

ILLINOIS POLLUTION CONTROL BOARD
April 27, 1989

NORTHERN ILLINOIS ANGLERS')	
ASSOCIATION, an Illinois)	
Corporation,)	
)	
Complainant,)	
)	
v.)	PCB 88-183
)	
THE CITY OF KANKAKEE,)	
a Municipal Corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J. Marlin):

On March 17, 1989, the City of Kankakee (Kankakee) filed its Answer to Amended Complaint. By its Order of March 23, 1989, the Board construed Kankakee's filing as a motion to dismiss the amended complaint and assess costs against Northern Illinois Anglers' Association (NIAA). The Board's Order also allowed NIAA to file a response to the motion, and NIAA filed its response on April 4, 1989.

After considering these filings, the Board finds no reason to dismiss NIAA's amended complaint, Kankakee's motion is denied.

In Kankakee's March 17, 1989 filing, Kankakee seems to be raising a res judicata defense to NIAA's amended complaint. That is, Kankakee is effectively asserting that NIAA's amended complaint is completely barred due to a February 7, 1989 judgment issued by the circuit court of Kankakee County. That circuit court order enforced a May 26, 1987 consent decree against Kankakee concerning a monthly discharge standard for fecal coliform. Kankakee was assessed a penalty by the court of \$5,500.00 for "fecal coliform violations from January 1, 1988 until November 30, 1988." (Paragraph I, Order of circuit court, attached to Kankakee's March 17, 1989 filing.)

One must raise the defense of res judicata either by way of an affirmative defense in an answer or by way of a motion to dismiss so as to give adequate notice of the defense prior to hearing. Environmental Protection Agency v. Peterson/Puritan, Inc., PCB 78-278, 39 PCB 409, 410 (September 4, 1980). The Board finds that Kankakee's defense has been raised at the appropriate time with respect to the hearing in this matter.

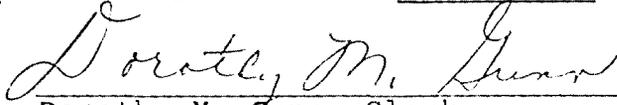
The burden of providing information and argument to support a res judicata defense is upon the respondent. When a former adjudication is relied upon as a complete bar to a subsequent action, the questions to be determined are whether the cause of action is the same in the two proceedings, whether the two actions are between the parties or their privies, whether the former adjudication was a final judgment upon the merits, and whether it was within the jurisdiction of the court rendering it. Peterson/Puritan, Inc., 39 PCB at 410-411; Environmental Protection Agency v. Giacnini, PCB 77-143, 33 PCB 547, 550-551 (May 24, 1979); Spiller v. Continental Tube Co., 95 Ill. 2d 423, 447 N.E.2d 834, 838 (1983).

Given the March 17th filing, Kankakee has not shown that the doctrine of res judicata bars NIAA's amended complaint due to the circuit court's February 7, 1989 order. However, Kankakee may attempt to prove a res judicata defense at hearing and in its post-hearing brief.

As a final note, the Board's decision concerning the duplicitous or frivolous determination pursuant to Section 31(b) of the Environmental Protection, as evidenced by the Board's Orders of January 5, 1989 and March 9, 1989, remains unchanged notwithstanding the recently received circuit court order of February 7, 1989.

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 27th day of April, 1989, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board