

ILLINOIS POLLUTION CONTROL BOARD
April 4, 2002

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 97-2
)	(Enforcement – Land, Water)
JERSEY SANITATION CORPORATION, an)	
Illinois corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by N.J. Melas):

On July 8, 1996, the Attorney General’s Office, on behalf of the People of the State of Illinois (People) initiated this action by filing a complaint. The People filed their second amended complaint on January 8, 2001 (Sec. Am. Comp.). The People alleged that respondent Jersey Sanitation Corporation (Jersey) violated various sections of the Environmental Protection Act (Act), the Board’s regulations, and several permit conditions with respect to Jersey’s operation of a sanitary landfill in Jerseyville, Jersey County.

This matter is before the Board on a motion for summary judgement (Mot.) filed by Jersey on November 5, 2001. The motion only pertains to portions of two counts in the complaint relating to alleged violations of disputed permit conditions. *See infra* pp. 3-4.

For the reasons outlined below, the Board grants Jersey’s motion for summary judgment. The Board finds that Jersey did not violate conditions A.4., C.2., C.3., and C.4. of its Supplemental Permit No. 1999-209-SP. Consequently, Jersey did not violate related Sections of the Act and the Board’s regulations, namely 415 ILCS 5/21(d)(1), 5/21(d)(2), 5/22.17(a) and 5/22.17(b) (2000); and 35 Ill. Adm. Code 745.181 and 745.201.

PROCEDURAL MATTERS – THE INSTANT CASE

After the filing of the motion for summary judgment, the People filed a motion to strike and response to Jersey’s motion for summary judgment (Mot. Str.) on December 11, 2001. On December 21, 2001, Jersey filed its response to the People’s motion to strike. (Resp.)

On January 2, 2002, the People filed a motion for leave to file a reply to Jersey’s response, claiming that new arguments were included in Jersey’s response and that the People would be materially prejudiced if not allowed to address the new argument. On January 17, 2002, in the response to People’s leave to file a reply, Jersey argued that it was not injecting new theories of arguments into the enforcement case and claimed that the people were not materially prejudiced. In a January 18, 2002 order, Board Hearing Officer Steven Langhoff

denied the People's leave to file a reply because the People did not show that they were materially prejudiced.

On January 23, 2002, the People filed a motion for leave to amend by interlineation, clarifying a citation in its motion to strike and in its leave to file a reply. The Board grants the motion for leave to amend with respect to the motion to strike only. On January 24, 2002, Jersey filed an errata sheet correcting a case citation in its response. The Board notes the correction.

STANDARD OF REVIEW

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." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

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." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, 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 (2nd Dist. 1994).

THE RELATED PERMIT APPEAL

On October 5, 1999, the Illinois Environmental Protection Agency (Agency) granted Jersey a post-closure permit for its sanitary landfill, also known as Supplemental Permit No. 1999-209-SP. Jersey was required to comply with several conditions in the Supplemental Permit. After the Board granted a joint request for extension of the appeal period, on January 3, 2000 Jersey timely filed a permit appeal to challenge the following conditions in the Supplemental Permit: A.4., B.6., C.1., C.2., C.3, C.4., and C.8. On June 21, 2001, the Board granted Jersey's motion for summary judgment and also struck the aforementioned conditions from Jersey's permit. In that order, the Board found that Jersey had demonstrated that, absent the conditions, the Supplemental Permit would not violate the Act or the Board's regulations. Jersey Sanitation Corp. v. IEPA, PCB 00-82, slip op. at 15 (June 21, 2001). The Board subsequently issued an order on September 20, 2001, denying the People's motion for reconsideration in PCB 00-82.

On October 25, 2001, the People submitted to the Illinois Appellate Court, Fifth Judicial Circuit a Notice of Filing and Petition for Direct Review of the Board's orders of June 21, 2001 and September 20, 2001 in PCB 00-82 (No. 5-01-0845). Mot. Str. at 2. On November 8, 2001, Jersey filed a Notice of Filing and Petition for Cross Appeal/Review. *Id.* These matters are still pending before the appellate court.

THE INSTANT CASE:

DISPUTED CONDITIONS IN THE SUPPLEMENTAL PERMIT

Jersey claims that there is no genuine issue of material fact regarding the stricken conditions in the Supplemental Permit and claims that summary judgment in its favor is therefore proper in the instant enforcement matter. Jersey claims that the Board needs only to determine if the stricken conditions in the Supplemental Permit and the related provisions in the Act and the Board's regulations are applicable to Jersey. Jersey requests summary judgment on conditions A.4., C.2., C.3, and C.4 in the Supplemental Permit. Jersey also requests summary judgment on the alleged violations of the Act and the Board's regulations related to the alleged permit violations: Sections 21(d)(1), 21(d)(2), 22.17(a) and 22.17(b) of the Act; and 35 Ill. Adm. Code 745.181 and 745.201.¹ Mot. at 4-5. The disputed permit conditions and related alleged violations of the Act and the Board's regulations are found in two counts (IV(D) and IX) of the second amended complaint.

Count IV(D)

Condition A.4. of the Supplemental Permit requires that the person responsible for post-closure care at a sanitary landfill have a valid prior conduct certification. The People alleged that no one responsible for post-closure care at Jersey's landfill had a current valid prior conduct certification. Therefore, the People alleged that Jersey was in violation of Condition A.4., and, as a result, the People also alleged that Jersey was in violation of 35 Ill. Adm. Code 745.181 and 745.201 and Sections 21(d)(1) and 21(d)(2) of the Act. Sec. Am. Comp. at 22-24. Sections 745.181 and 745.201 of the Board's regulations mandate that chief operators of waste disposal sites have a prior conduct certification. Sections 21(d)(1) and 21(d)(2) of the Act state that no one shall conduct a waste-storage or waste-disposal operation in violation of a permit condition or in violation of any Board regulation.

In PCB 00-82, the Board found that the closure and post-closure care of Jersey's sanitary landfill is governed by 35 Ill. Adm. Code 807. The Board found that since Jersey's sanitary landfill had a certificate of closure and was in post-closure care, it had ceased day-to-day operations. Thus, Jersey was not required to have a chief operator as defined by 35 Ill. Adm. Code 745. The Board found that, as a matter of law, Condition A.4. of the Supplemental Permit was unnecessary. Jersey Sanitation Corp., PCB 00-82, slip op. at 7, 9.

Conditions C.2. and C.3. of the Supplemental Permit mandate that the operator of Jersey's sanitary landfill evaluate groundwater quality. The operator is also supposed to provide groundwater sampling and an analysis of groundwater limit exceedences. The People alleged that Jersey failed to engage in such monitoring and reporting and therefore violated Conditions C.2. and C.3. As a result, the People also alleged that Jersey violated Sections 21(d)(1) and 21(d)(2) of the Act. Sec. Am. Comp. at 26-28.

Condition C.4. of the Supplemental Permit requires that during the post-closure care period, Jersey was to monitor and remediate any gas, water, or settling problems. The People

¹ The People allege other violations of Sections 21(d) and 22(a) of the Act related to other permits and other conditions at Jersey's sanitary landfill that are not at issue here.

alleged that that Jersey failed to engage in such monitoring and remediation and therefore violated Condition C.4. As a result, the People also alleged that Jersey violated Sections 21(d)(1), 21(d)(2), 22.17(a), and 22.17(b) of the Act. Sec. Am. Comp. at 25-26. Sections 22.17(a) and 22.17(b) of the Act state that the owner and operator of a sanitary landfill must monitor and remediate any gas, water, or settling problems at closed landfills.

In PCB 00-82, the Board found that Jersey did not waive the right to contest Conditions C.2., C.3., and C.4. because Jersey did not contest them when they were in a prior permit. The Board also struck Conditions C.2., C.3., and C.4. because they were unnecessary to accomplish the purposes of the Act and the Board's regulations. Absent these conditions, the permit would not have violated the Act or the Board's regulations. Although Section 22.17 of the Act requires monitoring for gas, water, and settling at closed landfills, neither the Act nor the Board's regulations require additional specificity. The Board found that Jersey's own plan for monitoring was sufficient. Jersey, PCB 00-82, slip op. at 12-14.

Count IX

The People alleged that at Agency inspections on November 19, 1998 and June 6, 2000, Jersey did not have a current chief operator with prior conduct certification at its sanitary landfill. The People alleged that, as a result, Jersey was in violation of Section 21(d)(2) of the Act and 35 Ill. Adm. Code 745.181 and 745.201. Sec. Am. Comp. at 40-42. However, in PCB 00-82 the Board found that Jersey was not required to have a chief operator with prior conduct certification. *See supra* p. 3.

ARGUMENTS/DISCUSSION

The People claim that, despite the holding in the prior permit appeal, there are still genuine issues of material fact and law at issue in this enforcement action and that a summary judgment in favor of Jersey is inappropriate at this time. Mot. Str. at 4.

Res Judicata

Res judicata is a legal doctrine which states that once a court decides a cause of action, that cause of action cannot be retried between the same parties. ESG Watts, Inc. v. IEPA, PCB 96-181, slip op. at 2 (July 23, 1998) and ESG Watts, Inc. v. IEPA, PCB 97-210, slip op. at 2 (July 23, 1998), citing Burke v. Village of Glenview et. al., 257 Ill. App. 3d 63, 69, 628 N.E. 2d 465, 469 (1st Dist. 1993). The elements of *res judicata* are: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identify of parties. ESG Watts, PCB 96-181 and 97-210, slip op. at 2, citing People ex rel. Burris v. Progressive Land Developers, Inc., 151 Ill. 2d 285, 294, 602 N.E.2d 820, 825 (1992).

Arguments

Jersey argues that *res judicata* does not apply. Instead Jersey claims that it is not in violation of the Conditions A.4, C.2, C.3, and C.4 and the related provisions in the Act and the Board's regulations because those conditions no longer exist. Resp. at 5. However, the Board

finds that Jersey is basically arguing that *res judicata* does apply in claiming that the decision from the permit appeal does not need to be decided again in the enforcement action.

The People state that a prior decision in a permit appeal is not *res judicata* in a subsequent enforcement action. Mot. Str. at 4, citing People v. Panhandle Eastern Pipeline Co., PCB 99-191 (Nov. 15, 2001); Panhandle Eastern Pipeline Co. v. IEPA, PCB 98-102 (May 20, 1999); Panhandle Eastern Pipeline Co. v. IEPA, PCB 98-102 (Jan. 21, 1999).

Discussion

In the Panhandle cases, the Board affirmed the Agency's denial of Panhandle's revised air pollution permit. The Board held that *res judicata* would not apply in a subsequent Panhandle enforcement case because "a permit appeal and an enforcement action are not the same cause of action, and therefore a decision in a permit appeal has no binding effect in a subsequent enforcement action". Panhandle, PCB 98-102, slip op. at 7-8 (May 20, 1999). The Board later found Panhandle liable for violations of the Act and the Board's regulations in the enforcement action, but did not base its finding on the holding in the Panhandle permit appeal. Panhandle, PCB 99-191 (Nov. 15, 2001).

The Board found that *res judicata* did not apply in ESG Watts because permit appeals and enforcement cases are not the same causes of action, there is a different inquiry in each one, and the burdens of proof rest on different parties. ESG Watts, Inc. v. IEPA, PCB 96-181, slip op. at 2 (July 23, 1998).

The Board finds that *res judicata* does not apply in the instant matter for the same reason that it found *res judicata* did not apply in Panhandle and ESG Watts. The PCB 98-102 permit appeal and this enforcement case are not the same cause of action.

Collateral Estoppel

Collateral estoppel can preclude relitigation of a specific issue even where *res judicata* does not apply. The Illinois Supreme Court has set three minimum threshold requirements for applying collateral estoppel: (1) the issue decided in the prior adjudication is identical with the one presented in the instant matter; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or a party in privity with a party to the prior adjudication. ESG Watts, PCB 96-181 and 97-210, slip op. at 2-3, citing Talarico v. Dunlap, 177 Ill. 2d 185, 191; 685 N.E.2d 325, 328 (1997).

To begin with, the Board finds that the first and third parts of the minimum threshold test have been met here. The same disputed permit conditions are at issue in PCB 00-82 and the instant matter. Estoppel is being asserted against the People in the instant matter, and the People are in privity with the Agency, the party opposing Jersey in PCB 00-82.

With respect to the second part of the threshold test, the People argue that the Board's order in PCB 00-82 may be reversed. Since Jersey's motion for summary judgment in this matter is based entirely on the Board's holding in the June 21 and September 20 orders in PCB

00-82, the People claim that the motion for partial summary judgment is not ripe until the 5th District Appellate Court decides this matter. Mot. Str. at 3-4. Jersey responds to the People's argument by stating that appeals do not affect the finality of or suspend operation of Board orders. Resp. at 4, citing 35 Ill. Adm. Code 101.904.

Section 101.904 of the Board's procedural regulations does not control here as it only provides that motions for reconsideration do not affect finality or suspend operation of Board orders. Nevertheless, the Board notes that the Act and the procedural regulations refer to Board orders on appeal as "final". See 415 ILCS 5/41 (2000); 35 Ill. Adm. Code 101.906. The Board finds that the summary judgment order in PCB 00-82 was a final judgment on the merits of that case for purposes of collateral estoppel. Accordingly, the three threshold requirements for collateral estoppel are met here.

There are exceptions to the applicability of collateral estoppel. Collateral estoppel must not be applied to bar a party from presenting a claim or defense unless no unfairness results to the party being estopped. ESG Watts, PCB 96-181 and PCB 97-210, slip op. at 2-3, citing Talarico, 177 Ill. 2d at 191-192. See also Van Milligan v. Board of Fire and Police Commissioners, 158 Ill. 2d 85, 96-97; 630 N.E.2d 830, 836 (1994). The Board finds that this exception does not apply to the facts herein. The People have not been barred from presenting claims of defenses.

In the ESG Watts cases, the Board also found that collateral estoppel does not apply if the burden of proof has shifted from the party against whom the doctrine is to be applied to its adversary. ESG Watts, PCB 96-181 and PCB 97-210, slip op. at 2-3, citing the Restatement (Second) of Judgments § 28(4). In the ESG Watts cases the burden shifted from the Agency (the complainant in the related enforcement action PCB 96-107) to ESG Watts. ESG Watts was the movant in a motion for summary judgment in those permit appeals. The Board found that collateral estoppel did not apply. *Id.*

In the instant matter, there has been no burden shift. In PCB 00-82, Jersey was the petitioner in a motion for summary judgment and had the burden of proof there: that the challenged conditions were not necessary to accomplish the purposes of the Act. In the instant matter, Jersey is again the petitioner in a motion for summary judgment and still has the burden of proof: that the stricken conditions do not apply to it and that lack of compliance with them does not result in a violation of the Act or Board regulations. The Board finds that the burden shifting exception does not apply here and thus finds that collateral estoppel does apply. It is not necessary to relitigate those conditions that the Board struck in the permit appeal.

In applying collateral estoppel, the Board finds that its decision from the PCB 00-82 permit appeal on the invalidity of the contested permit conditions applies to the instant enforcement case.

CONCLUSION

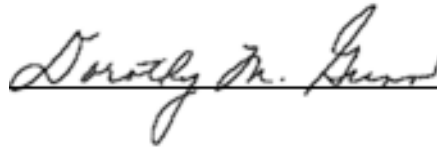
The Board grants Jersey's motion for summary judgment. The Board finds that Jersey did not violate the stricken conditions A.4., C.2., C.3., and C.4. of its Supplemental Permit No.

1999-209-SP. Consequently, Jersey did not violate related Sections of the Act and the Board's regulations, namely 415 ILCS 5/21(d)(1), 5/21(d)(2), 5/22.17(a) and 5/22.17(b) (2000); and 35 Ill. Adm. Code 745.181 and 745.201.

The Board orders the remaining allegations in this matter to hearing consistent with the Board's resources.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 4, 2002, by a vote of 6-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board