

ILLINOIS POLLUTION CONTROL BOARD  
August 21, 1997

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-177
	)	(EPCRA - Enforcement)
ESS L.P., INC., an Illinois limited	)	
partnership,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on a July 16, 1997 motion for summary judgment filed by the Illinois Attorney General, on behalf of the People of the State of Illinois (People). The People filed the complaint on April 7, 1997, alleging a violation of Section 25b-2(a) (failure to submit a toxic chemical release form) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/25b-2(a) (1996)). ESS L.P. failed to answer the complaint or motion for summary judgment. In the motion for summary judgment, the People request that the Board assess a \$60,200 civil penalty against ESS L.P.

For the reasons stated below, the Board finds that there are no genuine issues of material fact remaining and that the People are entitled to judgment under the law. Therefore, the People's motion for summary judgment will be granted.

PROCEDURAL HISTORY

The People filed this enforcement complaint on April 7, 1997. Pursuant to Section 103.122(d) of the Board's procedural rules, ESS L.P. could have filed a response within 30 days of receipt of the complaint. No answer was filed, and accordingly all material allegations of the complaint shall be taken as denied. 35 Ill. Adm. Code 103.122(d).

The instant motion for summary judgment was filed on July 16, 1997. Pursuant to Section 103.140(c) of the Board's procedural rules, ESS L.P. was allowed a response time of seven days after service of the motion. ESS L.P. did not file a response to the People's motion, and therefore it is deemed to have waived objection to the granting of the motion. 35 Ill. Adm. Code 103.140(c). However, such waiver of objection does not bind the Board in the decision of the motion.

### ALLEGED VIOLATION

The People allege that ESS L.P. violated Section 25b-2(a) of the Act. Section 25b-2(a) of the Act provides:

- a. Facilities which are required to file toxic chemical release forms with the State pursuant to Section 313 of the federal Emergency Planning and Community Right-to-Know Act of 1986 shall file such forms with the Illinois Environmental Protection Agency. 415 ILCS 5/25b-2(a).

Section 313 of the federal Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986 states:

(a) Basic requirement

The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year. 42 U.S.C.A. §11023(a) (1986).

### BACKGROUND

ESS L.P. owned or operated a facility at 475 Industrial Drive, West Chicago, DuPage County, Illinois (site) where it manufactured printed circuit boards in 1994. Hydrochloric acid, ammonia, nitric acid, formaldehyde, copper, xylene (mixed isomers) and dichloromethane were used at the site in 1994.<sup>1</sup> For purposes of EPCRA, each chemical requires a separate toxic chemical release form (Form R). The People allege that ESS L.P.

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<sup>1</sup> Hydrochloric acid, ammonia, nitric acid, formaldehyde, copper were used at the site in 1993. ESS L.P. filed Forms R for these chemicals (as well as for sulfuric acid and glycol ethers) to the Agency for the 1993 year on August 31, 1994.

failed to timely file its 1994 Forms R to the Illinois Environment Protection Agency (Agency) for these chemicals by the July 1, 1995 deadline.

Pursuant to Section 25b-6 of the Act, on September 1, 1995 the Agency sent ESS L.P. a warning notice by certified mail, stating that it had failed to submit its Forms R for 1994. The Agency states that ESS L.P. did not file the Forms R within 30 days, or within 30 days of September 5, 1995, by October 5, 1995, but did file them on January 2, 1996.

The People have calculated daily penalties beginning on October 6, 1995 and continuing until December 31, 1995, a period of 87 days.

### ANALYSIS

Summary judgment is appropriate when the pleadings, depositions and admissions of fact, together with any affidavits, show there is no genuine issue of material fact to be considered by the trier of fact and the movant is entitled to judgment under the law. Purtill v. Hess, 111 Ill. 2d 229, 240-241, 489 N.E.2d 867, 871-872 (1986); Waste Management of Illinois, Inc. v. IEPA (July 21, 1994) PCB 94-153; ESG Watts v. IEPA (August 13, 1992), PCB 92-54; Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; People v. ESG Watts (March 6, 1997), PCB 96-233.

Attached to the People's motion for summary judgment is an affidavit signed by Ms. Carlita Crockett of the Agency, attesting to all factual allegations of the complaint. ESS L.P. did not file its 1994 Forms R by July 1, 1995. The Agency sent the Section 25b-6 warning notice on September 1, 1995 and states that ESS L.P. received it on September 5, 1997.

Section 25b-6 of the Act states:

Prior to taking action pursuant to Title VIII for a violation of Section 25b-2 of this Act, the Agency shall issue, no earlier than August 1 of each year by certified mail or personal service upon the person complained against, a notice that the Agency has failed to receive from that person all required toxic chemical release forms and provide a period of 30 days to submit the forms to the Agency. In the event that person fails to file the forms with the Agency within the 30 day period, the Agency may proceed with enforcement pursuant to Title VIII of this Act.

ESS L.P. did not file its 1994 Forms R within the 30-day period after receiving the warning notice, or by October 5, 1995, but rather filed its 1994 Forms R on January 2, 1996. In accordance with Section 25b-6 of the Act, the Agency proceeded with enforcement.

Without exception, ESS L.P. has failed to respond to any filings in this matter. Therefore, as stated above, ESS L.P. has waived objection to the motion for summary judgment.

We find that the uncontested facts demonstrate that ESS L.P. violated Section 25b-2(a) of the Act by failing to timely file its Forms R for hydrochloric acid, ammonia, nitric acid, formaldehyde, copper, xylene (mixed isomers), and dichloromethane used at the site in 1994.

Although there was no physical injury to the people or environment, this is not a minor violation. The Agency cannot protect against environmental damage when it does not know what types and quantities of chemicals are being utilized by the facilities in the State. The reporting requirement of EPCRA are thwarted when facilities do not file toxic chemical release forms and the people of the State cannot access information on facilities using toxic chemicals.

### REMEDY

Having found that ESS L.P. violated the Act, the Board must determine what constitutes a proper remedy. The Act authorizes the Board to assess civil penalties for violations of the Act regardless of whether those violations resulted in actual pollution. ESG Watts, Inc. v. IPCB, 218 Ill.Dec. 183, 282 Ill.App.3d 43, 668 N.E.2d 1015.<sup>2</sup> The Board believes that violation of Section 25b-2 of the Act requires the imposition of the statutory civil penalty and would aid in the enforcement of the Act. The Board's authority to issue a civil penalty is governed by Section 42 of the Act. In accordance with Section 42(b.5):

In lieu of the penalties set forth in subsection (a) and (b) of this Section, any person who fails to file, in a timely manner, a toxic chemical release form with the Agency pursuant to Section 25b-2 of this Act shall be liable for a civil penalty of \$100 per day for each day the form is late. This daily penalty shall begin accruing on the thirty-first day after the date that the person receives the warning notice issued by the Agency pursuant to Section 25b-6 of this Act; and the penalty shall be paid to the Agency. The daily accrual of penalties shall cease as of January 1, of the following year. All penalties collected by the Agency pursuant to this

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<sup>2</sup> The Appellate Court found it was not excessive for the Board to assess a \$60,000 penalty for failing to timely pay solid waste fees or to timely submit various required reports, even though the violations caused no environmental harm and the operator was currently in compliance. The Court also found that it was reasonable to assume the operator received timely value of money by delaying necessary expenditures, even though evidence to support any economic benefit gained was slight to nonexistent. ESG Watts, Inc. v. IPCB, 218 Ill.Dec. 183, 282 Ill.App.3d 43, 668 N.E.2d 1015.

subsection shall be deposited into the Environmental Protection Permit and Inspection Fund.

Complainant seeks a civil penalty of \$8,600 against ESS L.P. for each of the seven chemical Forms R, for a total of \$60,200. The penalty was calculated beginning on October 6, 1995, thirty-one days after receiving the Agency warning letter, until December 31, 1995.

A violation of Section 25b-2 is analogous to an administrative citation violation. When a penalty is imposed in an administration citation, Section 42(b)(4) states that the violator "shall pay a civil penalty of \$500 for each violation," the Board does not have discretion to reduce or increase that penalty amount. Similarly, Section 42(b.5) requires that when a violation of Section 25b-2 is found, the violator "shall be liable for a civil penalty of \$100 per day for each day the form is late." Again, the Board does not have discretion to alter that statutory penalty amount. Because there exists an exact statutory penalty for a violation of Section 25b-2, the Board does not consider the Section 33(c) or 42(h) factors in its penalty analysis. The Board hereby finds that a civil penalty of \$8,600 against ESS L.P. for each chemical Form R, for a total of \$60,200, is required pursuant to statute.

Although the Board may be required in some types of enforcement actions to assess the five mitigation factors listed in Section 42(h) of the Act, the Board cannot use those factors to mitigate a Section 25b-2 violation. The Board is authorized to consider any matters of record in mitigation or aggravation of penalty when determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of Section 42 (415 ILCS 5/42(h)). However, there is no authority for the Board to consider 42(h) factors when determining a 42(b.5) penalty amount.

The Board will therefore impose the statutory \$100 per day civil penalty for each Form R not timely submitted, for a total of \$60,200.

### ORDER

1. The Board hereby grants summary judgment in favor of People of the State of Illinois against respondent ESS L.P., an Illinois Limited Partnership (ESS L.P.).
2. The Board finds that ESS L.P. violated Section 25b-2 of the Illinois Environmental Protection Act.
3. ESS L.P. shall pay a civil penalty in the sum of sixty thousand two hundred dollars (\$60,200) within 90 days of this order payable to the Treasurer of the State of Illinois and designated to the Environmental Protection Permit and Inspection Fund.

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 Permit and Inspection Fund and shall be sent by first class mail to:

Illinois Environmental Protection Agency  
Fiscal Services Division  
1021 North Grand Avenue East  
Springfield, IL 62702

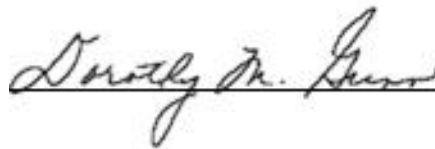
Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (35 ILCS 5/1003), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

IT IS SO ORDERED.

Board Member M. McFawn concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 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 opinion and order was adopted on the 21st day of August 1997, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board