ILLINOIS POLLUTION CONTROL BOARD
June 22, 1989

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

MR. FRED C. PRILLAMAN, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF PETITIONER; AND

MR. DONALD L. GIMBEL, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter is before the Board on the July 29, 1988 petition of Sexton Filling & Grading Contractors Corp. ("Sexton"). That petition seeks review of a single condition imposed by the Illinois Environmental Protection Agency ("Agency") on the closure and post-closure care permit issued on June 24, 1988 for Sexton's Bensenville landfill. Public hearings occurred on March 7 and April 5, 1989. Sexton filed its post-hearing brief on April 26, 1989. The Agency filed its response brief on May 9, 1989. Sexton filed a reply brief on May 16, 1989.

Sexton owns and operates a 54 acre landfill located in DuPage County, near Bensenville. A portion of the site was a pre-existing "borrow pit" for earth used in the construction of the Illinois Tollway. The site was operated intermittently from 1964 as a landfill, and Sexton obtained a developmental permit for landfill operation in 1973. Addison Creek flows through a relocated channel between the fill mounds on the site. The site was a floodplain. The wastes buried on the site include vegetative refuse, slag, and foundry sand, but apparently do not include special, hazardous, or putrescible household wastes. Agency Record at 62-63, March 20, 1989 Supplement to Agency Record.

The permit condition (special condition number 12) that Sexton now challenges pertains to groundwater monitoring. The text of this condition reads as follows:

> Within ninety (90) days of the date of this permit (i.e., by September 22, 1988), the

> permittee shall submit to the Permit Section information to show that the current groundwater monitoring program adequately monitors groundwater at the site, or in the alternative, submit a revised groundwater monitoring plan in accordance with the draft "Groundwater Monitoring Network", enclosed.
>
> Agency Record at 3.

Sexton attacks this condition, arguing that the Board should vacate it on three bases:

1. The Agency improperly treated the submission of Sexton's closure and post-closure care plan ("CPC plan") as a permit application;

2. The challenged condition improperly requires Sexton to comply with the draft "Groundwater Monitoring Network" guideline ("GMN guideline") as if it were a regulation; and

3. The challenged condition is not necessary because the Agency erred in determining that Sexton had not provided sufficient information to support its existing plan.

The Agency initially counters that it must review CPC plans as permits. Second, the Agency asserts that it referenced the draft GMN guideline to instruct Sexton as to the elements of a groundwater monitoring program that the Agency believes is adequate to satisfy the requirements of the Environmental Protection Act ("Act") and Board rules. It also used the guideline to provide internal guidance to its permit reviewers. Finally, the Agency highlights deficiencies in the information submitted by Sexton that necessitate the challenged condition. The Board addresses each issue in turn.

CPC Plans as Permit Applications

In support of its argument that Agency review of a CPC plan is not a permit review, and that submission of a CPC plan to the Agency is not an application for permit, Sexton asserts that submission of a CPC plan "is an application to modify the existing operating permit .... [T]herefore, there is no requirement that the application include the information which might otherwise be required by the Agency under Section 807.316(a) from applicants for developmental permits." Sexton Post-Hearing Brief at 20. Sexton asserts that CPC plans serve the limited functions of providing a basis for determining whether the closing facility is an indefinite storage or waste disposal unit and for estimating the amount of post-closure cost

assurance necessary. Sexton maintains that submission of a CPC plan does not provide an opportunity for the Agency to review the adequacy of a site's groundwater monitoring plan.

The Agency argues that because they are ultimately permit conditions, see, e.g., 35 Ill. Adm. Code 807.206(c), 807.501(b) & 807.523(a), the Agency must review CPC plans as permits and treat submission of CPC plans as applications for supplemental permits. The Agency concludes, "CPC plans which are filed with the Agency seeking to add, modify or delete a permit condition are of necessity a permit application." Agency Response Brief at 11.

Sexton's arguments to the effect that the Agency cannot review an aspect of site management vital to environmentally sound closure and post-closure care are unpersuasive. The Board cannot accept the proposition that the Agency must passively allow a violation of the Act or "file an enforcement action" (Sexton Post-Hearing Brief at 21-22) in order to obtain sound facility closure and post-closure care. The Board, when recently confronted with essentially the same arguments in another landfill CPC permit appeal, stated:

> The Board does not construe its solid waste closure and post-closure rules, 35 Ill. Adm. Code 807.500-807.666, as creating a sweeping mandate to rewrite all provisions of older solid waste permits. However, the closure and post-closure care plan submitted to the Agency is a permit application, and the Agency is free to review that application and impose permit conditions in the usual manner so long as those conditions relate only to closure and post-closure care.
>
> * * * *
>
> On its face, Section 807.503(a), in requiring a closure plan, characterizes such a plan as "a condition of the site permit." Id. (emphasis added). Identical language is found in Rule 807.523(a) regarding post-closure care plans. Only the Agency has authorization under the Act to create, modify, or delete a permit condition. Those documents which are filed with the Agency seeking to add, modify, or delete a permit condition are, of necessity, a permit application.
>
> Section 807.503 (d) requires that, "The closure plan shall be included in the permit application pursuant to Section 807.205." In addition, Section 807.504 defines the submission of any modification of a closure plan

> as a "permit application." The regulatory language is clear that the initial submission of a closure plan, or the submission of amendments to that plan, constitute a permit application.
>
> The permit application which is submitted must demonstrate that the facility will not violate provisions of the Act or Board regulations relating to closure or post-closure care. If the permit application does not demonstrate compliance, the Agency may deny the permit application or it may impose conditions which it believes are necessary to ensure compliance. In no event, however, may the Agency decision or its conditions be premised on matters other than closure and post-closure care compliance provisions.
>
> * * * *
>
> Also, contrary to Sexton's arguments, the Board does not believe, based on the particular facts of this case, that the Agency must resort to filing an enforcement action against a permittee in order to secure an adequate and protective permit.
>
> John Sexton Contractors Co. v. EPA, PCB 88-139, slip op. at 4-5 (Feb. 23, 1989), appeal docketed, No. 89-1393 (May 26, 1989).

In arguing that CPC plans serve a limited purpose, Sexton apparently fails to recognize that the Board promulgated the substantive CPC plan requirements of R84-22C pursuant to Sections 5, 22, and 27 of the Act, while it simultaneously imposed the financial assurance requirements pursuant to Section 21.1. See, 9 Ill. Reg. 18942, 18943 (Dec. 6, 1985). Those regulations, in addition to requiring closure and post-closure care financial assurances, see 35 Ill. Adm. Code 807. Subpart F, require closure and post-closure care in accordance with a CPC plan approved by the Agency and made a condition of the site operation permit. See 35 Ill. Adm. Code 807. Subpart E. Any arguments to the effect that R84-22C merely imposed new financial requirements would be incorrect.

Further, any argument that the Agency conducted a plenary review of Sexton's existing permits and imposed extra-regulatory requirements are wholly misplaced. When Sexton filed its CPC plan for Agency review and incorporation into the operating permit, the Agency had authority to review the extent to which that plan "minimizes the need for further maintenance" and "controls, minimizes or eliminates post-closure release of waste, waste constituents, leachate, contaminated rainfall, or waste

decomposition products to the groundwater ... to the extent necessary to prevent threats to human health or the environment." 35 Ill. Adm. Code 807.502. In the course of that review, the Agency determined that the groundwater monitoring information submitted by Sexton was insufficient to determine that the CPC plan would fulfill this new closure performance standard. By special condition 12, the Agency gave Sexton the option of either submitting additional information or submitting another groundwater monitoring plan in order to demonstrate that it would meet this standard. The Agency did not assert that the existing monitoring scheme was inadequate. Therefore, in all reality, the issue whether the Agency can impose new groundwater monitoring requirements on this existing facility is not before the Board at this time.

Even if this issue were before the Board, there are faults in Sexton's position. At the heart of Sexton's argument is the contention that imposition of special condition 12 posed "insurmountable technological and financial difficulties." Sexton Post-Hearing Brief at 21. Assuming this special condition actually imposed some new requirement (and the Board expressly finds that it does not), this issue is not appropriately addressed in this proceeding. There is no authority in the Act for either the Agency or the Board to determine the technical or economic impact of a rule as applied in the context of a permit appeal. Section 29(b) of the Act states as follows:

> Action by the Board in adopting any regulation for which judicial review could have been obtained under Section 41 [judicial review provision] of this Act shall not be subject to review regarding the regulation's validity or application in any subsequent proceeding under ... Section 40 [the permit appeal provision] of this Act.
>
> Section 29(b).

Therefore, once the Board has adopted a regulation, a challenge that its application is technically infeasible or economically unreasonable as applied to a particular facility is inappropriate in the context of a permit appeal. This does not mean that Sexton (or any other affected source) has no procedural mechanism to have the Board consider any "insurmountable technological or financial difficulties" Sexton may feel it faces. Sexton is free to initiate a general or site-specific rulemaking pursuant to Section 27, or an adjusted standard proceeding pursuant to Section 28.1 in order to obtain relief from generally applicable standards. If such relief were to be granted by the Board, the Agency could then modify the closure plan as appropriate.

The fact that the Agency could have sought revision of Sexton's CPC plan by an enforcement action seeking to show a threatened release of contaminants to the groundwater is simply

irrelevant. The Board sees no reason why the Agency should be compelled to issue a permit with a condition it believes would violate the Act, and then immediately initiate an enforcement action to vacate or modify the very condition it has just issued.

Further, the Board sees no reason to force a shift in the burden of proof to the Agency. In this proceeding, Sexton bears the burden of proving that no violation of the Act or Board regulations would have occurred had the Agency approved the CPC plan based on the information submitted by Sexton and whether special condition 12 was, therefore, unnecessary. Browning-Ferris Industries of Illinois, Inc. v. PCP, 179 Ill. App. 3d 598, 601, 534 N.E.2d 616, 619 (2d Dist. 1989); EPA v. PCB, 118 Ill. App. 3d 772, 780, 445 N.E.2d 188, 194 (1st Dist. 1983).

The Agency's supplemental permit review of the groundwater monitoring aspects of Sexton's CPC plan was a proper exercise of the Agency's authority. The Board will sustain an Agency action where the Agency acted properly.

In summary, the Board concludes that Sexton has failed to show that the Agency acted improperly when it imposed special condition 12 in the course of its permit review. That the entire CPC plan ultimately becomes a condition to the site's operating permit means that submission of a CPC plan for Agency review is tantamount to the filing of a supplemental permit application. This authorizes the Agency to review those aspects of site management that determine whether the CPC plan minimizes the need for further maintenance and prevents threats to human health and the environment. Therefore, whenever a permittee submits a CPC plan for review, the Agency must review all essential elements of the plan. The essential elements of a CPC plan include those aspects of site operations directly related to site closure and post-closure care.

The Draft GMN Guideline As A Regulation

Sexton argues that the reference to the draft GMN guideline in special condition 12 is an invalid assertion of Agency authority because the Agency is utilizing this draft as a rule. Sexton further asserts that the Agency did not promulgate the guideline as a rule and has not published this draft guideline in the Illinois Register, the Board's Environmental Register, nor by mass distribution to permittees. However, the Agency makes it available and uses it to provide guidance to the regulated community as to the elements of an adequate groundwater monitoring plan. April 7, 1989 Stipulation.

The Board also confronted this issue in Sexton v. EPA:

> Special Condition 17b includes the following language: "Propose a revised ground water monitoring program, based on draft Groundwater Monitoring Network design guidelines." Agency

> Record, Ex. 31, par. 17b. Sexton contends that the Agency thereby impermissibly attempted to impose its draft guidelines as rules that it had not subjected to notice and comment as required by law. Sexton Post-Hearing Brief at 28-31; see Ill. Rev. Stat. ch. 127, par. 1001-1021 (1988) (Administrative Procedure Act, or "APA"). The Agency concedes that it cannot impose such draft documents as rules, and responds that it does not now seek to do so. Agency Response at 23. The Board finds no conflict. The Agency cannot impose draft guidelines as rules. See APA at par. 1005(b). However, the Agency can direct a permittee's attention to any readily available source for guidance and further elaboration. In so noting, the Board does not affirm or condone the imposition of any non-statutory, non-regulatory materials as permit requirements.
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> Sexton v. EPA, PCB 88-139, at 15.

The Board finds no material difference between the "Propose ... based on ..." language involved in Sexton and the "submit ... in accordance with ..." language involved here.

Sexton has failed to convince the Board that it should vacate special condition no. 12 because the Agency has used the draft GMN guideline in an impermissible way. When the Agency uses non-regulatory guidance documents, it could do so either to guide Agency permit reviewers or to guide members of the regulated community. "The Agency cannot impose draft guidelines as rules," but it "can direct a permittee's attention to any readily available source for guidance and further elaboration." Id. However, the Agency's use of non-statutory and non-regulatory materials must never have the effect of constraining any exercise of the Agency's discretion. Such a use would elevate its effect to that of a rule. See, McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1320 (D.C. Cir. 1988).

A significant indication that the Agency has made an impermissible use of a non-regulatory resource is that the use directly affects regulatory compliance. Adherence to the provisions of the resource cannot establish compliance, and neglect of its provisions cannot evidence noncompliance. McLouth Steel Products, 838 F.2d at 1320-22. The use must constitute what the name of the guideline suggests: provide non-binding guidance, whether internal, external, or both. The Agency can go no further than using the resource materials for guidance.

The Agency is aware that it must approve a groundwater monitoring scheme that complies with the Act and Board rules, even if it does not fulfill the draft GMN guideline. As is indicated by the testimony of the Agency permit reviewer:

> [I]f an applicant chooses to meet the requirements to provide an adequate ground water monitoring program sufficient to monitor ground water up gradient and down gradient from a disposal facility and meets the requirements in the act and regulations we still must issue a permit whether or not the draft ground water monitoring network identified as Exhibit 12 is adhered to, if the level of technical information will allow an adequate review [sic] an issuance of a permit.
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> R. 55 (Mar. 7, 1989).

The Board finds, as a matter of fact, that the Agency has not presently applied the draft GMN guideline in a way that gives it the effect of a rule. Here, the Agency did not disapprove Sexton's monitoring scheme or impose another based on this document. The Agency premised its decision on the monitoring plan exclusively on the factual information submitted by Sexton. That factual information included a purported indication that there is fluctuation in water levels recorded in the existing wells over time and that Sexton located all three of its existing wells in a relatively small area of the site. The Agency only required Sexton to submit more information or, in the alternative, to assemble another scheme. If the factual information submitted by Sexton supports the Agency decision to seek more information, the condition will prevail on review by this Board. If that information does not support the Agency decision to seek more information, special condition 12 will fail, and the Board will strike it. The Board would not endorse the application of the draft GMN guideline as a requirement.

Therefore, there has been no actual application of the draft GMN guideline for the Board to review. The Agency's use of this document was only advisory. In such a circumstance, it makes little difference whether the Agency permit writer reviewed the draft GMN guideline, a textbook on geology, or a current scientific journal.

If the Board were to prohibit the Agency's use of outside resources for guidance of the regulated community, it would effectively curtail the Agency from sharing its expertise. It would increase the burden of compliance for many members of that community. Those members would then have less assurance of what course of conduct satisfies the requirements of the Act and Board regulations, even if this is only to determine the Agency's opinion as to the nature of that course.

Special Condition 12 Is Not Necessary

Sexton asserts that the Agency did not accurately evaluate the information it submitted when the Agency imposed special

condition 12. More specifically, Sexton maintains that the information it submitted to the Agency was sufficient to demonstrate the direction of groundwater flow, that its existing wells were adequate to gauge the site's impact on the groundwater, and that ponded water on the site resulted from accumulations of wood chips, not from waste leachate. Sexton Post-Hearing Brief at 25-28. Sexton highlights expert testimony to the effect that special condition 12 was not necessary. Id. at 28.

The Agency maintains, "Sexton did not submit sufficient information to the Agency." Agency Response Brief at 14. The Agency highlights an apparent fluctuation in groundwater elevations, which may indicate a variation in flow direction, and the fact that the existing monitoring wells are closely situated around one corner of the site. The Agency asserts that it could not determine the groundwater levels and flows throughout the site nor whether the existing wells would detect releases from the site. Id. at 15-16. Further, the Agency questions whether the present monitoring scheme adequately measures the background groundwater quality. Id. at 17.

The Board must now determine whether the Agency's imposition of special condition 12 was in error. EPA v. PCB, 118 Ill. App. 3d 772, 777, 455 N.E.2d 188, 777 (1st Dist. 1983). First, the Board disposes of a preliminary issue bearing on this point.

> The sole question before the Board in a review of the Agency's denial of a permit is whether the petitioner can prove that its permit application as submitted to the Agency establishes that the facility will not cause a violation of the Act. If the Agency has granted the permit with conditions to which the petitioner objects, the petitioner must prove that the conditions are not necessary to accomplish the purposes of the Act and therefore were imposed unreasonably.
>
> Id., 118 Ill. App. 3d at 780; 455 N.E.2d at 194 (citation and emphasis omitted).

Alternatively stated, Sexton "had to establish that its plan would not result in any future violation of the Act and the modifications, therefore, were arbitrary and unnecessary." Browning-Ferris Industries of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 603, 534 N.E.2d 616, 620 (2d Dist. 1989). Therefore, the ultimate issue in this proceeding is whether special condition 12 is "not necessary to accomplish the purposes of the Act." EPA v. PCB, 118 Ill. App. 3d at 780, 455 N.E.2d at 194.

In its arguments that special condition 12 is not necessary, Sexton highlights certain testimony of its witness, Mr. Richard Eldredge:

> Q. And what is your opinion as to whether that condition (Special Condition 12) is necessary?
>
> A. I do not believe that that condition is necessary at this site.
>
> Sexton Post-Hearing Brief at 25 & 29 (citing R. 100 (Mar. 7, 1989)).

As noted, this may be testimony as to the ultimate issue in this proceeding.

The Board, as a technically qualified body, does not consider opinion testimony on the ultimate issue of a proceeding as controlling. See Wawryszyn v. Illinois Central Railroad Co., 10 Ill. App. 2d 394, 403, 135 N.E.2d 154, 158 (1st Dist. 1956); cf. Greeley & Hansen v. E & D Robinson Construction, Inc., 114 Ill. App. 3d 720, 730, 449 N.E.2d 250, 257 (2d Dist. 1983); Arnold N. May Builders, Inc. v. Brucketta, 60 Ill. App. 3d 926, 930-31, 377 N.E.2d 579, 582-83 (3d Dist. 1978). This particular opinion testimony also lacks clarity. The testimony fails to specify for what purpose the witness deems special condition 12 unnecessary: unnecessary to prevent a future violation of the Act or Board rules? (a legal conclusion), unnecessary to adequately characterize the groundwater flow beneath the site? (a scientific conclusion), unnecessary to prompt Sexton to provide additional evaluation of the groundwater flows? (a policy conclusion), that the proffered guidance of the draft GMN guideline was unnecessary? (a personal discretionary conclusion), that the possibility of additional wells is unnecessary if Sexton does not submit further information? (an Agency-discretionary conclusion that is not yet before the Board), etc. Such evidence that can lead to disparate conclusions has little probative value, see Ryan v. Mobil Oil Corp., 157 Ill. App. 3d 1069, 1081-82, 510 N.E.2d 1162, 1170 (1st Dist. 1987); and is therefore, of questionable relevance. Such subjective evidence is insufficient to sustain Sexton's burden of proof. See Draper & Kramer, Inc. v. PCB, 40 Ill. App. 3d 918, 921-22, 353 N.E.2d 106, 109 (1st. Dist. 1976).

For the foregoing reasons, the Board can give little weight to Sexton's conclusory testimony, or arguments inextricably intertwined with this testimony. The Board will summarize the remaining arguments, then review the facts that bear on whether special condition 12 was necessary.

In its post-hearing brief, Sexton accurately summarizes the Agency's position with regard to the adequacy of Sexton's existing groundwater monitoring scheme in the following quotation of the Agency permit reviewer, Ms. Sallie A. Springer:

> Q. Sallie, it's true, isn't it, that you have no opinion as to whether any groundwater monitoring program different from that which is in place at this time at the Sexton facility is necessary?
>
> A. That's correct.
>
> Sexton Post-Hearing Brief at 25 & 29 (quoting R. 43 (Mar. 7, 1989).

The Agency has only concluded that more information is necessary to demonstrate that the existing system would assure that no violation would occur. The Agency has given Sexton the alternative option of submitting another scheme. The Agency provided the draft GMN guideline for Sexton's guidance. Agency Record at 3; R. 30-31, 36, 53, 60, 70 & 80 (Mar. 7, 1989). Unless Sexton has proven that the information it submitted to the Agency supports the viability of its existing system, the Board must sustain the special condition that requires further justification or another scheme.

The record indicates that this site consists of glacial tills overlying dolomitic bedrock. Addison Creek bisects the site. The information in Sexton's 1973 permit application shows that, prior to site development, Addison Creek was the topographic low point of the saturated zone. Sexton anticipated the stream to remain the low point after development. This information indicates that there were three primary directions of groundwater flow beneath the site. Groundwater in the dolomite bedrock flowed southwest within the site area. Groundwater in the overlying glacial till east of the stream flowed southwest at an oblique angle toward the stream, consistent with the observation that the stream is the topographic low point of the saturated zone. Groundwater in the glacial till west of the stream flowed southeast, similarly toward the stream. This 1973 information further indicates that the area of the site west of the stream was a pre-existing fill of unknown limits, which Sexton intended to complete. Sexton performed all borings on that portion of the site east of the stream, and did not disturb the western portion. Sexton Ex. 3. Sexton has since relocated the stream on the site, so that it now flows directly south between the east and west fill mounds. Sexton Ex. 2B; Agency Record at 40.

The record indicates that Sexton has three existing groundwater monitoring wells on the site. Well G101 lies midway on the southern boundary of the west fill mound, about 250 feet west of the stream and 800 feet east of the westernmost extent of the mound. Well G102 lies on the southern boundary of the eastern fill mound, about 150 feet east of the stream and 250 feet from the eastern boundary of the mound. Well G103 is at the midpoint of the eastern boundary of the eastern fill mound, which is about 1,500 feet long. Agency Record at 40; Sexton Ex. 5.

The Agency primarily premised its decision to impose special condition 12 on two facts: the groundwater monitoring information submitted by Sexton may indicate fluctuations in groundwater flow direction, and the existing groundwater monitoring wells lie in only one corner of the site. From this information, the Agency could not ascertain the directions of groundwater flow throughout the site. Neither could it determine whether the existing wells were upgradient or downgradient of the fill mounds. Therefore, the Agency maintains that it could not conclude that the existing wells would detect a leak of waste constituents from the fill and preclude a violation of the Act or Board regulations. Agency Response Brief at 15-17; R. 29-30, 33, 36, 59-61, 69-70 & 80 (Mar. 7, 1989). The groundwater elevations indicated in the Agency record for November 1986 and November 1987, which purportedly indicate this possible fluctuation in the direction of groundwater flow, are as follows:

Well	Nov. 86	Nov. 87
G101	652.60	653.42
G102	650.35	652.29
G103	653.06	651.38

Agency Record at 51-61.

The core of Sexton's explanation of how the information it submitted to the Agency actually does indicate the direction of groundwater flow throughout the site is embodied in the following testimony of Mr. Richard W. Eldredge, Sexton's contract engineer:

> Q. The information gathered from the [three] ground water monitoring wells has been furnished to the IEPA over the last 15 years, is that correct?
>
> A. That's correct.
>
> Q. And would you say with the help of that information you can tell ground water flow direction, are you referring to the same information that is on file with the IEPA?
>
> A. That is correct.
>
> Q. And you reviewed that information?
>
> A. I have reviewed that information, yes.
>
> Q. Using page [40] of the Agency file as well as Exhibit 2A [a map of the 1970 site contours] and with the help of the ground water monitoring elevations over the last 15 years, do you have an opinion as to what the ground water flow is at the subject site?

A. I do.

Q. What is that opinion?

A. The ground water flow on the site is to the south, south east.

Q. How do you know that?

A.. If you examine the elevations of the ground water elevation within the monitoring wells and if you examine the surficial ditch that goes through the site and look at the water elevations in that ditch, you will see that the water in the ditch running across the site runs from north to south and that the ground water as shown in the ditch is closely related to the surficial aquifer which is being monitored by the 3 wells.

In that manner, there is only one direction that ground water can flow and that's to the south, south east.

Q. Okay. Do you have an opinion therefore whether the 3 wells in question are up gradient or down gradient wells?

A. 3 wells in question are down gradient wells.

Q. Is there any question in your mind about that?

A. None.

Q. Calling your attention to pages 50 through 61 of the Agency record which are exhibits referred to by Sallie Springer in her testimony, Sallie Springer raised a question whether those readings on elevation in the ground water monitoring wells for the years 1986 and 1987 show a fluctuation ... in the ground water flow direction.

Can you explain those readings?

A. I think in any [superficial] ground water monitoring regime as we have here that what shows up in those wells will be closely related to the precipitation events that preceded the measurement.

> Therefore, in order to tell what kind of a condition exists one would have to look at the precipitation events, the condition of the ditch and whether the ditch was really representing charging media or a discharging media at that time.
>
> Q. Looking at the pages 50 through 61 of the Agency record, do those pages in anyway change your opinion that the ground water flow at this site is to the south, southeast?
>
> A. No.
>
> R. 92-95 (Mar. 7, 1989).

Sexton then tendered its Exhibit 5, which is a groundwater elevation contour map prepared by Mr. Eldredge based on the averages of its 1988 groundwater monitoring data. See R. 95-97 (Mar. 7, 1989); Sexton Ex. 5.

The Board believes that the variations in the 1986 and 1987 groundwater elevations have not been adequately explained by Sexton. In 1986, the groundwater elevations in wells G101 and G103 were higher than that in well G102. This would indeed imply a flow direction toward the southeast corner of the site, consistent with Sexton's contention of the nature of the local groundwater flow pattern. See Sexton Ex. 5. However, the 1987 data, wherein well G103 shows the lowest groundwater elevation of the three, similarly implies a northeasterly flow direction. A northeasterly flow direction is quite contrary to Sexton's contention of the groundwater flow pattern. It therefore casts a significant doubt on the reality of Sexton's simple model of groundwater flow. While it is possible to imagine scenerios whereby the apparent discrepencies in flow direction may be rationalized, it is neither the Board's nor the Agency's obligation to do so. Rather, Sexton, as the bearer of the burden of proof, must dispel this doubt. This it has not done.

The Board is further perplexed by Sexton's contention, as presented in the testimony of Mr. Eldredge, that all three of the current monitoring wells are down gradient wells. Supra. The term "down gradient" implies a reference point. Although the reference point is in fact not explicitly identified here by Sexton, most conventionally the reference point for a monitoring well is the potential source of pollution (i.e., the landfill). Thus, a well characterized as "down gradient" is logically presumed to be located in the direction toward which pollution would move from its source. Since the landfill is located to the west of well G103, the further logical conclusion is that the groundwater flow at G103 is from the west toward the east, and thus once more at odds with Sexton's general model of groundwater flow.

Monitoring data from the three existing wells not only raise reasonable doubt about the nature of the groundwater flow pattern in the immediate vicinity of these wells, it also underscores the fact that Sexton's characterization of the groundwater flow in other parts of the site is obviously not adequate. The three wells are located in a single quarter of the site and leave approximately three-quarters of the site's perimeter unattended. It is perhaps significant that under these circumstances not even Sexton's engineer would extrapolate the groundwater flow pattern from the three well points throughout the site area. See R. 109 & 113 (Mar. 7, 1989); Sexton Ex. 5. However, the critical issue is that if Sexton's model is not demonstrably correct in that small portion of the site area where monitoring data are available, it is at least equally questionable in that large portion where no data at all are available. Sexton has not borne its burden of proving otherwise.

Finally, the Board would note its reservation regarding Sexton's reliance on the existence today of the flow patterns which may have characterized the site in 1973. Sexton has caused a great deal of alteration to the site since 1973, including the obvious change in the nature of the materials at the site, the relocation of Addison Creek, and the alterations of site topography. Even at sites not so grossly altered, it is not uncommon to find far more complex shallow groundwater flow patterns than here posited by Sexton. Nevertheless, even if the flow pattern was simple in 1973, an affirmative demonstration that the site alterations have not fundamentally altered that pattern is seemingly in order.

The Board has another fundamental problem with Sexton's explanations. Initially, Sexton first raised its explanations at hearing; there is no indication that Sexton communicated this information to the Agency before the Agency made its decision. In fact, throughout the course of the hearing, Sexton highlighted the fact that it did not communicate this to the Agency. See R. 37, 81-82 & 101. Next, there is a similar defect in the supplemental information submitted by Sexton at hearing as Exhibit 5. Exhibit 5 is based on all of Sexton's 1988 monitoring information, and there is no indication that either Exhibit 5 or all the data upon which it is based were in the Agency's possession before June 24, 1988. This is the critical date, the date of the Agency's permit decision. See Agency Record at 1; R. 97, 106-07. The Board must restrict its review to information in the Agency's possession on that date. See EPA v. PCB, 118 Ill. App. 3d at 780-81; 455 N.E.2d at 194.

The Board must conclude that Sexton has failed to show the Agency was wrong in concluding there was uncertainty in the directions of groundwater flow throughout the site. It was Sexton's responsibility to provide the information which was necessary for this Agency determination. See Browning-Ferris Industries, 179 Ill. App. 3d at 607-09; 534 N.E.2d at 622-24. On this basis, the Board holds that special condition 12, which

sought this information, was necessary to accomplish the purposes of the Act and assure that no violation of the Act or Board rules would occur.

In summary, the Board holds that the Agency had authority to review Sexton's CPC plan as thought its submission was an application for a supplemental permit, that the Agency did not impermissibly impose the draft GMN guideline as though it were a rule, and that the Agency did not err in imposing special condition 12. Therefore, the Board affirms special condition 12.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Board hereby affirms the imposition of special condition 12 in the June 24, 1988 closure and post-closure care permit issued by the Illinois Environmental Protection Agency to Sexton Filling & Grading Contractors Corp.

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.

Board Member J. Anderson dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 22nd day of June, 1989, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board