

ILLINOIS POLLUTION CONTROL BOARD

April 16, 1998

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-233
	)	(Enforcement - Land)
ESG WATTS, INC., an Iowa corporation,	)	
	)	
Respondent.	)	

FINAL ORDER OF THE BOARD (by M. McFawn):

On February 5, 1998, the Board issued its opinion and order resolving the majority of matters in this enforcement proceeding. Two matters were left unresolved by the Board's February 5 order: (a) the Attorney General's request for attorney fees under 415 ILCS 5/42(f), and (b) what action the Board should take in response to failure of respondent ESG Watts, Inc. (ESG Watts) to comply with the Board's order of March 6, 1997, in which ESG Watts was ordered to deposit \$249,067 into the financial assurance trust fund for its landfill at Viola, Illinois, within 45 days (*i.e.*, by April 21, 1997).¹ Since ESG Watts had not addressed either issue as of February 5, the Board gave ESG Watts the opportunity to do so prior to the close of this case. The Board granted ESG Watts until February 20, 1998, to file a response to the Attorney General's request for attorney fees. The Board also directed ESG Watts to show cause, on or before February 20, 1998, why it should not be sanctioned for failure to comply with the Board's order of March 6, 1997. Complainant was granted until March 6, 1998, to respond to any filing by ESG Watts.

REQUEST FOR ATTORNEY FEES

The Attorney General requests an award of \$14,760 in fees. This request is supported by affidavits of attorneys Jane E. McBride and Thomas Davis, which were appended to "Complainant's Reply Brief," filed on June 2, 1997. Watts did not file a response to the Attorney General's fee request. The Board finds that the fee request is reasonable, and hereby awards the requested fees.

ESG Watts must pay \$14,760 on or before June 1, 1998. Such payment must be made by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Hazardous Waste Fund, and must be delivered to:

¹ The forty-fifth day, April 20, 1997, was a Sunday.

Illinois Environmental Protection Agency
 Fiscal Services Division
 1021 North Grand Avenue East
 P.O. Box 19276
 Springfield, IL 62794-9276

ESG Watts must write its Federal Employer Identification Number on the certified check or money order. Any portion of the fees awarded which is not paid by June 1, 1998, will incur interest at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a)), as now or hereafter amended, from the date payment is due until the date payment is received. Interest will not accrue during the pendency of an appeal during which payment of the fee award has been stayed.

FAILURE TO COMPLY WITH ORDER OF MARCH 6, 1997

On February 23, 1998, ESG Watts filed "Respondent's Cause as to Why it Should Not Receive Sanction for Failure to Comply with March 6, 1997, Order" (Cause). ESG Watts does not deny that it violated the Board's order. Cause at ¶ 5. It argues, however, that its failure to comply with the Board's order was due to financial inability, and that it diligently sought alternatives. It also points out that there is currently insurance in place bringing ESG Watts into full compliance with the financial assurance requirements for the Viola landfill. In support of its position, ESG Watts has filed an affidavit of Gerald R. Eilers, Vice President and Secretary of ESG Watts.

Complainant filed a response on March 6, 1998. Complainant responds with the argument that, notwithstanding ESG Watts' negotiations regarding insurance, no action was taken to bring the financial assurance trust fund up to the required amount during 1997, even though ESG Watts' tax returns indicate millions of dollars in business expenditures. Complainant recommends a \$50,000 penalty for the initial violation of the Board order and an additional penalty of \$1,000 per day for which the violation continued after April 24, 1997, through February 21, 1998, for a total recommended sanction of \$350,000. Response at 2.

The Board's authority (and, indeed, duty) to order sanctions for failure to comply with an order is found at 35 Ill. Adm. Code 101.280, which provides in relevant part:

- a) If a party . . . fails to comply with any order entered by the Board . . . the Board will order sanctions.***
- b) In deciding what sanction to impose the Board will consider factors including, but not limited to, the relative severity of the refusal or failure to comply, the past history of the proceeding, and the degree to which the proceeding has been delayed or prejudiced.

Subsection (a) of Section 101.280 lists a number of sanctions available to the Board, but the list is not exclusive. In addition to the listed sanctions, a party violating a Board order may be liable for civil penalties under Section 42(a) of the Environmental Protection Act (Act) (415 ILCS 5.42(a) (1998)).

Under Section 42(a) of the Act, violation of a Board order renders the violator liable for monetary penalties of up to \$50,000 per violation and \$10,000 per day that the violation continues. When imposing a penalty under Section 42(a) of the Act, Section 42(h) (415 ILCS 5/42(h) (1998)) authorizes the Board to consider any matters of record in mitigation or aggravation. The relative severity of failure to comply and the past history of the proceeding, which the Board must consider under Section 101.280, are adequately addressed in the Board's discussion of financial assurance violations in its opinion of February 5, 1998. See People v. ESG Watts, Inc. (February 5, 1998), PCB 96-233, slip op. at 4-14. Given the procedural posture of this case, the degree to which the proceeding has been delayed or prejudiced is not a significant factor in our analysis. ESG Watts has raised two matters which could mitigate the penalty to be imposed: (a) that it acted with "all dispatch" to comply with the Board's order, and (b) that it is currently (since February 19, 1998) in compliance with its financial assurance requirements. The presence of due diligence by a violator in attempting to comply is among matters the Board is specifically authorized under Section 42(h) to consider. See 415 ILCS 5/42(h)(2) (1998).

In determining an appropriate penalty, the Board will not sanction ESG Watts for the time when it was exercising diligence in its attempt to obtain insurance to come into compliance with its financial responsibility requirements. Based upon Mr. Eilers' affidavit, however, we do not find that ESG Watts exercised diligence prior to September 1, 1997.

Mr. Eilers describes two courses of action by ESG Watts prior to September 1, 1997: (a) consultation with insurance agents regarding obtaining a bond or insurance for closure and post-closure costs, and (b) negotiations with Resource Technology Corporation (RTC) for RTC's assistance in obtaining a bond. The Board does not find ESG Watts' consultations with insurance agents relevant to the issue of ESG Watts' diligence in complying with the Board's order because it appears from Mr. Eilers' affidavit that such consultations took place well before the Board entered its order of March 6, 1997. Indeed, ESG Watts' insurance agent, Jack Lawley, informed ESG Watts as early as 1995 that the company could not obtain a bond on its own due to its financial problems. Eilers Aff. at ¶¶ 8-9. The Board further does not find ESG Watts' discussions with RTC (which also began well before March 6, 1997) a credible means of achieving compliance. Based upon the testimony at hearing, RTC's involvement with the Viola landfill was contingent upon ESG Watts' obtaining local siting for the over-height portion of the landfill. (See Tr. of 3/25/97 at 59-60.) ESG Watts has never filed a siting application. As to Mr. Eilers' references to "contractual assurances," RTC's only obligation under the single contract before us, Respondent's Exhibit B, involves only an increase in bond requirements due to RTC's involvement. This is specifically identified as "supplemental to the usual bond required by the landfill operations." Res. Ex. B, ¶ 7(e). Given these circumstances, the Board finds that ESG Watts could not have reasonably expected its discussions with RTC to result in compliance, at least not at any time in the foreseeable

future. The Board thus finds that negotiations with RTC did not constitute diligence on the part of ESG Watts.

On September 1, 1997, Mr. Lawley presented a proposal which RTC rejected. It is only after this event that ESG Watts began earnestly investigating other options. On December 8, 1997, ESG Watts terminated its relationship with Mr. Lawley. Less than three weeks later, on December 23, 1997, ESG Watts' new agent, AON Risk Services, Inc., presented a proposal to ESG Watts which was accepted, and on February 19, 1998, insurance policies were filed with the Agency bringing ESG Watts into compliance with its financial assurance requirements for the Viola landfill.

The Board therefore concludes that it is appropriate to assess a penalty against ESG Watts for the period from April 21, 1997, when payment was due, to September 1, 1997, when it appears ESG Watts began to exercise diligence in its attempts to come into compliance, and concludes that the method of calculating a penalty applied in the Board's February 5, 1998, opinion—the profit or savings realized by ESG Watts due to its failure to comply—provides a reasonable basis for calculating an appropriate penalty now. Using the same conservative estimates as were employed in the Board's February 5 analysis, we set ESG Watts' profit or savings at 8% per annum. At this rate, given a base amount of \$249,067 and a time element of 133 days (or approximately 0.36 year), the Board finds that ESG Watts realized a profit or savings of \$7,173 by not complying with the Board's order. In recognition of the mitigating factors present in the matter currently before us, the Board reduces this amount by 50% and imposes a penalty of \$3,587 against ESG Watts.

ESG Watts must pay \$3,587 on or before June 1, 1998. Such payment must be made by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Environmental Protection Trust Fund, and must be delivered to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

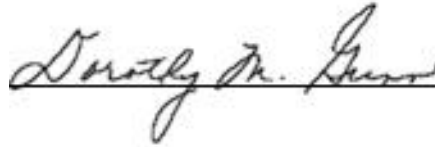
ESG Watts must write its Federal Employer Identification Number on the certified check or money order. Any portion of the sanction assessed not paid by June 1, 1998, will incur interest at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a)), as now or hereafter amended, from the date payment is due until the date payment is received. Interest will not accrue during the pendency of an appeal during which payment of the sanction has been stayed.

IT IS SO ORDERED.

Board Members R.C. Flemal and G. Tanner Girard, and Chairman Claire A. Manning dissented.

Section 41 of the Environmental Protection Act (415 ILCS 5.41 (1998)) 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 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 order was adopted on the 16th day of April 1998 by a vote of 4-3.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board