

ILLINOIS POLLUTION CONTROL BOARD
October 29, 1992

ESG WATTS, INC.,)
)
 Petitioner,)
)
 v.) PCB 92-54
) (Permit Appeal)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

KEVIN T. MCCLAIN APPEARED ON BEHALF OF PETITIONER;

PENNI S. LIVINGSTON APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on an April 10, 1992 petition for review filed by ESG Watts, Inc. (ESG). Pursuant to Section 40 of the Environmental Protection Act (Act), ESG seeks review of the Illinois Environmental Protection Agency's (Agency) denial of seven special waste stream permit applications. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1040.) Members of the public attended a hearing held on August 11, 1992 in Rock Island, Illinois. On August 13, 1992, the Board denied ESG's motion for summary judgment.

DISCUSSION

ESG owns and operates the Andalusia/Watts landfill in Rock Island County. On December 10, 1991, ESG filed seven special waste stream applications. (R. Exh. 1-7.)¹ ESG sought these permits so it could accept paint skimmings, paint filters and debris, grinding dust, and trap and drain clean-out from various generators. (Id.) On March 9, 1992, the Agency denied all seven applications, listing identical denial reasons in all seven denial letters. (R. Exh. 15-21.) Because the Agency's denial reasons frame the issues on review (Centralia Environmental Services, Inc. v. IEPA (May 10, 1990), PCB 89-170), the Board will set out the denial reasons in full:

- 1.) Agency inspections have revealed that there have been uncontrolled releases of leachate at this site. The waste may cause or contribute to the generation of a contaminated leachate. No demonstration has been made

¹ R. Exh. ___ refers to the Agency Record which consists of various exhibits.

0137-0047

that this waste will not do so. The acceptance of this waste could or will exacerbate the water pollution problems at this site by contributing to the volume and intensity of the leachate generated. Specifically, the following relevant violations are noted which relate to improper leachate management and mismanagement of stormwater which causes more leachate generation through contact with waste or existing leachate.

12(a) of the Act:

Causing or allowing the discharge of contaminants so as to cause water pollution in Illinois.

12(d) of the Act:

Depositing contaminants upon the land in such place and manner so as to create a water pollution hazard.

12(f) of the Act:

Causing, threatening, or allowing the discharge of leachate into the waters of the state, without an NPDES Permit, or in violation of regulations adopted by the Board.

21(p)(1) of the Act:

Conducting the landfill operations in a manner resulting in refuse in standing or flowing water on or around the site.

21(p)(2) of the Act:

Conducting the landfill operations in a manner resulting in leachate entering the waters of the State.

21(p)(3) of the Act:

Conducting the landfill operations in such a manner resulting in leachate flows exiting the landfill confines.

35 Ill. Adm. Code 302.203:

Causing or allowing matter of other than natural origin in concentrations or combinations toxic or harmful to human, animal, plant or aquatic life to enter waters of the State.

35 Ill. Adm. Code 807.313:

0137-0048

Causing or allowing the operation of the landfill so as to cause or threaten to allow the discharge of contaminants so as to cause water pollution in Illinois.

35 Ill. Adm. Code 807.314(e):

Allowing the operation of the landfill in a manner that does not provide adequate measures to monitor and control leachate.

- 2.) Waste at this facility has not been properly covered and contained. It has not been demonstrated that this waste stream is suitable for disposal without daily cover. Failure to comply with cover requirements can cause unpermissible [sic] migration, dust generation and excess generation of leachate from this waste. The frequency and severity of the following violations could or will be increased by disposing of this waste at this site.

21(p)(5) of the Act:

Conducting the landfill operations in a manner resulting in uncovered refuse remaining from a previous operating day.

21(p)(12) of the Act:

Failure to collect and contain litter from the site by the end of each operation day.

35 Ill. Adm. Code 807.302:

Failure to comply with the terms of Permit #1972-72 Condition #3: Each fill area, and daily cell area therein must be properly covered, graded, and maintained.

35 Ill. Adm. Code 807.305(a):

Failure to apply adequate daily cover to exposed refuse.

35 Ill. Adm. Code 807.306:

Failure to collect and contain litter from the site by the end of each operating day.

- 3.) Proper management of this waste cannot be assured until the sections listed below are complied with. This may lead to violations of the Environmental Protection Act

and the regulations promulgated thereunder. The consequences of such violations are the contamination and endangerment of the environment. Adding this waste to the site would increase the threat proportionately.

21(d)(1) of the Act:

Allowing the waste to be accepted may lead to conducting a waste-disposal operation in violation of any conditions imposed by a permit granted by the Agency. The following is a list of the permit conditions which disposal of this waste may violate:

#3 of Permit 1972-72 12/12/72
Cover Requirements

#8 of Permit 1984-801-SP 9/5/84
No Process Discharge Without Permit

#1 of Permit 1988-277-SP 11/28/88
Submitting Financial Assurance

#5 of Permit 1988-277-SP 11/28/88
Maintaining Financial Assurance

#14 of Permit 1988-277-SP 11/28/88
No Process Discharge Without Permit

#2 of Permit 1991-183-SP 8/20/91
Financial Assurance

#8 of Permit 1991-183-SP 8/20/91
No Process Discharge Without Permit

#2 of Permit 1991-292-SP 12/24/91
Financial Assurance

21(d)(2) of the Act:

Allowing the waste to be accepted may lead to conducting a waste-disposal operation in violation of any regulation or standard adopted by the Board under the Environmental Protection Act.

21.1(a) of the Act:

Allowing waste to be accepted may contribute to conducting a waste-disposal operation without posting adequate performance bond or other security with the Agency for the purposes of insuring closure of the site and post-closure care in accordance with the

Environmental Protection Act and regulations adopted thereunder.

The facility has been cited for a number of violations described in the January 30, 1992 Enforcement Notice Letter. Acceptance of this waste stream would lead to continued violations and may cause an increase in the intensity or frequency of containment movement. It was not demonstrated how this facility will accept and dispose of this material without causing continued violations of the provisions cited.

(R. Exh. 15-21.)

Testimony given by the Agency's permit analyst who reviewed ESG's permits indicates that the alleged existing violations at the site were a substantial basis for permit denial. Ronald Steward testified that he reviewed ESG's applications and was aware that the site was very much out of compliance. (Tr. at 104.) Steward testified that the Agency's January 30, 1992 enforcement compliance letter (Exh. 13) provided substantial justification for denial of the permits. (Tr. at 57-58, 73-74, 76.) Conversations with other Agency personnel also provided a basis for denial. (Tr. at 76, 109.) These conversations "reinforced what was already stated in the January 1992 letter". (Tr. at 82.) Steward testified that no violations other than those referenced in the enforcement letter were discussed. (*Id.*) According to Steward, the violations alleged in the enforcement action affected his decision to deny the permits. (Tr. at 86.) Steward testified that, to demonstrate that issuance of the permits would not cause violations of the Act and regulations, ESG needed to demonstrate "that violations of the Act would not occur as had been occurring, which was evidenced by the enforcement notice letter." (Tr. at 71-72.) According to Steward, he could not in good conscience grant permits where the applicant was not in compliance with the law in handling current waste streams. (Tr. at 112-13.)

It is well established that the primary issue in a permit appeal before the Board is whether the applicant has met its burden of establishing that the application, as submitted to the Agency, demonstrates that no violation of the Act or regulations would occur if the permit was granted. (Joliet Sand & Gravel v. IEPA (3d Dist. 1987), 163 Ill. App. 3d 830, 516 N.E.2d 955.) It is equally well established that permit denial is an improper substitute for an enforcement action. (Centralia Environmental Services, Inc. v. IEPA (October 25, 1990), PCB 89-170 at 10-11; Waste Management v. IEPA (October 1, 1984), PCB 84-45, 84-61 & 84-68 (consolidated); Frink's Industrial Waste, Inc. v. IEPA (June 30, 1983, PCB 83-10.) The record establishes that the Agency has filed an enforcement action against ESG for alleged violations at the Andalusia/Watts' site. The record also

0137-0051

establishes that the violations alleged in the enforcement notice letter form the basis of the permit denials. ESG contends that the Agency improperly denied its permits as a means of enforcement. The Agency responds that it denied the permits because it "received no assurance that [ESG] could take proper care of these wastes when [ESG] has not and was not taking proper care of the waste it received at the time of denial by operating within the limits and requirements of the law." (Agency Brief at 11.)

Denial Reason #1

The first denial reason relates to water pollution. The Agency reasons that because there have been prior uncontrolled releases of leachate at the site, new waste streams should not be permitted because they would exacerbate the water pollution problems existing at the site. In support of this finding, the Agency cites general statutory and regulatory prohibitions against water pollution (Ill. Rev. Stat. 1991, ch. 111 1/2, pars. 10012(a), (d), (f); 35 Ill. Adm. Code 302.203, 807.313), Section 807.314(e) of the Board's landfill regulations which prohibits operating a landfill without adequate measures to monitor and control leachate, and statutory prohibitions against operating a permitted landfill in a manner so as to allow refuse in water, leachate to enter water and leachate to exit confines of the landfill (Ill. Rev. Stat. 1991, ch. 111 1/2, pars. 1021(p)(1), (2), (3)).

The Agency's denial reason is clearly based on conduct which has allegedly already taken place, or is allegedly still occurring, at the site. Ron Steward, the Agency's permit analyst, testified that he "needed a demonstration that the approval of these permit applications would not cause violations as had previously occurred at the site with the waste they'd already accepted." (Tr. at 72.) The Board recognizes that it is the applicant's burden to demonstrate compliance in its application. However, Sections 21(p)(1), (2), and (3) of the Act prohibit certain conduct. Here, there is no conduct relating to the special waste streams as those wastes are not yet being accepted at the site. If these Sections are being violated at the site, the proper mechanism to address these violations is an enforcement action.

The first denial reason also references concerns about leachate monitoring and control. Ron Steward, the Agency's permit analyst, testified that he prepared a memorandum after speaking with Mitch Smith, who had inspected the site. (Tr. at 93.) This memorandum stated that, on March 9, 1992, Smith had observed two leachate seepages at the site. (R. Exh. 14.) Steward testified that a leachate seep is not necessarily a violation. (Tr. at 93-94, 99.) Thomas Jones, a civil engineer employed by ESG, testified that he was familiar with ESG's

0137-0052

leachate monitoring and control procedures. (Tr. at 126-27.) He testified that he was notified of the seeps observed by Smith on March 9, 1992 and that the seeps were repaired. (Tr. at 129.) Mitch Smith did not testify at hearing. The only references to the alleged violations contained in the record are those set out in Steward's memorandum and the enforcement notice letter. (R. Exh. 13, 14.)

The record establishes that the Agency's concerns about leachate control are based upon alleged violations at the site. Testimony at hearing indicates that to satisfy the Agency's concerns, ESG would have had to present its defense to the enforcement action in this permit appeal. Steward was questioned as to what information was needed to demonstrate compliance. (Tr. at 65-72.) In response, he stated that "[w]hat I needed was a demonstration that violations of the Act would not occur as had been occurring, which was evidenced by the [Agency's] enforcement notice letter." (Tr. at 71-72.) However, if the Agency has concerns that ESG is not adequately monitoring or controlling leachate so as to cause water pollution, an enforcement action is the appropriate mechanism to address such violations. (See e.g., Centralia Environmental Services v. IEPA (October 25, 1990), PCB 89-170 at 10-11.) Because the Agency's denial reason is an improper use of permit process as an enforcement tool, the Board finds that the denial reason must be stricken.

Denial Reason #2

The second denial reason relates to improper cover and containment of waste at the site. The Agency cites statutory and regulatory prohibitions against leaving refuse uncovered, failure to collect litter on a daily basis, and failure to comply with a previous permit condition requiring cover. According to the Agency, the frequency of these violations could or will increase if disposal of the special wastes is allowed.

The Agency alleges that the instant permits were not denied solely on the basis of the violations alleged in the pending enforcement action. Rather, the Agency asserts that the permits were denied because ESG failed to demonstrate that disposal of the special waste streams would not cause violations of the Act and regulations. The Agency's reasoning appears to be that, because ESG has allegedly failed to apply daily cover and remove litter in the past, it cannot prove to the Agency that it will do so in the future and, therefore, ESG should not be permitted to accept additional wastes. However, if the Agency believes that a permitted facility has violated the Act or regulations so as to pose a continuing threat to the environment, it may file an enforcement action seeking revocation of permits. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1033(b); Waste Management v. IEPA (October 1, 1984), PCB 84-45, 84-61 & 84-68 (consolidated) at 37.) Additionally, the Agency has Section 39(i) of the Act at

0137-0053

its disposal which allows the Agency to deny a permit if the operator has a history of repeated violations.² The Board finds that the second denial reason must be struck as an improper use of permit denial as a means of enforcement.

Denial Reason #3

The third denial reason concerns a general finding that adding special wastes to the site would increase the threat of contamination and endangerment to the environment. The Agency cites Section 21(d)(1) of the Act which provides that no person shall conduct a waste-disposal site in violation of any condition imposed in a permit. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1021(d)(1).) The Agency then cites numerous conditions imposed on ESG in prior permits, including cover requirements, prohibiting discharging without a permit and financial assurance. Section 31(a)(1) of the Act provides that the Agency may bring an enforcement action for violation of a permit condition. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1031(a)(1).) In Centralia Environmental Services, Inc. v. IEPA (October 25, 1991), PCB 89-170 at 11, the Board recognized that an alleged failure to comply with terms of a previously granted permit may be addressed by an enforcement action and are an improper basis for permit denial. Consequently, the Agency may not rely upon ESG's failure to comply with permit conditions as a basis for denial of the special waste stream permits.

Next, the Agency cites Section 21.1(a) of the Act which requires that no person shall conduct a waste-disposal operation on or after March 1, 1985 without posting a performance bond or other security for the purpose of insuring closure and post-closure care. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1021.1(a).) Section 807.661(d) of the Board's regulations allow use of a trust fund as an alternative method of providing financial assurance. (35 Ill. Adm. Code 807.661(d).) At hearing, the Agency presented the testimony of John Taylor, an Agency financial assurance analyst, who testified that, as of February 29, 1992, ESG's trust fund was \$140,000 in arrears. (Tr. at 175.) In Centralia, the Board stated that an owner/operator's obligation to submit payments into an established trust fund exists independent of its desire to obtain supplemental permits or, in the instant case, special waste

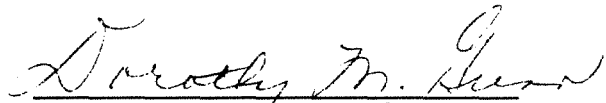
² The Board notes that in this case, the Agency only presents evidence of alleged violations. The Board's reference to Section 39(i) is not intended as a ruling on whether the Agency could properly utilize Section 39(i) in the instant case. Moreover, the Board notes that while the Agency cites Section 39(i) in its brief, it did not rely upon this provision in its denial letters.

For the foregoing reasons, the Board finds that the Agency's denial reasons must be reversed as an improper use of the permit process as a means of enforcement. Therefore, the Agency's decision denying ESG's seven applications for special waste stream permits is reversed and the Agency is directed to issue the permits.

IT IS SO ORDERED.

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. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Casteneda v. Illinois Human Rights Commission (1989), 132 Ill. 2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 27th day of October, 1992 by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

0137-0057