UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF THE ADMINISTRATOR

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| IN RE | ) | |
| | ) | RCRA V-W-86-R-77 |
| CID-CHEMICAL WASTE MANAGEMENT OF ILLINOIS, INC. | ) | |
| | ) | ORDER ON MOTION |
| Respondent | ) | |

This matter is before me on a motion to dismiss the Complaint and accompanying Order filed by the Respondent. This case was commenced by the issuance, on September 23, 1986, of the Complaint and Order. The Complaint alleged violations of the Illinois Hazardous Waste Management Administrative Code and sought a Compliance Order and the imposition of a civil penalty.

Distilled to its essence, the motion argues that since the Complaint only alleges violations of State law and since EPA has no authority to enforce State law, the Complaint must be dismissed for lack of jurisdiction.

Although the factual issues concerning the alleged violations are not especially relevant for the purposes of this decision, some historic facts need to be recited, to wit: On May 17, 1982 and on January 30, 1986, the State of Illinois was granted interim authorization and final authorization, respectively, by the USEPA to administer a hazardous waste program "in lieu of the Federal program". RCRA § 3006(b), 42 U.S.C. § 6926(b).

A careful reading of the Complaint reveals that, although it mentions several Federal statutes as providing the Agency's authority to bring the action, only violations of State laws or regulations are cited. Therefore, the question of whether and under what circumstances, the USEPA could enforce Federal law and regulations in an authorized state is not before me.

The Federal laws recited by the Agency in support of its authorty to bring this action are: §§ 2002(a)(1), 3006(b) and 3008 of RCRA. A careful examination of §§ 2002(a)(1) and 3006(b) reveals that they supply no such authority.

§ 3008 of RCRA provides a glimmer of support for the Agency's theory and it therefore must be examined in some detail. It provides as follows:

> "(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subtitle, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.
>
> (2) In the case of a violation of any requirement of this subtitle where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 3006, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section."

The Respondent argues that this section only authorizes the Agency to bring an action for violations of "<u>this subtitle</u>", i.e., for Federal law and not state law. Respondent says, as to subsection (2), that it confers no additional authority, but merely adds a notice provision to the authorized state as a condition precedent to the bringing of an action under subsection (1). As to subsection (2), I agree with the Respondent.

EPA argues as to subsection (1) <u>supra</u> that "these requirements of the authorized state program are considered the subtitle C requirements". Agency brief at p. 6. No authority for this rather broad statement is provided. The Agency then states that EPA's authority to enforce the laws of a state program are only circumscribed by the notice provision of subsection (2). In support of this notion, the Agency cites the Court's attention to the case of

Wykoff Co. v. EPA, 796 F.2d 1197 (9th Cir. 1986). Unfortunately that case says no such thing. The holding in Wykoff only says that EPA can enforce Federal law in an authorized state, not state law. (In that case, § 3013 of RCRA.) The Agency also cites the Court's attention to several decisions issued by some of my EPA colleagues and an internal memo written by the Agency's General Counsel. I find none of these authorities to be persuasive, for a variety of reasons. One of the cited cases has been revoked by the Administrator. The others were not directed to the precise point here in controversy, but only addressed the issue collaterally or as dicta. To the extent they seem to support the Agency's position, I disagree with their conclusions. As to the internal memo of the Agency's General Counsel, I find it not only unpersuasive, but in this case no more compelling than any other Agency counsel's arguments.

In its brief the Agency belatedly attempts to bolster its position by arguing that it was really bringing this action under the provisions of the Hazardous and Solid Waste Amendments of 1984 (HSWA), whose provisions are not a part of the State's delegated authority. While it may be true that the Respondent lost interim status as to some of its facilities pursuant to the provisions of HSWA, the Complaint alleges no violations of the substantive portions of that Act, only those of State law. In other word, the requirement to close and monitor certain of the Respondent's facilities may have been triggered by HSWA, but the specifics as to how such closure and monitoring must be accomplished are contained in the State law. It is these State requirements that the Complaint seeks to enforce, not those contained in HSWA. This argument is, therefore, without support.

The Agency also argues that its authority to enforce State law is supported by similar provisions found in the Clean Air Act and the Clean Water

Act, under which the courts have held that EPA may, in fact, enforce state law or requirements. It is true that under those two statutes, EPA may enforce state-imposed requirements, however this is so because the statutes specifically authorize such actions and expressly confer jurisdiction upon Federal courts to hear such cases. A careful examination of RCRA reveals no such authority nor does it confer jurisdiction on Federal courts to hear such cases. Absent similar language in RCRA, no meaningful parallels between the Acts can be made. The quotations from the Senate Committee Report submitted by EPA to bolster this argument must be disregarded since the Senate version was not passed by Congress. The House version was passed and the House Report lends no support to the Agency's position. It merely reiterates the notion that the Agency may enforce Federal law in an autorized state under certain circumstances. No mention is made of enforcing state law. I am therefore of the opinion that neither of the Acts referred to lend support to the Agency's position.

In addition to the language of the statute itself (§ 3008, supra), which the Respondent argues is dispositive of this matter, the Court was directed to the recent case of Northside Sanitary Landfill v. Thomas, 804 F.2d 371 (7th Circuit, 1986).

In that case, Northside sought a review of an order of the Administrator of EPA denying its Part B Permit. The Petitioner was not really contesting the Part B denial, which it agreed was proper, but rather the comments made by EPA at the public hearing on the question concerning what geographic areas of its facility were included in the denial.

As a necessary adjunct for its ultimate ruling, the court was required to address the extent of EPA's authority in those situations where a state had been granted Phase I authorization under 42 U.S.C. § 6926 (3006). This

was so since Northside was also seeking a formal hearing before EPA on the geographic area question. If EPA had no authority on that question, then a hearing before it would serve no purpose.

In its brief, the Agency argued that since the real issue had to do with what areas of Northside's facility were subject to closure and since that issue was one to be determined by state law, EPA had no authority on the question.

On page 21 of its brief, EPA argued that:

> "Because Indiana is solely responsible for approving Northside's closure plan, Indiana is free to impose closure requirements in accordance with its laws, and EPA's role, if any, in this process would be no more than an advisory or consultive one."

The Agency then cited the Administrator's order on reconsideration.

The court commented on this order, as follows:

> "On November 27, 1985, approximately two days before briefs were to be filed with this court in support of Northside's petition for review, the Administrator denied Northside's motion for reconsideration. Although the effect of his order was to affirm his initial order, the Administrator adopted a completely different rationale on reconsideration by holding that, because Indiana had been granted authority pursuant to 42 U.S.C. § 6926 to conduct closure proceedings for interim status permits, the comments in the Administrator's initial order regarding the scope of closure (and those comments made by the EPA and the Regional Administrator in the permit denial proceeding itself) "are without legal effect." In addition, the Administrator also noted that a parcel considered part of the facility for the purposes of a permit application need not automatically undergo closure upon a denial of the permit application."

On the question of EPA's authority to involve itself in state law, the court ruled:

> "Northside's argument, however, fails to account for the fact that the State of Indiana has received authorization, pursuant to 42 U.S.C. § 6926, to determine the closure requirements for any facility in that state whose interim status has been terminated by the EPA. See 40 C.F.R. §§ 265.1(c)(4); 271.121(b). Once the state agency has received authorization for its program, it shall 'carry out such program in lieu of the Federal program.' 42 U.S.C. § 6926(a). The EPA simply does not have the legal

"authority to determine whether, for what purposes, or which areas of Northside's facility must be closed. See 40 C.F.R. § 265.1(c)(4). The State of Indiana alone is responsible for these determinations. Even if the EPA is dissatisfied with, for example, the enforcement action taken by a state against a specific hazardous waste disposal facility, or the settlement agreement reached between the state and the facility, so long as the state has exercised its judgment in a reasonable manner and within its statutory authority, the EPA is without authority to commence an independent enforcement action or to modify the agreement." (Emphasis supplied.)

The court's ruling is in accord with the position taken by the Administrator of EPA in his Order on Reconsideration. See pages 6-8 of the Administrator's order wherein he said that:

"In view of the foregoing, Petitioner's claim that it has been denied an adequate hearing on the closure determination must be rejected. Indiana, not EPA, has the authority to approve Petitioner's closure plan, includng the responsibility to decide which areas of the facility have to comply with specific closure requirements such as the requirement for a final cover. Because state law has superseded the federal closure requirements, 40 CFR Part 265 (Subpart G), the closure proceedings will take place under the procedures established by the Indiana regulations corresponding to the federal requirements, and the closure plan must comply with the standards set out in Indiana law. Petitioner will therefore have the opportunity to present its arguments to the state. The Region's statement that the Old Farm Area must close cannot be viewed as a final action imposing closure obligations on Petitioner, for the statement is without legal effect as previously stated.

Granting Petitioner an additional hearing in a federal administrative forum would not only call the state's authority into question--by requiring EPA to decide a state law matter--but would also undoubtedly duplicate the efforts of state officials. Inasmuch as Petitioner does not challenge its permit denial but wishes only to be heard on the issue of its closure obligations, no purpose would be served by the submission of such evidence in a federal rather than a state proceeding. Indeed, Petitioner admits that some of the information it wishes to submit to EPA has already been submitted in state proceedings. The state administrative agency therefore provides the proper forum for resolving questions about Petitioner's closure obligations."

In my view, the position taken by Region V in this case is at odds with both that of the court and the Administrator in the Northside case. In this case, the violations of State law cited in the Complaint have either already

been decided by the State of Illinois under its own law or are the subject of administrative challenges brought by the Respondent and currently pending before a state administrative body. The fact that EPA may disagree with these state actions or decisions is, for all practical purposes, irrelevant. See Northside decision, supra. If EPA feels that the State of Illinois is improperly implementing its program, the Federal law and regulations provide a remedy. It can either bring an action under Federal law or revoke the authorization it previously granted to the State. I find no authority for it to bring an independent Federal action based solely on the alleged violations of State law. I also find no authority for me to interpret or enforce State law. Also the notion of a Federal Agency collecting fines for violations of State laws and depositing them in the Federal Treasury is singularly without apparent authority or precedent.

ORDER

For the reasons set forth above, it is hereby ordered that:

1. The motion to dismiss filed by the Respondent is granted.

2. Since this Order disposes of all matters before me in this case, it constitutes an Initial Decision.[1]

DATED: April 2, 1987

Thomas B. Yost
Administrative Law Judge

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[1]Unless an appeal is taken pursuant to the rules of practice, 40 C.F.R. 22.30, or the Administrator elects to reviw this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 C.F.R. 22.27(c).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION V

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| IN THE MATTER OF: | ) | |
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| CID CHEMICAL WASTE MANAGEMENT OF ILLINOIS | ) | DOCKET NO. V-W-86-R-77 |
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CERTIFICATE OF SERVICE

I hereby certify that the Initial Decision in the above referenced case, and this certificate have been served as shown below:

Certificate Mailed Certified mail on April 13, 1987 to:

Honorable Thomas B. Yost
Administrative Law Judge
U.S. Environmental Protection Agency
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Initial Decision & Certificate mailed Certified mail on April 13, 1987 to:

Angus MacBeth, Esquire
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Certificate and Original File mailed Certified mail on April 13, 1987 to:

Bessie Hammiel
Regional Hearing Clerk
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Certificate and Initial Decision hand delivered April 13, 1987 to:

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BEVERLY SHORTY

April 13, 1987

Beverely Shorty
Regional Hearing Clerk