

ILLINOIS POLLUTION CONTROL BOARD
June 17, 1999

COUNTY OF SANGAMON,)	
)	
Complainant,)	
)	
v.)	AC 98-4
)	(SCDPH 97-AC-1)
ESG WATTS, INC.,)	(Administrative Citation)
)	
Respondent.)	

ROBERT L. SMITH AND DWAYNE GAB, ASSISTANT STATE'S ATTORNEYS,
APPEARED ON BEHALF OF THE COUNTY OF SANGAMON; and

LARRY A. WOODWARD APPEARED ON BEHALF OF ESG WATTS, INC.

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

This matter is before the Board on the July 24, 1997 filing of an administrative citation (AC) by the County of Sangamon (County), against ESG Watts, Inc. (ESG Watts). The County alleges that a June 5, 1997 inspection of the Sangamon County Landfill revealed that ESG Watts had failed to place six feet of final cover on the landfill and had not removed 300,000 cubic yards of waste that ESG Watts had disposed of in unpermitted portions of the landfill. The AC charges ESG Watts with violating Sections 21(o)(6) and 21(o)(9) of the Environmental Protection Act (Act) (415 ILCS 5/21(o)(6), 21(o)(9) (1996)). ESG Watts filed its petition for review on August 22, 1997.

In an AC action under Section 31.1 of the Act (415 ILCS 5/31.1 (1996)), any person who is found in violation of any provision of subsections (o) or (p) of Section 21 is required to pay a penalty of \$500 for each violation of each provision plus any hearing costs incurred by the Board or the Illinois Environmental Protection Agency (Agency). For the reasons set forth below, the Board finds, as alleged by the County, that ESG Watts has violated Sections 21(o)(6) and 21(o)(9) of the Act. The Board accordingly finds ESG Watts liable for a penalty of \$1,000, and any associated hearing costs incurred by the County or the Board.

PROCEDURAL HISTORY

Related Actions

The site conditions reflected in this AC have been the subject of prior enforcement proceedings. The lack of six feet of final cover at this site and the 300,000 cubic yards of refuse with which it was "overfilled" contrary to permit limits was the subject of a prior enforcement action in the Sangamon County Circuit Court; one particular order is of special

interest here.¹ People of the State of Illinois and County of Sangamon v. Watts Trucking Service, Inc. and ESG Watts, Inc., No. 91-CH-242 (Cir. Ct. of Sangamon County, February 2, 1994) (hereinafter "People v. Watts"). As ESG Watts describes that order, the circuit court entered a finding of civil contempt against ESG Watts, but provided that ESG Watts could purge itself of contempt by moving the excess waste or obtaining local siting approval to leave the waste in place. Resp. Br. at 4-5. ESG Watts did file a request for local siting approval before the Sangamon County Board on December 2, 1996. The County Board denied siting approval on May 31, 1997. ESG Watts' July 3, 1997 petition to this Board for review of the County Board's denial was decided today. See ESG Watts, Inc. v. Sangamon County Board (June 17, 1999), PCB 98-2. The Board vacated the County Board's decision, finding that the County Board had no jurisdiction over the siting application due to ESG Watts' failure to give notice to property owners entitled to notice under Section 39.2 of the Act (415 ILCS 5/39.2 (1996)).

Prior Rulings Here

The Board accepted this matter for hearing on September 4, 1997. On November 24, 1997, ESG Watts filed a motion *in limine* seeking to prevent any testimony concerning the June 5, 1997 inspection from being presented at hearing. ESG Watts argued that the inspections amounted to trespass and were a warrantless search of ESG Watts' property. The hearing officer denied the motion *in limine*. See County of Sangamon v. ESG Watts, Inc. (December 22, 1997), AC 98-4 (Hearing Officer Order).

A hearing was held before Board Hearing Officer Kathleen Crowley on December 7, 1998, in Springfield, Illinois.² The County presented testimony of one witness, Allen Alexander, an associate sanitarian and certified solid waste inspector employed by the Sangamon County Department of Public Health. Tr. at 6. ESG Watts called one witness, John Reiser, the landfill's technical representative and certified operator. Tr. at 44. The hearing officer found both witnesses credible. Tr. at 48; see also Hearing Report, December 9, 1998 at 2. Each of the parties filed posthearing briefs in this matter: the County filed its brief on December 18, 1998, and ESG Watts filed its brief on January 20, 1999.³

THE ADMINISTRATIVE CITATION PROCESS

The process for issuing and contesting administrative citations is set forth in Sections 21(o), 21(p), 31.1, and 42(b)(4) of the Act (415 ILCS 5/21(o), 21(p), 31.1, 42(b)(4) (1996). Among other things, the Act allows for issuance of an AC when a person fails to provide final

¹ The Board notes that in ESG Watts, Inc. v. Sangamon County Board (June 17, 1999), PCB 98-2, the record refers to approximately 500,000 cubic yards of overfill while in this matter, the record refers to 300,000 cubic yards of overfill.

² The December 7, 1998 hearing transcript will hereinafter be cited to as "Tr. at ___." Hearing exhibits entered by the petitioner, County, will be cited to as "Pet. Exh. ___." Hearing exhibits entered by the respondent, Watts, will be cited to as "Resp. Exh. ___."

³ The briefs filed by the petitioner and respondent will hereinafter be cited to as "Pet. Br. at ___" and "Resp. Br. at ___."

cover within established time limits (415 ILCS 5/21(o)(6) (1996)) or deposits refuse in any unpermitted portion of the landfill (415 ILCS 5/21(o)(9) (1996)).

Section 31.1(b) of the Act provides that the Agency may delegate its authority to inspect landfills and issue administrative citations to units of local government. Such delegation must be by a written delegation agreement under Section 4(r) of the Act. 415 ILCS 5/4(r) (1996).

Section 31.1(d)(2) outlines the procedure by which a person receiving an AC may petition the Board for review of the AC and cause the person issuing the AC to present proof that the violation occurred as alleged. If the record demonstrates that such violation occurred, then the Board must adopt an order after finding the violation occurred as alleged and imposing a penalty of \$500 per violation as required by Section 42(b)(4) of the Act (415 ILCS 5/42(b)(4) (1996)). The only statutory defense to a finding of violation is if “the person appealing the citation has shown that the violation resulted from uncontrollable circumstances” in which case the Board shall adopt an order which imposes no penalty. 415 ILCS 5/31.1(d)(2) (1996).

JUNE 5, 1997 SITE INSPECTION

There is no real dispute about the conditions present at the site on June 5, 1997. As detailed below, ESG Watts’ arguments center around the legality of the site inspection and issues of whether conditions existing at the site were permissible pursuant to the circuit court’s order in the People v. Watts case.

ESG Watts, an Iowa corporation, owns and operates a sanitary landfill, known as the Sangamon County Landfill, located in Sangamon County, Illinois. Pet. at 1. ESG Watts operates the landfill under Agency Permit No. 1980-23-OP, which is designated with Site Code No. 1678220037. *Id.*

On June 5, 1997, Allen Alexander inspected the landfill along with another inspector, Derrick Pehlman. Tr. at 7, 28, 34. In delegation agreements entered into pursuant to Section 4(r) of the Act (415 ILCS 5/4(r) (1996)), the Agency has delegated authority to conduct landfill inspections and to issue ACs to the Sangamon County Department of Public Health. Accordingly, part of both Alexander’s and Pehlman’s duties included the inspection of facilities that operate under Agency permits. Tr. at 7. As reflected in the June 5, 1997 inspection report, Alexander and Pehlman were at the landfill from 12:45 p.m. to 1:30 p.m. observing and photographing conditions at the site. See AC, Alexander Affid. Alexander indicated that he entered the landfill site to take pictures of the landfill with Pehlman. Tr. at 28, 34. Alexander did not see any ESG Watts employees, and so the inspectors proceeded with the investigation in their absence.

Alexander testified that he could see that portions of the landfill were not covered as he stood on Sandhill Road, a road leading to the landfill. Tr. at 10, 16. Specifically, Alexander saw uncovered refuse which was visible about midway up the slope on the north corner of the northeastern slope of the landfill. Tr. at 10-13, 17; Pet. Exh. A-1; see Pet. Exh. B.

Alexander also testified that just south of the north corner of the northeastern slope there was not adequate final cover applied to the landfill. Tr. at 14; Pet. Exh. A-2; see Pet. Exh. B.

The uncovered refuse indicated to Alexander that there was inadequate final cover applied at these locations of the landfill. Tr. at 14. Alexander testified that there was no waste visible through the cover on the south face of the landfill. Tr. at 30-31; Pet. Exh. A-3. Alexander stated that no final cover had been applied to the landfill since the contours and height of the landfill had not changed. Tr. at 31-33. Alexander believed that the landfill had extended its deposition of waste beyond the permitted vertical and lateral boundaries. Tr. at 14. Alexander testified that he at no time saw, during monthly inspections of the landfill, the removal of 300,000 cubic yards of overfill as was required by the Sangamon County Circuit Court in People v. Watts.

The testimony of ESG Watts' witness Reiser did not contradict that of Sangamon County's witness Alexander. Reiser stated that he typically accompanied inspectors during inspections at the landfill; however he was not present on June 5, 1997, during the timeframe that Alexander and Pehlman inspected the landfill. Tr. at 36, 38. Reiser stated that he did not recall whether uncovered waste was present on the landfill on June 5, 1997. He also stated that there was not six feet of cover on the landfill as required by permit. Tr. at 41-43.

DISCUSSION

Since there was no apparent contention regarding the facts in this case, the Board will first present and discuss ESG Watts' legal arguments prior to making its factual findings.

ESG Watts' Res Judicata Claim

ESG Watts initially argues that this AC is barred by *res judicata*. The doctrine of *res judicata* provides 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. See Torcasso v. Standard Outdoor Sales, Inc., 157 Ill. 2d 484, 626 N.E.2d 225 (1993); Rodney B. Nelson v. Kane County Board, et al. (May 18, 1995), PCB 95-56.

Citing People v. Watts and the contempt order, ESG Watts accordingly contends that this AC should be dismissed consistent with the doctrine of *res judicata*. Resp. Br. at 4-5; Tr. at 4-5. ESG Watts reminds that, although the circuit court entered a finding of civil contempt against ESG Watts, it provided that ESG Watts could purge itself of contempt by moving the excess waste or obtaining local siting approval. Resp. Br. at 4-5. ESG Watts argues that because it timely filed its request for local siting approval before the Sangamon County Board by December 2, 1996, and because it timely filed its petition for review of the May 31, 1997 Sangamon County Board's denial of siting approval before the Board on July 3, 1997, it should not be held in violation of excess overfill and placement of final cover for an administrative citation cited on June 5, 1997. Resp. Br. at 4-5. ESG Watts believes that the appeal timeframe essentially "freezes" ESG Watts' capability to violate and be cited for an administrative citation. The Board does not agree.

This is the second time the Board has addressed an argument from ESG Watts that *res judicata* bars issuance of ACs at this site for the cover and overfill violations at issue here. ESG Watts arguments are no more persuasive here than they were in the previous case, Sangamon County v. ESG Watts, Inc. (March 6, 1997), AC 94-28 *et al.*, slip op. at 2-4. In finding that pending administrative citations issued after the entry of the court's order were not barred by the doctrine of *res judicata*, the Board stated:

[e]ven if the overfill in the administrative citations is the same overfill which was the subject of the circuit court action, the existence of overfill at the Sangamon County Landfill at the time of the inspections, which were performed subsequent to the circuit court action, constitute separate, additional violations of the Act. ESG Watts, Inc. (March 6, 1997), AC 94-28 *et al.*, slip op. at 5.

For the reasons quoted from its earlier opinion above, the Board finds that the instant AC is not barred by *res judicata*.

ESG Watts' Allegations of Unconstitutional Search

ESG Watts also argues that its Fourth Amendment rights (U.S. Const. Amend. IV) were violated when the inspectors inspected the landfill. Resp. Br. at 5. This issue was previously raised and addressed by the hearing officer in the context of the motion *in limine* discussed above (*supra*, p. 3). Section 4 of the Act (415 ILCS 5/4(d) (1996)) allows the Agency (or its delegated authority) to "enter at all reasonable times upon any private or public property" for the purpose of "[i]nspecting and investigating to ascertain possible violations of the Act or of regulations thereunder or of permits or terms or conditions thereof." The Board finds that, in entering the landfill at 12:45 p.m. during a regular business day, Alexander and Pehlman entered the landfill at a reasonable time to perform their inspection. The Board finds no violation of ESG Watts' Fourth Amendment rights.

ESG Watts also argues that the hearing officer made improper evidentiary rulings at hearing. The Board finds no merit in ESG Watts' arguments and finds that the hearing officer properly conducted the hearing in accordance with the requirements in the Board's procedural rules. See 35 Ill. Adm. Code 103.200. The hearing officer set forth a statement as to the witnesses' credibility in accordance with 35 Ill. Adm. Code 103.203(d) and the Board finds no reason to disturb the hearing officer's statement of credibility.

Finding of Violation

The Board finds that the County proved in its pleadings and at hearing that it had properly issued ESG Watts an AC on June 5, 1997. The record shows ESG Watts in violation of Sections 21(o)(6) and 21(o)(9) of the Act. Section 21(o)(6) states that no person shall conduct a sanitary landfill operation in a manner which results in the "failure to provide final cover within time limits established by Board regulations." 415 ILCS 5/21(o)(6) (1996). In this matter, the evidence and testimony show that ESG Watts failed to properly cover the landfill. Alexander testified that there was inadequate final cover just south of the north corner

of the northeastern slope of the landfill. Alexander knew that no final cover had been applied to the landfill since the contour and height of the landfill remained unchanged. Also, Alexander noticed uncovered refuse which indicated that ESG Watts had never applied proper cover. Further, the witness for ESG Watts, Reiser, testified that indeed six feet of cover was never applied to the landfill as required by permit. Accordingly, for these reasons, the Board finds ESG Watts in violation of Section 21(o)(6) of the Act. 415 ILCS 5/21(o)(6) (1996).

Section 21(o)(9) states that no person shall conduct a sanitary landfill operation in a manner which results in the “deposition of refuse in any unpermitted portion of the landfill.” 415 ILCS 5/21(o)(9) (1996). Again, the evidence and testimony show that ESG Watts deposited refuse in an area which was not properly permitted. Alexander testified that the landfill had extended its deposition of waste beyond the permitted vertical and lateral boundaries. The landfill was at least overfilled by 300,000 cubic yards without being permitted to do so. For these reasons, the Board finds ESG Watts in violation of Section 21(o)(9) of the Act. 415 ILCS 5/21(o)(9) (1996).

Penalty

Penalties in administrative citation actions are set forth in Section 42(b)(4) of the Act which states:

In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (o) or (p) of Section 21 of this Act shall pay a civil penalty of \$500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency. Such penalties shall be made payable to the Environmental Protection Trust Fund to be used in accordance with the provisions of the Environmental Protection Trust Fund, except that if a unit of local government issued the administrative citation, 50% of the civil penalty shall be payable to the unit of local government. 415 ILCS 5/42(b)(4) (1996).

ESG Watts is therefore ordered to pay a civil penalty of \$1,000 based on the violations. Further, pursuant to Section 42(b)(4) of the Act, ESG Watts is also required to pay hearing costs incurred by the Board and the County. The Clerk of the Board and Sangamon County will therefore be ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon ESG Watts. Upon receipt and subsequent to appropriate review, the Board will issue a separate final order in which the issue of costs is addressed.

For the reasons stated herein, the Board finds that ESG Watts violated Sections 21(o)(6) and 21(o)(9) of the Act. Accordingly, ESG Watts is liable for a penalty of \$1,000.

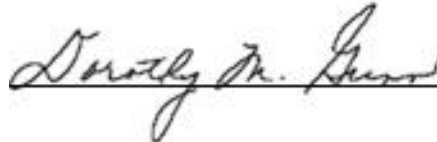
This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. The Board finds that respondent, ESG Watts, Inc., violated Sections 21(o)(6) and 21(o)(9) of the Illinois Environmental Protection Act. 415 ILCS 5/21(o)(6), 21(o)(9) (1996).
2. Sangamon County must file a statement of its hearing costs, supported by affidavit, with the Board and with proof of service on ESG Watts, within 15 days of the date of this order. Within the same 15 days, the Clerk of the Board must file a statement of the Board's hearing costs, supported by affidavit and with proof of service on ESG Watts.
3. ESG Watts is given leave to file a reply to the filings ordered in paragraph 2 of this order within 14 days after receipt of that information, but in no event later than 40 days after the date of this order.
4. No earlier than 40 days after the date of this order, the Board will issue a final order assessing a statutory penalty of \$500 for each violation, for a total civil penalty of \$1,000, and awarding appropriate costs.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above interim opinion and order was adopted on the 17th day of June 1999 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board