

ILLINOIS POLLUTION CONTROL BOARD
August 7, 1997

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| LAND AND LAKES COMPANY, |) | |
| |) | |
| Petitioner, |) | |
| |) | PCB 97-209 |
| v. |) | (Variance - Land) |
| |) | |
| ILLINOIS ENVIRONMENTAL |) | |
| PROTECTION AGENCY, |) | |
| |) | |
| Respondent. |) | |

OPINION AND ORDER OF THE BOARD (by K.M. Hennessey):

Land and Lakes Company (petitioner) has petitioned the Board for a determination that 35 Ill. Adm. Code 814.301 is not applicable to petitioner's River Bend Prairie solid waste facility (facility) or, in the alternative, for a variance from 35 Ill. Adm. Code 814.301. The Board finds that because Section 814.301 does not currently apply to petitioner, no variance is necessary. The Board therefore denies the petition for variance.

BACKGROUND

The facility is a non-hazardous waste disposal facility in Dolton, Illinois that is permitted to accept solid waste and special waste. "Petition for Variance" (Pet.) at 5. The Illinois Environmental Protection Agency (Agency) issued the facility a development permit in 1975 and an operating permit in 1977. Pet. at 4, 5. The Agency also issued petitioner an interim Subtitle D permit in 1993. Pet. at 7.

Although the parties do not identify the regulations under which petitioner received permits in 1975 and 1977, the Board assumes that those permits were issued under Part 807 of the Board's rules, which governed solid waste management sites at the time. 35 Ill. Adm. Code 807.201, 807.202. In 1990, the Board updated and replaced the Part 807 regulations with Parts 810 through 815. See Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills (August 17, 1990), R88-7, slip op. at 2.

Under the new regulations, one of the Board's goals was "to bring the State's landfills under the regulations for new landfills as quickly as possible." Non-Hazardous Waste Landfills (August 17, 1990), R88-7, slip op. at 23. Part 814 sets forth the procedures for the upgrade or closure of landfills existing at the time R88-7 was adopted.

First, within six months of the effective date of the new landfill rules (September 18, 1990), Section 814.103 required all existing landfill facilities to notify the Agency of the facility's estimated closure date. In that notification, facilities also were required to state

whether the facility was subject to the requirements of Subparts B, C, D, or E of Part 814, which in turn depended on the type of waste that the landfill received and its expected closure date. Subpart B applies to units accepting inert waste; Subparts C and D apply to units accepting chemical and putrescible wastes and closing, respectively, after or within seven years of the effective date of the regulations; and Subpart E applies to units accepting only inert waste, or to units accepting chemical and putrescible wastes that will initiate closure within two years of the effective date of the regulations. 35 Ill. Adm. Code 814.

Petitioner states that it timely filed its notification under 814.103. Pet. at 4. The Agency states, and petitioner does not contest, that the notification stated that the facility was subject to Subpart C of Part 814, the standards that apply to units accepting chemical or putrescible wastes that may remain open for more than seven years after the effective date of the regulations. "Illinois Environmental Protection Agency Recommendation and Response to Petition for Variance" (Ag. Rec.) at 5. The Subpart C regulations are the most stringent regulations contained in Part 814. Ag. Rec. at 4-5.

Second, the new regulations required owners or operators of permitted landfills to submit an application for significant modification to their permits for existing units. 35 Ill. Adm. Code 814.104(a). That application must demonstrate compliance with the subpart that applies to the landfill unit – in petitioner's case, Subpart C. 35 Ill. Adm. Code 814.104(b).

At the same time that petitioner was required to submit a significant modification application, petitioner decided that it wished to expand its facility. Pet. at 6. Petitioner therefore sought and obtained a variance from the Board that allowed petitioner to submit a combined application for a permit for a significant modification and a permit for expansion of the facility. Pet. at 1; Land and Lakes Company v. IEPA (September 5, 1996), PCB 96-198.

Petitioner filed a single permit application for both permits on September 19, 1996. Pet. at 1-2. On April 22, 1997, the Agency issued a draft list of deficiencies found during its technical review of the application. Shortly thereafter, the Agency and petitioner agreed to extend the decision deadline on the application to July 21, 1997, so petitioner could address those deficiencies. Pet. at 2. The record does not reflect whether the petitioner has addressed those deficiencies or whether the Agency has taken any action on the application.

On April 24, 1997, the Agency sent a letter to petitioner stating that if the facility had not received a significant modification permit by September 18, 1997, Section 814.301 required that the facility stop accepting waste. Pet. at 2; Exhibit B to Pet. The Agency stated in part:

Our files indicate that your facility has not yet received its first significant modification of permit.

35 Ill. Admin. Code Section 814.301 requires closure pursuant to 35 Ill. Admin. Code Part 814 Subpart D . . . for those non-hazardous waste landfills that cannot demonstrate, through a significant modification permit application and Illinois EPA inspection, compliance with the more stringent requirements of

35 Ill. Admin. Code Part 814 Subpart C Further, Subpart D requires Subpart D landfills to stop accepting waste by September 18, 1997. Therefore, if your landfill facility has not received its first significant modification of permit before September 18, 1997, you must stop accepting waste and comply with applicable regulations. Exhibit B to Pet.

On May 22, 1997, petitioner filed this petition with the Board. In the petition, petitioner seeks a determination that 35 Ill. Adm. Code 814.301 is not applicable to the facility. In the alternative, petitioner seeks a variance from 35 Ill. Adm. Code 814.301 for one year, or until the Agency issues a decision on petitioner's significant modification application and the Board rules on any appeal from that decision, whichever is earlier. Petitioner has not requested a hearing on the petition.

The Agency filed the Ag. Rec. on June 24, 1997. In that document, the Agency states that it has investigated and inspected the facility, and also has sought public comment on the requested variance. Ag. Rec. at 2-3. No one has responded to the Agency's request for public comment. Ag. Rec. at 3.

Based on its investigations, the Agency states that 35 Ill. Adm. Code 814.301 applies to the facility. Ag. Rec. at 5. The Agency recommends, however, that the Board grant petitioner the variance that petitioner requests. Ag. Rec. at 7.

DISCUSSION

The Board finds that 35 Ill. Adm. Code 814.301 does not currently apply to petitioner. No variance is necessary, therefore, and the Board denies the petition for variance.

The Illinois Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (1996)) directs the Board to "grant individual variances beyond the limitations prescribed in this Act, whenever it is found upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." 415 ILCS 5/35(a) (1996). As petitioner notes, it is sometimes necessary for the Board to determine how a regulation applies before considering whether to grant a variance. Pet. at 3; Pekin Energy Corp. v. IEPA (April 17, 1997), PCB 97-145, slip op. at 2. If a requirement has no effect on a variance petitioner, obviously no variance is necessary. Accordingly, the Board first must determine whether 35 Ill. Adm. Code 814.301 applies to petitioner.

Section 814.301 provides as follows:

- a) The standards in this Subpart [C] are applicable to all existing units of landfills, including those exempt from permit requirements in accordance with Section 21(d) of the Act, that have accepted or accept chemical and putrescible wastes. Based on an evaluation of the information submitted pursuant to Subpart A and any Agency site inspection, units that meet

the requirements of this Subpart [C] may remain open for an indefinite period of time beyond seven years after the effective date of this Part.

- b) Based on an evaluation of the information submitted pursuant to Subpart A and any Agency site inspection, units which are unable to comply with the requirements of this Subpart [C] are subject to the requirements of Subpart D or Subpart E. 35 Ill. Adm. Code 814.301.

The effective date of these regulations was September 18, 1990. Therefore, under Section 814.301, by September 18, 1997, landfill units must either comply with Subpart C or become subject to the requirements of Subpart D or Subpart E. Landfill units subject to Subpart D and E must initiate closure (and cease accepting waste) by September 18, 1997, at the latest. 35 Ill. Adm. Code 814.401(a), 814.501(a).

Petitioner argues that Section 814.301 is inapplicable for two reasons, both of which present issues that the Board has not previously considered. First, petitioner argues that because the Agency has not completed its evaluation of the significant modification application, it has not yet been determined that the facility is unable to comply with Subpart C and is therefore subject to Subparts D or E. Accordingly, petitioner argues that it is premature to determine that Section 814.301 applies to the facility. Pet. at 3-4.

The Agency argues that the application demonstrates that petitioner intends to operate and accept waste beyond September 18, 1997, and therefore is subject to the standards of Subpart C. Ag. Rec. at 5. It does not directly respond to petitioner's argument that it is premature to determine that Section 814.301 applies to the facility.

The Board agrees with petitioner that it is premature for the Agency to determine that the facility does not comply with Subpart C and is therefore subject to Subparts D or E. Until the Agency completes its evaluation of petitioner's significant modification application, it is not clear under which subpart the facility will be regulated. Therefore, the Agency has no basis for ordering petitioner to cease accepting waste at the facility and that order is therefore void. As a result, Section 814.301 does not currently apply to petitioner and no variance is necessary.

Furthermore, petitioner argues that even if the Agency's order was not premature, Section 814.105(b) provides an exception to the closure requirements of Section 814.301 if the owner has filed a timely application for significant modification. That subsection provides:

An owner or operator who has timely filed a notification pursuant to Section 814.103 and an application for significant permit modification pursuant to Section 814.104 shall continue operation under the terms of its existing permits until final determination by the Agency on its application and any subsequent appeal to the Board pursuant to Section 40 of the Act. During this time, the owner or operator will be deemed to be in compliance with all requirements of this Part. 35 Ill. Adm. Code 814.105(b).

Petitioner argues that because it has timely filed a notification under Section 814.103, as well as an application for significant modification, it is entitled to continue operating under its existing permits until the Agency has made a decision on the application and the Board has ruled on any appeal from that decision. Pet. at 4.

In response, the Agency does not specifically address Section 814.105(b). The Agency argues, however, that while it "could render a decision on the application at this time," it is awaiting further information from petitioner. Ag. Rec. at 6. The Agency does not argue, however, that the exception in Section 814.105(b) does not apply.

The Board finds that Section 814.105(b) applies and temporarily relieves petitioner of any obligation to comply with Section 814.301. The Agency agrees that petitioner timely filed both the application and notification, as required by 814.105(b). Ag. Rec. at 3. Although the Agency states that petitioner chose to receive a draft list of deficiencies rather than a denial of its permit application, the fact remains that the Agency has not yet made a final determination on the application. Section 814.105(b) allows petitioner to continue operating under its existing permits until the Agency has made a decision on the application and the Board has ruled on any appeal from that decision.

For this reason as well, Section 814.301 does not apply to petitioner at this time and a variance is not necessary. 415 ILCS 5/35(a) (1996). The Board therefore denies the petition for variance.

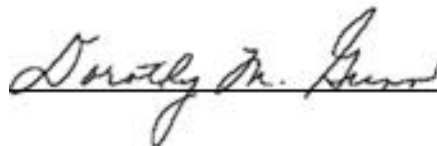
ORDER

1. The Board denies the petition for variance and dismisses this case.
2. The docket is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 7th day of August 1997, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board