ILLINOIS POLLUTION CONTROL BOARD
October 17, 1996

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB 97-20
v.	)	(Enforcement - Water)
	)	
BENTRONICS CORPORATION,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on a complaint filed on July 19, 1996 by the Illinois Attorney General, on behalf of the People of the State of Illinois (People), at the request of the Illinois Environmental Protection Agency (Agency). At issue are the discharging of chemicals into a creek adjacent to Bentronics Corporation (Bentronics) property, the deposition of contaminants upon land, and the discharge of contaminants to the Village of Bensenville's (Village) Publicly Owned Treatment Works (POTW). The People allege that Bentronics' operational practices violated Sections 12(a), (d), and (f) of the Illinois Environmental Protection Act (Act), 415 ILCS 5/12 (a), (d), and (f) (1994), and 35 Ill. Adm. Code, 307.1101(a)(1), 307.2301(c)(1), and (2).

On August 8, 1996 Bentronics filed a Motion for Leave to File Motion to Dismiss Instanter and a Motion to Dismiss. The People filed their response to the motion on August 16, 1996, and on August 27, 1996 Bentronics filed a reply under the caption "Response to the State's Motion to Strike the Motion to Dismiss".

Bentronics asserts that the matters alleged are barred under the theories of statute of limitations, double jeopardy under the United States and Illinois Constitutions, res judicata, failure to state a claim upon which relief can be granted. Accordingly, Bentronics asserts that the claim[1] should be dismissed with prejudice.

The People object to the motion to dismiss and requests that it be denied. The People maintain that the complaint is sufficiently specific to inform Bentronics of the violations, and that the complaint is not precluded by res judicata. The People assert that there is no statute of limitations in this matter, and that double jeopardy is inapplicable to the case at bar.

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[1] Bentronics also alleges that the complaint is duplicitous, but does not make any argument based on this theory. Therefore, the Board will not address the issue.

BACKGROUND

Bentronics was an electronic manufacturing company located on Bryn Mawr Avenue, in the Village of Bensenville, DuPage County, Illinois (Facility). (Comp. at 1.)[2] In July 1992 Bentronics requested the Village POTW terminate its process water discharge permit to the Village's South Treatment Plant, allegedly because it could not meet the Village's permit limits for copper and lead. (Id. at 7.) Bentronics installed an internal system to filter and recycle all of its rinse and cooling water in a closed-loop system. The purpose of the closed-loop system was to eliminate the need to discharge any process wastewater into the Village's sanitary sewer system. (Id. at 7.) On August 25, 1992 a Village inspection found that the process wastewater discharge lines emanating from Bentronics' plant were disconnected from the sanitary sewer and capped off, thus preventing discharges into the Village POTW. (Id. at 7.)

The complaint states that the Village's South Treatment Plant laboratory detected increased levels of copper and lead in its raw influent during February 1993. (Id. at 7.) On March 22, 1993 Village inspectors took a grab sample out of the main sewer line on Bryn Mawr Avenue which is downstream from the Bentronics' Facility. (Id at 7.) The laboratory analysis of the samples disclosed elevated levels of copper and lead. Count I of the complaint further states that on March 24, 1993 Village inspectors investigated Bentronics' premises to ascertain the source of the copper and lead contamination in the Village's sanitary sewer. (Id.at 2.) The complaint states that inspectors discovered a slop sink in the process area of the plant and that the slop sink hooked directly to the Village's sanitary sewer. The complaint alleges that Bentronics was dumping its waste into the Village's system by either dumping buckets of waste or pumping out drums directly into the slop sink. (Id.at 8.)

The complaint states on June 13, 1993 the Agency was notified by officers of the Village's POTW that Bentronics was allegedly dumping chemicals into a storm drain located on Bentronics' property. (Id. at 2.) The Agency's Emergency Response Unit and Bureau of Land inspectors investigated the Facility on June 13, 1996. The investigation revealed that chemicals released from a waste accumulation tank had settled in the parking lot and eventually discharged into the nearby creek. The investigators took samples from: the waste tank; accumulated waste in the parking lot; and the bank of the creek adjacent to the facility. Laboratory analysis of the samples taken from the waste tank and the accumulated waste in the parking lot revealed concentrations of copper of 277 milligrams per liter (mg/L) and 77 mg/L, respectively. (Id. at 2.) Accordingly, in Count II of the Complaint the People allege that Bentronics' conduct violated Section 12(a) of the Act. The People further allege that sometime prior to June 13, 1993 and continuing until August 18, 1993, Bentronics caused or allowed the depositing of liquid waste, which contained high concentrations of copper, in the Facility parking lot and on the bank of the adjacent creek in violation of Section 12(d) of the Act. (Id. at 5.) In Count III Bentronics is alleged to have caused, threatened or allowed the discharge

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[2] The Board will cite to the Agency's complaint as (Comp. at ____); Bentronics' motion to dismiss as (Mot. to Dismiss at ____); and the Agency's response to Bentronics' motion to dismiss as (Resp. at ____).

of contaminants to the Village's POTW in violation of Section 12(f) of the Act and 35 Ill. Adm. Code, 307.1101(a)(1), 307.2301(c)(1), and (2).

Based on Bentronics' operational practices and the sampling data, the People request that the Board find Bentronics in violation of Sections 12(a), (d), and (f) of the Act and 35 Ill. Adm. Code 307.1101(a)(1) and 307.2301(c)(1) and (2); order Bentronics to cease and desist from further violations; authorize a hearing; and order Bentronics to pay costs pursuant to Section 42(f) of the Act. (Comp. at 4, 6, 10.)

Bentronics' motion to dismiss states that a similar prosecution, involving seven criminal complaints, was filed in April 1993 against Bentronics by "the People of the State of Illinois, the Village of Bensenville" in the DuPage County Circuit Court. (Mot. to Dismiss at 2.) Those seven complaints alleged violations of local ordinances. Bentronics contends the criminal complaints were based on grab samples taken by the Village on March 22, 1993. (Id. at 2.) The criminal case concluded in November 1993 with Bentronics paying a $14,000 fine. Bentronics argues that the instant June allegations could and should have been raised prior to the conclusion of the Circuit Court case in November 1993. Bentronics ceased doing business at the end of 1994.

DISCUSSION

Bentronics contends that the People's complaint should be dismissed based on several theories. Bentronics argues that the matters alleged are barred under theories of statute of limitations, double jeopardy under the United States and Illinois Constitutions, res judicata, and failure to state a claim upon which relief can be granted.

Procedural Issues

The Board notes that Bentronics' Motion to Dismiss was filed a week after the deadline provided for such motion pursuant to Section 103.140(a) of the Board's procedural rules. However, the People have neither raised the issue of timeliness, nor asserted that they have been prejudiced by the delay. The Board accordingly grants the motion to file instanter.

Bentronics' filing of August 27, 1996 captioned "Respondent's Response to the State's Motion to Strike the Motion to Dismiss" erroneously characterizes the Agency's "Response to Respondent's Motion to Dismiss" as a motion to strike. Pursuant to 35 Ill. Adm. Code 101.241(c), Bentronics has no right to reply to the Agency's Response, nor Bentronics requested such a right, or alleged material prejudice. Therefore, the Board will not accept Bentronics August 27, 1996 response.

The People argue that Bentronics' motion to dismiss is defective because it did not cite whether it was brought pursuant to Section 2-615 or 2-619 of the Illinois Code of Civil Procedure. Section 101.100 of the Board's procedural rules specifically states that the Code of Civil Procedure shall not expressly apply to proceedings before the Board. Therefore, we will not automatically deny Bentronics' motion to dismiss because it may have failed to satisfy the Code's requirements.

Statute of Limitations

Bentronics contends that this complaint seeks a statutory penalty, and that therefore the two-year statute of limitations found at Section 13-202 of the Illinois Code of Civil Procedure applies. Bentronics argues that since the complaint was filed more than two years after the alleged violations, the instant action is barred by the statute of limitations. The People cite Pielet Bros. Trading Co. v. PCB for the proposition that the statute of limitations does not apply if the state is asserting a public right on behalf of all the people of the state versus the private rights on behalf of a limited right. (110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982).) We agree with the People that the instant action is being brought on behalf of the public, and therefore that the statute of limitations does not apply.

Moreover, as noted above, the Board is not bound by the Illinois Code of Civil Procedure. The People's complaint was brought pursuant to Sections 31 and 42 of the Act. Sections 31 and 42 of the Act do not contain by their terms express limitation periods within which a complaint must be filed. Additionally, nowhere does the Act contain an express statutory limitation period. (Pielet Bros; People of The State of Illinois v. Environmental Control and Abatement, Inc. (January 4, 1996), PCB 95-170.) For this reason as well the Board rejects Bentronics statute of limitations argument.

Double Jeopardy

Bentronics argues that the instant action is barred under the double jeopardy clause of the fifth amendment of the U.S. Constitution and Article I, Section 10, of the Illinois Constitution. Bentronics contends that the People are trying to punish Bentronics for the same violations charged by the Village in the April 1993 complaint. In response, the People argue that the double jeopardy doctrine only prohibits a second criminal prosecution or punishment; it does not prohibit subsequent civil actions which are remedial. The People argue that the civil penalties provided under the Act are remedial and not for the purposes of punishment. (People v. Fiorini; 143 Ill. 2d 318, 349, 574 N.E.2d 612,625 91991); Modine Manufacturing Co. v. IPCB, 193 Ill. App.3d 643, 549 N.E.2d 1379 (2nd Dist. 1990).) Finally, according to the People, "[t]he only similarity between the prior criminal prosecution and the current civil enforcement action is the presence of high levels of lead an [sic] copper in the sewer." (Resp. at 13.)

Bentronics obscures the purpose of the People's proposed civil penalty with the criminal penalty collected by the Village from Bentronics. The People's complaint alleges violation under the Act, and seeks a civil penalty to enforce that Act. There is no prohibition preventing the Government from criminally prosecuting a defendant and imposing a criminal penalty upon him, and then bringing a separate civil action based on the same conduct and receiving a judgment, as long as that judgment is not irrationally related to the goal of making the Government whole. (U.S. v. Halper, 490 US 435, 109 S.Ct. 1892 at 1903 (1989); see also U.S. v. Ursery, 116 S.Ct. 2135 (June 1996).) There is no argument in this matter that the People are pursuing a judgment against Bentronics that is irrationally related to the goals expressed in the Act.

Furthermore, the People's requested relief does not rise to the level of punishment for purposes of double jeopardy analysis. The primary reason for Section 42 authorization of civil penalties is to provide a method to aid in the enforcement of the Act. (Modine v. IPCB.) Any punitive considerations are secondary. (Southern Illinois Asphalt Co. v. Pollution Control Board, 60 Ill. 2d 204, 207 (1975); City of Monmouth v. Pollution Control Board, 57 Ill. 2d 482, 490 (1974).) The enforcement action against Bentronics does not constitute punishment within the meaning of the double jeopardy clause because the underlying purpose of the People's sanction is to enforce the Act.

Lastly, the criminal complaint was based upon sampling taken in March, 1993 (Mot. to Dismiss at 2), whereas this complaint is also based upon an inspection and sampling conducted by the Agency in June, 1993. (The Board notes that we do not have copies of the criminal complaints.) Therefore, Bentronics has failed to establish that the criminal citations against Bentronics were for the same offenses as alleged in this complaint. Therefore, the Board finds this action is not prohibited by the Double Jeopardy Clause.

Res Judicata

Bentronics contends that the doctrine of res judicata is an absolute bar to the People's action. (Mot. to Dismiss at 3.) First, Bentronics states that a final judgment was entered against it in November 1993. Second, the exact same dates, samples, and acts are at issue in the instant matter, and all were or could have been included in the circuit court case. (Id. at 4.) Lastly, the Village adequately represented the legal interests of the State, and therefore stands in privity to the State. As a result, Bentronics claims that the instant complaint should be barred by res judicata.

The People argue that the Act provides a distinct and separate bases for penalizing persons for civil versus criminal violations, citing Sections 42(a-h) and 44(a-o) of the Act, and that therefore the complaint is not barred by res judicata. The People claim they are not pursuing the same cause of action that the Village pursued under its criminal ordinance. To support this assertion, the People argue not only that the evidence required to sustain the present civil conviction would have been inadequate to sustain the prior criminal action, but that a different core of operative facts was involved in the two actions.

Under the doctrine of res judicata, 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 the judgment precludes the parties from entering into a subsequent action involving the same claim, demand, or cause of action. (Torcasso v. Standard Outdoor Sales, Inc., 193 Ill.Dec. 192, 626 N.E.2d 225 (1993); Rodney B. Nelson, M.D. v. Kane County Board et al (May 18, 1995), PCB 95-56.) Res judicata bars all matters that were actually raised or could have been raised in the prior proceeding. (Torcasso, 193 Ill.Dec. 192, 195, 626 N.E.2d 225; People v. Chicago & Illinois Midland Ry. Co., 196 Ill.Dec. 369 at 371, 629 N.E.2d 1213; A.W. Wendell and Sons, Inc. v. Qazi, 193 Ill.Dec. 247, 256, 626 N.E.2d 280 (Ill.App. 2d Dist. 1993); see also Rodgers v. St. Mary's Hospital of Decatur, 173 Ill.Dec. 642, 647, 597 N.E.2d 616. (1992).) An order dismissing a suit with prejudice is considered a final judgment

on the merits for purposes of applying res judicata. (Chicago & Illinois Midland Ry. Co., 196 Ill.Dec. 369 at 371, 629 N.E.2d 1213.) Where there is identity of parties, subject matter, and cause of action, res judicata extends 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. (Torcasso, 193 Ill.Dec. at 195.)

The test generally employed to determine the identity of a 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, referred to as the "same evidence" test. (Torcasso, 193 Ill.Dec. at 195, citing Redfern v. Sullivan, 111 Ill.App.3d 372, 376, 67 Ill.Dec. 166, 444 N.E.2d 205 (4th Dist. 1982).) Alternatively, courts have employed a "transactional" approach, which considers whether both suits arise from the same transaction, incident or factual situation. (Rodgers, 173 Ill.Dec. 642 at 647, 597 N.E.2d 616.)

Examining the facts in this matter under both of the traditional tests, Bentronics fails to prove that the cause of action before the Board is the same for purposes of res judicata, as was the prior action in circuit court. Foremost, the People's complaint states that samples were taken on June 13, 1993, two months after the complaints addressed in the circuit court; accordingly, the violations are alleged to have occurred at different times and therefore rely on different evidence. Additionally, the People allege a different statute was violated than did the Village. The People argue that Bentronics violated the Act, whereas the Village alleged violations of a local ordinance. Next, the People's action alleges a civil violation, whereas the Village's action alleged a criminal violation. Lastly, the relief requested in each action is different.

Bentronics includes ambiguous documentation to support its theory of res judicata. It includes an order from the DuPage Circuit Court accepting a guilty plea and fining the violator $14,000, a Non-Arrest Complaint and Arrest Ticket citing seven violations of local ordinances dated April 21, 1993, and three other Non-Arrest Complaint and Arrest Tickets. (Mot. to Dismiss, Exh. 2.) First, it is unclear from the filing what alleged violations Bentronics plead guilty to in the court order, as the ordinances are not included. Second, it is equally unclear whether the three complaints refer to some part of the seven complaints, whether the three are separate and distinct from those seven complaints, and whether the three complaints were included in the November 16, 1993 circuit court order.

As a result of the differences in the actions before the circuit court and the Board, the Board denies Bentronics' motion to dismiss based upon res judicata.

Failure to State a Claim Upon which Relief can be Granted

Bentronics contends that the Agency failed to collect samples from the creek, and only obtained samples from the ground. Bentronics argues that ground samples cannot maintain a cause of action that Bentronics discharged contaminants into a creek in violation of the Act. (citing Jerry Bliss, Inc. v. EPA, 138 Ill. App. 3rd 699, 485 N.E.2d 1154 (5th Dist., 1985).) Bentronics argues that a sample from the creek is an essential element in establishing that it discharged contaminants into the creek adjacent to its Facility. Bentronics also argues that it is

an abuse of discretion to impose any penalty three years after the alleged violations. (Mot. to Dismiss at 7.)

The People argue that the counts satisfy the minimum pleading requirements, and clearly and accurately inform Bentronics of the nature of the claims against it. (Resp. at 3-5.)

The Board rejects Bentronics' contention that the People have failed to state a claim upon which relief can be granted. When reviewing a motion to dismiss, all well-pleaded facts alleged in the complaint are taken as true, and the reviewing body considers whether any set of facts could be proved that would entitle the plaintiff to relief. (Porter v. Urbana-Champaign Sanitary Dist., 178 Ill.Dec. 137, 141, 604 N.E.2d 393 (4th Dist. 1992), People of the State of Illinois, v. Greyslake Gelatin Company et al (January 11, 1995), PCB 94-288.) The People have pleaded facts sufficient to fairly and accurately inform Bentronics of the claims against it. In addition, the People need not present evidence on every essential element in pleadings. Therefore, the Board finds that the People have presented well-pled facts sufficient to clearly support this cause of action against Bentronics.

CONCLUSION

Having found that the instant complaint is not precluded by the statute of limitations, double jeopardy under the United States and Illinois Constitutions, res judicata, or failure to state a claim upon which relief can be granted, the Board denies Bentronics motion to dismiss and directs Bentronics to answer the complaint within 30 days of service of this order.

Accordingly, this matter will proceed to hearing. The hearing must be scheduled and completed in a timely manner, consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with appropriate directions to the assigned hearing officer consistent with this order.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

Board Member K. Hennessey abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1996 by a vote of _____.

_____

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board