ILLINOIS POLLUTION CONTROL BOARD
May 9, 1991

EARL R. BRADD, as owner of the BRADD SANITARY LANDFILL,	)	
Petitioner,	)	
v.	)	PCB 90-173 (Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NEIL F. FLYNN APPEARED ON BEHALF OF PETITIONER, AND

JAMES G. RICHARDSON APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on the September 24, 1990 filing of a Petition for Review by Earl R. Bradd, as owner of the Bradd Sanitary Landfill. Mr. Bradd seeks review of the Illinois Environmental Protection Agency's ("Agency") August 21, 1990 decision to reject his Affidavit of Certification of Closure for the Bradd Sanitary Landfill.

In his petition, Mr. Bradd asks that the Board reverse the Agency's decision to reject his Affidavit for Certification of Closure, direct the Agency to issue a Certificate of Closure, find that the landfill was closed prior to July 1, 1990, and set the landfill's period for post-closure care at five years after completion of closure rather than the fifteen year post-closure care period provided by Section 22.17(a) of the Environmental Protection Act ("Act") (Ill. Rev. Stat. Ch. 111½ par. 1022.17(a)). (Pet. p. 3). In support of his request, Mr. Bradd claims that the Agency's August 21, 1990 Denial Letter failed to notify him as to the manner in which his closure activities violated or failed to comply with the Act and Board regulations, and that his closure activities conform to the closure plan previously approved by the Agency. (Id. pars. 6, 7).

PROCEDURAL HISTORY

As previously stated, Mr. Bradd filed his Petition for Review on September 24, 1990. On October 31, 1990, the Agency filed the Agency Record. On January 3, 1991, Mr. Bradd filed a motion, dated December 19, 1990, requesting the Board to strike the Agency's August 21, 1990 Denial Letter. In his motion, Mr. Bradd asserted, in part, that the Agency's Denial Letter did not include a statement, pursuant to Section 39(a) of the Act (Ill.

Rev. Stat. 1989, ch. 111½, par. 1039(a)), of specific reasons why the Act and regulations might not be met if the Certificate of Closure was approved, but only listed several statutory and regulatory citations that might be violated if the Certificate was approved. On December 31, 1990, the Agency filed its Response to Mr. Bradd's Motion to Strike.

On January 18, 1991, the Board issued an Order noting that the Agency, on the whole, provided an explanation of why the Act and regulations might not be met if the requested Certificate of Closure were granted. The Board also noted, however, that the Agency cited two regulatory sections, 35 Ill. Adm. Code 807.205(b) and (c), without providing a reason why the subsections might not be met if the requested Certificate of Closure was granted. Accordingly, the Board denied Mr. Bradd's motion and remanded the matter to the Agency with directions to amend its denial letter and supply the reasons for its citation of the two regulatory sections. Finally, the Board noted that it would be helpful if the Agency, in the future, would 1) frame its denial letters to be consistent with the order of the numbered paragraphs in Section 39(a) and (b) of the Act, and 2) link the specific reason(s) why the Act and the regulations might not be met if a Certificate of Closure or a permit was granted, to each statutory or regulatory section cited in the denial letter.

Hearings were held on February 1, 1991, and on February 5, 1991, in Bloomington, Illinois. One member of the public was present at the February 1, 1991 hearing.

On February 19, 1991, the Agency filed its Amended Denial Letter pursuant to the Board's January 18, 1991 Order. On March 1, 1991, Mr. Bradd filed his post-hearing Brief and a motion asking the Board to strike the Agency's Amended Denial Letter in its entirety (see below). On March 11, 1991, the Agency filed its response to Mr. Bradd's motion. On March 18, 1991, Mr. Bradd filed a reply to the Agency's Response. On March 25, 1991, the Agency filed its post-hearing Brief and a Motion to Strike Mr. Bradd's March 18, 1991 Reply. Finally, on March 29, 1991, Mr. Bradd filed his Reply Brief.

BACKGROUND

Mr. Bradd owns and operates the Bradd Sanitary Landfill located in Saybrook, McLean County, Illinois. (Pet. par. 1; Pet. Br. p. 1). The Agency issued a developmental permit (Permit No. 1974-82-DE) and an operating permit (Permit No. 1974-82-OP) for the facility on September 17, 1974, and on September 9, 1975, respectively. (Agency Rec. pp. 1-4; IEPA Ex. 1, 2; Pet. Exs. 5 and 6). Although the permitted site consists of approximately 35 acres, the operating permit only allowed for approximately 16 acres to be filled. (Id.). The operating permit also provided for a two-well groundwater monitoring program for the site.

(Agency Rec. pp. 3-4; IEPA Ex. 2; Pet. Ex. 6).

On October 14, 1988, the Agency issued a supplemental permit (Permit No. 1988-248-SP), in which it approved Mr. Bradd's closure and post-closure plan and cost estimates for the landfill. (Agency Rec. pp. 84-93; IEPA Ex. 4; Pet. Ex. 8). Special Condition 6 of the permit required Mr. Bradd to amend the soil over the entire planting area with lime, fertilizer, and/or organic matter, if necessary, and to provide mulch or some other form of stabilizing material on the side slopes. (Id.). Special Condition 14 of the permit required that a final cover (exclusive of any topsoil vegetative layer) of at least two feet in thickness be placed in lifts not to exceed eight inches (loose), that final compaction of the landfill's final cover be performed using a sheepsfoot roller, and that at least one compaction test be performed on a per acre, per lift basis. (Id.). Special Condition 15(b) required Mr. Bradd to propose, by way of a supplemental permit application, a revised groundwater monitoring program for the landfill that would be in conformance with the Agency's "Groundwater Monitoring Network Guidelines" (February 1987). (Agency Rec. pp. 84-93; IEPA Ex. 4; Pet. Exs. 8 and 34). The application for supplemental permit was to be submitted within 90 days of the date of Permit No. 1988-248-SP. (Agency Rec. pp. 84-93; IEPA Ex. 4; Pet. Ex. 8).

On January 13, 1989, and pursuant to the supplemental permit, Mr. Bradd filed a supplemental permit application containing the proposed revised groundwater monitoring program for the landfill. (Pet. Ex. 9). Mr. Bradd's proposed groundwater monitoring program consisted of six monitoring wells: one upgradient well on the eastern side of the landfill (G-103); one on the southern part of the landfill (G-104); and one on the northwestern part of the landfill (G-102). (Id. p. 8, Attachment 8e). Mr. Bradd's proposal continued to use an existing, Agency permitted well (MP-1) as a fourth monitoring well (G-101), and provided that two remaining wells would be used as peizometers (P-101 and P-102). (Id.). In a letter dated April 6, 1989, the Agency notified Mr. Bradd that the proposed groundwater monitoring program was deficient. Agency's Response to Petitioner's Motion to Strike Agency's Denial Letter, Ex. A; Pet. Exs. 10 and 38).

On April 30, 1990, Mr. Bradd notified the Agency that he would cease accepting waste and close the landfill at 12:00 p.m. (noon) on May 5, 1990. (Pet. par. 3, Ex. A; Agency Rec. p. 113; Pet. Exs. 11 - Attachment II, Figure No. 1, and 31). On June 27, 1990, Mr. Allyn Colantino of the Agency's Field Operation Services Division inspected the landfill to determine whether Mr. Bradd was complying with the closure requirements for the landfill. (Agency Rec. pp. 141-160; Pet. Ex. 13). On June 29, 1990, Mr. Bradd, in conjunction with M. Rapps Associates, Inc., an environmental engineering firm, filed an Affidavit for

Certification of Closure and supporting documentation with the Agency. (Agency Rec. pp. 94-172; IEPA Ex. 5; Pet. Ex. 11-Affidavit for Certification of Closure). On July 13, 1990, M. Rapps and Associates, Inc., mailed additional material to the Agency that supplemented its June 29, 1990 submission to the Agency. (Agency Rec. pp. 161-172; Pet. Ex. 11-Addendum). In a letter dated August 21, 1990, the Agency notified Mr. Bradd of its rejection of the Affidavit for Certification of Closure because the landfill was not closed in accordance with the previously approved closure plan. (Agency Rec. pp. 141-160; Petitioner's Motion to Strike Agency's Denial Letter, Ex. A; Pet. Ex. 12). In that letter, the Agency cited the following five deficiencies in support of its denial of Mr. Bradd's Affidavit for Certification of Closure:

1. Condition 15 of Permit No. 1988-248-SP required the submittal of a permit application assessing the current groundwater conditions at the site and proposing an adequate groundwater monitoring program. This has not been done. Although Application No. 1989-10 attempted to satisfy this condition, it was denied on April 6, 1989 due to technical deficiencies. No subsequent application addressing these deficiencies has been submitted to the Agency.

2. The final cover was not compacted using a sheepsfoot roller as required by Condition No. 14 of Permit No. 1988-248-SP.

3. Condition No. 14 of Permit No. 1988-248-SP requires at a minimum one compaction test per acre _per lift_ for the final cover. From the information included with the affidavit this requirement does not seem to have been fulfilled. The results of only approximately one compaction test per acre have been provided.

4. According to Allyn Colantino's (of IEPA's Field Operations Section) report on his June 27, 1990 inspection, in 6 of the 23 borings the total thickness of the final cover and vegetative layer was less than 30 inches. Based on these borings, Mr. Colantino has identified two areas which did not have adequate cover on June 27, 1990. The affidavit neither acknowledges the inadequacies discovered by Mr. Colantino nor does it indicate that these areas were subsequently redressed.

5. According to the Affidavit, the fertilizing, seeding and mulching procedures required by the closure plan approved by Permit No. 1988-248-SP had not been completed (or even begun) at the time the Affidavit was submitted to the Agency.

After the above reasons, the Agency cited the following statutory and regulatory sections that might be violated if the Certificate of Closure were issued: Sections 22.17(a) and 39(a) of the Act, and 35 Ill. Adm. Code 807.205(a), 807.205(b), 807.205(c), 807.206(a), 807.207(a), 807,210, 807.302, 807.305(c), 807.313, 807.314(e), 807.315, 807.308(a), 807.502, and 807.508.

PRELIMINARY MATTERS

Before reaching the substantive merits of this case, the Board must rule on Mr. Bradd's March 1, 1991 Motion to Strike the Agency's Amended Denial Letter and the Agency's Motion to Strike Mr. Bradd's March 18, 1991 Reply.

At the outset, we note that, pursuant to the Board's procedural rules, a moving party does not have the right to file a reply except as permitted by the Board to prevent material prejudice. 35 Ill. Adm. Code 101.241(c). Accordingly, because Mr. Bradd's reply was not accompanied by a motion for leave to file a reply, we will not consider the reply in our deliberations on Mr. Bradd's Motion to Strike the Agency's Amended Denial Letter.

With regard to Mr. Bradd's motion, Mr. Bradd first argues that the Agency did not comply with the Board's January 18, 1991 Order. (Pet. Motion par. 4). Specifically, Mr. Bradd argues that the letter is not limited to the reasons for the Agency's citation of 35 Ill. Adm. Code 807.205(b) and (c), but includes reasons and rationale which were never contained in either the April 6, 1989, or the August 21, 1990 Denial Letters. (Id. pars. 4, 5). Mr. Bradd also argues that the Amended Denial Letter violates Section 39(a) of the Act and denies him due process of law. (Id. par. 7).

In response, the Agency states that it decided to provide more information than the Board requested because it realized that its January 3, 1991 response to Mr. Bradd's first motion to strike was the only document that had overtly provided reasons as to how the various statutes and regulations listed in the Agency's August 21, 190 Denial Letter might have been violated. (Agency Response p. 1). The Agency also argues that, if it issued an amended denial letter that referenced only 35 Ill. Adm. Code 807.205(b) and (c), it would have run the risk that Mr. Bradd would argue that those sections were the only sections that

might not be met if the Certificate of Closure were issued. (Id. p. 2). Finally, the Agency argues that its amended denial letter lists the same information that was listed in its August 21, 1990 Denial Letter, and that only certain non-substantive style changes (i.e. format changes and the overt statement of the reasons for citing the various statutory and regulatory sections) differentiate the amended denial letter from the original. (Id.).

A review of the Agency's Amended Denial Letter indicates that the Agency did indeed reformat its earlier denial letter. However, the Agency also went beyond the Board's January 18, 1991 Order requesting it to supply the reasons for its citation of 35 Ill. Adm. Code 807.205(b) and (c) when it linked the specific reason(s) why the Act and the regulations might not be met with each statutory and regulatory section cited in the August 21, 1990 Denial Letter. As a result, when the Agency provided this more detailed explanation it, in effect, impermissibly supplemented the record. Accordingly, the Board will strike all of the information in the amended denial letter with the exception of the reasoning related to the Agency's citation of 35 Ill. Adm. Code 807.205(b) and (c) before analyzing the Agency's reasoning for its citation of the sections.

In its amended denial letter, the Agency provided the following explanation for its citation of 35 Ill. Adm. Code 807.205(b) and (c) in the August 21, 1990 Denial Letter:

> Again, referring to the permit review process, subsection (a) [807.205(a)] must be read in conjunction with subsections (b) and (c). As applied to the affidavit here, the information required by (b) is specified by the closure plan in Permit No. 1988-248-SP. The form, as stated in (c), to provide this information to the Agency is the affidavit. The affidavit here fell short of the "all data and information" requirements of (a) as no groundwater assessment or monitoring program was provided, and no proof of compliance with the sheepsfoot roller, compaction testing, final cover, and vegetative seeding requirements was provided.

35 Ill. Adm. Code 807.205 states, in part as follows:

> a) All applications for permit required under these Regulations shall contain all data and information specified in those rules governing the type of unit or site for which the permit is required.
>
> b) The Agency may adopt procedures requiring such additional information as is reasonably

necessary to determine whether the waste management site will meet the requirements of the Act and Regulations.

c) The Agency may prescribe the form in which all information required under these Regulations shall be submitted."

Although the Board does not disagree that 35 Ill. Adm. Code 807.205(b) and (c) are linked to 35 Ill. Adm. Code 807.205(a), it is clear from a review of the section that subsection (a) relates to an applicant's activities while subsections (b) and (c) specify the scope of the Agency's activities. Section 39(a) of the Act states that the Agency shall issue a permit upon proof by the applicant that the facility will not cause a violation of the Act or regulations. It is inherent from a reading of this section that it refers to an applicant's violation of the Act or regulations rather than the Agency's violation of the Act or regulations. Accordingly, because an applicant cannot violate subsections (b) and (c), we will strike 35 Ill. Adm. Code 807.205(b) and (c) from the Agency's August 21, 1991 Denial Letter.

STANDARD OF REVIEW

Permits are granted by the Agency pursuant to Section 39(a) of the Act which sets forth the requirements for securing a permit as follows:

> When the Board has by regulation required a permit...it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility...will not cause a violation of this Act or of regulations hereunder....In granting permits the Agency may impose such conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder.

Section 40(a)(1) of the Act provides that an applicant who has been denied a permit may petition the Board for a hearing to contest the Agency's denial of the permit application. Ill. Rev. Stat. 1989, ch. 111 ½, par 1040(a)(1). The standard of review in a permit appeal is as follows:

> [T]he sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Environmental Protection act would have occurred if the requested permit had been issued.

Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3d Dist. 1987); Browning-

Ferris Industries of Illinois, Inc. v. EPA, PCB 84-136 (May 5, 1988), aff'd No 2-88-0548 slip op. (2d Dist. February 3, 1989).

DISCUSSION

At the outset, and before beginning our analysis of this matter, we wish to address Mr. Bradd's reiteration of his Section 39(a) challenge to the Agency's August 21, 1990 Denial Letter that is contained in his post-hearing Brief. Again, Mr. Bradd argues as follows: 1) that the Agency's letter fails to meet the requirements of Section 39(a)(4) of the Act because it does not include a statement of specific reasons why the Act and regulations might not be met if the Affidavit for Certification of Closure were approved, but merely lists several statutory and regulatory citations which may be violated if the Affidavit for Certification of Closure was granted, and 2) that Section 39(a) of the Act, as applied, is fundamentally unfair and deprives him of due process of law. (Pet. Br. pp. 9-12).

Section 39(a) of the Act requires that the Agency provide an applicant with a detailed statement of the reasons for denying a permit application. Section 39(a) further provides that such statements shall include the following information: (1) the sections of the Act that may be violated if the permit were granted; (2) the provisions of the regulations, promulgated under the Act, that may be violated if the permit were granted; (3) the specific type of information, if any, that the Agency deems the applicant failed to provide; and (4) a statement of specific reasons why the Act and the regulations might not be met if the permit were granted.

In order for an applicant to adequately prepare its case in a permit review before the Board, the applicant must be given sufficient information to determine the bases for the Agency's determination and thus, notice of what evidence it needs to establish its case. The requirement that the Agency provide the applicant with the specific sections of the Act and regulations that support the permit denial is consistent with the statutory framework of the Act which requires that the Agency render its initial permit decision and the Board render its permit review decision within specified time periods. This streamlined process requires that the applicant be provided with the specific information upon which the Agency based its permit denial so that the applicant may prepare his case with an eye toward the issue(s) on review, i.e., whether the applicant has demonstrated that no violation of the Act or regulations would occur if the permit were granted.

Contrary to Mr. Bradd's contention, the listing of various sections of the Act and regulations after the denial reasons does not invalidate the Agency's denial letter or render it

inadequate. Mr. Bradd had made no attempt to support his contention that the Agency has not followed Section 39(a)(4) by arguing which sections of the Act and regulations cited by the Agency are an erroneous bases for permit denial. The Board itself reviewed the denial letter and linked the various statutory and regulatory sections with the denial reasons before ruling on Mr. Bradd's first motion to strike the letter. With the exception of 35 Ill. Adm. Code 807.205(b) and (c), we were able to make some connection between each cited section and at least one denial reason. Admittedly, although the Agency's denial letter was not in a format that easily lent itself to review, the Board cannot say that an applicant is denied fundamental fairness merely because the Agency's denial letter is complicated and requires a detailed analysis by the applicant. Centralia Environmental Services, Inc. v. IEPA, PCB 89-170 (October 25, 1990). Therefore, the Board rejects Mr. Bradd's contention that the Agency's denial letter fails to comply with Section 39(a)(4) of the Act simply because the Agency did not itself link the various statutory and regulatory sections to the denial reasons.

Denial Reason 1 - Groundwater Monitoring Program

Mr. Bradd argues that he proposed an adequate groundwater monitoring program pursuant to the supplemental permit and cites four reasons in support of his argument. First, Mr. Bradd notes that the Agency, in its April 6, 1989 letter denying his proposed groundwater monitoring program, failed to cite any statute or regulation that was or would be violated if the proposed program were approved. (Pet. Br. p. 14). Second, Mr. Bradd argues that the Agency improperly applied its Draft Groundwater Monitoring Network ("GMN") Guidelines when reviewing the proposed program. (Id. pp. 14-16). Specifically, Mr. Bradd argues that the reasons set forth in the Agency's April 6, 1989 denial letter are similar to portions of the Agency's Draft GMN Guidelines and that the Agency cannot, as a matter of law, impose or apply the draft GMN Guidelines as rules. (Id.). Third, Mr. Bradd argues that the landfill has always had and continues to have a permitted groundwater monitoring program and that the proposed program conforms to the Agency's Draft GMN Guidelines and would not violate any applicable statutory, regulatory or permit provision. (Id. pp. 17-18). Mr. Bradd adds that the record in this matter contains no evidence of any groundwater violations during the operation of the landfill, that the landfill has never been cited in any enforcement proceeding relating to any groundwater violation, that quarterly groundwater samples show no violation of the Act or regulations, and that samples taken from the well supplying water to the maintenance shed located on the site indicate that the water is bacteriologically safe to drink. (Id. p. 18). Fourth, Mr. Bradd notes that, even if his current groundwater monitoring program is inadequate, the Agency's Administrative Procedure #4 provides for the upgrade of the

system during the post-closure period.* (Id. pp. 18-20). Mr. Bradd adds that the Agency arbitrarily applied procedure #4 in this case because the Agency's enforcement and application of the procedure were dependent upon the availability of the Agency's resources, and that the procedure is arbitrary on its face because it unconditionally allows the Agency to determine when, or even if, the groundwater monitoring program is to be upgraded. (Id. 19-20). Finally, Mr. Bradd argues that the Agency's determination regarding the adequacy of his groundwater monitoring program is arbitrary because the Agency has allowed some Illinois landfill facilities to have one or no groundwater monitoring wells. (Id. pp. 20-21).

As the Board previously stated in its January 18, 1990 Order, because the April 6, 1990 denial letter referred to several problems with Mr. Bradd's proposed groundwater monitoring program and because the August 21, 1990 denial letter referenced the April 6, 1990 denial letter, the two letters were inextricably linked. Section 40(a)(1) of the Act (Ill. Rev. Stat. 1989, ch. 111½, par. 1040(a)(1)) provides, "If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency." (emphasis added)(see also 35 Ill. Adm. Code 105.102(a)(2)). Because Mr. Bradd never appealed Special Condition 15(b) of Supplemental Permit No. 1988-248-SP or the Agency's April 6, 1989 denial of his proposed groundwater monitoring program within the above statutory time frame, he has waived any objection to the Agency's imposition of Special Condition 15(b) and its denial of his proposed groundwater monitoring program. Further, Mr. Bradd, through his arguments, is challenging the imposition of Special Condition 15(b) rather than the fact that he performed groundwater monitoring required by the condition. In light of these factors, the Board will not review either Special Condition 15(b) or the validity of the Agency's April 6, 1989 Denial Letter at this juncture. To do otherwise would encourage permit applicants to delay appealing an Agency denial until a subsequent denial appeal arises. It also would result in the Board performing a de novo review of the closure plan at the time of submission of the Affidavit for Certification of Closure.

Moreover, we find that the Agency did not need to review the

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*Administrative Procedure #4 is an internal Agency procedure entitled "Procedure for Closure of Solid Waste Landfills (Non-Hazardous) under 807 Subpart E". Paragraph I(4) of Administrative Procedure #4 provides that facilities with deficient groundwater monitoring systems should be made to upgrade before they close if the Agency has the resources to do so; otherwise the Agency will allow the facilities to upgrade during post-closure. (Pet. Ex. 17).

contents of the Agency's April 6, 1989 Denial Letter or Mr. Bradd's proposed groundwater monitoring program simply because both were referenced in the Agency's August 21, 1990 Denial Letter. Rather, the fact that Special Condition 15(b) of Supplemental Permit No. 1988-248-SP had not been satisfied was a sufficient basis for the Agency to deny Mr. Bradd's Affidavit for Certification of Closure and not issue a Certificate of Closure for the landfill. Specifically, the Certificate of Closure is issued pursuant to 35 Ill. Adm. Code 807.508(b) which provides, in part, as follows:

> b. If the Agency finds that the site has been closed in accordance with the specifications of the closure plan, and the closure requirements of this Part, the Agency shall:
>
> 1) Issue a certificate of closure for the site;
>
> (Emphasis added).

we cannot expect the Agency to approve an Affidavit for Certification of Closure and issue a Certificate of Closure when an applicant has not complied with his closure plan. In light of the above, we uphold denial reason 1 and will not address Mr. Bradd's substantive arguments.

Denial Reason 2 - Sheepsfoot Roller Compaction

Mr. Bradd acknowledges that landfill machinery rather than a sheepsfoot roller was used to compact the final cover for 1½ acres of land at the landfill. (Id. p. 21). He notes, however, that when Mr. Colantino learned of this during his June 27, 1990 inspection, he stated that the methodology was adequate because the final cover was installed in small lifts. (Id. p. 21). Mr. Bradd adds that neither the Act nor Board regulations mandate compaction of the final cover with a sheepsfoot roller, that the Agency arbitrarily applies its "policy" of requiring a sheepsfoot roller because, at least at one other site, it did not require a sheepsfoot roller for compaction. (Id. p. 22). Finally, Mr. Bradd notes that this denial reason should not serve as a basis to reject the Certificate of Closure because a sheepsfoot roller is only one of several methods to achieve the required level of compaction and because compaction tests indicate that the landfill surpassed the 90% Standard Proctor Density required by the Agency. (Id.).

The Agency challenges the credibility of Mr. Bradd's assertions regarding the representations of Mr. Colantino. (Resp. Br. p. 6). Specifically, the Agency notes that although the record indicates that Mr. Colantino told Mr. Bradd to put the fact that he was installing the final cover in small lifts with

landfill machinery in the certificate of closure, Mr. Bradd did not mention the small lifts in the Affidavit for Certification of Closure. (Id.). The Agency also notes that the intra-lift and inter-lift compaction produced by a sheepsfoot roller is superior to landfill machinery and that Mr. Bradd's argument regarding the use of landfill machinery at another site is meaningless without an examination and comparison of the other site's features with this landfill's characteristics. (Id. pp. 6-7).

A review of the record indicates Mr. Colantino talked with Mr. Bradd and Mr. Timothy Sheehan, an environmental engineer with M. Rapps & Associates, Inc., during the June 27, 1990 inspection. Mr. Sheehan testified that, during his inspection, Mr. Colantino stated that the method of compaction at the site was adequate after Mr. Bradd informed him that the final cover was installed in small lifts. (R. 135). Mr. Sheehan also testified that Mr. Colantino directed Mr. Bradd to put such information in his Affidavit of Closure. (Id.). The Agency did not rebut Mr. Sheehan's assertions at hearing. However, Mr. Colantino did confirm that he asked Mr. Bradd if he had put lifts down of eight inches or less and if compaction tests had been performed on those lifts. (R. 253-54). Moreover, Mr. Colantino, in his August 14, 1990 inspection report, stated, "According to Mr. Sheehan, less than eight inch lifts were applied. Compaction was not achieved by the use of a sheep foot as required. Instead, rubber tired vehicles, which assisted in the transportation of the soil, were used to compact the cover." (Pet. Ex. 13; IEPA Ex. 5, p. 142). Finally, Mr. Bradd noted in his Affidavit that the final cover was placed in small lifts and "mechanically compacted". (Pet. Ex. 11, Attachment II, Paragraph 2).

In Modine Manufacturing Co. v. PCB, 176 Ill. App. 3d 1172 (1988) (an unpublished order that was discussed in Modine Manufacturing Co. v. PCB, 193 Ill. App. 3d 643, 549 N.E.2d 1379 (2nd Dist. 1990)), the Appellate Court found that the Agency's agreement not to institute enforcement proceedings for emission violations barred an enforcement action brought by the Agency, but that no such agreement existed with respect to certain permit violations cited by the Agency. It then dismissed the action for the emissions violations and remanded the case to the Board to set the penalty on the permit violations. (see Modine, 549 N.E.2d at 1381, 140 Ill. Dec. 509). In In the Matter of: Pielet Brothers' Trading, Inc., AC 88-51, 101 PCB 131 (July 13, 1989), Pielet deposited waste by an area method rather than by trench method pursuant to its permit. Pielet argued that, under the common law principles of estoppel, the Agency should be estopped from punishing it for changing its operations from a trench fill to an area fill because it allowed the change. The evidence revealed that Pielet had several meetings with the Agency and provided documentation indicating that it was operating as an area fill, and that the Agency did not inform Pielet that its

activities could be a violation of the Act for which an administrative citation could be issued. The Board found that the Agency was estopped from finding Pielet in violation of the Act based on its belief that "the record reveals that the Agency, through its representatives, made representations to Pielet Brothers upon which Pielet Brothers could reasonably have believed allowed it to deposit waste by the area fill method in certain portions of the landfill in addition to those permitted." (Id. p. 9, 101 PCB at 140). Finally, in IEPA v. Jack Wright, AC 89-227 (August 30, 1990), the Agency issued an administrative citation against Mr. Wright for an open dumping that resulted in litter. The Board concluded that statements made by an Agency field inspector led Mr. Wright to believe that no administrative citation would be filed if he took remedial action to clean up his facility and that, as a result, the Agency improperly issued the administrative citation against Mr. Wright.

At hearing, Mr. Sheehan specifically stated that Mr. Colantino told him that Mr. Bradd's method of compaction was adequate. Mr. Colantino's direct testimony does not refute or contradict Mr. Sheehan's testimony, nor did the Agency rebut Mr. Sheehan's testimony either on cross-examination or during closing arguments. Based on our review of the above evidence as well as the case law, we conclude that Mr. Colantino represented that the compaction at the site would be adequate, that it was not unreasonable for Mr. Bradd to have relied on such representation, and that the Agency is estopped from now citing denial reason 2 as a basis for its denial of Mr. Bradd's Affidavit for Certification of Closure. Accordingly, we find that denial reason 2 is an insufficient basis for the Agency's denial of Mr. Bradd's Affidavit of Certification of Closure and therefore will strike it.

Denial Reason 3 - Compaction Tests

Mr. Bradd argues that neither the Act nor Board regulations require compaction testing for each lift in each acre of a landfill. (Pet. Br. p. 23). Mr. Bradd adds that the per acre, per lift compaction testing is not a formal policy and that the Agency does not universally apply the requirement. (Id.). In fact, Mr. Bradd notes that the record indicates that this requirement is unique to the case at hand, and that Mr. James Schoenhard of the Agency's Division of Land Pollution Control advised Mr. Sheehan to disregard the per lift language, and stated that the tests would be meaningless because there is no recognized minimum compaction standard with respect to the lower lifts, and that he would require compaction testing for only the top lift and a demonstration of at least 90% Standard Proctor Density. (Id. pp. 23, 24). Mr. Bradd also argues that the evidence indicates that testing the lower lifts is unnecessary because inadequate compaction on the lower lifts will result in the failure to achieve the required compaction on the top lift.

(Id. p. 24). Finally, Mr. Bradd asserts that the final lift of cover at the landfill surpassed the 90% Standard Proctor Density compaction requirement. (Id.).

First, the Agency challenges Mr. Bradd's assertions regarding Mr. Schoenhard's representations to Mr. Sheehan. (Agency Br. p. 7). Specifically, it questions why Mr. Bradd did not seek confirmation of Mr. Schoenhard's representations in writing or mention them in his Affidavit for Certification of Closure. (Id.). The Agency also questions why Mr. Bradd never appealed this condition (or the condition requiring the use of a sheepsfoot roller) when Supplemental Permit No. 1988-248-SP was issued or when it was modified via the supplemental permit process (i.e. when Mr. Bradd submitted his proposed groundwater monitoring program). (Id.).

Mr. Sheehan testified that he talked with Mr. Schoenhard and told him that the per lift compaction requirement was ambiguous because Mr. Bradd did not have to meet a percent compaction for each lift. (R. 180-81). Mr. Sheehan also testified that Mr. Schoenhard responded as follows, "Tim, you 're right, all you need to do for your certification is certify that you have got 90 percent standard compaction proctor on the last lift." (Id.). The Agency did not rebut the testimony either on cross-examination or in its closing arguments.

Based on our review of the above evidence as well as the case law cited in denial reason 2, we conclude that Mr. Schoenhard represented that the per lift, per acre compaction requirement need not be met, that it was not unreasonable for Mr. Bradd to have relied on such representation, and that the Agency is estopped from now citing denial reason 3 as a basis for its denial of Mr. Bradd's Affidavit for Certification of Closure. Accordingly, we find that denial reason 3 is an insufficient basis for the Agency's denial of Mr. Bradd's Affidavit of Certification of Closure and therefore will strike it.

Denial Reason 4 - Final Cover and Vegetative Layer Thickness

In his Brief, Mr. Bradd first argues that, contrary to the denial reason, the record demonstrates that the thickness of the final cover and vegetative layer meet the requirements of the closure plan and exceed the requirements of the Board's regulations. (Pet. Br. p. 25). He adds that, pursuant to an agreement with Mr. Colantino, he added the required cover and certified in his Affidavit that he took corrective action. (Id. pp. 25-26). Mr. Bradd also notes that 35 Ill. Adm. Code 807.305(c) only requires a compacted layer of 24 inches of material rather than 30 and that, although certain borings indicated a cover of less than 30 inches, each one acre grid had at least one probe that demonstrated final cover of at least 30 inches and no probe indicated a cover of less than 24 inches.

(Id. p. 26).

The Agency does not dispute that Mr. Bradd and Mr. Colantino reached an understanding and that Mr. Bradd was to provide information on this matter in his Affidavit. (Agency Br. P. 8). The Agency, however, argues that Mr. Bradd's Affidavit does not show which borings indicated inadequate cover, and that the Affidavit contradicts Mr. Colantino's observations because it suggests the first 15 borings satisfied the 30 inch cover requirement. (Id.). It adds that certain photographic evidence relied on by Mr. Bradd does not demonstrate that he applied adequate cover. (Id.).

During Mr. Colantino's June 27, 1990 inspection of the landfill, Mr. Colantino made a total of 23 borings among 15 one-acre grids (with a total of five borings in grid 2, four borings in grid 3, and two borings in grid 9) to determine the thickness of the final cover and vegetative layer. (Pet. Ex. 13). He notified Mr. Bradd and Mr. Sheehan that eight of the borings (four borings in grid 2, three borings in grid 3, and one boring in grid 9) revealed less than 30 inches of cover. (R. 238-239). Specifically, grids 2, 3, and 9 had approximately 26 inches, 26 inches, and 27 inches of cover, respectively. (R. 238). He also stated that additional cover was needed, and directed Mr. Bradd to certify in his Affidavit that additional cover was, in fact, added. (R. 152, 239-240). Mr. Bradd agreed to apply the additional cover. (R. 152, 240; Pet. Ex. 4; Pet. Ex. 11, Attachment II).

At hearing, Mr. Sheehan testified that Mr. Colantino stated that there would be no need to complete any additional borings or probes to verify the fact that additional soil was added, if Mr. Bradd actually added additional soil and mentioned that fact in his Affidavit. (R. 154). Mr. Colantino's direct testimony does not refute or contradict Mr. Sheehan's testimony, nor did the Agency rebut Mr. Sheehan's testimony either on cross-examination or during closing arguments. Mr. Sheehan also testified that Mr. Bradd applied the additional cover to the eastern and southeastern corner of the site between June 27 and 29, 1990, and that Mr. Bradd mentioned the corrective measures in his Affidavit. (R. 152, 154-55, 240; Pet. Ex. 4; Pet. Ex. 11, Attachment II). Also, Mr. Bradd presented certain photographs taken on June 29, 1990 and a bill for earth moving at hearing as proof that he added additional cover to the areas in question on June 27, 28, and 29, 1991. (Pet. Exs. 4, 11 - Addendum, 16).

The above evidence indicates that Mr. Bradd did indeed apply additional cover. Because the Agency never re-inspected the site to verify that Mr. Bradd applied the required amount of cover, however, we cannot definitively state that the landfill has a final cover of exactly 30 inches in all places. Specifically, the photographs and Petitioner's Exhibit 4 do not indicate the

exact amount of cover that was added or where it was placed. We conclude, however, that Mr. Colantino represented to Mr. Bradd that no additional borings would be needed if Mr. Bradd added the additional soil and verified in his Affidavit that he took such action.

In his Affidavit, Mr. Bradd stated, "Presently, additional top soil placement and grading is being performed along the eastern and southeastern corner of the site." (Pet. Ex. 11, Attachment II). The question now becomes whether the above representation was adequate. Because Mr. Colantino never specified the degree of specificity that was to be provided in the Affidavit, we cannot conclude that Mr. Bradd's statement was inadequate. Rather, Mr. Bradd relied on Mr. Colantino's representations and provided the requested information in his Affidavit. Moreover, Mr. Bradd's and Mr. Sheehan's testimony indicates that Mr. Bradd added the required amount of cover to the site. This testimony was never rebutted. If the Agency wanted more proof that additional cover had been added, it should have either specified the proof that Mr. Bradd was to provide in his Affidavit, or re-visited the site and rebutted Mr. Bradd's and Mr. Sheehan's testimony. Based on our review of the above evidence as well as the case law cited in denial reason 2, we conclude that it was not unreasonable for Mr. Bradd to have relied on Mr. Colantino's representations, and that the Agency is estopped from now citing denial reason 4 as a basis for its denial of Mr. Bradd's Affidavit for Certification of Closure. Accordingly, we find that denial reason 4 is an insufficient basis for the Agency's denial of Mr. Bradd's Affidavit of Certification of Closure and will strike the denial reason.

Denial Reason 5 - Fertilizing, Seeding, and Mulching

Mr. Bradd argues that he complied with the closure plan and consulted with an agronomist. (Pet. Br. p. 27). He also argues that, even if one were to conclude that the landfill was not a completed site as of July 1, 1990, because it was not seeded by that date, the Board should find that the landfill was substantially completed by July 1, 1990, because the failure to seed by that date constitutes a de minimis deviation from the closure plan. (Id. p. 28). He adds that it is appropriate for the Board to find that he complied with the closure plan even though the seeding occurred after June 30, 1990 when one considers the fact that the Agency has great leniency with which to deal with deficient groundwater monitoring systems (see Ex.17-Administrative Procedure #4, Paragraph 4). (Id. p. 29).

The Agency questions why Mr.Bradd could not have planted temporary cover during the last week of June, and notes that Mr. Bradd did not plant the final cover in the Fall of 1990 when there were conducive conditions. (Agency Br. p. 9). The Agency also argues that Mr. Bradd knew that the final cover would be

planted during the summer and that he had at least two months (i.e. from May 5, 1990 to July 1, 1990) to apply to the Agency to modify the final cover planting requirements of his closure plan if he could not meet the July 1, 1990 deadline. (Id.). The Agency concludes that, as a result of Mr. Bradd's failure to modify the closure plan and the fact that no cover was planted by July 1, 1990, it had no choice by to cite Mr. Bradd for this deficiency. (Id.).

At hearing, Mr. Sheehan testified that he consulted with Mr. David Franzen, an agronomist of Shields Soil Service. (R. 157). He also testified that, because the time of the year was not conducive to establishing any vegetation, Mr. Franzen recommended a temporary cover of lime (fertilizer) and oats to stabilize the final cover and prevent soil erosion until growing conditions were more conducive to plant the final cover. (Id. p. 157-58; Pet. Ex. 11 - Attachment II, Figure No. 5). The lime and oats were applied during the first week of July 1990, and the record demonstrates that plant growth had occurred as a result of the July, 1990 planting. (R. 158; Pet. Exs. 2, 11 - Attachment II, Addendum).

The closure plan for the landfill specifies seeding, fertilizing, and mulching procedures in accordance with the Illinois Department of Transportation's "Standard Specifications for Road and Bridge Construction" requirements. (Pet. Ex. 7A p. 5). It also states that "a local agronomist will be consulted to review seeding and fertilizer specs and, if needed, recommend modifications to ensure vegetative growth". (Id.). The unrebutted testimony of Mr. Sheehan shows that this is exactly what Mr. Bradd did. When the Agency approved Mr. Bradd's closure plan, it knew that the seeding process could be modified in accordance with an agronomist's recommendation. As a result, the Agency cannot now complain that Mr. Bradd did not comply with the closure plan. Nor can it question why Mr. Bradd did not plant cover in the Fall of 1990 or attempt to modify the plan.
As previously stated, a Certificate of Closure is issued pursuant to 35 Ill. Adm. Code 807.508(b) which provides, in part, as follows:

> b. If the Agency finds that the site has been closed in accordance with the specifications of the closure plan, and the closure requirements of this Part, the Agency shall:
>
> 1) Issue a certificate of closure for the site;
>
> (Emphasis added).

Because Mr. Bradd complied with this requirement of his closure plan, we find that denial reason 5 is an insufficient basis for

the Agency's denial of Mr. Bradd's Affidavit of Closure and will strike it.

Post Closure Care Period

Section 22.17 of the Act governs the period of time that a landfill owner is required to monitor the site after the site is closed. During the 1988 Session of the 85th General Assembly, House Bill 3668 was introduced to increase the post closure care period from five to 15 years. The bill was signed into law on August 30, 1988 (Public Act 85-1240) and became effective on January 1, 1989. On May 12, 1988 an amendment to the law was adopted which delayed the date that the 15 year monitoring period went into effect until July 1, 1990.

As previously stated, Mr. Bradd requests that the Board find that the post closure care period applicable to the landfill is five years rather than 15 years. He argues that the landfill is subject to the five year post closure care period because the evidence indicates that the site was closed and completed prior to July 1, 1990. (Pet. Br. pp. 31-36). The Agency, on the other hand, maintains that the landfill was not closed and completed as of July 1, 1990 because all of the requirements of the landfill's closure plan had not been satisfied or met by that date. (Resp. Br. pp. 1-2, 13-15).

Section 22.17(a) provides as follows:

> The owner and operator of a sanitary landfill site shall monitor gas, water and settling at the completed site for a period of 15 years after the site is completed or closed, or such longer period as may be required by Board or federal regulation.

(Emphasis added).

Because the Board has upheld one of the Agency's denial reasons, we conclude that the Agency was justified in not approving Mr. Bradd's Affidavit for Certification of Closure and not issuing a Certificate of Closure for the landfill. Moreover, because the activities described in the closure plan have not been completed, we cannot say that the landfill was closed or completed prior to the July 1, 1990 deadline. Accordingly, the Bradd Sanitary Landfill is subject to a 15 year post-closure monitoring period.

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

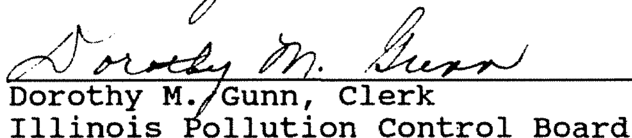
ORDER

For the foregoing reasons, denial reasons 2, 3, 4, and 5 are reversed. Denial reason 1 is upheld and, therefore, the Agency's denial of Mr. Bradd's Affidavit for Certification of Closure and refusal to issue a Certificate of Closure is affirmed and the Bradd Sanitary Landfill is subject to a 15 year post-closure monitoring period.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1041) provides for the appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certifies that the above Opinion and Order was adopted on the 9th day of May, 1991, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board