

ILLINOIS POLLUTION CONTROL BOARD
September 18, 1997

ENVIRONMENTAL SITE DEVELOPERS,)
INC., an Illinois corporation,)
)
Complainant,) PCB 96-180
) (Enforcement - Water - Citizens)
v.)
)
WHITE & BREWER TRUCKING, INC., an)
Illinois corporation,)
)
Respondent.)

PEOPLE OF THE STATE OF ILLINOIS,)
) PCB 97-11
Complainant,) (Enforcement - Water)
)
v.)
)
WHITE & BREWER TRUCKING, INC., an)
Illinois corporation,)
)
Respondent.)

ORDER OF THE BOARD (by M. McFawn):

On August 18, 1997, White & Brewer Trucking, Inc. (White & Brewer) filed with the Board a "Motion to Reconsider" and "Memorandum of Law in Support of the Motion to Reconsider" (Memorandum or Mem.) seeking reconsideration of the Board's order of July 10, 1997. In that order, the Board denied White & Brewer's motion for stay of the proceedings and consolidated the two cases brought before the Board involving the same landfill: Environmental Site Developers, Inc. v. White & Brewer Trucking, Inc., PCB 96-180 and People vs. White & Brewer Trucking, Inc., PCB 97-11. In its motion, White & Brewer asks that the Board reconsider the denial of the stay and the consolidation of these two cases. Environmental Site Developers, Inc. (ESDI) filed its response to White & Brewer's motion on August 21, 1997. The Attorney General did not file a response on behalf of the People of the State of Illinois (People).

On July 10, 1997, the Board declined to stay the proceedings in PCB 96-180 based on the pendency of a lawsuit in federal district court in Springfield between ESDI and White & Brewer. At that time, the parties had not informed the Board that ESDI had recently filed a counterclaim in the federal lawsuit. In support of its motion for

reconsideration, White & Brewer informs the Board that ESDI filed a counterclaim in the federal lawsuit on May 15, 1997 (Mem. at 4), and in its response, ESDI did not dispute this representation. The Board accepts this representation as true, and assumes that the counterclaim was pending when the Board ruled on White & Brewer's motion for stay of proceedings. While the filing of the counterclaim is not "new" information since it occurred prior to the Board's ruling of July 10, 1997, the Board believes that the counterclaim should be factored into its decision whether this matter should be stayed. Therefore, we will reconsider our order of July 10, 1997.

In its order of July 10, 1997 the Board concluded that a stay of proceedings in PCB 96-180 was not appropriate, after considering the factors set forth by the Supreme Court in A. E. Staley Mfg. Co. v. Swift & Co., 84 Ill.2d 245, 419 N.E.2d 23 (1980): (a) comity, (b) prevention of multiplicity, vexation and harassment, (c) likelihood of obtaining complete relief in the foreign jurisdiction, and (d) the *res judicata* effect of a foreign judgment in the local forum. The Board now concludes that matters raised in ESDI's counterclaim significantly impact the Board's determination with respect to two of these factors: prevention of multiplicity of litigation, and the *res judicata* effect of a judgment by the federal court in the case before the Board.

In paragraph 25 of count IV of its federal counterclaim, ESDI alleges violations of Illinois law which mirror the allegations in paragraph 6 of its complaint in PCB 96-180, wherein ESDI lists the actions it claims have resulted in violations of the Illinois Environmental Protection Act, 415 ILCS 5 (Act). Thus, the issues central to ESDI's case before the Board are now before the federal court. Although ESDI has sought some different relief from the Board than the federal court (i.e., statutory penalties), clearly if PCB 96-180 and the federal case continue simultaneously, multiplicity of litigation would occur. Furthermore, since ESDI's counterclaim in the federal case involves the same issues as its complaint in PCB 96-180, a final determination in the federal case would now have a *res judicata* effect in the case before us.

The Board believes that these factors now shift the balance of considerations under the Staley analysis in favor of a stay of proceedings in PCB 96-180 pending resolution of the federal case. White & Brewer has apprised the Board of its pending motion to dismiss count IV of ESDI's federal counterclaim. Mem. at 6 n.2. In the event that count IV is dismissed by the federal court, or in the event that the federal court abstains from consideration of count IV, the Board's stay of proceedings in PCB 96-180 will be lifted. We note that on August 21, 1997 the Board entered an order requiring the parties to file copies of all documents filed in the federal case with the Board, and to file with the Board copies of all orders entered by the court in the federal case. That order was entered to ensure that the Board issues no further orders without complete information. That order is still in effect under the stay to ensure that the Board is apprised of any developments in that case which would affect the stay ordered today.

We turn now to White & Brewer's request for reconsideration of the Board's consolidation of PCB 96-180 with PCB 97-11. Although the Board does not find White & Brewer's arguments in its Memorandum persuasive, the Board will nevertheless vacate that portion of its July 10, 1997 order consolidating PCB 96-180 with PCB 97-11.

The allegations of the Attorney General in PCB 97-11, for the most part subsume the allegations of ESDI in PCB 96-180, however these allegations cover a wider range of time and additional violations of the Act. Resolution of the issues raised by ESDI in its counterclaim in the federal action will not resolve fully the claims of the Attorney General. Accordingly, the Board concludes that litigation of PCB 97-11, while it may overlap the subject matter of the federal court case at certain points, is not "multiplicious" of that litigation. Furthermore, since the complainant in PCB 97-11 is not a party to the federal litigation, a judgment in the federal court cannot have *res judicata* effect with respect to PCB 97-11, because application of *res judicata* requires identity of parties. People ex rel. Burris v. Progressive Land Developers, Inc., 151 Ill. 2d 285, 294, 602 N.E.2d 820, 825 (1992). The Board thus concludes that it is not appropriate to stay PCB 97-11. Because it is appropriate to stay PCB 96-180 but not to stay PCB 97-11, the Board concludes that consolidation of the two cases is not "in the interest of convenient, expeditious, and complete determination of claims," 35 Ill. Adm. Code 103.141. Consequently, consolidation is no longer warranted. The Board will vacate that portion of its July 10, 1997 order.

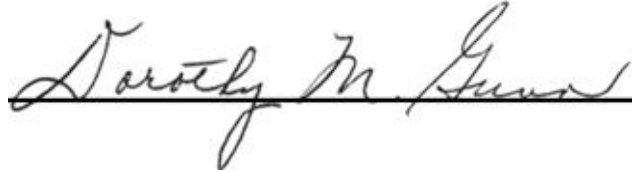
ORDER

First, the Board grants White & Brewer's motion that we reconsider our order of July 10, 1997, in light of the counterclaim recently filed by ESDI in the federal lawsuit. Upon reconsideration of that order, we hereby stay the proceedings in PCB 96-180 pending resolution of the federal lawsuit or occurrence of one of the other circumstances set forth above. Finally, we vacate that portion of our July 10, 1997 order consolidating PCB 96-180 and PCB 97-11.

IT IS SO ORDERED.

Board Member Kathleen M. Hennessey abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 18th day of September 1997, by a vote of 6-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board