UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

Plaintiffs-Appellees,

-against-

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants-Third-Party-Plaintiffs-Appellants,

JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Defendant-Appellant-Cross-Appellee,

-against-

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Third-Party-Defendants-Appellees.

Docket No. 03-7203

MEMORANDUM OF LAW OF THE CITY OF NEW YORK IN OPPOSITION TO APPELLEES' APPLICATION FOR ATTORNEYS' FEES AND COSTS

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Dated July 14, 2006

TABLE OF CONTENTS

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Appellants the City of New York, the New York City Department of Environmental Protection ("DEP"), and Joel A. Miele, former Commissioner of DEP

(collectively, "the City") submit this memorandum of law in opposition to the application for award of attorneys' fees and costs brought by Appellees Catskill Mountains Chapter of Trout Unlimited *et al.* ("Appellees").

PRELIMINARY STATEMENT

Appellees seek an award of $143,305.65 in attorneys' fees and $8,846.44 in costs allegedly incurred since February 6, 2003, when the United States District Court for the Northern District of New York issued its Memorandum – Decision and Order ("2003 Order").[1] Appellees seek fees not only pertaining to the City's appeal of the order, but also for their participation in two tangentially related proceedings: (1) as intervenors in pending state administrative hearings regarding the draft State Pollutant Discharge Elimination System ("SPDES") permit for the Shandaken Tunnel, and (2) as *amici curiae* in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) ("*Miccosukee*").

The City does not dispute that the participation by a prevailing party in litigation in ancillary post-judgment proceedings may give rise to compensable attorneys' fees where the party's efforts in such proceedings is necessary and effective in enforcing the judgment in the underlying litigation. Here, however, there is no basis for Appellees' recovery of fees for the post-judgment proceedings. First, the City has complied in full with all of its obligations under the District Court's order. Appellees do not, and cannot, claim that either of these post-judgment proceedings has affected the City's compliance. Second, Appellees have not prevailed in either of the post-judgment proceedings. The administrative permit proceedings have not concluded, and the Supreme Court expressly declined to resolve the issue argued in Appellees' *amicus* brief in *Miccosukee*. Accordingly, and as explained in further detail below and in the accompanying

[1] A copy of the 2003 Order is attached as Exhibit "A" to the accompanying Declaration of Hilary Meltzer, dated July 14, 2006 ("Meltzer Declaration").

Meltzer Declaration, Appellees are not entitled to fees or costs in connection with these ancillary proceedings.

Moreover, many of the attorneys' fees and costs Appellees have billed are excessive and unreasonable. Additionally, a number of Appellees' billing records are too vague to indicate the basis for Appellee's claims for reimbursement. Such excessive and poorly documented fees and costs should not be recoverable by the Appellees.

Finally, as this proceeding is not yet complete,[2] any award of fees and costs is premature.

For all of these reasons, the total fees and costs sought by Appellees should be reduced, at a minimum, from $152,152.09 to an amount less than $46,634.98.

ARGUMENT

POINT I

APPELLEES ARE NOT ENTITLED TO FEES AND COSTS RELATED TO THEIR PARTICIPATION AS INTERVENORS IN THE PENDING SPDES PERMIT PROCEEDINGS OR AS *AMICI CURIAE* IN *MICCOSUKEE*

A. Standard of Review for Recovery of Attorneys' Fees Under the Clean Water Act

The Clean Water Act states that "a court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate."[3] The party seeking reimbursement bears the burden of proving the reasonableness and necessity of hours spent and the rates

[2] The City petitioned for rehearing on June 27, 2006. This Court has not yet decided that petition.

[3] 33 U.S.C. § 1365(d).

charged.[4] If the documentation of hours "is inadequate, the district court may reduce the award accordingly."[5] Moreover, prevailing parties are not entitled to fees that are "excessive, redundant, or otherwise unnecessary" and, if the prevailing parties have achieved only limited success, their request for fees may be reduced proportionately.[6]

B. Appellees Have No Legal Basis for Recovering Fees and Costs Arising Out of Their Participation in Administrative Proceedings Concerning the Draft SPDES Permit

Appellees seek compensation for attorneys' fees and costs arising out of their involvement in the ongoing administrative SPDES permit proceedings. When a prevailing party seeks reimbursement for legal activities that occur after judgment and are peripheral to the central litigation, such as these administrative proceedings, it bears the burden of demonstrating that "the work product from the administrative proceedings was work that was both *useful* and of a type ordinarily *necessary* to advance the [central] litigation."[7] In addition, the party is entitled to compensation only if the post-judgment activities are "at least partly successful."[8] In order to be considered a "prevailing party" in this context, a plaintiff must obtain an actual order or consent decree in the post-judgment ancillary proceeding.[9]

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[4] *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see also New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136 (2d Cir. 1983).

[5] *Hensley*, 461 U.S. at 433.

[6] *Id*. at 433, 436.

[7] *Webb v. County Bd. of Educ.*, 471 U.S. 234, 243 (1985) (emphasis added); *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546 (1986).

[8] *Alliance to End Repression v. City of Chicago*, 356 F.3d 767, 769 (7th Cir. 2004) (explaining that the holding in *Delaware Valley* was based on facts where the party seeking fees prevailed in its enforcement of a consent decree).

[9] *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Human Resources*, 532 U.S. 598 (2001). *See also Alliance to End Repression*, 356 F.3d at 771 (while post-judgment

Appellees suggest that the Supreme Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council ("Delaware Valley")*[10] supports their claim to fees and costs for their participation in the SPDES permit proceedings.[11] In *Delaware Valley*, however, the post-judgment proceedings were necessary to enforce a consent decree. Here, in contrast, Appellees do not and cannot claim that the City has violated the District Court order, nor that their involvement in post-judgment proceedings was necessary – or indeed even relevant – to ensure the City's compliance.

In *Delaware Valley*, plaintiffs brought a citizen suit under the Clean Air Act to compel Pennsylvania to implement a vehicle emission inspection and maintenance program ("I/M Program"). The lawsuit resulted in a court-approved consent decree which "provided detailed instructions as to how the program was to be developed and the specific dates by which the tasks were to be accomplished."[12] Among other things, the consent decree required Pennsylvania[13] to promulgate regulations for a statewide I/M Program.[14] After the consent decree was entered, the plaintiffs: (1) submitted comments on proposed regulations Pennsylvania was required by the consent decree to adopt, and (2) opposed Pennsylvania's attempt to modify the terms of the consent decree in an administrative hearing before the United States

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"monitoring may reduce the incidence of violations of a decree . . . if it does not produce a judgment or order, then under the rule of *Buckhannon* it is not compensable").

[10] 478 U.S. 546 (1986).

[11] Appellees' Brief, pp. 8 – 10.

[12] 478 U.S. at 558.

[13] Pennsylvania was acting in this context through its Department of Transportation, or PennDOT.

[14] *Id*. at 549.

Environmental Protection Agency.[15] Pennsylvania was ultimately required to pay fees for those post-judgment activities, because they were undertaken in opposition to specific attempts by Pennsylvania to modify or undermine the terms of the court-approved consent decree.[16]

The situation is completely different here. The District Court enjoined the City to diligently pursue a SPDES permit; the City has done so.[17] The District Court order further directed the New York State Department of Environmental Conservation ("DEC") to make a determination regarding the City's SPDES permit application; the State is following applicable procedures to do so.[18]

In contrast to the consent decree in *Delaware Valley*, which imposed specific substantive requirements, the District Court here declined to include direction concerning the content of the SPDES permit in its order. Appellees are participating in the permit proceeding solely to influence the content of the permit. They argue that their work "is both useful and necessary to ensure that the goal of this litigation – cleaning up Esopus Creek ... is met."[19] What

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[15] *Id*. at 558-59.

[16] In contrast, the District Court explicitly denied plaintiffs' attempt to recover attorneys' fees for participating in administrative activities that "would not have affected plaintiffs' rights under the decree." *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 581 F. Supp. 1412, 1430 (E.D. Penn. 1984).

[17] 2003 Order at 24-25; Meltzer Declaration at ¶ 6.

[18] 2003 Order at 24-25; Meltzer Declaration at ¶¶ 5 – 12.

[19] Appellees' Memorandum of Law, p. 10, citing *Delaware Valley*. The other cases Appellees cite are equally unavailing. In *Sullivan v. Hudson*, 490 U.S. 877 (1989), the administrative proceedings for which the plaintiff received attorneys' fees were expressly ordered by the Court of Appeals and were "crucial to the vindication of [plaintiff's] rights." 490 U.S. at 889-90. Similarly, in *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565 (2d Cir. 2003), the ripeness doctrine required plaintiffs to seek relief under local administrative procedures *prior* to bringing their claims under the Fair Housing Amendments Act and the Americans with Disabilities Act, and thus plaintiffs were awarded attorneys' fees for pre-litigation administrative proceedings after prevailing in the litigation.

is relevant here, however, is not Appellees' "goal" but the relief sought and granted in the litigation, which relates to the necessity for rather than the substance of the permit. Appellees cannot claim that their involvement in the SPDES permit proceedings is "useful and necessary for securing full enforcement of the decree" against the City because, quite simply, the City has done everything that the Order has required it to do.[20]

Indeed, to the extent that Appellees seek to challenge the content of the draft SPDES permit, recovery of attorneys' fees from the City is inappropriate because, pursuant to applicable law, a SPDES permit is drafted, modified, and issued by DEC – not by the City.[21] Unlike the plaintiffs in *Delaware Valley* who sought attorneys' fees for commenting on regulations promulgated by the *defendant* pursuant to the consent decree, Appellees here seek attorneys' fees from the City for challenging a permit drafted by DEC. The City cannot be held responsible for Appellees' fees and costs for litigating against DEC regarding a permit which the City does not have the capacity to draft, issue, or modify.[22]

Finally, although Appellees allege that their presence "in the administrative proceedings has proven to be essential to creating a permit that actually complies with the Clean Water Act and takes meaningful steps toward cleaning up the Esopus Creek," they have failed to provide any support for these contentions. The permit proceedings are ongoing, and it is thus unclear whether Appellees' participation has been effective in achieving these purported goals.

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[20] *See Delaware Valley*, 478 U.S. at 556.

[21] *See* 33 U.S.C. § 1342 (allowing EPA to delegate its authority to issue Pollutant Discharge Elimination System permits to the states) and New York State Environmental Conservation Law, § 17-0101 *et seq*. (establishing New York State's SPDES permitting program).

[22] Conceivably, in future litigation brought against DEC and/or EPA after the permit is issued, Appellees might be entitled to attorneys' fees from DEC or EPA (but not from the City) if a court were to find that the permit terms were unlawful.

Moreover, even if they were correct that the draft permit does not comply with the Clean Water Act, which they are not, their claim would be against DEC, the drafter of the permit, not against the City.

Appellees thus cannot demonstrate that contesting the draft terms of the SPDES permit issued by DEC is useful and necessary to protecting the "final result" they obtained from the District Court. The final order only required the City to pursue and DEC to issue a SPDES permit for the Shandaken Tunnel. Any technical issues that Appellees have raised in SPDES permit proceedings regarding what they believe should and should not be included in the final permit go beyond the express terms of the Order. Appellees must therefore bear their own costs associated with advocating for the changes.

C. Appellees Have No Legal Basis for Recovering Attorneys' Fees and Costs Arising Out of Their Participation as *Amici Curiae* in *Miccosukee*

The framework for establishing a party's right to attorneys' fees for post-judgment participation in ancillary proceedings applies equally to Appellees' submission of an *amicus* brief in *Miccosukee*; that is, Appellees' activities would have to have been necessary and effective in enforcing the 2003 Order. For the reasons discussed above in connection with the pending permit proceeding, Appellees cannot make the necessary showing because there has never been any question that the City was in full compliance with the 2003 Order.

To the extent that their participation in *Miccosukee* was intended to protect Appellees' rights under this Court's October 2001 decision that transfers of water are subject to the Clean Water Act NPDES permit program, they nonetheless cannot contend that they played so significant a role as to be entitled to attorneys' fees. Appellees' brief was one of ten submitted in support of the respondent. Appellees' co-*amici* included the Commonwealth of Pennsylvania, former EPA Administrator Carol M. Browner, and several national environmental

organizations, among others. The Supreme Court gave no indication that Appellees' brief influenced its decision. Thus, Appellees' independent involvement in these proceedings was not "necessary" to the extent that would enable them to recover attorneys' fees in this proceeding because, unlike the interests of plaintiffs in *Delaware Valley*, Appellees' interests were adequately represented by other parties.[23]

Similarly, *amici* are not generally entitled to attorneys' fees from the losing party in the cases in which they submit *amicus* briefs.[24] In *Wilder v. Bernstein*, the Second Circuit made clear that, under section 1988 of the Civil Rights Act – a statute that is analogous to the fee-shifting provision of the CWA – an *amicus curiae*, without standing to intervene, cannot be considered a "prevailing party" and therefore is not entitled to recover attorneys' fees.[25]

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[23] *See Delaware Valley*, 581 F. Supp. at 1429 – 30 (holding that it was necessary for plaintiffs to participate as *amici* because their adversary in the central litigation, Pennsylvania, which had a history of noncompliance with the consent decree, was actually defending the consent decree in the collateral litigation). The City does not, of course, argue that plaintiff could not participate in these proceedings, but simply that they must pay their own fees for doing so.

[24] *Universal Waste Oil Products v. Root Refining Co.*, 328 U.S. 575 (1946) (denying attorneys' fees to *amici* who participated in proceedings to overrule an adverse judgment obtained by fraud that negatively impacted their clients in other proceedings).

[25] *Wilder v. Bernstein*, 965 F.2d 1196, 1203 (2d Cir. 1992) (explaining that its ruling that intervenors can recover attorneys' fees "will not open the flood-gates to *amicus curiae*, good samaritans, or even litigious meddlers so that they may team up and overburden the nonprevailing party with excessive attorneys' fees"); *see also Morales v. Turman*, 820 F.2d 728, 732 (5th Cir. 1987) (*amicus curiae*, without intervening, demonstrating standing, or having participated as a party in proceeding, is not entitled to fees despite having provided beneficial input to remedy); and *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) ("An organization or group that files an *amicus* brief on the winning side is not entitled to attorneys' fees and expenses as a prevailing party, because it is not a party"). *Cf. Smith v. Fussenich*, 487 F. Supp. 628 (D. Conn. 1980) (awarding attorneys' fees to applicant who "actively pursued plaintiffs interests not only as an amicus but also as counsel of record"); *Russell v. Board of Plumbing Examiners of the Cty. of Westchester*, 74 F. Supp. 2d 349 (S.D.N.Y. 1999) (awarding attorneys' fees to *amicus* whose members are vitally interested in the outcome before the Court [and whose] counsel contributed to plaintiffs victory).

Moreover, Appellees cannot contend that they substantially prevailed on the issues that they briefed in *Miccosukee*.[26] In *Miccosukee*, Appellees' objective was to convince the Supreme Court to affirm the Eleventh Circuit's decision.[27] Instead, the Court vacated the Eleventh Circuit's opinion and remanded the matter for further fact-finding. The Supreme Court expressly left open the essential legal issue of concern to Appellees – whether transfers of water from one water body to another constitute a discharge of a pollutant – explicitly inviting the petitioners to pursue such arguments in the courts below.[28] Thus, Appellees cannot claim to have prevailed in *Miccosukee*.

Finally, it is inequitable for Appellees to seek fees for more than two-hundred hours that their interns spent researching, drafting, and editing their twenty-eight page brief to the Supreme Court – a brief that essentially recites facts and law that Appellees had been litigating for several years in this case. This amount of time is patently excessive, as is Mr. Coplan's request to receive fees and costs for attending the oral argument in *Miccosukee*, solely to observe and not to participate. Thus, even if Appellees' fees and costs are allowed, they should be significantly reduced.

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[26] *See Knop v. Johnson*, 700 F. Supp. 1457 (W.D. Mich. 1988) (in which Court denied plaintiffs' application for attorneys' fees in their main proceeding for participation as *amicus* in collateral proceedings, finding, among other things, that plaintiffs had not prevailed in the collateral proceeding); *see also Hensley*, 461 U.S. at 436 (noting that limited success of efforts could lead to a reduction in attorneys' fees).

[27] *Brief of Amici Curiae Trout Unlimited et al.*, attached to the Meltzer Declaration as Exhibit "B."

[28] See *Miccosukee*, 541 U.S. at 109, 111.

POINT II

APPELLEES ARE NOT ENTITLED TO RECOVER UNREASONABLE FEES AND COSTS

Independent of the merits of Appellees' attempt to recover fees and costs from administrative hearings and *amicus* briefing, Appellees' demand for costs should be significantly reduced to the extent it is unreasonable.

A. Appellees Cannot Be Compensated for Work that Is Excessive, Duplicative, or Unnecessary

In reviewing a fee application, courts will examine the time expended by counsel with a view to the value of the work product to the client's case: "If the [court] concludes that any expenditure of time was unreasonable, it should exclude these hours from the lodestar calculation."[29] "In determining the number of hours reasonably expended for purposes for calculating the lodestar, the district court should exclude excessive, redundant, or otherwise unnecessary hours."[30] Bases for courts to exclude costs as "excessive, redundant, or otherwise unnecessary" include excessive time spent researching and writing briefs, sending too many attorneys to perform a given task, and using attorneys who have limited involvement to perform activities that could be performed more efficiently by someone else.[31] Here, as itemized in paragraphs 15 through 17, 23 through 25, 26 through 32, and 34 through 36 of the Meltzer

[29] *Luciano v. Olsten Corp.*, 109 F.3d 111, 116 (2d Cir. 1997).

[30] *Quentin v. Tiffany Co*., 166 F.3d 422, 425 (2d Cir. 1999).

[31] *Arbor Hill Concerned Citizens Ass'n v. Cty. of Albany*, 369 F.3d 91, 97 (2d Cir. 2004) (reducing fees due to excess amount of time spent writing brief); *Luciano*, 109 F.3d at 117 (reducing fees for sending multiple attorneys to jury selection and trial); *Rosso v. PI Management Associates*, 2006 U.S. Dist. LEXIS 27127, *11 (S.D.N.Y. 2006) (reducing billable hours because attorney with knowledge of case spent excessive time re-reviewing documents and preparing for court appearances while another attorney with limited involvement in the case spent excessive time performing rudimentary tasks).

Declaration, Appellees' billing records are replete with excessive, duplicative, or unnecessary hours which should be excluded as unreasonable.

B. Many of Appellees' Time Records Are Inadequate

"[A]ny attorney ... who applies for court-ordered compensation in [the Second Circuit] ... must document the application with contemporaneous time records [specifying] for each attorney, the date, the hours expanded, and the nature of the work done."[32] While it is not required that counsel describe in great detail how billable time was spent, the descriptions provided must provide an adequate basis for the Court "to determine the reasonableness of the claimed hours."[33] Courts in this Circuit have often stricken billing records as overly vague for activities described as "research and draft papers," "trial preparation," "phone and meetings," and "conferences" when the records do not include a description of what topics were researched or the nature of what was discussed.[34] Here, as further explained in paragraph 33 in the Meltzer Declaration, a substantial number of Appellees' fees are not sufficiently documented to allow compensation.

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[32] *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983).

[33] *Local 32B-32J v. Port Authority of New York and New Jersey*, 180 F.R.D. 251, 253 (S.D.N.Y. 1998); *see also Dailey v. Societe Generale*, 915 F. Supp. 1315, 1328 (S.D.N.Y. 1996), *aff'd in relevant part*, 108 F.3d 451 (2d Cir. 1997) ("[E]ntries listed simply as 'telephone call,' 'consultation,' and 'review of documents' are not sufficiently specific as to enable the Court to determine whether the hours billed were duplicative or excessive").

[34] *See, e.g.*, *Local 32B-32J*, 180 F.R.D. at 253; (excluding entries such as "research and draft papers," "phone and meetings," "conference," and "preparation for trial.") *Dailey*, 915 F.Supp. at 1328; *Aiello v. Town of Brookhaven*, 2005 U.S. Dist. LEXIS 11462, *12 (E.D.N.Y. 2005); *Amato v. City of Saratoga Springs*, 991 F.Supp. 62, 66 (N.D.N.Y. 1998).

CONCLUSION

For the reasons stated above and in the accompanying Meltzer Declaration, the City respectfully requests that any award of attorneys' fees and costs in this matter be substantially reduced, to an amount less than $46,507.15.

Dated: New York, New York
July 14, 2006

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