

ILLINOIS POLLUTION CONTROL BOARD
May 15, 1997

IN MATTER OF:)
)
PETITION OF CHEMETCO, INC. FOR) AS 97-2
ADJUSTED STANDARD UNDER 35 ILL.) (Adjusted Standard - RCRA)
ADM. CODE 720.131(a) & (c))

ORDER OF THE BOARD (by K.M. Hennessey):

This case involves the petition of Chemetco, Inc. (Chemetco) for an adjusted standard under 35 Ill. Adm. Code 720.131(a) and (c). In the petition, Chemetco seeks a solid waste determination regarding approximately 40,000 tons of zinc oxide material currently stored at its facility in Hartford, Illinois.

Now pending before the Board is Chemetco's motion for leave to supplement the record (motion). In the motion, Chemetco seeks to add to the record the affidavit of its president and documents attached to it. For the reasons set forth below, the Board denies the motion, but orders another hearing in this matter. The subject of the hearing will be limited to certain of the documents that Chemetco seeks to add to the record by its motion.

PROCEDURAL HISTORY

On August 9, 1996, Chemetco filed a petition for an adjusted standard under 35 Ill. Adm. Code 720.131(a) and (c). The Illinois Environmental Protection Agency (Agency) filed a response to the petition on September 9, 1996 and an amended response to the petition on January 28, 1997. In the amended response, the Agency recommends that the adjusted standard be granted under 35 Ill. Adm. Code 720.131(a) (not subsection (c)), subject to a number of conditions.

On March 11, 1997, a hearing was held in this matter. The parties have filed post-hearing briefs. The motion now at issue was filed by Chemetco on April 23, 1997. The Agency filed a reply on April 29, 1997, requesting that the Board deny the motion.

DISCUSSION

Chemetco seeks to supplement the record with the affidavit of David Hoff, Chemetco's president, (Chem. Exh. 17)¹ and documents described in the affidavit as (i) government documents for shipping zinc oxide into Spain (Chem. Exh. 18) and (ii) an agreement to sell zinc oxide to Elmet, S.L. (Elmet) of Spain (Chem. Exh. 19). The Board first discusses the latter two exhibits, and then turns to the affidavit. The Board will then discuss its order that another hearing be held in this matter.

¹ Chemetco's exhibits are cited as "Chem. Exh. __."

Mr. Hoff states that he testified at hearing that Chemetco's agreement with Elmet had already been renewed and reduced to writing for 1997. (Chem. Exh. 17 at para. 1.) He explains that the documents he had actually seen prior to hearing were in fact government documents allowing zinc oxide to be shipped into Spain (government documents). (*Id.*) The government documents, which are attached to the affidavit, are almost entirely in Spanish.

With respect to the Elmet agreement, Mr. Hoff states that it was not until after the March 11, 1997 hearing that Chemetco received the written Elmet agreement for 1997. (Chem. Exh. 17 at para. 2.) The agreement, which is also attached to the affidavit, is dated April 1, 1997.

The Board denies Chemetco's motion to supplement the record with the government documents and the Elmet agreement. Because these documents either did not exist until after the hearing or were not offered into evidence at hearing, the Agency could not cross-examine Mr. Hoff on them or present opposing testimony based on reviewing them. (See Village of Matteson v. World Music Theatre (March 26, 1992), PCB 90-146, 131 PCB 457, 458-459 (Board refused to consider party's filing in making final decision in part because opposing party did not have opportunity to cross-examine or present opposing testimony regarding filing).)

The Board also denies Chemetco's motion to add the affidavit itself to the record. Because the Board is ordering another hearing, Mr. Hoff will have an opportunity to testify as to the matters set forth in his affidavit, making his affidavit unnecessary.

The Board has several reasons for ordering another hearing in this matter. First, whether Chemetco has contracts for disposition of the zinc oxide and governmental approvals necessary for shipment is relevant under 35 Ill. Adm. Code 720.131(a) and (c). Second, introducing the documents into evidence at an adversarial hearing should result in a better record for the Board's decision on the adjusted standard. Finally, denying Chemetco's motion without ordering another hearing may lead Chemetco to file an amended petition, resulting in delay in final adjudication of this request.

The subject of the hearing, however, will be limited to the Elmet agreement and the government documents. In addition, for the latter to be admissible, Chemetco must have them translated into English by a qualified translator who verifies in writing that the translation is accurate.

ORDER

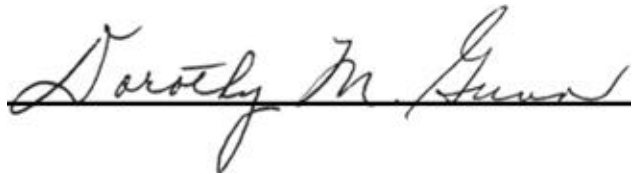
1. The Board denies Chemetco's motion to supplement the record.
2. The Board orders another hearing in this matter. The subject of the hearing will be limited to Chemetco's Exhibit 19 (Elmet agreement) and Chemetco's Exhibit 18 (government documents). For the latter to be admissible, Chemetco must have the government documents translated into English by a qualified translator who provides a written verification of the translation's accuracy. If Chemetco will seek to

introduce the government documents into evidence, their English translation and the translator's written verification of accuracy must be filed by Chemetco with the Board no later than 14 days before the hearing or an earlier date ordered by the hearing officer.

3. The scheduling, notice, and completion of the hearing, along with the submittal and filing of documents after the hearing, must be in accordance with the Board's order in this matter of September 19, 1996.

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 15th day of May, 1997, by a vote of 6-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board