ILLINOIS POLLUTION CONTROL BOARD
December 17, 2009

PETER ARENDOVICH	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 09-102
	)	(Enforcement – Citizen Noise)
ILLINOIS STATE TOLL HIGHWAY AUTHORITY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by G.L. Blankenship):

On April 28, 2009, Peter Arendovich (complainant) filed a complaint (Comp.) alleging that the Illinois State Toll Highway Authority (respondent) violates Section 900.102 of the Board's noise pollution regulations (35 Ill. Adm. Code 900.102). Comp. at 2. On July 15, 2009, respondent filed a motion to dismiss the complaint (Mot.) alleging the complaint is frivolous. On September 9, 2009, complainant timely responded to the motion by filing an amended complaint (Am.Comp.). On October 19, 2009, respondent filed a motion to dismiss the amended complaint (Mot.2) and on November 24, 2009, complainant responded (Resp.) to the motion to dismiss the amended complaint. For the reasons discussed below, the Board accepts the complaint and amended complaint for hearing and denies the motions to dismiss, in part. The Board grants the motions to dismiss in part by striking allegations of violations of the federal rules.

COMPLAINT AND AMENDED COMPLAINT

Complainant alleges that respondent violated Section 900.102 of the Board's noise regulations and 23 CFR Part 772.13(c) and 109(h). Comp. at 1, Am.Comp. at 1. Complainant alleges that respondent violated these provisions by failing to follow proper noise abatement procedures along I-355 in the area between 135th Street and Archer Avenue, especially along the 135th Street Bridge. Comp. at 1, Am.Comp. at 1-3. Complainant asks the Board to direct respondent to construct proper noise abatement barriers. Comp. at 3, Am.Comp. at 3.

MOTION TO DISMISS COMPLAINT

In its motion to dismiss, respondent argues that the complaint is frivolous because the complaint is a "request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." Mot. at 1, 7, citing 35 Ill. Adm. Code 101.202. Respondent details steps taken to alleviate noise emissions from the highway and argues that, because respondent's noise abatement is consistent with State and Federal law and exceeds certain criteria, the request for relief cannot be granted. Mot. at 7.

Respondent also argues that the complaint should be dismissed because the complaint alleges that the Board's decibel level (db(A)) requirements are being violated without specifying the requirements. Mot. at 1.

MOTION TO DISMISS AMENDED COMPLAINT

In the motion to dismiss the amended complaint, respondent incorporates the arguments from the motion to dismiss as those arguments relate to allegations in the amended complaint. Mot.2 at 1. Respondent asserts that the amended complaint sets forth a claim over which the Board lacks jurisdiction. *Id*. Specifically, respondent argues that the Board lacks authority to hear a claim under 23 CFR Part 772.13(c) and 109(h) as alleged in the amended complaint. Mot.2 at 2.

RESPONSE TO MOTION TO DISMISS AMENDED COMPLAINT

Complainant argues that the motion to dismiss the amended complaint is "solely based on legal technicalities, not addressing the specific cause for the complaint." Resp. at 1. Complainant argues that it has presented technical support by outlining the engineers' failure to follow prescribed guidelines and that the complaint is based on severe noise pollution at the complainant's property. *Id*.

DISCUSSION

The Board's authority to grant relief is enunciated in Section 33(a) of the Environmental Protection Act (Act) (415 ILCS 5/33(a) (2008)), which provides that the Board "shall issue and enter such final order, or make such final determinations, as it shall deem appropriate under the circumstances." Respondent has argued that further relief from any noise violation may not be appropriate or even feasible; however, respondent has cited no provision of the Act which would limit the Board's authority to grant such relief. The arguments presented by respondent are relevant when examining appropriate relief, if a violation is found, pursuant to Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2008)). Therefore, the Board finds that the complaint does request relief which the Board has the authority to grant.

As to respondent's argument that the complaint fails to cite specific requirements that are being violated, the Board finds that the amended complaint provides sufficient detail on the alleged violations to allow the respondent to prepare a defense. *See* 35 Ill. Adm. Code 103.204(c)(2). However, in the amended complaint, complainant alleges that respondent has violated certain provisions of the Federal Regulations. The Board agrees with respondent that the Board does not have the authority to enforce those provisions of Federal law. Therefore the Board finds that allegations relating to alleged violations of 23 CFR Part 772.13(c) and 109(h) are frivolous and will be struck.

The Board finds that the remainder of the complaint and amended complaint meet the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(c), (f). The Board therefore accepts the complaint and amended complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2008); 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 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 respondent to have admitted the allegation. 35 Ill. Adm. Code 103.204(d).

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) (2006). 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.

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."

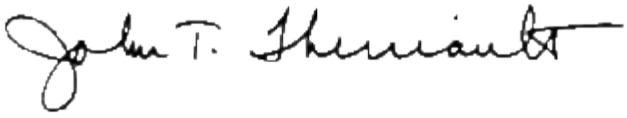
Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "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 (Section 42(h)(7)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency" (Section 42(h)(6)). 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.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 17, 2009, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board