

ILLINOIS POLLUTION CONTROL BOARD
June 6, 2013

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.) PCB 13-28
) (Enforcement - Water)
 ATKINSON LANDFILL CO., an Illinois)
 corporation,)
)
 Respondent.)

ORDER OF THE BOARD (by J.D. O'Leary):

The Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a four-count, first amended complaint against Atkinson Landfill Co. (ALC) concerning threatened water pollution allegedly caused by the disposal of leachate from ALC's active municipal solid waste landfill. The landfill is located at 1378 Commercial Drive in Atkinson, Henry County. The Board today rules solely upon ALC's motion for joinder of the Village of Atkinson (Village) and the City of Galva (Galva) (collectively, municipalities) as respondents (Mot.). For the reasons below, the Board denies ALC's motion.

In this order, the Board first provides the procedural history of the case relevant to the joinder motion, and summarizes the first amended complaint. After setting out the Board's procedural rules on joinder of parties, the Board describes ALC's joinder motion and the People's response in opposition (Resp.). The Board then states the reasons for denying the motion.

PROCEDURAL HISTORY

On December 17, 2012, the People filed the original complaint against ALC, which the Board accepted for hearing on December 20, 2012. With leave of the hearing officer, on January 28, 2013, ALC filed a motion to strike and dismiss the original complaint, as well as the motion for joinder of the municipalities.

By order of February 7, 2013, the hearing officer granted a February 6, 2013 agreed motion to provide the following: (1) the People with leave to file responses by March 15, 2013, to ALC's motion to strike and dismiss the original complaint and ALC's motion for joinder; and (2) ALC with leave to file replies to the People's responses by April 12, 2013. On March 15, 2013, the People filed their response in opposition to ALC's motion for joinder.

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. The first amended complaint did not name the Village or Galva as respondents. By

order of May 16, 2013, the Board granted the parties' May 13, 2013 agreed motion for additional time to file pleadings responsive to the first amended complaint.

On May 3, 2013, the People filed a notice (Not.) in this proceeding informing the Board that the Attorney General filed, on April 30 and May 3, 2013, separate enforcement actions against the Village and Galva, respectively. Not. at 1. The People further state that, simultaneously with these complaints, stipulations and proposals for settlement and motions for relief from the hearing requirement were also filed. *Id.* The corresponding Board dockets are PCB 13-60 (People v. Village of Atkinson) and PCB 13-61 (People v. City of Galva).

FIRST AMENDED COMPLAINT

The first amended complaint contains four counts. In count I, the People allege that ALC disposed of landfill leachate at the Village's Sewage Treatment Plant (Village STP) in excess of "the approximately 12,000 gallons per day limit" imposed by ALC's water pollution control permit No. 2008-EO-0331. 1st Am. Comp. at 5. The People allege that this disposal threatened "the pass through of untreated wastewater" into Green River. *Id.* According to count I, ALC therefore "threatened the discharge of a contaminant into waters of the State which could cause or tend to cause water pollution" in violation of Section 12(a) of the Environmental Protection Act (Act) (415 ILCS 5/12(a) (2010)). *Id.*

Count II of the first amended complaint alleges that ALC operated equipment to dispose of wastewater at the Village STP and indirectly to Green River in excess of the limits of permit No. 2008-EO-0331 "and thus without an operating permit" issued by the Illinois Environmental Protection Agency (Agency). 1st Am. Comp. at 7. Count II alleges that ALC therefore violated Section 309.204(a) of the Board's water pollution regulations (35 Ill. Adm. Code 309.204(a)). *Id.* Also according to count II, ALC's operation of trucks to haul leachate from the landfill in excess of permit No. 2008-EO-0331 limits, "which was disposed of at the Village STP, was capable of causing or contributing to water pollution," thereby violating Section 12(b) of the Act (415 ILCS 5/12(b) (2010)). *Id.*

In count III of the first amended complaint, the People allege that ALC disposed of landfill leachate at the Galva wastewater treatment facility (Galva WWTF) without any permit issued by the Agency. 1st Am. Comp. at 10. Count III alleges that this disposal threatened "the pass through of untreated wastewater" into Edwards River. *Id.* According to count III, ALC therefore "threatened the discharge of a contaminant into waters of the State which could cause or tend to cause water pollution" in violation of Section 12(a) of the Act (415 ILCS 5/12(a) (2010)). *Id.* Count IV alleges that by operating equipment to dispose of wastewater indirectly to Edwards River without an operating permit issued by the Agency, ALC violated Section 309.204(a) of the Board's water pollution regulations (35 Ill. Adm. Code 309.204(a)). *Id.* at 11. Also according to count IV, ALC's operation of trucks to haul leachate from the landfill "for disposal at the Galva WWTF without an operating permit, was capable of causing or contributing to water pollution," thereby violating Section 12(b) of the Act (415 ILCS 5/12(b) (2010)). *Id.* at 11-12.

The People ask that the Board order ALC to cease and desist from any further violations of the Act and regulations and pay civil penalties of \$50,000 for each violation and \$10,000 for each day of violation, and that the Board award the People their costs and reasonable attorney fees. 1st Am. Comp. at 5, 8, 11, 12.

BOARD PROCEDURAL RULES

Section 101.403(a) of the Board's procedural rules provides as follows:

- a) The Board, on its own motion or the motion of any party, may add a person as a party to any adjudicatory proceeding if:
 - 1) A complete determination of a controversy cannot be had without the presence of the person who is not already a party to the proceeding;
 - 2) The person who is not already a party to the proceeding has an interest that the Board's order may affect; or
 - 3) It may be necessary for the Board to impose a condition on the person who is not already a party to the proceeding. 35 Ill. Adm. Code 101.403(a).

Part 101 of the Board's procedural rules generally applies to all Board proceedings. *See* 35 Ill. Adm. Code 101.100(a). Part 103 of the Board's procedural rules applies only to enforcement actions. *See* 35 Ill. Adm. Code 103.100(a). Like Section 101.403(a)(1), Section 103.206(a) provides that "[t]he Board, on its own motion or the motion of a respondent, may order a person to be added as a respondent if a complete determination of a controversy cannot be had without the presence of the person who is not already a party to the proceeding." 35 Ill. Adm. Code 103.206(a); *see also* Geber v. Moushon, PCB 03-96, slip op. at 6-7 (May 15, 2003) (applying Sections 101.403(a)(2) and (a)(3) in enforcement action, as well as Section 103.206(a)).

ALC'S MOTION FOR JOINDER

ALC requests that the Board add the Village and Galva as "defendants" (*i.e.* "respondents" under 35 Ill. Adm. Code 103.202(a)) in this proceeding. ALC cites Section 2-614(a) of the Code of Civil Procedure (735 ILCS 5/2-614(a) (2010)), governing joinder of causes of action and counterclaims in civil litigation, as well as the Board's procedural rule on joinder of parties to adjudicatory proceedings (35 Ill. Adm. Code 101.403).¹ Mot. at 1. The motion states that the Board may take judicial notice that the Agency has issued notices of violation

¹ Section 2-614(a) provides that "[a]ny plaintiff or plaintiffs may join any causes of action, against any defendant or defendants; and the defendant may set up in his or her answer any and all cross claims whatever, whether in the nature of recoupment, set off or otherwise, which shall be designated counterclaims." 735 ILCS 5/2-614(a) (2010).

(NOVs) to both municipalities “arising out of the same set of operative facts as in the present cause.” *Id.* ALC has been informed by the People, according to the motion, that there have been “pre-enforcement meetings” between the People, the Agency, and the two municipalities regarding the NOVs. *Id.* at 2.

ALC claims the disposition of this action “should be consistent” with the outcome of the enforcement proceedings against the Village and Galva. Mot. at 2. Adding the two municipalities to this action would, ALC continues, “result in a ‘complete determination of [the] controversy’” as prescribed by Section 101.403(a)(1). *Id.* ALC further argues that because, upon information and belief, both the Village STP and Galva WWTF have “permits to accept leachate from ALC,” both municipalities have “‘an interest’ in the Board’s order” within the meaning of Section 101.403(a)(2). *Id.* Finally, under Section 101.403(a)(3), ALC maintains, if any condition were imposed on it in this case, the condition would have to “apply equally” to the municipalities. *Id.*

PEOPLE’S RESPONSE IN OPPOSITION

The People respond that Section 2-614(a) of the Code of Civil procedure is inapplicable because the People are not seeking to “join any causes of action against any defendant/respondent.” Resp. at 1-2. Moreover, the People add, ALC cites no authority that would *require* the People to pursue an enforcement action against either the Village or Galva. According to the People, ALC’s argument to that effect is contrary to its own argument in the motion to dismiss or strike the original complaint, *i.e.*, that the Attorney General may not bring an enforcement action until the Agency has exhausted the pre-enforcement process prescribed by Sections 31(a) and (b) of the Act (415 ILCS 5/31(a), (b) (2010)). *Id.* at 2 & n.1.

The People further contend that ALC “offers only bald assertions” that: (1) adding the municipalities as respondents would result in a complete determination; (2) both municipalities have an interest in this proceeding because they purportedly have permits to accept leachate from ALC; and (3) if the Board were to impose any condition on ALC, it would also have to apply the condition to the municipalities. Resp. at 2. The People maintain that the requirements of Section 101.403(a) are not met here because neither the Village nor Galva is a “necessary party” to this action. *Id.* at 3. While the municipalities’ employees may be witnesses in this action, according to the response, that does not mean the municipalities need to be added as parties here to cause a complete determination of the controversy. *Id.* The People add that any interest the municipalities may have in any order the Board enters in this case can be “satisfied by forwarding a copy of such order to the municipalities.” *Id.* Finally, the People claim that because the alleged violations have been remedied, the complaint seeks only the imposition of a civil penalty against ALC, and so no condition will result from this proceeding. *Id.*

DISCUSSION

The Board addresses the Code of Civil Procedure and then the Board’s procedural rules.

Code of Civil Procedure

ALC cites Section 2-614(a) of the Code of Civil Procedure (735 ILCS 5/2-614(a) (2010)), but does not explain its relevance here. The Code of Civil Procedure does not expressly apply to any Board proceeding. *See* 35 Ill. Adm. Code 101.100(b). Although the Board may look to the provisions of the Code of Civil Procedure for guidance when the Board's procedural rules are silent (35 Ill. Adm. Code 101.100(b)), the Board's rules expressly address joinder of parties, the relief sought by ALC's motion. Consequently, there is no need for the Board to look beyond its own rules here. Further, Section 2-614(a), by its terms, allows either a plaintiff to join causes of action against a defendant, or a defendant to set up counterclaims in its answer. Neither is proposed here. The Board finds that Section 2-614(a) of the Code of Civil Procedure does not support ALC's motion for joinder.

Board Procedural Rules

Under the Board's procedural rules, the Board may join a person as a party to an adjudicatory proceeding if one or more of three listed grounds are met. *See* 35 Ill. Adm. Code 101.403(a), 103.206(a). ALC relies upon each of the three grounds for joinder, but first states that the violations pled against it arise from its alleged disposal of leachate at the Village STP and the Galva WWTF (Mot. at ¶1); that enforcement proceedings against the Village and Galva "arise[e] out of the same set of operative facts as in the present cause" (*id.* at ¶2); and that "[i]t would appear that any disposition of the enforcement proceedings against ALC should be consistent with that of the Village of Atkinson and the City of Galva" (*id.* at ¶4).

Section 101.403(a)(1) of the Board's procedural rules provides the first ground for joinder: "[a] complete determination of a controversy cannot be had without the presence of the person" sought to be added. 35 Ill. Adm. Code 101.403(a)(1). This same ground for adding a party is provided in Section 103.206(a) for enforcement proceedings (35 Ill. Adm. Code 103.206(a)). On this ground, ALC's joinder motion offers the conclusory statement that the presence of the Village and Galva "would certainly result in a 'complete determination of [the] controversy.'" Mot. at ¶6, quoting 35 Ill. Adm. Code 101.403(a)(1). The Board finds that ALC has not explained how this ground is satisfied and therefore has failed to meet its burden as movant. *See* Goose Lake Ass'n v. Drake, PCB 90-170, slip op. at 1 (June 6, 1991) (movant must "adequately support a motion directed to the Board").

Further, under Section 33(a) of the Act (415 ILCS 5/33(a) (2010)), the first controversy for the Board to decide in this case consists of whether ALC violated the Act and Board regulations as alleged in the first amended complaint. If so, the question becomes whether the Board should (1) impose a civil penalty on ALC (and, if so, in what amount), (2) enter an order that ALC cease and desist from further violations, and (3) award the People their costs and attorney fees. 1st Am. Comp. at 5, 8, 11, 12; *see also* 415 ILCS 5/33(b), 33(c), 42(a), 42(f), 42(h) (2010). The standard for joinder is whether a complete determination of that controversy *cannot be had* absent joinder. *See* 35 Ill. Adm. Code 101.403(a)(1), 103.206(a). The Board finds that the complete determination of these matters does not require naming the Village and Galva as respondents to this proceeding. To the extent that employees of the Village or Galva possess information relevant to the issues in this case, ALC may subpoena them to testify at the

hearing. *See* 35 Ill. Adm. Code 101.622. That, however, is not a basis for the joinder of their employers.

Section 101.403(a)(2) provides the second ground for joinder: the person sought to be added “has an interest that the Board’s order may affect.” 35 Ill. Adm. Code 101.403(a)(2). ALC’s joinder motion asserts that the Village and Galva have “an interest in the Board’s order” because they have permits to accept leachate from ALC. Mot. at ¶7. ALC’s joinder motion, however, again fails to explain how any such permits give the municipalities an interest in this case. The first amended complaint does not ask the Board to bar or restrict ALC from disposing of leachate at either the Village STP or the Galva WWTF. Nor does the first amended complaint make any mention of either facility’s permit. The Board finds ALC has not demonstrated that either of the municipalities has an interest that a Board order in this case may affect.

Section 101.403(a)(3) provides the third ground for joinder: “[i]t may be necessary for the Board to impose a condition on the person” sought to be added. 35 Ill. Adm. Code 101.403(a)(3). ALC’s joinder motion states, again without elaboration, that “if any condition were to arise out of the instant cause, it must apply equally to” the Village and Galva. Mot. at ¶8. The Board finds ALC has not shown any likelihood that it will be necessary to impose a condition in this proceeding on either municipality. The violations alleged against ALC, according to the People, have been “previously remedied,” and the People seek a civil penalty against ALC and an order to cease and desist from further violations. Resp. at 3. The Board has no reason to expect it would need to impose a condition on the Village or Galva in this proceeding.

The Board recognizes that the complaints against the Village and Galva concern ALC’s alleged leachate disposal at the respective facilities. *See People v. Village of Atkinson*, PCB 13-60, slip op. at 1 (June 6, 2013); *People v. City of Galva*, PCB 13-61, slip op. at 1 (June 6, 2013). However, that those two complaints may have arisen out of the same set of facts alleged in the complaint against ALC does not dictate that the municipalities must be named as respondents here. ALC also fails to articulate its concerns over potential inconsistency between the disposition of this case and the other two. The stipulations in PCB 13-60 and PCB 13-61 are made only for purposes of settlement (*see* PCB 13-60 Stip. at 1; PCB 13-61 Stip. at 1) and have no bearing upon contested matters in this proceeding.

Ultimately, the scope of this proceeding is defined by the first amended complaint filed by the Attorney General. The 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. Bell Sports, Inc.*, PCB 95-91, slip op. at 7 (Mar. 20, 1997). With no showing by ALC that any ground for joinder under the Board’s procedural rules is met, the Board will not question the exercise of such discretion here. *See People v. Apollo Plastics Corp.*, PCB 09-108, slip op. at 5 (Oct. 21, 2010) (“the Board cannot order the parties to further negotiate a potential settlement, as this is truly a matter of prosecutorial discretion”); *People & Environmental Law and Policy Center v. Freeman United Coal Mining Co., LLC*, PCB 10-61, PCB 11-2 (consol.), slip op. at 16 (July 15, 2010) (the Board will not question the reasoning behind the People’s decision to exclude certain allegations from complaint).

CONCLUSION

For the above reasons, the Board denies ALC's motion to join the Village and Galva as respondents to this proceeding.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 6, 2013, by a vote of 5-0.

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, Assistant Clerk
Illinois Pollution Control Board