ILLINOIS POLLUTION CONTROL BOARD
May 4, 1995

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. JAMES LEE WATTS, individually and d/b/a WATTS TRUCKING SERVICE, INC., and ESG WATTS, INC., Respondents.	)	PCB 94-127 (Enforcement-Land)

THOMAS DAVIS, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF PETITIONER;

GREG RICHARDSON, OF ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF PETITIONER;

CHARLES NORTHRUP, OF SORLING, NORTHRUP, HANNA, CULLEN, & COCHRAN, APPEARED ON BEHALF OF RESPONDENTS.

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

On April 20, 1994, the People of the State of Illinois by the Attorney General (People or complainant) filed a three-count complaint alleging that James Lee Watts, individually, Watts Trucking Service and ESG Watts Inc. violated various provisions of the Illinois Environmental Protection Act (Act) and the Board's regulations. The specific allegations, concerning two landfills, included failure to timely pay fees pursuant to Section 22.15 of the Act and thereby violating Sections 21(k) and (d)(2) of the Act and 35 Ill. Adm. Code 858.401. The complaint also alleges that the respondents failed to timely file significant modification permits in a timely manner and thus violated Section 21(d)(2) of the Act and 35 Ill. Adm. Code 814.104. The complainant is seeking revocation of the operating permits for the two landfills or in the alternative $254,100 in civil penalties.

On September 26, 1994, the Board received a motion for partial summary judgement and then on September 29, 1994, the Board received a motion to dismiss or in the alternative motion for summary judgement, both filed by the respondents. On September 30, 1994, the Board received complainant's response to the first motion and on October 6, 1994, the Board received the complainant's response to the second motion. Finally, on October 14, 1994, the complainant filed a motion for leave to file a superseding four-count complaint which was granted by the Board on November 3, 1994. The superseding complaint realleges the violations from the April 20 complaint and adds an allegation

concerning failure to timely revise closure cost estimates. (See 35 Ill. Adm. Code 807.623.) Hearing was held on November 21, 1994 before the Board's hearing officer Deborah Frank, in Springfield, Sangamon County, Illinois. Members of the public attended the hearing; however, no members of the public wished to testify at the hearing or to make a statement.

Complainant's brief was filed on December 20, 1994 and the reply brief was filed on January 20, 1995. Respondents' brief was filed on January 9, 1995.

On February 22, 1995 complainant filed a motion to supplement the record and on February 28, 1995, complainant filed a revised motion to supplement the record. Respondents have responded to both filings (March 1, 1995 and March 7, 1995). The Board will grant the revised motion to supplement the record as the filings address the landfills' current status regarding compliance.

For the reasons enunciated within this opinion, the Board finds that respondent, ESG Watts, Inc., violated Sections 21(k), 21(o)(11) and (d)(2) of the Act and 35 Ill. Adm. Code 807.623, 858.401 and 814.104. The Board will not revoke the operating permits as requested by the complainant; however, for these violations the Board will impose a penalty of sixty thousand dollars ($60,000).

BACKGROUND

Respondent, ESG Watts, Inc. (ESG Watts) is a wholly owned subsidiary of respondent, Watts Trucking Service, Inc. (Watts Trucking). (Compl. Br. at 1; Resp. Br. at 4; Tr. at 176.)[1] James Lee Watts (James Watts) is the sole shareholder of Watts Trucking and is the president of both companies. (Compl. Br. at 1; Resp. Br. at 4; Tr. at 103.) ESG Watts owns and operates the Taylor Ridge Landfill in Rock Island County which was permitted in 1972. (Compl. Br. at 1; Resp. Br. at 4; Tr. at 176.) ESG Watts also owns and operates the Sangamon Valley Landfill in Sangamon County which has been permitted since 1980. (Compl. Br. at 1; Resp. Br. at 4.) These two facilities are the subject of the violations alleged in the complaint.

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[1] The superseding complaint filed October 14, 1994, will be cited as "Compl. at __"; the hearing transcript will be cited as "Tr. at __"; the complainant's exhibits will be cited as "Compl. Exh. ___ at __"; the complainant's brief will be cited as "Compl. Br. at __"; the respondent's brief will be cited as "Resp. Br. at __"; and the complainant's reply brief will be cited as "Compl. RBr. at __".

The Taylor Ridge Landfill was purchased in 1971 or 1972 by ESG Watts. (Tr. at 176; Resp. Br. at 4.) Taylor Ridge serves primarily the Rock Island area and covers an area of approximately 60 acres. (Tr. at 150; Resp. Br. at 4.) Taylor Ridge is permitted to accept both solid and special wastes. (*Id.*) At the current rate of disposal Taylor Ridge has capacity for approximately five years remaining. (*Id.*)

The Sangamon Valley landfill is located on the north edge of Springfield and has been accepting waste since approximately 1981. (Tr. at 138; Resp. Br. at 4.) Sangamon Valley is the only landfill in Sangamon County and it serves Springfield and the surrounding communities as well as Menard and Cass Counties. (Tr. at 139; Resp. Br. at 4-5.) Sangamon Valley consists of three "areas" only one of which has accepted waste. (Resp. Br. at 5.) The area which has accepted waste is approximately 27 acres in size while the two remaining areas are slightly larger. (*Id.*) A portion of the second area has been designed and constructed; however, no operating permit has been issued. (Tr. at 185; Resp. Br. at 5.) Sangamon Valley is currently accepting waste only from non-commercial haulers and has an estimated capacity of 40-50 years. (Tr. at 192-193; Resp. Br. at 5.)

COMPLAINT

The October 14, 1994 superseding complaint contained four counts alleging violation. In general, the complaint alleged that respondents failed to timely file a request for significant modification of the permits for the two landfills as well as failed to timely file quarterly reports and the fees due the state. Finally, the complaint alleges that the respondents failed to timely revise the closure cost estimates for the facilities. More specifically, Count I alleged violation of Sections 21(o)(11), 21(k) and 21(d)(2) of the Act and 35 Ill. Adm. Code 858.401(a) of the Board's regulations. Count II alleged violation of Section 21(d)(2) of the Act and 35 Ill. Adm. Code 814.104. Count III alleges "respondents, individually and collectively, have violated the requirements and prohibitions of the Act, the Board's rules and regulations including 35 Ill. Adm. Code Part 807, and the terms and conditions of the permits" as to Taylor Ridge and Sangamon Valley. Lastly, Count IV alleges violation of 35 Ill. Adm. Code 807.623.

STATUTORY AND REGULATORY FRAMEWORK

Section 21 of the Act provides in pertinent part:

No person shall:

* * *

d. Conduct any waste storage, waste-treatment, or waste-disposal operation:

* * *

1. Without a permit granted by the Agency or in violation of any conditions imposed by such permit . . ., or

2. In violation of any regulations or standards adopted by the Board under this Act;

* * *

k. Fail or refuse to pay any fee imposed under this Act.

* * *

o. Conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section in a manner which results in any of the following conditions:

* * *

11. failure to submit reports required by permits or Board regulations;

* * *

13. failure to submit any cost estimate for the site or any performance bond or other security for the site as required by this Act or Board rules. (415 ILCS 5/21.)

Section 22.15 of the Act provides, in pertinent part:

b. On and after January 1, 1987, the Agency **shall assess and collect a fee in the amount set forth herein from the owner or operator of each sanitary landfill** permitted or required to be permitted by the Agency to dispose of solid waste if the sanitary landfill is located off the site where such waste was produced and if such sanitary landfills owned, controlled, and operated by a person other than the generator of such waste [emphasis added]. (415 ILCS 5/22.15)

The Board's rules at 35 Ill. Adm. Code 807.623 state:

a) The **operator** must revise the current cost estimate at least once every two years. The revised current cost estimate must be filed on or before the second anniversary of the filing or last revision of the current cost estimate.

b) The **operator** must review the closure and post-closure care plans prior to filing a revised cost estimate in order to determine whether they are consistent with current operations and regulations. The **operator** must either certify that the plans are consistent, or must file an application reflecting new plans.

c) The **operator** must prepare new closure and post-closure cost estimates reflecting current prices for the items

> included in the estimates. The **operator** determines that there are no changes in prices [emphasis added].

35 Ill. Adm. Code 814.104 provides:

> a) All **operators** of landfills permitted pursuant to Section 21(d) of the Act [cite omitted] shall file an application for a significant modification to their permits for existing units, unless the unit will be closed pursuant to Subpart E within two years of the effective date of the Part.
>
> b) The **operator** of an existing unit shall submit information required by 35 Ill.Adm. Code 812 to demonstrate compliance with Subpart B, Subpart C or Subpart D, which ever is applicable.
>
> c) The application shall be filed within 48 months of the effective date of this Part, or at such earlier time as the agency shall specify in writing pursuant to 35 Ill. Adm. Code 8-7.209 or 813.201(b).
>
> d) The application shall be made pursuant to the procedures of 35 Ill.Adm. code 813 [emphasis added].

35 Ill. Adm. Code 858.401(a) states:

> Payment for the fee due under Section 22.15 of the Act shall be made on a quarterly basis with the submission of the Quarterly Solid Waste Summary. Such payment shall be received by the Agency on or before April 15, July 15, October 15 and January 15 of each year and shall cover the three calendar months preceding the receipt date.

VIOLATION

The respondents state in their brief:

> The violations alleged in the Amended complaint are not contested. Respondents do not dispute that certain reports and fees, the significant modification permit applications for both Taylor Ridge and Sangamon Valley, and the biennial cost revisions for Sangamon Valley were not timely submitted. However, Respondents have now complied with all these requirements. (Resp. Br. at 5.)

Respondents further state they "have never sought to avoid their obligation under the Act or to conceal their noncompliance". (Resp. Br. at 2.) Thus, respondents have admitted the violations alleged in the amended complaint.

Respondents do argue that only respondent ESG Watts should be held liable for the violations as alleged and that the imposition of liability on James Watts or Watts Trucking is not warranted either factually or legally. (Resp. Br at 15 and 21.) In support of this position, respondents argue that neither James Watts nor Watts Trucking is an owner or operator of either landfill at issue. (*Id.*) Respondents argue that the complainant must "pierce the corporate veil" to impose liability on James Watts or Watts Trucking and none of the necessary elements are found in this proceeding. (Resp. Br. at 16 and 22.)

Complainant lists 15 factors that complainant believes the Board should consider regarding the issue of liability of James Watts and Watts Trucking. (Compl. RBr. at 6-7.) The list includes the fact that James Watts is the sole stockholder and corporate president for both ESG Watts and Watts Trucking (Compl. RBr. at 6), as well as the fact that ESG Watts "does not directly receive revenue for the disposal of waste at the landfills (Tr. at 118)". (Compl. RBr. at 7.)

The Board finds that there is insufficient information in the record to hold Watts Trucking and James Watts personally liable for the violations alleged in the instant matter. The alleged violations all deal with failure to timely file reports, fees, permits or closure cost revisions. All of these are the responsibility of the owner or operator of the landfill as explicitly stated in the applicable statute or regulation. The record in the instant proceeding before the Board indicates that ESG Watts and not James Watts or Watts Trucking is the owner and operator of the Sangamon County and Taylor Ridge landfills (Compl. Br. at 1; Resp. Br. at 4; Tr. at 176) Therefore, considering the instant record, ESG Watts is solely responsible for filing all reports, fees, permits and closure cost revisions under the Act and the Board's regulations.

The record also indicates that James Watts, acting as president of ESG Watts, did not make decisions regarding the operations of the landfills in isolation. (Resp. Br. at 18; Tr. at 103, 110, and 115.) Further, the record does not show that ESG Watts is insolvent or that any injustice or fundamental unfairness exists that requires imposition of liability on either James Watts or Watts Trucking.

The Board finds that respondent, ESG Watts violated Sections 21(k), 21(o)(11) and (d)(2) of the Act and 35 Ill. Adm. Code 807.623, 858.401 and 814.104 as alleged by all four counts of the supplemental complaint. Thus, the only issue which remains for the Board is to determine the appropriate remedy.

PENALTY

Having found violation, the Board must now determine the penalty to be assessed. In determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act. (People v. Berniece Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park, (hereinafter Kershaw) PCB 92-164 (April 20, 1994); IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, (hereinafter Barry) PCB 88-71, 111 PCB 11 at 72 (May 10, 1990).) The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. (Wells Manufacturing Company v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148 (1978).) The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. In addition, the Board must bear in mind that no formula exist, and all facts and circumstances must be reviewed. (Kershaw, *supra*, at 14; Barry *supra*, at 62-63.)

The Board has stated that the statutory maximum penalty "is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts". (Barry, *supra* at 72.) The formula for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act (415 ILCS 5/42(a) and (b) (1992)). Section 42(a) provides for a civil penalty not to exceed $50,000 for violating a provision of the Act and an additional civil penalty not to exceed $10,000 for each day during which the violation continues. The total maximum penalty which could be assessed against ESG Watts is over twenty-five million dollars. The complainant requests that the operating permits for the two landfills be revoked or in the alternative requests an imposition of civil penalties in the amount of $254,100 and an order directing respondents to cease and desist from further violations. (Compl. Br. at 18.)

Section 33(c) Factors

Section 33(c) sets forth five factors which the Board must consider in making its determinations:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

2. the social and economic value of the pollution source;

3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

5. any subsequent compliance.

Section 33(c)(1) (Degree of Injury)

The complainant argues that two circuit court cases (91-CH-242; Compl. Exh. 7 (Zappa) and 92-CH-23; Compl. Exh. 9 (Cadagin))[2] in which respondents have been a party are pertinent to this inquiry. (Compl. Br. at 14.) Complainant maintains that because the findings in those previous cases included potential environmental harm, the "Board ought to find that some of the past violations have unreasonably interfered with the enjoyment of life by the adjacent property owners. . .". (*Id.*)

The respondents argue that the violations, in the instant matter, did not result in any injury or interference with the protection of the health, general welfare and physical property. (Resp. Br. at 23-24; Tr. at 200.) Respondents further maintain that the findings of the circuit court in the Zappa and Cadagin cases are not relevant to a determination of the effect these violations may have on the environment. (Resp. Br. at 24.)

The Board finds that the consideration of this factor mitigates the violations. The two circuit court cases cited by the complainant are more properly considered in the context of the penalty factor found at Section 42(h)(5) of the Act (previously adjudicated violations). The violations as alleged in this matter do not assert any discharges or emissions of pollutants to the environment has occurred. Rather, the violations for failure to timely file quarterly reports and fee payments are mechanisms by which the Agency and the Board monitor landfills and operators in the State. The Board notes that the failure to timely file the biennial closure revision and the failure to file significant permit modification permit applications could have resulted in environmental harm (See,

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[2] The record indicates that in the Cadagin matter a preliminary injunction was entered against ESG Watts and Watts Trucking in September of 1992. The injunction was for activities at the Taylor Ridge Landfill. In February 1994, Judge Zappa declined to permanently enjoin operations at the Sangamon Valley landfill and found that respondents had "made reasonable efforts to abate violations". (Exh. 7 at 2.) However, Judge Zappa did issue a total penalty of $350,000 against respondents (the Zappa matter is on appeal).

People v. Freedom Oil, PCB 93-59, (May 5, 1994)(appeal pending)); however in this case no environmental harm has been established.

Section 33(c)(2), (c)(3) and (c)(4) (Value, Suitability and Reasonableness)

The complainant states that the landfills have value as long as the operations comply with all applicable requirements. (Compl. Br. at 14.) Complainant maintains that the request to revoke the operating permits of respondents is made to "prohibit respondents from operating the landfills rather than to completely prohibit the operation by other more responsible parties". (*Id.*) The complainant also states that the suitability of the source to the location is "a moot point for the purposes of the relief requested". (*Id.*) Complainant argues that the Board "ought to find that compliance with the applicable requirements would reduce or eliminate the emissions, discharges or deposits resulting from the landfills and that such compliance is both technically practicable and economically reasonable". (Compl. Br. at 14-15.)

Respondents point out that the complainant concedes the social and economic value of the source as well as the suitability of location. (Resp. Br. at 25.) The respondents also argue that the issue of technical practicability and economical reasonableness are not relevant to this query. (*Id.*)

The Board finds that the consideration of the social and economic value of the facilities favors ESG Watts as does the suitability of location. The Board also finds that consideration of technical practicability and economic reasonableness must weigh against ESG Watts as compliance with these requirements is technically practicable and economically reasonable.

Section 33(c)(5) (Subsequent Compliance)

Complainant concedes that the respondents have subsequently complied with the provisions of the Act and Board regulations which were violated. However, Complainant asserts that the "subsequent compliance must be put into perspective". (Compl. Br. at 15.) For example, respondents were specifically under court orders which required the timely payment of solid waste fees by certified check. (*Id.*) Also, the original complaint in this action was filed on April 20, 1994 and respondents failed to timely file reports and pay fees due April 15 and July 15, 1994. (*Id.*) For these reasons, complainant recommends that the Board find that "any subsequent compliance is outweighed by the intentional nature of the violations". (*Id.*)

Respondents also point out that they are now in compliance with the requirements. (Resp. Br. at 26.) Further, respondents argue that they have made "good faith efforts to come into

compliance with the significant modification and cost revision requirements long before the original complaint was filed". (*Id.*)

The Board has noted in previous cases that "[t]he courts have found evidence of the presence or absence of good faith to be a very significant determinant of a penalty...[G]ood faith has been inferred from behavior which reflects diligence and which is reasonably directed towards the goal of achieving compliance. The acceptable efforts have included hiring engineers to find a cure for pollution, attempting to secure permits, installing pollution control equipment at considerable expense, and abandoning offensive practices altogether." (See, People v. Kershaw, PCB 92-164 (April 20, 1995) citing Illinois EPA v. Allen Barry, PCB No. 88-71, p. 35 (May 10, 1990) citing City of Chicago v. Illinois Pollution Control Board, 57 Ill.App.3d 517, 373 N.E.2d 512 (1st Dist. 1978); Harris-Hub Company, Inc. v. Illinois Pollution Control Board, 50 Ill.App.3d 608, 365 N.E.2d 1071 (1st Dist. 1977); Midland v. Illinois Pollution Control Board, 119 Ill.App.3d 428, 456 N.E.2d 914 (4th Dist. 1983); and Modine Manufacturing Company v. Pollution Control Board, 193 Ill.App.3d 643, 549 N.E.2d 1379 (2nd Dist. 1990).)

The Board finds that consideration of subsequent compliance factors against ESG Watts. ESG Watts is currently in compliance; however, compliance with some of the violations only occurred after the filing of this complaint. In fact, ESG Watts failed to comply with fee payment schedules after the filing of this complaint. The Board does not believe that such actions exhibit "good faith".

Section 42(h) Factors

Section 42(h) of the Act sets forth factors to be considered in determining the appropriate amount of the civil penalty. Those factors are:

1. the duration and gravity of the violation;

2. the presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

3. any economic benefits accrued by the violator because of delay in compliance with requirements;

4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and

5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.

Section 42(h)(1) and (h)(2)(Duration, Gravity and Due Diligence)

The complainant argues that an "imposition by the Board of a further civil penalty is not being sought for prior violations". (Compl. Br. at 16.) However, the complainant states: "In light of the duration and gravity of the new violations, and of the past violations, the Board would be justified in enhancing the penalty." (*Id.*) The complainant asserts that the duration of the "new" violations range from 20 days to sixteen and a half months and the gravity of the violations is "heightened by the obvious disregard of the respondents for the regulatory system in general and the Agency's fee collection and permitting programs in particular". (*Id.*)

The complainant argues that respondents have not exercised due diligence and asks that the Board find that the absence of due diligence is a factor in aggravation of the penalty. (Compl. Br. at 17.) Complainant maintains that the eventual submissions of fee payments, waste summaries, and permit applications are not relevant to the inquiry of due diligence; rather, the attempts, if any, to meet the specific deadlines would be the relevant inquiry. (*Id.*)

The respondents state that the duration of the fee and report violations is not disputed. The respondents do not dispute the duration of the violations for failure to timely submit the significant modification permit or the submission of the closure revision. (Resp. Br. at 28.) Further the respondents argue that the fee and report requirements are in the "general mechanism by which the State collects revenue" and the "State has now collected all the revenue that is due" from the respondents. (Resp. Br. at 27.) With regard to the failure to timely submit the significant modification permit applications, the respondents maintain that the purpose for those submittals has been served and the gravity of "missing the Agency's unilaterally imposed call-in date is also low". (Resp. Br. at 28.)

Respondents state:

> Although Respondents admit that certain payments were not timely made, given the vast array of economic and business pressures noted above, they request the Board to determine that they have been diligent in meeting fee obligations. (Resp. Br. at 29.)

Respondents go on to state that some of the problems in paying the fees were "occasioned by Respondents own 'cash-flow' problems". (Resp. Br. at 30.)

The Board finds that these factors should aggravate the penalty in this matter. ESG Watts violations were on-going for several months and some violations occurred after the initial filing of this complaint. Further, respondents admit that they knew they were in violation and made business choices to not timely file. An "intention" to comply and not "hiding" failure to comply do not constitute diligence or good faith on the part of ESG Watts. Quite the contrary, such factors illustrate the blatant noncompliance of ESG Watts.

Section 42(h)(3)(Economic Benefits)

The complainant does not delineate specific economic benefits which respondents have accrued by failing to comply with the Act and Board regulations. However, complainant does suggest that the Board consider that respondents have put the cost of compliance at the bottom of the list and have avoided the cost of compliance until after the filing of this enforcement action. (Compl. Br. at 17.)

Respondents assert that they did not obtain economic benefit from the failure to timely submit reports and fees. Further according to the respondents, "compliance has not been avoided but rather has been achieved by the submittal of the required payments." (Resp. Br. at 31.)

Mr. Watts testified that:

Q. [Mr. Davis] ...My question to you, though, is economic use of money, whatever other term you want to apply, having the money for use deferring the payment is not an economic benefit in your regard?

A. [Mr. Watts] The payments were deferred because of cash flow problems, not because of personal desire to just not pay it.

Q. But payment [*sic*] were deferred?

A. Payment [*sic*] were deferred because of cash flow problems, yes.

Q. And you decided to defer the payment?

A. I would say that on some occasions, yes.

Q. On this occasion, fourth quarter '93 it was due January 15. You deferred it until October, and you decided to do that, did you not?

A. If I didn't someone directly under me did yes. We put things in some order of relevance. If it was a matter whether to make payroll or pay a fee on time or if there was barely enough money to make payroll or, say, but fuel or equipment or to do what we deemed to be first order of business, like burying the waste and operating the site, then yes, possibly we paid those things first.

(Tr. at 115-116.)

Further Mr. Watts stated:

Q. [Mr. Davis] Now, these three fee payments totalled over $210,000, and you're suggesting that cash flow problems have prevented you from making payment until October 24, 1994?

A. [Mr. Watts] Yes, that's exactly true, that's correct, yes. It fluctuates from time to time. We are not a public company as some of the large companies nor are we a municipality.

In many cases other landfills are run by municipalities or public companies, and our cash flow situation is a little bit different. We are a small company and sometimes a struggling small company as cash flows.

Q. But during this time period you were presumably and correct me if I'm wrong, collecting your salary.

A. Pardon me, sir?

Q. You mentioned you had to make payroll, and you were on that payroll, were you not?

A. Yes, sir.

Q. So, basically a business decision, was it not, whether to pay the State of Illinois or to make other expenditures?

A. It was a business decision because of cash flow, yes.

(Tr. at 119-120.)

The Board finds that the economic benefits accrued by ESG Watts was substantial. ESG Watts made decisions whereby other business payments were made while the fees due to the State of Illinois were not paid. Those payments included paying Mr. Watts a salary of over $300,000 while deferring payment of fees due to

the State of Illinois. (Tr. at 119-120; Compl. Br. at 2.) In effect, ESG Watts was using money which rightfully belonged to the State of Illinois to pay their expenses. Further, by putting off the filing of the significant modification permit applications, ESG Watts was able to avoid the expenditures involved in hiring experts to prepare the applications and benefited economically from such decisions. Therefore, this factor substantially aggravates the penalty to be assessed and the Board will factor economic benefits of noncompliance[3] into the penalty calculation where appropriate.

Section 42(h)(4) (Deterrence)

The complainant is seeking revocation of the operating permits. Therefore, complainant maintains that "in a sense this request for relief indicates that no amount of monetary penalty . . . is expected to actually deter further violations". (Compl. Br. at 18.) Complainant argues that respondents "have demonstrated not only their inability to comply with the applicable requirements but also their unwillingness to do so". (*Id.*) The complainant does suggest a penalty of $254,100, if the Board determines that permit revocation is not appropriate. (*Id.*) The penalty is based upon a $500 fine per violation per day. (*Id.*) The complainant also asks that the penalty be apportioned among the three respondents. (Compl. Br. at 21.)

Respondents maintain that no monetary penalty is needed to deter future violations by respondents. (Resp. Br. at 31.) Respondents assert that compliance has been achieved for all the violations alleged in the amended complaint. (Resp. Br. at 31.) Respondents maintain that some violations have been beyond respondents' control (Resp. Br. at 32) and argue that permit revocation is not necessary if the respondents can achieve significant modification permits from the Agency for their operations. (Resp. Br. at 32.) Respondents argue that since they are now in compliance, there is no need to impose a penalty to deter future violation. (Resp. Br. at 31.)

Respondents have made business decisions not to comply in the past with the Act and Board regulations; therefore, the Board believes a penalty is necessary to deter future violations. The Board will assess a penalty which will dissuade ESG Watts from

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[3] The economic benefit of noncompliance can be calculated based on the formula in the Barry opinion (*supra*). The formula is based on the precept that the cost savings of delayed compliance must take into account the time-value of money. An interest rate factor can be used to calculate an economic savings or benefit from not spending capital or from not borrowing funds. (Barry, *supra.*, at 77.)

such future business decisions which result in violations. Finally, as previously stated, only ESG Watts will be held liable for the penalty assessed in this proceeding.

Section 42(h)(5) (Previously Adjudicated Violations)

Complainant asserts that:

> there are four distinct categories in sources of previously adjudicated violations: 1) the nineteen administrative citations, one of which the respondents failed to pay for two and a half years [see Compl. Br. at 13]; 2) the fourteen prior fee payment violations proven at hearing in this action; 3) the several violations found by Judge Cadagin as grounds for the entry of a preliminary injunction regarding Taylor Ridge; and 4) the numerous occasions of noncompliance considered by Judge Zappa in granting the judgement order in favor of the People in the Sangamon Valley Case. (Compl. Br. at 21-22.)

Complainant argues that this past record indicates a propensity of respondent to ignore the applicable requirements, as well as inability and unwillingness of respondents, to comply with requirements. (Compl Br. at 22.)

Respondents maintain that the complainant is attempting to relitigate the two circuit court matters in this proceeding. (Resp. Br. at 33.) Respondents argue that the one case is on appeal and therefore the findings should not be considered as those findings are not final. (*Id.*) Further, the second matter is also not final in that the order entered by the circuit court is a preliminary injunction and thus controverted facts have not been decided. (Resp. Br. at 34-35.)

The Board agrees with complainant that the history of adjudicated violations against ESG Watts indicates that a high penalty is warranted in this case to deter future violations. Nineteen administrative citations have been issued by the Board for violations at the Taylor Ridge and Sangamon Valley landfills. (Compl. Br. at 13.) Judicial orders in the Zappa case (Exh. 7) and Cadagin case (Compl. Exh. 9) have been entered into the record in this case. The Zappa decision did find violations of the Act over three years on twelve counts at Sangamon Valley landfill (Compl. Exh. 7 at 1), which would point to a higher penalty. However, Judge Zappa's order also found that the respondent had "made reasonable efforts to abate violations cited by the People". (Compl. Exh. 7 at p.2 para. 5.) This finding by Judge Zappa would mitigate against the Board ordering the most severe penalty in this case (which would be revocation of the operating permits). Judge Cadagin's preliminary injunction order found numerous violations of the Act at the Taylor Ridge landfill (Compl. Exh. 9), which aggravates the penalty in the instant

case. However, Judge Cadagin also ordered that "[t]he facility is to remain open until further order of the court" (Compl. Exh. 9 at 2), which also mitigates against the Board imposing the most severe penalty (revocation of operating permits).

Penalty Calculation

First, the Board will not revoke the operating permits of ESG Watts. The Board finds that the record in this proceeding simply does not warrant such an extreme penalty. The violations alleged and admitted in this case have caused no environmental damage nor has the failure to comply threatened the general public welfare. (Tr. at 200.) In fact, no damage can be attributed to the failure to comply. (See, Freedom Oil *supra*.) Therefore, revocation of an operating permit is not warranted.

The Board will assess a penalty sufficient to deter future violations and to cancel any economic benefit ESG Watts may have enjoyed. The Board will first assess a penalty for the late filing of fees. Respondents admit that the failure to timely file the fee payments was a "cash-flow" problem and business decision. (Tr. at 115-116, 119-120 and 178.) Further, James Watts testified that other bills including his own salary were being paid during the time that the fee payments were late. (Tr. at 119-120.) Therefore, to deter future violations, the Board will assess a penalty which removes the financial incentives to delay paying fees owed to the State of Illinois and thereby avoid the time-costs of money.

For the purpose of assessing a penalty, the Board will first assume that ESG Watts could have borrowed funds at an annual interest rate of 10% per annum to timely pay the fees to Illinois. To deter the respondent from future violations, the Board will add an additional 10% interest per annum as a disincentive to the late payment of fees in violation of the Act and Board regulations. In summary, a total penalty of 20% interest per annum is necessary to remove the economic incentive for late payments and to deter future violations.

The penalty for the six late payments can then be calculated by multiplying the amount of the fee, by the length of time the fee was late at an annual interest rate of twenty percent (20%). The penalty calculation for each of the six late fee payments is given in the tables below (rounded to approximate figures):

Sangamon Valley

1993 fourth qtr fees ($55,829)	96 days late	$ 2,800
1994 first qtr fees ($51,671)	152 days late	4,300
1994 second qtr fees ($36,631)	61 days late	1,200

Taylor Ridge

1993 fourth qtr fees	($86,861)	282 days late	13,000
1994 first qtr fees	($57,609)	192 day late	5,800
1994 second qtr fees	($65,631)	101 days late	3,300
	Rounded	Penalty Total	$30,000

(See Compl. Br. at 4-8.)

In addition to late filing of the fees for the above timeframes, ESG Watts failed to timely file six quarterly reports. These reports are a necessary regulatory requirement which allow the state to monitor landfills not only for compliance with the Act and Board regulations but also for capacity. In addition, ESG Watts did receive economic benefit by not expending the funds to timely prepare and file these reports. The Board will take into account the fact that ESG Watts is currently in compliance. Therefore, the Board finds that a flat penalty of two thousand five hundred dollars ($2,500) for each failure to file a report on time would be appropriate. The Board notes that this assessment is only five percent of the statutory maximum penalty of fifty thousand dollars ($50,000) per occurrence with no additional penalty for each day ESG Watts was not in compliance. Therefore, the penalty the Board will assess for these six violations will be a total of fifteen thousand dollars ($15,000).

The failure to timely file the two significant modification permit applications is a substantial violation. The Board regulations require all existing landfills to either file the significant modification permit application or begin closure. (35 Ill. Adm. Code 814.104(a).) Thus, ESG Watts' landfills have continued to operate while other landfills in the state have either timely submitted permit applications or begun to close. This factor results in an economic benefit to the respondent. The Board notes as mitigating factor that ESG Watts has filed the two permit applications and is continuing to pursue those applications before the Board and Agency. (See, Motions and responses filed 2/22/95, 2/28/95 and 3/1/95, 2/7/95 *infra* p. 2.) The Board finds that a five thousand dollar ($5,000) penalty for each violation with no additional penalty for each day of noncompliance is warranted. The total penalty the Board will assess for these two violations is therefore ten thousand dollars ($10,000).

Finally, ESG Watts failure to timely file the biennial closure revision benefited the respondent in at least two ways. First, ESG Watts was able to delay paying an expert to perform the review and secondly ESG Watts was not required to revise the funds. The Board will consider the fact that ESG Watts is presently in compliance, but will assess a penalty to deter future violations. The Board finds that a penalty of five

thousand dollars ($5,000) is appropriate for failure to timely submit the biennial review.

In summary, the Board finds that a monetary penalty is necessary to deter future violations by ESG Watts. Therefore, the Board will assess a total penalty of sixty thousand ($60,000) dollars against ESG Watts for violations of the Act and Board regulations. This penalty has been determined using the factors enunciated in Sections 33(c) and 42(h) of the Act, and considering all pertinent facts and circumstances in the record.

ATTORNEY FEES

Section 42(f) allows the Board to assess attorney's fees in cases where a person "has committed a wilful, knowing or repeated violation of the Act". (Section 42(f) of the Act.) By the respondents own admissions these violations were wilful, knowing and repeated. Therefore the Board finds that assessment of attorney's fees is proper. Complainant maintains that the total time expended on this preceding was forty-one and a half hours, which is supported by the affidavit of Mr. Thomas Davis. Complainant asks that an hourly rate of $120 be charged.

The Board notes that attorney's fees in the People's affidavit are charged at rates above the reasonable rate of $100 per hour as determined in a prior Board opinion. (See, People v. Freedom Oil (May 6, 1994) PCB 93-59, Stip. Op. at 11 and supplemental opinion, People v. Freedom Oil (June 6, 1994) PCB 93-59.) However, the $120 rate includes all reasonable costs such as certified mailings and word processing. Therefore, the Board finds these costs to be reasonable and will award the Office of the Attorney General four thousand nine hundred eighty dollars ($4,980). ESG Watts will be ordered to pay this sum to the Hazardous Waste Fund, created in Section 22.2 of the Act, as required by Section 42(f) of the Act.

CONCLUSION

The Board finds that respondent ESG Watts violated Sections 21(k), 21(o)(11) and (d)(2) of the Act and 35 Ill. Adm. Code 807.623, 858.401 and 814.104 as alleged by all four counts of the supplemental complaint. The record indicates that ESG Watts did so knowingly and wilfully. Further, the record establishes that ESG Watts accrued substantial economic benefit as a result of violating the Act. Therefore, the Board assesses a penalty of sixty thousand dollars ($60,000) and assesses four thousand nine hundred eighty dollars ($4,980) for attorneys fees.

This opinion on the penalty amount constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1) The Board finds respondent, ESG Watts violated Sections 21(k), 21(o)(11) and (d)(2) of the Act and 35 Ill. Adm. Code 807.623, 858.401 and 814.104 as alleged by all four counts of the supplemental complaint.

2) The Board hereby assesses a penalty of sixty thousand dollars ($60,000) against ESG Watts.

3) ESG Watts shall pay sixty thousand dollars ($60,000) within 60 days of the date of this Order. Such payment shall 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 shall be sent by First Class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

Respondent shall also write their Federal Employer Identification Number or Social Security Number on the certified check or money order. Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (35 ILCS 5/1003), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

4) Respondent ESG Watts shall pay four thousand nine hundred eighty dollars ($4,980) as fees and costs awarded to the Attorney General's Office. Such payment shall be made within 60 days of the date of this order by certified check or money order payable to the Treasurer of the State of Illinois, designated for deposit to the Hazardous Waste Fund, and shall be sent by First Class mail to:

Illinois Environmental Protection Agency
Fiscal Service Division
2200 Churchill Road
Springfield, IL 62706

The certified check or money order shall clearly indicate on its face, the case name and number, respondent's federal employer identification number and that payment is directed to the Hazardous Waste Fund.

5) Respondent, ESG Watts shall cease and desist from violations of the Act and the Board's regulations.

IT IS SO ORDERED

Board Member J. Theodore Meyer concurred.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 4th day of May, 1995, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board