

ILLINOIS POLLUTION CONTROL BOARD
April 20, 2000

ESG WATTS, INC., an Iowa corporation,)
)
 Petitioner,)
)
 v.) PCB 94-176
) (Permit Appeal - Land)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)
)

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board on a March 7, 2000 motion for partial summary judgment filed by respondent Illinois Environmental Protection Agency (Agency). Petitioner, ESG Watts, Inc. (Watts) has not responded to the motion.

For the reasons set forth below, the Board finds that there are no genuine issues of material fact and that the Agency is entitled judgment as a matter of law. Therefore, the Agency's motion for partial summary judgment is granted and this matter is dismissed.

BACKGROUND

Watts filed its petition (Pet.) for permit review on June 8, 1994, regarding its solid waste landfill in Sangamon County. On April 4, 1994, Watts submitted a permit application to the Agency seeking authorization to commence waste disposal operations in a new area of the Sangamon Valley Landfill. The Agency's May 4, 1994 determination (Letter) rejected Watts' application as incomplete.

On March 7, 2000, the Agency filed its motion for partial summary judgment (Mot.). Pursuant to Section 103.140(c) of the Board's procedural rules, Watts was allowed a response time of seven days after service of the motion. Watts failed to file a response, and therefore is deemed to have waived objection to the granting of the motion.¹ 35 Ill. Adm. Code 103.140(c). However, such waiver of objection does not bind the Board in the decision of the motion. *Id.*

¹ In response to a telephone call initiated on March 29, 2000, by the hearing officer, counsel for Watts indicated that no response to the pending motion would be forthcoming.

DISCUSSION

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 and Centralia Environmental Services, Inc. v. IEPA (May 10, 1990), PCB 89-170. The Agency's Letter states that the application is deemed incomplete. The Agency indicated that the application was incomplete because:

Pursuant to Section 21(t) of the Act and 35 Ill. Adm. Code, 814.109(a), "no person shall cause or allow a lateral expansion of a MSWLF unit on or after October 9, 1993, without a permit modification, granted by the Agency that authorizes the lateral expansion." ESG Watts, Inc. has not obtained such a permit modification. Letter at 1.

Watts has raised no factual dispute concerning this point. Watts did not contest that it did not obtain a permit modification allowing a lateral expansion before filing the application at issue here. Instead, Watts questioned the timing of the requirement, and claimed that Agency personnel should have advised it to seek a permit modification. Pet. at 4-5. According to Watts, the Agency should be estopped from enforcing that requirement.

In Panhandle Eastern Pipe Line Company v. IEPA (January 21, 1999), PCB 98-102, the Board identified the conditions under which a government entity should be estopped. Watts has met none of the factual requirements, and the record before us discloses no support for applying such a principle here.

Instead, the record discloses that a development permit was issued to Watts prior to the adoption of Subtitle D regulations. Once those new regulations became effective, Watts became obligated to satisfy those new requirements. Among the new changes was the requirement that a permit modification be obtained for lateral expansion of an existing landfill. 35 Ill. Adm. Code 814.109(a). This requirement was in addition to, not in lieu of, an operating permit. *Id.* Accordingly, the Agency was correct in finding Watts' application for an operating permit incomplete.

In its motion, the Agency notes that there were other denial points contained in the May 4, 1994 Letter. Mot. at 2. A motion for "partial" summary judgment was apparently filed because the Agency is only seeking summary judgment with regard to one of the denial points. However, as the Agency also notes, if the Board determines that the Agency was correct in denying the permit application based on incompleteness, then the final Agency decision must be affirmed. Mot. at 2, citing Earl R. Bradd v. IEPA (May 9, 1991), PCB 90-173.

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); QST Environmental, Inc. v. IEPA (May 6, 1999), PCB 99-40. The Board finds that no genuine issues of fact exist regarding whether Watts' application was complete.

The Board grants the Agency's March 7, 2000 motion for partial summary judgment. In so doing, the Board finds that the Agency properly rejected Watts' application. This opinion constitutes the Board's findings of fact and conclusions of law in this matter. This docket is closed.

ORDER

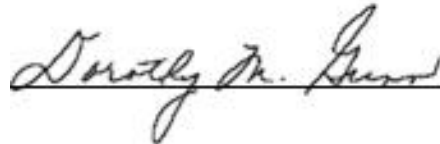
The Board orders as follows:

The Board grants the Agency's motion for partial 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 establish 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 20th day of April 2000 by a vote of 5-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board