

ILLINOIS POLLUTION CONTROL BOARD
December 19, 1996

JANE GRAHAM AND KATHY CREECH,)
)
Complainants,)
)
v.) PCB 97-79
) (Enforcement - Citizens)
)
CITY OF PARIS,)
)
Respondent.)

ORDER OF THE BOARD (by J. Theodore Meyer):

On October 31, 1996 Jane Graham and Kathy Creech (Citizens) filed a citizen's enforcement complaint against the City of Paris (Paris) alleging that Paris had violated Sections 9(a) and 9(c) of the Illinois Environmental Protection Act (Act) due to a city ordinance which allows the burning of combustible refuse within Paris' municipal boundaries. The complaint requests the Board to issue a cease and desist order precluding the open burning of trash in the city of Paris. On November 13, 1996 Paris timely filed a motion to dismiss claiming that this action is frivolous because the Board does not have the authority to grant the specific relief requested. No response to the motion to dismiss was filed.

This matter is before the Board today pursuant to Section 31(a)(2) of the Act and the Board's procedural rule at 35 Ill. Adm. Code 103.124(a) which require the Board to determine whether a citizen's complaint is frivolous or duplicitous. Additionally, the Board will rule on the motion to dismiss.

COMPLAINT

The Citizens allege that air and odor pollution are produced in the city of Paris by "hundreds of 'burn barrels' used by [r]esidents who burn items including, but not excluded to[:] paper, plastic, metals, garbage, human and animal excrement, grass, leaves and landscape waste, motor oil, asbestos shingles, carpet, tires, etc." (Comp. at 2.)¹ The complaint did not include any evidence of these allegations. Citizens further claim that this type of pollution causes acute nose, throat and eye irritation, as well as headaches, nausea, allergic reactions and asthma attacks. (Comp. at 3.) The complaint acknowledges that a Paris city ordinance allows for burning of combustible waste under certain conditions, but claims that enforcement of the ordinances are made "only on a 'call and complaint' basis". (Comp. at 2.) Citizens therefore request the Board to order Paris to cease and desist from allowing open burning within the city limits, and further order Paris to "develop and implement a solution for enforcing total compliance" with state laws and city ordinances. (Comp. at 3.)

¹ The complaint will be cited as (Comp. at __.) and the Motion to Dismiss will be cited as (MTD at __.).

MOTION TO DISMISS

In its Motion to Dismiss, Paris first asserts that Citizens incorrectly named it as a respondent in that the city itself does not engage in open burning. (MTD at 1.) Secondly, Paris argues that the mere presence of an ordinance that allows for certain burning within the city limits does not constitute a violation of the Act by the city. (MTD at 2, *citing to City of Lake Forest v. Pollution Control Bd.*, 146 Ill. App. 3d 848, 497 N.E.2d 181 (2nd Dist. 1986).) Paris asserts that the Board does not have authority to grant the specific relief requested and therefore the complaint should be dismissed as frivolous. (MTD at 2.)

REGULATORY BACKGROUND

As stated previously, in a citizen's enforcement action, the Board is required to first determine whether or not the complaint is frivolous or duplicitous. (415 ILCS 5/31(b); 35 Ill. Adm. Code 103.124(a).) Section 103.124(a) of the Board's regulations provides that if the Board determines that the complaint is frivolous or duplicitous, "it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision". (35 Ill. Adm. Code 103.124(a).) If the Board rules that the complaint is neither frivolous nor duplicitous, the case proceeds to hearing; however, such a ruling "does not preclude the filing of motions regarding the insufficiency of the pleadings". (*Id.*)

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. (*Brandle v. Ropp*, (June 13, 1985) PCB 85-68, 64 PCB 263.) An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. (*Citizens for a Better Environment v. Reynolds Metals Co.*, (May 17, 1973) PCB 73-173, 8 PCB 46.)

DISCUSSION

In its motion to dismiss, Paris cites to *City of Lake Forest*, an appellate decision which found that the mere presence of an ordinance which allows for burning of landscape is not a violation of Section 9(a) of the Act. (*City of Lake Forest*, 497 N.E.2d at 186.) The court concluded that the Board exceeded its statutory authority by ordering Lake Forest to cease and desist from allowing leaf burning, and in essence, repeal its municipal ordinance regulating the disposal of leaves. (*Id.* at 185.)

The Board agrees with the position presented in the motion to dismiss. Paris has an ordinance which allows for burning of "combustible refuse" within its city limits, but only under certain circumstances. (Comp. at 6, Paris Ord. No. 68-26, Sec. 1, 6-17-68.) The mere presence of this ordinance is not evidence of a violation of Sections 9(a) and (c) of the Act. Therefore, the Board has no authority to order Paris to cease and desist the allowance of burning combustible waste. In essence, the Board would be directing Paris to repeal its ordinance, a power clearly outside the Board's statutory authority. However, the Board notes that the decision in *City of Lake Forest* does not curtail the Board's authority to hear citizens enforcement cases involving violations of the open burning prohibitions found in the Act and Board regulations.

In conclusion, the Board finds that this complaint is frivolous because it fails to state a claim upon which relief can be granted by the Board. The motion to dismiss is granted; this docket is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (*See also* 35 Ill. Adm. Code 101.246 "Motions for Reconsideration".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the ____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board