

ILLINOIS POLLUTION CONTROL BOARD
December 4, 1990

JOSEPH P. COMER and MICHELLE)
S. COMER d/b/a/ FLAMINGO LAKE,)
)
Complainant,)
)
v.) PCB 90-145
) (Enforcement)
)
GALLATIN NATIONAL CO.,)
)
Respondent.)

ORDER OF THE BOARD (by J. D. Dumelle):

This matter is before the Board on a Motion to Dismiss and a Motion for Continuance filed by Gallatin National Co., ("Gallatin") on November 20, 1990. (The Board notes that the Hearing Officer has addressed the motion for continuance). Complainant, Joseph P. Comer and Michelle S. Comer d/b/a Flamingo Lake ("Comers") responded on November 29, 1990 to the motions filed by Gallatin and filed a Motion to Recuse the Hearing Officer.

The Board will first address the Motion to Dismiss. Gallatin moves for dismissal "because Gallatin has agreed with the Illinois Environmental Protection Agency ("Agency") to implement a sound control program at the balefill site that more than exceeds the relief sought by Complainants." (Motion p. 1). In support of this motion, Gallatin states that it currently has a development permit application pending with the Agency and the agreement worked out with the Agency was developed as a result of this process. Gallatin asserts that "the permit condition that the Agency has indicated it will impose will require Gallatin to modify its equipment, construct earthen berms and take control measures to strictly limit the impact of sound on the Comers." (Motion p. 4-5). Gallatin also states that "the Agency has acknowledged that if Gallatin complies with all the terms of the condition, Gallatin will be in compliance with the law." (Motion p. 5). Gallatin maintains that this agreement will give the Comers the relief that they sought in their filing of September 18, 1990.

In further support of its motion, Gallatin filed Exhibit B, which is a letter from Gregory T. Zak of the Agency to Linda Burke and Andrew Haubert. Gallatin offered this Exhibit in support of the agreement it asserts has been reached with the Agency. The letter sets forth areas of continued disagreement, specifically the classification of the Comers' property, as well

as specific controls to be used for the abatement of noise. Gallatin also attached a letter which indicates that it will accept the conditions set forth in Exhibit B.

The Comers response to the Motion to Dismiss points out that the relief sought by the Comers was two-fold. First, the Comers asked the Board to grant relief in the form of requiring Gallatin to modify equipment and second, to move equipment farther away from the Comers' property. Thus, the Comers maintain that the modification of equipment would constitute only partial relief. The Comers also maintain that the claim that Gallatin makes concerning compliance with the law is not relevant to this case because: "Gallatin can't state that they will be in compliance with the sections pertaining to noise and to this complaint, section 1023 and 1024 (sic.). (Response p. 1). The Comers also point to the Board's October 11, 1990 Order which stated:

Lastly, Gallatin claims the complaint is duplicitous because its development permit currently pending discusses steps it will take to monitor sound emissions levels near Complainant's property. The Board finds this circumstance irrelevant to its determination on this matter. (PCB 90-145, October 11, 1990.)

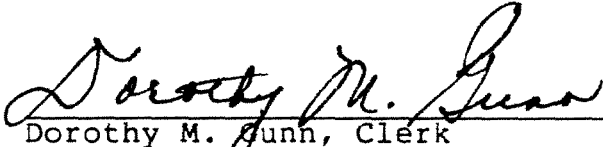
The Comers have correctly cited to the Board's Order of October 11, 1990, and the Board does not find the additional information and arguments presented by Gallatin to be persuasive. The Board finds that the circumstances surrounding Gallatin's permit application are not dispositive as it relates to a motion to dismiss. In addition, the Board notes that Exhibit B and the subsequent letter accepting the conditions in Exhibit B are also not persuasive. The Board is not convinced that the exchanged letters constitute an "agreement" on all issues with regards to noise abatement. There is nothing contained in Exhibit B which supports Gallatin's assertions that it has gone beyond what the Agency requires. Nor is there anything contained within Exhibit B to support the conclusion that "if Gallatin complies with the conditions, Gallatin will be in compliance with the law." (Motion p. 5). Also, Gallatin asserts that the conditions agreed to in Exhibit B will be included as a permit condition; however, the record does not indicate that the permit has been issued. The Board is reluctant to grant a motion to dismiss based on potential relief in a permit which has not been issued; therefore, the Motion to Dismiss is denied. Finally, even if Gallatin were in full compliance with an Agency issued permit that would not preclude a citizen enforcement action under Landfill, Inc. v. Pollution Control Board (74 Ill. 2d 541; 387 N.E.2d 258). If complainants can show that Gallatin is not in compliance with statutory or regulatory standards, they may pursue their action despite Agency permitting action.

As previously stated, the Comers filed a Motion to Recuse

the Hearing Officer on November 29, 1990. The Board will address that motion at its December 20, 1990 meeting, in order to allow time for a reply.

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 4th day of December, 1990, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board