

ILLINOIS POLLUTION CONTROL BOARD
May 19, 1994

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

DISSENTING OPINION (by C.A. Manning and M. McFawn):

We are in dissent with the majority opinion and order in this case. We would affirm the letter issued by the Illinois Environmental Protection Agency (Agency) on January 8, 1990 withholding approval of the certification of closure for Rock-Ola's interim status hazardous waste facility. The majority opinion recites, and we agree, that Rock-Ola bears the burden of proof to establish 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. Yet, rather than finding that the evidence submitted by Rock-Ola was sufficient to prove that the contested cleanup objectives are not necessary to prevent a violation of the Act or Board regulations, the majority finds that the record does not support the cleanup objectives established by the Agency. Of course, since Rock-Ola only argued that the contested soil cleanup objectives are "revised" cleanup objectives, and that they are arbitrary, capricious, and unreasonable, there is no such evidence. As a result, to reach its outcome, the majority placed the burden of proof on the Agency. This arbitrary shift is contrary to the standard opined by the majority and established case law addressing the burden of proof in permit appeals before the Board.

Rock-Ola contests the revision of one and the imposition of three new soil objectives by the Agency in its denial letter of January 8, 1989.¹ Specifically, the majority found that (1) "the *revised* clean-up objectives for tetrachloroethylene and trichloroethylene are not supported by the record", in that "the record does not show that the Act or Board regulations would be violated by the occurrence of these two VOCs at their reported

¹ We would agree that the Agency cannot revise the cleanup objective for 1,1,1-trichloroethane. Rock-Ola has proven satisfaction of the original cleanup objective. Thus, the burden shifts to the Agency. The Agency failed to prove why such satisfaction was not sufficient to prevent a violation of the Act or Board regulation.

concentrations," and are unreasonable "because the Agency knew that the chemical occurred on the site prior to the closure plan approval" (P.27); and (2) the "revised imposition of a revised clean-up objective for vinyl chloride is unreasonable and not supported by the record", because "the Agency detected several other hazardous VOCs which were not given clean-up objectives."

We disagree that the Agency issued "revised" cleanup objectives for any contaminant other than 1,1,1-trichloroethane. Soil cleanup objectives for the other three contaminants were not established by the Agency until its January 8, 1990 letter withholding certification of clean closure. No soil cleanup objectives for these three contaminants were contained in either the Agency's original or modified cleanup plan approval letters dated October 26, 1988 and May 11, 1989. Furthermore, the Agency reserved the right to establish soil objectives for these and other constituents in both letters at identical Conditions 7 and 12, respectively. In pertinent part, the Condition provides:

Cleanup objectives for parameters identified with concentrations greater than the applicable PQL will be established by the Agency *upon receipt of the analysis results.*

Rock-Ola never appealed this Condition, although its very language informed Rock-Ola that additional cleanup objectives would be forthcoming depending on the soil analytical results generated during cleanup. The Agency clearly reserved the right to impose new cleanup objectives and, then, did so upon receipt of the analysis results for three parameters, two of which were identified as having concentrations greater than the applicable PQL. The analytical results, which were generated in November, 1988, were received by the Agency on July 31, 1989. Thereafter, the Agency exercised the authority reserved at Condition 12. Neither Rock-Ola nor the majority contests that reservation of authority. Yet the majority opinion allows Rock-Ola to do just that by finding that the contested soil objectives are somehow "revised" objectives.

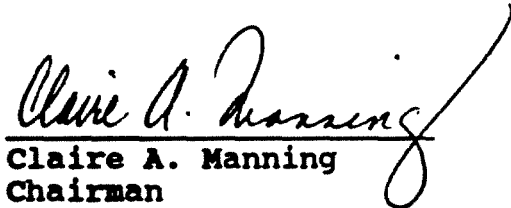
The Agency having exercised its right to establish the site-specific cleanup objective for tetrachloroethylene, trichloroethylene and vinyl chloride, the issue becomes whether the Agency's cleanup objectives are technically warranted. In other words, if Rock-Ola is correct and the closure plan should not be modified with these cleanup standards, would the closure plan without the revisions violate the Act or Board regulations. (Browning Ferris Industries, Inc. v. IEPA, (May 5, 1988), PCB 84-136, affirmed, Browning Ferris Industries, Inc. v. PCB, 179 Ill. App. 3d 598, 128 Ill. Dec. 434, 534 N.E.2d 616 (2nd Dist. 1989).)

"Based on the record", the majority comes to the conclusion that the closure plan without these objectives would not be violative of either the Act or Board regulations. Concerning tetrachloroethylene and trichloroethylene, the majority agrees with Rock-Ola, in sum, because the Agency knew about the presence of these two contaminants when it approved and subsequently modified Rock-Ola's closure plan, and because the cleanup objectives were set at levels lower than the levels detected prior to approval of the closure plan. This rationale ignores the evidence that the levels detected during cleanup were significantly higher and at different hot spots than found prior to cleanup. Rock-Ola is never compelled to prove why these conditions do not warrant cleanup objectives; instead, the majority opinion obligates the Agency to defend its decision.

Vinyl chloride is another example as to why the Agency reserved the right to establish new cleanup objectives. Unlike the other two compounds, vinyl chloride was not detected prior to cleanup and Rock-Ola did not test for it during cleanup, although it was required to do so pursuant to the approved closure plan. Upon receipt of the analytical results, the Agency established a cleanup objective for vinyl chloride, which it characterized as a degradation product of the other two VOCs. (See Agency Response Brief at at 10 and 31.) Yet, the majority precludes it from doing so on the fabricated argument that the Agency established no cleanup objectives for other hazardous compounds detected at similar levels prior to cleanup. Rock-Ola never even makes this argument, and we fail to see the relevance of this majority's comparison to the Agency's handling of the other hazardous compounds.

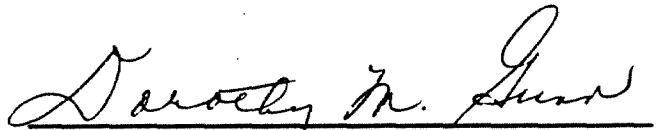
Finally, the record is lacking any specific arguments or information to explain why the site should be considered sufficiently "clean" to meet this standards established in 35 Ill. Adm. Code Part 725 *et al.* In Browning Ferris, the appellate court clearly articulated that the burden of proof to show why the "modification" is not necessary is on the petitioner. Only after a *prima facie* case has been established, does the burden shift to the Agency to support its application of the permit modifications, in this case additions to the closure plan prior to its approval. (Id. at 441). As Rock-Ola confines its arguments to procedural matters and estoppel arguments regarding the Agency's failure to follow its own internal procedures, never reaching the issue of why the closure plan without these modifications is in compliance with the Act or Board regulations, the *prima facie* case is not satisfied. Therefore, we would find that Rock-Ola has not carried its burden and absent that evidence the Agency cannot be ordered to issue a certificate of "clean" closure.

For the above reasons, we respectfully dissent.


Claire A. Manning
Chairman


Marili McFawn
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was entered on the 9th day of June, 1994.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board