

ILLINOIS POLLUTION CONTROL BOARD  
January 11, 1990

|                        |   |                 |
|------------------------|---|-----------------|
| TESTOR CORPORATION,    | ) |                 |
|                        | ) |                 |
| Petitioner,            | ) |                 |
|                        | ) |                 |
| v.                     | ) | PCB 88-191      |
|                        | ) | (Permit Appeal) |
| ILLINOIS ENVIRONMENTAL | ) |                 |
| PROTECTION AGENCY,     | ) |                 |
|                        | ) |                 |
| Respondent.            | ) |                 |

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on three motions. On December 7, 1989, petitioner Testor Corporation filed its motion for reconsideration and clarification of the Board's November 2, 1989 decision in this case. Respondent Illinois Environmental Protection Agency (Agency) filed its response to Testor's motion on December 20, 1989. The Agency filed its own motion for reconsideration on December 8, 1989. Testor responded to the Agency's motion on December 18, 1989. On December 28, 1989, Testor filed a motion to supplement its motion for reconsideration. The Agency responded to that motion to supplement on January 4, 1990.

In its motion, Testor first asks that the Board clarify its affirmance of Condition 1 of the Agency's approval of Testor's closure plan. Condition 1 required Testor to complete all of its closure activities by June 1, 1989, and to provide the Agency with certification of closure within 60 days of closure. That condition, based on 35 Ill.Adm.Code 725.213, gave Testor approximately six months to complete closure. The Board upheld that condition, but noted that Testor could still request an extension of the deadline pursuant to 35 Ill.Adm.Code 725.213(b) and (c). Testor states that it reads the Board's decision as intending to affirm the time periods set forth in the closure plan, not the particular dates imposed by the Agency's approval. Testor notes that if the Board's Order was read to affirm the specific dates, those dates would have passed and Testor could not request an extension of time. Therefore, Testor asks that the Board clarify that it meant to affirm the time periods of Condition 1 and not the specific dates. The Agency did not address this point in its response to Testor's motion.

The Board did intend to affirm the six month time period allowed for closure pursuant to Section 725.213, and not the specific dates set forth in Condition 1. The June 1, 1989 deadline for closure passed while this appeal was pending before the Board. Because Section 725.213(c) requires any request for extension of

the closure period to be made at least 30 days before expiration of that period, Testor would not be able to request an extension of the deadline if the particular dates of Condition 1 were upheld. That would, in effect, punish Testor for exercising its right to appeal the conditions imposed on its closure plan. The Board hereby clarifies its November 2 decision to hold that the time periods for closure specified in Condition 1 are upheld. The Board did not uphold the specific dates of Condition 1. Testor's request for clarification is granted.

Testor then asks the Board to reconsider its finding that Testor is subject to the Part 725 RCRA closure rules. Testor states that if it is found to be subject to the RCRA rules, it is subject to potential enforcement for many permitting, design, and operating rules pursuant to Part 725. Testor contends that it has proceeded in accordance with the Part 725 rules for purposes of remediation of this situation only, and only because the Agency was unwilling to proceed in any other context. Testor maintains that it in effect consented to the applicability of Sections 725.210 through 725.215 and Section 725.328 in this proceeding. Testor argues that the Board's November 2 decision goes beyond this acquiescence. Testor contends that the Board could properly limit its ruling on the applicability of the RCRA rules to Testor's acceptance of those rules for purposes of closure in this proceeding, without setting a "potentially far-reaching precedent of RCRA coverage."

In response, the Agency contends that the Board was correct in determining that the depression at issue in this case is indeed a "surface impoundment", and correct in finding that the Part 725 rules apply to Testor. The Agency maintains that Testor, the Agency, or this Board cannot selectively apply some regulations from Part 725 and not others. In other words, the Agency argues that since Testor is properly regulated by Part 725, it (Testor) is subject to all the Part 725 rules, and not just the rules governing closure. Thus, the Agency asks that the Board deny Testor's request for reconsideration of the applicability of Part 725.

The Board is not persuaded by Testor's claim that the Board should apply only selected parts of the Part 725 RCRA rules to the Testor facility based upon Testor's agreement to utilize those rules for this closure. In its November 2 decision the Board clearly found that Testor was subject to the Part 725 rules. That finding was based upon an analysis of the regulations, not upon Testor's consent to the applicability of some of the Part 725 rules. Testor does not argue that the Board's analysis was incorrect: instead, Testor contends that the Board should proceed with the Part 725 rules based only on its consent so that it (Testor) will not be subject to potential enforcement pursuant to Part 725. The Board finds that its analysis of the applicability of Part 725 to Testor is correct. However, the Board stresses that

its analysis was based only upon the situation before it in this case: whether Testor is subject to the Part 725 rules for purposes of closure. The question of whether Testor is subject to the permitting, design, operation, and other rules in Part 725 has never been before this Board, and the Board will not now address that question. To any degree that the Board's November 2 decision may be construed as deciding that all of the Part 725 rules are applicable to Testor, the Board clarifies that its holding was limited to the applicability of Part 725 closure rules. The Board takes no position on any other question of the applicability of Part 725. Testor's motion for reconsideration is granted in part, only to allow the Board to clarify its prior holding.

On December 28, 1989 Testor filed a motion to supplement its motion for reconsideration. Testor asks to file a copy of a pre-enforcement conference letter from the Agency, received by Testor on December 27. That letter informs Testor of several alleged violations of the rules of Part 725, and sets up a pre-enforcement conference between the Agency and Testor. Testor asks that this letter be filed because it "underscores the significance of the Board's determination regarding the applicability of the RCRA rules to the depression at Testor's facility and demonstrates that the potential for enforcement referred to in Testor's Motion for Reconsideration and Clarification has now become a serious threat of enforcement."

On January 4, 1990, the Agency filed its response in opposition to Testor's motion to supplement. The Agency argues that the motion should be denied because it was not filed within 35 days of the adoption of the November 2 order, pursuant to 35 Ill. Adm. Code 101.246. Second, the Agency contends that Testor's December 7 motion for reconsideration and clarification adequately set forth Testor's position and that the material in the motion to supplement is not required to explain Testor's position. Finally, the Agency maintains that potential enforcement action is not relevant to the Board's decision-making in this appeal.

The motion to supplement Testor's motion for reconsideration is denied. The Board agrees with the Agency that the question of whether enforcement is occurring has no relevance to the determination of whether the Part 725 rules are applicable to Testor. The issue here is whether the Board should reconsider and reverse its November 2 determination that the Part 725 rules do indeed apply to Testor. The pre-enforcement letter sent to Testor by the Agency is not relevant to that issue. The Board also points out that reconsideration must be based upon the record before the Board when it reached its decision, and the pre-enforcement letter is not part of that record. Therefore, Testor's motion to supplement is denied.

The Agency also filed a motion for reconsideration.<sup>1</sup> The Agency first asks the Board to reconsider its decision that Testor is not required as a matter of law to perform groundwater monitoring. The Agency contends that the Board erred in finding that after completing the closure, Testor will be required to either obtain a post-closure care permit or demonstrate equivalency, and that therefore groundwater would be considered again. The Agency asserts that groundwater may not be further considered, and bases that claim upon an analysis of "conforming" changes in the Board's regulations, effective January 15, 1988 (before Testor's proposed plan was filed). The Agency continues to maintain that federal law and guidance require groundwater monitoring at the Testor facility. Second, the Agency asks that the Board clarify its statement that "Section 722.134, which contains the 90-day permit exemption, applies only to generators, not to owners and operators of TSD facilities." The Agency asks the Board to clarify whether that exemption applies at a facility which is both a TSD and a generator.

In response, Testor maintains that the Board correctly concluded that Testor is not required as a matter of law to monitor the groundwater. Testor contends that the Agency is incorrect in stating that the groundwater issue will not be considered again, because it (Testor) must satisfy the Agency that the data submitted in its closure documentation report pursuant to Condition 1 of the plan demonstrates that the groundwater could not have been impacted. Testor states that the federal laws and guidance cited by the Agency merely require a demonstration that groundwater has not been affected, not that groundwater monitoring occur. Testor argues that monitoring is not the only way to demonstrate that the groundwater has not been affected. Finally, Testor states that the issue of the applicability of Section 722.134 to generators who are also owners and operators of TSD facilities has no effect upon it, because Testor will provide for prompt removal of the waste as it is excavated.

The Board must first point out that the Agency never before raised its claim that changes in the Board's regulations mean that groundwater will not be further considered, and has not explained why it did not do so at hearing or in post-hearing briefs. After reviewing the arguments and the regulations, the Board agrees with Testor that the Agency will have the opportunity to review the impact of this facility upon the groundwater when Testor submits its required closure documentation report. The Board also agrees

<sup>1</sup> The Board notes that the Agency stated that its motion was filed pursuant to 35 Ill. Adm. Code 103.240. That section of the Board's procedural rules deals with enforcement cases, not permit appeals. The Board will consider the motion under 35 Ill. Adm. Code 101.246, which is applicable to all types of proceedings before the Board.

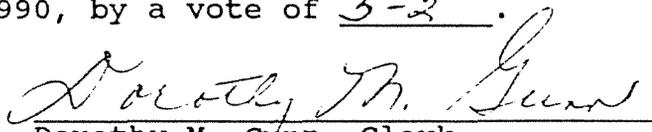
with Testor's contention that the federal law and guidance cited by the Agency require consideration of groundwater, but not necessarily groundwater monitoring. In its November 2 decision in this case, the Board held only that Testor's application demonstrated that neither the Act nor the regulations would be violated if the plan approval was issued without the conditions requiring groundwater monitoring. The Board stressed that its finding was based upon Testor's soil sampling plan, and Testor's promise to perform groundwater monitoring if contaminants are discovered. In other words, the Board finds that consideration of groundwater is an important issue in closing a facility, but that that consideration does not necessarily require groundwater monitoring. As for the Agency's request that the Board answer its question as to whether the Section 722.134 exemption applies to facilities which are both generators and owners and operators of a TSD, the Board will not do so in this proceeding. The issue is not squarely raised, and it certainly has not been argued by the parties. The Board will not issue an advisory opinion on the question. The Agency's motion for reconsideration is denied.

In sum, Testor's motion for clarification of the Board's findings on Condition 1 is granted, and Testor's motion for reconsideration of the findings on the applicability of Part 725 is granted only for purposes of clarification of the Board's November 2 decision. Testor's motion to supplement its motion for reconsideration is denied. Finally, the Agency's motion for reconsideration is also denied.

IT IS SO ORDERED.

R. Flemal and B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 11<sup>th</sup> day of January, 1990, by a vote of 5-2.

  
 Dorothy M. Gunn, Clerk  
 Illinois Pollution Control Board