ILLINOIS POLLUTION CONTROL BOARD
September 4, 2003

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 00-104
	)	(Enforcement – Air, Water)
THE HIGHLANDS, LLC, and MURPHY FARMS INC. (a division of MURPHY BROWN, LLC, a North Carolina limited liability corporation, and SMITHFIELD FOODS, INC., a Virginia corporation),	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by T.E. Johnson):

On June 16, 2003, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a motion for summary judgment on count I of the amended complaint against The Highlands, LLC, and Murphy Farms (a division of Murphy Brown, LLC and Smithfield Foods, Inc.) (respondents). *See* 35 Ill. Adm. Code 101.516. Hearing officer Brad Halloran granted the People an extension of time until July 25, 2003, to file a response. The People timely filed a response postmarked July 25, 2003. For the reasons set forth below, the Board denies the respondents' motion for summary judgment on count I of the amended complaint.

PRELIMINARY MATTER

The Board grants a motion made by the People in their motion to amend the original complaint, filed August 20, 2002, to change the caption of this matter to reflect that Smithfield Foods, Inc. of Smithfield, Virginia acquired Murphy Farms, Inc. since the date of filing of the original complaint. The Board also amends the caption to reflect that on January 4, 2001, the Board accepted a proposed settlement and stipulation between the People and Bion Technologies, Inc. The caption of this order reflects both these changes.

BACKGROUND

On December 21, 1999, the People filed a two-count complaint against respondents. *See* 415 ILCS 5/31(c)(1) (2002), *amended by* P.A. 93-152, eff. July 10, 2003. The People alleged that respondents violated Sections 9(a) of the Environmental Protection Act (Act) and Section 501.402(c)(3) of the Board's agriculture regulations. 415 ILCS 5/9(a); 35 Ill. Adm. Code 501.402(c)(3). The People further alleged that respondents violated these provisions by causing or allowing the emission of offensive odors and by causing or allowing those odors to interfere with the use and enjoyment of the neighbors' property.

The People filed an amended two-count complaint on August 20, 2002. The People allege in the amended complaint that respondents violated Sections 9(a) and 12(a), (d), and (f) of the Act and Section 501.405(a) of the Board's agriculture regulations. 415 ILCS 5/9(a) and 12(a), (d), and (f); 35 Ill. Adm. Code 501.405(a). The People further allege that respondents violated these provisions by causing or allowing the emission of offensive odors, and causing or allowing the discharge of livestock waste to a tributary of French Creek without a National Pollutant Discharge Elimination System (NPDES) permit so as to create a water pollution hazard. The complaint concerns respondents' swine facility located just south of Williamsfield in Elba Township, Knox County. The Board accepted the amended complaint on October 8, 2002. Both the complaint and the amended complaint concern respondents' swine facility located just south of Williamsfield in Elba Township, Knox County.

On June 16, 2003, the respondent Highlands, LLC filed a motion for summary judgment on count I of the amended complaint. The People responded on July 28, 2003.

BOARD RULES

Section 101.516(b) of the Board's procedural rules for enforcement actions provides:

> If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment. 35 Ill. Adm. Code 101.516(b).

Section 501.402(c)(3) of the Board rules provides:

> Adequate odor control methods and technology shall be practiced by operators of new and existing livestock management facilities and livestock waste-handling facilities so as not to cause air pollution. 35 Ill. Adm. Code 501.402(c)(3).

Section 501.405(a) provides that operators of livestock waste handling facilities must factor in the proximity to surface waters and the likelihood of reaching groundwater when determining the practical limit of livestock waste that may be applied to soils in the field. 35 Ill. Adm. Code 501.405(a).

STATUTORY BACKGROUND

Rather than setting forth the relevant statutes verbatim, a short summary follows. Section 9(a) of the Act is a prohibition against air pollution. 415 ILCS 5/9(a) (2003). Section 12(a) is a prohibition against water pollution. 415 ILCS 5/12(a) (2003). Section 12(d) is a prohibition against creating a water pollution hazard. 415 ILCS 5/12(d) (2003). Section 12(f) is a prohibition against discharging any contaminants into Illinois waters without an NPDES permit issued by the Environmental Protection Agency (Agency). 415 ILCS 5/12(f) (2003).

MOTION FOR SUMMARY JUDGMENT

Standard of Review

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment is a drastic means of disposing of litigation, and therefore it should only be granted when the movant's right to the relief is clear and free from doubt." Dowd, 181, Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489. N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis, which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

The Respondents' Arguments

The respondents argue that they are entitled to summary judgment on count I of the amended complaint because it is are barred by the doctrine of *res judicata*. Mot. at 10. The respondents argue that, in the alternative, the Board should grant the respondents partial summary judgment on count I of the amended complaint for the period of time beginning March 11, 2002 to the present. *Id*.

The respondents contend that in the instant matter, the three necessary elements of *res judicata* are met: (1) identity of parties or their privies; (2) identity of cause of action; and (3) entry of a final judgment on the merits by a court of competent jurisdiction. Mot. at 3-4; Supp. Br. at 2; citing People v. Progressive Land Developers, Inc., 151 Ill. 2d 285, 294, 602 N.E.2d 820 (1992). The respondents contend that Mr. Roy and Mrs. Dianne Kell filed a complaint against the Highlands and Murphy Family Farms, Inc. in the circuit court of Knox County on October 22, 1999, alleging among other things violations of Section 9(a) of the Act and Section 501.402(c)(3) of the Board rules. Mot. Exh. A. Respondents contend that on March 11, 2002, the court dismissed the Kells' second amended complaint with prejudice in response to a joint motion and stipulation to dismiss filed by the parties. Mot. at 3-4. Respondents argue that the joint motion to dismiss states all issues among the parties have been fully resolved, compromised and settled. Mot. at 4.

Respondents argue that the dismissal of the Kells' second amended complaint with prejudice pursuant to a settlement agreement constitutes a final judgment on the merits. Respondents further argue that the operative facts are the same for the Kells' action in Knox County Circuit Court and the present action and, therefore, the causes of action are identical. Finally, the respondents contend that resolution of this proceeding would benefit the Kells most,

and since the Kells' interests have already been adequately represented, privity of parties exists between those in this action and the resolved circuit court case.

The respondents allege that, in the alternative, the respondents are entitled to partial summary judgment from the time period beginning March 11, 2002 to the present. The respondents contend the Kells have not filed any complaints regarding odors originating from the facility since March 11, 2002, the date the joint motion and stipulation to dismiss was entered in the circuit court case. The respondents argue that the Kells have continued to live in the same location since the settlement. The respondents contend that all of these facts show that odors from the respondents' facility do not interfere with the Kells' health, general welfare, and physical property since March 2002. Mot. at 5. Accordingly, the respondents argue that there is no genuine issue of material fact that they are entitled to ask the Board to grant partial summary judgment in their favor as to count I of the amended complaint from the time period beginning March 11, 2002 to the present.

The People's Arguments

The People argue there is no identity of causes of action, no privity of parties, and there is too little information to determine whether the Kells' joint motion and stipulation to dismiss constitutes a final judgment on the merits. Accordingly, the People respond that the Board should deny the respondents' motion for summary judgment on count I of the amended complaint.

The People argue that in the Kells' action against The Highlands, LLC, and Murphy Family Farms, Inc., the Kells brought a private nuisance action which requires a different showing than an action brought by the Office of the Attorney General to enforce Section 9(a) of the Act and Section 501.402(3) of the Board regulations. The People argue the Kells only alleged that the respondents were out of compliance with the Act and Board rules as those violations are relevant to the question of whether the hog facility amounted to a temporary or permanent nuisance and also whether the facility was negligent. The People argue the Kells did not seek enforcement of Section 9(a) of the Act or Section 501.402(c)(3) of the Board rules.

The People further argue that the relief requested by the Kells is very different and requires a very different analysis than a determination of remedy under Section 42(h) of the Act. 415 ILCS 5/42(h) (2002), *amended by* P.A. 93-152, eff. July 10, 2003. For example, in the way of relief, the Kells requested civil damages, payable to themselves personally, and an abatement of a temporary nuisance. In this action the People seek a finding of violation of the Act and Board rules and the assessment of penalties, payable to the State Environmental Protection Trust fund.

The People contend there is no privity of parties between the Kells and the People. The People state "it is the identity of interest that controls in determining privity, not the nominal identity of the parties." Resp. at 6, citing Progressive Land Developers, 602 N.E.2d at 825. The People contend that the Kells' interest was to recover individual damages and an order for abatement of the odor such that it no longer caused a nuisance. Resp. at 7. On the other hand, the People's interest is a Board order finding violations of the Act and Board regulations, an

order to cease and desist from future violations of the Act and Board regulations, and a civil penalty to be paid to the State Environmental Protection Trust Fund. *Id*.

Finally, the People contend it is questionable whether there has been a final judgment on the merits in a court of competent jurisdiction, since the settlement and dismissal between the Kells and the respondents has been kept confidential. Resp. at 8. The People cite to Ekkert v. City of Lake Forest, 225 Ill. App. 3d 702, 707, 588 N.E.2d 482, for the principle that courts are reluctant to give preclusive effect to consent orders because the extent to which issues are actually litigated is doubtful. Resp. at 9. The People contend that because the Kells have not produced the settlement and dismissal agreement and because they allegedly have refused to talk to Agency inspectors once the settlement was finalized, the Board should not consider the settlement a final judgment on the merits. Resp. at 10.

DISCUSSION

The Board finds that the respondents are not entitled to summary judgment as a matter of law as to count I of the amended complaint. Below the Board discusses why the respondents did not meet the burden of proof to show that *res judicata* applies to count I of this proceeding or that they are entitled to partial summary judgment for the period of time beginning March 11, 2002, to the present.

The doctrine of *res judicata* bars the relitigation of claims or demands by the same parties or their privies that have been resolved by a final judgment on the merits by a court of competent jurisdiction. Kean Oil Co. v. IEPA, PCB 97-146, at 5-6 (May 1, 1997). *Res judicata* applies "not only to every matter that was actually determined in the prior suit, but to every other matter that might have been raised and determined in it." *Id*.

As the parties have correctly stated, in order to establish *res judicata*, the moving party must show: (1) an identity of parties or their privies; (2) a final judgment on the merits rendered by a court of competent jurisdiction; and (3) an identity of cause of action. Kean Oil, PCB 97-146 at 6.

The Board finds no privity of parties between the Kell's action for private nuisance and the People's present action to enforce the Act and Board rules. "Privity exists 'between parties who adequately represent the same legal interests.'" People *ex rel*. Burris v. Progressive Land Developers, Inc., 176 Ill. Dec. 874, 879, 602 N.E.2d 820, 825 (1992). The People's interest to protect public health and welfare of the People of the State of Illinois from environmental damage is different from the interests of private individuals. The Kells filed an action in circuit court to recover individual damages and an abatement of the nuisance only to the extent that would address their personal circumstances. The Kells' interest was to obtain private relief from the odors produced by the respondents' swine facility.

In addition, the People's amended complaint represents the interests of many more individuals than merely the Kells. The People's amended complaint indicates the Agency received approximately 110 complaints of odor coming from the facility submitted by neighbors

of the facility. Am. Comp. at 7. Furthermore, the People's response includes copies of complaints from residents other than the Kells as Exhibits B, C, and D.[1] Resp. Exh. B, C, and D.

Illinois courts have held that a dismissal with prejudice of an action is an adjudication on the merits since dismissal with prejudice is considered conclusive of the rights of the parties as if the matter had proceeded to trial and been resolved by final judgment. McLain v. West Suburban Hospital Medical Center, 208 Ill. App. 3d 613, 567 N.E.2d 532, 534 (Dec. 31, 1990). However, even if the circuit court's order dismissing the Kells' action with prejudice constitutes a final judgment on the merits, the Board finds no identity of causes of action. The Board has held that it has exclusive jurisdiction over private enforcement actions under the Act, the only exception being where the State is the original plaintiff in circuit court. People v. State Oil, *et al*., PCB 97-103 at 23 (Aug. 19, 2003). Here the State seeks enforcement of the Act and Board regulations. Accordingly, the causes of action in this enforcement action are not identical to the causes of action in the Kell's private action for nuisance.

The respondents' argument that they are entitled to summary judgment in their favor for the time period beginning March 11, 2002 forward is without merit. The Board finds evidence in the record supporting allegations that respondents have caused odor interferences since March 11, 2002.[2] Consequently, the Board finds there remain genuine issues of material fact regarding whether there have been violations of Section 9(a) of the Act and Section 501.402(c)(3) of the Board rules since March 11, 2002.

CONCLUSION

Res judicata does not apply here the Board denies the respondents' motion for summary judgment on count I of the amended complaint and the respondents' motion, in the alternative, for partial summary judgment for the period after March 1, 2002. The Board further directs the parties to proceed expeditiously to hearing on both counts of the amended complaint.

IT IS SO ORDERED.

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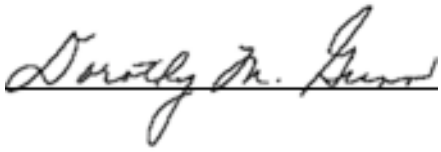
[1] Residents that submitted citizen pollution complaints to the Agency include Mrs. Del Leonard, Chris Hasselbacher (indicating that Randy and Debbie Newell and Don and Judy Doubet have also been affected), and Mrs. Joyce Martin. Resp. Exh. B, C, and D.

[2] "The Illinois EPA continues, to this date, to receive complaints from neighbors of the facility of offensive odors emanating from the facility that are causing unreasonable interference with the use and enjoyment of property." Am. Comp. at 17 (filed Aug. 20, 2002). In addition, the affidavit of Agency inspector James E. Kammueller refers to odor observations dated November 13, 2003, June 25, 2002, and June 19, 2002. Am. Comp. affidavit of James E. Kammueller at 3.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 4, 2003, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board