

ILLINOIS POLLUTION CONTROL BOARD
March 6, 1997

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 96-233
) (Enforcement - Land)
)
ESG WATTS, INC.,)
)
Respondent.)

ORDER OF THE BOARD (by M. McFawn):

This matter comes before the Board on a motion for summary judgment filed on December 16, 1996, by the People of the State of Illinois (complainant). On December 19, 1996, ESG Watts, Inc. (ESG Watts or respondent) filed a motion for extension of time to respond to complainant's motion for summary judgment. The hearing officer granted ESG Watts' motion, allowing until December 27, 1996 for a response to be filed. ESG Watts has not filed a response to the motion for summary judgment. A party who fails to file a response to a motion is deemed to have waived objection to the granting of the motion, but the Board is not bound by the waiver in its decision on the motion. (35 Ill. Adm. Code 101.241.)

Complainant seeks summary judgment on Counts I, II and III of the complaint based upon respondent's response to the request for admission of facts. On June 18, 1996, complainant filed a request for admission of facts. ESG Watts filed its response on August 28, 1996 admitting all facts alleged therein by complainant. Complainant's motion for summary judgment is premised on ESG Watts' admissions.

Summary judgment is proper only when the pleadings, affidavits, admissions and other items in the record demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. (Waste Management of Illinois v. IEPA, (July 21, 1994), PCB 94-153; Solomon v. American Nat'l Bank & Trust Co., 243 Ill.App.3d 132, 612 N.E.2d 3 (1st Dist. 1993).)

On January 10, 1997, complainant moved to amend the complaint to include violations that have occurred or continued subsequent to the filing of the initial complaint. Specifically, complainant seeks to amend Count I by adding an allegation that ESG Watts failed to upgrade its financial assurance, as required by its permit, by December 5, 1996. ESG Watts has not filed a response to the motion to amend the complaint. The Board grants complainant's motion to amend. However, the amendments to Count I of the complaint are not covered by the motion for summary judgment.

BACKGROUND

The five count complaint in this matter was filed on May 15, 1996 against ESG Watts. ESG Watts is an Iowa corporation authorized to do business in Illinois and is a wholly owned subsidiary of Watts Trucking Service. (Compl. at par. 5.)¹ ESG Watts operates the Viola Landfill near Viola in Mercer County, Illinois. The landfill occupies approximately 30 acres. (Compl. at par. 4.) The Illinois Environmental Protection Agency (Agency) has issued permits to ESG Watts or Watts Trucking Service authorizing waste disposal and sanitary landfill operations at the Viola Landfill. (Compl. at par. 7.)

The complaint alleges that ESG Watts violated various sections of the Environmental Protection Act (Act) (415 ILCS 5/5 *et seq.*) and the Board's regulations in operating the Viola Landfill. Pertinent to this pending motion, the complaint alleges that ESG Watts failed to maintain the necessary funds in its trust fund to demonstrate adequate financial assurance for closure and post-closure care, failed to file the proper reports concerning the same, and failed to monitor groundwater as required by its permit and submit quarterly groundwater monitoring reports.

As already stated, the motion for summary judgment is premised upon admissions made by ESG Watts in its response to complainant's request for admission of facts. Complainant also requests that the Board find that the violations were willful, knowing or repeated and award costs and reasonable attorney's fees pursuant to Section 42(f) of the Act. In addition, complainant requests that the Board order ESG Watts to post \$249,067 in its trust fund to correct the financial assurance violations. Further, complainant requests that the Board order ESG Watts to submit a revision of the current cost estimates and post-closure care in compliance with the Board's regulations. Complainant also requests that a hearing be scheduled for the allegations of violations not subject to summary judgment.

DISCUSSION

Count I: Financial Assurance Violations

Count I of the complaint alleges that ESG Watts violated its supplemental permits because it failed to upgrade the amount of its financial assurance since at least September 9, 1991. Count I alleges that ESG Watts failed to timely revise the current cost estimates of closure and post-closure care as required by its permits and necessitated by changes in circumstances, and therefore, ESG Watts also operated the landfill in violation of the conditions of its permits. As a result of these failures, the complaint alleges that ESG Watts violated Sections 21(d)(1) and (2), 21(e), 21(o)(13) and 21.1(a) of the Act and 35 Ill. Adm. Code 807.603 and 807.623.

In pertinent part, Section 21(d) prohibits conducting waste-disposal operations: (1) in violation of a permit condition, or (2) in violation of the Board's regulations. Section 21(e) of the Act prohibits the disposal of any waste except at a facility meeting the requirements of the

¹ References to the complaint filed on May 15, 1996 are indicated by Compl. at par. __.

Act and Board regulations. Section 21.1(a) of the Act requires the posting of a performance bond or other security to conduct waste disposal, while Section 21(o)(13) prohibits operating a permitted sanitary landfill if a cost estimate, performance bond or other security is not submitted as required. Pursuant to Section 807.603 of the Board's regulations, an operator of a landfill is required to maintain financial assurance equal to or greater than the current cost estimate at all times, and to increase the amount of financial assurance within 90 days of an increase in a cost estimate. Section 807.623 requires that the operator revise and file the revised cost estimates for closure and post-closure care plans at least every two years, even if there are no changes in costs.

Complainant claims that the admissions by respondent prove that respondent has failed to timely and adequately upgrade the financial assurance for the Viola landfill and to timely revise the current cost estimates of closure and post-closure care. Complainant relies on respondent's responses # 42, 43, 44, 45, 46, 48, 49 and 50 as proof that respondent did not maintain financial assurance as required. Complainant relies on responses #42, 47, 50 and 69 to show that respondent has failed to revise the current cost estimates of closure and post-closure care.

In its response to the admission of facts, ESG Watts admits that its supplemental permits require it to provide financial assurance in specific amounts by certain dates and that the financial assurance trust fund for the Viola Landfill did not contain the required funds. (Res. # 40 -50)² ESG Watts also admits that it did not revise and keep current cost estimates for closure and post-closure care. (Res. # 42, 47, 50 and 69.)

The Board grants summary judgment to complainant on Count I of the complaint. ESG Watts admits that it did not maintain sufficient financial assurance for its landfill operation or provide current cost estimates of closure and post-closure care as required by a condition in its supplemental permits and Board regulation. These failures by ESG Watts are in violation of permit conditions, the Act and Board regulations. Additionally, ESG Watts continued to operate the landfill while violating a condition of its permit. Therefore, ESG Watts violated Section 21(d) of the Act by operating its landfill in violation of a permit condition and Board regulation. Section 21.1(a) and Section 807.603 require landfill operators to upgrade financial assurance within 90 days when conditions change. Section 807.623 requires that the operator revise its cost estimates at least every two years. By failing to maintain sufficient financial assurance, ESG Watts violated Section 21.1(a) of the Act and 35 Ill. Adm. Code 807.603 of the Board's regulations, and by failing to update its financial assurance estimates on or before December 9, 1993 as required by its 1991 permit, ESG Watts violated its permit and Section 807.623. ESG Watts also violated Section 21(o)(13) by continuing to operate the Viola Landfill without providing the required financial assurance.

Based upon ESG Watts' admissions, the financial assurance fund for the Viola Landfill has not contained the proper dollar amount required by its supplemental permits and by Board

² ESG Watts' response to complaint's requests to admit facts was filed on August 28, 1996. This document is referenced as Res.# ____; the number refers to the number of facts to which Watts responded.

regulations since September 19, 1991 through May 15, 1996—the date this complaint was filed. The trust fund has contained no more than \$30,000 at any time, although the amount required was \$249,067 as of May 9, 1995. The Board will order ESG Watts to deposit sufficient funds into the trust fund within 45 days of the date of this order so that the fund provides at least \$249,067 financial assurance.

The Board notes that the amendments to Count I accepted by today's order are not included in the summary judgment since the complaint was amended after the motion for summary judgment was filed and there are no admissions by ESG Watts concerning them.

Count II : Groundwater Violation

Count II of the complaint alleges that a groundwater monitoring report submitted to the Agency on July 14, 1995 for the second quarter of 1995 indicates the presence of certain organic and inorganic constituents in excess of the groundwater quality standards for either Class I or Class II groundwater. (Compl. at par. 13.) The complainant maintains that the landfill is a likely source of the chemical constituents, the concentration of which exceed groundwater quality standards (Compl. at par. 25.), and that the groundwater underlying the landfill is likely a Class I resource groundwater. (Compl. at par. 27.) The complaint alleges that ESG Watts has violated 35 Ill. Adm. Code 620.115, 620.405 and 620.410 by causing, threatening or allowing the release of contaminants to cause exceedences of the groundwater standards. (Compl. at par. 26.) In addition, the complainant maintains that by causing threatening or allowing the discharge of contaminants into the groundwater, ESG Watts has violated Sections 12(a) of the Act, and 35 Ill. Adm. Code 620.301(a), and 807.313 and 807.315 (Compl. at pars. 28 and 29.) and by doing so has violated Section 21(d)(2) of the Act.

Section 620.301 prohibits the release of any contaminant to a resource groundwater such that treatment is necessary or an existing or potential use of the groundwater is precluded. Section 12(a) of the Act prohibits a person from causing, threatening or allowing the discharge of contaminants into the environment so as to cause or tend to cause water pollution. The operation of a landfill so as to cause, threaten or allow the discharge of any contaminants into the environment so as to cause or tend to cause water pollution in Illinois is prohibited by Section 807.313. Section 807.315 of the Board's regulations requires a landfill operator to prove that no damage will result to the waters of the State from the operation of the landfill and Section 21(d)(2) prohibits conducting waste-disposal operations in violation of the Board's regulations.

In the motion for summary judgment, complainant asserts that the admission of facts establishes that respondent violated Section 12(a) of the Act and Sections 807.313 and 807.315. Complainant relies on the groundwater report submitted by ESG Watts on July 14, 1995, which indicates the presence of certain organic and inorganic constituents in excess of the groundwater quality standards. ESG Watts admits that the groundwater report from the second quarter of 1995 indicates the presence of certain organic and inorganic constituents in excess of the groundwater quality standards for both Class I and Class II groundwater (Res. #68), and that the report indicated a significant change in groundwater quality. (Res. #69.)

The Board finds that these admission of facts by ESG Watts supports a finding of the alleged violations of 35 Ill Adm. Code 807.313 and 807.315. Concerning the alleged violation of Section 12(a), the parties need to address this allegation at hearing. Finally, the Board notes that Count II of the complaint alleges additional violations of the Act, as recited above. However, the motion for summary judgment does not address those allegations. Therefore, they remain to be addressed by the parties at hearing.

Count III: Groundwater Monitoring Violations

First, Count III of the complaint alleges that ESG Watts failed to timely submit any quarterly groundwater monitoring reports between the second quarter of 1992 and the first quarter of 1995. (Compl. at pars. 27-38.) Complainant maintains that ESG Watts admits that it did not submit quarterly groundwater reports between the second quarter of 1992 and the first quarter of 1995. (Res. #54-65.) Complainant alleges that failure by respondent to file the required monitoring reports violated Sections 21(d) and 21(o)(11) of the Act. (Compl. at par. 39) Again, Section 21(d)(1) prohibits conducting waste disposal operations in violation of a permit condition, while Section 21(o)(11) prohibits conducting a sanitary landfill if the required reports are not submitted.

Second, Count III also alleges that ESG Watts violated Section 21(d)(1) of the Act because it failed to install the monitoring wells and devices as required by permit. (Compl. at pars. 41 and 42.) Complainant maintains that ESG Watts admits that it installed the monitoring devices in 1995 (Res. #67) and not by May, 1992 as required by its supplemental permit. (Res. #66.)

Lastly, Count III of the complaint charges that ESG Watts violated Sections 12(a) and 21(d)(2) of the Act and 35 Ill. Adm. Code 807.313 and 807.315. (Compl. at par. 45.) Section 807.313 prohibits the operation of a landfill so as to cause, threaten or allow the discharge of any contaminants into the environment so as to cause or tend to cause water pollution in Illinois, while Section 807.315 of the Board's regulations requires a landfill operator to prove that no damage will result to the waters of the State from the operation of the landfill. Complainant maintains that ESG Watts' admission that it did not install the monitoring devices until 1995 (Res. #67) proves that ESG Watts failed to monitor the water quality and thereby violated Section 12(a) of the Act and Sections 807.313 and 807.315.

The Board grants summary judgment on Count III of the complaint. ESG Watts admits that it did not file the groundwater reports or install the monitoring devices as required as a condition of its permit. ESG Watts' failure to file the groundwater reports and install the monitoring devices are violations of ESG Watts' permits. Additionally, ESG Watts continued to operate its landfill while violating conditions of its permit and therefore, has violated Section 21(d)(1) of the Act. ESG Watts' failure to submit the required reports also violated Section 21(o)(11) of the Act which prohibits operating a landfill without filing the required reports. Finally, by failing to install the monitoring equipment, monitor groundwater beneath the landfill and submit the monitoring reports as required, ESG Watts operated its landfill in a manner which constitutes a threat to waters, which in this case, groundwaters of the State. ESG Watts thereby violated Sections 12(a) and 21(d)(2) of the Act and 35 Ill Adm. Code

807.313 and 807.315.

CONCLUSION

Based on the admission of facts by ESG Watts, the Board grants summary judgment in favor of complainant on Count I as initially filed, partial summary judgment on Count II, and on Count III of the complaint as filed on May 15, 1996. The parties are directed to address at hearing those portions of the complaint unresolved by today's order.

Furthermore, the Board defers making any determination on penalty until after the remaining allegations in the complaint and the amended complaint are adjudicated. Similarly, the Board defers any finding on whether the violations were willful, knowing or repeated and whether costs and attorney's fees should be awarded pursuant to Section 42(f) of the Act. At hearing, the parties are directed to include in the record evidence and arguments on the appropriate penalty to be imposed in this matter and on whether costs and attorney's fees should be awarded. (See 415 ILCS 5/42.)

ORDER

1. Complainant's motion filed on January 10, 1997 to amend the complaint is granted.
2. Summary judgment for complainant is granted against ESG Watts as to Count I as initially filed. (This ruling does not include the amendment allowed to the complaint pursuant to paragraph 1.) ESG Watts is found to have violated Sections 21(d)(1) and (d)(2), 21(e), 21(o)(13) and 21.1(a) of the Act and 35 Ill. Adm. Code 807.603 and 807.623.
3. Partial summary judgment for complainant is granted against ESG Watts as to Count II. ESG Watts is found to have violated 35 Ill. Adm. Code 807.313 and 807.315.
4. Summary judgment for complainant is granted against ESG Watts as to Count III. ESG Watts is found in violation Sections 21(d) and 21(o)(11) due to its failure to file the required groundwater monitoring reports; and in violation of Section 12(a) and 21(d)(2) of the Act and 35 Ill. Adm. Code 807.313 and 807.315 due to its failure to install the monitoring equipment and to monitor groundwater quality.
5. ESG Watts is ordered to deposit sufficient funds into the Viola Landfill trust fund so that the fund provides as least the \$249,067 as required by Permit 1994-285-SP, within 45 days of this order.
6. ESG Watts is ordered to submit to the Agency a revision of the current cost estimates for closure and post-closure of the Viola Landfill in compliance with 35 Ill. Adm. Code 807.603(b)(1) and 807.621(c) and (d), within 45 days of this order.
7. At the scheduled hearing the parties shall address the remaining allegations of the complaint, the issues relating to penalty, and awarding of costs and attorney's fees.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1997, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board