ILLINOIS POLLUTION CONTROL BOARD
May 10, 1990

CENTRALIA ENVIRONMENTAL SERVICES, INC.,	)	
Petitioner,	)	PCB 89-170 (Permit Appeal)
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

INTERIM OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board on a petition for review filed October 23, 1989 by Centralia Environmental Services, Inc. (CESI) in which CESI contests the Illinois Environmental Protection Agency's (Agency) denial of a supplemental development permit and an operating permit for Area IV of CESI's landfill site. Hearings were held on December 18, 19, 20, 27, and 28 of 1989 at which no members of the public attended.

STATEMENT OF FACTS

CESI's regional pollution control facility is located on a forty acre parcel of land near Centralia, Illinois in Marion County. The site was initially permitted for development as a non-regional pollution control facility on February 9, 1984. (Agency Record at 147-57.) The development permit was issued to Industrial Salvage, Inc. and John Prior, president, as owner and operator. (Id.) Progressive development of the site was to occur throughout six portions of the site designated as Areas I through VI. (Id. at 34-40.) In the development permit, the Agency imposed the condition that, prior to obtaining any operating permits for Areas I through IV, a registered professional engineer must certify that at least ten feet of clay with a maximum permeability of 1x10 -7 cm/sec exists at the bottom and sidewalls of the Area. (Id. Ex. 2 at 147-50.)

In 1986, the development permit was transferred to Jackson County Landfill, Inc. d/b/a/ Industrial Services Inc. as operator. The development permit was modified to allow site development as a regional pollution control facility. Also in 1986, an operating

permit was issued for Area I to Industrial Salvage, Inc. as owner and Jackson County Landfill, Inc. d/b/a Industrial Services, Inc. as operator. (Id. Ex. 8 at 674-90.) Area I was permitted for disposal of municipal waste and non-hazardous special waste; however, the disposal of special wastes which would yield fluid when subjected to the "paint filter test" was prohibited. Jackson County Landfill Inc. received a supplemental permit to allow the "retrofitting" of a leachate collection system so that liquid special waste could be accepted at the site. After failure to obtain Agency approval of the leachate collection system, the operator obtained a supplemental permit allowing for the removal of the leachate system.

On January 28, 1988, CESI purchased the business assets of Jackson County Landfill, Inc. (Id. at 937.) CESI submitted an application for transfer of all existing permits and for an operating permit for Areas II and III. (Id. Ex. 28 at 835-959.) At that time, the Agency and William T. Schmidt, president of CESI, discussed the need to investigate the alleged unauthorized disposal of waste in Area II and the need for remedial action to address allegations by a former employee that waste had been disposed of below grade in a 50 feet by 500 feet section located in Areas III and IV. (This area will be referred to as the "investigation area" or "remediation area".) (Id. at 835-36, 868-69, and 883.) Existing permits were transferred to CESI and CESI obtained an operating permit for Areas II and III on March 21, 1988. In granting CESI's permit, the Agency required that CESI conduct a remedial investigation of the 50 feet by 500 feet suspect area and to submit a plan of action for the Agency's approval. Also, the Agency imposed the condition that "in the event that the boring program reveals waste has been disposed of 'below grade', no operating permits for additional areas of this landfill will be issued by the Agency until an Agency approved remedial action is satisfactorily implemented pursuant to an issued supplemental development permit." (Permit No. 1987-299-SP condition no. 2(c)ii.)

On June 14, 1988, CESI submitted a plan of action which was approved by the Agency. (Agency Record at 1017-27.) The plan provided for the excavation of above-grade waste in the remediation area and the reburial of that waste on other permitted sections of the site. After the removal process began in August of 1988, the Agency requested that CESI aid in exploring allegations that hazardous wastes had been disposed of in the area by setting aside any drums encountered in the excavation process. Twelve drums were set aside for Agency inspection. Analysis of one of the drums revealed the presence of organic solvents, including toluene, ethylbenzene and substituted benzenes. (Id. at 537-42.)

In October of 1988, CESI contacted the Agency to discuss the waste removal process and boring program for the investigation area. CESI indicated that it was likely that waste had been

deposited below permitted levels and sought permission to remove the waste. The Agency agreed that the waste should be removed but also informed CESI that backfilling was not to occur until the boring program was completed. However, on October 5, 1988, CESI began filling the excavation area with recompacted clay. Following completion of the backfilling, borings were conducted in the investigation area. The borings did not encounter any waste; however, groundwater was encountered within a few feet of the surface of several borings. CESI submitted a report detailing the results of the investigation.

On June 29, 1989, CESI submitted a supplemental development permit application to the Agency. On September 21, 1989, CESI submitted an addendum to the application seeking to strike condition no. 2(c)ii from the supplemental permit (Permit No. 1987-299-SP). On September 27, 1989, the Agency denied CESI's application and motion to strike . On August 25, 1989, CESI submitted an application for an operating permit for Area IV. (Agency Record at 1425-65.) On October 6, 1989, the Agency denied CESI's application. In the instant matter, CESI appeals from the Agency's denial of both the supplemental development permit and the operating permit applications.

By order of the hearing officer, simultaneous briefs were due to be filed no later than January 16, 1990. While the Agency timely filed its brief, CESI failed to comply with the January deadline. On March 8, 1990, the Board entered an order directing CESI to explain the delay and to file a motion for extension of time to file its brief. CESI filed its motion stating that it had been unable to timely file its brief because the transcripts were not prepared and requesting an extension to April 19, 1990 to file its brief. On March 22, 1990, the Board entered an order directing CESI to file its brief no later than April 2, 1990, denying the Agency's request to decide the case without CESI's brief and allowing the Agency to file a reply brief. CESI filed its brief on April 3, 1990 with a letter stating that it was CESI's intention to file the brief on April 2, 1990 by flying to Chicago and personally delivering the brief. CESI stated that it was unable to do so because the pilot refused to fly due to bad weather conditions. Although CESI should have filed a motion to file its brief instanter setting forth the reasons for the one-day delay in filing its brief and requesting that the Board accept the brief instanter, the Board accepts the late filing of CESI's brief because the letter sets forth the reasons for failing to timely file the brief and because the one-day delay in filing is minimal and apparently unavoidable.

Supplemental Development Permit

In its section 39(a) letter, the Agency gave three reasons for denying CESI's application for a supplemental development permit. (Agency Record at 1494-96.) First, the Agency stated that "[n]o

hydrogeologic justification has been provided demonstrating that the one proposed additional groundwater monitoring well is adequate (and properly located) to detect any groundwater contamination resulting from filling the trench in Area IV with waste." (Id. at 1494.) The Agency noted that "[g]iven the fact that the procedures for determining the extent of the waste filling in the trench area were not carried out in accordance with the plan approved by the Agency nor the instructions given by the Agency, the groundwater monitoring needs to be designed to deal with the potential that waste was disposed directly on top of the bedrock and that leachate from this waste may have contaminated the groundwater." (Id.)

The second reason given by the Agency in denying CESI's application is that "CESI's application suggests that the possibility of groundwater contamination by organic compounds is not of concern and therefore proposes to construct the additional well using PVC and to omit organics as monitoring parameters for the groundwater. The possibility of organic contamination is of substantial concern and consequently the groundwater must be monitored for organics.. Constructing monitoring wells of PVC is not acceptable for purposes of conducting such monitoring." (Id. at 1495.)

The final reason stated in the Agency's denial letter is that "[p]ursuant to 35 Ill. Adm. Code 807.661, an annual evaluation of the trust fund serving as the instrument of financial assurance for closure/post-closure care should have been submitted to the Agency by February 23, 1989. Also, documentation of an annual payment of the trust fund should have been submitted by March 25, 1989. The Agency has not received either of these submittals." (Id.)

Operating Permit for Area IV

The Agency gave five reasons for denying CESI's application for an operating permit. First, the Agency stated that the boring logs and permeability tests provided with the application were not adequate to demonstrate the presence of the clay liner with a minimum thickness of 10 feet and a maximum permeability of 1x10 -7 cm/sec required by condition no. 6 of Permit No. 1987-194-Sp because: (1) the location of boring no. 7 (monitoring well) is not given on the sketch showing the location of the test probes; (2) the surface elevations of the probes are not provided on the boring logs; (3) the brown sandy clay found between 7 and 10 feet of depth of boring ST-4 has not been tested for permeability; and (4) boring logs nos. 9-11 of the remedial action report dated October 31, 1988 show porous materials within ten feet of the top of the liner. (Id. at 1504.)

Secondly, the Agency stated that a September 25, 1989 pre-operational inspection performed by the Agency revealed the following deficiencies: (1) material deposited on top of the clay liner in the eastern quarter of Area IV so that no visual

inspection could be made; and (2) failure to construct drainage controls and haul roads in accordance with the plans included in Permit No. 1984-3-DE. (Id. at 1504-05.)

Thirdly, pursuant to 35 Ill. Adm Code 807.661, the Agency stated that CESI failed to submit an annual evaluation of the trust fund serving as the instrument of financial assurance for closure/post-closure care by the requisite date of February 23, 1989 and failed to submit documentation of an annual payment to the trust fund by March 25, 1989. (Id. at 1505.)

Fourthly, the Agency stated that CESI had not obtained a supplemental development permit as required by condition no. 2(c)ii of Permit No. 1987-299-SP for the remedial area and, therefore, could not obtain an operating permit for Area IV. (Id.)

Lastly, the Agency stated that "[s]ince Area IV is an integral part of this facility, an operating permit for it cannot be issued until the existing problems of Areas I, II and III have been remediated. These problems include the increased potential for erosion, run-off, leachate migration and groundwater contamination caused by over-filling and over-steepening the slopes of Areas I, II and III. (Id.)

DISCUSSION

Before reaching the substantive merits of this permit review, the Board must address a preliminary issue raised by CESI regarding the Agency's denial statements. Of the eight "denial reasons" given by the Agency, only two are supported by reference to a specific section of the regulations which may be violated if the permits were granted. (Agency Record at 1494-96, 1504-06.) Three of the "denial reasons" refer to violations of conditions imposed in previous permits. The remaining three "denial reasons" do not refer to any section of the Act or regulations or other previously imposed permit conditions. CESI asserts that the permit denial letters issued by the Agency fail to meet the requirements of section 39(a) of the Act and are, therefore, "defective and invalid as a matter of statute." (CESI Brief at 23.) The Agency responds that the "deficiencies are stated with sufficient detail to inform [CESI] of their basis" and, therefore, are in compliance with section 39(a) of the Act. (Agency Reply Brief at 18.)

Section 39(a) of the Act requires that, within 90 days[1] of the filing of the application, the Agency provide the applicant with a detailed statement of the reasons for denying the permit application. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1039(a).)

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[1] This 90-day period is extended to 180 days when the application is for a permit to develop a landfill. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1039(a).)

Section 39(a) provides that "[s]uch statements shall include, but are not limited to the following: (1) the sections of the Act which may be violated if the permit were granted; (2) the provisions of the regulations, promulgated under this Act, which may be violated if the permit were granted; (3) the specific type of information, if any, which 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." (Id.) If the Agency fails to act within the specified time period, the applicant may deem the permit issued. (Id.)

The language of section 39(a) clearly requires that the Agency specifically set forth the applicable sections of the Act and regulations upon which it based its denial. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1039(a); City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990).) The Board's review of the plain language of section 39(a) and the denial statements issued in this matter supports the conclusion that the Agency has failed to comply with the requirements of the Act.

The "section 39(a) denial statement requirements" are consistent with the Act's mandate that the Agency issue a permit upon proof by the applicant that its facility will not cause a violation of the Act or regulations. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1039(a).) The intent of section 39(a) is to require the Agency to issue its decision in a timely manner with information sufficient for the applicant to determine the bases for the Agency's determination. (City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990).) The sole issue before the Board in a permit review is whether the applicant has proven that the application, as submitted to the Agency, demonstrates that no violation of the Act and regulations would occur if the permit were granted. (Joliet Sand & Gravel v. IPCB, 163 Ill. App. 3d 830, 516 N.E.2d 955, 958 (3d Dist. 1987).) "The burden of proof is placed upon the applicant, [in a permit appeal review before the Board], to demonstrate that the reasons for denial detailed by the Agency are inadequate to support a finding that permit issuance will cause a violation of the Act or Board rules." (Technical Services Co., Inc. v. IEPA, PCB 81-105 at 2 (November 5, 1981).)

In order for an applicant to adequately prepare its case in a permit review before the Board the applicant must be given 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 which support 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 on review, i.e., whether the applicant has

demonstrated that no violation of the Act or regulations would occur if the permit were granted.

Principles of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases for permit denial. Fundamental fairness would be violated if the Board were to supply this missing information on its own initiative at the permit-review level. Such action by the Board would be not only inconsistent with the plain language of section 39(a), but would also require that the applicant anticipate what the Board will construe as the statutory and regulatory bases for the Agency's permit denial. The Act's permit provisions do not provide for a system where the applicant is given the statutory and regulatory bases for permit denial after the applicant has argued the merits of that denial.

A review of the separation of functions between the Agency and the Board in the permit process also supports the Board's determination that it is not allowed to proceed to the substantive merits of this permit review absent denial statements that comport with the requirements of section 39(a). (See generally, Landfill, Inc. v. PCB, 74 Ill.2d 541, 387 N.E,2d 258, 264 (1978).) Pursuant to section 4(g) of the Act, the Agency has the duty to administer the permit system. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1004(g).) Section 39 of the Act directs the Agency to issue permits upon an applicant's proof that the proposed facility will comply with the Act and regulations, and authorizes the imposition of special permit conditions necessary to accomplish the purposes of the Act. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1039.) Therefore, it is the Agency with its technical staff capable of performing independent investigations which makes the initial determination of whether to issue a permit. (Mathers v. PCB, 107 Ill. App. 3d 729, 438 N.E.2d 213,218 (3d Dist. 1982).) Pursuant to section 40 of the Act, the Board, sitting in its quasi-judicial capacity, decides whether the applicant has proven that the application, as submitted to the Agency, demonstrated that no violation of the Act would occur if the permit were granted. (Joliet Sand & Gravel v. IPCB, 163 Ill. App. 3d 830, 516 N.E.2d 955, 958 (3d Dist. 1987).) However, the Board does not possess the power to issue permits.

Because the Agency has failed to perform its statutory duty, the Board cannot perform its duty in this permit review. Where the Agency has failed to support its permit denial by setting forth the applicable sections of the Act and regulations, the Board cannot step in at the review level and supply this missing information. The separation of duties does not allow the Board to examine the record in an attempt to glean and deduce the Agency's intent in denying the requested permit. If the Board were to "plug in" a section of the Act or regulations to support an Agency permit denial, the Board would exceed its statutory authority and principles of fundamental fairness would be violated.

Without this information, however, the Board cannot perform its function of determining whether the applicant has met its burden of demonstrating that no violation of the Act or regulations would occur if the permit were granted. Therefore, the Board concludes that the instant matter must be remanded to the Agency with directions to supply the statutory and regulatory bases for those "denial reasons" not so supported. The Board's decision to remand this matter to the Agency to cure the deficiencies in its denial statements is consistent with action taken by the Board recently in City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990).) In City of Metropolis, the City filed a motion for summary judgment prior to hearing based upon the Agency's failure to cite specific sections of the Act and regulations in support of its permit denial statement. (PCB 90-8 at 1.) The City asserted that because the denial letter failed to meet the requirements of section 39(a), the Agency failed to meet its 90-day statutory deadline for taking final action and, therefore, the permit should issue by operation of law. (Id.) The City requested that the Board grant summary judgment, reverse the permit denial and direct the Agency to issue the permit. (Id.) As in the instant matter, the Agency argued that its denial statement sufficiently informed the City of the reasons for denial and, therefore, complied with 39(a).

The Board denied the City's motion for summary judgement. (Id. at 2.) In so doing, the Board rejected the City's claim that the failure to cite the Act and regulations rendered the denial statement null and void for purposes of meeting the 90-day statutory deadline and, consequently, the Board concluded that the permit would not issue by operation of law. (Id.) However, the Board also found that "the language of [s]ection 39(a) is clear that the Agency must specifically set forth the applicable sections of the Act and regulations upon which it based its denial." (Id.) Therefore, the Board ordered the Agency to provide the missing information within 14 days of the date of the Board's order. (Id.)

In City of Metropolis, the Board refused to order the issuance of a permit by operation of law on the basis of the Agency's failure to comply with section 39(a). While the Agency's denial statement did not comply with section 39(a), such failure to comply is not tantamount to a failure to act which would trigger the issuance of a permit by operation of law. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1039(a).) However, the Board did require that the Agency cure the defect in its denial statement by directing the Agency to provide the missing information. The Board's action in City of Metropolis recognizes the principles of fundamental fairness and the requirements of the Act by directing the Agency to comply with section 39(a) enabling the applicant to have before it the requisite 39(a) information prior to hearing.

Although no motion for summary judgement was filed in the instant matter, a similar result is reached here by remanding the

matter to the Agency to cure its section 39(a) deficiencies. By remanding this matter to the Agency within the statutory time period, which has been extended by CESI by the filing of a "Waiver of Decision Deadline", the Board has complied with the provision of section 40(a)(2) of the Act requiring a Board decision within a specified time period. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1040(a)(2).) The Agency is directed to amend its denial statements, consistent with this opinion, within 28 days of the date of this order. Within 35 days of the Agency's action, CESI may either file an amended petition for review or notify the Board and the Agency of its intent to stand on its original petition. CESI should also indicate when filing its petition whether it requests a hearing on the Agency's amended denial statements or additional briefing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 10th day of May, 1990 by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board