ILLINOIS POLLUTION CONTROL BOARD
November 19, 1998

SCOTT and SHELLY BEHRMANN,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 98-84
	)	(Enforcement - Noise, Citizens)
OKAWVILLE FARMERS ELEVATOR - ST. LIBORY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Yi):

This matter is before the Board on respondent's September 28, 1998 motion to strike or dismiss the third amended complaint (complaint). On December 11, 1997, the Board received a citizen's enforcement complaint filed by Scott and Shelly Behrmann (Behrmanns). The Board denied Okawville Farmers Elevator - St. Libory's (Farmers Elevator) first motion to dismiss on March 19, 1998, and ordered this matter to proceed to hearing. On April 2, 1998, the Board accepted the Behrmanns' first amended complaint. On June 4, 1998, the Board accepted the Behrmanns' second amended complaint. On July 8, 1998, the Board denied Farmers Elevator's motion to dismiss the second amended complaint. On September 3, 1998, the Board accepted the Behrmanns' third amended complaint. As noted, Farmers Elevator filed the instant motion to dismiss on September 28, 1998. The Behrmanns filed their response on October 6, 1998.

MOTION TO DISMISS

In its motion, Farmers Elevator asserts a number of reasons to dismiss the complaint. First, the motion notes that complainant has recently filed a complaint in the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois. The respondents argue that the State Court complaint seeks substantially the same remedies as requested in the complaint before the Board. Mot. at 1.[1]

The motion to dismiss next asserts that the complaint contains conclusory and prejudicial allegations that Farmers Elevator's grain storage facility is an industrial business, and that the Behrmanns' land is residential for the purposes of the Illinois Environmental Protection Act (Act). 415 ILCS 5/1 *et seq*. (1996). Mot. at 2. Farmers Elevator asserts that the Behrmanns' land should be classified as Class C, not Class A land for the purposes of the Act because it contains a hog breeding operation.

[1] References to the motion to dismiss will be cited as Mot. at __. References to the response to the motion to dismiss will be cited as Resp. at __.

Farmers Elevator argues that the complaint makes no allegation of fact as to the social and economic value of the suitability or unsuitability of the alleged pollution source, or the technical practicability or economic reasonableness of reducing or eliminating any alleged emissions from the source. Mot. at 2. Farmers Elevator cites cases stating that such allegations are required by law. The respondent next asserts that the Behrmanns detailed instruction to the Board regarding what civil penalties to assess is frivolous, prejudicial, and should be stricken from the complaint.

The respondent cites the Illinois Farm Nuisance Act (740 ILCS 70/3 (1996)) which defines "farm" as being any parcel of land with an agricultural use, and provides that no farm shall become a private or public nuisance because of any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year if the farm was not a nuisance at the time it began operations, and the nuisance is not resulting from negligent or improper operation of any farm appurtenances. Mot. at 3. Farmers Elevator argues that the complaint requests relief based on nuisance actions as the result of dust and noise from respondent's grain storage operation, and that Farmers Elevator's operations has not changed since 1962. Thus, posits Farmers Elevator, the nuisance counts in the complaint should be dismissed. *Id*.

Finally, Farmer's Elevator asserts that the requested attorney fees, expert witness fees, and the assessment of a bond against respondent are remedies not available to the complainants. The respondent moves the Board to strike the complaint as being duplicitous, or alternatively, to strike those portions which are frivolous and insufficient as a matter of administrative law.

RESPONSE TO MOTION TO DISMISS

In response, the Behrmanns ask that the motion to dismiss the complaint be denied. The Behrmanns first state that the motion to dismiss was filed well outside the 14 day response limit set by the Board. Thus, assert the Behrmanns, the motion should not be considered, and should be stricken.

The Behrmanns next address the assertion that the complaint is duplicative. The Behrmanns note that the State Court complaint includes three counts: nuisance, trespass, and proceedings to prevent violation of the St. Libory Zoning Code. Resp. at 2-3. The Behrmanns argue that the State Court complaint does not allege noise or dust pollution, or violations of the Act. The Behrmanns conclude that the allegations and the relief sought in the State Court complaint are different and distinct than those sought in the complaint before the Board, and attach a copy of the first amended State Court complaint to their response as exhibit A.

The Behrmanns contend that Farmers Elevator's attempts to raise factual issues concerning land use classification is improper, and, regardless, reaches invalid conclusions. Resp. at 4. The Behrmanns assert that their land use is residential, that their lot contains no hog breeding operation, and that the only animal contained on their property is a small beagle.

Resp. at 5. The Behrmanns note that a small hog lot did exist on the south side of respondent's property, but that such lot is no longer in use. *Id*.

Next, the Behrmanns maintain that the cases cited by Farmers Elevator regarding the social and economic value of the alleged pollution source, or the technical practicability or economic reasonableness of reducing or eliminating any alleged emissions from the source were not fully explained by the respondent. The Behrmanns contend the cases also state that the Board should take into consideration the character and degree of injury to, or interference with the protection of the health, general welfare, and physical property of the people. Resp. at 5. The Behrmanns note that Farmers Elevator's refusal to utilize the appropriate technology to reduce the great amount of dust and noise it creates is baffling. *Id*.

The Behrmanns disagree with respondent's characterization of their grain storage facility as a "farm." The Behrmanns also state that Farmers Elevator has dramatically changed the use of its property, and that from the evidence presented through discovery and at the hearing in this matter, it will become blatantly clear to the Board that the respondent is operating its grain elevator in a negligent and improper manner. Resp. at 6. The Behrmanns dispute that respondent's property has been used as a grain storage business since 1962, and assert that respondent began its industrial grain elevator business in September of 1994. Resp. at 7.

Finally, the Behrmanns maintain that Farmers Elevator's continued assertion of inaccurate statements to the Board is an attempt to mislead the Board and delay the final hearing of this matter. The Behrmanns state that the respondent continues to operate its business in total disregard of complainant's physical and emotional health and well-being, and is depriving complainants of sleep at night and of the use and enjoyment of their property.

DISCUSSION

The motion to dismiss was not timely filed. However, while acknowledging complainant's assertion that respondent is attempting to delay this proceeding, the Board notes that complainant has itself amended its complaint three times, and is partially responsible for any delay that has occurred. Thus, the Board accepts respondent's motion to dismiss.

A complaint should not be dismissed unless it clearly appears that no set of facts could be proven that would entitle a complainant to relief. The Board will take all well-pleaded allegations in the complaint as true. Gorden Krautsack v. Bhogilal Patel, Subhas Patel, and Electronic Interconnect, Inc. (June 15, 1995), PCB 95-143; Miehle v. Chicago Bridge and Iron Co. (November 4, 1993), PCB 93-150.

An action before the Board is duplicative if the matter is identical or substantially similar to one brought in another forum. Brandle v. Ropp, (June 13, 1985), PCB 85-68. However, an action before the Board is not duplicative to an action involving the same parties in a different forum if the second action is based on statues and legal theories other than the Act. Lake County Forest Preserve District v. Ostro, (July 30, 1992), PCB 92-80. Dayton Hudson v. Cardinal Industries, Inc., and Daniel E. Cardinal, (August 21, 1997) PCB 97-134.

The State Court complaint is based on legal theories and statutes that are separate and distinct from those in the complaint before the Board. The State Court complaint is based on the common law theories of trespass and nuisance, and the St. Libory Zoning Code. The complaint before the Board is based solely on the Act, and the regulations promulgated thereunder. The Board finds that the matter before the Board is not duplicative, and denies the motion in this regard.

The Board next considers the classification of the land involved in this matter. The parties disagree on the classification of each parcel of property in question. The classification of the land cannot be decided on the evidence currently available, and is an issue of fact to be determined at hearing. For the purpose of the motion to dismiss, however, the allegations in the third amended complaint are well plead, and must be accepted as true. Thus, this portion of the motion to dismiss must be denied.

The Board finds that the complaint makes sufficient allegations of fact to proceed to hearing. Respondent has argued that because complainant did not allege certain factors as listed in Section 33(c) of the Act, 415 ILCS 5/33(c) (1996), that the complaint is deficient. This is not accurate. When making a determination, the Board must consider each factor listed in Section 33(c) that bears upon the reasonableness of an emission. However, the complainant does not need to submit evidence on each factor, or prevail at hearing on each factor, to meet their burden. See, *e.g.*, Processing & Books, Inc. v. Pollution control Board, 64 Ill. 2d 68, 76, 351 N.E.2d 865, 869 (1976).

The Board finds that the Illinois Farm Nuisance Act (Farm Act) does not apply to this matter. The Farm Act concerns nuisance actions. As noted, the complaint before the Board concerns alleged violations of the Act. These violations require the Board to determine, *inter alia*, whether noise or air pollution has occurred. That the facts supporting such a finding may also support a nuisance action is immaterial. Because there are not nuisance counts before the Board, respondent's request that such counts be stricken is moot, and denied.

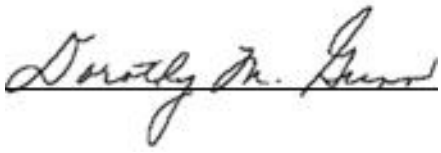
Finally, the Board considers Farmers Elevator assertion that the requested attorney fees, expert witness fees, and the assessment of a bond against respondent are remedies not available to the complainants. The Behrmanns did not respond to this argument. The Board finds in favor of Farmers Elevator in part. Attorney fees and expert witness fees are not available to a citizen complainant. Dayton Hudson (August 21, 1997) PCB 97-134. Such costs and fees are allowed by Section 42(f) of the Act, but only when the Attorney General or State's Attorney prevails in an enforcement action brought on the behalf of the People of the State of Illinois. See 415 ILCS 5/42(f) (1996). Accordingly, the Board strikes that portion of the request for relief seeking attorneys fees and expert witness fees. The Board does not, however, strike the request for an assessment of a bond against respondent. This is an appropriate request for relief pursuant to Section 33(b) of the Act. 415 ILCS 5/33(b) (1996).

CONCLUSION

The request for relief seeking attorney fees and expert witness fees is stricken from the complaint. The remainder of Farmers Elevator's motion to dismiss is denied. The parties are directed to proceed to hearing with all due expediency.

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 19th day of November 1998 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board