

ILLINOIS POLLUTION CONTROL BOARD

June 21, 2001

JERSEY SANITATION CORPORATION, an)
Illinois corporation,)
)
Petitioner,)
)
v.) PCB 00-82
) (Permit Appeal – Land)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On January 3, 2000, Jersey Sanitation Corporation (Jersey Sanitation) filed a petition to contest certain conditions imposed on a permit issued by the Illinois Environmental Protection Agency (Agency). Jersey Sanitation filed this permit appeal pursuant to Section 40(a)(1) of the Environmental Protection Act (Act) (415 ILCS 5/40(a)(1) (2000)). The Agency issued the permit with the contested conditions on October 5, 1999, for the certification of closure and post-closure care of Jersey Sanitation’s facility located in Jersey County, Illinois. On January 20, 2000, the Board accepted this matter for hearing.

On December 7, 2000, the petitioner filed a motion for summary judgment. On January 29, 2001, the Agency filed a response to petitioner’s motion and a motion for summary judgment. On February 26, 2001, petitioner filed a reply to the Agency’s response and a response to the Agency’s motion.¹ For the reasons discussed below the Board grants Jersey Sanitation’s motion for summary judgment and denies the Agency’s motion. The Board remands the permit to the Agency with direction to issue the permit consistent with this opinion and order.²

BACKGROUND

¹ The Agency’s response to petitioner’s motion and the Agency’s motion for summary judgment present the same arguments; therefore citation will only be made to the Agency’s response. Further, petitioner’s reply to the Agency response and the petitioner’s response to the motion for summary judgment also present the same arguments; therefore citations will be made to the reply.

² The petition will be cited as “Pet. at ___”; the motion for summary judgment filed by petitioner will be cited as “Mot. at ___”. The Agency’s response will be cited as “Resp. at ___” and petitioner’s reply will be cited as “Reply at ___”. The Agency’s record will be cited as “R. at ___”.

Jersey Sanitation's facility is a 10-acre site located two and one half miles from Jerseyville in Jersey County, Illinois. R0269. The facility opened in 1967 with an area fill and trench method operation. *Id.* Jersey Sanitation was issued an operating permit in 1974 (Operation Permit Number 1973-44-OP). *Id.* On October 13, 1992, Jersey Sanitation notified the Agency that it had stopped accepting waste on September 17, 1992, pursuant to 35 Ill. Adm. Code 807.505(a). R0019. On February 8, 1993, a supplemental permit (Supplemental Permit Number 1992-350-SP) was issued which approved a revised closure and post-closure care plan and cost estimates as well as a groundwater monitoring plan. R0269. On July 8, 1996, the People of the State of Illinois filed an eight-count complaint against Jersey Sanitation. People v. Jersey Sanitation PCB 97-2. The complaint alleges that Jersey Sanitation: caused or allowed water pollution, failed to control leachate, had refuse in water, violated the permit, failed to provide adequate cover on refuse, failed to provide adequate financial assurance, failed to maintain adequate final cover, and caused or allowed open burning. On January 8, 2001, an amended complaint was filed.

On June 7, 1999, Jersey Sanitation submitted an application for supplemental permit which included a certificate of closure, revised final contours with siting approval certification and a biennial revision of the closure and post-closure care plans and cost estimates. R0258-300. On October 5, 1999, the Agency granted a supplemental permit with conditions to Jersey Sanitation (Supplemental Permit No. 1999-209-SP). R0389-0396.

Jersey Sanitation filed this appeal based on the Agency's October 5, 1999 permit issuance. The appeal was timely filed because on November 18, 1999, the Board granted a joint request for extension of the appeal period pursuant to Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1)(2000)). Jersey Sanitation challenges seven separate conditions of the supplemental permit. Pet. at 2-3. Specifically, Jersey Sanitation is challenging conditions A.4, B.6, C.1, 2, 3, 4, and 8. Those conditions provide:

- A. Closure Certification
 - 4. Current, valid Prior Conduct Certification is required to conduct post-closure care. (Supplemental Permit No. 1999-209-SP, p.2.)
- B. Post Closure Care
 - 6. Prior to the Illinois EPA issuance of a completion of post-closure care certificate, the operator shall provide the following:
 - b. An analysis for the 35 Ill. Adm. Code 620.410 (a) & (b) parameters, excluding radio nuclides [sic], of all permitted upgradient and downgradient wells and assess the landfill's impact on groundwater by comparing the groundwater analysis results to the appropriate 35 Ill. Adm. Code 620.Subpart D

Groundwater standards. (Supplemental Permit No. 1999-209-SP, p.3)

C. Monitoring

1. Your monitoring program is approved in accordance with Attachments A through E of Permit No. 1992-350-SP, and is subject to the conditions contained therein.
2. The operator shall provide the statistical background concentration limits used to evaluate the groundwater quality. In accordance with special condition no. 4 of Attachment A to Permit No. 1992-350-SP, groundwater quality shall be evaluated by comparing analytical quantities to pooled upgradient (interwell) and each wells (intrawell) statistical confidence limits. The statistical confidence limits (both interwell and intrawell) are to be established using the first four consecutive quarters of sampled data obtained at the inception of monitoring. The statistical results, data, and methodology shall be submitted to the Illinois EPA in the form of a supplemental permit application no later than December 31, 1999.
3. The operator shall supply the Illinois EPA with all sampling and analysis procedures used in providing a reliable indication of groundwater quality in the zone being monitored. Also, the operator shall provide an evaluation of the groundwater exceedances reported in February 9, 1999 groundwater monitoring report, received April 2, 1999. The concentration levels for arsenic, iron, manganese, sulfate, TDS, TOC, and TOX in wells G104, G105 and G106 are above 620 Class I Standards. The evaluation shall include the comparison of the established background confidence limits to concentration levels of these parameters, a historical trend analysis of the data, groundwater flow maps over the last four consecutive monitoring quarters and, if necessary, an assessment monitoring plan in accordance with special condition no. 8(b) of Attachment A to Permit No. 1992-350-SP. This information shall be submitted to the Illinois EPA in the form of a supplemental permit application no later than December 31, 1999.
4. During the post-closure care period, the owner and operator shall monitor gas, water and settling and shall take whatever remedial action is necessary to abate any gas, water or setting problems which appear during that time. Post-closure groundwater monitoring shall be conducted and reported to the Illinois EPA on a quarterly basis for the monitoring wells and parameters identified in Attachment A of

Supplemental Permit No. 1992-350-SP. (Supplemental Permit No.: 1999-209-SP, pp. 3-4).

8. During the post-closure care period, water quality records shall be maintained at the office of the site operator and shall be reviewed quarterly. A water quality report shall be submitted quarterly. If the owner/operator or the Illinois EPA's Bureau of Land determines that adverse trends are developing, further investigation is to be performed. If corrective action becomes necessary, a plan is to be developed by the operator and submitted to the Permit Section, Bureau of Land for approval. (Supplemental Permit No.: 1999-209-SP, pp.4). Mot. at 2-3.

STATUTORY AND REGULATORY BACKGROUND

On August 17, 1990, the Board adopted new regulations for landfills in Illinois, which included new methods for setting groundwater monitoring standards. See, Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills (August 17, 1990), R88-7. In that opinion, the Board stated that:

All existing landfill facilities are required to notify the Agency (in accordance with Section 814.104), within six months of the effective date, principally with regard to the facility's estimated date of closure of existing units and state whether the facility is subject to the requirements of either Subpart B, C, D or E.

Pursuant to Part 814, if an existing facility is unable to meet the requirements of Subparts B or C and D, then it is subject to Subpart D and such a facility will have to initiate closure within 2 years of the effective date of the Part subject to the existing operation and closure standards of Part 807. Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills (August 17, 1990), R88-7, slip. op at 21.

The relevant Board rules at Part 807 provide:

Section 807.502 Closure Performance Standard

In addition to the specific requirements of this Part, an operator of a waste management site shall close the site in a manner which:

- a) Minimizes the need for further maintenance; and
- b) Controls, minimizes or eliminates post-closure release of waste, waste constituents, leachate, contaminated rainfall, or waste decomposition products

to the groundwater or surface waters or to the atmosphere to the extent necessary to prevent threats to human health or the environment.

Section 807.523 Post-Closure Care Plan

- a) An operator of an disposal site shall have a written post-closure care plan which shall be a condition of the site permit.
- b) The post-closure care plan shall include as a minimum a description of methods for compliance with all post-closure care requirements of this Part.
- c) An operator of an indefinite storage unit shall have a written contingent post-closure care plan which shall include as a minimum a description of methods of compliance with all post-closure care requirements of this Part assuming the unit will be closed as a disposal unit without removal of all wastes and waste residues. The contingent post-closure care plan shall be the same as a post-closure care plan, except as otherwise specifically provided.

Section 39(a) of the Act provides, in part, that: “in granting permits the Agency may impose such conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder.” 415 ILCS 5/39(a) (2000).

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Id.* Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to the relief “is clear and free from doubt.” *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present a factual basis which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

In this case both parties have asked that the Board grant summary judgment. Upon reviewing the pleadings and the record in this matter, the Board agrees that there are no issues of material fact and judgment may be granted as a matter of law. Therefore, the Board finds that summary judgment is appropriate. In determining which motion for summary judgment should be granted, the Board must look to the burden of proof in a permit appeal and the arguments presented by the parties.

BURDEN OF PROOF IN PERMIT APPEAL

A petition for review of permit conditions is authorized by Section 40(a)(1) of the Act (415 ILCS 5/40 (a)(1) (2000)) and 35 Ill. Adm. Code Section 105.204(a). The Board has long held that in permit appeals the burden of proof rests with the petitioner. The petitioner bears the burden of proving that the application, as submitted to the Agency, would not violate the Act or the Board's regulations. This standard of review was enunciated in Browning-Ferris Industries of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (2nd Dist. 1989) and reiterated in John Sexton Contractors Company v. Illinois (Sexton) (February 23, 1989), PCB 88-139. In Browning-Ferris the appellate court held that a permit condition that is not necessary to accomplish the purposes of the Act or Board regulations is arbitrary and unnecessary and must be deleted from the permit. In Sexton the Board held:

That the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violations of the Environmental Protection Act would have occurred if the requested permit had been issued.

Thus, the Board must determine that as a matter of law, Jersey Sanitation has proven that the application, as submitted to the Agency, demonstrated that no violations of the Act or Board rules would have occurred if the requested permit had been issued.

ISSUES

Jersey Sanitation is arguing that as a matter of law, absent the seven challenged conditions attached to its post-closure care permit, the Act or Board regulations will not be violated. Those seven conditions can be grouped in three issues. The first issue is whether prior conduct certification is required to conduct post-closure care. The second issue is whether the groundwater monitoring conditions are necessary to insure that the Act or Board regulations will not be violated. The third issue is whether the requirements of condition C.8 are necessary to ensure that the Act or Board regulations will not be violated.

DISCUSSION

As stated previously each party argues that it is entitled to summary judgment. Jersey Sanitation asserts that the conditions should be struck as a matter of law. The Agency maintains that the permit appeal should be dismissed and the conditions left in place. The following discussion will summarize the arguments raised by both parties both generally and in each of the three areas at issue. After the summary of the parties' arguments the Board will discuss the arguments.

General Arguments

Generally, Jersey Sanitation argues that it is required to close under the Board's rules at 35 Ill. Adm. Code 807. Jersey Sanitation points out that it notified the Agency that Jersey Sanitation stopped accepting waste on September 17, 1992, and as such was eligible to close the facility pursuant to the Board's rules at 35 Ill. Adm. Code 807. Jersey Sanitation concedes that Section 39(a) of the Act (415

ILCS 5/39(a) (2000)) allows the Agency to impose conditions that “may be necessary to accomplish the purposes of this Act and as are not inconsistent with the regulations promulgated by the Board.” Mot. at 3, citing 415 ILCS 5/39(a) (2000). However, Jersey Sanitation argues that none of the seven challenged conditions is required by 35 Ill. Adm. Code 807 or the Act. Mot. at 3. Jersey Sanitation argues that the Agency has no authority to impose conditions “merely because it [the Agency] considers them to be a good idea.” Reply at 8. Therefore, Jersey Sanitation argues the Board should strike the conditions. Mot. at 4.

In general, the Agency argues that Jersey Sanitation has waived any objection to conditions C.1, C.2, C.3, C.4, and C.8, because all of these conditions were conditions to the prior permit issued to Jersey Sanitation. Resp. at 13, 16, 20, and 24. More specifically, the Agency points out that Section 40(a) of the Act (415 ILCS 5/40(a) (2000)) allows a permit applicant 35 days to petition for a hearing. Resp. at 13-14. The Agency asserts that because Jersey Sanitation never appealed the conditions the challenge is untimely. Resp. at 14. The Agency cites to Bradd v. IEPA (May 9, 1991), PCB 90-173 to support its argument.

The Agency also argues that the Board should refuse to consider Jersey Sanitation’s challenge to these conditions because to do so would “encourage permit applicants to delay appealing an Agency final permit decision until a subsequent appeal arises.” Resp. at 14. The Agency finally asserts to allow Jersey Sanitation to object now would render the jurisdictional requirement for timely appeals meaningless. *Id.*

Discussion

The Board agrees with Jersey Sanitation that the closure and post-closure care of its facility are governed by 35 Ill. Adm. Code 807. The record clearly indicates that Jersey Sanitation properly acted under the Board’s rules to qualify for closure pursuant to Part 807. The Board notes that the Agency does not appear to be challenging that Jersey Sanitation is subject to 35 Ill. Adm. Code 807. Therefore, the Board will review the contested conditions in light of the post-closure care requirements of 35 Ill. Adm. Code 807 and the Act.

The Board agrees with the Agency that as a general principle a condition imposed in a previous permit, which is not appealed to the Board, may not be appealed in a subsequent permit. This general principal was reiterated by the Board in Panhandle Eastern Pipe Line Company v. Illinois Environmental Protection Agency (January 21, 1999), PCB 98-102, slip op. at 13, *aff’d* Panhandle Eastern Pipe Line Company v. IEPA and PCB, 314 Ill. App. 296, 734 N.E.2d 18 (4th Dist. 2000). However, the instant matter does not involve the same situation as in Panhandle or even Bradd. Panhandle involved a condition that had been placed on a construction permit and several subsequent operating permits. The petitioner sought to revise the operating permit and tried to challenge the emission limits set in the construction and subsequent operating permits. In this case, the permit being sought is a different type of permit (post-closure care as opposed to the prior closure permit). The facility is at a very different place in its history and a condition that may have been appropriate during the operation of the facility

may not be appropriate during the post-closure care period. Therefore, the Board finds that Jersey Sanitation has not waived its objection to the conditions imposed in a post-closure care permit.

Prior Conduct Certification (Condition A.4)

This condition would require Jersey Sanitation to have a Prior Conduct Certification to perform post-closure care at the facility. Jersey Sanitation argues that the Board's rules on prior conduct certification at 35 Ill. Adm. Code 745 require the "Chief Operator" to obtain prior conduct certification. Reply at 11. The "Chief Operator" is defined as the person in responsible charge of the waste disposal site on a 24-hour basis who is normally present at the disposal site, directing the day-to-day operations, and is the owner or operator or employed by the owner or operator to assure the day-to-day operations of the site are in compliance with the Board's rules. Reply at 11. Jersey Sanitation asserts that the rules demonstrate that a "Chief Operator" is only necessary when a site has a day-to-day operation and as of September 17, 1992, Jersey Sanitation has stopped accepting waste. *Id.* Further, the Agency determined that the site was closed, and the 15-year post-closure care period began September 30, 1994. *Id.*

Jersey Sanitation also asserts that the "Chief Operator" must obtain prior conduct certification or permits for the operation of the facility may be denied or revoked. Reply at 11. Jersey Sanitation argues that its prior operating permit was never denied or revoked for violating this regulation and Jersey Sanitation is now in the post-closure care period, not the operating period. Reply at 11-12. Also, Jersey Sanitation points out that the Agency has not cited to any provision in 35 Ill. Adm. Code 807 that requires a "Chief Operator" with prior conduct certification during the post-closure care period. Reply at 12. Jersey Sanitation opines that the Agency may have a "good faith" belief that an operator should be designated for the site even during post-closure, but there is no support in the regulations for this position. Reply at 12.

Jersey Sanitation further argues that this condition is not necessary to accomplish the purposes of the Act because Section 22.5 of the Act (415 ILCS 5/22.5 (2000)) requires "certification of personnel to operate refuse disposal facilities or sites (emphasis added)." Reply at 12. Jersey Sanitation also asserts that this condition is inconsistent with the post-closure care provisions of 35 Ill. Adm. Code 807 and the Agency cannot claim that not having prior conduct certification violates the Act and Board rules because the Act and Board rules do not require one. *Id.* Jersey Sanitation maintains that a "Chief Operator" prior conduct certification is only required during the operating period of a disposal facility as provided in 35 Ill. Adm. Code 745. *Id.*

The Agency asserts that Jersey Sanitation's operations are subject to the prior conduct certification requirements at 35 Ill. Adm. Code 745. Resp. at 9-10. The Agency opines that failure to have a site chief operator with prior conduct certification "during the life of the site permit – including the post-closure care period" would be a violation of 35 Ill. Adm. Code 745.181 and 745.182.³ Resp. at 10. The Agency asserts that the "policy reason that led to the General Assembly's passage of Section

³ The Board notes that there is no 35 Ill. Adm. Code 745.182.

22.05 of the Act, and the Board's promulgation of the Part 745 regulations" seems to apply equally before closure and during post-closure. Resp. at 10. Thus, the Agency argues the condition is necessary to accomplish the purpose of the Act or Board regulations and Jersey Sanitation is not entitled to summary judgment. Resp. at 10-11.

Discussion

The standard of review in a permit appeal where conditions are challenged is whether absent the challenged conditions there will be no violation of the Act or the Board's rules. Part 807 does not require prior conduct certification by its terms; however a reading of Part 745 does establish that facilities operating under Part 807 are subject to prior conduct certification requirements. Therefore, generally, a facility operating under Part 807 must have a "Chief Operator" with a prior conduct certification under Part 745. The question then becomes does Part 745 require prior conduct certification during post-closure care under Part 807. The Board finds that it does not. A facility that has a certificate of closure and is in the post-closure care portion of its life, has ceased day-to-day operations. Therefore, there is no "Chief Operator" as defined in Part 745 and prior conduct certification is not required for a facility in post-closure care under Part 807.

Groundwater Monitoring Requirements (Conditions B.6, C.1, C.2, C.3, and C.4)

All of these conditions relate to the post-closure care monitoring of groundwater at the Jersey Sanitation site. Specifically, Condition B.6 would require an analysis of parameters of all the wells assessing the impact to groundwater by comparing the results to the groundwater quality standard. Condition C.1 incorporates all of the conditions from the prior permit concerning groundwater into this permit. Condition C.2 would require Jersey Sanitation to provide statistical background concentration limits to evaluate the groundwater quality, including a specific methodology for establishing statistical confidence. Condition C.3 would require Jersey Sanitation to provide all sampling and analysis procedures used in providing a reliable indication of groundwater quality. In addition, under Condition C.3 Jersey Sanitation would need to provide extensive analysis of background confidence limits compared to concentration levels of certain parameters. Condition C. 4 would require monitoring for gas, water and settling and reporting to the Agency on a quarterly basis. Also, under Condition C.4, Jersey Sanitation would be required to take any remedial action steps necessary.

Jersey Sanitation argues that these conditions are not necessary to accomplish the purposes of the Act and replies to the arguments made by the Agency in its response to the motion for summary judgment. Jersey Sanitation characterizes the Agency arguments in four general categories. Jersey Sanitation characterizes the first Agency argument as the Agency maintaining that the conditions are common and reasonable. Reply at 13. Jersey Sanitation characterizes the second Agency argument as the Agency maintaining that the conditions were imposed in a previous permit and as such are not appealable. *Id.* Jersey Sanitation characterizes the third Agency argument as the Agency alleging that Jersey Sanitation did not provide certain information required under previous permits. *Id.* And Jersey Sanitation characterizes the fourth Agency argument as the Agency maintaining that the application for closure provided for some of the conditions. *Id.*

In reply to the first characterization, Jersey Sanitation argues that “common and reasonable” is not a standard upon which the Agency has been given the authority to impose conditions on a permit. Reply at 13. According to Jersey Sanitation, Section 39(a) of the Act (415 ILCS 5/39(a) (2000)) provides that the Agency may impose conditions that are necessary to accomplish the purposes of the Act, and none of the specific monitoring requirements in these challenged conditions is required by 35 Ill. Adm. Code 807.Subpart E. Reply at 13. Jersey Sanitation maintains that Subpart E applies to Jersey Sanitation because the Agency has approved the Certification of Closure and determined the date that post-closure care began. Reply at 13-14. Thus, Jersey Sanitation argues, the site is no longer regulated under the closure standards of 35 Ill. Adm. Code 807.502 but instead by the post-closure care requirements of 35 Ill. Adm. Code 807.523. Reply at 14.

Regarding the Agency argument that the conditions were in a previous permit and cannot now be appealed, Jersey Sanitation points to City of Rock Island v. IEPA (July 13, 2000), PCB 00-73 and urges the Board to follow that precedent. Reply at 2. Jersey Sanitation points out that in Rock Island the Agency argued that a condition related to designated maximum flow had never before been challenged and could not be challenged by Rock Island in the permit appeal before the Board. Reply at 2. The Board found that condition arbitrary in the Rock Island case. *Id.*

Jersey Sanitation also argues that the permit the Agency refers to was an operating permit focusing upon landfill activities during periods of waste disposal through Part 807 closure. Reply at 15-16. The permit at issue in this proceeding acknowledges that Jersey Sanitation has closed the landfill “in full compliance with the obligations of the earlier operating permit and it establishes the standard to be followed for the next decade or so of post-closure care” states Jersey Sanitation. Reply at 16. Jersey Sanitation argues that this is a completely new permit that supersedes the prior permit. *Id.*

Jersey Sanitation opines that this case is also factually distinguishable from the case cited by the Agency in support of its position. The case cited by the Agency is Bradd v. IEPA (May 9, 1991), PCB 90-173. Reply at 16. Jersey Sanitation points out that in Bradd, the Agency approved the closure and post-closure plan and included a condition that a groundwater monitoring program be proposed. The groundwater monitoring program was proposed and the Agency rejected the plan. Over a year later, an affidavit for certification of closure was rejected by the Agency and an appeal was filed with the Board. In that appeal, petitioner argued that the groundwater monitoring plan was adequate. The Board held that the petitioner had waived his right to appeal the adequacy of the groundwater monitoring plan. Bradd v. IEPA (May 9, 1991), PCB 90-173. In this case, Jersey Sanitation argues that because the Agency has accepted the affidavit for closure the Agency has indicated that the site has been properly closed in accordance with the closure plan. Reply at 17.

Next, in reply to the Agency assertion that Jersey Sanitation did not provide certain information required under previous permits, Jersey Sanitation asserts that the Agency cannot impose conditions to take the place of an enforcement action. Reply at 18. Jersey Sanitation cites to Grigoleit v. IEPA

(November 29, 1990), PCB 89-184⁴ to support this proposition. Jersey Sanitation argues that whether the Agency believes that these conditions may or may not have been complied with does not justify inclusion in this permit. Reply at 18.

Further, Jersey Sanitation argues that the only place in the Board's regulations where detailed monitoring requirements can be found is 35 Ill. Adm. Code 811. Reply at 18. These detailed groundwater monitoring requirements do not belong in Jersey Sanitation's post-closure care permit, according to Jersey Sanitation, because as an existing landfill, Jersey Sanitation notified the Agency of its intent to close and the Part 811 rules do not apply. *Id.*

Lastly, Jersey Sanitation addresses the Agency assertion that the conditions were included in the application. Jersey Sanitation argues that 35 Ill. Adm. Code 807.523 requires submission of a post-closure care plan that includes a description of the methods to be used to comply with Part 807. Reply at 19. Specially, Jersey Sanitation asserts it provided cost estimates which included groundwater monitoring and covers stabilization. *Id.* Jersey Sanitation argues that the fact that it complied with the Board's rules should not be viewed as an authorization for permit conditions for the post-closure care period. *Id.*

The Agency, in its response to the motion for summary judgment, argues each of the conditions listed above separately; however many of the arguments are similar. The Board will summarize the Agency's position on each condition, but the Board will not restate the general arguments in full under each condition.

With regard to Condition B.6, the Agency concedes that Part 807 does not have a section that specifically includes the items delineated in Condition B.6. However, the Agency asserts that is not the same as saying the requirements in Condition B.6 are not necessary. Resp. at 11-12. The Agency points out that Section 807.502(b) requires that a landfill site be closed in a manner which protects groundwater or surface waters to the extent necessary to prevent threats to human health or the environment. Resp. at 12. Further, Section 12(a) of the Act (415 ILCS 5/12(a) (2000)) prohibits the landfill from causing, allowing or threatening the discharge of contaminants into groundwater. Resp. at 12. The Agency asserts that it must determine that Jersey Sanitation's post-closure care has been completed and that the site will not cause future violations of the Act before the Agency can certify completion of the post-closure care period. And, the Agency asserts, absent this condition the Agency will be unable to do so. Resp. at 12. Furthermore, the Agency maintains that Jersey Sanitation's own application contemplated an analysis of the groundwater monitoring data and an assessment of the landfill's impact prior to certification of post-closure care completion. Resp. at 12-13.

⁴ The Board notes that it recently revisited this issue in Community Landfill Company v. IEPA (April 5, 2001), PCB 01-48, 01-49. In Community Landfill, the Board stated that the "ongoing enforcement action is the appropriate forum" to find if there is a violation and to craft a penalty. Community Landfill at 25.

The Agency argues that Jersey Sanitation has waived its objection to Condition C.1 and cites to Bradd. Resp. at 13. The Agency further argues that Jersey Sanitation seems to be arguing that it should no longer be subject to its previously approved groundwater monitoring plan because closure has been certified. Resp. at 14. The Agency asserts that since there is no provision in Part 807 for a new or different groundwater monitoring program for post-closure care, to be imposed upon certification of closure, “this would seem, in essence, to be an argument that no groundwater monitoring is required at all during post-closure care.” Resp. at 14. However, the Agency maintains that such an argument ignores Section 22.17 of the Act (415 ILCS 5/22.17 (2000)) which requires post-closure monitoring for gas, water and settling at closed or completed landfill sites for a minimum of 15 years. Resp. at 14-15. The Agency asserts it is clear that the Act requires monitoring of groundwater during post-closure care. Resp. at 15. Furthermore, the Agency indicates that the application submitted by Jersey Sanitation contemplated groundwater monitoring during the post-closure care period. Resp. at 15.

Regarding Condition C.2, the Agency reiterates the argument that Jersey Sanitation has waived objection the condition and that Jersey Sanitation’s application discussed evaluation of monitoring data. Resp. at 16-17. In addition, the Agency argues that Jersey Sanitation has never provided background data as required under the prior permit and such data is necessary to properly review and assess the groundwater monitoring results. Resp. at 18.

On Condition C.3, the Agency argues that Jersey Sanitation has waived its argument pursuant to Bradd. Resp. at 19. The Agency also asserts that the Board’s regulations at 35 Ill Adm. Code 620 support the imposition of this condition. Resp. at 20.

Finally with respect to Condition C.4, the Agency again argues that the objections have been waived and that the permit application acknowledged the need to monitor gas, water, and settling. Resp. at 21-22.

Discussion

As indicated previously, the Board has found that Jersey Sanitation did not waive objection to any of the challenged conditions because the conditions were placed on the prior permit. The Board will therefore examine the conditions to determine whether Jersey Sanitation has proven that the application, as submitted to the Agency, demonstrated that no violations of the Act or Board rules would have occurred if the requested permit had been issued.

The Agency asserts that some of the conditions should be upheld because the post-closure care permit application contemplated some type of groundwater monitoring and analysis. The Board is not persuaded that Jersey Sanitation has somehow consented to conditions imposed by the Agency by providing information on groundwater monitoring and analysis. However, the post-closure care plan is a condition of the site permit. See 35 Ill. Adm. Code 807.523(a). Further, the Agency in its letter granting the permit with conditions states: “Supplemental permit is hereby granted to Jersey Sanitation Corporation as owner and operator to modify the development and operations of the . . . facility all in

accordance with the plans prepared, signed and sealed by John W. Bossert, P.E. of Andrews Environmental Engineering, Inc., dated and received June 7, 1999.” R0389. Thus, the groundwater monitoring plan in the post-closure care plan is a condition of the permit.

On the issues of groundwater monitoring and recordkeeping the post-closure care plan submitted on June 7, 1999 states:

Groundwater Monitoring

Assuming groundwater monitoring of the site is conducted in accordance with the anticipated permit requirements at the time of closure, (4) monitoring wells will require sampling, analysis and reporting on a quarterly basis. Each sample will require quarterly laboratory analysis of the parameters on List 2 and annual analysis of the parameters on List 3A [See R0140-0141] Field measurements of water sample temperature, water elevation, well depth elevation, depth to water, pH, and specific conductance will also be performed. All results will be reported to the IEPA in the manner prescribed at the time of reporting. No changes in the groundwater monitoring program are anticipated during closure or the post-closure care period.

Groundwater monitoring results will be evaluated each quarter against background data, General Use Water Quality Standards, and other historic water analysis information. If a trend is believed to be developing, more frequent sampling (e.g. monthly) may be performed to substantiate or dismiss the likelihood of site impact. A professional engineering firm should be retained to develop future actions and/or plans for subsequent IEPA approval.

Recordkeeping

During site operation, record of field investigations, closure test results, inspection(s), sampling and corrective action taken will be maintained at the site. During post-closure care period, these records will be maintained at the site operator’s office. All record will indicate the date, problem, location, and corrective action implemented. R0296.

The Board finds that Conditions B.6, C.1, C.2, C.3, and C.4 should be stricken. The Board is persuaded that these conditions are not necessary to accomplish the purposes of this Act and that the permit absent these conditions, will not result in violations of the Act or Board regulations. Section 22.17 of the Act (415 ILCS 5/22.17 (2000)) does require monitoring for gas, water and settling at a closed landfill for 15 years. However, neither the Act nor the Board’s regulations at 35 Ill. Adm. Code 807 provide any additional specificity. Jersey Sanitation has provided a plan for monitoring groundwater, as well as gas and settling, at the facility. R0294-0297. The parameters to be monitored are extensive and must be compared against background and General Water Quality Standards. The Board also notes that the list of parameters to be monitored is the same list of parameters monitored for in Permit No 1992-350-SP. R0140-0141, 0296. The Board finds that the plan as submitted was

sufficient and these challenged conditions are not necessary. The Board finds that Conditions B.6, C.1, C.2, C.3, and C.4 should be stricken.

Condition C.8

Jersey Sanitation argues that the Board's rules at 35 Ill. Adm. Code 807.502 already provide for closure performance standards so the imposition of additional standards in this condition is unnecessary. Reply at 21. Jersey Sanitation asserts its post-closure cost estimates have made no provisions for the undertaking of the requirements of this condition. *Id.* Jersey Sanitation maintains if the Agency believed it had not complied with the provision prior to the commencement of the post-closure care period, the Agency should have filed an enforcement action under Title VIII of the Act. *Id.* Jersey Sanitation asserts that conditions cannot be imposed in a permit in place of an enforcement. *Id.*, citing Grigoleit v. IEPA (November 29, 1990), PCB 89-184 (See footnote 4).

Jersey Sanitation reiterates that there is nothing in Part 807 that requires such specific provisions during the post-closure care period as those the Agency imposed in condition C.8. Reply at 21. The Agency has cited no regulation where such issues are covered and the closest regulations are found in 35 Ill. Adm. Code 811.111-811.112, according to Jersey Sanitation. *Id.* Jersey Sanitation reasserts that it is covered by Part 807 and the requirements in Part 811 do not apply to the Jersey Sanitation landfill. *Id.*

The Agency asserts that quarterly groundwater monitoring is "a reasonable and customary practice, that is necessary to maintain accurate monitoring of the groundwater quality and assessment of potential adverse impact to groundwater from release from the facility." Resp. at 23-24. The Agency maintains that this is the reason that condition C.8 assists in fulfilling the purposes of the Act and is not inconsistent with the Act or Board regulations. Resp. at 24. Maintenance of records and review and reporting of the results help to determine the existence of adverse trends which could indicate that the facility is not meeting the requirements of the Act or Board regulations. *Id.*

The Agency also maintains that condition C.8 is "essentially" the language proposed by Jersey Sanitation in its permit application. Resp. at 24. The Agency opines that Jersey Sanitation "should be hard pressed to object to a permit condition as being unreasonable, arbitrary and vague when the condition question is essentially as proposed in its application." Resp. at 24.

Discussion

As previously stated, the standard of review in a permit appeal is whether the applicant has proven that the application, as submitted to the Agency, demonstrated that no violations of the Act or Board rules would have occurred if the requested permit had been issued. Although the Act does require that groundwater monitoring must occur (see above), the level of specificity in this condition is neither in the Act or the Board's rules at 35 Ill. Adm. Code 807. As discussed above, Jersey Sanitation has included a groundwater monitoring plan in the 1999 post-closure care permit application. The groundwater monitoring plan included in the 1999 post-closure care permit application is a

condition to the permit pursuant to 35 Ill. Adm. Code 807.523 and as submitted is sufficient to meet the requirements of the Act and Board regulations. Furthermore, the post-closure plan does provide for recordkeeping on site. Thus, Jersey Sanitation has proven that the application, as submitted to the Agency, demonstrated that no violations of the Act or Board rules would have occurred if the requested permit had been issued. Therefore, the Board finds that Condition C.8 should be stricken.

CONCLUSION

After a careful review of the record, the Board finds that summary judgment is appropriate and grants the motion filed by Jersey Sanitation. The Board denies the Agency's motion for summary judgment. The Board finds that Conditions A.4, B.6, C.1, C.2, C.3, C.4, and C.8 should be stricken. These conditions should be removed from the permit because Jersey Sanitation has demonstrated that absent these conditions the permit will not violate the Act or Board regulations. The Board will remand this permit to the Agency with direction to issue the permit consistent with this opinion and order.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

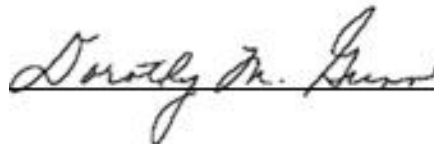
The Board directs the Agency to strike Conditions A.4, B.6, C.1, C.2, C.3, C.4, and C.8 and remands the permit back to the Illinois Environmental Protection Agency to issue the permit consistent with this opinion and order.

IT IS SO ORDERED.

Board Member E.Z. Kezelis dissents.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (2000)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.520 and 902, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of June 2001 by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board