

ILLINOIS POLLUTION CONTROL BOARD
March 19, 1998

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-107
	)	(Enforcement - Air - Land - Water)
ESG WATTS, INC.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board on three motions filed by ESG Watts, Inc. (ESG Watts), and one motion filed by complainant. On February 23, 1998, ESG Watts filed a motion for stay. Complainant filed its response on February 25, 1998. ESG Watts filed a motion to file a reply and its reply on March 4, 1998. On March 2, 1998, ESG Watts filed two motions: (1) a motion to vacate or modify the February 5, 1998, Board order, or in the alternative, motion for rehearing, and (2) a motion to reset order of pending motions, or in the alternative, to consolidate motions for purposes of hearing. Complainant filed its response on February 27, 1998.¹ ESG Watts filed a memorandum of law in support of its motion to vacate or modify on March 3, 1998, and ESG Watts further filed the last exhibit (Exhibit D) to its motion to vacate or modify on March 5, 1998. Complainant filed a motion to strike ESG Watts' memorandum of law on March 13, 1998.

The Board will first address the procedural motions filed by the parties: (1) the motion to reset order of pending motions filed by ESG Watts, and (2) the motion to strike filed by complainant. ESG Watts argues in its motion to reset order of pending motions, or alternative motion to consolidate for purposes of hearing, that procedurally, the relief sought in the motion to vacate should be determined first since the motion to stay is only relevant in the event the Board denies the motion to vacate. The Board notes that complainant did not respond to the motion to reset and therefore waives objection to the granting of the motion pursuant to the Board's procedural rules (see 35 Ill. Adm. Code 101.241; 103.140). In finding that no material or undue prejudice would result if the Board addresses the motion to vacate prior to addressing the motion to stay, the Board will, as ESG Watts requests, address the motion to vacate first. The Board grants ESG Watts' motion to reset order of pending motions and addresses both motions in this order.

Complainant asserts in its motion to strike ESG Watts' memorandum of law in support of the motion to vacate that Section 103.240 does not allow for the subsequent filing of a memorandum of law after a motion has been filed. Complainant believes that material

¹ Prior to receiving ESG Watts' motions on March 2, 1998, the Board received complainant's response.

prejudice would result to complainant if the memorandum is not stricken since complainant states it cannot file a reply which addresses new grounds that are inconsistent with the initially pleaded arguments. Complainant argues that the memorandum is inconsistent with the originally filed motion.

The Board denies the motion to strike the memorandum in support of the motion to vacate. ESG Watts' motion originally stated that its memorandum would be filed with the Board within 14 days of the filing of its motion to vacate. However, the Board received the memorandum one day after the filing of the motion to vacate. Additionally, the Board received the last exhibit to the memorandum two days later. All of these pleadings were filed with the Board during the 35 days within which ESG Watts could file any motion for reconsideration (35 Ill. Adm. Code 101.246) or motion subsequent to entry of final order (35 Ill. Adm. Code 103.240). The Board notes that its procedural rules do not specifically bar the filing of a memorandum subsequent to the filing of a motion. The Board further notes that complainant could have filed a response to the memorandum; therefore no undue prejudice has resulted in this matter. While not encouraging "piecemeal" filings, the Board will allow the memorandum of law to be filed and, accordingly, the motion to strike is denied.

The Board will now turn to the more substantive motions filed by ESG Watts: (1) the motion to vacate and (2) the motion to stay.

MOTION TO VACATE OR MODIFY THE FEBRUARY 5, 1998, BOARD ORDER, OR
IN THE ALTERNATIVE, MOTION FOR REHEARING

On February 5, 1998, the Board adopted a final opinion and order in this matter. The Board sent, by certified mail, a copy of the opinion and order to each of the parties. Pursuant to 35 Ill. Adm. Code 103.240, ESG Watts filed its motion to vacate or modify or motion for rehearing² within 35 days after service of the order. In essence, this motion is a motion for reconsideration of the Board's final opinion and order which is similar to a motion filed under Section 101.246, Motions for Reconsideration (35 Ill. Adm. Code 101.246).

ESG Watts asserts that the Board's February 5, 1998, final opinion and order should be vacated or modified, or that the Board should hold a new hearing, since the facts that the Board relied on in making its decision have substantially changed. Mot. to Vac. at 1; Watts Memo at 1. ESG Watts argues that the alleged violations have been remedied or have been substantially remedied. Mot. to Vac. at 1; Watts Memo at 1. In support of this argument, ESG Watts states that the Board should have considered the amount of financial assurance, which became effective just days before the Board adopted the opinion and order in this matter, on January 26, 1998 (see Watts Memo at 3; see Watts Memo, Exhibit B). ESG Watts further asserts that the Board should now consider that ESG Watts has implemented a system to control leachate and a program for stormwater runoff control. Watts Memo at 4. All

² Citations to ESG Watts' motion to vacate will hereinafter be referred to as "Mot. to Vac. at ____." ESG Watts' memorandum of law in support of such motion will be cited to as "Watts Memo at ____." Complainant's response to the motion will be referred to as "Resp. to Vac. at ____."

problems with regard to the National Pollutant Discharge Elimination System (NPDES) permit have been resolved, ESG Watts argues. With regard to the gas collection system, ESG Watts maintains that the system continues to be completed, but that the gas emissions are being controlled. Watts Memo at 5-6.

ESG Watts believes that the Board should take into consideration these new factual changes because Section 33(c) of the Environmental Protection Act (Act) (415 ILCS 5/33(c) (1996)) requires the Board to do so. Watts Memo at 6-9. ESG Watts requests that the Board either vacate the February 5, 1998, opinion and order, or in the alternative, modify the order to reflect that the operating permit is not revoked and the \$100,000 penalty is removed. ESG Watts requests a rehearing so the Board can hear the complete facts when deciding whether a penalty is appropriate. Watts Memo at 11.

Complainant responds by stating that ESG Watts has filed the present motion to vacate or modify “for the primary purpose of obtaining an ‘automatic’ stay [pursuant to Section 103.240].” Resp. to Vac. at 1. Complainant argues that Section 103.240 of the Board’s procedural rules (35 Ill. Adm. Code 103.240), which allows for an automatic stay once a motion is filed under that section and until the Board rules on the motion, is in conflict with Illinois Supreme Court Rule 335(g) (172 Ill. 2d R. 335(g)), which is followed when a party files a motion to stay pursuant to Section 101.303 (35 Ill. Adm. Code 101.303). Resp. to Vac. at 2. Complainant further asserts that none of the facts in this case have changed, nor have any of the alleged violations been corrected. Resp. to Vac. at 3. Because ESG Watts filed its memorandum after it filed this motion, complainant believes that the memorandum of law should not be allowed since Section 103.240 does not provide for such subsequent filings. Resp. to Vac. at 3. Last, complainant argues that the motion fails to identify any facts overlooked, evidence not available at hearing, any change in the law, or any error in the application of the existing law. Resp. to Vac. at 4. Accordingly, complainant desires that the Board deny the motion to vacate, modify, or alternative motion for rehearing.

A motion filed subsequent to the entry of a final order under Part 103 (“Enforcement Proceedings”) is similar to a motion filed under Part 101 (“General Provisions”) in that they both must be filed within 35 days, they both stay the effect of a final order, and the time for appeal from the final order in both types of motions runs anew after the Board rules on the motion. See 35 Ill. Adm. Code 101.246, 103.240. In ruling upon a motion for reconsideration, or in this case a motion to vacate a final order, the Board is to consider, but is not limited to, error in the previous decision and facts in the record which may have been overlooked. 35 Ill. Adm. Code 101.246(d). In Citizens Against Regional Landfill v. County Board of Whiteside County (March 11, 1993), PCB 93-156, the Board stated that “[t]he intended purpose of a motion for reconsideration is to bring to the court’s attention newly-discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court’s previous application of the existing law.” Korogluyan v. Chicago Title & Trust Co. (1st Dist. 1992), 213 Ill. App. 3d 622, 572 N.E.2d 1154.

The Board finds that the arguments presented in complainant’s motion do not present the Board with any new evidence, a change in the law, or any other reason to conclude that the Board’s decision was in error. ESG Watts has not shown that the facts which the Board used

in determining the outcome of this matter were different during the alleged time period of the violations covered by the complaint. The fact is that ESG Watts remained underfunded in its financial assurance trust fund during the timeframe which the Board used in determining the violations up through and including the hearing dates. ESG Watts had not properly addressed or alleviated the leachate, cover, or stormwater runoff problems during the time of the alleged violations. Further, ESG Watts was clearly in violation of the requirements of its NPDES permit during the time period alleged by complainant. With regard to the air odor problems, there are no new facts before the Board now which show that ESG Watts controlled gas emissions during the time of the alleged violations. The Board used the substantiated evidence in the record to find that ESG Watts' Taylor Ridge landfill operating permit should, as a penalty, be revoked and the Board will not move to vacate or modify its order. The Board sees no reason to hold a rehearing on this matter.

Although ESG Watts argues that the Board is required to address these "substantially changed facts" because Section 33(c)(v) (415 ILCS 5/33(c)(v) (1996)) requires the Board to consider "any subsequent compliance," the Board has already addressed Section 33(c)(v) in its February 5, 1998, opinion. See People v. ESG Watts, Inc. (February 5, 1998), PCB 96-107, slip op. at 50. There, the Board stated that, "compliance is sporadic at best." The Board will not now consider new facts as part of its earlier deliberations over Section 33(c)(v) since such facts will not now lessen the severity of violations which have already occurred.

The Board disagrees with complainant's argument that ESG Watts has no automatic stay from the point the motion to vacate was filed pursuant to Section 103.240. Despite complainant's belief that no automatic stay occurred in this instance since ESG Watts had previously filed a motion to stay pursuant to Section 101.303, the plain language of Section 103.240 does, indeed, automatically stay the Board's order. Because the Board granted the motion to reset order of pending motions (see above discussion), the Board need not address whether Rule 335 became in direct conflict with Section 103.240. Pursuant to Section 103.240, from the time that ESG Watts filed its motion to vacate with the Board on March 2, 1998, until today, ESG Watts had an automatic stay.

Because the Board denies the motion to vacate, the Board will now address the motion to stay below.

MOTION TO STAY

ESG Watts requests a motion to stay³ pursuant to 35 Ill. Adm. Code 101.303. Section 101.303 states that "[t]he procedure for stay of any Board order during appeal shall be as provided in Rule 335 of the Rules of the Supreme Court of Illinois." 35 Ill. Adm. 101.303. Rule 335 of the Rules of the Supreme Court of Illinois provide that the "[a]pplication for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency." 172 Ill. 2d R. 335.

³ ESG Watts' motion to stay will be cited to as "Mot. to Stay at ____." Complainant's response will be cited to as "Resp. at ____." ESG Watts' reply will be cited to as "Reply at ____."

ESG Watts argues that a stay is necessary to “secure the fruits of a meritorious appeal where otherwise they may be lost.” Mot. to Stay at 4. ESG Watts asserts that failure to grant this stay will result in extreme economic hardship to it. Specifically, ESG Watts states that if its operating permit were revoked, it would suffer a loss of business, damage to the hauling business, and a loss of customers while the appeal is pending. Mot. to Stay at 5. ESG Watts believes that if it had to cease accepting waste, it would have to begin closure within 30 days and such action would impose a “significant and unnecessary hardship on respondent.” Mot. to Stay at 5. ESG Watts argues that because the Board acted inconsistently by revoking ESG Watts’ operating permit as a “sanction of first impression,” ESG Watts will be successful on its appeal before the Illinois Appellate Court. Mot. to Stay at 5-7. Additionally, ESG Watts argues that the Board should stay this matter, and the requirement of ESG Watts to pay the \$100,000 penalty amount, because the funds could be better used for site management, among other things. Mot. to Stay at 7-8.

Complainant objects to the request for stay. Complainant argues that ESG Watts has misstated the facts in this matter. Complainant further argues that because ESG Watts failed to file an affidavit in support of its motion as required by Illinois Supreme Court Rule 335(g) when “facts are subject to dispute,” this motion should be denied based on procedural inaptitude. Resp. at 1-2. Complainant asserts that the Board should not stay the pending permit revocation and \$100,000 penalty amount since a stay is discretionary and the Board should not suspend the intent of its order. Resp. at 8-9.

ESG Watts replies to complainant’s response with a motion to file a reply instant, which the Board grants, and the reply. In its reply, ESG Watts states that it does not need an affidavit because the facts it raises in its motion are not in dispute. Reply at 3-5.

The Board denies the motion to stay filed by ESG Watts. The Board uses its discretion when deciding whether to grant a motion to stay of a final Board order. The Board has, on several occasions, denied such motions. See Alice Zeman v. Village of Summit, et al. (April 8, 1993) PCB 92-174, PCB 92-177; Village of Mattson v. World Music Theatre et al. (March 25, 1993), PCB 90-146; Citizens Against Regional Landfill v. County Board of Whiteside County et al. (May 20, 1993), PCB 92-156. In denying these motions, the Board believes the effect of a stay in its entirety would harm the environment. See IEPA v. Piolet Brothers Trading, Inc. (February 4, 1982) PCB 80-185. The Board has previously stated and continues to believe that the suspension of a cease and desist order would allow the very harm which an order was meant to prevent and any delay would be injurious to public interest. See IEPA v. Incinerator, Inc. (October 14, 1971), PCB 71-69.

The Board has found that the evidence clearly demonstrates that ESG Watts’ violations have occurred and that the provisions of the final order are necessary to prevent any further violations. Because the Board ordered ESG Watts not to accept any more waste at the Taylor Ridge landfill, to cease and desist from any further violations, and to pay a specific penalty amount and attorney fees, the Board would be acting adverse to the immediate effects of its February 5, 1998, opinion and order if it stayed any ruling imposed on ESG Watts. The Board maintains that its February 5, 1998, order should be timely executed by ESG Watts so as to ensure proper compliance with the Environmental Protection Act and the Board’s

regulations. The Board notes that ESG Watts can file a motion to stay for consideration by the appellate court.

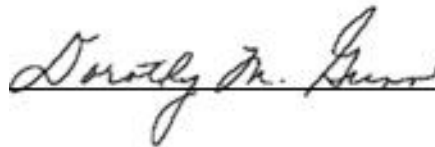
In conclusion, the motion to reset order of pending motions is granted. The motion to vacate, the motion to stay, and the motion to strike are all denied.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained.

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 172 Ill. 2d Rule 335.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 19th day of March 1998 by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board