

ILLINOIS POLLUTION CONTROL BOARD
January 18, 1991

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

ORDER OF THE BOARD (by J. Anderson):

This matter is before the Board on a "Motion to Strike the Agency's Denial Letter" filed by Earl R. Bradd, as owner of the Bradd Sanitary Landfill ("Bradd"). The motion was dated December 19, 1990, but was not received with the Board until January 3, 1991. On December 31, 1990, the Illinois Environmental Protection Agency ("Agency") filed its Response to Bradd's Motion to Strike.

In his motion, Bradd states that he filed an Affidavit for Certification of Closure with the Agency on June 29, 1990. The Agency notified Bradd of its denial of the Affidavit via a denial letter dated August 21, 1990. Bradd asks that the Board enter an Order striking the Agency's August 21, 1990 denial letter. Bradd also requests the Board to find that Section 39(a) of the Environmental Protection Act ("Act"), as applied in this case, is fundamentally unfair and denies him due process of law, and to direct the Agency to approve his Certificate of Closure.

In support of his motion, Bradd first asserts that the Agency's August 21, 1990 denial letter does not include a statement of specific reasons why the Act and regulations might not be met if the Certificate was approved, as the Agency is required to do under Section 39(a)(4) of the Act. Rather, Bradd argues that the letter simply lists several statutory and regulatory citations that may be violated if the Certificate of Closure was approved. Section 39(a)(4) of the Act provides, in part, as follows:

If the Agency denies any permit under this Section, the Agency shall transmit to the applicant within the time limitations for this Section specific, detailed statements as to the reasons the permit application was denied. Such statements shall include, but not be limited to the following:

* * * *

4. a statement of specific reasons why the Act and the regulations might not be met if the permit were granted.

Next, Bradd argues that Section 39(a) of the Act, as applied in this instance, denied him due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution because: 1) it allowed the State to deny his property interest without requiring the State to make a specific allegation that he violated an applicable statute or rule or specify any specific statute or regulation alleged to have been violated, and 2) the denial letter failed to provide "information sufficient to the applicant to determine the basis for the Agency's determination" or to provide him with sufficient notice to allow him to effectively and fairly assert his interests in this proceeding.

In response, the Agency states that, when the various statutory and regulatory sections in the August 21, 1990 denial letter are examined in conjunction with an April 6, 1989 letter denying Bradd's application to revise its groundwater monitoring program, little if any further specificity could be provided in the August 21, 1990 letter to describe how the deficiencies listed therein would prevent the requested Certificate of Closure from meeting the requirements of the Act and the regulations. The Agency also notes that, with regard to each of the denial points in the August 21, 1990 denial letter, the requested Certificate of Closure contained material that was contrary to the provisions of Bradd's existing permits. The Agency argues that, in effect, the requested Certificate of Closure was a supplemental permit application seeking modification of existing permit requirements with which Bradd had not complied, and that if the Agency had approved the requested Certificate, it would have violated the Act and regulations because it was not convinced that there would be no violations of the Act or regulations if the requested Certificate was granted.

As for Bradd's assertion that Section 39(a) of the Act denied him due process, the Agency argues that such assertion is contrary to the Board's holding that permit denials are not to be used as enforcement tools.

In most cases a denial letter stands alone. However, because the April 6, 1990 denial letter refers to several problems with Bradd's groundwater monitoring program and because the August 21, 1990 denial letter references the April 6, 1990 denial letter, the April 6, 1990 and August 21, 1990 denial letters are inextricably linked in this particular instance and must be examined together.

It appears from our review of the August 21, 1990 denial letter in conjunction with the April 6, 1989 letter, that the Agency, on the whole, has provided an explanation of why the Act and the regulations might not be met if the requested Certificate of Closure were granted. However, the Agency has cited two regulatory subsections, 35 Ill. Adm. Code 807.205 (b) and (c), without providing a reason why these subsections might not be met if the requested Certificate of Closure was granted.

When the Agency fails to support its denial by setting forth the reason(s) why certain sections of the Act or regulations will be violated, the Board cannot step in and supply the missing information. In other words, 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 Certificate of Closure. If the Board were to supply a reason to support the Agency's citation of a statutory or regulatory section, the Board would exceed its statutory authority and the principles of fundamental fairness would be violated.

On the other hand, we recognize that we will not be able to determine whether Bradd has met its burden of demonstrating that no violation of the Act or regulations would occur if the requested Certificate was granted if we do not have this information. Therefore, we conclude that the instant matter must be remanded to the Agency with directions to supply the reasons for its citation of 35 Ill. Adm. Code 807.205(b) and (c). (see Centralia Environmental Services, Inc., V. IEPA, PCB 89-170 (May 10, 1990, and City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990). Accordingly, we hereby deny Bradd's Motion to Strike the Agency's August 21, 1990 denial letter, and direct the Agency to amend its denial statement, consistent with this Order, within 28 days of the date of this Order.


We wish to make two final notes. First, because we remand this matter to the Agency, we will not address Bradd's constitutional claims. Second, the format of the denial letter has required the Board to take considerable time to parse its contents in order to discern whether the Agency, in fact, sufficiently satisfied the requirement of Section 39(a)(4) of the Act. We suggest 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), and 2) link the specific reason(s) why the Act and the

¹35 Ill. Adm. Code 807.205(b) states, "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." 35 Ill. Adm. Code 807.205(c) states, "The Agency may prescribe the form in which all information required under these Regulations shall be submitted."

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. Such an approach would aid in evaluating Agency denial letters and avoid motions of this nature in the future.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certifies that the above Order was adopted on the 18th day of January, 1991, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board