

ILLINOIS POLLUTION CONTROL BOARD
February 6, 2003

MARTIN E. and KATHY L. GEBER,)
)
Complainants,)
)
v.) PCB 03-96
) (Citizens Enforcement - Noise)
CLAYTON MOUSHON, CARRI SCHARF)
TRUCKING AND MATERIALS, and CITY)
OF EAST PEORIA, MAYOR: CHUCK)
DOBBELAIRE; CITY ADMINISTRATOR:)
JAMES THOMAS BRIMBERRY,)
)
Respondents.)

ORDER OF THE BOARD (by D.C. Karpziel):

On December 18, 2002, Martin E. and Kathy L. Geber (Geber) filed a complaint against Clayton Moushon, Carri Scharf Trucking and Materials, and the City of East Peoria (respondents). *See* 415 ILCS 5/31(d) (2002); 35 Ill. Adm. Code 103.204. Geber alleges that the respondents violated Sections 23 through 25 of the Environmental Protection Act (Act) (415 ILCS 5/23-25 (2002)) as well as Section 900.102 (35 Ill. Adm. Code 900.102) and Section 901.104 (35 Ill. Adm. Code 901.104) of the Board's regulations. Geber further alleges that the respondents violated these provisions by mining gravel 300 feet from the Geber's residence. The citizen's complaint alleges that the gravel mining operation vibrates the Geber residence and that the mining noise results in an unreasonable interference with the use and enjoyment of the Geber home. Furthermore, Geber alleges that the mining noise endangers the physical health, emotional health, and mental health and well being of the complainants. The complaint concerns Clayton Moushon's gravel mine operation approximately located on Valley Lane in East Peoria, Tazewell County.

Section 31(d) of the Environmental Protection Act (415 ILCS 5/31(d) (2002)) allows any person to file a complaint with the Board. Section 31(d) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." *Id.*; *see also* 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.* 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). The respondents have filed no motion. No evidence before the Board indicates that Geber's complaint is duplicative or frivolous with regard to Clayton Moushon and Carri Scharf Trucking and Materials.

However, the Board finds that Geber's complaint fails to state a cause of action against the City of East Peoria, Mayor Chuck Dobbelaire, and the City Administrator James Thomas Brimberry. Geber's complaint requests the Board to enter an order against the respondents to cease and desist violations of the Act and Board regulations and to cease operation of the mining operation. In the alternative, Geber asks the Board to order the respondents to move the gravel pit operation to the south side of a hill. The Board does not have the authority to order the City of East Peoria, Mayor Chuck Dobbelaire, and the City Administrator James Thomas Brimberry to provide the requested relief. Consequently, the Board dismisses the City of East Peoria, Mayor Chuck Dobbelaire, and the City Administrator James Thomas Brimberry from Geber's action.

Furthermore, the Board strikes the allegations regarding violations of Sections 23 and 25 of the Act as frivolous. Section 23 of the Act is the legislative purpose statement and as such cannot be violated. *See Powlowski v. Johansen*, PCB 00-157, slip op. at 2 (May 4, 2000). Section 25 of the Act indicates the Board may adopt regulations prescribing limitation on noise emissions. Although Geber can allege a violation of adopted regulations, Geber cannot allege violation of a provision for promulgation of those regulations.

The Board accepts the remainder of the complaint for hearing. *See* 415 ILCS 5/31(d) (2002); 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 the respondents fail within that timeframe 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 the respondents to have admitted the allegation. 35 Ill. Adm. Code 103.204(d).

The Board directs the hearing officer to proceed expeditiously to hearing. 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) (2002). 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.

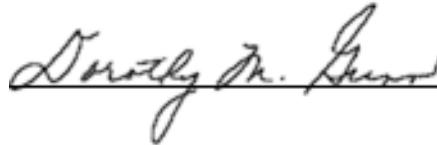
If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on a respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that

the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

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 dollar amount, and supporting its position with facts and arguments that address any or all of the Section 42(h) factors.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 6, 2003, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board