ILLINOIS POLLUTION CONTROL BOARD
February 19, 1998

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
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| Complainant, | ) | |
| | ) | PCB 96-76 |
| v. | ) | (Enforcement - Land) |
| | ) | |
| CHEMETCO, INC., | ) | |
| | ) | |
| Respondent. | ) | |

INTERIM OPINION AND ORDER OF THE BOARD (by K.M. Hennessey):

Chemetco, Inc. (Chemetco) owns and operates a secondary metal smelting facility (facility) near Hartford, Madison County, Illinois. The facility has several areas that contain, or once contained, wastes that are considered hazardous. These wastes trigger various laws and regulations. In this case, the Attorney General, on behalf of the people of the State of Illinois (State), alleges that Chemetco has violated some of those laws and regulations.

Specifically, in count I of its complaint, the State alleges that Chemetco did not perform the groundwater sampling and reporting that the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq*. (1996) (Act), and Board regulations require. In count II, the State alleges that Chemetco has not provided the financial or liability assurance that the Act and Board regulations require.

In this interim opinion and order, the Board considers the State's motion for summary judgment (motion), in which the State argues that the undisputed facts require judgment in its favor on both counts. The Board addresses each count in turn and concludes that the undisputed facts establish that Chemetco has violated certain provisions of the Act and Board regulations, as further specified below. Accordingly, the Board grants the portion of the State's motion regarding those violations. However, the parties do dispute facts relating to the appropriate penalty for these violations, as well as the facts regarding one of the State's claims. The Board therefore orders that this case be sent to hearing on the remaining disputed claim and on the proper penalty for these violations.

## BACKGROUND FACTS

The parties do not dispute the following background facts. Chemetco is a Delaware corporation authorized to do business in Illinois. Answer at 1, paragraph (para.) 5.[1] Chemetco

[1] Throughout this interim opinion and order, the following citation forms will be used: the complaint is cited as "Comp. at __"; the answer is cited as "Answer at __"; the motion is cited as "Motion at __"; exhibits to the motion are cited as "Motion Exh. __ at __";

operates a secondary metal smelting facility near Hartford, Madison County, Illinois. Answer at 1, para. 6. Chemetco produces four materials at its facility: zinc oxide, slag, lead-tin solder, and copper anodes. Resp. Exh. 1 at 3-27.

The facility contains five areas, each which contains, or once contained, wastes considered hazardous wastes under the Act. Answer at 2, para. 8. The Act defines "hazardous waste" as:

> [A] waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed, and which as been identified, by characteristics or listing, as hazardous pursuant to Section 3001 of the Resource Conservation or Recovery Act of 1976, P.L. 94-580, or pursuant to Board regulations." 415 ILCS 5/3.15 (1996).

The five areas (collectively, the "waste units") are:

1. a zinc oxide pile, which existed until 1984 (Resp. Exh. 1 at 4-2);

2. a zinc oxide bunker, to which the contents of the zinc oxide pile were moved in 1984 (*Id*.);

3. zinc oxide lagoons, which until 1984 served as settling units for slurry produced from the zinc oxide production system (and the contents of which were moved to the zinc oxide bunker) (Resp. Exh. 1 at 2-2, 6-1);

4. cooling water canals, which until 1985 provided non-contact cooling water and which received a zinc oxide spill (Resp. Exh. 1 at 2-3); and

5. floor wash water impoundments, which until 1980 received acid spills flushed by water from the tankhouse (Resp. Exh. 1 at 7-1).

Beginning in 1988, Chemetco submitted to the Illinois Environmental Protection Agency (Agency) a series of plans to close the waste units ("closure plans") and to provide for the care of the waste units after closure ("post-closure plans"). Resp. Mem. at 6; Resp. Exh. 3. The Agency

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Respondent's Opposition to Complainant's Motion for Summary Judgment is cited as "Resp. Mem. at __"; exhibits to that response are cited as "Resp. Exh. __ at __"; the State's Reply Brief is cited as "Reply at __"; exhibits to that reply are cited as "Reply Exh. __ at __"; Chemetco's response to the State's request to admit is cited as "RTA at __"; and depositions are cited by name of the deponent followed by the page number (for example, Davis Dep. at __.).

either disapproved the closure and post-closure plans or approved them with conditions. See Resp. Exh. 3; Resp. Mem. at 6.

## COUNT I

### Regulatory Framework

Parties that store, treat, or dispose of hazardous waste are subject to certain requirements under the Act and Board regulations. Count I concerns groundwater monitoring and reporting requirements.

Groundwater Monitoring

Certain groundwater monitoring requirements apply to those who own or operate "surface impoundments." A "surface impoundment" is:

> [A] facility or part of a facility which is a natural topographic depression, manmade excavation or diked area formed primarily of earthen materials (although it may be lined with manmade materials) which is designed to hold an accumulation of liquid wastes or wastes containing free liquids and which is not an injection well. Examples of surface impoundments are holding, storage, settling and aeration pits, ponds and lagoons. 35 Ill. Adm. Code 720.110 (1997).[2]

Surface impoundments are a subset of "hazardous waste management units." A "hazardous waste management unit" is defined in part as:

> [A] contiguous area of land on or in which hazardous waste is placed, or the largest area in which there is significant likelihood of mixing hazardous waste constituents in the same area. Examples of hazardous waste management units include a surface impoundment, a waste pile, a land treatment area . . . . 35 Ill. Adm. Code 720.110 (1997).

35 Ill. Adm. Code 725.190(a) and (b) (1997) impose certain requirements on owners or operators of surface impoundments and other hazardous waste management units that are used to "manage" hazardous waste. "Management" means "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery and disposal of hazardous waste." 35 Ill. Adm. Code 720.110 (1997).

Owners and operators of surface impoundments used to manage hazardous waste must establish and operate a groundwater monitoring system:

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[2] All references in this interim opinion and order are to the 1997 text of the regulations and the 1996 text of the Act, which have not changed in any respect material to this case during the period relevant to this case.

a) The owner or operator of a surface impoundment, landfill or land treatment facility which is used to manage hazardous waste must implement a groundwater monitoring program capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility, except as Section 725.101 and paragraph (c) provide otherwise.

b) Except as paragraphs (c) and (d) provide otherwise, the owner or operator must install, operate and maintain a groundwater monitoring system which meets the requirements of Section 725.191 and must comply with Sections 725.192 through 725.194. This groundwater monitoring program must be carried out during the active life of the facility and for disposal facilities during the post-closure care period as well.

35 Ill. Adm. Code 725.192 (1997) further specifies groundwater monitoring obligations that apply to these owners or operators:

a) The owner or operator must obtain and analyses samples from the installed groundwater monitoring system. The owner or operator must develop and follow a groundwater sampling and analysis plan.

Groundwater monitoring obligations also may arise from an owner's or operator's closure and post-closure plans. Each owner or operator of a hazardous waste management facility[3] must have a closure plan that, among other things:

> [C]ontrols, minimizes or eliminates, to the extent necessary to protect human health and the environment, post closure escape of hazardous waste, hazardous constituents, leachate, contaminated run-off or hazardous waste decomposition products to the ground or surface waters or to the atmosphere . . . . 35 Ill. Adm. Code 725.212 (1997).

35 Ill. Adm. Code 725.213(b) (1997) further provides that: "The owner or operator shall complete partial and final closure activities in accordance with the approved closure plan . . . ." Thus, to the extent that a facility's closure plans include groundwater monitoring requirements, and the facility undergoes partial or final closure, these regulations require the facility owner or operator to monitor groundwater.

Under Section 21 of the Act, a violation of these groundwater monitoring regulations is a violation of the Act as well:

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[3] A "hazardous waste management facility" means "all contiguous land, and structures, and other appurtenances and improvements on the land, used for treating, storing or disposing of hazardous waste. A facility may consist of several treatment, storage or disposal operational units (for example, one or more landfills, surface impoundments or combinations of them)." 35 Ill. Adm. Code 702.110 (1997).

No person shall:

* * *

(f) Conduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation:

* * *

2. In violation of any regulations or standards adopted by the Board under this Act . . . . 415 ILCS 5/21(f)(2) (1996).

Groundwater Reporting

Under 35 Ill. Adm. Code 725.175 (1997), owners and operators of facilities that treat, store, or dispose of contain hazardous waste must submit an annual report to the Agency that includes certain groundwater monitoring information:

The owner or operator shall prepare and submit a single copy of an annual report to the Agency by March 1 of each year. . . . The annual report must cover facility activities during the previous year and must include the following information:

* * *

f) Monitoring data under Section 725.194(a)(2)(B) and (c) and (b)(2) where required.

35 Ill. Adm. Code 725.194 (1997) further specifies the information required:

a) Unless the groundwater is monitored to satisfy the requirements of Section 725.193(d)(4), the owner or operator must:

* * *

2) Report the following groundwater monitoring information to the Director:

* * *

B) Annually: concentrations or values of the parameters listed in Section 725.192(b)(3) for each groundwater monitoring well, along with the required evaluations for these parameters under Section 725.193(b). The owner or operator must separately identify any significant differences from the initial background found in the upgradient wells, in

> accordance with Section 725.193(c)(2). During the active life of the facility, this information must be submitted as part of the annual report required under Section 725.175.

Under Section 21(f)(2) of the Act, a violation of these groundwater reporting regulations is a violation of the Act as well.

Facts -- Count I

Except where noted, the parties do not dispute the following material facts. Sometime before October 15, 1990, Chemetco submitted a request that the Agency modify its closure and post-closure plans for the waste units. Resp. Exh. 4 at 1. Chemetco apparently submitted this request in response to the Agency's April 6, 1990, conditional approval of Chemetco's closure and post-closure plans. Resp. Exh. 3; Resp. Exh. 4.

On October 19, 1990, the Agency denied Chemetco's modification request. The Agency set forth several reasons for its denial, including that the modification request did not meet condition 1.v.p. of the Agency's April 6, 1990, letter. Resp. Exh. 4 at 4. That condition required: "The full list of Appendix I constituents [from Part 724] as specified in the regulations shall be sampled for." Resp. Exh. 3 at 4. The Agency's October 19, 1990, letter also specified other deficiencies in Chemetco's groundwater monitoring program. Resp. Exh. 4.

On November 15, 1990, Cindy Davis, an Agency employee responsible for reviewing Chemetco's groundwater monitoring plans, met with Michelle Reznack of Chemetco and Doug Simmons of ENSR (Chemetco's consultant) to discuss the Agency's October 15, 1991, letter. Motion Exh. D at 1; Davis Dep. at 10-11. On or about December 12, 1990, Davis wrote a file memo describing the items discussed at the November 15, 1990 meeting, including the following:

> Sampling the monitoring wells for organics. Appendix I analyses of the floor wash impoundment and zinc oxide lagoons detected organics. The Agency previously informed Chemetco if organics were detected in the impoundments or lagoons, the groundwater monitoring program must include analyses for organics. Chemetco is concerned the IEPA will require all the existing wells to be replaced with wells constructed of stainless steel pursuant to Agency policy regarding well construction materials when sampling for organics. Chemetco proposed to use the existing wells for Appendix I analyses and if organics were detected then address the well construction issue. Chemetco does not desire to replace all the wells, perform the sampling, only to find no detection of organics in the groundwater. The Agency agreed to allow Chemetco to use the existing wells to determine if organics are of concern at the site. Motion Exh. D at 1.

Davis also testified about the November 15, 1990, meeting in a deposition and in an affidavit. In her deposition, she testified:

> I know we talked about the Appendix I parameters for all wells. The Agency was not looking for Appendix I parameters on all wells, it was not where we were going with it, we just needed to make sure there was not an organic problem underneath, you know, the groundwater beneath the plant, we didn't necessarily need all of the wells sampled to determine that. And number two, what we were talking about was we hadn't ironed out exactly what wells, like I said, what wells, what parameters, which wells were in the Shallow Aquifer Program[,] which were in the deep[,] which were in the upper region. And this comment she was – and what I remember saying to her was, "No, we don't want you to do anything until we have all of that worked out because they wouldn't know what to sample for in the meantime," that was basically the discussions we had. Davis Dep. at 28.

In an affidavit submitted with Respondent's response, Davis states:

> Although the Agency wanted Chemetco to meet 724 annual assessment requirements, those requirements were negotiable, and requiring Chemetco to sample over 24 wells for more than 200 Appendix I constituents would have entailed a large and unnecessary expense. Accordingly, I had the power to waive and did waive Chemetco's 1991 annual sampling as we continued to negotiate how many wells were to be sampled for Appendix I constituents. Resp. Exh. 2 at 2.

However, Davis did not remember telling Chemetco that it did not have to do any sampling until all aspects of the closure plan or monitoring plan were settled. Davis Dep. at 23.

Davis left the Agency in 1991 and formed a consulting firm, CSD Environmental Services, Inc., that now counts Chemetco among its clients. Davis Dep. at 5-6. Terri Blake Myers, an environmental protection specialist with the Agency, replaced Davis as reviewer of Chemetco's closure and post-closure care plans. Myers Dep. at 5; Davis Dep. at 25.

On or about January 22, 1991, Chemetco submitted a closure and post-closure plan (the "January 1991 plan") to the Agency. The January 1991 plan did not propose to sample all existing wells for Appendix I constituents on an annual basis. Instead, the January 1991 plan provided that Chemetco would sample well only 31A for organic compounds, and only for those organic compounds previously detected in samples from the zinc oxide and floor wash water impoundment contents. Motion Exh. A at 3-17 to 3-18, Table 3-4. Chemetco stated, "The construction and location of well 31A make it the most suitable well from which to monitoring [sic] organic parameters that could potentially leach from the closed unit. If analyses indicate that organics may be leaching from the closed unit, Chemetco will submit a plan for a permit modification to establish additional monitoring." Motion Exh. A at 3-18.

By letter dated April 19, 1991, the Agency sent a letter to Chemetco (the "April 19, 1991, letter) approving the January 1991 plan with various modifications, four of which are at issue in this case:

1. Condition 5 required Chemetco to monitor all wells on a quarterly basis for the presence of certain metals and other specified parameters. Exh. A to Comp. at 3.

2. Condition 5 also stated: "Annually samples are to be taken during the fourth quarter of the year for all wells and analyzed for the parameters listed in Appendix I of 35 Ill. Adm. Code 724. The analytical results shall be evaluated and submitted to the Agency on January 15 of every year." Resp. Exh. 7 at 3.

3. Condition 7 required Chemetco to determine groundwater flow rate and direction at the facility on a quarterly basis, and to submit maps showing this data to the Agency along with the quarterly monitoring results. Resp. Exh. 7 at 3.

4. Condition 8 required Chemetco to submit a written report to the Agency by March 1 of each year regarding the effectiveness of the corrective action program. Resp. Exh. 7 at 3.

In a letter dated May 30, 1991, Chemetco sent a letter to the Agency asking that the Agency delete condition 5's requirement that Chemetco annually sample all wells for all Appendix I parameters. See Resp. Exh. 8. In that letter, Chemetco did not object to any other conditions in the Agency's April 19, 1991, letter. *Id*. Chemetco reiterated its request that summer. Motion Exh. B at 1. In both letters, Chemetco stated, in effect, that it believed that the Agency and Chemetco had previously reached agreement on this issue. Resp. Exh. 8 at 3; Motion Exh. B at 3.

The Agency denied these requests by letter dated October 28, 1991. See Resp. Exh. 9. In that letter, the Agency added, "Due to the fact that the subject plan modification request has been disapproved, interim-status closure and post-closure care of the subject facility must continue to be carried out in accordance with the Agency's April 19, 1991 approval letter . . . ." Resp. Exh. 9 at 2.

Chemetco submitted another modification request on December 4, 1991. On March 11, 1992, the Agency again denied the request. See Resp. Exh. 11. The Agency reiterated that Chemetco must comply with the terms of the Agency's April 19, 1991 letter in carrying out interim closure and post-closure care of the hazardous waste units at the facility. *Id*. at 2.

Myers and other Agency representatives met with Chemetco representatives on April 2, 1992. While Chemetco again argued that it had reached an agreement with the Agency that Chemetco would sample only well 31A for Appendix I parameters, no such agreement was documented in the Agency's file. Reply Exh. R-5.

By letter dated October 30, 1992, Chemetco again asked the Agency to modify its closure/post-closure plans. After some negotiations, the Agency sent Chemetco a letter dated January 29, 1993, which expressly superseded the April 19, 1991, letter and deleted the requirement that Chemetco sample all wells for Appendix I constituents. See Resp. Exh. 13 at 3. In its place, the Agency required Chemetco to sample certain wells for Appendix I metals and

semi-volatiles on an annual basis, and to provide the results to the Agency on January 15 of every year. *Id*.

From April 19, 1991, through May, 1992, Chemetco did not perform certain groundwater monitoring and reporting tasks. Specifically:

1. Chemetco did not perform the quarterly sampling or submit the reports required under condition 5 of the April 19, 1991 letter. Respondent's Response to Request to Admit at (RTA) at 3, para. 14-23, 27-31. Although Chemetco did perform sampling during the second quarter of 1992, it did so in June, rather than in April or May, as condition 5 required. Resp. Exh. 7 at 3; Resp. Exh. 12 at 1. Furthermore, Chemetco did not submit the results to the State until October 1992, rather than by July 15, 1992, as condition 5 required. Resp. Exh. 7 at 3; Resp. Exh. 12 at 1.

2. During October or November, 1991, Chemetco did not perform the annual groundwater quality monitoring required under condition 5 of the April 19, 1991, letter. RTA at 3, para. 24-25.

3. Chemetco did not determine the groundwater flow rate and direction at its facility during April 1991 to June 1992, as condition 7 of the April 19, 1991 letter required. RTA at 4, para. 32-41.

4. Chemetco did not submit the Annual Report for calendar year 1991, as condition 8 of the April 19, 1991, letter required. RTA at 5, para. 26.

Conclusions of Law on Count I

A motion for summary judgment must be granted if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1105(c) (1996).[4] These pleadings, depositions, admissions, and affidavits "must be construed against the movant and in favor of the opponent of the motion, although the opponent cannot rely simply on his complaint or answer to raise an issue of fact when the movant has supplied facts which, if not contradicted, entitle him to judgment as a matter of law." Jackson Jordan, Inc. v. Leydig, Voit & Mayer, 158 Ill. 3d 240, 249, 633 N.E.2d 627, 630 (1994).

The regulatory framework, together with the undisputed facts, makes it clear that Chemetco was subject to various groundwater monitoring and reporting requirements and did not comply with these requirements from April 19, 1991, to May 1992.

[4] The Illinois Code of Civil Procedure, 735 ILCS 5/1-101 *et seq*. (1996) (Code), does not apply in proceedings before the Board, but the Board may refer to those rules on subjects not expressly addressed in the Board's procedural rules. 35 Ill. Adm. Code 101.100(b) (1997). The Board commonly refers to the Code when considering motions for summary judgment.

As an initial matter, the undisputed facts make it clear that at least some of Chemetco's waste units were "surface impoundments . . . used to manage hazardous waste" and therefore subject to the groundwater monitoring and reporting requirements outlined above. In its response, Chemetco argues that the former cooling canal and zinc oxide lagoons were closed by removal of all wastes in the 1980s, and that they, along with the former floor wash impoundment, were drained and filled in the 1980s. As a result, Chemetco claims that these units do not meet the regulatory definition of "surface impoundment" and that Chemetco does not use them to "manage" waste. Resp. Mem. at 26-27.

The Board does not agree that the former cooling canal, the zinc oxide lagoons, and the former floor wash impoundment have been closed. A "closed portion" of a facility is "that portion of a facility which an owner or operator has closed in accordance with the approved facility closure plan and all applicable closure requirements." 35 Ill. Adm. Code 720.110 (1997). A portion of a facility that had been used for treatment, storage or disposal operations after May 19, 1980 and that is not "closed" is considered active. *Id*.

While Chemetco may have removed hazardous wastes from the former cooling canal, the zinc oxide lagoons, and the former floor wash impoundment in the 1980s, the undisputed facts show that these units were not closed in accordance with all applicable closure requirements at the time of Chemetco's alleged violations. Chemetco does not argue that these units do not otherwise meet the regulatory definitions. Therefore, these units are "surface impoundments" in which hazardous wastes are "managed" as those terms are defined in Section 720.110.

Quarterly Groundwater Sampling

Several sections of the Illinois Administrative Code required Chemetco to develop and implement a groundwater sampling plan (subject to certain exclusions not applicable here). See 35 Ill. Adm. Code 725.190, 725.192 (1997). As discussed above, Chemetco did not implement a groundwater sampling plan between April 19, 1991, and May 1992. Second, 35 Ill. Adm. Code 724.213(b) (1997) required Chemetco to complete partial and final closure activities in accordance with an approved closure plan. Chemetco's failure to perform quarterly groundwater sampling violated condition 5 of the April 19, 1991 letter, which was, at the time, part of its approved closure plan. Finally, Chemetco's violations of these regulations also violated Section 21(f)(2) of the Act, which prohibits any person from conducting a hazardous waste-storage operation in violation of Board regulations.

Chemetco claims, however, that the Board should bar (or "estop") the Agency from enforcing these regulations because of the statements that Ms. Davis made to Chemetco's representatives at the November 15, 1990 meeting. Under the doctrine of equitable estoppel, an obligation may not be enforced against a party that reasonably and detrimentally relied on the words or conduct of the party seeking to enforce the obligation. See Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1997). However, the doctrine "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." Gorgees v. Daley, 256 Ill. App. 3d 143, 147, 628 N.E.2d 721, 725 (1st Dist. 1993). As the Illinois Supreme Court has explained, "[t]his

court's reluctance to apply the doctrine of estoppel against the State has been motivated by the concern that doing so 'may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials.'" Brown's Furniture, 171 Ill. 2d at 431-432, 665 N.E.2d at 806 (quoting Hickey v. Illinois Central R.R. Co., 35 Ill. 2d 427, 447-448, 220 N.E.2d 415, 426 (1966); see also Tri-County Landfill Company v. Pollution Control Board, 41 Ill. App. 3d 249, 353 N.E.2d 316 (2d Dist. 1976) (refusing to estop the Agency from enforcing the Act against various landfills that it had previously approved on the grounds that to do so would violate public policy).

Consistent with this reluctance, the courts have established several hurdles for those seeking to estop the government. Like all parties seeking to rely on estoppel, those seeking to estop the government must demonstrate that their reliance was reasonable and that they incurred some detriment as a result of the reliance. A party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue. See Medical Disposal Services, Inc. v. Pollution Control Board, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1997). Finally, before estopping the government, the courts require that the governmental body must have taken some affirmative act; the unauthorized or mistaken act of a ministerial officer will not estop the government. "Generally, a public body cannot be estopped by an act of its agent beyond the authority expressly conferred upon that official, or made in derogation of a statutory provision." Gorgees, 256 Ill. App. 3d at 147, 628 N.E.2d at 725; see also Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806 ("The State is not estopped by the mistakes made or misinformation given by the Department's [of Revenue] employees with respect to tax liabilities.").

Applying these rules to this case, and construing the facts most favorably to Chemetco, Chemetco's estoppel defense regarding its quarterly groundwater sampling obligations fails. The only requirement that Ms. Davis purported to waive were Chemetco's annual sampling and reporting requirements. Motion Exh. D at 1; Resp. Exh. 2 at 2; Davis Dep. at 28. Chemetco's quarterly sampling requirements involved different, and much more limited, parameters than those in its annual sampling requirements. Estoppel requires reasonable reliance, and it was not reasonable for Chemetco to deem Ms. Davis' alleged waiver of annual sampling and reporting requirements as a waiver of its quarterly groundwater monitoring obligations.

In addition, even if Ms. Davis' statements could be construed as waiving Chemetco's quarterly groundwater monitoring requirements, Chemetco certainly was not reasonable in relying on those statements after it received the Agency's April 19, 1991, letter, the date on which the Agency has alleged that Chemetco's violations began. That letter clearly reiterated the quarterly groundwater monitoring requirements and it simply was not reasonable for Chemetco to rely on any previous statements to the contrary by Ms. Davis. "[A] party claiming the benefit of an estoppel cannot shut his eyes to obvious facts . . . and then charge his ignorance to others." Vail v. Northwestern Mutual Life Insurance Co., 192 Ill. 567, 570, 61 N.E. 651, 652 (1901).

Finally, once the Agency issued the April 19, 1991 letter it became part of Chemetco's approved closure and post-closure plan. As noted earlier, Section 725.213(b) requires Chemetco

to complete its closure activities -- including groundwater sampling -- in accordance with its approved plan. Ms. Davis did not have authority to waive that requirement, and the Agency cannot be estopped from enforcing that requirement.

Quarterly Groundwater Determinations

As noted earlier, Chemetco did not determine the groundwater flow rate and direction at its facility from April 19, 1991, to May 1992, as condition 7 of the Agency's April 19, 1991 letter required. By failing to carry out this portion of that plan, Chemetco violated 35 Ill. Adm. Code 725.213(b), which requires Chemetco to carry out its closure plan, and Section 21(f)(2) of the Act, which requires Chemetco to comply with the Board's regulations.

Chemetco also seeks to estop the Agency from enforcing these regulations. This defense fails because Chemetco did not establish that Ms. Davis' statements reasonably could be construed to relieve Chemetco of its obligation to determine groundwater flow rate and direction on a quarterly basis. Furthermore, even if Ms. Davis' statements could be so construed, it was not reasonable for Chemetco to rely on her statements after it received the Agency's April 19, 1991, letter. Davis also lacked authority to waive those requirements once they became part of Chemetco's approved closure plan.

Annual Report

As noted earlier, Chemetco did not submit an annual report for 1991. By failing to do so, Chemetco violated Section 725.175, which required Chemetco to submit an annual report to the Agency by March 1 regarding facility activities during the previous year. Chemetco also violated 35 Ill. Adm. Code 725.194(a)(2)(B) (1997), which required the report to include the groundwater monitoring information specified in 35 Ill. Adm. Code 725.192(b)(3) and 725.193(b) (1997). In addition, Chemetco did not comply with condition 8 of the April 19, 1991 letter approving its closure plan, which required Chemetco to submit an annual plan addressing the effectiveness of the corrective action program, including certain specific information on groundwater at the facility. Resp. Exh. 7 at 3-4. By failing to comply with this condition, Chemetco violated 35 Ill. Adm. Code 725.213(b) (1997), which required Chemetco to implement its approved closure plan. Chemetco also violated Section 21(f)(2) of the Act, which required Chemetco to comply with Board regulations.

Chemetco again argues that the Agency is estopped from enforcing these laws. In one regard, Chemetco has a stronger claim regarding these violations, because Ms. Davis does allege that she specifically addressed this issue during the November 15, 1990, meeting. Even assuming that Ms. Davis did so, however, Chemetco's reliance on that statement after it received the April 19, 1991, letter was unreasonable. Furthermore, Ms. Davis lacked the power to waive those requirements once they became part of Chemetco's approved closure plan, as explained earlier. Therefore, the Board will not estop the Agency from enforcing these laws.

In summary, the Board grants partial summary judgment to the State as to Chemetco's liability on all claims in count I.

Penalty on Count I

In assessing a penalty for count I, the Board must consider all the facts and circumstances of the case, which may include the following factors:

i. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

ii. the social and economic value of the pollution source;

iii. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

iv. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

v. any subsequent compliance. 415 ILCS 5/33(c) (1996).

In addition, in setting a monetary penalty, Section 42(h) of the Act authorizes the Board to consider:

1. the duration and gravity of the violation;

2. the presence or absence of due diligence on the part of the violator because of delay in compliance with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

3. any economic benefits accrued by the violator because of delay in compliance with requirements;

4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and

5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. 415 ILCS 5/42(h) (1996).

In this case, the parties factually dispute many of the Section 33(c) and 42(h) factors, and these disputes preclude the Board from assessing a penalty without a hearing. For example, material factual disputes exist as to the character and degree of harm that Chemetco's violations caused. Compare Resp. Exh. 2 at 3 (generally asserting that no harm resulted from the violations) to Reply at 10-11 (noting that Resp. Exh. 12 shows that groundwater flow conditions changed

unexpectedly from April 1991 - May 1992). The parties also have other material factual disputes regarding the proper penalty.

Accordingly, while the Board grants the State partial summary judgment on count I, finding that Chemetco has violated the regulations and the Act as alleged, that judgment does not extend to the penalty for those violations. The Board therefore sends this matter to hearing on the proper penalty.

## COUNT II

### Regulatory Framework

Owners and operators of certain hazardous waste management units must provide financial and liability assurance for these units, as outlined below.

#### Financial Assurance

35 Ill. Adm. Code 725.243(a) (1997) provides that the "owner or operator of each facility shall establish financial assurance for closure of the facility." 35 Ill. Adm. Code 725.245(a) (1997) provides that the "owner or operator of a facility with a hazardous disposal unit shall establish financial assurance for post-closure care of the disposal unit(s)." An owner or operator may meet its financial assurance obligations in a variety of ways, including by establishing a trust fund, a surety bond, a letter of credit, or insurance. See 35 Ill. Adm. Code 725.243 (1997).

#### Cost Estimates

Owners and operators or hazardous waste management units also must provide cost estimates for closure (which the Agency uses to determine if an owner or operator has met its financial assurance obligations):

> (a) The owner or operator shall have a detailed written estimate, in current dollars, of the cost of closing the facility in accordance with the requirements in Sections 725.211 through 725.297, 725.328, 725.358, 725.380, 725.410, 725.251, 725.481 and 725.504 . . . . . 35 Ill. Adm. Code 725.242(a) (1997).

During the facility's active life, the owner or operator must update these estimates for inflation annually and when the closure plan is revised in a way that increases closure costs. See 35 Ill. Adm. Code 725.242(b) and (c) (1997).

Liability Assurance

Owners and operators of certain areas that contain hazardous waste must provide coverage for sudden accidental occurrences under 35 Ill. Adm. Code 725.247(a) (1997):

> a) Coverage for sudden accidental occurrences. An owner or operator of a hazardous waste treatment, storage or disposal facility, or a group of such facilities, shall demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator shall have and maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs. . . .

Owners and operators of surface impoundments, landfills, or land treatment facilities also must provide assurance for nonsudden accidental occurrences as well:

> b) Coverage for nonsudden accidental occurrences. An owner or operator of a surface impoundment, landfill or land treatment facility which is used to manage hazardous waste, or a group of such facilities, shall demonstrate financial responsibility for bodily injury and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility or group facilities. 35 Ill. Adm. Code 725.247(a) (1997).

Facts -- Count II

Except as stated otherwise, the parties do not dispute the following material facts.

Financial Assurance

Chemetco has provided some financial assurance for the waste units through a trust agreement established on March 25, 1986. Exh. G to Motion at 1. Schedule A to the trust agreement describes the units covered by the trust agreement. Resp. Exh. 19. It does not cover all of the units at issue in this case. Resp. Exh. 19.

Chemetco initially deposited $40,000 into the account established under the trust agreement. Exh. H to Motion. As of early 1997, the value of the trust account was approximately $200,000, according to Chemetco's president, David Hoff. Hoff Dep. at 23; Resp. Exh. 20 at 8.

In 1988, Chemetco's closure and post-closure cost estimate was approximately $8 million. Hoff Dep. at 22. Those costs were estimated to be over $5 million in 1991. Resp. Exh. 18. At the time of Mr. Hoff's deposition in early 1997, the estimated closure and post-closure costs were around $2,000,000. Hoff Dep. at 22.

Chemetco did not provide financial assurance for closure of the waste units from 1988 to December 2, 1996. RTA at 9, para. 51-59. Chemetco did not provide financial assurance for post-closure care for the units at issue in this case from 1988 through December 2, 1996. RTA at 9-10, para. 60-69.

Cost Estimates

In its motion, the State claims that Chemetco did not update its closure costs annually so they would be current. Motion at 16. It further states that Chemetco did not update its closure/post-closure cost estimate after its January 1991 plan was modified in April 1991 or January 1992. *Id*.

However, in both the motion and its reply, the State fails to cite any pleadings, affidavits, depositions, or documents that support these claims. Motion at 16; Reply at 15-16. In the absence of such proof, the Board cannot find that the State has established its factual claims regarding the cost estimates. Furthermore, in response to the motion, Chemetco provided copies of closure/post-closure estimates that it had submitted to the Agency in May 1988, October 1988, January 1990, July 1990, January 1991, June 1994 and June 1995. Resp. Exh. 18. These documents raise an issue of material fact as to the adequacy of these estimates, at least for these years. Because of these disputed material facts, the Board will not enter partial summary judgment on the State's claim that Chemetco violated 35 Ill. Adm. Code 725.242 (1997).

Liability Assurance

Chemetco also attempted to obtain liability insurance for its waste units to meet its obligation to provide coverage for sudden accidental occurrences. Hoff Dep. at 25. However, Chemetco did not provide this insurance from 1988 to August 1995. RTA at 10. In August 1995, Chemetco obtained an insurance policy from Reliance Insurance Company. Motion Exh. K. This policy provided liability limits of $1 million per loss and $2 million total for all losses. *Id*. It excludes groundwater contamination from coverage. *Id*.

Conclusions of Law on Count II

Chemetco argues that it was financially unable to provide financial assurance, and that liability assurance was not available until 1995. Resp. Mem. at 23-24. Chemetco also argues that it still is not possible to obtain coverage for groundwater contamination. Resp. Mem. at 26.

The State disputes these contentions factually, but the Board finds that Chemetco's financial condition, and the availability of liability assurance, are not material to the alleged violations. The regulations do not identify these factors as defenses, and neither the Board nor any court has considered these factors to be a defenses to an action for violating these regulations. While these factors may be relevant to the appropriate penalty, they do not preclude partial summary judgment for the State on its claims that Chemetco violated 35 Ill. Adm. Code 725.243 and 725.247 (1997). *Cf*. United States v. Production Plated Plastics, 742 F. Supp. 956, 961-62

(D. Mich. 1991) (impossibility and good faith are not available defenses to liability under federal financial assurance requirements).

Chemetco also argues that factual issues preclude a finding that the nonsudden coverage requirements of Section 725.247(b) apply. As noted earlier, those requirements apply only to surface impoundments, landfills, or land treatment facilities used to manage hazardous waste. As discussed on page 10, however, the former cooling canals, zinc oxide lagoons and former floor wash impoundment are "surface impoundments . . . used to manage hazardous waste" and Section 725.247(b) required Chemetco to provide nonsudden accidental coverage for them. Chemetco did not comply with this regulation.

In summary, the Board grants partial summary judgment to the State regarding its claims in count II that:

1. Chemetco has not established financial assurance for closure of its facility in violation of 35 Ill. Adm. Code 725.243 (1997) and Section 21(f)(2) of the Act, 415 ILCS 5/21(f)(2) (1996);

2. Chemetco has not established financial assurance for post-closure care of its facility in violation of 35 Ill. Adm. Code 725.245 (1997) and Section 21(f)(2) of the Act, 415 ILCS 5/21(f)(2) (1996); and

3. Chemetco has not established liability assurance for bodily injury and property damage to third parties caused by sudden and nonsudden accidental occurrences arising from operations of the facility, in violation of 35 Ill. Adm. Code 725.247(a) and (b) (1997) and Section 21(f)(2) of the Act, 415 ILCS 5/21(f)(2) (1996).

## Penalty on Count II

In determining the appropriate penalty for Chemetco's violations under count II, the Board must again consider all the facts and circumstances of this case, including the Section 33(c) factors set forth on page 13. The Board also may consider the Section 42(h) factors set forth on page 13.

As in count I, the parties dispute factual issues regarding the appropriate penalty. For example, the parties dispute the economic benefit that Chemetco has derived from its non-compliance. See Resp. Mem. at 33; Reply at 23. This and other disputed facts relevant to the proper penalty preclude the Board from assessing a penalty without a hearing.

## CONCLUSION

The Board grants the State partial summary judgment on liability on counts I and II, excluding the State's claims regarding Chemetco's alleged failure to provide written closure cost estimates. The parties must proceed to hearing on this remaining issue and the issue of the proper penalty for Chemetco's violations.

ORDER

1. The Board grants the State partial summary judgment, finding Chemetco has violated:

    a. For the period between April 19, 1991, through May 1992, 35 Ill. Adm. Code 725.190(b), 725.192(a), 725.213(b) (1997) and 415 ILCS 5/21(f)(2) (1996) (*i.e.*, quarterly groundwater sampling requirements);

    b. For calendar year 1991, 35 Ill. Adm. Code 725.175, 725.194(a)(2)(B), 725.213(b) (1997) and 415 ILCS 5/21(f)(2) (1996) (*i.e.*, Annual Report requirements)

    c. For the period between April 19, 1991, through May 1992, 35 Ill. Adm. Code 725.213 and 415 ICLS 5/21(f)(2) (1996) (*i.e.*, requirements to determine groundwater flow rate and direction);

    d. For the period since 1986, 35 Ill. Adm. Code 725.243 (1997) and Section 21(f)(2) of the Act, 415 ILCS 5/21(f)(2) (1996) (regarding financial assurance for closure);

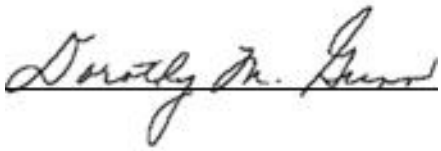
    e. For the period since 1986, 35 Ill. Adm. Code 725.245 (1997) and Section 21(f)(2) of the Act, 415 ILCS 5/21(f)(2) (1996) (regarding financial assurance for post-closure); and

    f. For the period since 1986, 35 Ill. Adm. Code 725.247(a) and (b) (1997) and Section 21(f)(2) of the Act, 415 ILCS 5/21(f)(2) (1996) (liability assurance for bodily injury and property damage to third parties caused by sudden and nonsudden accidental occurrences arising from operations of the facility).

2. The Board denies the State summary judgment on penalty issues and on the State's claim that Chemetco has violated 35 Ill. Adm. Code 725.242(a) (1997) and 415 ILCS 5/21(f)(2) (1996) by failing to provide detailed written closure cost estimates. The parties must proceed to hearing on these remaining issues.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above interim opinion and order was adopted on the 19th day of February 1998, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board