

ILLINOIS POLLUTION CONTROL BOARD
March 6, 1997

SANGAMON COUNTY,	)	AC 94-28	AC 94-81
	)	AC 94-29	AC 94-82
Complainant,	)	AC 94-48	AC 94-90
	)	AC 94-49	AC 94-91
v.	)	AC 94-50	AC 94-95
	)	AC 94-51	AC 95-8
ESG WATTS, INC.,	)	AC 94-52	AC 95-18
	)	AC 94-58	AC 95-21
Respondent.	)	AC 94-59	AC 95-28
	)	AC 94-60	AC 95-29
	)	AC 94-61	
	)	(Administrative Citations)	

ORDER OF THE BOARD (by M. McFawn and G.T. Girard):

This matter is before the Board on a motion for summary judgment, filed by respondent ESG Watts, Inc. (ESG Watts) on January 7, 1997. Complainant Sangamon County (County) filed a response to the motion for summary judgment on February 4, 1997. Finally, ESG Watts filed a reply in support of the motion for summary judgment on February 5, 1997, accompanied by a motion for leave to file. The motion for leave to file is granted, and the Board will consider the reply in ruling on the motion for summary judgment.

In its motion for summary judgment, ESG Watts claims that several of the counts included in the consolidated administrative citations are barred by the doctrine of *res judicata*. Specifically, ESG Watts asserts that the alleged violations of Section 21(o)(11) of the Environmental Protection Act (Act) for failure to submit reports, set forth in AC 94-29, AC 94-48, AC 94-49, AC 94-50, AC 94-51, AC 94-52, AC 94-58, AC 94-59, AC 94-60, AC 94-61, AC 94-81, and AC 94-91, were litigated by the Illinois Attorney General before the Board in PCB 94-127. Additionally, ESG Watts asserts that allegations concerning the depositing of refuse in any unpermitted portion of the landfill in AC 95-8, AC 95-18, AC 95-21, AC 95-28, and AC 95-29 were previously litigated in the circuit court case People of the State of Illinois and County of Sangamon v. Watts Trucking Service, Inc. and ESG Watts, Inc., No. 91-CH-242 (Cir. Ct. of Sangamon County, February 2, 1994).

SUMMARY JUDGMENT

Summary judgment is appropriate where there are no issues of material fact to be considered by the trier of fact and the movant is entitled to judgment as a matter of law. (Waste Management of Illinois, Inc. v. Illinois Environmental Protection Agency (July 21, 1994) PCB 94-153; ESG Watts v. Illinois Environmental Protection Agency (August 13, 1992), PCB 92-54; Sherex Chemical v. Illinois Environmental Protection Agency (July 30, 1992), PCB 91-202; Williams Adhesives, Inc. v. Illinois Environmental Protection Agency

(August 21, 1991), PCB 91-112.) We find that material issues of fact remain regarding the alleged depositing of materials in unpermitted portions of the landfill, and deny summary judgment on those counts. However, because we find there are no genuine issues of material fact regarding the alleged failure to submit reports, we find that summary judgment is appropriate on those counts, and for the reasons set forth below, grant that portion of ESG Watts' motion for summary judgment.

RES JUDICATA

The doctrine of *res judicata* provides that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. (Torcasso v. Standard Outdoor Sales, Inc., 193 Ill.Dec. 192, 195, 626 N.E.2d 225 (Ill. 1993); People v. Chicago & Illinois Midland Ry. Co., 196 Ill.Dec. 369 at 371, 629 N.E.2d 1213.) The test generally employed to determine the identity of cause of action for purposes of *res judicata* is whether the evidence needed to sustain the second cause of action would have sustained the first. (Torcasso, 193 Ill.Dec. at 195, 626 N.E.2d 225.) Courts have also employed a transactional approach, which considers whether both suits arise from the same transaction, incident or factual situation. (Rodgers v. St. Mary's Hospital of Decatur, 173 Ill.Dec. 642 at 647, 597 N.E.2d 616.)

Watts asserts that the counts concerning the failure to file reports were previously litigated before the Board in People v. James Lee Watts, (May 4, 1995) PCB 94-127, and that the counts concerning overfill were previously litigated in the Illinois circuit court action People of the State of Illinois and County of Sangamon v. Watts Trucking Service, Inc. and ESG Watts, Inc., No. 91-CH-242 (Cir. Ct. of Sangamon County, February 2, 1994). It is not disputed that both these decisions constituted final determinations on the merits by a forum of competent jurisdiction. Similarly, it is not disputed that the County was a party or in privity with a party to the prior actions. The County was a named party in the circuit court case, and the County's authority to bring administrative citations is based on a delegation agreement with the State. Therefore, the sole issue to be determined is whether the claims which are the subject of the listed citations were previously litigated in the prior actions.

Failure to File Reports

ESG Watts asserts that the factual basis for the "failure to submit reports" alleged in the aforementioned administrative citations is the failure to submit the April 15, 1996 solid waste fee report and the significant modification application. ESG Watts asserts that these matters were litigated in People v. James Lee Watts, (May 4, 1995) PCB 94-127, and that the allegations concerning failure to submit reports are therefore barred by the doctrine of *res judicata*.

In its response, Sangamon County asserts that the decision in PCB 94-127 should not bar the administrative citations, since that action did not address whether Watts filed the 1994 Third Quarter and Fourth Quarter Reports for the Sangamon Valley facility. The County asserts that the administrative citations allege failure to file these reports, as well as the April

15, 1996 report. Additionally, the County asserts that the complaint in PCB 94-127 did not allege that Watts failed to submit the reports on the dates of the administrative citation inspections, which extend from May 9, 1994 through September 27, 1994. The county also asks that the Board penalize respondent for each day that it failed to file the report.

In the Board's May 4, 1995 order in PCB 94-127, the Board found that ESG Watts had failed to timely submit six reports, including: 1) the 1993 Fourth Quarter Report for the Sangamon Valley facility; 2) the 1994 First Quarter Report for the Sangamon Valley facility; 3) the 1994 Second Quarter Report for the Sangamon Valley facility; 4) the 1993 Fourth Quarter Report for the Taylor Ridge facility; 5) the 1994 First Quarter Report for the Taylor Ridge facility; and 6) the 1994 Second Quarter Report for the Taylor Ridge facility. The Board found that a flat penalty of two thousand five hundred dollars (\$2,500.00) should be assessed for each of the six violations, for a total penalty of fifteen thousand dollars (\$15,000). Additionally, the Board found that ESG Watts failed to timely file its significant modification applications for the Sangamon Valley facility, which was due on May 1, 1993, and the biennial revision for Sangamon Valley facility, which was due on March 3, 1994.

Although the County asserts that the administrative citations allege that Watts failed to file its 1994 Third Quarter and Fourth Quarter reports for the Sangamon Valley facility, an examination of the inspection reports attached to each of the administrative citations reveals that each refers only to Watts' failure to file the 1994 First Quarter Report, due April 15, 1994, and there is no mention of Watts' failure to file the 1994 Third and Fourth Quarter Reports. Therefore, the County cannot rely on the 1994 Third and Fourth Quarter Reports to support the asserted violations. The Board will only consider the 1994 First Quarter Report in determining the validity of the alleged violations.

As stated above, the County asserts that the complaint in PCB 94-127 did not allege failure to submit reports on the dates of the administrative citation inspections. In PCB 94-127, the People filed a superseding complaint on October 14, 1994, which introduced a new count to charge the untimely submission of reports as a separate violation of the Act. This complaint states that the Agency received Watts' 1994 first quarter report on August 8, 1994. In its post-hearing brief in that proceeding, the Agency stated that the report was received 105 days late. In its May 4, 1995 opinion and order, the Board stated:

The Board finds that respondent, ESG Watts violated Sections . . . 21(o)(11) [failure to submit reports] as alleged by all four counts of the supplemental complaint.

(People v. James Lee Watts, (May 4, 1995) PCB 94-127, slip op. at 6.)

The record thus makes clear that the alleged violations in PCB 94-127 covered the entire 105-day period during which Watts failed to submit its First Quarter Report for the Sangamon Valley Landfill. Because the Board's decision in PCB 94-127 addressed the entire time period Watts failed to submit this report, we find that all allegations concerning the failure to submit this report are barred by the doctrine of *res judicata*. We therefore grant Watts' motion to dismiss these counts of the administrative citations.

Depositing Refuse in Unpermitted Portions of the Landfill

Watts asserts that the factual basis for the alleged violations of Section 21(o)(9) of the Act for “depositing of refuse in any unpermitted portion of their landfill,” set forth in AC 95-8, AC 95-18, AC 95-21, AC 95-28, and AC 95-29, is the overfill identified and sanctioned in the circuit court action People of the State of Illinois and County of Sangamon v. Watts Trucking Service, Inc. and ESG Watts, Inc., No. 91-CH-242 (Cir. Ct. of Sangamon County, February 2, 1994).

The circuit court decision in People of the State of Illinois and County of Sangamon v. Watts Trucking Service, Inc. and ESG Watts, Inc., No. 91-CH-242 (Cir. Ct. of Sangamon County, February 2, 1994), issued February 4, 1994, found that Watts had violated the Act as set forth in counts 1 through 12 of the complaint. Count 1 of the complaint included alleged violations of Section 21(o)(9) of the Act for depositing refuse in an unpermitted portion of the landfill.

In its response, the County concedes that violations occurring prior to the time the complaint in the circuit court action was filed on February 2, 1992 have been adjudicated on the merits. However, the County alleges that the pending administrative citations allege violations occurring after the circuit court action was decided. The inspections which form the basis for the administrative citations occurred on the following dates:

AC 95-08, December 27, 1994
 AC 95-18, January 17, 1995
 AC 95-21, January 31, 1995
 AC 95-28, February 28, 1995
 AC 95-29, March 14, 1995.

The County points out that the alleged violations are based on inspections which occurred almost a year after the circuit court made its finding of violation, and a year after it determined the appropriate monetary sanctions. The County therefore asserts that these violations constitute new causes of action which are not barred by the circuit court’s decision. The County asserts that the same evidence would not support both the circuit court action and the administrative citations, and that the subsequent evidence, i.e. the inspections, were needed to support the administrative citations.

As part of its order, the circuit court ordered:

7. [Watts] shall immediately undertake the following actions in strict compliance with Agency permits
 - E. The excavation and appropriate disposal of all refuse previously deposited in unpermitted lateral and vertical areas of Area 1.

8. The court is aware that [Watts] has been undertaking measures to come into full compliance with some of the conditions but all of these conditions must be met by May 31, 1994.

(People v. Watts Trucking Service, No. 91-CH-242, (Cir. Ct. of Sangamon County, February 2, 1994.)

We find that the administrative citations concerning overfill are not barred by the doctrine of *res judicata*. Even if the overfill in the administrative citations is the same overfill which was the subject of the circuit court action, the existence of overfill at the Sangamon County Landfill at the time of the inspections, which were performed subsequent to the circuit court action, constitute separate, additional violations of the Act. Additionally, because the violations alleged in the administrative citations occurred later in time, they rely on different evidence than that necessary to support the circuit court action, and they could not have been litigated in the circuit court action. We therefore deny Watts' motion to dismiss these counts of the administrative citations.

CONCLUSION

The Board finds that the alleged violations of Section 21(o)(11) of the Act for failure to submit reports in AC 94-29, AC 94-48, AC 94-49, AC 94-50, AC 94-51, AC 94-52, AC 94-58, AC 94-59, AC 94-60, AC 94-61, AC94-81, and AC 94-91, are barred by the doctrine of *res judicata*. These alleged violations were previously adjudicated in People v. James Lee Watts, (May 4, 1995) PCB 94-127. However, the alleged violations of Section 21(o)(9) of the Act for depositing refuse in an unpermitted portion of the landfill set forth in AC 95-8, AC 95-18, AC 95-21, AC 95-28, and AC 95-29, were not previously litigated in People of the State of Illinois v. Watts Trucking Service, Inc. and ESG Watts, Inc., No. 91-CH-242 (Cir. Ct. of Sangamon County, February 2, 1994), and are therefore not barred by the doctrine of *res judicata*.

Administrative citations AC 94-28, AC 94-82, AC 94-90, AC 94-95, AC 95-8, AC 95-18, AC 95-21, AC 95-28, and AC 95-29, as well as the remaining counts of AC 94-29, AC 94-48, AC 94-49, AC 94-50, AC 94-51, AC 94-52, AC 94-58, AC 94-59, AC 94-60, AC 94-61, AC94-81, and AC 94-91, shall proceed to hearing. The hearing officer is directed to establish an appropriate hearing date.

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 ____ day of _____, 1997, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

