ILLINOIS POLLUTION CONTROL BOARD
November 2, 1989

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

JEFFREY C. FORT AND LEE R. CUNNINGHAM, GARDNER, CARTON, AND DOUGLAS, APPEARED ON BEHALF OF PETITIONER; AND

PAUL R. JAGIELLO APPEARED ON BEHALF OF RESPONDENT.

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

This matter is before the Board on petitioner Testor Corporation's (Testor) November 23, 1988 petition for hearing. Testor's petition seeks review of its closure plan, which was approved subject to conditions by respondent Illinois Environmental Protection Agency (Agency). Testor specifically requests review of conditions 1, 3, 4, and 8 as they relate to the deadline for closure, the necessity of groundwater monitoring, and permit requirements. A public hearing was held in Rockford, Illinois on May 9, 1989. Both parties have submitted briefs.

Background

Testor owns and operates a plant in Rockford, Illinois. Operations at the plant include the formulation and mixing of paints and adhesives used for hobby models, arts, and crafts. Specific solvent blends for each type of paint are formulated in the pump room, which was equipped with a 1-1/2" overflow pipe to drain any spills of flammable liquid and prevent the accumulation of explosive vapors in the pump room.[1] The pipe ran to a small depression outside of the plant. On June 25, 1985, approximately 50 gallons of toluene spilled in the pump room when an employee propped open a deadman safety switch. The toluene ran through the floor drain and pipe to the small depression outside the building.

[1]The pipe, which was installed in 1952, was grouted closed in 1987.

On October 5, 1987, Agency personnel collected soil samples from the discharge area. These samples showed that the soil beneath the discharge area was contaminated with several volatile organic compounds (VOC), including toluene. The Agency informed Testor of these results by letter dated November 6, 1987. Testor responded that it did not believe that a closure pursuant to the Resource Conservation and Recovery Act (RCRA) was necessary, but that it wanted to work with the Agency to reach agreement on cleaning up the discharge area. (Ex. 32A.) Eventually, however, Testor did submit a RCRA closure plan in April 1988. (Ex. 3.) The Agency disapproved that plan on July 19, 1988. (Ex. 11.) After meeting with the Agency, Testor submitted a revised closure plan on August 26, 1988. (Ex. 22.) The Agency approved this revised plan on October 26, 1988, after adding several conditions. (Ex. 26.) Conditions 1, 3, 4, and 8 of that approval are the subject of this appeal.

Motion To Exclude Evidence

On July 24, 1989, the Agency filed a motion to exclude certain evidence and testimony which was admitted by the hearing officer at the May 9 hearing in this matter. Testor filed a response to this motion on August 2, 1989. The Agency's arguments in support of its motion were reiterated in its brief, and Testor again addressed the issue in its reply brief.

The Agency moves to exclude Exhibits 32B, 33, and Group Exhibit 34, and all testimony based upon those exhibits, on the grounds that those exhibits and testimony deal with events and information gathered after the Agency issued the permit with conditions on October 26, 1988. Exhibit 32B is an estimate of the cost of the groundwater monitoring required by conditions 3 and 4 of the permit. This estimate was developed by Gregory Verret, an engineer employed by Testor to develop its closure plan. Exhibit 33 is a flow chart showing the estimated schedule for Testor's three treatment or disposal options, also created by Mr. Verret. Group Exhibit 34 contains three figures: Figure 2 is a drawing of the soil sampling locations[2]; Figure 3 is an east-west geological cross-section of the discharge area; and Figure 4 is a north-south geological cross-section of the discharge area. In support of its contention that these exhibits and testimony based upon them should be excluded, the Agency points to 35 Ill. Adm. Code 705.101(c), which states that "Board review of [RCRA] permit issuance or denial...is restricted to the record which was before the Agency when the permit was issued." This regulation also cites to Section 40(b) of the Environmental Protection Act (Act), which states that hearings on RCRA permits are to be based "exclusively on the record before the Agency." Ill. Rev. Stat. 1987, ch. 111-1/2, par. 1040(b). The Agency contends that all of the disputed exhibits

[2] There is no Figure 1 in Exhibit 34.

were developed after the Agency's October 1988 permitting decision, and thus that none of the exhibits belong in "the record before the Agency."

In response, Testor first argues that the Agency has waived its objections to Mr. Verret's testimony which was based upon Exhibits 32B and 33 by failing to object to that testimony at hearing. As for Exhibit 32B itself, Testor maintains that although the document itself was prepared after the October 1988 decision, it is not new material, but simply represents an expert opinion of the cost of the groundwater monitoring conditions imposed by the Agency. Testor contends that Exhibit 32B is reflective of what the Agency, in its expertise, knew or should have known when it imposed the condition. Testor argues that Exhibit 33 is similar, in that it reflects matters within the Agency's expertise. Testor also admits that Exhibit 33 did not exist on October 26, 1988, but maintains that it could not have been prepared before that date because Testor did not know what conditions would be imposed by the Agency. Additionally, Testor contends that the three figures in Exhibit 34 are admissible. Testor maintains that Figure 2 is simply a graphic representation of the discharge area and the boring locations, based upon information in Testor's closure plan. (Ex. 3 at pp.6-10.) Testor admits that Figures 3 and 4 of Exhibit 34 do include information which was not before the Agency, since those figures are based upon actual testing of soil samples taken after October 26, 1988. However, Testor asserts that they are illustrative of the sampling process set forth in the closure plan, and that much of the testimony regards that process, not actual data.

The Board will grant the Agency's motion to exclude evidence and testimony for all exhibits and testimony except Figure 2 of Exhibit 34. Initially, the Board must point out that the Agency's references to Section 705.101(c) is not directly on point. That section refers to RCRA permit reviews, while the instant case involves an appeal of conditions attached to a closure plan. These are not the same thing. However, in a procedural sense the Board does treat closure plan reviews in the same manner as permit appeals, and the Board believes that Section 705.101(c) is persuasive authority in a closure plan review. That section is quite clear that Board review of a RCRA permit issuance or denial is restricted to the record which was before the Agency when the permit was issued. It is well-settled that when reviewing an Agency permit decision, the Board must determine whether the application, as submitted to the Agency, demonstrates that issuance of the permit without the contested conditions would not violate the Act or Board regulations. (See City of East Moline v. Illinois Pollution Control Board, No. 3-88-0788, slip op. at 11 (Ill. App. Ct. 3d Dist., August 31, 1989); Joliet Sand and Gravel v. Illinois Pollution Control Board, 163 Ill.App.3d 830, 516 N.E.2d 955, 958 (3d Dist. 1987); Ill. Rev. Stat. 1987, ch. 111-1/2, par. 1039(a).) The Board finds that in reviewing a closure plan approval, that

review is limited to the record which was before the Agency when it made the contested decision. Only Figure 2 of Exhibit 34, which is based upon information contained in Testor's application, is admissible. The Board will not consider Exhibits 32B, 33, or Figures 3 and 4 of Exhibit 34, nor any testimony based upon those exhibits, in reaching its decision on the merits of this appeal.[3] The Board also notes that Exhibit 32B, which is Mr. Verret's estimate of the cost of the groundwater monitoring, contains information which is not relevant to the issue of whether the application as submitted demonstrates that the plan without the contested conditions would not violate the Act or Board regulations. Cost is simply not a factor in that determination. (See East Moline, slip. op. at 11-13.)

Applicability of Part 725 Rules

This permit appeal presents a number of issues for Board decision. The first is whether the discharge area is properly a "surface impoundment" as defined at 35 Ill. Adm. Code 720.110 so that the RCRA closure rules, found at 35 Ill. Adm. Code 725, apply to this clean-up. Testor contends that the discharge area was not "designed to hold an accumulation of liquid wastes or wastes containing free liquids", as stated in the definition, but was designed to receive spills of raw materials to avoid the potential for an explosion in the pump room. The Agency points out, however, that Testor has itself stated that the discharge area was designed to receive spills of raw materials, and thus contends that the discharge area was "designed" to hold liquid which would flow down the drain. The Agency also maintains that the liquid which was intended to flow down the pipe and into the discharge area was indeed a "liquid waste". The Board must agree with the Agency's assessment that the discharge area is a surface impoundment.

Second, Testor argues that the Part 725 RCRA closure rules do not apply to the remediation of the contamination beneath the discharge area because it has never obtained interim status. Testor points to the Board's decision in Marley-Ingrid v. Illinois Environmental Protection Agency, PCB 88-17 (March 23, 1989), where this Board held that "the closure and post-closure requirements of 35 Ill. Adm. Code 725.328 can only operate within a regulatory scheme which governs those facilities that are generally in compliance with the interim status regulations." (Marley-Ingrid, March 23, 1989, slip op. at p. 8; emphasis in original.) Testor states that it is clear that Testor never submitted a Part A or

---

[3] The Board notes that in the recent decision in East Moline, the appellate court affirmed the Board's exclusion of evidence not submitted to the Agency. Although East Moline involved a different Board rule governing NPDES permit appeals (35 Ill. Adm. Code 105.102(6)(8)), the Board believes that East Moline supports its decision in the instant case.

Part B RCRA permit application and never certified compliance with the interim status requirements for groundwater monitoring or financial assurance. (Tr. 45 and 48-49.) Thus, because it never obtained interim status, Testor maintains that the Part 725 closure rules are not applicable to this clean-up.

In response, the Agency first contends that Board regulations show that a facility which did not obtain interim status is still subject to the interim status regulations of Part 725, including the regulations on closure of hazardous waste units. The Agency points to 35 Ill. Adm. Code 700.104(b), which states:

> b) The Board intends:
>
> 1) That, prior to RCRA permit issuance, all facilities otherwise subject to Part 725 comply with its requirements whether or not they have interim status under 40 CFR Section 122.23. [now 40 CFR 270.70]

The Agency maintains that this section means that all facilities are subject to the interim status regulations until they have received a permit which has been the subject of final Agency action. The Agency states that such a permit would be a Part B permit, and notes that Testor has never applied for or received a Part B permit. The Agency also points to 35 Ill. Adm. Code 725.101(b):

> b) The standards in this Part apply to ...those owners and operators in existence on November 19, 1980, who have failed to provide timely notification as required by Section 3010(a) of RCRA, or failed to file Part A of Permit Application as required by 40 CFR 270.10(e) and (g) or 35 Ill. Adm. Code 703.150 and 703.152. These standards apply to all treatment, storage, or disposal of hazardous waste at these facilities after November 19, 1980, except as specifically provided otherwise in this Part or 35 Ill. Adm. Code 721.

The Agency argues that this language unambiguously makes the interim status regulations of Part 725 applicable to facilities that failed to provide timely notification or failed to file a Part A application, and points out that Testor did neither. Thus, the Agency argues that Testor is indeed subject to the Part 725 rules even though it never received interim status. The Agency states that it would be absurd if Testor could avoid responsibility for compliance with basic hazardous waste requirements by simply not complying with those requirements. Finally, the Agency cites United States v. Indiana Woodtreating Corp., 686 F. Supp. 218 (S.D. Indiana, 1988), where a woodtreating plant which never obtained interim status or a RCRA permit was required to comply with the federal equivalent to Part 725 (40 CFR Part 265).

After careful consideration of the parties' arguments and the applicable statutes and regulations, the Board finds that Testor is subject to the Part 725 rules even though it never obtained interim status or a RCRA permit. A review of Section 700.104(b), which states that the Board intends the Part 725 rules to apply to all facilities prior to RCRA permit issuance whether or not they have obtained interim status, in conjunction with Section 725.101(b) convinces the Board that the plain language of these rules states that Part 725 applies to owners and operators of facilities in existence on November 19, 1980 who did not provide timely notification or file a Part A permit application, and have not received a Part B RCRA permit. It is undisputed that Testor did not provide notification pursuant to Section 3010(a) of RCRA and did not apply for either a Part A or a Part B permit. It is also undisputed that Testor's facility was in existence before November 19, 1980. Therefore, applying Sections 700.104(b) and 725.101(b) to Testor's circumstances, it is obvious that Part 725 applies to Testor. The Board recognizes that this finding contradicts the holding in Marley-Ingrid, but believes that this result is mandated by the clear language of Sections 700.104(b) and 725.101(b). The Board notes that it did not have the benefit of argument on the reading of these two sections together when making its decision in Marley-Ingrid, since neither party in that case ever brought Section 700.104(b) to the Board's attention. The Board's holding in Marley-Ingrid, that a facility which never officially obtained interim status or substantially complied with the interim status rules is not subject to Part 725, is overturned.

Condition 1

Testor has appealed four of the conditions which the Agency imposed on its approval of Testor's closure plan. Condition 1 requires 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. This gives Testor approximately six months to complete closure. Testor admits that this requirement is based upon 35 Ill. Adm. Code 725.213(b), which requires completion of closure activities within 180 days of approval of the closure plan. Testor points out, however, that Section 725.213(b)(1)(A) allows the Agency to extend that period if the owner demonstrates that the closure activities will, of necessity, take longer than 180 days to complete. The closure schedule in Testor's application included 150 days to complete all activities up to the treatment or disposal of the contaminated soils. The period of time needed for treatment or disposal of the soils was indicated as "unknown". (Ex. 3 at pp. 23-4; Ex. 22 at 24.) Testor states that it could not reasonably be expected to choose a treatment or disposal option until the contaminant concentrations, volume, and treatability of the soils were determined. Therefore, Testor's application set forth four disposal or treatment options: on-site treatment by mechanical aeration, biological degradation,

or vapor extraction, and off-site disposal at a RCRA landfill.[4] (Ex. 3 at p. 19; Ex. 22 at p. 20.) Testor argues that it is impossible to complete any of these options within the time period established in Condition 1, especially if contested Condition 8 (which requires Testor to obtain a Part B RCRA permit to stockpile excavated soils on-site prior to disposal) is upheld by the Board.

In response, the Agency points out that Testor's application does not give any indication whatsoever as to how long treatment or disposal of the soils may take. Thus, the Agency argues that Testor did not make the required demonstration that more than 180 days is necessary to complete closure. Without a request for extension and a demonstration of need, the Agency contends that Section 725.213(b) requires Testor to complete its closure activities within 180 days. The Agency maintains that Condition 1 is necessary to assure that the closure plan did not violate the Act or Board regulations.

As noted above, when reviewing an Agency permit decision, the Board must determine whether the application, as submitted to the Agency, demonstrates that issuance of the permit without the contested conditions would not violate the Act or Board regulations. Section 725.213(b) clearly requires the owner or operator to complete closure activities within 180 days after approval of the closure plan. That section also requires the Agency to approve an extension to that period if the owner or operator demonstrates that closure activities will, of necessity, take longer than 180 days to complete. The burden is clearly placed upon the owner or operator to request an extension and demonstrate that an extension is necessary. The only hint in Testor's application which could be construed as a request for extension is a statement that "[t]he ultimate disposal or treatment of contaminated soil removed during this phase may require a longer time period, depending on the time requirements for obtaining a disposal permit or to complete on-site treatment of contaminated soil." (Ex. 22 at p. 24.) The Board does not believe that this statement was sufficient to be considered a request for extension pursuant to Section 725.213(b). The Board is unable to find a demonstration that closure would take more than 180 days anywhere in Testor's application, and thus must conclude that the application did not demonstrate that Condition 1 was not necessary to avoid a violation of the Act or regulations. Additionally, the only evidence in the record which supports Testor's contention that it is impossible to comply with the 180 day period is new evidence and testimony by Mr. Verret, which the Board has excluded in response to the Agency's motion. Even if Testor had made a sufficient request for an extension of the time period, its

---

[4] The Board notes that although the biological degradation option is listed in Testor's application, that option was not mentioned by Testor at hearing or in post-hearing briefs.

application failed to demonstrate that closure activities would take more than 180 days. The Board must uphold the imposition of Condition 1. The Board notes, however, that Testor can still request an extension of the deadline pursuant to Section 725.213(b) and (c).

Conditions 3 and 4

Testor also challenges the imposition of Conditions 3 and 4. Condition 3 requires Testor to provide the Agency with a proposed groundwater monitoring system that would demonstrate that the groundwater quality in the saturated zone has not been adversely affected by operation of the surface impoundment. Condition 4 requires Testor to monitor the groundwater from its monitoring wells in accordance with Subpart F of Part 725 until Testor demonstrates that no release had occurred from the surface impoundment. In its application, Testor had proposed collecting soil samples at increasing depths to determine whether contamination extended to the saturated zone. If so, Testor would monitor the groundwater. If not, groundwater monitoring would not be performed. (Ex. 22 at p. 15; Tr. pp. 79-89.)

Testor contends that the Board's March 23, 1989 opinion in Marley-Ingrid holds that groundwater monitoring is not necessarily required for clean closure of a RCRA surface impoundment, although equivalency will have to be demonstrated. Testor attacks the testimony of Robert Carson of the Agency's permit section, who testified that there is no demonstration that an applicant could make to avoid doing groundwater monitoring for a clean closure. (Tr. at 192-193.) Testor maintains that Marley-Ingrid allows an applicant to demonstrate equivalency, and argues that the sampling program in its application is sufficient to do so if the contamination has not reached the saturated zone.

The Agency responds by stating its belief that Testor's proposal for addressing groundwater contamination is inadequate to demonstrate that the surface impoundment has not had an impact on groundwater. The Agency contends that a clean closure under Part 725 must consider groundwater, that it was not satisfied that Testor's proposal was adequate to show that groundwater was unaffected by the surface impoundment, and that Conditions 3 and 4 were included in the closure plan approval to correct those inadequacies.

The Board agrees with Testor that, pursuant to our March 23, 1989 opinion in Marley-Ingrid, a facility which is subject to Part 725 and seeks to close by removal is not required as a matter of law to comply with the Part 724 groundwater monitoring standards, although such facilities must at some time demonstrate that they have met the closure by removal standards of Part 724 when that facility seeks a determination of equivalency. As discussed above, the surface impoundment at Testor's facility is subject to Part

725, and Testor proposes closure by removal. Thus, Testor is not required as a matter of law to monitor the groundwater.

After a review of Testor's application and the parties' arguments, the Board finds that Testor's application demonstrates that neither the Act nor the regulations would be violated if the permit was issued without Conditions 3 and 4. In other words, the Board believes that Testor's proposed method of soil sampling to determine whether contamination has reached the saturated zone, coupled with Testor's commitment to perform groundwater monitoring if contamination has reached the saturated zone, is sufficient to prevent a violation of the Act or regulations. The Board emphasizes, however, that this finding is based in large degree on the fact that Testor's soil sampling program includes all constituents identified by the Agency's sampling in the area, all materials used at Testor's plant, and a range of other chemicals, and is not limited to the identified toluene release. The Board also notes that after Testor completes this closure, it must either obtain a post-closure care permit or demonstrate equivalency. In other words, this is not the last time that the area groundwater will be considered. The Agency is directed to issue the plan approval without Conditions 3 and 4, and to substitute Testor's proposed soil sampling and subsequent monitoring program.

Condition 8

Condition 8 requires Testor to obtain a RCRA Part B permit if it stockpiles excavated soils on the ground prior to disposal. Storage of hazardous waste in containers or tanks would be allowed for 90 days without a permit if Testor complies with the requirements of 35 Ill. Adm. Code 722.134. Testor challenges the imposition of this condition, stating that it does not believe that RCRA storage or treatment permits are required in this situation, which Testor analogizes to clean-up pursuant to Section 121 of CERCLA. Testor maintains that the Agency has not historically required such permits for the clean-up of spills, and contends that the imposition of the permit requirement does not serve any of the purposes of the permit system. Testor argues that the permit requirement actually undermines the goal of prompt remediation of potential environmental threats, and maintains that CERCLA's permit exemption should apply here.

The Agency, in response, points out that Testor's application contains a plan to stockpile contaminated soils after excavation from the surface impoundment. (Ex. 22 at pp 19-20.) The Agency states that Condition 8 was included in the plan approval to address violations of Board regulations which will occur if Testor does indeed stockpile the soils. The Agency maintains that the excavated soil is a hazardous waste when discarded (35 Ill. Adm. Code 721.133(d)), and that the act of stockpiling a hazardous waste into piles is the creation of a waste pile which is a hazardous waste management unit (35 Ill. Adm. Code 721.110). The Agency

contends that a RCRA permit is needed for any new hazardous waste management unit, and that even a hazardous waste unit built specifically as part of a closure process must be covered by a RCRA permit. The Agency states that its position is not that Testor must submit a Part B permit application as an absolute condition to closure, but that Testor must obtain such a permit if it chooses to stockpile the excavated soils. In sum, the Agency argues that Condition 8 is a necessary condition to the approved closure plan, but that Condition 8 does not require Testor to submit a Part B application if they follow other storage options which do not require a Part B permit.

The Board does not agree with the Agency that Condition 8 is necessary to assure that Testor's closure of the area does not violate the Act or Board regulations. The Board finds that the condition is based upon an incorrect analysis of the situation. The excavated soil does not become a hazardous waste when discarded, as the Agency maintains; rather, the contaminated soil already is a waste. The Board has held that the area in question is a surface impoundment; therefore, the facility is a treatment, storage, and disposal (TSD) facility. Section 722.134, which contains the 90-day permit exemption, applies only to generators, not to owners and operators of TSD facilities. The Board realizes that this facility became a TSD facility "accidentally", but this does not change the fact that it is a TSD facility under the regulations. Condition 8 is struck. However, striking the condition does not necessarily force Testor to obtain a RCRA storage permit. Testor would be well-advised to be prepared to provide for prompt removal of the waste as it is excavated.

Conclusion

In sum, the Board finds that the discharge area at Testor's facility is a surface impoundment, and that Testor's facility is subject to Part 725. Conditions 1 is upheld, and Conditions 3, 4, and 8 are reversed.

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

ORDER

The closure plan approved by the Agency on October 26, 1988 is affirmed in part and reversed in part. The Agency is directed to issue the plan approval without Conditions 3, 4, and 8, and to add Testor's proposed soil sampling and subsequent groundwater monitoring program as conditions to approval.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987, ch. 111-1/2, par. 1041, provides for appeal of final

orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

B. Forcade dissented and R. Flemal was not present.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 2nd day of November, 1989, by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board