

ILLINOIS POLLUTION CONTROL BOARD
May 15, 2003

MARTIN E. and KATHY L. GEBER,)
)
Complainants,)
)
v.) PCB 03-96
) (Citizens Enforcement - Noise)
CLAYTON MOUSHON and CARRI)
SCHARF TRUCKING AND MATERIALS,)
)
Respondents.)

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

This is a citizen enforcement action alleging that noise from a gravel mining operation in East Peoria, Tazewell County, violates the Environmental Protection Act (Act) (415 ILCS 5/24 (2002)) and Board rules (35 Ill. Adm. Code 900.102, 901.104). Complainants, Martin E. and Kathy L Geber (Gebers), reside near the gravel mine and are representing themselves. They allege respondents violated both the nuisance noise prohibition and the numeric limits on impulsive sound. Today the Board rules on three motions: two motions to dismiss; and one motion for leave to file an amended complaint to add respondents.

For the reasons below, the Board grants the motion of respondent Clayton Moushon (Moushon), dismissing him from this case, but denies the motion to dismiss of respondent Carri Scharf Trucking and Materials (Scharf Trucking). The Board also grants in part and denies in part the Gebers' motion for leave to file an amended complaint. Specifically, the Board allows the Gebers to file an amended complaint to add Carri Scharf Materials Company (CSM) and East Side Materials, L.L.C. (East Side) as respondents. However, the Board denies the motion to add Farmdale Valley Dev. Inc. (Farmdale) and the United States Army Corps of Engineers (Corps) as respondents.

Before discussing these motions and the Board's rulings, the Board sets forth the case's procedural history and the applicable laws for today's rulings.

PROCEDURAL HISTORY

On December 18, 2002, the Gebers filed a complaint against Moushon, Scharf Trucking, the City of East Peoria, Mayor Chuck Dobbelaire, and City Administrator James Thomas Brimberry.¹ On February 6, 2003, the Board dismissed the latter three respondents, but accepted for hearing the Gebers' complaint against Moushon and Scharf Trucking. Moushon filed an

¹ The complaint is cited as "Comp. at _."

answer on February 25, 2003, denying the complaint's allegations. Scharf Trucking filed an answer on February 27, 2003, denying the complaint's allegations and raising as a purported affirmative defense that Scharf Trucking lacks "an ownership interest in the mining operations."² Scharf Trucking Ans. at 2.

On March 17, 2003, Moushon filed a motion for his dismissal from this case with prejudice. Two days later, Scharf Trucking filed a motion for its dismissal from this case with prejudice.³ After obtaining the hearing officer's leave for additional time to respond to these motions, the Gebers filed a document on April 3, 2003, opposing dismissal of the two respondents *and* seeking to amend the complaint by adding four more respondents: CSM; East Side; Farmdale; and the Corps. The Gebers' April 3 filing therefore responded to the motions to dismiss and made a new motion. On April 14, 2003, Moushon filed a document constituting both a reply to the Gebers' response and a response to the Gebers' motion to add respondents. On May 1, 2003, the Gebers filed a reply to Moushon's response.⁴

The Board notes that both answers and both motions to dismiss were filed late. Under the Board's procedural rules, any answers were due within 60 days after service of the complaint and any motions to dismiss were due within 30 days after service of the complaint. *See* 35 Ill. Adm. Code 101.506, 103.204(d). The Gebers served Moushon with the complaint on December 11, 2002, and served Scharf Trucking on December 12, 2002, but Moushon and Scharf Trucking did not file their answers until late February or their motions to dismiss until mid-March. The Gebers, however, failed to include in the complaint the required notice to respondents that failing to timely answer the complaint would mean that the complaint's material allegations are deemed admitted. *See* 35 Ill. Adm. Code 103.204(e), (f). In the interest of fairness and administrative economy, the Board accepts the late-filed answers and motions to dismiss. *See* People v. Michel Grain Co., PCB 96-143, slip op. at 2 (Aug. 22, 2002) (accepting late motion to dismiss when notice in complaint was deficient).

Additionally, the Board cautions the parties that although *responses* to motions may be made as of right, *replies* to those responses are allowed only with the leave of the Board or hearing officer to prevent material prejudice. *See* 35 Ill. Adm. Code 101.500(d), (e). Here, Moushon and the Gebers filed replies without seeking leave. However, the Board recognizes that the Gebers, who are not attorneys, entitled their April 3, 2003 filing an "amended complaint." The filing was in fact not an amended complaint but rather a motion to amend the

² Moushon's answer is cited as "Mouchon Ans. at _." Scharf Trucking's answer is cited as "Scharf Trucking Ans. at _."

³ Moushon's motion to dismiss is cited as "Moushon Mot. at _." Scharf Trucking's motion to dismiss is cited as "Scharf Trucking Mot. at _."

⁴ The Gebers' April 3, 2003 filing is cited as "Geber Resp.-Mot. at _." Moushon's April 14, 2003 filing is cited as "Moushon Reply-Resp. at _." The Gebers' May 1, 2003 reply is cited as "Geber Reply at _."

complaint, and a response to the motions to dismiss. Under these circumstances, the Board accepts the replies of Moushon and the Gebers as no prejudice will result. See Michel Grain, PCB 96-143, slip op. at 2 (accepting reply filed without leave when no prejudice would result to other party).

APPLICABLE LAWS

Noise Laws

The Act provides:

No person shall emit *beyond the boundaries of his property* any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act. 415 ILCS 5/24 (2002) (emphasis added).

For purposes of this Section [25] and Section 24, “beyond the boundaries of his property” or “beyond the boundaries of the property of any person” *includes personal property* as well as real property. 415 ILCS 5/25 (2002) (emphasis added).

The Board’s noise rules provide:

No person shall *cause or allow* the emission of sound *beyond the boundaries of his property*, as property is defined in Section 25 of the Illinois Environmental Protection Act, so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter. 35 Ill. Adm. Code 900.102.

Noise pollution: the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity. 35 Ill. Adm. Code 900.102.

[N]o person shall *cause or allow* the emission of impulsive sound from any *property-line-noise-source* located on any Class A, B, or C land to any receiving Class A or B land which exceeds the allowable A-weighted sound levels, measured with fast dynamic characteristic, specified in the . . . table [set forth in this rule] when measured at any point within such receiving Class A or B land, provided, however, that no measurement of sound levels shall be made less than 25 feet from such property-line-noise-source. 35 Ill. Adm. Code 901.104 (emphasis added).

Property-line-noise-source: any *equipment or facility*, or combination thereof, which operates within any land used as specified by 35 Ill. Adm. Code 901.101. Such equipment or facility, or combination thereof, must be capable of emitting sound beyond the property line of the land on which operated. 35 Ill. Adm. Code 900.101 (emphasis added).

Motion to Dismiss

When ruling on a motion to dismiss, the Board takes all well-pled allegations as true. Dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See* People v. Peabody Coal Co., PCB 99-134, slip. op. at 1-2 (June 20, 2002); People v. Stein Steel Mills Co., PCB 02-1, slip op. at 1 (Nov. 15, 2001), citing Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991).

Adding Respondents

Section 101.403 of the Board's procedural rules provides:

- a) The Board, on its own motion or the motion of any party, may add a person as a party to any adjudicatory proceeding if:
 - 1) A complete determination of a controversy cannot be had without the presence of the person who is not already a party to the proceeding;
 - 2) The person who is not already a party to the proceeding has an interest that the Board's order may affect; or
 - 3) It may be necessary for the Board to impose a condition on the person who is not already a party to the proceeding. 35 Ill. Adm. Code 101.403(a).

Section 103.206 of the Board's procedural rules provides:

- a) The Board, on its own motion or the motion of a respondent, may order a person to be added as a respondent if a complete determination of a controversy cannot be had without the presence of the person who is not already a party to the proceeding.
- b) If the Board orders a person to be added as a respondent pursuant to subsection (a) of this Section, the Board will grant the complainant leave to file an amended complaint that sets forth a claim against the added respondent. The amended complaint must meet the requirements of Section 103.204 of this Subpart. 35 Ill. Adm. Code 103.206(a), (b).

DISCUSSION

The Board discusses the respective motions to dismiss of Moushon and Scharf Trucking before turning to the Gebers' motion to add respondents.

Motions to Dismiss

Moushon

In his motion to dismiss, Moushon states that, contrary to the complaint, he does not own the real property at which the gravel mining takes place. Moushon Mot. at 1-2; Moushon Ans. at 1; *see also* Comp. at 3. Moushon states that the site was acquired by East Side in July 2002 and that he is just the registered agent of East Side. Moushon Mot. at 1-2. He adds that East Side subsequently leased the entire site to CSM. *Id.* at 1.

Moushon, who is an attorney, argues that as a registered agent, he simply receives service of process for East Side and has no personal liability. Moushon Reply-Resp. at 1. In response, the Gebers concede that Moushon does not own the site, but maintain that he should remain a respondent because he is East Side's registered agent and because he "has promoted the development, and is actively representing all parties involved." Geber Resp.-Mot. at 1.

The noise provisions of the Act and Board rules allegedly violated, which are set forth above, prohibit persons from *causing or allowing* improper sound emissions. *See* 415 ILCS 5/24 (2002); 35 Ill. Adm. Code 900.102, 901.104. Moushon's mere status as a registered agent or development promoter or representative cannot alone render him in violation for causing or allowing the noise emissions alleged. The Gebers have alleged no other basis for his liability. Because Moushon's alleged violations are based solely on this status, the Board grants Moushon's motion for his dismissal from this case with prejudice.

Scharf Trucking

In its motion to dismiss, Scharf Trucking states that it is not the same entity as CSM. Mr. Carri Scharf explains in an attached affidavit that he is President of both Scharf Trucking and CSM. Scharf Trucking Mot. at 1, Affid. at 1. According to Mr. Scharf, Scharf Trucking is an "unincorporated business" while CSM is an Illinois corporation headquartered in Bloomington, Mclean County. Scharf Trucking Mot., Affid. at 1. The affidavit further provides that CSM is the "sole leaseholder" at the site. *Id.* at 2. Scharf Trucking maintains that it has no property interest in the site. Scharf Trucking Mot. at 1, Affid. at 1. In its purported affirmative defense, Scharf Trucking states that it "does not have an ownership interest in the mining operations." Scharf Trucking Ans. at 2.

The Gebers respond that Scharf Trucking is a proper respondent because "much of the equipment generating noise at the mining site is identified with the name 'Carri Scharf Trucking.'" Geber Reply at 1; Geber Resp.-Mot. at 1.

For purposes of the noise provisions at issue, the Board notes that “property” and “property-line-noise-source,” by definition, include personal property such as equipment. *See* 415 ILCS 5/25 (2002); 35 Ill. Adm. Code 900.101. Nowhere in its filings does Scharf Trucking state that it has no interest in or control over any *personal* property being used at the site that may be generating the complained of noise.

Moreover, ownership of property is not a prerequisite to violating the Act or Board rules against causing or allowing improper emissions. As the Illinois Supreme Court stated: “The analysis applied . . . for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of pollution.” People v. Fiorini, 143 Ill. 2d 318, 346, 574 N.E.2d 612, 623 (1991), citing Philips Petroleum Co. v. PCB, 72 Ill. App. 3d 217, 390 N.E.2d 620 (2d Dist. 1979) (train derailment punctured tank car releasing gas into air; gas company, which owned and loaded tank car, did not “cause or allow” air pollution where railroad company controlled the tank car at time it derailed). A complainant therefore “must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred.” People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793, 618 N.E.2d 1282, 1286 (5th Dist. 1993).

Based on the current record, the Board cannot find that no set of facts could be proven that would entitle the Gebers to relief from Scharf Trucking. The Board therefore denies Scharf Trucking’s motion to be dismissed from this case. The Board also notes that Scharf Trucking’s filings have been made by its President, Mr. Scharf. The record does not indicate that he is an attorney. Under Illinois law, a corporation must be represented by an attorney in an adjudicatory proceeding before the Board. *See* 35 Ill. Adm. Code 101.400(a)(2). If however, as it appears, Scharf Trucking is Mr. Scharf’s unincorporated sole proprietorship, he may continue to represent Scharf Trucking in this proceeding even if he is not an attorney. *See Riverview FS v. IEPA*, PCB 97-226, slip op. at 3 (July 10, 1997) (unincorporated sole proprietorship may proceed on own behalf or through attorney).

Motion to Add Respondents

The Gebers seek to amend their complaint to add four entities as respondents: CSM; East Side; Farmdale; and the Corps.

CSM

In their motion, the Gebers assert that CSM is leasing the site from East Side. Geber Resp.-Mot. at 1. Mr. Scharf, President of CSM, concedes this. Scharf Trucking Mot. at 1, Affid. at 1. To allow for a complete determination of this controversy, the Board grants the Gebers’ motion for leave to amend the complaint to add CSM. *See* 35 Ill. Adm. Code 103.206(a). Because CSM is a corporation, it will have to be represented by an attorney. *See* 35 Ill. Adm. Code 101.400(a)(2).

East Side, Farmdale, and the Corps

The Gebers move to add East Side, Farmdale, and the Corps based on their “legal ownership of the property in question.” Geber Resp.-Mot. at 1. Moushon, the registered agent for East Side, states that East Side is actually the *only* owner of the site and provides a trustee’s deed recorded by the Tazewell County Recorder of Deeds documenting East Side’s July 2002 purchase. Moushon Mot. at 1, Attach. Furthermore, Moushon argues that the only proper respondent in this enforcement action is CSM because CSM is the site’s sole tenant and “sole operator of the mining operations,” and because “[a]ny noise being generated on the subject property is under the exclusive control of [CSM].” Moushon Mot. at 2; Moushon Reply-Resp. at 3.

With their motion, the Gebers provide property tax documents that, on their face, indicate that at some point in time Farmdale and the Corps were in “ownership” of some parcels of land. Geber Resp.-Mot., Attach. According to the Gebers, these documents establish that Farmdale and the Corps, not only East Side, are the “legal owners” of the site. Geber Resp.-Mot. at 1. Moushon responds that neither Farmdale nor the Corps is a record owner of the site. Moushon Reply-Resp. at 2.

In their reply, the Gebers state:

[A]ll landowners, whomever they are, should be named in this complaint. Certainly any landowner should be aware of, and responsible for what events occur on his or her property. We are trying to name the proper owners, somebody must own this property! Geber Reply at 1.

To rule on the Gebers’ motion for leave to file an amended complaint, the Board need not reach all issues raised over property ownership, and certainly cannot decide whether and to what extent any given entity controls or is capable of controlling noise generated by the mining operations. However, it is well-established that a property owner may be found in violation of the Act or Board rules even if it has not actively caused the emissions at issue. *See Perkinson v. PCB*, 187 Ill. App. 3d 689, 694-95, 543 N.E.2d 901, 904 (3d Dist. 1989) (“the owner of the source of pollution causes or allows the pollution . . . unless the facts establish the owner either lacked the capability to control the source . . . or had undertaken extensive precautions”); *Meadowlark Farms, Inc., v. PCB*, 17 Ill. App. 3d 851, 861, 308 N.E.2d 829, 836 (5th Dist. 1974) (property owner violated Act’s prohibition on causing or allowing discharge resulting in water pollution because owner had “capability of controlling the pollutorial discharge”); *Michel Grain*, PCB 96-143, slip op. at 4 (“[R]espondent with control over a site may be found in violation even if the respondent did not actively dispose of contaminants.”).

Here, East Side’s registered agent, Moushon, has represented that East Side owns the site of the mining operation and has provided a deed to corroborate his representation. The Board finds that a final order in this enforcement action may affect an interest of East Side and further that it may be necessary to impose a condition on East Side in a final order. *See* 35 Ill. Adm. Code 101.403(a)(2), (3). Accordingly, the Board grants the Gebers’ motion for leave to file an amended complaint that adds East Side.

On this record, however, the Board cannot find that the land purportedly owned by Farmdale and the Corps is the real property on which the mining operations take place. Moreover, it is unclear whether Farmdale and the Corps still own the parcels identified in the tax documents provided by the Gebers. The Board therefore denies the Gebers' motion for leave to file an amended complaint naming Farmdale or the Corps as respondents.

Amended Complaint

The Gebers have 30 days from receipt of this order to file the amended complaint adding CSM and East Side as respondents. *See* 35 Ill. Adm. Code 101.302, 101.304, 103.204(a), (b). The amended complaint must, among other things, set forth a claim against CSM and East Side and include the required notice to respondents about the effect of failing to timely file an answer to the complaint. *See* 35 Ill. Adm. Code 103.204, 103.206(b).

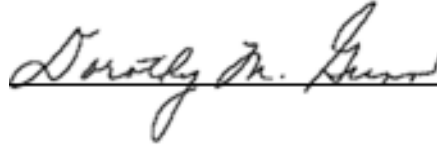
By granting the Gebers' motion *for leave to file* an amended complaint, the Board today is *not* accepting any such complaint for hearing. If and when the Board receives an amended complaint, the Board will decide in a separate order whether to accept the complaint for hearing. Once the Gebers serve CSM and East Side with the amended complaint, then those entities will have an opportunity to be heard. Under the Board's procedural rules, time periods within which CSM and East Side may file any answers or responsive motions will begin to run from their respective receipt of the amended complaint. *See, e.g.*, 35 Ill. Adm. Code 101.506, 103.204(d), (e), 103.212(b).

CONCLUSION

The Board grants Moushon's motion to be dismissed from this enforcement action and denies Scharf Trucking's motion to be dismissed. The Board therefore directs the Clerk to remove Moushon from the caption of this case, leaving Scharf Trucking as the lone respondent at this time. Additionally, the Board grants the Gebers' motion for leave to file an amended complaint against CSM and East Side, but denies the motion with respect to Farmdale and the Corps. Within 30 days after receiving this order, the Gebers may file an amended complaint that adds CSM and East Side as respondents.

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 15, 2003, 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