

ILLINOIS POLLUTION CONTROL BOARD

July 21, 2005

MATHER INVESTMENT PROPERTIES,)	
L.L.C.,)	
)	
Complainant,)	
)	
v.)	PCB 05-29
)	(Citizens Enforcement - Land)
ILLINOIS STATE TRAPSHOOTERS,)	
ASSOCIATION, INC.,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J.P. Novak):

This action is a citizen's land enforcement case filed August 17, 2004 by Mather Investment Properties, L.L.C. (Mather) against the Illinois State Trapshooters Association, Inc. (Trapshooters Association). In its complaint (Comp.), Mather alleges that Trapshooters Association violated Section 21(e) of the Environmental Protection Act (Act) (415 ILCS 5/21(e) (2004)) by abandoning lead fragments, broken clay targets, and associated contamination constituting waste at a site that was not permitted as a waste disposal, treatment, or storage site under the Act or the regulations or standards promulgated under it. Comp. at 5-6. As a result of the parties' three agreed motions for extension of the time to file an answer, the Board deferred formal acceptance of the case.

Today the Board determines whether to accept the case and decides a motion by Trapshooters Association seeking a stay pending the outcome of a circuit court action among parties including these two. The Board first determines that Mather's complaint is neither duplicative nor frivolous and accepts it for hearing. The Board then determines that a stay of this proceeding is not appropriate in light of the contract action in the circuit court.

Below, the Board initially sets forth the procedural history of the case. The Board next determines that the complaint is neither duplicative nor frivolous and accepts it for hearing. The Board then summarizes the parties' arguments on Trapshooters Association's motion for stay before analyzing them and deciding the motion.

PROCEDURAL HISTORY

On August 17, 2004, Mather filed a one-count citizens complaint against Trapshooters Association. Mather alleges that Trapshooters Association violated Section 21(e) of the Environmental Protection Act (Act) (415 ILCS 5/21(e) (2004)). Comp. at 4-6. Trapshooters Association has filed no motion alleging that the complaint is duplicative or frivolous. See 35 Ill. Adm. Code 103.212(b) (requiring filing of motion within 30 days after service of complaint). The site at issue is an approximately 64-acre parcel near the intersection of Interstate Highway

72 and Illinois Route 4, located southwest of the City of Springfield in Sangamon County. Comp. at 1-2.

On October 13, 2004, Trapshooters Association filed an Agreed Motion for Extension of Time to File an Answer (Agreed Mot. 1) in which it sought 60 additional days to December 15, 2004, in which to file its answer. Trapshooters Association stated “the parties are presently engaged in serious settlement talks, but will need some additional time to reach final settlement.” Agreed Mot. 1 at 1. Trapshooters Association further stated that complainant’s counsel in an October 11, 2004 letter had no objection to granting the motion. *Id.* On October 18, 2004, Mather filed a Response to Agreed Motion for Extension of Time to File an Answer (Resp. 1) stating that it had no objection to the Board granting the agreed motion. Resp. 1 at 1. In an order issued October 14, 2004, Board Hearing Officer Carol Webb (*née* Sudman) granted the motion.

On December 15, 2004, Trapshooters Association filed another Agreed Motion for Extension of Time to File an Answer (Agreed Mot. 2) in which it sought 60 additional days to February 15, 2005, in which to file its answer. Trapshooters Association stated “the parties remain engaged in serious settlement talks, but will need some additional time to reach final settlement.” Agreed Mot. 2 at 1. Trapshooters Association further stated that complainant’s counsel had no objection to granting the motion. *Id.* On December 17, 2004, Mather filed a Response to Agreed Motion for Extension of Time to File an Answer (Resp. 2) indicating that it had no objection to the Board granting the agreed motion. Resp. 2 at 1. In an order issued December 21, 2004, Board Hearing Officer Carol Webb granted the motion.

On February 14, 2005, Trapshooters Association filed another Agreed Motion for Extension of Time to File an Answer or to Otherwise Plead (Agreed Mot. 3). Trapshooters Association requested an additional 90 days to May 17, 2005, in which to file an answer or other responsive pleading, stating that “the parties remain engaged in serious settlement talks, but will need some additional time to reach final settlement.” Agreed Mot. 3 at 1. On February 23, 2005, Mather filed a Response to Agreed Motion for Extension of Time to File an Answer (Resp. 3), in which it stated that it did not object to the Board granting the motion. Resp. 3 at 1. Mather also referred to ongoing settlement discussions that need more time to bear fruit. *Id.* In an order dated March 3, 2005, the Board granted the motion.

On May 17, 2005, Trapshooters Association filed its Answer (Ans.), which stated three affirmative defenses. Ans. at 4. Also on May 17, 2005, Trapshooters Association filed its Motion for Stay (Mot.). Generally, Trapshooters Association argues in that motion that the Board should “stay this action in light of the pendency of Mather Investment Properties, L.L.C. v. Illinois State Trapshooters Association, Inc. and Hanson Profession Services, Inc., No. 2003-L-0144, now pending in the Circuit Court of Sangamon County.” Mot. at 1, 9; *see* 35 Ill. Adm. Code 101.514 (Motions to Stay Proceedings).

On June 3, 2005, Mather filed Petitioner’s Response to Motion for Stay (Resp.), in which it “requests that this Board deny Respondent’s Motion for Stay.” Resp. at 5. On June 7, 2005, Trapshooters Association filed Respondent’s Motion for Leave to File Reply in Support of Motion for Stay *Instanter* (Mot. Leave), accompanied by its Reply in Support of Motion for Stay

Instanter (Reply). On June 22, 2005, Mather filed Petitioner's Response to Respondent's Motion for Leave to File Reply (Resp. Mot. Leave).

COMPLAINT

In its complaint, Mather alleges that, on or about October 13, 1998, Panther Creek Office Park, L.L.C. (Panther Creek) entered into a contract to purchase approximately 64 acres of property located southwest of Springfield from Trapshooters Association. Comp. at 1-2; *see Ans.* at 1. Mather further alleges that, on or about August 24, 1999, Panther Creek, Trapshooters Association, and Mather amended the real estate purchase contract and "confirmed its assignment to Mather." Comp. at 2; *see Ans.* at 1. According to Mather, an outdoor shooting range has operated on the property since the 1930s, and Trapshooters Association operated that range at least from 1988 to 1998. Comp. at 2; *see Ans.* at 2. In or about September 1998, states Mather, it received a Phase I environmental assessment of the property, which identified no "recognized environmental condition." Comp. at 3; *see Ans.* at 3.

Mather further alleges that it received from the Illinois Environmental Protection Agency (Agency) on August 17, 2001, a letter stating that contamination resulting from shooting range activities may pose risks to human health or the environment. Comp. at 3, Exh. 1; *see Ans.* at 3. Mather states that it hired an environmental consultant "to delineate the scope and extent of the presence of lead fragments, broken clay targets, and associated contamination." Comp. at 3-4; *see Ans.* at 3. Mather report that it has paid more than \$180,000 to this consultant. Comp. at 4; *see Ans.* at 3.

In the single count of its complaint, Mather alleges that Trapshooters Association violated Section 21(e) of the Act (415 ILCS 5/21(e) (2004)) by abandoning lead fragments, broken clay targets, and associated contamination constituting waste at a site not permitted by the Agency. Comp. at 5-6; *see Ans.* at 4. Mather further alleges that Trapshooters Association abandoned those materials either by not using the property as a shooting range and/or transferring the property to Mather. *Id.*

Answer

Trapshooters Association specifically denies that it abandoned waste on the property and further denies that it was required to obtain a permit for waste disposal, treatment, or storage. *Ans.* at 4. Trapshooters Association thus denies that it failed to comply with any provisions of the Act or regulations or standards adopted under the Act. *Id.* In addition, Trapshooters Association raises three affirmative defenses: that the Board lacks statutory authority to direct that a party cease and desist from violations occurring entirely in the past; "to enter a mandatory injunction at the request of a private party;" and to order reimbursement of clean-up costs. *Id.*

Duplicative Determination

In a March 3, 2005 order, the Board granted the parties' third Agreed Motion for Extension of Time to File Answer or to Otherwise Plead and made an answer due no later than May 17, 2005. Mather Investment Properties, L.L.C. v. Illinois State Trapshooters Association,

Inc., PCB 05-29, slip op. at 2 (Mar. 3, 2005). In the same order, the Board stated that, if the parties did not file a stipulation and proposed settlement on or before May 17, 2005, the Board would determine whether the complaint is frivolous or duplicative and whether to accept the case for hearing. *Id.*

Both the Act and the Board's procedural rules require that, for complaints filed by citizens, the Board shall schedule a hearing unless it determines that the complaint is "duplicative" or "frivolous." 415 ILCS 5/31(d)(1) (2004); 35 Ill. Adm. Code 103.212(a). No later than 30 days after service of the complaint, respondents may file a motion alleging that a citizen's complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b). Trapshooters Association has filed no motion making that allegation. Since Trapshooters Association's attorney and president were served with the complaint nearly one year ago on August 17, 2004 and August 19, 2004, respectively, that motion would no longer be timely.

The Board's procedural rules provide that "'duplicative' means the matter is identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. "A complaint would be duplicitous if another action was pending between the same parties, alleging substantially the same violations, before another tribunal with power to grant the same relief as the Board." Lake County Forest Preserve District v. Neil Ostro, Janet Ostro, and Big Foot Enterprises, PCB 92-80, slip op. at 2 (July 30, 1992). "The Board may dismiss any complaint as 'duplicitous' that raises claims identical or substantially similar to another action." *Id.*, citing WIPE v. Pollution Control Board, 55 Ill. App. 3d 475, 480 (1st Dist. 1977).

Nothing in the record persuades the Board that this matter duplicates the circuit court action initiated by Mather. As it explains in more detail below in addressing the issue of comity with regard to the motion for stay, the Board finds that this matter and the circuit court complaint do not allege substantially the same violations and do not seek the same relief. Because it finds that this matter is not "identical or substantially similar" (35 Ill. Adm. Code 101.202) to the pending circuit court action, the Board finds that this matter is not duplicative. See Lake County Forest Preserve District v. Neil Ostro, Janet Ostro, and Big Foot Enterprises, PCB 92-80, slip op. at 2 (July 30, 1992) (finding Board proceeding is not duplicative of federal court complaint involving same actions and period of time).

Frivolous Determination

The Board's procedural rules provide that "'frivolous' means a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202. The complaint first seeks an order that Trapshooters Association violated Section 21(e) of the Act. Comp. at 6; *see* 415 ILCS 5/21(e) (2004). The Act provides the Board authority to conduct proceedings on complaints alleging such a violation and to issue a final order making a determination. 415 ILCS 5/5(d), 33(a) (2004). Second, the complaint seeks civil penalties of \$50,000 for each violation and \$10,000 per day that each violation continued. Comp. at 6. Section 42 of the Act allows the Board to impose penalties not exceeding these amounts. 415 ILCS 42(a) (2004). Third, the complaint seeks an order requiring that Trapshooters Association cease and desist from further

violations of the Act. Section 33 of the Act allows the Board to issue a direction of this nature. 415 ILCS 5/33(b) (2004).

In addition, Mather seeks an order directing Trapshooters Association to remediate any contamination remaining on the property and to reimburse Mather for remediation costs it has incurred or will incur. Comp. at 6-7. The Board has consistently held that it has authority to award remediation costs to private parties for violations of the Act. Grand Pier Center, et al. v. River East, L.L.C., et al., PCB 05-157, slip op. at 5 (May 19, 2005); Chrysler Realty Corp. v. Thomas Industries, Inc. and TDY Industries, Inc., PCB 01-25, slip op. at 3 (Dec. 7, 2000); Lake County Forest Preserve District v. Neil Ostro, Janet Ostro, and Big Foot Enterprises, PCB 92-80, slip op. at 12-13 (Mar. 31, 1994). The Board in Ostro noted that Section 33(a) of the Act specifically allows the Board “to enter such final orders as it deems appropriate.” Ostro, PCB 92-80, slip op. at 13 (Mar. 31, 1994); 415 ILCS 5/33(a) (2004). The Board has similarly found that Section 33 considers and provides for remediation of property. Ostro, PCB 92-80, slip op. at 12 (Mar. 31, 1994). Consequently, the complaint seeks only relief the Board could grant, and the Board therefore finds the complaint is not frivolous. Having determined that the complaint is neither duplicative nor frivolous, the Board accepts the complaint for hearing. The Board notes that Trapshooters Association on May 17, 2005, timely filed its answer.

RESPONDENT'S MOTION FOR STAY

Trapshooters Association asks the Board to stay this action during the pendency of Mather Investment Properties, L.L.C. v. Illinois State Trapshooters Association, Inc. and Hanson Professional Services, Inc., No. 2003-L-0144, which is pending in the Circuit Court of Sangamon County. Mot. at 1, 9; *see* Mot., Exh. A (circuit court complaint). After entering into a contract for the purchase of real estate in 1998 with Trapshooters Association, Panther Creek Office Park, L.L.C. assigned its interest in that contract to Mather on or about August 24, 1999. Mot at 1-2; Mot., Exh. A at 2; Comp. at 1-2; Ans. at 1. Mather took title to the property on September 28, 2000. Mot. at 3; Mot., Exh. A at 6; Comp. at 2; Ans. at 2. On August 17, 2001, the Agency notified Mather that “there is the potential for the establishment of new or the exacerbation of existing contaminant exposure pathways during and after the redevelopment of the property which pose an unacceptable risk to human health and/or the environment.” Mot., Exh. 3-A; Comp. at 3; Comp., Exh. 1; Ans. at 3. Mather subsequently retained an environmental consultant to assess the property. Comp. at 3-4; *see also* Mot. at 3.

On May 14, 2003, in Sangamon County Circuit Court, Mather sued Trapshooters Association and Hanson Professional Services, Inc. d/b/a Hanson Engineers Incorporated (Hanson). Mot. at 4; Mot., Exh. A. Mather sued Trapshooters Association for breach of contract. Mot. at 4; Mot., Exh. A at 6-9. Mather also sued Hanson for breach of contract (Mot. at 4; Mot., Exh. A at 9-12) and for negligent misrepresentation. Mot. at 4; Mot., Exh. A at 12-16. On each of the three counts, Mather sought judgment in an amount not less than \$250,000 including costs resulting from contamination, diminished property value, costs of the suit, and attorney fees. Mot., Exh. A at 9, 11-12, 15-16. Mather states that the Board is authorized to take official notice of this circuit court proceeding. Mot. at 1, citing 35 Ill. Adm. Code 101.630 (Official Notice); Village of Hillside v. John Sexton Sand & Gravel Corp., PCB 80-60 (Oct. 30, 1980) (taking official notice of pending Cook County Circuit Court proceedings).

Trapshooters Association states that the stay it seeks is one “aimed at avoiding duplicative litigation.” Mot. at 5, citing Village of Mapleton v. Cathy’s Tap, 313 Ill. App. 3d 264, 266 (3rd Dist. 2000). Trapshooters Association argues that here “the term ‘duplicative’ has a different meaning than that set forth in the Board’s regulations”:

Two actions are for the same cause when the relief requested is based on substantially the same set of facts. [citation omitted] The crucial inquiry is whether the two actions arise out of the same transaction or occurrence, not whether the legal theory, issues, burden of proof or relief sought materially differ between the two actions. [citation omitted] Furthermore, the purpose of the two actions need not be identical; rather, there need only be a substantial similarity of issues between them.

Mot. at 5, citing Village of Mapleton, 313 Ill. App. 3d at 266; compare 35 Ill. Adm. Code 101.202 (“Duplicative” means the matter is identical or substantially similar to one brought before the Board or another forum.). While Trapshooters Association acknowledges that “the two actions at issue here involve different causes of action, they arise from the same commercial transaction by which Trapshooters Association conveyed the property to Mather.” Mot. at 5. Trapshooters Association states that both complaints present substantially similar facts and the issue of the applicability of state environmental statutes and regulations. Mot. at 5-6.

Concluding that the two actions are “duplicative” under Village of Mapleton, Trapshooters Association argues that the Board when considering this motion to stay considers four factors: comity; prevention of multiplicity, vexation, and harassment; likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment. Mot. at 5, citing Environmental Site Developers, Inc. (ESDI) v. White and Brewer Trucking, Inc., PCB 96-180, PCB 97-11, slip op. at 4 (July 10, 1997). Trapshooters Association further argues that analysis of a motion to stay balances all four of these factors. Mot. at 5, citing Environmental Site Developers, Inc. v. White and Brewer Trucking, Inc., PCB 96-180, slip op. at 2 (Sept. 18, 1997).

First, Trapshooters Association states that “[c]omity” is the principle under which courts will give effect to the decisions of a court of another jurisdiction as a matter of deference and respect.” Mot. at 6, citing ESDI, PCB 96-180, slip op. at 4 (July 10, 1997). Since the circuit court has taken jurisdiction over a controversy, Trapshooters Association argues that the Board should defer to the circuit court in ruling in this matter because the Board has taken “jurisdiction over the same controversy as a result of a later-filed suit.” Mot. at 6. Specifically, Trapshooters Association states that the Board does not determine the contractual rights of parties. *Id.*, citing IEPA v. Will County Landfill, Inc., PCB 72-13, slip op. at 2 (Dec. 12, 1972). Trapshooters Association characterizes the nature of the property sale contract “a central issue in adjudicating environmental liability.” Mot. at 6. Consequently, Trapshooters Association argues, the Board should as a matter of comity defer to the circuit court’s expertise in that regard. *Id.*, citing Village of Mapleton, 313 Ill. App. 3d at 268.

Second, Trapshooters Association states that, “[i]n deciding whether to grant a stay, a court may consider whether judicial economy would be served.” Mot. at 6, citing Philips Electronics, N.V. v. New Hampshire Ins. Co., 295 Ill. App. 3d 895, 901-02 (1st Dist. 1998). Trapshooters Association claims that “a stay would avoid the multiplicity of proof and argument concerning the proper interpretation of the contract.” Mot. at 6, citing Village of Mapleton, 313 Ill. App. 3d at 268. Trapshooters Association further argues that, when another suit presents the same issues between the same parties, it ordinarily is vexatious and contrary to judicial economy. Mot. at 6, citing Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 495 (1941).

Third, Trapshooters Association notes that, on both of the two counts filed against Hanson in circuit court, Mather seeks judgment in an amount not less than \$250,000, including costs resulting from contamination, diminished property value, costs of the suit, and attorney fees. Mot. at 7; Mot., Exh. A at 11-12, 15-16. Trapshooters Association argues that, because Hanson is not a party to the Board proceeding, Mather is more likely to receive complete relief before the circuit court than before the Board. Mot. at 7. Trapshooters Association acknowledges that civil penalties sought by Mather before the Board are not available to it in circuit court. Mot. at 7. Trapshooters Association stress, however, that civil penalties are not compensatory in nature and would be paid not to Mather but to the Environmental Protection Trust Fund (Fund). Mot. at 7; 415 ILCS 5/42(a) (2004). Because payment to the Fund does not provide “the assistance, redress, or benefit which [] complainant seeks,” Trapshooters Association argues that it does not truly relieve Mather. Mot. at 7, citing *Black’s Law Dictionary* (6th ed.). Trapshooters Association thus suggests that complete relief is obtainable by Mather in the circuit court action. Because a stay only directs Mather to the circuit court proceeding until a stay is lifted, it does not deny Mather any relief that the Board may provide it. Mot. at 7.

Fourth, Trapshooters Association states that “[t]he doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same claim, demand or cause of action. [citations omitted] The doctrine is based on the public policy which favors judicial economy and the finality of litigation [citations omitted] and is divided into two branches: *res judicata*, or estoppel by judgment, and collateral estoppel, or estoppel by verdict. [citations omitted] Collateral estoppel is also referred to as ‘issue preclusion.’” Mot. at 8, citing Fried v. Polk Bros., Inc., 190 Ill App. 3d 871, 877 (2nd Dist. 1989). Trapshooters Association argues that the circuit court’s construction of the parties’ contract may preclude consideration of those issues in subsequent litigation before the Board. Mot. at 8. Trapshooters Association states that “[c]ollateral estoppel or issue preclusion is a proper consideration in issuing a stay of subsequent litigation.” *Id.*, citing Tumminaro v. Tumminaro, 198 Ill. App. 3d 686, 695 (2nd Dist. 1990) (reversing dismissal of complaint and remanding to determine whether stay appropriate). Trapshooters Association argues that the Board must interpret the parties’ contract in order to determine whether Trapshooters Association abandoned waste on the property. Mot. at 8 n.3, citing U.S. v. Petersen Sand & Gravel, Inc., 806 F.Supp. 1346, 1354 (N.D. Ill. 1992) (assessing issue of responsibility for disposal under CERCLA). Construction of that contract by the circuit court, argues Trapshooters Association, may preclude subsequent litigation of those issues before the Board. Mot. at 8.

PETITIONER’S RESPONSE TO MOTION FOR STAY

Mather objects to the motion for stay and argues that “[t]he crux of Respondent’s Motion for Stay is that another case has been filed between the same Parties (and others) addressing the same property and the same contamination.” Resp. at 3 (citing circuit court action). Mather argues that, under the Board’s procedural rules, Trapshooters Association’s opportunity to lodge that claim was to file a motion arguing that the Board case is duplicative. Resp. at 3; *see* 415 ILCS 5/31(d)(1) (2004); 35 Ill. Adm. Code 103.212(a). The Board’s rules require that such a motion “must be filed no later than 30 days following the date of service of the complaint upon the respondent.” 35 Ill. Adm. Code 103.212(b). Trapshooters Association’s attorney and president were served on August 17, 2004 and August 19, 2004, respectively. Mather suggests that Trapshooters Association’s Motion for Stay is in substance a motion alleging a duplicative complaint and that it should be denied because it is untimely. *See* Resp. at 3.

Mather argues that, even if Trapshooters Association’s argument that the complaint is duplicative is not untimely, “this case should clearly proceed because the two pending cases are not ‘identical or substantially similar.’” Resp. at 3, citing Union Oil Co. v. Barge-Way Oil Co., PCB 98-169, slip op. at 16 (Jan. 7, 1999). Mather states the Board has held two cases are not duplicative despite involving the same parties, time frame, and action, if they are based on different statutes and legal theories. Resp. at 3, citing Lake County Forest Preserve District v. Ostro, PCB 92-80, slip op. at 2 (July 30, 1992). Mather further states that the action before the Board seeks an order to clean-up the property and civil penalties, while the circuit court action seeks civil damages based on a contract dispute and negligent misrepresentation against Hanson, a third party. Resp. at 3-4. Mather concludes that “nothing about the pending Sangamon County Circuit Court action prevents the Board from proceeding in this matter.” Resp. at 4.

Mather notes that Trapshooters Association has named four factors considered by the Board in considering whether to grant a stay in another matter: comity; prevention of multiplicity, vexation, and harassment; likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment. Mot. at 4; *see* Mot. at 5, citing ESDI, PCB 96-180 (July 10, 1997). Mather first disputes Trapshooters Association’s characterization of the contractual transaction as the “central issue” of the dispute between the parties. Resp. at 4. Mather argues that the transaction bears no relation to Trapshooters Association’s alleged violation of the Act, which is the only issue before the Board. *Id.* Consequently, Mather argues that this case does not implicate the principle of comity. *Id.* Second, Mather also disputes Trapshooters Association’s claim that a stay would “avoid the multiplicity of proof and argument concerning the proper interpretation of the contract.” Resp. at 4, citing Mot. at 6. Mather argues that multiplicity does not exist where one action alleges abandonment of waste and another involves the terms of a contract. *Id.* Third, Mather argues that, because the circuit court action cannot adjudicate violations of the Act, it cannot obtain complete relief there. *Id.* Mather further argues that, since it’s not possible for it to obtain complete relief in circuit court, this factor does not justify staying the Board proceeding. Resp. at 5. Fourth, Mather argues that *res judicata* is not a factor applying to this motion because the two proceedings are different and “[a] judgment in either forum will not conclude or decide issues [in] the other.” *Id.*

Mather argues that the Board's procedural rule regarding motions to stay proceedings "clearly envisions a 'stay' in the context of staying enforcement of an order." Resp. at 2; *see* 35 Ill. Adm. Code 101.514(a). Mather states that the issue of staying enforcement of an order "is not easily applicable to this matter." Resp. at 2. Mather notes four standards recognized by the Board in analyzing whether a stay is appropriate: a certain and clearly ascertainable right that needs protection; irreparable injury without the injunction or stay; no adequate remedy at law exists; and probability of success on the merits. Resp. at 2, citing Nielsen & Brainbridge v. IEPA, PCB 03-98, slip op. at 1 (Feb. 6, 2003). Considering these factors, Mather first suggests that Trapshooters Association cannot identify a clearly ascertainable right to avoid a Board order imposing a civil penalty or requiring clean-up. Resp. at 2. Second, Mather argues that Trapshooters Association will suffer no irreparable injury if this matter is not stayed. *Id.* Third, Mather argues that, in the form of a hearing on the merits of this complaint, Trapshooters Association has an adequate remedy at law. *Id.* Fourth, Mather states that "there is no probability that movant will succeed in the underlying matter." *Id.* Mather concludes that "under the applicable standards outlined by the Board, no 'stay' of this proceeding is warranted." *Id.*

Mather further notes that the Board's procedural rule requires that a motion to stay proceedings "must be accompanied by sufficient information detailing why a stay is needed." Resp. at 2; 35 Ill. Adm. Code 101.514(a). Mather argues that Trapshooters Association has violated this provision by failing to identify this required information. Resp. at 2. Mather characterizes Trapshooters Association's motion for stay as "a procedural device by which they do not have to face the consequences of its own actions in contaminating the property at issue." *Id.*

Mather elaborates that it would be prejudiced by a stay because it will not be able to develop the property commercially. Resp. at 3. Mather further argues that the City of Springfield and its residents will be prejudiced by the loss of tax revenues and services that development of the property might generate. *Id.* Finally, Mather argues that the environment will also suffer if the property remains in a contaminated state. *Id.*

REPLY IN SUPPORT OF MOTION FOR STAY

On June 7, 2005, Trapshooters Association filed Respondent's Motion for Leave to File Reply in Support of Motion for Stay *Instanter*, accompanied by its reply. That motion argues that Mather "raised several issues not addressed in Petitioner's Motion for Stay." Mot. Leave at 2. On June 22, 2005, Mather filed Petitioner's Response to Respondent's Motion for Leave to File Reply, which objects to Trapshooters Association's motion for leave to file a reply.

While Trapshooters Association has not explicitly stated that it will suffer material prejudice in the event that the Board denies its motion for leave to reply, Trapshooters Association does state that it would be prejudiced if it could not respond to new issues. Mot. Leave at 2. Trapshooters Association argues that only the final paragraph of Mather's response to the motion for stay responds to issues raised in that motion. Mot. Leave at 2, citing Resp. at 4, ¶ 7. In preceding paragraphs, Mather raises four new factors for the Board to analyze in determining whether to grant a motion for a stay, questions whether Trapshooters Association under the Board's procedural rules had provided sufficient information describing why it needed

a stay, and argues that Trapshooters Association's motion is in substance an untimely claim that the complaint is duplicative. *See* Resp. at 2-3. Under these circumstances, the Board will infer that denying the motion for leave to file a reply would result in material prejudice. Accordingly, the Board grants leave to file the reply, and the motion to file *instanter* is granted. The Board accepts the reply and proceeds to address the issues raised in it.

Trapshooters Association states that Mather's response to the motion for stay "conflates preliminary injunctions with stays." Reply at 1, citing Resp. at 4. Trapshooters Association argues that it need not show that it is entitled to a preliminary injunction in order to obtain a stay of this matter. Reply at 1, citing Vasa North Atlantic Ins. Co. v. Selcke, 261 Ill. App. 3d 626, 628 (1st Dist. 1994). Trapshooters Association notes that the Board in another case did not require the respondent to make such a showing when seeking a stay. Reply at 1, citing ESDI, slip op. at 4-7 (July 10, 1997) (denying motion for stay).

Trapshooters Association further argues that Mather's response also conflates a determination whether a complaint is duplicative with a motion for stay. Reply at 1. Trapshooters Association notes that "[t]he Board has previously stayed a proceeding that was not deemed to be duplicitous." *Id.*, citing ESDI, PCB 96-180, PCB 97-11 slip op. at 2 (Mar. 26, 1996) (finding complaint neither duplicitous or frivolous) and ESDI, PCB 96-180, PCB 97-11 slip op. at 2 (Sept. 18, 1997) (granting stay on reconsideration in light of federal counterclaim). Trapshooters Association notes that the Board has yet to make its duplicative determination in this case. Reply at 2; *but see Mather Investment Properties, L.L.C. v. Illinois State Trapshooters Association, Inc.*, PCB 05-29, slip op. at 1 (Mar. 3, 2005) (stating that Board will make determination if parties have not filed proposed settlement by deadline for filing answer). Trapshooters Association restates its argument that a stay is appropriate not when actions involve different legal theories but where the underlying events are based on "the same transaction or occurrence." Reply at 2, citing Village of Mapleton, 313 Ill. App. 3d at 266.

Trapshooters Association further argues that, to the extent Mather claims it will be prejudiced by any delay, that prejudice results from its own actions. Reply at 2. Specifically, Trapshooters Association notes that Mather sought corrective action costs in the circuit court action filed more than one year before Mather filed this action. In Trapshooters Association's view, "it is misleading to suggest that the 'environment loses' if a stay is entered." *Id.* Trapshooters Association argues that Mather has raised the specter of environmental harm "opportunistically" where its chief concern is a delayed or lost business opportunity. *Id.*

DISCUSSION

Motion to Stay

Trapshooters Association has moved "to stay this action in light of the pendency of Mather Investment Properties, L.L.C. v. Illinois State Trapshooters Association, Inc., No 2003-L-0144, now pending in the Circuit Court of Sangamon County." Mot. at 1. Mather filed the circuit court action May 14, 2003 (Mot., Exh. A), approximately 15 months before filing this matter on August 17, 2004. Comp. at 1. The Board considers four factors in determining whether to stay a later-filed action: comity; prevention of multiplicity, vexation, and harassment;

likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment. ESDI, PCB 96-180, PCB 97-11, slip op. at 4 (July 10, 1997), citing A.E. Staley Manufacturing Co. v. Swift & Co., 84 Ill. 2d 245, 254 (1980); Tumminaro v. Tumminaro, 198 Ill. App. 3d 686, 694-95 (2nd Dist. 1990). The Board will address each of those factors in turn.

Comity

“Comity is the principle under which courts will give effect to the decisions of a court of another jurisdiction as a matter of deference and respect.” ESDI, PCB 96-180, PCB 97-11, slip op. at 4 (July 10, 1997), citing *Black’s Law Dictionary*, 6th ed. (1990) (noting that principle is not based on obligation). “Where another court has taken jurisdiction over a controversy, a court with jurisdiction over the same controversy as a result of a later-filed suit will generally, as a matter of comity, defer to the first court in ruling on the matter before both courts.” ESDI, PCB 96-180, PCB 97-11, slip op. at 4 (July 10, 1997).

To its Motion for Stay, Trapshooters Association attached a copy of the complaint in Mather Investment Properties, L.L.C. v. Illinois State Trapshooters Association, Inc. and Hanson Professional Services, Inc., No. 2003-L-0144, filed May 14, 2003 in the Sangamon County Circuit Court. Mot., Exh. A. The Board notes that, although the circuit court action involves both Mather and Trapshooters Association, it also involves another party, Hanson, as a second defendant. While that complaint addresses the same period of time and the same actions with regard to a parcel of property, it is based on legal theories other than the Act. Specifically, count I alleges breach of contract on the part of Trapshooters Association. Mot., Exh. A at 6-9. Count II, against only Hanson, seeks damages on the basis that Mather is a third-party beneficiary of a contract between Trapshooters Association and Hanson. Mot., Exh. A at 9-12. Finally, count III alleges negligent misrepresentation solely against Hanson. Mot., Exh. A at 12-16. The Board notes that its authority under the Act does not extend to adjudication of these contractual matters. *See* 415 ILCS 5/5(d) (2004); IEPA v. Will County Landfill, Inc., PCB 72-13, slip op. at 2 (Dec. 12, 1972) (“We do not determine the rights of the parties . . . for breach of contract.”).

In addition, the circuit court action seeks civil damages that the Board lacks authority to award. *See* 415 ILCS 5/42(a) (2004). Furthermore, the circuit court action specifically seeks attorney fees as an element of civil damages. Mot., Exh. A at 9, 12, 16. Board precedents make clear that the Board lacks statutory authority to award attorney fees in citizen enforcement actions. *See* ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 337-39, 676 N.E.2d 299 (3rd Dist 1997); People v. State Oil Co., PCB 97-103, slip op. at 11-12 (Aug. 19, 1999).

On the other hand, the complaint in this matter alleges only that Trapshooters Association has violated Section 21(e) of the Act (415 ILCS 5/21(e) (2004)), adjudication of which falls within the Board’s statutory authority. *See* 415 ILCS 5/5(d) (2004). In its prayer for relief from the Board, Mather seeks a statutory civil penalty, which would be payable to the State. Comp. at 6; *see* 415 ILCS 5/42(a) (2004) (making civil penalties payable to Environmental Protection Trust Fund). Mather also seeks from the Board an order that Trapshooters Association cease and desist from further violations of the Act. *Id.*; *see* 415 ILCS 5/33(b) (2004). In addition, Mather in this action also seeks an order that Trapshooters Association shall “remediate any remaining

lead fragments, broken clay targets, and associated contamination remaining on the property” to specified objectives. Comp. at 6, *see* 415 ILCS 5/33(a) (2004). While the circuit court action seeks damages including costs incurred as a result of contamination, it does not specifically seek an order directing Trapshooters Association to perform remediation. *See* Mot., Exh. A at 9, 11-12, 15-16. The circuit court action does not specifically seek any of these three remedies.

In making its duplicative determination above, the Board found that this matter and the circuit court complaint do not allege substantially the same violations and do not seek the same relief. The issue before the Board is not squarely before the circuit court, and vice versa. The Board thus finds that it is not necessary as matter of comity for the Board to defer to the circuit court by staying this proceeding.

Avoiding Multiplicity, Vexation, or Harassment

Trapshooters Association’s motion for stay does not specifically allege that this proceeding constitutes vexation or harassment but does argue that a stay would avoid multiplicity of proof and argument. Mot. at 6. As stated above, however, the Board believes that this case and the circuit court case are not substantially similar and are based upon different legal theories. Mather’s allegation that Trapshooters Association violated the Section 21(e) Act (415 ILCS 5/21(e) (2004)) is not before the circuit court and will not be decided there. The Board finds that denying Trapshooters Association’s motion for stay will not result in multiplicity of litigation. *See ESDI*, PCB 96-180, PCB 97-11, slip op. at 6 (July 10, 1997).

Complete Relief in Circuit Court

The Board cannot find that resolution of the circuit court case will result in complete relief to Mather. The alleged violation of the Act is not before the circuit court. Mather seeks from the Board an order requiring Trapshooters Association to pay civil penalties and to cease and desist from violating the Act. Comp. at 6. Since these issues are not before the circuit court, *see* Mot., Exh. A at 9, 11-12, 15-16, resolution of the circuit court case will not provide Mather with complete relief.

Res Judicata

“The doctrine of *res judicata* 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 new proceedings.” *Burke v. Village of Glenview*, 257 Ill. App. 3d 63, 69 (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 their privies.” *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 294 (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.” *ESDI*, PCB 96-180, PCB 97-11, slip op. at 6 (July 10, 1997), citing *Progressive Land Developers*, 151 Ill. 2d at 294. The doctrine is based on the principle of fairness and requires that litigation must end when a matter is decided on its merits. *Burke*, 275 Ill. App. 3d at 294.

As noted above, the allegation that Trapshooters Association violated the Act is not before the circuit court. Likewise, the contract and negligent misrepresentation claims before the circuit court are not and could not be brought before the Board. On the basis of the record before it, the Board cannot conclude that a final judgment in the circuit court would have a preclusive effect on the Board with regard to the alleged violation of the Act. *See Village of Park Forest v. Sears, Roebuck & Co.*, PCB 01-77, slip op. at 5 (Feb. 15, 2001) (stating that Board case alleging violation of the Act “could not be obviated by the resolution of the contract dispute in the circuit court”).

Even if the Board had found that the three elements of *res judicata* were present in this case, however, the Board has stated that the doctrine will not apply “if the court in the first action lacked subject matter jurisdiction over that claim.” *People v. State Oil Co.*, PCB 97-103, slip op. at 4 (Aug. 19, 1999), citing *Village of Maywood Board of Fire and Police Commissioners v. Department of Human Rights of the State of Illinois*, 296 Ill. App. 3d 570, 580 (1st Dist. 1998). The *State Oil* court noted that “[s]everal courts have found that the Board has exclusive jurisdiction over citizen complaints.” *People v. State Oil Co.*, PCB 97-103, slip op. at 5 (Aug. 19, 1999); *see* 415 ILCS 5/45(b) (2004). Since Mather could not have brought its claim under the Act in the circuit court case, *res judicata* would not apply even if the three elements of the doctrine were present. *See People v. State Oil Co.*, PCB 97-103, slip op. at 7 (Aug. 19, 1999).

The Board has previously found that this matter is not substantially similar to the proceeding before the circuit court. In that respect, Trapshooters Association’s emphasis upon *Village of Mapleton* is misplaced. In that case, the court specifically found that a “federal action testing the constitutionality of the ordinance and the Village’s prosecution of that ordinance are the ‘same cause’” for purposes of a motion to stay. *Village of Mapleton*, 313 Ill. App. 3d at 267. Because both of those cases involved the constitutionality of the village’s liquor licensing, they would elicit the same proof. *Id.* In this case, Mather need not show a breach of contract in order to demonstrate that Trapshooters Association has “disposed[d], treat[ed], store[d] or abandon[ed] any waste, or transport[ed] any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.” 415 ILCS 5/21(e) (2004). Similarly, the Board cannot find that finding a violation of Section 21(e) is preclusive on issues surrounding an alleged breach of contract. In this regard, Trapshooters Association’s reference to *Petersen Sand & Gravel* is unavailing. *Petersen* required interpretation of a contract under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Section 9607(a)(3) of CERCLA makes responsible “any person who by contract, agreement or otherwise arranged for treatment” of hazardous substances. *Petersen*, 806 F.Supp. at 1353 (emphasis added). In this case, Mather is not required by the Act to show that the alleged violation of the Act stemmed from any contract or agreement. *See* 415 ILCS 5/21 (2004).

Board Ruling

Based on its analysis of the four factors to be considered in deciding whether to grant a motion for a stay, the Board finds that a stay of these proceedings is not appropriate and denies the motion for stay.

Having accepted this complaint for hearing and declined to stay the proceedings, the Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, including any civil penalty, for the alleged violations.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2004). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an ongoing violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by the "lowest cost alternative for achieving compliance." The amended Section 42(h) also requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship."

Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). An SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform." SEPs are also added as a new Section 42(h) factor (Section 42(h)(7)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency" (Section 42(h)(6)). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of

non-compliance. A respondent establishing these criteria is entitled to a “reduction in the portion of the penalty that is not based on the economic benefit of non-compliance.”

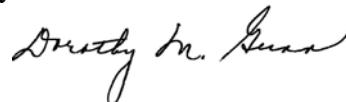
Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any, including whether to impose a civil penalty, and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any, including a specific total dollar amount and the portion of that amount attributable to the respondent’s economic benefit, if any, from delayed compliance, and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

CONCLUSION

The Board determines that this complaint is neither duplicative nor frivolous and accepts it for hearing. The Board concludes that a stay of these proceedings is not appropriate and denies the motion for stay. Having accepted this complaint for hearing and declined to stay the proceedings, the Board directs the hearing officer to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 21, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board