ILLINOIS POLLUTION CONTROL BOARD
April 4, 2002

ESG WATTS, INC., (Sangamon Valley Landfill), an Iowa corporation,	)	
Petitioner,	)	
v.	)	PCB 01-62
	)	(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 release any existing financial assurance tendered by ESG Watts for the Sangamon Valley landfill located in Sangamon County. This case was consolidated for hearing with ESG Watts, Inc. (Viola Landfill) v. IEPA, PCB 01-63 and ESG Watts, Inc. (Taylor Ridge/Andalusia Landfill) v. IEPA, PCB 01-64 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 not consolidate PCB 01-62 with PCB 01-63 and PCB 01-64 for decision because, although the issues are similar, the unique facts surrounding this 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 (Reply). 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 release existing financial assurance.

MOTIONS

Before considering 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 the 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, PCB 98-102 (Jan. 21, 1999); 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. Included in the summary of facts are facts surrounding the financial assurance for Taylor Ridge/Andalusia landfill and the Viola landfill. These facts are necessary to understand the interrelated nature of the financial assurance for all three of the ESG Watts facilities.

On February 18, 2000, ESG Watts was approved for transfer of operation and ownership of the Sangamon Valley landfill. J.Exh. A at 1. ESG Watts had not been released by the Agency from the obligation to supply financial assurance. *Id*. 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 closure/post-closure care of those two facilities. J.Exh. A at 1. On July 7, 2000, 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 all three landfills. *Id*.

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

[2] ESG Watts argues that there are three separate trusts while the Agency maintains there is only one trust account. The Board will address those arguments later in the opinion and in this section refer to a single trust.

Frontier Pacific Insurance Company (Frontier) of La Jolla, California offered the pollution liability coverage. Vol. II R. at 00194-00195. 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.

Until January 18, 1994, the Agency had treated the trust agreement submitted by ESG Watts as a unified trust. On January 18, 1994, the Agency transmitted trust agreement forms to ESG Watts. J.Exh. A at 2. On March 9, 1994, ESG Watts submitted four trust agreements on file with the Agency: one dated February 28, 1985 (Vol. II R. at 0316-0319) 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). The Agency never indicated that the trust agreements submitted on March 9, 1994 failed to establish a trust for each individual landfill. J.Exh. A at 2. On January 19, 1996, the Agency stated that there were separate trusts for each individual landfill and that funds could not be transferred from one trust account to another without complying with administrative regulations relating to excess funds. J.Exh. A at 1-2. On July 7, 2000, the trust account had $1,412,517.22. J.Exh. A at 2.

The original trust agreement dated February 28, 1985, provides that the trust "may be amended by an instrument in writing executed by" ESG Watts, the trustee and the Agency. Vol. II R. at 0318. The record also includes a letter from the trustee dated October 31, 1991, to the Agency which states that the original trust has not been "dissolved, terminated or amended." Vol. II R. at 0326. The trustee indicated that the "sub-accounting for each site is strictly for internal recordkeeping purposes only." *Id*.

On September 11, 2000, the Agency issued a decision refusing to accept the offered policies as substitute financial assurance for Taylor Ridge/Andalusia landfill and Viola landfill.[3] 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.

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[3] Today the Board also rules on the appeals filed in those two cases. ESG Watts, Inc. (Viola Landfill) v. IEPA, PCB 01-63 and ESG Watts, Inc. (Taylor Ridge/Andalusia Landfill) v. IEPA, PCB 01-64. In both those cases the Board affirmed the Agency's refusal to accept substitute financial assurance.

On September 11, 2000, the Agency also issued a denial letter which did not address the tendered financial assurance for Sangamon Valley landfill. Vol. II R. at 0141. In addition, the denial letter for Sangamon Valley landfill indicated that the Agency "refuses to release any existing financial assurance instrument tendered by ESG Watts, Inc., including any funds from the ESG Watts, Inc trust." Vol. II R. at 0141. The denial letter notes that the trust fund established by ESG Watts on February 28, 1995, "includes no language apportioning the trust assets to the operator's specific waste disposal sites." Vol. II R. at 0142. The letter states that the "corpus of this trust provides financial assurance for" all the landfills. *Id*.

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 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. 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 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 issues on appeal are framed by the Agency's denial letter. 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. * * * If there is no final action by the Agency within 90 days after the filing of the application for permit, the applicant may deem the permit issued. * * * 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 puts forth two arguments to support its position in this case. First, ESG Watts argues that the substitute financial assurance for Sangamon Valley landfill for the period for January 26, 2000 to January 26, 2001 provided by ESG Watts to the Agency has been approved by operation of law. Pet. Br. at 6. Second, ESG Watts maintains that there were separate trust funds for the Taylor Ridge/Andalusia landfill, the Viola landfill and the Sangamon Valley landfill. Pet. Br. at 14-15.

Approval by Operation of Law

ESG Watts asserts that the substitute financial assurance for Sangamon Valley landfill for the period for January 26, 2000 to January 26, 2001 provided by ESG Watts to the Agency has been approved by operation of law. Pet. Br. at 6. ESG Watts argues pursuant to Section 39(a) of the Act (415 ILCS 5/39(a)(2000)) the financial assurance is approved by operation of law. *Id*. ESG Watts cites Illinois Power Co. v. PCB, 112 Ill. App. 3d 457, 445 N.E.2d 820 (5th Dist 1983) and Marquette Cement Manufacturing Co. v. IEPA, 84 Ill. App. 3d 434, 405 N.E.2d 512, 514 to further bolster the argument. *Id*.

ESG Watts maintains that the legislature has "already assessed the risk of administrative delay and placed the risk squarely on the shoulders of the Agency." Pet. Br. at 7. Section 39(a) clearly states that if there is no final decision within 90 days after the filing of the application, the applicant may deem the permit issued, argues ESG Watts. *Id*. ESG Watts concludes that if the Board were to remand the nondecision to the Agency the Board would be allowing the Agency to engage in the administrative delay prohibited by Section 39(a) of the Act. *Id*.

Separate Trusts

ESG Watts asserts that the record contains evidence that there are separate trusts for the three landfills. Pet Br. at 14-15. Because there are three separate trusts, ESG Watts maintains that the funds in the trust for Sangamon Valley should be released as excess funds. Pet. Br. at 14.

AGENCY ARGUMENTS

The Agency puts forth three arguments[4] in support of the Agency's refusal to release financial assurance funds and the failure to "approve" financial assurance for Sangamon Valley landfill. First, the Agency argues that there was no need to approve substitute financial assurance, as ESG Watts was no longer responsible for providing financial assurance. Resp. Br. at 14-15. Second, the Agency argues that even had approval been required, the provisions of Section 39(a) of the Act do not apply to the approval of financial assurance mechanisms. *Id*. Finally, the Agency argues there is only one trust fund and therefore there is no "excess" financial assurance. Resp. Br. at 28-31. The Board will summarize each of the arguments below.

Approval by Operation of Law

The Agency maintains that the substitute financial assurance offered for Sangamon Valley landfill was not approved by default. Resp. Br. at 14. The Agency opines that since closure had not been initiated prior to the operating permit transfer, ESG Watts is no longer responsible for financial assurance for closure/post-closure care after the transfer. Resp. Br. at 14. The transfer was approved on February 18, 2000. J. Exh. A at 1. The Agency asserts that ESG Watts was no longer the owner or operator after the transfer and was released from the responsibility for providing financial assurance. Resp. Br. at 14. The Agency argues that since ESG Watts had no obligation to provide financial assurance the Agency had no obligation to review the offered financial assurance. *Id*.

The Agency's second argument is that the time limitations of Section 39(a) of the Act (415 ILCS 5/39(a) (2000)) do not apply to Agency decisions on financial assurance. Resp. Br. at 14. The Agency argues that the time limitation as set forth in Section 39(a) of the Act apply only to "instances where 'there is no final action by the Agency within 90 days after the filing of the application for permit'. (Emphasis supplied)." Resp. Br. at 14, citing 415 ILCS 5/39(a) (2000). The Agency opines that while certain financial assurance decisions are appealed to the Board under Section 40(a)(1) of the Act (415 ILCS 5/40 (2000)) "financial assurance mechanisms do not become permits by virtue thereof." Resp. Br. at 14-15.

The Agency further argues that Part 807 describes permit applications and financial assurance mechanisms are not permit applications. Resp. Br. at 15. The Agency maintains that financial assurance may be required as a condition of a permit, but the financial assurance mechanisms and the Agency decisions regarding the mechanisms are not permits. *Id*. The Agency maintains that accordingly the time limitations of Section 39(a) of the Act do not apply to Agency decisions on financial assurance mechanisms. *Id*.

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[4] The Board notes that the Agency puts forth an argument regarding financial assurance offered by ESG Watts for a time period prior to January 26, 2000. However, ESG Watts, in its brief, only addresses financial assurance for the period of January 26, 2000 to January 26, 2001. Therefore, the Board need not address the Agency's argument, as ESG Watts has not pursued the issue.

Separate Trusts

The Agency argues that under Illinois law when a method of exercising a power to modify or terminate is described in a trust agreement, the power may only be exercised in the manner described. Resp. Br. at 28 citing Parish v. Parish, 29 Ill. 2d 141, 193 N.E.2d 761 (1963); Dallinger v Abel, 199 Ill. App. 3d 1057, 557 N.E.2d 936 (3rd Dist. 1990); Williams v Springfield Marine Bank, 131 Ill. App. 3d 417, 475 N.E.2d 1122 (4th Dist. 1985). The Agency asserts that any attempt to modify or terminate a trust in a manner other than the one described in the trust agreement is void. Resp. Br. at 29, citing Dallinger. The Agency claims that the trust agreement from February 28, 1985 prescribed a manner for modifying or terminating the trust and the trust agreement has never been amended or terminated in accordance with the trust agreement. Resp. Br. at 29, citing Vol. II R. at 0316-0319.

In further support of this position, the Agency points to a letter from the trustee for the ESG Watts trust. Resp. Br. 29. In that letter (Vol. II R. at 0326), the trustee indicated that ESG Watts had not "dissolved, terminated or amended the original trust." Resp. Br. at 29. The letter indicated that "the sub-accounting for each site is strictly for internal recordkeeping purposes only." Vol. II R. at 0326. The Agency argues that the successor trustee cannot receive more than the predecessor trustee had to give. Resp. Br. at 31. Therefore, the Agency asserts the original financial assurance trust has not been amended or terminated. *Id*.

DISCUSSION

There are only two issues that need to be addressed in this proceeding. The first issue is whether the Agency's failure to decide on the substitute financial assurance offered by ESG Watts results in the financial assurance being acceptable by operation of law. The second issue is whether ESG Watts had one trust agreement or three. The Board will discuss each of these issues below.

Approval by Operation of Law

ESG Watts argues that because the Agency failed to make a decision within 90 days on the acceptability of the policy offered as substitute financial assurance for Sangamon Valley landfill, the financial assurance is acceptable as a matter of law. The Agency asserts that there was no need to make a decision on the financial assurance because ESG Watts no longer bore the responsibility for supplying financial assurance. The Board agrees with the Agency. Financial assurance for proper closure/post-closure care is the responsibility of the owner or operator of a landfill. 415 ILCS 5/21.1, 35 Ill. Adm. Code 807.600, 811.701. Once the operating permit for the Sangamon Valley landfill was transferred to another owner and operator, ESG Watts was no longer required to provide financial assurance. Therefore, the Board finds that the Agency was not required to make a decision on the acceptability of the financial assurance. Because the Board has accepted the Agency's position that a decision on the financial assurance was not necessary, the Board need not address the applicability of the time limitation in Section 39(a) of the Act (415 ILCS 5/39(a)).

Separate Trusts

ESG Watts maintains that the record demonstrates that there are three separate trust funds, one for each landfill. The Agency disagrees and argues that only one trust instrument exists with sub-accounting for each landfill. Again the Board agrees with the Agency. By the explicit terms of the February 28, 1985 trust, the only way to amend the terms of the trust was "by an instrument in writing executed by the Grantor [ESG Watts], the Trustee, and the IEPA Director." Vol. II R. at 0318. Although the record does contain three separate trust agreements from the successor trustee dated March 9, 1994 (Vol. II R. at 0303-0339, Vol. II R. at 0344-0347, Vol. II R. at 0352-0355) the record does not contain an "instrument in writing executed by" ESG Watts, the director of IEPA and the trustee which amends the trust agreement. Absent such an amendment, the trust cannot be modified and the original terms of the trust remain the same. Therefore, there is only one trust fund.

In a separate opinion and order, the Board today affirmed the Agency's refusal to accept substitute financial assurance for Taylor Ridge/Andalusia landfill and Viola landfill. See ESG Watts, Inc. (Viola Landfill) v. IEPA, PCB 01-63 (Apr. 4, 2002) and ESG Watts, Inc. (Taylor Ridge/Andalusia Landfill) v. IEPA, PCB 01-64 (Apr. 4, 2002) (consl.). Specifically in those cases, the Board found that the Pollution Liability Policies offered by ESG Watts as substitute financial assurance for Taylor Ridge/Andalusia landfill and Viola landfill did not meet the requirements of the Board's rules at 35 Ill. Adm. Code 807.665(c) and (e). Thus, the only financial assurance for those landfills is the trust fund. In this case the Board has found that the trust provided as financial assurance for all three landfills in 1985 is one trust and not a separate trust for each landfill. Even though ESG Watts need not provide financial assurance for the Sangamon Valley landfill, the Board finds that there are no excess funds available for release by the Agency because there is only one trust fund to provide financial assurance for all three landfills. Therefore, the Board affirms the Agency's decision refusing to release the corpus of the trust.

CONCLUSION

The Board affirms the Agency's refusal to release the corpus of the trust fund tendered by ESG Watts in February 1985. The trust fund represents the only financial assurance for the Taylor Ridge/Andalusia landfill and the Viola landfill. Therefore, even though ESG Watts is no longer required to maintain financial assurance mechanisms for Sangamon Valley landfill, the trust fund is not excess financial assurance and cannot be released.

ORDER

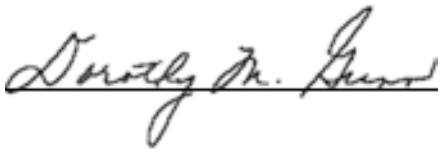
The Board affirms the Agency's refusal to release any existing financial assurance tendered by ESG Watts for the facilities owned by ESG Watts.

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 within 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 April 4, 2002, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board