ILLINOIS POLLUTION CONTROL BOARD
November 4, 2010

ROLF SCHILLING, PAM SCHILLING, and SUZANNE VENTURA,	)	
Complainants,	)	
v.	)	PCB 10-100
	)	(Citizens Enforcement - Water)
GARY D. HILL, VILLA LAND TRUST, an Illinois land trust, and PRAIRIE LIVING WEST, LLC,	)	
Respondents.	)	

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

On June 1, 2010, Rolf Schilling, Pam Schilling, and Suzanne Ventura (collectively, complainants) filed a citizen's water pollution complaint (Comp.). Complainants' named as respondents Gary D. Hill (Mr. Hill), Villa Land Trust (Villa), and Prairie Living West, LLC (Prairie) (collectively, respondents). The complaint alleges violations of the Environmental Protection Act (Act) (415 ILCS 5 (2008)) and a NPDES permit for the construction site (site) known as the "Prairie Living West" project (project) located at "900/955 Villa Court [in] Carbondale, Jackson County." Comp. at 2. Complainants allege that, from when construction commenced through the present, respondents have allowed construction materials and sediment to fill and pollute complainants' co-owned pond. On August 2, 2010, respondents filed a motion to dismiss the complaint as frivolous.

The Board denies respondents' motion to dismiss the complaint. The Board, under Section 31(d) of the Act, finds that the complaint is not duplicative or frivolous. 415 ILCS 5/31(d) (2008). The Board also denies respondents' motion to dismiss Mr. Hill and Villa as parties to this dispute. The reasoning behind the Board's ruling is explained below.

In this opinion, the Board first sets forth the procedural history of the case before describing the pleadings in detail. Next, the Board provides the applicable legal framework including a discussion of citizen's enforcement actions, procedures for determining whether a complaint is duplicative or frivolous, and the standards that apply to motions to strike or dismiss pleadings. The Board then rules on respondents' motion to dismiss and determines whether the complaint can be accepted for hearing.

PROCEDURAL HISTORY

On June 1, 2010, complainants filed their citizen's complaint. On June 28, 2010, respondents filed a motion for an extension of time (Mot. Ext.). In the motion, respondents

requested until July 31, 2010 to file an answer to the complaint. On July 1, 2010, complainants filed an objection to respondents' motion for an extension of time (Obj.).

On August 2, 2010, respondents filed a motion to dismiss the complaint (Mot. Dis.), alleging that the complaint is frivolous because it "fails to state a cause of action upon which the Board can grant relief." Mot. Dis. at 1 (*quoting* 35 Ill. Adm. Code 101.202)(internal quotations omitted). On August 19, 2010, complainants filed a motion for an extension of time to respond to respondents' motion to dismiss.

On September 2, 2010, the Board issued an order accepting respondents' motion to dismiss and granting complainants extended time to respond to the motion to dismiss until August 30, 2010. On September 3, 2010, complainants filed a motion for leave to file *instanter*. Complainants mistakenly filed the September 3, 2010 motion which did not include their response to the motion to dismiss. This mistake was corrected in a September 13, 2010 motion to withdraw the previously-filed motion and to file a response to the motion to dismiss *instanter*, along with complainants' response to the motion to dismiss. The Board received respondents' reply to complainants' response to the motion to dismiss (Reply) on October 6, 2010.[1] In the interest of administrative economy and as no material prejudice to the parties will result, the Board accepts as timely complainants' response to the motion to dismiss and accepts respondents' reply to complainants' response. *See* 35 Ill. Adm. Code 101.500(d), (e).

THE COMPLAINT

Complainants make a number of general allegations in their 10-page complaint, Comp. at 1-3, before setting forth detailed allegations regarding the two phases of respondents' construction activities. Comp. at 3-4. Complainants then set forth the permit conditions and provisions of the Act that respondents allegedly violated. Comp. at 5.

General Allegations

Complainants Rolf Schilling, Pam Schilling, and Suzanne Ventura filed a complaint against Mr. Hill, Villa, and Prairie alleging violations of respondents' NPDES permit and Sections 12(a), 12(b), 12(d), and 12(f) of the Act (415 ILCS 5/12(a), 12(b), 12(d), 12(f) (2008)). Comp. at 5. Further, complainants allege that respondents' two phases of construction activities violated the terms of the permit and the Act's provisions by contaminating complainants' co-owned pond with waste and construction materials. Comp. at 3, 4.

Rolf and Pam Schilling are husband and wife who own property adjacent to the site. Comp. at 2. Suzanne Ventura also owns property adjacent to the site. Comp. at 2. Together, complainants co-own a pond located between their properties and adjacent to the site. Comp. at 3. The complaint alleges that Mr. Hill is one hundred percent owner of Villa, an Illinois land trust, and is the managing member of Prairie. *Id.* The complaint also states that Mr. Hill

[1] Respondent's reply referenced their June 28, 2010 motion for an extension of time, where they were awaiting the results of an Agency survey. The reply presents the September 16, 2010 results of the survey. Reply at 1-2.

identified himself as the owner of the project in a Notice of Intent sent to the Environmental Protection Agency (Agency), which included a statement of "the intention of Mr. Hill to perform construction activities at the [site]." *Id.*

Complainants further believe that Prairie is acting as the operating entity for the project, which is a "planned unit development/skilled nursing facility." Comp. at 2. To date, complainants allege that the project is only partially completed, and more development is planned and underway. *Id.*

Phase I

According to the complaint, the project was divided into two different construction phases. Comp. at 2. Both construction phases occurred at the site. *Id.* The complaint states that Phase I occurred "during or about 2006." *Id.* Complainants allege that "during and about 2006 and 2007," the construction activities at the site caused substantial amounts of water, mud, "construction-site residues," eroded material, and other waste materials to enter into complainants' pond. Comp. at 3. As a result, complainants state, the pond became contaminated. *Id*. The complaint states that during Phase I of the construction activities, complainants objected to respondents. *Id*. Further, complainants allege that once respondents' construction activities for Phase I ended, the contamination of the pond also stopped. *Id.*

Phase II

According to the complaint, Phase II began "during or about 2009" and was still underway when the complaint was filed. Comp. at 2. In order to prepare for Phase II, the complaint continues, respondents applied for and obtained a NPDES permit from the Agency. Comp. at 3. The complaint attached both the statewide NPDES permit and a February 23, 2009 Agency letter explicitly stating that the permit covers Phase II construction activities. Comp. Exhibit B, Exhibit C. The complaint further alleges that after Phase II construction activities began, respondents "disregarded and abandoned their construction plans and plans to control and eliminate sediments and erosion from leaving the . . . site and polluting Complainants' property and the Pond," despite advice from their own engineers to do so. Comp. at 4.

Consequences Alleged

Complainants allege that as a result of the construction activities at the site and respondents' alleged failure to control erosion and stormwater discharge as mentioned above, complainants have suffered "severe" economic loss and the loss of their enjoyment of the pond. Comp. at 4. Specifically, the complaint claims that respondents' construction activities during both Phase I and Phase II caused "the substantial deposition of contaminating materials" into the pond. *Id*. This deposition, the complaint continues, has resulted in the following: muddied and turbid pond conditions, discolored pond water, the death and future death of numerous fish and other aquatic life within the pond, "serious and severe" flooding, the silting-in of the pond floor (which raised the floor "by measurable amounts"), and the inundation of complainants' properties. Comp. at 3, 4. Complainants claim that they expect costs in excess of $50,000 to "dredge and remove the contaminating materials placed within the [p]ond." Comp. at 4.

Relief Requested

Complainants ask the Board to order respondents to immediately cease and desist further violations and "any acts and omissions which cause or tend to cause such violations." Comp. at 5-6. Complainants also request that the Board impose an appropriate penalty on each respondent "for flagrant past noncompliance, to disgorge the economic benefits reaped by Respondents as a result of their noncompliance, and to encourage further compliance with all applicable environmental standards and requirements." *Id.*

MOTIONS

Below, the Board gives a detailed summary of the motions that followed the complaint, which includes: respondents' motion to dismiss, complainants' response to the motion to dismiss, and respondents' reply to complainants' response to the motion to dismiss.

Motion to Dismiss

Respondents move the Board to dismiss the complaint, as well as dismiss Villa and Mr. Hill from the case "entirely" (Mot. Dis. at 3) and to "award [r]espondents reasonable attorney's fees and costs." Mot. Dis. at 4.

Respondents claim that the complaint is frivolous, and therefore should be dismissed. Mot. Dis. at 1. Specifically, respondents argue that the complaint does not provide specific facts for which they can prepare a defense, such as "specific dates upon which the pollution occurred" and "any specific activities or sources of the pollution, other than 'construction activities.'" Mot. Dis. at 2. Respondents also claim that the complaint is vague where it describes "the type of pollution by referring to contaminants without describing in detail what they are." *Id.*

Respondents also dispute the alleged violation of Section 12(b) of the Act (415 ILCS 5/12(b) (2008)) stating that the complaint fails to show that "the facility is capable of causing or contributing to water pollution" and does not allege that respondents "are installing or operating any equipment that is causing water pollution." Mot. Dis. at 2. Respondents also dispute the alleged violation of Section 12(d) of the Act (415 ILCS 5/12(d) (2008)) claiming that the complaint focuses only on flooding and pollution of the pond, and therefore "does not list any contamination to 'land' that will create a water pollution hazard." Mot. Dis. at 3.

Additionally, respondents contest the alleged Section 12(f) violation (415 ILCS 5/12(f) (2008)) stating that the complaint does not allege a contamination of any water of the State. Mot. Dis. at 3. Respondents infer that the allegation of "the contamination of water in a privately owned pond" does not involve a water of the State. *Id.*

Finally, respondents argue that both Villa and Mr. Hill should be dismissed from the case. *Id*. Respondents state that Villa should be dismissed from the case because they allege that Villa "does not own the properties located at 900 and/or 955 Villa Court." *Id.* Mr. Hill should be dismissed from the case, respondents insist, because he "was not a managing member of

[Prairie]." *Id*. Respondents claim that a Westown Inc. is the sole member of Prairie. *Id.*; *see also* Mot. Dis. Exhibit B. Respondents argue in the alternative that even if Mr. Hill is a managing member of Prairie he, individually, is not personally liable for "a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." Mot. Dis. at 3 (*quoting* 805 ILCS 180/10-10(a)). Because Mr. Hill's "only other connection with this matter is allegedly as the beneficiary of [Villa]" and because "[Villa] does not own the property in question," respondents continue, Mr. Hill should be dismissed. *Id.*

Complainants' Response

Generally, complainants' response (Resp.) asks the Board to deny respondents' motion to dismiss in its entirety. Resp. at 9. The response alleges that respondents' motion "fail[s] to cite even a single case authority in support of their motion," and, on the contrary, "it is [respondents'] own motion, and not the Citizen's Complaint, which lacks any basis." Resp. at 1. Complainants argue that only "ultimate facts" are required for a sufficient complaint. Resp. at 1-2, 4.

Complainants initially note that respondents' motion to dismiss made no mention of the Agency survey that "formed the basis for Respondents' June 28, 2010 motion for extension of time." Resp. at 3. Complainants allege that this is a result of the respondents "simply seeking ways to delay substantive proceedings in this matter." *Id.*

Next, complainants maintain that their complaint provided specific dates when the pollution allegedly occurred, restating that the alleged violations occurred in 2006 and 2007 (Phase I), and in the spring of 2010 (Phase II). Resp. at 3. Complainants argue that respondents cite no case authority in their motion "because none exists requiring Complainants to specify particular days of the week, hours of the day, or other such specific evidence in support of their Citizen's Complaint." Resp. at 3-4. Instead, complainants claim, the dates listed in the complaint permit respondents to prepare a defense. *Id.*

Complainants additionally contend that the complaint provides sufficient facts for respondents to prepare a defense "particularly where, as here, the activities in question are subject to the requirements of an NPDES permit, for which Respondents applied and with which Respondents agreed to comply." Resp. at 4. Complainants also rebut respondents' allegations of vagueness by restating the alleged contaminants set forth in their complaint and noting that they all fall within the statutory definition of "contaminated" under 415 ILCS 5/3.165. *Id*.

Complainants then address respondents' assertion that the complaint's allegation of a violation of Section 12(b) of the Act fails to show that respondents' facility is capable of causing or contributing to water pollution, or that respondents are installing or operating equipment that is causing water pollution. Resp. at 5. Specifically, complainants argue that since they allege that respondents did in fact cause water pollution, they have established that the facility "certainly was capable of causing or contributing to water pollution." *Id.* (emphasis in original). Further, complainants insist that Section 12(b) of the Act does not require them to show that respondents are installing or operating equipment that is causing water pollution, but only that respondents are constructing or operating a facility "in violation of conditions imposed by a permit." *Id.*

Similarly, complainants rebut respondents' assertion that the complaint does not show land contamination that created a water pollution hazard. Resp. at 5-6. Here, complainants argue that the motion "overlooks the allegations of the Citizen's Complaint that clearly reveal that it was Respondents' construction activities upon the property (i.e., upon the land) . . . which has caused pollution to Complainants' property." *Id.* Complainants also reject as "completely without merit" respondents' allegation that a privately owned pond is not a water of the state, by asserting that the pond clearly falls within the Act's definition of "waters" (415 ILCS 5/3.550 (2008)). Resp. at 6.

Finally, complainants object to respondents' request that Villa and Mr. Hill be dismissed as parties of the case. With regard to Villa, complainants assert that Mr. Hill's affidavit "fails to set forth the basis of Mr. Hill's asserted personal knowledge concerning what [Villa] owns, and fails even to set forth information as to whether Mr. Hill knows who does own the property." Resp. at 7 (emphasis in original). In addition, the response attaches the affidavit of complainants' counsel, which includes an "Application for Permit or Construction Approval" that identifies Villa as Prairie's owner and Mr. Hill as Villa's owner. Resp. at 7, Exhibit 1. As a result of the apparent discrepancy between Mr. Hill's affidavit and complainants' counsel's affidavit, complainants state that "it is premature to conclude that [Villa] is not a proper party to this proceeding." Resp. at 7-8.

With regard to Mr. Hill, complainants assert that he is named as a party to the case because of his "personal and individual involvement, regardless of whether or not he has controlling or ownership interests in either of the two Respondents." Resp. at 8. Moreover, complainants argue, Mr. Hill also should not be dismissed "since there is no basis at this time for dismissal of Villa" and because "[Villa] is [Mr. Hill]." *Id.* (emphasis in original).

Respondents' Reply

In their reply, respondents' attach and ask the Board to incorporate a September 16, 2010 report from the Agency "to evidence and support their contention...that they are in full compliance of their NPDES permit and the [Act]." Reply at 1-2. Respondents also maintain that complainants' complaint should be dismissed for failing to state a cause of action. *Id.*

LEGAL FRAMEWORK

The Board first provides the legal framework for today's decision. In ruling on respondents' motion to dismiss and deciding whether to accept complainants' complaint for hearing, the Board discusses whether the complaint is duplicative or frivolous. Lastly, after denying the motion, the Board gives respondents' 60 days to file an answer and directs the parties to hearing.

Statutory Background

Section 31(d)(1) of the Act provides that:

> Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder . . . .Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing . . . . 415 ILCS 5/31(d)(1) (2008); *see also* 35 Ill. Adm. Code 103.212(a).

This type of enforcement action is referred to as a "citizen's enforcement proceeding," which the Board defines as "an enforcement action brought before the Board pursuant to Section 31(d) of the Act by any person who is not authorized to bring the action on behalf of the People of the State of Illinois." 35 Ill. Adm. Code 101.202. The complaint against respondents initiated a citizen's enforcement proceeding.

Section 31(c), referred to in the passage of Section 31(d)(1) quoted above, states that the complaint "shall specify the provision of the Act or the rule or regulation . . . under which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate the Act or such rule or regulation . . . ." 415 ILCS 5/31(c) (2008). The Act and the Board's procedural rules "provide for specificity in pleadings" (Rocke v. PCB, 78 Ill. App. 3d 476, 481, 397 N.E.2d 51, 55 (1st Dist. 1979)) and "the charges must be sufficiently clear and specific to allow preparation of a defense" (Lloyd A. Fry Roofing v. PCB, 20 Ill. App. 3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974)).

The Board's procedural rules codify the requirements for the contents of a complaint, including:

1) A reference to the provision of the Act and regulations that the respondents are alleged to be violating;

2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations 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.

3) A concise statement of the relief that the complainant seeks. 35 Ill. Adm. Code 103.204(c).

Duplicative/Frivolous Determination Procedures

Section 31(d) of the Environmental Protection Act (Act) (415 ILCS 5/31(d) (2008)) allows any person to file a complaint with the Board. Section 31(d) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2008); 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*.

Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b). Filing such a motion stays the 60-day period for filing an answer to the complaint. *Id*. "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).

Motions to Strike or Dismiss

The Board has often looked to Illinois civil practice law for guidance when considering motions to strike or dismiss pleadings. *See*, *e.g.*, People v. The Highlands, LLC, PCB 00-104, slip op. at 4 (Oct. 20, 2005); Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental, PCB 98-43, slip op. at 2 (Nov. 6, 1997); Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 3-4 (June 5, 1997). In ruling on a motion to strike or dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *E.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A,C&S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "To determine whether a cause of action has been stated, the entire pleading must be considered." LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist 1993), *citing* A,C&S, 131 Ill. 2d at 438 ("'the whole complaint must be considered, rather than taking a myopic view of a disconnected part[,]'" A,C&S *quoting* People ex rel. William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982)).

"[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003); *see also* Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303; Chicago Flood, 176 Ill. 2d at 189, 680 N.E.2d at 270 ("[T]he trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party."); People v. Peabody Coal Co., PCB 99-134, slip. op. at 1-2 (June 20, 2002); People v. Stein Steel Mills Services, Inc., PCB 02-1, slip op. at 1 (Nov. 15, 2001). The appellate court explained:

> It is impossible to formulate a simple methodology to make this determination, and therefore a flexible standard must be applied to the language of the pleadings with the aim of facilitating substantial justice between the parties. Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* Gonzalez v. Thorek Hospital & Medical Center, 143 Ill. 2d 28, 34, 570 N.E.2d 309 (1991)). The disposition of a motion to strike and dismiss for insufficiency of the pleadings is largely within the sound discretion of the court. Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* Groenings v. City of St. Charles, 215 Ill. App. 3d 295, 299, 574 N.E.2d 1316 (2nd Dist. 1991)).

Illinois requires fact-pleading, not the mere notice-pleading of federal practice. Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 518, 544 N.E.2d 733, 743 (1989); College

Hills Corp., 91 Ill. 2d at 145, 435 N.E.2d at 466-67. In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Grist Mill Confections, PCB 97-174, slip op. at 4 (*citing* Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303); *see also* College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466-67; City of Wood River, PCB 98-43, slip op. at 2 (petitioner is not required "to plead all facts specifically in the petition, but to set out ultimate facts which support his cause of action"). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988)). A complaint's failure to allege facts necessary to recover "may not be cured by liberal construction or argument." Condell Memorial Hospital, 119 Ill. 2d at 510, 520 N.E.2d at 43 (*quoting* People ex rel. Kucharski v. Loop Mortgage Co., 43 Ill. 2d 150, 152 (1969)). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 467.

"Despite the requirement of fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties." Grist Mill Confections, PCB 97-174, slip op. at 4 (*citing* Classic Hotels, Ltd. v. Lewis, 259 Ill. App. 3d 55, 60, 630 N.E. 2d 1167 (1st Dist. 1994)); *see also* College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466 ("In determining whether the complaint is adequate, pleadings are liberally construed. The aim is to see substantial justice done between the parties."). Fact-pleading does not require a complainant to set out its evidence: "'[t]o the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.'" People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981) (*quoting* Board of Education v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970)); City of Wood River, PCB 98-43, slip op. at 2. Moreover, "pleadings are not intended to create technical obstacles to reaching the merits of a case at trial; rather, their purpose is to facilitate the resolution of real and substantial controversies." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* College Hills, 91 Ill. 2d at 145).

BOARD ANALYSIS

Below, the Board determines whether the complaint is duplicative or frivolous while taking all of the complaint's allegations as true and drawing all reasonable inferences in favor of complainants.

Discussion

The Board finds that the complaint is neither duplicative nor frivolous. Specifically, the Board finds that the complaint presents the allegations with sufficient specificity for respondents to prepare their defense. Additionally, the Board finds that neither Villa nor Mr. Hill should be dismissed from the case.

Complaint not Duplicative

The Board has not identified any other cases either substantially similar or identical to this matter pending in other forums. In addition, respondents' motion to dismiss does not allege that any potentially duplicative matters are now pending. Based on the record currently before the Board, none of the allegations in the complaint are duplicative as to any respondent.

Complaint not Frivolous

The Board also finds that the complaint is not frivolous. As explained above, complainants are only required to set forth ultimate facts in their complaint, not "the evidentiary facts tending to prove such ultimate facts." People ex rel. Fahner, 88 Ill. 2d at 308, 430 N.E.2d at 1008-09. The complaint sufficiently alleges the ultimate facts necessary for respondents to prepare their defense.

In the motion to dismiss, respondents assert that the complaint "is void of specific dates upon which the pollution occurred" to complainants' property and pond and that the complaint "is vague when describing the type of pollution by referring to contaminants without describing in detail what they are." Mot. Dis. at 2. Respondents' motion also claims that the complaints' reference to construction activities "fails to enumerate any specific activities or sources of the pollution." *Id.*

The complaint alleges that the construction activities at the site for Phase I occurred "during or about 2006" and for Phase II "began during or about 2009, and continues through the date of the filing of this complaint." Comp. at 2. The complaint also specifies that the alleged pollution to complainants' pond and property from Phase I occurred "during or about 2006 and 2007" and from Phase II "on numerous instances during the spring of 2010." Comp. at 3-4. Moreover, the Notice of Intent that Mr. Hill provided to the Agency lists the approximate start date for Phase II as March 1, 2009. Comp. Exhibit A.

The complaint also lists the contaminants as "substantial amounts of water, mud, construction-site residues, eroded material, and other waste materials." Comp. at 3-4. The complaint lists the source of these contaminants as Phase I and II of respondents' "construction activities." *Id*. In addition, the Notice of Intent (NOI) and the General NPDES permit filed with the Agency and attached to the complaint explicitly apply to storm water discharges from "construction site activities." Comp. Exhibits A, B.

The Board finds that the complaint alleges facts in sufficient detail. In a citizen enforcement action, a complaint can adequately allege pollution without having to give exact dates and times upon which the contaminants caused pollution, and the exact names of the contaminants. Finley, et al. v. IFCO ICS-Chicago, Inc., PCB 02-208, slip op. at 12 (Aug. 8, 2002). Additionally, complainants would be hard pressed here to provide exact dates when the pollution occurred to their pond, where the time construction activities commenced and the time the contaminants entered complainants' property are likely to differ. Also, describing the pollution source as "construction activities" from a specific property is not too vague where the same description is used in the NOI and the NPDES permit. "It would be the rare complaint, citizen-initiated or otherwise, that could be pled in such detail." *Id.* Here, the complaint states

with adequate specificity the range of time which the alleged pollution occurred and the activities and contaminants that allegedly polluted their property.

Respondents maintain that the complaints' allegation of a Section 12(b) violation fails to show that "the facility is capable of causing or contributing to water pollution" and that respondents "are installing or operating any equipment that is causing water pollution." Mot. Dis. at 2. As noted above, however, complainants must only plead ultimate facts and are not required, in the complaint, to "plead all facts specifically in the petition." City of Wood River, PCB 98-43, slip op. at 2. The ultimate facts included in the complaint allege that respondents' construction activities caused the pollution to their pond, which infers that the construction activities are capable of causing water pollution. Comp. at 3, 4; Resp. at 5. Additionally, Section 12(b) of the Act prohibits operating a facility "in violation of any conditions imposed by such permit" (415 ILCS 5/12(b) (2008)), which is exactly what the complaint alleges. Comp. at 5.

Respondents argue that because the complaint does not show "any contamination to 'land' that will create a water pollution hazard," the alleged violation of Section 12(d) of the Act is insufficient. Mot. Dis. at 3. Complainants need only allege, however, that respondents' activities have "allowed the discharge of a contaminant into the environment...'so as to create a water pollution hazard.'" United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 24 (October 16, 2008) (*quoting* 415 ILCS 5/12(d) (2008)). A water pollution hazard "can be found although the actor does not yet threaten to cause pollution." *Id.* (*quoting* Tri-County Landfill Co. v. PCB, 41 Ill. App. 3d 249, 258, 353 N.E.2d 316, 324 (2nd Dist. 1976)). Complainants have met and exceeded this pleading requirement. The complaint clearly states that respondents' alleged "construction activities at the site resulted in substantial amounts of water, mud, construction-site residues, eroded material, and other waste materials to flow from the [project] onto property owned by Complainants, and into the [p]ond." Comp. at 3.

Respondents also allege that complainants' pond does not qualify as a "water of the State" under Section 12(f) of the Act, 415 ILCS 5/12(f) (2008). Mot. Dis. at 3. The Act defines "waters" to include "all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State." 415 ILCS 5/3.550 (2008). The question of whether a body of water is a "water of the State" is determined by the Board on a case-by-case basis, due to "the myriad of possible distinguishing factors" that arise when making such a determination. Central Ill. Public Service Co. v. EPA, PCB 73-384, slip op. at 11-12 (May 23, 1974); *see also* EPA v. James Jobe d/b/a Peacock Coal Co., PCB 80-214, slip op. at 4-6 (January 7, 1982). Based on the record currently before the Board, complainants' pond is a water of the State under Section 12(f) of the Act.

Finally, respondents insist that Mr. Hill and Villa be dismissed from the complaint entirely, because Villa allegedly does not own the properties named in this dispute, and Mr. Hill allegedly was not a managing member of Prairie and therefore is only connected to this matter through Villa (who, again, should also be dismissed). Mot. Dis. at 3. However, taking all the complaints' allegations as true, it is clear that there is at least a discrepancy as to who owns the site and as to Mr. Hill's level of involvement in the project. As a result, the Board denies respondents' request to dismiss Villa and Mr. Hill as parties of this case.

Hearing and Answer

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2006); 35 Ill. Adm. Code 103.212(a). Under the Board's procedural rules, a respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a 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 the respondent to have admitted the allegation. 35 Ill. Adm. Code 103.204(d). Respondents' filing of the motion to dismiss stayed the 60-day period for filing an answer to the complaint, which stay ends today with the Board's ruling on the motion. *See* 35 Ill. Adm. Code 103.204(e). Respondents therefore have 60 days from receipt of this order to file an answer to the complaint.

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."

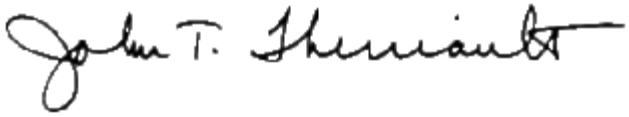
Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position 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.

CONCLUSION

The Board denies respondents' motion to dismiss complaint as frivolous. In addition, the Board denies respondents' request to dismiss Mr. Hill and Villa as parties to this dispute. Any answer to the complaint must be filed within 60 days after respondents' receive this order.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 4, 2010, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board