ILLINOIS POLLUTION CONTROL BOARD
May 18, 1995

RODNEY B. NELSON, M.D.,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 95-56
	)	(Citizen Enforcement - Land)
KANE COUNTY BOARD, WARREN KAMMERER, CHAIRMAN,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by M. McFawn):

This matter is before the Board upon a complaint filed by Rodney B. Nelson, M.D. (Nelson) on March 17, 1995. The complaint alleges that two of the conditions imposed by Kane County upon its January 11, 1994 grant of siting approval for an expansion of the Settler's Hill Landfill constitute an unreasonable amendment to the application, which render the entire application approval invalid. (Complaint at 2.) Nelson therefore seeks to have the Board declare that the siting approval granted by Kane County for expansion of the Settler's Hill Landfill is invalid.

Pursuant to Section 31(b) of the Environmental Protection Act (Act), the Board must make a determination as to whether the complaint is frivolous or duplicitous. Section 103.124(a) of the Board's procedural rules provides:

> If a complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the Board agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the compliant is not duplicitous, this does not preclude the filing of motions regarding the sufficiency of the pleadings.

(35 Ill. Adm. Code 103.124.)

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. (Brandle v. Ropp, PCB 85-68, 64 PCB 263 (1985).) An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. (Citizens for a Better Environment v. Reynolds Metals, Co., PCB 73-173, 8 PCB 46 (1973).) Because we find that the complaint

does not state a claim upon which relief can be granted, we find that this action is frivolous.

As an initial matter, we note that this action was filed as a citizen's enforcement action. Section 103.122(c)(1) of the Board's procedural rules requires that a formal complaint contain "[a] reference to the provision of the Act and regulations which the respondents are alleged to be violating." (35 Ill. Adm. Code 103.122(c)(1).) We find that Nelson's complaint fails to allege any violations of the Act which are properly the subject of an enforcement action.

The only section Nelson alleges has been violated is Section 39.2; he does not allege that the County is polluting in violation of the Act or Board regulations. In response to questions 6 and 7 of the Board's citizen complaint package, which ask the complainant to describe the type, location, duration and frequency of the alleged pollution, Nelson's complaint responds "not applicable". (Complaint at 12.) Similarly, in response to question 8, which asks the complainant to describe any bad effects of the alleged pollution on human health, plant or animal life, or the environment, Nelson's complaint responds "not applicable." (Complaint at 13.) The Board therefore finds that, when viewed as an enforcement action, the complaint fails to state a claim upon which relief can be granted, and that this action is therefore frivolous.

Concerning the alleged violations of Section 39.2, Nelson's complaint is an attempted challenge to the siting decision of the Kane County Board, wherein siting approval was granted for the expansion of the Settler's Hill Landfill. However, as set forth below, when viewed in this light, the complaint fails to state a claim upon which relief can be granted.

The Illinois siting law, sometimes known as S.B. 172, which is codified as part of the Act, gives county and municipal governments a limited degree of control over the siting of new solid waste disposal sites within their boundaries. (*See* M.I.G. Investments, Inc. v. IEPA, 119 Ill.Dec. 533, 535; 523 N.E.2d 1 (Ill. 1988).) Furthermore, Section 39.2(g) of the Act provides in relevant part:

> The siting approval, procedures, criteria and appeal procedures provided for in this Act for new pollution control facilities shall be the exclusive siting procedures and rules and appeal procedures for facilities subject to such procedures.

The sole and exclusive mechanism, then, for a third party to challenge a siting decision of a county board or the governing body of a municipality is set forth at Section 40.1 of the Act. This section provides in relevant part:

> If the county board or the governing body of a municipality . . . grants approval under Section 39.2 of this Act, a third party other than the applicant who participated in the public hearing conducted by the county board or governing body of the municipality may petition the Board within 35 days for a hearing to contest the approval. . . .

(415 ILCS 5/40.1(b).)

Nelson asserts that his complaint is not barred by the statutory time limits contained in the Act since the complaint is not based on the record developed during the public hearing held to consider the original application. We disagree. Because Nelson is seeking to challenge conditions imposed as part of the siting decision of a county board, Section 39.2(g) of the Act requires that Nelson's complaint be subject to the limitations set forth in Section 40.1(b) of the Act. Since more than 35 days have elapsed since the county board's siting decision, this action is time-barred.

Furthermore, Nelson has already attempted to challenge the Kane County Board's siting decision, in the action docketed as Rodney B. Nelson, III, M.D. v. Kane County, Kane County Board, and Waste Management of Illinois, Inc. PCB 94-51. In an order issued April 21, 1994, the Board dismissed that action, finding that Nelson did not participate in the public hearing process before the county board as required by Section 40.1(b). (Rodney B. Nelson, III, M.D. v. Kane County, Kane County Board, and Waste Management of Illinois, Inc. (April 21, 1994) PCB 94-51.) As set forth below, the Board finds that the present action is barred by the doctrine of *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. (Torcasso v. Standard Outdoor Sales, Inc., 193 Ill.Dec. 192, 195, 626 N.E.2d 225 (Ill. 1993); People v. Chicago & Illinois Midland Ry. Co., 196 Ill.Dec. 369, 371, 629 N.E.2d 1213 (Ill.App. 5 Dist. 1994).) *Res judicata* bars all matters that were actually raised or could have been raised in the prior proceeding. (Torcasso v. Standard Outdoor Sales, Inc., 193 Ill.Dec. 192 at 195, 626 N.E.2d 225; People v. Chicago & Illinois Midland Ry. Co. at 195, 196 Ill.Dec. 369 at 371, 629 N.E.2d 1213; A.W. Wendell and Sons, Inc. v. Qazi, 193 Ill.Dec. 247, 256, 626 N.E.2d 280 (Ill.App. 2d Dist. 1993); *see also* Rodgers v. St. Mary's Hospital of Decatur, 173 Ill.Dec. 642, 647, 597 N.E.2d 616. (Ill. 1992).) An order dismissing a suit with prejudice is considered a final judgment on the merits for purposes of applying *res judicata*. (People v.

Chicago & Illinois Midland Ry. Co. 196 Ill.Dec. 369 at 371, 629 N.E.2d 1213.)

The test generally employed to determine the identity of cause of action for purposes of *res judicata* is whether the evidence needed to sustain the second cause of action would have sustained the first. (Torcasso v. Standard Outdoor Sales, Inc., 193 Ill.Dec. 192 at 195, 626 N.E.2d 225 *citing* Redfern v. Sullivan, 111 Ill.App.3d 372, 376, 67 Ill.Dec. 166, 444 N.E.2d 205 (4th Dist. 1982).) Alternatively, courts have employed a "transactional" approach, which considers whether both suits arise from the same transaction, incident or factual situation. (Rodgers v. St. Mary's Hospital of Decatur, 173 Ill.Dec. 642 at 647, 597 N.E.2d 616.) We find that under either test, the present action is barred by the Board's action in Rodney B. Nelson, III, M.D. v. Kane County, Kane County Board, and Waste Management of Illinois, Inc. (April 21, 1994) PCB 94-51; *appeal dismissed sub nom.* Nelson v. Pollution Control Board, No. 2-94-0946 (3rd Dist. 1994).)

In this action and the prior action, the parties are the same, and the Board is the proper forum with competent jurisdiction. The prior action in PCB 94-51 conclusively determined Nelson's right to challenge the Kane County Board's siting decision, and was a final determination on the merits as to Nelson's statutory right to seek relief.[1] In the present action, Nelson is again attempting to appeal the siting decision of the Kane County Board, despite the prior adjudication which held that he failed to participate in the public hearing process before the county board as required by Section 40.1(b). We therefore hold that the prior action acts as an absolute bar to the present action.

CONCLUSION

We find that this action, when viewed as an enforcement action, fails to allege a violation of the Act or related regulations, as required by Section 103.122(c)(1) of the Board's procedural rules. Alternatively, if this action is viewed as a challenge to the Kane County Board's siting decision, we find that it is subject to the limitations set forth in Section 40.1(b) of the Act, and that it is therefore untimely, since it was not filed within 35 days of the Kane County Board's siting decision. Furthermore, such a challenge to the Kane County

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[1] The Board reviewed the Kane County Board's decision on the merits in the related action City of Geneva v. Waste Management of Illinois, Inc. and County Board, County of Kane, State of Illinois (July 21, 1994) PCB 94-58.

Board's siting decision is barred by the doctrine of *res judicata*, due to the Board's dismissal of Nelson's prior action, docketed as PCB 94-51. We therefore find that this action does not state a claim upon which relief can be granted, and is, therefore, frivolous. This action is hereby dismissed and this docket is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (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 order was adopted on the 18th day of May 1995, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board