

ILLINOIS POLLUTION CONTROL BOARD
October 20, 2022

PAUL C. PRATAPAS,)
)
 Complainant,)
)
 v.) PCB 23-13
) (Citizens Enforcement - Water)
 LISLE TOWNSHIP HIGHWAY)
 DEPARTMENT,)
)
 Respondent.)

ORDER OF THE BOARD (by A. Palivos):

On July 12, 2022, Paul C. Pratapas filed a complaint against Lisle Township Highway Department (Lisle Township). The complaint concerns Lisle Township’s curb repair work off Chicago Avenue in Naperville, DuPage County. After the complainant moved to modify the complaint with additional alleged violations, Lisle Township requested that the Board not accept the complaint because it is frivolous. For the reasons below, the Board accepts the complaint, as modified by this order, for hearing.

Below, the Board first summarizes the procedural history and summarizes the complaint. The Board then discusses the pending motions and considers whether the modified complaint is duplicative or frivolous before providing procedural direction and its conclusion.

PROCEDURAL HISTORY

On July 12, 2022, the complainant filed a complaint (Comp.). On July 15, 2022, the complainant filed proof of service showing service by certified mail on July 12, 2022.

On August 10, 2022, Lisle Township filed a motion for extension of time to file a motion that the formal complaint is frivolous, to which complainant did not respond. On August 25, 2022, respondent’s motion was granted by the hearing officer.

On September 7, complainant filed a motion to modify the formal complaint (Comp. Mot.) to include state law claims under the Illinois Environmental Protection Act (Act). On September 9, Lisle Township timely filed its motion to declare the formal complaint is frivolous (Resp. Mot.).

SUMMARY OF COMPLAINT

Using a sample form supplied by the Board, complainant filed a complaint, attached to which were 14 photos. The complaint alleges that Lisle Township’s sidewalk and curb replacement program is causing or allowing pollution off Chicago Avenue in Naperville, DuPage

County. Comp. at 2. Complainant describes the pollution as occurring “throughout neighborhoods at intersections with Westmorland Dr. and Concord Rd. Including but not limited to Jane Ave., Millcreek Ln., and Millcreek Ct.” Comp. at 2 (¶4).

The Board’s form complaint requests that the complainant “[d]escribe the type of pollution that you allege . . . and the location of the alleged pollution” as specifically as he or she reasonably can. Comp. at 3 (¶6). The complaint states that:

[t]oxic concrete washout water and slurry which is prohibited from making contact with soil and migrating to surface waters or into the ground water. As photographed, it is being buried in the holes for a curb segment before they pour it. Same thing occurred with the space next to curb segment where the asphalt was removed. Looked like the yellow stone which goes under asphalt was placed on top of the washout after it dried enough to be stable. As photographed. Rinse water also being left in the road. One worker even wiped their tool clean in someone’s front yard on the grass. *Id.* at 3.

The Board’s form complaint also asks the complainant to “[l]ist specific sections of the Environmental Protection Act [Act], Board regulations, Board order, or permit that you allege have been or are being violated.” Comp. at 3 (¶5). The complaint alleges that Lisle Township is violating or has violated “The Clean Water Act” and 40 CFR 450.21(e)(1). *Id.*

The Board’s form complaint also asks the complainant to “[d]escribe the duration and frequency of the alleged pollution” as specifically as he or she reasonably can. Comp. at 3 (¶7). The complaint states that:

Photographed: June 30, 2022 at 12:56 pm
 Photographed: July 1, 2022 at 10:15 am
 Photographed: July 7, 2022 at 2:40 pm

These are ongoing programs. I witnessed them wash out in front of my parents’ house sometime in 2019 as part of the sidewalk replacement program. *Id.*

The Board’s form complaint also asks the complainant to “[d]escribe any bad effects that you believe the alleged pollution has or has had. . . .” Comp. at 4 (¶8). The complaint states that:

[t]he toxic washout has been poured in front of private residences without notification of the dangers to children and pets. The washout can be seen already running down the curbside gutter towards the inlet which drains to the DuPage River, a Water of The United States posing a risk to plant and animal life. As well as the water quality of the river and ground water. *Id.*

The form complaint asks the complainant to “describe the relief that you seek from the Board.” Comp. at 4 (¶9). The complaint states it is “requesting The Village of Lisle Highway Department immediately stop polluting and change their operations to include BMP measures

required by The EPA to maintain compliance with The Clean Water Act. Specially, stop washing out concrete trucks in the street, holes, and in the curbside gutter while operating their sidewalk and curb replacement programs. Or any other activity which includes pouring concrete.” *Id.*

Finally, the complainant states that he is not aware that any “identical or substantially similar cases have been brought to the Board.” Comp. at 4 (¶10).

DISCUSSION

Statutory and Regulatory Background

“The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order.” 415 ILCS 5/5(d) (2020). Any person may bring an action before the Board to enforce Illinois’ environmental requirements. 415 ILCS 5/3.315, 31(d)(1) (2020); 35 Ill. Adm. Code 103.200. The complaint must contain information including a reference to the provision of the Act and regulations that the respondent is alleged to be violating. 415 ILCS 5/32(c)(1), (d)(1) (2020).

Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b). “Unless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing.” 415 ILCS 5/31(d)(1) (2020); 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is “identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202. 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.” *Id.*

Pending Motions

As noted above under “Procedural History,” the Board has before it two pending motions. In the following subsection, the Board first addresses complainant’s motion before deciding Lisle Township’s.

Complainant’s Motion to Modify Formal Complaint

On September 7, 2022, complainant filed a motion to modify the formal complaint. The motion requests that the complaint be modified to include the following state law violations: Section 12(a) of the Act (415 ILCS 5/12(a) (2020)) and 35 Ill. Adm. Code 304.141(b). Comp. Mot. at 1.

Section 12(a) provides in its entirety that no person shall “[c]ause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.” 415 ILCS 5/12(a) (2020). Section 304.141(b) provides in its entirety that

[n]o person may discharge any pollutant subject to, or which contributes or threatens to cause a violation of, any applicable federal or state water quality standard, effluent standard, guideline or other limitation, promulgated pursuant to the CWA or the Act, unless limitation for such a pollutant has been set forth in an applicable NPDES Permit. However, the Agency may, by permit condition, provide that the permittee may discharge pollutants present in its water supply intake sources in concentrations not greater than the concentrations in the intake sources, or which are added in trace amounts by normal domestic water usage. 35 Ill. Adm. Code 304.141(b).

Lisle Township has not responded to the motion. Under the Board's procedural rules, Lisle Township waives objection to granting the motion, but this waiver does not bind the Board's disposition of the motion. 35 Ill. Adm. Code 101.500(d).

The Board grants complainant's unopposed motion and modifies the complaint by adding these alleged violations of State law. As noted above, the Board has authority to conduct hearings on complaints alleging violations of State authorities. 415 ILCS 5/5/(d) (2020).

Respondent's Motion to Dismiss Formal Complaint as Frivolous

The Board also has pending respondent's September 9, 2022 motion to declare the formal complaint frivolous. As originally filed, the complaint first alleged that Lisle Township violated "The Clean Water Act" and 40 CFR 450.21(e)(1). Comp. at 3 (¶5). It did not allege a violation of the Act or Board regulations.

Lisle Township asserts that, "[u]pon information and belief, [that] the allegations included in the formal complaint did not result in any violations of state or federal regulations." Resp. Mot. at 1 (¶3). Lisle Township further asserts, "upon information and belief, the contract at issue was executed pursuant to the contract terms and in accordance with local, state, and federal rules and regulations." *Id.* at ¶4. Lisle Township then states that "all applicable local, state, and federal rules and regulations will be set forth in future contracts with Lisle Township Highway Department to ensure those rules and regulations are not violated in the future," before concluding to request the Board declare the formal complaint frivolous. Resp. Mot. at 2 (¶¶5, 6).

Respondent's motion references compliance with the terms of a contract. Respondent did not provide a copy of the contract with its motion. The issue of respondent's compliance with contract terms may be relevant to the reasonableness of the circumstances alleged in the complaint and to any remedy if the Board finds that a violation occurred. However, respondent's allegation that it complied with contract terms does not demonstrate that the complaint is insufficient. Taking all well-pled allegations of the complaint as true and drawing all reasonable inferences from them in favor of the non-movant, the Board cannot grant respondent's motion based on the allegation of respondent's compliance with a contract. *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).

However, the Board’s powers are limited to those vested in it by the Act and do not extend to enforcing exclusively federal law. Korman v. IEPA, PCB 21-16, slip op. at 8 (Mar. 18, 2021), citing Flagg Creek Water Reclamation Dist. v. Village of Hinsdale, PCB 06-141, slip. op. at 8 (Sept. 21, 2006); Rulon v. Double D Gun Club, PCB 03-7, slip. op. at 4 (Aug. 22, 2002). As noted above, Section 5(d) of the Act provides the Board authority to conduct hearings on complaints alleging violations of State authorities. 415 ILCS 5/5(d) (2020). This authority does not extend to alleged violations of federal authorities. The Board does not have authority to adjudicate the alleged violations of federal law listed in the complaint and grants Lisle Township’s motion requesting that the Board decline to accept them as frivolous.

Whether the Complaint as Modified is Duplicative

The Board first addresses whether the complaint – as amended above by granting the parties’ motions - is duplicative. As noted above, a complaint is duplicative if it is “identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202. The record does not show that a complaint alleging a water violation by Lisle Township is being adjudicated before the Board or in another forum. Lisle Township’s motion did not argue that the original complaint is duplicative, and it did not respond to complainant’s motion to modify. Based on the record now before it, the Board finds that the complaint is not duplicative.

Whether the Complaint as Modified is Frivolous

Next, the Board turns to whether the complaint is frivolous. As modified by granting the two motions above, the complaint “states a cause of action on which the Board can grant relief” by alleging violations of State law authorities. A complaint may also be frivolous if it requests “relief that the Board does not have authority to grant.” 35 Ill. Adm. Code 101.202. The complaint request relief including an order that Lisle Township “immediately stop polluting” and “[s]pecifically, stop washing out concrete trucks in the street, holes, and in the curbside gutter while operating their sidewalk and curb replacement programs.” Section 33(b) of the Act provides that, if the Board finds a violation, its final order may include an order to cease and desist from violations of the Act and regulations. 415 ILCS 5/33(b) (2020). The complaint also requests that Lisle Township “change their operations to include BMP measures.” The Board after finding a violation can order a respondent to develop and implement an abatement plan. *See, e.g., Gill v. CHS, Inc. – Carrollton Farmers Elevator*, PCB 16-68, slip op. at 3 (Jan. 21, 2016), citing McDonagh and Fishbaum v. Michelin, PCB 08-76, slip op. at 4 (July 10, 2008); Pawlowski v. Johansen and Quinley, individual and d/b/a Benchwarmers Pub, Inc., PCB 99-82 (Apr. 4, 2000 and Sept. 21, 2000). The Board can consider these requests for mitigation as an element of abatement under Section 33 if the complainant proves a violation. Accordingly, the complaint as modified above requests relief that the Board has authority to grant, and the Board finds that the complaint is not frivolous.

The Board finds that the complaint meets the content requirements of the Board’s procedural rules. *See* 35 Ill. Adm. Code 103.204(c). The Board accepts the complaint – as modified by this order – for hearing. *See* 415 ILCS 5/31(d)(1) (2020); 35 Ill. Adm. Code

103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a respondent fails by that deadline to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider that respondent to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d).

PROCEDURAL DIRECTION

The Board directs the hearing officer to proceed expeditiously to hearing. Upon its own motion or the motion of any party, the Board or the hearing officer may order that the hearing be held by videoconference. In deciding whether to hold the hearing by videoconference, factors that the Board or the hearing officer will consider include cost-effectiveness, efficiency, facility accommodations, witness availability, public interest, the parties' preferences, and the proceeding's complexity and contentiousness. *See* 35 Ill. Adm. Code 101.600(b), 103.108.

Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2020). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2020). Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id.* Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id.*

Accordingly, the Board further directs the hearing officer to advise the parties that in

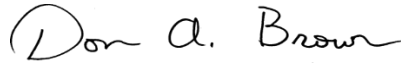
summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

CONCLUSION

For the reasons above, the Board grants complainant's motion to modify the formal complaint, and grants respondent's motion to declare the formal complaint frivolous. The Board also finds that the complaint, as modified by this order, is neither duplicative nor frivolous and accepts the modified complaint for hearing.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 20, 2022, by a vote of 5-0.



Don A. Brown, Clerk
Illinois Pollution Control Board