ILLINOIS POLLUTION CONTROL BOARD
February 20, 1985

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 83-2
CHEMETCO, INC.,	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Anderson):

On June 14, 1984 the Board entered an Opinion and Order in this action. These accepted a stipulation and proposal for settlement containing a compliance Order and provision for payment of a stipulated penalty into the Environmental Trust Fund (Trust Fund), in essence upon the condition that the parties certify their acceptance to the Board's finding of violation of the Environmental Protection Act (Act) (Ill. Rev. Stat. ch.111 1/2 §1001 et seq.) and various regulations. Such certification would be tantamount to the parties' agreement to modification of that portion of the stipulation which provided that Chemetco neither admits nor denies [violations]".*

On July 1 1984, Chemetco filed a Motion for Modification of the Board's une 14, 1984 Order. On August 7, 1984, the Agency filed an Objection to the same Board Order, and on August 13, 1984 Chemetco filed a Response objecting to part of the Agency's Motion and reasserted its earlier Motion to modify the Board's order.

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*The Board notes that this is the second "go around" on the issue of settlement of this case. An April 12, 1983 proposed settlement agreement which provided that Chemetco "denies [violations]" was rejected by the Board because, inter alia,

> "the imposition of a $20,000.00 stipulated penalty appears inappropriate under the Act in light of the Board's inability to find violations, since a) the Agency has not withdrawn any of the charges or allegations made in Counts I, II, III, and IV of the January 6, 1983 Complaint; and b) the Respondent, although agreeing to the imposition of a penalty, has nonetheless steadfastly denied that any violations occurred (including possible 'technical' violations due to permit expiration)." IEPA v. Chemetco, Inc., PCB 83-2, 54 PCB 157, Interim Order October 6, 1983 [footnote omitted].

The above filings all request that the stipulation be accepted exactly as originally proposed, thus eliminating the Board's modification of the stipulation to include findings of violation against Chemetco and a certificate of acceptance.

The Board hereby denies the modifications requested by the parties. On its own motion, the Board vacates its Opinion and Order of June 14, 1984 in their entirety. The proposed stipulation is rejected, and the parties are ordered to proceed to hearing in this matter, which shall be scheduled within 30 and held within 60 days of the date of this Order.

Procedural History

Prior to discussion of the Board's rationale for rejecting this stipulation, the Board will recapitulate the procedural history in this action.

This matter comes before the Board on the January 6, 1983 Complaint brought by the Illinois Environmental Protection Agency (Agency).

Count I of the Complaint alleged that, from June 14, 1978 to January 6, 1983, the Respondent intermittently allowed contaminants from its facility into the atmosphere causing air pollution in violation of Rule 102 of Chapter 2: Air Regulation (now 35 Ill. Adm. Code 201.141) and Section 9(a) of the Illinois Environmental Protection Act (Act).

Count II alleged that, from January 1, 1980 until January 6, 1983, the Respondent operated its plant so as to cause emissions of fugitive particulate matter in violation of Rule 102 of Chapter 2 (now 35 Ill. Adm. Code 201), Rule 203(f)(1) of Chapter 2 (now 35 Ill. Adm. Code 212.301), and Section 9(a) of the Act.

Count III alleged that, from June 14, 1978 until January 6, 1983, the Respondent operated each of its three 70-ton furnaces in such a manner as to allow particulate emissions into the atmosphere which exceeded the allowable emission rates in violation of Rule 102 of Chapter 2 (now 35 Ill Adm. Code 201.141), Rule 203(a) of Chapter 2 (now 35 Ill. Adm. Code 212.321), and Section 9(a) of the Act.

Count IV alleged that, from June 5, 1978 until December 12, 1978 and from December 8, 1981 to January 6, 1983, the Respondent operated its three 70-ton furnaces without an Operating Permit from the Agency in violation of Rule 102 of Chapter 2 (now 35 Ill. Adm. Code 201.141), Rule 103(b)(2) of Chapter 2 (now 35 Ill. Adm. Code 21.144, and Section 9(b) of the Act.

The initial hearing on this matter was held on March 4, 1983. The parties filed a Settlement Agreement on March 7, 1983. On April 12, 1983, the parties filed a second Settlement Agreement which was identical in substance to the first

Settlement Agreement, but which contained some minor language changes which had been read into the record at the hearing and had been requested by the Agency.

On October 6, 1983, the Board entered an Interim Order which rejected the proposed settlement agreement. Deficiencies in the initially proposed stipulation included the fact that: (1) Chemetco did not admit to any violations, but did agree to pay a $20,000 penalty and to undertake a compliance program; (2) the parties stated that the settlement agreement could be amended if they agreed in writing, but did not state that the Board's approval would be necessary (thereby creating a mechanism by which they could amend the compliance plan without first consulting the Board), and (3) the possibility of carcinogens being released into the atmosphere from arsenic-bearing materials during scrap metal processing operations (thereby possibly jeopardizing the health and safety of individuals who live near the metal reclamation and smelting facility) was not specifically addressed by the parties.

On March 28, 1984, a Joint Motion for Approval of an Amended Settlement Agreement and Exhibits, along with the aforementioned amended stipulation and exhibits, was filed. On April 6, 1984, a hearing was held and the third Amended Settlement Agreement (Stip.) and various exhibits were admitted into evidence as Parties' Exhibit No. 1. (R. 7-20.)*

In the third Amended Settlement Agreement, the parties amended the previous stipulation in an attempt to meet the Board's concerns. On page seven, paragraph two of the most recent stipulation, Chemetco has stated that it "neither admits nor denies the alleged violations", rather than simply denying the violations. The objectionable language on page seven in paragraph four pertaining to amendment of the agreement without prior Board approval was deleted in the latest stipulation, and the parties have noted that the compliance program was completed on October 6, 1983. (R.3.) Additionally, the Agency has indicated that "having investigated the potential for arsenic emissions during operation of Chemetco's process, it has determined that arsenic is driven off only during the heating stage and is therefore captured by the scrubbers and not released during charging and tapping."

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*Citations to the record (R.) refer to the transcript of the April 6, 1984 hearing. The parties filed the proposed settlement agreement before a hearing was held on the amended agreement. The Board will consider the official filing date of the third Amended Settlement Agreement to be April 30, 1984 (the date that the hearing transcript was filed with the Board).

In its June 14,1984 Opinion and Order, the Board granted the parties' Joint Motion for Approval of the Amended Settlement Agreement. However, the Board also noted that because the Board deemed it appropriate to include a finding of violation as item #1 in its Order, a Certificate of Acceptance and Agreement was included as item #5 in the Order.

As detailed in the stipulation, the Respondent, Chemetco, Inc. (Chemetco), is a Delaware corporation duly authorized by the Illinois Secretary of State to transact business in Illinois. Chemetco owns and operates a metal reclamation and secondary copper smelting facility (facility) in Hartford, Madison County, Illinois which has a plant site of 108 acres (located about 10 minutes by car north of Granite City, Illinois) which employs 176 people. Chemetco's site is zoned for heavy industrial use and is surrounded by farmland. The nearest houses not occupied by Chemetco personnel are about 1/4 mile from the plant site. An oil refinery, power plant, petrochemical plant, brass mill, and other large industrial facilities are all located within a 10-mile radius of the Respondent's plant. (See: Exhibit 1; R.8.)

Chemetco acquires a broad range of copper-bearing raw materials from scrap metal dealers and industry and produces copper cathodes from these raw materials, as well as recovering other non-ferrous metals as by-products. During smelting, refining and processing operations at its plant, Chemetco used three (now four*) 70-ton rotating furnaces equipped with overhead hoods which contain a scrubber system to capture particulate emissions. During part of the operations at Chemetco's facility, each of the furnaces are tilted, allowing the emission of odors, dust, and gases (including zinc oxides) to escape beyond the furnace hoods and roof of the plant into the atmosphere.

During Chemetco's processing operations, copper-bearing scrap is smelted and refined. The slag is treated in three (now four) top-blown, 70-ton rotating Kaldo furnaces which are called "converters". (See: Exhibits 2 and 3.) Some particulate emissions from these three (now four) converters are captured by separate hoods and then are ducted to, and cleaned in, separate venturi scrubbers (Stip. 2-3; R. 8-9.) Exhaust from this process reaches the atmosphere through three (now four) separate stacks. However, some particulate emissions are not captured by the hoods, ducts, and scrubbers. (Stip. 2; R. 9.)

The three rotating furnaces and associated air pollution control equipment (including the three venturi scrubbers) are

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*Between April 12,1983 and the present date, a fourth rotating rotary furnace (i.e., another "converter") has come into operation at the Respondent's facility. (See: page 5 of this Opinion.)

existing emission sources which were constructed and in operation before April 14, 1972. The Agency issued the requisite operating permit for the three furnaces on November 16, 1972 and renewed the permit on June 18, 1974 and April 2, 1976. However, because an Agency inspection on June 14, 1978 indicated possible violations of Rule 103(b)(2) of Chapter 2: Air Regulations (now 35 Ill. Adm. Code 201.144) and Section 9(a) of the Act, the Agency denied permit renewal on July 20, 1978. After corrective measures were taken by the Respondent, subsequent permit renewals occurred on December 12, 1978; July 20, 1979; and September 8, 1980. (See: Exhibit 6).

On February 26, 1981, the Agency received a petition, signed by 52 individuals, which alleged that Chemetco had violated Rule 203(f)(1) of Chapter 2: Air Regulations (now 35 Ill. Adm. Code 212.301) by improper emissions into the atmosphere. (See: Exhibit 7.) On March 10, 1981, the Agency notified the Respondent that its inspection indicated apparent violations of Rule 203(f)(1) of Chapter 2: Air Regulations (now 35 Ill. Adm. Code 212.301.)

On May 13, 1981, the Respondent put forth a proposal to modify the air pollution control equipment on its three rotating furnaces and to construct a fourth furnace. This proposal was based on various reports from consulting engineers (dating as early as April 1980) which indicated that it would be possible to design air pollution control equipment which could capture additional particulate emissions from the charging and tapping operations of Chemetco's three furnaces and also introduce a change in the basic process (utilizing four, rather than three, furnaces) to reduce overall particulate emissions from he Respondent's plant.

While negotiations were pending with the Agency, the Respondent submitted permit renewal applications for the three existing furnaces on June 5, 1981. After notice from the Agency on July 9, 1981 that it intended to deny Chemetco's pending permit renewal applications, the Respondent withdrew the applications. On June 16, 1981 and September 10, 1981, Chemetco submitted applications to the Agency for a construction permit for the fourth furnace. However, the Agency deemed these applications incomplete, and sent notices of incompleteness to the Respondent on July 8, 1981 and October 6, 1981. On December 3, 1981, Chemetco resubmitted its permit renewal application for the existing three furnaces and its construction permit application for the fourth furnace, but withdrew these applications following the Agency's December 30, 1981 notice of intention to deny these permits.

On February 10, 1982, the Respondent again applied for a construction permit for the fourth furnace. On March 22, 1982, the Agency issued Construction Permit No. 119801AAC to Chemetco which authorized the construction of a fourth converter and the concomitant air pollution control equipment. On July 2, 1982,

the Respondent applied for a construction permit to retrofit the three existing furnaces. On August 16, 1982, the Agency issued the requisite construction permit which authorized the Respondent to modify and install the necessary air pollution control equipment on Chemetco's three rotating furnaces. (See: Exhibit 6.)

During ongoing settlement negotiations, the parties were initially in dispute as to whether or not: (1) Chemetco was lawfully entitled to renewal of its operating permit after the expiration date of December 8, 1981; and (2) the charging and tapping emissions from the Respondent's three furnaces were insufficiently controlled on the dates alleged in the Complaint. (R. 13, Stip. 5.) The Respondent has neither denied nor admitted the allegations in the Complaint, but has agreed to improve control of charging and tapping emissions by following an agreed-upon compliance program and schedule involving retrofitting of the three existing furnaces to improve the snorkel hoods and the charging and tapping controls. (See: Exhibits 3 and 5.) Additionally, after the completion of the retrofitting program, the Respondent has agreed to conduct the necessary stack tests, and to notify the Agency in advance of the stack sampling so that Agency personnel may witness these tests and make simultaneous visual observations of the fugitive emissions from the melt shop building to determine compliance. (See: Exhibits 3 and 5.)

Although Chemetco has neither admitted nor denied the allegations of the Complaint, the proposed settlement agreement provides that the Respondent agrees to promptly pay a stipulated penalty of $20,000 into the Environmental Protection Trust Fund.*

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*This penalty is to be made payable to the Environmental Protection Trust Fund (Trust Fund), pursuant to the authority to so order granted to the Board in Section 42(a) of the Act as amended by P.A. 83-0618, effective September 19, 1983. The legislation creating the Trust Fund and a Commission to administer it was P.A. 81-951 effective January 1, 1980 and codified as Ill. Rev. Stat. 1983, ch. 111 1/2 ¶1061. That legislation provides in pertinent part that

> "The Commission may accept, receive and administer . . . any grants, gifts, loans, or other funds*** provided that such monies shall be used only for the purposes for which they are contributed and any balance remaining shall be returned to the contributor . . . ."

The Board wishes to emphasize that it does not construe the quoted portions of the Trust Fund Act as giving a potential right of recovery for penalties ordered to be paid into the Trust Fund pursuant to Section 42(a) of the Environmental Protection Act. (continued)

Rejection of the Stipulation

The basis for rejection of this stipulation is the Board's conclusion that it lacks statutory authority to accept settlements requiring payment of stipulated penalties and imposing compliance conditions without a Board finding of violation, based either on admissions or evidence contained in the record. The legislatively-created Board derives its enforcement powers and duties from the Act and the Administrative Procedure Act (APA), Ill. Rev. Stat. ch. 127 §1001 et seq. Section 33(a) of Title VIII: "Enforcement" of the Act empowers and requires the Board, after hearing, to "issue and enter such final order, . . . as it shall deem appropriate . . . [and shall] file and publish a written opinion stating the facts and reasons leading to its decision." The "written opinion" requirement of Section 33(a) has a counterpart in Section 14 of the APA, requiring in contested cases "findings of fact and conclusions of law".

Section 33(b) of the Act provides that "[s]uch [Section 32(a)] order may include a direction to cease and desist from violations of the Act or of the Board's rules, . . . and/or the imposition by the Board of civil penalties in accord with Section 42 of this Act.***" The pertinent subsection of the Section, Section 42(a), provides that

> "Any person that violates any provisions of this Act or any regulation adopted by the Board, or any permit or term or condition thereof, or that violates any determination or order of the Board pursuant to this Act, shall be liable to a civil penalty of not to exceed $10,000 for said violation and an additional civil penalty of not to exceed $1,000 for each day during which violation continues; such penalties may, upon order of the Board or a court of competent jurisdiction, be made

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When the Trust Fund was created, the legislature obviously envisioned that the fund was to receive voluntary gifts or contributions, to either be used for environmental purposes or to be returned so as to avoid frustration of the intention of the donor of the gift.

Payment of a penalty for violation of the Environmental Protection Act is a compulsory, and not a voluntary, act. There is no right of recovery for a penalty paid into the General Revenue Fund. In allowing penalty monies to be paid into the Trust Fund, the legislature has clearly implied that such penalties may, in essence, be earmarked for any appropriate environmental purpose. The Board concludes that to construe the Trust Fund Act as implying a right of recovery for penalties deposited into it runs counter to the intention of the Environmental Protection Act.

payable to the Environmental Protection Trust Fund, to be used in accordance with the provisions of "An Act creating the Environmental Protection Trust Fund", approved September 22, 1979, as amended."

The Act does not specifically mention settlement procedures. However, pursuant to the authority granted under Section 26 of the Act, the Board has adopted a procedural rule, 35 Ill. Adm. Code 103.180, permitting and providing requirements for submittal of a proposed settlement or compromise. A written statement is to be filed containing, among other things a "full stipulation of all material facts pertaining to the nature, extent, and causes of the alleged violation", a proposed compliance plan, and a proposed penalty. In line with the hearing requirements of Sections 31 and 32 of the Act, the written proposal is to be presented at public hearing for citizen comment on the alleged violations and proposed settlement terms. The Board has provided that it shall "consider such proposed settlement or stipulation and the hearing record" and may "accept, suggest revisions in, reject the proposed settlement or stipulation, or direct further hearings as it appears appropriate."

Viewing the Chemetco stipulation in light of these various statutory and regulatory requirements, it is clear that the Board cannot make any required findings of fact and conclusions of law beyond one that "the parties wish to settle the case for $20,000 payable into the Trust Fund." To the extent the Act authorizes the Board to order payment of what Chemetco admits is a penalty (see e.g. Motion of July 19, 1984 at p. 9), the authority is premised on a finding of violation. As Chemetco resists a Board attempt to make such a finding, and as the Act does not authorize the Board to accept, on the part of the State, "voluntary contributions" in settlement of "nuisance suits", the penalty portion of the stipulation must be rejected. As to the proposed compliance plan, in the absence of findings of violation, the Board is placed in the position of ordering accomplishment of "voluntary remedial activities" to correct "non-existant" non-compliance. The compliance plan portion of the stipulation is also rejected.

The parties have not directly addressed the Board's statutory authority to accept this stipulation, forwarding instead various policy arguments. These include the assertion that the law favors settlements (see Agency Motion of August 7, 1984, p. 4-5 and cases cited therein) and that a finding of violation destroys the essence of the bargain here and protracts litigation (see Chemetco Motion of July 19, 1984 at p. 8-9), and that the Board has in a few cases imposed fines without a finding of violation (Id., p. 4 note). While not here articulated, it might also be argued that the effect of the Board's decision interferes with the Attorney General's otherwise broad powers of prosecutorial discretion.

While these policy arguments might support a legislative change, they run counter to the Board's plain reading of the Act. The Board recognizes that the courts have accepted settlements between two parties without admissions. The courts, however, have inherent common law powers the Board does not possess. Additionally, the Act inherently recognizes that pollution issues affect the interest of other persons, above and beyond the parties, as Section 2 of the Act makes clear. The Board suggests that the Act was deliberately framed to require the Board to make findings of violations, so as to assure that compliance and payment of a penalty is a compulsory, not a voluntary, act. Existence or lack of findings of violation may also be important in the event of subsequent filing of enforcement actions against the same source: previous findings of violation may properly be considered as aggravating circumstances affecting penalty deliberations in later cases. The Board also notes, pursuant to Section 31, that complaints may be filed, and settlements reached, by citizens who take on the status of "private attorneys general", and questions whether wide prosecutorial discretion also accrues to such persons concerning stipulated penalties and compliance conditions.

Certification For Interlocutory Appeal

This "finding of violation" issue has here twice been argued, and potentially has applicability to every enforcement case brought before the Board. [In fact, the Board has today rejected several proposed stipulated settlements requiring payment of penalties or other "gifts" or "sums" and timely performance of compliance plans, in all of which cases no findings of violation could be made: People v. City of Chicago, PCB 81-190 ($3,000 penalty, $9,500 "voluntary contribution", stepped-up cross-connection enforcement program); IEPA v. Arnold's Sewer and Septic Service & Jimmy McDonald, PCB 83-23 ($300 "sum", "prohibition" from violations of the Act); People v. Joslyn Mfg. & Supply Co. and Herman Zeldenrust, PCB 83-83 ($8,000 penalty, $14,000 "payment", ceast and desist order); and IEPA v. City of Galva, PCB 84-3, 84-4 (consolidated) ($3,375 penalty, complex program of system improvements). In each of these cases the Board has certified a similar question for interlocutory appeal.] For these reasons, as well as the fact that a contrary result would have ended this action, the Board on its own motion hereby issues a statement (also known as a Certificate of Importance) to allow for immediate interlocutory appellate review of the Board's Order pursuant to Supreme Court Rule (SCR) 308. SCR 308(a) provides, in pertinent part that

> "When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing,

identifying the question of law involved. The Appellate Court may thereupon in its discretion allow an appeal from the order."

The Board has authority to issue such a statement (see Getty Synthetic Fuel v.PCB, 104 Ill. App. 3d 285 (1st Dist. 1982).

Pursuant to SCR 308, the Board finds that this Order a) "involves a question of law as to which there is substantial ground for difference of opinion", and b) immediate appeal "may materially advance the ultimate termination of [this] litigation". The question of law certified for appeal is as follows:

> Whether the Board correctly determined that it lacks statutory authority, pursuant to Ill. Rev. Stat. ch. 111 1/2, Sections 1032, 1033 and 1042 as they relate to Board acceptance of stipulations of fact and proposals for settlement in enforcement cases, to issue Opinions and Orders in which any Board findings of violation are precluded by the terms of the stipulation and proposal, but in which respondent is ordered to pay a stipulated penalty and to timely perform agreed-upon compliance activities.

Finally, in the event of an interlocutory appeal, the Board will entertain motion to stay its Order that this action go to hearing.

IT IS SO ORDERED.

J. D. Dumelle dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 20th day of February, 1985 by a vote of 4-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board