

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

Paul Christian Pratapas	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 2023-014
	)	(Enforcement)
Horizon Construction Group, Inc.	)	
	)	
Respondent.	)	

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**REPLY MEMORANDUM IN SUPPORT OF  
MOTION FOR DISMISSAL FOR WANT OF PROSECUTION**

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Respondent Horizon Construction Group, by its undersigned counsel, provides the following Reply Memorandum in Support of Motion for Dismissal with Prejudice, as follows:

**INTRODUCTION**

On June 21, 2023, the Respondent filed a Motion to Dismiss with Prejudice under Rule 219(c)(v) for want of prosecution and for the Complainant’s repeated and sustained failures to comply with the Schedule and Discovery Order. The Respondent’s Motion to Dismiss outlined precise dates that the Complainant failed to appear for three consecutive status conferences, failed to respond to Respondent’s Requests for Admission, Interrogatories, and Requests for Production of Documents. He also failed to serve any discovery requests of his own or comply with the deadline to disclose his lay or expert witnesses, including himself. *See*, Affidavit of Jon Micah Goeller Affidavit ¶ 5.<sup>1</sup> Given these missed deadlines, repeated failure to appear at status

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<sup>1</sup> We are filing an unsigned copy of the Affidavit with this Reply Memorandum. The notarized original Affidavit will be filed and mailed to the Board and a copy will be sent to the Complainant.

conferences, and his failure to make the disclosures mandated by the Schedule and Discovery Order, the Complainant is in default and is barred by law from presenting evidence or witnesses in support of his claims. He cannot meet his burden of proof.

In the Response to the Motion for Dismissal with Prejudice, the Complainant makes unsubstantiated and irrelevant assertions that the Board cannot accept while ruling on the Respondent's Motion to Dismissal with Prejudice.

### **ARGUMENT**

A. The Complainant's Lack of Access to Proper Resources to Participate in the Case should not be Considered by the Board in Ruling on the Motion

State law allows citizens to start legal proceedings to address allegations of non-compliance, but private litigants must nonetheless follow the rules, comply with scheduling orders, and file required documents on time. The Complainant did none of these things but still insists on having his evidentiary hearing. Contested case hearings are based on the mutual exchange of documentary and other evidence, witness lists, experts, and the opportunity to depose those lay and expert witnesses. Despite having ample opportunities to comply with these basic requirements of pursuing a complaint, Mr. Pratapas defaulted on making any of these essential disclosures, yet still insists on a vague right to hearing. Instead, he went missing for long stretches of time, and never communicated with the Hearing Officer and Respondent's counsel to request schedule accommodations.

Pursuing a citizen complaint requires a certain amount of sophistication and the ability to follow basic procedural steps and navigate the due process safeguards built into the evidentiary hearing process. Not every citizen complainant has the background or experience to follow these steps. That does not mean they are without any sort of redress at all. A citizen who is concerned about a situation but does not have the experience or training to navigate the contested case hearing

process can still contact the Illinois Pollution Control Board or County authorities in lieu of pursuing his or her own citizen's enforcement case.

Further, as shown below, a citizen complaint is only available for ongoing violations, and the undisputed evidence shows that if any violations occurred, they were temporary in nature and were quickly remedied.

B. The Board Should Not Consider the Complainant's Unsubstantiated Assertions in the Response to Motion for Dismissal with Prejudice

In paragraph two of the Complainant's Response to Motion for Dismissal with Prejudice, the Complainant makes unsubstantiated claims that he was refused physical access to the SWPPP. The Complainant has not cited any legal authority establishing that a nongovernmental entity is entitled to physical access the SWPPP book on a project site. The Respondent did provide the Complainant with a digital PDF of the SWPPP plan and a web link to the PDF plan available on the Illinois Department of Environmental Protection's ("ILEPA") National Pollution Discharge Elimination System's construction permit database. The Complainant had access to the SWPPP, just not at the time and place he demanded – access which in any event is not mandated.

C. The Board Should Not Consider the Complainant's Argument Alleging that the Respondent Continued Violating Permit Guidelines Immediately After Receiving A Letter Of Compliance From ILEPA And Serious Violations And Disregard For Permit Responsibilities.

In paragraphs three and six of the Complainant's Response to Motion for Dismissal with Prejudice, the Complainant alleges that the Respondent continued violating permit guidelines despite having received a letter of compliance from ILEPA. He further asserted that these purported violations – after receiving the letter of compliance -- were serious and a disregard for permit responsibilities. He asserts that this alleged disregard requires formal attention to prevent future incidents.

The Respondent's compliance with the terms of the construction permit is affirmatively and conclusively demonstrated by the ILEPA's issuance of the letter of compliance and is further demonstrated by ILEPA not pursuing any further enforcement actions or issuing notices of violations at the site.

The undisputed record shows that the Respondent properly obtained a NPDES construction permit that authorizes discharges of stormwater associated with the Respondent's construction activities from the Spring at Lily Cache Creek construction site in Bolingbrook, Will County.

The Respondent complied with the NPDES Construction Permit approval conditions by developing and maintaining a SWPPP and following accepted engineering practices.

The SWPPP properly described, and the Respondent implemented and maintained the following measures:

- (i) erosion and sediment controls, stabilization, and structural practices to control stormwater volume, minimize sediment discharges, and reduce topsoil exposure during construction;
- (ii) silt fence and stabilization construction entrances, installed inlet sediment traps and inlet basket filters above the storm sewer system, and kept sediment basins in good operating condition;
- (iii) best management practices to reduce the pollutants in stormwater discharges associated with construction and assure compliance with the terms and conditions of the NPDES Construction Permit.

The Respondent properly conducted inspections of disturbed areas of the construction site that had not been finally stabilized and inspected structural control measures and locations where vehicles enter or exit the site at least once every seven calendar days and within 24 hours of the end of a storm or by the end of the following business or workday that is 0.5 inches or greater or equivalent of snowfall.

D. The Complainant's Allegations Are Based on Wholly Past Actions, And No Claim for Relief Is Available.

The Complaint alleges violations of 415 ILCS 5.12(a), 5.12(d), and IL. Admin Code Title 35, 304.141(b). Section 5.12(a) addresses water pollution in the same manner as provisions of the Federal Clean Water Act, 33 U.S.C. 1251, *et seq.* The U.S. Supreme Court clearly held there is no standing for citizen suits where the relief addresses wholly past violations of the Clean Water Act. *Gwaltney of Smithfield, Ltd v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987).

In Illinois, citizens only possess the authority to enforce statutes as specifically allowed and authorized by statute. *Glisson v. City of Marion*, 188 Ill. 2d 211, 222-23 (1999). Additionally, 35 Ill. Adm. Code § 103.204(c)(1) requires that the complainant identify "...[T]he provisions of the Act that Respondents are alleged to be *violating*." (Emphasis added.) 35 Ill. Adm. Code § 103.204(c)(1) unambiguously addresses current violations that are alleged to be ongoing or "violating" at the time the complaint is filed. The only plain language interpretation of "to violate" and "violating" is the present tense. Therefore, consistent with the U.S. Supreme Court's holding in *Gwaltney*, 35 Ill. Adm. Code § 103.204(c)(1) does not authorize private citizen actions alleging wholly past violations, as done in both the Complainant and in the Complainants Response to Motion for Dismissal with Prejudice.

In addition to *Gwaltny*, the Illinois Pollution Control Board has specifically held that a private citizen cannot maintain actions for wholly past violations. *Environmental Law and Policy Center v. Freeman United Coal Mining Co. and Springfield Coal Co., LLC*, PCB 2011-002 (July 15, 2010). In *Environmental Law and Policy Center*, the Board held that a failed permit transfer left the named respondent in (then) current violation of NPDES permit requirements. In *Shelton v. Crown*, PCB 96-53 (Oct. 2, 1997), the Board denied a motion to dismiss; instead, finding continued operation of equipment gave rise to the alleged violation.

Both of these cases acknowledge that citizens may only pursue complaints for current and ongoing violations, which is the opposite of what the Complainant alleges here. The Complaint states specifically the following dates and times of the duration and frequency of the alleged pollution: “Photographed: June 4, 2022, at 3:21 pm; Photographed: June 8, 2022, at 1:39 pm; ILEPA inspection leading to Enforcement Action: June 9, 2022; Letter of Compliance June 24, 2022; and Return to sitewide pollution photographed: July 9, 2022 [at] 3:08 pm.”

ILEPA specifically found this site had returned to compliance by June 24, 2022, which extinguishes any claims the Complainant may have had. Therefore, these allegations do not support a continuing violation or injury. The Complainant has made no new allegations of or evidence of any current or ongoing violations.

E. The Complaint Failed to Allege That Any Contaminant or Pollutant Was Discharged into the Waters of The State.

A claim brought under 415 ILCS 5/12(a) or (d) must allege water pollution to waters of Illinois. *See People ex rel. Ryan v. Stonehedge, Inc.*, 288 Ill. App. 3d 318 (2d Dist. 1997); *People v. Professional Swine Management, LLC et al*, PCB 10-84, 2012 Ill. ENV LEXIS 55 (holding that a Complaint must reference “waters of the state” to assert a valid claim under Section 12.); *Tri - County Landfill Co. v. Illinois Pollution Control Board*, 41 Ill. App. 3d 249 (2d Dist. 1976); 415 ILCS 5/3.550.

The term “water pollution” is specifically defined in Section 12(a) as “the discharge of any contaminant into Illinois waters as will or is likely to create a nuisance or render such waters harmful to public health, safety, or welfare.” Therefore, to bring an action under 415 ILCS 5/12(a) or (d), a Complainant must identify a permanent body of water within the State (*i.e.*, an Illinois water”) that has or will become harmed within the meaning of Section 12(a). In *Central Illinois Public Service Co. v. Pollution Control Board*, 116 Ill. 2d 397, 411 (1987), the Illinois

Supreme Court Board agreed with the Board's interpretation that water pollution occurs when contamination is likely to render water "unusable" as a result of the acts or omissions of the respondent.

The Complaint failed to identify any affected Illinois water that was harmed or made unusable as a result of the alleged violations in his complaint or in any of his correspondence with the Board or the Respondent. Therefore, the Complainant failed to state a cause of action upon which relief could be granted as it fails to identify any waters of the state that were impacted, let alone polluted or threatened with pollution, by the alleged acts or omissions of the Respondent.

In light of the foregoing, the Board should enter an order dismissing the complaint with prejudice for want of prosecution, specifically, the Complainant's repeated and sustained failures to comply with the Schedule and Discovery Order. In addition, or in the alternative, the complaint should be dismissed with prejudice because the undisputed evidence shows that the alleged violations were temporary in duration and have been remedied. The Complainant has presented no evidence to the contrary. Based on the authorities cited above, there is no basis to maintain a citizen enforcement action, even if the Complainant had fully and timely complied with each element of the scheduling order, instead of defaulting on each element of that order.

Dated this 21st day of July 2023.

Respectfully submitted,

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