

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Michigan Waste Systems, Inc.

Dkt. No. RCRA-V-W-84-R-054

Respondent

ORDER GRANTING COMPLAINANT'S MOTION
TO DISMISS THE REOPENED PROCEEDING

I. Background

This proceeding was initiated upon issuance by the United States Environmental Protection Agency, Region V, of a complaint pursuant to section 3008(a) of the Resource Conservation and Recovery Act (RCRA), as amended, against respondent Michigan Waste Systems, Inc. Respondent owns and operates a hazardous waste landfill ("facility" or "Woodland Meadows North"). The complaint charged numerous violations of the ground-water monitoring regulations, 40 C.F.R. Part 265 Subpart F, which were promulgated under RCRA.

The Initial Decision herein held respondent liable for most of the violations alleged in the complaint, and assessed a civil penalty of \$9,825. The Compliance Order directed respondent to comply with several regulatory requirements within certain time periods.

Respondent moved to reopen this proceeding pursuant to 40 C.F.R. § 22.28 for the purpose of modifying the Compliance Order.¹ Respondent sought to present additional evidence regarding activities at the facility which had occurred since the trial in this matter took place, on the ground that substantial portions of the Compliance Order had been met or rendered unnecessary by respondent's activities since the trial. In addition, respondent was concerned that the Michigan Department of Natural Resources (MDNR) may have imposed or agreed to requirements inconsistent with the Compliance Order. The MDNR had received authorization from EPA on October 30, 1986 under section 3006 of RCRA to operate a hazardous waste program. 51 Fed. Reg. 36804; 40 C.F.R. § 272.1150.²

In 1988 and thereafter, MDNR evaluated respondent's facility and entered into agreements with respondent with regard to ground-water monitoring.

The hearing was reopened for purposes of addressing matters necessary to ensure that there were no significant inconsistencies between the Compliance Order and requirements imposed upon respondent by MDNR. Pursuant to an Order to submit a statement of specific issues to be addressed, Respondent listed twenty-two issues it wished to have addressed in the reopened hearing.

The issues contemplated for the reopened hearing were (1) whether a conflict existed between any portion of the Compliance Order and requirements imposed upon respondent by MDNR, or (2) whether it is impossible for respondent to comply with any requirement of the Compliance Order as a result of events which occurred after the hearing ended.³

By order dated April 9, 1993, respondent was directed to submit a list of specific requirements of the Compliance Order with which it believes it cannot or should not comply, and a statement of reasons for believing it cannot comply. Respondent filed a "Supplemental Statement of Evidence to be Offered at the Re-Opened Hearing," dated April 16, 1993 ("Statement of Evidence"), listing almost every paragraph in the Compliance Order, and describing the extent to which it believed such conflict or impossibility existed with respect to each paragraph.

Complainant responded to the Statement of Evidence on June 3, 1993, with a motion to dismiss the reopened hearing ("Motion to Dismiss").⁴ Complainant argued that the conflicts asserted by respondent are simply negotiations with the State over permit conditions, and do not relieve respondent of compliance with interim status requirements of 40 C.F.R. Part 265, since they pertain to that period prior to issuance of a permit. Complainant emphasized that respondent must comply with interim status regulations until such time as a permit is issued. Respondent did not specify any conflicting requirements imposed by MDNR, complainant argued further, but referred only vaguely to discussions and agreements with MDNR. Agreements respondent may have made with MDNR may address assessment of future releases, whereas the Compliance Order is concerned with assessing a past release, complainant suggested. The parties each filed responsive documents.

The question presented by the Motion to Dismiss is whether or not respondent has alleged any facts upon which evidence ought to be taken that provide a basis to amend the Compliance Order. Because this Order addresses complainant's

motion for dismissal, the facts will be construed in a light most favorable to the respondent.⁵

II. Discussion

Respondent seeks to present evidence of its development of an expanded ground-water monitoring network between the close of the hearing and the issuance of the Initial Decision. Respondent asserts that additional extensive hydrogeologic investigations and studies were completed, and that it agreed with MDNR to a system of 13 monitoring wells.

Respondent also asserts that the ground-water under its facility was affected after the hearing by a nearby construction project which involved the pumping of ground-water and resulted in dewatering of the soil. Respondent wishes to show that the requirements of the Compliance Order may be impossible to comply with until the ground-water returns to stabilized conditions.

In 1993, respondent's engineering consultant, Golder Associates, completed a "Groundwater Quality Assessment Plan/Report for the Woodland Meadows North Landfill" ("Assessment Plan"), which was submitted to MDNR. At complainant's request, respondent engaged Golder Associates to prepare a "Compliance Document Regarding Judge Greene's 1991 Order for the Woodland Meadows North Landfill," dated June 1993 ("Golder Compliance Document," attached to Supplementary Statement in Support of Complainant's Motion to Dismiss, dated November 22, 1993), which was submitted to complainant (Respondent's Opposition to Motion to Dismiss, dated July 2, 1993, at 8). The Golder Compliance Document purported to describe the extent to which respondent had complied, or need not comply, with each provision in the Compliance Order.

On June 15, 1993, MDNR conducted a Comprehensive Monitoring Evaluation ("CME") of respondent's facility. Ground-water monitoring wells were sampled, and wells and sampling techniques were evaluated. In addition, the Assessment Plan and Golder Compliance Document were reviewed, as were reports, plans, hydrogeologic evaluations and other documents concerning the facility. (Supplementary Statement in Support of Complainant's Motion to Dismiss, dated November 22, 1993, and attachments thereto). On September 30, 1993, MDNR issued a Letter of Warning to inform respondent that seven violations of the Compliance order had been noted at the facility. Enclosed with the letter was a report of the CME ("Warning Letter" and "CME Report," attached to Supplementary Statement in Support of Complainant's Motion to Dismiss).

Complainant's position is that the CME Report and Warning Letter clearly indicate that MDNR adopts the Compliance Order as the standard for interim status compliance. Thus, Complainant argues, MDNR's compliance program for the facility is not in any way inconsistent with the Compliance Order.

Respondent maintains that the reopened hearing must go forward, and that the CME provides additional reasons to consider evidence in light of new monitoring well installations and operations required by MDNR. Respondent met with MDNR on November 15, 1993. Pursuant to the meeting, respondent prepared a follow-up report describing measures it planned to take to upgrade the ground-water monitoring program (Response in Opposition to the November 22, 1993 Supplementary Statement in Support of Complainant's Motion to Dismiss, dated December 15, 1993 ("Respondent's Opposition"), and attached exhibits). Respondent points out that it agreed with MDNR to install additional monitoring wells, develop the leachate monitoring plan, and develop a list of parameters for statistical evaluation. Respondent argues that these additional requirements imposed by MDNR conflict with portions of the Compliance Order, rendering these portions impossible to comply with.

In general, it is noted that MDNR's evaluation of groundwater monitoring at respondent's facility in terms of whether respondent met requirements of the Compliance Order indicates consistency of those requirements with MDNR's program. Furthermore, the Warning Letter, which informed respondent of MDNR's view that the Compliance Order was being violated, shows MDNR's intent to enforce or prompt respondent's compliance with the requirements of the Compliance Order. Finally, the Compliance Order essentially requires that respondent come into compliance with the ground-water monitoring requirements of 40 C.F.R. Part 265, and these are incorporated by reference into the State hazardous waste program (Mich. Admin. Code r. 299.11003(1)(n)). Accordingly, it would seem unlikely that MDNR's post-Compliance Order requirements are inconsistent in any significant way with provisions of the Michigan Code.

With regard to the additional requirements imposed by MDNR as described by respondent, upon close examination it is seen that they do not conflict with the requirements of the Compliance Order. Rather, the additional requirements appear to be attempts on the part of MDNR to bring respondent into compliance with the terms of the Compliance Order. No significant inconsistency is likely to arise where MDNR is in the process of negotiating with respondent as to how the provisions of the Compliance Order must be implemented.

Respondent is concerned that upon review of information from respondent, EPA may disagree with actions respondent has already taken or planned with MDNR to be taken. For example, respondent argues that compliance with certain provisions of the Compliance Order would be "inconsistent with post-hearing regulatory approvals granted by MDNR," and "could lead to inconsistent locations" of wells and "potentially inconsistent regulatory supervision" (Statement of Evidence pp. 5, 11, 12, 16). On the whole, respondent's assertions are speculative, since they are not of a definite nature; speculation as to potential inconsistencies between EPA and MDNR in reviewing or approving of information submitted or actions taken by respondent in its implementation of the terms of the Compliance Order do not provide a basis for amending the terms themselves.

A conflict could arise if the Compliance Order requires an action to be taken, or a method to be implemented, which is impossible to comply with if requirements imposed by MDNR are met, or a standard that is impossible to comply with if the MDNR's standard is implemented. On the other hand, procedures that the Compliance Order requires in addition to those already performed, or standards set forth in the Compliance Order which are stricter than or supplement those set by MDNR, are not necessarily in conflict or impossible for respondent to perform.

Unless a conflict appears between the terms of the Compliance Order and any requirements imposed by MDNR, no cause has been shown to hear evidence for the purpose of amending the Compliance Order. Accordingly, each provision of the Compliance Order upon which respondent believes evidence should be taken is considered individually below as to any conflict with MDNR's program or impossibility of performance.

A. Paragraph 1.A.1 of the Compliance Order

Section 1.A of the Compliance Order requires respondent to complete the ground-water quality assessment plan required by 40 C.F.R. §§ 265.93(d)(2), and (d)(3). As noted above, an Assessment Plan was prepared in 1993; respondent has complied with the basic requirement to prepare a plan. Amendment of the Compliance Order could only be necessary if there is any specific requirement of a plan, as stated in the Compliance Order, which is (1) inconsistent with any requirements imposed upon respondent by MDNR, or (2) impossible to incorporate into the Assessment Plan because of events which occurred after the hearing in this matter.

Paragraph 1.A.1 requires respondent to "specify the number, location and depth of each well from which a sample of ground-water will be taken (or since July 1983, has been taken)." Because it submitted such details to MDNR, respondent asserts that compliance with this paragraph would be a duplication of effort, and would be inconsistent with regulatory approvals granted by MDNR.

Respondent's consultant indicates in the Golder Compliance Document that respondent has already satisfied the requirement of Paragraph 1.A.1. The Golder Compliance Document reports that section 2.2, Figure 1-5 and Table 2-2 of the Assessment Plan describe the current monitoring system, well locations and construction details. MDNR approves of this explanation of compliance with Paragraph 1.A.1 (CME Report).

With regard to wells described in the Assessment Plan, as well as any additional wells not included therein, simply providing EPA with information as to their number, location and depth does not constitute impossibility or conflict. Respondent has not alleged any facts which support an amendment to Paragraph 1.A.1 of the Compliance Order.

B. Paragraph 1.A.2

Respondent is required by Paragraph 1.A.2 to "specify the sampling methods for obtaining each sample from each well from which a sample of ground-water will be (or has been) taken." This provision reflects the regulatory requirement of 40 C.F.R. §265. 93 (d) (3) (ii) that the plan must "specify . . . [s]ampling . . . methods for those hazardous wastes or hazardous waste constituents in the facility."

Respondent asserts that it collaborated with MDNR over details of sampling methods. If EPA were to require different methods, the requirements could conflict. MDNR notes in the CME Report with respect to this paragraph, "modifications currently requested."

A requirement merely to specify in the plan the sampling methods to be used cannot conflict with any requirements imposed by MDNR. Even assuming *arguendo* that EPA requires different sampling methods than those which were approved by MDNR, nothing prevents respondent from simply stating in the plan the specific sampling methods it uses or intends to use. The Compliance Order merely requires respondent to specify the methods to be used, not to implement any particular method. As noted above, speculation about potential inconsistencies between EPA and MDNR in reviewing or approving of information submitted or

actions taken by respondent in its implementation of the terms of the Compliance Order does not provide a basis for amending the existing terms.

C. Paragraph 1.A.3

The "entire set of hazardous wastes and hazardous waste constituents in the facility" must be specified by chemical names, according to Paragraph 1.A.3 of the Compliance Order. Respondent asserts that it developed a list of hazardous wastes or hazardous waste constituents to be monitored in light of studies and constituents actually detected in leachate at the facility. The Golder Compliance Document states that the hazardous wastes disposed of in the facility are summarized in Table C-1 of the Assessment Plan, Appendix C.

Respondent argues that strict compliance with the literal terms of the Compliance Order would conflict with requirements established in conjunction with MDNR, to the extent sampling would have to be designed to cover hazardous waste or hazardous waste constituents not actually found in the leachate.

The fact that MDNR may have agreed that respondent may monitor only those constituents found in the leachate is not inconsistent with a requirement merely to provide a list of all hazardous wastes and hazardous waste constituents in the facility. This requirement may already have been met, as the record in this case includes lists of hazardous wastes and hazardous waste constituents disposed of in the facility (e.g., Complainant's Exhibit 11B, p. 20, Table 9; Joint Exhibit 7-B, Appendix D (Woodland Meadows North Modified Closure and Post-Closure Plan, Black & Veatch, December 1983, Appendix D)). Furthermore, a requirement to conduct additional sampling and analysis does not create a conflict with MDNR's program.

Indeed, under the State program, which incorporates the Federal ground-water monitoring regulations, respondent must prepare and implement a plan which includes monitoring (sampling and analysis) for the hazardous wastes or hazardous waste constituents which are in the landfill facility. 40 C.F.R. §265.93(d)(3) and (4), Mich. Admin. Code r. 299.11003(1)(n). The regulations do not state that only those hazardous wastes found in the leachate should be monitored. Respondent is required under 40 C.F.R. § 265.73 to keep written records of the description and quantity of each hazardous waste received at the facility. Under 40 C.F.R. § 265.93(d)(3)(ii), the ground-water quality assessment plan must specify "[s]ampling and analytical methods for those hazardous wastes or hazardous waste constituents in the facility," and under 40 C.F.R. § 265.93 (d) (4), respondent must implement the plan. The record shows

that respondent did not analyze samples for all hazardous wastes or hazardous waste constituents in the facility. Tr. 198, 278.

Thus, respondent's arguments and assertions with respect to Paragraph 1.A.3 do not provide a basis for amending the Compliance Order.

D. Paragraph 1.A.4

Respondent is required by Paragraph 1.A.4 to "specify laboratory analytical methods used since July 1983, or to be used, to provide a numerical value for the concentration of each hazardous waste or hazardous waste constituent in the facility."

As is the previous paragraph of the Compliance Order, this paragraph is based upon 40 C.F.R. § 265.93(d)(3)(ii), quoted above.

Respondent claims that unnecessary duplication of effort would occur, because it submitted documentation of EPA methods of analysis to MDNR. Respondent does not claim inconsistency or impossibility with respect to complying with this provision. Accordingly, there is no basis for amending this provision of the Compliance Order.

E. Paragraph 1.A.5

Paragraph 1.A.5 requires respondent to "specify evaluation procedures to be used to prove that the facility is not the source of any hazardous waste or hazardous waste constituent detected in any sample above the limit of detection associated with the specified analytical method(s)."

Respondent wishes to offer as evidence post-hearing monitoring data, including two years of background data, which was submitted to MDNR. Respondent argues that, to the extent that Paragraph 1.A.5 requires retracing steps to determine whether the facility is the source of any hazardous wastes or hazardous waste constituents in the ground-water, that paragraph is inconsistent with the operating assumption under which MDNR established the 13 well network and directed respondent to collect two years of background data. Respondent asserts that its evidence would show that if the facility had been the source of contamination of the ground-water, no background data would have been collected.

Paragraph 1.A.5 is based upon Federal regulations, 40 C.F.R. Part 265, which are part of the State program. Respondent is required under 40 C.F.R. § 265.93(d) (3) (iii) to "specify . . . [e]valuation procedures, including any use of previously-gathered groundwater quality information" in the ground-water assessment plan. Pursuant to section 265.93(d)(4), respondent must determine, under a plan meeting the requirements of section 265.93(d)(3), whether hazardous wastes or hazardous waste constituents have entered the ground-water.

MDNR found respondent to be in violation of Paragraph 1.A.5. Specifically, MDNR stated that the statistical method respondent submitted for its organic parameters has not been approved by the MDNR, and would not detect a release from the facility at the earliest possible moment. MDNR provided respondent with information on a method approved by MDNR (Warning Letter, Attachment; CME Report, review of Golder Compliance Document, and Statistical Program for Organic Indicator Parameters).

MDNR's finding of violation suggests that, although ground-water assessments had already been performed at the facility, MDNR would require respondent to retrace its steps, using an appropriate evaluation procedure, to determine whether the facility is the source of any hazardous waste or hazardous constituent detected in any sample. MDNR's enforcement of the requirement of Paragraph 1.A.5 clearly indicates that it is not inconsistent with MDNR's program. The monitoring data that respondent wishes to present would not support amendment of this provision of the Compliance Order.

F. Paragraph 1.A.6

Respondent was required in Paragraph 1.A.6 to "specify evaluation procedures necessary to establish the rate and extent of migration for each hazardous waste or hazardous waste constituent detected in any sample above the limit of detection associated with the specified analytical method(s)."

The Golder Compliance Document states that evaluation procedures were stated in the Assessment Plan, and that no detailed evaluation was necessary because no evidence of contamination was found.

While MDNR states in the CME Report that it approves of this response, it refers to another section in the CME Report which notes that toxic organic substances were identified as potential constituents of the landfill but were not currently being monitored (CME Report, review of the Golder Compliance Document). This suggests that further evaluation is necessary.

Respondent argues that additional ground-water monitoring and analysis would lead to unnecessary duplication of the extensive post-hearing data already collected. Respondent does not claim, however, that compliance with Paragraph 1.A.6 is impossible or inconsistent with MDNR's program. Therefore, no basis exists for amending this paragraph of the Compliance Order.

G. Paragraph 1.A.7

Paragraph 1.A.7 requires respondent to "specify a schedule of implementation not to exceed sixty (60) days for sampling, analysis and evaluation of all samples which remain to be taken, and for evaluation of analytical results for all samples for which analytical results have already been obtained by respondent." This requirement parallels that of 40 C.F.R. §265.93(d)(3)(iv), which requires the ground-water assessment plan to include "[a] schedule of implementation."

Respondent contends in its Supplemental Statement that it already sampled, analyzed, evaluated and submitted results to MDNR. The Golder Compliance Document states that sampling, analysis and evaluation of all ground-water samples has been performed and reported in the Assessment Plan. The Plan was developed with MDNR in response to the dewatering activities which had altered the ground-water chemistry, according to respondent; therefore the requirements imposed by MDNR as a result of the dewatering conflict with the requirement of Paragraph 1.A.7.

After the CME, respondent conceded that it has not completed all necessary sampling, analysis and evaluation. (See, Respondent's Opposition, and attachments thereto). Furthermore, the fact that respondent has already taken samples and analyzed and evaluated them does not conflict with a requirement to take additional samples for analysis and evaluation. No cause has been shown to consider evidence for the purpose of amending Paragraph 1.A.7.

H. Paragraph 1.A.8

Respondent is required by Paragraph 1.A.8 to "provide for collection of ground-water samples from all monitoring wells which exhibited a statistically significant difference in indicator parameters during 1983, and provide for analysis of formaldehyde, phenyl mercuric acetate, and phthalic anhydride." This requirement is based upon the requirement of 40 C.F.R. § 265.93[®] to resample wells which showed a significant increase in indicator parameters, and upon the requirements in 40 C.F.R. §§ 265.93(d)(3)(ii) and 265.93(d)(4) to

analyze samples for those hazardous wastes or hazardous waste constituents in the facility.

The Golder Compliance Document states that all wells which exhibited a statistically significant increase were resampled. Formaldehyde, phenyl mercuric acetate and phthalic anhydride are not constituents of the leachate, so compliance with this requirement is unnecessary, the Golder Compliance Document concludes.

Respondent explains that after the trial, a site-specific water quality parameters list was developed with MDNR based upon constituents readily found in the leachate, which would provide a reliable indication of a release from the facility. The three compounds referenced above were not detected and were not on the list developed with MDNR. Therefore, respondent asserts, requiring analysis for the three compounds "is a conflicting requirement and inconsistent with current regulatory requirements." Respondent does not cite a current regulatory requirement that is inconsistent with the provisions of Paragraph 1.A.8. Respondent asserts further that it has greatly changed the well network since the hearing, so the requirements of the Compliance Order are inconsistent with the current ground-water monitoring program.

The record shows that phthalic anhydride and phenyl mercuric acetate were disposed of in respondent's facility. Complainant's Exhibit 11-B (Groundwater Quality Assessment Phase I for Woodland Meadows North, January 25, 1985) p. 20, Table 9; Joint Exhibit 7-B, Appendix D (Woodland Meadows North Modified Closure and Post-Closure Plan, Black & Veatch, December 1983, Appendix D, 1981 Facility Annual Hazardous Waste Report). Respondent does not deny that formaldehyde, phthalic anhydride or phenyl mercuric acetate is contained in the Woodland Meadows North landfill. The record shows that respondent analyzed ground-water samples for indicator parameters and "priority pollutants," but not for those three compounds. Tr. 198, 277-278; Complainant's Exhibits 1-A, 1-B, 1-C, 2-A, 3-A, 7-B, 10-B, 11-B; Joint Exhibit 7-8, Respondent's Exhibits 1, 3.

MDNR found respondent to be in violation of Paragraph 1.A.8. Thus, respondent was directed by MDNR to submit a leachate monitoring plan that includes a mechanism for adding or deleting ground-water sampling parameters from the list based upon the leachate analysis, to account for toxic substances which were not being monitored but which were identified as potential constituents in the landfill (Warning Letter, Attachment; CME Report).

MDNR is working with respondent to fulfill its obligations under Paragraph 1.A.8. Even with the new well network, MDNR does not indicate in the CME Report any inconsistency or impossibility of compliance with Paragraph 1.A.8. If samples are analyzed for the three compounds named therein, and the compounds are not found in the samples, then, according to the agreement with MDNR on November 15, 1993 (Respondent's Opposition, Exhibit A), it appears that respondent may delete them from the ground-water sampling list. This is not inconsistent with Paragraph 1.A.8.

Respondent does not assert any facts or indicate it has any evidence which would show that it cannot provide for analysis of samples for the three constituents named in Paragraph 1.A.8. Therefore, there is no basis for taking evidence as to whether that provision of the Compliance Order should be amended.

I. Paragraph 1.B

Paragraph 1.B essentially requires respondent to comply with 40 C.F.R. §§ 265.93(d)(4) and (d)(5), which are incorporated by reference in the State program (Mich. Admin. Code r. 299.11003(1)(n)). Specifically, "[w]ithin 105 calendar days of the effective date of this Order, [respondent must] submit to EPA the written report required by 40 C.F.R. section 265.93(d), containing respondent's assessment of the ground-water quality and respondent's determination of the rate and extent of migration of the hazardous wastes or hazardous waste constituents in the ground-water, and the concentrations . . . in the ground-water." Similarly, the regulations require implementation of the ground-water quality assessment plan, determining the rate and extent of migration and concentration of hazardous wastes or hazardous waste constituents, and submittal of a report of the assessment. 40 C.F.R. § 265.93(d)(4) and (5).

Respondent submitted the Assessment Plan, including a report of the assessment, in June 1993. Recognizing that respondent has done a great amount of work to assess ground-water quality, MDNR stated in the CME Report that it did not necessarily agree with the findings, but deferred comment until submission of a final assessment report.

Respondent does not claim that it is subject to any inconsistent requirements with regard to this paragraph of the Compliance order. Respondent claims only that compliance would be an unnecessary duplication of effort. Thus, no reason exists to consider evidence for the purpose of amending the Compliance Order.

J. Paragraph 2.A

In section 2 of the Compliance Order, respondent is required to conduct soil borings and hydrogeologic investigations to establish the features described in Paragraphs 2.A through 2.F. Section 2 of the Compliance Order in essence provides a structure for respondent to determine whether sand formations are part of the uppermost aquifer⁶ in various areas of the facility, and to determine hydraulic gradients in the sand and basal till layers, so that respondent can properly monitor the uppermost aquifer as required by 40 C.F.R. § 265.91. That section of the regulations requires establishment of upgradient wells that will indicate background ground-water quality in the uppermost aquifer, and downgradient monitoring wells that will immediately detect the migration of hazardous waste or hazardous waste constituents into the ground-water in the uppermost aquifer.

Paragraph 2.A requires respondent to establish the "horizontal and vertical extent of sand formations present in the southwest, east and northeast portions of the facility." Respondent argues that compliance with this requirement could lead to inconsistent locations of the ground-water monitoring network in light of conclusions drawn by MDNR ground-water specialists.

As discussed above, such speculation is not a basis for amending the Compliance Order. Moreover, respondent's speculation is inconsistent with MDNR's Warning Letter, informing respondent that it is in violation of this requirement. In addition, upon review of the Golder Compliance Document, MDNR stated that the results of the dewatering process proved that the sand lenses are a hydraulically connected aquifer which must be monitored (CME Report).

K. Paragraph 2.B

Paragraph 2.B of the Compliance Order requires determination of the "presence and horizontal and vertical extent of or absence of sand formations along the western perimeter of the waste management area between the borings MC-1 and GA-31." Respondent again speculates that compliance with that provision would lead to possibly inconsistent locations of monitoring wells.

In the CME, MDNR found respondent in violation of this provision. According to MDNR, the pumping from the construction project revealed that the smaller sand units were not hydraulically isolated, and must be monitored (CME Report, review of Golder Compliance Document).

Clearly, there is no inconsistency between this requirement and MDNR's program. As to this provision as well as the preceding Paragraph 2.A, respondent's concern about potential inconsistencies regarding monitoring well locations provides no basis for amending Paragraph 2.B of the Compliance Order.

L. Paragraph 2.C

Paragraph 2.C requires respondent to establish "the magnitude and direction of any horizontal and vertical component of the hydraulic gradient within sand formations underlying the facility."

Respondent points out that it worked with MDNR to establish the gradients within the sand formations, and on the basis of that effort developed the 13 well network. Respondent asserts that, accordingly, literal compliance with Paragraph 2.C would lead to inconsistencies with MDNR determinations.

As MDNR notes in its CME Report, the Golder Compliance Document describes the gradient in 1989, preceding the dewatering, but not the gradient which developed afterward. MDNR observes that the new gradient was addressed in respondent's Ground-water Quality Assessment Plan dated October 1992. (CME Report, review of Golder Compliance Document).

Respondent has not claimed that an inconsistency exists between any requirements of MDNR and the terms of Paragraph 2.C. The vague assertion that compliance with that provision would lead to inconsistencies with MDNR determinations does not provide a basis for holding a hearing for purposes of amending the provision.

M. Paragraphs 2.D and 2.E

As provided by Paragraph 2.D, respondent must establish "the identification of the portion(s) of the limit of the waste management area which overlie such sand formations and are hydraulically downgradient . . . within such sand formations." Paragraph 2.E requires respondent to identify "whether the portion of the limit of the waste management area between the location of borings MC-1 and GA-31 is hydraulically upgradient or downgradient with respect to ground-water flow within the basal till."

Respondent asserts that MDNR agreed that there are no hydraulically upgradient or downgradient wells under normal conditions, and no hydraulic downgradient limit of the waste management area. Therefore, MDNR substituted intra-well

comparisons for upgradient and downgradient well comparisons. These agreements would be inconsistent with the requirements of Paragraphs 2.D and 2.E, respondent claims.

However, as MDNR points out in the CME Report, after the construction dewatering, there was an upward vertical gradient from the basal till to the sand layer, and a strong horizontal gradient in the sand layer, the magnitude of which is not changing significantly. Therefore, MDNR states in the CME Report that respondent must establish an upgradient/downgradient monitoring well relationship as required. MDNR observes that "The justification for using intrawell comparisons is not a currently valid option based upon the current flow regime" (CME Report, review of Golder Compliance Document). Consequently, respondent was informed in the Warning Letter that it was in violation of Paragraph 2.D.

Respondent forwarded a follow-up report to MDNR describing the measures discussed at the meeting on November 15, 1993. One of the measures listed was as follows: "Because of hydrogeological restraints at the [facility], the use of intrawell comparisons will continue at the site" (Respondent's Opposition, Exhibit B). However, this does not negate the possibility of making a determination to identify any portions of the limits of the waste management area as hydraulically downgradient or upgradient.

Thus, assuming the facts presented by respondent to be true, nevertheless respondent has not identified any inconsistency between agreements with MDNR and the requirements of Paragraphs 2.D and 2.E.

N. Paragraph 2.F

Paragraph 2.F requires establishment of "the locations, depths and effective screened intervals for all wells required under Paragraph 4 of [the Compliance] Order."

Respondent fears that compliance with this provision may lead to screened intervals inconsistent with those established by MDNR for all of the new wells. Such speculation of future inconsistency between Federal and State approvals does not constitute a basis for amending the Compliance Order.

O. Paragraph 3

Paragraph 3 requires respondent "within 210 calendar days of the effective date of [the Compliance] Order [to] submit a written report to EPA containing the conclusions of, and all data generated in, the implementation of the soil borings and hydrogeological investigations in Paragraph 2."

Respondent emphasizes that it submitted to MDNR numerous reports such as that contemplated by Section 2. Again, respondent speculates that there may be "potentially inconsistent regulatory requirements." Such speculation as to future inconsistency between Federal and State approvals is not a valid basis for amending the Compliance Order.

P. Paragraphs 4.A and 4.B

Paragraph 4 sets forth the requirement that, based on the soil borings and hydrogeological investigations, within 270 calendar days of the effective date of the Compliance Order, respondent must install a system of monitoring wells. According to Paragraph 4 (A) , this must include "a system of monitoring wells at the downgradient limit of the waste management area, which may include but must not be limited to [existing wells], provided that each well is established to be screened in ground-water which is hydraulically downgradient." That paragraph sets forth several details with which the wells must conform, including the following: "[w]here the downgradient limit . . . overlies sand formations and the basal till, monitoring wells must be clustered and the depths . . . must be such that their screened portions intercept all appropriate aquifer flow zones within the uppermost aquifer. . .and enable the collection of ground-water samples to ensure immediate detection of any statistically significant amount of hazardous waste or hazardous waste constituents that migrate . . .to the uppermost aquifer, which includes the basal till and any overlying sand formations which are aquifers."

Paragraph 4(B) requires as follows: "[A] system of monitoring well(s) confirmed to be hydraulically upgradient from the limit of the waste management area. The depth(s) of said well(s) shall be such that the screened portions intercept appropriate aquifer flow zones in the uppermost aquifer and enable the collection of ground-water samples that are representative of background ground-water quality in the sand formations and basal till near the facility, and not affected by the facility."

These provisions of the Compliance Order specify requirements for respondent to come into compliance with 40 C.F.R. § 265.91(a), which requires a monitoring well system of upgradient and downgradient wells meeting the following

criteria. Upgradient well(s) must be of sufficient number, location(s) and depth(s) to yield ground-water samples representative of background water quality in the uppermost aquifer and not affected by the facility. Downgradient wells must be of sufficient number, locations and depths to ensure that they immediately detect any statistically significant amounts of hazardous waste or hazardous waste constituents that migrate to the uppermost aquifer. 40 C.F.R. § 265.91(a)(1) and (2).

Respondent argues that an upgradient and downgradient system has proven unsuitable, and that post-hearing monitoring evidence shows that there are no hydraulically upgradient locations for wells. The 13 well system at the site, and the alternative methods of analysis agreed upon with MDNR, serve the same purpose; therefore, respondent argues, it is unnecessary to install new or different wells.

MDNR stated in the CME Report that the dewatering event revealed the sand layer to be the uppermost aquifer, and caused a more definitive upgradient/downgradient relationship. MDNR found that respondent has not complied with Paragraph 4.A because it has not clustered monitoring wells within both the sand layer and basal till. As to Paragraph 4.B, respondent failed to establish a suitable upgradient monitoring well for the sand layer aquifer (CME Report, review of Golder Compliance Document).

Pursuant to the CME Report, respondent agreed with MDNR to install another basal till monitoring well, and that, depending upon pumping tests, drilling and hydraulic testing, it may install additional wells in the sand layer in the northern and western areas around the facility. (Respondent's Opposition).

Although historically the upgradient/downgradient system may not have been suitable for the facility, respondent does not contest MDNR's conclusions that the dewatering event has made the use of such a system possible. As noted above, respondent's follow-up report to the MDNR meeting on November 15, 1993, states vaguely: "Because of hydrogeological restraints at the [facility], the use of intrawell comparisons will continue at the site" (Respondent's Opposition, Exhibit B). The fact that "hydrogeological restraints" may exist does not necessarily negate the possibility of installing additional wells which are upgradient or downgradient.

The agreement with MDNR as to installation of additional wells indicates respondent may be approaching compliance with Paragraphs 4.A and 4.B, but the

degree to which it has done so is not an appropriate issue to address in a reopened hearing.

While respondent may have data showing that there were no upgradient or downgradient locations, respondent has not indicated that full compliance with these provisions is currently impossible. Respondent has not raised any factual issue upon which a hearing should be held for amendment of Paragraphs 4.A and 4.B.

Q. Paragranh 5

Paragraph 5 of the Compliance Order requires respondent to determine, from samples taken from each of the wells installed pursuant to Paragraph 4, the concentration or value of each parameter contained or referred to in 40 C.F.R. §§ 265.92(b)(1), (b)(2) and (b)(3), in the manner and frequency required by section 265.92(c) and (d).⁷

Respondent claims that this provision is "inconsistent to the extent that data are collected for samples not required by the MDNR in light of the site-specific hazardous waste and hazardous waste constituent lists developed from actual site leachate data" (Statement of Evidence at 16).

In negotiating with MDNR in November 1993, Respondent apparently had contested some of the parameters. MDNR agreed that indicator monitoring parameters could be changed to correspond with recent leachate constituents, and directed respondent to include a mechanism in its ground-water monitoring plan for removing parameters from the ground-water sampling list based upon continued absence from the leachate (Respondent's Opposition, Exhibit A).

There is no question that respondent must comply with 40 C.F.R. § 265.92, which is part of the State hazardous waste program, with regard to new wells installed pursuant to Paragraph 4. That section of the regulations states, in pertinent part, "[f]or all monitoring wells, the owner or operator must establish initial background concentrations or values of all parameters specified in paragraph (b) of this section [drinking water, ground-water quality, and contamination indicator parameters] . . . quarterly for one year . . . After the first year, all monitoring wells must be sampled and the samples analyzed . . . at least annually [for ground-water quality] and at least semi-annually [for indicators of ground-water contamination]." 40 C.F.R. § 265.92(c)(1) and (d) (emphasis added).

Agreements with MDNR with regard to sampling and analysis of existing wells is irrelevant to respondent's compliance with Paragraph 5 of the Compliance Order. Paragraph 5 requires the analysis of samples taken only from new wells installed pursuant to Paragraph 4.

Taking and analyzing samples from the new wells in addition to the sampling and analysis required by MDNR for the existing wells is not an inconsistency. The requirement is to perform additional sampling and analysis, not to perform sampling and analysis in a different way than that required by MDNR. Respondent has not raised any issues of fact which would support an amendment to Paragraph 5.

R. Paragraph 6

Respondent is required by Paragraph 6 "[t]hereafter [to] to evaluate, keep records and report the ground-water monitoring results from the monitoring well system installed pursuant to paragraph 4, as required by 40 C.F.R. section 265.93 and 265.94."

Respondent asserts that MDNR's primary jurisdiction over the ground-water monitoring network makes this provision of the Compliance Order unnecessary, leading to potentially inconsistent regulatory supervision.

As discussed above, speculation of potentially inconsistent supervision does not constitute an inconsistency between the terms of the Compliance Order and any requirements of MDNR. Consequently, no basis for amending Paragraph 6 of the Compliance Order has been shown.

III. Conclusion

Respondent has not shown that additional evidence needs to be taken in connection with the Compliance Order issued in, and supported by, the initial record-based decision herein. Respondent has not alleged facts which show a conflict between the terms of the Compliance Order and requirements imposed by MDNR. Consequently, there is no basis for hearing any such evidence, and no reason to proceed further with the reopened hearing.

Respondent's concern about unnecessary duplication with respect to several provisions is understandable, and should be cause for caution at both agencies. It is not, however, a basis for taking additional evidence. This aspect of compliance must be left to the common sense, reasonableness, and fairness of

the two agencies. It is assumed that the officials of both agencies have these qualities in abundance, since that would be very much in the public interest.

IV. Motion for Discovery

By motion dated February 10, 1993, Respondent requested an Order of Discovery to take oral depositions of certain officials of the MDNR. Respondent seeks to obtain testimony concerning agreements between MDNR and respondent regarding ground-water monitoring at the facility, testimony concerning memoranda authored by MDNR officials regarding the facility, and testimony concerning events that occurred after the hearing in this matter.

The Rules of Practice provide, at 40 C.F.R. § 22.19(f)(2), that depositions may be ordered only upon a showing of good cause and upon certain stated findings. As concluded above, respondent has not alleged any facts which support the taking of evidence in contemplation of amending the Compliance Order. The motion for discovery is therefore rendered moot.

ORDER

The reopened hearing is DISMISSED. The Findings of Fact and Conclusions of Law stated in the Initial Decision remain unchanged. The Compliance Order of September 30, 1991, a copy of which is attached, is effective upon the date of service of this Order.

J. F. Greene
Administrative Law Judge

Dated: March 21, 1997
Washington, D.C.

Attachment

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order Granting Complainant's Motion to Dismiss the Reopened Proceeding, was filed with the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on March 21, 1997.

Shirley Smith
Legal Staff Assistant
For Judge J. F. Greene

NAME OF RESPONDENT: Michigan waste Systems, Inc.

DOCKET NUMBER: RCRA-V-W-84-R-054

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ATTACHMENT

It is hereby ORDERED that respondent shall comply with the following requirements:

1. Respondent shall complete the ground-water quality assessment plan and program required by 40 C.F.R. sections 265.93(d)(2), (d)(3), (d)(4), and (d)(5), including the following:

A. Within 30 calendar days of the effective date of this Order, respondent shall prepare and submit to EPA a document to be entitled "Ground-Water Quality Assessment Program Plan," which must

(1) specify the number, location, and depth of each well from which a sample of ground-water will be taken (or, since July 1983, has been taken);

(2) specify the sampling methods for obtaining each sample from each well from which a sample of ground-water will be (or has been) taken;

(3) specify, by chemical names, the entire set of hazardous wastes and hazardous waste constituents in the facility, including each constituent listed in Table 1 of 40 C.F.R. section 261.21 and, for each hazardous waste listed in 40 C.F.R. section 261.31 or section 261.32, that has been disposed of in the landfill, the corresponding constituents listed in Appendix VII to 40 C.F.R. Part 261.

(4) specify laboratory analytical methods used since July, 1983, or to be used, to provide a numerical value for the concentration of each hazardous waste or hazardous waste constituent in the facility;

(5) specify evaluation procedures to be used to prove that the facility is not the source of any hazardous waste or hazardous waste constituent detected in any sample above the limit of detection associated with the specified analytical method(s);

(6) Specify evaluation procedures necessary to establish the rate and extent of migration for each hazardous waste or hazardous waste constituent detected in any sample above the limit of detection associated with the specified analytical method(s);

(7) specify a schedule of implementation not to exceed sixty (60) days for sampling, analysis and evaluation of all samples which remain to be taken, and for evaluation of analytical results for all samples for which analytical results have already been obtained by respondent;

(8) provide for collection of ground-water samples from all monitoring wells which exhibited a statistically significant difference in indicator parameters during 1983, and provide for analysis of formaldehyde, phenylmercuric acetate, and phthalic anhydride;

B. Within 105 calendar days of the effective date of this Order, submit to EPA the written report required by 40 C.F.R. section 265.93(d) , containing respondent's assessment of the ground-water quality and respondent's determination of the rate and extent of migration of the hazardous wastes or hazardous waste constituents in the ground-water, and the concentrations of the hazardous waste or hazardous waste constituents in the ground-water.

2. Respondent shall, within 180 calendar days of the effective date of this Order, conduct soil borings and hydrogeological investigations to establish:

A. horizontal and vertical extent of sand formations present in the southwest, east, and northeast portions of the facility;

B. the presence and horizontal and vertical extent of or absence of sand formations along the western perimeter of the waste management area between the locations of borings MC-1 and GA-31;

C. the magnitude and direction of any horizontal and vertical component of the hydraulic gradient within sand formations underlying the facility;

D. the identification of the portion(s) of the limit of the waste management area which overlies such sand formations and are hydraulically downgradient, that is, in the direction of decreasing static head, within such sand formations;

E. the identification of whether the portion of the limit of the waste management area between the location of borings MC-1 and GA-31 is hydraulically upgradient or downgradient with respect to ground-water flow within the basal till; and

F. the locations, depths and effective screened intervals for all wells required under Paragraph 4 of this Order.

3. Respondent shall, within 210 calendar days of the effective date of this Order, submit a written report to EPA containing the conclusions of, and all data generated in, the implementation of the soil borings and hydrogeological investigations in Paragraph 2.

4. Based on the soil borings and hydrogeologic investigations, respondent shall, within 270 calendar days of the effective date of this Order:

A. Install a system of monitoring wells at the downgradient limit of the waste management area, which may include but must not be limited to, wells E-6, E-12, GA-31B, GA-32C, GA-33C, GA34A and GA-35A, provided each well is established to be screened in ground-water which is hydraulically downgradient. Where the downgradient limit of the waste management area overlies sand formations and the basal till, monitoring wells must be clustered and the depths of said clustered wells must be such that their screened portions intercept all appropriate aquifer flow zones within the uppermost aquifer, as defined by 40 C.F.R. section 260.10, and enable the collection of ground-water samples to ensure immediate detection of any statistically significant amount of hazardous waste or hazardous waste constituents that migrate from the waste management

area to the uppermost aquifer, which includes the basal till and any overlying sand formations which are aquifers. The number of said wells shall be of sufficient quantity to account for variations in the thickness of the silty clay till underlying the waste management area, the amounts and spatial distribution of leachate in the landfill, radial ground-water flow in the basal till, and the length of segments along the limit of the waste management area which are underlain by sand formations.

B. Install a system of monitoring well(s) confirmed to be hydraulically upgradient from the limit of the waste management area. The depth(s) of said well(s) shall be such that the screened portions intercept appropriate aquifer flow zones in the uppermost aquifer and enable the collection of ground-water samples that are representative of background ground-water quality in the sand formations and basal till near the facility, and not affected by the facility.

5. Within one year of the installation of each monitoring well installed pursuant to paragraph 4 of this order, determine from ground-water samples obtained from each such well the concentration or value of each parameter contained or referred to in 40 C.F.R. section 265.92(b)(1), (b)(2), and (b)(3), in the manner and frequency required by 40 C.F.R. section 265.92(c) and (d).

6. Thereafter evaluate, keep records and report the ground-water monitoring results from the monitoring well system installed pursuant to paragraph 4, as required by 40 C.F.R. sections 265.93 and 265.94.

7. Notwithstanding compliance with the terms of this Order, respondent may be required to take such further actions as may be necessary, including additional ground-water monitoring, assessment, and/or corrective action, to come into compliance with RCRA.

8. A civil penalty of \$9,825.00 is assessed against respondent for violations of RCRA and regulations promulgated thereunder. Respondent Michigan Waste Systems, Inc. is hereby ordered to pay within thirty (30) days from the date of service of this Order a civil penalty in the sum of \$9,825.00. Payment shall be by certified or cashier's check made payable to the Treasurer, United States of America, and mailed to: Environmental Protection Agency, Region 5 (Regional Hearing Clerk), P. O. Box 70753, Chicago, IL 60673.

¹ A copy of the Compliance Order is attached, designated as Attachment A.

² All Federal regulations at 40 C.F.R. Part 265 were adopted by reference in Rule 1003 of the regulations of Michigan promulgated pursuant to the Michigan Hazardous Waste Management Act (Mich. Admin. Code r. 299.11003(1)(n)).

³ After submission by the parties of statements as to issues to be presented, a Scheduling Order, dated November 3, 1992, specified the issues contemplated for the reopened proceeding, from those expressed generally in the December 24, 1991 Order Upon Motion to Reopen Hearing.

⁴ Complainant styled the motion as "Motion to Dismiss Rehearing." Respondent has not been granted a rehearing, which is a "second consideration of cause for purpose of calling to court's or administrative board's attention any error, omission or oversight in first consideration." Black's Law Dictionary (6th ed. 1990). Rather, the hearing has been reopened under 40 C.F.R. § 22.28 for the purpose of taking additional evidence, if appropriate. Complainant's motion will be treated as a motion to dismiss the reopened proceeding.

⁵ Although neither the Federal Rules of Evidence apply here, nor the principle that upon motion for dismissal, all factual allegations in the complaint should be presumed true and all reasonable inferences therefrom should be made in plaintiff's favor (*Bank v. Pitt*, 928 F.2d 1108, 1109 (11th Cir. 1991)), all reasonable fairness will be accorded to respondent.

⁶ "Aquifer" is defined as "a geologic formation, group of formations or part of a formation that is capable of yielding a significant amount of ground water to wells or springs"; the ,,'uppermost aquifer" is "the geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected with this aquifer within the facility's property boundary." 40 C.F.R. § 260.10.

⁷ Under those provisions, the concentration or value of certain parameters in ground-water samples must be determined for all monitoring wells. Initial background concentrations must be determined quarterly for one year. Thereafter, samples from all monitoring wells must be analyzed at least annually (for groundwater quality parameters) or semi-annually (for parameters indicating ground-water contamination). 40 C.F.R. §§ 265.92(b), (c) and (d).