ILLINOIS POLLUTION CONTROL BOARD
March 21, 1996

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

DISSENTING OPINION (by J. Theodore Meyer):

In 1988 the parties in this case signed a consent decree as a resolution to charges brought before the Circuit Court of Madison County in 1982 which included the following: noncompliance with daily maximum effluent concentrations; exceedence of daily effluent standards and water quality standards; open dumping; storage of hazardous wastes; failure to use protective cover and manage slag; and **failure to prepare closure and post-closure plans**. (See 1988 complaint, counts I-XII (Emphasis added.) The action before the Board involves violations for failure to properly implement the closure and post-closure plans. The majority believes that these violations are distinct from those contemplated in the consent decree and therefore accepts jurisdiction in this matter. I disagree for the following reasons.

The majority's first argument is that the present allegations contained in the complaint before the Board do not relate back to the original 1988 controversy. As proof the majority points to the 1988 complaint "covenant not to sue" to claim that it only pertains to a time period from May 1982 to June 1988, while the complaint before the Board involves a time period from April 1991 to May 1992.

I disagree. Covenant-not-to-sue provisions in consent decrees are applied prospectively, not for a certain time period, especially if the consent decree directs parties to complete certain actions in the future. (Comet Casualty Co. v. Schneider, 98 Ill. App.3d 786, 424 N.E.2d 911, 914-915 (1st Dist. 1981).) If charges are brought in 1982 and six years later the parties sign a consent decree, the parties are agreeing not to sue under the same charges not only during that time period, but also in the future. If a dispute regarding matters covered by the consent decree occurs in May 1992, the consent decree's covenant-not-to-sue still applies and the parties are bound by it.

The majority's second argument states that the consent order did not include a specific closure agreement between the parties and did not mention financial assurance at all; therefore, the complaint before the Board is a separate enforcement action. However, I believe several terms in the consent order do include the concept of closure plans, post-closure plans, financial

assurance and the actual closure itself. Specifically, the terms involving settlement, dispute resolution and retention of jurisdiction were set forth as follows:

C. TERMS OF SETTLEMENT

> 10. Chemetco submitted **closure plans** covering all of the units that are to be closed and any necessary post-closure plans on May 6, 1988. Such submittal is under IEPA review. **IEPA review and modification of plans by Chemetco to remedy any deficiencies cited by IEPA shall proceed** in accordance with 35 Ill. Adm. Code 725.212(d)(4).

K. DISPUTE RESOLUTION

> 1. The parties shall use their best efforts to informally and in good faith resolve all disputes or differences of opinion. Any dispute which arises with respect of the meaning, application, interpretation, **amendment, or modification** of any term of this Proposal for Settlement and attachments or **any plan** or report thereunder or with respect to any party's compliance therewith or any delay there under...shall, in the first instance, be the subject of such informal negotiations as set forth below.

N. RETENTION OF JURISDICTION

> The court shall retain jurisdiction of this matter for the purposes of interpreting, implementing, and enforcing the terms and conditions of this Proposal and Settlement and for the purposes of **adjudicating all matters of dispute among the parties**.

(1988 Consent Decree. Emphases added.)

It is well-settled law in Illinois that "consent decrees, which are utilized to effectuate settlement, are considered contracts between parties to litigation, and accordingly, the law of contracts controls their interpretation". (Clark v. Standard Life & Accident Insurance Co., 68 Ill. App.3d 977, 386 N.E.2d 890 (1979).) In construing contracts, "the primary objective is to determine and give effect to the intentions of the parties". (Dayan v. McDonald's Corp., 138 Ill. App.3d 367, 485 N.E.2d 1188 (1st Dist. 1985).) It is the language of the contract that is the most reliable indicator of the parties' intent; therefore "[c]ourts may not rewrite a contract to suit one of the parties, but must enforce the terms as written". (Id. at 490, 485 N.E.2d at 1193.)

In looking at the four corners of the consent decree, I believe the circuit court not only was aware that closure plans were a part of the ongoing dispute, but also specifically anticipated that disputes might arise from an amendment or modification of such a plan. The Agency brought these charges before the Board because it believed that Chemetco was violating the **modifications** of the closure plans it had approved in 1991 and 1993, closure plans specifically referred to in the consent decree. Although the term "financial

assurance" is not per se mentioned in the consent decree, it is such an integral part of closure and post-closure plans that it would be unreasonable to conclude that it was not contemplated by the parties when signing the consent decree. (*See* 35 Ill.Adm. Code 724.243.) Finally, the language of the provision regarding jurisdiction is unequivocal: "The court shall retain jurisdiction of this matter for the purposes of interpreting, implementing, and **enforcing** the terms and conditions of this Proposal and Settlement and for the purposes of adjudicating **all matters of dispute among the parties**." (See Consent Decree. (Emphasis added).) As such, since the charges in the present complaint involve matters that relate back to the consent order, the charges are improperly before the Board because the circuit court retained jurisdiction of them.

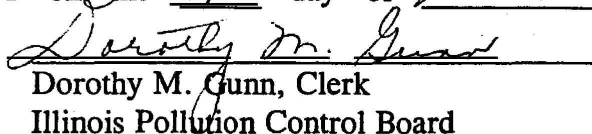
In its final argument, the majority interprets Chemetco's failure to invoke dispute resolution when the Agency filed its complaint before the Board as a waiver of that provision and therefore the Agency properly instituted this action before the Board. I disagree. Although a party's non-action has been interpreted as an "intentional relinquishment of a known right" (Sexton v. Smith, 112 Ill.2d 187, 492 N.E.2d 872 (1985)), it does not serve as a relinquishment of the court's jurisdiction. In other words, Chemetco's failure to invoke a dispute resolution provision served as a waiver of its right to expect that informal resolution will be attempted prior to any court action. It does not mean that Chemetco's nonaction divested the court of its jurisdiction of issues covered by the consent decree.

I believe that the charges brought before the Board in this matter stemmed directly from the issues contemplated by the consent decree signed in 1988, and supplemented in 1991 and 1993. I also adhere to the general principle that forums with concurrent jurisdiction should respect a court's prior jurisdiction. Therefore, to err on the side of caution, I would have referred this matter to the circuit court. It is equally important for a forum to stay vigilant against possible attempts of one party to harass another by way of instituting multiple actions in different forums. For these reasons, I believe that the Circuit Court of Madison County retained jurisdiction in this matter and the Board should have granted Chemetco's motion to dismiss.

For these reasons, I respectfully dissent.

J. Theodore Meyer

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting order was filed on the 27th day of March, 1996.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board