

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
)	(Consolidate)
Respondent.)	(Permit Appeal - Land)

DISSENTING OPINION (by J. Theodore Meyer):

I agree that the standard of review for an Illinois Environmental Protection Agency (Agency) decision to deny a permit renewal under Section 39(i) is less stringent than the arbitrary and capricious standard espoused by the parties in this matter. For denials based on Section 39(i) the Board must review not only the operating history of the permit applicant, but also the Agency's analysis of such history to determine whether or not the Agency abused its discretion in denying the permit. However, I disagree with the majority's analysis which found that the Agency did not abuse its discretion in denying ESG Watts (Watts) its permit renewals.

In explaining its decision to deny Watts' permits, the Agency stated that it looked at Watts' history "in the aggregate". (Transcript at 62-65.) The Agency never fully explained this analysis. Watts has an operating history which includes a civil penalty of \$350,000 for violations of landfill regulations at its Sangamon County landfill, and 19 administrative citations over a period of 10 years. These are not mere allegations and therefore can be legitimately considered in an analysis of an operator's history. However, Watts' operating history does not consist of these facts alone. There are factors in mitigation to consider, including those set forth in Section 745.141(b) of the Act, as mentioned in the majority opinion.


For six years, Watts operated the Taylor Ridge facility, the landfill at issue in this case, without incurring any violations and despite having endured 32 Agency inspections. In addition, the permit renewals at issue all involve waste stream permits, none of which have been found in violation of the Act or Board regulations. In fact, none of the prior adjudications against Watts involved waste stream permit violations.

Section 39 (i) allows for a great amount of discretion on the part of the Agency. As a result, the Agency must explain as fully as possible its bases for denial under this section to

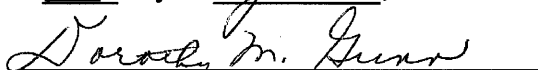
show that it did not abuse its discretion in denying a permit. If the Agency had articulated in the record that it had balanced the adjudicated violations against mitigating factors such as Watts' recent record at the Taylor Ridge facility, and found Watts to be a threat to the environment due to its operating history, upholding its decision to deny the permits may have been warranted. However, the Agency only mentioned the adjudicated violations--some of them rather minor and over 5 years old--as its basis for denying the permit renewals. Without this type of balancing test, or weighing of the evidence, the Agency's decision can be interpreted as utilizing permit denials as an enforcement tool, which is strictly prohibited. (ESG Watts, Inc. v. IEPA, (October 29, 1992) PCB 92-54, *aff'd*, IEPA v. IPCB, 252 Ill. App.3d 828, 624 N.E.2d 402 (3rd Dist. 1993).) There, the Agency tried to deny Watts a permit based on Section 39(i), but failed because its analysis of Watts' operating history was founded on allegations, not adjudications (Id.) Once those allegations were adjudicated, it seems that the Agency used them to deny these permit renewals. I find the Agency's failure to articulate whether or not it considered any mitigating factors in this case to be an abuse of its discretionary power under Section 39(i).

As the majority indicates, a federal district court case set forth the proposition that a permit holder has certain property and liberty interests in permit renewals and as such is entitled to certain due process protections. (Martell v. Mauzy, 511 F. Supp. 729 (N.D. Ill. 1981).) These property and liberty interests are inherent in permit renewals for the simple reason that a permit is granted in the first place because the Agency believed it would not violate the Act. Once granted, and without evidence of any violations under that permit, the permit holder should expect it to be renewed. Such is the case for Watts' waste stream permit renewal applications. The Agency considered Watts to be a sufficiently competent operator to grant it waste stream permits in the first place; without evidence of violations under these permits, Watts has a legitimate expectation that these permits will be renewed.

For these reasons, I respectfully dissent.


 J. Theodore Meyer

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was filed on the 1st day of April, 1996.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board