ILLINOIS POLLUTION CONTROL BOARD
January 19, 1989

MARLEY-INGRID (USA), INC., Petitioner,	)	
v.	)	PCB 88-17
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

JAMES I. RUBIN; MICHAEL A. STICK; KEVIN J. O'BRIEN; BUTLER, RUBIN, NEWCOMER, SALTARELLI & BOYD, APPEARED ON BEHALF OF PETITIONER, MARLEY-INGRID (USA), INC.; AND

PAUL R. JAGIELLO, APPEARED ON BEHALF OF RESPONDENT, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter is before the Board on the January 15, 1988 petition of Marley-Ingrid (USA), Inc. ("Marley-Ingrid"). That petition seeks review of several conditions imposed by the Illinois Environmental Protection Agency ("Agency") in the Agency's December 11, 1987 closure permit. That permit involves a hazardous waste surface impoundment located on land owned by Marley-Ingrid at Lake Bluff, Illinois. The public hearings occurred on April 20 and 27, 1988 at Lake Bluff, and one member of the general public attended without participating. Marley-Ingrid filed its post-hearing brief on September 30, 1988. The Agency filed its response on October 28, 1988. Marley-Ingrid filed its reply on November 7, 1988.

I. Background

Marley-Ingrid formerly owned a manufacturing facility along U.S. Highway 41 in Lake Bluff, Illinois. A small surface impoundment is located on a portion of that property. Ex. 1; R. 36-38 & 40-41. Marley-Ingrid maintained offices and manufactured plastics at the facility until 1987. Marley-Ingrid acquired the facility from Goodyear in 1979 or 1980. R. 110. Goodyear acquired the plant in 1956 from Deep Freeze, a company which manufactured refrigerators at the facility, and which built it in 1950. The surface impoundment collected industrial discharges from the facility from 1956 until 1974. R. 104-05.

The most significant known discharges into the surface impoundment occurred during Goodyear's tenure at the facility. Goodyear manufactured rubber hose at the plant. This process

produced lead-containing cooling water that drained into the impoundment. Agency Record, Ex. 13, 15 & 16; R. 98. Goodyear also used the impoundment to collect other plant wastes and operated a skimmer in the impoundment for oil separation. Agency Record, Ex. 1, 2, 19, 26. 31, 41, 48-51 & 54-59.

Marley-Ingrid hired Weston, a consulting engineering firm, to perform an environmental audit of the site in 1987 in contemplation of its imminent sale to the current owner, Penmark. R. 34 & 110. During the course of the environmental audit, Weston uncovered several potential problem areas at the site, including the fact that the impoundment sludges were RCRA hazardous as EP toxic for lead. See 35 Ill. Adm. Code 721.120 & 721.124 (1987). Weston performed much cleanup work prior to seeking Agency approval for the closure of the surface impoundment. Agency Record, Ex. 87; R. 37, 44-45, 48 & 116-17.

The record reflects that the site at one time had underground solvent and fuel storage tanks. R. 189, 204-05; Agency Record, Ex. 87. Oil reclamation also occurred within the plant. Tests on sludge samples from the sump near the oil reclamation area disclosed traces of a PCB, pentachlorophenol, pyrene, nitrophenol, and a phthalate. Excavation of the former waste disposal basin, now mostly covered by the Building 41 addition and replaced in service by the present impoundment, disclosed discolored soils. Agency Record, Ex. 87.

The closure plan submitted by Weston on behalf of Marley-Ingrid seeks to complete site cleanup for the impoundment. Weston submitted Marley-Ingrid's first version of a closure plan to the Agency on June 10, 1987. Ex. 1. The Agency rejected this plan as deficient on September 17, 1987. Ex. 2. Weston responded with more information on October 12, October 29, December 3, and December 7, 1987. Ex. 3-5; Petition, Ex. F. The Agency granted a closure permit with certain Agency-imposed conditions on December 11, 1987. Marley-Ingrid then filed the present appeal on January 15, 1988.

II. Regulatory Background

The Agency's authority to impose permit condition flows from the Environmental Protection Act ("Act"), Ill. Rev. Stat. ch. 111 1/2, pars. 1001-1052 (1988). The Act provides as follows with regard to conditions in RCRA permits:

> All RCRA permits shall contain those terms and conditions ... which may be required to accomplish the purposes and provisions of this Act. The Agency may include among such conditions, standards and other requirements established under this Act, Board regulations, the Resource Conservation and Recovery Act of 1976 (P.L. 94-580), as amended, and regulations pursuant thereto ....

Par. 1039(c) (emphasis added).

This section clearly indicates that the Act, Board regulations, and federal statutory and regulatory requirements can act as the foundation for conditions to an Agency-issued closure permit. The parties essentially dispute whether the provisions of 35 Ill. Adm. Code 724 or 725 of the Board rules would apply to the closure of the Marley-Ingrid surface impoundment. In so doing, they miss the essential issue: such conditions may also derive from federal requirements, in order that the state-issued permit and state regulatory program remain consistent with the federal RCRA regulations. See 42 USC 6926(e) (1987).

Federal amendments to RCRA, the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Pub. L. 98-616, Title II, secs. 243(c) & 215, 98 Stat. 3240-43, 3253 & 3261 (1984) (codified as 42 USC 6925(i) & (j) (1987)), mandated a change in the way the federal regulations apply to surface impoundments. In furtherance of this mandate, U.S. EPA promulgated final, immediately effective rules on December 1, 1987. 52 Fed. Reg. 45788 (Dec. 1, 1987). This predates the Agency's final disposition of Marley-Ingrid's permit application. See Ex. 6 (dated December 11, 1987). These regulations took effect in Illinois on that date, despite the fact that Illinois was an authorized state for administration of its own RCRA program. Compare 42 USC 6926(b) (1987) with 42 USC 6926(g)(1).

III. Discussion

The primary issue involved in this proceeding is the Agency's authority to impose major elements of a Subpart F groundwater monitoring program, see 40 CFR 264 & 265, Subpart F; 35 Ill. Adm. Code 724 & 725, Subpart F, as a condition to closure of Marley-Ingrid's surface impoundment.* Marley-Ingrid argues that the expense associated with such monitoring is unjustified. The Agency generally contends that such monitoring is necessary without explicit regulatory support.

Both parties urge this Board to review the extensive and expensive technical conditions imposed on this hazardous waste facility closure plan under the legal standards of 35 Ill. Adm.

* The Agency imposed conditions based on 35 Ill. Adm. Code 725. See Ex. 6. The Board notes that major dissimilarities appear between the structure and content of 35 Ill. Adm. Code 725, Subpart F monitoring requirements and those of 40 CFR 264, Subpart F. Because the parties have not addressed these apparent dissimilarities, the Board will not now attempt to discern the extent to which the Agency-conditioned permit might comply with 40 CFR 264 requirements.

Code 724 & 725 which provide a general narrative standard to ensure protection of the environment and public health. Both parties ignore binding federal regulations which appear, specifically and in great detail, to require most if not all of the contested conditions. This is particularly distressing since the Board directed the parties to the case in which these federal regulations were discussed, Browning Ferris Industries of Illinois, Inc. v. EPA, PCB 84-136 (May 5, 1988).

Those federal regulations are binding on Marley-Ingrid as a matter of federal law (and have been since December 1, 1987), whether or not Illinois could impose such conditions in this permit as a matter of state law. Those federal regulations address the contested conditions with great specificity and detail. And, Section 39(c) of the Act clearly authorizes the Agency to impose those federal regulatory requirements in this instance. Under these circumstances, the Board will not address whether a state narrative regulation regarding protection of the environment and public health would also justify imposition of such extensive and expensive technical conditions.

As the Board has previously noted the federal HSWA amendments render 40 CFR 264 standards applicable to certain facility closures, such as that now sought by Marley-Ingrid, notwithstanding the fact that the Board had not yet adopted final, effective, corresponding rules that would make 35 Ill. Adm. Code 724 apply. As previously stated in Browning-Ferris:

> In 1984, Congress amended RCRA to add new Section 3005 (i). That provision requires all hazardous waste facilities which had received hazardous wastes after July 26, 1982, to comply with certain regulatory requirements for new facilities. On December 1,1987, USEPA adopted final regulations implementing Section 3005 (i) at 52 FR 45788. That regulation not only requires compliance with the federal equivalent of Part 724, but the preamble to the regulation makes it clear that such facilities must submit a Part B application and obtain a RCRA permit:
>
> > Therefore, today's final rule differs from the proposed revision to Section 270.1(c) by requiring post-closure permits for any landfill, surface impoundment, waste pile, or land treatment unit which received waste after July 26, 1982, or which closed after January 26, 1983. The term "closure" in this context has been clarified

> to mean certification of closure according to Section 265.115.

Since [the subject] facility received hazardous waste after July 26, 1982, and did not certify closure prior to January 26, 1983 (see 35 Ill. Adm. Code 725.215 (1988); 40 CFR, Section 265.215 (1987)), [its owner/operator] is clearly subject to the December 1, 1987 regulations. Further, those federal regulations are legally applicable to [its owner/operator] as of December 1, 1987:

> Prior to HSWA a State with final authorization administered its hazardous waste program entirely in lieu of the Federal program. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in a state where the State was authorized to issue permits. When new, more stringent Federal requirements were promulgated or enacted, the State was obligated to enact equivalent authority within specified time frames. New federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.
>
> In contrast, under Section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time they take effect in non-authorized States. EPA is directed to carry out those requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, the HSWA requirements are applied by EPA

> in authorized States in the interim.
>
> Today's rule is promulgated pursuant to RCRA Sections 3004(u), 3004(v) and 3005(t). These provisions were added by HSWA. Therefore, the Agency is adding the requirement to Table 1 in Section 271.1(j) which identifies the Federal program requirements that are promulgated pursuant to HSWA and that take effect in all States, regardless of their authorization status.

> Therefore, while the Agency could not, in 1984, properly apply the state counterpart of the federal Part 264 regulations to [the subject facility], a substantial portion of the impact of today's decision has been undercut by developments in federal law during the pendency of this permit appeal. Those federal regulations do apply to [the subject facility] today as a matter of federal law, and they have since December, 1987.
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> Browning-Ferris Industries of Illinois, Inc. v. EPA, PCB 84-136, slip op. at 26-27 (May 5, 1988). (Quoting 52 Fed. Reg. 45794-96 (Dec. 1, 1987)).

Browning-Ferris Industries should have provided ample guidance to the parties that 40 CFR 264, Subpart F monitoring requirements directly apply to Marley-Ingrid's surface impoundment. As stated by the U.S. EPA in promulgating its HSWA amendments:

> Section 3005(i) of RCRA requires that all ... surface impoundments ... which received hazardous wastes after July 26, 1982, comply with the same groundwater monitoring, unsaturated zone monitoring, and corrective action requirements that apply to new units .... Previously, post-closure permits were required for land disposal units which closed after January 26, 1983, while new Section 3005(i) imposed Part 264 Subpart F requirements on any land disposal units which received wastes after July 26, 1982.

> [N]ew Section 3005(i) makes compliance with certain Part 264 rules a statutory requirement. Section 3005(i) subjects interim status regulated units to those groundwater monitoring, unsaturated zone monitoring and corrective action requirements which are applicable to new permitted units.
>
> [T]he Agency is persuaded that the groundwater protection standards of Part 264 provide a more environmentally protective mechanism for addressing groundwater protection ... than would be obtained through interim status closure and post-closure requirements.
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> 52 Fed. Reg. 45794 (Dec. 1, 1987).

Therefore, the HSWA amendments impose the Subpart F monitoring requirements on all surface impoundment land disposal units for which there were no closure permits issued prior to December 1, 1987.

The federal HSWA regulations apply to all RCRA interim status surface impoundment closure permits granted after December 1, 1987. The federal amendments impose a more stringent "closure by removal" standard on Marley-Ingrid than existed in the Board's rules on the date of the Agency's permit decision. However, the parties failed to address the effect of this applicability in their briefs. These amendments also impose certain other closure and procedural requirements not addressed by the parties and apparently not met by the Agency approval involved in this proceeding.

As previously quoted by the Board:

> [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.
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> Browning-Ferris Industries at 7 (quoting Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3d Dist. 1987)).

In order to properly sustain this burden, it was necessary for Marley-Ingrid to prove that its plan would have complied with the Act and applicable regulations, including 40 CFR 270 and 264 standards, as originally submitted to the Agency. Browning-Ferris Industries at 7 (citation omitted).

Neither Marley-Ingrid nor the Agency has addressed the requirements of 40 CFR 270 and 264. Therefore, the Board cannot address whether the plan as submitted or as amended by the Agency complies with the Act and applicable regulations. The Board will vacate the Agency permit for these reasons.

III. Conclusion

In summary, the Marley-Ingrid surface impoundment did not have a closure permit prior to December 1, 1987, so new 40 CFR 270.1(c) has required its closure according to 40 CFR 264 (corresponding to 35 Ill. Adm. Code 724) standards since December 1, 1987. The Act authorizes the Agency to impose permit conditions predicated on these federal requirements.

The Board concludes, as it has observed in the past, see Browning-Ferris Industries, No. PCB 84-136, slip op. at 26-27, that the December 1, 1987 federal amendments to 40 CFR 270.1(c) apply to Illinois interim status facilities obtaining Agency certification of their closure plans after that date. Neither Marley-Ingrid nor the Agency addresses compliance with 40 CFR 264 and 270 closure standards.

Under these circumstances, it is difficult for the Board to frame an appropriate Order to remedy this situation. In the usual case, contested permit conditions are affirmed in total, or particular conditions are reversed and the permit is remanded to the Agency with instructions as to how to cure deficiencies. In this case, as the issues were inappropriately framed by the parties, the Board cannot provide appropriate review of each and every term of the permit and its conditions. The only fruitful course in this action is for the permitting procedure to begin anew before the Agency. Accordingly, the Board vacates the December 11, 1987 permit.

Marley-Ingrid is free to file a new application with the Agency demonstrating compliance with all relevant regulatory requirements. The Agency is free to evaluate the information in light of the applicable procedural and substantive standards, and to make any appropriate decision. Such decision may include issuance of a permit with conditions which were at issue here, since the Board has not reached a decision on the merits of each condition.

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

ORDER

The Illinois Environmental Protection Agency closure permit of December 11, 1987 issued to Marley-Ingrid is hereby vacated.

IT IS SO ORDERED

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 19th day of January, 1989, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board