ILLINOIS POLLUTION CONTROL BOARD
March 21, 1996

ESG WATTS, INC., an Iowa Corporation,	)	
	)	PCB 94-243
Petitioner,	)	94-306
	)	94-307
v.	)	94-308
	)	94-309
ILLINOIS ENVIRONMENTAL	)	95-133
PROTECTION AGENCY,	)	95-134
	)	(Consolidated)
Respondent.	)	(Permit Appeal - Land)

DISSENTING OPINION (by G.T. Girard and E. Dunham):

We respectfully dissent from the majority opinion and order in this matter. The record in this consolidated proceeding does not support the Agency's denial pursuant to Section 39(i) of the Act of several permits based on ESG Watts' prior history as a landfill operator. We agree with the dissenting opinion of Board member Meyer, but we also believe that the sole legitimate rationale for the Agency denial of any permit under Section 39 of the Act is the probable violation of the Act or Board Regulations. The denial of a permit under Section 39(i) of the Act is no exception. The plain language of Section 39(i) of the Act allows the Agency to include in its evaluation of an operator's history administrative citations and circuit court cases where the adjudicated violations are for facilities other than the specific facility at issue in a permit application. However, denial of a permit for prior bad acts obviously is intended to prevent future bad acts, and cannot be applied by the Agency or the Board to punish an operator for those prior adjudicated violations. In previous cases before the Board (People v. James Watts, PCB 94-127 (November 3, 1995)) and the circuit courts (People v. Watts Trucking, No. 91-CH-242 (Cir. Ct. Sangamon Cty February 2, 1994)), the Agency has tried unsuccessfully to have the operating permits of ESG Watts revoked. In each adjudicated case, they failed. The Agency is now attempting to add to the penalties already assessed by denying permit renewals at a facility that has been remarkably free of violations for a period of 5 to 6 years. This is far beyond the Agency's authority and is among the most draconian penalties in the arsenal of the Agency. (IEPA v. IPCB, 252 Ill. App. 3d 828, 624 N.E.2d 402 (3rd Dist. 1993).)

Section 39(i) requires the Agency to evaluate the operator's history before granting or denying a permit. Clearly, the legislature intended that the entirety of an operator's record be examined prior to the issuance of a permit. However, in this case it does not appear that the Agency examined the entirety of the operator's experience. In fact, it is not clear from the record before the Board what the Agency did consider. The most oft-repeated phrase to describe the Agency's analysis in this Section 39(i) review was that the decision to deny the permits was made "collectively". (Tr. 57-59, 62-63, 65, 71, 75-79, 83, 88 and 133.) Mr. Bakowski did testify that the administrative citations were examined "collectively" by the

Agency for the severity and number of violations. (Tr. at 62-64.) However, when asked if a certain number of violations were necessary to trigger a permit denial based on Section 39(i), the Agency indicated there was not a specific number. (Tr. at 69.) Mr. Bakowski testified that the Agency had not examined the individual citations and could not state whether or not the citation violations had been abated. (Tr. 61-63.)

The Agency also testified that it considered the severity of the violations in the circuit court case. However, when asked if the Agency considered the efforts to abate the violations the Agency said that it had considered the fact that "without reasonable efforts of enforcement that the subject company wouldn't have done it". (Tr. at 73.) The Agency also testified that it had not reviewed each point in the circuit court case but rather looked at the points in the aggregate. The Agency indicated that the decision to deny the permits was made "collectively" by the Agency. (Tr. 57-59, 62-63, 65, 71, 75-79, 83, 88 and 133.) The Agency also testified that in making the collective decision the Agency considered comments from different sections within the Agency. However, the comments which were considered for all seven permits were only in the Agency's record for the permits in PCB 94-243. (R. 94-243 at 31-48; Tr. at 98 and 102.) Thus, even though the majority suggests that the Board must review the Agency's analysis in a Section 39(i) denial, we are unable to determine what analysis the Agency performed.

Further, the fact that these permits are all renewal permits is significant. The permits at issue are supplemental waste stream permits that allow ESG Watts to accept special, non-hazardous waste into the Taylor Ridge landfill. These permits have been in force for a period of years, and the waste streams have been handled at the Taylor Ridge facility without violation for some time. Since the petitioner has received these wastes, and handled them in accordance with Board regulations for some time, the petitioner has demonstrated that the permits can be issued without causing violations of the Act or Board regulations. The Agency does not enter any evidence that the past acts of the petitioner are expected to affect the good operating record of the Taylor Ridge facility, or that the issuance of these permits will, in any way, cause a violation of any provision of Illinois environmental law or regulation. The Agency has given no standard of review, guidance document, regulation or other objective rationale as to why this operator, and not every other operator with a history of violations at any site should be denied permits, whether at the site of prior violations, or at a site that operates violation free for over half a decade. It is true that, for Section 39(i) to have any force or effect, the acts of an operator at one facility may be considered when the operator seeks permits at another facility. If ESG Watts were seeking permits to open a new landfill, the Agency could legitimately claim that the past inability to follow regulations was a serious impediment to their issuance of permits. Where, as here, the petitioner has a record of compliance at the particular facility for which the permits are sought, the record of the facility should factor heavily in the analysis; not solely the record of the operator.

The existence of single circuit court case is not sufficient to find a history of repeated violations. We believe that it is particularly true in this case. The circuit court did find against ESG Watts on all twelve counts. However, the court also found that ESG Watts was abating

the violations and the court specifically denied a permanent injunction against ESG Watts. Thus, the court was not willing to permanently close the facility in the enforcement action.

The totality of administrative citations also do not warrant permit denial. Nineteen administrative citations for three facilities over a nine or ten year period averages to less that one administrative citation per facility per year. Because administrative citations are like "traffic tickets", we do not see that such a record is excessive. More importantly, the record does not establish when the Agency would deny the next permit application from a different operator with the same number of administrative citations, or even what number of adjudicated violations would trigger a Section 39(i) review.

For these reasons, we respectfully dissent.

G. Tanner Girard
Board Member

Emmett E. Dunham II
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was filed on the 19th day of April, 1996.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board