ILLINOIS POLLUTION CONTROL BOARD
February 23, 1989

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

OPINION OF THE BOARD (by B. Forcade):

Today's Opinion supports the Board's Order of February 2, 1989, in this matter.

This matter comes before the Board on the August 30, 1988 appeal by the Petitioner, John Sexton Contractors Company ("Sexton"), of certain conditions imposed by the Environmental Protection Agency ("Agency") in Sexton's closure and post-closure plan filed pursuant to the Environmental Protection Act ("Act"), Ill. Rev. Stat. ch. 111-1/2, par. 1001-52 (1988), for its Lansing-Sexton Landfill located in Cook County, Illinois.

The landfill is located on approximately 60 acres at 170th Street east of Torrance Avenue. The landfill was developed at an existing clay hole mined for the purpose of manufacturing bricks. On June 5, 1972, the Agency issued an Operational Permit for the installation and operation of the solid waste disposal site consisting of approximately 20 acres. On March 18, 1983, the Agency issued a supplemental permit allowing Sexton to operate on approximately 40 acres. Sexton has operated, and continues to operate, the site pursuant to those permits. The average annual waste received at the site is approximately 300,000 cubic yards. Petition at 2.

As originally filed, the appeal objected to "Special Conditions" 4, 17(b), and 19(b) imposed by the Agency on July 26, 1988, in its approval of the plan. The approved plan, including the Agency-imposed special conditions was granted in the form of a Supplemental Permit (No. 1988-084-SP).

On October 19, 1988, Sexton filed a Motion to Amend Petition and a First Amendment to Petition. The attempted amendment sought to additionally appeal Special Conditions 6, 17(a), 17(c). and 20. On October 26, 1988, the Agency filed its Objection to Petitioner's Motion to Amend Petition. On November 2, 1988,

Sexton filed a Response to Respondent's Objection to Petitioner's Motion to Amend Petition; however, by Order of October 28, 1988 (also filed with the Board on November 2, 1988), the Hearing Officer in this case had already allowed the Sexton motion and ordered the Motion to Amend Petition to be considered filed instanter.

Hearing was held as previously scheduled on November 3, 1988. Sexton called three witnesses, including Mr. James D. Schoenhard, the Agency permit reviewer, who was questioned by Sexton's counsel as under cross examination pursuant to Board rules. The Agency called no witnesses, relying instead upon its cross-examination of the Sexton witnesses. The attorney for the Village of Lansing and a reporter for the Lansing Times newspaper were present for some of the hearing, no other members of the public attended the hearing.

Sexton filed its brief on December 9, 1988; the Agency filed its brief on December 21, 1988. Since the "hard copies" of Sexton's brief were received on December 9, 1988, one day after the due date set by the Hearing Officer, Sexton filed a Motion for Leave to file Brief Instanter (Sexton had provided the Board and the Agency with a Faxed copy of the Brief on December 8, 1988). That Motion was granted by the Board on December 15, 1988.

On January 3, 1989, Sexton filed a Motion for Leave to File Petitioner's Response to Respondent's Brief Instanter and Petitioner's Response to Respondent's Brief. The Board granted the motion on January 5, 1989.

The regulations at issue in this proceeding are those relating to Solid Waste facilities, 35 Ill. Adm. Code Part 807. The regulations pertaining to Closure and Post-Closure Care, SubPart E, Sections 807.501-807.524, are particularly relevant. Those regulations were adopted in proceeding R84-22, and published at 9 Ill. Reg. 6722 (May 10, 1985) (effective April 29, 1985 as temporary rules) and at 9 Ill. Reg 18942 (Dec. 6, 1985) (effective November 25,1985 as permanent rules).

TIMELINESS OF THE FIRST AMENDMENT TO PETITION

As its first argument in its closing brief, the Agency contends that the Hearing Officer improperly allowed Sexton to amend its petition to seek review of conditions 6, 17(a), 17(c), and 19(b) after the 35-day deadline for appeals prescribed by Section 40(a) of the Act. The Agency asserts that the First Amendment to Petition is "tantamount to a new appeal" and was thus not timely filed. Sexton argues that the additional counts caused no prejudice to the Agency, that disallowance of its motion would cause prejudice to Sexton, and that such amendment is authorized by Board procedural rules. See 35 Ill. Adm. Code 103.210.

Based on the facts presented here, the Board agrees with Sexton and the Hearing Officer. Sexton timely filed its appeal pursuant to Section 40(a) of the Act so as to confer jurisdiction upon the Board to review the "decision of the Agency." This is conditioned, however, upon the proviso that no undue surprise results from such an amendment. No such undue surprise is alleged by the Agency.

The Board specifically does not address the situation where an amendment is opposed by argument and facts to show that the amendment would adversely affect an opposing party's ability to prepare its case. Nor does the Board address what effect a subsequently filed amendment would have on the timeframes for Board decision as stated in the Act. These questions the Board must leave for another day.

THE NATURE OF CLOSURE AND POST-CLOSURE PLAN APPLICATIONS

Sexton advances one argument as grounds for striking Special Conditions 4, 6, and 17 in their entirety. That argument is that the Agency "improperly" attempted to treat Sexton's Closure and Post-closure Plan application as a developmental permit application. As the Sexton brief puts it, "[t]he Agency's permit reviewer in this case, James D. Schoenhard, stated clearly for the record that every such request is, in effect, an application which allows the Agency to review again all of the developmental, design, construction, operation, and monitoring activities at the site." Sexton Post-Hearing Brief at 23-24 (citing R. 59). Sexton asserts that in so doing, "the Agency is improperly using the March 1, 1988 deadline for closure/post-closure care permit applications as an opportunity to "clean house" by getting rid of all the old Operating Permits that have what the Agency deems to be "inadequate" monitoring programs for groundwater and methane gas, and "inadequate" provisions for leachate and/or gas collection or treatment, all as judged by draft guidance which the Agency is applying as if they were rules." Sexton Post-Hearing Brief at 25.

For its part, the Agency asserts, on behalf of each of the contested conditions, that such condition is required to generate information sufficient to assure the Agency that the site will not present a threat to human health or the environment (or that the site would be closed in a manner that would prevent such a threat, or that the site would not violate the Act or Board Regulations). In defense of Special Condition 17, the Agency states its position succinctly:

> Since a closure plan does seek to modify a solid waste management site, the Agency was correct in considering Sexton's Closure and Post-Closure Plan Application as a supplemental permit application. Agency Response at 21.

In its response to the Agency's brief, Sexton argues that the Agency "did not find that Sexton's current or proposed programs would violate the Act if implemented" or that the Agency's conditions 4, 6, and 17 were necessary to ensure compliance. Rather, these conditions "were imposed for the express purpose of obtaining further information in the form of new permit applications." Sexton Reply at 5.

Sexton then states that if the Board allows such conditions, "it will create a situation in which an applicant for a permit will never obtain a single, definitive permit from the Agency." Id. (emphasis in original). Sexton suggests that the Agency could have addressed its concerns either through enforcement actions to obtain an Order from the Board to remedy deficient programs, Id. at 6, or through permit conditions which require a certain level of performance rather than a continuing permit application process. Id. at 7-8.

The Board does not construe its solid waste closure and post-closure rules, 35 Ill. Adm. Code 807.500-807.666, as creating a sweeping mandate to rewrite all provisions of older solid waste permits. However, the closure and post-closure care plan submitted to the Agency is a permit application, and the Agency is free to review that application and impose permit conditions in the usual manner so long as those conditions relate only to closure and post-closure care.

The Board's closure and post-closure care rules were adopted under the statutory authority of Section 21.1 of the Act relating to financial assurance as well as Section 22 of the Act, the general statutory authority to adopt regulations governing Land Pollution and Refuse Disposal. See 9 Ill. Reg. 6723 (May 10, 1985) & 9 Ill. Reg. 18943 (Dec. 6, 1985). As such, those regulations impose both substantive and financial requirements on facilities. All of Sexton's prior permits were issued before the effective date of these rules. Sexton's closure and post-closure care plan submissions and the Agency's action on that plan all occurred after the effective date of the regulations.

On its face, Section 807.503(a), in requiring a closure plan, characterizes such a plan as "a condition of the site permit." Id. (emphasis added). Identical language is found in Rule 807.523(a) regarding post-closure care plans. Only the Agency has authorization under the Act to create, modify, or delete a permit condition. Those documents which are filed with the Agency seeking to add, modify, or delete a permit condition are, of necessity, a permit application.

Section 807.503 (d) requires that, "The closure plan shall be included in the permit application pursuant to Section 807.205." In addition, Section 807.504 defines the submission of

any modification of a closure plan as a "permit application." The regulatory language is clear that the initial submission of a closure plan, or the submission of amendments to that plan, constitute a permit application.

The permit application which is submitted must demonstrate that the facility will not violate provisions of the Act or Board regulations relating to closure or post-closure care. If the permit application does not demonstrate compliance, the Agency may deny the permit application or it may impose conditions which it believes are necessary to ensure compliance. In no event, however, may the Agency decision or its conditions be premised on matters other than closure and post-closure care compliance provisions.

Sexton argues that a permit condition requiring a new permit application leads to a never ending cycle of permit applications, having no finality. This argument has greater persuasion where, as with the NPDES permit system, permits are subject to complete renewal every five years; here permits are not renewed every few years. Also, this argument ignores the fact that a permit condition requiring a new application, for example pertaining to the gas collection system, does not open review of other aspects of the previously approved permit.

If the hypothetical gas collection system were deemed inadequate the Agency could deny the permit application outright; such a decision would require a new permit application covering all aspects of closure and post-closure care. In addition, denial of the application would place the facility in immediate violation of Section 21.1 of the Act if the facility continued to operate, since the facility would have no closure plan upon which to base the cost estimates and required financial assurance. See Ill. Rev. Stat. ch. 111 1/2, par. 1021.1(a) (1988).

In the alternative, the Agency could approve the permit in major part, but require a new permit application pertaining only to the gas collection system. The Board believes this second approach would reduce rather than increase the chances for a never ending cycle of permit applications.

Whichever option the Agency chooses to pursue, Sexton is free to file an appeal of the Agency decision. If the Agency decision on the hypothetical gas collection system is incorrect, this Board is free to order the offending condition stricken or to order the denied permit to issue. Also, contrary to Sexton's arguments, the Board does not believe, based on the particular facts of this case, that the Agency must resort to filing an enforcement action against a permittee in order to secure an adequate and protective permit.

THE BURDEN OF PROOF IN PERMIT APPEALS

The standard of review in permit appeals is stated as follows:

> [T]he sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Environmental Protection Act would have occurred if the requested permit had been issued.
>
> Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3d Dist. 1987); Browning-Ferris Industries of Illinois, Inc. v. EPA, No. PCB 84-136, May 5, 1988 (citation omitted), aff'd, No. 2-88-0548, slip op. (2d Dist. Feb. 3, 1989).

It is the permit applicant, and not the Agency, which bears the burden of providing the technical information necessary to demonstrate that no violation would occur:

> The Board emphasizes that the burden of proof is on [the applicant], not the Agency. The Agency has no obligation to conduct ... monitoring or scientific testing of [the applicant's] facility. [The applicant] is entitled to a favorable decision if, and only if, it has successfully ... [borne its burden of proof].
>
> Browning-Ferris Industries of Illinois, Inc. v. EPA, No. PCB 84-136, at 8 (emphasis in original).

Therefore, the primary focus must remain on the adequacy of the permit application and the information submitted by the applicant to the Agency.

Sexton contends that it has met its burden of proof in that Sexton "went forward" and established a prima facie case. Sexton argues that the burden then shifted to the Agency to prove that the conditions it imposed were necessary. Sexton concludes that the Agency has failed to prove the necessity of the challenged conditions. Sexton Post-Hearing Brief at 1-4.

Whatever the merit of Sexton's initial proposition, Sexton fails to direct the Board's attention to facts in the record that tend to support its position. Instead, Sexton points to several conclusory remarks of its witnesses made before the Board. This leaves the Board without the benefit of facts from which it can exercise its independent judgment as to the merits of Sexton's proposed closure plan.

In this type of proceeding, the applicant appeals Agency-imposed conditions. However, it is the permit application that undergoes the initial Board review. To prevail, the applicant must prove how the application as submitted was environmentally sound. Whether the Board affirms or rejects challenged conditions is primarily dependent on the facts that the applicant made available to the Agency when the Agency made its permit decision. Reiteration of the desired conclusion offers no factual support for an independent evaluation. Therefore, conclusory arguments do not prove that the Agency erred on the threshhold issue: did the facts available to the Agency support a conclusion that no violation of the Act and Board regulations would have occurred had the permit issued as requested? A permit applicant cannot prevail by simply limiting its arguments to the impropriety of the Agency-imposed conditions without showing the propriety of its own requested conditions. Cf. Browning-Ferris Industries of Illinois, Inc. v. EPA, No. 2-88-0548, slip op. at 6-7 & 13-14 (2d Dist. Feb. 3, 1989).

THE SUBSTANTIVE CASE: SPECIAL CONDITIONS 4, 6, 17, 19(b), AND 20

Special Condition 4: Gas Control Devices

Special Condition 4 would require Sexton to estimate the duration of gas generation by the closed landfill and submit a plan to the Agency outlining how it intends to separately close its gas control system. Sexton's proposed closure plan outlined the number, locations, and type of passive gas flares that it had installed and that it intended to install at the site. It also asserted, "Upon closure, the gas may be used for electricity generation." Agency Record, Ex. 26, Par. 8G. Sexton's proposed plan stated no more.

The thrust of Sexton's arguments in support of its proposed plan are directed against the Agency-imposed special condition: the Agency erroneously assumes that Sexton will construct a system for gas use; that any such system for use would not be a waste disposal system; that the condition contradicts the permit granted passive flares by Special Condition 2; that requiring the prospective removal of gas flares after gas generation has ceased would require site activity beyond five years; and that allowing such a condition would effectively authorize the Agency to require Sexton to install an elaborate, expensive positive gas extraction system. Sexton Post-Hearing Brief at 32-35. Sexton does not indicate where, in the information available to the Agency, there is any indication of how long the landfill will continue to generate gas or when and how Sexton will remove the gas flares. The Agency highlights this lack of information and indicates that a premature closure could result in air and/or water pollution. Agency Response at 10-14.

The Agency points out in its response brief that it nowhere suggested that any gas control measures in addition to those proposed by Sexton are necessary or more appropriate. Agency Response at 14. The Board notes this fact. It also notes that Sexton's arguments as to the extreme cost of complying with this condition are largely misplaced. The Agency simply did not have enough information from Sexton to determine what gas control measures are appropriate for this site. In the absence of such a determination, any cost projection is inappropriate.

There was an absence of information before the Agency on July 26, 1988, that would demonstrate how and when Sexton would close its gas control system in a manner which assures no violation of the Act or Board rules. Therefore, the Board must conclude that Sexton has failed in its burden of proof of demonstrating that the plan as submitted was adequate. Agency-imposed Special Condition 4 simply requires submission of this essential information. Therefore, the Board finds that this condition is necessary to accomplish the purposes of the Act.

Special Condition 6: Leachate Management

Special Condition 6 would require Sexton to estimate the volume and quality of leachate it anticipates the landfill will generate, how the leachate will be attenuated, how its elevation will be stabilized, and how Sexton proposes to manage the leachate. Sexton's proposed plan indicated that Sexton might one day remove leachate through its passive gas control flares, Agency Record, Ex. 26, Par. 8G, and that Sexton would monitor the site for leachate "weeps," "seeps," and "popouts" through the final cover. Agency Record, Ex. 26, Par. 11, 12, 13 & 15. Sexton also planned to monitor the groundwater for contamination. Agency Record, Ex. 26, Par. 14.

The primary thrust of Sexton's arguments in support of its proposed plan are directed against the Agency-imposed special condition: that the Agency imposed this condition based on its misconceptions regarding the nature of the wastes placed in the landfill and the existing leachate level, that the Agency failed to show any inadequacy with the proposed method of leachate withdrawal, and that the installation of an alternative system for leachate withdrawal would be costly. Sexton Post-Hearing Brief at 36-38. Although Sexton's closure plan outlined a proposed method of leachate withdrawal, Sexton does not indicate how, based on the information available to the Agency, the Agency could have ascertained the existing leachate level, the amount and quality of the leachate that the landfill would generate, how Sexton would determine that such withdrawal was necessary, and the method by which Sexton proposed to manage this leachate. The Agency highlights these deficiencies, and further attacks the proposed method of withdrawal. Agency Response at 15-19.

The Board notes that Special Condition 6 nowhere suggests that any specific leachate withdrawal measures other than those proposed by Sexton are necessary or more appropriate. It also notes that Sexton's arguments as to the extreme cost of complying with this condition are largely misplaced. The Agency simply did not have enough information from Sexton to determine what leachate management measures are appropriate for this site. In the absence of such a determination, any cost projection is inappropriate.

There was no information before the Agency on July 26, 1988, that would indicate the volume and quality of leachate this site would generate, and which demonstrates that Sexton would manage that leachate in a manner which assures no violation of the Act or Board rules would occur. The Board must conclude that Sexton has failed in its burden of proof of showing its plan as submitted was adequate. The Agency-imposed Special Condition 6 simply requires submission of this essential information. The Board therefore concludes this condition is necessary to accomplish the purposes of the Act.

Special Conditions 17a, 17b, and 17c: Groundwater Monitoring

Special Condition 17a would require Sexton to monitor the background groundwater quality at the site for four quarters for 31 physical and chemical parameters and four parameters relating to the groundwater elevation and well depth. Sexton's proposed closure plan does not provide for additional background groundwater quality or groundwater depth characterization. See Agency Record, Ex. 25 & Ex. 26, Par 14, Att. A.

Special Condition 17b would require Sexton to install at least one upgradient and one additional downgradient monitoring well in the deep aquifer underlying the site. Sexton's proposed plan added no new wells to the two presently installed in the deep aquifer and located at the two far ends of the northern boundary. See Agency Record, Ex. 25 & Ex. 26, Par. 14.

Special Condition 17c would require Sexton to determine the gradients and groundwater flow directions through the potential leachate migration pathways underlying the landfill, and to identify the water resources potentially affected by any leachate flows from the fill. Sexton's proposed plan contains nothing to this effect, but the Agency record does include some limited and some generalized information about the locations of the underlying aquifers, the direction of groundwater flow, and the location of local surface waters. See, e.g., Agency Record, Ex. 1, 8 & 25.

Sexton contends that these special conditions duplicate previous submissions to the Agency made in 1983, when Sexton sought approval of its groundwater monitoring regime for the

site. See Agency Record, Ex. 25. Sexton also argues that the Agency-required upgradient monitoring well in the deep aquifer is unnecessary. Sexton Post-Hearing Brief at 39-41. The Agency counters that upon review of the information it had about Sexton's facility, certain inadequacies became apparent. Agency Response at 20-27.

With regard to the groundwater testing required by Special Condition 17a, the Board notes that the parties' relative postions are not as disparate as a superficial glance would make it appear. The required groundwater monitoring involves two aspects: testing to establish the background groundwater quality and ongoing testing to monitor that quality. As to the 31 physical and chemical parameters imposed for background testing, Sexton submitted a 1983 permit application that provided for semi-annual background testing for 23 of the 31 Agency-imposed parameters. Agency Record, Ex. 25 & 31.

Sexton has posed no objection to any specific parameter of the 31 that the Agency has required for background testing. Sexton's objection appears limited to the idea that the Agency will require any additional background testing at all. As to the eight parameters required for ongoing quarterly testing, Sexton has posed no objection. Therefore, the conflict is actually limited to the adequacy of the background groundwater quality data that Sexton has already obtained and submitted to the Agency.

Initially, the Board notes that Sexton challenges the Agency-imposed regime of background groundwater testing, but Sexton fails to argue that its own monitoring scheme was adequate. An examination of the record before the Agency supports a conclusion that Sexton has failed to prove that its proposed groundwater monitoring scheme effectively characterized the background quality of the local groundwater.

The record before the Agency indicates that Sexton had performed one round of background groundwater quality testing in the Spring of 1983. R. 30; Agency Record, Ex. 25. Further, the Agency's evaluation of the information gained from Sexton's ongoing quarterly monitoring resulted in the following observation:

> Results of the groundwater data indicate that substantial fluctuations exist between consequtive [sic] quarterly samples. The data was difficult to analyze and the problems may rest with the sampling and analytical methods. ...
>
> Agency Record, Ex. 25 (July 21, 1988 internal Agency memo by A. Tin).

Fluctuations in the ongoing quarterly results raise significant questions about the reliability of the existing background groundwater quality data.

The record also indicates that Sexton obtained permits to receive liquid and liquid-bearing wastes containing heavy metals, solvents, and reagents. Agency Record, Ex. 1-7, 9-18 & 22-23. Sexton argues that a permit to accept a waste does not mean that that waste is resident in the fill. Sexton argues that these wastes are not present in the fill. However, Sexton presents no tangible evidence to this effect, and it does not direct the Board's attention to any affirmative assertion before the Agency that it did not accept these permitted wastes at the site. As testified by the Agency permit reviewer, Mr. Schoenhard, at hearing under adverse examination by Sexton:

> Q. What is it about the parameters ... [contained in an Agency guideline] that do not appear ... [in Sexton's 1983 permit application] that caused you to now test for those parameters?
>
> A. This landfill had accepted a lot of liquid waste and a lot of metal wastes, according to the record, and a more complete list might help identify wheter any of those constituents of that liquid waste was moving out of the landfill and into the groundwater.
>
> Q. You don't know for a fact that the Sexton people accepted those liquid or metal wastes, do you?
>
> A. I didn't see them go into the landfill, nor do I know anybody that does. I just read it in the permit application that was approved.
>
> Q. What you mean to say is that Sexton had permission to take such wastes should they ever get the contract to do so, is that what you mean?
>
> A. Yes.
>
> Q. You don't know whether they ever got the contracts to do it or deposited those wastes in that landfill, do you?
>
> A. No.
>
> R. 32-33.

The burden was on Sexton to prove that its closure plan assured that no violation of the Act would occur by groundwater migration of waste constituents. In the context of establishing background contamination levels, this burden would have required Sexton to demonstrate that the Agency record contained reliable information on the background concentration of the approximately 20 to 30 chemicals subject to testing. However, Sexton does not direct the Board's attention to any data that would tend to extablish any background concentration for any parameter.

Sexton has failed to show any results indicating the background groundwater quality. Therefore, the Board concludes that Sexton has failed to prove the sufficiency of its closure plan as submitted to the Agency. Bolstering this conclusion are the Agency's concern over fluctuations in the monitoring data submitted by Sexton and uncertainties as to the volumes of wastes containing toxic components and liquids, if any, resident in the fill. Special Condition 17a is affirmed.

With regard to the additional groundwater monitoring wells required by Special Condition 17b, Sexton challenges the need for an upgradient well and any additional downgradient wells in the deep aquifer. Sexton's Director of Regulatory Affairs testified that such wells could cost up to $14,000 each. R. 174. The Board must begin its analysis of the "need" for these wells with consideration of the merits of Sexton's proposed plan. The "need" for any additional wells will depend on the information before the Agency when it made its permit decision, as well as on consideration of the purpose for groundwater monitoring.

The record indicates that any contaminant migration from the bottom of the fill would likely enter the deep aquifer. It also indicates that Sexton apparently installed four wells in the deep aquifer in 1974, but only the two on the northern site boundary were operable. Agency Record, Ex. 8. However, Sexton has not submitted information to the Agency that would adequately define the direction of groundwater flow in the deep aquifer. Sexton's plan would provide for monitoring in the deep aquifer only from the two existing wells. The Agency stated its position with regard to the deep wells in its post-hearing brief:

> The two deep wells monitor a water bearing zone beneath the landfill. It is the monitoring system in the deeper water bearing zone that is inadequate. Information shows that in some places, there may be as little as four feet of clay containment around the landfill. Mr. Schoenhard's permit review showed that Sexton had permission to accept wastes which contained constituents that could break down the clay containment. The Agency's concern was that the liquid could migrate through the

> clay containment and enter the groundwater around the facility. The monitoring system for the deeper aquifer is not adequate to determine if the site has affected the groundwater below the landfill.
>
> Agency Response at 24.

Some of the mentioned wastes permitted for the site are noted in the preceding discussion of Special Condition 17a. The Agency record includes an additional appraisal of the information available on the Sexton landfill:

> The facility should be required to re-evaluate their groundwater monitoring program since 4 years have passed, the Agency's groundwater review process has expanded, and there has been substantial residential development around the area. A proposal to update the system should be required. A copy of the Groundwater Monitoring Network should be sent. The following items should be considered in the review process:
>
> 1. The groundwater flow direction has not been confirmed in the deeper aquifer. There is no upgradient deep well to perform triangulation data. The existing assumption of a northward flow is based on regional flow patterns toward the river. The third well will provide the necessary information to evaluate whether there may be east or west components.
>
> 2. Depending on the determination of the actual flow direction, at least two more nested wells should be required at the north boundary if the proposed groundwater flow direction is confirmed. At present, there are only two nested wells to monitor approximately 1500 ft. The facility may also need to monitor on the east and west boundary depending on groundwater flow directions.
>
> 3. The facility should put in additional borings and/or piezometers to update the 1971 data and to further characterize the presence of sand lenses. The borings should be continuously sampled, and the boring logs and well completion reports be correctly labeled in accordance with current Agency guidelines.

> 6. Is it appropriate to ask for a map of the locations of the private wells which are around the landfill?
>
> Agency Record, Ex. 25 (July 21, 1988 internal Agency memo by A. Tin).

The Board concludes that Sexton has failed in its burden as it relates to groundwater monitoring of the deep aquifer. Numerous informational deficiencies reside in the Agency record. Sexton has neither dispelled these deficiencies nor otherwise proven its plan adequate to assure no violation of the Act before the Board. Special Condition 17b is affirmed.

As an aside, the Board notes Section 807.624 of its solid waste rules. This rule sets forth an interim formula for closure and post-closure care cost estimates. It provides that the minimum number of groundwater monitoring wells that a facililty operator may use as a basis for cost estimation is three. 35 Ill. Adm. Code 807.624(d)(7) (1986). Therefore, the Agency position that two wells are inadequate to characterize groundwater quality in the deep aquifer is not inconsistent with Board regulations. As stated by the Board in adopting Section 807.624:

> A minimal program involves one well upgradient to establish the background water quality, and two wells downgradient to detect leaks. The Board has therefore specified three as a minimal number of wells to be used in the formula.
>
> In re: Financial Assurance for Closure and Post-Closure Care of Waste Disposal Sites, R84-22C, Final Order at 32 (Nov. 21, 1985).

This bolsters the Agency conclusion that Sexton's plan for only two downstream wells in the deep aquifer is inadequate.

With regard to the additional groundwater information required by Special Condition 17c, Sexton challenges the need for additional information relating the directions of groundwater flows, leachate migration pathways, and potentially impacted water resources, as required by this condition. However, Sexton fails to highlight the adequacy of the groundwater information in the record. The Agency takes the position that the information in the record is insufficient and that the required information is necessary for proper site appraisal. The preceding discussion of Special Condition 17b cites the Agency's appraisal of the existing information. In light of the information available to the Agency and the need for the groundwater information required, the Board concludes that Sexton has failed to prove the adequacy

of its closure plan with regard to the information required by Special Condition 17c. Special Condition 17c is affirmed.

There was a lack of information before the Agency on July 26, 1988 that would have aided the Agency in adequately assessing the local groundwater flow characteristics and background groundwater quality. Further, Sexton's proposed closure plan would not have permitted an accurate determination of groundwater contamination from the landfill. Therefore, the Board must conclude that Sexton has failed in its burden of proof of demonstrating that the plan as submitted was adequate. The totality of Agency-imposed Special Condition 17 simply requires submission of this essential information. Therefore, the Board finds that this condition is necessary to accomplish the purposes of the Act.

Having concluded its consideration of Special Condition 17, the Board finds it useful to note another aspect of the conflict between the parties. Special Condition 17b includes the following language: "Propose a revised ground water monitoring program, based on draft Groundwater Monitoring Network design guidelines." Agency Record, Ex. 31, par. 17b. Sexton contends that the Agency thereby impermissibly attempted to impose its draft guidelines as rules that it had not subjected to notice and comment as required by law. Sexton Post-Hearing Brief at 28-31; see Ill. Rev. Stat. ch. 127, par. 1001-1021 (1988) (Administrative Procedure Act, or "APA"). The Agency concedes that it cannot impose such draft documents as rules, and responds that it does not now seek to do so. Agency Response at 23. The Board finds no conflict. The Agency cannot impose draft guidelines as rules. See APA at par. 1005(b). However, the Agency can direct a permitee's attention to any readily available source for guidance and further elaboration. In so noting, the Board does not affirm or condone the imposition of any non-statutory, non-regulatory materials as permit requirements.

Special Condition 19(b): The "Triggering Number"

In its closing brief, Sexton asserts that the Agency's choice of a "twice over background" test for "triggering" further evaluation of apparent groundwater data variations is arbitrary. Sexton Post-Hearing Brief at 42. Petitioner asserts that Sexton's own proposal, that further analysis shall be triggered by "distinctive differences," would allow Sexton to consider all factors, including the potential impact of seasonal fluctuations. The Agency asserts that the term "distinctive differences," as used by Sexton, is undefined and would invite disagreement over the subjective meaning of what constitutes a "distinctive difference." Agency Response at 27-28. Mr. Schoenhard, the Agency's permit reviewer, testified that the "two times" number was imposed based upon his case-specific attempt to provide a definite number in an admittedly "gray area." R. 67-68. He suggested that the Agency's "trigger" standard is more

fair, and that it is a "larger number than you might get from significant difference when you relate this significant difference to statistical value." R. 69. In any event, as the Agency noted, Sexton did not demonstrate that no violation of the Act or Board regulations would have occurred using its more subjective triggering mechanism. The Board also notes that Sexton did not demonstrate that it was prejudiced by the Agency's choice and did not challenge Mr. Schoenhard's assertion that the Agency's triggering mechanism might be more fair than its own.

It is clear to this Board that the Agency's "trigger" standard is, as Sexton contends, "arbitrary," in the sense that it reflects an individual's best judgment rather than an adopted regulatory standard. It is within this Board's technical knowledge that, for some constituents, a "twice over background" level could be unacceptably lax in some cases and unacceptably stringent in others. It is equally clear that the Sexton proposal, based on "distinctive differences," is at best vague and ambiguous. The Board would not relish the obligation to provide a precise interpretation of that term in the context of an enforcement proceeding.

Finally, the Board notes that should the "trigger" level be exceeded Sexton is not required to dig up the waste or redesign the landfill. Nor is Sexton insulated from enforcement if the "trigger" is not exceeded. The only obligation if the "trigger" is exceeded is that more monitoring data needs to be acquired. In this circumstance, the Board must hold that Sexton has failed to demonstrate that the requested condition, "distinctive differences," would not cause a violation of the Act or Board regulations. The Agency has provided a reasonable explanation for the "twice over background" level and the Board affirms that value.

Special Condition 20: The Use of Sludge for Soil Conditioning

Sexton argues against the imposition of Special Condition 20, which provides as follows:

> If municipal wastewater treatment plant sludge is to be used as a soil conditioner, the following will apply:
>
> a. A waste stream permit will be obtained by the site to dispose of sludge.
>
> b. Sludge will be mixed with soil at a ratio of one part soil to one part sludge to produce a "modified soil" for soil dressing.

c. The total thickness of "modified soil" shall be six (6) inches on the top plateau and three (3) inches on side slopes, unless the applicant can demonstrate material stability at greater thickness.

Agency Record, Ex. 31, par. 20.

Sexton asserts that the generation, transportation, and application of wastewater treatment plant sludge is administered solely by the Agency's Division of Water Pollution Control under 35 Ill. Adm. Code Part 309 rather than by the Division of Land Pollution Control under Part 807. In support of its contention, Sexton points to the exemption of generators and haulers of such sludges from the special waste hauling requirements. See 35 Ill. Adm. Code 809.211(c). Sexton further argues that in the context of use as a soil conditioner, such sludges are essentially the same as compost or fertilizers, which are products (not wastes) and therefore not subject to Part 807 regulations. Sexton Post-Hearing Brief at 44-45.

The Agency responds that such sludges are specifically included in the definition of "waste" at 35 Ill. Adm. Code 807.104. Agency Response at 30. It further notes that the subject water regulations, 35 Ill. Adm. Code 309.208(a)(3), require a construction and operating permit from Division of Water Pollution Control unless the site is regulated under Parts 700 et seq. of the Board's regulations (i.e., the land pollution regulations administered by the Division of Land Pollution Control).

Sexton fundamentally misunderstands the relationship between Parts 309 and 807 in this regard. The Agency is correct in asserting that the land application of wastewater treatment plant sludges at landfills is properly within the purview of the Part 807 rules and administered by the Division of Land Pollution Control. In all other settings (i.e., outside a landfill or other waste facility regulated under land pollution regulations), the Part 309 requirements apply. The regulations themselves are unambiguous on this point. There is no overlapping or duplication of permit requirements as Sexton suggests; land application of sludges regulated under Part 309 is not subject to Part 807, nor is such land application of sludges at a landfill subject to Part 309.

It is the Board's view, consistent with the foregoing analysis, that Special Condition 20 is an appropriate restatement of the regulatory requirements and the condition is affirmed. No issue is raised about the actual sludge usage conditions.

SUMMARY AND CONCLUSION

The Board believes that each of the special conditions should be affirmed on its own merits. However, the Board must note that a certain relationship exists among all of the conditions except 4 and 20. They all relate to the possibility of groundwater contamination of the deep aquifer. When viewed in this light, the substantial difference between the totality of the Agency's position and the totality of Sexton's position becomes clear.

The Agency's concerns relate to protection of the deep aquifer. The Agency believes that as little as four feet of clay in the bottom liner protects the deep aquifer from contamination. The fill contents are largely unknown, and they may include liquid and toxic chemical-laden wastes. The amount and character of the leachate in the fill is unknown, as are the rates of leachate formation and loss. The Agency claims that there is inadequate information regarding the directions of contaminant migration, inadequate characterization of the background water quality, and an inadequate number of monitoring wells to detect any contamination that might occur. Residential development has occurred in the immediate area, and the record does not indicate any active and potential uses for the local groundwater. In short, the Agency finds too many unanswered questions about this landfill and protection of the deep aquifer.

Sexton asserts, in largely conclusory terms, that the plan it submitted was adequate. However, Sexton's assertions are largely devoid of specific references to factual material from the record that would demonstrate the adequacy of such plan.

The Board notes that the totality of the missing information leads to a conclusion that the deep aquifer will not be protected by Sexton's closure and post-closure care plan..

Finally, the Board construes all unchallenged conditions as agreement by Sexton that the conditions are appropriately incorporated in its closure/post-closure plan.

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

IT IS SO ORDERED.

Board Members Joan Anderson and Michael L. Nardulli dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 23rd day of February, 1989, by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board