

ILLINOIS POLLUTION CONTROL BOARD
September 4, 1997

ESG WATTS, INC.,)	
)	
Petitioner,)	
)	PCB 97-210
v.)	(Permit Appeal - Land)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J. Yi):

On May 23, 1997 ESG Watts, Inc. petitioned the Board pursuant to Section 40 of the Environmental Protection Act (Act) for hearing to review the Illinois Environmental Protection Agency's (Agency) April 15, 1997 issuance of a permit with conditions. 415 ILCS 5/40 (1996). Petitioner operates a solid waste and special waste landfill located in Rock Island County, Illinois (known as Taylor Ridge or Andalusia landfill). On July 3, 1997 the Board received a motion for summary judgment filed by the Agency. On July 23, 1997 ESG Watts filed a response to the Agency's motion.¹

ARGUMENTS

The Agency states that on December 2, 1996 it received from petitioner an application for a supplemental permit (Illinois EPA Log No. 1996-404), dated November 27, 1996, that sought approval of the biennial revision of petitioner's closure and post-closure care plan and cost estimates for its Taylor Ridge facility pursuant to 35 Ill. Adm. Code Part 807, Subparts E and F. The Agency states that on April 15, 1997 it conditionally approved petitioner's application and issued Supplemental Permit No. 1996-404-SP.

As part of Supplemental Permit No. 1996-404-SP the Agency states that it included certain conditions. Specifically, the Agency states that it conditionally approved the water monitoring program suggested by petitioner pursuant to the requirements of Attachment A being met. The Agency maintains that Attachment A "contained a 35 Ill. Adm. Code Part 620 Groundwater Quality Standards compatible Groundwater Monitoring Program applicable to a sanitary landfill permitted under 35 Ill. Adm. Code Part 807." (Mot. at 2.)

The Agency asserts that the sole grounds for petitioner's appeal is that the permit encloses Attachment A which was not included in the permit application and which the Agency

¹ The Agency's motion for summary judgment will be referenced to as (Mot. at _) and ESG Watts response will be referred to as (Resp. at _.)

unilaterally imposed. The Agency claims that the petition does not address any other general or special conditions, and does not question any of the specifics of the Groundwater Monitoring Program that are set forth in Attachment A. (Mot. at 3.) The Agency argues that "[t]herefore, the sole issue on appeal in this case is the authority of the Illinois EPA to "unilaterally impose" as a special condition the Part 620 compatible Groundwater Monitoring Program that is set forth in Attachment A." (Mot. at 3.) The Agency concludes that the issue is appropriate for summary judgment because it relates to the Agency's permitting authority and is a question of law, and not a question of fact. (Mot. at 3.)

The Agency notes that petitioner's existing operating permit contains a Groundwater Monitoring Program that was initially approved by it prior to the effective date the Board's Groundwater Quality Standards, set forth in 35 Ill. Adm. Code Part 620, promulgated pursuant to the Illinois Groundwater Protection Act, 415 ILCS 55/1-9. (Mot. at 3.) The Agency states that "[a]lthough technically adequate at the time it was first proposed and approved, Watts' current Groundwater Monitoring Program is inadequate to meet the requirements of the Board's 35 Ill. Adm. Code Part 620 Groundwater Quality Standards." (Mot. at 3.)

The Agency concludes that since petitioner is presently subject to a Groundwater Monitoring Program as a part of its current operating permit, that the imposition of the Part 620 compatible Groundwater Monitoring Program described in Attachment A does not represent the unilateral imposition upon ESG Watts of a completely new program or activity. (Mot. at 4.) Instead the Agency argues that it is a revision to current technical requirements of an existing program or permitted activity already required by petitioner's current operating permit. (Mot. at 4.) The Agency claims that the primary difference between the existing operating permit and that on appeal is that the permit on appeal which contains Attachment A revises the existing permit to include additional parameters in order to be compatible with the Board's 35 Ill. Adm. Code Part 620 Groundwater Quality Standards. (Mot. at 4.)

The Agency argues that it "not only has the right to so revise Watts' permit so as to make its current Groundwater Monitoring Program compatible with the Board's Part 620 Groundwater Quality Standards, but - it is submitted - the Illinois EPA is also obligated to do so." (Mot. at 4.) Citing to the language of 35 Ill. Adm. Code 807.209(a), the Agency argues that it is required to revise petitioner's operating permit to make the Groundwater Monitoring Program compatible with the Board's Groundwater Quality Standards. (Mot. at 4.)

The Agency claims that if it is not allowed to impose conditions which are not part of the application for permit that anytime there is a change in the law, a significant advancement in scientific knowledge, or a significant enhancement in technical capabilities, the beneficial effects of the changes would be deferred until the permittee chooses to modify the affected parts of its operating permit. (Mot. at 5.) The Agency argues that this could not reflect the intended desire of either the legislature or the Board. (Mot. at 5.)

The Agency maintains that pursuant to both Section 39(a) of the Act and 35 Ill. Adm. Code Part 807.206(a), that it has the authority to impose such conditions in a permit that are

necessary to accomplish the purposes of the Act, and as are not inconsistent with the Board regulations. (Mot. at 6.) Accordingly, the Agency maintains that it has the regulatory authority to revise petitioner's current Groundwater Monitoring Program by enclosing a Part 620 compatible Groundwater Monitoring Program as described in Attachment A as a special condition to the supplemental permit in order to make petitioner's present Groundwater Monitoring Program conform with the Board's Groundwater Quality Standards as set forth in 35 Ill. Adm. Code Part 620. (Mot. at 7.) The Agency concludes that "[t]here exists in this case no genuine issue of material fact, and based upon the foregoing, the Illinois EPA is entitled to a judgment, or finding, in its favor as a matter of law." (Mot. at 7.)

Petitioner argues that it is not appealing on the basis that the Agency does not have the authority to impose conditions so that permits comply with new or revised Board regulations. (Resp. at 2.) Petitioner is requesting the Board to review the conditions contained in the Attachment A because the petitioner asserts that those conditions exceed the requirements of the Board regulations and are not necessary. (Resp. at 2.) Specifically, petitioner claims that the Agency's Attachment A utilizes the standards of the 35 Ill. Adm. Code 620.410, standards for Class I groundwater, instead of the standards for Class II groundwater as set forth at 35 Ill. Adm. Code 620.420. Petitioner maintains that the groundwater at the facility is designated as Class II groundwater. (Resp. at 2.) As a result of the disagreement as to which standards apply to the groundwater located at the Taylor Ridge Landfill based on the classification of the groundwater located at the facility, petitioner argues that there remains a genuine issue of material fact and respondent is not entitled to judgment as a matter of law. (Resp. at 2.)

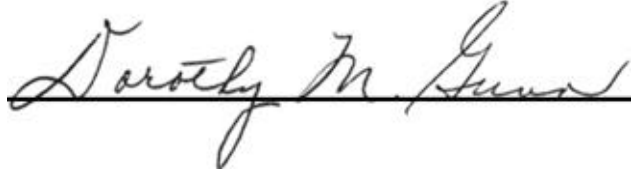
DISCUSSION

Summary judgment is appropriate when the pleadings, depositions and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. (See *Purtill v. Hess*, 111 Ill. 2d 229, 240-41, 489 N.E.2d 867, 871-72 (1986), *Waste Management of Illinois v. IEPA*, (July 21, 1994), PCB 94-153; *Solomon v. American Nat'l Bank & Trust Co.*, 243 Ill.App.3d 132, 612 N.E.2d 3 (1st Dist. 1993).)

Petitioner states that it is not challenging the Agency's authority to revise its permit to conform with current regulations but is instead challenging what is required to make its current Groundwater Monitoring Program compatible with the Board's Groundwater Quality Standards. The Board finds that there are genuine issues of fact to be resolved in this proceeding. There remains an issue of material fact concerning the classification of the groundwater at the Taylor Ridge facility which must be determined in order for the Board to rule on this appeal. Therefore, the Board finds that there are genuine issues of fact to be resolved in this proceeding. The motion for summary judgment is denied, and this matter shall proceed to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 4th day of September 1997, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board