ILLINOIS POLLUTION CONTROL BOARD
February 2, 1989

JOHN SEXTON CONTRACTORS COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 88-139
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

DISSENTING OPINION (by J. Anderson and M. Nardulli):

We must respectfully dissent from the action of the majority in this case. By its action today, the majority has, we believe, risked seriously undermining the integrity of the solid waste permitting system and ignored both the Act and its own regulations relating to closure and post-closure care of solid waste management facilities.

At the outset, we wish to emphasize that we are not questioning the technical role the Agency must play in implementing any regulatory scheme. However, in any regulatory system, there must be statutory and regulatory provisions somewhere which enunciate that role by way of directives, criteria or other similar devices which guide or provide boundaries for Agency determinations. The problem with this case, in our view, is that the Agency's determinations are devoid of such underpinnings; indeed, the majority in its own determination on appeal has veered away from such underpinnings. We believe such an approach is inherently incompatible with the essential rationale for requiring a regulatory framework within which all decision-makers are to make their determinations. This unusually lengthy dissenting opinion reflects the nature and depth of our concern in this matter.

The Nature of Closure and Post-Closure Plan Applications

The majority essentially agrees with the Agency's view that a closure plan application is, in fact, a supplemental permit application (Res. Br. at 21; Op. at 4). The majority claims both Sections 21.1 and 22 of the Act as statutory authority for this view. However, Section 21.1 of the Act, which establishes the solid waste closure and post-closure financial assurance requirement, makes no reference to any such permit modification system. It specifically limits the Agency's options to approval or disapproval of the financial assures; in so doing, it stands

in stark contrast to the permit conditioning discretion conferred by Section 39(a) of the Act.

Nor can Section 22 of the Act, which sets forth the Board's general rulemaking authority, be cited as support for the proposition that a closure plan application is a supplemental permit application. First, that Section's list of Board regulatory powers includes a specific provision for requirements and standards relative to closure and post-closure care of hazardous waste disposal sites, yet is silent regarding non-hazardous solid waste disposal sites which are the subject of Section 21.1. Even though the introductory paragraph of Section 22 indicates the listed powers are not to be viewed as limiting the generality of the grant of regulatory authority to the Board, that grant of authority is itself limited to such regulations as "promote the purposes of this Title". The "purposes of this Title" as regards closure and post-closure care plans for non-hazardous solid waste sites is found exclusively in Section 21.1. Wishful thinking will not make it otherwise.

In adopting the closure and post-closure ("CPC") plan (35 Ill. Adm. Code 807, Subparts E and F), this Board in 1985 acted consistently with Section 21.1 (and by extension, inconsistently with its Opinion today). In the Section describing the purpose, scope and applicability of the regulations (35 Ill. Adm. Code 807.501) the Board explicitly states as follows:

1. Closure plans are not permits, but "will become permit conditions pursuant to Section 807.206" (subsection (b); emphasis added);

2. The closure and post-closure care plans are limited in purpose to forming the basis of the cost estimates and financial assurance required by Subpart F for disposal sites as well as for determining whether a unit is a disposal unit or indefinite storage unit, which must provide financial assurance (subsection (c)).

As to the former, the majority seeks to read out of the section the "will become" qualifier. It does so despite its own Opinion supporting the adopting of the temporary CPC regulations (IN THE MATTER OF: FINANCIAL ASSURANCE FOR CLOSURE AND POST-CLOSURE CARE OF WASTE DISPOSAL SITES (TEMPORARY RULES), R84-22B, OPINION OF THE BOARD, April 4, 1985).

Some background should be noted here. The temporary rules adopted in docket R84-22B bridged the gap between prior emergency rules (R84-22A) and the final rules (R84-22C) during the period of time an Economic Impact Study was underway. The emergency rules were preceeded by an even earlier effort; this earliest version of the CPC rules was proposed for first notice under the Administrative Procedure Act on July 19, 1984 (R84-22). It contained proposed section 35 Ill. Adm. Code 501(d), which

required existing disposal sites subject to the new regulations through operation of Section 21.1 to file their closure and post-closure care plans in the form of "applications for permit modification" pursuant to 35 Ill. Adm. Code 807.209(c) (emphasis added). Had this view prevailed, today's majority opinion could claim substance. Unfortunately for the majority, that view did not prevail: even before the emergency rules of docket R84-22(A) were promulgated, the second notice for R84-22 had dropped Section 501(d).

The reason or dropping this originally-proposed subsection is made clear in the April 4, 1985 Opinion of the Board in R84-22B, cited previously. That Opinion states that "[t]he closure and post-closure care plans will become conditions of the site permits" (pg. 15) (emphasis added), and reported that the Board had considered and rejected the possibility of adopting an alternative rule which "just requires preparation and maintenance of a plan even by permitted sites" (Ibid, pg. 15). Rejection of that alternative, it noted, was due to two reasons. First, in a scheme where permits are required "it seems unwise" to leave closure and post-closure elements out of the permit; second, "because the plan is essential to the cost estimate and amount of financial assurance, prior Agency review is necessary to accomplish the purposes of Section 21.1 of the Act". In the interim until full implementation of the CPC requirements, the Board stated "operators will be required to formalize plans only with the first permit modifications" (emphasis added) (Id.) The Opinion of the Board supporting adoption of the permanent rules which now exist (R84-22C, November 21, 1985) did not alter the scheme enunciated in support of the temporary rules.

In view of the foregoing it is clear beyond dispute that closure plan applications are not themselves applications for permit modifications and that, except at the very inception of docket R84-22, this Board has not viewed them as such. The decision to attach the closure plans to existing permits as conditions thereof was done for policy reasons, not because of a strained interpretation of Section 21.1 or Section 22, and was implemented as an adjunct to, rather than an integral part of, the permit modification process.

With respect to the point made by Section 807.501(c), namely, that closure plans are limited in purpose to satisfying the financial assurance requirements of Section 21.1 of the Act, the Board has likewise affirmed its position over the years. It did so in its Opinion in support in the adoption of final CPC regulations (IN THE MATTER OF: FINANCIAL ASSURANCE FOR CLOSURE AND POST-CLOSURE CARE OF WASTE DISPOSAL SITES (ECONOMIC IMPACT OF TEMPORARY REGULATIONS AND ADOPTION OF FINAL REGULATIONS), R84-22C, OPINION OF THE BOARD, November 21, 1985). That Opinion states, at page 1, as follows:

> "Public Act 83-775 became effective on September 24, 1983. Provisions of this law, which are fully set out below, prohibited certain non-hazardous waste disposal operations after March 1, 1985 without a performance bond or other security for the purpose of insuring closure of the site and post-closure care in accordance with the Environmental Protection Act and Board rules. Section 21.1(b) of the Act required the Board to adopt by January 1, 1985 rules which specified the type and amount of the bonds or other securities.
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> On June 8, 1984, the Board opened this Docket for the purpose of promulgating regulations implementing P. A. 83-775". (Emphasis added).

Again, on page 7, the Board stated the purposes of these rules:

> "The rules implement the bond requirement of Section 21.1 of the Act by requiring the preparation of closure and post-closure care plans, and cost estimates based on these plans. The operator is required to provide financial assurance in an amount equal to the cost estimate. Financial assurance can be given by several mechanisms, including a trust fund, surety bond, letter of credit, closure insurance, and, for non-commercial sites, self-insurance". [Emphasis added).

It is difficult to imagine how the Board could have more explicitly or more closely linked the closure and post-closure requirements of Subpart E with the financial assurance requirements of Subpart F. The closure and post-closure requirements, therefore, must be viewed not as stand-alone requirements but as necessary components of the financial assurance mechanism mandated by Section 21.1 of the Act. As such, the Board's power to regulate in this area is derived from and governed by Section 21.1 of the Act, not Section 22.

In sum, whatever difficulty the majority has in distinguishing an original closure plan application from a conventional permit application is of recent origin; as noted above, this Board has clearly and consistently articulated the difference between the two types of applications for most of the last five years. Given the policy reasons enunciated and the procedures adopted by the Board for "marrying" closure plans to facility permits, it is obvious that closure plan applications progressed down a separate administrative track until such time as approved, after which, for policy reasons, the plans became

conditions of the respective permits. This gradual approach to assimilation of closure plans (i.e., by incorporation with the next permit modification submitted by the applicant during the transition period) was carefully articulated and purposely designed to avoid an unmanageable administrative burden. To hold otherwise now, at the end of that period of transition, is to rewrite the history of the Board's closure and post-closure rules.

Policy Implications

Statutory and regulatory authority issues aside, we also do not agree with the policy position implicitly embraced by the majority in this case. This position is that the Agency should not be precluded, in imposing closure and post-closure care requirements as conditions of CPC plans, from reasonable reliance upon the current body of technical knowledge. It is true that some of the older permits issued by the Agency were issued without the benefit of today's technical knowledge. It is also true that today we have more knowledge of what can be harmful, and a better idea of how and where to monitor for these contaminants than we did even a few years ago. It is another thing, however, to conclude that the closure and post-closure plan approval process is the appropriate vehicle for updating requirements applicable to existing sites.

In its Opinion supporting the adoption of permanent regulations governing the preparation of closure and post-closure care plans and cost estimates, the Board noted the problems posed by the potential change in solid waste handling regulations (then under consideration by the Board in docket R84-17; now under consideration in docket R88-7). It unequivocally rejected the notion that the closure and post-closure rules then being adopted had any such "updating" effects, stating instead that "[t]he rules rely on the existing closure and post-closure care requirements for sanitary landfills in Part 807. These are subject to revision in R84-17. Operators may be required to base cost estimates on the existing regulations pending modification" (Emphasis added). In the Matter of: Financial Assurance for Closure and Post-Closure Care of Waste Disposal Sites (Economic Impact of Temporary Regulations and Adoption of Final Regulations), R84-22C (November 21, 1985, page 7). Sexton correctly observes that "the Board did not contemplate that the Agency would require everything in Section 807.316(a), as if the information had never been furnished previously" (Pet. Br. at 24, citing the Board's Opinion in R84-22C at pg. 18). Sexton might have added that neither the Agency nor any other participant in the R84-22 proceedings, including the authors of the Economic Impact Study (EcIS), suggested otherwise.

The Board has previously noted the shortcomings in the present Solid Waste Rules. It has emphasized the importance and urgency of modernizing the State's rules for the management of

non-hazardous wastes. In the Matter of: Development, Operating and Reporting Requirements For Non-Hazardous Waste Landfills, R88-7 (February 25, 1988, pages 1, 24, 25, 33, 48 and 62). Nevertheless, the Board should not allow the Agency to open up pre-existing permits to impose requirements (as special conditions to closure and post-closure plans or otherwise) which are not authorized by the Act or current Board regulations.

It cannot be overlooked that Sexton's permit is of relatively recent origin (1983-1984). Under examination at hearing, the Agency's permit reviewer, Mr. Schoenhard, was unable to identify any new "rules and regulations" which might require new special conditions, or any new wastestreams received or any groundwater monitoring results reported which might warrant imposition of changes to the approved groundwater monitoring plan (T. 19-33). Hence, even if this application were to be construed as re-opening the permit for reconsideration of existing permit conditions and terms, the Agency has failed to articulate persuasively why Sexton's permit should be so reconsidered and modified. It should also be noted that there were no suspect monitoring readings or other environmentally related concerns involved.

It is also important to remember that it is not the function of a closure and post-closure plan and its financial assurance instruments to serve as an environmental liability insurance policy. Such liability insurance policies, unlike CPC plans, relate to liability that may be incurred for actual or threatened violations of the Act; irrespective of the presence or absence of CPC plans or financial assurances, a site owner/operator remains liable under an enforcement action for any actual or threatened environmental "upsets" in violation of the Act or Board regulations. In fact, the CPC financial assurances are not available to the Agency or the site's owner/operator for use in addressing such liability.

Similarly, even though the requirements of the Act and Board regulations relative to closure and post-closure care and monitoring may change*, such changes do not affect the owner/operator's ongoing liability for any environmental damage. In other words, financial assurances for closure and post-closure care are intended solely to assure that funds will be available to the Agency to accomplish the closure and post-closure care provided for in the closure and post-closure care plans (permit conditions) in the event that the owner/operator

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* The Board notes that Section 22.17 of the Act required 5 years' monitoring of gas, water and settling at a "completed" sanitary landfill site at the time the Board's closure and post-closure rules were adopted. Since then, Section 22.17 has been amended to increase the monitoring requirement to 15 years (P.A. 85-1240, effective July 1, 1990).

fails to do so (see 35 Ill. Adm. Code 807.600, 807.620 and 807.622). Costs are to be estimated with respect to the area to be filled, costs of cover materials, and the cost of moving, grading, seeding and venting the cover at the most expensive point in the site's operating life (Id.; see also 35 Ill. Adm. Code 807.624). The financial assurance regulations provide that, when the operator completes closure and post-closure care, financial assurance is no longer required.

Thus, closure and post-closure plans and financial assurances are not designed to provide for remediation of releases, determination of the existence or non-existence of releases or threats of releases, or for any other purposes which may be appropriate to enforcement actions or removals. The Agency's attempted use of the closure and post-closure plan approval process for such purposes is improper and contrary to the best interests of the Agency and the environment. If, for instance, an apparent upset or release of wastes should occur at a facility operating or closed under an Agency-conditioned closure plan, the effect of such conditions could in some cases serve to limit the Agency's options. It is manifestly impossible for a closure plan, per se, to anticipate the actions and expenses which may be imposed or assumed in the event of an actual threat to the environment.

Finally, with respect to policy, one is left to ponder the meaning and purpose of the State's solid waste permitting system and the Board's strenuous efforts in R84-17 and R88-7 to develop new solid waste regulations. If the Agency can impose its current ideas upon permittees without regard either as to what the facility's permit has authorized to be done or as to what wastes have been received at the facility in the past, precisely what role does a permit play? Landfill operators hereafter have no assurance that the terms of their permits delineate the requirements with which they will actually be compelled to comply. Without a shred of evidence of violation of the Act or of environmental harm, such operators hereafter may be required to re-design their landfills in the eleventh hour of their operating lives to suit the Agency's latest concept of technical propriety. Similarly, for what purpose does this Board strive to update its solid waste regulations? Landfill operators hereafter have no assurance that the terms of Board regulations define the technical standards with which they will actually be compelled to comply. Without an opportunity to participate in rulemaking affecting their concerns, such operators hereafter may be required to restudy and redesign their landfills in the eleventh hour of their operating lives or, indeed, at any time for new landfill units, to suit the Agency's latest concept of technically appropriate requirements. The Agency has candidly admitted that these concepts may be untested, unpublished and highly subjective. They can be found in draft memos, in uncirculated guidelines, in unexplained "boiler plate" language lodged in the Agency's word-processing equipment, and in the

individual permit reviewer's subjective inclinations (T. 30-31,33-34,66-69). Even if one were to endorse the idea that the Agency can impose special conditions in CPC plans, we cannot understand how such unsupported concepts can be viewed as technically substantiated.

It is no answer to these concerns to say, as the majority does, that appeals may be taken to the Board from "incorrect" special conditions. Having thus authorized the Agency to use a CPC plan application to re-open for decision matters settled years ago in the permitting process and/or to impose updated engineering judgments untested by the rulemaking process, how will the Board review such special conditions? What criteria will it apply? Must such criteria relate to the provision of financial assurances? The majority asserts that the Agency may impose conditions on closure plans "so long as those conditions relate only to closure and post-closure care" (Op. at 4; emphasis in original). This supposed standard is of no value in real-world terms. Virtually no activity at a landfill is devoid of impact on its closure and post-closure care needs. Conversely, few if any "conditions" on closure and post-closure care requirements will have no impact on daily landfilling activities. That is, indeed,the point.

BURDEN OF PROOF

The majority correctly asserts that the burden of proof is on the applicant in permit appeal cases. Most of the majority's conclusions on the respective Special Conditions under appeal are premised upon Sexton's failure to carry this burden, noting in several cases that Sexton's "primary thrust" in support of its cause is "directed against the Agency-imposed special condition" (e.g., pg. 7, re: Special Condition 6). As Sexton noted (Pet. Br., 1-4), Sexton introduced three witnesses to establish its prima facie case; it contends that the burden of "going forward" thereby passed to the Agency.

We cannot but agree with Sexton for two reasons. First, Sexton's witnesses not only attacked the Agency's special conditions as not necessary, but also asserted that Sexton's plan as proposed was adequate. For example, in the extensive expert testimony by Mr. Eldredge on behalf of Sexton with regards to Special Condition(s) 17 (T.114-130), Mr. Eldredge not only asserts that the Agency conditions are unneeded (T.126), but implicitly and explicitly defends the adequacy of the Sexton plan as proposed and originally permitted by the Agency in 1984 (e.g., T.124, 127,128-129). Second, the Agency's permit reviewer utterly failed to articulate any authority for imposing conditions in 1988 that are different from those imposed in 1984 (T. 26-29); this Board has within its knowledge and may take notice of the fact that, contrary to the Agency permit reviewer's implicit assertion (T.26), no new Board rules and regulations have been adopted since 1984 that would warrant re-opening

Sexton's permit. Surely, something more than mere curiosity must be required of the Agency to allow it to summarily discard already established permit requirements.

THE SPECIAL CONDITIONS

This dissenting opinion would be incomplete without briefly discussing the contested special conditions which the majority has today ratified. It should be remembered that had the majority joined in our view of this case (i.e., that the Agency cannot unilaterally add conditions to CPC plans), the Agency, under Section 21.1 of this Act still could have refused to approve the plan, and could have stated the same reasons as support for its denial as it has stated in support of its conditions. Under no circumstances would these core issues have been prevented from being presented to this Board on appeal.

One should also note in passing that these conditions were evidently inserted by the Agency in substantial reliance upon apparently erroneous assumptions, e.g., the presumed receipt by Sexton of "thousands of gallons" of liquid and other special wastes. While it is the applicant's burden to provide the Agency with the information upon which the Agency will base its determinations, it is incumbent upon the Agency to reasonably apprise the applicant of what kinds of information will be required, particularly where data before the Agency (e.g., supplemental waste stream permits) is inherently suspect. It is obvious from the record of this proceeding that the mere grant of a supplemental waste stream permit does not necessarily mean that the permitted wastestream will be actually received, and that the Agency knew this (Tr. 51-53, 156). Nevertheless, the majority in effect authorizes the Agency to rely upon such information.

Special Condition 4 requires Sexton to prepare and file a separate closure and post-closure care plan for a "gas control facility". A revised CPC plan for the landfill and a separate CPC plan for the gas control activity is to be sent to the Agency within 90 days. It cannot be contended that a requirement to create a plan in the future, where the conclusions of such a future plan are unknown and unlimited in range, can serve as a legitimate basis for current "approval" of a plan or for determining the appropriate amount of financial assurance required at this time. Moreover, it is clear that the Agency intends by this condition to impose closure and post-closure care requirements that run beyond the 5-year statutory obligation imposed by Section 22.17 of the Act. Since the majority has determined that the closure plan requirements of Subpart E of its Part 807 rules may require this result, it should identify both such "longer period of time" as the Agency is authorized to require, and the specific regulation by which the Board has established such period.

In its Opinion (pg. 6), the majority notes with regard to Special Condition 4 (and elsewhere with regard to other Agency-imposed conditions) that "the Agency simply did not have enough information from Sexton to determine [appropriate gas control measures]" and that in the absence of such determination "any cost projection is inappropriate". This is manifestly true, and as true for the Agency as it is for Sexton. That being so, one again is led to conclude that the Agency's "approval" of Sexton's closure and post-closure care plans has no value as a basis for implementing the bond requirement of Section 21.1 of the Act, but rather has value, in the Agency's view, solely as an excuse to re-open matters previously settled by the facility's permit.

Special Condition 6 likewise requires Sexton to undertake future action having uncertain outcomes. In this case, that future action is a proposal for a leachate management program. No time limit for performance is specified. As noted previously, no hazardous wastes were deposited in the landfill as presumed by the Agency in devising this Special Condition. No cost impact was evidently considered by the Agency (although Sexton suggests that this requirement could result in requiring a leachate collection system retrofit costing $800,000). No support is cited by the Agency for the permit reviewer's "impression" that this condition is necessary. The majority thus today ratifies a condition which, besides being intrinsically incapable of serving as the basis for current "approval" of a closure plan or as the basis for determining the currently appropriate amount of financial assurance, is without support in the record.

Special Condition 17 shares the characteristics of Special Conditions 4 and 6 in that its subsections (a)(b) and (c) require Sexton to undertake future actions having uncertain outcomes. Subsection (a) requires Sexton to retest its groundwater monitoring wells for an expanded number of parameters for four quarters. Subsection (b) requires Sexton to propose by a supplemental permit request to be submitted within 60 days, a revised groundwater monitoring program, to include at least one additional up-gradient well and an unspecified number of additional downgradient wells. Subsection (c) requires Sexton to determine gradients and directions of groundwaters through the potential leachate migration pathways and to identify potentially impacted water sources. No timeframe for satisfaction of subsection (c) is provided. No new regulatory or other requirements are cited by the Agency in explanation as to why the groundwater monitoring program approved by the Agency in 1984 has been so altered. The outcomes and the range of outcomes from these conditions are unspecified. Once again, the majority has thus affirmed conditions which are unsuitable for serving as a basis for current approval of a CPC plan or for determining the currently appropriate amount of financial assurance.

Special Condition 19(b) imposes a "twice background" triggering number for initiation of assessment groundwater monitoring. Sexton correctly argues that this is arbitrary and

without statutory, regulatory or scientific basis. While it could be argued that Sexton's own proposal is at best ambiguous and arbitrary, that is not the point. The majority today ratifies wholly arbitrary conditions as a "cure" for ambiguity. Consider the hypothetical situation in which adjacent facilities may thus have completely different triggering numbers for the same parameter and where the downgradient facility "benefits" from the omissions and violations of its up-gradient neighbor: if, for instance, the up-gradient facility releases leachate containing 500 ppm tetrachlorodibenzo-p-dioxins into the groundwater, the downgradient facility's "triggering point", under the majority's opinion, becomes 1000 ppm. This is neither rational nor protective of the environment.

Special Condition 20 imposes conditions on the use of municipal wastewater treatment plant sludge as a soil conditioner. Sexton asserts this is subject solely to permitting requirements imposed by the Agency's Division of Water Pollution Control under the NPDES program. Here, we would concur with the outcome, if not the reasoning, of the majority. NPDES requirements clearly do not apply in this regard to the use of wastes in a sanitary landfill.

In summary, we believe that the majority, in its understandable desire to "do something" about the landfill situation, has overridden its own regulatory system, present and future; in a very real sense, the majority has encouraged instead a "desktop" regulation-by-permit-reviewer "system" to be reviewed by the Board, from scratch, case by case, in a contested case setting. This creates a chaotic, balkanized, environmentally unsubstantiated system for landfill design and operation, weakens enforcement, and cuts out the full public participation and careful scientific assessment otherwise available in a regulatory proceeding. We firmly believe that such an ad hoc system serves to weaken, not strengthen, true environmental protection.

For the foregoing reasons, we dissent from the opinion of the majority.

Joan G. Anderson
Joan Anderson, Board Member

Michael Nardulli
Michael Nardulli, Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 2nd day of March, 1989.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board