ILLINOIS POLLUTION CONTROL BOARD
April 4, 2002

ESG WATTS, INC. (Sangamon Valley Landfill, Taylor Ridge/Andalusia Landfill, and Viola Landfill), an Iowa corporation,	)	
Petitioner,	)	
v.	)	PCB 01-139 (Permit Appeal - Land)
ILLINOIS ENVIROMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

LARRY A. WOODWARD, CORPORATE COUNSEL, APPEARED ON BEHALF OF PETITIONER; and

DANIEL MERRIMAN, ASSISTANT COUNSEL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On July 5, 2001, ESG Watts, Inc. (ESG Watts) filed a petition for review of a February 28, 2001 decision by the Illinois Environmental Protection Agency (Agency). The Agency's denial letter stated that the Agency "refuses to release any existing financial assurance tendered by ESG Watts including any funds from the ESG Watts trust fund." R. at 0084. The trust fund provides financial assurance for three facilities owned by ESG Watts.

On December 27, 2001, a hearing was held in Springfield before Board Hearing Officer Steven Langhoff. On January 25, 2002, ESG Watts filed a brief (Pet. Br.) in this proceeding. On February 19, 2002, the Agency filed a brief (Resp. Br.) and a motion for extension of time to file the brief (Mot.). On March 7, 2002, ESG Watts filed a motion to strike the respondent's brief (Mot.S.), a response to the motion for extension of time, and a reply brief (Reply). On March 25, 2002, the Board received the Agency's response to the motion to strike (R.Mot.S.). The Board will discuss the motions below.

For the reasons given in the opinion, the Board reverses the Agency's refusal to release existing financial assurance. However, the Board cannot lawfully direct the release of funds in the ESG Watts trust fund.

MOTIONS

Before considering the merits of this case, the Board must first address the outstanding motions relating to the filing of the Agency's brief. First, the Agency filed a motion for an

extension of time to file the brief. The Agency acknowledges the lateness of the brief but asserts that there was no "intention to willfully disregard the Hearing Officer's scheduling order, cause any undue delay or any material prejudice to any party" nor was there "any bad faith" on the part of the Agency. Mot. at 2. Furthermore, the Agency stated that the attorney for the Agency became aware of "a significant development" in this matter "on or about February 7, 2002." Mot. at 1. The Agency "felt" that the "significant development" should be brought to the Board's attention and a new section needed to be added to the brief to do so. *Id*.

ESG Watts argues that the Agency's brief should be stricken. First, with regards to the "significant development" the Agency discusses, ESG Watts argues the Agency did not support the allegations in the motion with an affidavit or any other sworn testimony. Mot.S. at 1. Furthermore, the dated information provided by the Agency demonstrates that the materials would have been available at the hearing in this matter if the Agency had exercised due diligence. *Id*. Also, the information was discussed in the presence of the Agency in December of 2001. *Id*. Finally, ESG Watts asserts that the information is not material to any issue in PCB 01-62, PCB 01-63, or PCB 01-64 as the materials deal with United Capitol Insurance Company, and the policies at issue in those cases were issued by Frontier Pacific Insurance Company. Mot.S. at 1-2.

ESG Watts also argues that the brief was filed "to introduce prejudicial bias" into this proceeding. Mot.S. at 2. Specifically, ESG Watts maintains that the Agency is suggesting that the release of surplus financial assurance would leave the State of Illinois without financial assurance when the Agency "knows that the policies have been replaced by other policies for the time period beginning January 26, 1998 to January 25, 2002, and by policies covering the period January 26, 1998 to January 25, 2003." Mot.S. at 2.

The Agency's response argues that the information included in the brief, "while admittedly outside the record" is relevant to the Agency's argument that the appeal is moot. R.Mot.S. at 3-4. Furthermore, the Agency argues that the brief had attached to it a "Verification of Facts Not of Record by Certificate." R.Mot.S. at 4. The Agency tenders a "correction" by stating that the certificate applies to the motion for extension of time. *Id*.

The Agency also responds to the ESG Watts argument that the Agency attempted to introduce prejudice by asserting that the assertions of fact are not accompanied by an affidavit. R.Mot.S. at 9. Further, the Agency asserts such information is outside the record of the proceeding. *Id*. Finally, the Agency states that there has been no approval of financial assurance by insurance policies for ESG Watts. *Id*.

The Board grants the motion for extension of time to file the brief. The Board believes that accepting the brief will allow for a more comprehensive discussion and resolution of the issues in the case. However, the Board does agree with ESG Watts in part and therefore the Board will strike portions of the Agency's brief from this record.

The Agency included in the brief a court order from the Circuit Court of Cook County that was entered on November 14, 2001. The court order was not before the Agency when the Agency's decision was made. Therefore, the Board cannot now consider that court order. The

Board also strikes the attachment from the brief and any argument relating to the attachment. *See* West Suburban Recycling and Energy Center, L.P. v. IEPA, PCB 95-199 and 95-125 (Oct. 17, 1996); Panhandle Eastern Pipe Line Company v. IEPA, PCB 98-102 (Jan. 21, 1999); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d at 738, 516 N.E.2d at 280 (5th Dist. 1987).

FACTS

At hearing, the parties introduced Joint Exhibit A (J.Exh. A) which is a stipulation by the parties to certain facts in this case. The following discussion summarizes the pertinent facts from the stipulation and adds additional facts from the hearing transcripts and the record of the case where necessary. Included in the summary of facts are facts surrounding the ESG Watts, Inc. (Sangamon Valley Landfill) v. IEPA, PCB 01-62 (Apr. 4, 2002) and ESG Watts, Inc. (Viola Landfill) v. IEPA, PCB 01-63, 64 (consol.) (Apr. 4, 2002). These facts are necessary to understand the interrelated nature of the financial assurance for all three of the ESG Watts facilities.

On November 27, 2000, ESG Watts was the licensed operator for the Taylor Ridge/Andalusia landfill and Viola landfill and had an obligation to provide financial assurance for the closure/post-closure care of the facility. J.Exh. A at 1. ESG Watts was not the licensed owner of Sangamon Valley Landfill, but ESG Watts had not been released by the Agency from the obligation to supply financial assurance. *Id.*

On November 27, 2000, ESG Watts submitted requests to approve substitute financial assurance for the Sangamon Valley landfill (R. at 00001-0076d), the Taylor Ridge/Andalusia landfill (R. at 0094-0171) and the Viola landfill (R. at 0188-0273) in the form of surplus lines "Pollution Liability Policies" issued by United Capitol Insurance Company for the period January 26, 1999 to January 26, 2001. J.Exh. A at 1. ESG Watts further requested that excess financial assurance, in the form of a trust,[1] be released for the Sangamon Valley landfill, the Taylor Ridge/Andalusia landfill and the Viola landfill. *Id.* ESG Watts also asked that United Capitol Insurance Company and ESG Watts be released from any financial assurance obligation for Sangamon Valley landfill. *Id.*

United Capitol Insurance Company of Atlanta, Georgia offered the pollution liability coverage. R. at 0003., J.Exh. A at 1. United Capitol Insurance Company was an insurer licensed to transact the business of insurance in Illinois when the policies were provided to the Agency. J.Exh. A at 1. The policies provided for financial assurance for closure/post-closure in the amount of $3,197,798 for Sangamon Valley landfill, $2,031,549 for Taylor Ridge/Andalusia landfill and $397,080 for Viola landfill. J.Exh. A at 1-2.

[1] In ESG Watts Inc. (Sangamon Valley) v. IEPA, PCB 01-62 (Apr. 4, 2002), ESG Watts argues that there are three separate trusts while the Agency maintains there is only one trust account. Based on the Board decision in PCB 01-62, the Board will refer to a single trust.

ESG Watts had four trust agreements on file with the Agency at the time of the submission of the insurance policies: one dated February 28, 1985 (PCB 01-63, 64[2] Vol. II R. at 0316-0319) and three dated March 9, 1994 (PCB 01-63, 64 Vol. II R. at 0336-0339, PCB 01-63, 64 Vol. II R. at 0344-0347 and PCB 01-63, 64 Vol. II R. at 0352-0355). On November 27, 2000, the trust account had $1,455,993.95. J.Exh. A at 2.

At the time of the submittals by ESG Watts, the amounts tendered by the policies were equal to the closure/post-closure care cost estimates for the landfills. J.Exh. A at 2. Prior to the Agency's final decision in this matter, the Agency approved a revised closure/post-closure care estimate for Viola landfill. J.Exh. A at 2. That revised estimate was $313,294. *Id.*

Until January 18, 1994, the Agency had treated the trust agreement submitted by ESG Watts as a unified trust. On January 18, 1994, the Agency transmitted trust agreement forms to ESG Watts. J.Exh. A at 2. On March 9, 1994, ESG Watts submitted four trust agreements on file with the Agency: one dated February 28, 1985 (PCB 01-63, 64 Vol. II R. at 0316-0319) and three dated March 9, 1994 (PCB 01-63, 64 Vol. II R. at 0336-0339, PCB 01-63, 64 Vol. II R. at 0344-0347 and PCB 01-63, 64 Vol. II R. at 0352-0355). The Agency never indicated that the trust agreements submitted on March 9, 1994, failed to establish a trust for each individual landfill. J.Exh. A at 2. On January 19, 1996, the Agency stated that there were separate trusts for each individual landfill and that funds could not be transferred from one trust account to another without complying with administrative regulations relating to excess funds. J.Exh. A at 2-3.

On February 28, 2001, the Agency issued a single denial letter in response to November 27, 2000, requests by ESG Watts. R. at 0084. In that letter, the Agency refuses to release any existing financial assurance instrument tendered by ESG Watts including the ESG Watts trust fund. R. at 0084. The letter indicates that the Agency "in separate actions" has refused to accept closure insurance policies offered by ESG Watts as substitute financial assurance for Taylor Ridge/Andalusia landfill and Viola landfill. *Id.* The letter also states that the Agency has "reason to believe" that the cost for closure/post-closure care at Taylor Ridge/Andalusia landfill and Viola landfill will be "significantly greater" than the total financial assurance offered by ESG Watts. *Id.*

STATUTORY AND REGULATORY BACKGROUND

A municipal solid waste landfill (MSWLF) is an area that receives household waste and may also receive commercial waste. 415 ILCS 5/3.85 (2000). MSWLFs are subject to the Board's rules at 35 Ill. Adm. Code Subtitle G, which include requirements for closure and post-closure care of the units. The rules also require that adequate financial assurance be in place to insure that if the operator cannot do so, proper closure and post-closure care can be undertaken without cost to the State. Section 21.1 of the Act provides in part:

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[2] The hearing officer allowed the filing of the record in this case which incorporates the record from ESG Watts , Inc. v. IEPA, PCB 01-63,64 (consol.) (Apr. 4, 2002). The record from that proceeding will be cited as "PCB 01-63, 64 Vol. II. R. at ___" in this proceeding.

(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 such 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.

(a.5) On and after the effective date established by the United States Environmental Protection Agency for MSWLF units to provide financial assurance under Subtitle D of the Resource Conservation and Recovery Act, no person, other than the State of Illinois, its agencies and institutions, shall conduct any disposal operation at a MSWLF unit that 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 purposes of:

(1) insuring closure of the site and post-closure care in accordance with this Act and its rules; and

(2) insuring completion of a corrective action remedy when required by Board rules adopted under Section 22.40 of this Act or when required by Section 22.41 of this Act.

The performance bond or other security requirement set forth in this Section may be fulfilled by closure or post-closure insurance, or both, issued by an insurer licensed to transact the business of insurance by the Department of Insurance or at a minimum the insurer must be licensed to transact the business of insurance or approved to provide insurance as an excess or surplus lines insurer by the insurance department in one or more states. 415 ILCS 5/21.1(a) and (a.5) (2000).

THE PERMITTING PROCESS

After the Agency's final decision on a permit is made, the permit applicant may appeal that decision to the Board. 415 ILCS 5/40(a)(1)(2000). The question before the Board in permit appeal proceedings is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would have occurred if the requested permit had been issued. Panhandle Eastern Pipe Line Company v. IEPA (Jan. 21, 1999), PCB 98-102; Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E. 2d 189 (1st Dist. 1983). Furthermore, the Agency's denial letter frames the issues on appeal. ESG Watts, Inc. v. IPCB, 286 Ill. App. 3d 325, 676N.E.2d 299 (3rd Dist. 1997).

Section 39(a) of the Act also allows the Agency to impose conditions on permits:

> In granting permits the Agency may impose such conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder. * * * If there is no final action by the Agency within 90 days after the filing of the application for permit, the applicant may deem the permit issued. * * * 415 ILCS 5/39(a) (2000).

Section 40(a)(1) of the Act provides that:

> If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 5/40(a)(1)(2000).

Standard of Review

It is well-settled that the Board's review of permit appeals of this type is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987). However, it is the hearing before the Board that provides a mechanism for the petitioner to prove that operating under the permit as granted would not violate the Act or regulations. Further, the hearing affords the petitioner the opportunity "to challenge the reasons given by the Agency for denying such permit by means of cross-examination and the Board the opportunity to receive testimony which would 'test the validity of the information (relied upon by the Agency)'." Alton Packaging Corp. v. IPCB, 162 Ill. App. 3d at 738, 516 N.E. 2d at 280, quoting IEPA v. IPCB, 115 Ill. 2d 65, 70 (1986).

Typically, evidence that was not before the Agency at the time of its decision is not admitted at hearing or considered by the Board. West Suburban Recycling and Energy Center, L.P. v. IEPA (Oct. 17, 1996), PCB 95-199 and 95-125; Panhandle Eastern Pipe Line Company v. IEPA (Jan. 21, 1999), PCB 98-102; Alton Packaging Corp. v. PCB, 162 Ill. App. 3d at 738, 516 N.E.2d at 280. Additionally, Section 105.214(a) of the Board's procedural rules states:

> Except as provided in subsection (b), (c) and (d) of this Section, the Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101.Subpart F, upon an appropriately filed petition for review under this Subpart. The hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact. 35 Ill. Adm. Code 105.214(a).

ESG WATTS ARGUMENTS

ESG Watts puts forth two arguments to support its position in this case. First, ESG Watts argues that the substitute financial assurance for the three landfills for the period

January 26, 1999 to January 26, 2001 provided by ESG Watts to the Agency has been approved by operation of law. Pet. Br. at 5. Second, ESG Watts maintains that the Agency exceeded its authority in determining that the Agency had reason to believe that the actual closure/post-closure care costs would exceed the approved costs. Pet. Br. at 9-11. Third, ESG Watts argues that even if the Agency has the power to withhold release of excess trust funds upon a belief that the actual costs might be higher than approved costs, the evidence in this matter does not support such a finding. Pet. Br. at 11-13.

Approval by Operation of Law

ESG Watts asserts that the substitute financial assurance for the three landfills for the period for January 26, 1999 to January 26, 2001 provided by ESG Watts to the Agency has been approved by operation of law. Pet. Br. at 5. ESG Watts points out that Section 21.1(e) of the Act (415 ILCS 5/21.1(e) (2000)) provides that the when the Agency disapproves a "performance bond or other security" posted pursuant Section 21.1(a) or (a.5), the applicant may "contest the disapproval as a permit denial pursuant to Section 40 of the Act [415 ILCS 5/40(2000)]." Pet. Br. at 5. ESG Watts further points out that Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2000)) provides that if the Agency refuses to grant or grants with conditions a permit under Section 39 of the Act (415 ILCS 5/39 (2000)) the applicant may appeal to the Board. *Id*. ESG Watts also points to the language in the Board's rules which allows the applicant to appeal the Agency's refusal to accept financial assurance as a permit denial. Pet. Br. at 6, citing 35 Ill. Adm. Code 807.605(c).

ESG Watts maintains that Section 39(a) of the Act (415 ILCS 5/39(a)(2000)) requires the Agency to make permit decisions within 90 days of receipt of an application, and the Agency did not do so here. Pet. Br. at 5-7. Thus, ESG Watts maintains the financial assurance is approved by operation of law. *Id*. ESG Watts cites Illinois Power Co. v. IPCB, 112 Ill. App. 3d 457, 445 N.E.2d 820 (5th Dist 1983) and Marquette Cement Manufacturing Co. v. IEPA, 84 Ill. App. 3d 434, 405 N.E.2d 512, 514 to further bolster the argument. *Id*.

ESG Watts maintains that the legislature has "already assessed the risk of administrative delay and placed the risk squarely on the shoulders of the Agency." Pet. Br. at 7. Section 39(a) clearly states that if there is no final decision within 90 days after the filing of the application, the applicant may deem the permit issued, argues ESG Watts. *Id*. ESG Watts contends that if the Board were to remand the nondecision to the Agency the Board would be allowing the Agency to engage in the administrative delay prohibited by Section 39(a) of the Act. *Id*.

The Agency Exceeded its Authority in Determining that the Agency had Reason to Believe that the Actual Closure/Post-Closure Care Costs Would Exceed the Approved Costs

ESG Watts points out that the Agency's denial letter frames the issues on appeal. Pet. Br. at 7-8, citing Pulitzer Community Newspaper, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990). ESG Watts maintains that in this case the only issue framed by the denial letter is that the Agency has reason to believe that the actual cost of closure/post-closure care will be significantly greater than the approved estimate of closure/post-closure care. Pet. Br. at 8-9.

ESG Watts argues that the Board's rules require the release of excess financial assurance upon acceptance of substitute financial assurance. Pet. Br. at 9. ESG Watts points out that Section 807.665 requires the closure/post-closure care policy be issued for a face amount at least equal to the current cost estimates. Pet. Br. at 10. ESG Watts states that the rule provides that after closure has been initiated, the operator may seek reimbursement for actual expenditures, and the Agency will instruct the insurer to make reimbursement unless the Agency has reason to believe that the actual costs will be significantly greater than the face amount of the policy. *Id*. ESG Watts argues that the Agency has inappropriately relied upon provisions dealing with reimbursement for expenditures after closure has been initiated as a denial reason. *Id*.

ESG Watts asserts that the only provisions which allow the Agency to withhold release of financial assurance based on a "reason to believe" that actual costs might exceed the current cost estimates are provisions which deal with reimbursements for expenditures after closure has begun. Pet. Br. at 9. ESG Watts maintains that this authority is absent when dealing with the release of a financial institution, release of an operator, releasing excess trust funds, and accepting financial assurance insurance policies in the first place. Pet. Br. at 10-11. ESG Watts argues that there is good reason for "this dichotomy" in that current cost estimates may be almost two years old when closure is initiated and matters may be discovered during actual closure that increases the costs. Pet. Br. at 11. However, prior to the initiation of closure, the Agency must rely on current cost estimates to determine if excess financial assurance exits. Pet. Br. at 11.

Even if the Agency has the Power to Withhold Release of Excess Trust Funds Upon a Belief that the Actual Costs Might be Higher than Approved Costs, the Evidence in this Matter does not Support such a Finding

ESG Watts argues that the Agency's "reason to believe" that the actual costs would be higher than the estimated costs was based on the fact that the Taylor Ridge/Andalusia landfill had to obtain a significant modification permit "pursuant to 35 Ill. Adm. Code 811.100 *et seq*. standards" and the current closure estimates were for a "Part 807" landfill. Pet. Br. at 11-12. ESG Watts asserts that the Agency's witness, however did not have any specific knowledge about the current cost estimate for Taylor Ridge/Andalusia landfill and did not know if the current cost estimate included "Part 811" requirements already. Pet. Br. at 12. ESG Watts maintains that the Agency was "guessing" and that is not a legally sufficient "reason to believe" that the actual costs would be more than the approved cost estimates. *Id*.

AGENCY ARGUMENTS

The Agency puts forth three arguments in support of the Agency's refusal to release financial assurance funds and the failure to "approve" financial assurance for the three landfills. First, the Agency argues that the provisions of Section 39(a) of the Act do not apply to the approval of financial assurance mechanisms. *Id*. Second, the Agency maintains that the record supports the Agency's reason to believe that regardless of the acceptability of the policies, the trust fund could not be released. Resp. Br. at 23. Finally the Agency asserts that the appeal by ESG Watts is moot. Resp. Br. at 34. The Board will summarize each of the arguments below.

Approval by Operation of Law

The Agency maintains that the substitute financial assurance offered for the three landfills was not approved by default. Resp. Br. at 14. The Agency argues that the time limitations of Section 39(a) of the Act (415 ILCS 5/39(a) (2000)) do not apply to Agency decisions on financial assurance. Resp. Br. at 14. The Agency argues that the time limitation as set forth in Section 39(a) of the Act applies only to "instances where 'there is no final action by the Agency within 90 days after the filing of the application for permit'. (Emphasis supplied)." Resp. Br. at 14, citing 415 ILCS 5/39(a) (2000). The Agency opines that while certain financial assurance decisions are appealed to the Board under Section 40(a)(1) of the Act (415 ILCS 5/40 (2000)) "financial assurance mechanisms do not become permits by virtue thereof." Resp. Br. at 14-15.

The Agency further argues that Part 807 describes permit applications, and financial assurance mechanisms are not permit applications. Resp. Br. at 15. The Agency maintains that financial assurance may be required as a condition of a permit, but the financial assurance mechanisms and the Agency decisions regarding the mechanisms are not permits. *Id*. The Agency maintains that accordingly the time limitations of Section 39(a) of the Act do not apply to Agency decisions on financial assurance mechanisms. *Id*.

The Record Supports the Agency's Reason to Believe that Regardless of the Acceptability of the Policies, the Trust Fund Could not be Released

The Agency argues that ESG Watts must close the Taylor Ridge/Andalusia landfill pursuant to Part 811 and at this time approval for a permit to close under Part 811 has not been issued. Resp. Br. at 24-25. The Agency maintains that just because there is not specific knowledge of what closure may cost under Part 811 does not mean that there is not a legitimate reason to believe that the costs will exceed current estimates. Resp. Br. at 25. The Agency points to the testimony of Chris Liebman who testified to the significantly increased obligation for closure under Part 811 versus Part 807, as well as increased financial commitment. Resp. Br. at 25, 26. Furthermore, the Agency asserts that even though Mr. Liebman lacked "intimate knowledge" of ESG Watts' closure plan, he was certain that the current plan did not meet the Part 811 requirements. Resp. Br. at 26.

The Appeal by ESG Watts is Moot

The Agency asserts that the policies tendered by ESG Watts in this case have expired and were not renewed. Resp. Br. at 35. Therefore, the Agency argues this appeal is moot. *Id*. The Agency points to Duncan Publishing, Inc. v. City of Chicago, 304 Ill. App. 3d 778, 709 N.E.3d 1281 (1st Dist. 1999) for the definition of when a claim is moot. Duncan states that "a claim is moot when no actual controversy exits or events occur which make it impossible for a court to grant effectual relief." Duncan at 709 N.E.2d 1281, 1285. The Agency argues that ESG Watts wanted to present the Agency with something of value to fully fund financial assurance obligations intervening circumstances have rendered the policies worthless. Resp. Br. at 37. The Agency asserts the Board can therefore no longer offer effectual relief and the appeal is moot. *Id*.

The Agency maintains that the principle of financial assurance is to provide security for potential future costs of closure and post-closure care. Resp. Br. at 38. With insurance coverage that has expired, this cannot be accomplished and the appeal is moot. *Id*.

DISCUSSION

There are three issues that need to be addressed in this proceeding. The first issue is whether the Agency's failure to decide on the substitute financial assurance offered by ESG Watts results in the financial assurance being acceptable by operation of law. The second issue is whether the Agency may refuse to release financial assurance based on a reason to believe that the actual cost of closure/post-closure care will be significantly higher than the cost estimates. Third, is whether the appeal is moot since the policies have expired. The Board has today already made a decision on each of these issues in other proceedings involving ESG Watts and the Agency. See ESG Watts, Inc. (Sangamon Valley)v. IEPA, PCB 01-62 (Apr. 4, 2002) and ESG Watts Inc. v. IEPA, PCB 01-63, 64 (consol.) (Apr. 4, 2002). The Board will summarize the Board findings in those cases below and then address the remaining issues in this case.

PCB 01-63, 64 Taylor Ridge/Andalusia Landfill and Viola Landfill

In a separate opinion and order, the Board today affirmed the Agency's refusal to accept substitute financial assurance for Taylor Ridge/Andalusia landfill and Viola landfill. In that opinion and order the Board found that the appeals were not moot even though the terms of the policies had elapsed. The Board also found no support in the Board's rules or the Act for the Agency to withhold funds in excess of current cost estimates because the Agency has a "reason to believe" the actual costs will exceed the estimates prior to the initiation of closure. As the Agency's arguments are the same in this case, the Board will not address these issues further in this proceeding.

PCB 01-62 Sangamon Valley Landfill

In another separate opinion and order today, the Board considered arguments regarding whether or not Agency decisions on financial assurance mechanisms are permit appeals. In that case, the Board did not reach the issue, as the Board found that a decision on the financial assurance was not necessary. A decision was not necessary because ESG Watts is no longer owner or operator of Sangamon Valley and therefore ESG Watts need not provide financial assurance for closure/post-closure care. Thus, the Board must address the issue in this proceeding.

Does the Agency's Failure to Decide on the Substitute Financial Assurance Offered by ESG Watts Result in the Financial Assurance Being Acceptable by Operation of Law?

ESG Watts maintains that the request to approve financial assurance is a permit appeal and as such is subject to the provisions of Section 39(a) of the Act (415 ILCS 5/39(a) (2000)). The Agency argues that the Agency's actions on financial assurance mechanisms are not permit

appeals. The Board disagrees. The clear language of the Act and the Board's rules defines Agency decisions on financial assurance mechanisms as permit appeals. Therefore, the decisions on financial assurance mechanisms are subject to Section 39(a) of the Act (415 ILCS 5/39(a) (2000)).

Section 21.1(e) of the Act provides:

> The Agency shall have the authority to approve or disapprove any performance bond or other security posted pursuant to (a) or (a.5) of the Section. Any person whose performance bond or other security is disapproved by the Agency may contest the disapproval as a permit denial appeal pursuant to Section 40 of this Act. 415 ILCS 5/21.1(e) (2000).

Section 21.1(a.5) of the Act specifically includes insurance policies of the type offered by ESG Watts in this case as "performance bond or other security" requirement. 415 ILCS 5/21.1(a.5) (2000). Therefore, the Act clearly anticipates that the refusal to approve a financial assurance mechanism may be contested as a permit appeal.

Furthermore, Section 807.605(c) (35 Ill. Adm. Code 807.605) of the Board's rules define which Agency actions may be appealed as permit denials pursuant to Section 21.1(e) of the Act (415 ILCS 5/21.1(e) (2000)). Section 807.605(c) includes the refusal to accept financial assurance tendered by the operator and the refusal to release excess funds as permit appeals. Thus, the Board's rules also clearly anticipate that the Agency's decision on financial assurance mechanisms is a permit appeal.

As both the Act and the Board's rules anticipate a permit appeal based on the Agency's action regarding financial assurance mechanisms, the Board finds that the request for approval is a permit application and as such is subject to the provisions of Section 39(a) of the Act (415 ILCS 5/39(a) (2000)). Therefore, the Agency's failure to act on a permit application within 90 days allows the operator to deem the permit approved by operation of law. It is undisputed that the Agency's decision on these applications was not made within 90 days of receipt of the application. Therefore, ESG Watts may deem the financial assurance approved by operation of law.

Even though the Board has found that ESG Watts may deem the permit approved, the Board cannot lawfully direct the release of funds in the ESG Watts trust fund at this time. ESG Watts is required to maintain financial assurance for the Taylor Ridge/Andalusia landfill and Viola landfill pursuant to Section 21.1 of the Act (415 ILCS 5/21.1 (2000)). The policies offered by ESG Watts in this proceeding have expired, so if the Board were to direct the release of the trust fund ESG Watts would not have financial assurance in place[3] and that would be a violation of the Act. Therefore, the Board cannot and will not direct the release of the trust fund at this time.

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[3] ESG Watts does state in the motion to strike that there are policies in place. Mot.S. at 2. However, ESG Watts did not include an affidavit to that fact and ~~did~~ that fact is outside the record in this proceeding.

CONCLUSION

The Board agrees that the financial assurance Pollution Liability Policies tendered by ESG Watts were approved by operation of law. However, the Board cannot and will not direct the Agency to release the corpus of the trust fund tendered by ESG Watts in February 1985. The trust fund represents the only financial assurance for the Taylor Ridge/Andalusia landfill and the Viola landfill and pursuant to Section 21.1 of the Act, the owner or operator of a landfill must maintain financial assurance. Thus, if the Board were to direct the release of the funds, the Board would be ordering a step which could place ESG Watts in violation of the law.

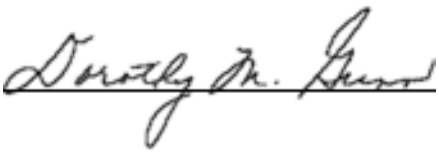
ORDER

The Board affirms the Agency's refusal to release any existing financial assurance tendered by ESG Watts for the facilities owned by ESG Watts.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 4, 2002, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board