ILLINOIS POLLUTION CONTROL BOARD
March 16, 2000

ESG WATTS, INC., an Iowa corporation (Taylor Ridge Landfill),	)	
Petitioner,	)	
v.	)	PCB 95-110 (Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by E.Z. Kezelis):

In this case, petitioner ESG Watts, Inc. (Watts) seeks review of the Illinois Environmental Protection Agency's (Agency) denial of Watts' significant modification permit application for its Taylor Ridge Landfill in Rock Island County, Illinois. Watts has filed a number of waivers of decision deadline in this case; pursuant to its most recent waiver of August 6, 1999, the deadline for decision is June 1, 2000.

This opinion and order sets forth the Illinois Pollution Control Board's rulings on the Agency's pending motion for summary judgment and a related motion by Watts. The Board grants Watts' motion for leave to file *instanter* its response to the Agency's motion for summary judgment. As for the Agency's motion for summary judgment, the Board finds, as a matter of law, that Watts' significant modification permit application was properly denied. The Board reaches a similar outcome today in ESG Watts, Inc. (Sangamon Valley Landfill) v. IEPA (March 16, 2000), PCB 95-109.

STATEMENT OF UNCONTESTED FACTS AND REGULATORY BACKGROUND

The following statement of uncontested facts is based on Watts' petition for hearing (Pet.); the Agency's denial letter of February 16, 1995 (Denial Letter), which sets forth the reasons why the permit application was being denied, and which was attached to Watts' petition as Exhibit A (Exh. A); the Agency's motion for summary judgment (Mot.); and Watts' response to the motion for summary judgment (Resp.). The regulatory background is based on the regulations and orders cited below. No affidavits were submitted by either party.

Watts operated a solid waste landfill located in Rock Island County, Illinois, commonly known as the Taylor Ridge Landfill. Pet. at 1. On September 15, 1994, Watts submitted a significant modification permit application to the Agency pursuant to 35 Ill. Adm. Code 814.104. Pet. at 1. Additional information was submitted to the Agency on numerous dates.

On December 16, 1994, the Agency determined that the application was complete. Pet. at 1. The Agency denied Watts' permit application on February 16, 1995. Exh. A. The Agency's Denial Letter was a seven-page document that detailed several dozen specific reasons for denial, including deficiencies in the general information submitted, as well as deficiencies concerning design, leachate collection and management, landfill gas, groundwater monitoring, groundwater remediation, timeliness of the submittal, and Watts' past history of violations. Exh. A.

WATTS' PETITION FOR HEARING

Watts' petition for hearing challenged the Agency's denial on several grounds. With respect to the Agency's reliance on Watts' past history of violations pursuant to Section 39(i) of the Environmental Protection Act (Act) (415 ILCS 5/39(i) (1992)), Watts claimed that the Agency's denial was: "primarily punitive and merely an impermissible aid to the enforcement process"; arbitrary, unreasonable, capricious and an abuse of discretion; and, with respect to one of the enumerated legal actions evidencing past violations, premature because the matter was still on appeal in the Fourth District Appellate Court. Pet. at 4.

Watts' other stated challenges to the denial included the argument that the alleged untimeliness of its significant modification permit application was the subject of a pending enforcement action not yet fully adjudicated before the Board, and, the argument that because the Agency had deemed Watts' application complete, it could not thereafter deny it on the basis that certain requisite information was lacking. Pet. at 5.

MOTION FOR SUMMARY JUDGMENT

Now before the Board is the Agency's February 4, 2000 motion for summary judgment. In it, the Agency reiterates the issues presented in Watts' petition and argues that each has been resolved since Watts filed its petition five years ago. Moreover, the Agency argues, no factual questions are raised in this case. Mot. at 3, 5. Rather, it argues, the only issues presented are legal questions, each of which must be answered in its favor. Finally, the Agency argues that if the Board finds in its favor on at least one stated basis for the permit's denial, summary judgment must be entered in its favor. Mot. at 2-3.

Watts' response focuses on two elements of the Agency's summary judgment motion. First, it argues that the material issue in this case is not whether the Agency had the ability generally to consider Watts' past history of violations under Section 39(i) of the Act; instead, it characterizes the issue as whether or not the Agency's consideration of past violations in denying this permit application was proper. Resp. at 3. Moreover, Watts argues, a grant of summary judgment instead of proceeding to hearing on the issue of the propriety of the Agency's reliance on past violations would act as *res judicata* and would operate as an insurmountable bar for rehabilitated operators in subsequent permit application proceedings. Resp. at 5.

Second, Watts argues that even though certain of the past violations relied on by the Agency have been affirmed on appeal in the five years since the permit application was denied,

reliance on them at the time of Watts' permit application was premature and therefore improper. Resp. at 6-7.

DISCUSSION

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id*. Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Denial Letter

In a permit appeal to the Board, it is the denial letter which frames the issues presented. ESG Watts v. Pollution Control Board, 286 Ill. App. 3d 325, 676 N.E.2d 299, 306 (3rd Dist. 1997), citing Pulitzer Community Newspapers v. IEPA (December 20, 1990), PCB 90-142; Centralia Environmental Services, Inc. v. IEPA (May 10, 1990), PCB 89-170; and City of Metropolis v. IEPA (February 22, 1990), PCB 90-8. The denial letter must contain a sufficient basis for the Agency's action. *Id*. Finally, it is well-established that the Agency cannot consider unadjudicated violations in determining to deny a permit application. Martell v. Mauzy, 511 F. Supp. 729 (N.D. Ill. 1981).

The Agency's Denial Letter stated in part:

> Furthermore, this application is being denied due to ESG Watts, Inc.'s history of repeated violations of State laws, regulations and standards concerning the operation of refuse disposal facilities or sites, under the authority granted to the Agency by Section 39(i) of the Act. Exh. A at 1-2.

In support of its reference to Watts' history of repeated violations of state laws and regulations, the Denial Letter cited 19 separate previously adjudicated administrative citations before the Board and one Sangamon County Circuit Court action against Watts.[1] In addition, the Denial

[1] The enumerated administrative citations were: AC 86-10, AC 87-55, AC 87-123, AC 88-17, AC 88-25, AC 88-45, AC 88-49, AC 88-50, AC 88-112, AC 89-131, AC 89-255, AC 89-278, AC 89-286, AC 90-26, AC 90-36, AC 94-11, AC 94-12, AC 94-13, and AC 94-15. A copy of the amended complaint in the Sangamon County Circuit Court action, captioned People of the State of Illinois v. Watts Trucking Service, Inc., and ESG Watts, Inc., 91 CH 242, was

Letter noted that Watts' significant modification application was submitted in an untimely fashion.

Section 39(i)

The statutory underpinning for the Agency's motion, and concomitantly, Watts' response, is Section 39(i) of the Act, which governs the Agency's authority to consider an applicant's history of past violations. Section 39(i) provides:

> i. Before issuing any RCRA permit or any permit for the conduct of any waste-transportation or waste-disposal operation, the Agency shall conduct an evaluation of the prospective operator's prior experience in waste management operations. The Agency may deny such a permit if the prospective operator or any employee or officer of the prospective operator has a history of:
>
> 1. repeated violations of federal, State, or local laws, regulations, standards, or ordinances in the operation of waste management facilities or sites; or
>
> 2. conviction in this or another State of any crime which is a felony under the laws of this State, or conviction of a felony in a federal court; or
>
> 3. proof of gross carelessness or incompetence in handling, storing, processing, transporting or disposing of waste. 415 ILCS 5/39(i) (1992).

History of Past Violations

The first issue before the Board is whether the Agency, in denying Watts' application for a significant modification permit, properly relied on Watts' history of cited violations. Watts characterizes this issue as one of material fact. Resp. at 3. The Agency, however, argues that this is a question of law. Mot. at 3. The Board agrees with the Agency and holds, as it has before, that this is a question of law. See ESG Watts., Inc. v. IEPA (March 21, 1996), PCB 94-243, slip op. at 1, aff'd in part and rev'd in part on other grounds, ESG Watts, Inc. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 286 Ill. App. 3d 325, 676 N.E.2d 299 (3rd Dist. 1997). Moreover, the Board finds that ESG Watts, Inc. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 286 Ill. App. 3d

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appended as Attachment A. Exh. A at 6, Attachment A. While Watts' appeal was still pending at the time its permit application was denied, the Fourth District ultimately affirmed. People v. Watts Trucking Serv., Inc., 272 Ill. App. 3d 1134, 272 Ill. App. 3d 1134, 688 N.E.2d 399 (4th Dist.), aff'd and remanded in an unpublished order pursuant to Rule 23; appeal denied, 163 Ill. 2d 584, 657 N.E.2d 636 (1995).

325, 676 N.E.2d 299 (3rd Dist. 1997) (ESG Watts 1997) controls the outcome of this issue, and that the Agency was correct in basing its denial of the permit application in part on the cited violations. In ESG Watts 1997, the appellate court rejected Watts' challenge to a March 21, 1996 Board order affirming the Agency's reliance on the same 19 administrative citations and Sangamon County Circuit Court case in seven consolidated permit appeals. ESG Watts, Inc. v. IEPA (March 21, 1996), PCB 94-243.

The Board reaches this conclusion for several compelling reasons. First, the identity of the operator is the same. Watts, which was the operator of the landfill at issue here, is the same entity involved in the 19 administrative citations, the Sangamon County action, and the seven permit appeals affirmed on the same Section 39(i) grounds in ESG Watts 1997. Second, the seven Agency denials affirmed in ESG Watts 1997 were contemporaneous with the denial at issue here. Each was issued within months of each other and within months of this February 17, 1995 denial.[2] Moreover, each relied on the same 19 administrative citations and circuit court action.

The Board's reliance on ESG Watts 1997 does not mean, however, that the Board is somehow relying on subsequently developed facts. Each of the operative facts relied on here all occurred before the Agency issued its denial letter. The legal principles announced in ESG Watts 1997 represent the state of the law on Section 39(i) and, coincidentally, the best and last pronouncement of the appellate court as to the propriety of applying Section 39(i) to Watts in 1995 in light of 19 administrative citations and a circuit court action.

Moreover, no intervening events or legal developments have occurred which would somehow change the character of these past violations for purposes of the Denial Letter at issue here. The severity of the past violations, their proximity in time to each other and the permit appeal at issue here, their quantity, and the degree of control exercised by Watts in the course of those past violations remain unchanged. Watts has not identified any factual issue that would somehow set this permit appeal apart from the seven already disposed of by the Board and the appellate court in ESG Watts 1997.

In ruling on a motion for summary judgment, the Board should construe the pleadings and other materials in the record strictly against the movant. Gauthier v. Westfall, 639 N.E.2d at 999. In this case, of course, the record should be strictly construed against the Agency. But where, as here, all that is contained in the record is insufficient to go to hearing, summary judgment is proper. *Id*.

[2] The Agency's denials were issued August 18, 1994 (PCB 94-243); October 7, 1994 (PCB 94-306); September 22, 1994 (PCB 94-307); September 22, 1994 (PCB 94-308); October 7, 1994 (PCB 94-309); March 23, 1995 (PCB 95-133); and February 28, 1995 (PCB 95-134). ESG Watts, Inc. v. IEPA (March 21, 1996), PCB 94-243.

Adjudicated/Unadjudicated Violations

Watts additionally argues that it is unfair for the Agency to have considered the Sangamon County Circuit Court litigation because the case was on appeal during the pendency of the permit application at issue here. Resp. at 7. The Board disagrees. For the purpose of Section 39(i) and in satisfaction of Martell, all that is necessary is that an adversarial hearing be held where the permit applicant had an opportunity to contest the alleged violations and that the violations be adjudicated as a result of that hearing. The Sangamon County Circuit Court litigation was adjudicated against Watts, and therefore, it satisfied these conditions. ESG Watts, Inc. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 676 N.E.2d at 306-07.

The second issue is whether in applying Section 39(i), the Agency improperly relied on the alleged untimeliness of the significant modification permit application. This allegation of untimeliness, which was pending before the Board in an enforcement action at the time the Agency issued its Denial Letter, was not adjudicated until May 4, 1995, or several months after the Denial Letter at issue here. See People v. James L. Watts, et al. (May 4, 1995), PCB 94-127 (assessing $60,000 penalty against ESG Watts), aff'd, ESG Watts, Inc. v. Pollution Control Board, 282 Ill. App. 3d 43, 668 N.E.2d 1015 (4th Dist. 1996). Because the issue was not yet adjudicated, the Board holds that it was not appropriate for the Agency to rely on this alleged violation. Martell v. Mauzy, 511 F. Supp. at 741.

For the reasons stated above, the Board finds that the Agency properly relied on 19 administrative citations and one Sangamon County Circuit Court action in its Section 39(i) review. It was improper for the Agency to consider the alleged untimeliness of the significant modification application because that matter was not yet adjudicated. Because a sufficient basis for the Agency's denial existed, the Board does not address any other challenges presented in Watts' petition. Industrial Salvage, Inc. v. IEPA (February 17, 1994), PCB 93-60.

Res Judicata/Rehabilitation

The final matter before the Board is ESG Watts' argument in opposition to summary judgment that this outcome impermissibly constitutes *res judicata*, or somehow stamps ESG Watts as a Section 39(i) perpetrator that the Agency might never be willing or able to find rehabilitated. Resp. at 5. We hold that this contention is without merit. The past violations relied on by the Agency were all proximate in time and all concerned this particular operator. If a Section 39(i) question with respect to this petitioner arises in the future, the Board is confident that the Agency will give appropriate consideration to any evidence of rehabilitation that may be presented to it.

The Board grants the Agency's February 4, 2000 motion for summary judgment. In so doing, the Board finds that: the Agency properly relied on Watts' history of past violations under Section 39(i) of the Act, specifically, the 19 administrative citations and the Sangamon

County Circuit Court action; that there are no genuine issues of material fact remaining; and that the Agency is entitled to judgment as a matter of law. This opinion constitutes the Board's findings of fact and conclusions of law in this matter. This docket is closed.

ORDER

The Board orders as follows:

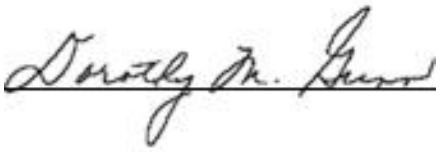
1. The Board grants Watts' motion for leave to file its response *instanter*.

2. The Board grants the Agency's motion for summary judgment. This docket is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 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 16th day of March 2000 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board