ILLINOIS POLLUTION CONTROL BOARD
April 4, 2002

ESG WATTS, INC., (Viola Landfill), an Iowa corporation,	)	
Petitioner,	)	
v.	)	PCB 01-63
	)	(Permit Appeal - Land)
ILLINOIS ENVIROMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ESG WATTS, INC., (Taylor Ridge/ Andalusia Landfill), an Iowa corporation,	)	
Petitioner,	)	
v.	)	PCB 01-64
	)	(Permit Appeal - Land)
ILLINOIS ENVIROMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

LARRY A. WOODWARD, CORPORATE COUNSEL, APPEARED ON BEHALF OF PETITIONER; and

DANIEL MERRIMAN, ASSISTANT COUNSEL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On October 10, 2000, ESG Watts, Inc. (ESG Watts) filed a petition for review of a September 11, 2000 decision by the Illinois Environmental Protection Agency (Agency). The Agency had denied a request by ESG Watts to substitute financial assurance for the Taylor Ridge/Andalusia landfill and Viola landfill. The Taylor Ridge/Andalusia Landfill is located in Rock Island County and the Viola landfill is located in Mercer County. This case was consolidated for hearing with ESG Watts, Inc. (Sangamon Valley Landfill) v. IEPA, PCB 01-62 and ESG Watts, Inc. (Viola Landfill) v. IEPA, PCB 01-63 as the cases involved similar facts and denial reasons. ESG Watts, Inc. v. IEPA, PCB 01-62, 01-63, and 01-64 (consld.) (Oct. 18, 2001). The Board will consolidate two of these cases for decision, PCB 01-63 and PCB 01-64.

However, PCB 01-62 will be decided separately because, although the issues are similar, the unique facts surrounding that case require a separate opinion and order.

On December 10, 2001, a hearing was held in Springfield before Board Hearing Officer Steven Langhoff. On January 25, 2002, ESG Watts filed a brief (Pet. Br.) in this proceeding. On February 19, 2002, the Agency filed a brief (Resp. Br.) and a motion for extension of time to file the brief (Mot.). On March 7, 2002, ESG Watts filed a motion to strike the respondent's brief (Mot.S.), a response to the motion for extension of time, and a reply brief. On March 25, 2002, the Board received the Agency's response to the motion to strike (R.Mot.S.). The Board will discuss the motions below.

For the reasons given in the opinion, the Board affirms the Agency's refusal to accept substitute financial assurance.

MOTIONS

Before proceeding with the merits of this case, the Board must first address the outstanding motions relating to the filing of the Agency's brief. First, the Agency filed a motion for an extension of time to file the brief. The Agency acknowledges the lateness of the brief but asserts that there was no "intention to willfully disregard the Hearing Officer's scheduling order, cause any undue delay or any material prejudice to any party" nor was there "any bad faith" on the part of the Agency. Mot. at 2. Furthermore, the Agency stated that the attorney for the Agency became aware of "a significant development" in this matter "on or about February 7, 2002." Mot. at 1. The Agency "felt" that the "significant development" should be brought to the Board's attention and a new section needed to be added to the brief to do so. *Id*.

ESG Watts argues that the Agency's brief should be stricken. First with regards to the "significant development" the Agency discusses, ESG Watts argues the Agency did not support the allegations in the motion with an affidavit or any other sworn testimony. Mot.S. at 1. Furthermore, the dated information provided by the Agency demonstrates that the materials would have been available at the hearing in this matter if the Agency had exercised due diligence. *Id*. Also, the information was discussed in the presence of the Agency in December of 2001. *Id*. Finally, ESG Watts asserts that the information is not material to any issue in PCB 01-62, PCB 01-63, or PCB 01-64 as the materials deal with United Capitol Insurance Company, and the policies at issue in those cases were issued by Frontier Pacific Insurance Company. Mot.S. at 1-2.

ESG Watts also argues that the brief was filed "to introduce prejudicial bias" into this proceeding. Mot.S. at 2. Specifically, ESG Watts maintains that the Agency is suggesting that the release of surplus financial assurance would leave the State of Illinois without financial assurance when the Agency "knows that the policies have been replaced by other policies for the time period beginning January 26, 1998 to January 25, 2002 and by policies covering the period January 26, 1998 to January 25, 2003." Mot.S. at 2.

The Agency's response argues that the information included in the brief, "while admittedly outside the record" is relevant to the Agency's argument that the appeal is moot.

R.Mot.S. at 3-4. Furthermore, the Agency argues that the brief had attached to it a "Verification of Facts Not of Record by Certificate." R.Mot.S. at 4. The Agency tenders a "correction" by stating that the certificate applies to the motion for extension of time. *Id.*

The Agency also responds to the ESG Watts argument that the Agency attempted to introduce prejudice by asserting that the assertions of fact are not accompanied by an affidavit. R.Mot.S. at 9. Further, the Agency asserts such information is outside the record of this proceeding. *Id.* Finally, the Agency states that there has been no approval of financial assurance by insurance policies for ESG Watts. *Id.*

The Board grants the motion for extension of time to file the brief. The Board believes that accepting the brief will allow for a more comprehensive discussion and resolution of the issues in the case. However, the Board does agree with ESG Watts in part, and therefore the Board will strike the following portions of the Agency's brief from this record.

First, the Agency's brief addresses arguments and issues from ESG Watts, Inc. v. IEPA, PCB 01-139 (PCB 01-139), which was not consolidated for hearing with the instant case.[1] PCB 01-139 involves similar issues as the instant case; however, the facts are different. Specifically, United Capitol Insurance Company issued the Pollution Liability Insurance policies at issue in PCB 01-139 whereas in this case Frontier Pacific Insurance Company issued the policies. Mot.S. at 1-2. Thus, arguments concerning policies issued by United Capitol Insurance Company are not relevant in this matter. Therefore, the portions of the brief that address arguments relating to United Capitol Insurance Company are stricken.

Second, the Agency included in the brief a court order from the Circuit Court of Cook County that was entered on November 14, 2001. The court order was not before the Agency when the Agency's decision was made. Therefore, the Board cannot now consider that court order. The Board also strikes the attachment from the brief and any argument relating to the attachment. *See* West Suburban Recycling and Energy Center, L.P. v. IEPA, PCB 95-199 and 95-125 (Oct. 17, 1996); Panhandle Eastern Pipe Line Company v. IEPA (Jan. 21, 1999), PCB 98-102; Alton Packaging Corp. v. PCB, 162 Ill. App. 3d at 738, 516 N.E.2d at 280 (5th Dist. 1987).

FACTS

At hearing, the parties introduced Joint Exhibit A (J. Exh. A) which is a stipulation by the parties to certain facts in this case. The following discussion summarizes the pertinent facts from the stipulation and adds additional facts from the hearing transcripts and the record of the case where necessary.

On July 7, 2000, ESG Watts was the licensed operator for the Taylor Ridge/Andalusia landfill and Viola landfill and had an obligation to provide financial assurance for the

[1] The hearing officer did allow the filing of a single brief in this case, the cases consolidated for hearing and PCB 01-139.

closure/post-closure care of the facility. J.Exh. A at 1. ESG Watts submitted a request to approve substitute financial assurance for the Taylor Ridge/Andalusia landfill and the Viola landfill in the form of surplus lines "Pollution Liability Policies" bearing the Surplus Line Association Stamp dated April 13, 2000. *Id*. ESG Watts further requested that excess financial assurance, in the form of a trust[2], be released for the Taylor Ridge/Andalusia landfill and the Viola landfill. *Id*.

Frontier Pacific Insurance Company (Frontier) of La Jolla, California offered the pollution liability coverage. Vol. II R. at 0194-0195. Frontier was not then and is not now licensed to transact business in Illinois but was approved to provide insurance as an "excess or surplus lines insurer" by the insurance department in one or more states. J.Exh. A at 1. Frontier had issued the policies to ESG Watts in accordance with the insurance laws regulating surplus insurance in Illinois. *Id*. The policies provided for financial assurance for closure/post-closure in the amount of $2,031,549 for Taylor Ridge/Andalusia landfill and $397,080 for Viola landfill. J.Exh. A at 2. The policy period was from January 26, 2000 to January 26, 2001. Vol. II R. at 0194, Pet. Br. at 6.

ESG Watts had four trust agreements on file with the Agency at the time of the submission of the insurance policies: one dated February 28, 1985 (Vol. II R. at 0316-0316) and three dated March 9, 1994 (Vol. II R. at 0336-0339, Vol. II R. at 0344-0347 and Vol. II R. at 0352-0355). On July 7, 2000 the trust account had $1,412,517.22. J.Exh. A at 2.

On September 11, 2000, the Agency issued a decision refusing to accept the offered policies as substitute financial assurance. Vol. II R. at 0236-0237 and Vol. II R. at 0308-0312. The Agency's denial letter indicates that the offered policies did not meet the requirements of the Board's regulations as the insurance provider was not licensed in Illinois. The Agency cited to 35 Ill. Adm. Code 807.665 for support. Further, because the policies did not meet the requiements of the Board's regulations, the Agency's denial letter stated that the policies did not meet the requirements of the Environmental Protection Act (Act) (415 ILCS 5 *et seq.* (2000)). Finally, the Agency's letter indicated that "regardless of the acceptability" of the policies, the Agency "has reason to believe" that the cost of closure/post-closure care will be greater than the offered policies. Vol. II R. at 0236 and R. at 0308.

The Taylor Ridge/Andalusia Landfill is currently permitted to close under 35 Ill. Adm. Code 807. However, Taylor Ridge/Andalusia Landfill is required to seek a significant modification permit and close under 35 Ill. Adm. Code 811. Vol. II R. at 0150-0191; Tr. at 14.

STATUTORY AND REGULATORY BACKGROUND

A municipal solid waste landfill (MSWLF) is an area that receives household waste and may also receive commercial waste. 415 ILCS 5/3.85 (2000). MSWLFs are subject to the

[2] In PCB 01-62, ESG Watts argues that there are three separate trusts while the Agency maintains there is only one trust account. Based on the Board decision in that case, the Board will refer to a single trust.

Board's rules at 35 Ill. Adm. Code Subtitle G, which include requirements for closure and post-closure care of the units. The rules also require that adequate financial assurance be in place to insure that if the operator cannot do so, proper closure and post-closure care can be undertaken without cost to the State. In September 1990, the Board amended the rules governing the operation, closure and post-closure care of MSWLF. Existing landfills, which would include Taylor Ridge/Andalusia, were required to close pursuant to the Board's rules at 35 Ill. Adm. Code 807 or to prepare a significant modification permit under 35 Ill. Adm. Code 814. If a MSWLF elected to prepare a significant modification permit the MSWLF would then need to be closed under the new requirements at 35 Ill. Adm. Code 811.

In 1993, the General Assembly amended the Act by changing Section 21.1 of the Act to provide that "no person . . . shall conduct any disposal operation at a MSWLF unit that requires a permit under Subsection (d) of Section 21 of this Act, unless that person has posted with the Agency" financial assurance insuring closure/post-closure care of the facility. P.A. 88-496, eff. Sept. 13, 1993. In December 1984, the Board adopted emergency amendments that added 35 Ill. Adm. Code 807.Subpart F. Subpart F implements the provisions of Section 21.1 of the Act. Financial Assurance for Closure and Post-Closure Care of Waste Disposal Sites, R 84-22A (Dec. 27, 1984). The Board then adopted permanent rules in November of 1985. Financial Assurance for Closure and Post-Closure Care of Waste Disposal Sites, R 84-22C (Nov. 5, 1985). The rules adopted in November 1985 have not been amended and are still in place today as a part of 35 Ill. Adm. Code 807.

Section 807.665 provides:

a) An operator may satisfy the requirements of this Subpart by obtaining closure and post-closure care insurance which conforms to the requirements of this Section and submitting an executed duplicate original of such insurance policy to the Agency.

b) The insurer must be licensed to transact the business of insurance by the Illinois Department of Insurance.

c) The policy must be on forms approved by the Illinois Department of Insurance.

d) Face amount:

1) The closure and post-closure care insurance policy must be issued for a face amount at least equal to the current cost estimate. The term "face amount" means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer will not change the face amount, although the insurer's future liability will be lowered by the amount of the payments.

2) The Agency shall approve a reduction in the amount of the policy whenever the current cost estimate decreases.

e) The closure and post-closure care insurance policy must guarantee that funds will be available to close the site and to provide post-closure care thereafter. The policy must also guarantee that, once closure begins, the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the Agency to such party or parties as the Agency specifies. The insurer will be liable when:

1) The operator abandons the site;

2) The operator is adjudicated bankrupt;

3) The Board or a court of competent jurisdiction orders the site closed;

4) The operator notifies the Agency that it is initiating closure; or

5) Any person initiates closure with approval of the Agency.

f) After initiating closure, an operator or any other person authorized to perform closure or post-closure care may request reimbursement for closure and post-closure care expenditures by submitting itemized bills to the Agency. Within 60 days after receiving bills for closure or post-closure care activities, the Agency will determine whether the expenditures are in accordance with the closure plan or post-closure care plan, and if so, will instruct the insurer to make reimbursement in such amounts as the Agency specifies in writing. If the Agency has reason to believe that the cost of closure and post-closure care will be significantly greater than the face amount of the policy, it may withhold reimbursement of such amounts as it deems prudent until it determines that the operator is no longer required to maintain financial assurance.

In 1995 the General Assembly amended Section 21.1 of the Act in P. A. 89-200, eff. Jan. 1, 1996. Section 21.1 of the Act provides in part:

(a) Except as provided in subsection (a.5), no person other than the State of Illinois, its agencies and institutions, or a unit of local government shall conduct any waste disposal operation on or after March 1, 1985, which requires a permit under subsection (d) of Section 21 of this Act, unless such person has posted with the Agency a performance bond or other security for the purpose of insuring closure of the site and post-closure care in accordance with this Act and regulations adopted thereunder.

(a.5) On and after the effective date established by the United States Environmental Protection Agency for MSWLF units to provide financial

> assurance under Subtitle D of the Resource Conservation and Recovery Act, no person, other than the State of Illinois, its agencies and institutions, shall conduct any disposal operation at a MSWLF unit that requires a permit under subsection (d) of Section 21 of this Act, unless that person has posted with the Agency a performance bond or other security for the purposes of:
>
> (1) insuring closure of the site and post-closure care in accordance with this Act and its rules; and
>
> (2) insuring completion of a corrective action remedy when required by Board rules adopted under Section 22.40 of this Act or when required by Section 22.41 of this Act.
>
> The performance bond or other security requirement set forth in this Section may be fulfilled by closure or post-closure insurance, or both, issued by an insurer licensed to transact the business of insurance by the Department of Insurance or at a minimum the insurer must be licensed to transact the business of insurance or approved to provide insurance as an excess or surplus lines insurer by the insurance department in one or more states. 415 ILCS 5/21.1(a) and (a.5) (2000).

The Board did not amend 35 Ill. Adm. Code 807.665 after the change in the Act. The Board did, however, amend the financial assurance rules at 35 Ill. Adm. Code 811 for MSWLF which were either new or preparing significant modification permits. The amendment to 35 Ill. Adm. Code 811 were added in RCRA Subtitle D Update, USEPA Regulations (July 1, 1996 through December 31, 1996) R97-20 (Nov. 20, 1997) and included the new statutory language from Section 21.1(a.5) of the Act (415 ILCS 5/21.1(a.5) (2000)).

In summary, MSWLFs are required by Section 21.1 of the Act, to provide financial assurance for closure/post-closure care. The financial assurance mechanisms are delineated by the Board's rules at 35 Ill. Adm. Code 807 and 811. The General Assembly amended Section 21.1 of the Act to allow insurers not licensed in Illinois to provide certain types of financial assurance subsequent to the original enactment of Section 21.1 and the Board's adoption of rules. The Board has amended the rules at Part 811 to reflect the statutory change but not the rules at Part 807.

THE PERMITTING PROCESS

After the Agency's final decision on a permit is made, the permit applicant may appeal that decision to the Board. 415 ILCS 5/40(a)(1)(2000). The question before the Board in permit appeal proceedings is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would have occurred if the requested permit had been issued. Panhandle Eastern Pipe Line Company v. IEPA (Jan. 21, 1999), PCB 98-102; Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E. 2d 189 (1st Dist. 1983). Furthermore,

the Agency's denial letter frames the issues on appeal. ESG Watts, Inc. v. IPCB, 286 Ill. App. 3d 325, 676N.E.2d 299 (3rd Dist. 1997).

Section 39(a) of the Act also allows the Agency to impose conditions on permits:

> In granting permits the Agency may impose such conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder. 415 ILCS 5/39(a) (2000).

Section 40(a)(1) of the Act provides that:

> If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 5/40(a)(1)(2000).

Standard of Review

It is well-settled that the Board's review of permit appeals of this type is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987). However, it is the hearing before the Board that provides a mechanism for the petitioner to prove that operating under the permit as granted would not violate the Act or regulations. Further, the hearing affords the petitioner the opportunity "to challenge the reasons given by the Agency for denying such permit by means of cross-examination and the Board the opportunity to receive testimony which would 'test the validity of the information (relied upon by the Agency)'." Alton Packaging Corp. v. PCB, 162 Ill. App. 3d at 738, 516 N.E. 2d at 280, quoting IEPA v. PCB, 115 Ill. 2d 65, 70 (1986).

Typically, evidence that was not before the Agency at the time of its decision is not admitted at hearing or considered by the Board. West Suburban Recycling and Energy Center, L.P. v. IEPA (Oct. 17, 1996), PCB 95-199 and 95-125; Panhandle Eastern Pipe Line Company v. IEPA (Jan. 21, 1999), PCB 98-102; Alton Packaging Corp. v. PCB, 162 Ill. App. 3d at 738, 516 N.E.2d at 280. Additionally, Section 105.214(a) of the Board's procedural rules states:

> Except as provided in subsection (b), (c) and (d) of this Section, the Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101.Subpart F, upon an appropriately filed petition for review under this Subpart. The hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact. 35 Ill. Adm. Code 105.214(a).

ESG WATTS' ARGUMENTS

ESG Watts maintains that the substitute financial assurance in the form of surplus line Pollution Liability Policies was sufficient to meet the obligation ESG Watts has to provide financial assurance for closure/post-closure care at the Taylor Ridge/Andalusia landfill and Viola landfill. In support of this position ESG Watts offers four arguments. First, ESG Watts asserts that the Agency's reliance on Section 807.665 is misplaced because Section 807.665(b) is *ultra vires* and is not a lawful regulation. Pet. Br. at 8. Second, ESG Watts argues that the record indicates that the copies of the policies provided the Agency were complete duplicates of the policies submitted to ESG Watts. Pet. Br. at 11. Third, ESG Watts maintains that the Agency exceeded its authority in determining that the Agency had "reason to believe" that the actual closure/post-closure care costs would exceed the approved costs. *Id*. Fourth, ESG Watts argues that even if the Agency has the power to withhold release of excess trust funds upon a belief that the actual costs might be higher than approved costs, the evidence in this matter does not support such a finding. Pet. Br. at 14. The following discussion will summarize each of these arguments.

The Agency's Reliance on Section 807.665 is Misplaced Because Section 807.665(b) is *Ultra Vires* and is not a Lawful Regulation

ESG Watts asserts that the Agency's reliance on upon Sections 807.665(b), (c), and (e) as denial reasons is misplaced. ESG Watts argues that assertion that Section 21.1 of the Act was amended by P.A. 89-200, eff. Jan. 1, 1996, to allow that an insurer, at a minimum, "must be licensed to transact the business of insurance or approved to provide insurance as an excess or surplus lines insurer by the insurance department in one or more states." 415 ILCS 5/21.1 (2000). ESG Watts points out that the Board amended 35 Ill. Adm. Code 811.714 (the financial assurance provisions for landfills classified as "new") to allow for insurance to be provided by an insurer who, at a minimum, must be licensed to transact the business of insurance or approved to provide insurance as an excess or surplus lines insurer by the insurance department in one or more states. 35 Ill. Adm. Code 811.714. These amendments became effective on November 25, 1997. ESG Watts further points out that the Board did not and has not made a similar change to Part 807. Pet. Br. at 9-10.

ESG Watts argues that the effect of not amending Part 807 is to "outlaw what the statute expressly allows" and that is in the nature of an *ultra vires* act. Pet. Br. at 10. As such, ESG Watts asserts that the Agency cannot disqualify the financial assurance tendered by ESG Watts as the financial assurance meets the requirements of Section 21.1 of the Act. *Id*.

ESG Watts also asserts that "it is a given that the Illinois Department of Insurance does not approve forms issued by surplus lines insurers since those policies are approved by the Surplus Lines Association of Illinois." Pet. Br. at 11.

The Record Indicates that the Copies of the Policies Provided the Agency Were Complete Duplicates of the Policies Submitted to ESG Watts

The Agency's denial letter specifically noted that the tendered policy was not an "executed duplicate original of the policy." Vol. II R. at 0237. However, ESG Watts argues that the stipulation of the parties is that the policy was accompanied by a statement from an authorized representative that the polices were complete duplicates. Pet. Br. at 11.

The Agency Exceeded its Authority in Determining that the Agency had "Reason to Believe" that the Actual Closure/Post-Closure Care Costs Would Exceed the Approved Costs

ESG Watts argues that the Board's rules require the release of excess financial assurance upon acceptance of substitute financial assurance. ESG Watts points out that Section 807.665 requires the closure/post-closure care policy be issued for a face amount at least equal to the current cost estimates. Pet. Br. at 13. ESG Watts states that the rule provides that after closure has been initiated, the operator may seek reimbursement for actual expenditures, and the Agency will instruct the insurer to make reimbursement unless the Agency has "reason to believe" that the actual costs will be significantly greater than the face amount of the policy. Pet. Br. at 13. ESG Watts argues that the Agency has inappropriately relied upon provisions dealing with reimbursement for expenditures after closure has been initiated as a denial reason. *Id*.

ESG Watts asserts that the only provisions which allow the Agency to withhold release of financial assurance based on a "reason to believe" that actual costs might exceed the current cost estimates are provisions which deal with reimbursements for expenditures after closure has begun. Pet. Br. at 13. ESG Watts maintains that this authority is absent when dealing with the release of a financial institution, release of an operator, releasing excess trust funds, and accepting financial assurance insurance policies in the first place. *Id*. ESG Watts argues that there is good reason for "this dichotomy" in that current cost estimates may be almost two years old when closure is initiated and matters may be discovered during actual closure that increases the costs. *Id*. However, prior to the initiation of closure, the Agency must rely on current cost estimates to determine if excess financial assurance exits. Pet. Br. at 13.

Even if the Agency Has the Power to Withhold Release of Excess Trust Funds Upon a Belief that the Actual Costs Might be Higher than Approved Costs, the Evidence in this Matter does not Support such a Finding

ESG Watts argues that the Agency's "reason to believe" that the actual costs would be higher than the estimated costs was based on the fact that the Taylor Ridge/Andalusia Landfill had to obtain a significant modification permit "pursuant to 35 Ill. Adm. Code 811.100 *et seq*. standards" and the current closure estimates were for a "Part 807" landfill. Pet. Br. at 14. ESG Watts asserts that the Agency's witness, however did not have any specific knowledge about the current cost estimate for Taylor Ridge/Andalusia Landfill and did not know if the current cost estimate included "Part 811" requirements already. *Id*. ESG Watts maintains that the Agency was "guessing" and that is not a "reason to believe" that the actual costs would be more than the approved cost estimates. *Id*.

AGENCY ARGUMENTS

The Agency argues that the decision to refuse to accept substitute financial assurance offered by ESG Watts is supported by the Act and Board regulations. The Agency asserts that ESG Watts cannot ignore the provisions of Section 807.665(b). Resp. Br. at 19. In addition, the Agency maintains that the record supports the Agency's "reason to believe" that regardless of the acceptability of the policies, the trust fund could not be released. Resp. Br. at 23. Finally the Agency asserts that the appeal by ESG Watts is moot. Resp. Br. at 34. The following discussion will summarize those arguments.

ESG Watts Cannot Ignore the Provisions of Section 807.665(b)

The Agency relies on the language of the Act to support the refusal to accept the policies offered by ESG Watts. The Agency points to language in Section 21.1(a) and (b) that requires financial assurance mechanisms to be in accordance with the Act and Board regulations. Resp. Br. at 19-20. The Agency then argues that, because the Board's regulations at Section 807.665(b) require the insurer to be licensed in Illinois and Frontier Pacific Insurance Company is not licensed in Illinois, the Agency cannot approve the substitution of financial assurance offered by ESG Watts in this case. Resp. Br. at 20.

The Agency opines that although the Agency "might welcome the authority to unilaterally determine which Board regulations" the Agency must follow, the Agency does not have the authority to do so. Resp. Br. at 21. Furthermore, the Agency argues that the Agency must look to both the Act and the Board regulations and if one is "more stringent" than the other the more stringent requirement must apply in order to protect the environment. *Id*. The Agency asserts that if ESG Watts believed the policies were adequate, ESG Watts could have sought a rule change or an adjusted standard from the Board. Resp. Br. at 22.

The Agency concedes that the general rule is that when there is a conflict between a rule and the statute the statute controls. Resp. Br. at 22. However, the Agency asserts the Board may narrow by interpretation or regulation a privilege or exemption granted by statute. *Id*. In support of this position the Agency cites to Pielet Brothers Trading, Inc. v. PCB, 110 Ill. App. 3d, 442 N.E.2d 1374 (5th Dist. 1982). In that case the Act at the time of the litigation contained an exemption that allowed a person to conduct disposal operations of refuse generated by the operator's activities. Resp. Br. at 22. The Board found that the Pielet facility did not meet the exemption, because the exemption applied to minor amounts of refuse which could be disposed of without environmental harm. Resp. Br. at 22-23.

The Agency admits that the provisions in this case do not have the long-standing history of Board interpretation that that was present in Pielet; however, the Agency argues that one apparent concern that led the Board to exclude the Pielet facility was the existence of an increased risk of environmental harm. Resp. Br. at 23, citing Pielet at 442 N.E.2d 1374, 1376. The Agency asserts that there is also an increased risk of environmental harm in the present case. Resp. Br. at 23. The Agency maintains that the risk of gas and leachate releases is greater with a facility closed pursuant to Part 807 rather than Part 811. The Agency also states that "as a generalization" there may be an increased need to rely on post-closure care with Part 807 facilities. The Agency argues that these risks justify retaining the requirement in Section 807.335(b). *Id*.

The Record Supports the Agency's "Reason to Believe" that Regardless of the Acceptability of the Policies, the Trust Fund Could not be Released

The Agency argues that ESG Watts must close the Taylor Ridge/Andalusia landfill pursuant to Part 811 and at this time approval for a permit to close under Part 811 has not been issued. Resp. Br. at 24-25. The Agency maintains that just because there is not specific knowledge of what closure may cost under Part 811 does not mean that there is not a legitimate "reason to believe" that the costs will exceed current estimates. Resp. Br. at 25. The Agency points to the testimony of Chris Liebman who testified to the significantly increased obligation for closure under Part 811 versus Part 807, as well as increased financial commitment. Resp. Br. at 25, 26. Furthermore, the Agency asserts that even though Mr. Liebman lacked "intimate knowledge" of ESG Watts' closure plan, he was certain that the current plan did not meet the Part 811 requirements. Resp. Br. at 26.

The Appeal by ESG Watts is Moot

The Agency asserts that the policies tendered by ESG Watts in this case have expired and were not renewed. Resp. Br. at 35. Therefore, the Agency argues this appeal is moot. *Id*. The Agency points to Duncan Publishing, Inc. v. City of Chicago, 304 Ill. App. 3d 778, 709 N.E.3d 1281 (1st Dist. 1999) for the definition of when a claim is moot. Duncan states that "a claim is moot when no actual controversy exits or events occur which make it impossible for a court to grant effectual relief." Duncan at 709 N.E.2d 1281, 1285. The Agency argues that although ESG Watts wanted to present the Agency with something of value to fully fund financial assurance obligations intervening circumstances have rendered the policies worthless. Resp. Br. at 37. The Agency asserts the Board can therefore no longer offer effectual relief and the appeal is moot. *Id*.

The Agency maintains that the principal of financial assurance is to provide security for potential future costs of closure and post-closure care. Resp. Br. at 38. With insurance coverage that has expired, this cannot be accomplished and the appeal is moot. *Id*.

REPLY OF ESG WATTS

ESG Watts argues five points in the reply brief. ESG Watts makes the first four points in a single paragraph each, while the fifth point is more extensive. A brief summary of the five points follows.

In the first two points, ESG Watts asserts that the Agency has misstatements in the brief. The first point is that the Agency on page seven of the brief asserts that the policies tendered have a $100,000 deductible. ESG Watts points to an endorsement in the record deleting the deductible portion of the policies. Reply at 1 citing Vol. II R. at 00132, 00297. The second misstatement according to ESG Watts is the argument put forward by ESG Watts regarding the February 28, 2001 denial letter at issue in PCB 01-139.[3]

[3] The Board need not address this argument in this case and will not do so.

Third, ESG Watts maintains that the Agency cannot argue on the one hand that access to the Illinois Insurance Guaranty Fund is why insurers should be licensed in Illinois, but then argue that on the other hand the Illinois Insurance Guaranty Fund does not apply to the type of policies at issue in the case. Reply at 2. ESG Watts maintains that the Agency is attempting to have it both ways and the Agency cannot do so. *Id*.

Fourth, ESG Watts argues that the Agency's entire argument in support of the denial reason that the Agency has a "reason to believe" the closure costs will exceed the cost estimates fails to take into consideration the plain language of Section 807.604. Reply at 2. ESG Watts maintains that the Agency, in the brief, admits ESG Watts submitted substitute financial assurance in the amount of the current closure/post-closure care cost estimates. *Id*. ESG Watts asserts that the plain language of Section 807.604 requires the release of surplus financial assurance. ESG Watts argues that the Agency's brief does not address this, but rather indicates that this was not the sole issue for denial. Reply at 2-3. ESG Watts argues that the Agency fails to address the "direct challenge to the reasonableness of the Agency's belief the actual costs of closure/post-closure care" at ESG Watts site will exceed the current cost estimates. Reply at 3.

Finally, ESG Watts asserts that the Agency misstates the law with regards to the Agency's argument that the appeal is moot. Reply at 3. ESG Watts concedes that under normal circumstances the appeals would be considered moot as the policies requested for approval are no longer effective by the terms of the policy. *Id*. However, ESG Watts argues the Board has recognized an exception to the mootness rule of a "substantial public interest" in a case. Reply at 3-4, citing Brockman v. Benabei, PCB 88-158 (Apr. 27, 1989) (Brockman). According to ESG Watts the "substantial public interest" exception is to be very limited and invoked only in cases displaying a clear and extraordinary degree of public concern. Reply at 4. ESG Watts argues that the exception may be invoked if the question is of a public nature, there is a desirability for making an authoritative determination to guide a subordinate body and there is a likelihood of recurrence of the question. Reply at 4, citing Brockman, People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N. E. 2d 769 (1952), Bonaguro v. County Officers Electoral Board, 158 Ill. 2d 391, 634 N.E.2d 712 (1994) (Bonaguro).

ESG Watts asserts that this case involves a "substantial question of a public nature." Reply at 4. ESG Watts points out that this case involves a question of financial assurance for sanitary landfills, a need to issue an "authoritative" decision to guide the Agency and the likelihood that the issue will represent itself. Reply at 4. Therefore, ESG Watts argues that this case represents an exception to the mootness rule.

ESG Watts also argues that the Board touched on another exception to the mootness rule in Brockman (pages 18-19). Reply at 4. That exception is the existence of "collateral legal consequences". Reply at 4-5, citing Kraut v. Rachford, 51 Ill. App.3d 206, 366 N.E.2d 497 (1st Dist. 1977); *In re* Sciara, 21 Ill. App. 3d 889, 316 N.E.2d 153 (1st Dist. 1974); *In re* Graham, 40 Ill. App. 3d 452, 352 N.E.2d 387 (1st Dist. 1976). ESG Watts points out that the courts have held that the "possible future consequences of an adjudication on further adjurations is a sufficient basis to invoke the collateral legal consequences exception." Reply at 5. ESG Watts asserts that the "collateral legal consequences" exception applies in this case. Reply at 6. ESG

Watts points to the potential liability for civil penalties if adequate financial assurance is not provided by ESG Watts for the sites owned by ESG Watts as a "collateral legal consequence" which requires that the mootness rule not apply. *Id*.

DISCUSSION

Although the parties make several arguments, there are only three issues for the Board to address. The first issue the Board must address is whether the appeal is moot. Second, if the appeal is not moot, the Board must decide if insurance policies offered by ESG Watts met the requirements of the Act and the Board regulations. Finally, the third issue is whether the Agency may refuse to release "surplus" financial assurance, if the Agency has a "reason to believe" that the actual cost of closure/post-closure care will exceed the current cost estimates. The Board will discuss each of the issues below.

Is the Appeal Moot?

Both parties agree that the due to the passage of time the insurance policies at issue have expired and under normal circumstance the appeal would be moot. However, ESG Watts correctly points out that there are exceptions to the principle that a case must be dismissed as moot. The Supreme Court of Illinois points out:

> One exception to the mootness doctrine allows a court to resolve an otherwise moot issue if the issue involves a substantial public interest. The criteria for application of the public interest exception are: (1) the public nature of the question, (2) the desirability of an authoritative determination for the purpose of guiding public officers, and (3) the likelihood that the question will recur. Bonaguro 634 N.E.2d 712, 713-714.

The Board, in 1989, applied this exception to a permit appeal case (Brockman) and will do so again today.

Clearly the question presented in this proceeding is one of a public nature in that financial assurance for closure/post-closure care of a landfill is essential to protect the State of Illinois from potential liability to care for landfills that may be abandoned. Also, an authoritative determination by the Board is necessary to establish the Board's interpretation of the Board's rules and the Act. Absent a definitive decision by the Board the relationship between the Board's rules at Part 807 and Section 21.1(a.5) will be unclear. Furthermore, the possibility of the question recurring is highly likely and a recurrence has already occurred (*see* PCB 01-139). Therefore, the Board finds that this appeal falls into an exception to the mootness doctrine and the Board will make a decision on the merits of the appeal.

In addition, the Board notes that the arguments raised by ESG Watts concerning potential civil liability for underfunded financial assurance or even no financial assurance are well founded. The Board has issued significant fines to ESG Watts in the past for just such violations (*See* People v. ESG Watts, Inc. PCB 96-233 (Feb. 5, 1998)). Thus, the concern raised by ESG

Watts is further reason to find that this appeal is not moot and a decision on the merits should be made.

Did the Insurance Policies Offered by ESG Watts Meet the Requirements of the Act and the Board's Regulations?

ESG Watts argues that the Board's failure to amend Part 807 is in the nature of an *ultra vires* act and as such the regulations at Section 807.665 cannot be used to "disqualify" financial assurance tendered by ESG Watts. Pet. Br. at 10. The Agency's denial letter indicated several reasons that the offered policies did not meet the regulations at Section 807.665. First, the insurer was not licensed in Illinois and the policies did not meet the requirements of Section 807.665. Vol. II R. at 0237. Second, the denial letter stated that the policies were not on forms provided by the Illinois Department of Insurance as required by 35 Ill. Adm. Code 807.665(c). *Id*. Third, ESG Watts did not provide sufficient proof that the insurer has sufficient reserves to pay for closure/post-closure care as required by 35 Ill. Adm. Code 807.665(e). The Board will discuss each of those issues in turn.

First, the Board agrees with the Agency that Section 807.665 does not expressly allow for policies offered by insurance companies not licensed in Illinois to be used as financial assurance. However, Section 21.1(a.5) of the Act does allow insurance companies not licensed in Illinois to be used to provide financial assurance. 415 ILCS 5/21.1(a.5) (2000). The Board and the Agency are both creatures of statute, therefore any authority the Board or the Agency possess must flow from the statute. Granite City Division of National Steel Company v. PCB, 155 Ill.2d 149, 613 N.E.2d 719 (1993). The Board cannot by rule disallow that which is allowed by statute. In this instance the plain language of the statue allows for insurance provided by either an insurance company licensed in Illinois "or at a minimum the insurer must be licensed to transact the business of insurance or approved to provide insurance as an excess or surplus lines insurer by the insurance department in one or more states." 415 ILCS 5/ 21.1(a.5) (2000). Thus, an insurance company need not be licensed in Illinois in order to provide pollution liability insurance. The Board cannot by rule limit insurance coverage to companies licensed in Illinois.

The Agency in the brief agreed that the general rule of law is that in conflicts between a statute and an administrative regulation, the statute controls. Resp. Br. at 22. However, the Agency argues that there is precedent for the Board to "narrow by interpretation or regulation . . . a[n] exception granted by statute." *Id*. The Agency cites to Pielet Bros. Trading, Inc. v. PCB, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982) (Pielet Bros.) to support this proposition. In Pielet Bros. the Board found that an exemption from the permit requirements which allowed the collection and disposal of refuse generated by the owner's own activities on site without a permit did not apply to the 80 acre site holding 250 cubic yards of refuse. Pielet Bros. at 442 N.E.2d 1372, 1377. The court agreed with the Board and found the language of the exemption ambiguous. *Id*. The court further found that the legislature did not intend for the exemption "to dominate and defeat the other provisions of the Act." *Id*.

The facts of this case are clearly distinguishable from Pielet Bros. in that the Agency is asking the Board to ignore the plain language of the statute. The language of Section 21.1(a.5) is not ambiguous and clearly allows "at a minimum the insurer must be licensed to transact the

business of insurance or approved to provide insurance as an excess or surplus lines insurer by the insurance department in one or more states." 415 ILCS 5/21.1(a.5) (2000). Furthermore, allowing such insurance companies to provide policies does not dominate and defeat other provisions of the Act. Therefore, the Board finds that Pielet Bros. is distinguishable and the Board will not apply it to this case.

The Agency also argued that the Act does not allow the Agency to issue a permit if the permit will violate the Act or Board regulations. Because the insurance policies were issued by an insurance company not licensed in Illinois, the Agency maintains that approving financial assurance provided by the insurance policies would have violated the Board's rule at Section 807.665. The Board appreciates the Agency's concern; however, the Act specifically allows for insurance companies not licensed in Illinois to provide these types of policies. The plain language of the Act must control.

Next the Board will determine whether the remaining provisions of Section 807.665 must be met in order for policies issued by insurers not licensed in Illinois to be accepted by the Agency. Section 807.665(c) requires that the policy be on forms approved by the Illinois Department of Insurance. Section 807.665(e) requires that the insurance policy guaranties that funds will be available for closure post-closure care.

ESG Watts argues that Section 807.665(c) and (e) should not be relied upon. Pet. Br. at 8. The Board disagrees. In 1997 when the Board amended the financial assurance rules at Part 811 to include the statutory language of Section 21.1 as amended in P.A 88-496, the Board did not remove the requirements that mirror Section 807.665(c) and (e). Thus, even where the Board rules allow financial assurance to be supplied by an insurer who "at a minimum . . . must be licensed to transact the business of insurance or approved to provide insurance as an excess or surplus lines insurer by the insurance department in one or more states." 415 ILCS 5/ 21.1(a.5) (2000). The Board does require use of forms by the Illinois Department of Insurance and proof that the insurer has sufficient reserves to pay for closure/post-closure care.

ESG Watts maintains that "it is a given that the Illinois Department of Insurance does not approve forms issued by surplus lines insurers." Pet. Br. at 11. The Board finds nothing in the record to support this assertion by ESG Watts. Furthermore, the inclusion of an identical provision in Part 811 indicates just the opposite.

As to the issue of compliance with Section 807.665(e), ESG Watts merely states that by statute surplus line policies are not a part of the Insurance Guaranty Trust Fund. Pet. Br. at 11. This argument does not address the requirement of Section 807.665(e) that "insurance policy must guarantee that funds will be available to close the site and to provide post-closure care" once closure begins. 35 Ill. Adm. Code 807.665(e). Furthermore, the Board can find nothing in the record which provides that assurance.

In summary, the Board finds that the provisions of Section 807.665 apply to financial assurance funds even though the rules do not allow an insurer not licensed in Illinois to provide insurance. The plain language of Section 21.1 of the Act overrides the provisions of Section 807.665(b). 415 ILCS 5/21.1 (2000). However, the remaining provisions of Section 807.665 do

apply. Therefore, the Board finds that the record supports the Agency's denial letter because, the offered Pollution Liability Policies do not conform with 35 Ill. Adm. Code 807.665(c) and (e). The Agency's denial is affirmed.

May the Agency Refuse to Release Financial Assurance Based on the Agency's "Reason to Believe"

ESG Watts argues that the funds in the trust fund should be released as the Pollution Liability Policies were issued in an amount equal to the current closure/post-closure care cost estimates. The Agency asserts that the Taylor Ridge/Andalusia landfill must close under Part 811 and the Agency has "reason to believe" that the current cost estimates are insufficient. Therefore, the Agency maintains that the funds in the trust fund are not "excess financial assurance" and cannot be released.

Section 807.604 provides in part that the Agency will agree to release a trustee when: "An operator substitutes alternate financial assurance such that the total financial assurance for the site is equal to or greater than the current cost estimate without counting the amounts to be released." 35 Ill. Adm. Code 807.604. The parties agree that the policies were issued in an amount equal to the current cost estimates. J.Exh. A at 2. Thus, the plain language of the Board's rules would appear to require the release of the trust fund upon acceptance of the Pollution Liability Policies.

The Agency however maintains that the "actual cost" of closure and post-closure will "significantly" exceed the amount stated in the Part 807 current cost estimates. Resp. Br. at 24. The Agency points to the testimony of Mr. Chris Liebman to support the proposition that the actual costs will exceed current cost estimates. Resp. Br. at 25. Mr. Liebman indicated the differences between closure/post-closure care under Part 807 and Part 811. As previously stated, Taylor Ridge/Andalusia Landfill must close pursuant to Part 811, although a current permit has not been approved. J.Exh. A at 2. The Agency has cited no authority for its denial based on a "reason to believe" that the actual cost will exceed the cost estimates.

ESG Watts points to language in 35 Ill. Adm. Code 807.601 *et seq.* which deals with reimbursement for expenditures after closure/post-closure care has begun as the language relied upon by the Agency. Pet. Br. at 13. A review of the Part 807 rules reveals that ESG Watts has correctly characterized the language in the Board's rules. The plain language of the Board's rules allows the Agency to withhold funds or the release of funds if "after initiating closure" the Agency has a "reason to believe" the costs will exceed the current cost estimates. See 35 Ill. Adm. Code 807.606, 807.661, and 807.665. Thus, the Board can find no support in the Board's rules or the Act for the Agency to withhold funds in excess of current cost estimates because the Agency has a "reason to believe" the actual costs will exceed the estimates.

Policy Issues

In addition to resolving the issues raised by the parties, the Board wishes to address two additional items. First, nothing in this opinion should be read to mean that ESG Watts need merely submit insurance policies on forms provided by the Illinois Department of Insurance to

receive approval for the policies as financial assurance for closure/post-closure care of the Viola and Taylor Ridge/Andalusia landfills. Any financial assurance offered must meet the requirements of the Board's rules not superseded by the Act and all provisions of the Act. Second, the Board is concerned about the status of Taylor Ridge/Andalusia landfill. The parties agree that the Taylor Ridge/Andalusia landfill must close pursuant to Part 811. Clearly, because of the additional requirements in Part 811 for closure/post-closure care, closure under Part 811 is more costly than closure under Part 807. Section 21.1 of the Act requires that adequate financial assurance be provided for closure/post-closure care. The Board at this time cannot envision a situation where the issue of surplus financial assurance can be determined until a closure/post-closure care permit has been approved pursuant to Part 811 for the Taylor Ridge/Andalusia landfill. And since there is only one trust fund providing closure/post-closure care financial assurance for both the Viola and Taylor Ridge/Andalusia landfills, the issue of surplus financial assurance for the Viola landfill is also dependent on approval of a closure permit under Part 811 for Taylor Ridge/Andalusia landfill.

CONCLUSION

The Board affirms the Agency's decision refusing to accept the substitute financial assurance offered by ESG Watts for the Taylor Ridge/Andalusia landfill and the Viola landfill because the insurance policies were not provided on forms approved by the Illinois Department of Insurance. The Board does agree with ESG Watts that the Agency inappropriately refused to accept the policies because the insurer was not licensed in Illinois. The Board also agrees that the Agency may not refuse to release financial assurance based on the Agency's "reason to believe" actual costs may exceed cost estimates.

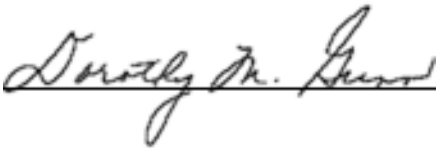
ORDER

The Board affirms the Agency's denial of substitute financial assurance.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court with 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 4, 2002, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board