

ILLINOIS POLLUTION CONTROL BOARD  
October 15, 1998

JAMES R. AND LUCILLE J. METZ,            )  
  )  
      Complainants,                            )  
  )  
      v.    )     PCB 98-18  
  )     (Enforcement - Citizens, Noise)  
UNITED STATES POSTAL SERVICE            )  
AND BRADLEY REAL ESTATE,                )  
  )  
      Respondent.                             )

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

On July 18, 1997, the complainants, James and Lucille Metz (Metzes), filed a complaint against respondent, the United States Postal Service (USPS) alleging violations of Sections 23 and 24 of the Environmental Protection Act (Act) (415 ILCS 5/23 and 24) and Sections 900.102 and 901.102 of the Board's regulations. 35 Ill. Adm. Code 900.102 and 901.102. The allegations arise from a U.S. Postal facility located at 1927 E. Sangamon Avenue, Springfield, Illinois. On August 5, 1998, the Metzes filed a motion for leave to file an amended complaint seeking to add respondents Bradley Real Estate (Bradley) as owners of the property. The amended complaint realleges the violations in the July 18, 1997 complaint. On August 20, 1998, the USPS filed a motion to dismiss (USPS Mot.) the amended complaint asserting that the complaint is frivolous because it is barred by sovereign immunity. On September 3, 1998, Bradley filed a motion (B.Mot.) requesting leave to file *instanter* a motion to dismiss and the motion to dismiss. The motion for leave to file *instanter* is granted. The Metzes filed a response to the USPS motion on September 2 (9/2 res.) along with a motion to file *instanter* which is granted. On September 10, 1998, the Metzes responded to the Bradley motion (9/10 res.).

The following discussion will first address the USPS's motion to dismiss and then discuss the motion by Bradley. Based on the arguments presented in the motions and responses, the Board finds that sovereign immunity has been waived under the "sue and be sued" clause at 39 U.S.C. 401 and that the complaint against Bradley is neither duplicitous or frivolous. Therefore, the motions to dismiss are denied and this matter shall proceed to hearing on the amended complaint.

RELEVANT STATUTES

Section 23 of the Act provides:

The General Assembly finds that excessive noise endangers physical and emotional health and well-being, interferes with legitimate business and recreational activities, increases construction costs, depresses property values, offends the senses, creates

public nuisances, and in other respects reduces the quality of our environment. It is the purpose of this Title to prevent noise which creates a public nuisance.

Section 24 of 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.

Section 4 of the Noise Control Act (42 U.S.C. 4903(b)) (Noise Control Act) provides:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government- - (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the emission of noise, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements.

39 U.S.C. 401 provides in pertinent part:

The Postal Service shall have the following general powers:

(1) to sue and be sued in its official name;

\* \* \*

## USPS MOTION TO DISMISS

### USPS Arguments

The USPS presents three arguments related to sovereign immunity in support of its motion to dismiss. Those arguments are, first, that although federal facilities operating within the state may be subject to substantive pollution standards, federal facilities are not subject to the procedural requirements imposed by the state for noise pollution control. USPS Mot. at 1. Second, the USPS argues that the public nuisance noise prohibition of the Act fails to establish “requirements” with which the USPS must comply pursuant to Section 4 of the Noise Control Act. USPS Mot. at 10. Finally, the USPS argues that the Noise Control Act has no provisions for citizens’ suits to enforce a federal entity’s duty to comply with state requirements. USPS Mot. at 15.

### Federal Facilities Are Not Subject To Procedural Requirements Imposed For Noise Pollution Control.

USPS argues that the federal government has not waived its sovereign immunity under the Noise Control Act for enforcement of procedural requirements by Illinois. Mot. at 18. USPS cites to the United States Supreme Court (Supreme Court) decision in Hancock v. Train,

426 U.S. 167 (1976) (Hancock) in which the Supreme Court interpreted Section 118 of the Clean Air Act (42 U.S.C. 1857f). USPS Mot. at 3-4. In Hancock, the Supreme Court interpreted language substantially similar to Section 4 of the Noise Control Act (USPS Mot. at 3-4) and found that Kentucky could not require the federal facilities within the state to obtain permits under state law. More broadly the Supreme Court stated:

Contrary to Kentucky's contention that Congress necessarily intended to subject federal facilities to the enforcement mechanisms of the state implementation plans, our study of the Clean Air Act not only discloses no clear declaration or implication of congressional intention to submit federal installations to that degree of state regulation and control but also reveals significant indications that in preserving a State's 'primary responsibility for assuring air quality within [its] entire geographic area' the Congress did not intend to extend that responsibility by subjecting federal installations to such authority. Hancock, 426 U.S. at 184.

USPS argues that after the decision in Hancock, federal courts uniformly acknowledged that federal facilities were not subject to State administrative authority for the enforcement of substantive pollution control requirements. Metropolitan Sanitary District v. U.S. Department of Navy, 722 F.Supp. 1565, 1570-71 (N.D. Ill. 1989); USPS Mot. at 5. Congress responded to Hancock by rewriting sections of the Clean Air Act, the Resource Conservation and Recovery Act (42 U.S.C. 6961) and the Clean Water Act (33 U.S.C. 1323) to reverse the decision. USPS Mot. at 6-7. USPS argues that Congress legislatively overturned Hancock by adding additional language reversing the outcome of the Hancock holding that left states "powerless to enforce their pollution laws against federal facilities through state administrative proceedings or orders." *Id.* USPS notes that it is "significant" that Congress did not amend the language of the Noise Control Act in a similar manner; "thus indicating Congress' intent to let the rule of law as enunciated by the Supreme Court of the United States in Hancock v. Train to remain applicable law insofar as the Noise Control Act was concerned." USPS Mot. at 7.

The Public Nuisance Noise Prohibition of the Act Fails to Establish "Requirements" With Which the USPS Must Comply Pursuant to Section 4 of the Noise Control Act (42 U.S.C. 4903(b)).

USPS argues that as the standard for whether or not there is noise pollution is one of "unreasonable interference," the Act does not set "State. . . requirements" with which USPS must comply pursuant to Section 4 of the Noise Control Act. USPS maintains that because "reasonableness" of the noise source is determined by using the factors set forth in Section 33(c) of the Act, the determination must be made by individualized analysis of the respondent's activity and emissions. USPS Mot. at 11. This individualized analysis to set standards does not embody "State . . . requirements" as contemplated by Section 4 of the Noise Control Act. USPS Mot. at 12.

USPS argues that the Illinois scheme for the control and abatement of noise "conflicts with the type of legal control contemplated by the statutory term 'requirement' in the Noise

Control Act.” USPS Mot. at 12. USPS maintains that the type of legal control relied upon by Congress in “requirements” refers to emission standards or emission requirements that constitute precise standards of uniform application. Romero-Barcelo v. Brown, 643 F.2d 835, (1st Cir. 1981) (Romero), rev’d on other grounds *sub nom.*, Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982); USPS Mot. at 12. In Romero, the First Circuit examined Puerto Rico’s statutory scheme for noise enforcement. USPS Mot. at 13. Puerto Rico maintained that activities at the Navy’s training center “unreasonably interfered with the health and welfare” of residents. *Id.* The First Circuit construed the meaning of “requirements” in the Noise Control Act as signifying precise standards capable of uniform application, finding that the nuisance statute of Puerto Rico did not constitute the type of “requirements” the Navy must comply with under Section 4 of the Noise Control Act. USPS Mot. at 13.

USPS maintains that the enforcement scheme in Illinois is like that of Puerto Rico. USPS Mot. at 14. Based on the First Circuit’s decision in Romero, USPS argues that the Illinois statute does not comport with the narrow waiver of sovereign immunity in Section 4 of the Noise Control Act.

The Noise Control Act Has No Provisions For Citizens’ Suits To Enforce A Federal Entity’s Duty To Comply With State Requirements.

USPS asserts that even assuming that Illinois’ noise statute does include “State . . . requirements” with which USPS must comply, there is no Congressional authorization of a private cause of action to enforce state standards. USPS Mot. at 15. In support of this assertion, USPS argues that a careful reading of Section 12 of the Noise Control Act, which, is the citizen suit provision, discloses that Congress expressly created a private cause of action only with respect to the enforcement of federal noise control requirements. USPS argues that the First Circuit in Romero acknowledged that Section 12 of the Noise Control Act had no provision to enforce a federal entity’s duty to comply with state and local requirements regarding the control and abatement of environmental noise. USPS Mot. at 16. Therefore, USPS maintains that Section 12 does not waive sovereign immunity for enforcement of a federal entity’s duty to comply with state requirements by a citizen. USPS Mot. at 17.

Metzes Response

In response to the motion to dismiss, the Metzes argue that the USPS has participated in this proceeding for over a year including the serving of interrogatories on the Metzes. The Metzes maintain that the arguments raised in the motion to dismiss have not previously been raised by the USPS and the claim that the complaint is “frivolous is untrue and inflammatory.” 9/2 res. at 2.

### Discussion

The USPS as an independent establishment of the executive branch is entitled to sovereign immunity unless that immunity is waived by Congress. Loeffler v. Frank, Postmaster General of the United States, (Loeffler) 486 U.S. 549, 553-554. As noted in Loeffler, Congress has waived sovereign immunity for the USPS. The Postal Reorganization Act of 1970 (codified at 39 U.S.C. 401 *et seq.*) specifically granted the USPS the power “to sue and be sued in its official name.” 39 U.S.C. 401. Courts have long held that the “sue and be sued” waiver of sovereign immunity should be liberally construed and in fact the Supreme Court in FHA v. Burr, 309 U.S. 242, 245 (1940) stated, in part:

When Congress launched a governmental agency into the commercial world and endowed it with authority to ‘sue and be sued,’ that agency is not less amenable to judicial process than a private enterprise under like circumstance would be. FHA v. Burr, 309 U.S. 242, 245 (1940).

The Supreme Court reiterated its rule of liberal construction of the “sue and be sued” clause in several cases including: Franchise Tax Appeal Board of California v. USPS, (California v. USPS) 467 U.S. 512, 517-518; FDIC v. Meyer, (Meyer) 510 U.S. 471, 475; and Loeffler at 553.

Although the Supreme Court has determined that the “sue and be sued” clause should be broadly construed, the Supreme Court has found that there are exceptions to the broad waiver of sovereign immunity granted by a “sue and be sued” clause. The first exception is that an explicit expression by Congress that a waiver of sovereign immunity in a new cause of action is exclusive, limits the waiver of a “sue and be sued” clause. Loeffler at 561. And, second, a limitation of the “sue and be sued” clause can be implicit if there has been a:

clear showing that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the ‘sue and be sued’ clause in a narrow sense. FHA v. Burr, 309 U.S. 242, 245; Meyer at 479.

After a careful review of the case law and statutes, the Board finds that Congress intended neither an explicit nor an implicit limitation on the waiver of sovereign immunity granted under the “sue and be sued” clause. Therefore, the USPS may be sued under the Environmental Protection Act in Illinois and the Board has jurisdiction to hear this matter.

The Board finds that the USPS’s final two arguments regarding the “limitations” of the Noise Control Act on causes of action as discussed in Romero are without merit. In the case of Romero, the governmental entity involved was the Department of the Navy. The Department of the Navy does not have a “sue and be sued” provision in its enabling act.

Thus, any waiver of sovereign immunity applying to the Department of Navy must be found in the statutes which authorizes the suit. In the Romero case the enabling statute was the Noise Control Act. Therefore, the provisions of the Noise Control Act limited the liability of the Department of Navy.

However, in the case before the Board, the USPS is subject to a broad waiver of sovereign immunity pursuant to the “sue and be sued” clause. Therefore, the Board need not look to the provisions of the Noise Control Act or the Hancock decision for USPS’s liability limits since we have already found that it is the “sue and be sued” clause which subjects USPS to the Board’s jurisdiction and not the provisions of the Noise Control Act.

### BRADLEY MOTION TO DISMISS

#### Arguments

Bradley argues that the amended complaint should be dismissed because the Metzses make no allegation that Bradley violated any of the statutory or regulatory provisions cited. B.Mot. at 1. Further, Bradley maintains none of the specific allegations of noise are attributable to Bradley. B.Mot. at 2. Bradley also argues that none of the specific types of relief requested are demanded of Bradley and that none can be accomplished by Bradley since the premises are not in the control of Bradley. B.Mot. at 2. Finally, Bradley asserts that if the USPS is dismissed, it would be inequitable to proceed against Bradley. *Id.*

#### Metzes Response

The Metzses respond by asserting that Bradley owns the property and the remedial action recommended is construction of a fence which will become a part of the property. 9/10 res. at 1.

#### Discussion

Prior to proceeding to hearing on a complaint filed by a citizen, the Board must determine whether a complaint is duplicitous or frivolous. 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. An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. Citizens for a Better Environment v. Reynolds Metals Co. (May 17, 1973) PCB 73-173.

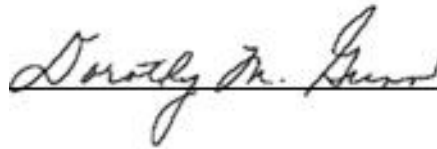
The amended complaint realleges the violations asserted in the original complaint. The only difference in the complaint is the addition of Bradley, who is the owner of the property. The Board denies Bradley’s motion to dismiss. The Board finds that the amended complaint does state a cause of action upon which relief can be granted. As owner of the property, Bradley may well be responsible for the alleged violations. Also, as owner of the property, Bradley may be uniquely suited to provide relief from the alleged violations. Therefore, the Board finds the amended complaint is neither duplicitous or frivolous at this time. The Board also notes that the caption has been amended to add Bradley Real Estate to the caption.

CONCLUSION

The Board accepts the amended complaint and directs that this matter proceed to hearing. Pursuant to Congress's broad waiver of sovereign immunity as to the USPS, the USPS is subject to the Board's jurisdiction. Further, the amended complaint does state a cause of action upon which relief may be granted as to both respondents. Therefore, the amended complaint is neither duplicitous or frivolous.

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 15th day of October 1998 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