

ILLINOIS POLLUTION CONTROL BOARD
June 3, 2021

MICHAEL J. KORMAN,)
)
 Petitioner,)
)
 v.)
) PCB 21-77
 MEDLINE INDUSTRIES, INC.,) (Citizens Enforcement - Water)
)
 Respondent.)
)
)
)

ORDER OF THE BOARD (by B.F. Currie):

On March 17, 2021, Michael J. Korman (Korman) filed a complaint (Complaint) against Medline Industries, Inc. (Medline). The complaint concerns Medline’s general stormwater National Pollutant Discharge Elimination System (NPDES) Permit No. ILR10AZ90, the associated Stormwater Pollution Prevention Plan (SWPPP) and any related inspection forms or reports. The NPDES permit was issued by the Illinois Environmental Protection Agency (IEPA) for construction activities at Medline’s distribution center located at Alleghany Road and Peterson Road, in Grayslake, Lake County. Medline filed a motion to dismiss the Complaint with prejudice as frivolous. For the reasons below, the Board grants the motion to dismiss and dismisses the case because the complaint does not sufficiently show that it states a cause of action on which the Board can grant relief.

COMPLAINT

On September 10, 2020, Mr. Korman filed a *pro se* complaint against the same respondent as the present case, Michael J. Korman v. Medline Industries, Inc., PCB 21-19, which was dismissed by the Board, on its own motion as frivolous. Within the Board opinion that dismissed that complaint, the Board noted that, “nothing in this order prevents Mr. Korman from filing another complaint, which must comply with the requirements including the Board’s procedural rules at 35 Ill. Adm. Code 103.204. *Id.* at 3. The Board opinion explained that Mr. Korman’s complaint, while alleging that Medline denied his request to review its SWPPP and inspection forms and reports, failed to include a copy of the NPDES permit issued to Medline or a copy of Mr. Korman’s request to see the SWPPP or inspection forms and reports. *Id.*

On March 17, 2021, Mr. Korman filed this *pro se* complaint against Medline using a sample form provided by the Board. This new complaint addresses the Board’s opinion in the previous filing against Medline and attaches several additional documents. Attached to the complaint are:

- Exhibit A: A letter dated August 24, 2020, from Mr. Korman to Medline (Request Letter).
- Exhibit B: A letter dated September 8, 2020, from Medline to Mr. Korman (Denial Letter).
- Exhibit C: An email dated March 4, 2021, from IEPA summarizing Mr. Korman's Freedom of Information Act (FOIA) request (IEPA FOIA Request).
- Exhibit D: An email dated March 11, 2021, containing IEPA's FOIA response (IEPA FOIA Response).
- Exhibit E: A copy of Medline's NPDES Permit number ILR10AZ90, including Notices of Intent, and ancillary forms (NPDES Permit).

Mr. Korman's Request Letter asks to visit the project site to review Inspection Reports, Contractor Certification Statements, and confirmation that certain certifications are at the construction site. Request Letter at 1. The Request Letter said, "I may also seek to review the updated SWPPP documentation on site to reflect changes made since construction commenced and which may differ from the documents posted on the IEPA Notice of Intent database upon Notice of Intent submission." *Id.* at 1. Medline denied Mr. Korman's request to visit the project site and rejected his request for documents but encouraged him to submit a FOIA request to IEPA in order to obtain the requested documents. Denial Letter at 1. Medline also asserted that some of the information Mr. Korman sought "may be deemed confidential in accordance with 40 CFR Part 2." *Id.* Mr. Korman submitted a detailed FOIA Request to IEPA which included the request for "[a]ll Inspection Reports submitted to IEPA." IEPA FOIA Request at 2. The FOIA response from IEPA appears to have provided Mr. Korman with his requested documents, except for any inspection reports or forms. IEPA FOIA Response. IEPA's response does not explicitly deny Mr. Korman's request for inspection reports or forms, but simply states, "[t]he information responsive to your request is attached." *Id.* at 1.

The complaint does not explicitly describe any documents that remain outstanding from Mr. Korman's FOIA request to IEPA. However, in paragraph 9 of the complaint, Mr. Korman explains the relief he is requesting from the Board, "[u]nder NPDES Permit # ILR10 Part IV B.6, Respondent is required to make all completed inspection forms/reports required under this permit available upon request to the public." Complaint at ¶9. Part IV(B)(6) of Medline's NPDES permit states as follows:

6. All storm water pollution prevention plans and all completed inspection forms/reports required under this permit are considered reports that shall be available to the public at any reasonable time upon request. However, the permittee may claim any portion of a storm water pollution prevention plan as confidential in accordance with 40 CFR Part 2. NPDES Permit at 5.

Paragraph 6 of the Board’s complaint form asks Mr. Korman to describe the type of pollution alleged and the location of the alleged pollution. Here, Mr. Korman says, “[a]t this time Complainant is not aware of any pollution at this project site.” Complaint at ¶6. It appears that all that remains outstanding from Mr. Korman’s information request are any inspection reports or forms Medline has filed in compliance with its NPDES Permit.

MOTION TO DISMISS

On April 15, 2021, Medline timely filed a motion to dismiss (Mot.) the complaint with prejudice. Arguing that the complaint is deficient, Medline lists three reasons why it should be dismissed, “[1] it fails to allege any actual violations of Medline’s [NPDES Permit]; (2) Medline has complied with the requirements of its NPDES Permit because its records are publicly available through state and local agencies; and (3) in seeking revocation of Medline’s Permit, despite alleging none of the requisite conditions for revocation, Mr. Korman seeks relief that the Board does not have the authority to grant.” Mot at 1.

Medline argues that Mr. Korman’s complaint fails to allege any violations at the project site. “The Complaint is devoid of any detailed or specific allegations regarding conduct that violated or even potentially violated the Permit terms and conditions.” Mot. at 3. Further, Medline points to several sections of the Complaint where Mr. Korman notes that he is unaware of any pollution at the construction site. Mot. at 3, *citing* Complaint at ¶6.

Medline, in a footnote, says that their consultants submit weekly inspection reports to the Lake County Stormwater Management Commission. Medline suggests that Mr. Korman submit a FOIA request to Lake County for those remaining reports. “Although Medline initially directed Mr. Korman to address his records request to the IEPA, which he subsequently did, it should also be noted that Medline’s consultants submit weekly inspection reports for review to the Lake County Stormwater Management Commission, as requested by that agency.” Mot. at 8.

Mr. Korman did not file a response to Medline’s motion to dismiss. Section 101.500(d) of the Board’s rules says, in part:

- d) Within 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party waives objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion. 35 Ill. Adm. Code 101.500(d).

Medline filed proof of service with the Board on April 21, 2021, indicating that Mr. Korman had been properly served with the motion to dismiss on April 16, 2021. A timely-filed response would have been due April 30, 2021, but none was filed with the Board.

DISCUSSION

Any person may bring an action before the Board to enforce Illinois’ environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2018); 35 Ill. Adm. Code 103.200. The complaint must contain, as described in the Board’s rule 103.204(c):

- 1) A reference to the provision of the Act and regulation that the respondents are alleged to be violating;
- 2) The dates, locations, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense; and
- 3) A concise statement of the relief that the complainant seeks. 35 Ill. Adm. Code 103.204(c); *See* 415 ILCS 5/31(c)(1), (d)(1) (2018).

Additionally, both the Illinois Environmental Protection Act (Act) and the Board's procedural rules "'provide for specificity in pleadings'... and 'the charges must be sufficiently clear and specific to allow preparation of a defense.'" United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 11 (Oct. 16, 2008) (citations omitted); *See* 415 ILCS 5/31(c) (2018); 35 Ill. Adm. Code 103.204(c).

When deciding a motion to strike or dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g., Beers v. Calhoun*, PCB 04-204, slip op. at 2 (July 22, 2004); *see also In re: Chicago Flood Litigation*, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). The complainant need not set out its evidence, but only the ultimate facts to be proved. *See Schilling v. Hill*, PCB 10-100, slip op. at 7 (Mar. 15, 2012). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85 (2003); *see also People v. Sheridan Sand & Gravel Co.*, PCB 06-177, slip op. at 4 (Sept. 7, 2006).

In this case, Mr. Korman alleges that Medline has violated Part IV(B)(6) of its NPDES permit by not providing copies of any inspection forms or reports to Mr. Korman. Complaint at ¶9. However, Medline claims that the forms are publicly available, through a FOIA request to Lake County, rather than IEPA. If IEPA's FOIA response to Mr. Korman was deficient or was denied, Mr. Korman's recourse is through a subsequent, more detailed FOIA request or filing a request for review with the Public Access Counselor of the Illinois Attorney General. 5 ILCS 140/9.5(a) (2018). A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202. The Board lacks the authority to compel state or local governmental agencies to produce documents requested through FOIA.

A properly pled complaint requires a reference to the provision of the Act and regulation that respondents are violating. 35 Ill. Adm. Code 103.204(c)(1). There is no such reference made in Mr. Korman's complaint. Further, Mr. Korman does not list any description of discharges or emissions that might constitute violations of the Act or Board regulations. *Id.* at 103.204(c)(2). And finally, there is no concise statement of relief requested. *Id.* at

103.204(c)(3). Without these components, the complaint is incomplete and is not sufficient to show that it states a cause of action on which the Board can grant relief.

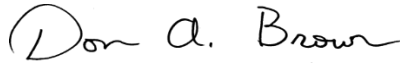
The Board finds that Mr. Korman has not pled a cause of action for which the Board can grant relief. As there is no specific cause of action pled, the Board is unable to note any alleged violations that could be dismissed with prejudice. Therefore, the Board grants Medline's motion to dismiss the complaint as frivolous, however denies the request that the complaint be dismissed with prejudice.

CONCLUSION

For the reasons stated above, the Board grants Medline's motion to dismiss, dismisses the complaint, and closes the docket.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 3, 2021, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board