

ILLINOIS POLLUTION CONTROL BOARD  
July 23, 1998

ESG WATTS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 96-181
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by M. McFawn):

On May 4, 1998, petitioner ESG Watts, Inc. (ESG Watts) filed a "Motion for Summary Judgment." On May 18, 1998, the Illinois Environmental Protection Agency (Agency) filed its response to the motion. ESG Watts' summary judgment motion is premised on the argument that groundwater classification cannot be litigated in this proceeding because the same issue was resolved in People v. ESG Watts, Inc. (February 5, 1998), PCB 96-107. The Board concludes that litigation of the groundwater classification issue in this proceeding is not barred, and denies ESG Watts' motion for summary judgment.

This proceeding was commenced on February 15, 1996, when ESG Watts filed a "Petition for Hearing" seeking review of conditions imposed by the Agency on ESG Watts' landfill permit for its facility in Rock Island County, commonly known as the Taylor Ridge landfill. The contested permit was No. 1995-374-SP, issued by the Agency on January 9, 1996. The permit revised the closure and post-closure plans for the Taylor Ridge landfill.<sup>1</sup> In its appeal, ESG Watts identified two specific conditions with which it took issue, and reserved the right to raise additional grounds for reversal of the Agency's decision. Its summary judgment motion involves the groundwater monitoring program included in the supplemental permit. ESG Watts objects because such a program was not included in the permit application and complains that "the [Agency] has unilaterally imposed [it]." Pet. at 2. The groundwater monitoring program treats the groundwater under the Taylor Ridge landfill as Class I (potable resource) groundwater. Permit Attachment A at 2, ¶ 6(b).

On February 5, 1998, the Board rendered a decision in PCB 96-107, an enforcement action filed against ESG Watts by the Attorney General on behalf of the

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<sup>1</sup> On May 23, 1997, while this case was pending, the Agency issued another supplemental permit for the Taylor Ridge landfill, No. 1996-404-SP, which was appealed in PCB 97-210.

people of the State of Illinois. The violations alleged in PCB 96-107 concerned ESG Watts' operation of the Taylor Ridge landfill. Among the violations alleged against ESG Watts in PCB 96-107 was a violation of 35 Ill. Adm. Code 620.410, which sets forth quality standards for Class I groundwater. The Board found in PCB 96-107 that the complainant had failed to prove that Class I groundwater standards applied, and applied instead Class II groundwater standards.

ESG Watts now asserts that under the doctrine of *res judicata*, the Board's determination in PCB 96-107 bars relitigation of groundwater classification in this proceeding. The Agency argues that the requirements for application of *res judicata* have not been met.

*Res judicata* is the legal doctrine which states that "once a cause of action has been adjudicated by a court of competent jurisdiction, it cannot be retried again between the same parties or their privies in a new proceeding." Burke v. Village of Glenview, 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 identity of parties, or privity between subsequent parties and the original parties. People ex rel. Burris v. Progressive Land Developers, Inc., 151 Ill. 2d 285, 294, 602 N.E.2d 820, 825 (1992). Where these elements are present, a judgment in a suit between the parties will be conclusive of all questions decided as well as questions which could have been litigated and decided, and will bar relitigation of any such issues in a subsequent action. *Id.*

The Board agrees with the Agency that *res judicata*, as defined above, does not apply here because there is not the required identity of causes of action. PCB 96-107 was an enforcement case, and this is a permit appeal. They are not the same "cause of action," primarily because of the different inquiry involved in each, as well as the burden of proof resting on different parties.

The Board next addresses the doctrine of collateral estoppel. Collateral estoppel can apply to preclude relitigation of a specific issue, even where the requirements for application of *res judicata* are not met. The Illinois Supreme Court has identified three minimum threshold requirements for the application of collateral estoppel. They are: (1) that the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) that there was a final judgment on the merits in the prior adjudication, and (3) that the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. Talarico v. Dunlap, 177 Ill. 2d 185, 191; 685 N.E.2d 325, 328 (1997).

Even if these threshold elements are satisfied, collateral estoppel does not apply in this case. Under Illinois law and federal law, there are exceptions to its applicability. The Illinois Supreme Court has ruled in Talarico that even where the threshold elements of the doctrine are satisfied and an identical common issue is found to exist between a former and current lawsuit, collateral estoppel must not be applied to

bar parties from presenting their claims or defenses unless it is clear that no unfairness result to the party being estopped. *Id.*

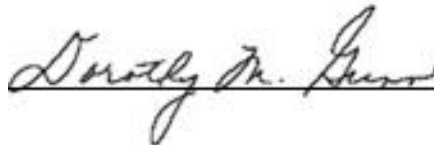
Additionally, the Restatement (Second) of Judgments provides that collateral estoppel does not apply if the burden of proof has shifted from the party against whom the doctrine is to be applied to its adversary. Restatement (Second) of Judgments § 28(4). Here, the burden of proof has shifted. In PCB 96-107, the Agency had the burden of proof. In fact, the Board found that there was not sufficient evidence before it to make a finding on the groundwater classification issue. Since the Agency had failed to meet its burden of proof, the Board considered the groundwater Class II as required by 35 Ill. Adm. Code 620.220(a). In this permit appeal, ESG Watts has the burden of proof. 415 ILCS 5/40(a). ESG Watt's burden is prove "that it is entitled to a permit and that the Agency's reasons for denial are either insufficient or improper." ESG Watts v. Pollution Control Board, 286 Ill. App. 3d 325, 331, 676 N.E.2d 299, 303 (3d Dist. 1997). Since the burden has shifted from the Agency to its "adversary," the exception applies and imposing collateral estoppel is inappropriate.

The Board concludes that even if the threshold elements for collateral estoppel are satisfied in this case, it is not applicable given these exceptions. ESG Watts' motion for summary judgment is therefore denied.

In making this ruling, the Board does not intend to alter the interpretation of the groundwater rules reached in PCB 96-107, specifically, that groundwater not shown to be Class I, III, or IV, is to be considered Class II groundwater. Thus, if no evidence pertaining to the classification of groundwater is present on the record in the instant case to demonstrate otherwise, the Board will consider the groundwater at Taylor Ridge to be Class II.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 23rd day of July 1998 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