STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY
FRONTIER CHEMICAL ROYAL AVENUE PHASE I POTENTIALLY RESPONSIBLE PARTIES GROUP and FRONTIER CHEMICAL ROYAL AVENUE PHASE II POTENTIALLY RESPONSIBLE PARTIES GROUP

Petitioners

-vs-

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

Respondents

PETITIONERS REPLY MEMORANDUM OF LAW

Index No. 7536-99

Preliminary Statement

Bond money to provide funding for facility closure is held by the State. Even though the Petitioners have spent in excess of $6 million for facility closure, the State takes the bizarre position that the Petitioners are not entitled to any of the bond funds in spite of the fact that the regulations provide a specific procedure for those spending funds for facility closure to be paid out of the fund.

As we shall demonstrate below, the position of the State is wrong as a matter of law. Facility closure is complete under the closure plan. The attempt by the State to divert these funds to perform remediation under a corrective action program of known releases must fail as a matter of law.

The position of the State that it has unlimited discretion in how to spend the bond funds is contrary to established Trust Law and ignores the plain meaning of the Bond which excluded post closure costs.

The State claims to have absolute discretion for the expenditures of these funds at Frontier Chemical property. Respondents' memorandum of law page 18. This ignores the plain meaning of

the bond language which was to "provide funding for facility closure". It also ignores the closure plan[1] approved by Frank Shattuck of the NYSDEC (Stephens affidavit Exhibit "K"). The State in its responding papers suggests that its closure plan was inadequate and admits that it intended to address facility environmental problems under a corrective action program. The approved closure plan, however, makes no provision for remediation. The State was fully informed as to the groundwater problem existing at Frontier at least by 1982. In a report delivered to it in May, 1991 releases to groundwater were further defined (Stephens affidavit of April 13 Exhibit "B"). The State does not address the numerous affidavits submitted by Petitioners to the effect that closure is complete under the closure plan. Instead the State claims that incidental soil sampling is necessary based on spills that occurred between 1982 and 1987 which were addressed in consent orders. Affidavit of Shattuck paragraph 15. The State never responds to the fact that it has ignored Petitioners repeated requests for reimbursement from the funds for closure expenditures. It apparently will continue to ignore the obligation to disperse these funds for closure costs unless ordered to do so by this Court or unless the Court takes jurisdiction over the case to ensure that the State does not use these funds for corrective action and remediation of the property which were never part of the closure plan or contemplated when the Bond was posted. If these activities had been included in the closure plan, the bond would have been insufficient in amount; a bond to cover these additional expenses would never have been posted. The State cannot change horses in mid stream and treat these funds as if they are a windfall to the State when the State received these funds under a judgment in which it represented to the Court that it was going to reimburse Petitioners for their expenditures for closure costs.

[1]Required by State Statute NYECL § 27-0918 subd. 1. The Closure Plan is found at Petition Exhibit "E".

If soil sampling is required under the closure plan based on evidence in areas where secondary containment was not in place, soils have been contaminated, then the Court should hold back sufficient funds to cover this item of expenditure which we believe would amount to considerably less than $50,000.00 and disperse the requested amount to the Petitioners.

"Closure" is distinct from "Corrective Action"

Corrective Action refers to remedial activities addressed to a condition at the site which is not associated with permitted operations of the facility. NYECL §§ 27-0911(2); 27-0913(1)(a)&(b). It addresses environmental conditions which pre-date the permit. Id. It also addresses environmental conditions which arise out of violations of a permit. Id. That is, corrective action addresses known releases to the environment. Id. See Turner, John H., Symposium: Article: The USEPA 40 C.F.D. 258 Financial Test/Corporate Guarantee - - New Environmentally Protective, Cost-Effective Mechanisms for the Demonstration of Financial Responsibility, 9 Fordham Envt. Law J. 567, 573, 618 and 619 (1998). Closure refers to the act of "securing" any portion of the facility or the facility as a whole. See 40 C.F.R. § 270.2 ("closure means the act of securing a hazardous waste management facility pursuant to the requirements of 40 C.F.R. part 264"). Closure is necessary even absent any release to the environment of hazardous substances. Closure is designed to involve treating and removing all hazardous wastes that have been brought onto the site in order that those wastes do not escape from their containers and contaminate the site.

Closure is the Hippocratic oath of environmental regulation through which the government requires as a condition of granting a permit to operate a hazardous waste management facility that a mechanism be put in place which assures that the hazardous substances brought onto the property pursuant to the permit be properly disposed, even if the permittee abandons the property. The

government would "first do no harm" by preventing the operators of hazardous waste management facilities from collecting wastes pursuant to a federal or state permit, on the watch of the federal and state government regulators only to abandon that waste due to financial difficulties and allow it to escape into the environment. At a minimum, provisions were put in place for proper disposal of all wastes brought onto the property under the permit through financial assurances for closure. NYECL § 27-0917(3).

Eventually, corrective action provisions were passed which addressed the inactive unpermitted portions of the facility of property.

If there was contamination on the property which resulted from activities which occurred prior to the issuance of the permit or interim status, those environmental conditions would be addressed by "corrective action." NYECL §§ 27-0911(2); 27-0913(1) (1990 amendments). "Corrective Action" also addressed other known releases such as spills which were not contemplated by the permit. Id.

Insurance for Pollution Risks

It is important to note that from 1971 through 1982 provisions of New York State Insurance Law prohibited coverage for damages caused by gradual pollution. Jeffrey Kehne, Encouraging Safety Through Insurance-Based Incentives: Financial Responsibility for Hazardous Wastes, 96 Yale L.J. 403 (December 1986); N.Y.S. Ins. Law §§ 46 (13)-(14) (currently modified at § 1113) (McKinney 1966 and Supp. 1982), repealed by 1982 N.Y. Laws 2060. The successor to the legislative requirement is the contractual "pollution exclusion." See Incorporated Village of Cedarhurst v. Hanover Ins. Co., 89 N.Y.2d 293,653 N.Y.S. 2d 68 (1986) (legislative source of pollution exclusion described in trial court opinion at 160 Misc. 2d 795, 611 N.Y.S. 2d 417).

The Environmental Impairment Liability policy followed the pollution exclusion as a response to the difficulties experienced by insurers in the pollution insurance business. See comment: The Problem with RCRA - Do the Financial Responsibility provisions really work, 36 AM. U.L. Rev. 133, 145-51 (1986). Insurance for liabilities connected with pollution was very difficult to obtain and expensive.

Financial Assurance for Closure

If the definition of "closure" included complete remediation or cleanup of any contamination on the property occupied by the facility, the "closure bond" would amount to insurance for gradual pollution. NYECL § 27-0917(3); § 27-0917(1) ("the commissioner shall promulgate regulations for hazardous waste facilities identifying financial requirements to be included as conditions in hazardous waste facility permits for the remediation of failures during operation and after facility closure, for facility closure and for pre-closure and post closure facility monitoring and maintenance"). No insurance company would write a policy that covered environmental remediation costs at the Frontier Royal Avenue facility in 1991. Contamination at the site began as early as 1906 when operations related to the production of bleach involved the placement of bleach sludge in unlined ponds.

Instead "closure" involves treating and removing containerized waste from the facility for proper disposal and cleaning and removing of the containers from the facility. In this case that process involved disposal of approximately 5,000 drums of material at permitted disposal facilities at a cost of approximately $2,500,000 and the disposal of approximately 120 tanks of hazardous waste at a cost of approximately $2,500,000. Once the wastes were treated and removed from the facility the secondary containment units or concrete pads with berms or curbs to prevent runoff were

cleaned with high pressure hot water and detergent and once the secondary containment unit was cleaned it was breached; that is, holes were drilled in the concrete in order to prevent water from collecting in the secondary containment unit. These tasks accounted for the remaining costs incurred by the PRP groups which total approximately $6 million.

Insurable Risk Predictability Provided by Closure Plan

When an insurance company underwrites a performance or surety bond, such as the bond involved in this case, it is encouraged by the regulations to rely on the approved closure plan and especially the approved closure cost estimate which defines the tasks that must be performed and of which the bond guarantees performance. NYECL § 27-0917(5).

The clearly defined tasks set forth in the approved closure plan and in the approved clos9ure cost estimates provide the insurance company with some predictability which was not available in the market related to Comprehensive General Liability Policies, even those with pollution exclusions or Environmental Impairment Liability policies.

Contemplation of Parties to Surety Bond

The DEC, Acstar Insurance Company and Frontier Chemical did not intend that Acstar would guarantee performance of remediation of the property on which the facility operated when the bond was signed on May 10, 1991. The intention was that Acstar would guarantee the removal of all the containerized wastes and clean the secondary containment units as indicated in the approved closure plan and the approved closure cost estimates. These activities have been completed.

If these activities had cost less than the full $1.5 million, currently $2.6 million, Acstar Insurance Company would be entitled to a refund of the amount remaining after completion of the work. At no time did Acstar guarantee that the site would be completely remediated or clean upon

closure but that the materials which had been brought onto the site pursuant to the permit and which continued to remain contained on the site would be removed and disposed of properly. A diversion of funds held for facility closure to remediation and/or corrective action is not proper.

If DEC had required Acstar to guarantee performance of activities related to remediation of contaminants which had escaped into the ground since 1906, Acstar would never have posted such a bond. No such costs were contemplated in the approved closure plan or in the bond itself.

The bond at issue in this litigation was posted at a time of great scarcity of insurance coverage related to environmental liabilities. The DEC's determination relative to the activities to which the proceeds of this bond can be applied is at odds with the intent of the parties at the time the bond was executed as evidenced by (1) the conditions of the insurance market at the time, (2) the language of the bond itself (3) the language of the statutes requiring the bond (4) the language of the regulations promulgated under the statutes requiring the bond and (5) contemporaneous DEC documents regarding closure, especially the approved closure plan and the approved closure cost estimates contained in the draft Part 373 permit as well as other portions of the draft part 373 permit. See exhibit "E" tab 1 to Affidavit of R. William Stephens sworn to March 13, 2000.

Affidavit of Frank Shattuck

(a) Remediation

The affidavit of Frank Shattuck attempts to avoid the expressed intent of the parties by reference to consent orders referencing violations of regulations by Frontier Chemical Company which violations have caused the site to become contaminated and to require remediation.[2] Mr.

[2]Orders on Consent #85-135 and #87-91A attached to the Shattuck affidavit do not relate to the site at issue in this litigation but to a second site owned by Frontier in Pendleton, new York.

Shattuck states:

> As a result of a [sic] these spills and leaks, soils and groundwater at the site will need to be remediated.

Shattuck affidavit, paragraph 4. Nowhere in the bond executed by Acstar Insurance Company on May 10, 1991, in the approved closure plan or in the approved closure cost estimates is there a guarantee related to remediation of contamination caused by spills addressed in consent orders entered between 1982 and 1987.

(b) The Old Sludge Settler

Attached to Mr. Shattuck's affidavit is a "closure plan" related to the sludge settler submitted by Frontier to DEC for approval in 1985. Also attached is a letter to Stanley Siegel of EPA from Paul R. Counterman of DEC indicating that Frontier removed the concrete structure consisting the sludge settler, took samples and backfilled the area with clean soil. DEC determined that the sludge settler was not subject to "closure" requirements and it would handle the remediation requirements of the plan under the corrective action program. Under the heading "condition" in the closure plan Frontier states:

> Frontier has reviewed its Part A permit and adopts the position that the old sludge settler was never permitted under EPA interim status. If this is the case, then Frontier believes that the "closure" requirements of RCRA (40 CFR, Subpart G, etc.) do not apply.
> If, however, the "Agencies" determine that formal closure is required under RCRA, then we would remind the New York State Department of Environmental Conservation of the 180 day advance notification of the EPA Regional Administrator prior to the commencement of closure. It is our understanding that, under this situation, work could not commence on the actual closure until approval of

> the plan has been received.
>
> In this case, the proposed schedule would have to be amended in an appropriate manner.

Closure Plan for Old Sludge Settler at 5 (August 27, 1985) attached at exhibit "B" to Shattuck affidavit; see also NYCRR § 373-1.3.

DEC made a determination that the work performed in connection with the sludge settler was not subject to the interim permit since the sludge settler was not operated under the Interim status permit. The sludge settler ceased operation in 1982. That is, the activities required by the closure plan were activities described under condition A-8 of the permit, more accurately described as corrective action for known releases than under condition A-3 "closure of facility or processes". See permit #2295 at Exhibit "B" to Affidavit of R. William Stephens (March 13, 2000).

The importance of this distinction is that DEC does not have the discretion to waive financial assurances for closure whereas DEC does have the discretion to waive the necessity of financial assurances relative to corrective actions. The practical effect is that if DEC had required any of the activities described in the sludge settler closure plan to be set forth in the closure plan submitted with Frontier's Part 373 application, Frontier would have had to make estimates of the costs of those activities in the closure cost estimates in the Part 373 application (see § 13.0 for closure plan and § 15.0 for closure cost estimate in each of the four part 373 applications submitted by Frontier to DEC for approval in 1985, 1986, 1988 and 1990 as well as the draft 373 permit compiled by DEC in preparation to issue a final 373 permit to Frontier, all of which are attached at Exhibit "E" to the Affidavit of R. William Stephens at tabs 2, 3, 4, 5 and 1 respectively). Frontier would not have been able to obtain the more extensive financial assurance and DEC would have been forced to close the

Frontier facility. Remediation and corrective action activities are not closure activities despite Frontier's use of the term "closure plan." The DEC was correct to characterize these activities as corrective action. DEC did not have a choice and therefore did not make a mistake in characterizing these activities as "corrective action" activities.

Acstar Insurance Company did not guarantee the remediation of contaminants throughout the site. DEC knew of contamination throughout the site and yet approved closure plans that did not address remediation of any part of the site in at least 1985, 1986, 1988 and 1990 as well as in the draft 373 permit compiled by DEC after 1990.[3] Remediation at the site has always been addressed by consent orders describing corrective actions which addressed known releases which require remediation. Closure has always addressed securing the facility by removing containerized wastes from the property before those wastes escaped from their containers into the environment.

DEC acknowledges it knew about contamination at the property beginning in approximately 1982. DEC alleges that it should have required further activities in the closure plans it approved over and over again between at least 1985 and 1990. This court should not base the determination of the appropriate use of the bond proceeds on what DEC should have required of Frontier and Acstar but what DEC actually required. The language of the bond requires that the funds be used for closure not corrective action or remediation. These activities are distinct based on the statutes that require that they be undertaken. NYECL §§ 27-0917(1)(5) & (9).

Remediation of the area formally occupied by the sludge settler was not contemplated as a use of the closure bond at the time it was executed nor should it have been. DEC was free to require

[3]Earlier permit applications, if those exist, did not appear to be contained in the DEC documents made available to us for review.

a performance bond related to that corrective action or remediation activity and did so in connection with Consent Order No. 85-136 (July 14, 1986).

DEC's position that closure is not complete until the site is completely free of contamination erroneously claims that corrective action and remediation is a subset of closure. This is not the case; corrective action and closure are treated separately in the Federal and State statutes as well as the regulations. Closure involves securing the facility by removing containerized waste and corrective action involves remediation of known releases. NYCRR § 373-2.6. DEC's position that releases related to the sludge settler can be addressed with the proceeds of the closure bond represents a refusal to acknowledge controlling Federal and State statutes not a simple misinterpretation of DEC's own regulations. Indeed, prior to coming into possession of the bond proceeds, DEC classified these activities separate from closure.

Compliance with the Closure Performance Standard

The closure performance standard at 373-3.7(b) states:

> The owner or operator must close the facility in a manner that:
> (1) minimizes the need for further maintenance
> (2) controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated runoff or hazardous waste decomposition products to the ground or surface waters or to the atmosphere; and
> (3) complies with the closure requirements of this subpart.

NYCRR § 373-3.7(b). The permitted facility in this case was the area occupied by tanks and drums and the concrete pad on which they were located. All of the wastes have been removed from the permitted facility pursuant to the approved closure plan and the concrete pad or secondary

containment unit on which these wastes rested in tanks and drums has been cleaned and broken in order to prevent water from collecting within it.

These activities have "minimize[d] the need for further maintenance" of the facility. They have "control[led], minimize[d] or eliminate[d]" "post-closure escape of hazardous waste . . . to the ground or surface waters or to the atmosphere."

The formerly permitted facility is no longer a potential source of contamination of the property on which it rested. Contamination of the property which occurred sometime between 1906 and 1992 when the facility ceased operations requires remediation. DEC was aware that this remediation would be necessary in 1982 at the very latest. DEC treated these known releases under a corrective action program as is provided for in the statutes and regulations, under consent decrees and as a condition in the draft permit. DEC never required any reference to remediation activities of any kind in the approved closure plans or the approved closure cost estimates which they rigorously scrutinized beginning as early as 1984 and continuing right up until the last day Frontier operated the facility.

The Closure Plan

Mr. Shattuck next points to regulations which require that a closure plan contain certain information. It is important to note that the closure plan referred to by Mr. Shattuck was approved by DEC year after year and incorporated into the draft part 373 permit compiled by DEC. The known releases were always addressed in consent orders and the corrective action module to the draft Part 373 permit application, never in the closure plan. These activities were simply not closure activities.

It is also important to note that the regulations at § 373-3.7 (c)(2)(iv-vi) relating to closure

plans apply not only to treatment and storage facilities such as Frontier but also to facilities operating waste piles, surface impoundments and disposal facilities. Closure of a permitted facility which operates a waste pile (Frontier did not operate a waste pile) can involve the closure of a waste management unit where waste is stored on top of soil. The waste sitting on top of the soil tends to contaminate the soil. Instead of a concrete secondary containment unit such as that involved in this case, the secondary containment unit is soil. Upon closure the contaminated soil must be removed and handled as hazardous waste. Testing must be conducted to determine how much soil was contaminated and whether the groundwater has been contaminated. These steps are contemplated as part of closure of a waste pile.

In connection with a landfill or other disposal facility, waste is left in place and must be capped; a leachate collection system must be put in place and groundwater must be monitored. If there is a release that release must be reported and the DEC can require the operator to take corrective action. The corrective action through which the known release is remediated is not part of closure.

Each activity that is contemplated must be set forth in the plan. Closure of a treatment and storage facility does not typically involve soil removal because wastes do not typically come in contact with soil because of the concrete pad or secondary containment system. Groundwater monitoring, leachate collection and run-on and runoff control are typically associated with land disposal facilities.

Mr. Shattuck appears to suggest that since all of these activities are required to be contained in the closure plan all of these activities constitute closure activities in this case. That is not true. A storage and treatment facility which operates on a concrete pad with berms or curbs as its

secondary containment system such as the facility in this case should not require contaminated soil removal, leachate collection or groundwater monitoring as part of its closure plan. If the facility has a "failure" causing it to release hazardous substances into the soils and groundwater, such a known release is addressed under a "corrective action" program. NYECL § 27-0917(i) ("remediation of failures during operations"). The facility operator enters into a consent decree with DEC or the corrective action becomes a condition of a Part 373 permit. The DEC can require financial assurances such as a performance bond to ensure completion of the corrective action. DEC can also revoke the facility's permit. Such a spill does not change the closure plan. Closure is designed to remove those wastes that have been brought onto the property pursuant to the permit which have not already escaped from their container into the environment. A note under section § 373-3.10(g) "Response to leaks or spills . . ." states:

> Note: The Commissioner may, on the basis of any information received that there is or has been a release of hazardous waste or hazardous constituents into the environment, issue an order under ECL article 71 requiring corrective action or such other response as deemed necessary to protect human health or the environment.

An inactive portion of the facility such as the sludge settler in this case is also addressed under the corrective action program both because it ceased operating before the facility began its operation under interim status subject to the regulations of NYCRR § 373-3 which were filed in 1985 and because it caused a known release which was addressed by various consent decrees which involved separate financial assurances related specifically to the tasks required under the consent decree.

The two competing notions of known release and soils which, in effect, constitute secondary

containment are present in the language of the regulation which states:

> "[A]t closure of a tank system the owner or operator must remove or decontaminate all waste residues, contaminated containment system components (liners etc.), contaminated soils, and structures and equipment contaminated with waste, and manage them as hazardous waste."

NYCRR § 373-3.10(h).

In the event that a tank or tank system is not placed on top of a secondary containment system such as a concrete pad with berms or curbs the soil underneath it serves as a secondary containment system. If there is evidence that the soils are contaminated (i.e. if the soils are stained with chemicals), those soils must be removed and samples must be taken to determine whether the contamination has reached the groundwater.

The closure performance standard states:

> This closure plan is designed to ensure that the facility will not require further maintenance and controls, minimize and/or eliminate threats to human health and the environment and avoid the escape of hazardous waste, hazardous waste constituents, contaminated rainfall, or waste decomposition products to the ground, surface waters or to the atmosphere. If there is evidence of spills or leaks in portions of the facility where concrete containment areas are not provided, samples will be taken and analyzed to determine the extent of contamination in the soil and, if necessary, in the groundwater. If spills or leaks occur within any of the concrete containment areas, spilled materials will be recovered and re-introduced into the appropriate system. All concrete containment surfaces will be decontaminated with a high pressure hot water spray to remove any surface contamination. A detergent may be added to the water, if needed, to enhance the cleaning.

Mr. Shattuck suggests that there were areas of the facility where drums and tanks were stored on earthen pads without concrete pads "[w]hen the permit was initially issued" in 1980 and that DEC personnel observed leakage which came into contact with site soils which gave rise to many orders on consent. There is no suggestion that there were "portions of the facility where concrete containment areas are not provided" at the time of closure. Closure does not refer to cleanup of spills that were the subject of consent orders years prior to the cessation of operations at the facility and which were addressed by those consent orders. Corrective action is designed to address spills and other violations of the permit which result in known releases. See NYCRR § 373-2.6. Closure involves securing the hazardous wastes which have been brought to the facility and disposing of those wastes properly before they are permitted to escape from their containers into the environment.

Section 373-2.8(d)(1)(x) provides the procedure for obtaining reimbursement for partial or final closure expenditures. That section requires the DEC to provide reimbursement within 60 days of the receipt by DEC of bills for partial or final closure. DEC has conceded that the petitioners have conducted closure activities. The only circumstance under which DEC is permitted to withhold reimbursement is where DEC makes a determination that the remaining costs of closure exceed the funds available for closure. If the DEC makes such a determination, it must inform the person who has requested a reimbursement in writing of the reasons for the refusal to honor the request.

Instead of paying out the reimbursement, DEC has refused to respond to the petitioner's demand for approximately ten months. In the context of this action, the DEC has expressed its intention to use the funds for activities other than facility closure in violation of the language of the bond, federal and state statutes and federal and state regulations. DEC should be required to reimburse the petitioners for their expenditures which were completely consistent with the approved

closure plan and the approved closure cost estimate.

The Petitioners are not collaterally estopped by the prior litigation.

Petitioners intervened in the action of the State of New York against the insurer on the bond. The dismissal of petitioners claim against the insurer did not constitute a holding by the Court that the Petitioners were never entitled to obtain the bond funds once they were in the hands of the State of New York but only that the State of New York was the only party who could collect on the bond. Now that the funds are in the hands of the State of New York, the State Regulations give the petitioners a right to collect the funds for legitimate expenses incurred for closure costs. Regulation 6 NYCRR 373-3.8(d)(1)(x) provides:

> "After beginning partial or final closure, an owner or operator or another person authorized to conduct partial or final closure may request reimbursements for partial or final closure expenditures by submitting itemized bills to the commissioner. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for partial or final closure activities, the commissioner will instruct the trustee to make reimbursements 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."

Whatever the holding in the action by petitioners against the company issuing the bond it has no

bearing on the situation now that the funds are in the hands of the State of New York and available to pay facility closure costs.

The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue that was clearly raised in a prior action and decided against that party. Ryan v. New York Telephone Co., 62 N.Y. 2d 494, 500, 478 N.Y.S. 2d 823 (1984) . The application of collateral estoppel rests on the existence of two elements. First, the identical issue must have been necessarily decided in the prior litigation. Second, the party being precluded must have had a full and fair opportunity to litigate the issue in the prior lawsuit. D'Arata v. New York Central Mutual Fire Ins. Co., 76 N.Y. 2d 659, 664, 563 N.Y.S. 2d 24 (1990).

The petitioners in this proceeding intervened in the action by New York State against Acstar Insurance Company for payment on the bond posted by Acstar to guarantee the availability of funds for facility closure at the Frontier Royal Avenue facility. The court determined that the Phase I and Phase II PRP groups (petitioners in this proceeding) were not third party beneficiaries of the surety bond and therefore were not entitled to payment directly from Acstar Insurance Company of amounts spent for facility closure.

This action involves a demand by the petitioners that New York State reimburse them for expenditures they made for facility closure from funds held in trust pursuant to the terms of the bond to provide funding for facility closure. Reimbursement is provided for by NYCRR § 373-2.7(d)(1)(x). The procedure provided for in the regulations requires that an individual who has expended funds for facility closure consistent with the approved closure plan must submit bills to the Commissioner of DEC and within 60 days the Commissioner will pay the invoice so long as it is consistent with the approved closure plan or provide a detailed written statement why it refuses

to do so.

The first action relative to the bond involved the question of whether Acstar Insurance Company would be required to pay over the proceeds of a bond to the State of New York. In the first action, the PRP groups urged that they had an interest in the bond proceeds. This action involves whether the State of New York is required to reimburse the petitioners for expenditures they made for facility closure. These are two separate issues. The issue in this action is not identical to the issue in the former action. There is no need to address the full and fair opportunity to litigate since the issues are not identical and the issue in this case was not necessarily decided in the first case.

The question of whether Acstar Insurance Company should pay a sum to the petitioners is a separate question from whether the DEC should be required to pay a sum to the petitioners based on a demand that was made pursuant to state regulations after the state received the proceeds of the bond.

The first action concerned whether the petitioners were contemplated beneficiaries under the bond. This case concerns whether now that the state has received the bond funds and the petitioners have made their demand, DEC is within its rights to refuse to respond to petitioners' demand under the regulations.

There would be nothing inconsistent about a decision in the first action that Acstar must pay the proceeds of the bond to New York State and a decision in this action that the petitioners' have made expenditures consistent with the approved closure plan and are entitled to reimbursement from the state from the proceeds of the bond. Indeed, an affidavit submitted by the attorney general in the first case stated that "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."

Affidavit of Timothy Hoffman, Esq. sworn to December 9, 1996 at 3 attached at exhibit "Q" to the R. William Stephens, Esq. affidavit sworn to March 15, 2000. Indeed, the Court specifically stated:

> Upon receipt of these funds, the DEC is required to use the bond proceeds to defray closure costs already incurred and those closure costs that may be incurred in the future.

Memorandum Decision, Order and Judgment of Judge Mahoney at 9 (February 11, 1998). Borrowing Justice Black's formulation:

> Great [states] like great men, should keep their word.

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 142, 80 S. Ct. 543 (1960).

The Respondents position completely ignores the approved closure plan which was the basis for determining the amount and sufficiency of the bond to provide funding for facility closure.

The State statute (NYECL § 27-0918 subd. 1) and regulations require that a temporary storage facility such as Frontier have a detailed closure plan approved by the State and provide financial assurance for facility closure. The closure plan for Frontier (Petition Exhibit "E") included a detailed listing of every tank, its volume, the material stored in the tank and a listing of the exact number of drums on site. This closure plan was required to be reviewed and updated according to the regulations at periodic intervals to ensure that the posted bond which provided financial assurance for closure was sufficient to accomplish the work set out in the closure plan.[4]

---

[4] Contrast the evidence before the Court on the issue of whether or not the work under the closure plan is complete. The plaintiff offers the affidavits of three individuals who were intimately involved in the closure of the facility.
William B. Popham, an engineer with Blasland, Bouck & Lee who was involved in the removal and the decontamination of tanks, containment vessels, relating piping and ancillary equipment contained at the Frontier facility. CONTINUED ON NEXT PAGE

James K. Kay, an engineer with Conestover Rover & Associates, had a responsibility for the execution and implementation of the closure plan at the Frontier Chemical Royal Avenue Facility insofar as it relates to the removal of drummed waste as outlined in the facility closure plan.

Kevin Matheis, an engineer employed by the Environmental Protection Agency, who was the on-scene coordinator for the EPA and implementation of the orders for the removal of tanked and drummed waste and the implementation of the closure plan.

All three opined that the closure plan was completed and implemented in every way. The State, however, offers an affidavit of Frank Shattuck who "believes" that the closure plan has not been completed. His affidavit nowhere contains any information which would suggest that he was on-site or has personal knowledge of the closure activities at the Frontier facility between 1994 and 1995. His belief is necessarily based on hearsay since he has no personal knowledge set forth in his affidavit. This affidavit with its hearsay conclusions is insufficient to establish on behalf of the State that the closure plan has not been completed. Personal knowledge of the affiants submitted on behalf of petitioners, contains conclusive evidence that the closure plan has been completed.

The facility closure plan for the Frontier Site did not require remediation even though the State was on notice from the history of the property, consent decrees dating back to 1982, and from a study which Frontier had delivered to the State in May of 1991, that the soil and groundwater was contaminated. The State is asking the Court to completely disregard the approved closure plan for the Frontier site and instead act as if the closure plan said in effect:

> "Closure of the site shall be accomplished by removal of all materials in all tanks, drums, and remediation of all soil and groundwater contamination."

This is not what the closure plan required. The closure plan requires specifically that the drums on site would be removed and disposed of at a proper facility and that all materials in the tanks would be removed and properly disposed of and gave a cost estimate for each of the specific tasks (See approved closure plan, Petition Exhibit "E" and Memorandum of Shattuck approving closure plan, Stephens Affidavit Exhibit "L"). If the closure plan had required, in addition to the removing and cleanup of all tanks and drums, remediation of soil and groundwater contamination, the bond would never have been sufficient to cover these tasks and no one would have been able to post such a bond as required by the regulations.

Additionally, the documents on file with the DEC and the day-to-day activities of the DEC indicate that the Department considered the closure plan to be extremely important. Mr. Shattuck required DEC personnel to consult the closure plan in determining if financial assurances for closure were sufficient to accomplish closure. (Stephens affidavit Exhibit "O") In addition, the order of the

---

It should be noted that the State had on-site monitors during the implementation of the closure plan by the petitioners but offers no affidavit of any on-site monitors that the closure plan work is not complete.

CONTINUED FROM PREVIOUS PAGE

DEC Commissioner to Frontier to close the facility was to close the facility "according to the Closure Plan" (Stephens affidavit Exhibit "B").

The State wants the Court to ignore the closure plan and act as if these funds can be spent by the State for anything the State feels should be done at the facility. That is not closure and that is not the "closure" referred to in the bond. The facility closure referred to in the bond, is closure under the approved closure plan.

Petitioners alternative claim for relief should be allowed. The court should convert this proceeding to an action at law and issue a declaratory judgment that the funds are held by the Respondents in trust to cover closure costs and that the Petitioners are entitled to share on a pro rata basis the funds with others who have expended funds for approved closure costs.

Petitioners believe that their expenditures for closure costs should be reimbursed by the State from the funds now held by the respondents. If some soil sampling can be shown to be necessary to complete the closure plan, the Court can withhold a sufficient sum to cover those anticipated expenses and distribute the remaining funds to the petitioners. Respondents do not claim that the petitioners have not expended substantial sums for closure costs and carried out 99% of the closure plan. The position of the State that these funds can be expended by the State for any activities at Frontier ignores the plain language of the bond which requires them to be kept separate, segregated and used only for the purpose set forth in the statute and in the bond.

Petitioners also request alternative relief. It is clear that the State intends to completely disregard the bond language and proceed on its own as if this money were a windfall to the State. The petitioners request and the Court allow the proceeding to be converted to an action at law and a declaratory judgment issue that the funds held by respondents are to be held in trust by the State

agents for the purpose expressly set forth in the bond, i.e. "To provide funding for facility closure." The court should also declare that the funds cannot be used for any other purpose than to pay closure expenditures according to the closure plan.

The fiduciary duties of the State agents to apply the funds for the purposes set forth in the bond, require the Court to enter such an order. Otherwise, the State agents will be free to dissipate the funds for expenditures for items other than those set forth in the statutorily required closure plan approved by the State.

At the very least, the Petitioners are entitled to share the funds held for closure costs on a pro rata basis with the State.

The Petitioners have documented closure cost expenditures in an amount exceeding $6 million. The State has expended thus far less than $47,000.00. The State alleges that some soil sampling needs to be performed under the closure plan. This is not based on a finding that there was evidence of leaks and spills in areas of the facility that did not contain secondary containment but that there were such areas back in 1980. All other closure activities under the plan are complete. Even assuming the State were to expend $50,000.00 in soil sampling, then the pro rata distribution of funds held by the State would be as follows assuming $2.6 million in the fund.

Petitioners expenditures	$6,000,000.00
State expenditures (47,000 + 50,000) say,	100,000.00
$\frac{6,000,000}{6,100,000}$ of $2,600,000.00 to Petitioners or	2,557,377.05
$\frac{100,000}{6,100,000}$ of $2,600,000.00 to State or	42622.95

The attempt by the State to divert all the funds to itself to be spent for purposes at the

property including remediation and corrective action and to ignore the expenditures of the petitioners is erroneous as a matter of law.

Conclusion

For all the above reasons and the reasons set forth in our Memorandum of Law, the Court should enter an Order requiring the payment to petitioners of $2,550,000 or, in the alternative, an Order requiring respondents to hold the funds in trust for payment of closure costs under the approved closure plan.

DATED: April 12, 2000
Buffalo, New York

Yours etc.,
Raichle, Banning, Weiss & Stephens

R. William Stephens, of counsel
R. Hugh Stephens, of counsel
Attorneys for Petitioners
410 Main Street
Buffalo, NY 14202
(716) 852-7587

Z:\rhs\RHS Resume\Summary of Representative Cases\Frontier Phase I and Phase II PRP Group reply memo of law 53.wpd