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,

-against-

Decision and Judgment
Index #7536-99
RJI #0199ST0499

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.

Supreme Court, Albany County, Special Term April 14, 2000)

(Justice Thomas W. Keegan, Presiding)

APPEARANCES:

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KEEGAN, J.:

In this CPLR article 78 proceeding the Frontier Royal

Avenue Facility Phase I and Phase II PRP Groups seek an order requiring the respondents to pay the petitioners the proceeds from the payment of a surety bond which was posted on behalf of Frontier Chemical Waste Process, Inc. ("Frontier").

Frontier, is the former owner/operator of the Frontier Chemical Royal Avenue facility, a hazardous waste treatment and storage facility located in Niagara Falls, New York. Frontier was specifically authorized to store hazardous waste on the property in 45 tanks, and 4,774 drums.

Petitioners are a group of over 60 companies (potentially responsible parties, i.e., PRPs) who have expended funds for closure at the Frontier Royal Avenue facility.

In late 1992, after numerous violations, consent orders, an 18 count indictment, and years of financial difficulties, the Commissioner of the Department of Environmental Conservation ("DEC") determined that the Royal Avenue facility presented an imminent danger to the public and the environment and issued a Summary Abatement Order. When Frontier failed to comply with the Order, DEC asked the U.S. Environmental Protection Agency ("EPA") to initiate emergency removal action at the site. Although demand for payment of the closure costs was made upon Frontier, Frontier was insolvent and declined to pay. Consequently, on January 15, 1993, DEC notified Acstar Insurance, the company that issued the bond guaranteeing the financial assurances of Frontier, that Frontier had failed to pay the bond's $1,500,000.00 penal sum.

Acstar refused to pay on the bond, and legal action ensued. DEC did not receive the $2,500,000.00 proceeds of the bond until June of 1999. Meanwhile, petitioners (arrangers and transporters of hazardous material to the facility, and therefore jointly, severally and strictly liable for costs under the Comprehensive Environmental Response, Compensation and Liability Act ["CERCLA"]), expended over 6 million dollars for closure costs.

In the instant proceeding, petitioners contend that the bond monies which were to provide funding for facility closure should be paid over to them to help defray the expenses they incurred implementing the facility closure plan. Petitioners claim that the State cannot withhold the bond proceeds to finance cleanup of contaminated groundwater or to remediate the site as these are separate corrective action and/or post-closure costs not the facility closure costs as contemplated in the Bond.

In support of their position, the petitioners argue 1) that the site was a treatment and storage facility, not a waste disposal facility, 2) the Bond provided coverage for facility closure costs only, 3) the Closure Plan was limited to discrete activities which did not include remediation of the site soils or groundwater and, 4) closure is complete.

Section 27-0917(5) of the Environmental Conservation Law ("ECL") requires an owner or operator of a hazardous waste facility to demonstrate financial responsibility for facility closure costs by several means, including the posting of surety or performance

bonds.

Section 373-2.8(j)(2) of Title 6 of the NYCRR in effect in May of 1991 laid out the exact wording a surety bond must contain and provided that the instructions in brackets were to be replaced with the relevant information and the brackets deleted. The Acstar Bond at issue contains the required language. As petitioners point out, the Commissioner, in describing in the bracketed space what the guaranteed sums would "provide funding for" inserted "facility closure" and omitted the words "and post closure."

Section 27-0918 of the ECL is entitled Closure and post-closure plans. Subsection (1) and (2) require that an owner or operator of a hazardous waste facility submit, for DEC's approval, plans for the closure and post-closure monitoring and maintenance of the facility, along with a written estimate of the costs associated therewith. Subsection (7) of § 27-0918 however, specifically limits the provisions of the section relating to post-closure monitoring and maintenance plans and costs estimates to owners and operators of disposal facilities.

Section 373-3.7 of Title 6 of the NYCRR sets forth the standard for and regulates the content of a closure plan. The performance standard demands that the facility be closed in a manner that minimizes the need for further maintenance and controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of

hazardous waste, constituents or waste products to the ground, surface water or atmosphere. 6 NYCRR 373-3.7(b)(1) & (2).

The plan must include a detailed description of steps needed to remove or decontaminate the hazardous waste, and the activities necessary to ensure that closure "satisfy the standard, including but not limited to groundwater monitoring, leachate collection, and run-on and runoff control." 6 NYCRR 373-3.7(c)(2)(v).

It is undisputed that the plan submitted by Frontier was accepted and approved by DEC. Furthermore, it is undisputed that the DEC Part 373 Draft Permit for the Frontier facility included a Closure Plan, and specifically did not include Post-Closure Care and Maintenance. Indeed, the explanation that because Frontier's activities "involve storage and treatment only and not disposal, a post-closure care and maintenance is not required" appears on the designated page of the permit application.

Respondents' arguments that there were numerous uncontrolled releases of contaminants at the site on a continuous basis, notwithstanding, this Court believes that the Frontier facility simply was not a waste disposal facility within the meaning of § 27-0918(7) of the ECL, and the Bond did not include or insure coverage for post-closure costs, because it need not have included those costs.

What should have been included in the Closure Plan, and why it wasn't, is irrelevant -- the Bond, Closure Plan, and closure

costs estimate were all accepted by DEC as part of the permit application process.

The approved Closure Plan basically ensured the removal of chemicals, drummed and tanked waste, and the clean-up of the storage tanks, containment vessels, piping and ancillary equipment at the facility. As evidenced by the affidavits before the Court, these steps were taken by the petitioners. And as argued by the petitioners, once the hazardous waste was removed and clean-up performed, post closure escape of hazardous waste, constituents or waste products to the ground, surface water or atmosphere (6 NYCRR 373-3.7[b][1]&[2]) was eliminated. Yet, respondents, who admit that the activities listed on the Closure Plan were "technically" performed, argue that the site was not properly closed in accordance with the site closure plan or in conformance with the regulatory performance standard found. This Court does not agree.

Upon review of the evidence presented, including the Closure Plan itself, the estimated vs. actual costs comparisons, previous consent orders, the relevant regulations, and particularly the affidavits of James K. Kay, Kevin Matheis, and William B. Popham, who all opined that the Closure Plan was complete, this Court believes that the State has confused the costs of closing a hazardous waste site with the facility closure costs.

Petitioners have established that 1) the Frontier facility was not a hazardous waste disposal site, 2) the Bond provided coverage for the facility closure costs, 3) the Closure

Plan was limited to discrete activities which did not include corrective action or the remediation of the site's soil or groundwater, and 4) closure according to the approved Plan has been almost totally completed by the petitioners.

In view of the foregoing, it is the opinion of this Court that the petitioners are entitled to the proceeds of the Bond. Therefore, respondent Commissioner John P. Cahill's refusal to partially reimburse the petitioners for the closure costs they've incurred is arbitrary and capricious.

In so finding, the Court agrees with the petitioners that the holding in the action of the State of New York against Acstar Insurance Company has no bearing on the instant litigation, it is DEC's own regulations that give petitioners a right to collect the funds for the costs they incurred. Specifically, 6 NYCRR 373-3.8(d)(1)(x) provides that a "person authorized to conduct partial or final closure may request reimbursements for partial or final closure expenditures by submitting itemized bills to the commissioner."

Accordingly, the motion to amend the petition is granted, and the relief requested in the Amended Petition is granted, to the extent that respondent Eliot Spitzer is directed to pay petitioners the amount of proceeds from the Bond held in his escrow account, minus the amount expended by the State for monitoring and oversight costs thus far, and minus the amount required to complete the closure plan by conducting the necessary soil sampling and removal

if necessary pursuant to 6 NYCRR 373-3.10(h).

This memorandum shall constitute both the Decision and Judgment of this Court.

All papers, including this Decision and Judgment, are being returned to the petitioners' attorneys. The signing of this Decision and Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

ENTER.

Dated: Albany, New York
June 20, 2000.

Thomas W. Keegan, J.S.C.

PAPERS CONSIDERED:

(1) Notice of Motion dated March 6, 2000.
(2) Amended Verified Petition dated March 6, 2000.
(3) Affidavit of R. Williams Stephens, Esq., sworn to March 6, 2000, with attached exhibits.
(4) Verified Petition dated December 27, 1999.
(5) Affidavit of Carol D. Quinn, sworn to September 12, 1996.
(6) Affidavit of David L. Cook, sworn to September 12, 1996.
(7) Affidavit of Fredric Jakes, sworn to September 9, 1996.
(8) Affidavit of Carl J. Johnson, sworn to September 9, 1996.
(9) Affidavit of Frank Shattuck, sworn to December 5, 1996.
(10) Affidavit of Kevin Matheis, sworn to December 6, 1996.
(11) Affidavit of William B. Popham, sworn to March 8, 2000, with attached exhibit.
(12) Affidavit of Neil M. Gingold, sworn to March 7, 2000, with attached exhibits.
(13) Affidavit of James K. Kay, sworn to March 6, 2000.

(14) Affidavit of R. Williams Stephens, sworn to March 15, 2000, with attached exhibits (A-S).
(15) Objection in Point of Law and Verified Answer dated February 28, 2000.
(16) Affidavit of Frank E. Shattuck, sworn to February 25, 2000, with attached exhibits.
(17) Affidavit of Peter J. Buechi, sworn to February 25, 2000, with attached exhibit.
(18) Objection in Point of Law and Verified Answer dated April 10, 2000.
(19) Affidavit of Frank E. Shattuck, sworn to April 10, 2000, with attached exhibits.
(20) Affidavit of Peter J. Buechi, sworn to April 7, 2000, with attached exhibits.
(21) Affidavit of R. William Stephens, sworn to April, 2000, with attached exhibits.