ILLINOIS POLLUTION CONTROL BOARD
December 16, 1993

PERMATREAT OF ILLINOIS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 93-159
	)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

DISSENTING OPINION (by C.A. Manning and M. McFawn):

For the reasons set forth below, we cannot join in the decision of the majority. Rather, we respectfully dissent from that decision, which strikes conditions 6 through 9 as not being necessary for the proper closure of the waste pile at issue in this appeal. While undoubtedly well-intentioned, the decision of our colleagues has the effect of allowing PermaTreat to close its waste pile without determining whether the closure is in fact "clean" pursuant to the Board's RCRA closure regulations at 35 Ill. Adm. Code Part 725.[1] Indeed, the majority decision allows PermaTreat to finalize closure without conducting the very inspections necessary to determine whether that closure complies with the Board's own closure performance standards, specifically, the closure requirements for waste piles at Subpart G and L.

We believe that at the root of our colleagues' decision is an underlying belief the waste pile is not subject to RCRA. They believe the waste pile is an integral part of PermaTreat's manufacturing process and, as such, is exempt from the RCRA clean-closure requirements. Nevertheless, the majority examines the necessity of the contested conditions for proper closure under RCRA. We believe their underlying concern about the applicability of RCRA closure to the "pile", however, affected their analysis of

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[1] The majority opinion and the briefs reference 35 Ill. Adm. Code Part 725 as the applicable standards for closure of the "waste pile." While there may be an issue as to the applicability of Part 725 to Permatreat's facility rather than Part 724 of our regulations, like the majority, we will refer to Part 725 since there is no practical difference between the language and requirements of the pertinent sections of the two parts and neither party raised this question but instead relied upon Part 725. (But see, R. at 295.)

the contested conditions, and shaped, in part, their determination that conditions 6, 7, 8 and 9 have no relationship to the "closure" of the waste pile. We disagree.

Unlike the majority, we have no difficulty with concluding the pile constituted a "waste pile" under RCRA. The definition of "pile" at Section 720.110 is: "any non-contaminated accumulation of solid, non-flowing hazardous waste that is used for treatment or storage." Petitioner admits storing and treating hazardous waste accumulated in the subject pile. The waste stored and treated there was subsequently put into barrels and manifested for off-site disposal as a hazardous waste. Therefore, the waste pile is subject to either the RCRA permitting or the RCRA closure regulations. This Petitioner chose closure.[2]

PermaTreat's argument that the pile is not a RCRA waste pile is gratuitous and self-serving since it is a RCRA closure plan for the waste pile which brings the Petitioner to the Board in this proceeding. It is not this Board's function to determine whether the case was brought under the proper posture, but rather whether the case is cognizable under that posture. Therefore, in this RCRA appeal our duty is to appropriately apply the Environmental Protection Act and the Board's rules and regulations, and determine whether there would be a violation of either the Act or the rules if the closure plan were to be approved absent the contested violations.

As for the argument that the CCA solution may not be a hazardous waste because it drained on the drip pad for return to the wood treatment process, any leaked CCA would be a hazardous waste. Once leaked, the CCA solution is no longer exempt pursuant to the exemption cited by the majority at Section 721.104(c) because it has "exited" the manufacturing process unit. Since the waste pile is subject to RCRA, with no absolute exemption applicable to these facts, Petitioner is obligated to comply with the RCRA closure regulations. The four contested conditions require Petitioner to perform inspection and testing for the purpose of demonstrating compliance.

While the majority is correct in its recitation of the standard to be applied by the Board in reviewing the closure permit conditions applied by the Agency, the majority fails, in our opinion, to properly apply that standard. The Board must decide whether the Petitioner (not the Agency) has proven there would be no violations of the Environmental Protection Act if the requested

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[2] Permatreat elected to file a closure plan for the "waste pile" as the result of a pre-enforcement conference with the Illinois Environmental Protection Agency ("Agency"). (R. at 295.)

permit, absent the contested conditions, had been issued. Applied to the case before us, the question we must answer is whether Petitioner has proven the closure plan, as submitted by PermaTreat, would not violate the Act or the Board's rules if issued without the contested conditions. Based upon the evidence before us, it is our opinion PermaTreat failed to carry its burden of proof. As explained in more detail below, we would find that the record warrants the imposition of conditions 6 through 9. Absent these conditions, the clean closure requirements of 35 Ill. Adm. Code Part 725 would be violated.

Conditions 6 and 7

Condition 6 has two parts: (1) the concrete surface of the drip pad must be steam-cleaned and triple-rinsed under the supervision of the Marion Office of the Agency (R. at 419); and (2) an independent registered professional engineer must inspect the integrity of the concrete surface of the drip pad and the construction joints for cracks to determine whether migration of the CCA solution and seepage onto the soil may have occurred. (Id. at 420.) After the instant appeal was filed, PermaTreat agreed to perform the first part of condition 6 (steam cleaning), but opposed the engineer's "integrity" report and the imposition of condition 7 which would have, in the event of a professional engineer's report finding an integrity breach, required soil testing. We disagree with the majority's decision to allow the closure without these two conditions.

As to PermaTreat's argument that inspecting the drip pad and certifying it is free of cracks or defects is unrelated to the waste pile operation, we would find that in order for the Agency to verify the clean closure standards are met, such inspection is warranted. Section 725.358, Closure and Post-Closure Care (for Waste Piles), provides in pertinent part:

> At closure, the owner or operator must remove and decontaminate all waste residues, contaminated containment system components..., contaminated subsoils and equipment contaminated with waste and leachate, and manage them as hazardous waste ....

Petitioner did remove the waste pile itself and the contaminated mesh screen (R. at 315-324) and handled both as a hazardous waste in accordance with Section 725.358. Petitioner's obligation to comply with the remainder of Section 725.358 is the issue before us. The contested conditions address waste residues and contaminated subsoils. At this time, the Agency is not requiring that Petitioner remove contaminated containment system components, e.g. the drip pad. Condition 6 only requires Petitioner to inspect the containment system components to determine whether further contamination could have occurred, and if so, to what extent. Once that determination is made, Petitioner and the Agency will know

what further steps may be necessary to achieve full compliance with Section 725.358.

Much of the argument in the record is whether a crack existed at the time of the 1991 inspection. That argument is irrelevant. The contested portion of condition 6 only requires petitioner to look for cracks or evidence of impermeability under the specific portion of the drip pad (an 18' x 18' area) upon which the waste pile accumulated. Furthermore, since the area was covered during the 1991 inspection by the waste pile, the actual evidence of a crack could not even have been determined at the time the Agency imposed this contested condition.[3] Thus, we fail to understand the majority's rationale that conditions 6 and 7 are not supported by the record on the basis the Agency failed to prove the existence of a crack stemming from the 1991 inspection. We believe ascertaining the integrity of the drip pad was an appropriate endeavor in and of itself and moreover, because the waste pile materials covered the subject area, it would have been impossible for the Agency to clearly determine the presence of any crack without such an inspection.

The parties argue about whether the area near the pad was contaminated by CCA dripped from the waste pile or from treated lumber. These arguments aside, the inspection photos from the Agency's 1991 inspection, in our opinion, reveal staining on the edge of the drip pad and on the soil near the waste pile. (R. at 187, photo #5; R. at 186, photos ##3 and 4.) RCRA requires that the Agency determine whether this drainage or seepage originated from cracks in the concrete. (35 Ill. Adm. Code 725.353(a)(1);a waste pile should be on an impermeable base.) These inspection photographs raise the possibility the liquid drained through the concrete pad and seeped from the walls themselves, i.e. the pad's integrity was breached. Therefore, the integrity of the drip pad needs to be ascertained not only to determine whether there has been sub-soil contamination, but also whether soil near the waste pile was contaminated with CCA originating from the waste pile. Moreover, the inspection photos from 1991 demonstrate there was no berm around the waste pile area at the time of that inspection.

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[3] We note Petitioner waited to appeal the requirements that it inspect the drip pad for impermeability and the surrounding soil for possible contamination until five months after the conditions were imposed by the Agency. According to the record, the Agency conditioned approval of the second Closure Plan submitted by Petitioner (approval of the first having been denied) with the contested conditions on December 11, 1992. (R. at 366 - 375.) Petitioner did not then contest those conditions; not until May 13, 1993 did Petitioner seek to have the conditions deleted by the Agency.

Furthermore, Petitioner also admits washing down the drip pad routinely. This wastewater or other water combined with the dripped CCA, or the dripped CCA solution alone, could have easily gone over the side of the pad when there was no containment berm present, the slope of the pad towards the sump not necessarily being sufficient to contain it.

Our RCRA regulations provide other specific requirements for the proper operation of a waste pile: wind dispersal should be controlled (35 Ill. Adm. Code 725.351); the waste pile must be protected against run-on and run-off of water (35 Ill. Adm. Code 725.353 (a)(2), 725.353(a)(3) and 725.353(a)(4)); and there is a general prohibition on the wastes containing free liquids (35 Ill. Adm. Code 725.353(b)(2)). We find the evidence shows these regulations were not consistently satisfied when the waste pile was operated. Therefore, there are sufficient facts in the record demonstrating the CCA solution drained from the waste pile onto the drip pad and based upon the staining evidenced in the inspection photographs, most likely off of the drip pad and onto the surrounding soil. The waste pile sat on a mesh screen and pallets for the purpose of draining liquids. (R. at 322.) In 1991, there was no berm around the waste pile to prevent run-off. The record also contains no information regarding what, if any, steps the petitioner took to control wind dispersal. The Agency also testified one of the pallets on which the waste pile was to have rested was located off of the concrete edge. (Tr. at 70-E.) Given these Agency site inspection observations, the Petitioner did not present sufficient proof to satisfy its burden that the soil staining did not originate from the waste pile.

On the issue of whether the waste pile was "moist" or "dry" or, whether it contained free-flowing liquids, PermaTreat argued that on the "day of inspection" the waste pile was dry. (P.Br. at 9.) We find this fact unpersuasive as to whether the waste pile contributed to contamination on the site. It is an uncontested fact the waste pile was placed on a mesh screen for the specific purpose of accommodating drippage from the waste pile. In fact, the Petitioner admits the waste pile was placed at the top of the drip pad for the specific purpose of recapturing the liquid in its process (P.Br. at 9).

Collectively, these facts are sufficient to support the Agency's concern that minimal inspection and testing for contamination originating from the waste pile be done as part of the waste pile's closure under RCRA . Accordingly, imposition of conditions 6 and 7 are necessary to insure no violation of the RCRA clean closure requirements.

Conditions 8 and 9

Conditions 8 and 9 require PermaTreat to test the soils to the east and south of the drip pad to demonstrate "no soil [contamination] is present in the area surrounding the former waste pile". (R. at 420 and 421.) The conditions set forth the specific number of samples, the distance between samples and the depth of the samples. (R. at 420 and 421.) For the reasons below (as well as those discussed above in support of conditions 6 and 7), we find the testing requirements contained in conditions 8 and 9 proper.

We disagree with PermaTreat's argument and thus, the majority opinion, that conditions 8 and 9 should be stricken as unsupported by the record. PermaTreat argues the slope of drip pad would prevent seepage from flowing from the drip onto the soil obviating soil testing on the east and south sides of the drip pad. However, the 1991 inspection photographs show drainage or seepage off of the northeast portion of the drip pad from the area of the waste pile (R. at 187, photo #5) and from the south (Id. at 186, photo #3) and southwest (Id., photo #4). Also, the Agency's permit writer, William Sinnott, testified as to his observations of "liquid" on the dirt about a yard from the east side of the drip pad (Tr. at 60-64) and ponding of liquid on the south side of the drip pad (Tr. at 70-E - 70-F). We are also persuaded by the total lack of evidence in the record concerning PermaTreat's efforts to control wind dispersal. This lack of evidence raises the distinct possibility that hazardous waste could have blown onto the surrounding soil.

The general purpose of the RCRA closure plan is that after completion of the clean up, the site is to be free of contaminants; if it is not, or cannot be made so, the operator is required to provide post-closure care. (Section 725.358.) This evidence supports a finding the area around the former waste pile may have been contaminated due to its operation. (That is not to say it might not also have been contaminated by the manufacturing process). To determine whether contamination exists, and the extent of that contamination, conditions 8 and 9 are necessary. Without the application of these conditions, there can be no determination as to whether PermaTreat's actions to date have brought about clean-closure or whether further decontamination of the area around the former waste pile is required and/or, post-closure care is required pursuant to Section 725.358. Therefore, we would find conditions 8 and 9 are necessary and must be satisfied in order for Petitioner to comply with the applicable RCRA regulations.

CONCLUSION

In sum, we would conclude the RCRA closure regulations apply to this waste pile, and Petitioner has the burden of proving its Closure Plan would not allow for violations of the Act and the

corresponding regulations absent the contested conditions. We would find Petitioner failed to prove contamination from the waste pile did not occur, and does not now exist. Conditions 6 through 9, as written by the Agency, are necessary to determine whether such contamination exists, and if so to what extent, so that clean closure can be verified, or post-closure care implemented as necessary. Without conditions 6 through 9, Petitioner cannot demonstrate clean closure of its waste pile as required by the our RCRA regulations. Therefore, Petitioner has failed to prove there would be no violation of the Act absent the contested conditions.

For these reasons, we respectfully dissent.

Claire A. Manning
Chairman

Marili McFawn
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was submitted on the 7th day of January, 1994.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board