

ILLINOIS POLLUTION CONTROL BOARD  
October 2, 1997

ROY K. JOHNSON,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 98-31
	)	(Citizens - Air, Noise)
ADM-DEMETER, HOOPESTON	)	
DIVISION,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by K.M. Hennessey):

This citizen's enforcement complaint (Complaint) comes before the Board on two motions. The first is respondent City of Hoopeston's (City) "Motion to Dismiss Because the Complaint is Duplicitous and Frivolous" (Motion) under 35 Ill. Adm. Code 103.124. The Board finds that the Complaint against the City fails to state a cause of action and is therefore frivolous to that extent. The Board grants the Motion and dismisses the City from this action. The Board also strikes the City from the caption of this case.

The second motion pending before the Board is the Motion for Extension of Time of respondent ADM-Demeter, Hoopeston Division (ADM). On August 28, 1997, ADM moved for an extension of two weeks to allow ADM to determine whether the complaint is duplicitous or frivolous and to file a motion thereon. It is now October 2, 1997 and ADM has not filed a motion to dismiss the complaint. The Board therefore denies ADM's motion as moot and does not address it further in this order. The Board further finds that the Complaint against ADM is not frivolous or duplicitous and therefore accepts this case for hearing against ADM.

BACKGROUND

Complainant Roy K. Johnson (Mr. Johnson) lives at 715 N. Market Street in Hoopeston, Illinois, and has lived there for over 35 years. Complaint at 2, 8. He alleges that in 1986, ADM began an open grain and elevator storage operation (grain facility) on North Market Street in Hoopeston, a few hundred yards from his home. Complaint at 4, 8. Mr. Johnson alleges that the street leading to the grain facilities is approximately 40 feet from his home, and that railroad tracks that the grain facilities use run a few hundred feet behind his house. Complaint at 4.

Mr. Johnson alleges that the grain facilities, and accompanying train and truck traffic (collectively, the grain facility operations), have created air pollution in violation of Sections 8, 9, and 10 of the Environmental Protection Act (Act), (415 ILCS 5/8, 9, 10 (1996)). Complaint at 3. He also alleges that the grain facility operations have created noise pollution in violation of

Sections 23, 24, 25, and 27 of the Act, (415 ILCS 5/23, 24, 25, 27 (1996)) and 35 Ill. Adm. Code 900.12 of the Board's regulations. Complaint at 3.

Mr. Johnson alleges, for example, that trucks and trains traveling to and from the grain facilities create noise pollution. Complaint at 4. He also alleges that trucks going to and from the grain facilities that are untarped or uncovered release grain dust, as does the loading of railroad cars for shipping. Complaint at 6. As a result, Mr. Johnson alleges that he cannot get proper rest, sleep, and relaxation, and that his enjoyment of his life and home have been diminished. Complaint at 10. He alleges that he has presented his problems but that little or nothing has been done to resolve them. Complaint at 11. (Mr. Johnson does not identify the persons to whom he presented his problems.) Mr. Johnson seeks an order stopping the air, noise, and vibration problems. Complaint at 11. He also requests an injunction and money penalties. Complaint at 11.

Mr. Johnson states that he believes that the grain facility operations also violate "Illinois Vehicle Code 5/15-109.1, City of Hoopston ordinance, and Code of Federal Regulations #40, Subpart DD." Complaint at 10. He does not expressly seek any relief for those alleged violations.

### PROCEDURAL HISTORY

Mr. Johnson filed an informal complaint with the Board on September 25, 1996 (which the Board forwarded to the Illinois Environmental Protection Agency, in accordance with the Board's usual practice.) Complaint at 12. The informal complaint has not been resolved. Complaint at 12. Mr. Johnson filed the instant complaint on August 21, 1997. The City filed the Motion on September 11, 1997. Mr. Johnson has not responded to the Motion.

### DISCUSSION

Section 103.124(a) of the Board's procedural rules (35 Ill. Adm. Code 103.124(a)) implements Section 31(d) of the Act, 415 ILCS 5/31(d). Section 103.124(a) requires the Board to determine whether citizens' suits are duplicitous or frivolous. A suit is "duplicitous"<sup>1</sup> (*i.e.*, duplicative) if the matter is identical or substantially similar to one brought in another forum. Dayton Hudson Corporation v. Cardinal Industries, Inc. (August 21, 1997), PCB 97-134, slip op. at 3. A suit is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. Dayton Hudson, PCB 97-134, slip op. at 3.

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<sup>1</sup> The Board and the courts have consistently read the term "duplicitous" as "in the sense of being duplicative." See, *e.g.*, Winnetkans Interested in Protecting the Environment, 55 Ill. App. 3d 475, 478, 479, 370 N.E.2d 1176, 1178, 1179 (1<sup>st</sup> Dist. 1977).

The City argues that Mr. Johnson's suit is frivolous on several grounds.<sup>2</sup> In particular, it notes that Mr. Johnson complains of noise and air pollution arising from the grain facility and its operations, and that the City plays no role in the operation of either. Motion at 2.

The Complaint does not allege that the City has any role in the operation of these facilities, nor does it allege that the City has any role in the air and noise pollution of which Mr. Johnson complains. While Mr. Johnson identifies the City as an entity causing pollution, he does not specifically allege any pollution except that emanating from the grain facility operations. The Complaint does allege that the grain facility operations may violate a City ordinance.

The Board finds that Mr. Johnson has not stated a cause of action against the City. While Mr. Johnson identifies the City as a source of pollution, he fails to specify what pollution the City has caused. All of Mr. Johnson's specific allegations regarding pollution are directed at the grain facility operations, not the City. Mr. Johnson does not allege that the City is in any way involved in the grain facility operations. Furthermore, while Mr. Johnson alleges that the grain facility operations may violate a City ordinance, the Board does not have authority to enforce that ordinance, nor to order the City to enforce its own ordinance. See 415 ILCS 5/31(d) (1996) (allowing the filing of complaints before the Board only for violations of the Act, rules and regulations thereunder, and permits issued under the Act). In these circumstances, the Board cannot find that Mr. Johnson has stated a cause of action against the City and therefore grants the City's motion to dismiss. The Board does not find it necessary to reach the City's remaining grounds for dismissal.

However, this case is not frivolous or duplicative with respect to ADM. It identifies ADM's facilities as the source of the air and noise pollution complained against, and alleges facts that, if proven at hearing, could justify a finding of air and noise pollution. ADM has not identified any other litigation between itself and Mr. Johnson regarding the alleged air and noise pollution, so the complaint is not duplicative. This case is therefore accepted for hearing against ADM.

The hearing must be scheduled and completed in a timely manner consistent with Board practices. The hearing officer must inform the clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding the credibility of witnesses, and all actual exhibits to the Board within five days of the hearing.

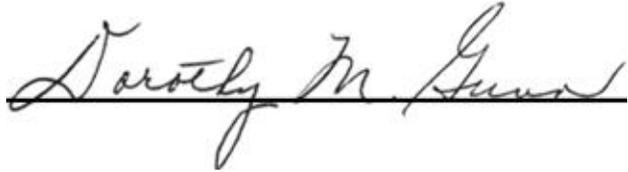
If the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer must unilaterally set a hearing date in conformance with the schedule above. The hearing officer and the parties are encouraged to expedite this proceeding to the extent possible.

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<sup>2</sup> The Motion also states that the Complaint is duplicitous and that Johnson has filed various formal and informal complaints about the grain facility operations since 1986. However, the City does not argue that this case is identical or substantially similar to another case pending in another forum, and therefore the Board cannot find that the Complaint is duplicitous.

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 2nd day of October 1997, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a solid horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board