

ILLINOIS POLLUTION CONTROL BOARD
May 3, 2001

STUART C. NUSS,)
)
 Complainant,)
)
 v.) PCB 01-119
) (Enforcement – Citizens, Water)
 VILLAGE OF DURAND,)
)
 Respondent.)

ORDER OF THE BOARD (by N.J. Melas):

On February 26, 2001, Stuart C. Nuss filed a complaint (comp.) against the Village of Durand (Durand). On March 2, 2001, Durand filed a motion to dismiss (mot.). Nuss has not responded to the motion to dismiss.

For the reasons below, the Board finds that Nuss' complaint is frivolous, grants Durand's motion to dismiss, and closes the docket.

BACKGROUND

The Complaint

The allegations in the complaint arise from Durand's installation of a sewer line in close proximity to a private well on Nuss' property. Comp. at 1.

Nuss alleges that Durand may have run afoul of Section 370.240 of the Illinois Environmental Protection Agency's (Agency) regulations by deviating from Agency specifications in Durand's permit for the sewer line. See 35 Ill. Adm. Code 370.320. Nuss also alleges that, as a result of deviating from the Agency's design criteria at Section 370.320 of the Agency's regulations, Durand has violated Section 309.241(a) of the Board's regulations. In addition, Nuss alleges that there is a "potential for failure of the sewer pipe, which would threaten the complainant's potable water well." Comp. at 1.

Nuss requests that the Board require minimal excavation to allow the sewer line to be examined. Nuss also requests that the Board compel Durand to come into compliance with "the required standards and specifications". Comp. at 1.

The Motion to Dismiss

Durand asks that the Board dismiss the complaint. In the alternative to dismissal, Durand asks that Nuss submit evidence to allow the Board to determine if an excavation of the

site is necessary. If the Board determines that an excavation is necessary, Durand asks that the Board order the excavation to be performed in a manner that causes the least amount of damage to Nuss' driveway. Durand also asks that Nuss be responsible for the excavation costs if the excavation reveals that there is no violation of Section 309.241 of the Board's regulations. Mot. at 2.

PCB 01-30

Nuss made essentially the same allegations against Durand in a prior docket, PCB 01-30. In that docket, the Board examined the merits of some of the allegations that Nuss has made against Durand in the instant matter. The Board discussed the allegations regarding Part 370 of the Agency's regulations. The Board then discussed Nuss' allegations that sewer leaks could threaten his potable water supply. The Board determined that Nuss failed to cite specific provisions of the Environmental Protection Act (Act), regulations, or permits that had been violated. The Board found that it could not accept the complaint for hearing. However, the Board allowed Nuss to file an amended complaint. Nuss v. Durand (October 19, 2000), PCB 01-30, slip op. at 3-4. Nuss then filed an amended complaint but failed to properly serve Durand. Consequently, the Board dismissed the amended complaint and closed the docket. Nuss v. Durand (February 15, 2001), PCB 01-30.

DUPLICITOUS/FRIVOLOUS DETERMINATION

Section 103.212(a) of the Board's procedural rules directs the Board to determine whether or not a citizen's complaint is duplicitous or frivolous. If the complaint is duplicitous or frivolous, the Board shall enter an order setting forth reasons for so ruling and shall inform the parties of its decision. The parties may file motions regarding the insufficiency of the pleadings if the Board rules that the complaint is neither duplicitous nor frivolous.

Duplicitous

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in this or any other forum. Walsh v. Kolpas (September 23, 1999), PCB 00-35; Brandle v. Ropp (June 13, 1985), PCB 85-68.

The Board finds that the complaint is not duplicitous. The prior complaint has been dismissed, and the record does not indicate that the complaint is currently pending in another forum.

Frivolous

A complaint before the Board 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. People v. State Oil (August 19, 1999), PCB 97-103, slip op. at 3; Lake County Forest Preserve District v. Ostro (July 30, 1992), PCB 92-80.

Potential Sewer Leaks

In the October 19, 2000 order for docket PCB 01-30, the Board examined some of the merits of the allegations that Nuss has again made against Durand in the instant matter. Nuss alleged that sewer leaks could occur in the future, thereby threatening his water supply. However, Nuss did not cite any related provision in the Act or the regulations. Persons filing complaints must specifically identify the provision of the Act or the regulations that the respondent is allegedly violating. 415 ILCS 5/31(c) and (d) (1998); 35 Ill. Adm. Code 103.204(c)(1). The Board held that Nuss' allegations against Durand failed to cite specific provisions of the Act, regulations, or permits that had been violated. Nuss v. Durand (October 19, 2000), slip op. at 4.

In the instant docket, Nuss again does not cite to any related provisions of the Act or the regulations regarding the potential sewer leaks. Nuss has failed to allege a cause of action upon which the Board can grant relief. Thus, the allegations regarding the sewer leaks are frivolous.

Section 309.241 of the Board's Regulations

In its October 19, 2000 order for docket PCB 01-30, the Board did not address the allegation that Durand may have violated Section 309.241 of the Board's regulations. (Nuss first cited Section 309.241 in the amended complaint filed on November 22, 2000.) This same allegation is included in the complaint now before the Board. Section 309.241 provides as follows:

Section 309.241 Standards for Issuance

- a) The Agency shall not grant any permit required by this Subpart B, except an experimental permit under Section 309.206, unless the applicant submits adequate proof that the treatment works, pretreatment works, sewer, or wastewater source will be constructed, modified, or operated so as not to cause a violation of the Act or of this Subtitle and
- b) If the Agency has promulgated, pursuant to Section 309.262, criteria with regard to any part or condition of a permit, then for purposes of permit issuance proof of conformity with the criteria shall be prima facie evidence of no violation. However, non-conformity with the criteria shall not be grounds for permit denial if the condition of subsection (a) of this section is met.

Section 309.241(a) of the Board's regulations refers to the proof that a permit applicant must submit to receive a permit. It does not appear from the face of the complaint that Nuss is alleging a violation of Section 309.241(a).

With respect to Section 309.241(b) of the Board's regulations, Nuss alleges that Durand is not complying with the Agency's design criteria at 35 Ill. Adm. Code 370. Even if Nuss'

allegations are true and if Durand is not meeting the condition at 35 Ill. Adm. Code 309.241(a), it is the Agency's responsibility to issue and deny permits. The Board cannot find that Durand violated a regulation if the regulation directs the Agency to act or not to act. The Board cannot provide any relief to Nuss regarding this allegation. Therefore the Board finds that Nuss' Section 309.241 allegation is frivolous.

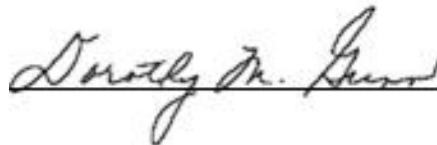
CONCLUSION

The Board finds that, pursuant to Section 31(d) of the Act (415 ILCS 5/31(d) (1998)) and Section 103.212(a) of its procedural rules, Nuss' complaint is frivolous. The Board will therefore grant Durand's motion to dismiss and will close the docket.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.520, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 3rd day of May 2001 by a vote of 7-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn". The signature is written in black ink and is positioned above the printed name and title.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board