ILLINOIS POLLUTION CONTROL BOARD
March 23, 1989

MARLEY-INGRID (USA), INC., Petitioner,	)	
v.	)	PCB 88-17
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

ORDER OF THE BOARD (by B. Forcade):

This matter is before the Board on the February 21, 1989 motion for reconsideration filed by Marley-Ingrid (USA), Inc. ("Marley"). That motion attacks the January 19, 1989 Opinion and Order of the Board, which vacated the December 11, 1987 closure permit issued by the Illinois Environmental Protection Agency ("Agency") to Marley. The Agency responded to Marley's motion on March 6, 1989. Marley filed a Reply on March 7,1989.

Motion For Reconsideration

Marley's position in its motion for reconsideration is that the Board incorrectly applied the law generally to this case, and specifically that the Board incorrectly applied the holding in Browning-Ferris Industries of Illinois, Inc. v. Environmental Protection Agency, PCB 84-136 (May 5, 1988), as well as the December 1, 1987 federal regulatory adoption (52 FR 45788) to the facts of this case.

Marley's argument is tardy and inappropriate. The only reason the Board received any briefs on the law from Marley is because by Order of May 19, 1988, the Board demanded such briefs. In addition, in that same Order the Board specifically directed the parties' attention to the recently decided case of Browning-Ferris, the case in which the December 1, 1987 federal regulatory adoption was discussed at length. On September 30, 1988, Marley filed a 24 page Brief, on November 7, 1988, Marley filed a 12 page Reply Brief. Neither document mentions the Browning-Ferris case or the December 1, 1987, federal regulatory adoption even once. Neither document even attempts to explain why the regulatory provisions of 35 Ill. Adm. Code 725 should be applied to the decision under review. For Marley to complain at this late date that the Board has misapplied the law generally, and those two precedents in particular, smacks of complaining about a self-inflicted wound.

Despite any lack of propriety in the motion, it does point out a legal error in the Board's Opinion. That error should be corrected; therefore, the Board grants reconsideration. The January 19, 1989 Opinion and Order vacated the permit at issue because, in the Board's opinion, the permit decision was made under the wrong regulatory standards.

The Board held that the 40 CFR 264, Subpart F groundwater monitoring requirements applied directly to all interim status facility closures by virtue of December 1, 1987 HSWA-prompted amendments to the federal RCRA regulations. Opinion and Order of Jan. 19, 1989 at 6-7. This holding was clearly in error, to the extent it includes closures by removal. The Board must therefore modify the holding in the January 19, 1989, Opinion as follows:

> Where a facility which is validly subject to interim status under 35 Ill. Adm. Code 725 (i.e., has substantially obtained and maintained interim status) seeks a closure permit to close by removal, that facility is not required as a matter of law to comply with the Part 724 groundwater monitoring requirements. However, such facilities must demonstrate at some time in the future that they have met the closure by removal standards of Part 724 when the facility seeks a determination of equivalency under 35 Ill. Adm. Code 703.160 (or federal 40 CFR 270.1(c)(6)). 35 Ill. Adm. Code 703.159; see 40 CFR 270.1(c).

That modification to the Board's holding does not, however, dispose of this case. The Board must still determine what regulatory standard applies to the decision under review, and whether that decision was correctly made. Throughout the six briefs filed so far in this proceeding, the parties have consistently stated that the interim status closure provisions of Section 725.328 apply. However, those six briefs do not once explain why that is true. The Board must therefore conduct its own review.

Applicable Regulatory Law

Illinois and federal law both prohibit hazardous waste treatment, storage, or disposal without a RCRA permit. Ill. Rev. Stat. ch. 111 1/2, par. 1021(f)(1) (1989); 42 USC 6925(a) (1988); 35 Ill. Adm. Code 703.121(a) (1987); 40 CFR 271.1(b) (1988). An owner or operator of a hazardous waste treatment, storage, or disposal facility can conduct hazardous waste activities by securing a new permit under Illinois Part 724 and/or federal Part 264 or, in the case of certain existing facilities, by securing and maintaining "interim status" consistent with the interim

status facility standards of Part 725 and/or Part 265. 35 Ill. Adm. Code 703.156; 40 CFR 270.71(b). Those interim status standards became effective November 19, 1980, 45 Fed. Reg. 33154 (May 19, 1980), and they imposed numerous substantive requirements on those interim status facilities to which they apply. Facilities with interim status can continue to operate until final disposition of their permit application under Illinois Part 724 and/or federal Part 264. Three requirements applied to qualify a facility for interim status:

1. The facility must have been in existence on November 19, 1980;

2. The owner or operator must have notified the USEPA of its hazardous waste activities at its facilities by August 17, 1980; and

3. The owner or operator must have submitted Part A of its RCRA permit application for the facility.

42 USC 6930(a); 40 CFR 270.1(b), 270.10(e) & 270.70; 35 Ill. Adm. Code 703.150(a) & 703.153(a); see 45 Fed. Reg. 33119 (May 19, 1980) (USEPA promulgation of regulations identifying hazardous wastes, which triggered the notification requirement).

Thus, within the context of today's factual scenario there are two groups of relevant regulatory law. The first regulatory group governs new permits for hazardous waste facilities. New permits may be required for new or existing facilities. These regulations are found at 35 Ill. Adm Code 724 under Illinois law and 40 CFR 264 under federal law. These regulations "apply to owners and operators of all facilities which treat, store or dispose of hazardous waste..." Section 724.101 (b). However, "[a] facility owner or operator who has fully complied with the requirements for interim status... must comply with the regulations specified in 35 Ill. Adm. Code 725 ..." Section 724.103 (a).

The second group of regulations, those governing interim status facilities, are found at 35 Ill. Adm. Code 725 in Illinois law and 40 CFR 265 in federal law. They apply to owners and operators of facilities, "...who have fully complied with the requirements for interim status under Section 3005 (e) of the Resource Conservation and Recovery Act (RCRA)..." 35 Ill. Adm.

Code 725.101 (b).* Thus, to determine whether the regulations of Part 725 apply, one must determine whether the facility secured and maintained interim status.

The federal regulations governing hazardous waste were initially effective in Illinois. Subsequently the State of Illinois acquired authority to implement the hazardous waste program. To the extent it is relevant, this Order will cite both the state regulatory provision 35 Ill. Adm. Code "XXX" and the federal provision 40 CFR "XXX". Effective dates are provided where appropriate. Within this regulatory scenario, the Board must determine whether Marley was entitled to secure a "closure" decision under the interim status provisions of 35 Ill. Adm. Code 725 or 40 CFR 265.

Under the interim status facility standards, the owner or operator was to engage in various site management, monitoring, and recordkeeping requirements. The facility owner or operator was to assess and maintain records of the volume and character of wastes placed in the facility, beginning in November 1980. 35 Ill. Adm. Code 725. Subpart E (effective May 17, 1982); 40 CFR 265, Subpart E. Beginning on that date, the owner or operator was to maintain on site a copy of current closure and post-closure care plans for its facility. 35 Ill. Adm. Code 725. Subpart G (effective May 17, 1982); 40 CFR 265, Subpart G. On November 19, 1981 the owner or operator was to implement a groundwater monitoring plan and submit an outline of it to USEPA. 35 Ill. Adm. Code 725. Subpart F (effective May 17, 1982); 40 CFR 265, Subpart F; see 45 Fed. Reg. 33239-42 (May 19, 1980).

The interim status standards imposed various other general and specific requirements on surface impoundments. 35 Ill. Adm. Code 725. Subpart B (general facility standards, including

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* Section 725.101 (b) also provides that the Part 725 standards would apply to any facility in existence on November 19, 1980, which failed to secure interim status. This provision would allow facilities that technically failed to secure interim status to continue operation after November 19, 1980 where their continued operation would be in the public interest and EPA had issued an Interim Status Compliance Letter ("ISCL") or a Compliance Order under Section 3008 of RCRA. 45 Fed. Reg. 76632 (November 19,1980). Continued compliance with the Part 725 standards was a necessary prerequisite to such a determination, "...EPA has announced its intent to exercise prosecutorial discretion where appropriate to allow continued operation of existing facilities that did not qualify for interim status if such facilities complied with the applicable EPA Part 265 regulations." 48 Fed. Reg. 52719 (November 22, 1983).

notice, inspection, personnel training, etc.), Subpart D (contingency planning), Subpart F (groundwater monitoring), Subpart H (financial assurance) & Subpart K (specific surface impoundment requirements); 40 CFR 265, Subparts B, D, F, H & K. The overall intent and objective of these provisions was to assure the management of hazardous wastes in a manner that was consistent with the protection of human health and the environment. 42 USC 6902(a)(4) & (b). One obvious purpose of the waste characterization, groundwater monitoring, and record keeping requirements was to later assist in facility closure. See 35 Ill. Adm. Code 725.174(c) & 725.194(b); 40 CFR 265.74(c) & 265.94(b).

Under the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Congress required owners and operators of surface impoundments to undertake certain actions to maintain their interim status. Interim status was to terminate for those facilities on November 8, 1985 unless they took two specific actions:

1. They were to submit a Part B RCRA permit application for a final RCRA permit; and

2. They were to certify their compliance with the interim status groundwater monitoring and financial assurance requirements.

42 USC 6925(e)(3); 40 CFR 270.73(c); 35 Ill. Adm. Code 703.157(c).

If the owner or operator of a surface impoundment failed to submit a Part B application and required certification by November 8, 1985 which was acceptable to USEPA, the facility's interim status automatically terminated as of that date. Vineland Chemical Co. v. EPA, 810 F.2d 402, 409 (3d Cir. 1987); In re Commonwealth Oil Refining Co., 805 F.2d 1175, 1178-79 (5th Cir. 1986); United States v. T & S Brass and Bronze Works, Inc., 681 F. Supp. 314 (D.S.C. 1988); United States v. Vineland Chemical Co., 692 F. Supp. 314, 321 (D.S.C. 1988); United States v. Conservation Chemical Co., 660 F. Supp. 1236, 1241 (N.D. Ind. 1987).

The Board will now examine the present record for indications whether Marley acquired and maintained interim status for its surface impoundment. The Board will simultaneously examine what these facts indicate with regard to whether Marley properly complied with the interim status requirements of Part 725.

Initially, with regard to acquisition of interim status, the record indicates that the Marley surface impoundment did not attain interim status. Marley acquired the site in 1979 or 1980,

prior to the effective date of the RCRA notification and permit requirements. R. 110; see Agency Record, Ex. 65, 66 & 87. It also indicates that Marley did not notify USEPA of the existence of its hazardous waste surface impoundment nor submit a Part A application. The Agency characterized Marley as a "non-notifier" in its Closure Plan Review Notes, Agency Record, Ex. 82, and indicated to USEPA that it had no such record of this facility. Agency Record, Ex. 86. Further, Marley admits to initial discovery of the character of the impoundment in the course of a 1987 environmental audit of the site. R. 34 & 110; Agency Record, Ex. 87.

Second, with regard to the maintenance of interim status, even if Marley had acquired interim status for its impoundment in 1980, it did not have any groundwater monitoring wells until 1987, Agency Record, Ex. 105, so it obviously did not comply with 40 CFR 265, Subpart F from November 1981 (or 35 Ill. Adm. Code 725. Subpart F from May 1982) through at least November 1987. Even at this late date, Marley has still not installed one upstream groundwater monitoring well and three downstream monitoring wells as required by Section 725.191, nor has Marley fulfilled the sampling and analysis requirements of Section 725.192. Further, the record nowhere indicates that Marley had ever prepared a closure plan or performed other compliance-oriented activities until at least late in 1987. These facts indicate that Marley has not complied with major portions of Part 725 and maintained any interim status.

Third, even if Marley had acquired interim status for its impoundment in 1980 and maintained interim status from 1980 until 1985, it did not comply with the 1984 HSWA amendments to avoid a loss of that status on November 8, 1985. Marley did not certify compliance with 35 Ill. Adm. Code 725. Subpart F in 1985 because it did not have any groundwater monitoring wells until 1987. Agency Record, Ex. 105. Further, the record nowhere indicates that Marley has ever submitted a RCRA Part B application. Nor have they acquired and maintained financial responsibility or completed groundwater monitoring. These facts indicate that Marley did not avoid a loss of any interim status under the 1984 HSWA requirements.

Finally, with regard to the effect of Marley's non-compliant status on the factual record before the Board, Marley offers the results of limited testing and conclusory technical arguments to characterize the site geology, soils, and underlying groundwater. It does not offer the type of detailed information that compliance with the interim status requirements would have produced.

It is reasonably clear from the record that Marley never acquired interim status in 1980. It is undeniably clear from the record that Marley did not maintain interim status by compliance

with the Part 725 regulations. To the extent that those regulations applied to Marley, the parties have failed to show that Marley was ever in compliance with any of the regulations of Part 725 and the record clearly demonstrates that Marley was in absolute violation of nearly all of the substantive regulations. In addition to the non-compliance caused by Marley's inaction, the record shows Marley violated the provisions of Section 725.212 (d)(1) by attempting to close the site without approval.* If Marley ever had acquired interim status, Marley lost it by Congressional mandate on November 8,1985. The Board holds that Marley is not entitled to seek interim status closure under Section 725.328.

Adequacy Of The Information Submittal

In a similar manner, the Board finds that Marley's initial information submittal was inadequate to justify any Agency regulatory permit decision. Marley claims to have submitted a "Parts 724 and/or 725 ... hazardous waste surface impoundment closure plan for review and approval". Agency Record, Ex. 71. Marley's submittal contains inadequate information whether it is tested against the information that would have been developed by a compliant interim status facility in anticipation of closure or tested against the information requirements of a Part B application for a new permit seeking to close an existing facility.

By now, a compliant interim status facility would have developed a substantial amount of information on the operations of the facility and the impact the facility was having on the environment. As much of today's conflict involves groundwater monitoring, the Board must note that a compliant facility would have installed one upstream and three downstream monitoring wells and secured information from those wells for a period of nearly seven years. Within this context, the Board would be able to determine whether additional monitoring was necessary as part of a closure plan. Marley's submittal clearly lacks this information.

* Marley drained the impoundment and removed 110 tons of contaminated sediments from its bottom in May 1987. R. 44-45; Agency Record, Ex. 71. Marley's consulting engineers characterized this removal as occurring "during routine maintenance." Agency Record, Ex. 71. However, the record indicates that Marley performed this removal upon discovery of the contamination and with a view to closing the unit. *See* R. 9-10; 34-36, 42-45 & 48-49; Agency Record, Ex. 87. This initial cleanup work was part of the overall closure activity, and it occurred prior to the issuance of a closure plan approval.

Marley's submittal also failed the information requirements for a proper permit application. Permit applications for RCRA hazardous waste permits are governed by 35 Ill. Adm. Code Part 703. Subpart D. The purpose of permit application regulations is to ensure that the permit applicant, permit decisionmaker, and any reviewing body will have an adequate amount of particular types of information so that correct, well informed, permit decisions can be made. The only permit applications relevant today under RCRA are the Part B permit applications under Section 703.182 et seq. For new permits, Section 703.185 et seq. requires far more information in the permit application than Marley has provided in its closure plan submittal. In fact, that section requires far more information than Marley now has placed at issue regarding the interim status closure permit. The permit application provisions of Part 703 are quite extensive because they are intended to apply to those that have not previously participated in the regulatory scheme for the control of hazardous waste. Marley's submittal did not satisfy the information requirements of Part 703.

The facts of this case are similar to those involved in United States v. T & S Brass and Bronze Works, Inc., 681 F. Supp. 314 (D.S.C. 1988). T & S Brass began operation of a surface impoundment prior to RCRA, but failed to notify USEPA and file a Part A RCRA permit application until 1985. The court held that T & S never acquired interim status. Id. at 318. Further, although T & S Brass filed a Part B application and certification on November 8, 1985, that certification was incomplete. Id. at 319. This failure to properly comply with the November 8, 1985 cut-off date resulted in a loss of any interim status as of that date. Id. at 320-21. Although the point of the T & S Brass case was that T & S Brass violated RCRA by continuing operation of its impoundment after November 1985, Id. at 321-22; see also Vineland, 692 F. Supp. 314, more important to the present proceeding was the fact that the court ordered an immediate closure under Part 264 of the federal rules.

Conclusion

In addition to the legal impediments to applying Part 725 standards to the minimal information Marley submitted in this case, there are other more pragmatic considerations. These common-sense factors force the Board to conclude that the closure and post-closure care requirements of 35 Ill. Adm. Code 725.328 can only operate within a regulatory scheme which governs those facilities that are generally in compliance with the interim status regulations. The Part 725 interim status standards applicable to surface impoundments include inflexible, non-discretionary information-gathering requirements. This Board simply cannot pluck the specific narrative standard of Section 725.328 away from the broader regulatory framework and apply it to a recently acquired ad hoc collection of data (which clearly

does not meet the requirements of Sections 725.190 et seq. in either quality or quantity), then make a determination as to what constitutes an appropriate closure plan under the RCRA regulations.

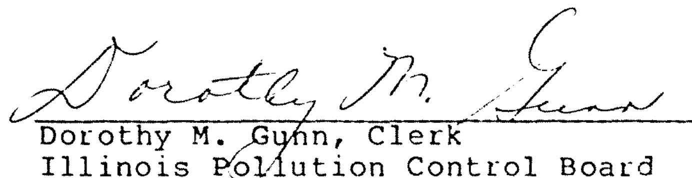
Section 725.328 does not constitute a convenient regulatory hook upon which to hang all of the recently discovered but poorly studied hazardous waste sites in Illinois. Those facilities must submit Part B applications for a Part 724 permit. The Agency decision to grant Marley a permit should therefore be vacated as improper. The Board affirms the January 19, 1989 Order which vacated this permit.

The Board is cognizant of the apparent circumstances which have created the dilemma today confronting Marley. Whatever these circumstances, it is clearly too late for Marley or the Agency to utilize those forms of relief available only to facilities which have obtained and maintained interim status. Without specifically endorsing any alternative, the Board suggests that Marley and the Agency consider other avenues, including those available under remedial statutory authorities (e.g., "superfund" and enforcement provisions), as opposed to prescriptive/managerial statutory authorities (e.g., permit-based systems such as RCRA and NPDES). It may be that such other avenues may be less onerous but still appropriate mechanisms for assuring an environmentally acceptable closure of this facility.

Section 41 of the Environmental Protection Act, Ill. Rev. 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 that the above Order was adopted on the 23rd day of March, 1989, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board