

ILLINOIS POLLUTION CONTROL BOARD
August 21, 2003

MARTIN E. and KATHY L. GEBER,)
)
Complainants,)
)
v.) PCB 03-96
) (Citizens Enforcement - Noise)
CARRI SCHARF TRUCKING AND)
MATERIALS, CARRI SCHARF)
MATERIALS COMPANY, and EAST SIDE)
MATERIALS, L.L.C,)
)
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 denies a motion filed by respondent East Side Materials, L.L.C. (East Side) to dismiss the Gebers' amended complaint. Additionally, after striking two allegations of the amended complaint as frivolous, the Board accepts for hearing the amended complaint adding East Side and Carri Scharf Materials Company (CSM) as respondents. Before discussing these issues, the Board briefly sets forth this case's procedural history.

PROCEDURAL HISTORY

On December 18, 2002, the Gebers filed a complaint against Clayton Moushon (Moushon), Carri Scharf Trucking and Materials (Scharf Trucking), the City of East Peoria, Mayor Chuck Dobbelaire, and City Administrator James Thomas Brimberry. On February 6, 2003, the Board dismissed the latter three respondents, but accepted for hearing the Gebers' complaint against Moushon and Scharf Trucking. On May 15, 2003, the Board granted Moushon's motion to be dismissed from this case and denied Scharf Trucking's motion for dismissal. In that order, the Board also granted in part and denied in part the Gebers' motion to file an amended complaint to add respondents. Specifically, the Board denied the Gebers' motion to add "Farmdale Valley Dev. Inc." and the United States Army Corps of Engineers as respondents, but gave the Gebers 30 days to file an amended complaint to add CSM and East Side as respondents.

On June 11, 2003, the Gebers filed an amended complaint to add CSM and East Side. On June 25, 2003, the hearing officer issued an order in which, among other things, she referred to the amended complaint to add respondents. On July 17, 2003, CSM filed an answer to the amended complaint while East Side filed an objection to the hearing officer's order or, alternatively, a motion for East Side to be dismissed based on alleged deficiencies of the amended complaint. The Gebers did not respond to East Side's objection or motion.¹

DISCUSSION

The Board discusses East Side's objection and motion to dismiss before addressing whether the amended complaint is duplicative or frivolous and should be accepted for hearing.

East Side's Objection and Motion to Dismiss

East Side argues that the amended complaint failed to properly add East Side as a respondent because the amended complaint merely identifies East Side as the *owner* of the property emitting noise. Mot. at 2. East Side therefore objects to the June 25, 2003 hearing officer order because the order refers to the Gebers' amended complaint "to add" East Side and directs the parties to include East Side in the case caption when filing documents. *Id.* at 1-2. Alternatively, East Side moves to dismiss the amended complaint against East Side, arguing that the amended complaint fails "to state sufficient facts to state a cause of action against East Side" because "ownership of property is insufficient to state a cause of action." *Id.* at 3.

When ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all inferences from them in favor of the non-movant. 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).

The noise provisions of the Act and Board rules involved here prohibit persons from causing *or allowing* improper sound emissions. *See* 415 ILCS 5/24 (2002); 35 Ill. Adm. Code 900.102, 901.104. It is well-established that a property owner may be found to have violated the Act or Board rules even if it has not actively caused the emissions at issue. *See, e.g.,* 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").

¹ The Board cites the Gebers' amended complaint as "Am. Comp. at _" and East Side's objection and motion to dismiss as "Mot. at _."

The Board's May 15, 2003 order gave the Gebers 30 days to file an amended complaint adding CSM and East Side as respondents. *See Geber v. Moushon*, PCB 03-96, slip op. at 8 (May 15, 2003). Within 30 days, the Gebers filed an amended complaint. The Gebers' amended complaint states that it is "[f]or the purpose of adding respondent parties" and continues:

The property emitting the noise is owned by East Side Materials L.L.C., and operated by Carri Scharf Materials Co. We allege the respondents are in violation of [the] Act 415 ILCS 5/24[,] Act 415 ILCS 5/25[,] 35 Ill. Adm. Code 900.101[,] 35 Ill. Adm. Code 900.102[,] 35 Ill. Adm. Code 900.104. Am. Comp. at 1.

These sentences taken together identify East Side and CSM as the respondents being added. There is no ambiguity here. East Side's arguments to the contrary are strained, relying on bits of the amended complaint read in isolation. The amended complaint identifies (1) specific provisions of the Act and Board rules allegedly violated by East Side and CSM; (2) the mining operation, including specific activities there, as the source of the noise; and (3) the duration, frequency, and impact of the noise. Am. Comp. at 1.

The Board finds that the amended complaint properly adds East Side and CSM as respondents and therefore finds no merit in East Side's objection to the hearing officer order. Further, the Board finds that the amended complaint states a claim against East Side and CSM. *See* 35 Ill. Adm. Code 103.204. Taking the amended complaint's allegations as true and drawing all inferences from them in favor of the Gebers, the Board cannot find that no set of facts could be proven that would entitle the Gebers to relief from East Side. Accordingly, the Board denies East Side's motion to dismiss the amended complaint. *See Finley v. IFCO ICS-Chicago, Inc.*, PCB 02-208, slip op. at 8-9 (Aug. 8, 2002) (denying motion to dismiss based on alleged factual deficiencies in complaint).

Duplicative or Frivolous

Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [a] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2002), *amended by* P.A. 93-152, eff. July 10, 2003; *see also* 35 Ill. Adm. Code 103.212(a). The Board has already accepted for hearing this proceeding's original complaint (*see Geber*, PCB 03-96, slip op. at 2 (Feb. 6, 2003)), which remains against respondent Scharf Trucking, a different entity than CSM (*see Geber*, PCB 03-96, slip op. at 5, 8 (May 15, 2003)). The Board now considers whether the amended complaint against East Side and CSM is duplicative or frivolous.

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. No evidence before the Board indicates that the Gebers' amended complaint is duplicative. 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." 35 Ill. Adm. Code 101.202. The Gebers ask the Board to order respondents to comply with applicable noise provisions. Am. Comp. at 2. The amended complaint states a cause of action in alleging violations of the prohibitions on nuisance

noise and impulsive sound limit exceedences (415 ILCS 5/24 (2002); 35 Ill. Adm. Code 900.102, 900.104). *Id.* at 1. These aspects of the amended complaint are not frivolous.

However, the amended complaint also alleges violations of Section 25 of the Act (415 ILCS 5/25 (2002)) and Section 900.101 of the Board's noise rules (35 Ill. Adm. Code 900.101). *Id.* Because Section 25 of the Act provides authority for the Board to adopt noise rules and Section 900.101 of the Board's rules sets forth definitions concerning noise, the respondents cannot violate either provision. The Board accordingly strikes from the amended complaint the alleged violations of Sections 25 and 900.101 as frivolous. *See Geber*, PCB 03-96, slip op. at 2 (Feb. 6, 2003) (striking from the original complaint alleged violations of noise sections on legislative purpose and rulemaking authority).

The Board accepts for hearing the amended complaint as modified by this order. *See* 415 ILCS 5/31(d)(1) (2002), *amended by* P.A. 93-152, eff. July 10, 2003; 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 a respondent fails 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 respondent to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d). CSM timely filed an answer to the amended complaint. East Side's motion to dismiss stayed East Side's time period for filing an answer. *See* 35 Ill. Adm. Code 103.204(e). East Side therefore now has 60 days from receipt of this order to file an answer to the amended complaint.

The Board directs the hearing officer to move 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), *amended by* P.A. 93-152, eff. July 10, 2003, and P.A. 93-575, eff. Aug. 21, 2003. 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 the 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 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 Section 42(h) factors.

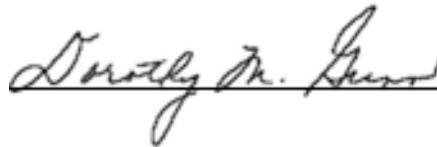
CONCLUSION

The Board finds meritless East Side's objection to the June 25, 2003 hearing officer order and denies East Side's motion to dismiss the amended complaint. From the amended complaint, the Board strikes as frivolous alleged violations of Section 25 of the Act and Section 900.101 of the Board's rules. The Board accepts for hearing the remainder of the amended complaint adding East Side and CSM as respondents. Within 60 days after receiving this order, East Side may file an answer to the amended complaint. All filings must reflect the caption of this order.

Finally, the Board notes that this citizen noise enforcement action was initiated over eight months ago when the Gebers filed their original complaint. The Board accepted that complaint for hearing about six and a half months ago. This docket reflects no less than nine named respondents (three remain) and three motions to dismiss (two denied and two filed late). The Board directs the Gebers and the respondents (Scharf Trucking, East Side, and CSM) to proceed diligently with this case.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 21, 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