

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEOPLE OF THE STATE OF ILLINOIS, )  
*ex rel.* LISA MADIGAN, Attorney )  
 General of the State of Illinois, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 ATKINSON LANDFILL CO., an )  
 Illinois corporation, )  
 )  
 Respondent. )

PCB No. 13-28  
 (Enforcement-Water)

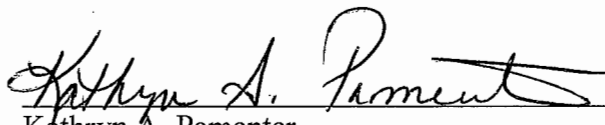
**NOTICE OF FILING**

To: ***Via Regular Mail***  
 Kenneth Anspach, Esq.  
 Anspach Law Office  
 111 West Washington Street  
 Suite 1625  
 Chicago, Illinois 60602

***Via Hand Delivery***  
 Bradley P. Halloran  
 Hearing Officer  
 Illinois Pollution Control Board  
 James R. Thompson Center, Suite 11-500  
 100 W. Randolph Street  
 Chicago, Illinois 60601

PLEASE TAKE NOTICE that on the 12th day of July, 2013, the Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, filed the attached Complainant's Response to Motion for Consolidation and for Stay, a true and correct copy of which is attached hereto and is hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS,  
*ex rel.* LISA MADIGAN, Attorney General  
 of the State of Illinois

By:   
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DATE: July 12, 2013

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEOPLE OF THE STATE OF ILLINOIS, )  
*ex rel.* LISA MADIGAN, Attorney )  
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**COMPLAINANT’S RESPONSE TO MOTION FOR CONSOLIDATION  
 AND FOR STAY**

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois (“People or “Complainant”), and responds to Atkinson Landfill Co.’s (“Atkinson Landfill”) Motion for Consolidation and for Stay. In support of this response, the People state as follows:

1. On December 17, 2012, Complainant filed a four-count Complaint against Atkinson Landfill, alleging violations of Sections 12(a) and (b) of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/12(a), (b) (2010), and Section 309.204(a) of the Illinois Pollution Control Board’s regulations regarding water pollution (“Board Water Pollution Regulations”), 35 Ill. Adm. Code 309.204(a).

2. On January 28, 2013, Atkinson Landfill filed its Motion for Joinder (“Joinder Motion”). Through the Joinder Motion, Atkinson Landfill moved the Illinois Pollution Control Board (“Board”) to join the Village of Atkinson and the City of Galva as respondents in this case.

3. On April 18, 2013, the Board accepted Complainant's four-count First Amended Complaint against Atkinson Landfill.

4. On June 6, 2013, the Board entered an Order denying Atkinson Landfill's Joinder Motion.

5. On June 7, 2013, Atkinson Landfill filed its Motion to Strike and Dismiss the First Amended Complaint ("Motion to Dismiss"). On June 21, 2013, Complainant filed its response to the Motion to Dismiss and its Motion to Strike Respondent's Section 2-619(a)(9) Motion to Dismiss and Affidavits of Gary Hull and Erik Vardijan, which are incorporated herein by reference (collectively, the "Responses to Motion to Dismiss").

6. On June 28, 2013, Atkinson Landfill filed its Motion for Consolidation and for Stay (the "Motion") in PCB No. 13-28. Through the Motion, Atkinson Landfill moves the Board to consolidate PCB No. 13-28 with *People v. Village of Atkinson*, PCB No. 13-60, and *People v. City of Galva*, PCB No. 13-61. Pending before the Board in both PCB Nos. 13-60 and 13-61 is a Stipulation and Proposal for Settlement (collectively, the "Stipulations") to resolve the one-count complaints filed against the Village of Atkinson and the City of Galva alleging Section 12(a) violations of the Act, 415 ILCS 5/12(a) (2012). In the Motion, Atkinson Landfill also moves the Board to either deny or stay the pending Motions for Relief from Hearing Requirement in PCB Nos. 13-60 and 13-61.

7. As a threshold matter, Atkinson Landfill did not file any motion in PCB Nos. 13-60 and 13-61. In addition, the Certificate of Service attached to the Motion does not indicate that counsel for the Village of Atkinson or the City of Galva were served with a copy of the Motion. As such, the Village of Atkinson and the City of Galva, against whom Atkinson Landfill is

seeking relief, have not been afforded an opportunity to be heard on the Motion. Accordingly, the Motion should be denied on procedural grounds.<sup>1</sup>

8. Section 101.406 of the Board's General Rules provides:

The Board, upon the motion of any party or upon its own motion, may consolidate two or more proceedings for the purpose of hearing or decision or both. The Board will consolidate the proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party. The Board will not consolidate proceedings where the burdens of proof vary.

35 Ill. Adm. 101.406. Atkinson Landfill offers only a bald assertion that litigating PCB Nos. 13-28, 13-60 and 13-61 as a consolidated case would "result in a 'convenient, expeditious, and complete determination of claims.'" (Motion at ¶ 12.)

9. Consolidating the separate cases pending against the Village of Atkinson and the City of Galva with the case against Atkinson Landfill is not warranted under Section 101.406 of the Board's General Rules. The Village of Atkinson and the City of Galva have entered into Stipulations for settlement purposes to resolve the one-count complaints pending against them. (See PCB 13-60 Stip. at 1; PCB 13-61 Stip. at 1.) To date, no settlement has been reached with Atkinson Landfill regarding the four-count complaint pending against it, and the parties are complying with a briefing schedule relating to Atkinson Landfill's Motion to Dismiss. To the extent Atkinson Landfill's Motion to Dismiss is denied, Atkinson Landfill and Complainant will

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<sup>1</sup> Similarly, without citation, Atkinson Landfill contends that the Board may take judicial notice of Violation Notice L-2010-01361 dated November 10, 2010. (Motion at ¶ 1.) Judicial notice extends to matters which are commonly known, within the specialized knowledge and experience of the Board or of public record. 35 Ill. Adm. Code 101.630; see, e.g., *People v. Davis*, 65 Ill.2d 157, 165 (1976). A specific violation notice, and the statements within the notice, do not meet this standard, but rather must be offered in evidence at a hearing. Similarly, Atkinson Landfill cites no evidence for its assertions that (a) this case arose out of a 2010 Violation Notice (L-2010-01361) or (b) that the Illinois EPA directed Atkinson Landfill to remove excess leachate. (Motion at ¶ 1.) Further, Atkinson Landfill's statement that its disposal of additional leachate was "specifically authorized by permit and/or under 35 Ill. Adm. Code 307.1101(13) and 40 CFR 403.5(8)" is disputed, as set forth in the Responses to Motion to Dismiss. (*Id.*) As such, Paragraph 1 of the Motion should be stricken.

be engaged in extensive discovery and preparation for trial. As such, consolidation of the three cases would not result in a convenient or expeditious determination of claims. In addition, the four-count complaint pending against Atkinson Landfill may be completely determined without consolidating the cases. Employees of the Village of Atkinson and the City of Galva may be witnesses in this case. Further, the burdens of proof vary, in that the case against Atkinson Landfill involves operating permit violations not at issue in the cases against the Village of Atkinson and the City of Galva. Because consolidation of the cases would materially prejudice Complainant, the Village of Atkinson and the City of Galva, Atkinson Landfill's Motion seeking consolidation of PCB Nos. 13-28, 13-60 and 13-61 should be denied.

10. Section 101.514(a) of the Board's General Rules provides:

Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion.

35 Ill. Adm. Code 101.514(a). Contrary to this General Rule, Atkinson Landfill offers no information detailing why a stay is needed or appropriate. Rather, the only paragraph dedicated to the requested relief states, "[b]y the same token, ALC requests that the Motions for Relief from Hearing requirement filed by the Attorney General in PCB 13-60 and 13-61 be either denied or stayed indefinitely." (Motion at ¶ 13.) The Board has previously recognized in its order denying Atkinson Landfill's Joinder Motion that "[t]he stipulations in PCB No. 13-60 and PCB 13-61 are made only for purposes of settlement . . . and have no bearing upon contested matters in this proceeding." *People v. Atkinson Landfill Co.*, PCB No. 13-28, slip op. at p. 6 (June 6, 2013). As set forth above, the Stipulations have been negotiated with the Village of Atkinson and the City of Galva to resolve their respective cases. No basis exists to stay those

proceedings until the contested litigation with Atkinson Landfill is completed. Therefore, Atkinson Landfill's request for a stay of PCB Nos. 13-60 and 13-61 should be denied.<sup>2</sup>

11. Without tying its argument to the standards articulated in 35 Ill. Adm. Code 101.406 or 101.514(a), Atkinson Landfill devotes much of its Motion to the doctrine of *res judicata* and the concept of claim-splitting. (Motion at pp. 2-4.) In *Rein v. David A. Noyes & Co.*, 172 Ill.2d 325 (Mar. 21, 1996), on which Atkinson Landfill relies, the plaintiffs filed complaints against the defendants in late 1990, alleging fraudulent misrepresentation of material facts regarding purchased bonds, common law fraud, breach of fiduciary duty and failure to register securities. 172 Ill.2d at 327-29. After the lower court dismissed the counts seeking rescission, the plaintiffs voluntarily dismissed the remaining counts. *Id.* at 329-30. Over one year later, the plaintiffs filed a new complaint against the same defendants, setting forth virtually identical counts and allegations as in the original complaints. *Id.* at 331. In considering whether *res judicata* applied, the *Rein* court stated:

The 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 cause of action. . . . For the doctrine of *res judicata* to apply, three requirements must be met: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies.

*Id.* at 334-35. Finding that the first case was finally adjudicated on the merits and the two cases involved the same parties and cause of action, the *Rein* court held *res judicata* barred the second

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<sup>2</sup> Section 31(c)(2) of the Act provides, in relevant part, that "the Board shall cause notice of the stipulation, proposal and request for relief to be published and sent in the same manner as is required for hearing pursuant to subdivision (1) of this subsection. The notice shall include a statement that any person may file a written demand for hearing within 21 days after receiving the notice." 415 ILCS 5/31(c)(2) (2012). The Board published notice regarding the Village of Atkinson and the City of Galva Stipulations on June 8, 2013 and June 14, 2013, respectively. The 21-day period to file a written demand for hearing expired on June 29, 2013 and July 5, 2013, respectively. No written demand for hearing was filed before those dates in either PCB No. 13-60 or 13-61, respectively. Accordingly, the Stipulations should be approved.

lawsuit. *Id.* at 340; *see also Nelson v. Chicago Park District*, 408 Ill. App. 3d 53, 65 (1<sup>st</sup> Dist. 2011) (finding all of the elements of *res judicata* had been met to bar second lawsuit).

12. Unlike in *Rein* and *Nelson*, none of the three elements of *res judicata* is satisfied in this case. First, no final judgment has been entered in PCB Nos. 13-60 or 13-61. Even if the Stipulations filed in PCB Nos. 13-60 and 13-61 are approved, the Board will not have entered a final judgment “on the merits.” *See People v. Atkinson Landfill Co.*, PCB No. 13-28, slip op. at p. 6 (June 6, 2013). Second, as Atkinson Landfill admits, there is no identity of parties. (Motion at ¶ 7.) The Village of Atkinson and the City of Galva are respondents in PCB Nos. 13-60 and 13-61, respectively. Atkinson Landfill is not a respondent in either PCB No. 13-60 or 13-61. Third, while certain facts are similar among the three cases, the case against Atkinson Landfill is premised on its disposal of landfill leachate (a) at the Village of Atkinson in excess of the limits set forth in Atkinson Landfill’s Water Pollution Control Permit No. 2008-EO-0331 dated April 3, 2008 and (b) at the City of Galva without any operating permit. (First Amended Complaint at p. 2, ¶¶ 4-6; pp. 8-9, ¶¶ 12-13.) The respective one-count complaints against the Village of Atkinson and the City of Galva do not arise from their violations of an operating permit. Different facts, evidence and burdens of proof exist between PCB No. 13-28 and PCB Nos. 13-60 and 13-61. Accordingly, the doctrine of *res judicata* is inapplicable.

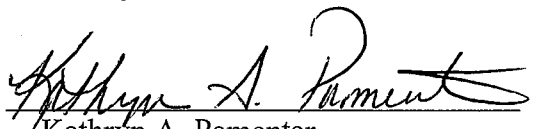
13. Respondent also contends that Complainant has engaged in “claims-splitting.” (Motion at ¶¶ 8-9.) “The rule against claim-splitting . . . prohibits a plaintiff from suing for part of a claim in one action and then suing for the remainder in another action.” *Rein*, 172 Ill.2d at 340. In *Rein*, “plaintiffs’ claims resulting from the sale of the Richmond bonds could not be divided. Thus, following the final adjudication of the rescission counts in *Rein I*, plaintiffs were barred from litigating the common law counts [against the same defendants] in a subsequent

action.” *Id.* Unlike in *Rein*, Complainant included all of its counts against Atkinson Landfill in one complaint filed in PCB No. 13-28. Complainant’s filing of separate lawsuits against the Village of Atkinson and the City of Galva, with simultaneously filed Stipulations resolving those cases, does not constitute claims-splitting. As the Board recognized in denying Atkinson Landfill’s Joinder Motion, “[t]he Attorney General, acting within her prosecutorial discretion, may pursue enforcement through multiple proceedings rather than a single action, just as she may, in an enforcement action against multiple respondents, settle with none, one, any, or all respondent(s). . . .” *People v. Atkinson Landfill Co.*, PCB No. 13-28, slip op. at p. 6 (June 6, 2013) (internal citation omitted).

WHEREFORE Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this Court deny Respondent’s Motion for Consolidation and for Stay and grant such other relief as this Court deems proper.

PEOPLE OF THE STATE OF ILLINOIS,  
*ex rel.* LISA MADIGAN, Attorney General  
of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/  
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BY:   
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**CERTIFICATE OF SERVICE**

I, KATHRYN A. PAMENTER, an Assistant Attorney General, do certify that I caused to be served this 12th day of July, 2013, the attached Notice of Filing and Complainant's Response to Motion for Consolidation and for Stay upon (a) Kenneth Anspach, Esq. by placing a true and correct copy in an envelope addressed as set forth on said Notice of Filing, first class postage prepaid, and depositing same with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 p.m., and (b) Bradley P. Halloran via hand delivery.

  
KATHRYN A. PAMENTER

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