ILLINOIS POLLUTION CONTROL BOARD
March 26, 1992

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| IN THE MATTER OF: | ) | |
| | ) | |
| THE PETITION OF CABOT CORP. FOR AN ADJUSTED STANDARD FROM THE REQUIREMENTS OF 35 Ill. Adm. Code 725.293 | ) | AS 91-10 (Adjusted Standard) |

INTERIM ORDER OF THE BOARD (by J. Anderson):

The Cabot Corp. (Cabot) filed a petition for an adjusted standard from the requirements of 35 Ill. Adm. Code 725.293 on December 27, 1991. Cabot filed its petition pursuant to Ill. Rev. Stat. 1991 ch. 111½, par. 1028.1, 35 Ill. Adm. Code 725.293(g) and 35 Ill. Adm. Code 106.Subpart D. Cabot seeks this adjusted standard from certain secondary containment requirements for tanks containing hazardous wastes. 35 Ill. Adm. Code 725.293(h)(3) requires that a petitioner submit its completed alternative design and operating practices demonstration within 180 days of filing its petition for an adjusted standard.

The Board will delay the question of authorizing hearing until Cabot has either filed the required demonstration or 180 days have elapsed since the filing of the petition.[1] 180 days after December 27, 1991 is June 24, 1992.

Ill. Rev. Stat. 1989 ch. 111½, par. 1028.1(d)(1) requires a petitioner for an adjusted standard to publish a newspaper notice of the filing of its petition within 14 days of the filing with the Board. The record bears no indication that Cabot has done this.

A failure to publish a notice required by statute renders a petition as filed defective and, thus, subject to dismissal for lack of Board jurisdiction. However, due to the 180-day time lag, unusual for adjusted standard proceedings and unique to this type of petition, the Board construes the Ill. Rev. Stat. 1989 ch. 111½, par. 1028.1(d)(1) 14-day newspaper publication requirement as running from the date of filing of the alternative design and operating demonstration. Essentially, the filing of

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[1] 35 Ill. Adm. Code 106.415(a) requires that the Board conduct a public hearing on an adjusted standard petition. The Board adopted this provision in R86-46, at 11 Ill. Reg. 13457 (Aug. 14, 1987) (effective August 4, 1987). In P.A. 85-1048, 1988 Ill. Legis. Serv. (West) 344, 356 (July 14, 1988) (effective Jan. 1, 1989), the General Assembly amended Section 28.1(d) of the Environmental Protection Act, Ill. Rev. Stat. 1989 ch. 111½, par. 1028.1(d), to eliminate the former mandatory public hearing requirement. It provides instead that the Board or another person may request a public hearing after public notice.

the demonstration completes the filing of the petition. Only after the filing of the alternative design and operating demonstration will the petition become ripe for review of the full scope of and underlying justification for the relief sought by the petitioner.

The Board received the "Agency Response" on March 13, 1992. The Agency filed a motion to file instanter together with this document. 35 Ill. Adm. Code 106.414(a) provides that the Agency must file its response within 21 days after the filing of the petition. In this instance, this would mean that an Agency response would have been due on or before January 18, 1992, 55 days before the Agency's actual filing. See 35 Ill. Adm. Code 101.109. In support of its motion, the Agency states that it received a copy of the petition on January 2, 1992, that the press of business prevented earlier completion of the response, that no prejudice to Cabot will result from the delay, and that the Board will benefit from the response. Cabot has not responded to the motion.

Initially, for reasons outlined more fully below, the Board holds that the filing of the completed alternative design and operating practices demonstration triggers the 21 day filing requirement for an Agency response. Therefore, we construe the March 13, 1992 filing as Agency preliminary comments. As such, the Board finds those comments very useful to the disposition of this matter. For reasons discussed at length below, the timely filing of such preliminary comments citing deficiencies in the petition is absolutely necessary.

While granting the Agency's motion to file instanter, the Board emphasizes our concern about the 55 day delay in filing these comments in an adjusted standard proceeding. See In re Petition of Keystone Steel and Wire Co. for Hazardous Waste Delisting, No. AS 91-1, (Feb. 6, 1992). These concerns are magnified where the Agency has raised issues that go to the heart of the sufficiency of the petition, and where the Agency thereby postpones its substantive review of the petition. We do recognize that the use of the adjusted standard procedure is relatively new in matters related to hazardous waste regulations in general, and in particular to secondary containment requirements for tanks, which uniquely include the 180 day post-filing provision. In this case, fortunately, the 180 day delayed filing provision provides a potential opportunity to remedy the situation. Because we have construed Cabot's filing of the required demonstration as the trigger for notice and hearing requests, we also construe the 21 day time requirement for Agency response (absent a co-petition) as running from the date of that same filing. In so holding, we emphasize the need for the parties to get this adjusted standard proceeding back "on track".

As we stated in Keystone Steel and Wire Co., No. AS 91-1:

> It is intended that the entity seeking the adjusted standard and the Agency assemble and review the informational justification before a petition is filed before the Board. . . .
>
> The essence of the adjusted standard procedure is to develop the information, the issues, and the response at the front end of the process.
>
> We advise that, where a perceived deficiency exists that threatens to frustrate a full Agency response, either the Agency or the petitioner should bring the matter to the Board at the outset.
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> Keystone Steel and Wire Co., No. AS 91-1, at 9-10.

Where the Agency perceives deficiencies in an adjusted standard petition, it is imperative that the Agency timely disclose those deficiencies. Where, as here and in the Keystone Steel and Wire proceeding, the Agency comes in late and does not address major portions of the petition because of asserted informational deficiencies, the entire adjusted standard process is threatened. The Board could face a situation where we "do[] not have the benefit of the Agency's input on criteria whose review is required under the state's federally derived . . . provisions." Keystone Steel and Wire Co. at 10. This could face us with an untenable situation where such deficiencies still exist at the end of the process.

As noted, the March 13, 1992 Agency filing cites several deficiencies in the Cabot petition, apart from the pending alternative design and operating practices demonstration. Most of these are alleged informational deficiencies. For example, paragraphs 16, 17, 20, 22, and 24 indicate that Cabot has not sufficiently described its tank system to permit adequate review. Paragraph 20 indicates that further information is necessary as to the character of the hazardous wastes involved. The conclusion cites several items of information required by 35 Ill. Adm. Code 725.293(g) that the demonstration outline and schedule set forth by Cabot might appear to omit. Finally, Paragraph 26 outlines three informational items normally part of a Part B permit application that the Agency would find "useful and helpful".

Other portions of the Agency filing cite numerous disputed factual and legal conclusions. Paragraph 13 disputes Cabot's assertion that the Tuscola plant has several tank systems. The Agency cites to the definitions of "ancillary equipment", "tank", and "tank system" at 35 Ill. Adm. Code 720.110 and asserts the existence of only two tanks in Cabot's tank system. The Agency maintains that there are only two tank systems at the Tuscola plant. Paragraphs 18 and 19 of the response dispute a Cabot

description of two equipment items as "above ground trenches".

The Board's determination will depend on the record and the Cabot petition, as completed by the filing of the alternative design and operating demonstration and the Agency's substantive response. Although we reserve judgment on the various potential informational deficiencies and issues, the Board highlights the unique posture of this matter.

Initially, it is always most beneficial that the petitioner and the Agency resolve as many issues between themselves as possible, preferably before filing. See Keystone Steel and Wire Co., No. AS 91-1, at 9. This either eliminates issues or circumscribes the scope of the issues the Board must confront, thereby reducing the case to the real issues between the parties and allowing timely action by the Board.

Second, the RCRA regulations addressed here contain a date-certain deadline on filing the petition and a later deadline for filing the completed alternative design and operation demonstration. This means that Cabot has this single opportunity to obtain relief of the type and to the extent it now seeks. It is particularly important here for the Board to resolve any disputes regarding informational deficiencies prior to the "180 day" completion of the petition.

Finally, as Cabot points out in its March 24, 1992 motion for extension of time, delays in this proceeding foreshorten its time frame for compliance with the RCRA secondary containment requirements. Cabot must comply with these requirements if the Board denies an adjusted standard.

For the foregoing reasons, Cabot might ultimately prove well served, as would any adjusted standard petitioner, to pay close heed to the substance of the Agency's March 13, 1992 preliminary comments. This is especially true of a proceeding such as this one, where an adverse determination could leave a party unable to refile to seek alternative relief, as would be the situation in a normal adjusted standard proceeding.

The March 13, 1992 Agency preliminary comments also request that the Board grant additional time after the filing of the alternative design and operation demonstration to allow the Agency to review the demonstration and submit "further commentary." The Agency suggests that 90 days is sufficient additional time. The Board construes this as a motion for an extension of time to file.

In light of the fact that the Board interprets the filing of the completed alternative design and operating practices demonstration as triggering the deadline for filing the Agency response, this renders the Agency response as due 21 days after

Cabot files the demonstration. The Agency-requested 90 days is an unusually long time to file this document, and the Agency has not submitted justification for such an extended period of time. The Cabot March 24, 1992 motion for extension of time suggests that no more than 30 days would be necessary. Cabot further points out that delays in this proceeding would diminish its ability to timely comply with the RCRA regulations if the Board denies the petition.

We will adopt the time delay agreed to by Cabot. The Board hereby grants the Agency until 30 days after the filing of the completed demonstration (more than a week longer than the usual 21 day time allowed by 35 Ill. Adm. Code 106.414(a)) to file its response. If the Agency can later justify an additional extension of time, the Board will entertain an appropriate motion.

As a part of its March 23, 1992 filing, Cabot states that it is presently entering into discussions with the Agency to address the Agency's concerns cited in the March 13, 1992 filing. This is highly desirable. However, the Board stresses that this matter has two deadlines for Cabot. First, Cabot must file its completed alternative design and operating practices demonstration on or before June 24, 1992 (180 days after filing the petition). The unique posture of this type of proceeding may not permit the filing of subsequent amended demonstrations because this deadline is federally-derived. Second, as to at least some of its equipment, Cabot must comply with the general RCRA regulations on or before January, 1994 if the Board denies relief on the petition.

This means that the Board must be in a position to resolve any disputes as to the sufficiency of the petition and the proposed alternative design and operating demonstration enough ahead of time to allow Cabot to cure those deficiencies. It also means that Agency assertions that it does not have enough information to address the substantive aspects of the completed demonstration, as it did in Keystone Steel and Wire, is simply not acceptable in the context of this proceeding.

For these reasons, the Board hereby directs Cabot to file a response to this Order no later than April 10, 1992. That report shall set forth Cabot's present position and supporting arguments as to each fact and legal conclusion disputed by the Agency in its March 13, 1992 preliminary comments. That response shall further set forth exactly what Cabot will do to cure each informational deficiency cited by the Agency as a part of the completed demonstration, or it shall set forth exactly why Cabot believes that no such deficiency exists. That response shall roughly set forth the then-current status of any discussions between Cabot and the Agency. The Agency shall file any reply to the Cabot response no later than April 17, 1992. This will

enable the Board to determine whether further action is necessary to assure that this matter develops in a timely manner. This tight time-frame is regrettable, but it is necessary because of the delay incurred thus far.

In its March 24, 1992 filing, Cabot requests an extension of time to 21 days (from the regulatory 14 days) to respond to the Agency response. The Agency has not yet had an opportunity to respond to this motion, but the Board will grant the additional 7 days.

In summary, a failure to file the alternative design and operating practices demonstration required by 35 Ill. Adm. Code 725.293(h)(3) on or before June 24, 1992, or a failure to file the proof of newspaper publication within 14 days after that filing, as required by Ill. Rev. Stat. 1989 ch. 111½, par. 1028.1(d)(1), will render the petition subject to dismissal. The Board hereby grants the Agency's motion to file its preliminary comments instanter. The Board hereby grants the Agency 30 days after the filing of the alternative design and operating practices demonstration to file its response. Cabot shall file its reply to the Agency response no later than 21 days after the filing of the response. On our own motion, the Board hereby directs Cabot to file a response to this Order on or before April 10, 1992 that addresses the Agency preliminary comments and reports the status of any discussions with the Agency relating to the informational deficiencies cited by the Agency. The Agency must file any reply to the Cabot r778esponse on or before April 17, 1992. We will defer further action in this matter until after we receive these filings.

IT IS SO ORDERED.

R.C. Flemal concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above Order was adopted on the 26th day of March, 1992, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board