IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE CLEAN AIR COUNCIL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 02-1553 GMS
	)	
SUNOCO, INC. (R&M), a Pennsylvania Corporation,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On October 18, 2002, the plaintiff, the Clean Air Council ("the Council"), filed the above-captioned citizens' suit under Section 304 of the Clear Air Act, 42 U.S.C. §§ 7601-7671q. Specifically, the Council seeks to penalize Sunoco, Inc ("Sunoco") for certain flaring events that have occurred since December 2001. On January 21, 2003, the Council filed its first amended complaint.

Presently before the court is Sunoco's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). Sunoco also seeks an award of attorneys' fees. For the following reasons, the court will grant the motion to dismiss, but deny the request for attorneys' fees.

II. BACKGROUND

Sunoco owns and operates a petroleum refinery with a north plant in Marcus Hook, Pennsylvania and a south plant in Claymont, Delaware (collectively, "the Refinery"). The Refinery produces gasoline and other petroleum products from crude oil. One byproduct of the refining process is hydrogen sulfide gas ("H_2S"). Sunoco controls H_2S emissions by piping the H_2S gas to an adjacent plant operated by General Chemical Corporation ("General Chemical") for treatment.

When the General Chemical facility is shut down or cannot process the H_2S, Sunoco routes the H_2S gas through a flare for destruction in Claymont, Delaware. Startups, shutdowns, or malfunctions within other processes at the Sunoco refinery can also generate H_2S gas. This gas is then sent to the flare for destruction as well.

The Delaware Department of Natural Resources and Environmental Control ("DNREC") administers and enforces both state and federal air quality permitting laws within the state of Delaware. On December 28, 2001, DNREC issued a permit to Sunoco regulating air emissions at the Refinery, including the H_2S pipeline and the flare. The permit identifies the flare as a "[s]ite flare for burning H_2S during times the gas cannot be delivered to customer," and notes that the flare is "also used for burning of gas from safety valves" in the Refinery. *See* Permit AQM-003/00021 at 3. The flare is used for destruction of certain vapors from other Refinery operations as well.

On April 11, 2002, DNREC issued a Notice of Violation to Sunoco, alleging that certain flaring events between December 28, 2001 and April 2002 violated Sunoco's permit. It further notified Sunoco of DNREC's intent to pursue an enforcement action.

Sunoco and DNREC entered into negotiations between April and May 2002 to determine whether a settlement of the enforcement action was possible. On May 29, 2002, DNREC filed a civil enforcement action against Sunoco. *See DiPasquale v. Sunoco, Inc.*, No. 02C-05-273 (SLD) (Del. Super. Ct. May 19, 2002) (the "DNREC Complaint"). The DNREC Complaint alleged that fifty-seven flaring events between December 28, 2001 and May 17, 2002 violated Sunoco's permit.

On May 29, 2002, DNREC and Sunoco also filed a Stipulation of Final Judgment resolving the allegations in the DNREC Complaint (the "Final Judgment"). The Final Judgement resolved all claims relating to flaring at the Marcus Hook Refinery. The Final Judgment included both civil

penalties and injunctive relief. Specifically, for past flaring incidents, the Final Judgment assessed a civil penalty of $390,000, plus $10,000 in litigation costs. For future flaring events, the Final Judgment requires Sunoco to pay stipulated penalties. The amount of the penalty varies between $500 and $10,000 per event, based on the amount of SO_2 emitted and the length of the flaring event. The Final Judgment also requires both immediate and long-term injunctive relief to minimize future flaring. Immediate, interim measures include improving and maintaining equipment, using improved operating procedures to ensure better reliability, investigating the cause of, and potential solutions for, flaring events, and developing and implementing an Environmental Management System.

Additionally, the Final Judgment requires Sunoco to investigate and identify a long term technical solution by November 29, 2003. The stated goal is to achieve zero flaring incidents resulting from problems at General Chemical. Once DNREC approves the solution, Sunoco has four years to implement it.

Since the entry of the Final Judgment, Sunoco has destroyed H_2S gas by flaring twelve additional times. It is undisputed that Sunoco paid the stipulated penalties for each of these events. Moreover, on October 25, 2002, Sunoco submitted the technical plan pursuant to the terms of the Final Judgment. Sunoco proposed to construct a "Sulfur Recovery Unit with a Tailgas Unit, and an Incinerator, with appropriate redundancy to provide a high level of operational reliability." Once the Sulfur Recovery Unit is in operation, Sunoco will no longer send its H_2S gas off-site to General Chemical for treatment, thereby eliminating flaring incidents caused by operational problems at General Chemical. This system is scheduled to be in full operation by 2006, or earlier.

III. STANDARD OF REVIEW

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) may present either a facial or factual challenge to subject matter jurisdiction. *Mortensen v. First Fed. Savings and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). The present motion makes a facial challenge to the complaint because Sunoco's arguments are based solely upon the application of legal principles to the facts as alleged in the complaint. Such a motion requires the court to consider the allegations of the complaint as true and to make all reasonable inferences in the plaintiff's favor. *See id*.

The purpose of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. *See Kost v. Kozakiewicz*, 1 F.3d 183 (3d Cir. 1993). Thus, as in the case of a Rule 12(b)(1) motion, the court must accept the factual allegations of the complaint as true. *See Graves v. Lowery*, 117 F.3d 723, 726 (3d Cir. 1997); *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996). In particular, the court looks to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." *Colburn v. Upper Darby Tp.*, 838 F.2d 663, 666 (3d Cir.1988). However, the court need not "credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3rd Cir.1997). A court should dismiss a complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *See Graves*, 117 F.3d at 726; *Nami*, 82 F.3d at 65 (both citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Thus, in order to prevail, a moving party must show "beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

IV. DISCUSSION

A. The Clean Air Act

"[T]he citizen suit is meant to supplement rather than to supplant government action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987). Congress authorized citizens' suits to allow private citizens to act when "the Federal, State, and local agencies fail to exercise their enforcement responsibility." S. Rep. No. 92-414, at 64 (1971). As Senator Muskie commented on the then-newly enacted Clean Air Act, "the idea is to use citizens to trigger the enforcement mechanism. If that enforcement mechanism does not respond, then the citizen has his right to go to court." 116 Cong. Rec. 33103 (1970).

To ensure that the role of citizens remains secondary, the Clean Air Act expressly prohibits citizens' suits where the State has chosen to act. Specifically, it states that, "[n]o action may be commenced [i]f the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order[.]" 42 U.S.C. § 7604(b)(1)(B).

Moreover, "the court must presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct that could be considered dilatory, collusive, or otherwise in bad faith." *Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986). Settling with a violator is within a government agency's discretion, even if citizens might have preferred more stringent terms than those determined by the government to be appropriate. *See Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (S.D. Iowa 1997). As the Connecticut district court stated in *Connecticut Fund for the Environment*,

> [t]he mere fact that the settlement reached in the state action was less comprehensive than the remedy sought in the instant action is not sufficient in itself to overcome the presumption that the state action was diligently prosecuted. Indeed, if the question of "diligent prosecution" were always to depend upon the outcome of the prior pending state suit, a state suit in which the defendant prevailed or reached some compromise with the state could never preclude a subsequent citizens' suit in the federal courts no matter how diligently the state suit had been prosecuted.

631 F. Supp. at 1294. The citizens' suit provision "was not intended to enable citizens to commandeer the federal enforcement machinery." *United States EPA v. Green Forest*, 921 F.2d 1394, 1402 (8th Cir. 1990). Thus, it is DNREC, not the citizens, who is principally responsible for enforcing the law.

1. Diligence

The first question the court must address is whether DNREC's enforcement efforts were diligent. The court concludes that they were diligent as a matter of law.

In the present case, the Council contends that DNREC did not act diligently because the public was not allowed to comment on the settlement. It further contends that DNREC's penalties do not consider the economic benefit that delayed compliance afforded Sunoco. Finally, it maintains that, in any event, the question of diligence is a factual issue. For the following reasons, the court finds each of these arguments to be unavailing.

The Council first argues that the Final Judgment's swift execution effectively excluded its members from participating in the settlement negotiations. However, in making this argument, it has failed to point to any statutory or regulatory language giving citizens such a right to participate in enforcement actions. The court concludes that this failure is due to the fact that there is no such right. Indeed, the Clean Air Act only provides society in general with a remedy against air pollution.

See 42 U.S.C. § 7401(b). Thus, once the State acts to achieve that result, the Act does not authorize citizens to duplicate those efforts.

Moreover, the Council has pointed to no case invalidating a prosecution under the Clean Air Act because citizens were excluded. Instead, the cases upon which the Council relies involve the Federal Water Pollution Control Act, commonly known as the Clean Water Act. This act, however, expressly provides for public participation at various points in enforcement proceedings. *See* 33 U.S.C. § 1319(g)(4); *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 890 F. Supp. 470, 490 (D.S.C. 1995) (relying on the public participation provision of the Clean Water Act); *Love v. New York State Dep't of Envtl. Conservation*, 529 F. Supp. 832, 843-844 (S.D.N.Y. 1981) (same) Thus, Congress has demonstrated that it is eminently capable of explicitly providing for public hearings when it deems them necessary. It did not do so when enacting the Clean Air Act.

The Council next contends that Sunoco has been involved in ongoing violations which suggest DNREC's lack of diligence. Sunoco admits that, since the entry of the Stipulation, there have been twelve flaring incidents. The court nevertheless finds that the subsequent flaring events do not demonstrate a lack of diligence in enforcement. Indeed, DNREC has already provided for, and prosecuted, such violations under the Final Judgment's stipulated penalties provision. The fact that DNREC has chosen to act through a stipulated penalty clause, rather than by seeking the same penalty in a separate civil enforcement action, does not render its prosecution any less diligent. *See Hudson River Sloop Clearwater v. Consolidated Rail*, 591 F. Supp. 345, 351, n.5 (N.D.N.Y. 1984), *rev'd on other grounds*, 768 F.2d 57 (2d Cir. 1985).

The Council also contends that the terms of the Final Judgment itself are unsatisfactory, and thus, reflect DNREC's lack of diligence. Specifically, it takes exception with the Final Judgment

because it "merely" requires Sunoco to pay a civil penalty of $390,000, in addition to the stipulated penalties for future violations. The Council maintains that "the penalties could and should have been much greater." In essence, the Council suggests that DNREC should have engaged in an economic benefit analysis before entering into the Final Judgment because only then could DNREC have known what penalties would be sufficiently high to punish Sunoco. In support of this proposition, the Council cites to the South Carolina district court's opinion in *Laidlaw*. 890 F. Supp. at 491. In that opinion, the court found that the lack of an economic benefit analysis was the most persuasive evidence of lack of diligence. *See id*. On reconsideration, however, the *Laidlaw* court clarified that the economic benefit argument alone would not have justified a finding of lack of diligent prosecution. *See id*. at 498-499. Indeed, the court stated that it had not held that the state agency must always calculate, or even consider, economic benefit. *See id*. The court therefore finds this case to be of little aid to the Council's position.

The court also views as misplaced the significance the Council has ascribed to the Kansas district court's opinion in *United States v. A.A. Mactal Constr. Co.,* 1992 WL 245690 (D. Kan. 1992). In that case, the court itself was faced with the assessment of a fine in the first instance. *See id*. at *1. To aid it in making that determination, the court relied on the economic benefit conferred on the violator for not having complied with the regulations. *See id*. at *2. It did not, however, have the opportunity to consider the situation presently before this court, namely, whether an agency prosecution was diligent. Thus, although the *Mactal* court considered the economic benefit of not complying with the regulations, it did so under different circumstances.

Moreover, other courts have found prosecutions to be diligent where the outcome involved little or no monetary penalty. *See e.g. Arkansas Wildlife Fed'n v. ICI Americas*, 29 F.3d 376, 378

(8th Cir 1994) (assessing a $1,000 penalty); *Hudson River Sloop*, 591 F. Supp. at 352 (refusing to hold that severe monetary penalties are a prerequisite to a finding of diligence). The court likewise concludes that the amount of the penalty cannot render the Final Judgment in this case "totally unsatisfactory." *See Connecticut Fund for the Env't.*, 631 F. Supp. at 1294 (noting that "the mere fact that the settlement reached in the state action was less burdensome to the defendant than the remedy sought in the instant action is not sufficient in itself to overcome the presumption that the state action was diligently prosecuted."). Therefore, Council has failed to allege any facts that, if true, would demonstrate a lack of diligence in this case.[1] The court thus finds that DNREC has acted diligently as a matter of law.

2. Compliance

The Council next argues that its citizen suit should not be barred because DNREC's civil action does not require compliance with the Clean Air Act. Specifically, the Council contends that the Final Judgment (1) requires neither interim nor permanent solutions, (2) merely sets a goal of meeting permit requirements, without requiring anything concrete, (3) extends the goal more than four years into the future, and (4) does nothing to require compliance during the remaining term of the permit.

The test, however, of the state's actions is whether they represent "a diligent prosecution . . . to require compliance," not whether DNREC has phrased every word of the Final Judgment precisely as the Council would have preferred. Instead, the court must examine whether "the

[1]The Council also attempts to avoid dismissal by requesting additional time to take discovery into the "circumstances surrounding Delaware's enforcement action [.]" However, granting such a request would be inappropriate where, as here, the plaintiff's complaint fails to allege facts that, if proven, would provide "persuasive evidence" of a lack of diligence. *See Connecticut Fund for the Env't v. Contract Plating*, 631 F. Supp. 1291, 1293 (D. Conn. 1986).

government's efforts may reach the same result sought by [the] plaintiff." *New York Coastal Fishermen's Ass'n v. New York City of Dep't of Sanitation*, 772 F. Supp. 162, 166 (S.D.N.Y. 1991). The gravamen of the Council's complaint is Sunoco's excessive flaring. The Final Judgment directly addresses this issue by requiring specific immediate steps to address known or suspected causes of flaring. It further requires Sunoco to identify and implement a plan to reduce all flaring within four years. Thus, the Council's stated goal of eliminating flaring events is already being addressed.

The Council also objects to the flexibility which the Final Judgment provides in identifying and implementing the methods to achieve this goal. In essence, it argues that the Final Judgment requires only a "plan" and does not specifically identify the technology to be installed. It further takes exception to the fact that DNREC does not face a concrete deadline to approve the plan, and that Sunoco might request additional time to implement the plan. In sum, the Council appears to be concerned that allowing any flexibility will "ensure[ ] Sunoco will continue to burn Acid Gas in Claymont." The Council's Brief in Opposition at 13.

The court concludes that the Council demands far more precision in the Final Judgment than the law requires. The Final Judgment need not be written in the precise terms the Council would have used; it simply cannot be "totally unsatisfactory." *Hudson River Sloop*, 591 F. Supp. at 351. The flexibility the Final Judgment provides in the instant case cannot justify overturning it. Indeed, courts have approved settlements with similarly flexible terms. *See e.g. Community of Cambridge Envtl. Health v. Community of Cambridge*, 115 F. Supp. 2d 550, 552, 556-57 (D. Md. 2000) (upholding the diligence of a consent order with "a timetable for hiring contractors, initiating studies, completing the studies, and implementing the study recommendations" to comply.); *North*

and South Rivers Watershed Ass'n v. Town of Scituate, 755 F. Supp. 484, 487 (D. Mass. 1991), *aff'd* 949 F.2d 552 (1st Cir. 1991) (upholding the diligence of a consent order that required the town to "take all steps necessary to plan, design, and construct facilities necessary to adequately treat and dispose of all wastewater.").

The Council next suggests that additional interim remedies are available. As the court has previously stated, however, the test is whether DNREC's prosecution is "totally unsatisfactory," not whether it required the remedy which the Council would have preferred. *See Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992). Moreover, the Council appears to be ignoring the interim remedies that DNREC did require. Specifically, DNREC required immediate improvements to certain equipment, improved operating procedures, detailed investigations of any future flaring events, a new Environmental Management System, and improved communication procedures, both within the Refinery and with DNREC.

Finally, the Council objects to the portion of the Final Judgment which allows Sunoco time to implement the long-term remedy, while requiring only stipulated penalties in the interim. Again, however, the Council's wish for a personalized remedy is not sufficient to demonstrate a "totally unsatisfactory" resolution. Therefore, the court finds the Council's argument on this point to be unpersuasive.

Having thoroughly considered, and rejected, each of the Council's contentions, the court finds the current action to be statutorily barred by DNREC's diligent prosecution of an enforcement action. The court need not, therefore, address Sunoco's alternative argument with regard to the doctrine of res judicata.

B. New Source Performance Standards

Count II of the Council's amended complaint claims that the flaring events violated not only Sunoco's permit, but also 40 C.F.R. § 60.11(d) of the New Source Performance Standards ("NSPS") program. The NSPS requires a facility to operate in a manner consistent with "good air pollution control practice" for minimizing emissions. The Council now alleges that Sunoco violated this requirement by: (1) failing to install a sulfur recovery unit and (2) failing to use portable sulfur recovery technologies to maintain a reserve supply of sweet crude oil. *See* Amended Complaint at ¶ 42. For the following reasons, the court disagrees that this section applies.

The NSPS program does not regulate entire plant sites, such as petroleum refineries. Instead, it regulates individual pieces of equipment and process units ("affected facilities") within a plant. *See* 40 C.F.R. § 60.2 (defining "affected facility); *ASARCO, Inc. v. EPA*., 578 F.2d 319, 323 (D.C. Cir. 1978). Each NSPS defines what equipment constitutes the "affected facility" under that particular standard. *See e.g.* 40 C.F.R. § 60.100(a) (identifying "affected facilities" for petroleum refining source category). The general provisions, including Section 60.11(d), apply only to affected facilities as defined under the individual standards:

> [a]t all times, including periods of startup, shutdown, and malfunction, owners and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions.

40 C.F.R. § 60.11(d).

In the present case, the NSPS that applies to refineries, Subpart J, identifies "affected facilities" as fuel gas combustion devices, fluid catalytic cracking units, and sulfur recovery plants. *See* 40. C.F.R. § 60.100(a). The only potential "affected facility" identified in Count II of the

Amended Complaint is the flare. Thus, to comply with Section 60.11(d), Sunoco must ensure that its flare is properly maintained and operating within proper parameters. The Council does not, however, allege that Sunoco has failed to properly maintain and operate the flare itself. Rather, as the court noted above, it alleges only that Sunoco has (1) failed to install a sulfur recovery unit and (2) failed to use portable sulfur recovery technologies or maintain a reserve supply of sweet crude oil.[2] Neither of these allegations involves the flare.

The Council cites a number of cases in support of its position that Section 60.11(d) applies to the present case. The court, however, concludes that these cases are distinguishable on their facts. First, each of the cited cases involved emissions from, and problems with, specific "affected facilities" and their associated pollution control devices. For instance, *United States v. Nevada Power Co.*, involved an electric generating unit and its associated pollution control device. 1990 WL 149661, at *4 (D. Nev. June 1, 1990). The alleged violation of "good air pollution control practices" was limited to the alleged failure to minimize emissions from that unit, not from other unregulated equipment elsewhere in the facility. *See id*.

Second, the cases cited by the Council each involved alleged improper maintenance or operation of the affected facilities and their associated pollution control devices. They do not, as the Council suggests, compel the installation of new equipment. Thus, for example, when a scrubber developed leaks that reduced its efficiency, the failure to repair those leaks violated good air pollution control practices. *See Longview Fibre Co. v. Washington Dep't of Ecology*, 949 P.2d 851,

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[2]In its opposition brief to the present motion, the Council attempts to expand Count II to encompass additional "affected facilities," including the H_2S pipeline, additional fuel gas combustion devices, and the fluid catalytic cracking units. However, Count II itself alleges only violations at the flare and the "facility" as a whole. Therefore, the court concludes that Count II is limited to the flare.

856 (Wash. Ct. App. 1998) (applying the Washington State air pollution control statute). Similarly, continuing to operate an affected facility when its associated pollution control device is malfunctioning, without taking sufficient additional steps to minimize emissions, can also violate that requirement. *See Nevada Power*, 1990 WL 149661, at *4.

Here, the Council has neither alleged that the flare itself is improperly combusting the H_2S sent to it, nor that it must be replaced to prevent further malfunctions. Accordingly, Count II of the amended complaint must be dismissed.

C. Attorneys' Fees Pursuant to the Clean Air Act

The citizens' suit provision of the Clean Air Act authorizes an award of attorneys' fees to "any party, whenever the court determines such award is appropriate." 42 U.S.C. § 7604(d). This provision is not limited to those advocating "pro-environment" positions. *See Alabama Power v. Gorsuch*, 672 F.2d 1, 11 (D.C. Cir. 1982). Furthermore, when Congress first adopted Section 304 in 1970, it faced the concern that the broad access provided for by the citizen suit provision could result in "frivolous and harassing litigation" against private parties. 116 Cong. Rec. 33103 (remarks of Sen. Muskie). Thus, before the court may award attorney's fees to the defendant, it must determine that the suit is "frivolous, groundless, pursued in bad faith, or maintained after its baselessness became apparent." *Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923, 931 (7th CIr. 2000).

Furthermore, the court recognizes that citizen suits are fundamental to the effective enforcement of environmental legislation. Given this importance, the court is mindful that freely awarding attorneys' fees to defendants would have a chilling effect on actions brought to vindicate citizen rights. Therefore, as the Supreme Court instructed in *Christiansburg*, the court will "resist

the understandable urge to engage in post hoc reasoning by concluding that, because the plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978).

In the present case, while the claims were ultimately unavailing, the court cannot say that the Council's complaint was frivolous, groundless, pursued in bad faith, or maintained after its baselessness became apparent. The Council was not advocating the position that a citizen suit should be permitted to go forward even where a diligent state prosecution had already taken place. Rather, it suggested that, in this case, the Final Judgment was essentially an unsatisfactory sham settlement accruing to Sunoco's benefit, and to the environment's detriment. It was well within its rights to make such an argument.

As the court discussed above, the crux of the Council's argument centered around the questions of diligence and compliance. To support its position, the Council relied on, among other things, Sunoco's flaring incidents which occurred after the entry of the Final Judgment. It further relied on a district court opinion which had considered the lack of an economic benefit analysis as one factor among many in determining the question of diligence. These facts tend to belie the frivolousness of this action because the Council was entitled to make the argument that, at a minimum, these facts amounted to a lack of diligence in this circumstance. The fact that it was unable to convince the court on this matter is not an appropriate ground on which to punish the Council.

Additionally, the only other evidence of bad faith that Sunoco points to is a statement made by a staff attorney for the Council prior to the commencement of the instant lawsuit. In that statement, the attorney remarked that "DNREC's action probably will block the Council from

pursuing a citizen lawsuit against the company." *See* Sunoco's Opening Brief (D.I. 6) at 20. Sunoco argues that this statement is additional proof that the Council knew it could not bring this lawsuit. However, this statement is unhelpful to Sunoco's argument as it is entirely plausible that, upon further thought, the attorney reasonably changed his view.

The court thus concludes that an award of attorneys' fees would be inappropriate on the facts of the case presently before it.

V. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Sunoco's Motion to Dismiss (D.I. 20) is dismissed as MOOT.
2. Sunoco's Motion to Dismiss (D.I. 28) is GRANTED.
3. Sunoco's Motion for Attorneys' Fees and Costs (D.I. 5) is DENIED.
4. The Council's Motion for James R. May to Appear Pro Hac Vice (D.I. 30) is dismissed as MOOT.

Dated: April 2, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE