

ILLINOIS POLLUTION CONTROL BOARD
March 21, 1996

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

ORDER OF THE BOARD (by C.A. Manning):

This matter comes before the Board on a motion to dismiss filed on October 20, 1995 by respondent, Chemetco, Inc. (Chemetco), requesting that the Board dismiss the complaint filed on October 10, 1995 by the People of the State of Illinois on behalf of the Illinois Environmental Protection Agency (Agency). The complaint alleges violations of Section 21(f)(2) of the Environmental Protection Act (Act) (415 ILCS 5/21(f)(2) (1994)) and 35 Ill. Adm. Code 725.190(b), 725.192(a), 725.213, 725.175, 725.194(a)(2)(B), 725.242(a), 725.243, 725.245, and 725.247(a)(b) which regulate hazardous waste, closure, post-closure and financial assurance.

In the motion to dismiss,¹ Chemetco contends that because the parties entered into a consent order approved by the Circuit Court of Madison County on June 30, 1988, jurisdiction over the instant complaint continues in the circuit court rather than the Board. On October 27, 1995 complainant filed a response to Chemetco's motion to dismiss arguing that the 1988 consent order does not preclude prosecution of any of the

¹ The 1988 complaint filed on June 29, 1988 in the Madison County Circuit Court will be cited to as (1988 Complaint at ____). The 1988 consent order entered into between the parties on June 30, 1988 will be cited to as (Consent Order at ____). The 1993 supplementary consent order entered into between the parties on October 4, 1993 will be cited to as (Supplement at ____). The 1995 complaint filed on October 10, 1995 presently pending before the Board will be cited to as (Complaint at ____). Chemetco's motion to dismiss filed on October 20, 1995 will hereinafter be cited to as (Mot. to Dismiss at ____). Complainant's response to the motion to dismiss filed on October 27, 1995 will be cited to as (Response at ____). Chemetco's memorandum in support of its motion to dismiss filed on December 29, 1995 will be cited to as (Memo at ____). Complainant's memorandum in support of its response filed on January 17, 1996 will be cited to as (Response Memo at ____).

charges in the pending complaint filed with the Board. Chemetco filed a request for oral argument on November 7, 1995 in order to expand on the meaning and scope of the 1988 consent order. Chemetco filed a reply in support of its motion to dismiss on November 15, 1995 and complainant subsequently filed a motion to strike the reply memorandum. Pursuant to a December 7, 1995 Board order directing Chemetco to submit caselaw in support of its motion to dismiss, Chemetco filed a memorandum on December 29, 1995 and complainant filed a memorandum of law in support of its response on January 17, 1996. Chemetco filed a reply to complainant's response on January 24, 1996 and complainant filed a motion to strike Chemetco's reply.

This order addresses Chemetco's motion to dismiss, Chemetco's motion for oral argument, complainant's motion to strike Chemetco's reply memorandum in support of its motion to dismiss and complainant's motion to strike Chemetco's reply to complainant's response memorandum. For reasons more fully explained below, the Board denies Chemetco's motion to dismiss, the Board denies Chemetco's motion for oral argument and the Board grants both of complainant's motions to strike. The hearing officer is directed to schedule this matter for discovery and hearing.

BACKGROUND

Chemetco is a secondary copper smelter which occupies approximately twelve acres near Hartford, Madison County, Illinois. (Complaint at 2.) Chemetco operates four furnaces for smelting and refining copper-bearing and other metal-bearing materials. On June 29, 1988 the Attorney General of the State of Illinois filed a complaint in the Circuit Court of Madison County styled People of the State of Illinois v. Chemetco, Inc., No. 88-CH-200 (1988 Complaint) alleging several violations of the Act and associated regulations.²

On June 30, 1988 the Circuit Court of Madison County, Illinois, approved a consent order (Consent Order) entered into by the parties. (Mot. to Dismiss at 1.) The consent order included the terms of settlement and addressed Chemetco's future operation of the zinc oxide pits, floor washwater impoundments, cooling water canals and other matters. (Mot. to Dismiss at 1-2.) The consent order contained several different clauses concerning Chemetco's agreement to cease and desist from further violations, comply with other laws, the penalties for non-compliance, the circuit court's retention of jurisdiction, dispute resolution between the parties, and a covenant not to sue. The consent order also required Chemetco to submit closure plans and any

² The allegations in the 1988 complaint included, but were not limited to, the following: noncompliance with daily maximum effluent concentrations in wastewater discharges, exceeding the prescribed numerical effluent standards for various constituents, exceeding water quality standards, open dumping, storage of hazardous wastes, failure to prepare closure and post-closure plans, failure to utilize protective cover, and failure to manage slag. (See Counts I-XII in the 1988 complaint.)

necessary post-closure plans to the Agency pending subsequent review by the Agency. (Consent Order at 17.)

As required by the consent order, on January 22, 1991 Chemetco submitted to the Agency for its approval, closure and post-closure plans for three hazardous waste disposal surface impoundments for zinc oxide pits, floor washwater impoundments, and cooling water canals. (Complaint at 2.) In a letter dated April 19, 1991, the Agency issued conditional approval of Chemetco's closure and post-closure plans as long as Chemetco agreed to implement a corrective action program which, among other matters, required Chemetco to perform quarterly groundwater sampling in all wells. (Complaint at 3.) On three different occasions over a period of several months, Chemetco requested that the Agency modify the approved corrective action program. On January 29, 1993 the Agency issued a revised conditional approval of Chemetco's closure and post-closure plan which superseded the Agency's April 19, 1991 previous closure plan approval letter. This letter modified the previous closure requirement that Chemetco perform quarterly groundwater sampling in all wells to allow Chemetco to sample only in specific wells. (Complaint at 5.)

Subsequent to the June 30, 1988 consent order, the parties entered into two additional consent agreements: (1) an amended consent order on June 17, 1992, and (2) a supplemental consent order (Supplement) on October 4, 1993. (Supplement at 4-13, 27.) The supplement incorporated the original 1988 consent order and added new requirements incumbent on Chemetco. The objective of the supplement was to ensure compliance with the national ambient air quality standards (NAAQS) for lead, the particulate matter emissions limitations, and permitting requirements. (Supplement at 16.) Neither the amended consent order nor the supplement referred to the closure or post-closure plans as approved in the Agency's April 19, 1991 letter or the superseding January 29, 1993 Agency letter.

On November 1, 1993, pursuant to Section 31(d) of the Act (415 ILCS 5/31(d) (1994)), the Agency sent Chemetco a notice informing Chemetco of the Agency's intention to file a formal enforcement complaint. (Complaint at 7, Exhibit 3.) In response, Chemetco never invoked the dispute resolution pursuant to the provisions of the consent order or supplement.³ As a result of unsuccessful negotiations between the

³ The parties agreed in Section K of the 1988 consent order and in Section G of the 1993 supplement to invoke dispute resolution as follows: "1. The parties shall use their best efforts to informally and in good faith resolve all disputes or differences of opinion. Any dispute that arises with respect to the meaning, application, interpretation, amendment or modification of any term of this Proposal for Settlement (Supplement Consent Order) and attachments . . . or with respect to any party's compliance therewith or any delay thereunder shall, in the first instance, be the subject of such informal negotiations as set forth below. 2. If Chemetco objects to any action taken by IEPA regarding this Proposal for Settlement, Chemetco shall notify IEPA in

parties, the Illinois Attorney General instituted this action. Count One of the present complaint alleges Chemetco's failure to perform conditions of the corrective action program including the quarterly groundwater sampling during April 19, 1991 through May 1992 as approved in the April 19, 1991 letter and the January 29, 1993 superseding letter. Count Two addresses Chemetco's failure to establish financial assurance for the cost of closure and post-closure care of its facility and failure to demonstrate financial responsibility for bodily injury and property damage to third parties. (Complaint at 8-9.)

PRELIMINARY MATTERS

Request for Oral Argument

Chemetco's request for oral argument on the motion to dismiss was filed with the Board on November 7, 1995. In Land & Lakes Company v. Village of Romeoville, PCB 91-7 (March 14, 1991), the Board denied a request for oral argument in a motion for sanctions because the Board believed oral argument would serve no useful purpose in that instance. Here, Chemetco's request for oral argument is based on a motion to dismiss where both parties have set forth their arguments in the pleadings filed with the Board. The Board finds that no useful purpose would result from granting Chemetco's request for oral argument and therefore denies Chemetco's request for oral argument.

Motions to Strike

The Board's procedural rules state that the moving party shall not have the right to reply, except as permitted by the hearing officer or the Board. 35 Ill. Adm. Code 103.140(c). The rules also state generally that a reply is not permitted except to prevent material prejudice. 35 Ill. Adm. Code 101.241(c). Chemetco did not ask leave to reply nor has Chemetco demonstrated material prejudice would result from lack of a reply. In addition, Chemetco's submitted replies do not state further argument for consideration by the Board. Therefore, the Board grants complainant's November 21, 1995 motion to strike Chemetco's reply memorandum and the Board grants complainant's January 31, 1996 motion to strike Chemetco's reply to complainant's response memorandum.

writing of its objection, detailing its position and the basis therefor and its proposed resolution, within fourteen (14) days of the action. ” (Consent Order at 25, Supplement at 34.)

ARGUMENTS OF THE PARTIESMotion to Dismiss

Chemetco argues in its motion to dismiss that the 1988 consent order controls all actions between the parties. Chemetco states that because the complaint at issue concerns closure, which was a matter addressed in the consent order, the 1995 complaint should be adjudicated by the circuit court. Chemetco cites several sections in the consent order, including the covenant not to sue, wherein Chemetco and the Agency agreed that all controversy between the parties with respect to the charges contained in the complaint, are terminated. (Consent Order at 22, Mot. to Dismiss at 2.) Chemetco further cites to the retention of jurisdiction provision of the consent order whereby the court retained jurisdiction of the 1988 matter for the purpose of adjudicating "all matters of dispute among the parties." (Consent Order at 29, Mot. to Dismiss at 2.) Chemetco also cites to the dispute resolution provision in the consent order which required the parties to use their best efforts to informally resolve any differences between them.⁴ (Consent Order at 25, Mot. to Dismiss at 2-3.)

Chemetco argues the consent decree is a contract between the parties wherein the parties agreed to continuing jurisdiction in the circuit court. Chemetco states that in negotiating a contract, the parties are free to select a forum for adjudication and, here, Chemetco argues the parties agreed that the proper forum would be the circuit court. (Memo at 2-3.) Chemetco's position is that closure, post-closure, and financial assurance are all issues stemming from the original 1988 consent order; therefore, because the circuit court retained jurisdiction, the circuit court remains the proper forum for adjudication. Consequently, Chemetco argues that the Board is not the proper adjudicatory forum to hear the matters at issue.

In response, complainant argues that both counts of the present complaint are separate and distinct allegations from the 1988 complaint. Complainant states that the 1995 complaint did not arise from the matters previously resolved by the circuit court in 1988. (Response Memo at 8.) Complainant argues Count One relates to the corrective action program of the closure plan which was not conditionally approved by the Agency until April 19, 1991, a date long after the consent order was entered into by the parties. Since the 1988 complaint alleged that Chemetco had no closure plan whatsoever and because the 1988 consent order required a closure plan pending Agency approval, the results of the 1988 complaint and consent order remain separate from the present allegations. (Response at 3.) Complainant states that Chemetco violated 35 Ill. Adm. Code 725.190(b), 725.192(a) and 725.213 and Section 21(f)(2) of the Act by not performing the quarterly groundwater sampling required by the approved closure plan in the letters of April 19, 1991 and January 29, 1993.

⁴ See supra note 3 (dispute resolution clause as written in the 1988 consent order and 1993 supplement).

Complainant argues in Count Two of the present complaint that Chemetco did not provide a written estimate of closure costs, financial assurance or financial responsibility for bodily injury and property damage to third parties after the Agency's April 19, 1991 approval of Chemetco's closure plan thereby violating 35 Ill. Adm. Code 725.242(a), 725.243, 725.245, 725.247(a) and (b) and Section 21(f)(2) of the Act. (Response at 4.) Complainant argues that Count Two differs from the 1988 complaint because the 1988 complaint refers to the period of May 17, 1982 through June 29, 1988 at which time Chemetco had no closure plan. (Response at 4.) Complainant argues Chemetco has not previously been charged with 35 Ill. Adm. Code 725.247(a) and (b) in any other matter. (Response Memo at 16.)

Finally, complainant argues that Chemetco has waived the dispute resolution provision since Chemetco failed to timely object to action taken by the Agency. (Response at 5.) Complainant states that Chemetco must first invoke dispute resolution under the consent order for the court to resolve a dispute among the parties. Because Chemetco failed to invoke dispute resolution, complainant argues that Chemetco has waived its rights under the consent order. (Response Memo at 11-12.) Complainant argues that it has the discretion to file this enforcement case with the Board apart from any previous consent orders entered between the parties.

ANALYSIS

Chemetco's motion to dismiss is based on the terms of the 1988 consent order, the 1992 amended consent order and 1993 supplementary consent order.⁵ However the terms of the consent orders do not explicitly state the terms of agreement between the parties with regard to closure, post closure, and financial assurance.

Chemetco argues that several provisions in the consent orders require the Board to release jurisdiction to the circuit court. The Board disagrees for the following reasons. First, Chemetco cites to the covenant not to sue which states that the consent order terminates all controversy between the parties and that no further actions will commence against Chemetco with respect to those charges. The allegations before the Board in the present complaint do not relate back to the original 1988 controversy between the parties. However, the present allegations relate to violations of the specific closure and post-closure plans, which the Agency conditionally approved in a letter dated April 19, 1991 and later modified on January 29, 1993. The present allegations also relate to financial assurance, a matter not previously addressed by the parties. The covenant not to sue pertains to the 1988 complaint which encompasses violations which took place from a time period from May 17, 1982 through June 29,

⁵ Because the 1988 consent order, the 1992 amended consent order and the 1993 supplementary consent order are cumulative, the consent orders will hereinafter be group-referenced as "consent orders."

1988. In this instance, the complaint addresses a separate time period from April 19, 1991 through May 1992. Accordingly, the Board finds Chemetco's argument meritless.

Second, Chemetco argues that the court retained jurisdiction for the purpose of adjudicating matters of dispute among the parties. The general rule is that a party can not enter into a consent order before one tribunal and then seek to have a second tribunal enforce it. W.R. Grace & Co. v. Beker Industries, Inc., 128 Ill. App. 3d 215, 470 N.E. 2d 577, 588-589 (1st Dist. 1989). Here, complainant is not requesting the Board to enforce the consent order; complainant is filing a separate enforcement action with the Board. The Board acknowledges that it does not have the authority to enforce a consent order when the consent order was entered by another adjudicatory forum. Further, the Board could not circumvent jurisdiction of the circuit court if the court had retained jurisdiction for a specific matter. The circuit court may similarly acknowledge the Board's jurisdiction if the Board were to expressly retain jurisdiction since the courts have held that the Board and circuit courts have concurrent jurisdiction under the Act. (See Janson v. Illinois Pollution Control Board, 69 Ill. App. 3d 324, 387 N.E.2d 404, 25 Ill. Dec. 748 (3d Dist. 1979).⁶ On remand from the Illinois Supreme Court, the Third District Appellate Court stated in Janson, "[t]he Pollution Control Board and the circuit court do have some concurrent jurisdiction." (Janson at 407.) Since the Board has been given the express authority to adjudicate in enforcement proceedings and the power to perform that duty, it cannot decline to do so here. The Board therefore finds that the retention of jurisdiction section does not preclude the Illinois Attorney General from pursuing this enforcement action before the Board.

The Board has the discretion to interpret the consent orders to determine whether the parties intended that the circuit court be the only forum to adjudicate all future enforcement questions between the parties. The parties' intention in a consent judgment must be determined from the language employed in the agreement for such judgment and, where there is no ambiguity, from such language alone. Carvallo v. Carvallo, 62 Ill. App. 3d 394, 378 N.E. 2d 1288, 1291 (1st Dist. 1978). If the complaint before the Board specifically alleged that Chemetco violated the provisions of the consent orders, those allegations would properly come within the circuit court's jurisdiction. However, this is not the situation before the Board. As such, the Board interprets the consent orders to allow the court to adjudicate any further matters of dispute among the parties which relate to the consent order or the 1988 complaint.

In the instant case, the Agency's complaint before the Board does not allege that Chemetco has violated the consent orders. The matters in this instant cause occurred subsequent to 1988 and occurred outside the terms of the consent order. Here, the

⁶ In People ex rel. Scott v. Janson, 57 Ill. 2d 451, 312 N.E.2d 620 (1974), the Illinois Supreme Court reversed and remanded this case to the Third District Appellate Court on issues of jurisdiction.

consent orders stated that Chemetco submitted closure plans which were still pending Agency review; Chemetco ensuingly submitted closure and post-closure plan modifications to the Agency on January 22, 1991; the Agency approved the plan and added its own conditions and modifications in a letter dated April 19, 1991 and a superseding letter dated January 29, 1993. Accordingly, Chemetco satisfied the consent orders since it submitted sufficient closure and post-closure plans to the Agency.

The present allegations before the Board are separate and distinct from Chemetco's already fulfilled requirements regarding the submittal of a closure plan in the consent orders. The instant complaint before the Board alleges that Chemetco did not perform the requirements in the Agency's approved closure plan. The Agency's 1991 and 1993 letters are separate matters not addressed or agreed to by the parties anywhere in the consent orders. Therefore, the Board views closure and post-closure as separate matters from the 1988 allegations and subsequent consent orders.

Assuming that the terms of the consent orders are applicable, Chemetco argues thirdly, that the dispute resolution provision in the consent order bars this enforcement action. Prior to the filing of this enforcement action, complainant informed Chemetco of its intention to file a claim as required by Section 31(d) of the Act on November 1, 1993. The parties unsuccessfully attempted negotiating the dispute and this action was filed nearly two years later. Chemetco did not file an objection with the Agency within 14 days of the filing as is required by the dispute resolution provision. Chemetco could have filed an objection to invoke dispute resolution when it was notified of the violations, the pending enforcement action or the filing of the complaint; however, Chemetco failed to do so. Further, since Chemetco chose not to assert its rights in court, Chemetco has, in effect, shown the consent order does not apply in this situation. As a result of Chemetco's non-action, the Board finds the dispute resolution provision of the consent order waived and inapplicable in this matter.

Regarding Count Two which pertains to financial assurance, closure costs and financial responsibility, complainant alleges new regulatory sections, 35 Ill. Adm. Code 725.247(a) and (b), which were never previously alleged against Chemetco. This illustrates the separation of the present enforcement action from previous actions between the parties due to the new allegations in this case.

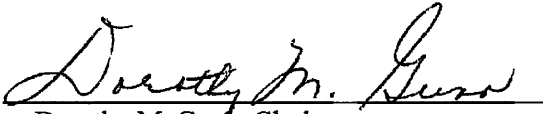
CONCLUSION

The Board finds that the consent orders entered into between the parties do not apply to the violations alleged in this enforcement action; therefore, the Board finds this enforcement action to be within the jurisdiction of the Board. In summary, the Board denies Chemetco's motion to dismiss and request for oral argument; the Board grants both complainants' motions to strike Chemetco's reply memoranda. Hearing shall proceed consistent with this order.

IT IS SO ORDERED.

Members E. Dunham and J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 2nd day of March, 1996, by a vote of 5-2.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board