

ILLINOIS POLLUTION CONTROL BOARD
September 17, 1998

LAWRENCE C. SWEDA,)
)
 Complainant,)
)
 v.) PCB 99-38
) (Enforcement - Noise, Citizens)
 OUTBOARD MARINE CORPORATION)
 and THE CITY OF WAUKEGAN,)

 Respondent.

ORDER OF THE BOARD (by M. McFawn):

Respondents Outboard Marine Corporation (OMC) and the City of Waukegan, Illinois (Waukegan) have each filed motions to dismiss this enforcement proceeding (on August 28, 1998, and August 31, 1998, respectively), asserting that it is frivolous. On September 15, 1998, complainant Lawrence C. Sweda filed a "Motion to Not Dismiss," which the Board construes as an objection to the motions to dismiss. After reviewing the complaint and the arguments of the respondents, the Board grants the motions to dismiss with respect to the alleged violation of Section 23 of the Environmental Protection Act (Act), 415 ILCS 5/23 (1996), and denies the motions to dismiss with respect to the other claims alleged in the complaint.

Mr. Sweda initiated this enforcement action by filing a formal complaint on August 21, 1998. The complaint alleges violations of Sections 23 and 24 of the Act and 35 Ill. Adm. Code 901.102 and 901.104. Section 23 of the Act sets forth the General Assembly's findings and the purpose of Title VI of the Act, concerning noise pollution. There can be no "violation" of Section 23. Thus, to the extent the complaint seeks relief for an alleged violation of Section 23, that claim is frivolous. Section 24 of the Act and Sections 901.102 and 901.104 of the Administrative Code, however, contain prohibitions of various activities. Section 24 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.

Sections 901.102 and 901.104 prohibit emission of sound above certain decibel levels under various circumstances. Mr. Sweda alleges that the OMC and Waukegan have violated these provisions through their operation of propane cannons to frighten seagulls away from OMC and Waukegan property on Waukegan Harbor. Comp. at 2-3.

An action before the Board is frivolous if it requests relief which the Board could not grant. Lake County Forest Preserve District v. Ostro (July 30, 1992), PCB 92-80. Mr. Sweda asks the Board to enter an order directing the respondents to cease and desist from further violations of applicable statutes and regulations, or granting such other relief as the Board deems appropriate. A direction to cease and desist from violations is specifically authorized as an element of a final order in an enforcement case. See 415 ILCS 5/33(b) (1996). The Board is more generally authorized to enter such a final order as it deems appropriate under the circumstances. 415 ILCS 5/33(a). Thus, Mr. Sweda has not, on the face of his complaint, requested relief which the Board cannot grant.

The respondents have not identified any defect in the complaint which would, as a matter of law, prevent the Board from granting the requested relief. In their motions, both OMC and Waukegan describe the gull problem facing them and the basis for their use of propane cannons for gull control, as well as the distance from Mr. Sweda's house to the propane cannons. While the matters discussed by OMC and Waukegan may be relevant to the Board's final determination in this case, they do not render the complaint frivolous.

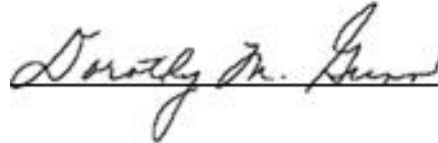
The Board accordingly finds that the complaint is not frivolous with respect to the alleged violations of Section 24 of the Act and 35 Ill. Adm. Code 901.102 and 901.104. At the inception of each citizen's enforcement action, the Board also examines whether the complaint is duplicitous. An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. Brandle v. Ropp (June 13, 1985), PCB 85-68. In the complaint, Mr. Sweda states that to his knowledge no other action is pending against these respondents for this alleged noise pollution. Comp. at 4. The respondents have not indicated that any other action is pending. The Board accordingly cannot find that this matter is duplicitous. The Board therefore accepts this case 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 that 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 the hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 17th day of September 1998 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