

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
<i>ex rel.</i> LISA MADIGAN, Attorney)	
General of the State of Illinois,)	
)	
Complainant,)	
)	
v.)	PCB No. 13-28
)	(Enforcement-Water)
ATKINSON LANDFILL CO., an)	
Illinois corporation,)	
)	
Respondent.)	

MOTION FOR CONSOLIDATION AND FOR STAY

Respondent, ATKINSON LANDFILL CO. ("ALC"), by its attorney, Kenneth Anspach, pursuant to Section 101.406 and 101.514 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.406 and 101.514, and Sections 31(c)(1) and (c)(2) of the Illinois Environmental Protection Act, hereby moves the Pollution Control Board (the "Board") to consolidate the within case, PCB 13-28, with *People v. Village of Atkinson*, PCB 13-60 ("PCB 13-60") and *People v. City of Galva*, PCB 13-61 ("PCB 13-61"), and further requests that this Board either deny or stay the STATE OF ILLINOIS' (the "STATE") Motions for Relief from Hearing Requirement in PCB 13-60 and 13-61, and in support thereof states as follows:

1. This Board may take judicial notice that this cause arose out of Illinois EPA ("IEPA") Violation Notice W-2011-30225, and was filed before this Board as PCB 13-28. Violation Notice W-2011-30225 and PCB 13-28, in turn, arose directly out of Violation Notice L-2010-01361 dated November 10, 2010. There, the Illinois Environmental Protection Agency ("IEPA") required ALC to "IMMEDIATELY, maintain a maximum head of leachate

0.30 meter (one foot) above the liner in Cell A.” In compliance with that directive to reduce the amount of leachate above the liner (the “IEPA Directive”), ALC allegedly sent additional leachate to the Village of Atkinson and City of Galva. ALC’s alleged actions in doing so were specifically authorized by permit and/or under 35 Ill. Adm. Code 307.1101(13) and 40 CFR 403.5(8), which authorize any POTW to designate discharge points where “[a]ny trucked or hauled pollutants” may be discharged. (See ALC’s Motion to Dismiss First Amended Complaint.) Thus, because ALC was directed by IEPA to remove the excess leachate from the landfill and its doing so was authorized by permit and state and federal law, no violations of law or permit occurred. ALC was never informed by IEPA that compliance with the IEPA Directive would result in the additional violations that were set forth in Violation Notice W-2011-30225 and in the Complaint in PCB 13-28.

2. In complete disregard of the IEPA Directive and of applicable state and federal law as set forth above, the STATE filed the Complaint in PCB 13-28. By the same token, the STATE subsequently also filed Complaints and Stipulations and Proposals for Settlement in *People v. Village of Atkinson*, PCB 13-60 (“PC B 13-60”) and *People v. City of Galva*, PCB 13-61 (“PCB 13-61”).

3. PCB 13-60 and PCB 13-61 arise out of the same nucleus of operative facts as PCB 13-28. In that regard, paragraphs 1-3 and 5-18 of Count I of PCB 13-28 are either identical or virtually identical to paragraphs 1-3 and 9-22 of PCB 13-60, and paragraphs 1-3, 8-11 and 13-15 of Count I and paragraphs 12-20 of Count III of PCB 13-28 are either identical or virtually identical to paragraphs 1-2 and 9-23 of PCB 13-61. While there are additional counts in PCB 13-28, the number of counts is a matter of pleading by Attorney General.

4. PCB 13-28, 13-60 and 13-61 not only, therefore, arise out the same nucleus of operative facts, they arise out of the same cause of action. Just because there are multiple case numbers and theories of recovery, does not disguise that there is only one cause of action. While one group of facts may give rise to a number of different theories of recovery, there remains only a single cause of action. *Rein v. David A. Noyes & Co. ("Rein")*, 172 Ill. 2d 325, 338 (1996). If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted and *res judicata* bars the latter action. *Id.* Here, as demonstrated by the identical or near identical pleading in all three cases, that identity exists.

5. Illinois has adopted the "transactional test" in determining whether an identity of cause of action exists for the purposes of *res judicata*. Pursuant to the transactional test, separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. Further, the transactional test permits claims to be considered part of the same cause of action even if there is not a substantial overlap of evidence needed to sustain the second lawsuit that would have sustained the first lawsuit, so long as they arise from the same transaction. *Nelson v. Chicago Park District*, 408 Ill. App. 3d 53, 63-64 (1st Dist. 2011).

6. The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. *Rein*, 172 Ill. 2d at 334-335. The doctrine extends not only to what is actually decided in the original action, but also to matters which could be decided in that suit. *Id.*

7. For the doctrine of *res judicata* to apply, three requirements must be met: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies. *Rein*, 172 Ill. 2d at 335. Here, by virtue of pending Stipulations and Proposals for Settlement in PCB 13-60 and 13-61, and pending Motions for Relief from Hearing Requirement in both cases, a final judgment, absent any intervention by this Board, is about to be entered in those cases. As set forth above, because of virtually identical pleading in PCB 13-60 and 13-61 and PCB 13-28, there is an identity of cause of action. Moreover, the only reason that there are different respondents, and thus not an identity of parties, in these cases is because the Attorney General divided the parties up, in piecemeal fashion, giving the impression that there is more than one claim; an objective review of the pleadings discloses that such is not so.

8. As a matter of public policy, plaintiffs generally are not permitted to split their causes of action. *Rein*, 172 Ill. 2d at 340. The rule against claim-splitting, which is an aspect of the law of preclusion, prohibits a plaintiff from suing for part of a claim in one action and then suing for the remainder in another action. *Id.*

9. The rule against claim splitting is relaxed where there is an omission due to ignorance, mistake or fraud, or where it would be inequitable to apply the rule. The rule against claim-splitting does not apply to bar an independent claim of part of the same cause of action if: (1) the parties agree in terms or in effect that plaintiff may split his claim or the defendant acquiesces therein; (2) the court in the first action expressly reserves the plaintiff's right to maintain the second action; (3) the plaintiff is unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action; (4) the

judgment in the first action is plainly inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a continuing or recurrent wrong; or (6) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason. *Rein*, 172 Ill. 2d at 341. None of these conditions apply here.

10. Because the attempt at claim splitting is a sham, and must inevitably be deemed to be so, should this Board enter judgments upon the Stipulations and Proposals for Settlement, the releases set forth therein would bar the State's action in PCB 13-28.

11. Section 101.406 of the Board General Regulations, 35 Ill. Adm. Code 101.406, states as follows:

Consolidation of Claims


The Board, upon the motion of any party or upon its own motion, may consolidate two or more proceedings for the purpose of hearing or decision or both. The Board will consolidate the proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party. The Board will not consolidate proceedings where the burdens of proof vary.

12. ALC requests that all three cases causes, PCB Nos. 13-28, 13-60 and 13-61, be consolidated pursuant to Section 101.406 of the Board General Regulations, 35 Ill. Adm. Code 101.406, in order to litigate the cause of action as a single whole and avoid the inevitable *res judicata* impact of not doing so. Doing so would, accordingly, result in a "convenient, expeditious, and complete determination of claims." Should this Board not do so, State's action in PCB 13-28 would be barred. Therefore, far from being prejudiced by a consolidation, the State should welcome it.

13. By the same token, ALC requests that the Motions for Relief from Hearing requirement filed by the Attorney General in PCB 13-60 and 13-61 be either denied or stayed indefinitely.

WHEREFORE, SHERIDAN moves that causes PCB No. 13-28 be consolidated with PCB 13-60 and PCB 13-61 and further requests that this Board either deny or stay the STATE's Motions for Relief from Hearing Requirement in PCB 13-60 and PCB 13-61.

Respondent, ATKINSON LANDFILL
CO.,

By: 
its attorney

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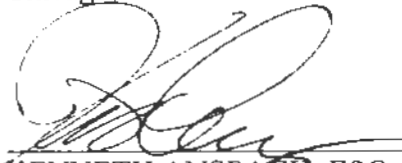
THIS FILING IS SUBMITTED ON RECYCLED PAPER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalties of perjury as provided by law pursuant to 735 ILCS 5/1-109, that the attached Motion for Consolidation and for Stay was ___ personally delivered, X placed in the U. S. Mail, with first class postage prepaid, ___ sent via facsimile and directed to all parties of record at the address(es) set forth below on or before 5:00 p.m. on the 28th day of June, 2013.

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