

By order of April 18, 2013, the Board granted the parties' March 15, 2013 agreed motion for leave to file the People's first amended complaint (1st Am. Comp.), and accepted it for hearing. Count I of the first amended complaint alleges ALC disposed of leachate at the Village treatment plant in excess of the daily limit imposed by the landfill's water pollution control permit, thereby threatening the pass through of untreated wastewater into Green River. In count II, the People allege that ALC operated equipment to dispose of wastewater at the Village plant in excess of permit limits and thus without an operating permit issued by the Illinois Environmental Protection Agency (Agency). Count III alleges that ALC disposed of leachate at the Galva facility without any permit issued by the Agency, thereby threatening the pass through of untreated wastewater into Edwards River. In count IV, the People allege that ALC's operation of trucks to haul leachate to the Galva facility for disposal without an operating permit was capable of causing or threatening water pollution. The first amended complaint did not name the Village or Galva as respondents.

On April 30 and May 3, 2013, the People filed separate one-count water pollution enforcement actions against the Village and Galva, respectively. Simultaneously with these complaints, the People filed stipulations and proposals for settlement and motions for relief from the hearing requirement. *Id.* See People v. Village of Atkinson, PCB 13-60 and People v. City of Galva, PCB 13-61. By orders dated June 6, 2013, the Board directed the Clerk to publish notice of the stipulations, proposed settlements, and requests for relief from the hearing requirement. Newspaper notice of the proposed stipulations in PCB 13-60 and PCB 13-61 was published on June 12 and 28, respectively. A request for a hearing was not filed in either case within 21 days following publication of the notices. See 415 ILCS 5/31(c)(2) (2010). The Board has yet to take action on these cases.

Also by order of June 6, 2013, the Board denied ALC's motion for joinder of the municipalities. On June 7, 2013, in accordance with the schedule set by the Board, ALC filed a motion to strike or dismiss the first amended complaint. On June 21, 2013, the People filed their response to the motion to strike or dismiss, along with a motion to strike portions of the dismissal motion and affidavits attached to it.

On June 28, 2013, ALC filed the motion to consolidate this case with PCB 13-60 and 13-61 and to deny or stay the motions for relief from the hearing requirement in those cases (Mot.). On July 12, 2013, the People filed a response in opposition to the consolidation and stay motion (Resp.). It is this motion that the Board rules upon today; the Board reserves ruling on the dismissal motion and motion to strike.

ALC'S MOTION FOR CONSOLIDATION AND STAY

As grounds for consolidation, ALC argues that PCB 13-60 and 13-61 arise out of the "same nucleus of operative facts" as this case, as several "identical or virtually identical" paragraphs in the complaints in PCB 13-28 and PCB 13-60 and in PCB 13-28 and PCB 13-61 demonstrate. Mot. at 2. On this basis, ALC contends there is an "identity of cause of action" among the cases, adding that the other elements of *res judicata* or claim preclusion are met here. *Id.* at 3-4. ALC explains that under that doctrine, a final judgment in a proceeding bars a party to that proceeding or someone in privity with the party from asserting the same cause of action in a

subsequent action against the same party or someone in privity with that party. . *Id.* at 3. ALC adds that separate claims will be considered to be part of the same “cause of action” if they “arise from the same “group of operative facts,” even if they assert different theories of relief. *Id.* ALC claims that, absent consolidation, an avoidable *res judicata* problem will arise in these cases.

ALC recites the three elements of *res judicata* as follows. First, a final judgment on the merits must have been entered in a prior action. Second, the prior and subsequent actions must involve the same cause of action. Third, the prior and subsequent actions must involve the same parties or others in privity with them. Mot. at 4, citing Rein v. David A. Noyes & Co., 172 Ill. 2d 325, 665 N.E.2d 1199 (1996). Specifically, ALC points out that, because of the pending proposed settlements in the cases against the municipalities, absent grant of its consolidation motion, a final “judgment is about to be entered” in those cases. *Id.* at 4. In addition, ALC claims that while the respondents differ in this case and the cases against the municipalities, there is no legitimate reason for this; the People simply “divided the parties up, in piecemeal fashion” but actually have a single claim arising out of a single transaction. *Id.* ALC adds that no exception to the rule against claim splitting, an aspect of the doctrine of *res judicata*, allowed the People to divide up their claim in that fashion. *Id.*, citing Rein, 172 Ill. 2d at 340, 665 N.E.2d at 1206. Thus, ALC continues, if the Board were to enter judgment in PCB 13-60 and 13-61, the People’s claims in this case would be barred by *res judicata*. *Id.* at 5.

According to ALC, consolidation would avoid that bar and permit the “convenient, expeditious, and complete determination” of the People’s claims. Mot. at 5. In addition, ALC claims that to avoid *res judicata*, the PCB 13-60 and 13-61 motions for relief from the hearing requirement should be “either denied or stayed indefinitely.” *Id.* at 6.

PEOPLE’S RESPONSE IN OPPOSITION

The People argue that ALC’s consolidation motion should be denied for a procedural reason: ALC did not file similar motions in PCB 13-60 or 13-61 and apparently did not serve the consolidation motion on the Village nor Galva. Resp. at 2-3.

Beyond that, the motion should be denied, according to the People, because consolidation is unwarranted for the reasons that this case and the cases against the municipalities are in different procedural postures and involve distinct “burdens of proof.” Resp. at 3-4. The People explain that this case (PCB 13-28) includes alleged violations of ALC’s operating permit that are not at issue in the actions against the municipalities. *Id.* Consolidation also is not necessary, according to the People, to allow ALC to call Village or Galva employees as witnesses in this case—ALC can simply subpoena them to testify. Nor, according to the People, is there cause for the Board to delay its acceptance of the proposed settlements in PCB 13-60 and 13-61 “until the contested litigation with [ALC] is completed.” *Id.* at 4-5.

The People further argue that the motion does not explain how *res judicata*, and in particular the concept of claim splitting, relate to the standard for consolidation. Regardless, the People continue, none of the elements of *res judicata* is met here. Resp. at 5-6. Nor, according to the People, does the pursuit of separate enforcement actions against ALC, the Village and

Galva constitute claim splitting; unlike in Rein, the People included all claims against ALC in the complaint in this case and, in the exercise of discretion, chose to bring and settle separate cases against the municipalities. *Id.* at 6-7. For these reasons, the People urge the Board to deny the motion.

DISCUSSION

At the outset, the Board notes that in their response to the consolidation and stay motion, the People request that the Board strike the first paragraph of the motion. Resp. at 3 n.1. That paragraph asserts that the Agency directed ALC to remove excess leachate from the landfill and that ALC's alleged disposal of the leachate was "authorized by permit and state and federal law." Mot. at 1-2. Citing the People's response to ALC's motion to strike or dismiss the first amended complaint, the People point out that the motion's assertions are disputed. Resp. at 3 n.1. Because the Board denies the consolidation motion, the Board also denies as moot the People's request to strike the first paragraph in ALC's motion.

Under Section 101.406 of the Board's procedural rules, the Board will consolidate proceedings if consolidation is in the interest of "convenient, expeditious, and complete determination of claims, and if [it] would not cause material prejudice to any party." 35 Ill. Adm. Code 101.406. Here, following the precise language of this provision and putting *res judicata* aside for the moment, the Board finds that several considerations strongly counsel against consolidation. The actions against the municipalities, on the one hand, and this case, on the other, are in divergent procedural postures. Proposed settlements in the former cases are pending before the Board, and no person or party—including, most notably, ALC—timely requested a hearing in either PCB 13-60 or PCB 13-61 after notice of the stipulations, proposed settlements, and motions for relief from the hearing requirement was published in each case. This case, by contrast, is at a far earlier stage of litigation—briefing on ALC's dismissal motion—and, absent settlement, will proceed to discovery and a hearing. Moreover, the People represent that to date they have not reached a settlement with ALC. Resp. at 3. The Board concludes, as suggested by the People, that consolidation would, therefore, materially prejudice the municipalities as well as the People by needlessly prolonging the litigation affecting them.

As for factual overlap between the cases, it is true that, broadly speaking, the complaints in each case concern ALC's alleged leachate disposal at the Village and Galva facilities, such that there are similar allegations in each case (*compare, e.g.*, 1st Am. Comp. (13-28) at 2-3 *with* Comp. (13-60) at 3; 1st Am. Comp. (13-28) at 8-10 *with* Comp. (13-61) at 3-4). Nevertheless, the asserted violations are not the same. Not only are the claims asserted against different respondents, but the permit violations alleged against ALC in this case are not at issue in the cases against the municipalities. While the People have the burden of proof in each enforcement case, the number and type of violations the People must prove in this case are different from those they would have to prove in the Village and Galva cases, each of which involves a single alleged violation. In fact, the Board observes, as a practical matter, given the proposed

settlement with each municipality, the People will not have to present proof at hearing of anything in the Village and Galva actions.¹

Adding *res judicata* to the picture, the Board finds, as suggested by the People, that the doctrine does not apply here and, therefore, is not a basis for consolidation. In particular, the third element of *res judicata*—an identity of parties between the prior and subsequent actions—plainly is not satisfied. As ALC admits, the three enforcement actions do not involve the same parties or others in privity with them. The first element of *res judicata* also is not met: no final judgment has been entered in PCB 13-60 or PCB 13-61. However, it is true that Board acceptance of the settlements in the latter cases will result in final Board orders. Nevertheless, *res judicata* will not apply upon entry of final Board orders in PCB 13-60 and PCB 13-61 because all elements of *res judicata* must be met for the doctrine to apply (*see, e.g., Rein*, 172 Ill. 2d at 335, 665 N.E.2d at 1204), and the Board has already found that the third element is not met.

For the same reason, the Board need not address whether the final element of *res judicata*—whether the three enforcement proceedings involve the same cause of action—is met. This is a more difficult question, requiring consideration of the relation between the material facts of each case in “time, space, origin, and motivation,” among other factors (*River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 312, 703 N.E.2d 883, 893 (1998), quoting *Restatement (Second) of Judgments* § 24, at 196 (1982)). Again, there is no need for the Board to undertake that analysis here.

The Board is persuaded that the filing of separate actions against ALC, the Village, and Galva does not constitute “claim splitting,” that is, “suing for part of a claim in one action and then suing for the remainder in another action.” *Rein*, 172 Ill. 2d at 340, 665 N.E.2d at 649. In *Rein*, the plaintiffs voluntarily dismissed some claims against the defendants so they could appeal the disposition of other claims, and then re-asserted the voluntarily dismissed claims in a second suit against the same defendants. *See Rein*, 172 Ill. 2d at 339-40, 665 N.E.2d at 649-50. By contrast, here, the People did not raise some claims against ALC in this action and hold others back for subsequent litigation—specifically, the actions against the Village and Galva. Rather, the People asserted what they represent are all claims against ALC in this action, and then chose to pursue, and settle, related claims against *other* parties in separate actions. *Rein* is, therefore, distinguishable, and the rule against claim splitting does not apply.

In sum, the Board finds that the situation here does not meet the standard for consolidation. With no basis for consolidation, the Board further determines there is no reason to stay Board action in the Village and Galva cases, unnecessarily delaying settlement of those matters while this contested case proceeds. The Board disposes of those actions in separate orders today.

¹ Consolidation would be improper if the burden of proof formally varied from one proceeding to another. *See* 35 Ill. Adm. Code 101.406 (Board “will not consolidate proceedings where the burdens of proof vary”).

CONCLUSION

For the above reasons, the Board denies ALC's motion to consolidate this case, PCB 13-28, with PCB 13-60 and 13-61, and the Board will proceed to decision in the latter cases without delay.

IT IS SO ORDERED.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 8, 2013, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

John Therriault, Clerk
Illinois Pollution Control Board