

STATE OF MICHIGAN  
IN THE INGHAM COUNTY CIRCUIT COURT  
GENERAL TRIAL DIVISION

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MICHAEL COX, Attorney General of  
the State of Michigan and the  
MICHIGAN DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

Plaintiffs,

v

CEMEX, INC.,

Defendant.

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OPINION and ORDER

Hon. Beverley Nettles-Nickerson

Docket No: 02-1135-CE

This Court, having reviewed Defendant's Motion for Resolution of Dispute, Plaintiffs' Response, Defendant's Reply, and all other documents thereof, issues the following:

OPINION

FACTS

On August 6, 2002 a Consent Decree was entered to resolve some-of the environmental compliance issues at the Cemex, Inc. facility in Charlevoix, Michigan. Cemex operates a cement-producing facility located on the shores of Lake Michigan and is next to Fisherman's Island State Park. The Consent Decree was entered to resolve a number of issues related to six cement kiln dust ("CKD") disposal piles and related groundwater. The primary focus of the Consent Decree was to provide a remedial response for the CKD piles. Additional fuel oil ground water collection and

treatment activities were included in the Consent Decree because the fuel oil groundwater plume that was a result of fuel oil spill of approximately one hundred fifty thousand (150,000) gallons is in the vicinity of the CKD piles.

The subject of this dispute is the demand of the Michigan Department of Environmental Quality ("MDEQ") for stipulated penalties under the Consent Decree for two alleged violations. Alleged Violation 1 concerned the alleged failure to maintain operation of two groundwater recovery wells, known as PW-5 and PW-8 during the six to seven months of 2003. Alleged Violation 2 concerned the alleged failure to notify MDEQ of the inoperative status PW-5 and PW-8 in a timely manner.

#### ANALYSIS

The Cemex admits that PW-5 and PW-8 were not operational for the first half of 2003. In addition, Cemex admits it failed to report the non-operable status of PW-5 and PW-8 until approximately July 23, 2003. These admissions persuade this Court that Cemex is subject to the stipulated penalties of the Consent Decree.

Although the Consent Decree is quite clear as to the dollar amount of the stipulated penalties, this Court is not inclined to assess the full penalty as the Plaintiffs has requested. This Court is persuaded by Cemex's counsel that the non-operation of PW-5 and PW-8 could have been addressed in an Operation Maintenance Plan ("OMP") for the groundwater collection-and treatment system. As Cemex's counsel zealously argued, MDEQ protracted the implementation of the OMP. While Cemex took four to six weeks to submit its proposed OMP, the MDEQ took up to six months to respond. It is the opinion of this Court that the MDEQ's action and/or inaction in commenting on Cemex's proposed OMP is a mitigating factor; therefore, this Court will abate the amount of the stipulated penalties.

After careful consideration of the facts and circumstances this Court will reduce the amount to 21.743037 percent of stipulated penalties. Using the Period of Delay time line and the use the same proportion of increase in the Consent Decree as well as the two hundred three (203) days the Plaintiffs used in calculating damaged, the penalty totals \$121,000 (days 1-15 = \$3,261.46, days 16-30 = 4,892.18, and days 31-203 = \$112.846.36).

In addition, this Court assesses a four thousand dollar (\$4,000.00) per month penalty for Cemex's failure to inform the MDEQ of the non-operable status of the well. The failure to give notice is for six months so the total penalty for Cemex's failure to give notice is twenty-four thousand dollars (\$24,000.00).

In reaching this decision, this Court acknowledges Cemex's argument that the Consent Decree does not specify that PW-5 and PW-8 should continuously operate. To require this could subject Cemex to penalties if any of the wells had to be taken offline for maintenance. Also, Cemex argued that there was no evidence of a negative environmental impact as a result of the frozen lines to PW-5 and PW-8. In fact, Cemex argues that its remedial measures while the water lines were frozen actually improved the groundwater.

Nonetheless, this Court is not inclined to adopt a "No Harm, No Foul" approach. The parties freely entered into the Consent Decree. As the Assistant Attorney General persuasively argued, the State entered into the Consent Decree in order to minimize litigation while ensuring that companies hold to their responsibility of minimizing any negative environmental impact their actions may cause.

Moreover, this Court finds that upholding the stipulated penalties of the Consent Decree is required as a matter of public policy. Though violations of the Consent Decree could result in

substantial penalties, it is the opinion of this Court that the penalties are in place to send companies the message that minimizing negative environmental impact is very important. Even minor violations must be addressed in a timely manner even if the result is no detectable negative environmental impact.

Furthermore, this Court would have been less inclined to assess a penalty for two hundred three (203) days had Cemex reported the non-operable status of the wells sooner. Had Cemex notified the MDEQ as soon as it learned of the non-operable status and commenced remedial measures to compensate for the non-operation, this Court would have been hesitant to assess a penalty for the non-operation. This Court finds that Cemex's act of concealment justifies the Court's decision to assess the penalty for two hundred three (203) days.

**ORDER**

**IT IS ORDERED** that Defendant pay the amount of one hundred forty-five thousand dollars (\$145,000.00) as penalty.

Dated: 11-3-04

BEVERLEY NETTLES-NICKERSON

Hon. Beverley Nettles-Nickerson  
Circuit Court Judge

