

ILLINOIS POLLUTION CONTROL BOARD
August 3, 2023

PAUL CHRISTIAN PRATAPAS,)
)
 Complainant,)
)
 v.) PCB 23-67
) (Citizens Enforcement - Water)
 LAKEWEST CUSTOM HOMES, RATHBUN)
 CSERVENYAK & KOZOL LLC, and)
 @PROPERTIES,)
)
 Respondents.)

ORDER OF THE BOARD (by J. Van Wie):

On December 1, 2022, Paul Christian Pratapas (Mr. Pratapas) filed a citizen’s complaint (Comp.) against Lakewest Custom Homes (Homes), Rathbun Cservenyak & Kozol LLC (Rathbun), and @properties (@properties). The complaint concerns a construction site in Naperville, DuPage County. @properties filed a motion to dismiss the complaint. Neither Homes nor Rathbun responded to the complaint.

Below, the Board first summarizes the procedural history and addresses the service issues. The Board then addresses the pending motions regarding @properties. Finally, the Board discusses the complaint as to Homes, and provides procedural direction and its conclusion.

PROCEDURAL HISTORY

Paul Pratapas filed a citizen’s complaint on December 1, 2022. On December 28, 2022, @properties filed a motion to dismiss the complaint (Mot. to Dis.) on the grounds that service was not proper; for failure to state a cause of action upon which relief could be granted; and because there is other affirmative matter avoiding the legal effect of or defeating the claim. Neither Homes nor Rathbun filed a motion.

On June 1, 2023, the Board denied @properties’ motion to dismiss for failure to serve, but directed Mr. Pratapas to file the required proof of service of the complaint on the respondents within 30 days or face dismissal of the complaint for failure to properly serve. *See* 35 Ill. Adm. Code 101.304; *see also* 35 Ill Adm. Code 103.204(a). The Board reserved ruling on the remaining motions to dismiss for until service of the complaint was proper.

PROOF OF SERVICE

On June 1, 2023, the Board found that Mr. Pratapas’ service attempts on the respondents to date were not proper, and directed Mr. Pratapas to file the required proof of service of the

complaint on the respondents no later than July 3, 2023, or face dismissal of the complaint for failure to serve. *See* 35 Ill. Adm. Code 101.302(b); 101.304.

A total of 238 days have elapsed since Mr. Pratapas initially filed the complaint with the Board. Additionally, the Board has already granted Mr. Pratapas an extension of 30 days to file the required proof of service. The Board notes that for this original complaint, Mr. Pratapas used a sample citizen complaint form, available on the Board's website, to file his complaint on December 1, 2022. The instructions accompanying that form include detailed steps on how to serve complaints on respondents in accordance with the Board's rules.¹ Under "Affidavit of Service" on the form, Mr. Pratapas checked that the complaint would be served on the respondents by "[p]ersonal service and [Mr. Pratapas] will make the personal delivery. However, the affidavit of service is not available to me currently." Comp. at 10. This form was signed and notarized.

On June 13, 2023, Mr. Pratapas filed proof of service by certified mail on Homes on December 29, 2022, accompanied by an affidavit of service on that date, which was signed and dated June 12, 2023. On June 15, 2023, Mr. Pratapas filed a "Motion to Dismiss @properties as Respondent" (Prat. Mot.). Mr. Pratapas did not file a proof of service on either Rathbun or @properties.

Service on Rathbun

On December 5, 2022, Mr. Pratapas filed an unnotarized "Proof of Service" indicating that he attempted personal service of the complaint on Rathbun on December 2, 2022 (Rath. Proof). In its June 1, 2023 order, the Board found the December 1, 2022 service attempt improper and directed Mr. Pratapas to correct service on all three respondents. To date, Mr. Pratapas has not filed the required proof of service on Rathbun. Because Mr. Pratapas has failed to timely file the required proof of service of the complaint on Rathbun, the Board dismisses Rathbun as a respondent from this case.

Service on @properties

On December 5, 2022, Mr. Pratapas filed an unnotarized "Proof of Service" indicating that he attempted personal service of the complaint on @properties on December 1, 2022 (@prop. Proof). On December 23, 2022, Mr. Pratapas again filed the same form describing the same service attempt.

On December 28, 2022, @properties filed a motion to dismiss the complaint for failure to properly serve @properties. In its June 1, 2023 order, the Board denied @properties' motion to dismiss for failure to serve, but found the December 1, 2022 service attempt improper and directed Mr. Pratapas to correct service on all three respondents. To date, Mr. Pratapas has not filed the required proof of service on @properties. Because Mr. Pratapas has failed to timely file

¹ Illinois Pollution Control Board, *Formal Complaint Package*, PCB.ILLINOIS.GOV, <https://pcb.illinois.gov/documents/dsweb/Get/Document-87676/> (last visited July 13, 2023).

the required proof of service of the complaint on @properties, the Board dismisses @properties as a respondent from this case.

Service on Homes

On December 5, 2022, Mr. Pratapas filed a “Proof of Service” indicating that he served the complaint on Homes by email. On December 23, 2022, Mr. Pratapas filed a certified mail receipt indicating that he sent something to Homes at 1309 N. Loomis St., Naperville, Illinois. On January 3, 2022, Mr. Pratapas filed a certified mail return receipt for something mailed to Homes at this address, signed received by Dan Jurjovic on December 29, 2022.

In its June 1, 2023 order, the Board found the January 3, 2023 “Proof of Service” insufficient and directed Mr. Pratapas to file the required proof of service on Homes by July 3, 2023. On June 13, 2023, Mr. Pratapas filed a signed delivery confirmation of the complaint on Homes, with a notice identifying the filed complaint to which the delivery confirmation corresponds, in accordance with the Board’s rules. *See* 35 Ill. Adm. Code 101.304(d)(2). Because Mr. Pratapas has timely filed the required proof of service on Homes, the Board turns to review of the complaint for content requirements.

Motions to Dismiss @properties

On December 28, 2022, @properties filed a motion to dismiss the complaint. The motion argued that service was not proper on @properties; that the complaint fails to state a cause of action upon which relief could be granted; and that the complaint is barred by the affirmative matter that @properties was neither the builder, owner, nor operator of the site that was the subject of the complaint. *Mot. to Dis. At 5, 7-10; see 735 ILCS 5/2-619(a)(9) (2022)*. On June 1, 2023, the Board denied @properties’ motion to dismiss the complaint for failure to serve but directed Mr. Pratapas to file the required proof of service on the respondents by July 3, 2023, or face dismissal of the complaint for failure to serve. The Board reserved ruling on the remaining motions to dismiss until service was proper.

There are before the Board two pending motions, filed by the respondent and the complainant, respectively, concerning dismissal of the complaint as to @properties. Because service was never completed on @properties under the Board’s rules, the Board has no jurisdiction over @properties in this matter and denies as moot both motions to dismiss. 35 Ill. Adm. Code 101.304(b); 35 Ill. Adm. Code 101.400(a). The Board at this time makes no determination on the merits of the arguments in the motions to dismiss.

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) (2022); 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.*

Complaint as to Homes

In his complaint, Mr. Pratapas alleges that respondents violated Sections 12(a) and (d) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/12(a), (d) (2020)). Comp. at 3. 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) (2022). Section 12(d) provides in its entirety that no person shall “[d]eposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.” 415 ILCS 5/12(d) (2022).

Mr. Pratapas alleges that these violations were caused by Homes’ construction of townhomes on a “very small patch of land adjacent to a tributary of a Water of the United States and/or the Naperville MS System”. Comp. at 3. Mr. Pratapas described the alleged water pollution as “a large corrugated pipe sat on top of the snow at an angle leading from the build area into what [he] would guess is a tributary of a Water of the United States or the Naperville MS3/4”. *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. Here, the complaint states only “[s]ee included photographs” but does not include any photographs. The complaint does include a copy of an email exchange between Homes and Mr. Pratapas regarding a storm sewer pipe and correspondence between Homes and Mr. Pratapas. *Id.* at 11. The emails are dated February 26, 2021 and March 9, 2021.

The complaint lists 10 different requests for relief. Specifically, the complaint requests that the Board:

1. Find that the respondents have violated the Act;
2. Assess a maximum civil penalty against the respondents;
3. Investigate into any relevant inspection reports and/or contractor certifications;

4. Issue an order stating Waters of the United States must be protected via approved BMPS [sic];
5. Issue an order prohibiting Homes from building any additional homes until their contact info and all relevant info is obtainable without conflict or endangerment to any citizens exercising their civil liberties;
6. Provide case information to United States Postal Inspector Service for the purpose of determining if mail fraud charges are appropriate;
7. Issue an order requiring Dan Jurjovec [sic] to provide the Board his credentials as a homebuilder;
8. Issue an order requiring case details be shared with the American Bar Association;
9. Perform a review of @property sites in the State of Illinois for compliance with Environmental and Safety Regulations; and
10. Issue a no contact order prohibiting respondents from engaging in harassment against complainant and his parents for engaging in their civil liberties.

Comp. at 3.

The Board can only grant relief that it has the authority to grant. Of the relief requested here, the Act gives the Board authority to find a violation of the Act. *See* 415 ILCS 5/33 (2022). Section 42(a) of the Act gives the Board authority to impose civil penalties for violations of the Act and Board regulations. 415 ILCS 5/42(a) (2022). 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, individually and d/b/a Benchwarmers Pub, Inc.*, PCB 99-82 (Apr. 4, 2000 and Sept. 21, 2000). If the complainant proves a violation, the Board can consider these requests for mitigation as an element of abatement under Section 33. *See* 415 ILCS 5/33 (2022). The Board has the authority to grant items 1, 2 and 4 of the requested relief and accepts the complaint as to these requests.

The Board does not have authority to grant items 3, 5, 6, 7, 9 and 10 of the requested relief. The Board is not the agency with authority to oversee construction activity, including contractor certifications, builder credentials, or construction site investigation. *See* 35 Ill. Adm. Code 101.106; *see also*, 415 ILCS 5/5 (2022). The Board does not have jurisdiction over violations of federal, state, or municipal criminal or civil code, including allegations of mail fraud. 35 Ill. Adm. Code 101.106; *see also*, 415 ILCS 5/5 (2022). The Board also does not have authority to issue injunctions. *See* 415 ILCS 5/33(b) (2022). Finally, the Board does not have the authority to perform reviews of property sites throughout the state to determine compliance. The Illinois Environmental Protection Agency has the duty to investigate alleged violations of the Act. 415 ILCS 5/30 (2022). The Board therefore lacks the authority to grant the relief requested in items 3, 5, 6, 7, 9 and 10. The Board finds the complaint is frivolous on these points and strikes these requests for relief. 35 Ill. Adm. Code 101.202.

Concerning publication of the case information, all the Board's determinations in enforcement actions are publicly available through the Clerk's Office On-Line (COOL).

Because anyone can access the information pertaining to this case at any time, item 8 of the requested relief is moot. The Board accordingly strikes request for relief number 8.

The Board finds that parts of the complaint as to Homes meet 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) (2022); 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). However, because the Board in this case did not accept the complaint until more than 60 days after it was filed, the Board grants Homes an additional 60 days to file an answer to the complaint. Homes has until October 2, 2023 to file an answer to the complaint.

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) (2022). 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) (2022). 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.

ORDER

1. The Board dismisses Rathbun as a respondent in this case.
2. The Board dismisses @properties as a respondent in this case.
3. The Board denies as moot @properties’ motion to dismiss for failure to state a cause of action and for other affirmative matter.
4. The Board denies as moot complainant’s motion to dismiss @properties from this case.
5. The Board strikes requests for relief numbered 3, 5, 6, 7, 9 and 10, and strikes as moot request for relief number 8. The Board accepts the complaint as to Homes as to requests for relief numbered 1, 2 and 4.
6. The Board directs the hearing officer to proceed to hearing on the complaint as modified by this Order.

IT IS SO ORDERED.

Board Member M.D. Mankowski abstained.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 3, 2023, by a vote of 3-0.



Don A. Brown, Clerk
Illinois Pollution Control Board