

ILLINOIS POLLUTION CONTROL BOARD
December 7, 1995

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 BELL SPORTS, INC., A CALIFORNIA)
 CORPORATION, AND WASTE HAULING)
 LANDFILL, INC., AN ILLINOIS)
 CORPORATION, AND WASTE HAULING,)
 INC., AN ILLINOIS CORPORATION,)
)
 Respondents.)
 -----)
 WASTE HAULING LANDFILL, INC.,)
 AN ILLINOIS CORPORATION, AND)
 WASTE HAULING, INC., AN ILLINOIS)
 CORPORATION,)
)
 Counterclaimants,)
)
 v.)
)
 BELL SPORTS, INC., A CALIFORNIA)
 CORPORATION,)
)
 Counter-respondent.)

PCB 95-91
(Enforcement-land)

ORDER OF THE BOARD (by M. McFawn):

This matter is before the Board on two motions to dismiss. The first is a joint motion to dismiss two counts of the State of Illinois' complaint¹ (Counts V and VI) which was filed by Waste Hauling Landfill, Inc. (WHLI) and Waste Hauling, Inc. (WHI) on September 11, 1995. The second is motion to dismiss filed by Bell Sports, Inc. on September 18, 1995 seeking to strike a counterclaim brought by WHLI and WHI against Bell Sports, Inc. Responses to each of the motions were timely filed by the State and WHLI/WHI respectively. For reasons more fully explained below, we deny both motions to dismiss and return this case to the hearing officer for scheduling of discovery and hearing.

¹The original complaint was filed by the Attorney General on behalf of the Illinois Environmental Protection Agency and the State of Illinois on June 14, 1995.

**WHL AND WHI'S MOTION TO DISMISS
COUNTS V AND VI OF THE COMPLAINT**

WHLI and WHI's September 11, 1995 motion to dismiss is the second motion to dismiss filed in this case by these parties. In denying WHLI and WHI's June 14, 1995 first motion to dismiss on August 3, 1995, the Board rejected WHLI and WHI's argument that the entire complaint before the Board arose out of the "same transaction or occurrence" as another matter pending before the circuit court in Macon County, Illinois since 1992 and that it was therefore subject to dismissal pursuant to Section 2-619(a)(3) of the Illinois Code of Civil Procedure. The Board, instead, found this case was not substantially similar to the matter pending in circuit court and that it was appropriate for this case to proceed to hearing before the Board. We agreed with the Attorney General that the two actions are different in that this case involves alleged violations of the State's Resource Conservation and Recovery Act provisions, while the case before the circuit court involves alleged violations for operating a sanitary waste landfill out of compliance with the Act and the Board's regulatory sanitary landfill requirements. (See Board Order of August 3, 1995 at 2.)

In the instant motion, WHLI and WHI renew their objection to the complaint going forward; however only as to Counts V and VI. In the instant motion, WHLI and WHI again argue under the principles of *res judicata* and *estoppel*, and additionally for the first time, under the common law doctrine of claim splitting,² that the State of Illinois can not proceed against WHLI and WHI before the Board while a case involving similar facts and allegations remains pending in the circuit court. WHLI and WHI further argue that the State of Illinois is barred by *res judicata* from obtaining relief before the Board when the State has already been awarded preliminary injunctive relief from the circuit court order regarding the substance of Counts V and VI.

In response, the Attorney General argues that the Board already decided the question of whether the complaint (or any portion thereof) should be dismissed on the basis that this case arises out of the "'same occurrence or transaction' as another matter pending before the circuit court", when the Board denied WHLI and WHI's first motion to dismiss on August 3, 1995. The Attorney General argues that on this ground alone, the motion should be denied. The Attorney General also argues that claim splitting does not prohibit the Attorney General from exercising his prosecutorial discretion of bringing this action before the

²Under the rule against claim splitting a plaintiff is not permitted to sue for part of a claim in one action and then sue for the remainder in another action. (*Rein v. David A. Noyes & Co.* (1st Dist. 1995) 649 N.E.2d 65, 208 Ill. Dec. 232.)

Board while a complaint remains pending in the circuit court. The Attorney General believes this is especially true here where Counts V and VI of the complaint before the Board relate to hazardous waste and Counts I and VI of the complaint in circuit court concern solid waste, rendering the two matters substantially different and thus, the complaint sufficient to survive a motion to dismiss. (Response at 5.)

We deny WHLI and WHI's second motion to dismiss and do so for the same reasons as articulated in our order of August 3, 1995. WHLI and WHI have failed to raise any new legal argument or present any other reason to alter or reconsider our earlier decision denying WHLI and WHI's first motion to dismiss. While WHLI and WHI now raise, for the first time, the issue of "claim splitting" after we have entered our August 3 order, we do not find this argument to be any more compelling than WHLI and WHI's prior *estoppel* and *res judicata* arguments previously raised on this issue. All of these legal theories share the same public policy concerns against avoiding the unnecessary harassment of multiplicitous lawsuits rising out of the same transaction or occurrence (See *Rein*, 208 Ill. Dec. at 235.) In this instance, the Board has already determined that the case pending before the Board was appropriately brought by the Attorney General and it is not substantially similar to warrant dismissal. We note additionally that the circuit court has made a similar finding.³ Therefore, we believe it appropriate that the Attorney General may bring the action before the Board, and we will not dismiss Counts V and VI.

**BELL SPORTS' MOTION TO DISMISS
THE COUNTERCLAIM OF WHLI AND WHI**

Also pending before the Board is a September 18, 1995 motion to dismiss the counterclaim of WHLI and WHI filed by Bell Sports. As part of WHLI and WHI's answer to the complaint (filed on September 11, 1995), these two respondents included a counterclaim against Bell Sports which essentially alleges that the paint sludge by-products at issue in this case were generated by Bell Sports without regard to the RCRA permitting, hazardous waste determination, or marking or analysis requirements of the Board's regulations. WHLI and WHI further allege that Bell Sports' actions have caused WHLI and WHI to be subjected to potential civil penalties through "no fault of its own and due

³On September 14, 1995, the circuit court in denying a motion for preliminary injunction to prevent the Attorney General from proceeding against Waste Hauling Landfill, Inc. before the Board in the instant action, held that it could not enjoin the Director of the IEPA from proceeding because this case is "not technically a multiplicitous action" to the matter pending in circuit court. (*People v. Waste Hauling Landfill, Inc.*, No. 92-CH-5, September 14, 1995, Order at 2.)

solely to the failure of the Respondent, Bell Sports, Inc., to conduct its operations in such a manner as to determine whether its paint sludge may or may not contain excess levels of substances alleged to be hazardous waste." (WHLI and WHI Answer/Counterclaim at 18.) WHLI and WHI thus request that the Board assess civil penalties against Bell Sports only and "exonerate" WHLI and WHI. (*Id.*)

The motion to dismiss brought by Bell Sports argues that the counterclaim is "duplicative" of the complaint filed by the State of Illinois and frivolous and should therefore be dismissed under the Board's standards for "frivolous and duplicitous determinations". (Motion at 3-4.) Bell Sports also argues it is "frivolous" because the counterclaim can be read to seek monetary compensation from Bell Sports to reimburse WHLI and WHI for their share of any civil penalties that may be assessed in this case.

We deny the motion to dismiss and do so because it is clear that WHLI and WHI have the right to file a private citizen enforcement actions against Bell Sports pursuant to Section 31(b) of the Act. (415 ILCS 5/31(b).) Therefore, for administrative efficiency and because the claims involve the same site and the same parties as the principal case, it is equally appropriate that a counterclaim (or crossclaim) also be allowed. (See e.g. *Lefton Iron and Metal Co. v. Moss-American Corp. and Kerr-McGee Chemical Corp.* (March 9, 1989) PCB 87-191, 97 PCB 110 (the procedural rules do not necessarily preclude allowing a counterclaim).) In several private citizen enforcement actions, the Board has allowed the filing of a counterclaim⁴ and in one case, has consolidated a separate citizens' enforcement action together with a State-initiated enforcement action, so as to adjudicate the case in the same proceeding. (*People v. Boyd Brothers*, PCB 94-275 and *Boyd Brothers v. Abandoned Mined Lands Reclamation Council*, PCB 94-311 (consolidated December 1, 1994).)

In denying the motion to dismiss we find that the counterclaim is neither frivolous nor duplicitous as we believe that WHLI and WHI are entitled to argue, among other things, and present evidence on the issue of responsible parties, liability for violating the Act and any corresponding regulations. Importantly, WHLI and WHI are entitled to offer evidence on the issue of the proper apportionment of any civil penalties that the Board may award.

Accordingly, both the joint motion to dismiss two counts of the State of Illinois' complaint (Counts V and VI) filed by WHLI

⁴In addition to *Lefton Iron and Metal Co.*, the Board has also allowed counterclaims in *Miehle v. Chicago Bridge and Iron Co.* (December 16, 1993) PCB 93-150) and *Mandel v. Kulpaka* (February 25, 1995 and August 2, 1995) PCB 92-33.

and WHI on September 11, 1995, and the Bell Sports' motion to dismiss the counterclaim brought by WHLI and WHI, are denied. As a hearing officer has been assigned to this case, this matter shall proceed to hearing. We expect the proof at hearing will conform with the elements of the complaint brought by the State of Illinois and there will be a nexus to the hazardous waste violations, and the State should not prove up violations that are pending in circuit court. Additionally, Bell Sports has requested in a motion filed both on October 2, 1995 and November 1, 1995, an extension of time in which to file an answer to WHLI and WHI's counterclaim. The motion is granted. The answer is now due on or before December 21, 1995.

IT IS SO ORDERED.

Board member J. Theodore Meyer concurred in part and dissented in part.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 17th day of December, 1995, by a vote of 5-1.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board