STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

FRONTIER CHEMICAL ROYAL AVENUE PHASE I PRP GROUP and FRONTIER CHEMICAL ROYAL AVENUE PHASE II PRP GROUP

Petitioners **Index No. 7536-99**

-against-

JOHN P. CAHILL, Commissioner of NYS Dept. of Environmental Conservation, as Trustee

AND

ELIOT L. SPITZER, Attorney General of the State of New York, as Custodian of certain funds on deposit

Assigned Judge:

Respondents

PETITIONERS MEMORANDUM OF LAW

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PETITIONERS MEMORANDUM OF LAW[1]

Preliminary Statement

This is a special proceeding commenced under Article 78 of the Civil Practice Law and Rules and seeks an order requiring the Respondents to pay to the Petitioners the amount of at least $2,550,000.00 from a trust fund held by them exceeding $2,600,000.00. These funds are the proceeds from the payment of a performance bond which was posted on behalf of the former owner/operator of the Frontier Chemical Royal Avenue facility, a hazardous waste treatment and storage facility located in Niagara Falls, New York. The stated purpose of the bond was to "provide funding for facility closure" in the event that the owner/operator was unable to provide for facility closure if it became necessary. Closure became necessary in 1993. The DEC demanded payment on the bond on January 15, 1993 when the owner/operator of the facility refused to take action.

[1]There are two sets of Exhibits which are referenced in this memorandum; Exhibits attached to the petition designated Petition Exhibit "–" lettered "A" through "L"; Exhibits attached to affidavit of R. William Stephens designated Stephens affidavit Exhibit " " lettered "A" through "T"; other affidavits, also filed on behalf of Petitioners have exhibits attached. See affidavit of William B. Popham Exhibit "A"; affidavit of Neil M. Gingold Exhibit "A" through "D"; the affidavit of James K. Kay has no exhibit.

There is no dispute that the funds in the amount of $2.6 million are available (Paragraph 10 and 21 of Petition admitted in State's answer); there is no dispute that the Petitioners have expended in excess of $6,000,000.00 for facility closure under the State approved closure plan; there is no dispute that no one other than the Petitioners and the State have expended funds for facility closure under the State approved closure plan.[2]

The case presents the question of whether those who have expended funds for facility closure costs in carrying out the approved closure plan are entitled to reimbursement from the bond funds.

NYECL § 27-0917 subsection 5 requires that the owner or operator have a bond ("one of the instruments of financial assurance") "to insure proper facility closure based on the estimates approved pursuant to section 27-0918. NYECL § 27-0918(1) provides that owners and operators shall submit plans for the closure and post-closure monitoring and maintenance of their facilities. Subsection (2) provides that the plan for closure also have a written estimate of the costs associated with the closure plan. The bond written by the NYSDEC provides funding for facility closure only. Post closure costs were excluded. The approved closure plan excluded post-closure costs.

The claim of the Commissioner that he now has discretion as to how to spend these bond funds - now that closure is complete - for other than facility closure under the closure plan and closure cost estimate is contrary to Federal and State Environmental Law, contrary to the Federal and State regulations, contrary to Trust Law and completely ignores the wording of the bond, the closure plan approved by the Department and the closure cost estimate approved by the Department. Whatever discretion the Commissioner had while closure was ongoing has ended now that facility closure is complete. The Commissioner must now pay the Petitioners as long as the amount remaining in the fund is sufficient to cover the other claim.

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[2]The State now claims facility closure costs of $46,234.00. The Environmental Protection Agency makes no claim against the bond funds.

The Bond Form

Performance bonds for closure are one kind of financial assurance; financial assurance for closure is required by statute NYECL §§ 27-0917 subd. 1 and 27-0918 subd. 5.

The regulations specifically provide the form the bond must take and the exact language the bond must contain as follows.

6 NYCRR § 373-2.8(2)

(2) A financial guarantee bond, as specified in paragraph (d)(2) or (f)(2) of this section, or paragraph (d)(2) or (f)(2) of section 373-3.8 of this Part, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Bond Number: _____

Date bond executed: _____
[if more than one Surety, identify bond number with Respective Surety]

Effective date: _____

Principal: _____
[legal name and business address of owner or operator]

Type of organization: _____
[insert "individual," "joint venture," "partnership" or "corporation"]

State of Incorporation: _____

Surety(ies): _____
[name(s) and business address(es) of Surety(ies)]

Obligee: New York State Department of Environmental Conservation

EPA identification numbers, name, address, and penal sum amount(s) for each facility guaranteed by this bond [indicate facility and amounts separately]:

_____

_____

_____

Total penal sum of bond: $ _____ (Payable in good and lawful money of the United States of America)

WHEREAS, the Principal has agreed to provide financial assurances to the New York State Department of Environmental Conservation (hereinafter referred to as "NYSDEC"), guaranteeing that the sum of $ _____ Will be available and made payable to the Commissioner of NYSDEC (hereinafter the "Commissioner") or into a standby

trust fund, as directed by the Commissioner, for the benefit of NYSDEC, which guaranteed sums shall provide funding [insert "for facility closure and post-closure" or such other language, upon written approval of the Commissioner, which limits or reduces the activities for which the Bond guarantees funds] for each and every hazardous waste management facility identified above as provided for and as required for the obtaining and issuing of a permit to own or operate each such facility; and

. . . [other required bond language set forth in the form omitted]

The court should note the bracket language in this paragraph "which guaranteed sums shall provide funding [insert "for facility closure and post-closure" or such other language which limits or reduces the activities for which the Bond guarantees funds].

The actual language of the bond as written is "provide funding for facility closure" Bond Petition Exhibit "C", page 2.

The Commissioner omitted "and post closure" from the bond coverage. The closure cost estimate[3] confirms that no post closure is required at the Frontier facility. The statute provides that post closure monitoring and maintenance plans and cost estimates associated therewith shall apply to owners and operators of disposal facilities NYECL § 27-0918 subd. 7. Frontier was not a disposal facility.

Chronological History Of Events

In the late 1980s, Frontier Chemical owned and operated a treatment and storage facility, under a permit issued by the New York State Department of Environmental Conservation (NYSDEC) to handle and dispose of liquid hazardous waste.

Under Federal law, parties that are permitted to handle such materials are required to demonstrate financial responsibility either by showing that they have sufficient net worth to close the facility in the event it becomes necessary (42 USC § 6924 (a)(6)), or by posting a performance bond to cover facility closure costs (42 USC § 6924(t)(1)). This requirement has two purposes; first

[3]Required by State law (NYECL § 27-0918 subd. 1) and Stephens affidavit Exhibit "O" accepted by DEC.

it provides a fund so that the cost of facility closure does not fall on the taxpayers generally and second, it encourages those who have hazardous waste to send it to a facility that holds a permit allowing it to handle such material because they know that the financial situation is such that facility closure costs will be covered.[4] Federal law requires that State law requirements on this subject be at least as stringent as the Federal requirements so that one State which has relaxed standards does not become the dumping ground for the hazardous waste of all the other states (42 USC § 6929). Frontier Chemical Company posted a performance bond in the required amount of $1,500,000.00 to cover facility closure costs.[5] Petition Exhibit "C".

Additionally, Frontier Chemical Company was required (NYECL § 27-0918 subd. 1) to file a facility closure plan (Petition Exhibit "E") which set forth in detail the activities which would constitute facility closure including the location and identity of various vats, aboveground tanks, and

[4]At least in part, as it turns out.

[5]At the time the bond was posted in 1991, the Commissioner had the discretion to require the bond be used for closure costs and facility post-closure costs; in this specific case however, the Commissioner required and the bond stated that this performance bond was for facility closure costs only and did not include facility post-closure costs. See Point I *infra* and text supra page 2.

drums which would be removed and the contents properly disposed of if facility closure became necessary, Petition Exhibit "E".[6] This facility closure plan was approved by the Department (Exhibit "O") and became a condition of the permit (Stephens affidavit Exhibit "B" paragraph A-3 page 3) and is attached to the petition at Exhibit "E".

Frontier Chemical Company fell on hard times and the Commissioner on January 15, 1993, called for the forfeiture of the bond amount ($1,500,000.00). Petition, Exhibit "D".

In the meantime, because of the critical situation which existed at the Frontier Chemical Royal Avenue Facility and because the State of New York did not have sufficient funds to perform facility closure itself, the NYSDEC turned the facility over to the Environmental Protection Agency for action. The Environmental Protection Agency issued potentially responsible party letters calling for facility closure of the Frontier Chemical Royal Avenue facility to the Owner of the facility as well as the transporters and the arrangers for disposal of the hazardous substances which had been sent to the facility by various companies. The Petitioners are two groups of Potentially Responsible Parties who joined together to respond to the demands of the Environmental Protection Agency to perform facility closure. These companies sent their waste to Frontier in compliance with applicable

[6]The facility closure plan is quite specific. It was prepared "with the assumption that this work will be done by a "third party", that is, an independent, outside contractor as required by 6 NYCRR § 373-2(c)(1)(ii) Exhibit "E" 13-2. The plan provides for removal of waste in containers (primarily 55-gallon drums) and waste in bulk tanks. Petition Exhibit "E" 13-x. It provides for removal of waste from 4,772 drums in 18 specifically designated storage areas totaling 263,560 gallons of drummed liquid, Petition Exhibit "E" 13-5. It also provides for removal of waste from 9 tanks totaling 80,846 gallons from the oxidation process; 12 tanks totaling 326,460 gallons from the blended fuels system, Petition Exhibit "E" 13-6; and 23 tanks totaling 454,063 gallons from the waste water treatment system, Exhibit "E" 13-11. Overall, the closure plan provides for the removal from the facility of more than 800,000 gallons of liquid including wastewater. The closure plan also provides: "When closure is completed, the owner or operator will submit to the Commissioner certification by both the owner and operator and by an independent professional engineer registered in New York State that the facility has been closed in accordance with the specifications in the approved closure plan. Petition Exhibit "E" 13-16. See Affidavit of Matheis, Petition Exhibit "K", Paragraph 6. "Based on my review of same (facility closure plan) and my personal knowledge of the response activities described in paragraph 5 above, those above described PRP funded and implemented response activities were consistent with and effectively performed the closure tasks required for containers and tanks as described in said closure plan." The closure plan became a condition of the permit 6 NYCRR § 373-2.7(c)(1)(i). Permit Exhibit B paragraph A-3, page 3, attached hereto.

law relying, in part on the fact that Frontier gave financial assurance for facility closure to the State, i.e. the bond. Since no funds were available under the facility closure bond (because the bonding company refused to honor its bond), the Petitioner groups expended in excess of $6,000,000.00 performing facility closure called for under the facility closure plan on file with and approved by the NYSDEC. In this connection an on-scene coordinator for the Environmental Protection Agency, Kevin Matheis, supervised the activity of the contractors hired by the Petitioner groups and his affidavit which states that facility closure was completed by the Petitioners is attached to the petition as a Exhibit "K" and confirms that the facility closure plan was performed by the Petitioners. Other affidavits confirm that facility closure is complete under the closure plan.

The State of New York commenced an action on the bond in which the petitioners joined. After cross-motions for Summary Judgment, the State Supreme Court issued an order to the bonding company to pay the face amount of the bond plus interest to the State of New York. A number of the affidavits used in that litigation filed by the State of New York and the Petitioners are attached as exhibits to the petition in this case. Collectively, they set forth the Petitioners' expenditures for facility closure costs, the expenditures of the State of New York for facility closure costs and the fact that facility closure is complete. The Appellate Division affirmed the order of Supreme Court and the bond money was turned over to respondent Attorney General.

There are only two parties who have incurred facility closure costs. The State now claims in the amount of $46,234.00; and the petitioners in the amount of about $6,000,000. The amount of funds presently contained in the trust fund for facility closure exceed $2,600,000.00. The bond requires that these funds be paid for facility closure costs. The State regulations require that result. The State statutes and Federal statutes providing for financial assurance of Owners/Operators require that these funds be applied to facility closure. The bond references the permit which has as a

condition of the permit a facility closure plan and a closure cost estimate (Stephens affidavit Exhibit "B" A-3 page 3). The trustee of a trust set up for a particular purpose is required under the law to use the funds only for that purpose. There is no reason for the Commissioner to delay a partial payment to Petitioners of at least $2,550,000.00[7] which should be ordered by this Court in this special proceeding as a matter of law.

Jurisdiction

This is a Special Proceeding brought against the State officers under CPLR 7803 to determine whether respondents have failed to perform a duty enjoined upon them by law CPLR 7803(1) or to determine whether the failure of the State officers to pay a portion of the set aside funds to the Petitioners is arbitrary and capricious CPLR 7803(3). The Supreme Court has jurisdiction to hear such a proceeding under Article 78 of the CPLR.

Venue

The venue of this action in Albany County is proper. The Bond which requires payment of the funds to the Respondent as Trustee was posted in Albany County at the direction of Respondent's predecessor; Section 506(b) requires that the venue of the action be in Albany County.

The Fund

There is presently on deposit in the escrow account of the Respondent Attorney General a sum of more than $2,600,000.00 which are the bond proceeds.

The Bond

The bond posted by Frontier Chemical Waste Process, Inc. reproduced as Exhibit "C" attached to the petition. It recites that Frontier had "agreed to provide financial assurances" to the

[7]The Environmental Protection Agency makes no claim against the funds (Answer of respondents, Exhibit "2"). The fact that the State claims facility closure costs of $46,243.00 is no reason why the court should not grant the Petitioners the amount of $2,550,000.00. This would still leave funds in the trust sufficient to cover claimed State facility closure costs.

State

> "guaranteeing that the sum of $1,500,000 will be available and made payable to the Commissioner of NYSDEC or into a standard trust fund, as directed by the Commissioner for the benefit of NYSDEC which guaranteed sums shall provide funding for facility closure for each and every hazardous waste management facility identified above as provided for and as required for the obtaining and issuing of a permit to own or operate each such facility; and ...[8]
>
> NOW, THEREFORE . . .the surety(ies) hereto are held and firmly bound to NYSDEC in the above full and just penal sum for the payment of which we bind ourselves . . .

Bond Petition Exhibit "C", page 2

Facility Closure Costs

Petitioners are now aware of only two parties who have expended funds for facility closure costs at the Frontier Chemical Royal Avenue Facility: to wit, the Petitioners (Phase I and Phase II PRP Groups) and the State of New York.

The Petitioners have expended in excess of $6,000,000.00 facility closure costs. Petition Exhibits "F", "G", "H" and "I" (affidavit of Popham, Exhibit "A" and affidavit of Kay). The State of New York claims expenditures of $46,234.00. Allowing sufficient funds to cover the claim by the State of New York in the amount of $50,000.00 there remains available for distribution for facility closure costs funds exceeding $2,550,000.00 which the Respondent, John P. Cahill, is obligated to distribute in accordance with the provisions of the Bond creating the fund and in accordance with applicable State statutes and regulations, the permit and the approved facility

[8]The Bond language is dictated by the State Regulation 6 NYCRR § 373-2.8(j)(2). The required language incorporates the closure plan and closure cost estimate by reference to the permit. The permit (Stephens Affidavit Exhibit "B") requires a Closure Plan and a Closure Cost Estimate as a condition of the permit. See Permit Exhibit "B" paragraph A3, page 3. The State Statutes also require a Closure Plan and a Closure Cost Estimate (NYECL § 27-0918 subd. 1). The form required by the Federal Regulations for the Performance Bond 40 CFR § 264.151(c). specifically provides that "the Principal shall faithfully perform closure of each facility for which this bond guarantees closure, in accordance with the closure plan and other requirements of the permit . . . The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above". (40 CFR § 264.151(c))

closure plan.

Summary of Argument

The Commissioner is bound by the prior actions of the Department as to these bond funds; the funds must be applied to facility closure costs; the funds cannot be paid for post-closure costs; they must be devoted to reimburse expenditures to carry out the approved closure plan since facility closure as outlined in the closure plan is complete.

The approved closure plan as set forth in the accepted closure cost estimate was carried out by the Petitioners. The closure cost estimate contained no amount for soil or groundwater sampling; the closure cost estimate specifically provided that post closure costs were not necessary; there has been no showing by the Commissioner that this was necessary or contemplated.

The Petitioners have spent more than the bond amount for facility closure costs covered by the bond in performing the facility closure according to the plan which is a part of the permit; the Commissioner's act in refusing payment is arbitrary and capricious; the Commissioner should order payment of the reimbursement from the bond funds as a purely ministerial act under the terms of the bond creating the fund.

Argument

POINT I

The Commissioner cannot now repudiate the bond terms which he selected; "which limits or reduces the activities for which the Bond guarantees funds"; nor can the Commissioner change or alter the fact that the bond reference to funding for closure refers to the closure plan and the closure cost estimate of Frontier which the State found to be acceptable.

The required bond language is established by regulation 6 NYCRR 373-2.8(j)(2).[9] The bond must contain the language incorporating the words "which guaranteed sums shall provide funding

[9]Reproduced in part at page 2 supra.

for" and "each and every hazardous waste management facility identified above as provided for and as required for the obtaining and issuing of a permit to own or operate each such facility." 6 NYCRR 373-2.8(j)(2). There is a bracket provided for in the regulation dictating the bond wording after the required words "provide funding for" which states:

> ["for facility closure and post-closure" or such other language, upon written approval of the Commissioner, which limits or reduces the activities for which the Bond guarantees funds]

Bond Petition Exhibit "C", page 2. The Commissioner inserted in this bracketed space "for facility closure" thereby omitting the words "and post closure." The bond therefore, consistent with the language of the regulation is limited to funding facility closure and does not cover post closure activities. A remedial investigation/feasibility study (RI/FS), capping, remedial work, groundwater monitoring and treatment are all corrective action and/or post-closure costs (see Affidavits of Kay, Popham, and Gingold and Matheis Petition Exhibit "K").

The Closure Cost Estimate of Frontier and also provides that no post-closure care and maintenance is required under the Closure Plan.

> **16.0 <u>POST-CLOSURE CARE AND MAINTENANCE PLAN</u>**
> **{6 NYCRR 373-2.7(g) and 373-2.7(h)}**
>
> Since the hazardous waste activities of Frontier Chemical Waste Process, Inc. involve storage and treatment only and not disposal, a post-closure care and maintenance plan is not required.
> All wastes, waste residues, equipment and containment devices will be treated, decontaminated and/or removed upon final closure, hence such a plan is unnecessary.[10]

Stephens affidavit, Exhibit "E".

[10]Stephens affidavit Exhibit "E" 16.0 Page 16-1.

Finally, the various memoranda of the State disclose that the State was using the closure plan to determine what the closure cost estimate should be.[11] They also disclose that the State found the closure cost estimate of Frontier acceptable[12] and accordingly reduced the amount of waste at the facility to conform to the amount at the Surety. See Stephens affidavit Exhibits "E" "G", "O" and "K".

In a similar context involving a state officer as a custodian of a fund the Court of Appeals declared: "The integrity of the State government, upon which the public is entitled to rely, requires, at the very least, that the State keep its lawfully enacted promises." Alliance of American Insurers v. Chu 77 NY 2d 573 at 577 (1991), 77 N.Y.2nd

POINT II

The respondent, Cahill, by successfully prosecuting an action against the bonding company and receiving the bond proceeds has adopted the trust agreement set forth in the bond and acquiesced in becoming a trustee of the subject funds.

When the State successfully prosecuted an action against the bonding company (Acstar) that posted the performance bond on behalf of the Owner/Operator (Frontier Chemical Corporation) and received the funds now held by the Respondent Spitzer as custodian, the Respondent Cahill approved the trust provision set forth in the bond and is now the constructive trustee holding the funds for beneficiaries that paid "for facility closure" (Bond Exhibit "C", page 2) at Frontier.

To create a valid trust under the law of that State four essential elements must be provided: (1) a designated beneficiary, (2) a designated trustee, who is not the same person as the beneficiary, (3) a clearly identifiable res, and (4) the delivery of the res by the settlor to the trustee with the intent

[11]Stephens affidavit Exhibit "O".

[12]Stephens affidavit Exhibit "K" Memorandum of September 14, 1992, third paragraph.

of vesting legal title in the trustee. *Brown v. Spohr*, 180 N.Y. 201, 209, 73 N.E. 14 (1904). Agudas Chasidei Chabad of U.S. v. Gourary 833 F.2d 431 at 433-434 (2nd Cir. 1987)

All of these elements are satisfied; the beneficiaries are those who have expended funds for facility closure; (Petitioners, State of New York); the trustee is Respondent Cahill, the res is the fund of approximately $2.6 million held by Respondent Spitzer as custodian; and the delivery of the funds occurred in June, 1999.

Additionally, the State received the bond funds in June of 1999. The regulations then in effect require the owner/operator to place the bond funds in a trust fund. Since the owner/operator is defunct, the commissioner is required to establish the trust fund. The regulation provides:

> The owner or operator who uses a surety bond to satisfy the requirements of this subdivision must also establish a standby trust fund. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Commissioner. The standby trust fund must meet the requirements specified in paragraph (1) of this subdivision.

6 NYCRR 373-3.8(d)(2) (amendment effective November 30, 1994).

POINT III

The Trustee has a duty to carry out the terms of the trust; i.e., to pay such funds to those who have financed facility closure.

(a) General Principles Regarding Trust Obligations.

The trustee of a trust fund has an obligation to apply the funds for the purpose set forth in the instrument creating the trust and only for that purpose.

It is settled hornbook law[13] that a trustee must scrupulously follow the mandate of the trust instrument and carry out the trust. As a fiduciary, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust to the exclusion of the interests of all other parties. *106 NY Jur 2d Trusts § 234*

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.

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[13] ***Scott on Trusts states:***
§ **164. Duties and powers of the trustee.** The extent of the duties and of the powers of a trustee depends primarily upon the terms of the trust. Insofar as the trust instrument expressly or by implication imposes duties or confers powers upon the trustee, the terms of the trust determine the extent of his duties and powers, except so far as the performance of the duties or the exercise of the powers is or becomes impossible, or the provision is illegal, or there has been such a change of circumstances as to justify or require deviation from the terms of the trust. II Scott on Trusts § 164 Third Edition 1967.
Corpus Juris Secondum states:
Enforcing Execution or Performance of Duties of Trust.
Where the trust has been declared or established, or the trustee has accepted the trust, equity, as long as it is possible for it to do so, will not permit the trustee to defeat the trust by his wrongful acts, or failure or refusal to act, but it will enforce the execution or performance of the trust. Equity will not compel a trustee to take on himself the burdens of a trust; but where the trust has been declared or established, or the trustee has accepted the trust, equity, as long as it is possible for it to do so, will not permit the trustee to defeat the trust by his wrongful acts, or failure or refusal to act, but will afford relief by compelling a faithful execution of the trust for the preservation and enforcement of rights depending on and derivable from it, even though the directions contained in the instrument creating the trust may seem to be fanciful or unwise, provided the person seeking the execution of the trust complies with any conditions precedent imposed by the trust instrument. Thus, a court of equity may, in a proper case, compel a trustee to make payments to the beneficiaries; to apply the trust fund or property to the purposes for which the trust was created; to refund money misappropriated; to transfer or convey the trust property, and properly execute a deed therefor; or to made a sale of the trust property according to the terms of the trust; and it may compel the execution of a power in trust. Similarly, relief will be afforded in equity against a trustee who attempts to hold the property and disclaim the trust, or who refuses to take proper steps for the protection of the trust property against adverse claims. (Footnotes omitted) 90 C J S Trusts§422.
American Jurisprudence 2d states:
Beneficiaries, for the duration of a trust, have a legally enforceable right to insist that the terms of the trust be adhered to; this is so even where the trust is revocable. While it has been stated that the remedies of a beneficiary against a trustee are exclusively equitable, trustees may be sued, upon misapplication of such funds, either at law for money had and received, or in equity as a trustee for a breach of trust. A trust beneficiary may bring an action for damages against a trustee or a third person. Furthermore, the beneficiary of a trust can maintain a suit; to compel the trustee to perform its duty; to enjoin the trustee from committing a breach of trust; to compel the trustee to redress a breach of trust; to appoint a receiver to take possession of the trust and administer the trust; or to remove the trustee. (Footnotes omitted)76 AM Jur2d Trusts §665.

> Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions (*Wendt v. Fischer, 243 N.Y. 439, 444)*. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

Meinhard v. Salmon 249 N.Y. 458 (1932) (Cordoza, J.).

The primary duty of a trustee of a trust is to carry out the purposes for which the trust was created. Here the trust was established "to provide funding for facility closure" (Bond page 2). The primary obligation and duty of the trustee of this trust once the funds were paid to the State of New York was to apply those funds to those who had incurred expenses for facility closure. This, the trustee has failed to do. The funds have not been so applied and the parties who have incurred substantial facility closure expenses in closing the facility according to the Department's approved plan remain unreimbursed. The law imposes a duty on the trustee to pay out the funds at least to the extent that any remaining claim will not be compromised.

The Restatement of Trusts provides:

> § **345. Duty of Trustee to Transfer Title or Possession on Termination of Trust.** Upon the termination of the trust it is the duty of the trustee to the person beneficially entitled to the trust property to transfer the property to him or, if the trustee has possession but not title, to delivery possession to him. *2 Restatement of Trusts 2d § 345 (1959)*
>
> *d. Conveyance of property in kind.* If upon the termination of the trust there is a single beneficiary who is entitled to the trust property, it is the duty of the trustee to convey the property to him, rather than to sell it and to pay him the proceeds, unless it is otherwise provided by the terms of the trust. By the terms of the trust, however, the trustee may be authorized or directed to sell the trust property and to pay over the proceeds.

When the time for the termination of the trust has arrived it is the duty of the trustee to proceed with the expedition to wind up the trust and distribute the estate.

> *To the extent that a distribution of a part of the property can be made without risk to the beneficiaries or to the trustee, he should make such distribution. Thus, if it is clear that a certain beneficiary is entitled to receive a certain part of the trust estate, the trustee is not justified in withholding such part from distribution merely because the total amount which the beneficiary is to receive has not been ascertained*. [Emphasis added.] *2 Restatement of Trusts 2d § 345 (1959)*

(b) Application of principles to DEC Commissioner

It is clear that the respondent Cahill holds the 2.6 million dollars as a trustee and respondent Spitzer as a custodian of the funds. The trust instrument i.e., the Bond provides the direction to the trustee as to how the funds are to be applied namely "to provide funding for facility closure" Bond Exhibit C, page 2. Because facility closure is complete (Affidavit of Matheis, Exhibit "K", see also Affidavits of Popham, Kay and Gingold) there is no reason to delay distribution of at least so much of the funds that can be made without risk to beneficiaries other than petitioners. The State of New York is sufficiently protected if in excess of $50,000 is held by the trustee to cover a claim which now totals about $47,000.

The failure of the respondent to distribute trust funds for facility closure more than 5 years after facility closure is complete, is a violation of the trust duty imposed on him at common law. It is clear that the legal duty imposed on the trustee may be imposed by common law. In re Steinway, 159 NY 250 (1899). It is improper to hold this fund hostage for the completion of investigation and remediation of the property as a hazardous waste site. The bond is quite specific and refers only to facility closure costs – not corrective actions, not post closure costs and not hazardous waste site investigation. Again, the admonition of the Court of Appeals is relevant; "the statutory scheme, viewed as a whole created in the State obligations to preserve the fund and to use its assets and earnings only for the narrow purposes set forth." *Alliance of American Insurers v. Chu 77 NY 2d 573 at 588 (1991)*.

POINT IV

It was originally contemplated that the trustee would hold such funds and apply them to facility closure costs; because facility closure is now complete, there is no reason to delay payment of the available funds to Petitioners.

In the normal course of events, the requirement that a Owner/Operator of a permitted facility demonstrate financial responsibility and post a performance bond to cover facility closure costs anticipates that in the event that facility closure is required, the bond monies would be held in trust and applied to facility closure costs. In some instances the way this is handled at facilities which have been abandoned, is that the State in receipt of the facility closure bond funds agrees to turn over such funds to a group of PRPs who sign a Consent Order agreeing to perform facility closure or to the federal or state agency overseeing the work. The funds are then applied to facility closure costs.

The State of New York apparently decided in 1993 that it would turn over the bond proceeds to the Environmental Protection Agency to help fund the two removal actions. In a memorandum dated April 22, 1993, Kevin Matheis the On-Scene Coordinator states:

> "As a part of the company's financial assurance requirements for closure under the New York State Environmental Conservation Law, Frontier Chemical Waste Process, Inc., obtained a bond with ACSTAR Insurance Company, in the amount of $1,500,000.00. The bond was issued on May 10, 1991 and is payable to the New York State Department of Environmental Conservation (NYSDEC).
>
> Since issuance of a Summary Abatement Order in December 1992, which required the company to cease operations, the NYSDEC has been attempting to access the bond. On January 15, 1993 Commissioner Jorling issued a demand letter to ACSTAR which required that the bond be surrendered in 14 days. ACSTAR responded to this letter by requesting a 60 day extension. Although the NYSDEC responded to this request by allowing a 14 day extension, they have yet to receive the bond monies. Presently, this matter has been referred to the New York State Attorney General's office. <u>The NYSDEC is continuing the pursuit of the funds and has acknowledge that the money will be turned over the Environmental Protection Agency upon collection</u>. The Environmental Protection Agency's office of Regional Counsel continues to pursue remittance of the bond money to the Environmental Protection Agency." [Emphasis added.]

(Stephens Affidavit, Exhibit "P")

The bonding company refused to honor its obligation until judgment was entered against it in 1999.

If the bonding company had paid the funds then the State of New York would have had those funds available to close the facility itself or to negotiate with a group of parties who would agree with the State to perform facility closure according to the plan and use the funds that the State had in its possession, or the funds could have been turned over to the Environmental Protection Agency. In the 8 years since facility closure was ordered, Petitioners have completed the facility closure, and only thereafter has the State received the bond funds in trust to cover facility closure costs. There is no reason to now delay payment.

POINT V

Earlier memoranda decisions of Supreme Court in the action of the Bond are not determinative of the standing of petitioners now; the federal and state regulations provide for reimbursement from bond funds.

The State has appended to it brief copies of Supreme Court decisions in the action on the bond. The State has not argued that petitioners lack standing to make claims against the funds. No doubt the State will quote from dicta in those Supreme Court memoranda that the State may use these funds for remediation. That issue was not before the court in that case. The only issue before the court was the enforceability of the bond against the Surety. Statements of the court as to how the bond proceeds might be used by the State are pure dicta.[14]

[14]The affidavit of the Assistant Attorney General in the bond action, however, is somewhat revealing. He stated in an affidavit sworn to on December 9, 1996: "The bond is a financial assurance requirement under ECL § 27-0917 which is intended for protection against closure costs. Defendant cannot, consistent with legislative intent, deny that protection by stonewalling bond payment. Payment of defendant's bond obligation will not result in a double recovery" for the State. Rather, the NYSDEC must and will use the bond monies to finance facility closure and thereby defray substantial closure costs already incurred and any that may still be incurred. See Shattuck 12/5/96 affidavit; Matheis 12/6/96 affidavit; Stephens 9/13/96 affidavit, Ex.s G, H, J, K; Frazer 10/23/96 affidavit, p. 3, paragraphs 9 and 10. Thus defendant's seventeenth defense is without merit." [Emphasis added.] (Stephens affidavit, Exhibit "Q").

The federal regulations (40 CFR 264-143(a)) and the state regulations (6 NYCRR 373-3.8(d)(2)(x) provide that claims may be filed to obtain reimbursement from bond funds for closure costs. Both the federal and state regulatory provisions contemplate that the bond funds will be spent for facility closure. Closure in this case is according to the closure plan. The facility closure under the closure plan is complete. The funds cannot be used for post closure costs. The petitioners should be paid the amount claimed as reimbursement.

POINT VI

The papers filed by the respondent Commissioner establish that he is proceeding contrary to the Statutes and Regulations and that court intervention is necessary; the Bond funds cannot be used to address corrective action or surface impoundments.

Section 27-0917 subd. 1 provides authority for DEC to require financial assurance for many different types of activities at a hazardous waste management facility:

> Within eighteen months after the effective date of this section, the commissioner shall promulgate regulations for hazardous waste facilities identifying financial requirements to be included as conditions in hazardous waste facility permits for [1] the remediation of failures during operation and after facility closure, [2] for facility closure and [3] for pre-closure and post closure facility monitoring and maintenance.

ECL § 27-0917 subd. 1. The language of the bond states:

> [w]hich guaranteed sums shall provide funding for facility closure for each and every hazardous waste management facility identified above and as required for the obtaining and issuing of a permit to own or operate each such facility.

Bond at A-2, Petition Exhibit "C". The bond requires the bonding company to pay over the amount of the bond in the event that the bond is called by DEC after the occurrence of certain conditions precedent. The bond requires DEC to hold the bond proceeds in trust and to apply the funds to the costs of facility closure. Section 373-3.8(d)(2) provides:

> (2) Financial guarantee bond (i) An owner or operator may satisfy the requirements of this subdivision by obtaining a financial guarantee bond which conforms to the requirements of the paragraph and submitting the bond to the Commissioner . . .

(ii) The wording of the surety bond must be identical to the wording specified in Section 373-2.8(j)(2) of this Part.

(iii) The owner or operator who uses a surety bond to satisfy the requirements of this subdivision may also be requested to establish a standby trust fund. Under the terms of the bond, all payments will be made in accordance with instructions from the Commissioner. The standby trust fund, if required, must meet the requirements specified in paragraph (1) of this subdivision.

6 NYCRR § 373-3.8(d)(2) (in effect May 10, 1991). Section 373-3.8(d)(1)(x) provides:

> Within 60 days after receiving bills for partial or final closure activities, the Commissioner will instruct the trustee to make reimbursement in those amounts as the Commissioner specifies in writing, if the Commissioner determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the Commissioner has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, the Commissioner may withhold reimbursements of such amounts as he deems prudent until he determines, in accordance with paragraph (8) of this subdivision, that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. If the Commissioner does not instruct the trustee to make such reimbursements, the Commissioner will provide the owner or operator with a detailed written statement of reasons.

6 NYCRR § 373-3.8(d)(1)(x) (in effect May 10, 1991). The regulation at § 373-3.8(d)(2) provides that the DEC "may require" the establishment of the standby trust fund. 6 NYCRR § 373-3.8(d)(2)(iii) (in effect May 10, 1991). The terms of the standby trust require the Commissioner to pay funds over to those who have incurred closure costs and have submitted requests for reimbursement so long as the costs incurred were consistent with the closure plan, unless the Commissioner finds that the cost of closure will significantly exceed the amount of funds available in the trust. The Commissioner's duties where the establishment of the standby trust has not been requested are not so precisely defined. There can be no question, however, that the funds must be used for facility closure under the terms of the bond. Any question as to the affect on DEC's duty to require the establishment of the standby trust conforming to the requirements of 373-3.8(d)(1) was removed with the amendments to the regulations promulgated in 1994. Section 373-3.8(d)(2)(iii) was amended to read:

> The owner or operator who uses a surety bond to satisfy the requirements of this subdivision must also establish a standby trust fund. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Commissioner. The standby trust fund must meet the requirements specified in paragraph (1) of this subdivision.

6 NYCRR § 373-3.8(d)(2) (amendment effective Nov. 30, 1994). It is useful to review the federal regulations which required the establishment of the standby trust and established the same mechanism for reimbursing those who have expended funds for facility closure consistent with the approved facility closure plan. 40 C.F.R. § 265.143(a) , (b) & (c) (July 1, 1990 edition in effect on May 10, 1991) set out in Appendix L.

Respondents' acknowledge the application of section 373-2.8(j)(1) in their memorandum of law:

> DEC regulations empower the DEC Commissioner to direct that payments from a closure bond be made to "any person" [sic] as reimbursement for expenditures for the cost of closure. See 6 NYCRR Section 373-2.8(j)(1). However, the Commissioner is not <u>required</u> to pay anyone - the Petitioners here or anyone else; it is a purely discretionary obligation.

Respondents' Memorandum of Law at 17 n.5 (February 28, 2000)(emphasis in original). Section 373-2.8(j)(1) contains the form that must be used to establish the standby trust pursuant to section 373-3.8(d)(2)(iii) and states:

> The Trustee shall make payment from the Fund as the Commissioner shall direct, in writing, to provide for the payment of the costs of Closure and Post Closure of the facilities covered by this Agreement. The Trustee shall reimburse the Settlor or other persons as specified by the Commissioner from the Fund for the expenditures of such covered activities in such amounts as the Commissioner shall direct in writing. In addition, the Trustee shall refund to the Settlors such amounts as the Commissioner specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

6 NYCRR § 373-2.8(j)(1). The reimbursement procedure set out in section 373-3.8(d)(1)(x) requires action of the Commissioner now because closure is complete.

> Within 60 days after receiving bills for partial or final closure activities the Commissioner <u>will</u> instruct the trustee to make reimbursements in those amounts as the Commissioner specifies in writing, if the Commissioner determines that partial or final closure expenditures are in accordance with approved closure plan, or otherwise justified.

6 NYCRR § 373-3.8(d)(1)(x)(emphasis added). Nowhere in the Respondents' answer or in the affidavits submitted therewith do the Respondents identify any activity, described in the DEC approved closure plan or in the approved current closure cost estimates, which is not complete or that any of Petitioners' activities were not consistent with the approved closure plan. The regulation continues:

> If the Commissioner has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, the Commissioner may withhold reimbursements of such amounts as he or she deems prudent.

6 NYCRR § 373-3.8(d)(1)(x). The Commissioner has not made such a determination. The Commissioner has given no indication of what he believes to be the maximum cost of closure over the remaining life of the facility. Finally, the Commissioner must within 60 days either direct payment of reimbursement to those who have incurred closure costs consistent with the closure plan or provide a detailed written statement of the reason for its refusal:

> If the Commissioner does not instruct the trustee to make such reimbursements, the commissioner will provide the owner or operator with a detailed written statement of reasons.

6 NYCRR § 373-3.8(d)(1)(x). Since the Petitioners have already spent in excess of $6 million to close the facility, there are no funds available for a refund to the settlor. Since closure consistent with the approved closure plan is complete, the funds held in trust should be distributed to the Petitioners who have carried out the approved closure plan. Respondents' characterization of their duty as a "purely discretionary obligation" demonstrates the need for the intervention of this Court.

ECL section 27-0917(5) provides:

> Any permit issued by the department to construct or operate a hazardous waste facility shall, except pursuant to regulations promulgated pursuant to subdivision two of this section, require the owner or operator, or an affiliate thereof, to secure, at a minimum, one of the instruments of financial assurance provided for in paragraph (c) of subdivision one of this section [including a surety bond]. Such instruments shall be designed to insure proper facility closure, based on the estimates approved pursuant to section 27-0918 of this chapter.

ECL § 27-0917(5). Closure is performed pursuant to a closure plan as set out in section 27-0918 subd. 1:

> Owners and operators of hazardous waste facilities shall submit to the department for its approval plans for the closure and post-closure monitoring and maintenance of their facilities. The department may promulgate rules and regulations concerning the contents of such plans.

ECL § 27-0918 subd. 1. The content of these plans is specifically provided for in the regulations at section 373-3.7(c):

> (2) Content of plan. The plan must identify steps necessary to perform partial and/or final closure of the facility at any point during its active life. The closure plan must include, at least:
>
> (i) a description of how each hazardous waste management unit at the facility will be closed in accordance with subdivision (b) of this section.
>
> . . .
>
> (iv) a detailed description of the steps needed to remove or decontaminate all hazardous waste residues and contaminated containment system components, equipment, structures and soils during partial and final closure, including but not limited to procedures for cleaning equipment and removing contaminated soils, methods for sampling and testing surrounding soils, and criteria for determining the extend of decontamination required to satisfy the closure performance standard;
>
> (v) a detailed description of other activities necessary during the partial and final closure period to ensure that all partial closures and final closure satisfy the closure performance standards, including but not limited to groundwater monitoring, leachate collection, and run-on and runoff control.

6 NYCRR § 373-3.7(c)(2)(i), (iv), (v). Closure cost estimates are provided for at section 373-3.8(c)(1):

> (c) Cost estimates for facility closure. (1) The owner or operator must have a detailed written estimate, in current dollars, of the cost of closing the facility . . .
>
> (i) The estimate must equal the cost of final closure at the point in the facility's active life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan (see section 373-3.7(c)(2) of this Subpart).

6 NYCRR § 373-3.8(c)(1). The cost estimate must be attached as schedule A to the closure trust fund required under section 373-3.8(d)(1) and set out at section 373-2.8(j)(1).

The Commissioner had broad discretion to require or not to require financial assurance for various activities at the site. Closure is the only activity that the Commissioner lacks the authority to waive. Section 27-0917(3) states:

> Any owner or operator of an existing or proposed hazardous waste facility may request a modification from the department of any of the financial requirements established pursuant to subdivision one of this section. A modification may be granted in the discretion of the department if such financial requirements are found to be unnecessary or inappropriate, consistent with public interest and the purposes of this section and supported by written findings setting forth the reasons for the modification. Such modification request shall be considered a request for modification of the permit for the facility pursuant to article seventy of this chapter. In no case shall a modification granted pursuant to this subdivision eliminate or reduce the minimum requirements established in subdivision five of this section.

ECL §27-0917(3). Having exercised its discretion, the Department now wishes to avoid the consequences of it choices. It is now asking this Court to declare that "closure," a term narrowly defined in the regulations which require a written closure plan setting out with specificity the tasks to be completed and written closure cost estimates indicating the costs contemplated for each of these tasks, also encompasses "corrective action," a term with its own narrow and distinct definition. See generally, John H. Turner, The U.S. EPA 40 C.F.R. Part 258 Financial Test/Corporate Guarantee – New Environmentally Protective, Cost-Effective Mechanisms for the Demonstration of Financial Responsibility, 9 Fordham Envtl. Law J. 567 at n.13-28 (and accompanying text) (1998) (discussion of financial responsibility requirements for closure costs and corrective action under RCRA; RCRA "seeks to provide that adequate funds are available to close waste management facilities, care for them after closure, undertake necessary corrective and compensate for releases from those facilities"); Judith M. Nixon, Comment: The Problem with RCRA -- Do the Financial Responsibility Provisions Really Work?, 36 Am. U. L. Rev. 133, n.172-73 (and accompanying text) (Fall 1986).

"Corrective action" under RCRA arose out of a gap in the statutory coverage of RCRA which existed because of the method used to phase-in the new requirements relative to owners and operators of hazardous waste management facilities. The statutory scheme allowed the owners and

operators of hazardous waste management facilities in existence on the date the statute took effect to be "deemed" to have a permit so long as they submitted an application for a permit pursuant to the regulations promulgated under the statute. These facilities are described as having "interim status" until their permit application is either approved or denied. 42 U.S.C. § 6925(e); 40 C.F.R. Part 265; ECL § 27-0911(1); 6 NYCRR § 373-1.3, Part 373-3. The gap existed because while the RCRA permitting process and the standards it imposed addressed active facilities operating under interim status, it did not address inactive hazardous waste management units that might exist on the same property but which were not active and for which a permit was not required.

The gap in the statutory scheme was addressed in 1984 with amendments to RCRA section 3004 (42 U.S.C. § 6924) adding subsection (u) which provides:

> **(u) Continuing releases at permitted facilities**
>
> Standards promulgated under this section shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit. Permit issued under section 6925 of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

42 U.S.C. §§ 6924(a), (t) & (u) (emphasis added). The legislative history explains the rationale for the amendments related to corrective action:

Current EPA regulations do not address all releases of hazardous constituents from solid waste management units at facilities receiving permits under section 3005(c). This facility which is causing ground water contamination from inactive units, without the permit addressing that contamination in any way. The Conferees believe that all facilities receiving permits should be required to clean up all releases from all units at the facility, whether or not such units are currently active.

This provision provides also that, where corrective action cannot be completed prior to issuance of permit, the cleanup may occur after the date of final permit issuance only if the conditions, schedules, terms, and financial assurances of such cleanup actions are specified as a condition of the permit.

House Conference Report No. 98-1133, at 91-93, reprinted in 1984 U.S.C.C.A.N. 5662-64. These amendments to federal law (42 U.S.C. § 6924(u)), caused the New York State legislature to make certain amendments to NYECL sections 27-0911, 27-0913 and 27-0917 in 1990. L. 1990, c. 831, § 8, 10-12. The amendments to ECL section 27-0911 authorize the granting of exemptions from requirements and require corrective action:

> 1. Standards applicable to owners and operators of hazardous waste treatment, storage and disposal facilities shall be those established in title seven of this article, and the regulations promulgated thereunder, shall be consistent with comparable standards promulgated thereunder, shall be consistent with comparable standards promulgated by the administrator pursuant to RCRA, and shall also include compliance with the manifest system established in section 27-0905 of this title. Where appropriate and consistent with the provisions of RCRA, such standards may authorize the granting of exemptions from requirements, or variances in requirements, according to criteria established therein.
>
> 2. Such standards shall require corrective action, including corrective action beyond the facility boundary where necessary to protect human health and the environment, for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility seeking a permit under section 27-0913 of this title, regardless of the time at which waste was placed in such unit.

NYECL § 27-0911. Section 27-0913 was amended to authorize corrective action provisions as permit conditions:

> 1. a. No person shall engage in storage, treatment, or disposal, including storage at the site of generation, of hazardous wastes without first having obtained a permit pursuant to title seven of this article. Such permits shall require corrective action, including corrective action beyond the facility boundary where necessary to protect human health and the environment, for all releases of hazardous waste or constituents from any solid waste management unit at a permitted treatment, storage or disposal facility, regardless of the time at which waste was placed in such corrective action where such corrective action cannot be completed prior to issuance of the permit.
>
> b. Where appropriate and consistent with the provisions unit, and shall contain schedules of compliance for such of RCRA, the commissioner may by regulation provied for interim status for hazardous waste treatment, storage or disposal facilities. Such regulation may include, but shall not be limited to, termination provisions, corrective action provisions and requirements for modification of such facilities as may be necessary to protect human health and the environment. The condition of interim status shall not be deemed a permit within subdivision four of section 70-0105 of this chapter, and shall not be deemed to be a license within subdivision four of section one hundred two of the state administrative procedure act.

NYECL § 27-0913(a) & (b). Section 27-0917 addresses financial assurances for corrective

actions in subsection 9:

> 9. The Commissioner shall promulgate regulations establishing requirements of financial responsibility to assure the completion of corrective action required pursuant to subdivision two of section 27-0911 or subdivision one of section 27-0913 of this title.

NYECL § 27-0917.

Corrective action addresses non-permitted portions of the property whether they be inactive hazardous waste management units which were active prior to the enactment of the permitting standards or portions of the property affected by other non-permitted activities. Closure arises out of the permitting process and the standards which that process imposes upon owners and operators of hazardous waste treatment, storage and disposal facilities. The two activities work hand in hand but their functions do not typically overlap.

In United States v. Indiana Woodtreating, 686 F. Supp. 218 (S.D. Ind. 1988) an operator failed to comply with the requirements necessary to qualify for interim status as a facility in operation at the time the RCRA permitting standards came into effect. United States v. Indiana Woodtreating, 686 F. Supp. 218, 221-22 (S.D. Ind. 1988). It failed to file the necessary application including a closure plan and closure cost estimate and to obtain a financial instrument guaranteeing funds for closure. Id. The Court held that section 3008(h) of RCRA required the operator to undertake corrective action in spite of its failure to obtain interim status. Id. In that case corrective action expanded to include all of the necessary environmental activities required at the property. Since permit status was never obtained, there was never a determination relative to which portion of the site was active and required closure under the permit and which portion of the property was inactive and would require corrective action for known releases at the discretion of the Agency.

In Interfaith Community Organ. V. AlliedSignal, Inc., 928 F. Supp. 1339 (D.N.J. 1996) the plaintiffs attempted to force companies in the process of remediating an inactive hazardous waste disposal site to comply with RCRA's permitting provisions. The Court held:

> The EPA has consistently taken the position that RCRA permits are not required for inactive hazardous disposal sites that stopped accepting waste before RCRA was enacted. See 53 Fed. Reg. 31,149 (17 Aug. 1988) ("only facilities where hazardous waste is intentionally placed into land or water after November 19, 1980 require RCRA disposal permits") (emphasis added); 45 Fed. Reg. 33,068 (19 May 1980) ("[t]he Agency's intent is not to regulate under subtitle C portions of facilities closed before the effective date of the regulations") (emphasis added).

Interfaith Community Organ. V. AlliedSignal, Inc., 928 F. Supp. 1339, 1350 (D.N.J. 1996). Corrective action addresses those "portion of the facility closed before the effective date of the regulations."

Respondents acknowledge the distinction between active and inactive or open and closed portions of the facility in their memorandum of law:

> DEC has broad authority to deal with closed units at active hazardous waste management facilities by requiring facility owner/operators to undertake "corrective action" for all releases of hazardous waste or constituents from any waste management unit at a site regardless of when the waste was placed in the unit. See ECL 27-0911.

Respondents Memorandum of Law at 6 n.3 (Feb. 28, 2000). Under RCRA's statutory scheme, active hazardous waste facilities require permits and the permit is conditioned upon the operator's provision of financial assurance for the closure of the active portions of the facility. DEC has broad discretion to require that an operator address environmental issues involving inactive hazardous waste management units on the property through "corrective action" which is different from facility closure.

The overlap of corrective action requirements under RCRA and the Superfund program can be demonstrated by reference to DEC's handling of the surface impoundment, the remediation of which DEC proposes to finance with funds it holds in trust for closure costs.

Order on Consent No. 85-136 executed by Frontier and DEC July 14, 1986 states:

> 6. Authority to order the owner of a surface impoundment or class of surface impoundments from which hazardous constituents are likely to migrate to or are leaking into groundwater, to develop a remedial program or take such other measures as the State may impose to protect human health and the environment is contained in Section 215 of the

> Hazardous and Solid Waste Amendments of 1984 [codified at 42 U.S.C. § 6925(j), addressing active surface impoundments].
>
> 7. Alternatively, since the sludge settler may be considered an inactive hazardous waste disposal site as that term is defined in the Environmental Conservation Law Section 27-1301(2), pursuant to Section 27-1313(3)(a) whenever the Commissioner of Environmental Conservation "finds that hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment, he may order the owner of such site and/or any person responsible for the disposal of hazardous waste at such site (i) to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the Department at such site, and (ii) to implement such program within reasonable time limits specified in the order." In addition: "The Commissioner, after investigation, notice and an opportunity to be heard, may issue, modify and revoke orders prohibiting violations of any of the provisions of Article 27 or of any rule or regulation promulgated pursuant thereto and requiring the taking of such remedial measures as may be necessary or appropriate." ECL Section 71-2727(1).

Order on Consent No. 85-136 (July 14, 1986). In the early days of "corrective action," DEC properly relied on the state Superfund program to manage inactive portions of the facility. These inactive portions of the facility were not subject to closure requirements under the permit because Frontier did not have a permit to operate surface impoundments. The permit did not provide for closure of a surface impoundment because it did not provide for the active operation of a surface impoundment - it did not provide for such an impoundment to be open.

Frontier's Part 373 permit application contained a Closure Plan at section 13.0. It contained a closure cost estimate at section 15.0. Its application contained the following statement relative to its Post Closure Care and Maintenance Plan at section 16.0:

16.0 Post Closure Care and Maintenance Plan
6 NYCRR 373-2.7(g) and 373-2.7 (h)

Since the hazardous waste activities of Frontier Chemical Waste Process, Inc. involve storage and treatment only and not disposal, a post-closure care and maintenance plan is not required.
All wastes, waste residues, equipment and containment devices will be treated, decontaminated and/or removed upon final closure, hence such a plan is unnecessary.

17.0 Insurance Requirements
6 NYCRR 373-2.8(h)(1) and (2)

17.2 Non-Sudden Insurance
6 NYCRR 373-2.8(h)(2)

Frontier Chemical does not operate surface impoundments, landfills, or land treatment facilities, therefore, no liability insurance is required for non-sudden accidental occurrences.

Frontier Chemical Draft Part 373 Permit (emphasis added). Frontier's approved closure plan provided for the closure of those operations at the facility which Frontier actively operated under interim status pursuant to its permit application. DEC had no discretion to permit the facility to operate any portion of the facility in the absence of a closure plan. DEC addressed inactive units originally based only on the authority conferred by section 27-1313 under the state Superfund program and then after enactment of "corrective action" provisions of RCRA under those provisions and the regulations promulgated thereunder. See ECL § 27-0911 (corrective action provisions took effect in 1991). Those inactive areas addressed under the Consent Decree were not and should not also have been addressed under closure. The DEC had discretion to require a financial assurance relative to the completion of the "corrective actions" addressed in that Consent Decree and it did so:

> XVII. No later than fifteen (15) days after the issuance of this Order by the Department, Respondent shall post or deposit with the Department an irrevocable letter of credit or performance bond issued by a financial institution licensed to do business in the State of New York, in a form acceptable to the Department, in the sum of $150,000. Such irrevocable letter of credit or performance bond shall be non-cancellible, non-diminishable, non-reducible and non-impairable until the Department acknowledges completion of the elements of the Investigation.

Order on Consent No. 85-136 (July 14, 1986) (Exhibit tab 4). It is not clear what became of this bond. This is the mechanism set forth in the statutory scheme at work. A closure bond for closure of the active facility and a separate financial assurance relative to activities associated with inactive portions of the site. Having been unable to obtain a sufficient bond to insure performance of activities related to inactive units DEC cannot divert the proceeds of a surety bond which it holds in trust for closure and expend those funds for corrective action.

The state regulations relative to closure of treatment and storage facilities which use tanks and drums in their operations are addressed in the regulations at section 373-2.9 Containers and 373-2.10 Tanks. See Closure Plan at 13-1 (Petition Exhibit E). The regulations relative to closure of Surface Impoundments are set forth at 373-3.11. The regulation states:

> (a) Applicability. The regulations in this section apply to owners and operators of facilities that use surface impoundments to treat, store, or dispose of hazardous waste.

6 NYCRR 373-3.11. As stated above Frontier was not permitted to operate a surface impoundment. Closure does not address inactive unpermitted units. Closure for an inactive surface impoundment is not "normally required at a hazardous waste facility" nor is it a routine activit[y] in a closure plan. See Affidavit of Frank Shattuck sworn to February 28, 2000 (Shattuck Affidavit) at 3-4, ¶ 8 & 9; 6 NYCRR §373-2.6 (not even applicable to facilities operating without final permits under interim status standards under 373-3). An inactive surface impoundment is addressed by a Consent Decree or by a "corrective action module to a Part 373 permit" as it was in this instance. Shattuck Affidavit at 4, ¶ 10. The closure plan at issue in this litigation was not "scaled back" in 1991 because of the "severe financial difficulties" it was experiencing. Shattuck Affidavit at 3, ¶ 7-8. Frontier had essentially the same closure plan in 1985 when it first submitted its Part 373 Application and in each of its next five permit application submissions. None of the Part 373 permit applications allowed Frontier to operate a surface impoundment nor did any of them provide for the closure which

involved placing caps on surface impoundments, removing soil or treating groundwater. Consent Decrees issued beginning in 1982 and updates of those consent decrees up through 1989 addressed those issues under the authority of the state Superfund program and the related powers of DEC to address inactive hazardous waste facilities. Stephens affidavit exhibit D.

The Draft 373 Permit which contained the "corrective action module" confirms this analysis describing the inactive units in detail and providing the same statutory authority provided above. If Frontier had had the means to obtain more expansive financial assurances, DEC could have required the such assurances for corrective action or under the same type of Consent Decree described above. Having exercised its discretion and allowed Frontier to operate without more extensive financial assurances, DEC, like the Petitioners must now live with the consequences of those decisions.

POINT VII

The Commissioner's action in sending out the "New Year Notices" has no bearing on his present obligation to reimburse the petitioners from the Bond funds.

In June, 1999 the Commissioner received 2.4[15] million dollars, the proceeds of the Bond. The petitioners submitted requests for reimbursement of some of their expenditures for facility closure costs.[16] The Commissioner failed to respond. The petitioners then served a formal demand for reimbursement by certified mail[17]. Again, no response. The Commissioner was served by personal service of this special proceeding on December 28, 1999. Three days later the Commissioner then

[15]Although the funds are presently in the Attorney General's escrow account they have constructively been received by the Commissioner.

[16]July, 1999 and August 1999.

[17]December 1, 1999 (Petition Exhibit L).

sent out a notice[18] to 12 corporations to perform an RI/FS at the Royal Avenue Hazardous Waste Site, a site declared to be a hazardous waste site more than five (5) years before on which the Commissioner for that ensuing period had taken no action and notwithstanding the fact that there are literally thousands of companies that through the years have sent manifested hazardous waste to the site.[19] The Commissioner now takes the bizarre position that he may spend these funds in his discretion at the hazardous waste site or for corrective action. Corrective action is different from facility closure (Compare NYECL § 27-0918 subd. 5 closure with § 27-0911 subd. 2 corrective action). Expenditures to clean up a hazardous waste site are not mentioned in either the closure plan or the closure cost estimate and not covered by the bond. Corrective Action is addressed in the Frontier Module III-Corrective Action requirements (Exhibit "R" attached hereto) and is different from closure under the closure plan.

A few of these companies have sent a letter to the Assistant Attorney General expressing their desire that the funds be spent for the RI/FS. This has absolutely no bearing on the issue of reimbursement for facility closure costs since the 12 companies have spent nothing in facility closure costs. Facility closure is complete; any expenditures of any parties to address conditions at the hazardous waste site fall into the category of post-closure costs excluded from bond coverage.

POINT VIII

The Commissioner of the Department of Environmental Conservation failed to perform a duty imposed on him by law, namely, to carry out the terms of the Trust and to pay the funds over to those who have incurred facility closure costs. This failure is also arbitrary and capricious. The Court under Article 78 can enter an order requiring the Commissioner to perform his duty or a purely ministerial act.

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[18]This is the New Year's Notice sent out on December 31, 1999.

[19]Why these 12 corporations have been singled out among the thousands that have sent waste to the site when the DEC has complete information as to who the thousands are and how much hazardous waste they sent to the facility is nowhere explained why the owner of the property, a party with strict liability under CERCLA is not noticed is also puzzling. Perhaps the DEC was simply getting out notices in the hope that some Court would hold that the sending of notices justified not paying the funds to Petitioners.

CPLR §7803 provides:

> "The only questions that may be raised in a Court proceeding under this article are:
> 1. Whether the body or officer failed to perform a duty imposed upon it by law; or
> . . .
> 3. Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . .

The Commissioner of the Department of Environmental Conservation holds funds as Trustee to cover facility closure costs and is required now to carry out the terms of the trust and to pay over a portion of those funds to Petitioners who have incurred substantial facility closure costs. This Court has jurisdiction under Article 78 to correct the failure of the Commissioner to perform a duty imposed on him by law. The failure to make such payments is arbitrary and capricious. The Court may issue a "peremptory mandamus" order requiring the respondent to discharge a duty. Matter of Picone v. Commissioner of Licenses, 241 NY 157 at 162 (1925); People ex rel Carlisle v. Board of Supervisors, 217NY 424, 431 (1916).

Likewise the failure of the Attorney General who is the custodian of these funds to make such a payment constitutes a breach of his duties as custodian of the trust funds and his duty to turn the money over for payment to the Petitioners can be enforced by an order of this court. It requires a purely ministerial act—the payment of the funds to the petitioners. Article 78 of the CPLR is designed to force a state official to perform a purely ministerial act.

A mandamus is a traditional device used to compel a party to perform a ministerial duty. "The law is well settled that the purpose of a writ of mandamus is to compel action only in the exercise of a purely ministerial function." Hansen v. Teachers' Retirement Board 236 App. Div. 589, 592, 260 N.Y.S. 481 (1st Dept. 1932) "Its integral objective is to enforce ministerial obedience to valid law enjoining specific duties." Mooney v. Cohen, 160 Misc. 537, 540, 290 N.Y.S. 243 (Sup.

Ct. Kings County 1936). "Mandamus is a proper vehicle to compel the performance of a duty which is merely ministerial in nature and involves no exercise of judgment or discretion." Assn. of Boards of Visitors of New York State Facilities for the Mentally Disabled v. Prevost, 98 A.D.2d 260, 263, 471 N.Y.S.2d 342, 344 (3d Dept. 1983) In Hamptons Hospital & Medical Center, Inc. v. Moore, the New York Court of Appeals quoted CPLR Manual (rev'ed) by Weinstein-Korn-Miller, when it held that "An article 78 proceeding may lie … by way of mandamus to compel performance by an administrative agency of a duty enjoined by law. Mandamus for such purpose, however, lies only where the right to relief is 'clear' and the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion." 52 N.Y.2d 88, 96, 417 N.E.2d 533, 538, 436 N.Y.S.2d 239, 243 (1981).

CONCLUSION

Petitioners have expended more than $2,550,000.00 in facility closure costs. "Facility closure" means the closure costs under the closure plan and closure cost estimate. The bond funds are "to provide funding for facility closure" and do not cover "post-closure costs", costs for funding corrective actions or costs to investigate or remediate a hazardous waste site. The court should order the payment requested in the petition to pay Petitioners $2,550,000.00 as reimbursement for facility closure costs.

For all the above reasons, the Court should enter an order requiring the Respondents to pay Petitioners $2,550,000.00 as reimbursement for facility closure costs.

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