time for
10 cross-examination --

11 MR. STEWART: -- okay, Judge. I tell you what I'm
12 going to do then, I'm going to hold with her and I'm going
13 to ask Mr. Charlie Cunningham to talk about, just very
14 briefly, some flaws in this streamlined risk evaluation.

15 THE COURT: We're going to finish up with her first.

16 MR. STEWART: Okay. All right.

17 Q I wanted to ask her if Mr. Weinischke said
18 anything to you about your work record, or your history -- I
19 mean, your place of work in connection with your coming here
20 to testify?

21 A He said he wouldn't imagine that someone from my
22 organization would want to come and do this to the community
23 which would, in effect, leave the community without a
24 remedy.

25 Q Would leave the community without a remedy --

1 A -- or instrument delay on the start up of the
2 cleanup.

3 THE COURT: Has the Hudson River been cleaned up?

4 THE WITNESS: No, sir.

5 THE COURT: How long have you been involved in that?

6 THE WITNESS: Two years. But EPA has done the RI/FS,
7 which leads to the Record of Decision, or the document that
8 describes the remedy or the cleanup. So, it --

9 Q How long have they been involved in working on the
10 Hudson with EPA?

11 A Twenty years.

12 THE COURT: All right.

13 MR. STEWART: Speaking -- thank you.

14 THE COURT: Cross-examination?

15 CROSS-EXAMINATION

16 BY MR. WEINISCHKE:

17 Q Janet, it's nice to meet you in person.

18 A Yes.

19 Q The woman I asked you to call in Atlanta was Sally
20 Bethea (phonetic)?

21 A Okay.

22 Q And she's -- she's the director of the
23 Riverkeeper -- Chattahoochee Riverkeeper. Why did I ask you
24 to call her?

25 A Because you had worked with her in an effort to

1 protect some water body, side-by-side, to get the right
2 thing done.

3 Q And when I spoke to you, I asked you -- I said,
4 I've got your comments that you submitted on our consent
5 decree, and I asked you if you had been provided with the
6 response that we submitted to your comments. Do you recall
7 that?

8 A Yes.

9 Q And had you received those comments, or the
10 response?

11 A I had not read them, no.

12 Q And -- well, you hadn't received them, you told me
13 --

14 A They're on the Web site, but I had not received
15 them, not from Mr. Stewart.

16 Q Okay. And I, in fact, sent you immediately a
17 facsimile copy of our response to your comments?

18 A Yes. About eighteen pages had come through --

19 THE COURT: But as I understand it, the revised decree
20 doesn't propose a listing, does it?

21 MR. WEINISCHKE: No. No, Your Honor, it does not.

22 THE COURT: That's what your agenda --

23 THE WITNESS: Yes. That's my primary request.

24 MR. WEINISCHKE: Your Honor, in their comments, they
25 said that there's a difference in the way this site is

1 treated because it's not listed. And what I wanted the
2 witness to have an opportunity to see was that we explained
3 that there's not a difference, and she had never had the
4 benefit of that.

5 THE COURT: All right. I take that as accepted. I
6 take that as you have indicated, and then I'll give you the
7 opportunity to put someone on in response to her coming.

8 MR. WEINISCHKE: Well, Your Honor, I'd like to get more
9 from her point --

10 THE COURT: No. No. You may later call her as your
11 witness.

12 MR. WEINISCHKE: May I finish cross-examining her?

13 THE COURT: On another question. Yes.

14 MR. WEINISCHKE: Okay.

15 Q We talked about your comments saying that this
16 consent decree didn't follow the model RDRA consent decree.
17 Do you recall that?

18 A Yes.

19 Q And I said, well, the reason it doesn't follow
20 that is because it's not an RDRA consent decree --

21 A That's right. It's for the RI/FS.

22 Q And as you understand it, you don't get an RDRA
23 consent decree until the RI/FS is concluded?

24 A Yes.

25 Q That's the process that we follow under the

1 Superfund?

2 A That's right. And as a former Superfund attorney,
3 I knew that.

4 Q Are you aware of the activities that ATSDR has
5 conducted in Anniston?

6 A Yes, I have a fairly good understanding of what
7 those are. I couldn't recite them for you today, but I do
8 know their policies.

9 Q Do you know that the activities that ATSDR
10 conducted here are consistent with those that they conduct
11 when there's an NPL listing?

12 A I believe that access to the funds and the up
13 front understanding appear to be that that money will be
14 mobilized, does have an impact on negotiations. So whether
15 or not there is activity by ATSDR, to what level that
16 activity may rise, I still firmly believe that that strong
17 arm of enforcement teeth as provided by the NPL listing is
18 not provided to this community.

19 Q I understand that. But if the funding is there
20 for ATSDR -- and ATSDR has testified before Congress that
21 we've got X million dollars to do the work we need to do
22 here -- then they wouldn't have to tap into the Superfund if
23 they had that money?

24 A Okay.

25 Q Do you agree with that?

1 A I don't know enough about it to really be able to
2 give an opinion.

3 Q Do you know that Dr. Henry Falk (phonetic) has
4 testified before Congress and has gotten a budget to do the
5 work in Anniston?

6 A I think the fact that we had to have him testify
7 before Congress and have it taken out of the normal process
8 of NPL listing and access to that money, poses to me the
9 feeling that this may be problematic, but I don't know for
10 sure.

11 Q You know our consent decree requires the
12 defendants to reimburse us for all money that we spend in
13 this monitoring and overseeing the work here?

14 A Yes.

15 Q Is that consistent with CERCLA?

16 A Yes, I think --

17 THE COURT: But the rub is that we don't know how much
18 money you're planning to spend.

19 MR. WEINISCHKE: Well, Your Honor, they --

20 THE COURT: Well, I just make that comment in passing.
21 Go ahead with your cross-examination.

22 MR. WEINISCHKE: Okay.

23 THE WITNESS: Certainly for the Hudson, EPA did the
24 RI/FS and did the Record Of Decision, and we're only to the
25 point now where we have an agreement for the sampling.

1 Q And the reason that EPA did that was they didn't
2 have a responsible party standing up and saying, we'll give
3 you the money on the Hudson River?

4 A We've had quite an effort on the Hudson River with
5 General Electric.

6 Q I understand that. But they didn't come to the
7 table willingly, did they?

8 A No. And, therefore, the NPL listing has given us
9 quite a bit of enforcement authority.

10 Q Absolutely. I agree with that.

11 Do you know if the State of Alabama wants the Anniston
12 PCB site listed on the NPL?

13 THE COURT: The objection is sustained.

14 THE WITNESS: I do know that --

15 THE COURT: No. That means don't answer.

16 MR. WEINISCHKE: I have no further questions.

17 THE COURT: All right. Anything from the defendants?

18 MR. COX: Just a few.

19 THE COURT: All right.

20 CROSS-EXAMINATION

21 BY MR. COX:

22 Q And, I'm sorry, your last name again? I'm having
23 trouble hearing in the courtroom.

24 A MacGillivray.

25 Q And you work for the Riverkeeper; is that right?

1 A Yes.

2 Q And is the Riverkeeper being compensated in any
3 way for you coming down here?

4 A Not a dime.

5 Q Is any --

6 A -- my travel costs, my hotel room. That's it.

7 Q -- have you worked with a law firm in New York,
8 the Casvit, Benson (phonetic) firm?

9 A No. In fact, I've never heard of them before.

10 Q And Mr. Weinischke touched on this a little bit,
11 but the reason that EPA did the RI/FS on the Hudson River is
12 because GE refused to do it; isn't that true?

13 A In my experience -- yes, GE -- on both the
14 Housatonic and the Hudson River, we've had tremendous issues
15 with them participating in the cleanup.

16 Q And in your review of the -- you mentioned you'd
17 reviewed the original consent decree that was filed in
18 March, have you also had an opportunity to review the
19 revised consent decree?

20 A Yes.

21 Q Is there anything in either of those two
22 documents, on the face of those two documents, that in any
23 way limits the amount of money that Solutia or Monsanto or
24 Pharmacia may have to spend to perform the RI/FS and the
25 other activities that are required under either consent