

ILLINOIS POLLUTION CONTROL BOARD
May 19, 1994

ROCK-OLA MANUFACTURING CORPORATION,)	
)	
Petitioner,)	
)	
v.)	PCB 90-24
)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)	
)	
Respondent.)	

JOHN CHEN OF RUDNICK & WOLFE APPEARED ON BEHALF OF PETITIONER;

DANIEL P. MERRIMAN AND JOHN BURDS APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

This matter comes before the Board upon a petition for review filed on February 15, 1990, by Rock-Ola Manufacturing Corporation (Rock-Ola). Rock-Ola requests that the Board review a January 8, 1990, decision by the Illinois Environmental Protection Agency (Agency) withholding approval of a certification of closure for Rock-Ola's interim status hazardous waste facility. The facility at issue is located at 800 North Kedzie Avenue, Cook County, Chicago, Illinois.

Rock-Ola seeks to close its former interim status hazardous waste container storage area pursuant to 35 Ill. Adm. Code 725.215¹. The Agency received Rock-Ola's certification and supporting documentation on July 31, 1989. (R. at 43-202.)² On January 8, 1990, the Agency issued its denial letter stating that soil samples were not analyzed for all parameters required by the

¹The Board notes that Rock-Ola's original petition stated that it filed a closure plan with the Agency pursuant to 35 Ill. Adm. Code 724 et seq. (Pet. at 1.) The Agency correctly considered this case under Section 725, because the Rock-Ola site was an "interim status" facility.

²Rock-Ola's petition will be cited as "Pet. at ___"; Rock-Ola's October 21, 1993, "Post-Trial Memorandum" will be cited as "Pet. Br. at ___"; Rock-Ola's March 21, 1994, "Reply Memorandum" will be cited as "Pet. Rep. Br. at ___"; the Agency's January 6, 1994, "Supplemental Response" will be cited as "Res. Br. at ___"; the Agency Record will be cited as "R. at ___"; the Board Hearing Transcript will be cited as "Tr. at ___"; the Stipulation of Facts introduced at the Board Hearing as Joint Exhibit #1 will be cited as "Stip. at ___"; Petitioner's Exhibit #1 will be cited as "Pet. Ex. at ___"; Respondent's Exhibits will be cited as "Res. Ex. ___ at ___".

approved closure plan. In addition, the denial letter established revised soil cleanup objectives. (R. at 1-3.) Rock-Ola filed with the Board a "petition for hearing", requesting that the Board reverse the Agency's denial of certification of closure and approve Rock-Ola's certification of closure for the facility. (Pet. at 3.)

The Agency Record was filed on July 1, 1993. Hearing was held before Hearing Officer Marvin Medintz on August 16, 1993, in Chicago, Cook County, Illinois. No members of the public attended. Rock-Ola filed a "Post-Trial Memorandum" on October 21, 1993. The Agency filed a "Supplemental Response" on January 6, 1994. Rock-Ola filed a "Reply Memorandum" on March 21, 1994. During the pendency of this case, Rock-Ola filed numerous waivers of the Board's statutory decision deadline while Rock-Ola and the Agency engaged in ultimately unsuccessful settlement negotiations. The latest waiver of decision deadline was filed by Rock-Ola on April 28, 1994, moving the Board's decision deadline to May 20, 1994.

Based on review of the record, the Board finds that Rock-Ola should be issued a RCRA clean closure certification for its North Kedzie facility for the reasons set forth below.

FACILITY DESCRIPTION

Rock-Ola formerly operated a manufacturing facility at the North Kedzie property where Rock-Ola made juke boxes and vending machines. (Stip. at 1.) Rock-Ola had been engaged in manufacturing at the site since the early 1900's. (R. at 299.)

Certain hazardous wastes³ were generated in Rock-Ola's manufacturing process, including recycled paint washer solution, recycled water wall paint booth solutions, spent halogenated solvents, degreasers, paint sludge, and non-halogenated solvents. (R. at 301.) These materials were placed in 55-gallon drums and stored in the drum storage area at the northwest corner of the Kedzie facility, adjacent to North Spaulding Avenue. (R. at 301 and 302.) The hazardous waste storage area was a 60-foot by 100-foot curbed concrete slab, which could hold approximately 60 drums. (R. at 301-303.) The pavement was constructed on a one-foot layer of fill over natural undisturbed dense glacial clay. (R. at 301-303.)

In 1986, Rock-Ola ceased operations at the North Kedzie facility and relocated to Addison, Illinois. (R. at 299.) During 1986, Rock-Ola removed its hazardous waste containers for off-site disposal. (R. at 303, 339-342.) During the relocation,

³ Listed hazardous wastes are given in Appendix G of 35 Ill. Adm. Code 721.

all buildings and structures were demolished and rubble was removed from the site. (R. at 299.) The hazardous waste containment area pavement was excavated to bare soil and the rubble and debris removed from the site during the relocation. (R. at 303.) Rock-Ola ceased doing business in October, 1992. (Stip. at 1.)

Records on the hazardous waste containment area have been kept only since 1980, in response to United States Environmental Protection Agency (USEPA) regulations. (R. at 303.) Rock-Ola filed a Part A application, dated October 27, 1980, with the USEPA and attained RCRA interim status. (R at 35, 301, 330-338.) Two hazardous waste storage sites were listed in the Part A application; the hazardous waste containment area (SO1) which is at issue in this case, and a small storage tank (SO2) on the sixth floor of the former #10 building, which is not at issue in this case. (R. at 44.) Rock-Ola did not develop a closure plan upon obtaining interim status. (R. at 47.)

According to Rock-Ola's Part A application, legal ownership of Rock-Ola's North Kedzie property had been held by LaSalle National Bank as Trustee under a Trust Agreement dated June 6, 1976. (R. at 334.)⁴ On December 24, 1986, ownership was transferred to Trust number 111394. (Stip. at 1.) Thereafter, an entity related to Trust number 111394 demolished the buildings to build a shopping center. (Stip. at 1.) The Agency site inspection report narrative of March 14, 1988, states that the new owner is Paul Gussin of Maryland. (R. at 413.) The shopping center on the site, named Kedzie Plaza, opened for business on November 18, 1989. (Stip. at 14.)

REGULATORY FRAMEWORK

The Board's responsibility in this matter arises from the Environmental Protection Act (Act). (415 ILCS 5/1 et seq. (1992).) The Board is charged therein to adjudicate disputes arising out of permit⁵ decisions made by the Agency. (Section 40 of the Act.) Although the closure plan required as a prerequisite for closure certification is not a literal "permit application", in prior cases the Board has treated closure plan

⁴The Board notes that the Stip. (p. 1) gave the date of the Trust Agreement as June 1, 1986. The Agency Record clearly gives the date of 1976. The date of the Trust Agreement is not material to decide this case.

⁵Rock-Ola's closure plan is a permit in the context of the Act and a closure plan in reference to state and federal RCRA programs. The Agency's authority to issue RCRA permits is given at Section 39(d) of the Act.

condition appeals as permit appeals (see further discussion under "Standard of Review" below).

Certification of closure for interim hazardous waste facilities is required by 35 Ill. Adm. Code 725.215. Section 725.215 is part of 35 Ill. Adm. Code Subtitle G, which are the Illinois regulations necessary to carry out the state's responsibilities under the federal Resource Conservation and Recovery Act (RCRA). The Board is required under the Act to adopt all federal RCRA regulations into Illinois law (see Section 20 of the Act).

Section 725.215, entitled "Certification of Closure", states:

Within 60 days after completion of closure of each hazardous waste surface impoundment, waste pile, land treatment and landfill unit, and within 60 days after completion of final closure, the owner or operator shall submit to the Agency, by registered mail, a certification that the hazardous waste management unit or facility, as applicable, has been closed in accordance with the specifications in the approved closure plan. The certification must be signed by the owner or operator and by an independent registered professional engineer. Documentation supporting the independent registered professional engineer's certification must be furnished to the Agency upon request until the Agency releases the owner or operator from the financial assurance requirements for closure under Section 725.243(h). (Emphasis added.)

STANDARD OF REVIEW

This is an appeal of the Agency's January 8, 1990, decision to withhold approval of Rock-Ola's final RCRA closure certification and impose additional soil cleanup objectives. A RCRA closure plan submittal is properly treated procedurally as a permit application (Testor Corporation v. IEPA (November 2, 1989), PCB 88-191). However, the extensive formal procedures applicable to normal RCRA permit appeals (see 35 Ill. Adm. Code Section 705) are not applicable to Section 725 RCRA interim status closure plan appeals. (Browning Ferris Industries, Inc. v. IEPA (May 5, 1988), PCB 84-136, affirmed, Browning Ferris Industries of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 128 Ill. Dec. 434, 534 N.E.2d 616 (2nd Dist. 1989).) The owner or operator in such an appeal bears the burden to prove that there would be no violations of the Act or Board regulations if the permit (e.g. closure plan approval) were to issue without the contested conditions. (Id.) Although the cases cited above pertained to appeals from Agency-imposed conditions on closure

plans, the standard of review in the instant appeal, where the Agency withheld RCRA closure certification, remains the same. To prevail in this appeal, Rock-Ola must show, based on the record before the Agency at the time of its January 8, 1990, decision, that the closure of its hazardous waste container storage facility complied with all applicable provisions of the Act and Board regulations.

When the Agency denies a permit, it must issue a statement in accordance with Section 39(a) of the Act which sets forth the sections of the Act and regulations that may be violated, the type of information the Agency deems the applicant failed to provide and a statement of the specific reasons why the Act and regulations might not be met if the permit was granted. It is well established that the information in the denial statement frames the issues on review. (415 ILCS 5/39(a); Centralia Environmental Services, Inc. v. IEPA, PCB 89-170 at 6 (May 10, 1990); City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990).) Such information is necessary to satisfy principles of fundamental fairness because it is the applicant who has the burden of proof before the Board to demonstrate that the reasons and regulatory and statutory bases for denial are inadequate to support permit denial. (Technical Services Co. v. IEPA, PCB 81-105 at 2 (November 5, 1981).)

As previously stated, Rock-Ola seeks to close its hazardous waste containment facility pursuant to 35 Ill. Adm. Code 725.215. Central to this appeal is the requirement that the facility "has been closed in accordance with the specifications in the approved closure plan". (Section 725.215.) In this case, the Agency denied certification for the one alleged deficiency specified in the denial letter. Therefore, before we proceed to the arguments of the parties, we must review Rock-Ola's facility closure plan and then frame the discussion by examining the Agency denial letter.

CLOSURE HISTORY

Closure Plan Development

The development, Agency approval, and contested accomplishment of Rock-Ola's closure plan has a lengthy history dating back to 1988. A factual recitation of the closure plan history is complicated by numerous factors. These factors include the normal features that complicate RCRA clean closure certifications, such as the pertinent regulations and Agency review process that sets soil clean-up objectives and reviews documentation to ascertain closure according to plan. The peculiar factors that complicated this case included two property owners, two legal firms, two closure plans, two Rock-Ola environmental consultants, three Agency project managers, and the

presence of a shopping center now on the site. Therefore, a lengthy factual history is necessary to lay the foundation for a discussion of issues leading to Board findings and conclusions.

On April 15, 1988, the Agency posted a pre-enforcement conference letter, notifying Rock-Ola of the requirement to file a written closure plan for the Kedzie facility. (R. at 400; Stip. at 2.) After a settlement conference with the Agency, Rock-Ola agreed to file a written closure plan. (Stip. at 2.) The Agency notified Rock-Ola on June 24, 1988, that Rock-Ola's closure plan had been received, and the apparent violation for not filing a closure plan was now resolved, but the adequacy of the closure plan was not addressed. (R. at 385.)

In May 1988 Rock-Ola began an environmental investigation of the facility conducted by STS Consultants (Project No. 25458-XH). The results of that investigation were submitted to the Agency on July 25, 1988. (R. at 294-384; Stip. at 2.) Information in the "Closure Documentation Report" included facility description (R. at 299), description of waste management units (R. at 301), regulatory history (R. at 303), and various technical studies including soil sampling for numerous chemical parameters. (R. at 304-306.) Rock-Ola collected twenty-eight soil samples in the area of the drum storage facility. (R. at 305.) The deepest depth of the soil exploration was five feet. (Stip. at 2.) Joint Exhibit #1 also stipulates that:

"...The Closure Documentation Report identified the presence of certain constituents on the Kedzie facility, including, but not limited to: 1,1,1-trichloroethane, tetrachloroethylene, trichloroethylene, 1,1-dichloroethane, cadmium, chromium and lead. The highest levels of each of these constituents detected in the soils were as follows:

Volatile Organic Compounds⁶

1,1,1-trichloroethane	2.60 ppm
tetrachloroethylene	.031 ppm
tetrachloroethylene	.043 ppm (soil gas)
trichloroethylene	.030 ppm
1,1-dichloroethane	.100 ppm

⁶The Board will refer to volatile organic compounds as VOC (singular) or VOCs (plural) in this opinion.

E.P. Toxicity⁷

cadmium	.08	ppm
chromium	1.10	ppm
lead	1.20	ppm

Rock-Ola's environmental consultant stated that due to the low levels of soil contamination, no additional excavation or remediation efforts were necessary..."

(Stip. at 2-3.)

On August 16, 1988, Rock-Ola also submitted additional soil analyses to the Agency for two samples collected at boring B-105. (R. at 288-292.) These tests were done because the chemical analyses submitted to the Agency on July 25, 1988, had shown the highest level of 1,1,1-trichloroethane (2.60 ppm) at B-105. In the additional testing, the highest level of 1,1,1-trichloroethane detected was 4.8 ppm (Stip. at 3; R. at 292) and the highest level of trichloroethylene was 0.05 ppm. (Stip. at 3; R. at 292.)

"The Agency assigned Eugene W. Dingledine, an engineer in the Permit Section of the Division of Land Pollution Control, to review the closure of the Kedzie facility. Dingledine's review was based on his interpretation of the information contained in the Closure Documentation Report and the Agency's field notes. As part of the review process, Dingledine completed a closure plan review form. (Ex. 28.) On review form, Dingledine noted that Rock-Ola was making a clean closure request. In the review form, he reported that the sampling was performed properly, and stated that the Closure Documentation Report provided that no waste would be removed from the Kedzie facility. In the review form, Dingledine recommended to approve the closure plan, as submitted, without modification. (Ex. 28.)"

(Stip. at 3.)

On August 8, 1988, Mr. Dingledine prepared an internal Agency memo requesting a "Clean-up Objectives Review" by the Agency's Clean-up Objectives Team (COT). (R. at 272, 278.) The

⁷E.P. Toxicity stands for Extraction Procedures Toxicity Test. This test, developed by USEPA, predicts movement of certain chemicals, especially metals, through soil with infiltrating rain water. (Tr. at 185.)

COT⁸ only reviewed scientific data associated with closure plans and provided site-specific recommendations for cleanup objectives. (Tr. at 150, 195.) Mr. Dingledine's memo reflected Rock-Ola's request that the chemical sampling be accepted and no further clean-up be required. (R. at 277.)

COT met on September 8, 1988, to consider clean-up objectives for the Rock-Ola site as reported in an internal Agency memo of September 15, 1988. (R. at 275.) COT reviewed the sampling and analysis report and determined that additional clean-up was needed to meet objectives. COT suggested clean-up objectives for cadmium, chromium II, chromium VI, and lead (R. at 275) that were incorporated into the closure plan.

COT's technical recommendations were forwarded for review and approval to the Agency's committee for Coordinated Review of Permit Applications (CROPA). A committee composed of senior Agency managers, CROPA's purpose was to review the closure plan and the technical recommendation of COT, and make the final policy decision on whether or not the clean-up objectives⁹ were appropriate for that facility. (Tr. at 152-154.) On September 27, 1988, CROPA reviewed and accepted a COT recommendation for clean-up objectives for metals in soils at Rock-Ola's site. (R. at 274.) CROPA also recommended additional exploratory work at greater depths to determine if organic contamination was present. (R. at 274.)

On October 26, 1988, the Agency approved the Closure Documentation Report prepared by STS Consultants (Rock-Ola's consultant), and attached conditions to the closure plan. (Stip. at 4-6.) The Agency-approved closure plan only established clean-up objectives for four metals (cadmium, chromium III, chromium IV and lead) and one VOC (1,1,1-trichloroethane). (Stip. at 6, R. at 272.)

Site Remediation

In November, 1988 soils were excavated in and around the subject area. (Stip. at 6; R. at 63.) The soil was excavated to 18 inches around soil borings B-105 and B-107 (Stip. at 6; R. at

⁸ A member of COT from 1986-1993, Agency employee, Dr. Hornshaw, testified at hearing that COT was "discontinued" in February 1993 (Tr. at 140, 141).

⁹At hearing Agency project manager, Eric Minder, testified that "[c]lean-up objectives are concentrations which the Agency establishes to which the facility must clean-up soils if concentrations exceed the clean-up objectives at the site before closure certification will be approved". (Tr. at 67.) Mr. Minder further testified that "[s]tandard procedure requires that clean-up objectives be established by COT CROPA teams". (Tr. at 67.)

63) and 90 cubic yards were removed. (Stip. at 7.) Thirty-six square foot areas around other soil boring sites were also excavated to eighteen inches and an additional 70 cubic yards of soil were removed. (Stip. at 7.) The soils were stock-piled on visqueen plastic and covered. (Stip. at 7.) These stock-piled soils were later given designation S03 by the Agency. (See point #1 of May 11, 1989, closure plan approved by Agency; Stip. at 7.)

On March 3, 1989, Barbara Magel of the law firm Karaganis & White sent a letter to the Agency requesting an extension of the closure date for the property. (Stip. at 7; R. at 261, 262.) On May 11, 1989, the Agency sent a revised closure plan in response to the Magel letter. (Stip. at 7.) Agency engineer G. Tod Rowe reviewed the correspondence from attorney Magel and recommended an Agency response. (R. at 394.) On May 25, 1989, Magel wrote a letter to the Agency stating that her firm represented the new owner, but did not have authority to represent Rock-Ola. (Stip. at 10; R. at 203, 204.) In May 1989 the stock-piled soils (waste pile S03) were properly disposed. (Stip. at 11.) On July 28, 1989, Rock-Ola submitted its Closure Certification Statement and Documentation to the Agency (Stip. at 11), which was signed by Rock-Ola's President (R. at 45) and an engineer with Rock-Ola's environmental consultant, MAECORP. (R. at 48.) On July 31, 1989, the Agency received Rock-Ola's closure certification statement and the supporting documentation consisting of MAECORP's Closure Documentation Report. (R. at 44-202.) A closure verification inspection dated August 3, 1989, by Agency inspector, John Maher, of the Agency's Maywood office indicated that regulated unit S01 had been closed in accordance with the approved closure plan. (R. at 33, 58.)

Results of Final Chemical Analyses

The Closure Documentation Report, prepared for Rock-Ola by MAECORP, described the clean-up at the Kedzie facility. (Stip. at 12; R. at 52-62.) MAECORP personnel identified a 120-foot by 160-foot area of concern which included the 60-foot by 100-foot hazardous waste containment area. (R. at 55.) MAECORP obtained and analyzed perimeter soil samples for 1,1,1-trichloroethane by employing an organic vapor analyzer and observed no detectable amounts of 1,1,1-trichloroethane. (R. at 56.) Soil samples were analyzed at the eleven areas where soil had been removed. (Stip. at 12; R. at 63.) For the five parameters with specified clean-up objectives in the closure plan, the highest levels of contamination detected in this confirmatory sampling were as follows: 1,1,1-trichloroethane, chromium IV, and lead were not detected; cadmium was detected at 0.005 ppm; and chromium III was detected at 0.013 ppm. (Stip. at 12; R. at 65-76.)

The soil testing reported in confirmatory sampling (R. at 65-76) detected other contaminants above their PQL's only at

Location 10 (which corresponds to B-102 of the 1988 soil testing; see sample location map, R. at 63). In the denial letter, the Agency expressed concern with contamination by 1,1-dichloroethane, tetrachloroethylene, and trichloroethylene. (R. at 1.) The concentration level at Location 10 for each of these VOCs was: 1,1 dichloroethane at 0.0167 ppm; tetrachloroethylene at 0.118 ppm, and trichloroethylene at 0.832 ppm. (R. at 66.)

These three constituents of new concern to the Agency had been detected in the soil sampling submitted for the Agency by Rock-Ola in July and August 1988 (Stip. at 12), prior to the Agency issuance of the closure plan and clean-up objectives.

1,1-Dichloroethane was detected at the following locations and concentrations prior to closure plan approval in 1988:

<u>Record Page</u>	<u>Bore Site</u>	<u>Concentration (ppm)</u>
R. at 116	B-105 B	0.10
R. at 289	B-105 C	0.003
R. at 291	B-105 D	0.004

Tetrachloroethylene was detected at the following locations and concentrations prior to closure plan approval in 1988:

<u>Record Page</u>	<u>Bore Site</u>	<u>Concentration (ppm)</u>
R. at 99	B-101 A	0.031
R. at 100	B-101 B	0.001
R. at 114	B-105 A	0.003
R. at 124	B-107 B	0.002
R. at 289	B-105 C	? ¹⁰

Trichloroethylene was detected at the following locations and concentrations prior to closure plan approval in 1988:

<u>Record Page</u>	<u>Bore Site</u>	<u>Concentration (ppm)</u>
R. at 105	B-102 A	0.030
R. at 107	B-102 B	0.008
R. at 113	B-104 A	0.007
R. at 117	B-105 A	0.001
R. at 119	B-105 B	0.010

¹⁰The concentration level reads 01 ppm on the test results data sheet. This value is not reported in the same form as other results in the columns above. The Agency believes that review of the preceding line, shows that the value should be read as <0.001 ppm, or a "non-detect". (See footnote 2 of Res. Br. at 4.) While this may be the most plausible explanation, the Board must still note uncertainty with this datum.

R. at 121	B-106 A	0.009
R. at 290	B-105 C	0.030
R. at 292	B-105 D	0.050

AGENCY REVIEW OF ROCK-OLA'S CLOSURE DOCUMENTATION

On July 31, 1989, the Agency received Rock-Ola's Closure Certification Statement and documentation. The Agency assigned Eric Minder¹¹ to review Rock-Ola's final closure certification and supporting documentation. (Tr. at 68-70, 74.) Mr. Minder studied documents in the Agency's Rock-Ola file, prepared written notes documenting his review (R. at 34-41), and prepared a two page memorandum to COT, dated November 7, 1989, which indicated soil contamination with 1,1-dichloroethane, tetrachloroethylene, and trichloroethylene at MAECORP's soil sampling location No. 10 (R. at 13, 14) which corresponds to sample site B-102 of the STS pre-closure sampling. (R. at 63.)

On November 16, 1989, Mr. Minder prepared a form requesting a re-evaluation of soil clean-up objectives for the Rock-Ola site. (R. at 9.) Based on Mr. Minder's request, COT met again on November 30, 1989, to reconsider and re-evaluate Rock-Ola's site. (R. at 8.) Pursuant to that review, COT recommended additional soil clean-up objectives for tetrachloroethylene and trichloroethylene of 0.025 ppm each. (R. at 8.)

The COT recommendations for the Rock-Ola site were reviewed by CROPA on December 18, 1989. (R. at 7.) CROPA noted that because the level of trichloroethylene was high, additional efforts should be made to see if removal or monitoring were necessary. (R. at 7.) The CROPA memo also noted that the area of concern had been paved with asphalt for a parking lot. The memo stated that, "CROPA does not condone the practice of early burial of materials to develop an argument that later removal is now difficult". (R. at 7.) Mr. Minder's review notes closed with the following notation:

Due to the contaminants found in the soils underlying the container storage area, this facility was re-evaluated by COT/CROPA. Since the contaminants were determined to be at high enough level to be considered an environmental risk, clean-up objectives were set for contaminants of concern. These clean-up objectives were outlined in the Agency's January 8, 1990, letter to MAECORP and Rudnick & Wolfe.

(R. at 41.)

¹¹Mr. Dingleline, the original Agency project manager assigned to this project, retired from the Agency in June, 1989. (Res. Br. at 6.)

The Agency letter (R. at 1-4) denying Rock-Ola's closure certification was sent on January 8, 1990, which is 161 days after receipt of Rock-Ola's final closure certification and supporting documentation. The letter was prepared by Mr. Minder (R. at 3; Tr. at 82) and signed by Lawrence Eastep, Manager of the Agency's Bureau of Land, Division of Land Pollution Control, Permit Section. (R. at 4.)

On January 8, 1990, the Agency issued its denial letter which precipitated the instant appeal. The contents of that denial letter will be examined after discussing Rock-Ola's closure plan below.

PROPER ISSUES FOR REVIEW

Which Closure Plan to Use

The Board must dispose of issues in two preliminary areas before proceeding to decide this case. First, the Board must decide which one of the two closure plans applies to this case. Second, the Board must decide which issues have been raised by the Agency denial letter to frame this appeal.

Rock-Ola's closure certification documentation received by the Agency on July 31, 1989, claimed final closure in accordance with the October 26, 1988, approved closure plan. (R. at 45.) The Agency denial letter of January 8, 1990, stated that Rock-Ola's closure certification documentation did not meet the conditions set forth in the May 11, 1989, approved closure plan modification. (R. at 1.) The Board must first decide which closure plan applies in the instant case.

The stipulated history of Rock-Ola and Agency interactions that led to the closure plan were introduced at hearing in Joint Exhibit #1. (Stip. at 1-4.) On April 15, 1988, the Agency notified Rock-Ola of possible violations of the Agency's rules and regulations, including the possible violation that Rock-Ola failed to furnish a closure plan for the N. Kedzie facility. (Stip. at 1.) Following discussions between Rock-Ola and the Agency, Rock-Ola submitted its Closure Documentation Report to the Agency (Stip. at 2) on July 25, 1988 (referenced in Agency Record at p. 43 as being filed on July 31, 1988). Rock-Ola submitted additional soil test results to the Agency on August 16, 1988. (Stip. at 3.) On October 26, 1988, the Agency approved with conditions Rock-Ola's Closure Documentation Report.

(Stip. at 4.)¹² There was no appeal by Rock-Ola of the conditions.

The Agency issued the revised closure plan on May 11, 1989, in response to a letter from attorney Barbara Magel of the legal firm, Karaganis & White, requesting an extension of the closure completion date. (Stip. at 7.) On May 25, 1989, attorney Magel wrote a letter to the Agency stating that her firm represented the purchaser and had no authority to act on behalf of Rock-Ola. (Stip. at 10.)

The Agency asserts that the only difference between the October 26, 1988, and the May 11, 1989, Agency closure plan approvals related to the addition of a closure plan for the stockpiled soil in the May 11 version. (Res. Br. at 14-15.) This new waste pile (designated S03) was created during closure activities for the container storage area (S01). (Stip. at 7.) Waste pile S03 is not at issue in this appeal. Rock-Ola maintains that the May 11, 1989, closure plan approval was issued in error by the Agency, and the October 26, 1988, Agency letter should apply. (R. at 45, 203-204; Pet. Br. at 7, 11.) The Agency also discusses the relationship between Rock-Ola and the purchaser, Mr. Gussin. (Res. Br. at 13-15.) However, the major Agency argument is that the conditions at issue are identical in the two closure plans approved by the Agency. (Res. Br. at 14-15.) The Agency Brief (Res. Br. at 15) notes that conditions 1, 4, 6 and 7 of the October 26, 1988, letter are identical to conditions 2, 6, 9 and 12 of the May 11, 1989, letter (R. at 205, 207, 208, 270-273; Stip. at 4-6, 7-10) and asserts that these conditions are at issue in this appeal.

The Board agrees with the Agency that the substantive specifications at issue are the same in the 1988 and 1989 closure plan approval letters issued by the Agency. The Board finds that although the Agency's January 9, 1990, letter to Rock-Ola withholding closure certification approval made reference to the May 11, 1989, closure plan approval, while Rock-Ola's closure certification documentation made reference to the October 26, 1988, closure plan approval letter, the disparity is inconsequential in determining the merits of this case.¹³ For the purposes of this review, the Board will refer to the condition numbering given in the May 11, 1989, closure approval letter.

¹²The Stipulation includes the footnote that "[t]he parties agree that the October 26, 1988, letter sets forth the following conditions, but do not agree whether the conditions are binding, enforceable or applicable". (Stip at 4.)

¹³The Board also notes that Rock-Ola was served with both closure plan approvals, but did not appeal either of the closure plan approval letters, or their conditions.

Issues Raised by Agency Denial Letter

The Agency denial letter (R. at 1-3) frames the issues on appeal. As a preliminary matter, the Board notes that there is an apparent discrepancy between the conditions given as closure plan deficiencies in the Agency denial letter (R. at 1-3) and the deficient conditions asserted in the Agency Brief. (Res. Br. at 15-20.) The Agency denial letter specifically addresses one aspect of Condition 12, and also notes that additional soil contaminants were observed in the confirmatory chemical analyses submitted with the closure documentation. (R. at 1.) The Agency Brief maintains that Conditions 2, 6, 9 and 12 are at issue. (Res. Br. at 15.) The Agency Brief then proceeds with arguments concerning Conditions 2, 9, and 12. (Res. Br. at 15-20.)

Condition 2

Condition 2 is a lengthy description of the proper information to include in a Closure Documentation Report. (Stip. at 7-8.) It includes the date by which closure should be completed and other specific documentation required. The Agency Brief (Res. Br. at 15) argues that one failing of the Rock-Ola closure was that an independent engineer was not present at all critical closure activities as required by one aspect of Condition 2. (See paragraph 2, Condition 2, p. 7-8 of Stip.) However, the Board can observe no reference to this deficiency in the Agency denial letter. (R. at 1-3.) Since the Agency denial letter frames the issues on review, the Agency cannot raise the absence of the engineer as an issue at this stage of the proceedings, and the Board finds that this issue is not properly before the Board in this review. The Board notes, however, that many other aspects of Condition 2 merely refer to the form of the documentation necessary for submittal to the Agency as a Closure Documentation Report, which is necessary for proper Agency review. The denial letter does not specify any deficiencies in documentation form as submitted by Rock-Ola.

Condition 6

Condition 6 (Stip. at 9) states:

If the Agency determines that implementation of this closure plan fails to satisfy the requirements of 35 Ill. Adm. Code, Section 725.211, the Agency reserves the right to amend the closure plan. Revisions of closure plans are subject to the appeal provisions of Section 40 of the Illinois Environmental Protection Act.

Section 725.211 includes the requirement that closure must be completed in accordance with the closure plan. Even though

not specifically addressed in the Agency denial letter by Condition number, that requirement is included in paragraph 3 of page 2 (R. at 2) of the Agency denial letter, and is a proper issue in this review. However, the Board will not use this very general closure requirement to review every single condition of the Rock-Ola closure plan. The Board will consider Condition 6 as a general requirement applied to those specific Conditions raised as proper issues for review in the Agency Denial letter.

Condition 9

Condition 9 (Stip. at 9) specifies requirements for how the chemical sampling and analytical procedures should be conducted for the parameters of concern. While the Agency Brief (Res. Br. at 16) asserted concerns with discrepancies in how the sampling was conducted, these concerns were not originally raised in the Agency denial letter. Therefore, for the same reasons discussed under Condition 2 above, the Board finds that Agency cannot now argue that Condition 9 was not met, and Condition 9 is not properly before the Board in this review.

Condition 12

The Agency denial letter of January 8, 1990, stated that Condition 12 of the May 11, 1989, approved closure plan modification "was not done" by Rock-Ola. (R. at 1.) Condition 12 of the May 11, 1989, closure plan (Stip. at 10), which is equivalent to Condition 7 of the October 26, 1989, plan (Stip. at 6) states:

Soil sampling shall be carried out to greater depths in natural soil (i.e. not fill material) across the sampling grid shown on Figure 4 (STS Drawing nol. 25458-XH) of the Closure Documentation Report until tests show the parameters listed below to be below the objectives listed in the table below:

<u>Parameters</u>	<u>Soil Objective EP Tox (mg/l)</u>
Cadmium	0.05
Chromium III	1.0
Chromium VI	0.05
Lead	0.1

Concentrations in TCLP¹⁴
Extract (mg/l)

1,1,1-trichloroethane 5.28

The soil samples shall be analyzed for the parameters listed on the laboratory report sheets submitted with the August 16, 1988, letter from STS Consultants, Ltd. to Mr. Gene Dingleline in addition to those identified above. Cleanup objectives for parameters identified with concentrations greater than the applicable PQL will be established by the Agency upon receipt of the analysis results. (Stip. at 6.)

The Agency denial letter of January 8, 1990, specifically addressed one deficiency with respect to Condition 12 of the May 11, 1989, approved closure plan. (R. at 1.) The Agency denial letter stated:

Condition 12 of the above-referenced approved closure plan modification stated that all additional soil samples be analyzed for the parameters listed on the laboratory report sheets submitted with the August 16, 1988, letter from STS Consultants, Ltd. A review of the closure certification submittal revealed this was not done. Review of the above-referenced certification submittal also revealed that the soils were contaminated with 1,1-dichloroethane, tetrachloroethylene, and trichloroethylene.

The Agency denial letter therefore alleges that Rock-Ola did not comply with the closure plan in relation to Condition 12 because Rock-Ola did not analyze soil samples for all the chemical parameters required by the closure plan in the final confirmatory sampling.

Revised Cleanup Objectives

After describing the one alleged deficiency pertaining to Condition 12, the Agency denial letter then mandated revised cleanup objectives by stating:

"...Review of the above-referenced certification submittal also revealed that the soils were

¹⁴The Board notes that TCLP stands for Toxicity Characteristic Leachate Procedure. This is a standard procedure for characterizing hazardous wastes in soils. In this standardized procedure a soil sample is treated with a solvent. Then, the solvent is extracted, and the extract is analyzed for chemical constituent concentration levels.

contaminated with 1,1-dichloroethane, tetrachloroethylene, and trichloroethylene.

Due to the deficiencies referenced above, revised soil cleanup objectives have been set for the site. A listing of the cleanup parameters, soil objectives, and acceptable detection limits for analytical methods are listed below:

Parameter	Soil Objective (ppb)	ADL ¹⁵ (ppb)
1,1,1-Trichloroethane	1,000	5.0
Tetrachloroethylene	25	0.3
Trichloroethylene	25	1.2
Vinyl Chloride	10	2.0

Parameter	Soil Objective EP Tox (mg/l)
Cadmium	0.05
Chromium III	1.00
Chromium VI	0.05
Lead	0.10

A sampling and analysis plan addressing these cleanup objectives for the location of the former container storage area must be submitted to the Agency by March 15, 1990.

Closure certification for the facility will not be approved by the Agency until the soil contamination has been reduced to the objectives listed above and all of the requirements of the approved closure plan are met.

Closure activities must be completed by August 1, 1990...."

(R. at 1-2.)

The Agency denial letter clearly states that Rock-Ola allegedly failed to perform all the chemical analyses required by the approved closure plan. The Agency denial letter also alleges that the confirmatory chemical sampling showed contamination of the site with three additional VOCs: 1,1-Dichloroethane, Tetrachloroethylene, and Trichloroethylene. Because the required chemical tests were not performed, and because of chemical levels

¹⁵ADL stands for "Acceptable Detection Limit". ADL is an Agency term used to "identify the lowest practical quantitation limit or PQL of any of the USEPA's, SW 846 methodologies for analyzing chemicals". (Tr. at 157, 158.) "SW 846 is a compilation of USEPA analytical techniques for analyzing chemicals in various media." (Tr. at 158.)

detected in the final sampling, the Agency set the revised soil clean-up objectives.

The revised clean-up objectives give clean-up objectives for three VOCs that were not specified in Condition 12 of the approved closure plan. These VOCs are Tetrachloroethylene, Trichloroethylene, and Vinyl Chloride. The clean-up objectives for Cadmium, Chromium III, Chromium IV, and Lead, are restated at the same clean-up objective levels that were given in Condition 12 of the closure plan. One other VOC, 1,1,1-Trichloroethane, was given a revised cleanup objective level which differed from the clean-up level specified in Condition 12 of the closure plan.

Summary of Proper Issues for Review

In summary, Rock-Ola's performance of chemical sampling (Condition 12) and the associated revised cleanup objectives were properly raised as issues for review in the Agency denial letter. Condition 6 (closure in accordance with closure plan) was not specifically enumerated in the Agency denial letter, but was raised as a general requirement. Since Condition 6 applies to all other Conditions, it will be considered by the Board, in this review, as it applies to those aspects of Condition 12 opened for review. Condition 2 (independent engineer presence at major activities) and Condition 9 (methodology for analytical and chemical samples) were not raised as deficiencies in the Agency denial letter, and will not be considered by the Board in this review.

The Board notes that the Agency Brief does not specifically mention that the Agency denial letter frames the issues on review. In contrast, the Agency's consistent position is that the burden is on Rock-Ola to prove that its closure certification and supporting documentation establish (based on the record) that final closure has been completed in accordance with the approved closure plan. (Res. Br. at 12-20.) The Board agrees with the Agency that Rock-Ola's RCRA closure certification documentation must comport with the Act. However, this burden on Rock-Ola does not relieve the Agency of its responsibility specified at Section 39(a) of the Act which directs that the Agency shall give specific reasons for permit denials. Taken to its extreme conclusion, the Agency position would have the Board totally ignore the Agency denial letter, and reopen the entire permit for reconsideration.

The Board must again point out that it is well settled that the information in the denial statement frames the issues on review. (See Standard of Review, p.4, supra) This is required to achieve due process for the applicant that bears the burden of proving the appeal. The Agency has made no pleading in this case that Agency personnel or the extensive internal Agency review

process made an error by not noting deficiencies with Conditions 2, 9 and other aspects of Condition 12 in the denial letter. As previously discussed, the Agency had extensive internal procedures for approving RCRA closure plans and RCRA closure plan certifications. That review process did not consider Conditions 2 and 9 of sufficient concern to place them in the denial letter. For all the aforementioned reasons, the Board reiterates that the Agency denial letter frames the issues on review: Conditions 2 and 9 will not be addressed in this review. Those aspects of Condition 12 raised in the Agency denial letter will be examined.

Rock-Ola's Arguments and Board Findings

In this appeal, Rock-Ola bears the burden to prove that no violations of the Act or Board regulations would occur if the closure plan certification was approved as submitted to the Agency by Rock-Ola. The Agency denial letter stated the Agency's rationale for denial, alleging that Rock-Ola did not perform all the chemical testing required by Condition 12, and that levels of contamination reported in the closure confirmatory soil sampling required revised clean-up objectives.

Rock-Ola advances four major arguments in contesting the Agency's denial of closure certification: 1) Rock-Ola complied with its approved closure plan (Pet. at 2); 2) the Agency did not follow its normal procedures in reviewing (Pet. at 2) Rock-Ola's closure certification documentation (Pet. Br. at 12-17; Pet. Rep. Br. at 2-5); 3) the Agency did not establish the revised clean-up objectives in accordance with Condition 12 (Pet. Rep. Br. at 5-6); and 4) the Agency should be estopped from denying the closure certification (Pet. Br. at 17-20; Pet. Rep. Br. at 6-9).

Compliance with Closure Plan

Rock-Ola broadly asserts that closure was accomplished in compliance with the closure plan. (Pet. at 2.) The Agency arguments against Rock-Ola's assertion (Res. Br. at 12-20) are lengthy and bolstered by numerous citations to statutes, regulations, and the instant record. The Agency arguments also call into question Rock-Ola's compliance with Conditions 2 and 9 of the closure plan, which the Board has previously found (see p. 14-15 supra) are not properly raised as issues in this appeal. However, the Board did find that one aspect of Condition 12 is a proper issue for review, and therefore, Rock-Ola bears the burden of proving to the Board that the contested aspect of Condition 12 of the closure plan was met.

The contested aspect of Condition 12 of the closure plan specified that all additional soil samples submitted with closure plan certification should be analyzed for parameters listed on the laboratory sheets submitted with the August 16, 1988, letter

from STS Consultants. (See R. at 289, 290.) MAECORP reported that eleven soil samples were analyzed for chemical constituents after closure in 1989. (R. at 57.) Only one soil sample taken had any detectable values for the twelve individual VOCs analyzed. (Stip. at 11.) The total VOC level for that one soil sample was less than 1 ppm. (Id.)

Comparison of the chemicals tested for after closure by MAECORP (R. at 66, 67) to the list of chemicals tested for before closure by STS Consultants (R. at 289, 290) shows that 16 VOCs¹⁶ were not individually analyzed by MAECORP. (R. at 99-126, 289-292.) MAECORP did not specifically explain why those sixteen VOCs were not individually tested. MAECORP did note in the "Work Discussion" section of the Closure Documentation Report (R. at 57) that "[t]o minimize the analytical cost, it was arranged with the laboratory to analyze the samples for total VOCs prior to TCLP analysis. Then, if the total VOC levels were below the TCLP clean-up objective level, running TCLP would not be necessary." (R. at 57.)

The Board's examination of the record shows that failure to perform tests for the individual VOCs in this case is not sufficient ground, by itself, to rule that Rock-Ola has not complied with the approved closure plan. The total VOC level was less than 1 ppm for the one soil sample with VOC contamination out of the eleven soil samples tested. (Stip. at 11.) Fifteen of the sixteen VOCs were not detected at any location in 1988 pre-closure plan testing by STS Consultants. (R. at 99-126, 289-292.) One VOC, 1,1-Dichloroethylene, was detected in two samples at the B-105 site (Location 1 of MAECORP) that was the focus of the most excavation activity. (R. at 289-291.) The area around soil borings B-105 and B-107 were the most extensively excavated for off-site disposal. (Stip. at 6,7; R. at 63.) None of the VOCs tested for by MAECORP in post-closure testing were detected at B-105. (Location 1 of MAECORP testing, see R. at 63, 65.) In addition, the Board notes that the one VOC given a clean-up objective, 1,1,1-trichloroethane, had the highest pre-closure concentration of 4.8 ppm at B-105D (R. at 292), and was not detected in post-closure testing at that site. (See Location 1, R. at 65.) In addition, the soil cleanup objectives for 1,1,1-trichloroethane was set at 5.28 ppm in the Agency approved closure plan. (Stip. at 10.) For these reasons, the Board finds that the record shows that Rock-Ola complied with the requirement of Condition 12 of the Closure Plan to test for the parameters

¹⁶Bromoform, Carbon Tetrachloride, Chlorobenzene, Chlorodibromomethane, Chlorethane, 2-Chloroethylvinyl Ether, Dichlorobromomethane, Dichlorodifluoromethane, 1,1-Dichloroethylene, 1,2-Dichloropropane, Dichloropropylene (mixed), Methyl Bromide, Methyl Chloride, 1,1,2,2-Tetrachloroethane, 1,1,2-Trichloroethane, Vinyl Chloride.

listed in the data sheets presented with the August 16, 1988, letter from STS Consultants.

Agency Procedures

Rock-Ola asserts that Agency procedures were not followed in three major ways. First, Rock-Ola asserts that Section 39 of the Act (415 ILCS 5/39) provides that Rock-Ola's closure certification approval should proceed by default since the Agency failed to act on Rock-Ola's certification of closure within 90 days of submittal. (Pet. at 2.) Second, Rock-Ola asserts that the Agency failed to adhere to its own deadline for review. (Pet. Br. at 14.) Third, Rock-Ola argues that the Agency did not follow its normal review procedure in this case. (Pet. Br. at 15.) As a remedy, Rock-Ola argues that the Agency's actions should lead to certification of closure by default. (Pet. Br. at 15.)

90-day Deadline for Permit Review. Rock-Ola did not advance arguments in support of its assertion that Section 39 of the Act mandates closure certification by default if the Agency does not act within 90 days. The Agency properly argued that the Board has previously ruled that the default provisions found in Section 39(a) of the Act do not apply to RCRA permits. (See Marathon Petroleum Company v. IEPA (July 27, 1989), PCB 88-179.) Instead, it is Section 39(d) of the Act that applies to RCRA permits or RCRA closure plans, matters which are in the nature of permits. (See Testor Corporation v. IEPA (November 2, 1989), PCB 88-191.) Section 39(d) of the Act contains no default provision. Therefore, the Board finds that Rock-Ola has no regulatory basis for requesting closure certification by default because the Agency did not act within 90 days after Rock-Ola submitted its closure certification.

Agency Internal Deadline for Review. Next, Rock-Ola argues that the Agency is bound by Agency guidelines to review closure certification documentation in either 60 or 120 days. (Pet. Br. at 14.) The Agency's internal review deadlines are given in the document entitled "Instructions for the Preparation of Closure Plans for Interim Status RCRA Hazardous Waste Facilities". (R. at 211-232.) The pertinent section reads as follows:

Following certification of closure, the Agency will conduct an inspection of the closed facility and review the certification documents to ensure that the certification meets regulatory requirements and verify that the closure was conducted in accordance with the approved closure plan. This review will take up to 60 days for facilities which have established financial assurance and as long as 120 days for other facilities.

(R. at 228.)

Rock-Ola points out that the Agency received Rock-Ola's closure certification documentation report on July 31, 1989. (Stip. at 12; Tr. at 124.) The Agency denial letter was issued on January 8, 1990. (Tr. at 113-124.) Rock-Ola argues that because the review was not completed for 161 days, the Agency failed to meet its deadline, and therefore, the Agency must approve Rock-Ola's request for closure certification. (Pet. Br. at 15.)

The Agency first argues that Agency instructions constitute guidance and direction, but are not rules or regulations, and thus have no legal or regulatory effect. (See Platolene 500 v. IEPA (May 7, 1992), PCB 92-9; Strube v. IEPA (May 21, 1992), PCB 91-205.) Second, the Agency argues that the issue before the Board should be whether or not Rock-Ola's certification and documentation meets the specifications of Rock-Ola's approved closure plan. The Agency maintains that the Board would violate its own regulation if it approved Rock-Ola's closure certification by default, without determining that Rock-Ola's closure certification demonstrated compliance with the interim status regulatory requirements (Section 725).¹⁷

The Board is concerned by the amount of time (161 days) that the Agency took to review Rock-Ola's closure certification documents, despite Agency published guidelines that the review would be finished in either 60 or 120 days.¹⁸ However, the Agency has properly cited prior Board opinions (Platolene 500, supra and Strube, supra) that Agency guidelines are not controlling, and the Board must look to its regulations in deciding the issues of this case. Therefore, the Board will not order the Agency to certify closure in this case based on the argument that Agency internal deadlines were not met.

Normal Agency Review Procedures. Finally, Rock-Ola asserts that an agency must consistently apply its rules and procedures,

¹⁷As previously noted, the Board's Section 725 interim status hazardous waste regulations are based on underlying federal RCRA regulations, which the Board is required by Illinois statute to adopt as identical-in-substance regulations into Illinois Law.

¹⁸The Board notes that Rock-Ola maintains that it met the financial assurance requirements which would trigger the Agency guideline deadline of 60 days for review, rather than 120 days. (Pet. Br. at 14.) The Agency argues with Rock-Ola's assertion in footnote #32. (Res. Br. at 30-31.) The Agency took 161 days to review the closure certification documentation, which is beyond either the 60-day or the 120-day deadline. Therefore, the Board does not need to review whether or not Rock-Ola met the financial assurance requirements of Section 725.243, since the Agency did not meet either the 60-day or the 120-day deadline.

and that an agency's past interpretation of its rules and procedures is controlling in disputes. (Pet. Br. at 15-16.) Rock-Ola cites to Dean Foods as authority for both assertions. (Dean Foods Co. v. Illinois Pollution Control Bd., 143 Ill. App. 3d 322, 333, 492 N.E. 2d 1344, 1352 (2d Dist. 1986).) Rock-Ola maintains that in the instant case, the Agency failed to adhere to its past practices in reviewing closure certification requests. (Pet. Br. at 16.) Rock-Ola argues that the Agency did not follow its normal procedure because the Agency has required Rock-Ola to remediate constituents which Rock-Ola reported to the Agency before closure. (Pet. Br. at 16-17.) Although not specifically named by Rock-Ola, the three additional VOCs given cleanup parameters are Tetrachloroethylene, Trichloroethylene, and Vinyl Chloride. (R. at 1.) Rock-Ola argues that the Agency determined that "no action was required" for the three additional VOCs because the Agency failed to include those VOCs in the approved closure plan after reviewing pre-closure plan chemical sampling showing the presence of those VOCs on the site. (Pet. Br. at 16-17.)

The Agency agrees with Rock-Ola as a basic principle of law that the Agency is bound to follow its own procedures. (Res. Br. at 27.) The Agency takes issue with Rock-Ola's assertion that failure to establish specific clean-up objectives at the time of the original closure plan approval constituted a "no action determination". (Res. Br. at 31.) The Agency points to one aspect of Condition 12 of the closure plan (Stip. at 10), which states that additional clean-up objectives would be established by the Agency if any parameters were detected at concentrations greater than their PQL's¹⁹. The Agency argues that the plain language of Condition 12 calls for the Agency to establish revised clean-up objectives if subsequent testing shows elevated levels of organic contaminants. (Res. Br. at 31.)

Both Rock-Ola and the Agency cited testimony at hearing by Dr. Hornshaw (Tr. at 213) to support their arguments. Dr. Hornshaw was a member of the Agency Clean-up Objectives Team (COT), which provides site specific recommendations for clean-up at various kinds of sites. (Res. Br. footnote 3 at 4.) At the Board hearing, Dr. Hornshaw was asked; "[h]ow many times in a permit procedure...does the same application normally go to COT?" (Tr. at 213.) Dr. Hornshaw replied:

¹⁹Practical Quantitation Limits (PQL's) are essentially the level at which chemicals can be reliably detected. Since there are different analytical techniques available for detecting and quantifying an individual chemical, each technique will have its own PQL for each chemical. (Tr. at 158.) The Board notes that the Agency Record and Hearing Transcript indicates that the Agency uses ADL and PQL interchangeably.

"Normally, once, but if there's ever anything detected, not the first time through, it can come back again and again.

We have a couple of boomerang sites that keep showing up as confirmation sampling is done.

For instance, to determine that the site has met clean-up objectives, sometimes a new set of chemicals will be discovered in the confirmation sampling and then the project manager will bring the new information back to COT to determine a new set of objectives."

(Tr. at 213.)

The plain language of Dr. Hornshaw's testimony is contrary to the Agency's stated position in the instant case that according to Condition 12, additional clean-up objectives would be established by the Agency if any parameters were detected at concentrations greater than their PQL's. Dr. Hornshaw specifically stated that to become a "boomerang site", "...a new set of chemicals" would be discovered in confirmatory sampling. (Tr. at 213.) In the instant case, the revised clean-up objectives were made for chemicals already known at the site (and one that was not detected). The Board finds that the Agency did not follow normal procedure by submitting Rock-Ola's certification to COT and CROPA to establish revised clean-up objectives for chemicals that were detected prior to closure plan approval. However, as discussed in considering internal Agency time deadlines, this Board does not consider inconsistency of Agency procedures to lead necessarily to a clean closure certification by default.

Revised Clean-up Objectives

Rock-Ola argues that closure work is complete at the Kedzie facility and that Rock-Ola remediated for those chemicals for which the Agency established clean-up objectives. (Pet. Br. at 17.) To support its arguments, Rock-Ola cites the stipulated statement that, "[t]he analytical data shows that the cleanup brought the levels of contamination below the cleanup objectives for the specific parameters established in the Agency's closure plan approval letter". (Stip. at 12.) Rock-Ola asserts that now that closure work is complete, the Agency "has changed its mind" (Pet. Br. at 17) and has required Rock-Ola to attain clean-up levels for chemicals reported to the Agency prior to Agency approval of the closure plan. In addition, Rock-Ola asserts that the Agency has issued revised clean-up objectives that are lower than the soil concentrations reported to the Agency prior to closure plan approval. (Pet. Br. at 17.) Rock-Ola argues that the imposition of revised clean-up objectives in this case is

arbitrary, capricious, and unreasonable. (Pet. at 2.) Rock-Ola cites appellate authority that an administrative agency must consistently apply its rules and procedures. (Dean Foods Co. v. Illinois Pollution Control Board, 143 Ill. App. 3d 322, 333, 492 N.E.2d 1344, 1352 (2d Dist. 1986).)

The Agency argues that Condition 12 of the closure plan gives the Agency specific authority to issue revised clean-up objectives for chemicals detected in soil samples in concentrations greater than their applicable PQL's. (Res. Br. at 31; Stip. at 10.) The Agency maintains that Rock-Ola's confirmatory soil sampling showed concentrations above PQL for three VOCs (1,1-dichloroethane, tetrachloroethylene, and trichloroethylene), therefore it is justified in revising clean-up objectives. (Res. Br. at 31.) In addition, the Agency asserts that dramatic increases in the soil concentrations of trichloroethylene and tetrachloroethylene observed when comparing pre-closure plan and post-remediation chemical analyses showed that Rock-Ola failed to meet Condition 6 of the closure plan. (Res. Br. at 33.) Condition 6 specifies that implementation of the closure plan must satisfy the requirements of 35 Ill. Adm. Code Section 725.211. (Stip. at 9.) Further, the Agency speculates that the dramatic increase in levels of the two chemicals mentioned above may likely constitute "an unexpected event" pursuant to 35 Ill. Adm. Code 725.212(c).

The Agency also argues that Board precedent (see Browning Ferris Industries, Inc. v. IEPA (May 5, 1988), PCB 84-136) gives the Agency authority to revise clean-up objectives based on changed scientific and regulatory understanding. The Agency maintains that Agency understanding did change between the first time COT met to recommend clean-up objectives and the second time COT met and recommended the revised objectives under appeal. (Res. Br. at 32.) The Agency maintains that the soil clean-up objectives approved in the closure plan were based on a derivation from the general use water quality standards of 35 Ill. Adm. Code 302.208. (Res. Br. at 32; referring to Tr. at 186 and R. at 286A.) The Agency asserts that when COT met the second time to review Rock-Ola, the Agency based soil clean-up objectives on a derivation from the USEPA MCL (Maximum Contaminant Level) and PMCL (Proposed Maximum Contaminant Level). MCL is the maximum concentration of a specific chemical that is not to be exceeded in drinking water. MCL's are established by USEPA. (Tr. at 159.) The PMCL is a value that has been proposed by the USEPA in the Federal Register. The PMCL has not finished going through the notice and public comment procedures necessary to establish a federal rule. (Tr. at 159, 160; Res. Br. at 32; referring to Tr. at 160, 161 and R. at 8.)

After reviewing the record in this proceeding, the Board finds that the Agency's imposition of revised clean-up objectives

is unreasonable for the reasons given in the paragraphs below. First, there is no direct statutory or regulatory authority for the Agency's revised soil clean-up objective for 1,1,1-trichloroethane. Second, Agency imposition of revised soil clean-up objectives for trichloroethylene and tetrachloroethylene which were not given a clean-up objective in the original closure plan is not supported by the record. Third, vinyl chloride was given a revised soil clean-up objective even though it was not reported in any samples and was not given a clean-up objective in the original closure plan. Fourth, there were nine additional hazardous VOCs detected in soil testing prior to closure plan approval which were not given clean-up objectives.

First, 1,1,1-trichloroethane was given a clean-up objective of 5.28 ppm in the Agency approved closure plan. (Stip. at 10.) The soil testing reported by Rock-Ola prior to closure plan approval found 1,1,1-trichloroethane present in 13 samples at 7 locations. (R. at 101, 103, 105, 107, 109, 111, 113, 115, 117, 119, 121, 123, 125.) Reported concentrations ranged from <0.001 (non-detect) to 4.8 ppm. (R. at 292.) 1,1,1-trichloroethane was not detected in confirmatory soil sampling (R. at 66, 72), submitted with closure certification. Therefore, the record shows that Rock-Ola achieved compliance with this clean-up objective. The revised soil objective for 1,1,1-trichloroethane given in the Agency denial letter was 1.0 ppm. The Agency denial letter gave no explanation for revising the clean-up objective for 1,1,1-trichloroethane. (R. at 1-4.) The Agency Brief generally argues that COT revised the clean-up objective for 1,1,1-trichloroethane from 5.28 ppm to 1.0 ppm because COT changed the basis of its derivations from Illinois groundwater standards to federal MCL's and PMCL's. However, the Board can find no direct statutory or regulatory authority for the Agency's new position that soil cleanup objectives should be set at federal MCL's, which were developed as drinking water standards. Therefore, since Rock-Ola has demonstrated that the closure plan clean-up objective for 1,1,1-trichloroethane was achieved, the Board finds that the imposition of a revised clean-up objective for 1,1,1-trichloroethane is not necessary to achieve compliance with the Act or Board regulations.

Second, two of the VOCs given revised clean-up objectives were found in pre-closure soil testing at concentrations higher than their respective revised soil cleanup objectives, yet the Agency assigned no clean-up objectives in the closure plan. Tetrachloroethylene was reported in four samples (R. at 99, 100, 114, 124) at three bore holes (B-101, B-105, B-107) in soil sampling prior to closure plan approval. Reported concentrations, when detected, ranged from 0.001 ppm to 0.031 ppm. In confirmatory sampling, a concentration of 0.118 ppm was

detected at location 10²⁰. (R. at 66.) Tetrachloroethylene was not detected at the same site in pre-closure plan testing. (R. at 102, 104.) Trichloroethylene was reported in 8 samples (R. at 105, 107, 113, 117, 119, 121, 290, 292) at four bore holes (B-102, B-104, B-105, B-106) in soil sampling prior to closure plan approval. Detected concentrations ranged from 0.001 ppm (R. at 117) to 0.050 ppm. (R. at 292.) In confirmatory sampling, a concentration of 0.832 ppm was reported at Location 10. (R. at 66.) Trichloroethylene was reported from the same site at a concentration of 0.03 ppm in testing by STS Consultants prior to closure plan approval. (R. at 105.) For both VOCs, the revised clean-up objective was 0.025 ppm, which was lower than the reported concentrations for each VOC in soil testing before the closure plan was approved.

The Board finds that the revised soil clean-up objectives for tetrachloroethylene and trichloroethylene are not supported by the record. The record does not show that the Act or Board regulations would be violated by the occurrence of these two VOCs at their reported concentrations. Both of these VOCs were known to occur at the site in concentrations higher than the revised soil clean-up objective issued by the Agency and yet the Agency issued no clean-up objective in the closure plan. As discussed above, the Agency has cited no direct statutory or regulatory authority for setting soil cleanup objectives at federal MCL's which were developed as drinking water standards. Therefore, the Board finds that the imposition of revised soil clean-up objectives for tetrachloroethylene and trichloroethylene is unreasonable because the Agency knew that the chemicals occurred on the site prior to closure plan approval. In addition, the Board finds that the soil concentrations reported in confirmatory sampling were not sufficiently high to constitute "an unexpected event" pursuant to 35 Ill. Adm. Code 725.212(c).

Third, vinyl chloride was not detected in any soil sampling reported prior to closure plan approval. (R. at 99-126, 289-292.) No clean-up objective was set in the closure plan. (Stip. at 7-10.) Rock-Ola's consultant, MAECORP, did not specifically test for vinyl chloride in the confirmatory sampling. (R. at 65-75.) The Agency refers to vinyl chloride as a "degradation product" (Res. Br. at 10, 31) and the Agency testified that vinyl chloride is likely to move through soil and contaminate water. (Tr. at 176.) However, since vinyl chloride was not detected in any pre-closure plan soil samples, and the Agency detected several other hazardous VOCs which were not given clean-up objectives (next point discussed), the Board finds that the

²⁰Location 10 of MAECORP's sampling for the closure certification testing corresponds to site B-102 of the STS Consultants soil sampling performed prior to closure plan approval.

imposition of a revised clean-up objective for vinyl chloride is unreasonable and not supported by the record.

Fourth, nine additional hazardous VOCs were detected in pre-closure plan soil testing, yet they were not given clean-up objectives. The nine VOCs and their highest reported concentrations were: Benzene, 0.09 ppm (R. at 118); Chloroform, 0.11 ppm (R. at 102); 1,2-Dichloroethane, 0.04 ppm (R. at 102); 1,1-Dichloroethylene, 0.025 ppm (R. at 291); Ethylbenzene, 0.102 ppm (R. at 291); Methylene Chloride, 0.06 ppm (r. at 118); Toluene, 0.083 pp (r. at 292); 1,2-Transchloroethylene, 0.005 ppm (R. at 105); and Trichlorofluoromethane, 0.004 ppm (R. at 105). Seven of those VOCs had concentrations equal or higher than the revised clean-up objectives set for trichloroethylene, tetrachloroethylene, and vinyl chloride.

SUMMARY

After careful review of the record, the Board finds that Rock-Ola has adequately followed the RCRA closure plan of May 11, 1989, and that the documentation submitted with closure certification shows that Rock-Ola met the clean-up standards of the May 11, 1989, closure plan. The stipulated agreement submitted jointly by both parties stated that Rock-Ola had brought levels of contamination below the cleanup objective for the specific parameters established in the Agency's closure plan letter (Stip. at 12). In addition, the Board finds that the imposition of revised clean-up objectives in the January 8, 1990, Agency denial letter are not necessary to comply with the Act or Board regulations. In summary, the Board finds that Rock-Ola should be issued a RCRA clean closure certification, without conditions, by the Agency, for Rock-Ola's North Kedzie facility (site S01). Since the Board has found that Rock-Ola's RCRA closure certification for the North Kedzie facility (S01) should be issued by the Agency without conditions, there is no need to rule on Rock-Ola's estoppel arguments.

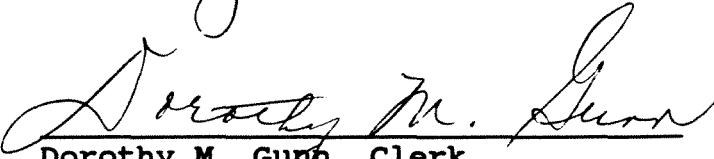
ORDER

The Agency is directed to issue the RCRA clean closure certification without conditions for Rock-Ola's North Kedzie facility (site S01).

IT IS SO ORDERED.

Chairman Claire A. Manning and Board Member Marili McFawn dissent.

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 May, 1994, by a vote of 4-2.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board