

ILLINOIS POLLUTION CONTROL BOARD

May 16, 2002

BARBARA AND RONALD STUART,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 02-164
	)	(Citizens Enforcement - Noise)
FRANKLIN FISHER,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by G.T. Girard):

On April 3, 2002, Barbara and Ronald Stuart (complainants) filed a complaint against Franklin Fisher (respondent). The complaint alleges that the respondent violated Sections 23 and 24 of the Environmental Protection Act (Act) (415 ILCS 5/23, 24 (2000)) and 35 Ill. Adm. Code 900.102 and 901.102 of the Board’s regulations. Complainants further allege violations of the Humane Care for Animals Act (510 ILCS 70/3.01, 3.02, and 3.03 (2000)). On April 30, 2002, respondent filed a motion to dismiss (Mot.). On May 9, 2002, complainants filed a response (Resp.) to the motion to dismiss.

Section 103.124(a) of the Board’s procedural rules directs the Board to determine whether or not a citizen’s complaint is duplicitous or frivolous. The Board denies the motion to dismiss in part and grants the motion in part. The Board finds that the alleged violations of Section 23 of the Act, and the alleged violations of the Humane Care Animal Act are frivolous for the reasons discussed below. The remaining alleged violations will be accepted for hearing.

**MOTION TO DISMISS**

Respondent argues that this complaint fails to state a cause of action and should be dismissed as frivolous. In support, respondent asserts that the use of a propane cannon is not *per se* a violation and the property on which the cannon is used is a farm and has been a farm for three generations. Mot. at 1. The cannons have not been used prior to July 15 or after November 15 in past years and are used only during daylight hours. Mot. at 2. Respondent also argues that farms and farmers are protected from nuisance suits by statutory provisions. Mot. at 3-4.

Complainants object to the motion to dismiss and argue that the Board has the authority to hear the case. Resp. at 1. Complainants further argue that the cannons were not used until 2001 and the use of the cannons is “harming people” in the community. *Id.*

## DUPLICITOUS/FRIVOLOUS DETERMINATION

Section 103.124(a) of the Board's procedural rules implements Section 31(d) of the Act. It provides:

The Clerk shall assign a docket number to each complaint filed \*\*\* the Chairman shall place the matter on the agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of the decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings. 35 Ill. Adm. Code 103.124(a).

### Duplicitous

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. Brandle v. Ropp, PCB 85-68 (June 13, 1985). The Board has not identified any other cases, identical or substantially similar to this, pending in other forums. Therefore, based on the record before us, this matter is not duplicitous.

### Frivolous

An action before the Board is frivolous if it requests relief that the Board cannot grant. Lake County Forest Preserve Dist. v. Ostro, PCB 92-80 (July 30, 1992). After careful consideration of the respondent's arguments, the Board finds that the complaint is not frivolous.

## CONCLUSION

The Board finds that the alleged violation of Section 23 of the Act is frivolous, pursuant to Section 103.124(a). Section 23 of the Act only contains legislative objectives as opposed to prohibitions on activities. *See* 415 ILCS 5/23 (2000). Further the Board finds the allegations of violation of Humane Care of Animals Act are also frivolous as the Board is not authorized to hear complaints alleging violations of the Humane Care of Animals Act (510 ILCS 70/3.01, 3.02, and 3.03 (2000)). The respondent has failed to convince the Board that a cause of action does not exist as to the remainder of the complaint. Therefore, the Board finds that the remainder of the complaint is neither duplicitous nor frivolous and is accepted for hearing.

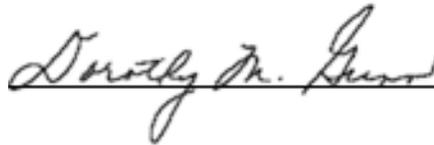
The hearing must be scheduled and completed in a timely manner consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with this order and Section 103.125 of the Board's rules. 35 Ill. Adm. Code 103.125. The Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days of hearing.

Any briefing schedule shall provide for final filings as expeditiously as possible. If, after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if, after an attempt, the hearing officer is unable to consult with all of the parties, the hearing officer shall unilaterally set a hearing date. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 16, 2002, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board