

ILLINOIS POLLUTION CONTROL BOARD  
April 11, 1991

ESG WATTS, INC.	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	PCB 90-95
	)	(Permit Appeal)
Respondent,	)	
	)	
and	)	
	)	
PEOPLE OF THE STATE	)	
OF ILLINOIS,	)	
	)	
Intervenors.	)	

KEVIN T. McCLAIN, of IMMEL, ZELLE, OGREN, McCLAIN, & COSTELLO,  
APPEARED ON BEHALF OF PETITIONER;

LISA MORENO APPEARED ON BEHALF OF RESPONDENT; and

KELLY A. O'CONNOR, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF  
OF INTERVENORS.

OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board on ESG Watts', Inc. (herinafter "Watts" or "Company") petition for review concerning its NPDES permit application for a proposed Industrial Waste Treatment Complex ("facility") located in Rock Island, Illinois. The Company filed this permit request with the Illinois Environmental Protection Agency ("Agency") on February 11, 1987. Watts subsequently waived the statutory deadline date on numerous occasions. On March 30, 1990, the Agency denied the Company's permit application. On May 7, 1990, Watts filed this appeal with the Board. Hearing was held on December 10, 1990, at which time the Attorney General ("AG") moved to intervene. Over the objection of the petitioner, the Hearing Officer granted this motion.

FACTS - PROCEDURAL HISTORY

On February 11, 1987, Watts filed a permit application to develop and construct its Industrial Waste Treatment Complex located at 602 First Street, Rock Island, Illinois. The proposed facility would store and treat hazardous wastes which would be contained at the facility and stored in either an incoming bulk

truck, drum, plant receiving or treatment tank, the plant piping system or the facility waste water treatment equipment. The facility planned to have eight treatment and receiving tanks for hazardous waste and five tanks for storage of product chemicals, treated water and waste oil for recycling. In its treatment operations, the facility would handle water-based or aqueous waste, containing heavy metals, dichromate, cyanide, sulfide, oil and solvent residues. The facility is designed to treat and discharge 100,000 gallons of wastewater per day, with a maximum of 120,000 gallons per day. The treatment provided by the facility would consist of hexavalent chromium reduction, cyanide destruction, sulfide destruction, metal prescription, simple neutralization and filtration prior to discharge. (See, generally, Ex. 18.)

In its initial application, Watts advised the Agency that treated wastewater would be discharged into the City of Rock Island's storm sewer system. Using this alternative, the discharge point would be the Mississippi River. (Ex. 18). On October 28, 1988, a draft permit was written which was, in part, based upon the Agency's determination that the specific discharge point was identified to a geographical location. (Ex. 25). On November 1, 1988, however, the company modified its permit application when its consulting engineer informed the Agency that the proposed discharge through the storm sewer was impossible because the storm sewer was indirectly linked to the Rock Island sanitary system. (Pet. Br. at 3).

On November 7, 1988, Watts informed the City of Rock Island that it intended to discharge the water directly to the Mississippi River via private pipeline. (Ex. 9). In order to construct a pipeline, however, the company needed to obtain an easement. Hearing was held in this regard at the local level and on March 29, 1990, the City of Rock Island denied the company's petition for an easement. (Ex. 2). On March 30, 1990, the Agency, having no waiver for the statutory deadline date,<sup>1</sup> denied the petitioner's NPDES permit application. In support of this denial, the Agency cited sections 12 and 39 of the Illinois Environmental Protection Act ("Act") in addition to 35 Ill. Adm. Code 309.241. The denial letter further stated:

...An NPDES permit for the proposed project cannot be issued because a feasible discharge location has not been identified. Construction permits cannot be issued until an NPDES permit can be issued.

(Ex. 1).

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<sup>1</sup>The deadline expired on March 31, 1990.

Pursuant to the Hearing Officer's order, a briefing schedule was established and submittals were filed by the Petitioner as well as the AG. The Agency did not file a brief.

### ISSUE PRESENTED

The issue presented upon appeal is whether Watts should be able to obtain an NPDES permit and thus begin construction of its facility despite the fact that it is unable to inform the Agency of a specific discharge point. In its brief supporting the Agency's decision, the AG argues that without a feasible discharge point, an NPDES permit cannot be issued. The AG states that the discharge point is a crucial aspect of any NPDES permit. Watts does not deny this, but instead maintains that throughout the permit application period (three years), it did nothing to cause the Agency to believe that any other body of water would receive its discharge other than the Mississippi River. To this end, the company asserts that construction of its facility should not be postponed as a result of a local zoning issue which is separate and apart from the merits of its permit application.

### DISCUSSION

The AG asserts that pursuant to Section 39(a) of the Act in addition to well-established case law, the burden is on the petitioner to demonstrate that no violation of the Act or Board regulations will occur in order to reverse a permit denial. Waste Management Inc. v. IEPA, PCB 84-45,84-6 and 84-68 (Consolidated Opinion) November 26, 1984; aff'd, IEPA V. PCB and Waste Management, Inc., 138 Ill. App. 3d 550 (3rd Dist. 1985); aff'd 115 Ill. 2d 65 (1986); Browning Ferris v. PCB, 179 Ill. App. 3d 598 (2nd Dist. 1989).

Having established this foundation, the AG submits that the petitioner failed to live up to this burden in that it did not provide the Agency with a specific discharge point. In support of this contention, the AG cites 35 Ill. Adm. Code 309.241. Yet this is not the regulation applicable in the instant case. Section 309.241 applies to those permits outside the scope of the NPDES program. See, 35 Ill. Adm. Code 309.101(a). This is a dispute regarding an NPDES permit and therefore the pertinent regulation is 35 Ill. Adm. Code 309.154.

35 Ill. Adm. Code 309.154 states:

- a. No person shall cause or allow the construction of any new treatment works, disposal well or wastewater source for which an NPDES Permit is required...unless such NPDES Permit contains an authorization to construct as a condition of such permit.

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- c) The Agency shall not issue any authorization to construct unless the applicant submits adequate proof, including any of the information or documents set forth in Section 309.221 as the Agency may require, which ensures that the proposed construction, modification or operation:
- 1) Either conforms to the criteria promulgated by the Agency under Section 309.221 or is based on other criteria which the applicant proves will produce consistently satisfactory results; and
  - 2) Will not cause a violation of the conditions of the NPDES Permit.

This regulation reinforces the assertion contained within the Agency's denial letter as well as the argument put forth by the AG. That is, construction of a facility can only take place as a condition of an NPDES permit. (Int. Br. at 11; Ex. 1). Having established that an NPDES permit must issue prior to construction, the question remains as to whether an NPDES permit can be issued without an identifiable discharge point.

Within this context, the remedy which the company seeks is only that it be allowed to begin construction of the facility in question. It is indisputable that given the circumstances at bar, Watts is unable to discharge any wastewater. In this regard, the company first maintains that the Board's review of a permit appeal can only be based upon the record. Mathers v PCB, 107 Ill. App. 3d 729 (3d. Dist. 1982). Secondly, Watts states that the sole question before this Board in a review of the Agency's denial is whether the petitioner can prove that the permit application, as submitted to the Agency, establishes that the facility will not cause a violation of the Act. IEPA v. PCB, 118 Ill. App. 3d 772 (1st Dist. 1983). Finally, the company asserts that the Agency should not deny a permit because the petitioner's proposed method of discharge is subject to a local zoning ordinance. Lake County v. PCB, 75 Ill. Dec. 750 (1983); Carlson v, Village of Worth, 62 Ill. 2d 402 (1975).

With this in mind, the company argues that:

...To the extent the agency had environmental concerns about the eventual disposal of the water, it could have issued an NPDES permit with the condition that no discharge could occur until the actual discharge point was

identified or, further, condition the construction permit, stating that an NPDES permit would have to be obtained before the discharge commenced into the Mississippi River.

(Pet. Br. at 8).

While this argument at first appears reasonable, it ignores the legal standard to which Watts must adhere. As already discussed in this Opinion, 35 Ill. Adm. Code 309.154 makes clear that NPDES permits and the construction of a facility are inseparably linked. Thus the company's contention that the Agency could have conditioned the construction permit requiring that an NPDES permit would have to be obtained before discharge commenced into the Mississippi River is clearly mistaken. The whole purpose behind NPDES permits is the regulation of point source discharges. While the facts in the instant case are very unusual indeed, the company's attempt to put the horse before the cart is simply unpersuasive. It is not inconceivable, for example, that Watts will be unable to procure a local easement. Should this occur, the company may seek another means of disposal such as underground injection. It could be the case, then, that an NPDES permit would be issued to allow construction and the facility would never even discharge into a navigable waterway.

The petitioner also maintains that:

...The Agency's reasons for denial were based upon speculation, not evidence in the record, that the petitioner might, possibly, sometime in the future, commit a violation by improperly disposing of the wastewater at the Watts Disposal Facility.

(Pet. Br. at 7).

This mischaracterizes the problem. The Agency was forced to speculate due to the lack of evidence in the record. While the Agency record leaves no doubt that Watts intends to discharge into the Mississippi River, the company has been unable to provide a means to do so nor has it provided the Agency with a specific discharge point. Because the discharge point remains a fundamental component of NPDES permits, and because the company has been unable to specify where that discharge would be located, it has failed to adequately prove that in the event it was granted a permit, it would comply with the provisions of the Act. See 35 Ill. Adm. Code 309.103 and 40 CFR 122.22(k)(1).

Similarly, the company has maintained that "other options remain available to the petitioner". (Pet. Br. at 5). What these other options might entail is inherently speculative.

Because they were not specifically identified and included in the permit application, the Agency had no choice but to guess as to how compliance with the Act would be accomplished.

Finally, Watts' assertion that the Agency should not deny a permit because the company's method of disposal is subject to a local zoning ordinance is less than compelling. This argument is premised on the theory that but for the easement dispute, the Agency would have granted a permit. Such an approach is not only speculative, but fails to address the lack of a specific discharge point. Although we agree with the company that our decision can only be based on the record, the lack of information regarding a discharge point remains a significant deficiency in the petitioner's permit application. That this omission is a result of a local dispute is incidental rather than dispositive. That is, the company's dispute over an easement may be local in nature, yet it still remains within the scope of the Act because the company has made the securing of that easement a vital aspect of its permit application. The Agency cannot overlook a fundamental component of an NPDES permit merely because a permittee experiences local problems which happen to involve the same issue. Nor can it issue a permit for something which the petitioner intends to do, but is without the resources to actually comport with the Act and the provisions thereto.

Thus we must affirm the Agency here because Watts has failed to prove that had a permit been issued, the company would have complied with the provisions of the Act. IEPA v. PCB, 107 Ill. App. 3d 729 (3rd. Dist. 1982). Even if the easement were not at issue in this case, the Board would not reverse the Agency because Watts has failed to identify a specific discharge point. The issue in this case is not whether Watts is able to ultimately obtain an easement from the city, but whether Watts can adequately demonstrate compliance with the Act without identifying a specific discharge point. We hold today that the company has failed to live up to this burden and, accordingly, we affirm the Agency's permit denial.

This Opinion constitutes the Board's findings of Fact and Conclusion of law.

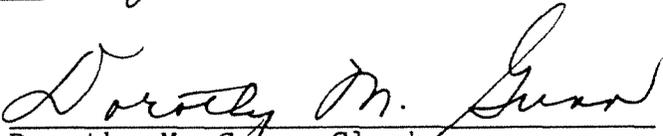
#### ORDER

For the reasons contained herein, the Agency's denial of petitioner's permit appeal is hereby affirmed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989 ch. 111½, par. 1041, provides for appeal of final Orders of the Board within 35 days. The rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion and Order was adopted on the 11<sup>th</sup> day of April, 1991 by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

