ILLINOIS POLLUTION CONTROL BOARD
August 4, 1988

PEARSON INDUSTRIES, INC.	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 87-7
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

THOMAS J. IMMEL OF IMMEL, ZELLE, OGDEN, MCCLAIN, GERMERAAD AND COSTELLO APPEARED ON BEHALF OF THE PETITIONER

VIRGINIA I. YANG, OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF THE RESPONDENT.

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

This matter comes before the Board from a January 14, 1987 Permit Appeal filed on behalf of Pearson Industries, Inc. (hereinafter "Pearson"). The Petitioner appeals the decision of the Illinois Environmental Protection Agency (hereinafter "Agency") of December 9, 1986, concerning the modification of Petitioner's closure plan. The Board held public hearing on this matter at the Henry County Courthouse, in Cambridge, Illinois on July 23, 1987. Pearson submitted its post-hearing brief on September 2, 1987. The Agency filed a response brief on September 17, 1987 and the Petitioner filed a reply brief on September 23, 1987. Further action on Pearson's closure plan has been stayed.

BACKGROUND

Pearson operates a small, farm equipment manufacturing company in Galva, Henry County. There are approximately one-hundred-and-fifty employees at the plant. The plant is equipped with a spray-painting system that is used to paint the finished products. When the color of the paint is changed, the paint system is flushed with the desired color of paint until the system runs with that color. The paint that is pumped through the system during the flushing process is generally known as paint waste. This paint waste was collected in drums and stored in a sixty feet by fifty feet dirt area outside of the Pearson plant, until final disposal. (R.117).

The paints used by Pearson prior to October 31, 1985, may have contained pigments exceeding the E.P.A. Extraltion Procedure Toxicity for heavy metals set forth at 35 Ill. Adm. Code

721.124. Although the presence of heavy metals was not conclusively shown, heavy metals and toxic solvents are commonly found in the types of paints used by Pearson. Further, Pearson's own test of paint chips found in the storage yard showed that the paint waste was a hazardous waste because of its ignitability (R. 17). As a result, the paint, and the paint wastes, are classified as hazardous waste. The Agency also stated that its previous site investigations showed that xylene and toluene may have been stored in the storage area (R. 117).

As a hazardous waste generator, Pearson is governed by the Board's regulations in 35 Ill. Adm. Code 722. Under section 722.134(b), Pearson became an operator of a hazardous waste storage facility because it allowed the hazardous waste to accumulate for more than ninety days. As a result, Pearson, and the drum storage area, are subject to the requirements of 35 Ill. Adm. Code 724, Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities.

Pearson planned to cease generation of hazardous waste by using water-soluble paints instead of solvent based coatings. As a result, it no longer requires a storage area for hazardous waste. However, because hazardous wastes were stored in the storage area for periods of greater than ninety (90) days, it was necessary for Pearson to file a closure plan for the storage area, with the Agency, in compliance with 35 Ill. Adm. Code 725.212. In compliance with 35 Ill. Adm. Code 703.150(a), Pearson submitted Part A of the permit application for a hazardous waste material facility in August of 1980. In this application, the Petitioner stated that its hazardous waste from non-specific sources fell under the generic classification of F003 and F005 as set forth in 35 Ill. Adm. Code 721.131. These generic classifications include the following hazardous wastes:

F003	The following spent non-halogenated solvents: xylene, acetone, ethyl acetate, ethyl benzene, ethyl, methyl isobutyl ketone, n-butyl alcohol, cyclohexanone, and methanol; and the still bottoms from the recovery of these solvents.
F005	The following spent non-halogenated solvents: toluene, methyl ethyl ketone, carbon disulfide, isobutanol, and pyridine; and the still bottoms from the recovery of these solvents.

Pearson submitted a partial Closure/Post Closure Plan to the Agency on August 19, 1985. The Agency responded on November 13, 1985 by notifying Pearson of numerous deficiencies in its plan. Pearson submitted additional information for its Closure/Post

Closure Plan on February 27, 1986.

In the plan, Pearson states that the maximum waste inventory in the storage area was approximately 345 drums. The maximum drum weight was approximately 400 although many of the drums were only partially full. Pearson began final removal of the drums on November 6, 1984 and by June 25, 1985 all of the drums containing hazardous waste had been properly disposed. Pearson stated that it will no longer use the area to store hazardous waste.

The hazardous waste remaining in the storage area is the result of spillage and drum leakage. This is documented by an Agency inspection report from February 20, 1985 and from the Petitioner's Closure/Post Closure Plan which reports analytical test results on paint residues (not soil) taken from the surface of the storage area. Pearson estimates in the Closure/Post Closure Plan that less than one drum of paint residue is present in the storage area.

To close the facility, Pearson could either cover the area containing hazardous waste and provide for post-closure care or remove all of the hazardous waste from the area. Pearson proposed the following preliminary removal procedure for the soil in the storage area:

> The removal of two to three inches of soil from the surface of the entire Drum Storage Area is planned. Any penetration of paint residues into the soil beyond a 2-inch depth is considered unlikely.
> Since this cleanup proposal covers a physical removal of soil and solid-type residues with no anticipated complications, it will only be described briefly here. More details will be provided in the final report for this closure.
>
> The procedure planned is to use a small front-end loader to remove the soil and paint residues. Cleanup would be started at one end of the area and move towards the other. By starting outside of one end, the loader would not have to operate on the residues. On-site supervision and visual inspection by ESG Watts would be used to determine if removal is required beyond that planned in any particular location. The paint residues are the only known hazardous material in the area. Since they are readily visible to someone looking for them, visual inspection during cleanup is considered an adequate criteria.
>
> As the soil and residues are removed, they will be placed in bulk-type trailer units

placed next to the area. Procedures will be used to prevent the loss of material between the loader pickup area and the bulk containers.

Upon completion of removal operations, the front-end loader will be cleaned over a bulk container using a steel scraper. After cleaning, the scraper will be discarded into the container. The bulk containers will be covered immediately to prevent rainfall entry and wind losses. Arrangements for transport to final disposal will be made as soon as final test results are available.

Following cleanup, soil samples will be taken from the grid locations where the red, blue, yellow and green paint residues were collected on July 3, 1986. They will be analyzed for chrome (total) and lead by the EPA Extraction Procedure (EP) Toxicity test. Sampling procedures are covered in an attachment to this Closure Plan revision.

Four background samples will be taken outside of the Drum Storage Area. These will be taken about 50 feet away from the corners on lines at 45 degree angles to north-south directions. The sampling coordinates are: Ne - S1185.0,W2-60.0; SE - S13-50.0,W2-60.0; SW - S13-50.0, W3-85.0; NW - S11-85.0,W3-85.0.

The background samples will be tested the same as the ones from inside the cleanup area. In addition, the following analyses will be run on one of the samples from each group: Unified Soils Classification test (ASTM D2487), and Particle Size Analysis (ASTM D422). These tests determine the clay, sand, and silt content of soils.

Should the follow-up testing show that hazardous waste remains in the Drum Storage Area, the cleanup and testing procedures detailed above will be repeated. When all work has been completed and the bulk containers transported for final, manifested disposal, a final report documenting the cleanup will be prepared and submitted to the IEPA.

On December 9, 1986, after reviewing the closure plan submitted by Pearson, the Agency approved the plan subject to the following conditions:

1. The entire drum storage area shall be excavated to a depth of 1 foot and disposed as hazardous waste.

2. The soil shall be sampled at the points indicated in the closure plan. For the sampling points in the storage area, samples shall be taken from the top 2 inches of the floor of the excavation.

3. The parameters and cleanup levels listed in the table below shall be used in testing the soil and in demonstrating decontamination.

Parameter	Cleanup Level
Toluene	3 mg/kg
Xylene	3 mg/kg
Benzene	2 mg/kg
Methyl Ethyl Ketone	169 mg/kg
PAHs	0.5 mg/kg
Ethylene Glycol Butyl Ether	130 mg/kg
Isobutyl Alcohol	148 mg/kg
Methyl Isobutyl Ketone	50.9 mg/kg
Cyclohexanone	63 mg/kg
Aliphatic & Aromatic Petroleum Distillate	to be determined
Polyisocyanate	to be determined
Tri (Dimethylaminoethyl) Phenol	to be determined
Aliphatic Alcohol	to be determined
Aliphatic Ester	to be determined
Copper	0.02 mg/l (EP Tox)
Lead	0.1 mg/l (EP Tox)
Chromium (Hexavalent)	0.05 mg/l (EP Tox)
Chromium (Trivalent)	1.0 mg/l (EP Tox)
Cadmium	0.05 mg/l (EP Tox)

Cleanup levels for aliphatic and aromatic petroleum distillate, polyisocyanate, tri (dimethylaminoethyl) phenol, aliphatic alcohol and ariphatic ester have not yet been determined. Pearson shall test the soil for these parameters and submit the results to the IEPA by April 7, 1987, for evaluation, and propose a revised closure schedule, if necessary. In its response to this submittal, the Agency shall include a schedule for completion of closure and submittal of closure certification.

4. Sampling, sample preservation and analytical methods shall be conducted in accordance with Appendices A, B, and C of 35 Ill. Adm. Code Part 721. Furthermore, the soil shall be tested using SW846 Methods 8240 and 8250 for the organics and SW846 Method 1310 for the metals.

5. If levels for any of the above parameters for samples taken in the storage area exceed cleanup levels, the soil sampling program shall be expanded vertically and laterally, using the grid sampling method described on page 4 and 5 of the enclosed instructions, until the boundary of contamination is defined. All contaminated soil shall be excavated and disposed as hazardous waste. After excavation, the area shall be resampled and tested to demonstrate all contaminated soil has been removed.

6. After it is demonstrated that all contaminated soil has been removed, the area shall be restored to its present contours with clean soil.

7. All equipment used in the excavation process including the end loader and containers shall be steam cleaned or disposed as hazardous waste.

8. When closure is complete the owner or operator must submit to the Director certification both by owner or operator and by an independent registered professional engineer that the facility has been closed in accordance with the specifications in the approved closure plan.

Also, to document the closure activities at your facility, please submit a Closure Documentation Report which includes:

a. The volume of waste and waste residue removed.

b. A description of the method of waste handling and transport.

c. The numbers on the waste manifests.

d. A description of the sampling and analysis methods used.

e. A chronological summary and analysis methods used.

f. Photo documentation of closure.

g. Tests performed, methods and results.

h. A scaled drawing of no smaller scale than 1:100, showing the drum storage area and the locations of the soil sampling points including background sampling points.

All certification, logs, or reports which are required to be submitted to the Agency by the facility should be mailed to the following address:

Illinois Environmental Protection Agency
Division of Land Pollution Control
Permit Section
2200 Churchill Road
Post Office Box 19276
Springfield, IL 62794-9276

9. This facility must continue to meet the applicable requirements of 35 Ill. Adm. Code Part 722 - Standards Applicable to Generators of Hazardous Waste and Part 723 - Standards Applicable to Transporters of Hazardous Waste.

10. The "Certification Regarding Potential Releases from Solid Waste Management Units" which you submitted is being forwarded to the USEPA for possible future action. The approval of this closure plan neither approves or disapproves of the aforementioned "Certification".

Pearson estimates the procedure it proposes would cost approximately twenty-thousand dollars ($20,000), while the conditions imposed by the Agency would increase the cost of closing the facility to approximately two-hundred-thousand dollars ($200,000). (R. at 26).

ISSUES

In order to determine the appropriateness of the Agency's modifications to the Closure/Post Closure Plan, the Board must first address some preliminary issues. The first issue is whether the disposition of the proceeding should be decided under the RCRA permit appeal regulatory procedures in 35 Ill. Adm. Code 705 or the standard Board procedures for Agency permit denials under 35 Ill. Adm. Code 105. Because this facility has filed a Part A application but has not submitted a Part B application, as required under the RCRA regulations, the facility was deemed to have achieved "interim status" and was required to comply with the interim status standards of Part 725 of the Board's regulations. Part 725 interim status standards are generally implemented without a permit application or review. However, the Board provides for appeal of Agency decisions to the Board under 35 Ill. Adm. Code 725.218(g). Therefore, the permit was not a RCRA permit and is not subject to specialized RCRA procedural requirements. However, the Agency's decision may be appealed to the Board under the procedures established in 35 Ill. Adm. Code 105. Browning Ferris Industries of Illinois, Inc. v. Illinois Environmental Protection Agency, PCB 84-136, Slip Op. at 4-5 (May 5, 1988).

The next preliminary issue is the standard of review to be applied in permit appeal hearings. The Petitioner repeatedly argues that the Agency fails to show a technical justification for their modification of the closure plan. However, the Agency is not required to justify its action. It is the Petitioner that bears the burden of proving the Agency's permit conditions unnecessary. Environmental Protection Agency v. Illinois Pollution Control Board, 118 Ill. App. 3d 772, 780, 445N.E.2d 188, 194 (1st Dist. 1983). Pearson must show that the record before the Agency indicated that Pearson's Closure/Post Closure Plan was sufficient to ensure that the drum storage area would not cause a violation of the Act or Board regulations governing hazardous waste disposal facilities.

Another issue raised by the Petitioner is whether the soil in the drum storage area should be treated as hazardous waste. While Pearson acknowledges that the paint waste was hazardous waste, and disposed of the drums accordingly, it denies that the soil in the storage area is hazardous waste. Pearson maintains that the classification of the paint waste in its permit application was inadvertent and incorrect. (R. at 28). According to tests performed by its consultant, Pearson maintains that the paint waste in its storage yard should be classified as D001 as set forth in 35 Ill. Adm. Code 721.121 because it exhibits the characteristic of ignitability but is not a listed hazardous waste (R at 17). Further, Pearson maintains that the D001 classification applies only to the paint waste and not to the soil in the storage area and that the concentration of paint waste is so low that the soil in the storage area may not qualify as a hazardous waste. Pearson's proposed Closure/Post Closure

Plan calls for core sampling of the soil to determine if it is hazardous or non-hazardous.

First, it must be reiterated that the requirement for a permit for a Closure Plan is necessitated by the fact that hazardous waste was stored in the storage area for longer than ninety (90) days and is required whether or not the soil is a hazardous waste. The question that arises is how should the soil that is collected from the storage area be disposed. Again, Pearson bears the burden of proving that its plan will ensure that no section of the Act or Board regulation will be violated.

The Agency must make its decision based on the permit application. Even though the record included Pearson's statement that the hazardous waste was misclassified as type F waste, the Agency is responsible for determining what portions of the record should be given the greatest credence. Obviously, the Agency was not sufficiently persuaded by Pearson's disclaimer. Although the paint waste stored in the yard at closure was to be type D hazardous waste, and the paint samples taken from the yard surface were also type D waste, the Agency had no assurances as to what had been stored in the yard previously. The Agency had reason to believe type F waste may have been stored in the yard (R at 117). Therefore, they formulated conditions to ensure a comprehensive closure of the area.

PERMIT REVIEW

In a permit appeal case, the Board must put itself in the position of the Agency at the time the permit application is reviewed and determine if there is sufficient proof, supplied by the applicant, that the facility will not cause a violation of the Act or the Board's regulations. The Board may add conditions to the granting of the permit as may be necessary to accomplish the purpose of the Act and regulations. In accordance with Section 40(d) of the Act, the decision of the Board shall be based exclusively on the record before the Agency including the record of the hearing.

The conditions imposed by the Agency increase the number of parameters for which the soil is to be tested and the amount of soil that is required to be removed from the yard. The Agency explained that their previous experience in a closure or cleanup that involved paint wastes found some of these added parameters to be common constituents of paint wastes. Therefore, the Agency decided that it would be reasonable to expect that some of these parameters might also be present at the Pearson site (R. 93 and 107). The Agency demanded testing for xylene and toluene because site investigations by the Agency indicated that both were used as solvents at the facility and were stored in the subject storage yard (R. 117 and 133). The Agency indicated that it imposed the requirement of excavation of twelve inches of soil because they felt it would allow the Petitioner to avoid

additional analytical soil testing costs. (R.64).

The Petitioner argues that the testing for all of the parameters included by the Agency are unnecessary because the paint waste are hazardous only because of flash point. Pearson therefore proposes that the excavated soil be tested by flash point. They also maintain that the cost of excavating and testing the soil will be incurred by the Petitioner and therefore they should be allowed to excavate and test in the manner they feel will be most cost effective. The Petitioner also maintains that the Agency is imposing an unnecessary expense on Pearson by requiring that the soil be disposed of as hazardous waste even if analytical testing shows it is non-hazardous.

In reviewing the Closure/Post Closure Plan submitted by Pearson to the Agency on February 27, 1986, the Board believes that the plan is not sufficient to ensure that the hazardous waste will be properly disposed of as required by 35 Ill. Adm. Code 725.211 because it fails to supply sufficient detail of the proposed closure plan. In particular, the plan fails to state the exact area to be excavated, fails to test the excavated soil for type F hazardous waste and does not call for the excavation of a larger area if the soil is found to be hazardous. The Board will not order the Agency to issue a permit without greater assurances that all of the hazardous waste will be removed from the area.

The Agency is correct in requiring the Petitioner to test for the parameters it has listed. It is undisputed that paint waste is present in the soil and both Pearson and the Agency know that paint and paint residue contain solvents and metals. The rules do not specify the tests to be used to determine if the removal process is complete. Removal can be taken to mean the elimination of all hazardous waste and constituents from the site. Complete removal is not intended to be determined by whether or not the soil is a hazardous waste. Therefore, the Petitioners proposal of testing the excavated soil for flash point, to determine if the soil was a characteristics hazardous waste, would be inadequate.

The Agency could have required Pearson to demonstrate removal of all hazardous constituents down to the level of detection. Instead, the Agency acted with reasonable leniency by using levels of detection, established extraction procedures and water quality standards to define removal. The Agency's conditions allow constituents to remain at levels below the levels established by the water quality standards. The Agency also allows constituents to remain if they do not leach under the extraction procedures test.

Pearson has proposed the removal of only the top three inches of soil as opposed to the removal of twelve inches suggested by the Agency. Under Pearson's proposal the Petitioner would be required to excavate soil from the storage area at

increments of 3 inches in depth until the last portion of soil excavated and the soil remaining in the yard both test negative for all hazardous constituents. The Agency admits that Pearson's plan would assure a clean-up of the area but the Agency is of the opinion that the removal of twelve inches of soil would prove more cost efficient for the Petitioner because it would reduce their expenditures for analytical testing of samples. (R. 62 and 64).

Because it is the Petitioner who will bear the cost of the clean-up, it should be allowed to determine the means by which the clean-up is achieved while the Agency shall be responsible for determining if those means are sufficient to ensure the clean-up. In this matter, if Pearson desires to excavate at three inch increments, and the Agency is of the opinion that this will result in a complete clean-up, Pearson should be allowed to proceed as it wishes. However, it must be clarified that Pearson will be required to excavate the entire storage yard after every analytical test that indicates the presence of hazardous materials tested for, and in concentrations above, the limits imposed by the Agency. The Petitioner will not be allowed to divide the area at anytime and continue to clean up only the areas where hazardous materials are detected.

Pearson also objects to the Agency requiring them to dispose of all of the excavated soil as hazardous waste even if the analytical testing indicates no hazardous material is present. The top three inches of soil removed obviously must be discarded as hazardous waste because it will include the paint residue visibly present in the yard. (R.30). While the other soil excavated may not have hazardous characteristics it still must be disposed of as hazardous waste because Section 721.103(c)(2)(A) requires any solid waste generated from the treatment, storage or disposal of hazardous waste to be managed as a hazardous waste. Therefore, all of the soil removed from the yard must be disposed of as hazardous waste.

The Board, therefore, will order the Agency to modify Pearson's Closure/Post Closure Plan by imposing the Board's conditions. These conditions have been formulated to guarantee the elimination of the hazardous waste and minimize the need for further maintenance while avoiding unnecessary actions.

The case will be remanded to the Agency with instructions to include the new conditions drafted by the Board. Section 4(1) and 39(d) of the Act make the Agency the RCRA permitting authority for Illinois. This authority has also been designated by the USEPA. The Board is not a "Co-authority" for RCRA cases and therefore the Board must remand to the Agency for enforcement. Further, it is more practical for the Board to specify the required modifications and allow the Agency to issue the Permit. As a result, the Agency will remain as the permitting agency for the Pearson Closure/Post Closure Plan.

This Opinion constitutes the Board's finding of facts and conclusions of law in this matter.

ORDER

This matter is remanded to the Illinois Environmental Protection Agency with instructions to approve the Closure/Post Closure Plan submitted by Pearson Industries, Inc. consistent with the findings in the opinion which are herein summarized:

1. The Petitioner, Pearson, may excavate the storage area at depth increments of three inches (or at any increments it desires). Analytical testing of both the excavated soil and the storage area must be performed, as prescribed by the Agency, after each excavation. Additional soil must be excavated from the entire area of the storage yard after every analytical test that indicates the presence of hazardous materials above the limits imposed by the Agency. At no time may the Petitioner divide the excavation area, for the purpose of limiting future excavation, to those areas where hazardous waste has been detected.

2. All of the soil removed from the yard must be disposed of as hazardous waste.

3. The parameters and clean-up levels for analytical testing in the Agency's conditions, shall be adhered to by the Petitioner.

4. The reporting requirements, stated in the Agency's conditions, shall be adhered to by the Petitioner.

Section 41 of the Environmental Protection Act, Ill. Re. Stat. 1985, ch. 111-1/2, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify the the above Opinion and Order was adopted on the 4th day of August, 1988, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board