

ILLINOIS POLLUTION CONTROL BOARD  
September 9, 1999

IN THE MATTER OF: )  
)  
PETITION OF HORSEHEAD RESOURCE AND ) AS 00-2  
DEVELOPMENT COMPANY, INC. FOR AN ADJUSTED ) (Adjusted Standard - RCRA)  
STANDARD UNDER 35 ILL. ADM. CODE 720.131(c) )  
)

ORDER OF THE BOARD (by N.J. Melas):

On July 20, 1999, Horsehead Resource Development Company, Inc. (Horsehead) filed a petition for an adjusted standard (petition) with the Board under 35 Ill. Adm. Code 720.131(c). Horsehead petitioned the Board to determine that its crude zinc oxide (CZO) product is classified as a commodity-like material rather than a solid waste. Pet. at 1-2. However, Horsehead failed to timely cause publication of the required notice. As a result, the Board dismissed the petition, but allowed Horsehead leave to refile the petition. See In re: Horsehead Resource and Development Company, Inc. (August 5, 1999), AS 00-1.

Pursuant to the discussion below, the Board accepts Horsehead's refiled petition for hearing, grants Horsehead's request to incorporate the record from docket AS 00-1 into docket AS 00-2, grants motions from attorneys John Moore and Paul Gutermann to appear *pro hac vice*, and grants Horsehead's motion for non-disclosure of confidential financial information.

REFILED PETITION AND MOTION TO INCORPORATE

On August 6, 1999, Horsehead refiled the petition for the adjusted standard with the Board under 35 Ill. Adm. Code 720.131(c). On that same date, Horsehead filed a motion requesting that the Board incorporate the record from docket AS 00-1 into a new docket which the Board has numbered as docket AS 00-2. Pursuant to Board regulations, Horsehead caused timely publication of the required notice on August 7, 1999, and filed a certificate of publication with the Board on August 11, 1999. See 35 Ill. Adm. Code 106.711 and 106.712. On August 27, 1999, the Illinois Environmental Protection Agency timely filed its response to Horsehead's petition. In the response, the Agency recommended that the Board grant the petition assuming that Horsehead provides additional information on chlorine content in the raw material and procedures it will follow if it accidentally releases raw material or CZO.

The Board accepts the refiled petition for hearing and grants the motion to incorporate the record from docket AS 00-1 into a new docket.

The Board must hold at least one public hearing before it grants an adjusted standard from provisions in the Resource Conservation and Recovery Act (RCRA). See 35 Ill. Adm. Code 106.415(a). The Board will assign a hearing officer to schedule and preside at the hearing. The hearing officer may unilaterally schedule a hearing if the parties fail to schedule a hearing date or if the hearing officer is unable to consult with the parties on a hearing date.

The hearing officer must inform the Clerk of the Board of the time and the location of the hearing at least 40 days in advance of the hearing so that a 30-day public notice of the hearing may be published. After the hearing, the hearing officer must submit an exhibit list, a statement regarding the credibility of the witnesses, and all exhibits to the Board within five days of the hearing. The hearing officer must also schedule the filing of any posthearing briefs. The Board encourages the hearing officer and Horsehead to expedite the hearing process as much as possible.

MOTIONS TO APPEAR PRO HAC VICE

On July 20, 1999, the Board received a motion to appear *pro hac vice* from attorney John N. Moore. Moore, a licensed attorney in both Pennsylvania and the District of Columbia, seeks to represent Horsehead in this matter before the Board. The Board allows Moore to appear *pro hac vice*.

On September 7, 1999, the Board received a motion to appear *pro hac vice* from attorney Paul E. Gutermann. Gutermann, a member in good standing of the District of Columbia Bar, also seeks to represent Horsehead in this matter before the Board. The Board allows Gutermann to appear *pro hac vice*.

#### APPLICATION FOR NON-DISCLOSURE

Also on July 20, Horsehead filed an application for non-disclosure of confidential data (application). Horsehead seeks to protect certain confidential financial data in the petition pursuant to Section 101.161 of the Board's procedural rules. See 35 Ill. Adm. Code 101.161. For the reasons outlined below, the Board grants the application and protects the financial data at issue from public disclosure.

#### Regulatory Framework

The regulations for non-disclosable information are similar to the regulations for protection of trade secrets at 35 Ill. Adm. Code 120. Board regulations at 35 Ill. Adm. Code 101.160 to 101.161 govern non-disclosable information.

Horsehead is asking for non-disclosure of certain financial data in its petition pursuant to 35 Ill. Adm. Code 101.161(a)(3) which provides that "confidential data" may be protected in a Board non-disclosure order.

The Board's procedural rules at 35 Ill. Adm. Code 101.161(b) state that an application for non-disclosure shall contain:

- 1) Identification of the precise material, or parts of material, for which non-disclosure is sought;
- 2) Indication of the particular non-disclosure category into which the material falls; and
- 3) A concise statement of the reasons for requesting non-disclosure. The application shall be verified by affidavit and contain such data and information as will inform the Board of the nature of the material for which non-disclosure is sought, the reasons why non-disclosure is necessary, and the number and title of all persons familiar with such information and how long the material has been limited from disclosure.

#### Discussion

In submitting its petition, Horsehead seeks to prevent disclosing the prices that it charges for CZO to two of its customers, Zinc Nacional and Zinc Corporation of America (ZCA). Horsehead also seeks to protect certain information on CZO's economic value. Pet. at 2. In the application, Horsehead describes the exact location in the text of the petition where it seeks to protect the financial information: transaction prices for CZO sold to Zinc Nacional and ZCA (Pet. at 21), information on CZO's profitability (Pet. at 23, n.13), invoices to Zinc Nacional for CZO (Pet. at Exh. 8), and invoices to ZCA for CZO (Pet. at Exh. 9). Horsehead satisfies the Board's requirements at 35 Ill. Adm. Code 101.161(b)(1).

Horsehead states that it seeks protection of the financial data pursuant to 35 Ill. Adm. Code 101.161(a)(3) which provides that "confidential data" may be protected from public disclosure. Pet. at 3. Horsehead admits that "confidential data" is undefined in both the Illinois Environmental Protection Act (Act) and the Board's

regulations, but explains that the financial data that it seeks to protect does not fall under the other categories listed at 35 Ill. Adm. Code 101.161(b) such as trade secrets and privileged information at judicial proceedings. Horsehead has nonetheless adequately categorized the information it seeks to protect and meets the requirements at 35 Ill. Adm. Code 101.161(b)(2).

Horsehead provides many reasons why non-disclosure of the financial data is necessary. Horsehead's customers do not have knowledge of what it charges other customers for CZO. Disclosing this information in the petition would give Horsehead's customers and competitors a "competitive advantage" at Horsehead's expense. Pet. at 4, 5. For example, customers would have an added advantage in negotiating future contracts with Horsehead. Pet. at 5, 6. Horsehead's competitors would be able to evaluate its marketing strategy and undercut its product pricing. Pet. at 5. In sum, disclosure would inhibit Horsehead's ability to competitively market CZO. Pet. at 3.

Horsehead is very careful to maintain the confidentiality of the financial information. Pet. at 4. Only the president, vice presidents, controller, marketing team, and plant managers are familiar with or have access to the invoices at issue in Exhibits 8 and 9 of the petition which are necessary to generate the information at issue on page 21 of the petition. Pet. at 7. Only the president and vice presidents have access to the data necessary to produce the information at issue in footnote 13 of the petition. *Id.* Horsehead claims that the financial data at issue has never been disclosed to the public. *Id.*

Horsehead also submitted an affidavit signed by James M. Hanrahan, one of its vice presidents. The company thus satisfies the Board's requirements at 35 Ill. Adm. Code 101.161(b)(3).

#### Conclusion

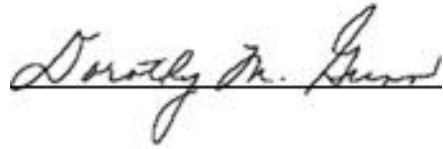
The Board grants the application for non-disclosure. Pursuant to the provisions at 35 Ill. Adm. Code 101.161(c), the single copy of the petition with the non-disclosable financial information has been filed with the Clerk of the Board and is available for examination only by Board members, attorney assistants to Board members, the Board's assigned hearing officer, members of the Board's technical staff, and members of the Board's Clerk's Office. That copy of the petition is also available for inspection by authorized representatives of the State of Illinois or the United States for the purposes of carrying out the Act or federal laws and regulations. 35 Ill. Adm. Code 101.161(c); 415 ILCS 5/7(e) (1998).

#### ORDER

1. The Board accepts Horsehead's refiled petition for hearing.
2. The Board grants Horsehead's request to incorporate the record from docket AS 00-1 into a new docket, which the Board has numbered AS 00-2.
3. The Board grants the motions of attorneys John Moore and Paul Gutermann to appear *pro hac vice* on behalf of Horsehead.
4. The Board grants Horsehead's motion for non-disclosure of confidential financial information.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 9th day of September 1999 by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board