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DEQ Hearings Coordinator
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BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

YOUNG'S SEPTIC SERVICE,)
)
Petitioner,)
)
v.)
)
IDAHO DEPARTMENT OF)
ENVIRONMENTAL QUALITY,)
)
Respondent.)
_____)

Docket No. 0115-03-17

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND PRELIMINARY
ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

I. PROCEDURAL BACKGROUND

This matter is before the Hearing Officer on Motions for Summary Judgment filed by the Idaho Department of Environmental Quality (hereinafter DEQ), and Young's Septic Service (hereinafter Young's). DEQ is represented by Stephanie T. Ebright. Young's is represented by Margaret B. Hinman. Both parties' Motions for Summary Judgment were timely filed in accordance with pre-hearing orders and supported by written argument and supporting affidavits. Oral argument was held by telephone conference call on May 25, 2004. The matter was submitted to the Hearing Officer at the end of oral argument.

II. FINDINGS OF FACT

Young's received annual permits from 1979 through 2000 to apply domestic septage to land. In 2001, Young's submitted an application for a septic tank pumper permit to the Southeastern District Health Department (hereinafter Health District). The Health District has specific review and approval authority for certain aspects of the permit process pursuant to a Memorandum of Understanding with DEQ. DEQ retains authority over approval of the disposal sites.

Young's 2001 application proposed to dispose of domestic septage on an approximately four acre tract of land in Blackfoot, Idaho. DEQ did not reject the application but found it inadequate regarding information as to soil composition on the proposed site, maps illustrating the site locations and surrounding areas, and management information. Young's was informed of this by the Health District in writing. The Health District subsequently informed Young's in writing that the 2001 permit application was disapproved as to the proposed site but Young's would be allowed to continue disposal on the site on a temporary basis until February 28, 2002. By that date it was expected that the City of Blackfoot would have a pre-treatment facility operational and able to accommodate septage from Young's operation.

DEQ's disapproval of the 2001 application cited set-back criteria found in DEQ guidance. DEQ suggested lime stabilization as a means of reducing the set-back criteria. Young's rejected lime stabilization and stated grounds for this rejection.

By February 28, 2002, Young's ceased use of the site named in its application and began delivering loads of septage to the City of Blackfoot's waste water treatment facility or to the Idaho Falls waste water treatment facility.

On May 3, 2003, Young's submitted additional information to supplement its original 2001 permit application and requested that the application be reconsidered. Young's requested variance from the DEQ's guidance regarding set-back distances between the proposed site operations and an adjacent county road. DEQ responded that the additional materials were insufficient and that additional information was required before the site could be approved. DEQ required Young's to demonstrate as to how variances from the set-back requirements would be protective of ground and surface waters and public health.

On October 7, 2003 Young's responded that DEQ's suggested methods were cost prohibitive and unnecessary. On November 19, 2003 DEQ notified Young's in writing that it had completed its review of Young's application, as supplemented, and indicated that a variance from the set-back requirements could only be granted upon an adequate demonstration that such a variance would not endanger human health or the environment.

In response to the November 19, 2003 letter, Young's filed its Petition for Review and included a letter dated December 5, 2003 seeking reconsideration of its application as well as reducing from 606,000 to 450,000 gallons the proposed number of gallons for disposal on site.

III. CONCLUSIONS OF LAW

Applicability of IC 39-107D

IDAPA 58.01.23.213.02 provides that motions for summary judgment IN DEQ proceedings are governed by the Idaho Rules of Civil Procedure. Rule 56, IRCP states summary judgment may be granted if the pleadings, depositions and admission on file, together with affidavits, establish that there is no genuine issue of material fact and the

moving party is entitled to a judgment as a matter of law. Both parties contend in their motions for summary judgment that there are no genuine issues of material fact.

DEQ's Memorandum in Support of Motion for Summary Judgment concedes that since 1993 the 1987 Clean Water Act Amendment regulate the disposal of domestic septage and that implementing regulations (known as "503 rules") apply to land application of domestic sewage as proposed in Young's permit application. Young's does not dispute DEQ's view that the federal rules and federal guidance expressly state that the federal program is meant to operate alongside state programs.

Young's contends that the passage of Idaho Code Section 39-107D has the effect of limiting DEQ to application of the federal standards only. Idaho Code Section 39-107D which became effective July 1, 2002, provides in part that:

Any rule promulgated or adopted by the board which is broader in scope or more stringent than federal law or regulations, or which regulates an activity not regulated by the federal government, submitted to the standing committee of the legislature pursuant to section 67-5291, Idaho Code shall include a notice by the board identifying the portions of the adopted rule that are broader in scope or more stringent than federal law or rules or which regulate an activity not regulated by the federal government.

Young's further contends that the application by the DEQ of IDAPA 58.01.15.003.02(d), which utilized guidance developed in 1993, provides more stringent requirements than those found in the federal 503 rules.

The effect of Young's argument is to require that every time the federal government promulgates a less stringent requirement than that currently found in the state regulatory scheme, the DEQ must submit the rule to the standing committee of the legislature pursuant to Idaho Code Section 67-5291 with a notice to the board identifying the portions of the rule which are more stringent than the federal requirement.

DEQ argues that there is no explicit requirement in IC 39-107D that it be applied retroactively and that IC 73-101 requires that statutes will not apply retroactively unless expressly declared by the legislature. There is no such express declaration IC 39-107D. Indeed, subsection 1 of that statute refers to “the proposed rule” clearly envisioning a situation where DEQ proposes a new rule which is more stringent than an existing federal rule instead of the situation Young’s found itself in where DEQ was acting under a rule long ago established in 1960, as implemented with guidance developed in 1993 which is alleged to be more stringent than the federal rule 503 requirements.

Young’s has failed to provide any authority for its position that IC 39-107D requires DEQ to essentially re-promulgate every rule in existence prior to July 1, 2002, the effective date of IC 39-107D.

Young’s petition must rise or fall on its argument regarding IC 39-107D, since the only relief requested in the petition is that “this matter be remanded to the DEQ for consideration of Petitioner’s application on the basis of compliance with federal law only.”

The Hearing Officer concludes that IC 39-107D does not prohibit DEQ from applying IDAPA 58.01.15.003.02(d) and that DEQ is not limited to applying only the federal 503 rules to Petitioner’s application.

The Effect of DEQ Guidance

As an adjunct to its argument that DEQ may only apply the federal 503 rules, Young’s alleges in its petition that DEQ denied the application on the basis of state guidance, which it claims is unenforceable. Young’s restates this argument in its Motion

for Summary Judgment by arguing that DEQ's guidance does not equal regulations and that DEQ's reliance on the guidance constitutes legal error.

Young's argument correctly notes that the regulation in question, IDAPA 58.01.15.003.02(d), provides the following:

03. Disposal Methods. Disposal of excrement from septic tanks shall be by the following methods only:

- d. Drying in a location and by a method approved by the Department of Environmental Quality.

However, Young's reliance on Idaho Code 67-5250(2) is misplaced. That section specifically recognizes the use of "agency guidance." That section provides that the mere indexing of a guidance document "does not give that document the force and effect of law or other precedential authority." Thus, guidance which is inconsistent with the statute or rule does not have the force of law.

DEQ effectively argues that rather than applying guidance or a rule of law where no deviation can occur, DEQ applied the guidance as setting forth factors to be considered which provided the applicant some flexibility in obtaining the permit. For example, DEQ applied guidance by suggesting that the minimum set-back requirements could be deviated from if lime was used in the application process.

Thus, the Hearing Officer finds that DEQ has not applied guidance in a manner which constitutes legal error.

Arbitrary and Capricious Denial

Young's petition sets forth several allegations that DEQ's denial was arbitrary and capricious. Young's claims that DEQ abused its discretion in denying the application

alleging that no threat to health or the environment had been detected from Young's past operations. Further, Young's argues that DEQ was over-reacting to complaints made by a neighbor regarding Young's operations. Finally, Young's argues that the permit application denial has the effect of denying Young's its property rights.

Young's offers no expert opinion and only very limited facts in support of its arguments that DEQ's denial of the permit is arbitrary and capricious. Even the sole affidavit submitted by petitioner, that of Randy Young, apparently one of the principals in Young's Septic Service, fails to provide any support for the claim that the permit denial rendered Young's land useless for any other business purpose.

Young's has provided no authority for its claim that a mere allegation of improper motive by DEQ in denying the application can raise an issue of material fact requiring a hearing on DEQ's denial, which is supported by correspondence between DEQ and Young's consistently setting forth the basis for the denial as a legitimate concern for public health and the environment grounded in the application of DEQ rules.

Young's makes no effort to raise a material issue of fact in response to DEQ's affidavits which establish that the proposed application of 450,000 gallons to the approximately four acre site is well in excess of EPA guidance of 77,000 gallons and state guidance of between 69,230 and 96,153 gallons. Young's focuses solely on an unsubstantiated allegation of significant cost for additional soil tests and made no effort to refute DEQ's position of the inadequacy of Young's soil tests.


The Hearing Office concludes that DEQ's denial of the permit application was not arbitrary and capricious.

IV. PRELIMINARY ORDER

Based upon the Findings of Fact and Conclusions of Law set out above, DEQ's Motion for Summary Judgment is granted. Young's Motion for Summary Judgment is denied.

Pursuant to Idaho Code § 67-5245 and 58.01.23.730, this is a preliminary order which will become a final order without further notice unless a petition for review by Board of Environmental Quality is filed with the Hearing Coordinator within fourteen (14) days after the service date of this preliminary order. Pursuant to Idaho Code § 67-5245(4), the basis to review must be stated in the petition.

Dated this 3rd day of June, 2004.


Frederick F. Belzer
Hearing Officer