454210/emm #5009744v1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Paul Christian Pratapas,	)	
	)	
Complainant,	)	
	)	
v.	)	No: **PCB 2023-075**
	)	
Willow Run by M/I Homes,	)	(Enforcement – Water)
	)	
Respondent.	)	

Notice of Electronic Filing

PLEASE TAKE NOTICE that I have electronically filed today with the Illinois Pollution Control Board the attached **Respondent's Response In Opposition To Complainant's Motion To Amend Formal Complaint** with **Exhibits A through D**, a copy of which is attached hereto and hereby served upon you.

Respectfully submitted,

By: /s/ David J. Scriven-Young
David J. Scriven-Young

Date: July 17, 2023

David J. Scriven-Young
Counsel for Respondent
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Tel: 312-881-6309
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Anne E. Viner
Counsel for Respondent
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Certificate of Service

The undersigned, an attorney, hereby certifies that the above Notice and any attached documents were served via email transmission to the Clerk and all other parties listed below at the addresses indicated by 5:00 p.m. on July 17, 2023.

Illinois Pollution Control Board
Don Brown – Clerk of the Board
100 W. Randolph St., #11-500
Chicago, IL 60601
Email: don.brown@illinois.gov

Paul Christian Pratapas
(Complainant)
1779 Kirby Parkway
Ste. 1, #92
Memphis, TN 38138
Email: paulpratapas@gmail.com

Respectfully submitted,

By: /s/ David J. Scriven-Young
David J. Scriven-Young

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PAUL CHRISTIAN PRATAPAS,	)	
	)	
Complainant,	)	
	)	
v.	)	No. PCB 2023-075
	)	
WILLOW RUN BY M/I HOMES,	)	(Enforcement – Water)
	)	
Respondent.	)	

RESPONDENT'S RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION TO AMEND FORMAL COMPLAINT

On June 1, 2023, the Board granted Respondent Willow Run By M/I Homes' ("M/I") Motion to Dismiss Complainant Paul Christian Pratapas's ("Pratapas") Formal Complaint for frivolousness and directed Pratapas to amend his complaint for specificity no later than July 3, 2023. (6/1/23 Order, attached hereto as Ex. A, p. 3.) In its Order, the Board noted that its "procedural rules require complaints to include 'dates, locations, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations.'" (*Id*. at p. 1 (citing 35 Ill. Adm. Code 103.204(c)(2).) The Board found that Pratapas's Complaint failed to meet this requirement:

> "However, the complaint lacks any details describing the extent, duration, or strength of the alleged violation and only cites general violations, such as 'toxic concrete washout water and slurry from making contact with soil and migrating to surface water or into the ground not managed.'"

(*Id*. at p. 2.)

Contrary to the Board's Order, Pratapas did not file an amended complaint. Instead, Pratapas filed a "Motion to Amend Formal Complaint", to which he did not even attach a proposed amended complaint. Rather, Pratapas's motion requests that the Complaint be amended to include eight paragraphs that criticize M/I's compliance with its permit requirements and state what

Pratapas believes should be the standards related to concrete washout areas and containers. Even with these new allegations, however, the Complaint still does not contain the required details describing the extent, duration, or strength of the alleged violation. Therefore, the proposed amendment would not cure the defects in the Complaint that the Board identified, and Pratapas's motion should be denied.

ARGUMENT

I. Pratapas's Motion Should be Denied Because He Failed to Attach a Proposed Amended Complaint to His Motion

As an initial matter, it should be noted that the Board's June 1, 2023 Order required Pratapas to "amend his complaint for specificity no later than July 3, 2023." (Ex. A, p. 3.) Pratapas violated the Board's Order by failing to file an amended complaint[1]; moreover, he failed to even attach a proposed amended complaint to his motion. For this reason alone, Pratapas's motion should be denied.

The Board's rules clearly provide that a motion for leave to amend the complaint must attach a proposed amended complaint that meets certain requirements:

> (d) . . . If a party wishes to file an amendment to a complaint . . . the party who wishes to file the pleading must move the Board for permission to file the pleading.
>
> (e) The pleading sought to be filed under subsection (d) must:
>
> 1) Set forth a claim that arises out of the occurrence or occurrences that are the subject of the proceeding; and
>
> 2) Meet the requirements of Section 103.204 of this Subpart, including the requirement to serve the pleading by U.S. Mail with a recipient's signature recorded, a third-party commercial carrier with a recipient's signature recorded, or personal service upon the respondent . . . .

[1] Furthermore, Pratapas did not file a motion requesting additional time to file an amended complaint. Since the Board had already given him leave to file an amended complaint, Pratapas could have filed an amended complaint that contained the specificity that the Board found lacking. Pratapas did not do so; thus, the Board should evaluate Pratapas's filing based on the standards for motions for leave to file amended complaints under the Board's precedent and rules.

35 Ill. Adm. Code 103.206(d) & (e). In addition to the service requirements, Section 103.204 provides that the complaint must be captioned in a certain format, contain a "reference to the provision of the Act and regulations that the respondents are alleged to be violating", establish "the dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations", which will "advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense", and contain a "concise statement of the relief that the complainant seeks." 35 Ill. Adm. Code 103.204(c). If the complainant does not attach a proposed amended complaint to its motion, the Board cannot possibly evaluate whether the amended pleading complies with 35 Ill. Adm. Code 103.206(d) & (e) and 35 Ill. Adm. Code 103.204(c). *See Joseph T. Ryerson & Son, Inc. v. Travelers Indem. Co.*, 2020 IL App (1st) 182491, ¶ 76 (affirming trial court's denial of plaintiff's request for leave to replead because it failed to identify what proposed amendment it would make that would enable the court to determine whether plaintiff met the standard to amend); *Loftus v. Mingo*, 158 Ill. App. 3d 733, 746 (4th Dist. 1987) ("There is no presumption that a proposed amendment will be a proper one and it is not error to refuse to allow an amendment that has not been presented when there are no means of determining whether or not it will be proper and sufficient").

Here, Pratapas failed to attach a proposed amended pleading to his motion. Thus, he not only failed to follow the Board's Order requiring him to file an amended complaint, but he also failed to follow the Board's regulations governing motions for leave to amend. As a result, Pratapas's motion should be denied.

II. Pratapas's Motion Should be Denied Because the Facts Alleged in his Motion Do Not Cure the Defects that the Board Identified in the Complaint

Even if the Board were to disregard its requirement that motions for leave to amend should attach copies of the proposed amended pleading, Pratapas's motion should still be denied because the "facts" contained in his motion (1) should not be considered by the Board because they were not set forth in an affidavit or certification as required by 35 Ill. Adm. Code 101.504 and (2) do not cure the defects in the Complaint that the Board previously identified.

First, the Board's rules clearly state that facts asserted in motions "that are not of record in the proceeding must be supported by oath, affidavit, or certification consistent with Section 1-109 of the Code of Civil Procedure." 35 Ill. Adm. Code 101.504. Pratapas did not supply an affidavit or certification to support the facts contained in his motion; therefore, those facts should not be considered by the Board.

Second, if even considered by the Board, the Complaint[2] (when combined with the new facts in the motion) still is deficient as identified by the Board, as there remain no facts detailing the extent, duration, or strength of the alleged violations. Under the Board's precedent, parties before the Board do not have an absolute right to amend pleadings. *Mayer v. Lincoln Prairie Water Co.*, PCB No. 11-22, 2013 Ill. ENV LEXIS 133, *10 (May 02, 2013) (attached hereto as Exhibit C). Relying on *Freedberg v. Ohio National Insurance Co.*, 2012 IL App (1st) 110938, ¶ 45, the Board considers four factors when determining whether to deny a motion to amend: "(1) whether the proposed amendment would cure a defect in the pleading; (2) whether the proposed amendment would prejudice or surprise other parties; (3) whether the proposed amendment is timely; and (4) whether there were previous opportunities to amend the pleadings." *Mayer*, 2013 Ill. ENV LEXIS 133 at *11-12.

[2] A copy of the Complaint is attached hereto as Exhibit B.

Here, Pratapas cannot meet the first factor, because the purported allegations in his motion continue to consist of general and vague statements of violations as the Board previously identified in the Complaint, such as "toxic concrete washout water and slurry from making contact with soil and migrating to surface water or into the ground not managed." (Ex. A, p. 2.) An examination of the statements in the Motion clearly shows that Pratapas has once again failed to provide the required detail concerning the extent, duration, or strength of any purported violations:

> Paragraph 1: "This designated concrete washout area demonstrates a total disregard for permit requirements and is representative of M/I practices as demonstrated in photographic evidence provided to The Board, as well as is an industry standard as demonstrated by the photographs submitted with the other Formal Complaints filed by Complainant. And the documented words of a chief engineer for a involved municipality dealing with their own case containing the same total disregard for permit requirements regarding concrete/paint/stucco washout."

Analysis: This paragraph does not provide any new information concerning extent, duration, or strength of the alleged violation. Instead, it restates what Pratapas said in his Complaint, *i.e.*, that a photograph (which he originally attached to the Complaint) somehow shows that a permit was violated. Because the Board already rejected this photograph as being evidence of extent, duration, or strength, the Board should do so again here. Moreover, Pratapas's vague references to photographs and "documented words" provided in other cases before the Board have nothing to do with what happened at this particular site.

> Paragraph 2: "The designated washout area is missing any and all adequate curbside and ground protection. The area should have a plastic type barrier against the soil with 3 inch stone on top with no area of soil left exposed. The Act states no pollutants, such as concrete washout, should touch the ground. This implementation of a completely different design than was approved with the permit demonstrates a total misunderstanding of how the area and container should be used."

Analysis: Just as he did in the Complaint, Pratapas generally alleges that concrete washout is uncontrolled at the site. However, the Board specifically stated in its Order that general

allegations such as this are not sufficient. He also theorizes as to the understanding or not of M/I Homes with respect to its permit obligations. These statements do not add anything with respect to the extent, duration, or strength of the alleged violation. In addition, his general statements as to what the Act says and the supposed implementation of a different design are unsupported by legal citations or specific facts. In contrast, M/I Homes has previously provided the Board with the Affidavit of Jason Polakow, M/I's executive overseeing the Willow Run project, that provides specific details regarding how M/I has implemented and maintained appropriate controls for soil erosion and the management of concrete washout at the site in accordance with its Stormwater Pollution Prevention Plan ("SWPPP") and NPDES Permit. (*See* J. Polakow Aff., attached as Ex. B to M/I's Mem. of Law in Supp. of Mot. That The Board Determine That The Formal Compl. Is Frivolous Or, In The Alternative, To Dismiss The Compl. Pursuant To 735 ILCS 5/2-619(a)(9), filed on Jan. 10, 2023.)

> Paragraph 3: "The common practice is for personnel/superintendents to think the container is for the concrete and not understand the pollutant of significance is washout water. What I have seen a hundred times as a Certified SWPP Compliance Manager is the concrete truck will dump its remaining load and do a basic washout over the container. Then, back up and do a more complete washout on the ground of the designated area and/or the street in front of the container. This lack of concern for contaminated water is further demonstrated by the lack of a cover on the pictured container as required by their permit. I believe Illinois experiences rain and snow."

Analysis: Most of this paragraph does not relate to M/I but instead relays what Pratapas believes to be true in "common practice" and what Pratapas apparently has witnessed at various sites "hundreds of times." The only statement pertaining to M/I is the incorrect assumption that a container cover was required and may have been missing in a photograph that he previously

attached to the Complaint;[3] however, this adds nothing with respect to the extent, duration, or strength of the alleged violations.

> Paragraph 4: "This designated washout area is also being used to store miscellaneous items, which along with the orientation of the container blocks access to the part of the container used by the trucks while washing out. The side [*sic*]. The container is not sitting flat and the slope of the designated area as implemented freely allows pollutants to enter the street uncontrolled."

Analysis: This paragraph appears to be restating Pratapas's claim that washout water is migrating to the street. However, the Board has already stated that such generalities do not sufficiently allege the extent, duration, or strength of the alleged violation. The statements concerning how the storage of items and the orientation of the container are conjecture and are not statements of fact because Pratapas never witnessed the washing out of trucks at the Willow Run site.

> Paragraph 5: "The area of exposed soil doesn't even meet permit requirements. Pollutants aren't controlled and prevented form [*sic*] entering the street, inlets and/or leaving the site. At minimum, there should be a curbside cutback as approved by the Illinois Urban Manual to prevent sediment from accumulating in the curbside gutter as seen in the photo."

Analysis: Just like paragraphs 3-4, this paragraph restates Pratapas's claim concerning migrating washout water; however, it adds nothing concerning the extent, duration, or strength of the alleged violation. Moreover, it relies on a photograph that (1) shows a curbside cutback negating his claim; and (2) was attached to the original Complaint and deemed insufficient by the Board.

[3] M/I's NPDES Permit does not require that the container be covered. (*See* Permit, attached as Ex. 1 to J. Polakow Aff., attached as Ex. B to M/I's Mem. of Law in Supp. of Mot. That The Board Determine That The Formal Compl. Is Frivolous Or, In The Alternative, To Dismiss The Compl. Pursuant To 735 ILCS 5/2-619(a)(9), filed on Jan. 10, 2023.)

> Paragraph 6: "I would encourage The Board to order M/I homes [*sic*] to have this contractor service a container in their presence. The approved ways include vacuuming the washout water, letting it evaporate or sealing container prior to removal. I have never seen a vacuum truck in Illinois service any designated concrete washout container. I have never seen the evaporation technique used. The design of this container would prevent concealing the water without a custom lid, which does not exist. A superintendent for the "#1 Homebuilder in America" told me the containers were simply loaded on a truck and hauled away with the toxic washout water disregarded completely."

Analysis: In this paragraph, Pratapas expresses his belief that M/I's contractor does not actually do the job that the contractor gets paid to do, despite Pratapas's admission that he has never seen a vacuum truck service a container and that he has never seen the evaporation technique used. Although he lacks any personal knowledge of the actions of M/I's contractor with respect to the Willow Run property, this does not stop him from theorizing about the container's lid or expressing what someone else told him about what happened at a different site. Such allegations are irrelevant and certainly would not add anything to the Complaint concerning the extent, duration, or strength of the alleged violation. Furthermore, nothing in the Board's rules or authorizing statute empowers the Board to order M/I "to have this contractor service a container in their presence."

> Paragraph 7: "Based on my professional experience and experience inspecting sites as part of Formal/Informal Complaints, including multiple sites by M/I Homes, it can be assumed any major homebuilder will have a designated concrete washout area comparable to this. Even the people approving permits don't know the washout water is a/the pollutant of concern."

Analysis: This paragraph does not allege anything relevant to M/I's Willow Run site, except to indicate Pratapas's belief that the site's washout area is like those found at other sites, and that permit writers approve of such sites. His conjecture as to what unnamed permit writers may know or not know is completely irrelevant. Additionally, the paragraph does not contain allegations concerning the extent, duration, or strength of the alleged violation.

> Paragraph 8: "NEPA and it's [*sic*] regulatory intention is to avoid pollution and enforcement avoidance via segmentation. It is important to see this as a company standard, an industry standard and a major opportunity for The Board to address a significant source of pollution in Illinois. It is also important to note there are readily available solutions for the Illinois concrete industry to adopt and completely avoid this problem. Some states currently require these readily available solutions for concrete trucks."

Analysis: This paragraph does not contain statements that are relevant to M/I's Willow Run site. Instead, Pratapas admits that the "solutions" he seeks to impose on M/I through this action are not industry standard and are certainly not required by Illinois law or the Board's rules. He seeks to have the Board use this case to dramatically alter the rules by which sites like Willow Run operate; however, this is not the Board's role in these types of cases. Furthermore, the Board lacks authority to enforce provisions of federal law, like NEPA, that have not been incorporated into the Board's authorizing statute or rules. *Arendovich v. Ill. State Toll Highway Auth.*, PCB No. 09-102, 2009 Ill. ENV LEXIS 438, *4-5 (Dec. 17, 2009), attached hereto as Exhibit D.

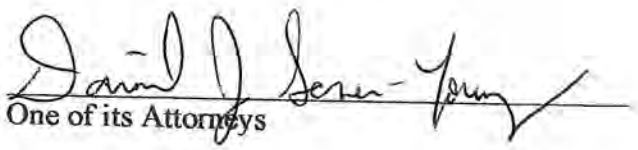
Because the facts contained in Pratapas's motion do not provide any new information concerning the extent, duration, or strength of the alleged violation, Pratapas failed to cure the defects identified by the Board. Thus, Pratapas's motion should be denied.

CONCLUSION

For these reasons, Pratapas's Motion to Amend Formal Complaint should be denied.

Respectfully submitted,

WILLOW RUN BY M/I HOMES



One of its Attorneys

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Attorneys for Respondent Willow Run by M/I Homes

Doc. No. 5007946.2

ILLINOIS POLLUTION CONTROL BOARD
June 1, 2023

PAUL CHRISTIAN PRATAPAS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 23-75
	)	(Citizen's Enforcement - Water)
WILLOW RUN HOMES by M/I HOMES,	)	
	)	
Respondent.	)	

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

On December 12, 2022, Paul Christian Pratapas (Mr. Pratapas) filed a citizen's complaint (Comp.) against Willow Run Homes by M/I Homes (M/I). The complaint concerns M/I's residential construction located at South Drauden Road and Lockport Street in Plainfield, Will County[1]. On January 10, 2023, M/I filed a motion to dismiss on the grounds that the complaint is frivolous, and fails to state a claim, and a motion to dismiss the complaint by other affirmative matter avoiding the legal effect of or defeating the claim (Mot.). On the same day, M/I also filed a memorandum in support of its motion (Memo).

The Board first addresses M/I's motion to dismiss the complaint on the grounds of frivolousness and then addresses the motion to dismiss the complaint on the grounds of other affirmative matter. The Board grants M/I's motion to dismiss for frivolousness, in part, but gives Mr. Pratapas time to amend his complaint; strikes two of Mr. Pratapas' requests for relief; and denies M/I's motion to dismiss the complaint on the grounds of other affirmative matter.

MOTION TO DISMISS: FRIVOLOUS

Under 415 ILCS 5/31(d)(1) (2020), the Board will dismiss complaints that are frivolous. "Frivolous" is defined in the Board's rules as, "any request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202(b). M/I argues that the complaint is frivolous because it fails to state a cause of action and requests relief that the Board does not have the authority to grant. Mot. at 1-2.

The Board's procedural rules require complaints to include "dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations." 35 Ill. Adm. Code 103.204(c)(2). Mr. Pratapas' complaint alleges that the violation occurred on December 9, 2022, and at the general location of South Drauden Road and

[1] The complaint does not cite the specific address of the alleged violation. Rather, it states that the violation happened at the intersection of South Drauden Road and Lockport Street in Plainfield. Comp. at 2.

EXHIBIT
- A -

Lockport Street in Plainfield, Illinois. Comp. at 2. However, the complaint lacks any details describing the extent, duration, or strength of the alleged violation and only cites general violations, such as "toxic concrete washout water and slurry from making contact with soil and migrating to surface water or into the ground water not managed." Comp. at 2.

Complaints must request relief that the Board has the ability to grant. 35 Ill. Adm. Code 101.202(b). In his complaint, Mr. Pratapas requests that the Board: 1) find that M/I violated its permit; 2) assess a civil penalty of $50,000; 3) investigate fraudulent Storm Water Pollution Prevention Plan [SWPPP] inspection reports and contractor certifications; 4) void M/I's permit for the site until the alleged violations are resolved; 5) issue an order requiring that SWPPP plans for phasing and concrete washout cannot be implemented unless documented otherwise in the Illinois Urban Manual; and 6) issue an order requiring M/I to place SWPPP signage; and 7) issue an order prohibiting M/I from conducting future business in the State of Illinois. Comp. at 3. The Board has broad statutory authority to grant relief; however, it does not have the authority to investigate fraudulent SWPPP inspection reports and contractor certifications. *See* 35 Ill. Adm. Code 101.106(b). The Board also does not have the authority to bar an entity from conducting business in the State of Illinois. *Id*. Therefore, the Board strikes these requests for relief and gives Mr. Pratapas 30 days to amend his complaint as to the specificity of the violations.

MOTION TO DISMISS: OTHER AFFIRMATIVE MATTER

A defendant may file a motion to dismiss on the grounds that the plaintiff's claim is barred by other "affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (2020). Because the allegations of the complaint are taken as true, the "affirmative matter" presented by the defendant must do more than just refute a well-pleaded fact in the complaint. Doe v. Univ. of Chi. Med. Ctr., 2015 IL App (1st) 133735, P39. Illinois courts describe the difference between proper and improper "affirmative matter" motions as the difference between "yes but" and "not true" motions. *Id*. at 40. A "yes but" motion admits that the complaint states a cause of action and that the allegations are true, but argues that a defense exists that defeats the claim. *Id*. In contrast, a "not true" motion only contradicts the allegations and is simply an answer to the complaint. *Id*. A "not true" motion is not a basis for dismissal and is better suited for the trial stage of litigation instead.

In Smith v. Waukegan Park District, the plaintiff sued for retaliatory discharge, alleging he was fired because he filed a worker's compensation claim against the defendant, a municipal park district. 231 Ill. 2d 111 (2008). The defendant moved to dismiss, asserting statutory tort immunity as an affirmative matter to defeat the plaintiff's claim. *Id*. The court recognized that tort immunity could, under the proper circumstances, constitute an "affirmative matter"; however, it held that a question of fact remained because the defendant simply disputed the complaint's allegation that plaintiff was fired out of retaliation for filing a worker's compensation claim. *Id*. Therefore, the motion to dismiss was improper because the defendant only contradicted a well-pleaded allegation. *Id.*

In this case, M/I argues that the complaint should be dismissed because the Willow Run development project holds a General Permit to Discharge Storm Water Associated with Construction Activities, NPDES Permit No: ILR10ZAQS dated July 15, 2021. The NPDES

Permit states that "[t]the following non-storm water discharges are prohibited by this permit: concrete and wastewater from washout of concrete (unless managed by an appropriate control)." M/I also contends that it has controls in place for concrete washout compliance and provided testimony from Jason Polakow in support of its argument (Ex. B). Similarly to Smith, under the proper circumstances the NPDES permit could allow concrete washout with proper controls, but whether or not M/I complied with the controls is a question of fact that M/I is only refuting. Because M/I's argument only contradicts the allegations in the complaint, the motion is improper and the Board denies the motion.

ORDER

1. The Board grants M/I's motion to dismiss for frivolousness in part and directs Mr. Pratapas to amend his complaint for specificity no later than July 3, 2023.

2. The Board grants M/I's motion to strike Mr. Pratapas' requests to investigate into fraudulent SWPPP inspection reports and contractor certifications and to bar M/I from doing business in Illinois.

3. The Board denies M/I's motion to dismiss for other affirmative matter.

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 1, 2023, by a vote of 3-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board

FORMAL COMPLAINT

Before the Illinois Pollution Control Board

Paul Christian Pratapas	)	
Complainant,	)	
v.	)	PCB 20 -
	)	*[For Board use only]*
Willow Run by M/I Homes	)	
Respondent	)	

EXHIBIT
- B -

1. **Your Contact Information**

Name:	Paul Christian Pratapas
Street Address:	1330 E. Chicago Ave. #110
	Naperville
County:	DuPage
State:	IL
Phone Number:	630.210.1637

2. **Name and Address of the Respondent (Alleged Polluter)**

Name:	M/I Homes Naperville
Street Address:	2135 City Gate Lane #620
	Naperville, IL 60563
County:	DuPage
State:	Illinois
Phone Number:	630.426.1370

3. **Describe the type of business or activity that you allege is causing or allowing pollution (*e.g.*, manufacturing company, home repair shop) and give the address of the pollution source if different than the address above.**

M/I Homebuilders is building a new neighborhood of housing without adequate and required BMPs

Pollution Source: S DRAUDEN RD AND LOCKPORT ST SOUTH PLAINFIELD, IL

4. **List specific sections of the Environmental Protection Act, Board regulations, Board order, or permit that you allege have been or are being violated.**

1. 415 ILCS 5.12(a)
2. 415 ILCS 5/12 (d)
3. IL Admin Code Title 35, 304.141(b)

5. **Describe the type of pollution that you allege (*e.g.*, air, odor, noise, water, sewer back-ups, hazardous waste) and the location of the alleged pollution. Be as specific as you reasonably can in describing the alleged pollution.**

Water. Toxic concrete washout water and slurry prohibited from making contact with soil and migrating to surface waters or into the ground water not managed. Across the site, pollutants are not controlled and minimized from entering the street and or stormwater system.

6. Describe the duration and frequency of the alleged pollution.

Photographed 12/9/2022 11:40am while raining.

7. Describe any bad effects that you believe the alleged pollution has or has had on human health, on plant or animal life, on the environment, on the enjoyment of life or property, or on any lawful business or activity.

The negative environmental impacts of concrete washout and sediment laden water is widely documented and part of the reason for the NPDES permit program.

Likely fraud of inspection reports and contractor certifications. Fraudulent submission/approval of boiler plate SWPPP with no intent/ability to comply as approved. Poses immediate risk to Canadian Geese using the area during foraging and pond hopping. As well as, to the stormwater system and receiving water(s). Poses threat to wild animals which includes foxes, coyotes, rabbits, and lots of other creatures who drink water.

8. Describe the relief that you seek from the Board.

1. Find that Respondent has violated their permit
2. Assess a civil penalty of Fifty Thousand Dollars ($ 50,000.00) against Respondent for each violation of the Act and Regulations, and an additional civil penalty of Ten Thousand Dollars ($10,000.00) per day for each day of each violation
3. Investigation into fraudulent SWPPP inspection reports and contractor certifications
4. Due to the overwhelming issue with this particular violation in IL, the fact MI Homes has another open case with the IPCB for this very same thing and has made no changes, upon receipt of this formal complaint, voiding the permit for the site until such time as the builder ceases to pollute the surrounding groundwater and surface water and any SWPPP deficiencies related to signage, certifications, inspections, material storage and designated concrete washout area design/implementation are fixed and all IPCB cases resolved
5. An order stating SWPPP plan(s) for phasing and concrete washout areas must be implemented as presented and approved unless documented otherwise with standards being found in the Illinois Urban Manual.
6. An order requiring MI Homes to place SWPPP signage as required by the ILCGP
7. An order prohibiting MI Homes from conducting future business in the State of Illinois

9. **Identify any identical or substantially similar case you know of brought before the Board or in another forum against this respondent for the same alleged pollution (note that you need not include any complaints made to the Illinois Environmental Protection Agency or any unit of local government).**

   No identical or substantially similar cases have been brought to The Board which I am aware of.

10. I am representing myself as an individual.

11. Paul Christian Pratapas

Complainant's Signature

CERTIFICATION

I, _____, on oath or affirmation, state that I have read the foregoing and that it is accurate to the best of my knowledge.

_____

Complainant's Signature

Subscribed to and sworn before me

this _____day

of _____, 20__.

_____

Notary Public

My Commission Expires: _____

NOTICE OF FILING

Note to the Complainant: This Notice of Filing must accompany the Formal Complaint and the Documentation of Service. Once you have completed the Notice of Filing, the Formal Complaint, and the Documentation of Service, you must file these three documents with the Board's Clerk *and* serve a copy of each document on each respondent.

Please take notice that today I, **Paul Christian Pratapas**, filed with the Clerk of the Illinois Pollution Control Board (Board) a Formal Complaint, a copy of which is served on you along with this Notice of Filing. You may be required to attend a hearing on a date set by the Board.

Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney. 35 Ill. Adm. Code 103.204(f).

Paul Christian Pratapas

Complainant's Signature

Street: 1330 E Chicago Ave. #110

City/State/Zip: Naperville, IL 60540

Date: 12.12.2022

INFORMATION FOR RESPONDENT RECEIVING FORMAL COMPLAINT

The following information has been prepared by the Board for general informational purposes only and does not constitute legal advice or substitute for the provisions of any statute, rule, or regulation. Information about the Formal Complaint process before the Board is found in the Environmental Protection Act (Act) (415 ILCS 5) and the Board's procedural rules (35 Ill. Adm. Code 101, 103). These can be accessed on the Board's website (www.ipcb.state.il.us). The following is a summary of some of the most important points in the Act and the Board's procedural rules.

Board Accepting Formal Complaint for Hearing; Motions

The Board will not accept this Formal Complaint for hearing if the Board finds that it is either "duplicative" or "frivolous" within the meaning of Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1)) and Section 101.202 of the Board's procedural rules (35 Ill. Adm. Code 101.202 (definitions of the terms "duplicative" and "frivolous")). "Duplicative" means the complaint is identical or substantially similar to a case brought before the Board or another forum. *See* 35 Ill. Adm. Code 103.212(a) and item 10 of the Formal Complaint.

"Frivolous" means that the Formal Complaint seeks 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. For example, the Board has the authority to order a respondent to stop polluting and pay a civil penalty, to implement pollution abatement measures, or to perform a cleanup or reimburse cleanup costs. The Board does

not have the authority, however, to award attorney fees to a citizen complainant. *See* 35 Ill. Adm. Code 103.212(a) and items 5 through 9 of the Formal Complaint.

If you believe that this Formal Complaint is duplicative or frivolous, you may file a motion with the Board, within 30 days after the date you received the complaint, requesting that the Board not accept the complaint for hearing. The motion must state the facts supporting your belief that the complaint is duplicative or frivolous. Memoranda, affidavits, and any other relevant documents may accompany the motion. *See* 35 Ill. Adm. Code 101.504, 103.212(b). If you need more than 30 days to file a motion alleging that the complaint is duplicative or frivolous, you must file a motion for an extension of time within 30 days after you received the complaint. A motion for an extension of time must state why you need more time and the amount of additional time you need. Timely filing a motion alleging that the Formal Complaint is duplicative or frivolous will stay the 60-day period for filing an Answer to the complaint. *See* 35 Ill. Adm. Code 103.204(e), 103.212(b); *see also* 35 Ill. Adm. Code 101.506 (generally, all motions to strike, dismiss, or challenge the sufficiency of any pleading must be filed within 30 days after service of the challenged document).

The party making a motion must "file" the motion with the Board's Clerk and "serve" a copy of the motion on each of the other parties to the proceeding. The Board's filing and service requirements are set forth in its procedural rules (35 Ill. Adm. Code 101.300, 101.302, 101.304), which are located on the Board's website (pcb.illinois.gov).

If you do not file a motion with the Board within 30 days after the date on which you received the Formal Complaint, the Board may find that the complaint is not duplicative or frivolous and accept the case for hearing without any input from you. The Board will then assign a hearing officer who will contact you to schedule times for holding telephone status conferences and a hearing. *See* 35 Ill. Adm. Code 103.212(a).

Answer to Complaint

You have the right to file an Answer to this Formal Complaint within 60 days after you receive the complaint. If you timely file a motion alleging that the complaint is duplicative or frivolous, or a motion to strike, dismiss, or challenge the sufficiency of the complaint, then you may file an Answer within 60 days after the Board rules on your motion. *See* 35 Ill. Adm. Code 101.506, 103.204(d), (e), 103.212(b).

Failing to file an Answer to the Formal Complaint within 60 days after you were served with the complaint may have severe consequences. Failure to timely file an Answer will mean that all allegations in the Formal Complaint will be taken as if you admitted them for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office, or an attorney. *See* 35 Ill. Adm. Code 103.204(f).

Necessity of an Attorney

Under Illinois law, an association, citizens group, unit of local government, or corporation must be represented before the Board by an attorney. In addition, an individual who is not an attorney cannot represent another individual or other individuals before the Board. However, even if an individual is not an attorney, he or she is allowed to represent (1) himself or herself as an individual or (2) his or her unincorporated sole proprietorship. *See* 35 Ill. Adm. Code 101.400(a). Such an individual may nevertheless wish to have an attorney prepare an Answer and any motions or briefs and present a defense at hearing.

Costs

In defending against this Formal Complaint, you are responsible for your attorney fees, duplicating charges, travel expenses, witness fees, and any other costs that you or your attorney may incur. The Board requires no filing fee to file with the Board your Answer or any other document in the enforcement proceeding. The Board will pay its own hearing costs (*e.g.,* hearing room rental, court reporting fees, hearing officer expenses).

If you have any questions, please contact the Clerk's Office at (312) 814-3461.

DOCUMENTATION OF SERVICE

Note to the Complainant: This Documentation of Service must accompany the Formal Complaint and the Notice of Filing. Once you have completed the Documentation of Service, the Formal Complaint, and the Notice of Filing, you must file these three documents with the Board's Clerk *and* serve a copy of each document on each respondent.

This form for the Documentation of Service is designed for use by a non-attorney and must be notarized, *i.e.*, it is an "affidavit" of service. An attorney may modify the form for use as a "certificate" of service, which is not required to be notarized.

Affidavit of Service

I, the undersigned, on oath or affirmation, state that on the date shown below, I served copies of the attached Formal Complaint and Notice of Filing on the respondent at the address listed below by one of the following methods: [*check only one—A, B, C, D, or E*]

A. _____ U.S. Mail or third-party commercial carrier with the recipient's signature recorded by the U.S. Postal Service or the third-party commercial carrier upon delivery. Attached is the delivery confirmation from the U.S. Postal Service or the third-party commercial carrier containing the recipient's signature and showing the date of delivery as _____ [*month/date*], 20__. [*Attach the signed delivery confirmation showing the date of delivery.*]

B. _____ U.S. Mail or third-party commercial carrier with a recipient's signature recorded or to be recorded by the U.S. Postal Service or the third-party commercial carrier upon delivery. However, the delivery confirmation from the U.S. Postal Service or the third-party commercial carrier containing the recipient's signature is not available to me at this time. On _____ [*month/date*], 20__, by the time of __:__ AM/PM, at _____ [*address where you provided the documents to the U.S. Postal Service or the third-party commercial carrier*], copies of the attached Formal Complaint and Notice of Filing were provided to the U.S. Postal Service or the third-party commercial carrier, with the respondent's address appearing on the envelope or package containing these documents, and with proper postage or delivery charge prepaid. [*Within seven days after it becomes available to you, file with the Board's Clerk the delivery confirmation—containing the recipient's signature and showing the date of delivery—and identify the Formal Complaint to which that delivery confirmation corresponds.*]

C. _____ Personal service and I made the personal delivery on _____ [*month/date*], 20__, by the time of __:__ AM/PM.

D. _____ Personal service and another person made the personal delivery. Attached is the affidavit of service signed by the other person (or the declaration of service signed by the process server) who made the personal delivery, showing the date of delivery as _____ [*month/date*], 20__. [*Attach the other person's signed affidavit or declaration showing the date of delivery.*]

E. __X__ Personal service and I will make the personal delivery. However, the affidavit of service is not available to me currently.

RESPONDENT'S ADDRESS:

Name: M/I Homes Naperville

Street: 2135 City Gate Lane #620

City/State/Zip: Naperville, IL 60563

Paul Christian Pratapas

Complainant's Signature

Street: 1330 E. Chicago Ave. #110

City, State, Zip Code: Naperville, IL 60540

Date: 12.12.2022

Subscribed to and sworn before me

this 12 day

of December, 20__.

Official Seal
Ana Herrera Campos
Notary Public State of Illinois
My Commission Expires 9/6/2026

A Campos

Notary Public

My Commission Expires: 9/6/2026

(A)

pcp

(B)

pcp

A LARGE MAJORITY OF CONSTRUCTION PERSONELL HAVE NO IDEA THE WASHOUT WATER IS A POLLUTANT. ANOTHER FAILURE BY ILEPA.

(C)

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PRICE OF COMPLIANCE INCORPORATED IN THE HOME VALUES? INSTEAD OF COMPLYING OR RETURNING VALUE/CASH TO CUSTOMER $ IS POCKETED? PUBLIC COMPANIES REPORT THIS AS PROFIT AT EARNINGS CALLS AND ARTIFICIALLY INFLATE STOCK SIMILAR TO WHAT HAPPENED WITH ENRON? THAT FITS REQUIREMENT FOR RACKETEERING, A CONTINUING CRIMINAL ENTERPRISE.

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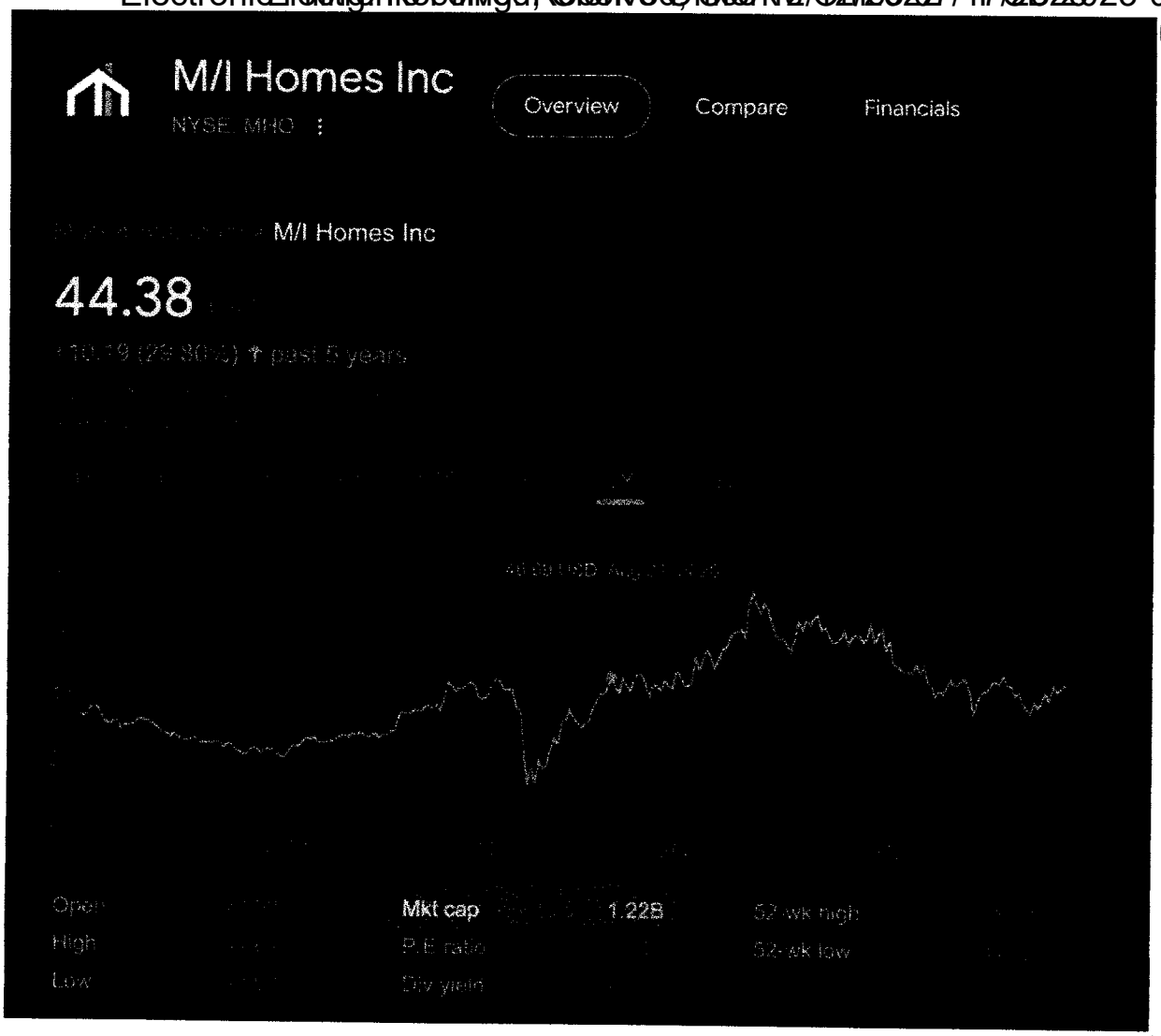
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Overview
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2013 Ill. ENV LEXIS 133

Illinois Pollution Control Board

May 02, 2013

PCB No. 11-22 (Citizens Enforcement Land)

Reporter
2013 Ill. ENV LEXIS 133 *

SCOTT MAYER, Complainant, v. LINCOLN PRAIRIE WATER COMPANY, KORTE & LUITJOHAN CONTRACTORS, INC., and MILANO & GRUNLOH ENGINEERS, LLC., Respondents

Core Terms

contractor, amended complaint, water line, replacement, original complaint, discovery, motion to amend, contaminated, propose an amendment, deny a motion, crop, opportunity to amend, soil

Opinion By: [*1] ZALEWSKI

Opinion

ORDER OF THE BOARD (by C. K. Zalewski):

On November 15, 2010, Scott Mayer (Mayer) filed a citizen's enforcement complaint (Comp.) against Lincoln Prairie Water Company (Water Company), Korte & Luitjohan Contractors, Inc. (Contractors), and Milano & Grunloh Engineers, LLC (Engineers) (collectively, respondents). Complainant seeks to recover from respondents over $ 647,000 in costs to remediate the land pollution respondents allegedly caused on his farmland, a 50-acre site in Shelby County.

On April 7, 2011, the Board accepted the complaint for hearing, finding it was neither duplicative nor frivolous on the whole, although the Board struck some portions of the relief requested as beyond the Board's authority to grant. On January 28, 2013, Mayer filed a motion to amend the complaint (Mot. Am.) and a first amended complaint (Am. Comp.). On February 29, 2013, Contractors filed a response in opposition to the motion for leave (Resp.). The other respondents did not file responses to the motion. For the reason stated below, the Board denies Mayer's motion and directs that this action proceed to hearing.

The Board first sets forth the procedural history of this case. Next, the **[*2]** Board summarizes the motion as well as the response of Contractors. Finally, the Board details the relevant statutory provisions and case law before setting forth the reasons for denying the motion.

THE ORIGINAL COMPLAINT

The November 15, 2010 complaint alleges violations of the Environmental Protection Act (Act) (415 ILCS 5 (2010)) by respondents at a 50-acre site in Shelby County on which Mayer grows row crops. Comp. at 1-2.

EXHIBIT
- C -

Mayer alleges that in April 2005 he gave the Water Company an easement for installation, operation, and maintenance of underground water lines, and that during trenching respondents shredded an underlying telephone line. Comp. at 2. Mayer alleges that the pieces of telephone line were then open dumped by bulldozing them into an open trench resulting in contamination consisting of "pieces of wire, aluminum and plastic cable coating in the field." *Id.* Mayer seeks to recover $ 647,000 in costs to remediate the property, along with his litigation costs and attorney fees from respondents. Comp. at 6, 11, and 16.

MOTION AND AMENDED COMPLAINT

Mayer's original complaint seeks $ 647,000 in remediation cost to remove and replace the soil contaminated as a **[*3]** result of the installation, operation, and maintenance of underground water lines. Comp. at 16. After the completion of discovery, Mayer filed the motion to amend the complaint adding $ 7,100 to his request for relief for the replacement cost of a water line that would allegedly be damaged during removal and replacement of the contaminated soil. Am. Comp. at 6, 10, 17. He also added three new counts to the amended complaint seeking damages of $ 18,000 for crop losses, and $ 1,081.50 per year since 2007 for losses due to fallow field areas. Am. Comp. at 22, 27, 32.

Specifically, Mayer seeks to amend the original complaint by adding:

1) "replacement cost of $ 7,100.00 for the water line which will be damaged during the removal and replacement of the contaminated soil" to Paragraph 28 of Count I, Paragraph 27 of Count II, and Paragraph 28 of Count III of the original complaint; Am. Comp. at 6, 11, and 16.

2) "and, $ 7,100.00 for replacement cost of the damaged water line" to Paragraph 29-B of Count I, Paragraph 28-B of Count II, and Paragraph 29-B of Count III of the original complaint; Am. Comp. at 6, 11, and 16.

3) Counts IV, V, and VI asking that the Water Company (Count IV), **[*4]** Contractors (Count V), and Engineers (Count VI) be found in violation of the Act and directing respondents to pay Mayer "$ 18,000.00 for the lost hay crop and $ 1,081.50 for the 2007 crop year and each year thereafter during which the portion of the field has remained fallow. " Am. Comp. at 22, 27, 32.

RESPONSE

On February 19, 2013, Contractors filed an objection to Mayer's Motion for Leave to File an Amended Complaint. Resp. at 1. Contractors argue that Mayer's motion is "untimely because the Complainant knew or should have known about this alleged need [for replacement of the water line] well before he filed the original Petition." *Id.* at 4. Further, Contractors argue that Mayer's request, "comes after the parties have completed the discovery process, including the expert/opinion witness component of the discovery process. " *Id.*

In support of its argument that Mayer unnecessarily delayed broaching replacement of the water line, Contractors also state that Mayer sought supplemental interrogatories from Contractors on February 6, 2012, to which Contractors objected. Resp. at 4. Mayer did not address Contractors' objection to those interrogatories until September 17, 2012. **[*5]** *Id.* Contractors claim that there are no written disclosures by Mayer reflecting anything about the alleged need for or the replacement cost of the subject water line. *Id.* Specifically, there was no disclosure made by Mayer from any expert/opinion witness that addresses the issue of the water line in any way. *Id.*

Moreover, Contractors claim that allowing Mayer's motion would, "significantly prejudice Respondents and would eviscerate the significance of the requirement that [Mayer] place the Respondents on notice of [Mayer's] allegations in the Petition." Resp. at 6. Contractors cite *Freedberg v. Ohio National, 2012 Ill. App. 110938, 975 N.E.2d 1189 (2012)* to support their argument. In Freedburg, the Appellate court states that "ordinarily, amendment should not be allowed where the matters asserted were known by the moving party at the time the original pleading was drafted and for which no excuse is offered in explanation of the initial failure." Resp. at 7, citing *Freedberg v. Ohio National, 2012 Ill. App. 110938, 975 N.E.2d at 1201 (2012).* The Freedburg Court also indicated that:

> [i]n determining whether to allow **[*6]** an amendment to the pleadings, the trial court considers the following factors: (1) whether the proposed amendment would cure a defect in the pleadings; (2) whether the proposed amendment would prejudice or surprise other parties; (3) whether the proposed amendment is timely; and (4) whether there were previous opportunities to amend the pleading. Resp. at 7, citing *Freedberg, 975 N.E.2d at 1202.*

Contractors assert that factors 2, 3, and 4 weigh in favor of denying the motion, opining that, "[a]ny factual basis supporting the alleged claim for removal and replacement of the water line has been known to this Complainant well before this Petition was filed." Resp. at 7. Contractors argue that before receiving Mayer's motion for leave, no party in this case was aware that Mayer intended to add three new counts involving new allegations and new requests for additional damages against all respondents. *Id.*

Contractors claim that the new allegations in Counts IV, V, and VI of the amended complaint have not been subject to discovery. Resp. at 8. Contractors also assert that the economic damages sought in the new counts were the subject of an Order issued by **[*7]** the Circuit Court of Shelby County. *Id.* Therefore, allowing Mayer to introduce them to the case, according to Contractors, will be prejudicial to the respondents. Resp. at 8-9.

Contractors also claim the pursuit of damages due to fallow farm ground and loss of crops is inappropriate in this case because the "Moorman Doctrine" bars recovery for fallow land and crop loss in this case. Contractors state that "[t]ort law affords the proper remedy for losses arising from personal injuries or damage to one's property, whereas, contract law and the Uniform Commercial Code provide the proper remedy for economic losses stemming from diminished commercial expectations without related injuries to persons or property." Resp. at 9, citing *Moorman Manufacturing v. National Tank, 91 Ill.2d 69, 82, 435 N.E.2d 443, 449 (1982).*

Finally, Contractors state that the Board should deny Mayer's requests for the award of attorney's fees and costs because the Board has already ruled on that issue in its April 7, 2011 Order denying respondents' Motions to Dismiss. That order struck Mayer's request for fees and costs set out in the original complaint. Resp. at 10. **[*8]** Therefore, Contractors assert the Board and/or Hearing Officer should deny Mayer's Motion for Leave Amending the Complaint. *Id.*

Water Company and Engineers

The Water Company and Engineers have not filed a response to Mayer's motion to amend. The Board's procedural rules provide that, "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, but the waiver of objection does not bind the Board...in its disposition of the motion." *35 Ill. Adm. Code 101.500(d)*; People v. Envt'l Health and Safety Svcs., Inc., PCB 05-51, slip op. at 13 (Jul. 23, 2009). The Board finds that by failing to respond to Mayer's motion to amend complaint, Water Company and Engineers have waived any objection to the Motion to Amend Complaint. *Id.* The Board notes however, that while the Water Company and Engineers have waived any objection to the granting of the motion, the Board is not bound by that waiver to grant the motion.

DISCUSSION

The Board's procedural rules contemplate the amendment of complaints (*see, e.g.* **[*9]** *35 Ill. Adm. Code 101.403* and *103.206*), but do not specifically provide standards for decisions of such motions. The Board's procedural rules do, however, provide that "the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent." *35 Ill. Adm. Code 101.100(b)*. The Board looks to Section 2-616 of the Code of Civil Procedure for guidance. *735 ILCS 5/2-616* (2010). Section 2-616 provides:

> At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim

for which it was intended to be brought or the defendant to make a defense or assert a cross claim. 735 ILCS 5/2-616(a) **[*10]** (2010).

A review of Section 2-616(a) of the Code (735 ILCS 5/2-616(a) (2004)) and the case law interpreting that section indicates that while the provisions of Section 2-616(a) of the Code are discretionary, amendments of pleading should be liberally allowed. Savage v. Mui Pho, 312 Ill. App. 3d 553, 556-57 (5th Dist. 2000). Further, the courts have stated that Section 2-616(a) is to be "liberally construed so that cases are resolved on their merits." *Id.* Additionally, the Board's practice is to liberally allow amendments to complaints and petitions filed with the Board. *See generally* People v. The Highlands, L.L.C. and Murphy's Farm, Inc., PCB 00-104 (May 6, 2004) and People v. 4832 Vincennes, LP and Batteast Construction Co., PCB 04-7 (Nov. 6, 2003).

However, the courts have consistently held that parties do not have an absolute right to amend pleadings under the Code (735 ILCS 5/1-1 *et seq.* (2002)). *See* Zubi v. Acceptance Indemnity Insurance Company, 323 Ill. App. 3d 28, 30-32; 751 N.E.2d 69, 80 (1st Dist. 2001). The Board has denied motions **[*11]** for leave to file an amended complaint where the amended complaint would prejudice the parties, the amended complaint was not timely filed, and the complainant had the opportunity to amend the complaint at an earlier time. People v. Community Landfill, PCB 97-193 slip. op. at 4 (Mar. 18, 2004). The Appellate Court also provides direction on when a motion to amend a complaint should be granted or denied stating, "[o]rdinarily, amendment should not be allowed where the matters asserted were known by the moving party at the time the original pleading was drafted and for which no excuse is offered in explanation of the initial failure." Resp. at 7, *citing* Freedberg, 975 N.E.2d at 1201. Further, the Freedberg opinion says, "leave to amend a complaint is properly denied in circumstances . . . where the proposed additional counts are based on facts available to the plaintiff when the original complaint was filed." *Id.* at 1203. The Freedburg Court provides four factors to consider when determining whether to deny a motion to amend: "(1) whether the proposed amendment would cure a defect in the pleading; (2) whether the proposed amendment would prejudice **[*12]** or surprise other parties; (3) whether the proposed amendment is timely; and (4) whether there were previous opportunities to amend the pleadings." *Id.* at 1202.

The first Freedburg factor, whether the amendment cures a defect, is not at issue here. The Board must then consider factors two, three, and four in light of Mayer's motion. To assess the second factor, whether the other parties would sustain prejudice or surprise by virtue of the amendment, the Board looks to the current status of the case. The parties in this case have completed discovery including the expert witness discovery based on the original complaint filed November 15, 2010. Allowing the new allegations in Counts IV, V, and VI, which according to Contractors "introduce novel allegations to the case that lay claim to a factual basis for an economic damages claim," would be prejudicial to respondents given that the amendment was filed after the parties completed discovery in September 2012. Therefore, the Board finds that this Freedburg factor weighs against granting Mayer's motion.

In reviewing the third factor, whether the filing was timely, the Board examines the history of the proceeding. The water lines are **[*13]** at the root of Mayer's original complaint. Discovery served upon respondents in February 2012 included mention of damage to and replacement of water lines. In his Motion to Amend, Mayer simply states, "since filing Complaint, Complainant has learned that the removal of contaminated soil with [sic] result in the destruction of a water line located in the contaminated area [1]." Motion at 1. This brief explanation is insufficient to excuse the two years that have passed in this matter between the filing of the complaint and the filing of Mayer's motion and the eleven months that passed between exhibiting knowledge of the issue in discovery documents and amending the complaint to reflect that knowledge. Therefore, the Board finds that the amended complaint is not timely, and this Freedburg factor weighs against granting Mayer's motion.

Finally, the Board finds that the fourth Freedburg **[*14]** factor also weighs against Mayer because the Board has no evidence before it that Mayer was prevented from amending the complaint at an earlier date. Like the plaintiff in Freedberg, Mayer "did not provide any explanation for filing the motion at such a late stage in the proceedings."

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[1] The Board reads Complainant's Motion to state "the removal of contaminated soil *will* result in the destruction of a water line. "

Freedberg, 975 N.E.2d at 1203. Further, the fact that Mayer raised costs of the water line in discovery served upon respondents in February 2012 suggests that Mayer chose not to amend the complaint at that time to the detriment of respondents. Therefore, the Board finds that Mayer was not prevented from amending the complaint at an earlier time.

The Board finds that the amended complaint would prejudice the respondents, is not timely, and that Mayer had the opportunity to amend the complaint earlier in the case. Because the right to amend is not absolute, and in this case would prejudice the respondents, the Board finds that the amended complaint should not be accepted. Therefore, the Board denies the motion for leave to file an amended complaint and strikes the amended complaint. The Board further directs this matter proceed expeditiously to hearing.

CONCLUSION

After reviewing **[*15]** the arguments, pleadings and facts surrounding the filing of the amended complaint, the Board finds that the amended complaint would prejudice the respondents, is not timely, and that complainant previously had the opportunity to amend the complaint. Therefore, the Board denies the motion for leave to file the amended complaint, strikes the amended complaint, and directs the hearing officer to proceed expeditiously to hearing on the original complaint.

IT IS SO ORDERED.

End of Document

2009 Ill. ENV LEXIS 438

Illinois Pollution Control Board

December 17, 2009

PCB No. 09-102 (Enforcement -- Citizen Noise)

Reporter
2009 Ill. ENV LEXIS 438 *

PETER ARENDOVICH, Complainant, v. ILLINOIS STATE TOLL HIGHWAY AUTHORITY, Respondent

Core Terms

amended complaint, motion to dismiss, civil penalty, noise, economic benefit

Opinion By: [*1] BLANKENSHIP

Opinion

ORDER OF THE BOARD (by G.L. Blankenship):

On April 28, 2009, Peter Arendovich (complainant) filed a complaint (Comp.) alleging that the Illinois State Toll Highway Authority (respondent) violates Section 900.102 of the Board's noise pollution regulations (*35 Ill. Adm. Code 900.102*). Comp. at 2. On July 15, 2009, respondent filed a motion to dismiss the complaint (Mot.) alleging the complaint is frivolous. On September 9, 2009, complainant timely responded to the motion by filing an amended complaint (Am.Comp.). On October 19, 2009, respondent filed a motion to dismiss the amended complaint (Mot.2) and on November 24, 2009, complainant responded (Resp.) to the motion to dismiss the amended complaint. For the reasons discussed below, the Board accepts the complaint and amended complaint for hearing and denies the motions to dismiss, in part. The Board grants the motions to dismiss in part by striking allegations of violations of the federal rules.

COMPLAINT AND AMENDED COMPLAINT

Complainant alleges that respondent violated Section 900.102 of the Board's noise regulations and 23 CFR Part 772.13(c) and 109(h). Comp. at 1, **[*2]** Am.Comp. at 1. Complainant alleges that respondent violated these provisions by failing to follow proper noise abatement procedures along I-355 in the area between 135th Street and Archer Avenue, especially along the 135th Street Bridge. Comp. at 1, Am.Comp. at 1-3. Complainant asks the Board to direct respondent to construct proper noise abatement barriers. Comp. at 3, Am.Comp. at 3.

MOTION TO DISMISS COMPLAINT

In its motion to dismiss, respondent argues that the complaint is frivolous because the complaint is a "request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief. " Mot. at 1, 7, citing *35 Ill. Adm. Code 101.202*. Respondent details steps taken to alleviate noise emissions from the highway and argues that, because respondent's noise abatement is consistent with State and Federal law and exceeds certain criteria, the request for relief cannot be granted. Mot. at 7.

EXHIBIT
- D -

Respondent also argues that the complaint should be dismissed because the complaint alleges that the Board's decibel level (db(A)) requirements are being violated **[*3]** without specifying the requirements. Mot. at 1.

MOTION TO DISMISS AMENDED COMPLAINT

In the motion to dismiss the amended complaint, respondent incorporates the arguments from the motion to dismiss as those arguments relate to allegations in the amended complaint. Mot.2 at 1. Respondent asserts that the amended complaint sets forth a claim over which the Board lacks jurisdiction. *Id*. Specifically, respondent argues that the Board lacks authority to hear a claim under 23 CFR Part 772.13(c) and 109(h) as alleged in the amended complaint. Mot.2 at 2.

RESPONSE TO MOTION TO DISMISS AMENDED COMPLAINT

Complainant argues that the motion to dismiss the amended complaint is "solely based on legal technicalities, not addressing the specific cause for the complaint." Resp. at 1. Complainant argues that it has presented technical support by outlining the engineers' failure to follow prescribed guidelines and that the complaint is based on severe noise pollution at the complainant's property. *Id*.

DISCUSSION

The Board's authority to grant relief is enunciated in Section 33(a) of the Environmental Protection Act (Act) (*415 ILCS 5/33(a)* (2008)), **[*4]** which provides that the Board "shall issue and enter such final order, or make such final determinations, as it shall deem appropriate under the circumstances." Respondent has argued that further relief from any noise violation may not be appropriate or even feasible; however, respondent has cited no provision of the Act which would limit the Board's authority to grant such relief. The arguments presented by respondent are relevant when examining appropriate relief, if a violation is found, pursuant to Sections 33(c) and 42(h) of the Act (*415 ILCS 5/33(c)* and *42(h)* (2008)). Therefore, the Board finds that the complaint does request relief which the Board has the authority to grant.

As to respondent's argument that the complaint fails to cite specific requirements that are being violated, the Board finds that the amended complaint provides sufficient detail on the alleged violations to allow the respondent to prepare a defense. *See* *35 Ill. Adm. Code 103.204(c)(2)*. However, in the amended complaint, complainant alleges that respondent has violated certain **[*5]** provisions of the Federal Regulations. The Board agrees with respondent that the Board does not have the authority to enforce those provisions of Federal law. Therefore the Board finds that allegations relating to alleged violations of 23 CFR Part 772.13(c) and 109(h) are frivolous and will be struck.

The Board finds that the remainder of the complaint and amended complaint meet the content requirements of the Board's procedural rules. *See* *35 Ill. Adm. Code 103.204(c)*, (f). The Board therefore accepts the complaint and amended complaint for hearing. *See* *415 ILCS 5/31(d)(1)* (2008); *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 respondent fails within that timeframe 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 respondent to have admitted the allegation. *35 Ill. Adm. Code 103.204(d)* **[*6]** .

The Board directs the hearing officer to proceed expeditiously to hearing. 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)* (2006). 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 **[*7]** 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, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by the "lowest cost alternative for achieving compliance." The amended Section 42(h) also requires the Board to ensure that the penalty **[*8]** 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 of unreasonable financial hardship."

Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform." SEPs are also added as a new Section 42(h) factor (Section 42(h)(7)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency" (Section 42(h)(6)). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of non-compliance. A respondent establishing these criteria is entitled to a "reduction in the portion of the penalty that is not based on the economic benefit of non-compliance. "

Accordingly, the Board further directs **[*9]** 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.

IT IS SO ORDERED.
