

ILLINOIS POLLUTION CONTROL BOARD
December 18, 1997

IN THE MATTER OF:)
)
PETITION OF AMOCO OIL COMPANY) AS 96-6
FOR AN ADJUSTED STANDARD FROM) (Adjusted Standard - RCRA)
35 ILL. ADM. CODE 721.132)

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This matter comes before the Board upon the petition filed by Amoco Oil Company (Amoco) on December 28, 1995, as amended on August 11, 1997. By its amended petition, Amoco seeks an adjusted standard to exclude certain waste in its "Pond 1 Landfill" in Wood River, Illinois, from "hazardous" classification under 35 Ill. Adm. Code 721 Subpart D, pursuant to 35 Ill. Adm. Code 720.122. The Board finds that Amoco (a) did not follow the required procedures in its testing of demonstration samples, and (b) did not test a sufficient number of samples, as required under the Board's rules. Accordingly, Amoco's petition is denied.

PROCEDURAL HISTORY

Amoco filed its initial "Petition for Adjustment of Standard Pursuant to 415 ILCS 5/28.1" (Petition) on December 28, 1995. Notice of the Petition was published in the Alton Telegraph on January 5, 1996. On March 20, 1996, the Illinois Environmental Protection Agency (Agency) filed its "Response to Petition for Adjusted Standard" (Response). In its Response, the Agency recommended denial of the petition due to an asserted insufficiency of information presented in the Petition. On August 11, 1997, after discussions with the Agency, Amoco filed an "Amendment to Petition for Adjusted Standard Pursuant to 415 ILCS 5/28.1" (Amendment) providing additional information. The Agency filed its "Amended Response to Amended Petition for Adjusted Standard" (Amended Response) on September 12, 1997, in which it recommended that the Board grant the adjusted standard with the conditions indicated in the Amendment. Amoco waived a hearing on its Petition, and no person requested a hearing; accordingly, no hearing was held.

It appeared from the Petition and supporting documents that less than the minimum of four samples required under 35 Ill. Adm. Code 720.122(h)¹ had been analyzed by Amoco in support of its delisting request. On October 2, 1997, the Board adopted an order directing the parties to file briefs addressing whether the Board could grant this adjusted standard without jeopardizing Illinois' RCRA delisting authority, given that Section 720.122(h) was adopted as a rule identical in substance to 40 CFR 260.22(h), and 35 Ill. Adm. Code 720.122(q)² requires Illinois' delisting program to be at least as stringent as the federal program. On October 30, 1997, Amoco filed "Petitioner's Memorandum in Response to the 10/02/97 Order of the Illinois Pollution Control Board" (Amoco Brief), in which it asserted that it had in fact tested six samples—three samples of waste from the landfill and three

¹ Section 720.122(h) provides, "Demonstration samples must consist of enough representative samples, but in no case less than four samples, taken over a period of time sufficient to represent the variability or the uniformity of this waste."

² Section 720.122(q) provides, "The Board will not grant any petition that would render the Illinois RCRA program less stringent than if the decision were made by U.S. EPA."

samples of leachate from the landfill. Amoco argues that the leachate and waste samples are, for the purposes of this petition, functionally equivalent, and thus it has met the requirements of Section 720.122(h). On November 5, 1997, the Agency filed its "Brief," in which it argued that although Amoco had not submitted the required number of samples, other restrictions to be imposed under the adjusted standard would have the effect of keeping the Illinois program overall at least as stringent as the federal program, notwithstanding that the number of samples tested in support of this delisting petition is less than the number required under federal regulations.

REGULATORY FRAMEWORK

Section 22.4 of the Illinois Environmental Protection Act (Act) (415 ILCS 5/22.4) requires that identification and listing of hazardous wastes in Illinois must be identical in substance to that in the United States Environmental Protection Agency's (USEPA) RCRA program (40 CFR 261). Regulations governing the identification and listing of hazardous wastes are found at 35 Ill. Adm. Code 721. Of significance in this proceeding is 35 Ill. Adm. Code 721.132, which lists hazardous solid wastes from specific sources, and from which Amoco seeks an adjusted standard.

On March 1, 1990, USEPA delegated authority to Illinois to administer several components of the RCRA program, including the authority to delist hazardous wastes in lieu of USEPA. Regulations governing RCRA delistings are found at 35 Ill. Adm. Code 720.122, subsection (n) of which provides:

- n) Delistings that have not been adopted by U.S. EPA may be proposed to the Board pursuant to a petition for adjusted standard pursuant to 35 Ill. Adm. Code 106.Subpart G. The justification for the adjusted standard is as specified in subsections (a) through (g) above, as applicable to the waste in question. The petition must be clearly labeled as a RCRA delisting adjusted standard petition.

The contents of the adjusted standard petition are governed by 35 Ill. Adm. Code 106.413 and 720.122(i).

The Board's authority to grant adjusted standards derives from Section 28.1 of the Act (415 ILCS 5/28.1 (1996)). Section 28.1 provides that a petitioner may request, and the Board may impose, an environmental standard that is different from the standard that would otherwise apply to the petitioner as the consequence of the operation of a rule of general applicability. The standards which the Board is to apply in considering a petition for an adjusted standard resulting in a RCRA delisting are set forth at 35 Ill. Adm. Code 720.122(a), which provides:

- a) Any person seeking to exclude a waste from a particular generating facility from the lists in 35 Ill. Adm. Code 721.Subpart D may file a petition, as specified in subsection (n) below. The Board will grant the petition if:
 - 1) The petitioner demonstrates that the waste produced by a particular generating facility does not meet any of the criteria under which the waste

was listed as a hazardous or acute hazardous waste; and

- 2) If the Board determines that there is a reasonable basis to believe that factors (including additional constituents) other than those for that [sic] the waste was listed could cause the waste to be a hazardous waste, that such factors do not warrant retaining the waste as a hazardous waste. A Board determination under the preceding sentence must be made by reliance on, and in a manner consistent with, "Petitions to Delist—A Guidance Manual", incorporated by reference in Section 720.111. A waste that is so excluded, however, may still be a hazardous waste by operation of 35 Ill. Adm. Code 721.Subpart C.

Because Amoco seeks delisting of dissolved air flotation float (USEPA hazardous waste number K048), which is listed as code "T" (toxic) in Section 721.132, the additional provisions of 35 Ill. Adm. Code 720.122(d) apply. That section provides in relevant part:

- d) Toxic waste. If the waste is listed in code "T" in 35 Ill. Adm. Code 721.Subpart D:
 - 1) The petitioner shall demonstrate that the waste:
 - A) Does not contain the constituent or constituents (as defined in 35 Ill. Adm. Code 721.Appendix G) that caused U.S. EPA to list the waste, using the appropriate test methods prescribed in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", U.S. EPA Publication SW-846, as incorporated by reference in Section 720.111; or
 - B) Although containing one or more of the hazardous constituents (as defined in 35 Ill. Adm. Code 721.Appendix G) that caused U.S. EPA to list the waste, does not meet the criterion of 35 Ill. Adm. Code 721.111(a)(3) when considering the factors used in 35 Ill. Adm. Code 721.111(a)(3)(A) through (K) under which the waste was listed as hazardous; and
 - 2) Based on a complete petition, the Board will determine, if it has a reasonable basis to believe that factors (including additional constituents) other than those for which the waste was listed could cause the

waste to be hazardous waste, that such factors do not warrant retaining the waste as a hazardous waste. A Board determination under the preceding sentence must be made by reliance on, and in a manner consistent with, "Petitions to Delist—A Guidance Manual", incorporated by reference in Section 720.111.

- 3) The petitioner shall demonstrate that the waste does not exhibit any of the characteristics, defined in 35 Ill. Adm. Code 721.121, 721.122, 721.123 or 721.124, using any applicable methods prescribed in those Sections.

ANALYSIS

Sample Testing Methodology

Section 720.122(d)(1) contains two alternative demonstrations, one of which must be made before a toxic hazardous waste can be delisted: the petitioner must either demonstrate that the waste for which delisting is sought does not contain the constituents for which the classification of waste into which it falls was originally listed, or that, although containing such constituents, the waste is not capable of posing a substantial hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed. See 35 Ill. Adm. Code 721.111(a)(3). Amoco in its Petition proffers evidence which it asserts provides the first demonstration.

The Board finds that the evidence presented by Amoco is insufficient. Section 720.122(d)(1)(A) requires that the demonstration be made "using the appropriate test methods prescribed in 'Test Methods for Evaluating Solid Waste, Physical/Chemical Methods', U.S. EPA Publication SW-846." The appropriate test method to determine toxicity of a solid waste is the Toxicity Characteristics Leaching Procedure (TCLP), test method 1311 from USEPA publication SW-846. See 35 Ill. Adm. Code 721.124(a). In that test, the waste sample is subjected to an extraction procedure involving treatment with an acid solution; the resulting extract is then analyzed for the presence of contaminants. According to its Petition, Amoco performed this test using deionized water instead of the specified acid solution. The Board consequently cannot find that Amoco used "the appropriate test methods described in [publication SW-846]" in making its demonstration, and accordingly the Board concludes that the requirements of Section 720.122(d)(1) have not been met.

The defect in Amoco's analytical procedures is not cured by Amoco's testing of actual leachate samples from the landfill. The object of the test is to arrive at a number or numbers to be compared to values found in the tables located in 35 Ill. Adm. Code 721. The Board's regulations do not allow comparison of table values to values obtained from a substantially different test (*i.e.*, a test using deionized water instead of the specified extraction solution, or an analysis of leachate), and therefore such a comparison cannot be the basis for a delisting of the waste.

The Board understands and is sympathetic to Amoco's position that the results of its leachate testing are more indicative of "real world" conditions than the results of the TCLP test performed on the waste. Whatever the merits of Amoco's argument, however, the fact remains that the regulations governing delisting of hazardous wastes require use of the TCLP test as set forth in

USEPA publication SW-846, and inasmuch as Amoco has not performed the test as required, Amoco has not made the demonstration required under those regulations. It is furthermore not within the Board's authority to grant relief from the requirements of Section 720.122(d)(1). Under Section 28.1(c)(4) of the Act, 415 ILCS 5/28.1(c)(4) (1996), the Board may only grant an adjusted standard from a rule of general applicability where "the adjusted standard is consistent with any applicable federal law." Section 720.122(d)(1) is identical in substance to 40 CFR 260.22(d)(1). Consequently, any adjustment from Section 720.122(d)(1) would render it inconsistent with federal law, and is thus not permitted under the Act.

Number of Samples

The Board also finds that Amoco did not test enough demonstration samples to qualify for delisting of the waste in the Pond 1 Landfill. Section 720.122(h) requires a minimum of four samples; Amoco tested only three. Both Amoco and the Agency have argued that, notwithstanding this admitted shortcoming, the Board can nevertheless delist Amoco's waste. The Board is not persuaded by the arguments of either Amoco or the Agency.

Amoco's Arguments

Amoco argues that, while it only tested three samples of waste from the landfill, it also tested three samples of leachate. It argues that the leachate is an accurate indicator of the character of the waste, and that therefore it should be considered to have tested six samples. For the reasons stated above, the Board cannot accept this argument. Under the Board's regulations, which are identical in substance to federal regulations, samples of the waste for which delisting is sought must be obtained and tested in accordance with the procedures set forth in USEPA publication SW-846; where those procedures are not followed, test data (no matter how reflective of reality) is insufficient to support delisting. Leachate from the landfill is not, for the purposes of a delisting petition, equivalent to or interchangeable with extract resulting from performance of the TCLP test. So, even if Amoco had followed the proper procedures in its performance of the TCLP test, the Board would still have to deny its petition for failure to test the appropriate number of samples.

Agency's Arguments

The Agency has argued that, while less than the required number of samples were tested in this case, restrictions to be imposed in the requested adjusted standard would keep the Illinois RCRA program at least as stringent as the federal program, and thus granting Amoco's requested adjusted standard would not violate Section 720.122(q). The Board does not decide today whether the determination of "less stringent" can be made based on consideration of the program as a whole, rather than on a section-by-section basis, because even if such an analysis is allowable, the adjusted standard would still be denied.

The Agency predicates its argument on conditions in the proposed adjusted standard that would require Amoco to maintain the waste for which delisting is sought in its closed, capped, and monitored hazardous waste landfill. The Agency argues that, given these conditions, there will be no greater risk posed to the environment from the waste by granting

of the adjusted standard. What the Agency ignores is that the purpose of Amoco's petition is not to permit different treatment of the waste, but to permit different treatment of the leachate from the landfill. See Amendment, Section II-5. None of the conditions in the proposed adjusted standard would provide any protection from any danger posed by leachate from the landfill. The Board therefore could not find that granting this adjusted standard would not result in a less stringent program than if the delisting decision were made by USEPA.

Furthermore, for the reasons discussed above, the Board could not grant (assuming Amoco had sought) relief from the requirements of Section 720.122(h), because it is identical in substance to 40 CFR 260.22(h), and granting such relief would render the adjusted standard inconsistent with federal law.

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

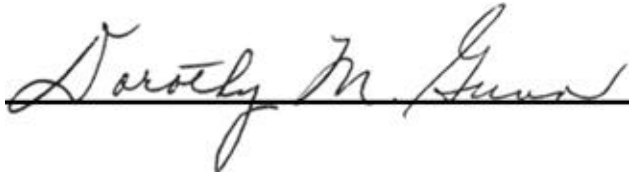
ORDER

For the reasons stated in the foregoing opinion, Amoco's "Petition for Adjustment of Standard Pursuant to 415 ILCS 5/28.1," as amended, is denied.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill.2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 18th day of December 1997, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board