ILLINOIS POLLUTION CONTROL BOARD
July 23, 1998

ESG WATTS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 97-210
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Yi):

On May 4, 1998, petitioner ESG Watts, Inc. (Watts) filed a motion for summary judgment. On May 18, 1998, the Illinois Environmental Protection Agency (Agency) filed its response to the motion. Watts' motion asserts that the Agency is barred by the doctrine of *res judicata* from imposing Class I groundwater monitoring standards upon Watts. The motion is premised on the argument that groundwater classification cannot be litigated in this proceeding because the same issue was resolved in People v. ESG Watts, Inc. (February 5, 1998), PCB 96-107. The Board finds that litigation of the groundwater classification issue in this proceeding is not barred, and denies Watts' motion for summary judgment.

This proceeding was commenced on May 23, 1997, when Watts filed a petition for hearing (Pet), relating to a permit application received by the Agency on December 2, 1996, concerning Watts' facility in Rock Island County (Taylor Ridge). The permit application seeks a revision to Watts' closure and post-closure plans, and was assigned IEPA Log Number 1996-404. On April 15, 1997, the Agency approved the permit application with conditions. Watts identified one specific condition with which it took issue, and reserved the right to raise additional grounds for reversal of the Agency's decision. The condition to which Watts objects is the inclusion of a groundwater monitoring program "which was not included in the permit application and which the [Agency] has unilaterally imposed." Pet. at 1. The groundwater monitoring program treats the groundwater under the Taylor Ridge landfill as Class I (potable resource) groundwater. Permit Attachment A at 2, ¶ 6(b).

On February 5, 1998, the Board rendered a decision in PCB 96-107, an enforcement action filed against Watts by the attorney general on behalf of the people of the State of Illinois. The violations alleged in PCB 96-107 concerned Watts' operation of the Taylor Ridge landfill. Among the violations alleged against Watts in PCB 96-107 was a violation of 35 Ill. Adm. Code 620.410, which sets forth quality standards for Class I groundwater. The Board found in PCB 96-107 that the complainant had failed to prove that Class I groundwater standards applied, and applied instead Class II groundwater standards.

Watts now asserts that under the doctrine of *res judicata*, the Board's determination in PCB 96-107 bars relitigation of groundwater classification in this proceeding. The Agency argues that the requirements for application of *res judicata* have not been met.

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. *Id*.

The Board agrees with the Agency that *res judicata* does not apply between PCB 96-107 and this proceeding because there is not the required identity of causes of action. An enforcement case and a permit appeal are not the same "cause of action," primarily because of the different inquiry involved in each.

The Board next addresses the doctrine of collateral estoppel. Collateral estoppel can apply to preclude relitigation of a specific issue, even where the requirements for application of *res judicata* are not met. Although collateral estoppel is often recognized as a branch of *res judicata*, courts just as regularly make no distinction between the doctrines. Cirro Wrecking Company v. Anthony Roppolo, 153 Ill. 2d 6, 605 N.E. 2d 544 (1992) (citations omitted). And, although it has been noted that both doctrines are subject to traditional analyses, there may be no area of law less susceptible to rigid formulation. *Id*.

The Illinois Supreme Court has identified three minimum threshold requirements for the application of collateral estoppel. They are: (1) that the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) that there was a final judgment on the merits in the prior adjudication, and (3) that the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. Talarico v. Dunlap, 177 Ill. 2d 185, 191; 685 N.E. 2d 325, 328 (1997).

Even if these threshold elements are satisfied, collateral estoppel does not apply in this case. Under Illinois and federal law, there are exceptions to its applicability. The Illinois Supreme Court ruled in Talarico that even where the threshold elements of the doctrine are satisfied and an identical common issue is found to exist between a former and current lawsuit, collateral estoppel must not be applied to preclude parties from presenting their claim or defenses unless it is clear that no unfairness results to the party being estopped. *Id*.

In the Restatement (Second) of Judgment there are several exceptions to this doctrine. One such exception is that collateral estoppel does not apply if the burden of proof has shifted from the party against whom the doctrine is to be applied to its adversary. Restatement (Second) §28 (4). Here, the burden of proof has shifted. In PCB 96-107, the Agency had the

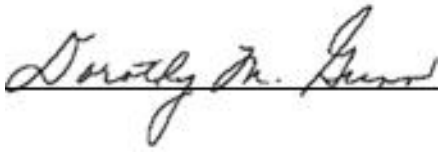
burden of proof. The Board found that there was not sufficient evidence before it to make a finding on the groundwater classification issue. Since the Agency had failed to meet its burden of proof, the Board considered the groundwater to be Class II as required by 35 Ill. Adm. Code 620.220(a). In this permit appeal, Watts has the burden of proof. See 415 ILCS 5/40(a). Watts' burden is to prove "that it is entitled to a permit and that the Agency's reasons for denial are either insufficient or improper." ESG Watts v. PCB, 286 Ill. App. 3d 325,331, 676 N.E.2d 299, 303 (3rd Dist. 1997). Since the burden has shifted from the Agency to its 'adversary,' the exception applies and imposing collateral estoppel is inappropriate.

The Board concludes that even if the threshold elements for collateral estoppel are satisfied in this case, it is not applicable given the aforementioned exception. Accordingly, Watts' motion for summary judgment is denied.

In making this ruling, the Board does not intend to alter the interpretation of the groundwater rules reached in PCB 96-107; specifically, that groundwater not shown to be Class I, III, or IV, is to be considered as Class II groundwater. Thus, if no evidence pertaining to the classification of groundwater is present on the record in the instant case to demonstrate otherwise, the Board will consider the groundwater at Taylor Ridge to be Class II.

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 23rd day of July 1998 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board