

ILLINOIS POLLUTION CONTROL BOARD
July 10, 1997

ENVIRONMENTAL SITE DEVELOPERS,)	
INC., an Illinois corporation,)	
)	
Complainant,)	PCB 96-180
)	(Enforcement - Water - Citizens)
v.)	
)	
WHITE & BREWER TRUCKING, INC., an)	
Illinois corporation,)	
)	
Respondent.)	
)	
_____)	
PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	PCB 97-11
)	(Enforcement - Water)
v.)	
)	
WHITE & BREWER TRUCKING, INC., an)	
Illinois corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by M. McFawn):

This case is before the Board on a number of motions, including a motion by respondent White & Brewer Trucking, Inc. (White & Brewer) to stay the proceedings, a motion by complainant Environmental Site Developers, Inc. (ESDI) for partial summary judgment, and a motion by ESDI to consolidate this case with People v. White & Brewer Trucking, PCB 97-11, another enforcement action brought against White & Brewer by the Illinois Attorney General on behalf of the people of the State of Illinois.

BACKGROUND

This case concerns leachate from a landfill owned and operated by White & Brewer near Coffeen, Illinois. The relevant circumstances and events, as derived from allegations in the pleadings filed by parties in the various lawsuits described below, are as follows.

White & Brewer purchased the landfill from ESDI on August 23, 1990. All permits relating to the landfill were subsequently transferred to White & Brewer, and White & Brewer is

currently the owner and operator of the landfill.¹ At the time the landfill was sold, four of the five cells of the landfill (Cells A through D) were closed; only Cell E was (and is) open and receiving waste. Since at least October 1992, leachate has been flowing out of Cell D of the landfill and ultimately into the waters of Shoal Creek. The amounts of certain substances in the leachate exceed the amounts permitted in the various permits issued by the Illinois Environmental Protection Agency (Agency).

On August 2, 1995, White & Brewer filed a lawsuit in federal district court for the Central District of Illinois in Springfield against ESDI, among others, alleging claims under the federal Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*, as amended by the federal Resource Conservation and Recovery Act of 1976 (RCRA), as well as breach of contract, misrepresentation, fraudulent misrepresentation, and violation of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2. The federal case is still pending. The gist of the federal case, as it relates to this case, is that the leachate problem is due to acts or omissions by ESDI when it owned and operated the landfill, that White & Brewer was unaware of the problem when it bought the landfill, and that White & Brewer has never “operated” Cell D of the landfill, the cell from which the leachate flows. Among the relief sought by White & Brewer in the federal case is an order requiring ESDI and its president to correct all violations of RCRA (i.e., remediate the leachate problems at the landfill).

On February 15, 1996, ESDI filed the complaint in this case with the Board. ESDI alleges that the flow of leachate into Shoal Creek violates various provisions of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* (Act), and seeks an order directing White & Brewer to cease and desist from violating the Act (i.e., remediate the leachate problems at the landfill) as well as imposition of monetary penalties against White & Brewer. ESDI bases its claim on allegations made by White & Brewer in the complaint filed in the federal case. ESDI contends that through the allegations in the federal complaint, White & Brewer has admitted violations of the Act.

On July 15, 1996, the Attorney General filed the complaint in case number PCB 97-11 with the Board, seeking the same relief as ESDI, for violations of the Act based on the leachate flow from the landfill.

PENDING MOTIONS

Eleven motions in total are presently pending before the Board. In its “Motion to Amend Respondent’s Response in Opposition to Motion to Consolidate and Motion for Stay of Decision on Consolidation and Response to Motion for Partial Summary Judgment” (Motion to Amend) filed on February 28, 1997, White & Brewer indicated that it no longer sought the relief requested in “Respondent’s Motion for Stay of Decision on Consolidation,” filed on

¹ White & Brewer asserts in a number of places in filings with the Board that it never “operated” the closed cells of the landfill. Under Board regulations, however, where there is no other person conducting a waste treatment, waste storage or waste disposal operation, the owner is the *de jure* “operator” of a facility. See 35 Ill. Adm. Code. 807.104, 810.103.

January 14, 1997.² The Motion to Amend will be granted, and the latter motion withdrawn. In six of the remaining nine pending motions, the parties seek leave to file various documents relating to the other pending motions. These six motions are:

1. Respondent's Motion for Leave to File Response in Excess of Page Limits (regarding ESDI's motion for partial summary judgment) (1/14/97)
2. Complainant's Motion for Leave to File Reply re Motion for Partial Summary Judgment (1/23/97)
3. Complainant's Motion for Leave to File Reply re Motion for Consolidation (1/27/97)
4. Respondent's Motion for Leave to file Memorandum of Law in Support of Motion to Stay Proceedings in Excess of Page Limits (3/31/97)
5. Complainant's Motion for Leave to File Response in Excess of Page Limit (re stay motion) (4/25/97)
6. Respondent's Motion for Leave to File Reply to Complainant's Response in Opposition to Motion to Stay Proceedings (5/12/97)

The remaining three motions raise more substantive issues:

7. Complainant's Motion to Consolidate (12/9/96)
8. Complainant's Motion for Partial Summary Judgment (12/9/97)
9. Respondent's Motion to Stay Proceedings (3/31/97)

No responses have been filed with the Board in opposition to any of the first six motions listed above. The Board believes that the various documents which the parties seek leave to file will be helpful to the Board in resolving the remaining pending motions, and accordingly these motions will be granted.

We turn then to the three remaining motions. Because resolution of "Respondent's Motion to Stay Proceedings" could obviate the need for a ruling on "Complainant's Motion to Consolidate" or "Complainant's Motion for Partial Summary Judgment," we consider that motion first, although it was filed after the other two motions. In granting "Complainant's Motion for Leave to File Reply re Motion for Partial Summary Judgment" (item 2 above), the Board grants ESDI fourteen days to file its reply. The Board will rule on "Complainant's Motion for Partial Summary Judgment" after considering any additional arguments which ESDI may raise.

² Not to be confused with "Respondent's Motion to Stay Proceedings," a separate motion filed on March 31, 1997, which is discussed below.

Respondent's Motion to Stay Proceedings

White & Brewer has moved to stay proceedings in this case based on the pending federal case. ESDI, as noted, is a defendant in the federal case. White & Brewer contends that resolution of the federal case, which was filed before this case, could impact this case and consequently this case should be stayed pending resolution of the federal case to avoid possible conflicting judgments and the waste of judicial resources.

The Illinois Supreme Court has identified four factors to be considered in determining whether the later-filed of two arguably related actions should be stayed: (a) comity, (b) prevention of multiplicity, vexation and harassment, (c) likelihood of obtaining complete relief in the foreign jurisdiction, and (d) the *res judicata* effect of a foreign judgment in the local forum. A. E. Staley Mfg. Co. v. Swift & Co., 84 Ill.2d 245, 254, 419 N.E.2d 23, 27-28 (1980). The Board concludes that none of these factors militates in favor of a stay in this case.

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 (Black's Law Dictionary, 6th Ed. (1990)). 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. The Board concludes, however, that the case before the Board is not the same as the case before the federal court, and consequently the Board need not, under principles of comity, defer to (i.e., stay proceedings here pending) the ruling of the federal court.

Although both this case and the federal case involve alleged violations of environmental law at the landfill, and both seek, among other relief, orders requiring cessation of pollution from the landfill, the federal case involves claims under RCRA against ESDI and its president, whereas this case involves claims for violation of the Act by White & Brewer. In suggesting that the two cases are connected because both cases seek the same ultimate outcome, i.e., cessation of pollution at the landfill, White & Brewer ignores fundamental distinctions between the two: each seeks that relief from a different party under a different regulatory scheme. The issues before the Board are not before the federal court, and vice versa.

Issues very similar to those before the Board on White & Brewer's stay motion were considered by the federal court in its review of a motion for judgment on pleadings, which included a prayer for abstention. The federal court denied the motion. A copy of the federal court's opinion (cited herein as "Fed. Op.") was attached to the Motion to Amend, and includes the following enlightening quotes:

Plaintiff [White & Brewer] argues that neither Illinois' environmental regulatory scheme nor its permit process are at issue in the instant case. * * * Plaintiff states

that if the Court abstains, it will be left without meaningful relief because Counts I & II are brought pursuant to [RCRA], which is exclusively a federal claim.

* * *

. . . Illinois environmental policies and scheme are not at issue in the instant case.
* * * In each of the cases cited by Defendants, abstention was proper because had the court not abstained, it would have been required to review the state's environmental permit process.

On the other hand, the case at bar raises no issues as to Illinois' policies and regulations regarding the issuance or the renewing of landfill permits. There is no dispute that [White & Brewer] owns and operates the disposal site under validly issued permits. There also seems to be little question that those permits were violated. The only issue raised is who should be responsible for bringing the disposal site into compliance with said permits. The Court cannot say that the issue of who is responsible would require it to delve into the intricacies of Illinois' environmental law.

* * *

[T]he Court is unsure that there will be a conflict between it and the Illinois administrative process. Illinois' concerns with environmental violations are, presumably: (1) that they never occur, or (2) if they do occur, that they are resolved. The Court fails to see how resolution of the issues before it would jeopardize those concerns or the State's environmental policy. Fed. Op. at 7, 12-13.

Not only does the federal case involve a different regulatory scheme and seek relief from a different party than in the case before the Board, but apparently White & Brewer, the party requesting a stay here, has argued (successfully) in federal court that the cases are unrelated. The only potential intersection of the two cases would occur if both parties were simultaneously required to stop the alleged pollution from the landfill. The federal court, however, cites authority holding that RCRA citizen suits can be "harmonized" with state law where necessary. Fed. Op. at 13. We agree.

Multiplicity, Vexation or Harassment

There has been no allegation of vexation or harassment in this case, but White & Brewer does contend that continued prosecution of this case will result in multiplicity of litigation. As noted above, however, we believe that this case and the federal case are fundamentally different in character, given that relief is sought against different parties under different regulatory schemes. The claims against White & Brewer for violations of the Act are not before the federal court, and will not be decided in the federal case. The Board accordingly finds that the progress of the two cases simultaneously will not result in multiplicity of litigation.

Complete Relief in Foreign Forum

For the same reason, resolution of the federal case will not result in complete relief to ESDI. Among the relief sought from the Board in this case is an order directing White & Brewer to cease and desist from violating the Act. Inasmuch as there are no claims pending against White & Brewer in the federal case, ESDI will not obtain complete relief from the federal court upon resolution of the federal case.

Res Judicata

The last factor to be considered in determining whether related actions should be stayed concerns the doctrine of *res judicata*. It is the conclusion of the Board that the potential *res judicata* effects of a judgment entered by the federal court are too speculative to require a stay of these proceedings.

Res judicata is the legal doctrine which 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 a new proceeding.” Burke v. Village of Glenview, 257 Ill.App.3d 63, 69, 628 N.E.2d 465, 469 (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 privity between subsequent parties and the original parties. People ex rel. Burris v. Progressive Land Developers, Inc., 151 Ill.2d 285, 294, 602 N.E.2d 820, 825 (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. People ex rel. Burris v. Progressive Land Developers, Inc., 151 Ill.2d 285, 294, 602 N.E.2d 820, 825 (1992).

As we have noted, the claims against White and Brewer in this case for violations of the Act are not before the federal court. If such claims could be brought as counterclaims in the federal case, and would not be subject to abstention by the federal court (issues which we do not address), then a judgment in the federal case would have a *res judicata* effect in this case. For two reasons, however, the Board will not stay these proceedings pending the outcome of the federal case, even assuming the aforementioned conditions were met.

First, we note that the “Scheduling Order” entered by the federal court on March 24, 1997, has set a trial date in the federal case of, at the earliest, May 5, 1998. Given the posture of this case, we believe that the issues before the Board can be resolved well in advance of that date. If they are, then the Board’s order may have a *res judicata* effect on the federal case, and prevent relitigation of the issues before us in that forum. The only effect of staying proceedings here would be the needless delay of resolution of the issues involved in this case. Under these circumstances, to stay proceedings in this case would be inconsistent with the Board’s obligation as a unit of state government to manage its activities so as to minimize environmental damage. (See Section 2(a)(iv) of the Act.)

Second, the *res judicata* doctrine, even if applicable in this case, would have no effect on People v. White & Brewer Trucking, PCB 97-11, an enforcement action brought against White &

Brewer by the Attorney General involving essentially the same circumstances as this case, as is discussed in more detail below in the Board's discussion of ESDI's Motion to Consolidate. Staying the proceedings in this case will not prevent litigation of the issues involved here, nor would it prevent the possibility of entry of conflicting judgments by the Board and the Federal Court on the issue of White & Brewer's liability. Accordingly, we believe the better course, particularly in light of the scheduling order in effect in the federal case, is to proceed with this case, so that the issues before us are determined completely and efficiently.

Based on the foregoing analysis of the four factors to be considered in deciding whether this matter should be stayed, the Board concludes that a stay of proceedings is not appropriate in this case, and "Respondent's Motion to Stay Proceedings" will be denied. We now proceed to consider "Complainant's Motion to Consolidate."

Complainant's Motion to Consolidate

ESDI has moved to consolidate this case with People v. White & Brewer Trucking, PCB 97-11, an enforcement action brought by the Attorney General against White & Brewer based on the same circumstance which underlies both this case and the federal case, namely, leachate from the Landfill pooling and flowing ultimately into Shoal Creek. Filings in this case indicate that the Attorney General was served with "Complainant's Motion to Consolidate" and the briefs filed by ESDI and White & Brewer. We have received no response from the Attorney General.

Under 35 Ill. Adm. Code 103.141, "in the interest of convenient, expeditious, and complete determination of claims, the Board may consolidate or sever enforcement, variance, permit or other adjudicative claims involving any number of parties, and may order additional parties to be brought in pursuant to the provisions of Section 103.121." In evaluating the propriety of consolidation of cases, among the factors considered by the Board are whether "both proceedings arise from the same alleged incident at the same site and concern identical factual circumstances and violations." People v. Boyd Brothers, Inc. (December 1, 1994), PCB 94-311.

There can be no dispute that the "same alleged incident at the same site" test is met here. Although the facts and circumstances alleged in the ESDI and Attorney General complaints are not "identical," resolution of each of the five claims in the ESDI complaint will be determined by (or determine) resolution of one or more of the claims in the Attorney General's complaint. More specifically, the ESDI complaint alleges the following violations of the Act:

6. Beginning on or about October 28, 1992, and continuing from time to time thereafter, contaminants deposited at the Landfill have been discharged into the environment, including waters of the State, or have threatened to be so discharged, so as to:
 - a. Cause or tend to cause water pollution;
 - b. Create a water pollution hazard;

- c. Violate discharge limitations imposed by an NPDES permit issued by the Illinois Environmental Protection Agency for the Landfill;
- d. Violate post-closure care and monitoring conditions imposed by permits issued by the Illinois Environmental Protection Agency for the Landfill; and
- e. Violate effluent, water quality, and groundwater quality standards adopted by the Pollution Control Board

Each alleged violation listed in paragraph 6 above is also the basis of at least one claim in the Attorney General's complaint in PCB 97-11. The Attorney General's complaint in PCB 97-11 alleges in Count I:

- 23. From November 7, 1991, to at least August 11, 1995, and continuing to a date known only by the Respondent, the Respondent caused or allowed concentrations of inorganic chemical constituents to exceed established standards for Class I groundwater. In so doing, the Respondent has caused water pollution and thereby violated Section 12(a) of the Act
- 24. From November 7, 1991, to at least August 11, 1995, and continuing to a date known only by the Respondent, the Respondent caused or allowed concentrations of inorganic chemical constituents to exceed the established standards for Class II groundwater. In so doing, the Respondent has caused water pollution and thereby has violated Section 12(a) of the Act
- 25. From at least November 7, 1991, to at least August 11, 1995, and continuing to a date known only by the Respondent, the Respondent's activities at the site have caused allowed contaminants to be deposited upon the ground in such place and manner so as to create a water pollution hazard. In so doing, the Respondent has violated Section 12(d) of the Act

Count II of the Attorney General's complaint alleges:

- 22. During, but not limited to, the period between March 1991 and May 1996, the Respondent discharged effluent which exceeded the limits set forth in its NPDES Permit No. IL0064735 for total suspended solids, boron, sulfate, manganese, and pH, as evidenced by information reported on the [Discharge Monitoring Reports submitted to IEPA].
- 23. By causing or allowing discharges of total suspended solids, boron, sulfate, manganese, and pH in excess of permitted limitations, the Respondent has violated Section 12(f) of the Act

24. By discharging contaminants into waters of the State so as to cause or tend to cause water pollution in Illinois, W&B has violated Section 12(a) of the Act

Count III of the Attorney General's complaint alleges:

18. Since at least November 24, 1992, and continuing to the present date, a liquid substance originates from Cell D, flows to the northeast, and enters a drainage pattern in Cell E that flows into the east branch of Shoal Creek. The liquid contains a red solid that is deposited on the stream floor.
19. The liquid, as described in the foregoing paragraph 17 [sic], constitutes "leachate" as that term is defined in [35 Ill. Adm. Code 807.104].
20. Since at least March 29, 1995, and continuing to the present date, leachate pools have formed on the ground on the east side of the landfill in Cell D.
23. By causing or allowing the discharge of contaminants to flow from the site into waters of the environment of the State so as to cause water pollution, the Respondent has violated Section 12(a) of the Act
24. By causing or allowing leachate pools to form on the ground at the site, Respondent has created a water pollution hazard and, in so doing, has violated Section 12(d) of the Act

Count VI of the Attorney General's complaint alleges:

14. On January 9, 1992, the Illinois EPA approved certification of closure for Cells A-D, with the 15-year post-closure care period beginning on January 8, 1992.
15. On November 24, 1992, and continuing to a date better known to the Respondent, a portion of the east side of the landfill in the area of Cell D was eroded such that waste material was exposed.
16. By failing to maintain adequate final cover at the site, the Respondent has violated Section 21(d)(1) and (2) of the Act
17. Since at least November 24, 1992, and continuing to the present date, a leachate seep has emanated from Cell D and flowed northeast to Cell E where it continues eastward to Shoal Creek.
18. By failing to take necessary remedial action after site closure to abate the continuing leachate seeps from Cell D, Respondent has violated Section 21(d)(1) and (2) of the Act

ESDI's claims correspond to the Attorney General's allegations as follows:

- ESDI's allegation in paragraph 6(a) of its complaint, that since October 28, 1992, White & Brewer has discharged contaminants from the Landfill so as to cause or tend to cause water pollution, is subsumed by the Attorney General's allegations in paragraphs 23 and 24 of Count I and paragraph 24 of Count II, and subsumes the Attorney General's allegations in paragraph 23 of Count III.
- ESDI's allegations in paragraph 6(b) of its complaint, that since October 28, 1992, White & Brewer has discharged contaminants from the Landfill so as to create a water pollution hazard, is subsumed by the Attorney General's allegations in paragraph 25 of Count I, and subsumes the Attorney General's allegations in paragraph 24 of Count III.
- ESDI's allegations in paragraph 6(c) of its complaint, that since October 28, 1992, White & Brewer has discharged contaminants from the Landfill so as to violate discharge limitations imposed by an NPDES permit issued by the Agency for the Landfill, either subsume or are subsumed by the Attorney General's allegations in paragraphs 22 and 23 of Count II.
- ESDI's allegations in paragraph 6(d) of its complaint, that since October 28, 1992, White & Brewer has discharged contaminants from the Landfill so as to violate post-closure care and monitoring conditions imposed by permits issued by the Agency for the Landfill, are subsumed by the Attorney General's allegations in paragraphs 16 and 18 of Count VI.
- ESDI's allegations in paragraph 6(e) of its complaint, that since October 28, 1992, White & Brewer has discharged contaminants from the Landfill so as to violate effluent, water quality, and groundwater quality standards adopted by the Pollution Control Board, are subsumed by the Attorney General's allegations in paragraphs 23 and 24 of Count I.

Given the extent to which the claims are congruent, the Board finds under the circumstances present that it is in the interest of convenient, expeditious, and complete determination of the claims against White & Brewer that this case be consolidated with PCB 97-11. "Complainant's Motion to Consolidate" will be granted.

ORDER

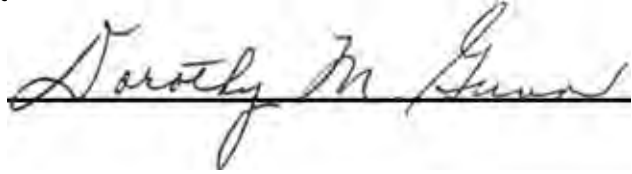
1. Complainant's Motion to Consolidate is granted. This case is hereby consolidated with People v. White & Brewer Trucking, PCB 97-11.
2. Respondent's Motion for Leave to File Response in Excess of Page Limits re ESDI's motion for partial summary judgment is granted.
3. Respondent's Motion for Stay of Decision on Consolidation is withdrawn.
4. Complainant's Motion for Leave to File Reply re Motion for Partial Summary Judgment is granted. Complainant may file a reply in support of its Motion for Partial Summary Judgment within fourteen days of adoption of this Order by the Board.
5. Complainant's Motion for Leave to File Reply re Motion for Consolidation is granted.
6. Respondent's Motion to Amend Response in Opposition to Motion to Consolidate and Motion for Stay of Decision on Consolidation and Response to Motion for Partial Summary Judgment is granted.
7. Respondent's Motion for Leave to file Memorandum of Law in Support of Motion to Stay Proceedings in Excess of Page Limits is granted.
8. Respondent's Motion to Stay Proceedings is denied.
9. Complainant's Motion for Leave to File Response in Excess of Page Limit re Respondent's Motion to Stay Proceedings is granted.
10. Respondent's Motion for Leave to File Reply to Complainant's Response in Opposition to Motion to Stay Proceedings is granted.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 335 establishes filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 10th day of July 1997, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board