ILLINOIS POLLUTION CONTROL BOARD
July 30, 1992

SHEREX CHEMICAL COMPANY, INC., Petitioner,	)	
v.	)	PCB 91-202 (Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on Sherex Chemical Company, Inc.'s (Sherex) motion for summary judgment filed June 5, 1992. On June 24, 1992 the Illinois Environmental Protection Agency (Agency) filed a motion to file its response and cross motion for summary judgment instanter. The Agency's motion to file instanter is granted. On July 5, 1992, Sherex filed its response to the Agency's cross motion.

BACKGROUND

The facts are not in dispute. Sherex purchased its Mapleton facility in 1979 from Ashland Chemical Company (Ashland). Ashland purchased the property in 1967 from Archer-Daniels-Midland Company (ADM). While ADM owned the property, it operated a high pressure alcohol reactor (HPA reactor). ADM cleaned the reactor with a nitric acid cleaning solution which contained copper and cadmium. The cleaning solution was disposed of on-site until 1975 or 1976, after which the solution was sent off-site for disposal.

The HPA reactor on-site disposal area at the Mapleton facility was added to Illinois' State Remedial Action Priorities List (SRAPL)[1] and investigatory efforts were performed by Sherex. Ashland, Sherex and the Agency agreed to jointly fund a Remedial Investigation (RI) and also agreed to pursue costs from ADM. The final RI was completed in May of 1988 at a cost of $300,000. The RI concluded that the cleaning material had not shown significant migration and recommended further monitoring and installation of an additional well.

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[1] The Board notes that on June 25, 1992, the Illinois Appellate Court, Fourth Judicial District, held that the Agency's regulations purporting to authorize the SRAPL are void. (States Land Improvement Corp. v. IEPA No. 4-91-0365, slip op. (June 25, 1992).)

In March, 1988, the Illinois Attorney General, at the request of the Agency, filed a civil action against ADM for the recovery of response costs. ADM filed a contribution action against Ashland and Sherex and Ashland and Sherex filed counterclaims. On January 7, 1991, the federal district court entered a consent decree agreed to by ADM, Sherex, Ashland, the State and the Agency governing past and future response costs.

On September 20, 1991, the Agency issued Sherex's RCRA Part B Permit. The permit designates certain sites at the Mapleton facility as Solid Waste Management Units (SWMU) subject to corrective action, including investigation and possible remedial action. Sherex filed a permit appeal with the Board challenging the designation of the SWMUs. Pursuant to a stipulation agreement, Sherex and the Agency have resolved all issues appealed by Sherex except for item #14 in Section III of the permit designating the HPA reactor disposal area as a SWMU.

DISCUSSION

The parties agree that there are no genuine issues of material fact and that the only question remaining is whether the Agency's designation of the HPA reactor area as a SWMU is improper because the Agency has already agreed to the appropriate remediation in the consent decree which also releases the parties from future claims. In a permit appeal before the Board, the issue is whether the disputed permit condition is necessary to accomplish the purposes of the Environmental Protection Act (Act) and Board regulations. (Joliet Sand & Gravel v. IPCB (3d Dist. 1987), 163 Ill. App. 3d 830, 516 N.E.2d 955, 958.) Because the Board is presented with motions for summary judgment, the proper inquiry is whether, as a matter of law, the designation of the HPA reactor area as a SWMU is necessary to accomplish the purposes of the Act and Board regulations in light of the consent decree. To decide this issue, the Board must compare the provisions of the consent decree and the permit condition.

The section of the permit governing corrective action provides that Sherex shall submit to the Agency a "written RCRA Facility Investigation (RFI) Phase I Workplan to document the absence or presence of hazardous waste or hazardous constituents" from the "SRAPL site (HPA reactor cleaning solution area)." (R. 162-63.) The requirements for the RFI Phase I Workplan are outlined in Attachment A which provides that the purpose of Phase I is to demonstrate conclusively whether or not any release of hazardous wastes or constituents has occurred from the SWMU. (R. 184.) If the Agency determines that the data submitted in the Phase I Workplan establishes that no release occurred, no further action is required. (R. 163.) If the Agency concludes a release did occur, Sherex must submit a Phase II Workplan to determine the extent of migration. (R. 163.) The Agency will determine whether corrective action is necessary based upon the Phase II

Workplan. (R. 163.) These provisions are standard "boiler-plate" language in RCRA Part B Permits. (Pet. Mot. for Summ. Judg. Ex. E Dep. James Moore at 63.)

The consent decree recognizes that there was an actual and threatened release of copper and cadmium, which are hazardous substances, from the SRAPL HPA reactor disposal area at the Mapleton site. (Pet. Mot. for Summ. Judg. Ex. C at 3.) The parties agreed that the State would be reimbursed for past and certain future response costs and that ADM, Ashland and Sherex will share past, future and contingent response costs. (Id. at 4.) The decree provides that the State or its designee may undertake a monitoring program to determine the levels of cadmium and copper in the groundwater and that the Agency, in consultation with the other parties, will determine which wells to sample, the method of sampling and the schedule for sampling and analysis. (Id. at 6.) The decree creates a fund allowing the state to perform further response action, possibly including the construction of a slurry wall. (Id. at 7-10.) The release section of the decree, which is the focal point of the Agency's cross motion for summary judgment, provides as follows:

> In consideration of the mutual promises and undertakings contained herein, the parties agree that upon entry of this Consent Decree, they hereby release each other...from any and all claims of any party to the disposal of spent nitric acid wash from the HPA reactor at the Mapleton site, including all claims which were raised or which could have been raised with respect thereto.
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> Further, nothing in this Consent Decree shall be construed as a release of any right to bring an action to redress violations of this Consent Decree or of any applicable State or Federal laws or regulations or to obtain response costs with respect to the migration of hazardous substances from the Site or to the Site from another site.

(Id. at 13-15.)

Sherex contends that the language of the consent decree bars the Agency from requiring any corrective action for the SRAPL HPA reactor site unless such action is required by the consent decree. The Agency contends that the release language quoted above preserves the Agency's right to designate the SRAPL site as a SWMU subject to corrective action.

The second paragraph of the release language quoted above preserves the right to bring an action to enforce the terms of the consent decree or an action to enforce any applicable laws or regulations. This language simply preserves the Agency's ability to bring an enforcement action to address violations of the Act

or regulations. Designation of the SRAPL site as a SWMU during the permitting process is not an "action to redress violations" of the laws or regulations. Contrary to the Agency's contention, this release language does not preserve the right to impose permit conditions.

The first paragraph of the release quoted above provides that the parties have agreed to release each other from any "claims" relating to the disposal of acid nitric wash at the HPA reactor disposal area which were raised or could have been raised. However, the Agency's authority to impose a permit condition is not a claim. The Board finds that this language by itself does not preclude the Agency from imposing permit conditions relating to the HPA reactor area.

Based upon a review of the release provisions, the Board finds that this language preserves the Agency's ability to bring certain enforcement actions and that the release does not preclude the Agency from imposing permit conditions. Apart from the release provisions of the decree, however, the Board is still left with the question of whether the remaining provisions of the decree prevent the Agency from requiring further response action with regard to the SRAPL HPA reactor site.

The consent decree governs corrective action necessitated by the release of cadmium and copper which was present in the nitric acid solution used in cleaning the HPA reactor and disposed of on-site at the Mapleton facility. The parties agree that this consent decree was entered into after adding the HPA reactor disposal area to the SRAPL and the completion of the Remedial Investigation (RI) funded by Ashland, Sherex and the Agency. The subject matter of the decree and the challenged permit condition is identical. Both the decree and the permit condition concern the release of cadmium and copper from the HPA reactor disposal area. The consent decree sets forth the Agency's agreement as to the appropriate corrective action to be performed at the SRAPL HPA reactor disposal area. The challenged permit condition requires that Sherex perform certain studies investigating the occurrence of a release from the SRAPL HPA reactor disposal area.

The Board concludes that because the Agency has entered into a consent decree agreeing to the corrective action measures to be performed at the SRAPL HPA reactor site as a result of the release of cadmium and copper, it is barred from imposing a permit condition designating that same site as a SWMU subject to investigation and corrective action.

Moreover, the Board finds that, as a matter of law, the challenged permit condition requiring investigation into whether a release has occurred and possible corrective action is not necessary to accomplish the purposes of the Act and regulations. While the parties have focused on the release provisions of the

consent decree, they have failed to focus on whether the challenged condition is necessary to accomplish the purposes of the Act and regulations. As noted above, this is the proper inquiry in a permit appeal before the Board. Here, this inquiry must be addressed in the context of a motion for summary judgment.

Citing 35 Ill. Adm. Code 724.201, the Agency does make the general assertion that the condition is consistent with the Board's regulations. However, Section 724.201 merely provides that owners and operators seeking hazardous waste disposal permits must institute corrective action for all releases from SWMUs. This general provision does not support the Agency's imposition of the challenged permit condition in light of the investigative and remedial actions taken by the parties to the consent decree. The instant condition is not necessary because a release has already been identified, a RI has been performed assessing the extent of migration and appropriate corrective action has been established. To require, by way of a permit condition, actions which have already been undertaken pursuant to a consent decree does nothing to further the purposes of the Act or regulations. Therefore, the Board reverses the Agency's imposition of the permit condition designating the SRAPL HPA reactor site as a SWMU subject to corrective action. Sherex's motion for summary judgment is granted. The Agency's cross motion for summary judgment is denied. The Agency is instructed to strike the challenged condition from Sherex's RCRA Part B Permit.

The Board notes that the stipulation entered into by Sherex and the Agency provides that "the parties will request a continuance of the hearing as it concerns [three items]...to allow Sherex to complete its the [sic] proposed sampling and analysis plan...and in order to allow the Agency to complete its review [of] Sherex's sampling and analysis results." However, the stipulation also provides that the stipulation will be implemented by means of a permit application filed by Sherex after completion of the sampling results. Sherex also states in its memorandum in support of summary judgment that "[a]fter completion of the sampling the parties hope to be able to resolve all remaining issues. If not, the hearing will resume." (Mem. at 3 fn. 3.) Sherex's motion for summary judgment does not indicate that it is a partial motion for summary judgment, but rather states that the issue concerning the designation of the SRAPL HPA reactor site as a SWMU is the "only issue currently pending in its appeal of the RCRA Part B Permit". (Id. at 1.) Although the parties have agreed to continue the hearing in this docket, they have also agreed that any issues stemming from the three "sampling items" will be dealt with via a new permit application. The Board concludes that the instant order disposes of all remaining issues in this docket and, therefore, this docket is closed.

IT IS SO ORDERED.

B. Forcade concurs.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Casteneda v. Illinois Human Rights Commission (1989), 132 Ill. 2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 30th day of July, 1992 by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board