ILLINOIS POLLUTION CONTROL BOARD
July 27, 1989

MARATHON PETROLEUM CO., Petitioner,	)	
v.	)	PCB 88-179
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

JOSEPH S. WRIGHT, JR., ESQ., APPEARED ON BEHALF OF PETITIONER; AND

BRUCE L. CARLSON, ESQ., APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes to the Board on a November 3, 1988 petition for hearing filed by Marathon Petroleum Company ("Marathon"). That petition seeks review of several conditions imposed by the Illinois Environmental Protection Agency ("Agency") in the Resource Conservation and Recovery Act ("RCRA") Part B permit issued for Marathon's Robinson, Illinois, facility. See Section 21 (f) of the Environmental Protection Act. Public hearings were held in Robinson on January 26, and 27, 1989. One member of the public filed an objection and testified at hearing. Marathon filed a closing brief on March 27, 1989. The Agency did not file a brief. On June 5, 1989, Marathon noted the passing of time within which briefs were to be filed and requested the matter be decided on the present record.

Marathon operates a refinery engaged in processing crude oil and producing petroleum products such as gasoline, fuel oil, oil and coke. The facility occupies approximately 900 acres near the City of Robinson, in Crawford County, and has a capacity of 195,000 barrels per day. The western portion of the site contains the refinery, the eastern portion is used for farming.

Marathon currently holds Illinois Air Operating permits for 34 separate operating units and tanks. Marathon also has an NPDES permit for its wastewater treatment plant discharge. Today's proceeding involves aspects of Marathon's operations governed by RCRA. The Marathon facility manages a wide variety of hazardous wastes at the following types of management units: container storage, tank storage, surface impoundments, and land treatment.

The administrative record presently before the Board is over 5,000 pages long.* The record involves two permits; first, a final Part B RCRA permit issued by the Agency, and second, a hazardous waste permit issued by the United States Environmental Protection Agency ("USEPA") pursuant to the Hazardous and Solid Waste Amendments of 1984 to RCRA ("HSWA"). While the final RCRA permit is over 200 pages long, the challenged substantive conditions occupy less than a page of text in total.

On appeal, Marathon asserts three issues for Board review:

1. The Agency failed to issue Marathon's RCRA permit in a timely manner and, therefore, the permit issued as a matter of law as requested by Marathon (without the offending conditions);

2. The Agency's imposition of groundwater monitoring and reporting on a quarterly basis is without support in fact or law and that the semi-annual monitoring requested by Marathon is adequate; and

3. The Agency imposed condition that requires immediate closure of 30' by 30' outdoor container storage area is arbitrary and capricious.

No other portion of the RCRA permit is challenged, and no part of the USEPA HSWA permit is challenged here.

Permit by Default

In its November 28, 1988 and December 12, 1988 briefs, Marathon asserts that its RCRA Part B permit issued by operation of law. The Agency filed a reply brief on November 28, 1988.

Marathon argues that the last paragraph of Section 39(a) of the Act applies, which provides that the applicant may deem the permit issued if the Agency fails to take final action on the permit by a stated time limit (in this case 180 days). The Agency argues that Section 39(d) applies, which provides in the first sentence that the Agency "may issue RCRA permits exclusively under this subsection" and thus renders the time limits of Section 39(a) inapplicable.

* The Administrative Record filed by the Agency consists of 4,930 consecutively numbered pages. They will be cited as, "Adm. Rec., p. XXX." The Pollution Control Board hearing transcript will be cited as, "R. XXX." Other documents will be cited by name and page.

The Agency essentially argues that where there is an express statutory statement of exclusive applicability, statutory construction dictates that it prevail, quoting from Sutherland Statutory Construction, Section 57.09 (4th Edition) as follows:

> One of the strongest indications of what construction should be given a statutory provision may be found in the use of negative, prohibitory, or exclusionary words ... .
>
> Words of a statute indicating that a particular course of action, or the like, is intended to be exclusive, are mandatory.
>
> Agency Br. p. 3)

Marathon puts forth a number of arguments in rebuttal, including:

The Agency's argument precludes application of the rest of the Act to RCRA permits, which cannot be true because at least three other sections of the Act apply to RCRA permits, namely Section 39(i) which requires the Agency to "evaluate the prospective operator's prior experience in waste management operations" before issuing any RCRA permit; Section 39(1), which precludes the Agency from issuing construction or operation permits of any kind within the boundaries of a setback zone where prohibited; and Section 39(a), which applies to all permits in providing "When the Board has by regulation required a permit for the construction, installation or operation of any type of facility, equipment, vehicle, vessel or aircraft, the applicant shall apply to the Agency for such a permit ..."

Marathon argues that there are two unambiguous time limits in Section 39(a) for all Agency permits, with no exceptions. The relevant language is as follows:

> If there is no final action by the Agency within 90 days after the filing of the application for permit, the applicant may deem the permit issued; except that this time period shall be extended to 180 days when (1) notice and opportunity for public hearing are required by State or federal law or regulation, or (2) the application which was filed is for any permit to develop a landfill subject to issuance pursuant to this subsection.

In further support, Marathon quotes from the Senate debates on June 22, 1979 concerning H.B. 1060, which extended the Agency's time limit to 180 days for permits with public notice and hearing requirements (Marathon Res. Br. p. 3-5) and which clearly indicate that the legislators were addressing the federal public hearing requirements of the Clean Air Act and the Resource Conservation and Recovery Act. H. B. 1060 became P. A. 81-369, eff. January 1, 1980.

Marathon also addresses the reason for the "exclusively" phrase in Sections 39(b), (d) and (e) by quoting from the House debates of June 5, 1973 concerning H. B. 1585, where this phrase was first used in reference to NPDES permits. (Marathon Res. Br. p. 6,7). The debates clearly indicate that the intent was to establish a single permit requirement, rather than separate State and federal permits.

Finally, Marathon argues that the legislature knew how to set time limits, since it did so for Board decisions regarding permit appeals in Section 40(a)(3).

Board Discussion

The Board first notes that the Section 40(a)(3) language (P.A. 83-431 eff. September 17, 1983) did not eliminate decision limits but rather eliminated applicability of the "deemed issued" language and provided instead that the petitioner was entitled to a mandamus order from the Appellate Court.

Marathon's arguments essentially rest upon the need to examine the Act as a whole, including legislative history, in determining the applicability of the 180 day default provisions in Section 39(a) to a RCRA-Part B permit. Marathon, however, only selectively examines the legislative history and portions of the Act related to the RCRA permit system.

Let us accept that the legislature, starting in 1973, used the "exclusive" language to avoid a dual permit system and that in 1979 it wished to extend the decision limits to 180 days because of, in part, the Resource Conservation and Recovery Act notice and hearing requirements.

Marathon ignores a series of subsequent legislative actions that the Board believes clearly preclude the applicability of the default provisions in Section 39(a).

The first wave of USEPA regulations implementing the Resource Conservation and Recovery Act were not published in the Federal Register until May 19, 1980, which was after the June 1979 legislative debates and after H.B. 1060 become law (see 40 CFR 260-265, 45 Fed. Reg. 33073 et. seq., May 19, 1980). The legislature, in extending the time limit for default, could hardly have been at that time addressing the role of the default provisions itself in the overall federal regulatory scheme, because none existed.

However, in 1981, the legislature adopted a series of directives and mandates that made quite clear its intent that Illinois adopt a hazardous waste management program equivalent to the federal programs.

Included in the provisions of P.A. 82-380, eff. September 3, 1981, were: Section 20(a)(4-9) and (b) which explicitly articulates that the legislature intends that the State adopt a hazardous waste management program no less stringent or in conflict with federal law, secure federal authorization and delegating to the Board the responsibility to adopt detailed regulations as needed to secure such authorization; Section 22.4(a) and (b) which mandates the Board to adopt regulations "identical in substance" to federal regulations on an accelerated timetable; and Section 39(d) and (e), which contains the "exclusive" language for RCRA and UIC permits.

P.A. 82-380 also first defined, in what is now Section 3.29, what was a RCRA permit.

> "RCRA PERMIT" means a permit issued by the Agency pursuant to authorization received by the Agency from the United States Environmental Protection Agency under Subtitle C of the Resource Conservation and Recovery Act of 1976. (P.L. 94-580) (RCRA) and which meets the requirements of Section 3005 of RCRA and of this Act.

Other subsequent amendments continued this pattern. (See P. A. 83-1072 eff. July 1, 1986 and 85-861 creating Section 22.4(e), (now 22.4(d) regarding other "identical in substance" provisions related to the RCRA program.)

Section 40(a)(3), concerning the removal of the Board's RCRA, UIC and NPDES default provisions, occurred in P.A. 83-431, eff. September 17, 1983. As noted by Marathon, an appellate court had construed the Board's Section 40(a)(2) default provisions as applicable in an appeal involving an NPDES permit. Section 40 at that time did not differentiate between the appeal of RCRA, UIC and NPDES permits and other permits. As noted above, the legislature adopted Section 40(a)(3) to cure the default problem at the Board level. Remedying this provision for the Board can hardly be construed at this juncture as affirming that the legislature intended to have an Agency default provision apply to RCRA permits. It makes no sense to argue that it took no action to address an Agency default "problem" because it intended to preserve the problem at that level. The legislature had already expressed its intent otherwise and was simply clarifying its intent as applied to the Board in light of a contrary court decision.

The Board has implemented on an ongoing basis its "identical in substance" mandate. The regulations routinely supersede existing state requirements that are less stringent than or in conflict with federal requirements. There is nothing in the federal regulations allowing permits to be "deemed issued" and there consequently is no such default provision in the Board's regulations. (see R84-9, Jan. 1985). The Board's regulations provide that only the Agency, in lieu of the USEPA Administrator, makes permit determinations (see 35 Ill. Adm. Code 705.201 - 705.212). These regulations comport with the legislature's "identical in substance" mandate, the mandate not to have a program less stringent than or in conflict with federal law, and the statutory authorization to the Agency to issue RCRA permits exclusively pursuant to Sec. 39(d), thus allowing the discontinuance of the State hazardous waste permit program once authorization was received.

Prior to the Agency's submittal of the State's RCRA authorization package, the Agency noticed the package for public hearing, made it available for public inspection at a number of locations, held a public hearing on June 12, 1985, and received public comments until July 19, 1985 (see "Notice of Public Hearing on Intent to Apply for Final Authorization under the Resource Conservation and Recovery Act", first sheet of the RCRA authorization package.)

It should be noted that the authorization package includes a June 4, 1985 certification by the Illinois Attorney General as to the adequacy of the state's statutes and regulations and a lengthy statement analyzing the regulations and the statutory authority, as required by USEPA for authorization. The statement affirms the equivalency of the Board's regulations, including the RCRA permit process.

After the USEPA held another public hearing and comment period, and received further Agency and Attorney General clarifications, Illinois received final authorization, including authorization to issue RCRA permits, effective January 31, 1986 (Fed. Reg. Vol. 51, No. 20, January 30, 1986).

The Board agrees that, prior to authorization to issue RCRA permits, the hazardous waste permits issued by the State were subject to the Section 39(a) default provisions. Once authorization was received, however, hazardous waste permits were to be issued by the State "exclusively" as RCRA permits, as authorized under Section 39(d) (see also Section 21(f)(1), which requires a RCRA permit "issued by the Agency under subsection (d) of Section 39 of this Act". (underlining added)). Once this occurred, the incompatible default provisions no longer applied.

Marathon also seems to suggest that, if the "exclusive to this section" language in Section 39(d) were read to exclude the default provisions in Section 39(a) as the Agency asserts, then

no other permit provisions in Section 39(a) could be applicable. We do not agree. The Board in its earlier "identical in substance" implementation of the federal "interim status" regulations (prior to authority to issue RCRA permits), had construed the Act as preserving the applicability of all earlier adopted rules that were more stringent than or not in conflict with the federal mandate. Preserving these provisions without instituting a new rulemaking pursuant to Section 22.4(b) was appealed to the appellate court which upheld the Board on appeal. Implicit in this decision was the authority to preserve other permit requirements in the Act, as long as they continue to be compatible with the federal program. (Commonwealth Edison et al. v IPCB, 127 Ill. App. 3d 446; 468 N.E. 2d 1339 (Third Dist. 1984).)

Finally, Marathon's argument that the "exclusively under this subsection" language in Section 39(d) is undermined by other provisions addressing RCRA permits, such as those in Section 39(i) and (l), is without merit. Section 39(d) itself provides, in the second paragraph in pertinent part, that "all RCRA permits shall contain those terms and conditions ... which may be required to accomplish the purposes of this Act. The Agency may include among such conditions, standards and other requirements established under this Act ..."

It is clear, if one truly looks at the Act as a whole, that Section 39(d) cannot be construed as preserving the default provisions of Section 39(a) for RCRA permits. The Board accordingly finds that the default provisions in the last paragraph of Section 39(a) do not apply to RCRA permits.

Even if Marathon were correct that a permit issued by operation of law, such a holding does not answer the question of what conditions apply. In a similar case involving a Board default, Illinois courts have held that a default permit only insulates the permittee from charges of operating without a permit; it does not grant conditions requested in the application:

> The result of inaction by the Board during the 90 days period is that the "petitioner may deem the permit issued." (Ill. Rev. Stat. 1981, ch. 111 1/2, par. 1040(a).) Our reading of that language in context of the rest of the Act leads us to conclude, as indeed IPC has argued, that a permit issued by operation of law under section 40(a) does not issue with or without any particular conditions or in the manner requested by the aggrieved party as the Board has argued. A permit issued by operation of law after initial denial could not contain conditions. In fact, a determination of the specific content of permit conditions

> was not sought by IPC nor made by the trial court. Instead, the effect of inaction by the Board for 90 days is that the party seeking review has a permit and is protected from charges of operation without a permit, a violation of both State and Federal law. (Ill. Rev. Stat. 1981, ch. 111 1/2, par. 1012(b), (f); 33 U.S.C. secs. 1311, 1342 (Supp. 1978).) It does not insulate the permittee from compliance with all Federal and State substantive standards and limitations. This result does not make the review superfluous as the Board suggests, for legally unjustified or arbitrary conditions in the permit are no longer binding on IPC. In the case of a permit review challenging conditions, if the permit issues by operation of law, the permit issues without the challenged conditions.
>
> If the conditions were properly imposed under the Act and regulations, IPC concedes that they would remain valid and enforceable. In summary, IPC is vulnerable to any charge for a legal violation except that of operating without a permit, thus there can be no conflict with Federal law. As IPC has so aptly stated, the 90-day requirement of section 40(a) evinces legislative concern with bureaucratic delay. It was not the intent of the General Assembly to create a "license to pollute."
>
> Illinois Power Co. v. PCB, 112 Ill.App.3d 457, (5th Dist., 1983), at 461-462.

Thus, the question of whether semi-annual or quarterly monitoring is appropriate and the question of whether the outdoor container storage area must close now, remain unanswered by any holding that a permit issued by default. At most, Marathon gained insulation from a charge of operating without a permit from the time the permit should have issued, until the time the Agency actually issued the permit. If the permit conditions are valid they will be enforceable against Marathon from the point of permit issuance forward, despite the fact that the permit might have issued late. Even if Marathon secured a late filed permit, it did not gain a "license to pollute."

Monitoring and Reporting Conditions

Marathon has eight existing monitoring wells and has proposed to add or replace five wells to be screened in the Mermom Sandstone Member of the Mattoon Formation. These will be utilized for the RCRA detection monitoring program for the facility's surface impoundments and land treatment facility. The detection monitoring program will therefore consist of eleven downgradient wells and two upgradient wells. Each well will be monitored for approximately 40 parameters from the following categories: volatile organic compounds, phenols, polynuclear aromatic hydrocarbons, metals, and water quality parameters (Adm. Rec., pp. 3748-3758). Each of the thirteen wells will be sampled and analyzed for the 40 or so parameters on a quarterly basis for the first year to establish initial groundwater quality. Marathon raises no objections to these testing requirements.

After the initial groundwater quality is established, the final RCRA permit requires Marathon to sample each of the thirteen wells for each of the 40 or so parameters on a quarterly basis. Marathon does not object to the sampling of each of the thirteen wells, nor to the analyses of each of the 40 or so parameters. Marathon does object to the fact that quarterly testing should be done. Marathon asserts that semi-annual testing is the appropriate frequency.

Marathon has also challenged the reporting requirements of the detection monitoring program to the extent that it requires quarterly reporting of the results of the testing program. Marathon has not posed any specific objection to the reporting requirement. Marathon restates its position that after initial groundwater quality values are determined, testing and reporting should be done on a semi-annual basis rather than a quarterly basis.

In addition to the previous detection monitoring program, there is a separate shallow zone observation monitoring program. This program involves seven existing monitoring wells and six additional proposed wells, all of which will be screened in the Radnor Till. The purpose of these wells is to provide early warning of releases from the surface impoundments and land treatment facility. All of these thirteen wells are at the same location as previously described detection monitoring wells. R. 27. Samples from these wells are to be analyzed for the same 40 or so parameters as previously described for the detection monitoring program.

The final RCRA permit requires that each of the thirteen shallow wells be monitored for each of the 40 or so parameters on a quarterly basis for one year to establish initial groundwater quality values. After the initial values are established, the final permit requires all thirteen shallow wells to be tested on a quarterly basis during the full term of the permit for each of

the 40 or so parameters. Sample results are to be reported quarterly. Marathon has not objected to any aspect of the testing or reporting for the shallow zone observation monitoring program.

The specific permit monitoring condition Marathon appeals is Condition V C-2 (Adm. Rec., p. 3752):

> After initial groundwater quality has been established, each of the monitoring wells listed in Condition B.1 above shall be sampled quarterly in accordance with the Schedule in Condition H.3 below and the samples analyzed for the constituents listed in Condition C.1 above.

The specific permit reporting condition Marathon appeals is Condition V H-3 (Adm. Rec., p. 3756):

> The Permittee shall submit the analytical results and measurements required by Conditions E, G.2 and G.3 and the results of the statistical analyses required by Condition G.4 to the address listed in Condition B.3 in accordance with the following schedule:
>
> Quarterly Sampling Schedule
>
> | Samples to be Collected During the Preceding Months of | Results Due to the Agency by |
> |---|---|
> | January - February | April 15 |
> | April - May | August 15 |
> | August | October 15 |
> | October - November | January 15 |
>
> Groundwater monitoring data shall be reported on the chemical analysis forms included as Attachment N to this permit.

These two conditions represent the groundwater monitoring conflict.

The Board must now determine whether the Agency's imposition of the contested conditions was in error. EPA v. PCB, 118 Ill. App. 3d 772, 777, 455 N.E.2d 188, 777 (1st Dist. 1983).

> 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, Marathon had to establish that its permit request "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 the contested conditions are "not necessary to accomplish the purposes of the Act." EPA v. PCB, 118 Ill. App. 3d at 780, 455 N.E.2d at 194.

Marathon advances two arguments to support its opposition to quarterly detection monitoring. First, Marathon asserts that the Agency has imposed quarterly monitoring as a consequence of an unwritten policy which has never been legally adopted. Marathon asserts that imposition of this informal policy goes beyond the requirements of substantive environmental law in Illinois. Further, Marathon asserts that imposition of a statewide informal policy of quarterly monitoring denies Marathon the opportunity to notice and comment which due process requires.

Second, Marathon asserts that there is no valid technical basis to support quarterly detection monitoring at this particular facility. At hearing, Marathon presented three expert witnesses in support of the position that semi-annual detection monitoring is adequate to promptly detect changes in chemical composition of the groundwater that are indicative of contamination from the regulated units. Marathon asserts that the site-specific conclusions of its experts are not contested by the Agency.

The Agency's position on quarterly monitoring is more difficult to ascertain. This is primarily because the Agency did not choose to file a post-hearing brief which would support its monitoring conditions. Neither did the Agency request the opportunity to provide closing statements at hearing which would outline the Agency's theory. The Board is, therefore, left to generally review the hearing transcript and briefly scan the 4,930-page Administrative Record before the Agency. The Board does not believe it is obligated to go to great lengths to "make the Agency's case."

At hearing, the Agency presented three witnesses. They described the manner in which the Agency imposes groundwater monitoring at Illinois facilities. They also described the benefits that quarterly monitoring would provide over semi-annual monitoring. Lastly, they described facility conditions and site history. The Board must evaluate the parties' position in light of substantive regulatory law on monitoring.

The Board has adopted regulations that address hazardous waste monitoring programs at 35 Ill. Adm. Code 724.190 to 724.201. The only regulatory requirement which specifically addresses the frequency of monitoring at issue here is 35 Ill. Adm. Code 724.198(d):

> Section 724.198 Detection Monitoring Program
>
> An owner or operator required to establish a detection monitoring program under this Subpart must, at a minimum, discharge the following responsibilities:
>
> * * *
>
> d) The owner or operator must determine groundwater quality at each monitoring well at the compliance point at least semi-annually during the active life of a regulated unit (including the closure period) and the post-closure care period. The owner or operator must express the groundwater quality at each monitoring well in a form necessary for the determination of statistically significant increases under Section 724.197(h).

This regulatory provision requires the Agency to impose semi-annual detection monitoring at each facility in Illinois, without reference to the site-specific conditions. It also allows the Agency to impose more frequent monitoring where necessary to detect contaminants that may be escaping from the particular regulated unit, i.e., a decision premised on site-specific conditions. Since the monitoring frequency requested by Marathon is semi-annual, it obviously complies with regulatory minimums. The Board must therefore evaluate why the Agency imposed quarterly monitoring and whether it is supported by site-specific conditions.

At hearing, the Agency permit writer, Mr. Carson, explained that quarterly monitoring was placed in this permit as a result of Agency policy:

> Q. [BY MR. WRIGHT, ATTORNEY FOR MARATHON] Have you ever drafted any policy relating to the frequency of monitoring?
>
> A. [BY MR. CARSON] No.
>
> Q. Do you have such a policy?
>
> A. Yes. It's not a written policy that I'm aware of, but that is the IEPA policy.
>
> Q. The policy is for quarterly monitoring?
>
> A. Yes.
>
> Q. And was that policy applied here?
>
> A. Yes.
>
> R. 153-154.

Later, the manager of the permit section of the Division of Land Pollution Control, Mr. Eastep, testified. He testified that quarterly monitoring was applied at all facilities to detect seasonal variations:

> Q. [BY MR. CARLSON, ATTORNEY FOR THE AGENCY] And do you know how many of the facilities permitted by your section for solid waste disposal are required to monitor the groundwater on a quarterly basis?
>
> A. [BY MR. EASTEP] I believe there are approximately 250 non-hazardous facilities and approximately 50 hazardous waste facilities.
>
> Q. And how far back does the practice of requiring such quarterly monitoring of groundwater in permits extends?
>
> A. To the best of my knowledge it goes back at least to 1973 when what was referred to then as Chapter 7 of the Pollution Control Board rules was promulgated.
>
> Q. For what technical reasons has quarterly monitoring been required?
>
> A. Generally it's been due to seasonal variations.
>
> Q. And what do you mean by seasonal variations?

A. Well, depending on the year, you can have groundwater fluctuations in relation to rainfall or precipitation or potentially you could have it in some areas due to the levels of streams that they -- that they charge because of things like bank storage. That's all.

R. 161-162

* * *

Q. [BY MR. WRIGHT, ATTORNEY FOR MARATHON] Mr. Eastep, your policy for quarterly monitoring is applied across the board, is it not?

A. [BY MR. EASTEP] That's correct.

Q. You do not make any exceptions?

A. To the best of my knowledge, all the permitted facilities have been required to do quarterly monitoring.

Q. And in applying this policy, it is not necessary, I take it, for you to examine site-specific considerations?

A. Well, site-specific considerations would be involved if after somebody had a history of monitoring if we wanted to vary that. But we've reserved the right to make more frequent monitoring, and I suppose we would be willing to entertain a request from an applicant to make less frequent monitoring.

Q. But you've never granted less frequent?

A. I don't recall any.

Q. Do you know -- we now know what the Agency policy is. What is the Board's -- Pollution Control Board's policy as expressed in the regulations, if you know?

A. Their regulations for monitoring -- in general or just hazardous waste facilities?

Q. Hazardous waste facilities.

A. The minimum requirement is semi-annually.

> Q. And just so I understand correctly, the Board's reg says that in the case of a Part B permit, the applicant shall monitor at least semi-annually?
>
> A. That's my understanding.
>
> Q. So that the Agency has adopted a policy which is different than and is more strict than the Board's?
>
> A. Yes.
>
> R. 173-174.

At hearing, the Agency did provide testimony regarding site conditions and facility history. However, there was no testimony that these particular site conditions compelled a requirement for quarterly monitoring. Marathon did provide testimony that site conditions had been adequately characterized, specifically as it pertained to seasonal variation, so as to support semi-annual monitoring. Mr. French, Marathon's consultant who prepared the hydrogeological assessment, stated:

> Throughout the seven years of monitoring, the data have provided a consistent picture of flow direction. Within the sandstone also we have plotted the fluctuations of water levels through time. We've also observed from those plots a consistent picture of highest water levels within the sandstone occurring generally in the late winter to early spring period. The lowest water levels typically occur late summer, early fall, and that picture is consistent from well to well and from year to year such that we see pretty much a semi-annual variation in water level fluctuations.
>
> R. 25.
>
> * * *
>
> It's my professional judgment that semi-annual monitoring would be adequate to detect any plume of contamination that could possibly enter the groundwater system. I base that on our observations of the seasonal nature of groundwater fluctuations being semi-annual. I base that on the location and distribution of the well system that's in place. I base that on the consideration of the groundwater flow rates of[,] as I mentioned earlier[,] anywhere between 8 to 12 feet per year such that semi-

> annual would in theory provide a picture of groundwater quality every four to six feet in the subsurface as groundwater flow occurs, and again to my professional judgment based on this site's characteristics that would be a more than adequate program to detect any plume.
>
> R. 32.

Marathon's two other technical witnesses agreed.

Marathon has demonstrated that the requested semi-annual monitoring and reporting meets regulatory minimums and that site-specific conditions do not require more frequent monitoring and reporting. The Agency did not refute this prima facie case. Thus, Marathon has demonstrated that the conditions are not necessary to meet the purposes of the Act and that the Agency's imposition of quarterly monitoring and reporting was unnecessary.

It is clear that the Agency did not premise its decision based on conditions specific to the Marathon facility. Board regulations provide minimum monitoring frequency. The Agency may not make those statewide regulations more stringent by application of an informal policy. The Board will remand this matter to the Agency with directions to reissue the permit utilizing a semi-annual frequency in the contested detection monitoring conditions.

Container Storage Pad Area

Marathon also appeals the requirement that it close a container storage pad area. This unenclosed pad area is a 30' x 30' pad which is underlain by gravel and a synthetic liner. There are steel pans on the pad into which drums of waste are placed on pallets. The container storage pad area is for the storage of drums of wastes which are not applied or treated at the land treatment facility. These are such wastes as spent catalysts and other commercial chemicals, spent and unspent, that are used in the refining process. The container storage area is used to temporarily accumulate these materials until a sufficient quantity of drums is accumulated for shipment to off-site disposal (R. 20, 75, 141).

Marathon's consultant recommended the construction of an enclosed building for the storage of drums. This would allow separate storage for different kinds of drums and prevent run-on and precipitation from accumulating. The building was built, and the pad area is directly in front of the entrance to the building. The roadway access to the pad is now the roadway access to the building (R. 75-77).

The pad is currently used to load and unload or to receive drums from internal generating sources within the refinery,

before being placed in the building. Since the building is not designed to have a truck pull into it, the pad is also used prior to off-site shipment by truck. The current permit allows drums to remain on the pad for up to 24 hours. The pad is in current use and has been operated for its use ever since it was build (R. 75-78, 98-109, 141-149, 154-155).

The contested requirement, Special Condition 4, states as follows:

> <u>Closure of Previous Container Storage Area</u>
>
> Within 180 days after the effective date of this permit, the Permittee shall submit an Interim Status (35 IAC, Part 725) closure plan for closure of the previous outdoor container storage area which is currently being used as a drum loading/unloading area. This closure plan shall include soil sampling of low points surrounding the loading/unloading area and shall be developed in accordance with IEPA's "Instructions for the Preparation of Closure Plans for Interim Status RCRA Hazardous Waste Facilities", February 1988. Upon final closure of the container storage area, soil sampling shall be conducted beneath the loading/unloading area.
>
> (Adm. Rec., p. 003800)

The controversy was originally raised by Marathon in their comments on the draft permit:

> The present container storage area consists of a small drum storage building and an ancillary 30' x 30' loading/unloading area located immediately north of the building. The loading/unloading area had been utilized during the early years of interim status as the primary container storage area where drums were stored in open steel pans on pallets. IEPA is requiring "interim status" closure of the loading/unloading area as a special condition in the draft permit, even though Marathon has proposed to sample, analyze, and decontaminate the area when the entire unit is finally closed at the end of its operating life.
>
> Marathon believes that an interim status closure of the loading/unloading area is

> neither appropriate nor warranted. This approach is also inconsistent with the determination by IEPA and EPA that no closure of the interim status impoundments will be required prior to retrofit with double liners and leachate collection systems.
>
> If IEPA still believes that closure is required, the closure should not include activities which will tear up the pad. If closure is required, Marathon therefore believes that decontamination criteria should be based on sampling and analysis of surface soils around the pad to detect contaminated runoff.
>
> (Adm. Rec., p. 004111)

The Agency formally replied to the comment:

> Response: 35 IAC 725.212(d)(2) requires commencement of closure activities for a unit within 30 days after the last receipt of hazardous waste. 35 IAC 725.213(a) requires the treatment, removal or disposal of all hazardous wastes in accordance with the approved closure plan within 90 days after the final receipt of hazardous waste. Although the previously used container storage area is currently used as a loading/unloading area for the new storage area, it is no longer used for the storage of waste and does not meet the requirements for storage of liquid containerized wastes under Part B standards. Therefore, the unit must be closed. The Agency has revised Condition 5 of Attachment D to indicate that this interim status closure will involve soil sampling of low points at the perimeter of the loading/unloading of the pad. Upon final closure of the container storage area, soil sampling shall be conducted beneath the loading/unloading pad, and if necessary, around the pad.
>
> (Adm. Rec., p. 004406)

The parties agree that, since the pad area had interim status, the relevant regulatory guidance is 35 Ill. Adm. Code

725.212(d)(2) and 725.213(a). They provide as follows:

> Section 725.212 Closure Plan; Amendment of Plan
>
> * * *
>
> d) Notification of partial closure and final closure.
>
> * * *
>
> 2) The date when the owner or operator "expects to begin closure" must be either with[in] 30 days after the date on which any hazardous waste management unit receives the known final volume of hazardous wastes or, if there is a reasonable possibility that the hazardous waste management unit will receive additional hazardous wastes, no later than one year after the date on which the unit received the most recent volume of hazardous waste .... (emphasis added)
>
> Section 725.213 Closure; Time Allowed for Closure
>
> a) Within 90 days after receiving the final volume of hazardous wastes at a hazardous waste management unit or facility, or 90 days after approval of the closure plan, whichever is later, the owner or operator shall treat, remove from the unit or facility or dispose of on-site, all hazardous wastes in accordance with the approved closure plan .... (emphasis added)

To determine whether closure of the pad area is required, the Board must determine whether the pad area has received the "final volume of hazardous waste."

Marathon asserts that the pad has not received the final volume of wastes because: (1) the pad is still "receiving wastes" as that phrase is used in 35 Ill. Adm. Code 725.213(a) just as it always did; (2) the pad is an adjunct and part of an operating waste management unit consisting of the building, the pad and the secondary containment equipment; (3) Marathon has submitted a closure plan for the entire unit, including the pad, to be implemented at the end of the life of the unit; (4) the

closure of the pad located in front of the door of the building would disrupt the use of the building; (5) if the existing pad were to be closed a new pad would have to be put in its place for the same purpose; and (6) the pad is still used as a storage area although the Agency has limited the storage to 24 hour periods. (Marathon Final Brief, pp. 17-18.)

The Agency's position is more difficult to ascertain, because it did not file a final brief. The Agency's position appears to be that the pad area, "is no longer used for the storage of waste," (Adm. Rec., p. 004406), because wastes are not stored there for more than 90 days (R. 99-100).

The Board would agree with the Agency that any generator of hazardous waste may only accumulate such wastes for 90 days, and that accumulation beyond that limit will subject the generator to RCRA storage requirements. 35 Ill. Adm. Code 722.134(a) and (b). That is not the same, however, as defining storage to require accumulation for over 90 days. In fact, "storage" is defined in Board regulations, and it contains no time limit:

> "Storage" means the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed or stored elsewhere.
>
> 35 Ill. Adm. Code 720.110

Here, it is undisputed that the container pad area continues to receive, "Hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed or stored elsewhere." Thus, the container pad area has not received the final volume of hazardous wastes, and closure is not mandated by Section 725.212(d)(2) or 725.213(a).

No reason for closure has been advanced except the "final volume" of waste. The Board must conclude that Marathon has demonstrated that the closure condition is not necessary to accomplish the purposes of the Act and therefore it was imposed unreasonably. Accordingly, the Board will remand the matter to the Agency with directions to strike the closure condition and to decide what conditions, if any, are necessary for continued operation of the pad area.

The Board must note that closure of the storage pad area was required in the Agency draft permit. In public comments, Marathon requested that the closure requirement be stricken or modified. In the final permit, the Agency modified the requirement as requested by Marathon.

The Board also notes that today's Opinion in no way addresses what conditions, if any, would be necessary for

continued operation of the container pad area.

In summary, the Board reverses the Agency decision to require quarterly detection monitoring and reporting and reverses the Agency decision to require closure of the container pad area. This matter is remanded to the Agency with directions to reissue a permit without these conditions.

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

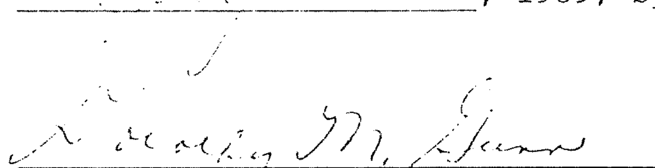
ORDER

The Illinois Environmental Protection Agency imposition of Condition V C-2, Condition V H-3, and Special Condition 4 in the permit issued to Marathon Petroleum Company is hereby reversed. This matter is remanded with directions.

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 Opinion and Order was adopted on the 27th day of ________, 1989, by a vote of ________.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board