

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

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**SENECA MEADOWS, INC. and** :  
**MACEDON HOMES, INC.,**

**Plaintiffs,** :

**v.** : **C.A. No. 95-CV-6400L**

**ECI LIQUIDATING, INC., et al.,** :

**Defendants** :

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**MEMORANDUM OF LAW OF THE STATE OF NEW YORK  
AS AMICUS CURIAE IN OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS**

**PRELIMINARY STATEMENT**

The State of New York by Eliot Spitzer, Attorney General of the State of New York, as amicus curiae, submits this memorandum of law in opposition to defendants' motion to dismiss the complaint. The motion to dismiss in effect challenges the powers of the New York State Department of Environmental Conservation (NYSDEC) to settle claims under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (CERCLA or Superfund), as amended. NYSDEC entered into three Orders on Consent pursuant to which the Plaintiff Seneca Meadows, Inc. (Seneca) was obligated to investigate and remediate a site known as the Tantalio Landfill (Site) in Seneca Falls, New York. The Orders constituted a settlement by NYSDEC of its claims against Seneca under both state law and under the federal Superfund law. As a result of that settlement, and pursuant to the express authority of CERCLA, 42 U.S.C. § 9613(f)(3)(B), Seneca is empowered to bring a contribution action under CERCLA against other parties that it alleges are also responsible for

the pollution of the Site. Defendants argue that Seneca settled only its state claims with the NYSDEC, and not its CERCLA claims, and thus cannot avail itself of the CERCLA contribution cause of action. This argument is based on a misreading of the Orders on Consent and a misunderstanding of CERCLA.

### **INTEREST OF AMICUS**

NYSDEC's authority to settle with responsible parties who remediate a hazardous waste site depends in large part on the ability of those parties to bring contribution actions under CERCLA against other responsible parties. Because of this settlement scheme, in place for over twenty years, toxic cleanup cases are settled without the necessity of NYSDEC spending state funds or suing responsible parties. Without the right to sue other responsible parties under CERCLA's contribution provisions, many responsible parties would be unwilling to settle with NYSDEC. As a result, NYSDEC would be required to expend scarce state funds to investigate and remediate such sites and then to sue responsible parties. The Attorney General has sought leave to file this memorandum of law as *amicus curiae* to uphold this critical settlement scheme, to preserve state funds, and to insure that those parties who step forward to clean up hazardous waste sites throughout the state are entitled to recover under CERCLA a fair portion of their costs from other responsible parties.

### **FACTUAL BACKGROUND**

Plaintiff Seneca owned and operated the Tantalio Landfill. Based on preliminary site studies, NYSDEC determined that the Site represented a significant threat to the public health or environment under Environmental Conservation Law (ECL) § 27-1305, and thus listed the Site as a Class 2 site on its Registry of Inactive Hazardous Waste Disposal Sites in December 1983.

NYSDEC 1992 Order on Consent (Affidavit of Robert S. Sanoff in Support of Defendants' Motion to Dismiss All Claims, Exhibit A, paragraph 3, at page 1-2)(Sanoff Aff.). Pursuant to an Order on Consent with NYSDEC, Plaintiff Seneca agreed to conduct a Remedial Investigation/Feasibility Study (RI/FS) to determine the nature and extent of the contamination. The RI/FS was conducted pursuant to and in conformance with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. Part 300, and the USEPA interim final guidance document entitled "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA." NYSDEC 1992 Order on Consent (at page 2; see also section II, at pages 6-7; section V, at page 8; section VII, at page 10; section X, at pages 12-13). Thus, as is the case with all NYSDEC hazardous waste cleanup consent orders, the requirements established by USEPA for CERCLA sites were incorporated into and made a part of Seneca's obligations under the Order on Consent. NYSDEC requires parties that conduct a RI/FS to follow those CERCLA standards and procedures to insure that all investigation and remediation work is consistent with the NCP, a prerequisite for recovery under CERCLA of response costs. 42 U.S.C. § 9607(a); 6 New York Code, Rules and Regulations (NYCRR) § 375-1.10(c).

. In this case, Seneca entered into two further Orders on Consent with NYSDEC pursuant to which it agreed to implement the remedies selected in two separate Records of Decision (RODs). NYSDEC 2003 Order on Consent (Sanoff Aff., Exhibit B), and NYSDEC 2004 Order on Consent (Sanoff Aff., Exhibit C). The 2003 Order obligated Seneca to implement a remedial action that included capping the landfill and addressing overburden groundwater contamination; the 2004 Order obligated Seneca to implement a remedial action that addressed bedrock groundwater contamination at and about the Site. These consent orders required compliance

with the NCP and resolved both the state's ECL claims and its CERCLA claims. *See* 6NYCRR § 375-1.10(c).

Plaintiff Seneca fulfilled its obligations under the three Orders on Consent. Later, pursuant to 42 U.S.C. §§ 9607(a) and 9613(f)(3)(B), Seneca filed suit against defendants seeking contribution from others whose wastes were disposed at the Site.

## **ARGUMENT**

### **PLAINTIFFS ARE ENTITLED TO SEEK CONTRIBUTION UNDER CERCLA FROM OTHER RESPONSIBLE PARTIES AFTER SETTling WITH NYSDEC**

#### **1. The CERCLA Statutory Scheme**

Congress enacted CERCLA in 1980, and amended it in 1986, through the Superfund Amendments and Reauthorization Act (SARA), "in response to severe environmental and public health effects posed by the disposal of hazardous wastes." *United States v. A & N Cleaners and Launderers*, 788 F.Supp. 1317, 1322 (S.D.N.Y. 1992). *See, also, United States v. Hooker Chemicals*, 680 F.Supp. 546, 548 (W.D.N.Y. 1988). As the Court stated in *United States v. Reilly Tar & Chemical Corp.*, 546 F.Supp. 1100, 1112 (D. Minn. 1982):

First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

With over 1,200 hazardous waste sites currently on the Federal National Priorities List (40 C.F.R. Part 300, App. B), and over 800 additional sites on the State of New York's Inactive Hazardous Waste Site Registry, the broad remedial purposes behind CERCLA remain very much

alive, and critically necessary.

As this Circuit's Court of Appeals has recognized, "Congress clearly did not intend, however, to leave clean up under CERCLA solely in the hands of the federal government," but provided an important role for the States. *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1041 (2d Cir. 1985).

Most important, CERCLA provides similar authority to the USEPA and to states to sue for, and settle regarding, cleanup costs. The core enforcement provisions of CERCLA provide equivalent authority for the states, the federal government, and Indian tribes to file actions under CERCLA to recover the costs of investigating and remediating hazardous waste sites. 42 U.S.C. §§ 9607, 9613. CERCLA authorizes states, just as the federal government, to recover among other things, "all costs of removal or remedial action ... not inconsistent with the national contingency plan" from certain classes of potentially responsible parties (PRPs), subject to only a few affirmative defenses. 42 U.S.C. § 9607(a). The parties responsible for the government response costs<sup>1</sup> -- incurred by either the federal or state governments -- are current owners and operators, owners and operators at the time of disposal, generators or those who arranged for the disposal of hazardous substances, and transporters of hazardous substances. 42 U.S.C. § 9607(a)(1)-(4).

Liability under CERCLA is strict, without regard to fault. *Shore Realty*, 759 F.2d at 1044; *Hooker*, 680 F.Supp. at 549, 556; *A & N Cleaners*, 788 F.Supp. at 1323. And liability

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<sup>1</sup> "The terms 'respond' or 'response' means [sic] remove, removal, remedy, and remedial action;, [sic] all such terms ... include enforcement activities related thereto." 42 U.S.C. § 9601(25).

under CERCLA is joint and several, unless the defendant can prove that its environmental harm is divisible from that of other responsible parties. *United States v. Alcan*, 315 F.3d 179, 185 (2d Cir. 2003); *A & N Cleaners*, 788 F.Supp. at 1323; *Hooker*, 680 F.Supp. at 549, 556; *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992). It is because of the government's authority to impose joint and several liability upon PRPs that the right of such PRPs to seek contribution from others is particularly important.

Consonant with the power to sue PRPs under section 107, CERCLA provides those PRPs that settle with the governments the right to pursue non-settling PRPs for contribution under CERCLA. 42 U.S.C. § 9613(f)(3)(B). Settling PRPs are also given certain protections against being sued for contribution by non-settling PRPs. 42 U.S.C. § 9613(f)(2). This enforcement and settlement scheme effectuates the remedial nature of CERCLA by encouraging PRPs to settle with the federal and state governments, which allows for the expedient cleanup of hazardous waste sites and the prevention of further risks to the public. At the same time it provides settling PRPs with the ability to recover a portion of the response costs from other PRPs.

While CERCLA provides the core enforcement provisions, state law provides ancillary powers to effectuate the recovery of response costs. For example, the states do not have the power to list sites on the federal National Priorities List, under section 105 of CERCLA; nor to issue an order requiring PRPs to clean up a site, subject to penalties and special damages, under section 106 of CERCLA; nor to use the federal superfund for investigating and remediating hazardous waste sites, under section 9611 of CERCLA. 42 U.S.C. §§ 9605, 9606, and 9611. Instead, New York has established its own Inactive Hazardous Waste Disposal Site list, or Registry; it has created its own source of funding for the investigation and remediation of such

sites; and, it can rely on state law to issue orders to PRPs to clean up such sites. ECL Article 27, Title 13, particularly §§ 27-1305 (Registry); State Finance Law § 97-a (funding); and ECL § 27-313 (orders).

While the state law provisions of ECL Article 27, Title 13 provide the necessary powers to take certain actions with regard to hazardous waste sites that are not provided by CERCLA, the core authority on which the state relies for the recovery of response costs is found in section 107(a) of CERCLA. 42 U.S.C. §§ 9607(a).

## **2. Plaintiffs Settled with NYSDEC and Are Entitled to Pursue a Contribution Claim under CERCLA Against Defendants**

The state is authorized by CERCLA to sue PRPs for joint and several liability under section 107(a). 42 U.S.C. § 9607(a). CERCLA recognizes that the states may settle their claims either administratively or judicially, and expressly creates a right of contribution. Section 113(f)(3)(B) provides “A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).”<sup>2</sup> 42 U.S.C. § 9613(f)(3)(B). Moreover, once a PRP settles with a state for the costs of investigating and remediating a hazardous waste site, it obtains contribution protection. 42 U.S.C. § 9613(f)(2). This is not only statutorily clear but logically necessary for the CERCLA cleanup scheme to work.

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<sup>2</sup> Alternatively, a PRP can obtain the right to seek contribution under CERCLA if it is subject to a civil action under sections 106 or 107 of CERCLA. 42 U.S.C. §§ 9606, 9607. Section 113 (f)(1) provides: Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title. . . .” 42 U.S.C. §9613 (f)1).

Here, through a series of Orders on Consent from 1992 through 2004, NYSDEC settled or resolved all its claims, under CERCLA as well as under state law, with Seneca. All work was conducted pursuant to and in conformance with federal standards and with the NCP, and thus Seneca was entitled to seek contribution under CERCLA.

Defendants argue that Seneca settled only its ECL claims with the NYSDEC, and not its CERCLA claims, and thus cannot avail itself of the CERCLA contribution cause of action. That is simply a misreading of the Orders on Consent. Under the second Order, Plaintiff was granted contribution protection under section 113(f)(2) of CERCLA for the “Matters Addressed” in the Order. NYSDEC 2003 Order on Consent (Sanoff Aff., Exhibit B, section XIII.K, at page 12). Under the third Order, NYSDEC released and covenanted not to sue Seneca “for each and every claim, demand, remedy, or action whatsoever...which the Department has or may have pursuant to article 27, Title 13 of the ECL or pursuant to any other provision of statutory or common law involving or relating to investigative or remedial activities relative to or arising from the disposal of hazardous waste...at the Site.” (Sanoff Aff., Exhibit C, section II.G, at page 6)(emphasis added).<sup>3</sup> The 2004 Order on Consent expressly recites the provision under CERCLA granting the Plaintiff the right to seek contribution from other PRPs as a result of its entering into an administrative settlement with NYSDEC:

Furthermore, to the extent authorized under 42 U.S.C. section 9613(f)(3)(B), by entering into this administrative settlement of liability, if any, for some or all of the response actions and/or for some or all of the costs of such action, Respondent is entitled to

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<sup>3</sup> All three Orders on Consent must be construed as a whole to set forth the obligations and rights of Seneca and NYSDEC related to the Site. Only with the third Order did Seneca complete the investigation and remediation of the entire Site and therefore obtain the release and covenant not to sue.

seek contribution from any person except those who are entitled to contribution protection under 42 U.S.C. section 9613(f)(2).

NYSDEC 2004 Order on Consent (Sanoff Aff., Exhibit C, Section XIV.J, at page 19). This language, of course, is the very language of section 113(f)(3)(B) of CERCLA. 42 U.S.C. § 9613(f)(3)(B). Thus, it is beyond doubt that Seneca settled both its ECL and its CERCLA claims with the state, and under the crystal clear language of CERCLA, Seneca has a right to seek contribution.

Defendants attempt to manufacture doubt by relying on the recent United States Supreme Court case of *Cooper Industries, Inc. v. Aviall Services*, -- U.S.--, 125 S. Ct. 577, 160 L.Ed. 2d 548 (December 14, 2004). The *Aviall* case is of no help to defendants, however, as it is irrelevant to the present case. *Aviall* raised the issue of whether a PRP that has not been sued under section 106 or 107 of CERCLA has the right to bring a contribution action under CERCLA against other PRPs. In that case, *Aviall* cleaned up the site voluntarily without entering into a settlement with the state and without being sued under section 106 or 107 of CERCLA. The Supreme Court held that the PRP that voluntarily cleaned up the site did not have a right of contribution under CERCLA, relying solely on section 113(f)(1), which allows a right of contribution “during or following any civil action under section 9607(a) of this title.” The Court did not address the issue of the right to CERCLA contribution after settling with a state, as the issue was not before the Court. As Plaintiffs have pointed out in their Memorandum in Opposition, both *Cooper*, the party that had been sued for contribution, and the United States acknowledged in oral argument before the Supreme Court that if *Aviall* had entered into an administrative settlement with the state then *Aviall* clearly would have been entitled to sue for contribution under section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

In contrast, when faced with the same facts that are before this Court — where PRPs entered into Orders on Consent with NYSDEC to clean up a hazardous waste site — courts have held that such PRPs are entitled to seek contribution under CERCLA. In a pre-*Aviall* case in the Western District on all fours with the present case, for example, the court held that PRPs, who were members of a Steering Committee and who entered into several Orders on Consent with NYSDEC, in 1993 and 2001, had in effect settled their CERCLA liability with the state and were entitled to seek contribution under CERCLA from other PRPs. *Pfohl Brothers Landfill Site Steering Committee v. Allied Waste Systems*, 255 F.Supp. 2d 134 (W.D.N.Y. 2002) (Report and Recommendation by Magistrate Judge Foschio adopted by the District Court). The Magistrate Judge found that both Orders on Consent were entered into pursuant to DEC’s authority under New York ECL § 27-1301 and that: “The Orders on Consent thus establish that they are administrative settlements by which the Steering Committee members have settled their liability to New York in connection with the cleanup and remediation of the Landfill, in accordance with 42 U.S.C. § 9613(f)(3)(B).” *Id.* at 154-155. Similarly, in *Fireman’s Fund Insurance Company v. City of Lodi, California*, 296 F.Supp.2d 1197, 1210-1212 (E.D.Cal. 2003), the court found that the City of Lodi had entered into an agreement with the state environmental agency to investigate and remediate contamination within the city sewers, with oversight provided by the state agency. The court held that: “Because Lodi resolved its liability to an agency of the state for some of its response costs based on the design, construction, and operation of Lodi’s sewers, the court finds that the Agreement is an ‘administrative settlement’ within the meaning of CERCLA section 113(f)(3)(B).” *Id.* at 1212. *See also, New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997) (where the court reasoned that a PRP that entered into

a series of consent decrees with EPA, requiring the PRP to finance and implement remedial action at a landfill, “may seek contribution from non-settling potentially responsible persons” under 42 U.S.C. § 9613(f)(3)(B).

The other cases relied on by defendants are unavailing. In both *Elementis Chemicals, Inc. v. T.H. Agric. & Nutrition, L.L.C.*, 2005 U.S. Dist. LEXIS 1404 (S.D.N.Y. January 31, 2005), and *AMW Materials Testing, Inc. v. Town of Babylon*, 348 F.Supp.2d 4 (E.D.N.Y. 2004), the contribution plaintiffs had not entered into any administrative settlement nor had they been sued under section 106 or 107 of CERCLA, and therefore were indistinguishable from *Aviall* and without a right of contribution under CERCLA. The holding in *Pharmacia Corporation v. Clayton Chemical Acquisition, LLC*, 2005 U.S. Dist. LEXIS 5386 (S.D. Ill. March 8, 2005), is also irrelevant, for a different reason. In *Pharmacia*, a PRP entered into two orders with the US EPA under section 106 of CERCLA, and the court held that the orders did not constitute an administrative settlement. The reasoning of the court revolved around an interpretation of the interplay between sections 106 and 122 (which governs federal settlements) of CERCLA. 42 U.S.C. §§ 9606, 9622. In particular, the court found that both orders were entered pursuant to section 106, which provides EPA with authority to issue unilateral orders requiring PRPs to clean up a site, rather than pursuant to section 122, which governs settlements with the United States. Moreover, the penalties provided under the orders were also based on section 106 rather than section 122. Neither section is applicable to the state, and the analysis and holding in the case are not applicable. The state respectfully submits that, in addition, the court’s reasoning is flawed in that it relies on the form of the settlement agreement rather than its substance, since the orders in substantive effect settled the CERCLA claims of the United States against the PRPs

subject to the orders.

One final argument raised, rather vaguely, by defendants deserves a brief comment. Defendants suggest, without any analysis or case law support, that since NYSDEC is not authorized to issue orders under section 106 of CERCLA, it follows “inexorably” that NYSDEC cannot resolve any liability under CERCLA in its cleanup orders. Defendants’ Memorandum in Support, at 7 and Footnote 11. There is nothing inexorable or logical about the statement. As discussed above, the authority of NYSDEC to settle CERCLA claims derives from its authority to assert claims against PRPs under section 107(a) of CERCLA, not under section 106. Once settlement is reached, the right to contribution follows pursuant to section 113 of CERCLA. 42 U.S.C. § 9613(f)(3)(B). That is inexorable.

## **CONCLUSION**

For all of the foregoing reasons, Defendants' motion to dismiss Plaintiffs' contribution claim under section 113(f)(3)(B) should be denied.

Dated: New York, New York  
April 29, 2005

Respectfully submitted,

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