ILLINOIS POLLUTION CONTROL BOARD
February 5, 1998

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

THOMAS DAVIS AND JANE MCBRIDE, OFFICE OF THE ILLINOIS ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT; and

LARRY A. WOODWARD APPEARED ON BEHALF OF RESPONDENT.

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

This case is before the Board on the complaint of the Attorney General on behalf of the people of the State of Illinois (Complainant) against ESG Watts, Inc. (ESG Watts). ESG Watts is operator of a municipal solid waste landfill in Mercer County known as the Watts/Viola Landfill. The original permit for development and operation of the landfill was issued in 1973; supplemental permits were issued in 1991, 1993, 1995, and 1996. The complaint alleges numerous violations of the Environmental Protection Act (Act), 415 ILCS 5 (1996), as well as regulations implementing the Act. The Board, having considered the evidence presented and the arguments of the parties, now renders its decision. Also before the Board are "Complainant's First Motion to Supplement the Record," filed on January 27, 1998, and "Respondent's First Motion to Supplement the Record," filed on February 2, 1998. The Board denies these motions.

PROCEDURAL HISTORY

On May 15, 1996, Complainant filed a five count complaint against ESG Watts asserting violations of financial assurance requirements (count I), groundwater contamination (count II), violation of groundwater monitoring requirements (count III), violations of final cover requirements (count IV), and violation of final contour requirements (count V). Complainant served ESG Watts with a "Request for the Admission of Facts" on June 14, 1996. ESG Watts filed its "Response to Request for the Admission of Facts" (Res.) on August 28, 1996.

Based upon ESG Watts' "Response to Request for the Admission of Facts," Complainant moved for summary judgment on counts I, II, and III on December 16, 1996. On January 10, 1997, Complainant moved to amend count I of the complaint to add

allegations of another violation of a permit-imposed financial assurance requirement which occurred subsequent to the filing of the original complaint. On March 6, 1997, the Board granted Complainant's motion to amend the complaint and granted summary judgment on counts I and III and partial summary judgment on count II of the complaint, but noted that the grant of summary judgment on count I was only with respect to the violations alleged in the original complaint, and did not include the additional allegations added through the amendment of the complaint. The Board reserved the issue of appropriate penalties for the violations pending final hearing.

Hearings were held on March 13 and 25, 1997, at which both sides introduced evidence.[1] On May 5, 1997, Complainant filed "Complainant's Brief" (Comp. Br.). On May 23, 1997, ESG Watts filed "Respondent's Brief" (Res. Br.). On June 2, 1997, Complainant filed "Complainant's Reply Brief" (Reply).

SUMMARY OF FINDINGS[2]

As explained in more detail below, the Board finds that ESG Watts has not provided financial assurance for closure of the Viola landfill as required in its permits. ESG Watts has further failed to provide updated cost estimates for closure and post-closure care in a timely manner or to upgrade its financial assurance in light of changes in cost estimates. The Board also finds that ESG Watts has caused contamination of groundwater in the vicinity of the Viola landfill. ESG Watts further failed to perform groundwater monitoring or submit a groundwater assessment plan as required under its permits. Because ESG Watts failed for three years to conduct the required groundwater monitoring, and because ESG Watts has not performed the groundwater assessment, it is impossible to tell when this contamination began or the extent of remediation required. Although it appears undeniable that ESG Watts has failed to maintain cover on the landfill as required by its permits, the Board finds that the regulation which ESG Watts is alleged to have violated regarding final cover does not apply to the Viola landfill, and accordingly finds no violation thereof, nor any violation of the Act predicated on that alleged regulatory violation. Finally, the Board finds that ESG Watts has placed waste above the permitted final contours of its landfill. From these circumstances the Board finds 24 violations of the Act and Board regulations, and imposes total fines of $683,200 against ESG Watts.

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[1] The transcript of the March 13 hearing will be cited as "Tr.1." The transcript of the March 25 hearing will be cited as "Tr.2."

[2] This summary is provided solely as a convenience to readers, and is not intended to be a comprehesive statement of all findings or conclusions of the Board in this case. The specific findings and conclusions of the Board are set forth below.

CHRONOLOGY OF SIGNIFICANT EVENTS

May 16, 1973: Illinois Environmental Protection Agency (Agency) issues Permit No. 1973-34-OP, permitting operation of the Viola landfill as a solid waste disposal facility. Comp. Ex. 3 at 2.

June 14, 1991: Agency issues Supplemental Permit No. 1991-098-SP, setting the financial assurance cost estimate at $159,258. Comp. Ex. 5.

December 9, 1991: Agency issues Supplemental Permit 1991-285-SP, establishing a revised groundwater monitoring program and increasing the financial assurance cost estimate to $214,382. Comp. Ex. 1A at 1.

July 15, 1992: Date on which first groundwater monitoring report was due under Supplemental Permit No. 1991-285-SP. Comp. Ex. 1A at 1.

September 18, 1992: Date by which Viola landfill stopped receiving waste. Tr.2 at 57.

December 9, 1993: Date on which revised cost estimates were due under Supplemental Permit No. 1991-285-SP. Comp. Ex. 1A at 2.

September 30, 1994: Date of surveyor's report showing exceedence of permitted landfill contours. Comp. Ex. 4.

November 14, 1994: Agency receives financial assurance cost estimates from ESG Watts. Comp. Ex. 3 at 1..

February 8, 1995: Agency issues Supplemental Permit No. 1994-532-SP, approving revised cost estimate. Comp. Ex. 3.

July 14, 1995: ESG Watts submits its first groundwater monitoring report, indicating contamination. Comp. Ex. 17.

October 25, 1995: Beling Consultants, an engineering firm, informs ESG Watts by letter that according to its calculations there are 52,000 cubic yards of waste above the permitted contours of the landfill. Comp. Ex. 7.

May 15, 1996: Complaint against ESG Watts filed.

August 1, 1996: ESG Watts and Resource Technology Corp. enter into contract regarding gas removal system for the Viola landfill. Res. Ex. B.

September 6, 1996: Agency issues Supplemental Permit No. 1996-194-SP to ESG Watts, which among other things set current closure cost estimate at $397,080 and provides for movement of over-contour waste. Comp. Ex. 6.

December 5, 1996: Date by which ESG Watts was required under 35 Ill. Adm. Code 807.603 to increase financial assurance so as to equal current cost estimate contained in Supplemental Permit No. 1996-194-SP.

March 6, 1997: Board grants summary judgment against ESG Watts on counts I and III of complaint and partial summary judgment on count II. ESG Watts ordered to bring balance of financial assurance trust fund up to $249,067 within 45 days.

March 13, 1997: Hearing begins.

March 25, 1997: Hearing concludes.

April 23, 1997: Agency submits affidavit that ESG Watts failed to comply with the Board's March 6, 1997, order requiring deposit of funds into financial assurance trust fund.

ANALYSIS

Count I: Violation of Permit Financial Assurance Requirements

Count I of the complaint alleges that ESG Watts violated the Act and its implementing regulations by failing to meet the financial assurance requirements contained it its permits and failing to update cost estimates as required. Complainant alleges that these failures resulted in violations of Sections 21(d)(1), (d)(2), and (o)(13) and 21.1(a) of the Act (415 ILCS 5/21(d)(1), 21(d)(2), 21(o)(13), 21.1(a) (1996)) and 35 Ill. Adm. Code 807.603 and 807.623. In the amendment to the complaint, Complainant alleges additional violations of Sections 21(d)(1), 21(o)(13), and 21.1(a).

Applicable Statutes and Regulations

Section 21 provides in relevant 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. . . .
>
> 2. in violation of any regulations or standards adopted by the Board 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:

* * *

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.

Section 21.1(a) provides:

a. Except as provided in subsection (a.5) no person other than the State of Illinois, its agencies and institutions, or a unit of local government shall conduct any waste disposal operation on or after March 1, 1985, which requires a permit under subsection (d) of Section 21 of this Act, unless that person has posted with the Agency a performance bond or other security for the purpose of insuring closure of the site and post-closure care in accordance with this Act and regulations adopted thereunder.

35 Ill. Adm. Code 807.603 provides:

a) The operator must maintain financial assurance equal to or greater than the current cost estimate at all times except as provided in this Section.

b) The operator must increase the total amount of financial assurance so as to equal the current cost estimate within 90 days after any of the following:

1) An increase in the current cost estimate[.]

35 Ill. Adm. Code 807.623 provides:

a) The operator must revise the current cost estimate a 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 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 the 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 must file revised estimates even if the operator determines that there are no changes in the prices.

Summary Judgment

On March 6, 1997, the Board granted summary judgment against ESG Watts on the violations alleged in the original count I of the complaint. In so doing, the Board stated:

> 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 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. People v. ESG Watts (March 6, 1997), PCB 96-233, slip op. at 7-8.

Thus, ESG Watts has been found in violation of Sections 21(d)(1), 21(d)(2), 21(o)(13), and 21.1(a) of the Act and 35 Ill. Adm. Code 807.603 and 807.623.

In light of the Board's grant of summary judgment against ESG Watts on Count I, the only matters remaining for determination at this point, other than penalty, are the violations alleged in Complainant's amendment to the complaint, namely, that by failing to timely post financial assurance required under Special Condition 2 of Supplemental Permit 1996-184-SP (Comp. Ex. 6) ESG Watts has violated Sections 21(d)(1), 21(o)(13), and 21.1(a) of the Act. The Board does, however, consider the evidence introduced at the hearing to determine the duration of violations previously found.

Determination of Violations

Evidentiary Facts. ESG Watts established a financial assurance trust fund for the Viola landfill. Res. ¶ 39. The balance of the financial assurance trust fund was approximately $20,928.00 as of December 20, 1990. Res. ¶ 40. The balance of the fund had increased to approximately $26,020.00 as of December 31, 1995, Res. ¶ 41, but ESG Watts has not made any deposits into the fund since 1990. Res. ¶ 42. At the time of the filing of the complaint on May 15, 1996, the financial assurance trust fund for the Viola landfill did not contain more than $30,000.00. Res. ¶ 50.

On September 6, 1996, the Agency issued Supplemental Permit No. 1996-184-SP to ESG Watts. Comp. Ex. 6 at 1. Special Condition 2 of Supplemental Permit 1996-184-SP provides:

> 2. The operator must maintain financial assurance equal to or greater than the current cost estimate at all times. The current cost estimate is $397,080.00. Comp. Ex. 6 at 2.

The amount of the current cost estimate, $397,080, should have been in the trust fund by December 5, 1996 (the date 90 days after the increase in the cost estimate). 35 Ill. Adm. Code 807.603. At the time of the hearing on March 13, 1997, the amount in the trust fund was $27,316. Tr.1 at 107.

Discussion. Inasmuch as ESG Watts has admitted that the balance of the financial assurance fund for the Viola landfill was far less than $397,080 prior to September 6, 1996, and that it has not made any deposits into the fund since 1990, and given that as of March 13, 1997, there was only $27,316 in the fund, the Board finds that ESG Watts did not comply with Special Condition 2 of Supplemental Permit 1996-184-SP. Consequently, the Board concludes that on September 6, 1996, and every day thereafter through at least March 13, 1997, ESG Watts was in violation of Section 21(d)(1) of the Act inasmuch as for that period ESG Watts conducted a waste disposal operation in violation of a condition imposed by a permit granted by the Agency.

The Board further finds that ESG Watts did not comply with 35 Ill. Adm. Code 807.603(b)(1). Accordingly the Board concludes that on December 5, 1996, and every day thereafter through at least March 13, 1997, ESG Watts was in violation of Section 21(o)(13) of the Act for conducting a sanitary landfill operation in a manner which resulted in failure to submit security for the site as required by Board rules. The Board also concludes that on December 5, 1996, and every day thereafter through at least March 13, 1997, ESG Watts was in violation of Section 21.1(a) of the Act for conducting a waste disposal operation without posting with the Agency a performance bond or other security for the purpose of ensuring closure of the site and post-closure care in accordance with regulations adopted under the Act.

With regard to the violations which were the subject of the Board's grant of summary judgment, the violations of Sections 21(d)(1) and 21(d)(2) were found to have begun on September 19, 1991, and it is clear from the evidence submitted at the hearing that the violation of Section 21(d)(1) continued to September 6, 1996, when Supplemental Permit 1996-184-SP became effective, while the violation of Section 21(d)(2) continued through at least March 13, 1997. The violations of Sections 21(o)(13) and 21.1(a) continued from at least September 19, 1991, to December 5, 1996 (when ESG Watts was required to have met the new terms of Supplemental Permit 1996-184-SP). The violation of 35 Ill. Adm. Code 807.603 continued from at least September 19, 1991, through at least March 13, 1997. The violation of 35 Ill. Adm. Code 807.623 began on December 9, 1993, and continued through November 14, 1994. Comp. Ex. 3 at 1.

Appropriate Penalty

Complainant asks the Board to impose a total penalty of $426,000. Of this amount, $116,000 is attributed to the cost of money saved by ESG Watts as a result of its failure to fund the financial assurance trust fund; the balance is made up of other components which Complainant attributes to other violations of the Act and its implementing regulations. (These other components are discussed below in the Board's analysis of counts III and V.) While these numbers are certainly useful for discussion purposes, the Board believes that the analysis of an appropriate penalty for ESG Watts' violations must go beyond merely economic gain.

In determining an appropriate penalty, the Board first calculates the maximum penalty which could be assessed under the Act. The Board then considers the mitigating or aggravating impact of the the circumstances of the case, including specifically the factors set forth in Sections 33(c) of the Act (415 ILCS 5/33(c) (1996)).

Calculation of Maximum Penalty. The maximum penalties which can be assessed are established in Section 42(a) of the Act (415 ILCS 5/42(a) (1996)), which provides:

> Except as provided in this Section, any person that violates any provision of this Act or any regulation adopted by the Board, or any permit or term or condition thereof, or that violates any determination or order of the Board pursuant to this Act, shall be liable to a civil penalty not to exceed $50,000 for the violation

> and an additional civil penalty of not to exceed $10,000 for each day during which the violation continues[.]

Other subsections of Section 42 contain several exceptions to application of subsection (a), but none applies here.

In its initial grant of summary judgment, the Board found four violations of the Act and two violations of Board regulations by ESG Watts. The Board today finds three more violations of the Act. For nine violations, the maximum base fine is $450,000. Each of the violations has also been found to have continued for some period: the initial violations of Section 21(d)(2) and 35 Ill. Adm. Code 807.603 continued from September 19, 1991, to March 13, 1997, or for 2,002 days; the initial violations of Sections 21(o)(13) and 21.1(a) continued from September 19, 1991, to December 5, 1996, or 1905 days; the initial violation of Section 21(d)(1) continued from September 19, 1991, to September 6, 1996, or 1,814 days; the violation of 35 Ill. Adm. Code 807.623 continued from December 9, 1993, to November 14, 1994, or 339 days; the second violation of Section 21(d)(1) continued from September 6, 1996, to March 13, 1997, or for 188 days, and the second violations of Sections 21(o)(13) and 21.1(a) continued from December 5, 1997, to March 13, 1997, or 98 days. Two violations times 2,002 days, plus two violations times 1,905 days, plus one violation times 1,814 days, plus one violation times 339 days, plus one violation times 188 days, plus two violations times 98 days equals 10,351 days of continuing violation by ESG Watts. At $10,000 per day, the maximum fine assessable under the Act for continuing violations is $103,510,000. The total maximum fine, both for base violations and continuing violations, is thus $103,960,000.

<u>Section 33(c) Factors.</u> The factors to be considered by the Board are set forth in Sections 33(c) of the Act (415 ILCS 5/33(c) (1996)). Section 33(c) provides in relevant part:

> c. In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
>
> i. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> ii. the social and economic value of the pollution source;
>
> iii. 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;

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

v. any subsequent compliance.

The Board now considers how each of the listed factors relates to the violations of the Act and regulations found under count I of the complaint.

Character and Degree of Injury. The Board finds that ESG Watts' failure to provide the financial assurances required in its permits results in a significant degree of interference with the protection of health, welfare and property. Although the financial assurance violations committed by ESG Watts may not be the most dramatic possible violations of the Act, they are among the most insidious in character: ESG Watts violates the provisions which are in place to ensure that other more threatening violations do not occur. The Board thus takes these violations very seriously. The Board concludes that this factor weighs in aggravation of the penalty to be imposed against ESG Watts.

Social and Economic Value. The Viola landfill no longer accepts waste; it thus no longer provides any social or economic benefit to its region through its operation. There is no evidence of any social or economic value to the closed landfill. The Board concludes that this factor also weighs in aggravation of the penalty to be imposed against ESG Watts.

Suitability of Pollution Source. The Viola site has been permitted as a landfill since 1973. The Board concludes that this factor weighs neither in aggravation nor mitigation of the penalty to be imposed.

Technical and Economic Reasonableness of Compliance. The expenditures required to comply with the relevant Act sections and regulations are set in ESG Watts' permits. If ESG Watts believed that the amounts set in its permits were or are inordinately high, it had recourse through the Board's permit appeal procedures. The Board will not undertake a review of the reasonableness of the terms of ESG Watts' permits in this case. Accordingly the Board concludes that this factor weighs in aggravation of the penalty to be imposed against ESG Watts.

Subsequent Compliance. Through the time of the hearings there had been no compliance by ESG Watts. The Board concludes that this factor weighs in aggravation of the penalty to be assessed against ESG Watts.

Other Mitigating or Aggravating Factors. Section 42(h) of the Act (415 ILCS 5/42(h) (1996)) authorizes the Board to consider the impact of any matter of record in determining an appropriate civil penalty. Section 42(h) provides:

> h. In determining the appropriate civil penalty to be imposed under subdivision[] (a) . . . of this Section, the Board is authorized to consider any matters of record in mitigation

> or aggravation of penalty, including but not limited to the following factors:
>
> 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 future 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.

The Board finds the factors listed in Section 42(h) relevant in this case and considers the impact of each of them on the penalty to be imposed against ESG Watts.

Duration and Gravity of Violation. As is discussed above, the Board considers these violations very serious. They have continued for over five years. The Board concludes that this factor weighs in aggravation of the penalty to be imposed against ESG Watts.

Diligence in Achieving Compliance. Although ESG Watts presented testimony regarding its plans to achieve compliance (specifically, its plans to obtain a bond), see Tr.1 at 144-45, the Board gives this testimony very little weight, since (a) it appears that no efforts were made until shortly prior to the hearing, (b) compliance had not actually been achieved at the time of the hearing, and (c) any compliance is dependent on third parties over whom ESG Watts has no control. More telling is the lack of evidence of any effort whatsoever by ESG Watts to achieve compliance in the preceding five years. Back when ESG Watts was making a profit (ESG Watts had taxable income of approximately $1.5 million in 1995; Tr.1 at 141), it made no effort to bring the financial assurance trust fund up to the required level. Consequently, ESG Watts statement that "[w]hile it is a knowing violation, it is not a willful violation," Res. Br. at 5, rings false. The Board concludes that ESG Watts' failure to fund the trust fund was willful and in bad faith. The Board concludes that this factor weighs in aggravation of the penalty to be assessed against ESG Watts.

Monetary Benefits. John Taylor, a financial assurance analyst for the Agency, testified that for the period from September 12, 1991, to January 7, 1997, ESG Watts realized a

savings of approximately $116,000 by not funding the trust fund. Tr.1 at 108-09. Mr. Taylor's testimony was based upon calculations summarized in Complainant's Exhibit 10. In his calculations, Mr. Taylor assumed a twelve percent cost of capital to ESG Watts. These calculations were challenged by ESG Watts, whose witness Arthur Evans testified that Mr. Taylor's calculations used the wrong interest rate and improperly compounded the return.

The Board finds that Mr. Taylor used an appropriate interest rate in his calculations. Although Mr. Evans testified that up through July of 1994 ESG Watts had borrowed money at rates ranging from 0 to 8.75% with a weighted average of 6.70%, Tr.1 at 51-52, he also testified that those loans were secured. Tr.1 at 59. Consequently, the range of rates cited by Mr. Evans cannot be used to establish the appropriate rate for calculating ESG Watts' savings, since these savings are analogous to an unsecured loan. Furthermore, ESG Watts has been unable to borrow money since July of 1994. Tr.1 at 52. Accordingly, we agree that the estimate used by Mr. Taylor in his calculations was "very conservative." Tr.1 at 109. We also agree that it was appropriate for Mr. Taylor to compound the return in his calculations, given that over time ESG Watts had the benefit of the proceeds of or savings due to money freed up on account of its failure to fund the financial assurance trust fund.

After weighing the conflicting testimony of Mr. Taylor and Mr. Evans, the Board finds that ESG Watts realized a benefit of at least $116,000 due to its failure to fund the financial assurance trust fund.

Penalty Necessary for Deterrence. Although the Board and Illinois courts have imposed numerous fines on ESG Watts, ESG Watts' actions clearly demonstrate that the company does not take such penalties seriously. For example, ESG Watts was adjudicated in violation of the Act and Board regulations regarding its Taylor Ridge landfill in People v. Watts Trucking Service, Inc., case number 92 CH 23 (Cir. Ct. Sangamon Co.). A preliminary injunction order was entered on September 11, 1992, in which the court found that ESG Watts had violated Sections 12(a), 12(d), 21(d), 21(d)(2), 21(k), 21(p)(1), 21(p)(2), 21(p)(3), 21(p)(5), 21(p)(12), and 21.1(a) of the Act. Res. ¶¶ 1-10. A judgment order in the Sangamon County case was entered on February 2, 1994, imposing penalties in the amount of $350,000, awarding fees and costs in the amount of $30,940, and requiring corrective actions. This order was affirmed on appeal. Res. ¶ 11. A contempt order was entered on February 23, 1995, finding ESG Watts "to be in indirect civil contempt of this Court for having substantially failed and wilfully refused to comply with certain provisions of the judgment order," imposing sanctions in the amount of $200,000, and awarding attorney's fees in the amount of $2,400. A supplemental contempt order was entered on June 10, 1996, finding that ESG Watts had failed to purge itself of contempt and ordering payment of the $200,000 contempt sanctions and $3,120 in additional attorney's fees. Res. ¶ 12.

There may be a point at which the severity of a penalty will drive home to ESG Watts that compliance with Illinois' environmental laws is in its own best interest, but apparently that point has not yet been reached. Even if ESG Watts never comes to this realization, it is important for others who may find themselves in ESG Watts' position to recognize that ignoring environmental laws will not be countenanced in this State.

ESG Watts, for its part, asserts an inability to pay heavy fines. The Board is not convinced. Although James Watts, president of ESG Watts, testified that the company lost money last year, Tr.1 at 142, and that its assets are encumbered, Tr.1 at 167, it is far from clear that ESG Watts could not, by exercising sufficient corporate will, fund the financial assurance trust fund or pay a substantial penalty. For example, ESG Watts currently carries on its books outstanding stockholder loans of approximately $800,000. Tr.1 at 60. Some or all of this amount may be collectable. Insider transfers may be recoverable. The company is worth quite a bit of money and could command a good selling price, Tr.1 at 141; perhaps financing could be arranged through one of ESG Watts' numerous affiliates.

Even if ESG Watts could not afford to pay a penalty, such a circumstance would not preclude imposition of a fine, particularly where, as here, a significant concern of the Board is to dissuade other landfill operators from adopting ESG Watts' irresponsible *modus operandi.* We find the situation before us very similar to that addressed by the appellate court in Standard Scrap Metal Co. v. Pollution Control Board, 142 Ill.App.3d 655, 491 N.E.2d 1251 (1st Dist. 1986). The appellant, a company which for years had "demonstrated a blatant disregard for the requirements and procedures designed to protect the environment," 142 Ill.App.3d at 662, 491 N.E.2d at 1255, argued that fines imposed by the Board were arbitrary and capricious, partly because penalties and costs of compliance would impose a difficult financial burden on it. The court rejected this argument, stating:

> If Standard Scrap does not now have funds to cover both penalty and compliance costs, as well as cease and desist operations until compliance is achieved, that hardship is self-imposed. The company should have taken the necessary steps to bring its facility into compliance when first notified by the Agency and at a time when sufficient funds were available to do so. Standard Scrap cannot now be allowed to pass of a necessary cost of doing business in this state, and one borne equally by competitors, by arguing that compliance with environmental laws will put it out of business. 142 Ill.App.3d at 664, 491 N.E.2d at 1257.

This discussion applies with full force to the case currently before us.

The Board concludes that this factor weighs in aggravation of the penalty to be imposed.

Prior History of Violations. This is hardly ESG Watts' first encounter with Illinois' environmental regulatory system. This is not even ESG Watts' first proceeding involving this landfill or the violation of financial assurance requirements. ESG Watts was adjudicated in violation of 35 Ill. Adm. Code 807.623 in the enforcement action People v. Watts, PCB 94-127 (May 4, 1995), *aff'd sub nom* ESG Watts, Inc. v. Pollution Control Board, 282 Ill.App.3d 43, 668 N.E.2d 1015 (4th Dist. 1996). Res. ¶ 32. ESG Watts was adjudicated in violation of the Act and Board regulations regarding the Viola landfill in People v. Watts Trucking Service, Inc., case number 92 CH 35 (Cir. Ct. Sangamon Co.) in a summary judgment entered on December 15, 1995, on the allegations that ESG Watts had failed to post

adequate financial assurance as required by Permit No. 1991-285-SP in violation of Sections 21(d) and 21.1(a) of the Act. ESG Watts was ordered to post $214,382 within 30 days. Res. ¶ 34.

In other matters, ESG Watts has been adjudicated in violation of the Act in the following administrative citation proceedings: AC 87-123 (Apr. 7, 1988), AC 88-17 (May 5, 1988), AC 88-112 (Jan. 19, 1989), AC 89-38 (Apr. 6, 1989), AC 89-131 (July 3, 1990), AC 89-255 (Jan. 11, 1990), AC 89-278 (Jan. 25, 1990), AC 89-286 (Jan. 25, 1990), AC 90-26 (Aug. 8, 1991), AC 90-36 (June 20, 1991), AC 94-11 (Apr. 21, 1994), AC 94-12 (May 5, 1994), AC 94-13 (May 5, 1994), and AC 94-15 (May 5, 1994). Res. ¶¶ 14-15, 20-31.

The Board concludes that this factor weighs in aggravation of the penalty to be imposed.

Conclusion. From consideration of the factors discussed above, the Board concludes that a substantial penalty against ESG Watts is warranted. Nevertheless, ESG Watts clearly has nowhere near the resources to pay even a fraction of the tens of millions of dollars which could theoretically be assessed against it under Section 42(a). Under these circumstances, the Board considers the economic benefit realized by ESG Watts an appropriate basis for a penalty.

The Board concludes that in order to deter future violations of the Act by ESG Watts and others, ESG Watts must not be allowed to realize any economic advantage from failure or refusal to comply with the Act and its implementing regulations. Accordingly, the Board initially assesses a penalty in the amount of $116,000 against ESG Watts for failure to meet its financial responsibility requirements.

Assessing this penalty, however, merely places ESG Watts in the position in which it would have found itself had it met its obligations. Were this the only penalty assessed against ESG Watts, it would lose only the money saved by failing to comply with the Act. Accordingly, the Board concludes that it is necessary in this case to assess an additional penalty to encourage compliance. The Board has previously found that requiring a repayment of two dollars for each dollar realized due to violation of the Act and regulations removes the economic incentive for noncompliance. People v. Watts (May 4, 1995), PCB 94-127, slip op. at 16, *aff'd sub nom.* ESG Watts, Inc. v. Pollution Control Board, 282 Ill.App.3d 43, 668 N.E.2d 1015 (4th Dist. 1996). The Board therefore imposes an additional penalty of $116,000, for a total of $232,000.

These penalties must be paid on or before April 2, 1998.

Count II: Contamination of Groundwater

Count II of the complaint alleges violations of the Act and Board regulations based upon contamination of groundwater. Complainant claims that ESG Watts has violated Sections 12(a) and 21(d)(2) of the Act (415 ILCS 5/12(a), 21(d)(2) (1996)) and 35 Ill. Adm. Code 620.115, 620.301(a), 620.405, 620.410, 807.313, and 807.315.

Applicable Statutes and Regulations

Section 21(d)(2) of the Act is set forth above in the Board's discussion of count I. Section 12(a) of the Act provides:

> No person shall:
>
> a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

35 Ill. Adm. Code 620.115 provides:

> No person shall cause, threaten or allow a violation of the Act, the [Illinois Groundwater Protection Act, 415 ILCS 55,] or regulations adopted by the Board thereunder, including but not limited to this Part.

35 Ill. Adm. Code 620.301(a) provides:

> a) No person shall cause, threaten or allow the release of any contaminant to a resource groundwater such that:
>
> 1) Treatment or additional treatment is necessary to continue an existing use or to assure a potential use of such groundwater; or
>
> 2) An existing or potential use of such groundwater is precluded.

35 Ill. Adm. Code 620.405 provides:

> No person shall cause, threaten or allow the release of any contaminant into groundwater so as to cause a groundwater quality standard set forth in this Subpart to be exceeded.

Quality standards for various classifications of groundwater are found in other sections of Part 620. Standards for Class I groundwater are found at 35 Ill. Adm. Code 620.410; standards for Class II groundwater are found at 35 Ill. Adm. Code 620.420.

35 Ill. Adm. Code 807.313 provides:

> No person shall cause or allow operation of a sanitary landfill so as to cause or threaten or allow the discharge of any contaminants

> into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under the Act.

35 Ill. Adm. Code 807.315 provides:

> No person shall cause or allow the development or operation of a sanitary landfill unless the applicant proves to the satisfaction of the Agency that no damage or hazard will result to waters of the State because of development and operation of the sanitary landfill.

Summary Judgment

In its order of March 6, 1997, the Board entered summary judgment against ESG Watts on two of the violations alleged in count II: 35 Ill. Adm. Code 807.313 and 807.315. The remaining alleged violations were left for the parties to address at hearing.

At the same time, the Board also entered summary judgment against ESG Watts on the violations alleged in Count III. Among the violations alleged in count III on which judgment was entered were violations of Sections 12(a) and 21(d)(2) of the Act. ESG Watts has argued, at the hearing and again in its brief, that the violations of these sections alleged in counts II and III are actually the same, and so the Board's entry of summary judgment on count III resolved the violations of Sections 12(a) and 21(d)(2) alleged in count II.

In paragraph 24 of count II of the complaint, which is incorporated by reference as paragraph 24 of count III, Complainant alleges that a groundwater monitoring report submitted on July 14, 1995, indicated exceedences of groundwater quality standards for a number of constituents.

Paragraph 29 of count II of the complaint, which contains the allegation of violations of Sections 12(a) and 21(d)(2), alleges:

> By causing, threatening or allowing the discharge of contaminants into the groundwater so as to cause or tend to cause water pollution, Watts has violates [Section 12(a)] and 35 Ill. Adm. Code 807.313 and 807.315. By violating the regulatory prohibitions against water pollution applicable to sanitary landfills, Watts has also violated [Section 21(d)(2)].

The analogous allegations in count III are contained in paragraph 45, which alleges:

> By failing to conduct and/or report groundwater monitoring to the [Agency] for approximately three years, Watts thereby failed

> to detect the presence of contaminants and thereby caused, allowed or threatened discharges or releases of contaminants so as to cause or tend to cause water pollution in violation of [Section 12(a)] and 35 Ill. Adm. Code 807.313 and 807.315. By violating the regulatory provisions against water pollution applicable to sanitary landfills, Watts has also violated [Section 21(d)(2)].

Although these paragraphs of the complaint are superficially similar, the Board concludes that the basis for its grant of summary judgment on count III, as articulated in the March 6 order, precludes a finding that the ruling on count III resolves the violation of Section 12(a) alleged in count II. In its March 6 order, the Board ruled:

> [B]y failing to install the monitoring equipment, monitor groundwater beneath the landfill and submit monitoring reports as required, ESG Watts operated its landfill in a manner which constitutes a threat to waters, which [sic] 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. People v. ESG Watts, Inc. (March 6, 1997), PCB 96-233, slip op. at 5-6.

The basis of the violations alleged in count II is the actual presence of contaminants in the groundwater, reflected in the monitoring results reported by ESG Watts. In granting summary judgment on count III, the Board found that by failing to properly monitor the groundwater, ESG Watts had threatened a discharge which would tend to cause water pollution. This is a separate question from whether actual water pollution has been caused by constituents from the landfill. Although the language in the quoted provisions of count III of the complaint (and, indeed, the language of Section 12(a)) is broad enough to encompass both types of violations, it does not necessarily follow that the two are equivalent. The Board concludes that the allegations in count II describe a separate violation of Section 12(a) from that which was subject to the grant of summary judgment on count III.

Likewise, the Board concludes that counts II and III allege separate violations of 35 Ill. Adm. Code 807.313. Upon review, however, it appears to the Board that counts II and III describe the same violations of 35 Ill. Adm. Code 807.315 and Section 21(d)(2). Accordingly, although summary judgment has been entered on both counts, with respect to section 807.315 the Board finds that ESG Watts has committed only one violation. The Board also concludes that in entering summary judgment on count III it has resolved the violation of Section 21(d)(2) alleged in count II.

In light of these conclusions, the issue of an appropriate penalty for violations of Section 807.315 and Section 21(d)(2) will be addressed in our discussion of count III below. We now address the violations alleged in count II which were not resolved in the Board's March 6 order.

Determination of Violations

Evidentiary Facts. The Board finds as follows: On July 14, 1995, ESG Watts submitted a groundwater monitoring report to the Agency for the second quarter of 1995. The report documented the analytical results of samples collected on May 31, 1995, and reflected 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. Subsequent groundwater reporting reveals that the exceedences continued through at least July 29, 1996. Comp. Ex. 20. Organic contaminants would pose direct threats to public health if they were consumed. Comp. Ex. 1 at 33. Treatment would be necessary if the groundwater were to be used for consumption. Comp. Ex. 1 at 32.

ESG Watts' witness, hydrogeologist Ronald Patterson, opined that the cause of exceedences of groundwater standards by inorganic analytes is that the background levels are very high. Tr.1 at 175-76. Sampling data going back to 1973 shows similar, very high metal levels in upgradient wells. Tr.1 at 178-79. Kenneth Liss, the Agency's Groundwater Unit Manager, acknowledged that because of occurrences in upgradient wells, inorganic levels in the groundwater might reflect regional background information. Comp. Ex. 1 at 28. Mr. Liss also suggested that the inorganic contamination could have come from the landfill. Tr.2 at 44. There is not, however, a preponderance of evidence from which the Board can find that the landfill, rather than background levels, caused the inorganic exceedences.

Both witnesses agree, however, and the Board finds, that the landfill is the logical source of the organic contaminants. Tr.1 at 196-197; Comp. Ex. 1 at 28. Mr. Patterson's opinion as to the cause of the exceedences of groundwater standards by organic analytes is gas migration through the unsaturated zone. Tr.1 at 179. Mr. Liss agreed that gas migration could have been a source, but also stated that the source could be leachate. Comp. Ex. 1 at 28-29, 38. Mr. Patterson testified that he did not see any indications of leachate. Tr.1 at 191.

Discussion.

35 Ill. Adm. Code 620.301(a). Having found organic contaminants present in the groundwater around the landfill, and having found the landfill to be the source of the contaminants, the Board concludes that ESG Watts has caused the discharge of contaminants into groundwater. Having also found that treatment would be necessary before the groundwater could be used for consumption (*i.e*, to assure a potential use), the Board concludes that ESG Watts has violated 35 Ill. Adm. Code 620.301(a). There is insufficient evidence for the Board to determine when this violation began.[3] The most recent monitoring report entered into evidence indicates that as of July 29, 1996, levels of several organic

[3] Complainant has argued that this lack of evidence is due to ESG Watts' failure to conduct the groundwater monitoring required under its permits. While this fact does not shift the burden of proof with regard to the violations alleged in count II, the Board considers it a very significant factor in aggravation of the penalty to be imposed for violations of the monitoring requirements found under count III, discussed below.

analytes still exceeded Class II groundwater standards. Comp. Ex. 20. The Board accordingly finds that ESG Watts' violation of Section 620.301(a) continued from May 31, 1995, to July 29, 1996.

35 Ill. Adm. Code 807.313. In its March 9 order granting summary judgment, the Board concluded that ESG Watts had violated 35 Ill. Adm. Code 807.313. As with the violation of Section 620.301(a), there is insufficient evidence for the Board to determine the date on which this violation began. The Board finds that this violation also continued from May 31, 1995, to July 29, 1996.

35 Ill. Adm. Code 620.405 and 620.410. Section 620.405 prohibits causing a release of contaminants into groundwater so as to violate groundwater quality standards. Section 620.410, which ESG Watts is alleged to have violated, sets forth groundwater quality standards for Class I groundwater. To determine whether a violation has occurred, the Board must first determine which classification applies to the groundwater in the vicinity of the Viola landfill.

All groundwaters of the State are designated as either groundwater management zones or one of four classes of groundwater. 35 Ill. Adm. Code 620.201. There is no claim or evidence here that this case involves a groundwater management zone, so we review the classifications of groundwater. Groundwater can only fall into Classes I, III, and IV, involving "potable resource" groundwater, "special resource" groundwater, and "other" groundwater, respectively, if certain criteria are met; all other groundwater is considered Class II, "general resource" groundwater. See 35 Ill. Adm. Code 620.220(a). There has been no assertion that the groundwater beneath the landfill might be Class III or Class IV groundwater. Complainant has, however, alleged that the groundwater is "likely a Class I groundwater resource," Complaint at 14, and has alleged that ESG Watts has violated Section 620.410, the standards for Class I groundwater.

The criteria for classification of groundwater as Class I are set forth in 35 Ill. Adm. Code 620.210, which provides:

> Except as provided in Sections 620.230, 620.240, or 620.250, Potable Resource Groundwater is:
>
> a) Groundwater located 10 feet or more below the land surface and within:
>
> 1) The minimum setback zone of a well which serves as a potable water supply and to the bottom of such well;
>
> 2) Unconsolidated sand, gravel or sand and gravel which is 5 feet or more in thickness and that contains 12 percent or less of fines (i.e. fines which pass through a No. 200 sieve tested

according to ASTM Standard Practice D2488-84, incorporated by reference at Section 620.125);

3) Sandstone which is 10 feet or more in thickness, or fractured carbonate which is 15 feet or more in thickness; or

4) Any geological material which is capable of a:

A) Sustained groundwater yield, from up to a 12 inch borehole, of 150 gallons per day or more from a thickness of 15 feet or less; or

B) Hydraulic conductivity of 1 x 10^{-4} cm/sec or greater using one of the following test methods or its equivalent:

i) Permeameter;

ii) Slug test; or

iii) Pump test.

b) Any groundwater which is determined by the Board pursuant to petition procedures set forth in Section 620.260, to be capable of potable use.

Although Mr. Liss stated that the groundwater in question would be classified as Class I by the Agency, Comp. Ex. 1 at 30, there is no evidence before the Board from which it can find that the groundwater under the landfill is Class I groundwater. The only testimony regarding wells serving as potable water supplies was to the effect that there are no potable water wells downgradient from the landfill. Tr.1 at 180. There was no evidence submitted as to the geological makeup of the strata underlying the landfill. The Board's records reflect no determination of the status of this groundwater pursuant to a petition under Section 620.260. Accordingly, the Board cannot find that the groundwater under the landfill is Class I Potable Resource Groundwater. The Board thus finds no violation of 35 Ill. Adm. Code 620.410.

Absent proof that the groundwater falls into one of the more specific categories, however, groundwater is considered Class II. 35 Ill. Adm. Code 620.220(a). The concentrations of organic constituents in the groundwater are alleged to have exceeded the standards for Class II groundwater. Complaint at 13. ESG Watts has admitted that the sampling reports reflected such exceedences. The Board accordingly finds that ESG Watts has violated Section 620.405, by causing the release of contaminants into groundwater so that the standards for Class II groundwater are exceeded. As is discussed above, there is insufficient evidence for the Board to determine the date on which this violation began; based, however, on the monitoring reports received into evidence, the Board finds that this violation continued from May 31, 1995, through July 29, 1996.

Section 12(a) and 35 Ill. Adm. Code 620.115. In light of the foregoing discussion, the Board finds that ESG Watts has allowed the discharge of contaminants into the environment in violation of Board regulations and standards. The Board accordingly concludes that ESG Watts has violated Section 12(a) of the Act and 35 Ill. Adm. Code 620.115. Again, we cannot determine when these violations began. The Board finds that these violations as well continued from May 31, 1995, through July 29, 1996.

Appropriate Penalty

Calculation of Maximum Penalty. The Board has found five separate violations based on the allegations in count II, for a maximum base penalty of $250,000.00. Each of these violations was found to have continued from May 31, 1995, through July 29, 1996, or for 425 days. Five violations times 425 days times $10,000.00 per day equals $21,250,000.00 in maximum fines for continuing violations, for a total maximum fine of $21,500,000.00. (The statutory basis for these calculations is explained in the Board's discussion of an appropriate penalty under count I above.)

Statutory Factors. In considering the factors set forth in Sections 33(c) of the Act, the Board finds as follows:

Character and Degree of Injury. Although the contamination of the groundwater underlying the Viola landfill has rendered the water unfit for consumption without treatment, there is no evidence of any such use or intended use of the water; *i.e.*, no present injury. Still, because potential future use of the water has been precluded, the Board concludes that this factor weighs in aggravation of the penalty to be imposed against ESG Watts.

Social and Economic Value. For the reasons set forth in its discussion of Count I, the Board concludes that this factor weighs in aggravation of the penalty to be imposed against ESG Watts.

Suitability of Pollution Source. For the reasons set forth in its discussion of Count I, the Board concludes that this factor weighs neither in aggravation nor in mitigation of the penalty to be imposed against ESG Watts.

Technical and Economic Reasonableness of Compliance. Mr. Liss testified that the costs of a remedial program could range from $70,000.00 to $1,000,000.00, based on programs at other sites. Comp. Ex. 1 at 27. There was no testimony as to the cost of a program specific to the Viola landfill site. It may be that costs of compliance could be at least partially offset by income from landfill gas recovery. ESG Watts' witness, Mr. Patterson, opined that the source of the organic contamination was gas migration. Tr.1 at 179, 191. ESG Watts has entered into a contract with Resource Technology Corp. for that company to install a gas collection system at the landfill. Tr.2 at 58-59; Resp. Ex. B. A gas removal system might reduce the impact of organics on groundwater. Tr.2 at 45. With this system in place, ESG Watts might actually realize income from removal of gas, the potential source of its groundwater contamination. Resp. Ex. B. Absent more evidence as to the actual cause of ESG Watts' groundwater problems (i.e., gas, leachate, or a combination of the two), and

absent more specific information as to the costs of remedial measures which would be required, it is very difficult for the Board to evaluate the economic reasonableness of compliance. There has been no suggestion of any technological barriers to compliance. The Board accordingly concludes that this factor weighs neither in aggravation nor mitigation of the penalty to be imposed.

Subsequent Compliance. Through the last hearing date there had been no evidence of compliance by ESG Watts. The Board concludes that this factor weighs in aggravation of the penalty to be assessed against ESG Watts.

Other Factors. In its review of other relevant factors, the Board finds as follows:

Duration and Gravity of Violation. As noted above, it is impossible to tell the duration of these violations, and the actual impacts are speculative. This circumstance is due, however, to various permit violations by ESG Watts, discussed in more detail under count III below. Under Supplemental Permit 1991-285-SP, ESG Watts was required to monitor groundwater beginning in 1992. ESG Watts did not perform the required monitoring until 1995. As a direct result of ESG Watts' failure to monitor groundwater as required by its permits, we cannot tell when the contamination of the groundwater began, and consequently we cannot say with any certainty whether monitoring would have caught the contamination of the groundwater sooner. Likewise, ESG Watts was required in the event of a significant change in water quality to undertake a groundwater assessment; it has never done so. As a result, we cannot tell the full extent of the contamination or what steps will be necessary for remediation. Furthermore, even after the contamination was discovered ESG Watts took no steps to address the problem until after this enforcement proceeding was filed. The Board finds from these circumstances that this factor weighs in aggravation of the penalty to be imposed.

Diligence in Achieving Compliance. ESG Watts has been aware of the violations of groundwater standards since at least July of 1995, and yet not until August 1, 1996—after this enforcement action was filed—do we see any indication of effort on the part of ESG Watts to address the problem. Furthermore, ESG Watts has indicated that it is waiting for final approval of a siting application (addressed in more detail below in the Board's discussion of Count V) before applying for the permit to construct the gas recovery system. Tr.2 at 60. To the Board's knowledge, this siting application has never been filed. Even if filed, the granting or denial of the application is not within ESG Watts' control, and is thus an unacceptable contingency on ESG Watts' undertaking of measures to ensure compliance with the Act and Board regulations. The Board finds that ESG Watts has not been diligent in addressing its groundwater contamination problems, and concludes that this factor weighs in aggravation of the penalty to be imposed.

Monetary Benefits. The monetary benefits to ESG Watts from committing the violations found under count II are the costs saved by failing to take the measures necessary to achieve compliance. As noted above, such costs are speculative on this record. Indeed, if ESG Watts' witness is correct and the source of the organic exceedences is gas migration, the proposed gas collection system could have been an appropriate response. ESG Watts would realize income from such a system, Res. Ex. B, so it may be that ESG Watts has lost money

by not complying. The Board concludes that this factor weighs neither in aggravation nor mitigation of the penalty to be imposed against ESG Watts.

Penalty Necessary for Deterrence. For the reasons stated in its discussion of count I, the Board concludes that this factor weighs in aggravation of the penalty to be imposed.

Prior History of Violations. For the reasons stated in its discussion of count I, the Board concludes that this factor weighs in aggravation of the penalty to be imposed.

Conclusion. Again, the Board concludes that a substantial penalty is appropriate. The Board is most disturbed with regard to these violations by ESG Watts' failure to take any steps to prevent or remediate groundwater contamination until after this enforcement action was filed, despite having been aware of the problem since at least July of 1995. The Board accordingly finds that an appropriate basis for a penalty in this case is the duration of the violations. As noted above, the violations continued for 425 days. (We note that this is the minimum time the violations could have continued; but for ESG Watts' monitoring lapses, the evidence could well indicate a much longer period of contamination.) The Board will impose a penalty of $100 per day per violation. Five violations times $100 times 425 days equals a total penalty of $212,500. This amount must be paid on or before April 2, 1998.

Count III: Groundwater Monitoring Violations

As was discussed briefly above, count III of the complaint alleges violations of the Act stemming from ESG Watts' failure to undertake required groundwater monitoring for approximately three years after the permits requiring the monitoring went into effect, and failure to take further steps required in the event of a significant change in groundwater quality. Specifically, count III alleges violations of Sections 12(a) and 21(d)(2) of the Act, 35 Ill. Adm. Code 807.313 and 807.315, and two violations each of Sections 21(d)(1) and 21(o)(11) of the Act. Most of these statutes and regulations are quoted above. Section 21(o)(11) of the Act (415 ILCS 5/21(o)(11) (1996)) provides:

> No person shall:
>
> * * *
>
> 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[.]

On March 6, 1997, the Board entered summary judgment against ESG Watts on the violations alleged in count III. The only remaining issues with respect to count III concern an appropriate penalty.

Appropriate Penalty

Calculation of Maximum Penalty. There are eight total violations under Count III, for a total base maximum penalty of $400,000. (The statutory basis for this and the following calculations is explained in the Board's discussion of an appropriate penalty under count I above.)

The groundwater monitoring program approved in Supplemental Permit No. 1991-285-SP required ESG Watts to submit its first monitoring report to the Agency by July 15, 1992. Comp. Ex. 1A. ESG Watts did not submit a monitoring report until July 14, 1995. This circumstance gave rise to violations of Sections 21(d)(1), 21(o)(11), and 12(a) of the Act and 35 Ill. Adm. Code 807.313. The violation of Section 807.313 in turn gave rise to a violation of Section 21(d)(2) of the Act. The Board accordingly finds that the violations of Sections 21(d)(1), 21(o)(11), and 12(a) of the Act and 35 Ill. Adm. Code 807.313 continued from July 15, 1992, through July 14, 1995, or for 1,094 days. Four violations times 1,094 days times $10,000 per day equals a maximum penalty of $43,760,000 for continuing violations of these sections.

The violation of Section 21(d)(2) of the Act continued for the same period; this violation, however, for operating a landfill in violation of Board regulations, includes the time periods that ESG Watts was in violation of regulations based on the Board's findings under count II as well. The violations of Board regulations under count II were found to have continued from May 31, 1995, through July 29, 1996. Thus, the total time that ESG Watts was in violation of Board regulations under counts II and III was from July 15, 1992, through July 29, 1996, or for 1,504 days. The Board accordingly finds that the maximum fine for continuing violations of Section 21(d)(2) is $15,040,000.

The second violations of Sections 21(d)(1) and 21(o)(11) are based upon ESG Watts' failure to comply with permit requirements which went into effect upon a significant change in groundwater quality. Under Supplemental Permit No. 1991-285-SP, ESG Watts was required to notify the Permit Section of the Agency's Division of Land Pollution Control in writing within 15 days in the event of a significant change in groundwater quality; a significant change in the groundwater also triggered a number of other activities to be undertaken by ESG Watts. Complainant's Ex. 1A. The Board concludes that the written notification required under the permit was a "report" within the meaning of Section 21(o)(11). ESG Watts did not submit the report (or take any of the other required actions) within the time specified, nor was any evidence submitted that it had done so at any time up through the conclusion of the hearing. ESG Watts must have known about the change in groundwater quality at the latest by July 14, 1995, the date on which it submitted its first monitoring report. The Board accordingly finds that violations of Sections 21(d)(1) and 21(o)(11) based upon ESG Watts' failure to submit the required report to the Agency continued from July 29, 1995 (the date 15 days after the latest date on which ESG Watts could have learned of the change in groundwater quality) through at least March 25, 1997, or for 605 days. Two violations times 605 days times $10,000 per day equals a total maximum fine of $12,100,000 for continuing violations of these two sections of the Act.

Thus, the total maximum fine for the violations found under count III is $71,300,000.

Statutory Factors. In considering the factors set forth in Section 33(c) of the Act, the Board finds as follows:

Character and Degree of Injury. The Board finds that ESG Watts' failure to perform the groundwater monitoring required under its permit resulted in a significant degree of interference with the protection of health, welfare and property. While the violations under count III are not of a type that will necessarily result in direct harm to the environment, they are, like the financial assurance violations discussed in count I, particularly insidious, because they hinder enforcement of other statutes and regulations which do involve direct impact on the environment. The insidious effect of these violations is aptly illustrated in this case, where due to ESG Watts' violations of the groundwater monitoring requirements of its permits it is impossible to determine when the groundwater underlying the Viola landfill became contaminated, and thus to what extent the contamination could have been prevented by early intervention. The Board concludes that this factor weighs in aggravation of the penalty to be imposed against ESG Watts.

Social and Economic Value. For the reasons set forth in its discussion of count I, the Board concludes that this factor weighs in aggravation of the penalty to be imposed against ESG Watts.

Suitability of Pollution Source. For the reasons set forth in its discussion of count I, the Board concludes that this factor weighs neither in aggravation nor mitigation of the penalty to be imposed.

Technical and Economic Reasonableness of Compliance. ESG Watts has acknowledged in "Respondent's Brief" that the costs of installation of monitoring wells and monitoring of groundwater were "not exorbitant." Res. Br. at 13. There has been no claim of any technological barriers to compliance. The Board concludes that this factor weighs in aggravation of the penalty to be imposed against ESG Watts.

Subsequent Compliance. Since July of 1995, ESG Watts has been in compliance with the monitoring and reporting requirements. Through the hearings, however, the assessment monitoring plan required under the permit had not been submitted, much less implemented. The Board concludes that this factor weighs in aggravation of the penalty to be imposed against ESG Watts.

Other Factors. In its review of other relevant factors, the Board finds as follows:

Duration and Gravity of Violation. As noted above, the Board considers the violations found here very serious. ESG Watts failed to monitor groundwater for almost three years and failed to take required steps upon a substantial change in groundwater quality for eighteen months. No reason has been proffered for this delay. The Board concludes that this factor weighs in aggravation of the penalty to be imposed against ESG Watts.

Diligence in Achieving Compliance. With full knowledge of its duties under its permit, and for no legitimate reason which has been articulated to us, ESG Watts failed to carry out its duties under its permit for three years. Apparently ESG Watts simply decided not to spend the necessary money. Tr.2 at 72. The three year delay in implementing the groundwater monitoring required under ESG Watts' permit does not indicate diligence on the part of ESG Watts. Similarly, it appears that the steps ESG Watts has taken toward compliance with the groundwater assessment requirements of its permit were only prompted by the filing of this enforcement action. The Board finds that ESG Watts has not been diligent in achieving compliance, and concludes that this factor weighs in aggravation of the penalty to be imposed.

Monetary Benefits. ESG Watts missed 12 quarterly reports (the second, third, and fourth quarters of 1992, all four quarters of 1993, all four quarters of 1994, and the first quarter of 1995). For each report, ESG Watts samples from six wells. Thus, ESG Watts has saved the cost of 72 sample tests.[4] The Board therefore concludes that this factor weighs in aggravation of the penalty to be imposed against ESG Watts.

Penalty Necessary for Deterrence. For the reasons stated in its discussion of count I, the Board concludes that this factor weighs in aggravation of the penalty to be imposed.

Prior History of Violations. For the reasons stated in its discussion of count I, the Board concludes that this factor weighs in aggravation of the penalty to be imposed.

Conclusion. Complainant seeks a penalty of $60,000 for the violations alleged under Count III. This amount represents a fine of $5,000 per groundwater monitoring report which ESG Watts failed to file. Complainant argues that this penalty is appropriate based upon the Board's opinion in People v. Watts (May 4, 1995), PCB 94-127. In the absence of evidence from which we can determine the monetary benefit realized by ESG Watts, the Board agrees that Complainant's number is an appropriate starting point. Two significant circumstances, however, differentiate this case from People v. Watts. First, the factors bearing on an appropriate penalty weigh far more heavily in aggravation in this case than in the earlier case. Second, while Complainant's reasoning takes into account the reports that ESG Watts failed to file, it does not address the second set of violations involved under count III, namely, ESG Watts' failure to submit the groundwater assessment plan required under its permit.

Accordingly, the Board imposes a fine of $60,000 against ESG Watts as a base fine for its failure to submit the monitoring reports as required. The Board also imposes an additional fine of $60,000 for ESG Watts' failure to take the required steps involving groundwater assessment, and in recognition of the aggravating factors present in this case, for a total fine of $120,000 for the violations found under count III. These penalties must also be paid by April 2, 1998.

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[4] Unfortunately we have no evidence as to the cost of each of these tests. Mr. Liss testified that the cost of sampling tests utilized in groundwater assessment (a more extensive test than that used by ESG Watts for its quarterly reports) ranges from $2,500 to $4,000 per event, Comp. Ex. 1 at 25; presumably the cost of the tests ESG Watts failed to perform was less than this.

Count IV: Final Cover Violations

In count IV, Complainant alleges that ESG Watts has violated the Board's regulations at 35 Ill. Adm. Code 807.305(c), as well as Sections 21(d)(2) and 21(o)(6) of the Act (415 ILCS 5/21(o)(6) (1996)), by failing to place final cover on the Viola landfill in a timely manner. 35 Ill. Adm. Code 807.305 provides:

> Unless otherwise specifically provided by permit, the following cover requirements shall be followed:
>
> * * *
>
> c) Final Cover - a compacted layer of not less than two feet of suitable material shall be placed over the entire surface of each portion of the final lift not later than 60 days following the placement of refuse in the final lift, unless a different schedule has been authorized in the Operating Permit.

Section 21(d)(2) of the Act is quoted in the Board's discussion of count I above. Section 21(o)(6) provides:

> No person shall:
>
> * * *
>
> 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:
>
> * * *
>
> 6. failure to provide final cover within the time limits established by Board regulations.

Section 807.305 by its terms applies only where a permit does not specifically provide final cover requirements. Permits issued to ESG Watts do so provide, both as to the composition of the final cover (see Comp. Ex. 5) and the schedule for application (see Comp. Ex. 21). Although ESG Watts clearly did not timely apply final cover (Res. Br. at 13) and has failed to maintain final cover on the landfill in accordance with its permits (Comp. Ex. 8, 9, 22), the Board nevertheless can only conclude that Section 807.305 does not apply to ESG Watts, and finds no violation of that regulation.

Because the alleged violations of Sections 21(d)(2) and (o)(6) are predicated upon the alleged violation of Section 807.305, the Board also finds no violation of either of these sections under count IV.

Count V: Final Contour Violations

Count V alleges violations of Sections 21(d)(1), 21(e), and 21(o)(9) of the Act based upon ESG Watts' alleged placing of waste above the permitted contours of the landfill.

Applicable Statutes and Regulations

Section 21(d)(1) is quoted in the Board's discussion of count I above. Sections 21(e) and 21(o)(9) (415 ILCS 5/21(e) and (o)(9) (1996)) provide:

> No person shall:
>
> * * *
>
> e. Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.
>
> * * *
>
> 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:
>
> * * *
>
> 9. deposition of refuse in any unpermitted portion of the landfill[.]

Determination of Violations

Evidentiary Facts. The maximum permitted elevation for the Viola landfill is 690 feet above sea level. Comp. Ex. 14. The current elevation of a portion of the landfill is 704.2 feet above sea level; this was determined by a survey dated September 30, 1994. Comp. Ex. 4. Approximately six to seven acres of the landfill is above the permitted elevation. Tr.1 at 30. ESG Watts' consultants estimated the volume of waste over the permitted elevation at 52,000 cubic yards, exclusive of cover. Tr.1 at 40-41, Comp. Ex. 7. ESG Watts applied for, and received, a supplemental permit to facilitate movement of over-contour waste to other parts of the landfill which were still under permitted contours. Comp. Ex. 6. Through the dates of the hearings, however, ESG Watts had not moved any waste.

Discussion. ESG Watts does not dispute that the current contours of the landfill exceed those set forth in its permits. It has, however, disputed the contention that the over-contour portions of the landfill contain waste.

The Board finds the most credible evidence as to the composition of the over-contour portion of the landfill to be the letter from ESG Watts' own engineering consultants (Comp. Ex. 7) in which the consultants estimate that the over-contour portion of the landfill contains approximately 52,000 cubic yards of waste. This estimate was submitted by independent third parties familiar with the landfill. (The engineers involved, Beling Consultants, are apparently the same engineers who certified the final cover for the landfill; Tr.1 at 73; Tr.2 at 99-100.) This estimate, unlike the testimony of ESG Watts' witnesses, was not produced specifically for this litigation, but rather was submitted to the Agency as part of a supplemental permit application, and was intended to be relied upon by the Agency.

ESG Watts, having elicited from the Agency witnesses acknowledgment that additional soil placed on top of the landfill would not violate the Act, submitted testimony that in some areas more than the required cover was placed. Tr.2 at 74. ESG Watts argues that the evidence is consistent with the over-contour portion of the landfill containing merely clean soil placed there for erosion control, and accordingly the Board should not find waste over the permitted contours. The Board rejects this argument. ESG Watts applied for a supplemental permit to facilitate moving the over-contour waste on June 4, 1996. Comp. Ex. 6. ESG Watts, better than anyone else, was in a position to know whether there was waste over-contour at the landfill. ESG Watts, better than anyone else, was in a position to know whether it had applied 77,000 cubic yards of clean soil to the landfill. If it had, why would it apply for a permit which provided, among other things, for movement of waste? ESG Watts' actions in 1996, which indicate waste in the over-contour portion of the landfill, are far more telling than its words at the hearing.

The Board concludes that by depositing waste in the portion of the landfill above the permitted contours, ESG Watts has violated Section 21(o)(9). The Board further concludes that by exceeding the final contours set forth in its permit, ESG Watts has violated Section 21(d)(1). The Board concludes that each of these violations has continued from at least September 30, 1994, through at least March 25, 1997 (the close of the hearing).

With respect to Section 21(e), Complainant has neither alleged nor identified in its briefs a requirement imposed by the Act or any regulation which is not met by the landfill as a result of the waste deposited over-contour. The Board will not speculate as to the basis of Complainant's allegations. The Board therefore does not find a violation of Section 21(e).

Appropriate Penalty

Calculation of Maximum Penalty. The Board has found two separate violations based on the allegations in count V, for a base maximum penalty of $100,000. Each of these violations has been found to have continued from September 30, 1994, through March 25, 1997, or for 907 days. Two violations times 907 days times $10,000 per day equals $18,140,000 in maximum fines for continuing violations, for a total maximum fine of $18,240,000. (The statutory basis for these calculations is explained in the Board's discussion of an appropriate penalty under count I above.)

<u>Statutory Factors.</u> In considering the factors set forth in Section 33(c) of the Act, the Board finds as follows:

<u>*Character and Degree of Injury.*</u> Notwithstanding speculation in Complainant's brief (Reply at 23), there is no evidence of any injury resulting from ESG Watts' placing of waste above the permitted contours of the landfill. The Board concludes that this factor weighs in mitigation of the penalty to be imposed.

<u>*Social and Economic Value.*</u> For the reasons set forth in its discussion of Count I, the Board concludes that this factor weighs in aggravation of the penalty to be imposed against ESG Watts.

<u>*Suitability of Pollution Source.*</u> Although the Board has found that waste has been deposited in an area not permitted as a landfill, there is no evidence of harm to date due to waste placed over-contour, and no evidence or argument that the over-contour portion of the landfill could not be sited for waste disposal. The Board concludes that this factor weighs neither in aggravation nor in mitigation of the penalty to be imposed.

<u>*Technical and Economic Reasonableness of Compliance.*</u> ESG Watts has identified two readily available means of achieving compliance: movement of over-contour waste to a portion of the landfill with space available under the final contours (for which a permit has already been issued to ESG Watts), or obtaining local siting for the portion of the landfill currently above permitted contours. Both options have been available to ESG Watts for years, and no suggestion has been made that either is economically unreasonable. The Board concludes that this factor weighs in aggravation of the penalty to be imposed.

<u>*Subsequent Compliance.*</u> Through the last hearing date there had been no evidence of compliance by ESG Watts, despite issuance of Supplemental Permit No. 1996-194-SP. The Board concludes that this factor weighs in aggravation of the penalty to be assessed against ESG Watts.

<u>Other Factors.</u> In its review of other relevant factors, the Board finds as follows:

<u>*Duration and Gravity of Violation.*</u> These violations continued for at least two and one-half years, notwithstanding readily available means of achieving compliance. Given the lack of evidence of any injury on account thereof, however, the Board concludes that this factor weighs neither in aggravation nor mitigation of the penalty to be imposed.

<u>*Diligence in Achieving Compliance.*</u> The Board finds no diligence by ESG Watts. The over-contour problem was apparent from at least September of 1994. Not until June of 1996 did ESG Watts apply for a permit to facilitate movement of the over-contour waste, and despite receiving such a permit, it has never done so. Despite much talk about obtaining siting for the over-contour waste, the evidence reflects no application for such siting ever having been filed. The Board infers from ESG Watts' failure to take any actions either to obtain siting or to move the over-contour waste that ESG Watts is, again, avoiding compliance out of unwillingness to make the necessary expenditures. The Board finds no good faith by ESG

Watts in attempting to achieve compliance. The Board concludes that this factor weighs in aggravation of the penalty to be imposed.

Monetary Benefits. Because there appears to be capacity remaining in the landfill in areas which are under final contours, the Board cannot find that ESG Watts realized an economic benefit proportional to the volume of waste placed over-contour, as Complainant has suggested. ESG Watts could have placed the over-contour waste in other portions of the landfill; accordingly, it did not earn tipping fees which it could not have earned but for placing waste in an unpermitted portion of the landfill. While conceivably ESG Watts could have received some benefit from placing waste as it did, there is no evidence from which any such benefit can be quantified. The Board concludes that this factor weighs neither in aggravation nor mitigation of the penalty to be imposed.

Penalty Necessary for Deterrence. For the reasons stated in its discussion of count I, the Board concludes that this factor weighs in aggravation of the penalty to be imposed.

Prior History of Violations. For the reasons stated in its discussion of count I, the Board concludes that this factor weighs in aggravation of the penalty to be imposed.

Conclusion. As is discussed above, the Board cannot find that there is a direct correlation between the amount of waste placed above the permitted final contours of the landfill and the economic benefit to ESG Watts attributable to violation of the Act. Although ESG Watts presumably had some reason for this course of conduct, no evidence has been submitted as to why ESG Watts placed waste above the permitted contours of the landfill or what (if any) economic benefit was realized by ESG Watts as a result of placing the waste so as to exceed the final contour rather than in those portions of the landfill where capacity remains below the final permitted contours. It may be that this was merely one of the "acts of corporate stupidity" suggested by ESG Watts in "Respondent's Brief." Res. Br. at 9. In any event, on the record before it, the Board cannot find that tipping fees earned through deposit of the waste which was placed above permitted contours provide the proper basis for a penalty.

As with the violations under count II above, the Board is most vexed with respect to these violations by ESG Watts' continuing unwillingness to take the necessary steps to comply with the law. Since September 18, 1996, ESG Watts has had a permit to relocate the waste from the unpermitted (over-contour) portion of the landfill to the under-contour portion of the landfill. We have no indication of any action by ESG Watts to actually relocate the waste. At any time, ESG Watts could have applied for siting for the over-contour portion of the landfill. Based on the record, ESG Watts never did so, and has given no reason for not doing so. While there is no evidence of an injury to the environment to date resulting from the violations found under count V, the Board concludes that it is nevertheless necessary to impose a penalty against ESG Watts in order to deter future recalcitrance, both on the part of ESG Watts and others, in addressing violations of the Act, particularly where the violator is aware of the circumstances constituting the violation and means of achieving compliance are readily available.

A very important point needs to be made to ESG Watts: ESG Watts does not have the option of indefinitely delaying its compliance while it seeks siting for the over-height portion of the landfill. "We're waiting until we get siting" is not a valid excuse for noncompliance, particularly where no siting application is pending. As we have previously noted, the decision whether or not to grant siting to ESG Watts rests with independent third parties and is not within ESG Watts' control; ESG Watts cannot guarantee that siting will ever be forthcoming. ESG Watts' unilateral decision not to comply with environmental laws pending siting (at some unidentified point in the future) is unacceptable.

Because the penalty imposed for these violations is based upon delay, the Board believes that the proper basis for the penalty is the length of time for which these violations continued. The Board will impose on ESG Watts a penalty of $100 per day that the violations were found to continue. The violations continued for 907 days, for a total fine of $90,700.

ATTORNEY FEES AND COSTS

Complainant has requested attorney fees and costs in accordance with Section 42(f) of the Act (415 ILCS 5/42(f) (1996)), which provides in relevant part:

> Without limiting any other authority which may exist for the awarding of attorney's fees and costs, the Board . . . may award costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants, to the State's Attorney or the Attorney General in a case where he has prevailed against a person who has committed a wilful, knowing or repeated violation of the Act.

From the facts found above, it is abundantly clear that the vast majority of violations found in this proceeding were willful and knowing, and in several cases repeated. The Board accordingly finds that it is appropriate to award Complainant fees and costs incurred in the prosecution of this case.

The Attorney General has submitted affidavits based upon which $14,760 in fees are claimed. ESG Watts is granted until February 20, 1998, to file any response. Complainant is granted until March 6, 1998, to reply to any response filed by ESG Watts. The Board will quantify fees and costs in a separate order.

FAILURE TO COMPLY WITH ORDER OF MARCH 6, 1997

On April 23, 1997, Complainant filed an "Affidavit of John Taylor" indicating that ESG Watts did not deposit funds sufficient to bring the financial assurance trust fund up to $249,067 within 45 days of the Board's order of March 6, 1997. The Board orders ESG Watts to show cause why it should not be sanctioned for failure to comply with the Board's order. ESG Watts is granted until February 20, 1998, to file any appropriate material. Complainant is granted until March 6, 1998, to reply to any filing by ESG Watts.

MOTIONS TO SUPPLEMENT THE RECORD

On January 27, 1998, Complainant filed "Complainant's First Motion to Supplement the Record," seeking leave to file an affidavit and exhibit relating to activity in the Viola trust fund since the hearing. On February 2, 1998, ESG Watts filed "Respondent's First Motion to Supplement the Record," seeking to introduce its own evidence regarding trust fund activity since the hearing. At this late date, the Board will not reopen evidence in the case-in-chief. Both motions to supplement the record are accordingly denied. The parties are invited, however, to submit any relevant evidence for consideration in connection with the Board's order to ESG Watts to show cause why it should not be sanctioned for failure to comply with the Board's March 6, 1997, order.

ORDER

1. For the reasons set forth in the foregoing opinion, the Board finds that ESG Watts has violated the following statutes and regulations:

   a. Sections 21(d)(1), 21(d)(2), 21(o)(13), and 21.1(a) of the Act, including two violations each of Sections 21(d)(1), 21(o)(13), and 21.1(a), and 35 Ill. Adm. Code 807.603 and 807.623, as alleged in count I as amended;

   b. Sections 12(a) of the Act and 35 Ill. Adm. Code 620.115, 620.301(a), 620.405, and 807.313, as alleged in count II;

   c. Sections 12(a), 21(d)(1), 21(d)(2), and 21(o)(11) of the Act, including two violations each of Sections 21(d)(1) and 21(o)(11), and 35 Ill. Adm. Code 807.313 and 807.315, as alleged in count III; and

   d. Sections 21(d)(1) and 21(o)(9) of the Act, as alleged in count V.

2. For the reasons set forth in the foregoing opinion, the Board hereby assesses the following penalties against ESG Watts: $232,000 for violations found under count I, $212,500 for violations found under count II, $120,000 for violations found under count III, and $90,700 for violations found under count V, for a total penalty of $655,200.

3. ESG Watts must pay $655,200 on or before April 2, 1998. Such payment must 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 must be delivered to:

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

ESG Watts must write its Federal Employer Identification Number on the certified check or money order. Any portion of the penalties assessed not paid by April 2, 1998 will incur interest at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a)), as now or hereafter amended, from the date payment is due until the date payment is received. Interest will not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

4. ESG Watts must cease and desist from violations of the Act and the Board's regulations.

5. ESG Watts may file a response to Complainant's request for attorney fees on or before February 20, 1998. Complainant may file a reply to any response filed by ESG Watts on or before March 6, 1998.

6. ESG Watts is hereby ordered to show cause, on or before February 20, 1998, why it should not be sanctioned for failure to comply with the Board's order of March 6, 1997. Complainant may file a response to any filing by ESG Watts on or before March 6, 1998.

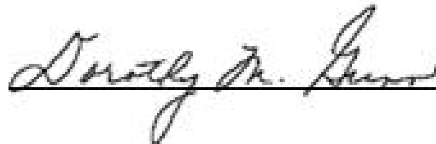
7. "Complainant's First Motion to Supplement the Record" is denied.

8. "Respondent's First Motion to Supplement the Record" is denied.

IT IS SO ORDERED.

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 5th day of February 1998, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board