

ILLINOIS POLLUTION CONTROL BOARD
February 6, 2003

ESG WATTS, INC. (Sangamon Valley)	
Landfill), an Iowa corporation,)	
)	
Petitioner,)	
)	
v.)	PCB 00-160
)	(Permit Appeal - Land)
ILLINOIS ENVIROMENTAL PROTECTION)	
AGENCY,)	
)	
Respondent.)	

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

On March 23, 2000, ESG Watts, Inc. (Watts) filed a petition for hearing seeking review of a letter issued by the Illinois Environmental Protection Agency (Agency) on February 22, 2000. The letter concerned required financial assurance for closure and post-closure care of the Sangamon Valley Landfill owned by Watts in Sangamon County. The Board initially dismissed the petition, indicating that the Board lacked jurisdiction to review the February 22, 2000 letter. ESG Watts v. IEPA, PCB 00-160 (Aug. 24, 2000). On May 2, 2002, the Appellate Court, Fourth District remanded the case to the Board directing the Board to hold a hearing on the sufficiency of an insurance policy at issue in the February 22, 2000 letter.

The Board held the post-remand hearing on October 15, 2002. As discussed below, the Board dismisses the proceeding as moot because the Board has already found in another case that financial assurance was adequate for the time period in question.

PROCEDURAL BACKGROUND

On March 23, 2000, Watts filed a petition for hearing (Pet.). In that petition for hearing, Watts asked that the Board “determine” that the Agency’s “refusal to make a determination” or the issuance of a February 22, 2000 notice of violation letter “was improper, not authorized by law, and arbitrary and unreasonable.” Pet. at 4. Watts further asked that the Board issue an order “requiring the Agency to approve” Pollution Liability Policy No. FRAC0001004 as financial assurance for the Sangamon Valley Landfill. *Id.* The Agency’s February 22, 2000 notice of violation letter indicated that Watts was still subject to referral for enforcement action pursuant to Section 31(b) of the Environmental Protection Act (Act) (415 ILCS 5/31(b) (2002)), because the various documents submitted by Watts to the Agency did not satisfy the requirements of a proposed Compliance Commitment Agreement. R. at 111-13.

The Board found that Watts’ petition for review must be dismissed for two reasons. ESG Watts v. IEPA, PCB 00-160 (Aug. 24, 2000). First, the Board found that because of the 35-day appeal deadline specified in Section 40 of the Act (415 ILCS 5/40 (2002)), the only action of the

Agency properly before the Board would be the Agency's February 22, 2000 letter. The letter was a correspondence by the Agency pursuant to Section 31 of the Act (415 ILCS 5/31 (2002)). ESG Watts v. IEPA, PCB 00-160 (Aug. 24, 2000) *slip op* at 1. The Board found that Section 31 of the Act (415 ILCS 5/31 (2002)) is a preliminary process designed to afford regulated entities a process for resolving alleged violations before enforcement proceedings are initiated against them. *Id.* The Board found that a letter issued under Section 31 of the Act (415 ILCS 5/31 (2002)) such as the February 22, 2000 letter is not a final, appealable determination under the facts of this case. *Id.*

Watts filed an appeal of the Board's decision with the Appellate Court, Fourth District. On May 2, 2002, the Board received the mandate from the court. The court reversed the Board's decision in this proceeding finding that the Board had jurisdiction. The court stated, "we reverse and remand to the Board for hearing on the sufficiency of the insurance policy." ESG Watts, Inc., v. PCB, no. 4-00-0861 (4th Dist. Dec. 2001).

On October 15, 2002, hearing was held before Board Hearing Officer Stephen Langhoff. On November 18, 2002, Watts filed a brief (Pet. Br.) and on December 9, 2002, the Agency filed a brief (Ag. Br.).

STATUTORY BACKGROUND

Section 21.1(a) of the Act (415 ILCS 5/21.1(a) (2002)) requires an operator to provide financial assurance to the Agency for the closure and post-closure care of a waste disposal site. The financial assurance can be satisfied by providing a performance bond, or other security, including insurance, that meets the requirements specified in Section 21.1 of the Act (415 ILCS 5/21.1 (2002)).

Section 31 of the Act (415 ILCS 5/31 (2002)) sets forth the procedures to be followed by the persons who wish to file a complaint alleging violations of the Act. More specifically Section 31 of the Act (415 ILCS 5/31 (2002)) contains notice requirements the Agency must follow when the Agency becomes aware of an alleged violation of the Act. Section 31(a) of the Act specifies detailed requirements that the Agency must follow when serving notice of an alleged violation of the Act and/or Board regulation. 415 ILCS 5/31(a) (2002). The respondent must also follow specific requirements under Section 31(a) of the Act (415 ILCS 5/31(a) (2002)), including submission of a proposed Compliance Commitment Agreement, in the negotiations to avoid referral to the Attorney General's office for prosecution. Section 31(b) of the Act concerns alleged violations that remain subject to disagreement between the Agency and the respondent after the requirements of Section 31(a) of the Act have been followed. 415 ILCS 5/31(a) and (b) (2002). The requirements of Section 31(b) of the Act are a precondition to the Agency's referral to the Attorney General's office for prosecution. 415 ILCS 5/31(b) (2002)

FACTS

In 1994 Watts executed a trust agreement to provide financial assurance for closure and post-closure care of the Sangamon Valley Landfill. Watts began to seek to replace the trust agreement with an insurance policy in early 1998. R. at 1-7. Watts and the insurers submitted

various certificates of insurance and related correspondence to the Agency in an effort to provide substitute financial assurance in an amount sufficient to allow for the release of the trust account and to satisfy Watts' financial assurance obligations under Section 21.1(e) of the Act (415 ILCS 5/21.1(e) (2002)). *See e.g.* R. at 5-41. During that time period, the Agency issued notices of violation pursuant to Section 31(b) of the Act (415 ILCS 5/31(b) (2002)) to Watts pertaining to those same financial assurance obligations for the Sangamon Valley Landfill. R. at 42-46, 69-71, and 89-91. The first notice of violation letter was issued January 8, 1999¹. R. at 42-46. The Agency advised Watts in that letter that a written response would be required within 45 days, that each violation must be addressed, that the response would constitute a proposed Compliance Commitment Agreement pursuant to Section 31 of the Act (415 ILCS 5/31 (2002)), and that a request for a meeting would be honored. *Id.*

Watts responded to the first notice of violation letter on February 10, 1999, indicating that Watts believed that the company was in compliance and submitted confirmation of insurance coverage. R. at 47-53. On September 15, 1999, the Agency again issued a notice of violation letter indicating that the response from Watts was insufficient. R. at 69-71. Watts provided additional information to the Agency (*see e.g.* R. at 89-90, 109). However, on February 22, 2000, the Agency informed Watts that the transmittals were not considered a compliance commitment agreement and the matter may be referred to the Office of the Attorney General. R. at 111-12.

DISCUSSION

The Board will summarize the arguments of both parties. Then, the Board will delineate the issue before discussing the rationale for the Board's finding and decision.

Arguments

In the brief, Watts argues that the Board should find that Watts had posted sufficient financial assurance for the Sangamon Valley Landfill for the period from January 26, 1998 through January 26, 2000.² Pet. Br. at 6. Watts argues that the Board should make this determination because the Board has previously found that the Agency's failure, within 90 days, to approve financial assurance means that Watts may deem the financial assurance approved. Pet. Br. at 3-4, citing ESG Watts, Inc. v. IEPA, PCB 01-139 (Apr. 4, 2002). Watts asserts that the Agency failed to act upon the request to approve financial assurance from Watts and the requests should be approved as a matter of law. Pet. Br. at 4.

The Agency argues that there is no actual controversy remaining in this proceeding and

¹ The record indicates that though the letter was dated January 8, 1998, the letter was actually sent on January 8, 1999. *See* R. at 69.

² The Board notes that in the brief filed by Watts, Watts indicates that Watts is seeking a declaration that sufficient financial assurance was posted for a period of two years (January 26, 1998 through January 26, 2000). However, as discussed in the Board's finding, the relief sought by the petition is for the period of January 26, 1999 through January 26, 2000.

the proceeding should be dismissed as moot. Specifically, the Agency asserts that the only insurance policy at issue in the February 22, 2000 notice of violation letter was a policy for the period from January 26, 1999 through January 26, 2000. Ag. Br. at 2. The Agency points to the Board's decision in ESG Watts, Inc. v. IEPA, PCB 01-139 (Apr. 4, 2002) and notes that the Board has already determined that another insurance policy, which covered the period from January 26, 1999 through January 26, 2000 for Sangamon Valley Landfill, was approved as a matter of law. Ag. Br. at 2. Further the Agency notes that the Board has found that after the transfer of ownership of the Sangamon Valley Landfill from Watts, Watts is no longer obligated to provide financial assurance for Sangamon Valley Landfill. Ag. Br. at 2 citing, ESG Watts, Inc. v. IEPA, PCB 01-62 (Apr. 4, 2002). Therefore, the Agency maintains that whether the letter dated February 22, 2000 made the correct determination with regards to Watts' obligation to provide financial assurance is irrelevant. Ag. Br. at 2.

Board Finding

In this proceeding, Watts is seeking a determination by the Board that an insurance policy issued for the time period of January 26, 1999 through January 26, 2000 was adequate financial assurance for the Sangamon Valley Landfill. However, as pointed out by both parties, since this petition for hearing was originally filed, the Board has issued two decisions regarding the adequacy of the financial assurance for the Sangamon Valley Landfill. These decisions have resolved any controversy in this proceeding about the insurance policy as adequate financial assurance for the time period January 26, 1999 through January 26, 2000. Therefore, the Board agrees with the Agency that this proceeding is moot as discussed below.

The Board found that Watts had an insurance policy covering Sangamon Valley Landfill for the period of January 26, 1999 through January 26, 2000. ESG Watts, Inc. v. IEPA, PCB 01-139 (Apr. 4, 2002) *slip. op.* at 3.

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. ESG Watts, Inc. v. IEPA, PCB 01-139 (Apr. 4, 2002) *slip. op.* at 11.

In ESG Watts, Inc. v. IEPA, PCB 01-62 (Apr. 4, 2002), the Board found that financial assurance for proper closure/post-closure care is the responsibility of the owner or operator of a landfill. 415 ILCS 5/21.1 (2002), 35 Ill. Adm. Code 807.600, 811.701. Once the operating permit for the Sangamon Valley Landfill was transferred to another owner and operator, Watts was no longer required to provide financial assurance. ESG Watts, Inc. v. IEPA, PCB 01-62 (Apr. 4, 2002) *slip. op.* at 9. Watts transferred ownership of Sangamon Valley Landfill prior to the issuance of the February 22, 2000 letter. ESG Watts, Inc. v. IEPA, PCB 01-62 (Apr. 4,

2002) *slip. op.* at 3.

The Supreme Court of Illinois stated:

A case becomes moot where the occurrence of events since filing of the appeal make it impossible for the reviewing court to render effectual relief. Balmoral Racing Club, Inc. v. Illinois Racing Board 151 Ill. 2d 367, 397 603 N.E. 2d 489 (1992). A court should not decide a case where the judgment would have only an advisory effect. [cite omitted] The court would have, in effect, rendered an advisory opinion where a decision on the merits cannot result in appropriate relief to the prevailing party. Berlin v. Sarah Bush Lincoln Health Center 179 Ill. 2d 1, 688 N.E.2d 106 (1997).

Furthermore, “a claim is moot when no actual controversy exists or events occur which make it impossible for a court to grant effectual relief.” Duncan Publishing, Inc. v. City of Chicago, 304 Ill. App. 3d 778, 709 N.E.3d 1281 (1st Dist. 1999).

In Watts’ brief, the relief sought by Watts is a declaration that Watts had posted sufficient financial assurance for the Sangamon Valley Landfill for the period from January 26, 1998 through January 26, 2000. *See* Pet. Br. at 6. However, only the policy issued for the period from January 26, 1999 through January 26, 2000 was at issue in this petition for hearing. *See* R. at 49, 108-111 and Pet. at 4. Thus, Watts is actually asking for a declaration that sufficient financial assurance was posted for Sangamon Valley Landfill from January 26, 1999 through January 26, 2000. The Board has already found that to be the case. *See* ESG Watts, Inc. v. IEPA, PCB 01-139 (Apr. 4, 2002). The Agency concedes that the Board has already found that adequate financial assurance was posted for Sangamon Valley Landfill for the period January 26, 1999 through January 26, 2000. *See* Ag. Br. at 2. The Board finds that there is no controversy because the relief sought by Watts has already been granted and the Agency concedes that the relief was granted. Therefore, Board finds that the proceeding is moot.

CONCLUSION

The Board finds that this proceeding is moot. Board decisions in two subsequent cases have resolved the issue so that Watts already has the relief being sought in this proceeding. Therefore, the Board dismisses the petition for hearing as moot.

This opinion constitutes the Board’s findings of fact and conclusions of law.

ORDER

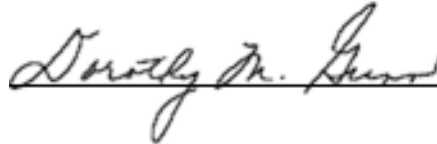
The Board hereby dismisses the petition for hearing as moot.

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 5/31(a) (2002)); *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 February 6, 2003, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board