

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.) PCB No. 13-28
)
 ATKINSON LANDFILL CO.,)
)
 Respondents.)

OBJECTIONS TO COMPLAINANT'S MOTION TO STRIKE
RESPONDENT'S SECTION 2-619(a)(9) MOTION TO DISMISS
AND AFFIDAVITS OF GARY HULL AND ERIK VARDIJAN

Respondent, ATKINSON LANDFILL CO. ("ALC"), has moved the Pollution Control Board (the "Board"), pursuant, *inter alia*, to § 2-615 of the Code of Civil Procedure, 735 ILCS 2-615(a) and § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9) has moved this Board to strike and dismiss (the "Motion to Dismiss") the First Amended Complaint (the "Complaint") of complainant, PEOPLE OF THE STATE OF ILLINOIS ("the STATE"). The STATE, in response, submitted Complainant's Response to Respondent's Motion to Strike and Dismiss First Amended Complaint ("Complainant's Response"). Complainant's Response is directed only to that portion of the Motion to Dismiss under § 2-615 of the Code of Civil Procedure, 735 ILCS 2-615(a). The STATE has thereby waived objections to the granting of the Motion to Dismiss under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9).

It is duly noted that the STATE purported to file a so-called Motion to Strike Respondent's Section 2-619(a)(9) Motion to Dismiss and Affidavits of Gary Hull and Erik Vardijan ("the STATE's Motion to Strike"). ALC hereby objects to the STATE's Motion to Strike.

I. THE STATE'S MOTION TO STRIKE IS UNAUTHORIZED.

The STATE'S Motion to Strike was filed under the purported authority of, *inter alia*, 735 ILCS 2-615 and §101.506 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.506 ("§101.506"). Yet, both 735 ILCS 2-615 and §101.506, only authorize the striking of "*pleadings*." (Emphasis added.) ALC hardly needs to point out that motions are not "*pleadings*." It is well settled in this State that "Section 2-615 applies only to the dismissal of pleadings." *In re Marriage of Sutherland*, 251 Ill. App. 3d 411, 414 (2nd Dist. 1993). The STATE also cites Section 101.500 in purported support of the filing of the STATE's Motion to Strike, which merely allows the filing of "any motion the parties wish to file that is permissible under the Act or other applicable law." Given that the STATE's Motion to Strike is not permissible under 735 ILCS 2-615 and §101.506, Section 101.500 does *not* authorize the filing of a motion that is, itself, impermissible.

Finally, the STATE's Motion to Strike also cites Ill. Sup. Ct. Rule 191(a) relating to the requirements of affidavits under § 2-619 of the Code of Civil Procedure, 735 ILCS 2-619. Yet, nothing in Ill. Sup. Ct. Rule 191(a) authorizes the striking of motions brought under § 2-619 of the Code of Civil Procedure, 735 ILCS 2-619. Accordingly, the STATE's Motion to Strike is a nullity.

II. THE STATE HAS WAIVED OBJECTIONS TO ALC'S MOTION TO DISMISS COUNTS I-IV UNDER § 2-619(a)(9) OF THE CODE OF CIVIL PROCEDURE, 735 ILCS 2-619(a)(9).

The Motion to Dismiss is divided into two parts, one under § 2-615 of the Code of Civil Procedure, 735 ILCS 2-615 and one under § 2-619(a)(9) of the Code of Civil Procedure, 735 ILCS 2-619(a)(9). The STATE has elected to not file any response to the motion under 735 ILCS 2-619(a)(9). In this regard, §101.500(d) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.500(d), states, in pertinent part:

Within 14 days after service of a motion, a party may file a response to the motion. *If no response is filed, the party will be deemed to have waived objection to the granting of the motion...*

Given that the STATE elected to not respond to the 735 ILCS 2-619(a)(9) motion, it has waived objection to the granting of the motion.

In footnote 2 to the STATE's Motion to Strike, the STATE purportedly "reserves the right to respond to Respondent's Section 2-619(a)(9) argument on the merits if the Board denies its Motion to Strike Respondent's Section 2-619(a)(9) Motion to Dismiss and Affidavits of Gary Hull and Erik Vardijan." Where is this right that the STATE is purportedly reserving? Certainly, no right to respond exists to respond after the 14 day deadline under §101.500(d) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.500(d).

Further, with whom did the STATE reserve such right? Certainly, there was no motion brought before either the Board or the Hearing Officer seeking to reserve the right to respond "on the merits" should the Board deny the STATE's Motion to Strike. Certainly, no such stipulation was sought, or agreed to, by ALC. One must conclude, then, that the STATE reserved this so-called right with none other than itself. As such it is not subject to being honored by this Board, given the explicit nature of the waiver in §101.500(d) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.500(d). In *General Agents Insurance Company of America, Inc. v. Midwest Sporting Goods Company*, 215 Ill. 2d 146, 162-163 (2005), the Court found that a party may not unilaterally reserve rights that do not otherwise exist, stating "As a matter of public policy, a reviewing court cannot condone an arrangement where an insurer can unilaterally modify its contract, through a reservation of rights..." Here, since no right exists to respond if the Board denies the STATE's Motion to Strike, it cannot be unilaterally reserved.

III. ASSUMING ARGUENDO THE STATE'S MOTION TO STRIKE IS AUTHORIZED, IT FAILS TO PROVIDE ANY RATIONALE FOR STRIKING THE MOTION TO DISMISS.

The main thrust of the STATE'S Motion to Strike, to which all but one sentence thereof is devoted, is a request that the Board strike the Affidavits of Gary Hull and Erik Vardijan. While the STATE'S Motion to Strike is also directed against the Motion to Dismiss under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9), it only devotes one sentence out of the five page motion to providing a rationale for striking the Motion to Dismiss under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9), itself. That sentence, in the STATE'S Motion to Strike at 4, is as follows:

[B]ecause Respondent's Section 2-619(a)(9) argument within its Motion to Dismiss is based solely on the Hull Affidavit and the Vardijan Affidavit and the inadmissible hearsay statements contained therein, *see* Respondent's Motion to Dismiss at pp. 18-21, 25-27, that argument must also be stricken.

ALC's motion under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9), is not dependent upon the viability of these affidavits. Regardless of whether the Board accepts these affidavits, the Board must find that the Complaint's attempted causes of action are barred under the terms of the Clean Water Act ("CWA") pretreatment program, 33 U.S.C. § 1317(b) and under the terms and conditions of Permit No. 2008-E0-0331, a copy of which is attached to the Complaint.

Federal and state law under the CWA pretreatment program delegates to the POTWs authority over the disposition of trucked leachate from landfill operations that are not the subject of general and specific discharge prohibitions, none of which are actually alleged here in the First Amended Complaint (the "Complaint"). *See* Part I(D) of ALC's Reply in Support of Motion to Dismiss First Amended Complaint (the "Reply"), which is specifically incorporated by this reference herein.

In accordance with this delegation of authority over trucked leachate from landfill operations, 35 Ill. Adm. Code 307.1101 provides, as follows:

No person may introduce the following types of pollutants into a POTW:

(13) *Any* trucked or hauled pollutants, *except at discharge points designated by the POTW.* (Emphasis added.)

Likewise, 40 CFR 403.5 provides, as follows:

[T]he following pollutants shall not be introduced into a POTW:

(8) *Any* trucked or hauled pollutants, *except at discharge points designated by the POTW.* (Emphasis added.)

Thus, a POTW, in this instance the Village of Atkinson Sewage Treatment Plant (the "Village STP") and City of Galva wastewater treatment facility (the "Galva WWTF"), has the authority under both 35 Ill. Adm. Code Part 307 and 40 CFR 403 to administer to the discharge of "[a]ny trucked or hauled pollutants." This argument was made in the Motion to Dismiss, Part II(A) at 18-21 and Part IV(A) at 25-27. Thus, the attempted causes of action in the Complaint both, in Counts I-II, that ALC violated the terms of Permit No. 2008-E0-0331 in allegedly making discharges of trucked leachate into the Village STP, and, in Counts III-IV, in allegedly making similar discharges into the Galva WWTF without a permit issued by the STATE, do not state claims because they are barred by the provisions of the pretreatment program, set forth above, delegating to the POTWs, not to the STATE, authority over such discharges. Thus, the Complaint is barred under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9) on the basis that it is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." That "other affirmative matter" are, *inter alia*, the above cited provisions of the pretreatment program, 35 Ill. Adm. Code 307.1101 and 40 CFR 403.5(8).

In accordance with the regulatory framework of the pretreatment program, Permit No. 2008-E0-0331 pertaining to the Village STP specifically requires adherence to the dictates of 40 CFR 403, of which 40 CFR 403.5(8) is cited above, as follows:

SPECIAL CONDITION 2: The issuance of this permit does not relieve the permittee of complying with 35 Ill. Adm. Code, Part 307 and/or the General Pretreatment Regulations (40 CFR 403) and any guidelines developed pursuant to Section 301, 306, or 307 of the Federal Clean Water Act of 1977.

SPECIAL CONDITION 3: The issuance of this permit does not relieve the permittee of the responsibility of complying with any limitations and provisions imposed by the City of Atkinson.

Thus, a POTW, in this instance the Village STP, has the authority under both 35 Ill. Adm. Code Part 307 and 40 CFR 403 to designate discharge points where “[a]ny trucked or hauled pollutants” may be discharged. In addition, 35 Ill. Adm. Code 307.1101(13) and 40 CFR 403.5(8), in referring to the word “any” trucked or hauled pollutants, authorizes the POTW to determine the *amount* of the discharge.¹ Permit No. 2008-E0-0331, at Special Condition 2, specifically states that ALC must comply with those provisions.

In addition, Special Condition 3 of Permit No. 2008-E0-0331 requires that ALC must “comply... with any limitations and provisions imposed by the City of Atkinson [sic].” This requirement is further acknowledgment of the POTW’s authority over the discharge of trucked leachate. Thus, ALC was required to comply with any limitations or provisions imposed by the Village STP with respect to the amount and location of leachate discharges into the Village STP.

Moreover, Special Conditions 2 and 3 are set forth in Permit No. 2008-E0-0331, attached to the Complaint and upon which Counts I and II are founded. To the extent that the allegations

¹ The word “any” is defined in pertinent part as: “Some; one out of many; an indefinite number.” Black’s Law Dictionary, 4th Ed.

of Counts I and II conflict with such exhibits, the exhibits control. *Bajwa v. Metropolitan Life Insurance Company*, 208 Ill. 2d 414, 431-432 (2004).

Thus, this Board has ample basis to dismiss the Complaint under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9) based upon the “other affirmative matter” of the above cited provisions of the pretreatment program, 35 Ill. Adm. Code 307.1101 and 40 CFR 403.5(8), as well as Special Conditions 2 and 3 of Permit No. 2008-E0-0331. Note that this affirmative matter is exclusive of any consideration of the Affidavits of Gary Hull and Erik Vardijan.

IV. THE AFFIDAVITS OF GARY HULL AND ERIK VARDIJAN COMPLY WITH THE PROVISIONS OF § 101.626 OF THE GENERAL RULES OF THE POLLUTION CONTROL BOARD, 35 Ill. Adm. Code 101.626.

The main criticism of the Affidavits of Gary Hull and Erik Vardijan (respectively, the “Hull Affidavit” and the “Vardijan Affidavit”) (collectively, the “Affidavits”) as set forth in the STATE’s Motion to Strike at 3 is that “The Affidavits are substantively deficient because they are based upon hearsay statements.” Yet, hearsay is implicitly allowed as an exception to the rules of evidence by § 101.626 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.626, which states in pertinent part:

In accordance with Section 10-40 of the IAPA, the hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part.

(a) Evidence. The hearing officer may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged.

There is nothing in the Affidavits which does not meet this standard. Furthermore, as an exception to the rules of evidence § 101.626 implies that hearsay may be relied upon, if it would

be "relied upon by prudent persons in the conduct of serious affairs." While ALC does not agree that the statements cited as examples of hearsay in the STATE's Motion to Strike actually constitute hearsay, if they do they would fall within the exception created by § 101.626.

V. THE AFFIDAVITS COMPLY WITH Ill. Sup. Ct. Rule 191(a).

The STATE's Motion to Strike at 3 also asserts that the Affidavits do not comply with Ill. Sup. Ct. Rule 191(a), which provides, in pertinent part:

Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure, 735 ILCS 5/2-1005], affidavits submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure 735 ILCS 5/2-619, and affidavits submitted in connection with a motion to contest jurisdiction over the person, as provided by section 2-301 of the Code of Civil Procedure 735 ILCS 5/2-301, shall be made on the personal knowledge of the affiant; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used.

As set forth in part IV of these Objections, the main criticism of the STATE's Motion to Strike is that the Affidavits contain hearsay, and thus purportedly do not comply with the requirement that statements be made upon "personal knowledge." Most of the statements cited as examples are statements referencing conversations by the affiants with either Village of Atkinson employee Bob Floming or the Water and Sewer Superintendent of the City of Galva. Yet, those statements fully comply with Ill. Sup. Ct. Rule 191(a) because they fall within the definition of statements which are not hearsay under Illinois Rule of Evidence 801((d)(2)(f). That exception states:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if

- (2) Admission by Party-Opponent. The statement is offered against a party and is
- (F) a statement by a person, or a person on behalf of an entity, in privity with the party or jointly interested with the party.

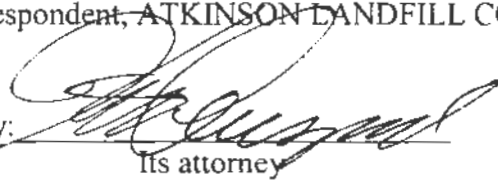
The Village of Atkinson and the City of Galva are municipal corporations of the State of Illinois. See Complaint, *People v. Village of Atkinson*, PCB No. 13-60, par. 3, and Complaint, *People v. City of Galva*, PCB No. 13-61, par. 3. They also operate under NPDES permits issued by the STATE. See Complaint, *People v. Village of Atkinson*, PCB No. 13-60, par. 5, and Complaint, *People v. City of Galva*, PCB No. 13-61, par. 5. As such they are in privity with the STATE. Accordingly, statements made by persons on behalf of the Village of Atkinson and City of Galva are admissions by party-opponents which fall under the definitions of Statements Which Are Not Hearsay under Illinois Rule of Evidence 801((d)(2)(f)).

Other criticisms of the Affidavits, such as that the Hull Affidavit only refers to disposal of leachate on one particular date may possibly be a consideration for the relevance of the affidavit as to the other dates of disposal, but certainly does disqualify the affidavit under Ill. Sup. Ct. Rule 191(a) and the STATE's Motion to Strike does not so argue. The criticism that the Vardijan Affidavit "only refers to an authorization allegedly given for Respondent's disposal of landfill leachate at a designated location on May 4, 2011" may be correct, but that affidavit clearly states at paragraph 4 that "[a]ll subsequent loads...were discharged into the sewers of the Galva WWTF at the same designated discharge point." Moreover, there is no dispute that this leachate was, in fact, accepted by these municipalities. See Complaint, Count I, par. 6 and Count III, par. 13.

Accordingly, ALC requests that the STATE's Motion to Strike be denied and that ALC's Motion to Dismiss under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9) be granted.

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By:



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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 Objections to Complainant's Motion to Strike Respondent's Section 2-619(a)(9) Motion to Dismiss and affidavits of Gary Hull and Erik Vardijan 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 18th day of July, 2013.

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