

ILLINOIS POLLUTION CONTROL BOARD
August 24, 2000

ESG WATTS, INC., (Viola Landfill) an Iowa corporation,)
)
 Petitioner,)
)
 v.)
) PCB 00-158
 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,) (Permit Appeal - Land)
)
 Respondent.)
)
)
)

ORDER OF THE BOARD (by E.Z. Kezelis):

This matter is one of six actions initiated by ESG Watts (Watts) as permit appeals.¹ For the reasons stated below, the Board hereby dismisses this and two of the other actions.

BACKGROUND

On March 23, 2000, Watts filed a petition for hearing (Pet.). In it, Watts alleged that in 1994, it executed a trust agreement for the Viola Landfill, and that in early 1998 it began to seek to replace the trust agreement with an insurance policy. Pet. at 1. Over-time, Watts and its insurers submitted various certificates of insurance and related correspondence to the Illinois Environmental Protection Agency (Agency) in an effort to release the trust account and satisfy Watts' financial assurance obligations under Section 21.1(e) of the Environmental Protection Act (Act) (415 ILCS 5/21.1(e) (1998)). Pet. at 1-2. Watts alleges that during that same time period, the Agency issued notices of violation pursuant to Section 31(b) of the Act to Watts pertaining to those same financial assurance obligations for the Viola Landfill. Pet. at 1-2. According to Watts, the first notice of violation was issued January 8, 1998. Pet. at 1, Exh. I. At that time, the Agency advised Watts that a written response would be required within 45 days, that each violation must be addressed, that the response would constitute a proposed Compliance Commitment Agreement pursuant to Section 31 of the Act, and that a request for a meeting would be honored. Pet. at 1, Exh. I. On February 22, 2000, the Agency issued a letter reiterating that Watts was still subject to referral for enforcement action pursuant to Section 31(b), because the various documents submitted by Watts to the Agency did not satisfy the requirements of a proposed Compliance Commitment Agreement. Pet. at 2, Exh. O.

Watts' petition alleges that the February 22, 2000 letter is appealable to the Board under one or more of several theories. First, according to Watts, the Agency wrongfully refused to issue a decision at all on the replacement financial assurance Watts had been offering, and accordingly, its failure to issue a decision is itself appealable pursuant to Section 21.1 of the Act. Pet. at 3. In the alternative, Watts argues that the February 22, 2000 letter was "improper, not authorized by law, and arbitrary and unreasonable," and is appealable pursuant to Section 31(b) of the Act. Pet. at 3. For its relief, Watts requests that the Board issue an order requiring the Agency to approve a specific insurance policy as financial assurance for the Viola Landfill and to release the trustee from the trust imposed upon a trust account that served as the earlier financial assurance for the Viola Landfill.

¹ Watts operated three landfills in Illinois: the Viola Landfill in Mercer County, which is the subject of this docket as well as ESG Watts, Inc. v. Illinois Environmental Protection Agency, PCB 00-208; the Taylor Ridge/Andalusia Landfill in Rock Island County, which is the subject of ESG Watts, Inc. v. Illinois Environmental Protection Agency, PCB 00-159 and ESG Watts, Inc. v. Illinois Environmental Protection Agency, PCB 00-207; and the Sangamon Valley Landfill in Sangamon County, which is the subject of ESG Watts, Inc. v. Illinois Environmental Protection Agency, PCB 00-160, and ESG Watts, Inc. v. Illinois Environmental Protection Agency, PCB 00-206. Today's Board action dismisses three cases: PCB 00-158, PCB 00-159 and PCB 00-160. The three later filed dockets (PCB 00-206, PCB 00-207, and PCB 00-208) will, in light of this order, continue to proceed.

MOTION TO DISMISS

The Agency's motion to dismiss was filed on April 17, 2000 (Mot.), and was accompanied by a special appearance. Briefly, the Agency argues that it is not entirely clear from Watts' petition precisely what it is that Watts is appealing, nor the legal basis for the appeal. Mot. at 1. Relying on the 35-day appeal period provided by Section 40 of the Act, the Agency concedes that the only Agency action whatsoever during that timeframe is the February 22, 2000 letter. Mot. at 2.

According to the Agency, its February 22, 2000 letter was issued pursuant to Section 31 of the Act. Mot. at 2. The purpose of Section 31, the Agency argues, is to provide notice and an opportunity to resolve alleged violations before formal enforcement proceedings are initiated. Citing People v. Eagle-Picher-Boge, L.L.C. (July 22, 1999), PCB 99-152, the Agency argues that its compliance with Section 31 is a precondition to referral for prosecution. Citing People v. Community Landfill Company, Inc. (March 16, 2000), PCB 97-193 and National Marine, Inc. v. IEPA, 159 Ill. 2d 381, 639 N.E.2d 571 (1994), the Agency claims that no Board review during this preliminary process is available to recipients of such notice.

Finally, the Agency argues that the Section 31 process is a preliminary one; it neither disposes of the proceedings nor adjudicates legal duties or rights. Mot. at 3. According to the Agency, an appealable determination of liability can occur only after the recipient either: (1) chooses not to participate in the Section 31 process; or (2) the recipient fails to resolve the alleged violations during the Section 31 process, and the Agency refers the matter for enforcement before an adjudicative body. Mot. at 3.

DISCUSSION

The Board finds that Watts' petition for review must be dismissed. First, the Board finds that because of the 35-day appeal deadline specified in Section 40 of the Act, the only action of the Agency properly before the Board would be the Agency's February 22, 2000 letter. Examination of that letter reveals that it is clearly and plainly correspondence by the Agency pursuant to Section 31 of the Act. Section 31 of the Act, in turn, is a preliminary process designed to afford regulated entities a process for resolving alleged violations before enforcement proceedings are initiated against them. Section 31 is a process; it is not an end result. Absent extraordinary circumstances not present here, the Board finds that a Section 31 transmittal such as the February 22, 2000 letter before us here is not a final, appealable determination.

MISCELLANEOUS MATTERS

The Board notes that on May 19, 2000, Watts purported to file a document captioned Petitioner's Suggestions in Opposition to Respondent's Motion to Dismiss. Pursuant to the Board's rules, Watts' response had been due no later than April 24, 2000. Watts' filing was 24 days late, and no motion seeking an extension of time was filed. On May 30, 2000, the Agency moved to strike the filing. Watts did not respond to the motion.

The Agency's motion to strike is granted. As Watts and the Agency are frequent litigants, the Board's procedural rules are well known to them. Flagrant disregard will no longer be tolerated. Simply put, litigants have an obligation to comply with deadlines.

The Board also notes that, pursuant to a hearing officer order dated July 5, 2000, the parties briefed the question of whether subsequent events rendered this matter moot, and in the alternative, whether this docket should be consolidated with a later-filed Viola Landfill appeal. ESG Watts, Inc. v. IEPA, PCB 00-208. Watts initiated that matter on May 30, 2000, by appealing the Agency's letter of April 21, 2000. In that letter, the Agency formally rejected an insurance policy offered by Watts as substitute financial assurance for the Viola Landfill; refused to release the existing trust account; and, advised Watts that it could appeal that Agency action as a permit denial pursuant to 35 Ill. Adm. Code 105 and Section 21.1(e) of the Act.

The parties' briefing pursuant to the July 5, 2000 hearing officer order was completed on July 28, 2000. In light of the outcome of this case, the Board does not need to reach the issue of mootness nor consolidation.

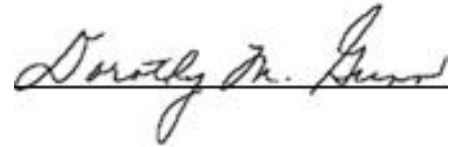
CONCLUSION

For the reasons stated herein, the Board grants the Agency's motion to dismiss this petition, and grants the Agency's motion to strike Watts' filing of May 19, 2000, as untimely. Because of the outcome of this case, the Board does not address the issues of mootness nor consolidation. This action is hereby dismissed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 24th day of August 2000 by a vote of 7-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn". The signature is written in black ink and is positioned above a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board