

ILLINOIS POLLUTION CONTROL BOARD
June 22, 1989

SEXTON FILING AND GRADING)
CONTRACTORS CORPORATION,)
)
Petitioner,)
)
v.) PCB 88-116
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

DISSENTING OPINION (by J. Anderson):

I must respectfully dissent from the holding of the majority. As in the previous case involving this Petitioner and a Closure/Post-closure Care (CPC) plan (John Sexton Contractors Co. v. EPA, PCB 88-139, decided February 23, 1989), the Board majority, inter alia, ignores its own prior statements and the uncontroverted history of the adoption of the CPC plan program in Illinois. The several flaws in the majority's logic in that case are detailed in the lengthy Dissenting Opinion, which is equally applicable and expressly incorporated herein.

There remain a few matters which deserve further comment in this proceeding.

First, the majority asserts (p. 4) that Sexton "fails to recognize" that the Board promulgated the CPC plan requirements of R84-22C pursuant to Sections 5, 22 and 27 of the Act, rather than simply Section 21.1. The majority then cites to page 18943 of the Illinois Register of December 6, 1985, as support for this statement and as justification for characterizing CPC plan applications as permit applications.* It is interesting that the majority did not mention its own formal Opinion adopted in R84-22C (see attached), which Opinion is customarily excluded from publication in the Illinois Register. Had the majority cited to that Opinion, which articulates the bases for its rulemaking, it

* The majority did not cite to page 18944 of the December 6, 1985 Illinois Register, which unequivocally states that "these rules implement the requirements of Section 21.1 of the Environmental Protection Act that operators of non-hazardous waste landfills provide financial assurance for closure and post-closure care". No mention is made of any other Section of the Act or any other purposes of the rules.

would have been unable to find a single line of text in support of its position. The reason for this lack of support is clear: as noted in the dissenting opinion from PCB 88-139, the majority has chosen to "rewrite the history of the Board's closure and post-closure rules" (p. 5). It is true that Sections 5, 22 and 27 of the Act were invoked in R84-22C, but not with respect to the substantive CPC plan requirements (the opinion of the Board in R84-22C includes a segment headed "STATUTORY PROVISIONS" (pp. 6-7). Sections 5, 22 and 27 are not mentioned; only Sections 21(d) and 21.1 are included). Moreover, the core assumption upon which the majority now grounds its holding (i.e., that the technical closure and post-closure requirements stand alone, without reference to determining closure and post-closure care costs) flies in the face of the Board's enunciated "Phase-in Provisions" as set forth on page 8 of the opinion in R84-22C, which states that operators on March 1, 1985 "could avoid the financial assurance requirement by ceasing to accept waste and initiating closure pursuant to existing permit conditions" (emphasis added). The emphasized language makes clear that closure requirements have meaning only within the context of financial assurance requirements and do not stand alone; otherwise, the technical closure and post-closure care requirements would have applied immediately to sites existing on March 1, 1985.

Second, the majority inaccurately characterizes Sexton's arguments. On page 3, Sexton is claimed to argue "that the Agency cannot review an aspect of site management vital to environmentally sound closure and post-closure care". In truth, Sexton nowhere makes this argument. Rather, Sexton argues that the Agency cannot, in the guise of review of a CPC plan application, revisit and rewrite the underlying permit. The difference is crucial; this case presents an example of the application of that difference and illustrates the pitfalls of the majority's approach.

In its opinion (p. 14), the majority attempts to justify the imposition of special condition 12 by noting the location of the three monitoring wells and by suggesting that 1987 monitoring data, notwithstanding the testimony of Sexton's expert witness and the results of 15 years' monitoring data to the contrary, "casts a significant doubt on the reality of Sexton's simple model of groundwater flow". Upon reflection, it is clear that not only does such apparently aberrant data scarcely arouse "significant doubt", but such doubt as may exist has relevance primarily to the design and operation of the landfill, rather than to closure and post-closure care.

It is indeed disingenuous to suggest that any shortcoming in a groundwater monitoring program is of consequence to the CPC plan but not to the design and operating permits upon which that CPC plan is founded. The requirements which must be satisfied

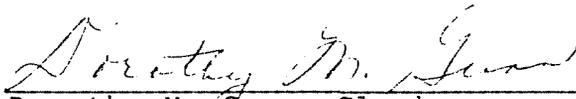
during closure and post-closure care of necessity must be keyed to the realities of design and operation as previously permitted by the Agency; to hold otherwise is to effectively submerge the design and operating permit into the CPC plan, the "condition" thereby swallowing the permit.

Finally, the majority finds that the Agency has not presently applied the draft GMN guideline in a way that gives it the effect of a rule (p. 3). I disagree. The majority acknowledges that "adherence to the provisions of the resource cannot establish compliance" (p. 7) yet ignores the fact that special condition 12 provides for just that. Condition 12 states that one of two alternative modes of compliance available to Sexton is for Sexton to "submit a revised groundwater monitoring plan in accordance with the draft "Groundwater Monitoring Network", enclosed "(emphasis added)". If this does not amount to proclaiming that adherence to the draft guidelines establishes compliance, I am at a loss to say what does.

For the foregoing reasons, I respectfully dissent.


Joan G. Anderson

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 3rd day of July, 1989.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board