OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 9, 2003

Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601-3286

Re: *People v. ESG Watts, Inc., an Iowa corporation*
PCB No. 01-167

Dear Clerk Gunn:

Enclosed for filing please find the original and ten copies of a NOTICE OF FILING and POST-HEARING BRIEF in regard to the above captioned matter. Please file the originals and return a file-stamped copy to our office in the enclosed self-addressed stamped envelope.

Thank you for your cooperation and consideration.

Sincerely,

Thomas Davis
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706

TD/pp
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant,	)	
v.	)	**PCB 01-167**
ESG WATTS, INC., an Iowa corporation,	)	
Respondent.	)	

NOTICE OF FILING

To: Larry Woodward
Corporate Counsel
Watts Trucking Service, Inc.
P.O. Box 5410
Rock Island, Illinois 61204-5410

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, a POST-HEARING BRIEF, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY:_____
THOMAS DAVIS, Chief
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: July 9, 2003

CERTIFICATE OF SERVICE

I hereby certify that I did on July 9, 2003, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and POST HEARING BRIEF

To: Larry Woodward
Corporate Counsel
Watts Trucking Service, Inc.
P.O. Box 5410
Rock Island, Illinois 61204-5410

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s)

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid

To: Carol Sudman
Hearing Officer
Illinois Pollution Control Board
600 South Second Street, Suite 402
Springfield, Illinois 62704

Thomas Davis
Assistant Attorney General

This filing is submitted on recycled paper.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
vs.	)	**No. 01-167**
	)	**(Enforcement)**
ESG WATTS, INC., an Iowa corporation,	)	
	)	
Respondent.	)	

POST-HEARING BRIEF

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by Lisa Madigan, Attorney General of the State of Illinois, hereby files its Brief subsequent to the hearing conducted on June 3, 2003, and provides the following argument:

INTRODUCTION

In its February 5, 1998, order, in the previous enforcement action (PCB 96-107), the Board had revoked the operating permit issued to Watts and ordered that Watts must not accept any more waste at the Taylor Ridge Landfill. ESG Watts was ordered generally to cease and desist from violations of the Act and the Board's regulations. The Board specifically directed that "ESG Watts must, in accordance with the supplemental permits issued by the Agency, perform the compliance requirements including the initiation and timely completion of closure and post-closure care, groundwater assessment monitoring, and gas and leachate extraction." A civil penalty of $100,000 was also imposed and attorney's fees of $26,567 were awarded.

When Respondent continued to operate the landfill, the Attorney General's Office filed a civil action in Rock Island County Circuit Court (98 CH 20) to enforce the Board Order. An Injunction Order was entered on March 20, 1998, requiring the landfill to cease waste disposal

pending appeal. ESG Watts received its final volume of waste at this facility on or about March 20, 1998. The court action was later amended to include allegations of Respondent's failure to comply with the Board's February 5, 1998, order regarding the implementation of closure and corrective actions. On December 29, 1999, a Judgment and Injunction Order (People's Exhibit 1) was entered adjudicating the violations alleged in the Amended Complaint, including continuing odor and runoff violations, and again requiring the closure and remedial measures to be timely implemented.

An appeal of the Board's February 5, 1998, order was taken to the Third District Appellate Court, which subsequently dismissed the appeal. The Illinois Supreme Court denied a petition for leave to appeal. After the termination of the appeal, Respondent failed to pay the penalties imposed in PCB 96-107 as well as PCB 96-233 and 96-237 (and accrued interest). The Attorney General's Office filed a civil action in Sangamon County Circuit Court (00 CH 239) to collect the monetary sanctions. After finding that Respondent failed to comply with final orders of the Board, in October 2000, the Court ordered the company to pay $30,000 per month to satisfy the penalties and accrued interest.

This present proceeding was initiated by a Complaint filed on June 12, 2001. Counts I, II and III respectively alleged continuing failures to effectuate closure and to control odors and runoff. The Amended Complaint filed with the Board on August 14, 2002, added Count IV to allege overfilling beyond the maximum permitted vertical elevation and Count V to allege that Respondent has failed to submit quarterly groundwater monitoring reports for the 3rd and 4th quarters of 2001 and the 1st and 2nd quarters of 2002.

In addition to these alleged violations, Watts still has not obtained a significant modification to its permits. As discussed below, this fact is relevant because Watts contends that it cannot complete closure absent approval of its "sig mod" and, therefore, in essence, the

Illinois EPA is to blame because Watts has spent hundreds of thousands of dollars in an unsuccessful effort to obtain a sig mod. At least, this seemed to be the purpose of Respondent's evidentiary presentation.

In an effort to provide background, Complainant suggests that the Board ought to take official notice pursuant to Section 101.630 of the prior proceedings and the final orders in PCB 94-127 as well as PCB 96-107. In particular, the Board has previously found that "ESG Watts' sig mod application for the Taylor Ridge landfill was due, pursuant to 35 Ill. Adm. Code 814.104, 814.105(b) and Agency deadline, on September 1, 1993." PCB 96-107 (February 5, 1998) at page 13. This factual finding reiterated the Board's previous finding of violation in PCB 94-127 (May 4, 1995) for Respondent's failure to timely file a sig mod application.

As argued below, however, Respondent's showing of "money down a hole" does not equate to due diligence. A series of technically deficient permit applications, and consequent permit denial appeals, does not equate to a defense for noncompliance. This purported defense may be summarized as follows: closure has not been completed because the overfill has not been relocated; that the overfill has not been relocated because the closure plan has not been revised; that the closure plan has not been revised because the pending sig mod application has not been approved; and runoff problems have not been corrected because the stormwater control plan has not been implemented because final cover has not been installed because the overfill has not been relocated because the closure plan has not been revised because the pending sig mod application has not been approved. ESG Watts has always tried to defend against the numerous enforcement actions by attempting to show that compliance was somehow thwarted by the Illinois EPA's permitting actions. This argument, whether the focus is the agency's refusal to release financial assurance trust funds or to issue permit approvals, has been repeated *ad nauseum*.

PROOF OF VIOLATIONS

Respondent's Answer:

ESG Watts filed an Answer to the Amended Complaint on March 14, 2003, indicating the following material admissions, denials and contentions:

Count I: Closure Violations

3. Respondent ADMITS that it had ceased accepting waste on March 20, 1998.

9. Respondent ADMITS that it had failed to comply with final orders of the Board regarding payment of penalties, and was ordered on October 23, 2000, by the Court to pay $30,000 per month to satisfy the penalties and accrued interest.

10. Respondent ADMITS only that it has failed to complete groundwater assessment monitoring but further alleges that said actions have been made futile by the Illinois EPA requirement that it move waste in order to close the landfill.

12. Respondent CONTENDS that it began the implementation of the closure plan on December 18, 2000, with the performance of assessment monitoring of the groundwater.

14. ESG Watts DENIES that it has failed to timely initiate and complete the closure of the Taylor Ridge Landfill in accordance with the Board's order in PCB 96-107 and the permits issued to Watts by the Illinois EPA, and has thereby violated Section 21(d) of the Act Respondent ADMITS that it has failed to complete groundwater assessment monitoring but further alleges that said actions have been made futile by the Illinois EPA requirement that it move waste in order to close the landfill.

15. Respondent DENIES that it has knowingly or willfully committed these presently alleged closure violations since at least December 29, 1999.

16. Respondent ADMITS it has been previously adjudicated in violation of Section 21(d) of the Act.

Count II: Odor violations

15. Respondent DENIES that it had been required by the 1996 permit to effectuate the installation of a gas collection system and CONTENDS that this permit merely allowed the installation and operation of the system.

16. ESG Watts ADMITS that gas recovery wells for the primary purpose of energy production had been installed by December 12, 1996, and that a flare was connected to 30 of the wells on or before April 3, 2000.

20. Respondent DENIES that it has caused or allowed the emissions of landfill gas and other contaminants in sufficient quantities and of such characteristics and duration as to unreasonably interfere with the enjoyment of life or property by neighbors to the landfill.

21. Respondent DENIES that it has violated its permits by failing to implement the gas management system and thereby violated Section 21(d) of the Act.

22. Respondent DENIES that it has caused air pollution in violation of Section 9(a) of the Act.

23. Respondent ADMITS it has been previously adjudicated in violation of Sections 9(a) and 21(d) of the Act.

Count III: Runoff violations

17. Respondent DENIES that it has caused or allowed the discharge of stormwater runoff and other contaminants.

18. Respondent DENIES that it has failed to implement the stormwater control plan required by its permits.

19. Respondent DENIES that runoff from the landfill has created a nuisance so as to unreasonably interfere with the enjoyment of life or property by neighbors to the landfill.

20. Respondent DENIES that it has violated its permits by failing to implement the stormwater control plan and thereby violated Section 21(d) of the Act.

22. Respondent DENIES that it has caused water pollution in violation of Section 12(a) of the Act.

23. Respondent ADMITS it has been previously adjudicated in violation of Sections 12(a) and 21(d) of the Act.

Count IV: Overfill Violations

14. Watts ADMITS that prior to January 1, 1995, it had deposited approximately 34,100 cubic yards of waste in areas of the landfill exceeding the maximum permitted elevation of 758 feet mean sea level, and that this waste remains in the overfilled areas of the landfill.

15. Watts ADMITS that, by exceeding the permit limitations regarding the contours of waste disposal, it has violated Section 21(d)(1) of the Act. However, Respondent CONTENDS that this violation is barred by *res judicata* because the overfill was purportedly known to the Illinois EPA as of January 1, 1995.

16. Respondent ADMITS that it has been previously adjudicated in violation of Section 21(d) of the Act, for exceeding its permitted maximum vertical elevations at the Sangamon Valley Landfill and the Viola Landfill.

Count V: Reporting Violations

14. Respondent ADMITS that it has failed to submit quarterly groundwater monitoring reports for the 3rd and 4th quarters of 2001 and the 1st and 2nd quarters of 2002 as required by its permits.

15. Respondent ADMITS that, by failing to submit quarterly groundwater monitoring reports, it has violated Sections 21(d)(1) and 21(o)(11) of the Act.

16. Respondent ADMITS that it has been previously adjudicated in violation of Sections 21(d)(1) and 21(o)(11) of the Act, for failing to submit monitoring reports.

Complainant's Exhibits:

Complainant admitted the following exhibits:

1. December 29, 1999, Judgment and Injunction Order in *People of the State of Illinois v. ESG Watts, Inc.*, Rock Island County Circuit Court No. 98 CH 20, attached to the Complaint filed on June 12, 2001.

2. Supplemental Permit No. 1996-087-SP, issued June 13, 1996 ("the 1996 permit").

3. Supplemental Permit No. 1996[sic]-136-SP, issued July 2, 1999 ("the 1999 permit").

4. One-page summary of closure cost estimates from permit application log no. 2001-459.

5. Testimony of Joyce Munie, Manager of the Permits Section, Bureau of Land, Illinois EPA.

6. Testimony of Kevin Bryant, Manager of Accounting and Cash Management, Illinois EPA.

7. Monthly status report by ESG Watts for April 2003 and cover letter dated May 5, 2003.

8. Monthly status report by ESG Watts for February 2003 and cover letter dated March 3, 2003.

9. July 30, 2001, letter from Attorney General's Office to counsel for Respondent.

10. November 20, 2001, letter from Attorney General's Office to counsel for Respondent.

11. December 27, 2001, letter from Attorney General's Office to counsel for Respondent.

12. January 31, 2000, Judgment and Injunction Order in *People of the State of Illinois v. ESG Watts, Inc.*, Mercer County Circuit Court No. 99 CH 10.

13. May 3, 2000, letter from Respondent with April 13, 2000, certification from consultant regarding the Viola Landfill.

14. Report with photographs of inspection by Ronald Mehalic on April 4, 2002.

15 Report with photographs of inspection by Ronald Mehalic on July 25, 2002.

16. Report with photographs of inspection by Ronald Mehalic on October 16, 2002.

17. Report with photographs of inspection by Ronald Mehalic on January 8, 2003.

18. Transcript of the October 29, 1996, testimony of Joe Whitley in *People of the State of Illinois v. ESG Watts, Inc.*, PCB 96-107.

Respondent's Exhibits:

Watts has tendered an entire box of documents, mostly consisting of all the previous sig mod permit application. The evidentiary objective of this "kitchen sink" approach is difficult to discern until Respondent's Brief may be reviewed. The People, therefore, continues to reserve the right to object on the grounds of weight, materiality and relevance. For instance, some of the exhibits relate to totally extraneous issues such as whether Rock Island County might have authorized the overfill to remain in place (Respondent's Exhibit 15). Other exhibits, such as the RTC bankruptcy case file docket sheet (Respondent's Exhibit 29), are simply meaningless.

AFFIRMATIVE DEFENSE

The Respondent has pleaded allegations of fact that, as a legal matter, do not rise to an affirmative defense so as to defeat the claims in Counts I and II. None of these allegations

constitutes an affirmative defense pursuant to Section 2-613(d) of the Civil Practice Act, 735 ILCS 5/2-613(d) (2002). As to Count IV, however, Respondent admits the overfill violation and asserts that a finding of liability is barred by the equitable doctrine of *res judicata*, since it contends that the State attempted to address this claim in PCB 96-107 and could have subsequently prosecuted such violation 98 CH 20.

The equitable doctrine of *res judicata* is that a cause of action may not be relitigated by the same parties or those in privity with them in a subsequent proceeding before the same or any other tribunal, except as the judgment may be brought before a court of appellate jurisdiction for review in the manner provided by law.

> The doctrine of *res judicata,* briefly stated, is that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. [Citation.] The doctrine of *res judicata,* in all cases where the second suit is upon the same cause of action and between the same parties or their privies as the former action, extends not only to the questions actually litigated and decided, but to all grounds of recovery or defense which might have been presented. [Citations.] When a former adjudication is relied upon as an absolute bar to a subsequent action, the only questions to be determined are whether the cause of action is the same in both proceedings, whether the two actions are between the same parties or their privies, whether the former adjudication was a final judgment or decree upon the merits, and whether it was within the jurisdiction of the court rendering it.

People v. Kidd, 398 Ill. 405, 408-09 (1947). More recently, in *People v. Progressive Land Developers, Inc.*, 151 Ill. 2d 294, 176 Ill. Dec. 874 (1992), the Illinois Supreme Court summarized the three criteria as "(1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies." *See* also *Low v. A & B Freight Line, Inc.*,175 Ill. 2d 176, 180, 222 Ill. Dec. 80 (1997).

First of all, the overfill violation, which Respondent has admitted, is not "the same claim, demand or cause of action" adjudicated previously nor is it one of the "grounds of recovery or defense which might have been presented" in the previous prosecutions. The "identity of cause

of action" is not satisfied merely because, once again, the State is enforcing environmental violations at the Taylor Ridge Landfill. This criterion is not satisfied because the overfill violation was not one of the grounds underlying the violations adjudicated in PCB 96-107 or 98 CH 20. As the Supreme Court stated in *Loew*: "The doctrine extends not only to what actually was decided in the original action but also to matters which could have been decided in that suit. *La Salle National Bank v. County Board of School Trustees*, (1975) 61 Ill. 2d 524, 529, 337 N.E. 2d 19." These matters must directly relate to the actual causes of action previously adjudicated.

While the courts possess inherent powers in equity to, for instance, allow an affirmative defense to defeat a claim, issue injunctions, and impose contempt sanctions, the Board is a creature of statute. An administrative agency is different from a court because an agency only has the authorization given to it by the legislature through the statutes. *See, e.g., Business & Professional People for Public Interest V. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 243, 144 Ill. Dec. 334, 555 N.E.2d 693 (1989). An administrative agency has no inherent judicial powers. *See, e.g., Ford v. Environmental Protection Agency*, 9 Ill. App. 3d 711, 292 N.E.2d 540 (1973).

Sections 31.1(g), 33(d), and 42(d) of the Act acknowledge that the Board lacks the power to enforce its orders by explicitly providing for enforcement through the filing of a civil action in the circuit courts to obtain injunctions and to collect penalties. In contrast, a court enjoys the inherent power to impose contempt sanctions to coerce compliance with its judgment orders. In addition to the absence of expressly granted authority to enforce its own orders, the administrative powers of the Board are strictly delineated by specific statutory provisions. For instance, Section 35 of the Act delegates authority to the Board to grant a variance when compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship. This provision authorizes the Board to exercise limited discretionary authority through "balancing the hardships" in determining whether a

variance may be granted. The enforcement-related authorizations in Title VIII are also narrowly confined. Section 31(e) of the Act provides that, once the State or other complainant has proven a violation, "the burden shall be on the respondent to show that compliance . . . would impose an arbitrary or unreasonable hardship." This type of "balancing the hardships" after a violation is proven is intrinsically different than defeating a claim through the allowance of an affirmative defense. The Board is mandated by Section 33 to consider specified factors in subsection (c). More importantly, subsection (a) explicitly restricts the Board's discretion in providing that subsequent compliance is neither a defense nor a bar to penalty imposition. The scope of such discretion as to penalty imposition is set forth through the Section 42(h) criteria. In summary, the Board is simply unable to function as a court does.

By pleading that "said violation was known to the IEPA on or before January 1, 1995," the Respondent assumed an evidentiary burden that it has failed to satisfy. In rebuttal to the factual allegation that the overfill violation was known to the Illinois EPA, Complainant alleges that Respondent informed the Illinois EPA of the documented existence and extent of the wastes deposited beyond the permitted vertical limits on a date subsequent to the entry of the Judgment and Injunction Order in 98 CH 20 on December 29, 1999. At hearing, Tom Jones testified about the overfill issue. Tr. at 159-60, 177-80, 187-96. The possibility that ESG Watts had exceeded its maximum permitted vertical elevation came to light during the hearings in the prior case (PCB 96-107). Steve Brao had performed soil borings at the landfill just two weeks before the October 1996 hearings,[1] utilizing a previous aerial survey that Jones testifieded was "not an accurate representation of the landfill at the time he did his cover thickness investigation." Tr. at 189. These documents were produced to Complainant during discovery depositions in mid-October 1996; Respondent admitted the documents at hearing on October

[1] *See* PCB 96-107 Tr. at 589. Brao also testified that "there was no top-of-waste survey to rely on." Tr. at 591.

30, 1996. When the hearing resumed on December 12, 1996, the Complainant attempted to elicit testimony on the possibility of an overfill violation, utilizing the survey documents, but the Respondent objected and an offer of proof was rejected. In its February 5, 1998, Order in PCB 96-107, the Board denied Complainant's motion to conform pleadings to proof regarding the overfill allegation:

> This claim is based upon the testimony of an ESG Watts' witness at the very final stages of the hearing. Throughout the entire discovery process, complainant never once raised an issue concerning the vertical elevation in excess of permit limits. The Board agrees with ESG Watts that this allegation results in unfair surprise and disallows ESG Watts from providing an informed evidentiary response. Further, given the character of the testimony regarding the overage, adequate evidence of this potential violation is lacking.

The Board's criticism of the Complainant was not only gratuitous but also unfair for at least two obvious reasons. First, the documents which suggested the possibility that ESG Watts had exceeded its maximum permitted vertical elevation at Taylor Ridge were not produced to the State until the depositions only a week before the first hearing.[2] It would be unlikely that Complainant could raise an issue of which it was (throughout the entire discovery process) unaware. Secondly, the documents which suggested the possibility that ESG Watts had exceeded its maximum permitted vertical elevation at Taylor Ridge were generated by Respondent. It would be unlikely that Respondent would be unfairly surprised by information that it generated and possessed. In reality, it was due to the discovery abuses of the Respondent that "adequate evidence of this potential violation [was] lacking," at the time of the prior adjudication.

At hearing in the present proceeding, Tom Jones testified that "everybody knew that we were over height," but did not acknowledge the uncertainty or adequacy as to the "evidence" of

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[2] *See* PCB 96-107 Hearing Officer Order of October 17, 1996.

the situation. Tr. at 190. He suggested that Respondent's Exhibit 14, a submittal to the Illinois EPA dated October 21, 1999,"specifically addressed" the overfill violation. *Id.* The consultants for the Respondent submitted the materials within this exhibit during the pendency of 98 CH 20 in an unsuccessful effort to convince the State that the closure of the Taylor Ridge Landfill could only occur if ESG Watts were allowed to accept additional waste during closure to facilitate proper final contours. Respondent's Exhibit 14 includes an August 10, 1999, letter from Envirogen to Jones indicating that the landfill still had at least 300,000 airspace cubic yards of net capacity remaining and espousing a position that "as long as the landfill does not 1) violate a limit set during the siting process (i.e. capacity, area, height, etc.) or 2) have a net increase in capacity, then local siting approval may not be required for revising the landfill final grades." If "everybody knew that we were over height," then ESG Watts and its legal and technical representatives were still careful not to provide reliable proof of such violation during the pendency of 98 CH 20 and the ill-pleaded appeal of PCB 96-107. At best, the sporadic discussions concerning closure of the facility and compliance with leachate, stormwater and gas emissions control requirements were merely a delay tactic. In his testimony, Jones conceded that the overfill was not quantified until the next sig mod application, which was submitted January 29, 2001. *See* Respondent's Exhibit 15. Once the State had received and reviewed adequate factual information showing that ESG Watts had exceeded its maximum permitted vertical elevation at Taylor Ridge, such allegation of violation was timely pleaded in the present proceeding.

Even if Respondent could establish the requisite factual grounds regarding an earlier time at which the Illinois EPA had direct knowledge of the overfilled wastes, the Board cannot exercise the equitable powers that it does not possess in order to defeat the claim in Count IV

through a finding of *res judicata*. However, based upon the record, the Board may simply rule that the Respondent has not proven the facts to support such a defense.

The People are certainly mindful that the Board has made *res judicata* findings in past cases, including the February 5, 1998, order in PCB 96-107 (pages 5-6). That ruling was erroneous, but a re-examination of the issues may be instructive for the Board's consideration of the Count IV defense in the present proceeding. The circuit court had on September 11, 1992, entered a preliminary injunction against ESG Watts for leachate and water pollution violations. In PCB 96-107, Complainant had alleged NPDES permit, effluent and water quality violations dating back to 1986. The Board accepted Respondent's argument "that under the doctrine of *res judicata*, any pre-1992 water violations should be barred because such violations were previously prosecuted" in the court case and found that the pre-1992 violations were "substantially the same violations as in the previous circuit court case." Disregarding for the moment the critical issue of whether the Board has legislatively delegated authority to exercise equitable powers, the first criterion is clearly not demonstrated: the 1992 preliminary injunction order was not "a final judgment on the merits;" in fact, the Fourth District Appellate Court has already explicitly ruled on this very issue.[3]

The lack of a final judgment on the merits was the primary argument by the People in opposition to the *res judicata* claim in PCB 96-107, but such was ignored by the Board. Instead, the Board substituted an accurate representation of fact ("Complainant asserts that the effluent and water quality violations from the July 1986 inspection and the NPDES permit violations that have occurred since the permit issuance in October 1986, were not previously included" in the court case) for the People's actual argument that the injunction was not a final

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[3] *See ESG Watts, Inc. v. Pollution Control Board*, 282 Ill. App. 3d 43, 53-4 (4th Dist. 1996), which held that the preliminary injunction order "was not a binding determination on the merits" but was properly considered in aggravation as a "previously adjudicated violation" for purposes of Section 42(h)(5).

judgment. However, it is instructive here to simply focus on the second criterion, the identity of the cause of action. The Board's finding that the violations were "substantially the same" as those underlying the preliminary injunction would be a valid finding. Although the effluent and water quality violations from the July 1986 inspection and the NPDES permit violations that have occurred since the permit issuance in October 1986 as alleged in PCB 96-107 were not included in the 1992 circuit court case, such allegations could have been prosecuted therein so as to more comprehensively support the *showing*[4] of water pollution that resulted in the issuance of the preliminary injunction. The pre-1992 discharges of leachate and stormwater runoff violated the Board's effluent and water quality standards and the facility's NPDES permit and thereby violated Section 12(a) of the Act. The pleadings and evidentiary presentation to Judge Richard Cadagin, however, simply provided a *showing* that recent and ongoing leachate and stormwater runoff caused or threatened water pollution. In other words, the effluent, water quality and permit violations would have constituted "grounds of recovery . . . which might have been presented" in the prior court case and were as the Board found "substantially the same" as the showing of water pollution. However, the preliminary injunction was not a final judgment and the Board was not authorized to exercise equitable powers in PCB 96-107.

In summary, while the Judgment Order in 98 CH 20 is a final judgment, the overfill violation pleaded in PCB 01-167 is not "substantially the same" as those other violations (e.g. failure to implement stormwater, leachate and gas management) before the court and the Board is still not authorized to exercise equitable powers. The landfill's operating permit had been revoked as of March 5, 1998; there was no allegation in 98 CH 20 that ESG Watts had operated in violation of its permit. The crux of that court action was that ESG Watts had failed to comply with the Board's February 5, 1998, order in PCB 96-107. Therefore, there is no final

[4]Of course, only a "showing" of violation is necessary. *See, e.g., People v. Mika Timber Co.*, 221 Ill. App.3d 192, 581 N.E.2d 895 (5th Dist. 1991).

judgment on the merits and no identity as to cause of action, and thus the *res judicata* claim must fail.

PROOF OF VIOLATIONS

Two witnesses testified at hearing on behalf of the Complainant. Gary Styzens, Chief Internal Auditor for the Illinois EPA, presented expert testimony as to the economic benefit resulting from the continuing delays in the completion of closure of the Taylor Ridge Landfill. Joe Whitley testified as to the continuing off site impacts caused by the gas emissions and stormwater runoff from the landfill. People's Exhibit 18 is the transcript of Mr. Whitley's prior testimony on October 29, 1996, in PCB 96-107. This prior testimony is relevant because the problems have continued unabated and it is necessary for the Board to have a context within which to consider Mr. Whitley's present testimony. Mr. Whitley testified that the runoff and odor problems he had described during his previous testimony had only "gotten worse" over the past six and a half years. Tr. at 73. Mr. Whitley provided several photographs depicting the runoff problems (Exhs. 21-26) and testified at length about the retention pond and other conditions on his property and the landfill. Tr. at 77-88. His testimony clearly supports another finding of nuisance and repeated violations. For instance, he testified that "many, many times I have to go in the house and shut the windows. I cannot stand the odors." Tr. at 89. When asked how the gas emissions had affected his life or interfered with his activities and enjoyment of his property, Mr. Whitley said that as far as sitting on his deck "sometimes it's completely impossible." Tr. at 91. During the past two or three years, it has been completely impossible for him to sit by the pond, which is closer to the landfill than the house. Tr. at 92. He is often prevented from working in his flower garden. Tr. at 93. With the passing of his wife in September 2002, Mr. Whitley has spent less time at home than before, but the interference with his enjoyment of the simple pleasures of country living has obviously increased.

The Complainant also presented the written testimony of Joyce Munie, the Manager of the Permits Section, and Kevin Bryant, the Manager of Accounting and Cash Management. People's Exhibits 5 and 6.

Both the 1996 permit (Exh. 2) and the 1999 permit (Exh. 3) explicitly required Respondent to "initiate implementation of the closure plan within 30 days after the site receives its final volume of waste." In addition to this specific permit condition, Section 807.506 of the Board's regulations generally requires landfills to "initiate implementation of the closure plan within 30 days after the site receives its final volume of waste." The written testimony of Joyce Munie (Exh. 5) indicates that the Respondent clearly failed to comply with these generally applicable regulations and specifically applicable permit conditions. In her professional opinion or conclusion, the facility must be properly closed, monitored, and the appropriate corrective actions identified and implemented, as soon as possible, so that potential environmental threats may be mitigated; not only are the potential threats to the environment likely to increase the longer closure is delayed, but the technical difficulties and costs will also likely increase. Ms. Munie is a professional engineer, licensed in the State of Illinois, and well qualified to speak on behalf of the Illinois EPA.

In contrast, the testimony of Jones is presented to purportedly demonstrate that closure has been "initiated" and to explain why it has not been completed. This testimony was apparently intended to support the contention in Respondent's Answer (¶ 12, Count I) that ESG Watts began the implementation of the closure plan on December 18, 2000, with the performance of assessment monitoring of the groundwater; however, there was no specific testimony as to that or any other date. Tr. At 165. Asked what activities were part of closure, Jones listed leachate collection, landfill gas management, and groundwater monitoring. Tr. at 172. While these actions are certainly necessary during and subsequent to closure, each was

a permit obligation prior to March 20, 1998, when the landfill was forced to cease accepting waste for disposal. For instance, in the weeks leading up to the hearings in PCB 96-107, which alleged odor violations resulting from uncontrolled landfill gas emissions, 88 wells were installed pursuant to the 1996 permit for gas and leachate collection. In this prior case, the Board noted that a sig mod permit had been denied by the Illinois EPA in February 1995 because it lacked a groundwater assessment monitoring program, that Respondent had agreed in October 1995 to perform groundwater assessment and monitoring, and that, when the Illinois EPA issued a permit in January 1996 requiring the landfill to perform groundwater assessment and monitoring, ESG Watts appealed; the Board specifically found that "ESG Watts had not complied with the requirements in its groundwater monitoring permit." February 5, 1998, order at page 25.[5] Therefore, the testimony of Jones that closure was initiated is substantially impeached by these prior factual findings. This factual context also diminishes the weight of his explanation: "I feel the issuance of a permit is required to properly close the landfill, to move the waste, to improve design which will include a stormwater management plan, gas collection system, leachate collection system will all be tied together in a final closure document which we have not been able to obtain." Tr. at 172-73. The intent, design and effect of this approach have combined to achieve years of delay.

ESG Watts has benefitted economically from this delay because the expenditures have been deferred or avoided. Obviously, no revenue is being generated because no waste disposal is being conducted. Additionally, it has cost money for attorney's fees and consulting expenses to achieve this delay. Funding for these efforts has been found while not only compliance and corrective actions have been indefinitely postponed but also court ordered payments have been ignored. Mr. Bryant's testimony indicates that no payment has been

[5]The appeal (PCB 97-210) was subsequently dismissed upon joint motion.

made by Watts since August 2001. More than $40,000 in interest has accrued on the unpaid $100,000 penalty previously imposed for violations at the Taylor Ridge Landfill. The $30,000 monthly payments required under a court order in a collection action have not been made and these funds have obviously not been allocated to compliance measures. The company has failed to initiate and complete closure of the landfill in a timely fashion and has deferred the expenditure of $1,183,545 in closure costs that are proposed in the pending sig mod application. According to the calculations of Gary Styzens, the economic benefits of noncompliance with the closure requirements (which include the relocation of the overfill) are at least $284,383. *See* People's Exhibit 20 and Tr. at 25-70.

The Complainant asserts that these calculations were quite conservative and fairly simplistic. First, he utilized the current cost estimates proposed by the Respondent in the pending sig mod application. People's Exhibit 4. As counsel for Respondent established during cross-examination, these costs have not yet been approved. Tr. at 46-7. Mr. Styzens indicated that the $1,183,545 figure was still a reasonable estimate of closure costs. Tr. at 47. Secondly, he deflated these 2003 dollars and provided the "biggest tax break up front" instead of depreciation allowances over time. Tr. at 50. Thirdly, the prime lending rates were utilized to estimate the economic benefit accrued for each year or portion thereof, even though it is unlikely that a lender would provide these rates for a high risk company with a poor credit history. Lastly, the economic benefit calculations did not take into account the lack of expenditures for proper operation of the gas collection system and timely submission of the groundwater monitoring reports.

Therefore, the Board's determination of economic benefit in the present proceeding is qualitatively different than the *Panhandle Eastern Pipe Line* case (PCB 99-191). In that previous matter, the Board was confronted with dueling experts and conflicting testimony

concerning weighted average costs of capital based upon company specific financial information. In its November 15, 2001, Order (at page 33), the Board found that "half a million dollars represents a good approximation of Panhandle's economic benefit from delayed compliance," even though the Complainant's assessment of economic benefit was $628,759 and the Respondent's estimate was substantially lower. Here, Watts has presented no evidence of a lower amount nor disputed that there was an economic benefit. The Board, therefore, has no basis in the record to "split the baby" in the recapture of the economic benefits of deferred or avoided compliance expenditures.

Respondent will likely attempt to blame the State for the delay and to reduce the economic benefit assessment by the Board. In rebuttal to these assertions, Complainant has provided exhibits documenting the State's enforcement objectives as communicated to Respondent. People's Exhibits 9, 10 and 11. These are not settlement negotiation communications but rather demands for action. For instance, counsel for Respondent was advised (Exh. 9) that "there exist no legal or technical impediments to the relocation of the overfilled wastes within the previously permitted final contours of the landfill" and that "the Attorney General's Office's compliance demand as to Count I is for ESG Watts to properly relocate the overfilled wastes, beginning September 1, 2001, and to be completed by November 1, 2001." Following concerns expressed at a subsequent meeting, a proposed court order was drafted "to facilitate the resolution of the vertical overfill problem." People's Exhibit 10. More than a month later, no reply was made to the suggested judicially sanctioned mechanism. People's Exhibit 11. The clock had run out for another year.

It is important for the Board to view the present proceeding in the proper context, to wit: the most recent in a series of enforcement actions. In PCB 94-127 and PCB 96-107, the lack of a sig mod supposedly prevented the landfill from complying with other already permitted

requirements. ESG Watts in those proceedings and the present one seemingly contends that, if the State really wanted compliance, the Illinois EPA must approve whatever permit application may be pending, and that the Illinois EPA would do so if the permit applicant were anyone other than ESG Watts. The factual context of each of these enforcement actions has essentially been that Respondent argues that it cannot do what is necessary until some other contingent event occurs, such contingency being beyond Respondent's control. For instance, as it contends in its Answer to the Amended Complaint, "said actions have been made futile by the Illinois EPA requirement that it move waste in order to close the landfill."

Another example is the stormwater management plan; its implementation has been delayed for various reasons and was a primary focus of the hearings in PCB 96-107. Currently, as Jones testified, "Andrews Engineering is trying to make a case to delineate certain areas in the landfill from having to have additional final cover." Tr. at 173. Jones was then asked whether this unresolved issue affected the installation of stormwater retention structures and final contours: "As long as that issue is outstanding, yeah, it affects your ability to have an acceptable final cover with, you know, final – final contours, final cover, well placement, leachate extraction placement." Tr. at 174.

Another aspect of this context is that ESG Watts has utilized so many different persons and firms for legal and technical representation over the years. The only continuity has been provided by the prosecutors and regulators; the concerns of local residents and officials are another constant. *See, e.g.*, Tr. at 116-21. The lawyers and consultants come and go, usually after they have failed to receive compensation, and it is obviously time consumptive for each new lawyer or consultant to come up to speed.[6] The laboratories providing analytical services

[6]The burden on the prosecutors and regulators is also increased by the revolving door resulting from Respondent's cash flow problems. Good faith efforts are made again and again to inform the newly retained attorneys and engineers of the history of the landfill, of the "where we are and how we got here" aspects. *See, e.g.*, People's Exhibit 9.

refuse to provide documentation when ESG Watts fails to pay them. *See, e.g.,* Tr. at 165. The only tangible result of this revolving door is the continuation of pollutional discharges and emissions without effective monitoring and control.

CONCLUSION

The evidence has clearly shown that closure has not been completed because the overfill has not been relocated; that the overfill has not been relocated because the closure plan has not been revised; that the closure plan has not been revised because the pending sig mod application has not been approved. Similarly, the runoff problems and the adverse off site impacts to Mr. Whitley's property have not been corrected because the stormwater control plan has not been implemented because final cover has not been installed because the overfill has not been relocated. The odor problems and the nuisance caused to Mr. Whitley are just as bad as in 1996 because Watts has failed to properly operate the gas collection system, which had been installed by December 12, 1996; the single flare, which was connected to only 30 of the 88 wells on or before April 3, 2000, has not been operational since January 27, 2003. As to the reporting violations, these are admitted as alleged; in addition, Ms. Munie indicates that no reports were submitted for the subsequent three quarters.

Evidence in aggravation has been presented to demonstrate previously adjudicated violations, lack of due diligence, and economic benefit. The gravity and duration of the violations are well supported by the proof. The remaining Section 42(h) factor pertains to "the amount of monetary penalty which will serve to deter further violations by the violator. . . ." On this issue, two statements may be made without fear of contradiction: First, the previously imposed Board penalties in PCB 96-107 as well as PCB 96-233 and 96-237 have not been paid; and secondly, it is obvious that those penalties ($100,000; $658,787; and $256,000, respectively) were inadequate to deter these subsequent violations. Therefore, it stands to

reason that the amount of monetary penalty which will serve to deter further violations by the violator must be increased to achieve this statutory objective and thus the Board must impose a significantly higher civil penalty upon ESG Watts. The Complainant recommends a penalty of $1,000,000 plus attorney's fees and expert witness costs. This recommended amount is ten times the previous penalty for the Taylor Ridge Landfill in PCB 96-107, but slightly less than the total of the three 1996 enforcement cases. The request for an award of reasonable fees and costs may be supported by a finding that these present and continuing violations are knowing, wilful or repeated pursuant to Section 42(f); if the Board makes such a finding, the People ask leave to quantify the reasonable fees and costs through affidavits. This is the practice allowed by the Board in the 1996 enforcement cases, although the People respectfully suggest that the Board ought to increase the rate for attorney's fees from $120 per hour to $150 per hour.

In PCB 96-233, regarding the Viola Landfill,[7] the Board had imposed a record penalty for a contested environmental enforcement action although specific economic benefit information was not presented. This penalty record was recently broken by the *Panhandle Eastern Pipe Line* decision (PCB 99-191) in which the Board relied upon expert testimony regarding economic benefit.

In closing, a million dollar penalty is appropriate for this violator, especially in light of the conservative economic benefit calculations. ESG Watts has an unprecedented history of violations prosecuted in numerous Board and court actions. The appellate courts have either upheld or dismissed all of the enforcement appeals. Moreover, ESG Watts has litigated numerous permit appeals before the Board, challenging many different actions by the Illinois EPA, and has prevailed only in a fraction of these matters. The Respondent is currently

[7]Subsequent court action was also required to achieve strict compliance with the Board's order. *See* People's Exhibits 12 and 13.

delinquent in its obligations under a pending court order regarding collection of the prior penalties and a rule to show cause is also pending. Whatever penalty the Board imposes, whether a million dollars or some other amount, it is reasonably anticipated that the Complainant will likely be forced to expend additional litigation efforts to collect it. In this case, Respondent has offered absolutely no evidence regarding its ability to pay a penalty while Complainant has provided substantial evidence as to the refusal of Respondent to comply with the compliance and payment obligations imposed by a series of Board and court orders.

Respectfully submitted,

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