

ILLINOIS POLLUTION CONTROL BOARD
July 25, 1991

EARL R. BRADD, as owner of)
the BRADD SANITARY LANDFILL,)
)
 Petitioner,)
)
 v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
 Respondent.)

PCB 90-173
(Permit Appeal)

ORDER OF THE BOARD (by J. Anderson):

On June 13, 1991, Earl R. Bradd, as owner of the Bradd Sanitary Landfill, filed a motion to reconsider the Board's May 9, 1990 Opinion and Order affirming the Illinois Environmental Protection Agency's ("Agency") August 21, 1990 decision to reject Mr. Bradd's Affidavit of Certification of Closure for the Bradd Sanitary Landfill. The Agency has not filed a response to the motion.

Mr. Bradd requests the Board to vacate its May 9, 1991 Opinion and Order in this matter. Specifically, Mr. Bradd requests the Board to vacate that portion of the Opinion and Order that affirms the Agency's denial reason 1, which relates to Mr. Bradd's groundwater monitoring program, and remand the matter to the Agency:

- 1) with directions to conduct an independent review of Bradd's groundwater monitoring plan on its merits to determine if it meets Agency (sic) closure requirements; and
- 2) to the extent that the Agency believes that the plan does not meet Agency (sic) groundwater monitoring requirements, afford Mr. Bradd the opportunity to submit additional information and upgrade his groundwater monitoring closure plan.¹

The Board grants the motion to reconsider. For the following reasons, we vacate our previous finding on denial reason 1 and remand this matter to the Agency for the purposes

¹In his motion, Mr. Bradd refers to "IEPA" or "Agency" regulations. We wish to note, however, that the regulations at issue are Board regulations.

articulated by Mr. Bradd above.

To review, on October 14, 1988, the Agency issued a supplemental permit to Mr. Bradd's developmental and operating permits in which it approved Bradd's closure and post-closure plan. Condition 15(b) of that permit required Mr. Bradd to submit a revised groundwater monitoring plan, via a supplemental permit application, within 90 days. Although Mr. Bradd submitted his revised groundwater monitoring plan on January 13, 1989, the Agency rejected the plan in an April 6, 1989 letter. That letter stated, "[s]hould you wish to reapply or have any questions regarding this application, please contact [the Agency]". On August 21, 1990, the Agency denied Mr. Bradd's Affidavit for Certifications of Closure and determined that it would not issue a Certificate of Closure, in part, because Mr. Bradd had not satisfied condition 15(b) of his closure and post-closure plan. Specifically, the denial reason 1 of that letter stated as follows:

Condition 15 of Permit No. 1988-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.

We are concerned with the fact that the Agency based its August 21, 1990 denial of Mr. Bradd's Affidavit for Certification of Closure on his alleged failure to submit an adequate groundwater monitoring plan pursuant to condition 15 of his closure and post-closure care plan. Our concern is magnified by the fact that the Agency offered Mr. Bradd an opportunity to submit another supplemental permit application in its April 6, 1989 denial letter, but did not specify a time frame for such action. Because no time frame was specified and because Mr. Bradd was planning to closing his facility prior to July 1, 1990, we cannot say that it was unreasonable for Mr. Bradd to forego submission of another supplemental developmental and operating permit application and instead address the Agency's groundwater concerns in his Affidavit for Certification of Closure.

Moreover, neither Mr. Bradd's failure to submit additional information prior to the submission of his Affidavit for Certification of Closure nor his failure to appeal the April 6, 1989 permit denial should preclude him from addressing the groundwater issue in his Affidavit for Certification of Closure or affect his right to appeal the Agency's denial of his

Affidavit of Certification of Closure. In other words, Mr. Bradd had the right to have the Agency to conduct a substantive review of his Affidavit and not merely back-reference the April 6, 1989 rejection of his prior revised groundwater monitoring program. However, that appears to be exactly what happened in this instance. Specifically, there is no indication that the Agency reviewed the merits of Mr. Bradd's groundwater monitoring submissions in support of Affidavit for Certification of Closure, or otherwise interacted with Mr. Bradd, to determine if Mr. Bradd had an adequate groundwater monitoring plan at the time of closure and whether the site had been closed "in accordance with the specifications of the closure plan". (see 35 Ill. Adm. Code 807.508(b)). As a result, the Agency, in effect, denied Mr. Bradd the opportunity to appeal the merits of the Agency's denial of his Affidavit of Certification of Closure and impermissibly used the permit process as a means of enforcing an alleged permit violation (i.e. not having an adequate groundwater monitoring program). (see Waste Management v. IEPA, PCB 85-85, 61, and 68, 60 PCB 173 (October 1, 1984), aff'd sub nom. IEPA v. IPCB and Waste Management v. PCB, 138 Ill. App. 3d 550, 486 N.E.2d 293 (3rd Dist. 1985), aff'd 115 Ill.2d 65, 503 N.E.2d 343 (1986)).

Finally, we wish to note that the Agency, while advising Mr. Bradd that he could reapply or seek further information, failed to mention, in its April 6, 1989 denial letter, that Mr. Bradd had a right to appeal its decision within 35 days. We suggest that such language would have eliminated any confusion as to whether the Agency's April 6, 1989 determination was a final action. (see Marjorie Campbell v. IEPA, PCB 91-5 (June 6, 1991), Johnson v. State Employees Retirement System, 155 Ill. App. 3d 616, 508 N.E.2d 351 (1st Dist 1987)).

Accordingly, for the foregoing reasons, we vacate our previous finding on denial reason 1 and remand this matter to the Agency to conduct an independent review of Mr. Bradd's groundwater monitoring plan on its merits to determine if it meets the Board's closure requirements. In making this ruling, we emphasize that the Agency should handle this matter as it would an initial permit application and ensure that Mr. Bradd is treated as any other permit applicant in affording him the opportunity to submit additional information.

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 25th day of July, 1991, by a vote of 5-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board