

ILLINOIS POLLUTION CONTROL BOARD
January 9, 1992

GALLATIN NATIONAL COMPANY,)	
)	
Petitioner,)	
)	
v.)	
)	
ILLINOIS ENVIRONMENTAL)	PCB 91-156
PROTECTION AGENCY,)	(Permit Appeal)
)	
Respondent.)	

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

On November 15, 1991, Gallatin National Company ("Gallatin") filed a motion for summary judgment and a memorandum in support of its motion. Gallatin's motion for summary judgment involves its appeal from the Agency's denial of Gallatin's May 6, 1991 request for reconsideration of certain permit conditions and Gallatin's June 11, 1991 request for a permit modification for its proposed landfill in Fairview, Fulton County, Illinois. Gallatin argues that the Illinois Environmental Protection Agency ("Agency") is applying an improper standard for groundwater compliance and that the Agency failed to issue its decision on its application for permit modification in a timely manner. On November 25, 1991, the Agency filed a response to Gallatin's motion for summary judgment as well as its own motion for summary judgment. On December 4, 1991, Gallatin filed its response to the Agency's motion for summary judgment.

For the reasons expressed below, the standard with which Gallatin is to comply is no degradation, beyond the zone of attenuation, from the background water quality (i.e., no degradation of pre-existing groundwater quality within 100 feet of its facility in 100 years). Thus, no adjusted standard is needed; the standard with which Gallatin seeks to comply is already contained in the regulations. On the issue of whether the Agency issued its decision on Gallatin's application for permit modification in a timely manner, the Board finds that the Agency did not.

The following is a summary of the circumstances preceding the issues before us now. On January 18, 1991, in PCB 90-183, this Board granted a variance to Gallatin. The purpose of the variance was to allow Gallatin time to gather and submit four quarters of groundwater monitoring data to the Agency, via a request for permit modification, in order to establish background water standards after it had earlier filed a permit application to develop and operate its proposed solid waste disposal facility. The problem was that Gallatin had filed its

application for a permit to develop and operate its proposed solid waste disposal facility prior to the effective date of the Board's new landfill regulations which contain the new pre-application monitoring requirement. On April 1, 1991, the Agency issued a permit to Gallatin for the development and operation of its "balefill". Gallatin has appealed Conditions 36 and 72 of that permit. The conditions require Gallatin to seek an adjusted standard from the Board for those constituents in the groundwater which exceeded the Board's general water quality standards. Then, pursuant to its variance, on May 6, 1991, Gallatin requested the Agency to reconsider the above-mentioned permit conditions. Specifically, Gallatin stated that the Board's regulations as well as the supporting documentation in R88-7 made it clear that an adjusted standard would be necessary only if Gallatin would cause the pre-existing background water quality conditions to be exceeded, regardless of that quality. On June 11, 1991, Gallatin submitted an application for permit modification to the Agency which contained the quarterly groundwater monitoring data. The application also reiterated Gallatin's May 6, 1991 request that the Agency use the background conditions at the site as the groundwater standard. On August 28, 1991, the Agency denied Gallatin's permit modification. Its stated reasons for denial were that the concentration of certain constituents in the groundwater exceeded the Board's general water quality standards and that Gallatin did not obtain an adjusted standard for those background constituents in the groundwater that exceeded the Board's general water quality standards.

In its motion for summary judgment, Gallatin argues that the 35 Ill. Adm. Code 811.320, the background documents in R88-7, and PCB 90-183 make it clear that background concentration is the proper standard for groundwater compliance and that an adjusted standard is required only when the pre-existing background concentrations are exceeded. Gallatin also argues that, notwithstanding the above, its application for permit modification should issue by operation of law because the Agency failed to issue a decision on Gallatin's application for permit modification within the time frame specified by the Board in its January 18, 1991 Opinion and Order in PCB 90-183 (i.e., within 21 days after the permit modification was filed with the Agency) and instead issued its decision 77 days after it received Gallatin's application for permit modification.

In response, the Agency argues that 35 Ill. Adm. Code 811.320 does not specify whether the applicable groundwater quality standards are to be the existing background concentrations or at a level set via the adjusted standard mechanism. The Agency also argues that it has no authority to approve the use of background concentrations as the applicable groundwater quality standards because it would, in effect, be granting the facility an adjusted standard for constituents

exceeding the Board's water quality standards. As for Gallatin's argument that the Agency issued an untimely denial of its application for permit modification, the Agency argues that the Agency issued its denial within the 90 day deadline set forth in Section 39(a) of the Environmental Protection Act ("Act"), Ill. Rev. Stat. 1989, ch. 111½, par. 1039(a), and 35 Ill. Adm. Code 813.103, 8134.201, and 813.202, and that the Board has no authority to shorten the statutory review period and, in effect, amend the Act.

The Board's regulations make it clear that background concentration is the proper standard for groundwater compliance and that an adjusted standard is required only when the pre-existing background concentrations will be exceeded. Specifically, 35 Ill. Adm. Code 811.320(a)(1) provides that "[g]roundwater quality shall be maintained at each constituent's background concentration, at or beyond the zone of attenuation," and 35 Ill. Adm. Code 811.320(a)(1)(A)-(B) provides that the applicable groundwater standard for any constituent shall be "[t]he background concentration", or an adjusted standard. Finally, 35 Ill. Adm. Code 811.320(d)(1) provides that "[b]ackground concentrations...shall be used for the purpose of establishing groundwater quality standards...."

In addition, in its Response to Additional Comments on Proposed Pars 807, and 810 through 815 (June 7, 1991), in R88-7, the Board's Scientific and Technical Section concluded:

[f]or the situation in which the background is above an existing Board established standard for a specific monitored constituent, the STS had recommended that the lower of the two, namely the Board established standard would be the applicable standard. The STS had intended that the operator would apply for an adjusted groundwater quality standard...[h]owever, after reconsideration, based on the comments and hearing testimony, STS agrees that filing an adjusted standard each time the background concentration is above a Board established standard may not be feasible.

(Id. pp. 25-26)

The foregoing expresses the Board's intent to establish a non-degradation standard (i.e. 100 feet in 100 years standard) as the compliance standard for landfill facilities. An adjusted standard procedure is applicable only when a facility seeks to alter the existing background quality at the compliance point rather than comply with the non-degradation standard.

In fact, it is clear from the Board's decision on Gallatin's variance petition in PCB 90-183 that the background concentration is the proper standard for groundwater compliance. In that

Opinion, the Board noted, in part, that:

It is...necessary for Gallatin to show that there will be no increases in the concentrations of constituents above the background at a compliance point (beyond 100 feet) in 100 years, as a result of operations at the facility. However, the specific numerical concentrations that are established as background are needed, and must be included in a permit, because they become the groundwater quality standard applicable to that site to show compliance.

Pursuant to the Board's Order, Gallatin determined the applicable background groundwater quality standard at the site through four quarters of groundwater monitoring. Because Gallatin has demonstrated that it can meet the non-degradation standard already contain in the regulations, no adjustment needs to be requested or granted. The Board notes that the same non-degradation standard was proposed as the applicable standard at the beginning of, and remained throughout, the R88-7 proceeding.

The Board also points out that there are inherent enforceability problems in requiring an entity who had nothing to do with the pre-existing background exceedence to clean it up, and certainly not as a condition of a permit. Gallatin is a new facility and has not even been alleged to have contributed to a degradation of pre-existing water quality. In fact, in the PCB 90-183 variance, in order to assure that Gallatin's construction activity would not affect the background water quality, the Board specifically placed a 500 foot minimum distance limitation between such activity and its groundwater monitoring wells. (See PCB 90-183, p. 11, Condition 1). In so saying, of course, the landfill regulations do not preclude the Agency from bringing an enforcement action against any person, Gallatin included, for violating any applicable standard. We also note that we agree with Gallatin in that the Agency's arguments are at odds with good public policy; if a landfill operator were expected to meet the Board's general water quality standards where the pre-existing water quality is substandard through no fault of his own, it would encourage landfill operators to build in areas of high quality potable groundwater, rather than where the pre-existing groundwater is of substandard quality and the general standards could not be met.

In summary, we believe, and so find, that the R88-7 record supports and 35 Ill. Adm. Code 811.320 clearly by its terms, sets the sole landfill compliance standard as background groundwater quality unless an adjusted standard allows otherwise. As explained above, we suggest that the Agency's concern that issuing a permit somehow would condone a violation by Gallatin of the general water quality standards is misplaced.

Notwithstanding the above, the Board wishes to address the issue of whether the Agency should have issued its decision within the time frame specified in the Board's January 18, 1991 Order. The last sentence of Condition 4 of the Board's January 18, 1991 Order in PCB 90-183 states as follows:

...The Agency's decision on the permit modification shall issue no later than 21 days after permit modification is filed.

Moreover, the last sentence of Condition 3 states:

...Such [application for permit modification] shall not constitute a new application for purposes of calculating the Agency's decision deadline date.

Although the Agency is correct that Section 39(a) of the Act provides that the Agency has 90 days to review a permit application, the Agency did not file either a motion for reconsideration pursuant to 35 Ill. Adm. Code 101.246, nor did it challenge the Board's power to impose the conditions via a petition for review to the appellate court pursuant to Section 41 of the Act. Accordingly, the Agency has waived any objection that it may have had regarding the imposition of the above conditions. Moreover, if the Board were to rule in favor of the Agency on this issue it would, in effect, be condoning the Agency's decision to disregard the Board's Order as well as punishing Gallatin although Gallatin complied with and relied upon the deadlines set forth in the Board's Order.

Accordingly, for the foregoing reasons, Gallatin's motion for summary judgment is granted and the Agency's motion for summary judgment is denied.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

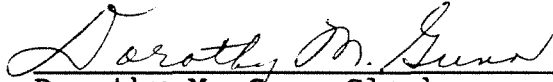
Gallatin's National Company's motion for summary judgment is granted. The Illinois Environmental Protection Agency's motion for summary judgment is denied. The Board strikes Conditions 36 and 72 of the Illinois Environmental Protection Agency's April 1, 1991 permit and reverses the Illinois Environmental Protection Agency's August 28, 1991 denial of Gallatin's application for permit modification. The Illinois Environmental Protection Agency shall reissue its April 1, 1991 permit accordingly.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111½, 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.

Board Members J. Theodore Meyer and M. Nardulli dissented.

I, Dorothy M. Gun, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 9th day of January, 1992, by a vote of 4-2.



Dorothy M. Gun, Clerk
Illinois Pollution Control Board