

ILLINOIS POLLUTION CONTROL BOARD
November 26, 1990

GALLATIN NATIONAL COMPANY,)
)
 Petitioner,)
)
v.)
)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
)
 Respondent.)

PCB 90-183
(Variance)

ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on an "Appeal of Hearing Officer's Order Dated November 12, 1990 and Motion for Expedited Review" filed November 19, 1990 by the Illinois Environmental Protection Agency (Agency). On November 29, 1990, Gallatin National Company (Gallatin) filed its response to the Agency's appeal of the hearing officer's ruling. This matter is set for expedited hearing on November 29, 1990.

Before addressing the merits of the appeal of the hearing officer's ruling, some discussion of the background of this case is necessary. On October 9, 1990, Gallatin filed a petition requesting a "variance from the regulations contained in 35 Ill. Adm. Code 812 until October, 1991." By its petition for variance, Gallatin is seeking relief from the application of the Board's newly enacted landfill regulations set forth in Part 812 of the regulations to Gallatin's pending application before the Agency for a development permit for a balefill in Fairview, Illinois. Gallatin argues that because its permit application was pending before the Agency prior to the September 19, 1990 effective date of the new regulations, the Agency should not apply those new regulations to Gallatin's permit application, but should rather apply the "old regulations" in effect at the time the application was filed. However, Gallatin also asserts that it is in "substantial compliance" with most of the new regulations, but argues that compliance with "some of the new regulations will impose an arbitrary or unreasonable hardship." While Gallatin cites four examples of new regulations imposing such a hardship, it does not delineate exactly from which regulations it seeks a variance. Rather, Gallatin requests a variance from Part 812 until October of 1991, when, it asserts, it will be in full compliance and before it will be receiving any waste.

The Agency's recommendation objects to the requested variance on the basis that the requested relief is inappropriate because Gallatin is, in actuality, requesting permanent relief and, therefore asks that the petition be dismissed. Alternatively, the Agency asserts that the variance should be denied because Gallatin has failed to meet its burden of proof under Section 35(a) of the

Act. The Agency also asserts that "retroactive" application of the new regulations is appropriate.

On November 13, 1990, Gallatin filed a motion for expedited discovery and accompanying interrogatories. These 30 interrogatories basically ask the Agency whether Gallatin's permit application satisfies various sections of Part 812 and, if it does not, to explain why the application does not meet the requirements of the section. On November 13, 1990, the hearing officer entered an order granting Gallatin's motion for expedited discovery, ordering the Agency to answer the interrogatories no later than November 26, 1990. This order noted that the hearing officer attempted to telephone the Agency to see if it objected to the motion, but received no response from the Agency.

In its appeal of the hearing officer's ruling, the Agency argues that it was denied a chance to respond the motion for expedited discovery because the hearing officer granted the motion the same day the Agency was served with the motion. The Agency correctly states that it was not served with the motion until November 13, 1990 and that the faxed copy it received on November 9, 1990 did not constitute proper service. The Agency also notes that on November 13, 1990, the Agency attorney attempted to return the hearing officer's telephone call but was unable to reach the hearing officer.

In its November 26, 1990 response to the Agency's appeal of the hearing officer's ruling, Gallatin argues that the Agency's appeal is improper because it does not comply with 35 Ill. Adm. Code 101.247(b) governing interlocutory appeals of hearing officer's rulings on motions. While the Board does not countenance the Agency's failure to file with the Board a motion for interlocutory appeal, the Board will rule upon the Agency's motion appealing the hearing officer's ruling because of the importance of the issue involved to the resolution of this matter and because of the expedited schedule of the instant proceeding. Gallatin also argues that the arguments raised in the Agency's motion are without merit and should be disregarded.

The Board finds that, under the instant facts, the hearing officer's conduct of ruling on Gallatin's motion on the same day the motion was served on the Agency is harmless error. The hearing officer needed to act on Gallatin's motion within a relatively short time period given that the expedited hearing is scheduled for November 29, 1990. While the hearing officer's ruling makes no reference to the need to avoid undue delay or material prejudice, the Board finds that given that the hearing in this matter is set for November 29, 1990, the hearing officer's conduct in granting the motion prior to the response period having expired is not inappropriate.

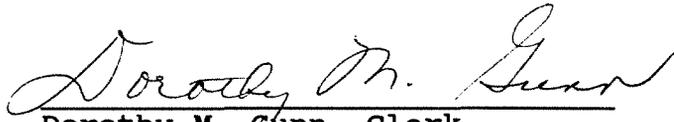
In addition to the procedural issues raised by the Agency, the

Agency also objects to the substance of the posed interrogatories as being unnecessary and burdensome. The Board recognizes that the scope of discovery is broad. (Wilson v. Norfolk and Western Ry. Co., 440 N.E.2d 238, 244 (5th Dist. 1982).) However, the rules of discovery do not require that the interrogated party furnish information that does not presently exist for the benefit of an adverse party. (Mendelson v. Feingold, 387 N.E.2d 363, 366 (2d Dist. 1979).) Discovery is directed only to disclosure of that which does exist, for example, knowledge possessed by persons. (Id.) One of the primary purposes of discovery is to promote the fact-finding process. (People v. Rayford, 356 N.E.2d 1274, 1277 (5th Dist. 1976); Quagliano v. Quagliano, 236 n.E.2d 748 751 (3d Dist. 1968.) Interrogatories calling for conclusions are improper. (Fedors v. O'Brien, 188 N.E.2d 739, 742 (1st Dist. 1963).)

In the instant case, the interrogatories are directed toward the Agency's permit decision which has not yet been rendered. The interrogatories would require the Agency to disclose its determination of whether it deems Gallatin's permit application to demonstrate compliance with the new regulations. Such matters constitute conclusions and do not serve the fact-finding purpose of discovery. Requiring the Agency to answer the posed interrogatories would be tantamount to directing the Agency to render its permit decision prematurely and in a proceeding collateral to the permit proceeding. Therefore, the Board finds the interrogatories to be improper and grants the Agency's motion appealing the hearing officer's ruling. The hearing officer's order granting Gallatin's motion for expedited discovery is reversed.

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 26th day of November, 1990 by a vote of 4-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board