10-16-92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Chem-Met Services, Inc.,	)	Docket No. RCRA-V-W-011-92
	)	
Respondent	)	

ORDER DENYING MOTION FOR STAY

On September 25, 1992, the very day pre-hearing exchanges were due to be submitted in accordance with the ALJ's letter, dated July 28, 1992, Complainant served a Motion For Stay and a Motion For An Extension Of Time. The former motion pointed out that among materials Complainant was asked to submit in the mentioned letter was an explanation of the effect of Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991) on the violations alleged in the complaint. Shell Oil vacated the "mixture rule," 40 CFR § 261.3, for noncompliance with the Administrative Procedure Act and Complainant stated that it agreed the "mixture rule" was a basis for violations of land disposal restrictions alleged in the complaint. Noting that the effect of Shell Oil as applying retroactively or prospectively only was currently before the Environmental Appeals Board (EAB) In The Matter Of Hardin County, OH, Docket No. RCRA-V-W-89-R-29, Complainant moved that proceedings in the instant matter be stayed pending a decision by the EAB in Hardin County. The Motion For An Extension Of Time pointed to the Motion For Stay and asked that the time for filing pre-hearing exchanges be extended until a decision is rendered in Hardin County.

Under date of October 10, 1992, Respondent, Chem-Met Services, Inc. (Chem-Met), submitted responses to the referenced motions, urging that the motions be denied. As to the Motion For Stay, Chem-Met points out that generally a court will not grant a motion for a stay pending the outcome of a second proceeding where the parties in the two proceedings are different, citing Landis v. North American Co., 299 U.S. 248, 255 (1936) ("[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another case settles the rule of law that will define the rights of both"). Chem-Met asserts that the existence of an appeal and an action which includes similar issues is not a rare circumstance and that Complainant has failed to carry its burden of showing that it is entitled to a stay (Response at 2).

Because Complainant instituted this action [on January 31, 1992] with full knowledge of the decision in Shell Oil, Chem-Met avers that Complainant should not be heard to complain about hardship in proceeding with its own action. In contrast, Chem-Met says that staying the proceeding is highly inequitable to it, because it operates under the shadow of a potential $1,122,733 penalty assessment. It alleges that this potential adversely affects Chem-Met, because it creates, in the minds of its customers, lenders, insurers and others with whom it does business, uncertainty as to its resources, financial stability, regulatory integrity and compliance status (Response at 3). Moreover, Chem-Met avers that it has additional viable legal and factual defenses,

which are not based on the "mixture" and "derived from" rules and which it would be precluded from raising during the pendency of a stay.

Asserting that the only rationale for the stay set forth by Complainant is that the EAB may issue a decision which will be dispositive of the "mixture rule," Chem-Met points out that uncertainty as to the effect of Shell Oil will likely remain, because the losing party in Hardin County will likely appeal the EAB's decision.* For all these reasons, Chem-Met urges that the Motion For Stay be denied.

As to Complainant's Motion For An Extension Of Time, Chem-Met asserts that the motion should be denied, because it is untimely and fails to show good cause (Response To Complainant's Motion For An Extension Of Time, dated October 9, 1992). Chem-Met quotes Consolidated Rule 22.07(b), which provides that a motion for an extension of time may be granted upon timely motion; for good cause shown; and after consideration of prejudice to other parties. Chem-Met emphasizes that in order to be timely the motion must be filed in advance of the due date on which the pleading, document or motion is due to be filed, unless the failure to make timely motion was the result of excusable neglect. Chem-Met avers that Complainant's motion was not timely, because it was not filed in advance of the due date. Pointing out that Rule 22.07(b) was promulgated to avoid the situation here, Chem-Met alleges that

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* If the EAB affirms dismissal of the complaint, the Agency's only appeal would be to the Administrator.

Complainant waited until the due date for the pre-hearing exchange to file its request for an extension of time. As a consequence, Complainant has the benefit of Chem-Met's pre-hearing exchange upon which Chem-Met has expended substantial time and resources, while EPA has expended little or no effort.

Noting that the appeal in Hardin County was filed on August 3, 1992, and that Complainant, in a status report, dated September 4, 1992, stated that it intended to file a motion for stay pending a decision on the appeal in Hardin County, Chem-Met asserts that there is no "excusable neglect" and no basis for extending the pre-hearing directive (Response at 3).

Repeating its contention that, because of uncertainty created by the large potential penalty assessment, granting the motion for an extension would be prejudicial, Chem-Met says that Complainant should be found in default for failure to file a timely pre-hearing exchange. Alternatively, Chem-Met says that Complainant should be precluded from introducing any documents or witnesses to support the findings in the complaint, which have not already been timely submitted (Response at 5, 6).

C O N C L U S I O N

Chem-Met's objections being well-taken, the Motion For Stay and the Motion For An Extension Of Time are denied. Although Chem-Met is correct that Complainant is in default for failure to comply with the directive for submitting a pre-hearing exchange, or failure to file a timely motion for an extension of time therefor,

and Complainant's tactics here will not be condoned, a finding of default is discretionary and will not be entered. Instead, Complainant is directed to file its pre-hearing exchange not later than October 23, 1992. Chem-Met may respond to Complainant's pre-hearing exchange on or before November 6, 1992. As a sanction for its tactics herein, a similar privilege is denied Complainant.

Dated this 16th day of October 1992.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER DENYING MOTION FOR STAY, dated October 16, in re: Chem-Met Services, Inc., Dkt. No. RCRA-V-W-011-92, was mailed to the Regional Hearing Clerk, Reg. V, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
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Legal Staff Assistant

DATE: October 16, 1992

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