

ILLINOIS POLLUTION CONTROL BOARD
February 19, 1998

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 96-237
) (Enforcement - Land)
ESG WATTS, INC., an Iowa corporation,)
)
Respondent.)
)

THOMAS DAVIS, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF PETITIONER;

LARRY A. WOODWARD APPEARED ON BEHALF OF RESPONENT.

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

On May 20, 1996, the People of the State of Illinois by the Attorney General (complainant) filed a one-count complaint against ESG Watts Inc. (ESG Watts). The complaint alleges that ESG Watts failed to provide timely biennial cost revisions and to properly fund financial assurance for the Sangamon Valley landfill in violation of the Illinois Environmental Protection Act (Act) and the Board's regulations. On February 5, 1997, complainant filed an amended complaint (Comp.) that extended the dates of alleged noncompliance through September 1996. The purpose of the financial assurance requirements, including the biennial cost revisions, is to provide funding for closure/post-closure care of a landfill. The specific sections of the Act and Board regulations that ESG Watts allegedly violated are Sections 21(d)(1), 21(d)(2), 21(o)(13), and 21.1(a) of the Act and Sections 807.603(b)(1) and 807.623(a) of the Board's rules. 415 ILCS 5/21(d)(1), 21(d)(2), 21(o)(13), and 21.1(a) and 35 Ill. Adm. Cod 807.603(b)(1) and 807.623(a).

Hearing (Tr.) was held in this matter on April 16, 1997, in Springfield, Sangamon County, Illinois, before Hearing Officer Deborah Feinen. At hearing no testimony was heard; instead, the testimony of James Watts, Mr. John Taylor and Mr. Arthur Evans from the March 13, 1997, hearing in PCB 96-233 was to "be considered as part of this record also." Tr. at 1. The Board hereby incorporates the hearing transcript and exhibits thereto from PCB 96-233 (PCB 96-233Tr.) into the record of PCB 96-237. Those transcripts and exhibits will be added to this record. No members of the public were present at the hearing in PCB 96-237.

Complainant's brief (Comp. Br.) was filed on April 16, 1997, and the reply brief (Reply) was filed on May 14, 1997. Respondents' brief (Resp. Br.) was filed on May 2, 1997. On March 26, 1997, a stipulation of evidence was submitted by complainant (Stip.) and

on April 2, 1997, an affidavit by Arthur Evans (Affd.), corporate controller for ESG Watts was submitted.

On January 27, 1998, complainant filed a motion to supplement the record. On February 2, 1998, ESG Watts filed a motion to supplement the record. The Board denies both these motions.

For the reasons enunciated in the opinion below, the Board finds that ESG Watts has failed to provide timely biennial cost revisions and to properly fund financial assurance for the Sangamon County Landfill. ESG Watts violated Sections 21(d)(1), 21(d)(2), 21(o)(13), and 21.1(a) of the Act and Sections 807.603(b)(1) and 807.623(a) of the Board's rules. 415 ILCS 5/21(d)(1), 21(d)(2), 21(o)(13), and 21.1(a) and 35 Ill. Adm. Code 807.603(b)(1) and 807.623(a). For these violations, the Board will impose a civil penalty of \$256,000. Further, the Board finds that the violations were willful and knowing and therefore the Board will award the Attorney General \$2,400 in attorney fees.

BACKGROUND

ESG Watts owns and operates the Sangamon Valley Landfill in Sangamon County, Illinois. Comp. at 1-2. The Board and the circuit courts have found that ESG Watts previously violated numerous provisions of the Act and the Board regulations. See generally, People v. ESG Watts, PCB 96-107, February 5, 1998 (PCB 96-107) and, People v. ESG Watts, PCB 96-233, February 5, 1998 (PCB 96-233). More specifically, the operations of the Sangamon Landfill in general and the financial assurance requirements in particular have been litigated before the Board and the Circuit Court. See, People v. ESG Watts, PCB 94-127, May 4, 1995 (PCB 94-127) aff. in ESG Watts v. PCB, 282 Ill. App. 3d 43, 668 N.E.2d 1015 (4th Dist. 1996), and People v. Watts Trucking and ESG Watts, Inc., 91-CH-242 (Cir. Ct. Sangamon Co.). The Sangamon Valley Landfill stopped accepting waste in February 1992. Resp. Br. at 4.

In May 1992, the Illinois Environmental Protection Agency (IEPA) issued a permit (1992-038-SP) that required ESG Watts to provide financial assurance for the Sangamon Valley landfill based on cost estimates supplied to IEPA in March 1992. Comp. at 5. No date for subsequent revision of the cost estimates was provided in that permit. Comp. at 6. Section 807.623(a) of the Board's rules requires that an operator must revise current cost estimates at least every two years (a biennial review). 35 Ill. Adm. Code 807.623. In PCB 94-127, the Board found that ESG Watts failed to file a biennial review by March 1994 and had violated the Act and Board regulations. PCB 94-127 at 15. A cost estimate was filed as a part of ESG Watts' application for significant modification in September 1994. Affd. at 6(d); Comp. at 6.

The financial assurance fund for the Sangamon Valley Landfill has been underfunded since December 1994. Stip at 4; Aff at 6(d). As of September 16, 1994, the closure/post-closure care cost estimate to be funded within 90 days was \$1,391,090. Affd. at Exhibit B. When the 90 days expired, the fund contained \$663,733.21 for closure/post-closure costs, representing a deficiency of \$727,356.79 on December 15, 1994. Affd. at Exhibit B. This

deficiency continued for 740 days. Affd. at Exhibit B. On September 26, 1996, a cost estimate was provided that indicated the fund should contain \$956,325 within 90 days. Affd. at 6(e); Stip. at 4. When the 90 days expired, the Sangamon Valley Landfill fund contained \$751,593.76 representing a deficiency of \$204,731.24 on December 24, 1996. Affd. at Exhibit B. This deficiency continued for 91 days up through March 25, 1997. Affd. at Exhibit B.

Mr. Arthur Evans, corporate comptroller for ESG Watts testified concerning the economic status of ESG Watts in PCB 96-233. Mr. Evans indicated that during the time period from September 1991 through July 1994 ESG Watts was able to borrow funds for operations at interest rates between 0% and 8.75%. PCB 96-233Tr. at 51-52; Aff at Exhibit B. The weighted average cost of borrowed money for ESG Watts from 1991 through 1994 was 6.70%. PCB 96-233Tr. at 53; Affd. at Exhibit B. The average income for funds deposited in the financial assurance trust funds between 1991 and 1996 has been 4.54%. Affd. at Exhibit B. Mr. Evans testified that since July 18, 1994, ESG Watts has attempted to borrow money and has been refused. PCB 96-233Tr. at 52.

In February 1995, the IEPA denied ESG Watts request for a permit and rejected cost estimates included in that permit application. Comp. at 6. ESG Watts did not file a new cost estimate until July 1996. Resp. Br. at 2. ESG Watts admits that it should have filed a new biennial review after February 1995. Resp. Br. at 2-3.

STATUTORY AND REGULATORY FRAMEWORK

Section 21 of the Act provides in pertinent part:

No person shall:

* * *

d. Conduct any waste storage, waste-treatment, or waste-disposal operation:

* * *

1. Without a permit granted by the Agency or in violation of any conditions imposed by such permit . . .; or
2. In violation of any regulations or standards adopted by the Board under this Act;

* * *

o. Conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section in a manner which results in any of the following conditions:

* * *

13. failure to submit any cost estimate for the site or any performance bond or other security for the site as required by this Act or Board rules. (415 ILCS 5/21.)

Section 21.1 states:

- 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.

* * *

Section 807.603 titled "Upgrading Financial Assurance" states, in pertinent part:

- b) The operator must increase the total amount of financial assurance so as to equal the current cost estimate within 90 days after any of the following:
 - 1) An increase in the current cost estimate:

* * *

Section 807.623 titled "Biennial Revision of Cost Estimate" states:

- a) The operator must revise the current cost estimate at least once every two years. The revised current cost estimate must be filed on or before the second anniversary of the filing or last revision of the current cost estimate.

VIOLATION

ESG Watts admits that it has violated Sections 21(d)(1), 21(d)(2), and 21.1(a) of the Act and Section 807.603(b)(1) of the Board's rules (415 ILCS 5/21(d)(1), 21(d)(2), and 21.1(a) and 35 Ill. Adm. Code 807.603(b)(1)). Resp. Br. at 1-2; Tr. at 1. In its brief, ESG Watts states:

. . . it is not disputed that between October 15, 1994, and December 15, 1994, Respondent was in compliance with the amounts required to be in its closure/post-closure trust fund . . . but that starting on December 15, 1994,

Respondent was required to have at least \$1,391,090.00 and it only had \$663,733.21 in said fund. It is further undisputed that at no time after December 15, 1994, did Respondent have the required amounts in its closure/post-closure trust fund. Resp. Br. at 2.

Based on ESG Watts admissions, the Board finds that ESG Watts has violated Sections 21(d)(1), 21(d)(2), and 21.1(a) of the Act and Section 807.603(b)(1) of the Board's rules. 415 ILCS 5/21(d)(1), 21(d)(2), and 21.1(a) and 35 Ill. Adm. Code 807.603(b)(1).

ESG Watts also admits that it violated Section 21(o)(13) of the Act and Section 807.623(a) of the Board's rules. 415 ILCS 5/21(o)(13) and 35 Ill. Adm. Code 807.623(a). However, ESG Watts disputes the time period it was in violation of Section 21(d)(2) and 21(o)(13) of the Act and Section 807.623(a) of the Board's rules by failing to file a revision of its closure/post-closure care cost estimates. Resp. Br. at 3. Specifically, ESG Watts asserts that because the application for significant modification was not denied until February 17, 1995, ESG Watts was in compliance from September 1994 to February 1995. Resp. Br. at 3. Further, the cost estimates were submitted on July 27, 1996, and thus, ESG Watts was in compliance after July 1996. Resp. Br. at 3. Therefore, the time between February 17, 1995, and July 27, 1996, are the times during which no cost revisions had been submitted. Resp. Br. at 3. ESG Watts argues that because the Board stated in PCB 94-127, on May 4, 1995, that ESG Watts was currently in compliance with the biennial revision requirements, ESG Watts cannot be considered to have violated those requirements until at least after May 4, 1995. Resp. Br. at 3.

The Board has carefully reviewed its opinion in PCB 94-127. In that case, the Board's determination that ESG Watts was in compliance with the biennial cost revision requirements was based on a February 28, 1995, supplement to the record in PCB 94-127 that indicated the cost revisions had been submitted with the application for a significant modification permit. Therefore, the Board was indicating compliance as of February 28, 1995, not May 4, 1995. ESG Watts admits that it should have filed a new biennial cost revision after IEPA rejected the cost revisions submitted with the significant modification permit application. Resp. Br. at 4. The IEPA rejected the cost revisions in February 1995. Comp. at 6. Therefore, the Board finds that ESG Watts was in violation as of March 1, 1995, for failing to file biennial cost revisions. ESG Watts violated Section 21(o)(13) of the Act and Section 807.623(a) of the Board's rules. The only issue that now remains is for the Board to determine the appropriate remedy.

PENALTY

Having found violation, the Board must now determine the penalty to be assessed. In determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act. People v. Berniece Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park, (hereinafter Kershaw) PCB 92-164 (April 20, 1994); IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, (hereinafter Barry) PCB 88-71, 111 PCB 11 at 72 (May 10, 1990). The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. Wells

Manufacturing Company v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148 (1978). The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. In addition, the Board must bear in mind that no formula exist, and all facts and circumstances must be reviewed. Kershaw at 14; Barry at 62-63.

The Board has stated that the statutory maximum penalty “is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts.” Barry, at 72. The formula for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act 415 ILCS 5/42(a) and (b) (1996). Section 42(a) provides for a civil penalty not to exceed \$50,000 for violating a provision of the Act and an additional civil penalty not to exceed \$10,000 for each day during which the violation continues. By multiplying the number of sections of the Act and Board regulations that ESG Watts is alleged to have violated (six) a potential civil penalty of \$300,000 is reached. Add to that sum, a civil penalty of \$10,000 a day for each day of noncompliance with those six sections (over 1,300 days), the total maximum penalty that could be assessed against ESG Watts is over \$13,000,000. The complainant requests an imposition of civil penalties in the amount of \$10,000 for the failure to timely revise current cost estimates and a penalty of \$80,000 for the failure to upgrade financial assurance instruments. Comp. Br. at 7.

Section 33(c) Factors

Section 33(c) sets forth five factors that the Board must consider in making its determinations:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
2. the social and economic value of the pollution source;
3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
5. any subsequent compliance.

The Character And Degree Of Injury To, Or Interference With The Protection Of The Health, General Welfare And Physical Property Of The People.

Although the Board in PCB 94-127 found that this factor mitigated the violation, the Board today finds that the failure to adequately fund closure/post-closure financial assurance

funds interferes with the protection of the health, general welfare and physical property of the people. PCB 94-127 at 7. The purpose of financial assurance is to provide a guarantee to the State that funds are available to clean up a facility at the end of its life. PCB 96-233 at 11, citing 35 Ill. Adm. Code 807.603. And as acknowledged by ESG Watts, compliance with financial assurance requirements is necessary to assure that the State of Illinois will not have to pay for correcting environmental harm created by insolvent polluters. Resp. Br. at 4. Thus, an inadequate fund could mean that the State would be required, at taxpayer expense, to clean up or even close a facility. Clearly such an outcome would be a substantial interference.

The Board is convinced that the complainant in this matter has demonstrated the potential for environmental harm. Therefore, the Board finds that this factor aggravates the violations in this proceeding.

The Social And Economic Value Of The Pollution Source.

The Board finds that this factor does not affect the violations in this case. The Sangamon Valley Landfill is no longer accepting waste.

The Suitability Or Unsuitability Of The Pollution Source To The Area In Which It Is Located, Including The Question Of Priority Of Location In The Area Involved.

This factor also has no affect on the penalty amount in this case. The Sangamon Valley Landfill was sited many years ago and now that it is not accepting waste, the Board will not revisit the suitability of its location.

The Technical Practicability And Economic Reasonableness Of Reducing Or Eliminating The Emissions, Discharges Or Deposits Resulting From Such Pollution Source.

The Board finds that conducting biennial reviews and maintaining the level of financial assurance is both technically practicable and economically reasonable. Biennial reviews are conducted by the owner/operator of a landfill and submitted to the IEPA for review. Thus, there are two levels of review for cost estimates. In addition, the estimates are based on the contents of the landfill for which the owner/operator has direct control. Therefore, the Board finds that this factor aggravates the violation.

Any Subsequent Compliance.

Although ESG Watts has completed the biennial review, as of the date of the filing of the reply brief, the financial assurance fund was still underfunded. Therefore, the Board finds that this factor should be considered in aggravation of the violations.

Section 42(h) Factors

Section 42(h) of the Act sets forth factors to be considered in determining the appropriate amount of the civil penalty. Those factors are:

1. the duration and gravity of the violation;
2. the presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
3. any economic benefits accrued by the violator because of delay in compliance with requirements;
4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and
5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.

The Duration And Gravity Of The Violation.

By ESG Watts' calculations the financial assurance fund for the Sangamon Valley Landfill was underfunded for 831 days from December 15, 1994, through March 25, 1997. ESG Watts admits that the duration of the violations was well over two years. Including the previously adjudicated case PCB 94-127, ESG Watts failed to properly fund financial assurance for the landfill since 1992, except for a two month period in 1994 when excess funds were on deposit. Affd. at Exhibit B. ESG Watts also failed to provide the biennial cost revision to comply with Section 807.623(a) from March 1995 until July 1996. Therefore, the Board finds that this factor will aggravate the penalty imposed.

The Presence Or Absence Of Due Diligence On The Part Of The Violator In Attempting To Comply With The Requirements Of This Act And Regulations Thereunder Or To Secure Relief Therefrom As Provided By This Act.

ESG Watts stated in its brief that it has "deposited substantial funds in the closure/post-closure care trust funds . . . and that its operation have not been subject to serious violations." Resp. Br. at 4-5. ESG Watts further maintains that the shortfalls in funding results in the "failure to fund the cost of removal of the admitted overfill." However, siting of the overfill may be possible. Resp. Br. at 5. ESG Watts maintains that it "continues to work on achieving full funding." Resp. Br. at 5.

The Board can find no evidence in this record that from December 15, 1994, through March 25, 1997, ESG Watts attempted to comply with the financial assurance requirements prior to these enforcement proceedings. ESG Watts may have been confused regarding the need to file a separate revision of closure/post-closure care costs after the significant modification permit was denied. However, this confusion only relates to submission of the

cost estimates, not the funding of the financial assurance fund. The Board finds that this factor aggravates the penalty to be imposed.

Any Economic Benefits Accrued By The Violator Because Of Delay In Compliance With Requirements.

The major economic benefit to ESG Watts in this case resulted from underfunding financial assurance for the Sangamon Valley landfill from December 15, 1994 through March 25, 1997. The parties agree that economic gain for ESG Watts can be calculated by taking the cost of borrowed money and subtracting the income provided by the financial assurance trust fund to give a net cost of borrowing. PCB 96-233Tr. at Exhibit 10; Affd. at Exhibit B. However, the parties disagree on the amount of the economic benefit; the largest disagreement centers on the assumed borrowing costs used in the calculations.

Complainant relies on the testimony of IEPA employee John Taylor who assumed that ESG Watts could borrow money at 12% per annum to secure funds for financial assurance. PCB 96-233Tr. at 115. Mr. Taylor assumed that the money in the financial assurance fund would earn 4.08% per annum net after taxes and trustees fees. PCB 96-233Tr. at 122. Therefore, Mr. Taylor used a net cost of 8% per annum to calculate the economic gain for ESG Watts. PCB 96-233Tr. at 118 and Exhibit 10. Using Mr. Taylor's method, the economic benefit to ESG Watts by underfunding financial assurance between December 15, 1994, through March 25, 1997, is \$123,749.90.

ESG Watts' Corporate Controller, Mr. Evans, calculated an economic benefit totaling \$33,586.38 by underfunding financial assurance for the Sangamon Valley landfill between December 15, 1994, and March 25, 1997. Affd. at Exhibit B. This benefit was calculated by using ESG Watts' weighted average borrowing costs between 1991 and 1994 (6.7% per annum) and subtracting the interest rate paid on funds in the financial assurance trust fund (4.54% per annum). ESG Watts does not indicate whether taxes and management fees were subtracted from the income rate of 4.54% per annum. Affd. at Exhibit B. Mr. Evans called the difference between borrowing costs and trust fund income (2.16% per annum) an "incremental interest differential" which was then multiplied by the amount of underfunding and time to yield the total economic benefit. Affd. at Exhibit B.

The Board finds that complainant's method of calculating economic benefit is supported by the record in this case. By ESG Watts' own admission, it has been unable to borrow money since July 1994. PCB 96-233Tr. at 52. In light of that admission, the 6.7% weighted average cost of borrowing used by ESG Watts in its calculations applies to a time period before the violation occurred in the instant case. Therefore, the assumption by complainant that economic benefits should be based on an assumed 12% per annum cost of borrowed money is conservative, when ESG Watts admits that it has been unable to borrow money at all. The Board will also use 4% per annum as the historical rate of return for financial assurance trust funds. When the net income rate for the trust funds (4% per annum) is subtracted from the assumed 12% per annum borrowing cost, we arrive at 8% per annum to use in calculating economic benefit to ESG Watts by not properly funding financial assurance.

Further, we observe that in PCB 94-127, affirmed by the Appellate Court, we assumed a 10% per annum net cost of borrowed money in calculating economic benefit to ESG Watts for underfunding financial assurance at the Sangamon Valley landfill during an earlier time period. PCB94-127 at 13, aff. at ESG Watts v. PCB, 282 Ill. App.3d 43, 668 N.E.2d 1015 (4th Dist. 1996). Using a more conservative 8% per annum (and more favorable to ESG Watts), we find in this case that ESG Watts gained an economic benefit of \$123,749.90 by underfunding financial assurance for the Sangamon Valley landfill from December 15, 1994, through March 25, 1997. Thus, ESG Watts gained a substantial economic benefit by failing to comply. Therefore, this factor will weigh in aggravation of the penalty.

The Amount Of Monetary Penalty Which Will Serve To Deter Further Violations By The Violator And To Otherwise Aid In Enhancing Voluntary Compliance With This Act By The Violator And Other Persons Similarly Subject To The Act.

ESG Watts argues that the financial condition of ESG Watts should be considered as a mitigating factor by the Board. Resp. Br. at 5. ESG Watts maintains that the threat to the environment that exists is from forcing ESG Watts into an insolvency position by the imposition of new fines. Resp. Br. at 5. ESG Watts asserts that it is uncontroverted:

1. that the recent fines and loss of revenue have “seriously strapped” its cash flow position;
2. that since 1994, ESG Watts has been unable to borrow funds at any interest rate;
3. that ESG Watts cannot sell assets in a sufficient amount to raise the funds necessary to fully fund the trust fund; and
4. that ESG Watts lost money in 1996.

Resp. Br. at 6-7.

ESG Watts also argues that the record is clear that it has not complied with the Act and the Board’s regulations because ESG Watts does not have the financial ability to comply. Resp. Br. at 7. ESG Watts asserts that imposition of substantial new fines “cannot be considered to aid enforcement” of the Act and the fines that have already been imposed are sufficient to act as a deterrent. Resp. Br. at 7.

The Board is not persuaded by the arguments of ESG Watts. ESG Watts made business decisions not to comply in the past with the Act and Board regulations; therefore, the Board believes a penalty is necessary to deter future violations. Although, ESG Watts has, as of the date of this opinion, been fined hundreds of thousands of dollars, the facts are that in this proceeding the Board must decide what penalty will deter future violations. Therefore, the Board will assess a penalty that will dissuade ESG Watts from future business decisions that result in violations.

The Number, Proximity In Time, And Gravity Of Previously Adjudicated Violations Of This Act By The Violator.

The history of past violations by ESG Watts is well documented and we will not repeat those here. See, generally, People v. ESG Watts, PCB 96-107, February 5, 1998, and People v. ESG Watts, PCB 96-233, February 5, 1998. ESG Watts has consistently failed to meet its obligations under the Act and Board regulations and this factor should be considered in aggravation of a penalty.

Penalty Calculation

The Board has previously penalized two dollars for each dollar gained through noncompliance with the Act and Board regulations. PCB 94-127 at 13, aff. in ESG Watts v. PCB, 282 Ill. App. 3d 43, 668 N.E.2d 1015 (4th Dist. 1996) and PCB 96-233 at 16. The Board has found that ESG Watts had an economic benefit of \$123,749.90 by underfunding financial assurance for the Sangamon Valley landfill from December 15, 1994 through March 25, 1997. The Board must assess a penalty higher than that amount to deter future violations. Therefore, the Board finds that a civil penalty of \$246,000 will deter future noncompliance by ESG Watts.

In PCB 94-127, the Board imposed a \$5,000 penalty for ESG Watts' failure to submit a biennial report in a timely manner. That case was decided in May 1995 and yet no biennial report was filed by ESG Watts until July 1996. The Board is convinced that a more substantial penalty is necessary to deter further violations of the biennial reporting requirements. Therefore, the Board will also impose a penalty of \$10,000 for the failure to file a biennial report.

In summary, the total civil penalty for ESG Watts' failure to update financial assurance and failure to file biennial cost revisions is \$256,000.

ATTORNEY FEES AND COSTS

Complainant has requested attorney fees and costs in accordance with Section 42(f) of the Act (415 ILCS 5/42(f) (1996)), that provides in relevant part:

Without limiting any other authority which may exist for the awarding of attorney's fees and costs, the Board . . . may award costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants, to the State's Attorney or the Attorney General in a case where he has prevailed against a person who has committed a willful, knowing or repeated violation of the Act.

From the facts found above, the Board finds that the violations in this proceeding were willful and knowing. And in fact, ESG Watts does not dispute complainant's claim for attorney fees.

Resp. Br. at 7. The Board accordingly finds that it is appropriate to award complainant fees and costs incurred in the prosecution of this case.

The Attorney General has submitted affidavits based upon which \$2,400 in fees are claimed. The Board grants the Attorney General \$2,400 in fees and costs.

CONCLUSION

The Board finds that ESG Watts has failed to provide timely biennial cost revisions and to properly fund financial assurance for the Sangamon County Landfill. By not properly funding financial assurance, ESG Watts violated Sections 21(d)(1), 21(d)(2), and 21.1(a) of the Act and Section 807.603(b)(1) of the Board's rules. 415 ILCS 5/21(d)(1), 21(d)(2), and 21.1(a) and 35 Ill. Adm. Code 807.603(b)(1) and 807.623(a). By not filing a timely biennial cost revision, ESG Watts violated Section 21(o)(13) of the Act and Section 807.623(a) of the Board's rules. 415 ILCS 5/21(o)(13) and 35 Ill. Adm. Code 807.623(a). In order to deter future violations of the Act and the Board's regulations, the Board will impose a penalty of \$256,000. Further, the Board finds that the violations were willful and knowing and therefore the Board will award attorney fees of \$2,400 to the Attorney General's office.

This opinion on the penalty amount constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

- 1) The Board finds respondent, ESG Watts violated Sections 21(d)(1), 21(d)(2), 21(o)(13), and 21.1(a) of the Act and Sections 807.603(b)(1) and 807.623(a) of the Board's rules. 415 ILCS 5/21(d)(1), 21(d)(2), 21(o)(13), and 21.1(a) and 35 Ill. Adm. Cod 807.603(b)(1) and 807.623(a).
- 2) The Board hereby assesses a penalty of two hundred fifty six thousand dollars (\$256,000) against ESG Watts.
- 3) ESG Watts shall pay two hundred fifty six thousand dollars (\$256,000) within 60 days of the date of this Order. Such payment shall be made by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Environmental Protection Trust Fund, and shall be sent by First Class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 N. Grand Avenue East
Springfield, IL 62702

Respondent shall also write their Federal Employer Identification Number or Social Security Number on the certified check or money order. Any such penalty not paid within the time prescribed shall incur interest at the rate set

forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (35 ILCS 5/1003), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

- 4) Respondent ESG Watts shall pay two thousand four hundred dollars (\$2,400) as fees and costs awarded to the Attorney General's Office. Such payment shall be made within 60 days of the date of this order by certified check or money order payable to the Treasurer of the State of Illinois, designated for deposit to the Hazardous Waste Fund, and shall be sent by First Class mail to:

Illinois Environmental Protection Agency
Fiscal Service Division
1021 N. Grand Avenue East
Springfield, IL 62702

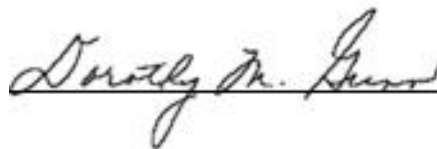
The certified check or money order shall clearly indicate on its face, the case name and number, respondent's federal employer identification number and that payment is directed to the Hazardous Waste Fund.

- 5) Respondent, ESG Watts shall cease and desist from violations of the Act and the Board's regulations.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 19th day of February 1998, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board