

ILLINOIS POLLUTION CONTROL BOARD

February 3, 2000

COUNTY OF SANGAMON,)	
)	
Complainant,)	
)	
v.	)	AC 00-3 (SCDPH 99-AC-3)
	)	AC 00-4 (SCDPH 99-AC-2)
	)	AC 00-5 (SCDPH 99-AC-4)
ESG WATTS, INC.,	)	AC 00-6 (SCDPH 99-AC-5)
	)	AC 00-7 (SCDPH 99-AC-6)
Respondent.	)	AC 00-8 (SCDPH 99-AC-7)
	)	AC 00-15 (SCDPH 99-AC-9)
	)	AC 00-18 (SCDPH 99-AC-8)
	)	AC 00-21 (SCDPH 99-AC-10)
	)	AC 00-23 (SCDPH 99-AC-11)
	)	AC 00-24 (SCDPH 99-AC-12)
	)	AC 00-25 (SCDPH 99-AC-13)
	)	AC 00-26 (SCDPH 99-AC-14)
	)	AC 00-29 (SCDPH 99-AC-16)
	)	AC 00-30 (SCDPH 99-AC-17)
	)	AC 00-31 (SCDPH 99-AC-18)
	)	AC 00-37 (SCDPH 99-AC-22)
	)	AC 00-38 (SCDPH 99-AC-23)
	)	AC 00-39 (SCDPH 99-AC-24)
	)	AC 00-40 (SCDPH 99-AC-25)
	)	AC 00-41 (SCDPH 99-AC-26)
	)	AC 00-42 (SCDPH 99-AC-27)
	)	AC 00-43 (SCDPH 99-AC-28)
	)	AC 00-44 (SCDPH 99-AC-29)
	)	AC 00-45 (SCDPH 99-AC-30)
	)	AC 00-46 (SCDPH 99-AC-31)
	)	AC 00-47 (SCDPH 99-AC-32)
	)	AC 00-48 (SCDPH 99-AC-33)
	)	AC 00-49 (SCDPH 99-AC-34)
	)	AC 00-50 (SCDPH 99-AC-35)
	)	AC 00-51 (SCDPH 99-AC-36)
	)	AC 00-53 (SCDPH 99-AC-37)
	)	AC 00-54 (SCDPH 99-AC-38)
	)	AC 00-55 (SCDPH 99-AC-39)
	)	(Administrative Citation)
	)	(Consolidated)

ORDER OF THE BOARD (by E.Z. Kezelis):

This matter is before the Board on a motion to dismiss, strike, direct decision, or grant summary judgment, filed by respondent ESG Watts, Inc. (ESG Watts) on December 20, 1999. Complainant Sangamon County (County) filed its response to the motion on January 18, 2000. For the reasons discussed below, the Board denies the motion.

BACKGROUND

ESG Watts is the owner and operator of a landfill located in Sangamon County, Illinois. The County filed an action on December 23, 1991, in the Circuit Court of the 7th Judicial Circuit, Sangamon County, Illinois, docketed as People of the State of Illinois and County of Sangamon v. Watts Trucking Service, Inc. and ESG Watts, Inc., 91-CH-242, alleging various violations of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (1998)), including Sections 21(o)(5), (6), and (9) of the Act. 415 ILCS 5/21(o)(5), (6), (9) (1998). On February 4, 1994, the Circuit Court found that ESG Watts had violated the Act as set forth in counts 1 through 12 of the complaint. It retained jurisdiction to enforce its order, and since then, has issued a Contempt Order and a Supplemental Contempt Order, which is pending before the Circuit Court. Contempt Order in No. 91-CH-242, dated February 23, 1995, and Supplemental Contempt Order in No. 91-CH-242, dated June 10, 1996.

The County filed the instant administrative citations alleging new violations of Sections 21(o)(5), (6), and (9) of the Act with the Board. 415 ILCS 5/21(o)(5), (6), (9) (1998). Each of these several dozen citations alleges separate violations occurring over a period of months after June 1, 1999, seven years after the filing of 91-CH-242 and five years after the Circuit Court rendered its decision.

In its motion,¹ ESG Watts asserts that the administrative citations filed in these consolidated administrative citations are barred by the doctrine of *res judicata*. Mot. at 2. Specifically, ESG Watts argues that the alleged violations of Sections 21(o)(5), (6), and (9) of the Act are the subject of the action still pending in the Circuit Court. 415 ILCS 5/21(o)(5), (6), (9) (1998). Mot. at 2. ESG Watts asserts that the Circuit Court retained jurisdiction to enforce its orders, and that in light of the pending contempt proceedings, the Board has no power to hear the newly filed consolidated administrative citations. See Mot. at 2.

¹ ESG's motion to dismiss, strike, direct decision, or grant summary judgment will hereinafter be referred to as "Mot. at __."; ESG's argument in support of its motion will hereinafter be referred to as "Argument at __."; Sangamon County's response to the motion to dismiss, strike, direct decision, or grant summary judgment will hereinafter be referred to as "Resp. Br. at __."

RES JUDICATA

The doctrine of *res judicata* provides that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights among the parties, and constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. Torcasso v. Standard Outdoor Sales, Inc., 157 Ill. 2d 484, 626 N.E.2d 225 (1993); People v. Chicago & Illinois Midland Ry. Co., 258 Ill. App. 3d 409, 629 N.E.2d 1213 (5th Dist. 1994). One test generally employed to determine the identity of causes of action for purposes of *res judicata* is whether the evidence needed to sustain the second cause of action would have sustained the first. Torcasso, 626 N.E.2d at 228. Courts have also employed a transactional approach, which considers whether both suits arise from the same transaction, incident, or factual situation. Rodgers v. St. Mary's Hosp. of Decatur, 149 Ill. 2d 302, 597 N.E.2d 616 (1992).

The Illinois Supreme Court has adopted the transactional test for determining whether claims are part of the same cause of action for purposes of determining *res judicata*. River Park, Inc. v. City of Highland Park, 184 Ill. 2d 290, 703 N.E.2d 883 (1998). The adoption of the “transactional” test is consistent with the approach proposed in the Restatement (Second) of Judgments, as well as the trend of decisions in other jurisdictions. River Park, 703 N.E.2d at 893.

ESG Watts asserts that People v. Chicago & Illinois Midland Ry. Co., 258 Ill. App. 3d 409, 629 N.E.2d 1213, (5th Dist. 1994), controls on the issue of *res judicata* in the instant case, because the circuit court retained jurisdiction over its orders and the pending Supplemental Contempt Order. See Argument at 3. The County, however, argues that the instant administrative citations are based upon inspections which have occurred over five years after the circuit court’s decision in 91-CH-242, and are therefore new violations which are not barred.

ESG Watts’ *res judicata* argument is without merit. First, the Board has addressed, and rejected, this identical argument once before. Sangamon County v. ESG Watts, Inc., (March 6, 1997), AC 94-28, *et al.* There, the Board found that the County’s administrative citations concerning overfill were not barred by the doctrine of *res judicata*.

Even if the overfill in the administrative citations is the same overfill which was the subject of the circuit court action, the existence of overfill at the Sangamon County Landfill at the time of the inspections, which were performed subsequent to the circuit court action, constitute separate, additional violations of the Act. Sangamon County v. ESG Watts, Inc., AC 94-28, *et al.*, slip op. at 5.

Just as we held there, once again we hold that these newly filed administrative citations involve later occurring, separate instances of alleged misconduct by ESG Watts, and that each is a separate, actionable violation of the Act under the “transactional” test adopted by the Illinois Supreme Court in River Park, 184 Ill. 2d 290, 703 N.E.2d 883 (1998). These administrative citations are not barred by the doctrine of *res judicata*.

Second, the Board also concludes that even if Chicago & Illinois Midland Ry. provides a more appropriate *res judicata* standard here, as ESG Watts apparently believes, its argument must still, nonetheless, fail. The violations alleged in the administrative citations occurred some seven years after the violations that are the subject of the Circuit Court proceeding, they rely on different evidence than that necessary to support the Circuit Court action, and they could not have been litigated in the Circuit Court action. We therefore deny ESG Watts’ motion to dismiss these administrative citations on *res judicata* grounds.

SUMMARY JUDGMENT

Summary judgment is appropriate where there are no material issues of fact to be considered by the trier of fact and the movant is entitled to judgment as a matter of law. (Waste Management of Illinois, Inc. v. IEPA (July 21, 1994), PCB 94-153; ESG Watts, Inc. v. IEPA (August 13, 1992), PCB 92-54; Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; Williams Adhesives, Inc. v. IEPA (August 21, 1991), PCB 91-112.) The Board finds that material issues of fact remain regarding the extent to which there was waste in unpermitted portions of the landfill, the lack of final cover, and the presence of uncovered refuse, which are the alleged violations of Sections 21(o)(5), (6), and (9) of the Act, and denies summary judgment. 415 ILCS 5/21(o)(5), (6), (9) (1998).

DUPLICITOUSNESS

Finally, ESG Watts argues that the consolidated administrative citations are duplicitous because of the pending circuit court action, and therefore, they are barred by the Board's rule on duplicitous filings. Argument at 2. ESG Watts' argument is misplaced. The Board may make a duplicitous and frivolous determination in a Section 31 enforcement action (415 ILCS 5/31 (1998)) under Section 103.124 of the Board's rules. 35 Ill. Adm. Code 103.124. However, the Board is not required to make a duplicitous and frivolous determination in a Section 31.1 administrative citation action (415 ILCS 5/31 (1998)) under Section 103.124. 35 Ill. Adm. Code 103.124.

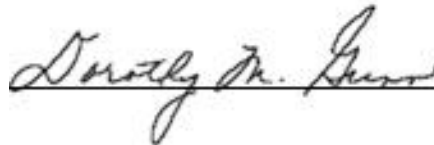
Even if the Board were required to make such a determination, however, it would conclude that the matters before us are not duplicitous. The Board has not identified any other cases, identically or substantially similar to these cases, pending in this or another forum. Therefore, based on the record before us, these matters would not be duplicitous.

CONCLUSION

The Board finds that the alleged violations of Sections 21(o)(5), (6), and (9) of the Act, set forth in AC 00-03, *et al.*, were not previously litigated in People of the State of Illinois and County of Sangamon v. Watts Trucking Service, Inc. and ESG Watts, Inc., 91-CH-242, and are therefore not barred by the doctrine of *res judicata*. Respondent's motion to dismiss, strike, direct decision, or grant summary judgment is denied. Administrative citations AC 00-03, *et al.* shall proceed to hearing. The hearing officer is directed to establish an appropriate hearing date.

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 3rd day of February 2000 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board