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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	*	
	*	
CID-CHEMICAL WASTE MANAGEMENT OF ILLINOIS, INC.,	*	Docket No. V-W-86-R-77
	*	
	*	
Respondent	*	

ORDER ON MOTION

By motion dated March 10, 1989, the Respondent seeks the issuance of an Order for Summary Judgment (accelerated decision) against the Agency with regard to the allegations contained in paragraphs 15, 16 and 17 of the Complaint. The Agency filed its reply on June 6, 1989, and the Respondent filed its reply on June 19, 1989. At the outset the Court must apologize for its failure to rule on this motion earlier. For most of the time involved, the Court was without a secretary and thus could produce no work. In the interim, several cases have appeared on the Court's docket which required expedited action.

Paragraph 15 of the Complaint alleges that since the Respondent failed to file a partial closure plan for Area 2 of its facility it lost interim status therefore on November 8, 1985. As to this claim, the Respondent has shown that at the time it clean-closed the area, the rules did not require notification of a partial closure. I agree that the then existing rules did not require such a filing. The Agency, in its reply seems to have abandoned its claim as to a violation for failure to submit a partial closure plan and in any event states

that no penalty was assessed for that violation. Thus, the only issue before me relates to the $22,500.00 penalty associated with the alleged failure of the Respondent to install a ground-water monitoring system (GWMS) as alleged in paragraph 16 of the Complaint. Paragraph 17 of the Complaint merely restates the findings in paragraphs 15 and 16 and states that the Agency has determined that the Respondent has violated 35 Ill. Adm. Code 725.190 through 725.194 for failure to "...install a GWMS..." The Complaint does not allege that the Respondent installed an inadequate GWMS, but that it failed to install any system at all. The documents attached to the Respondent's motion and exhibits contained in its pre-hearing exchange demonstrate that, in fact, such a system was installed and monitored on December 1981, May 1982, July 1982, and November 1982. Area 2 was clean-closed during the period running from November 19, 1982 and July 1983. This closure, which was certified by the state of Illinois, rendered the area no longer subject to the ground-water monitoring requirement.

In its Reply Brief, the Agency now attempts to change the alleged violation from failure to install a GWMS to a different charge. It now argues that the system installed was defective, since the down-gradient wells were located 1000 to 4000 feet away from the boundary of the surface impoundments. The Agency points to this allegation as just one of the factual areas in dispute, which makes the issuance of an accelerated decision improper. The Agency also argues that the Respondent failed to follow the

requirements of § 725.193, which involves the use of the "student-T" test in regard to statistical comparisons. Clearly by this assertion, the Agency admits that the Respondent did install a GWMS, but that it was totally inadequate. The Agency also points out that the inadequacies of the GWMS is one of the reasons that it contends that the Respondent could not have clean-closed the facility since it could not certify that the ground water at the impoundments had not been impacted by wastes from the surface impoundment.

As to this last assertion, the Respondent correctly points out that the relevant Illinois rules do not require such a certification if the owner can demonstrate to the state agency that it has removed from the impoundment: 1) standing liquids; 2) waste and waste residues; 3) the liner, if any, and 4) underlying and surrounding contaminated soil. See 35 Ill. Adm. Code § 725.328(a)(1986).

It is clear from an examination of the pleadings and the responses filed by the Agency, that it is attempting to change its theory of the case by now claiming that rather than installing no GWMS, as alleged in the Complaint, the Respondent actually did install such a system but that it was inadequate. Nothing in the Complaint would suggest that such a violation was charged. Even under the relaxed rules applicable to cases brought under the Administrative Procedures Act, such a posture is not permitted.

Accordingly, it is hereby ordered that the Respondent's

motion for Summary Judgment as to paragraphs 15, 16 and 17 of the Complaint is **GRANTED**, and that the $22,500.00 penalty associated with the violations contained therein is **DISMISSED**.

Dated: 6/8/90

Thomas B. Yost
Administrative Law Judge

CERTIFICATION OF SERVICE

I hereby certify that the original of the foregoing was served on the Regional Hearing Clerk, EPA Region V (service by first class U.S. mail); and the following parties were served a copy by certified mail, return-receipt requested. Dated in Atlanta, Georgia this 8th day of June, 1990.

Jo Ann Brown
Secretary, Hon. Thomas B. Yost

ADDRESSEES:

Larry L. Johnson, Esq.
Assistant Regional Counsel
U.S. EPA - Region V
230 South Dearborn Street
Chicago, IL 60604

Angus MacBeth, Esq.
Sidley and Austin
1722 Eye Street, N.E.
Washington, DC 20006

HONORABLE THOMAS B. YOST
U.S. ENVIRONMENTAL PROTECTION AGENCY
345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

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