

ILLINOIS POLLUTION CONTROL BOARD
July 27, 1989

THE NUTRASWEET COMPANY AND)
CONSUMERS ILLINOIS WATER)
COMPANY,)
)
Petitioners,)
)
v.) PCB 88-84
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

SUPPLEMENTAL OPINION AND ORDER OF THE BOARD (by J. Marlin):

On June 20, 1989 NutraSweet Company (NutraSweet) and Consumers Illinois Water Company (CIWC) filed a motion requesting that the Board either clarify or modify its Order of December 15, 1988. On July 25, 1989, the Illinois Environmental Protection Agency (Agency) filed a Response to that motion.

In that Order, the Board granted CIWC a variance from Section 304.105, Violation of Water Quality Standards, as it applies to the total dissolved (TDS) water quality standard prescribed by Section 302.208. The variance expires on December 29, 1993. NutraSweet discharges to CIWC which is a privately owned treatment works. CIWC in turn discharges to waters of the State.

In the variance request, disposed of by the December 15, 1988 Order, NutraSweet requested variance from Section 304.105 as it applies to the TDS standard, if the Board found that Section 304.105 applies to NutraSweet. However, neither NutraSweet nor the Agency took a position as to whether Section 304.105 would apply to NutraSweet's discharge to CIWC. The Board found that Section 304.105 did not apply to NutraSweet since it discharged to a sewer tributary to a treatment works. The Board's rationale was as follows:

The petitioners and the Agency all take no position as to whether Section 304.105 is applicable to NutraSweet's discharges to the CIWC sewer system.

Section 304.105 provides in part:

In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources cause a violation of any applicable water quality standard. (emphasis added)

The term "effluent" is defined by Section 301.275 as:

Any wastewater discharged, directly or indirectly, to the waters of the State or to any storm sewer, and the runoff from land used for the disposition of wastewater of sludges, but does not otherwise include nonpoint source discharges such as runoff from land or any livestock management facility or livestock wastehandling facility subject to regulation under Subtitle E. (emphasis added)

Although NutraSweet discharges to a sewer tributary to CIWC which in turn discharges to waters of the State, the Board does not believe that NutraSweet's discharge to CIWC would fall under the prohibition of Section 304.105.

Section 304.105 utilizes the term "source". That term, though, is not defined under the Board's water regulations. Yet, the definition of "effluent" includes any wastewater discharged, directly or indirectly, to waters of the State". The term "wastewater source" is defined by Section 301.430. That Section defines the term as:

Any equipment, facility, or other source of any type whatsoever which discharges wastewater, directly or indirectly (except through a sewer tributary to a treatment works), to the waters of the State. (emphasis added).

Reading the above regulatory language together, the Board finds that NutraSweet would not be subject to Section 304.105 since it discharges to a sewer tributary to the treatment works of CIWC.

NutraSweet, PCB 88-84, slip op. at 9 (December 15, 1988).

In the instant motion NutraSweet and CIWC claim that amendments adopted by the Board in In re: Miscellaneous Amendments to 35 Ill. Adm. Code, Subtitle C: Water Pollution, R88-1, (April 6, 1989), cast doubt on the Board's decision that Section 304.105 does not apply to NutraSweet. Specifically, the amendments adopted under R88-1 (which became effective April 18, 1989) altered the definition of Section 301.430, Wastewater Source, to delete the words "except through a sewer tributary to a treatment works". That is, with this change, a plain reading

of Section 301.430 suggests that sources which discharge to sewers are "wastewater sources". Incorporating this modified definition of "wastewater source" into the Board's rationale set forth in its December 15, 1988 decision could support a conclusion that Section 304.105 applies to sources which do not discharge directly to waters of the State but rather discharge to wastewater treatment works.

In R88-1, the Board stated that it was altering Section 301.430 "to provide consistency between Section 301.430 and the regulations of Parts 307 and 310". Parts 307 and 310 set forth pretreatment requirements. The pretreatment requirements only apply to sources which discharge to publicly owned treatment works (POTW). Therefore, sources which discharge to privately owned treatment works, such as NutraSweet, are not subject to the pretreatment requirements.

NutraSweet and CIWC contend that the pretreatment rationale shows that the Board's amendment to Section 301.430 was never intended to have the effect of subjecting NutraSweet to Section 304.105. If the Board agrees with that position, NutraSweet and CIWC request that the Board not alter the variance previously granted.

However, if the Board finds that Section 304.105 is now applicable to NutraSweet, then the petitioners request that NutraSweet be granted a variance from Section 304.105.

The petitioners file their motion pursuant to Section 103.241(b) and (c) and assert that the "newly discovered evidence", which is the basis for the motion, is the recent amendment to Section 301.430.

In its Response, the Agency states that it "takes no position on the issue raised" by the petitioners' motion.

The R88-1 docket was opened by the Board in order to provide "a vehicle for making minor amendments to the Board's rules and regulations". In re: Miscellaneous Amendments to 35 Ill. Adm. Code, Subtitle C: Water Pollution, R88-1, slip op. at 1 (April 6, 1989). After considering the petitioners' arguments, it appears that the amendment to Section 301.430 has had a greater substantive impact upon the regulatory scheme than previously anticipated.

The language of the relevant regulatory passages is clear and unambiguous. A plain reading of those Sections, after the amendments of R88-1, indicate that NutraSweet is subject to Section 304.105. As a result, the Board will consider whether NutraSweet is entitled to a variance from Section 304.105 as it relates to the TDS water quality standard of Section 302.208.

In its Opinion of December 15, 1988, the Board noted that the Agency stated that it was "not...likely that a significant

environmental impact [would] result" from granting a variance. The Board discussed the hardship which would be suffered by the petitioners if the variance request were denied:

NutraSweet is considering significant process changes to its University Park plant. These changes, if made, would involve large capital investment (Am. Pet., p. 9) and will likely change the TDS concentration of NutraSweet's discharge. The Agency points out in its Recommendation:

[I]f the contemplated process changes are made, NutraSweet will no longer routinely produce various listed hazardous wastes. Other RCRA process wastes would be burned as fuel in a boiler which the Company would install on site to produce steam for process heating. These developments would eliminate the need for the hauling of most hazardous wastes from the facility. The Agency agrees that the reduction or elimination of transportation incidents involving hazardous materials is beneficial and desirable.

(Ag. Rec., p. 12).

Reducing the production and transportation of hazardous waste are commendable goals for any industry, and NutraSweet should be encouraged to pursue process changes which would effectuate such goals.

During the term of the previous variance NutraSweet has expended large sums in modifying its processes to improve the quality of its discharge. The Board notes that NutraSweet's wastewater has improved to the extent that CIWC no longer needs a variance from Section 304.105 as it applies to chloride and sulfate. The remaining compliance problem now centers around TDS.

Given the cost to achieve compliance through control techniques and the distinct possibility of a major process change which would alter NutraSweet's discharge, the Board finds it reasonable to give NutraSweet additional time to seek site-specific relief. The additional time will allow

NutraSweet to investigate further options for compliance which may involve treatment in addition to a degree of regulatory relief.

Given the unique circumstances of this particular case, the Board finds that the petitioners would suffer an arbitrary or unreasonable hardship if a variance were denied.

Id. at 9-10.

Consequently, in its December 15th Opinion the Board found that NutraSweet, as well as CIWC, would suffer an arbitrary or unreasonable hardship if a variance were denied. However, the Board did not grant NutraSweet a variance from Section 304.105, because it found that that Section was not applicable to NutraSweet. Since the Board today has held that Section 304.105 applies to NutraSweet, it will grant NutraSweet a variance. NutraSweet's variance will expire on the same date as CIWC's variance. However, the variance period for NutraSweet will begin on April 18, 1989, the effective date of the R88-1 amendments.

Today's Order simply amends the Order of December 15, 1988. NutraSweet's variance is subject to the terms and conditions of the variance as set forth in the December 15th Order.

This Supplemental Opinion and the Opinion of December 15, 1988 constitute the Board's findings of fact and conclusions of law in this matter.

ORDER

The Board hereby amends its Order dated December 15, 1988 to add the following provisions:

The NutraSweet Company (NutraSweet) is hereby granted variance from 35 Ill. Adm. Code 304.105 as it applies to the standard for total dissolved solids imposed by 35 Ill. Adm. Code 302.208 for NutraSweet's discharge to Consumers Illinois Water Company's (CIWC) sewer system. This variance shall begin on April 18, 1989 and expire on December 29, 1993 or when NutraSweet achieves compliance, whichever occurs first. The variance is subject to conditions imposed by the Board's Order of December 15, 1988 and by this Order, dated July 27, 1989.

Within 45 days after the date of this Order, dated July 27, 1989, NutraSweet and CIWC shall execute and send to the Agency a Certificate of Acceptance by which it agrees to be bound by the terms and

conditions of the variance as set forth in the Board's Orders of December 15, 1988 and as amended by this Order, dated July 27, 1989. The executed Certificate shall be sent to:

Illinois Environmental Protection Agency
Attention: Jose Gonzalez
Enforcement Programs
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

The 45-day period shall be held in abeyance for any period during which this matter is appealed. Failure to execute and forward the Certificate within 45 days renders this Variance void and of no force and effect. The form of the certification shall be as follows:

CERTIFICATION

I, (We) _____, having read the Orders of the Illinois Pollution Control Board in PCB 88-84, dated December 15, 1988 and July 27, 1989, understand and accept the Orders, realizing that such acceptance renders all terms and conditions thereto binding and enforceable.

The NutraSweet Company

Consumers Illinois Water Company

Authorized Agent

Authorized Agent

Title

Title

Date

Date

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111 1/2 par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED,

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion and Order was adopted on the 27th day of July, 1989, by a vote of 6-0.

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