ILLINOIS POLLUTION CONTROL BOARD
March 1, 2006

DALE L. STANHIBEL,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 07-17
	)	(Citizens Enforcement – Air, Noise)
TOM HALAT d/b/a TOM'S VEGETABLE MARKET,	)	
	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by A.S. Moore):

The respondent, Tom Halat d/b/a/ Tom's Vegetable Market (Halat), seeks to dismiss a citizens air and noise enforcement complaint filed by Dale L. Stanhibel. Specifically, Halat claims that the complaint against him is barred by an affirmative defense. In the alternative, Halat seeks to dismiss the complaint or to have judgment on the pleadings entered in his favor on the basis that Stanhibel's complaint is frivolous under the Board's procedural regulations.

For the reasons described below, the Board denies Halat's motion for dismissal on the basis of the claimed affirmative defense. Also for the reasons described below, the Board denies Halat's alternative motion for dismissal or for judgment on the pleadings on the basis that Stanhibel's complaint is frivolous. The Board finds that Stanhibel's complaint is neither frivolous nor duplicative, accepts the complaint for hearing, and directs the hearing officer to proceed expeditiously to hearing.

PROCEDURAL BACKGROUND

On September 18, 2006, Stanhibel filed a complaint (Comp.) against Halat. *See* 415 ILCS 5/31(d) (2004); 35 Ill. Adm. Code 103.204. Stanhibel alleges that Halat violated Section 24 of the Environmental Protection Act (Act) (415 ILCS 5/24 (2004)) and section 900.102 of the Board's noise regulations (35 Ill. Adm. Code 900.102).

In an order dated November 2, 2007, the Board directed Stanhibel to file by Monday, November 27, 2006, proof of service of the complaint upon Halat. On November 8, 2006, Stanhibel timely filed the certified mail receipt showing service upon Halat on September 19, 2006. *See* 35 Ill. Adm. Code 101.300(b)(2).

On December 1, 2006, Halat filed a motion to vacate any possible default, to extend time to respond to the complaint, and for leave to file a motion to dismiss (Mot.). Halat stated in his motion that Stanhibel failed to attach to the complaint a notice required by the Board's procedural rules. Mot. at 1, citing 35 Ill. Adm. Code 103.204(f). Halat further stated that, as a non-attorney, he "was unaware of the requirements to respond or otherwise plead to the

Complaint." *Id*. Reporting that he had obtained counsel, Halat sought leave to file a motion to dismiss on the basis that "there is an affirmative matter that negates the legal effect of the claim." Mot. at 2, citing 735 ILCS 5/2-619(a), 35 Ill. Adm. Code 101.500, 101.506.

In an order dated December 7, 2006, the Board noted that Stanhibel failed to include in his complaint language required by 35 Ill. Adm. Code 103.204(f), which addresses answering a complaint. *See* Comp. In the December 7, 2006 order, the Board granted Halat's motion for leave to file a motion to dismiss and directed Halat to file that motion by January 8, 2007. The Board also stated in that order that, because service of the complaint did not fully comply with the Board's procedural rules, the Board would accept a motion to dismiss filed by January 8, 2007, as a timely motion. *Id*.; *see* 35 Ill. Adm. Code 103.204(f). Having granted Halat's motion for leave to file the motion to dismiss, the Board denied as unnecessary Halat's motion to extend time to respond to the complaint. The Board also denied Halat's motion to vacate any possible default as moot. Finally, the Board reserved ruling on whether the complaint is frivolous or duplicative and whether to accept the complaint for hearing. *See* 35 Ill. Adm. Code 103.212(a).

On January 9, 2007, Halat filed and the Board received a motion to dismiss or, in the alternative, motion for judgment on the pleadings (Mot. to Dis.), accompanied by the affidavit of the respondent. Mr. Stanhibel has filed no response to the motion to dismiss.

MOTION TO DISMISS: AFFIRMATIVE DEFENSE ALLEGED

Halat's Arguments

Halat notes that paragraph six of the complaint alleges that "(noise - air) air - the release of propane in the air 'noise' - the firing off of four propane cannons 9:30 AM to 5:30 PM in Tom's Halat south lot 10214 Algonquin Rd Huntley, IL 60142." Mot. to Dis. at 1, citing Comp. at 3 (¶6). Halat further notes that paragraph seven of the complaint alleges that Halat fired the propane cannons "Aug. - Sept. - Oct. - 005 - late summer early fall Aug. - Sept. - Oct. - 2006 - late summer early fall seven day's week from - dawn - to - dusk every few seconds - still continuing as of 9/14/06." Mot. to Dis. at 1, citing Comp. at 3 (¶7).

Halat argues that the Code of Civil Procedure allows a motion to dismiss when "the claim asserted against defendant is barred by other affirmative matter avoiding the illegal effect of or defeating the claim." Mot. Dismiss at 1, citing 735 ILCS 5/2-619(a)(9) (2004) and 35 Ill. Adm. Code 101.500 (allowing Board to entertain motions permissible under legal authorities including Illinois Code of Civil Procedure). Specifically, Halat claims that he obtained from the Illinois Department of Natural Resources (DNR) nuisance animal removal permits allowing the use of propane cannons to remove redwing black birds from his property. Mot. to Dis. at 2; Mot. to Dis., Exh. A (Halat affidavit). Halat further claims that "[a]ll permits obtained were in full force and effect for all dates and times in which propane cannons were utilized and propane cannons were specifically authorized as a device able to be utilized under all permits." Mot. to Dis., Exh. A.

Halat argues that DNR has exercised its authority under the Wildlife Code (520 ILCS 5/1.1 *et seq*. (2004)), which was enacted in 1988, "to issue permits specifying the means and

methods by which wildlife may be removed." Mot. to Dis. at 2. Halat claims that, because the Act "is a more general statute" than the Wildlife Code, and because the Act predates the Wildlife Code, any conflict between the two statutes must be resolved by granting precedence to the permit issued by DNR over the provisions of the Act. *Id*., citing Sierra Club v. Kenney, 88 Ill. 2d 110, 429 N.E.2d 1214 (1981) and Johnson v. State Electoral Bd., *et al*., 53 Ill. 2d 256, 290 N.E.2d 886 (1972).

Board Analysis

The Board first notes that the complainant has filed no response to Halat's motion to dismiss the complaint on the basis of the claimed affirmative defense. The Board's procedural rules provide that, if a party does not file a response to a motion, "the party will be deemed to have waived objection to the granting of the motion." 35 Ill. Adm. Code 101.500(d). However, "the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion." *Id*. Because the Board is not bound by Stanhibel's failure to respond to the motion to dismiss, the Board below will address the substance of the motion and Halat's claimed affirmative defense.

Halat argues that the nuisance animal removal permit issued to him by DNR defeats the claim that he has violated the Act and the Board's noise regulations. Yet the Supreme Court of Illinois has stated that "[t]he grant of a permit does not insulate violators of the Act or give them a license to pollute. . . . One receiving a permit for an activity that allegedly violates the law can be charged with causing *or threatening to cause* such a violation in a citizen complaint." Landfill, Inc. v. PCB, 387 N.E. 2d 258, 265 (1978) (emphasis in original) (citation omitted). Similarly, the Appellate Court of Illinois has stated that the issuance of a permit "only prevents prosecution for failure to possess a permit; the permit is not a grant of any right to violate obligations otherwise imposed by law." Grigoleit Co. v. PCB, 613 N.E.2d 371, 375-76 (Ill. App. 4th Dist. 1993). Finally, the Board itself has determined that "[c]ompliance with a permit is never a defense against violation of the Act or of a regulation promulgated pursuant to the Act." West Suburban Recycling and Energy Center v. IEPA, PCB 95-119, 95-125 (cons.), slip op. at 22 (Oct. 17, 1996) (citations omitted).

Based on the clear weight of these precedents, the Board can only conclude that the animal nuisance removal permits issued to Halat by DNR do not defeat the claims raised in the complaint. Those permits do not require dismissal of the complaint. Accordingly, Halat's motion to dismiss on the basis of the claimed affirmative defense is denied. Below, the Board turns to Halat's alternative basis for his motion to dismiss the complaint.

MOTION TO DISMISS: FRIVOLOUSNESS ALLEGED

Halat's Arguments

Halat first notes that the Board under its own procedural rules may dismiss a complaint as frivolous on the timely motion of a respondent. 35 Ill. Adm. Code 103.212(b); *see* 35 Ill. Adm. Code 101.202 (defining "frivolous"). In addition, Halat argues that the Board under the Code of Civil Procedure has the authority to dismiss when a pleading is "substantially insufficient in law,

or that the action be dismissed, or that a pleading be made more definite and certain in a specified manner, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated mis-joined parties be dismissed, and so forth." Mot. to Dis. at 2., citing 735 ILCS 5/2-615 (2004) (motions with respect to pleadings).

As a preliminary matter, Halat claims that the complaint has not named the correct respondent. Mot. to Dis. at 3; Mot. to Dis., Exh. A. Halat claims that no business entity named "Tom's Vegetable Market" exists at the address listed in the complaint. Mot. to Dis. at 3. Instead, Halat claims that he is the President of Tom's Farm Market and Greenhouses, Inc. *Id*.

Substantively, Halat makes a number of arguments that the complaint is substantially insufficient in law (*see* 735 ILCS 5/2-615 (2004)) and frivolous (*see* 35 Ill. Adm. Code 101.202). First, Halat argues that Stanhibel "fails the allege how the release of propane in the air, even if release, creates air pollution." Mot. to Dis. at 3, citing 415 ILCS 5/24 (2004) and 35 Ill. Adm. Code 900.102 (Prohibition of Noise Pollution).

Second, Halat claims that the complaint makes inconsistent statements regarding the times at which the alleged noise from propane cannons occurred. Mot. to Dis. at 3. Halat notes that, in paragraph six, the complaint refers to noise occurring between 9:30 AM and 5:30 PM. Halat further notes that, in paragraph seven, the complaint refers to noise occurring from dawn to dusk from August to October. *Id*. Continuing, Halat suggests that the Board take judicial notice of the fact that these two statements are inconsistent because dawn precedes 9:30 AM and dusk falls later than 5:30 PM from August to October. *Id*. Halat then argues that, because the statements referring to these times were made under oath, the inconsistencies between them should lead the Board to nullify the allegations and reject the complaint. *Id*., citing Shipherd v. Field, 70 Ill. 438 (1873).

Third, Halat argues that "the complaint in this matter is too vague and does not state a cause of action because it fails to identify the specific acts by individuals and the specific dates on which those occurred, and the specific instance which caused a violation of the identified statutes." Mot. to Dis. at 3. Halat further argues that "[n]o specific conduct on Thomas C. Halat is personally alleged in the complaint." *Id*. Halat claims that the complaint presents no facts "alleging unreasonable interference with the enjoyment of the plaintiff's life or with any lawful business or activity of the plaintiff." *Id*., citing 415 ILCS 5/24 (2004). Halat notes that, in response to a request to describe any ill effects believed to have resulted from the alleged noise pollution, the complaint states "headache - nervous = my five year old beagle has to be sedated - I can't enjoy my own backyard or patio - the last two years - the noise and loud loud popping sound." Comp. at 4 (¶8). Halat argues that this statement "does not identify to whom any headache or nervousness has occurred or how the sound has caused the complainant to fail to be able to enjoy his backyard of patio for the last two years." Mot. to Dis. at 3-4. Halat concludes by arguing that the complaint does not meet "the standard required of a complaint to be comprehensible or based in fact or law to allow this Board to grant the relief requested to the complainant." Mot. Dismiss at 4.

Fourth, Halat argues that the complaint has not satisfactorily alleged a violation of the Board's noise regulations. Mot. to Dis. at 4, citing 35 Ill. Adm. Code 900.102. Specifically,

Halat argues that the complaint does not allege any emission of noise exceeding limits established by the Act or the regulations. Mot. to Dis. at 4.

Finally, Halat notes that, in response to a request to "[i]dentify any identical or substantially similar case you know of that is already pending before the Board in another forum against this respondent for the same alleged pollution," the complaint lists Stuart v. Fisher, PCB 02-164. Mot. to Dis. at 4. Halat argues that Stuart v. Fisher does not involve the respondent "and should be stricken from the complaint." *Id*.

Board Analysis

Again, the Board notes that Stanhibel has filed no response to Halat's motion to dismiss the complaint on the basis that is insufficient or frivolous. The Board's procedural rules provide that, if a party does not file a response to a motion, "the party will be deemed to have waived objection to the granting of the motion." 35 Ill. Adm. Code 101.500(d). However, "the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion." *Id*. Because the Board is not bound by Stanhibel's failure to respond to the motion to dismiss, the Board below will address the substance of the motion and Halat's claim that the complaint is insufficient or frivolous.

The Board first addresses Halat's preliminary claim that the complaint does not name the correct respondent. *See* Mot. to Dis. at 2. The Board's procedural rules specifically provide that "[m]isnomer of a party is not a ground for dismissal; the name of any party may be corrected at any time." 35 Ill. Adm. Code 103.202(c). The Board declines to find that the complaint is frivolous or to dismiss the complaint on this basis.

Second, the Board addresses Halat's argument that there is an inconsistency between a reference to the times of 9:30 AM and 5:30 PM in one paragraph of the complaint and a reference to the periods of dawn and dusk in another. *See* Mot. Dismiss at 3; Comp. at 3 (¶¶6-7). The Board has stated that "[a]mendments to pleadings to conform to the proof submitted are to be liberally allowed within the sound discretion of the hearing body." Knox v. Turris Coal Co. and AEI Resources, inc., PCB 00-140, slip op. at 6 (Jan. 9, 2003) (citations omitted). In People v. Petco Petroleum Co., PCB 05-66 (May 19, 2005), the Board stated that, although its procedural rules are silent on the issue of amending a complaint to make a correction, it could look to the Code of Civil Procedure for guidance. *Id*., citing 35 Ill. Adm. Code 101.100(b). The Code of Civil Procedure provides that "[a] pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs." 735 ILCS 5/2-616(c) (2004). Considering complainant's ability to seek to amend the complaint, Halat's claim that an inconsistency exists does not now require the Board to find that the complaint is frivolous or to dismiss it.

The Board next addresses Halat's third and fourth arguments that the complaint does not state a cause of action with sufficient specificity. *See* Mot. to Dis. at 3-4. The Board's procedural rules provide that a complaint must contain "[t]he dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violation of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense." 35 Ill. Adm. Code

103.204 (c)(2). The complaint alleges that, during the months of August, September, and October in both 2005 and 2006 at 10214 Algonquin Road in Huntley, the respondent fired propane cannons at regular intervals and caused loud popping sounds between 9:30 AM and 5:30 PM or between dawn and dusk in violation of section 24 of the Act and section 900.102 of the Board's noise regulations. Comp. at 2-4; *see* 415 ILCS 5/24 (2004) and 35 Ill. Adm. Code 900.102 . The complaint further alleges that these alleged violations caused a headache and nervousness, prevented the complainant from enjoying the use of his own patio and backyard in two years, and required the sedation of his five-year-old dog. Comp. at 4 (¶8). The Board cannot conclude that these allegations fall short of what is required by the procedural rules or that they fail reasonably to allow preparation of a defense. The Board therefore declines to find that the complaint is frivolous or to dismiss it on the basis that it not sufficiently specific.

Finally, the Board addresses Halat's argument that the case of Stuart v. Fisher, PCB 02-164, does not involve the respondent in this case and that reference to the case should be struck from the complaint. *See* Mot. to Dis. at 4. The Board notes that the form complaint requests that the complainant "[i]dentify any identical or substantially similar case you know of that is already pending before the Board or in another forum *against this respondent* for the same alleged pollution. Comp. at 4 (¶10) (emphasis added). Stuart v. Fisher does not involve this respondent, and citing the case does not respond to the request in the form complaint. However, the Board considers the reference to the case as mere surplusage and harmless error. In addition, the Board's orders and opinions in Stuart v. Fisher and other cases are materials of which the Board may take notice. *See* 35 Ill. Adm. Code 101.630. The Board therefore cannot agree with Halat that the reference to that case should be struck from the complaint.

Based on the analysis above, the Board cannot conclude that the complaint should be dismissed on the grounds stated. Halat's motion in the alternative of a judgment on the pleadings is therefore denied. Below, the Board determines below whether the complaint is frivolous or duplicative.

DUPLICATIVE/FRIVOLOUS DETERMINATION

Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2004); *see also* 35 Ill. Adm. Code 103.212(a). 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. 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." *Id.* The Board above determined that it would not dismiss the complaint on the basis of Halts' arguments that it is frivolous. Nothing before the Board indicates that the complaint is duplicative or frivolous. The Board finds that the complaint is neither duplicative nor frivolous and accepts the complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2004); 35 Ill. Adm. Code 103.212(a). The Board directs the hearing officer to proceed 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) (2004). Specifically, the Board considers the Section 33(c) factors first to determine what, if anything, to order the respondent to do to address the violation, 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 come into compliance.

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.

With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by the "lowest cost alternative for achieving compliance." The amended Section 42(h) also requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary of unreasonable financial hardship."

Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). An SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform." SEPs are also added as a new Section 42(h) factor, as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency." 415 ILCS 5/ 42(h)(6) (2004). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of non-compliance. A respondent establishing these criteria is entitled to a "reduction in the portion of the penalty that is not based on the economic benefit of non-compliance."

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 of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the

portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

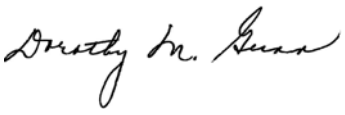
Under the Board's procedural rules, "[i]f the respondent timely filed a motion under Section 103.212(b) or 35 Ill. Adm. Code 101.506, the 60-day period to file an answer . . . will be stayed. The stay will begin when the motion is filed and end when the Board disposes of the motion." 35 Ill. Adm. Code 103.204(e). In an order dated December 7, 2006, the Board granted Halat's motion for leave to file a motion to dismiss and directed Halat to file that motion by January 8, 2007. *See* 35 Ill. Adm. Code 101.506. Because the original service of the complaint did not fully comply with the Board's procedural rules, the Board also stated in that order that it would accept a motion to dismiss filed by January 8, 2007, as a timely motion. Halat timely filed a motion to dismiss, which the Board denied in its entirety above. The Board's disposition of that motion ends the stay of Halat's 60-day deadline to answer the complaint. Accordingly, Halat is directed to file an answer on or before Monday, April 30, 2007.

CONCLUSION

The Board denies Halat's motion to dismiss based on a claimed affirmative defense and also denies Halat's alternative motion to dismiss on the basis that the complaint is frivolous. The Board directs Halat to answer the complaint on or before April 30, 2007.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 1, 2007, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board