ILLINOIS POLLUTION CONTROL BOARD
April 7, 2011

SCOTT MAYER,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 11-22
	)	(Citizens Enforcement - Land)
LINCOLN PRAIRIE WATER COMPANY, KORTE & LUITJOHAN CONTRACTORS, INC., AND MILANO & GRUNLOH ENGINEERS, LLC,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by C.K. Zalewski):

In summary, the Board today accepts this citizen's land pollution complaint for hearing, denying each respondent's motion to dismiss. The Board, under Section 31(d) of the Environmental Protection Act (Act), 415 ILCS 5/31(d), finds that the allegations of the complaint are not duplicative or frivolous. But, the Board on its own motion strikes as frivolous that portion of the complaint's relief request seeking complainant's costs and attorney fees, as the Act does not authorize the Board to grant such relief. The reasoning behind the Board's ruling is explained below.

In this opinion, the Board first provides a brief procedural history of this action, followed by 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 sets forth the allegations of the complaint and the arguments presented in the motions to dismiss. The Board then rules on respondents' motions to dismiss and determines that the complaint can be accepted for hearing. Lastly, the Board gives respondents' 60 days to file an answer and directs the parties to hearing.

PROCEDURAL HISTORY

On November 15, 2010, Scott Mayer (Mayer or complainant) filed a citizen's land pollution complaint (Comp.). Complainant named as respondents Lincoln Prairie Water Company (Water Company), Korte & Luitjohan Contractors, Inc.(Contractors), and Milano & Grunloh Engineers, LLC (Engineers) (collectively, respondents). The complaint alleges violations of the Environmental Protection Act (Act) (415 ILCS 5 (2008)) by respondents at a 50- acre site in Shelby County on which Mayer grows crops. Comp. at 1-2.

Complainant alleges that in April 2005 he gave the Water Company an easement for installation, operation, and maintenance of underground water lines, and that during trenching

that spring, respondents shredded an underlying telephone line into pieces. Mayer alleges that the pieces were then open dumped by bulldozing them into an open trench, and that contamination resulted. Complainant seeks to recover from respondent $647,000 in costs to remediate the property, along with his litigation costs and attorney fees.

The Water Company filed a responsive motion December 13, 2010 (WC Mot.), and separate responsive motions were filed by the Contractors (Con. Mot.) and Engineers (Eng. Mot.) on December 15, 2010. Additionally, on December 15, 2010, the Contractors filed a memorandum in support of their motion (Memo.); the other respondents' motions specifically adopted and incorporated the Contractors' memorandum (WC Mot. at 4 (asserting its motion was "in essence identical" to that of the Engineers) and Eng. Mot. at 5). Each respondent moved to dismiss the complaint as being, within the meaning of Section 31(d) of the Act, 415 ILCS 5/31(d) (2008), "frivolous" (alleging that the materials were neither "waste" nor "open dumped")[1] and as "duplicative" of a pending 2008 action in the Shelby County circuit court.[2]

Mayer filed separate responses in opposition to each motion on January 3, 2011 (Resp. WC, Resp. Con., Resp. Eng.). In each, Mayer asserts that the complaint is not frivolous. Resp. WC at 1-3, Resp. Con. at 1-3, Resp. Eng. at 1-3. Mayer also asserts in each that the complaint was not duplicative, as that the complaint was filed with the Board pursuant to an October 26, 2010 ruling of the Shelby County Court vacating an order setting a jury trial in the case on February 21, 2011 and directing the filing of a complaint with the Board within 30 days. Resp. WC at 3-4, Resp. Con. at 3-4, Resp. Eng. at 4-5.

LEGAL FRAMEWORK

The Board first provides the legal framework for today's decision. In ruling on respondents' motions to dismiss and deciding whether to accept complainant's complaint for hearing, the Board discusses whether the complaint is duplicative or frivolous.

Statutory Background

Citizen's Enforcement Case Procedures

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

[1] These terms are discussed in detail later, at pp. 3-4.

[2] Scott Mayer and Rose Elaine Mayer v. Lincoln Prairie Water Company, Korte & Luitjohan Contractors, Inc., and Milano & Grunloh Engineers, LLC, No. 08-L-5 (Circuit Ct. for the 4th Jud. Dist. Shelby County) (filed Feb. 11, 2008). A copy of Mayer's initial complaint and third amended complaint were attached to the Contractors' motion as Exhibits A and B. (Con. Mot. Exh. A-B).

> 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).

The Act's Provisions Concerning Land Pollution

The complaint's allegations allege violations of Sections 21(a) and (p)(7) of the Act, and the motions to dismiss cite several definitions of the Act. Applicable provisions are set forth below.

Section 21 of the Act provides in pertinent part that

No person shall:

(a) Cause or allow the open dumping of any waste.

* * *

(p) In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

(7) deposition of:

(I) General construction of demolition debris as defined in Section 3.160(a) of this Act;

415 ILCS 5/ 21(a), (p) (2008).

Section 3.160 of the Act defines "construction or demolition debris" as follows:

(a) "General construction or demolition debris" means non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: bricks, concrete, and other masonry materials; soil; rock; wood, including non-hazardous painted, treated, and coated wood and wood products; wall coverings; plaster; drywall; plumbing fixtures; non-asbestos insulation; roofing shingles and other roof coverings; reclaimed or other asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical wiring and components containing no hazardous substances; and corrugated cardboard, piping or metals incidental to any of those materials. General construction or demolition debris does not include uncontaminated soil generated during construction, remodeling, repair, and demolition of utilities, structures, and roads provided the

> uncontaminated soil is not commingled with any general construction or demolition debris or other waste.
>
> To the extent allowed by federal law, uncontaminated concrete with protruding rebar shall be considered clean construction or demolition debris and shall not be considered "waste" if it is separated or processed and returned to the economic mainstream in the form of raw materials or products within 4 years of its generation, if it is not speculatively accumulated and, if used as a fill material, it is used in accordance with item (i) in subsection (b) of this Section [i.*e*. it is not commingled with any other clean construction or demolition debris or any waste.]. 415 ILCS 5/3.160(a) (2008).

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)).

THE COMPLAINT

Complainant structures his 17-page complaint so as to make his allegations against each of respondents in a separate count: Count I concerns the Water Company, Count II concerns the Contractors, and Count III concerns the Engineers. Each count contains 28 or 29 numbered paragraphs, and a 4 point request for relief. The bulk of the factual allegations contained in Count I apply to each of the respondents, so they are not repeated in the discussions of Counts II and III below.

Count I: the Water Company

Scott Mayer owns a parcel of real estate in Shelby County consisting of approximately 50 acres, on which he grows crops. Comp. Counts I, II, II, para. 1-3, pp. 1-2, 6-7, 11-12. On April 15, 2005, Scott Mayer entered into a written agreement with Lincoln Prairie Water Company. Comp. Count I, para. 4, p. 2 and Comp. Exh. 1.

In this agreement, entitled "Right of Way Easement", Mayer grants the Water Company a "permanent, exclusive easement" in exchange for "good and valuable consideration delivered.".Comp. Exh. 1 at 1. The easement gives the Water Company a 20 foot wide permanent easement parallel with existing road right of way, and well as a 5 foot wide temporary construction easement adjacent to the permanent one. *Id.* The easement gave the right "to erect, construct, install, and lay, and thereafter use, operate, inspect, repair, maintain, abandon, replace and remove underground water lines and above and below ground appurtenances thereto (the "Improvements"). *Id.* The document provides that the already-delivered consideration "shall constitute payment in full for any damages to the real estate by reason of the Improvements' initial construction, although payment of "reasonable damages to growing crops or other personal property" is expressly provided for. *Id.* at 1-2. The agreement further required the Water Company to "remove from the Easement Area all surplus soil and debris resulting from any such activity [described in the easement]". *Id.* at 2.

The complaint then asserts that on the same day, April 15, 2005, the Water Company, through its agents the Contractors and Engineers, began trenching on the property. Comp. Count I, para. 5. During the course of the trenching all respondents allegedly

> shredded into various sized pieces, a telephone cable running the length of said trench, leaving pieces of wire, aluminum and plastic cable coating in the field [which material was] initially dumped along side the trench and thereafter, bulldozed into the open trench. Comp. Count I, para. 6-7.

After completion of the trenching that spring, Mayer planted the entire 50 acres in corn, which he harvested in the fall. While tilling the soil, complainant noticed "the pieces of wire, aluminum, and plastic coating in the easement" (hereinafter referred to in this opinion as "telephone cable components"). Comp. Count I, para. 8-10. During the spring of 2006, Mayer left the easement fallow, planting the remainder of the parcel in alfalfa. After baling a portion of the alfalfa crop, Mayer observed wire protruding from one of the bales, causing him to quarantine approximately 200 bales of alfalfa (valued at $18,000). *Id.*, para. 11-13. Mayer

additionally ceased bailing the 60 feet directly north of the easement "due to the wire contamination of his alfalfa". *Id.*, para. 14.

During the Spring of 2010, Mayer "had anhydrous" applied to the field, and observed telephone cable components in the easement after the application. Mayer tilled the easement on April 11, 2010, and again observed cable materials in the easement. After a rain on the easement June 25, 2010, Mayer observed approximately 170 pieces of telephone cable components. He removed the telephone cable components and tilled the easement. After June 25, 2010, and after the easement had been rained on, he observed 200 pieces of telephone cable components. Comp Count I, para. 15-23.

After citations to various provisions of the Act (including Sections 21(a) and (p)(7) (Comp I, para. 23-25), Count I of the complaint alleges that "by dumping demolition debris onto the real estate owned by the Complainant, the Water Company has violated Section 21 of the Act. Comp I, para. 26. Count I asserts that "Complainant has been damaged in that the cost to remove and replace the contaminated soil is in excess of $647,000", and that he has incurred attorney fees and costs. Comp I, para. 28-29. Count I's relief request is for a finding of violation against the Water Company, an order "to pay to $647,000 to put the real estate in the condition it was prior to contamination", an award of attorney fees and costs, and "such other relief as the Board may deem appropriate". Comp. Count I, para. A-D.

Count II: the Contractors

Count II concerns the Water Company's contractors, Korte & Luitjohan Contractors, Inc. Count II asserts that it is the Contractors who did the trenching, shredded the telephone cable, and bulldozed telephone cable components into the open trench on April 15, 2005. Comp. II, para. 4-6. Otherwise, the balance of the factual allegations of Count II are the same as those of Count I.

Count II's relief request is for a finding of violation against the Contractors, an order "to pay $647,000 to put the real estate in the condition it was prior to contamination", an award of attorney fees and costs, and "such other relief as the Board may deem appropriate". Comp. II, para. A-D.

Count III: the Engineers

Count III concerns the Water Company's Engineers, Milano & Grunloh Engineers, LLC. Count III repeats the assertions of Count II concerning the Contractors' actions on April 15, 2005 Comp. III, para. 4-6. Mayer asserts, specific to the Engineers that:

> At all times relevant, respondent, Milano & Grunloh Engineers, LLC provided construction inspection and observation for the benefit of the Complainant, Scott Mayer, in part, to avoid contamination of the aforesaid real estate during said trenching. Comp. III, para. 7.

Count II's relief request is for a finding of violation against the Contractors, an order "to pay to $647,000 to put the real estate in the condition it was prior to contamination", an award of attorney fees and costs, and "such other relief as the Board may deem appropriate". Comp. I, para. A-D.

MOTIONS

Below, the Board gives a summary of the motions that followed the complaint, which includes: respondents' motions to dismiss, and complainants' response to each motion to dismiss. The Board will begin with the Contractors' motion, as it is the most comprehensive and is supported by the memorandum adopted and incorporated by the Water Company and the Engineers.

The Contractors' Motion to Dismiss

In their December 15, 2010 motion to dismiss, Korte & Luitjohan Contractors assert that the complaint is frivolous, as it fails to state a cause of action since there is no violation of the Act based on the facts presented. Con. Mot. at 1-4. Additionally, the Contractors assert that the complaint here is duplicative, as identical acts are complained of in a still-pending Shelby County circuit court action Mayer filed in 2008. Con. Mot. at 4, and Exh. A-B.

Complaint as Frivolous

The Contractors assert that the complaint demonstrates that the telephone cable components were in the ground when the Contractors began work in 2005, and were "placed back in the ground (albeit in a different condition) after the work was done." Con. Mot. at 2. The Contractors contend that the ground was usable after the work was completed, as demonstrated by the fact that Mayer grew corn. The Contractors assert (without citation to the complaint) that

> The Complainant admits that the components of telephone cable do not create an environmentally dangerous condition and are not pollutants, asserting that they constitute "non-hazardous, uncontaminated materials". *Id.*

The Contractors assert that they did not engage in "open dumping" as defined in Section 3.305 of the Act, 415 ILCS 5/3.305 (2008), as they did not "consolidate refuse from more than one source." Con. Mot. at 2. In their memorandum, the Contractors note that they "simply placed back in the ground telephone wire that was in the ground when they began the project". Memo. at 2. They note that they have attached various materials found on the website of the Illinois Environmental Protection Agency (IEPA) which describe "open dumps" and contain illustrative photos. *Id.* and Exh. A-C. They assert that these IEPA materials demonstrate the point that this situation involves no open dumping, and so no violations of Sections 21(a) or (p) of the Act. The Contractors assert that there is no "open dumping" because there was no "consolidation of refuse from one or more sources". Con. Mot. at 3.

The Contractors further assert that "materials generated" by their activities do not come within the Act's definition of "open dumping" of "waste" or "general construction or demolition debris." The Contractors assert that the limited listing of materials considered to be general

construction or demolition debris in Section 3.160(a) does not include "telephone wire". Memo. at 3. The Contractors assert that the dirt and telephone wire placed back in the trench were not clean or general construction or debris, but were instead "uncontaminated soil as defined in Section 3.160(c) of the Act:

> "Uncontaminated soil' means soil that does not contain contaminants in concentrations that compose a threat to human health and safety and the environment. 415 ILCS 5/3.160(c) (2008).

The Contractors further remark that, as pointed out in Section 3.160(c)(2): "Uncontaminated soil shall not be considered waste. 415 ILCS 5/3.160(c)(2) (2008). While the Contractors acknowledge that the:

> the 'tiny pieces of telephone wire are contaminants—see 415 ILCS 5/3.165[3]; however, they now pose no more of a threat to human health and safety or the environment than they did before Korte & Luitjohan dug and filled in the trench on the Mayer property.
>
> In short, not only was there no open dumping, the material involved was not waste. The Environmental Protection Act does not apply. Memo at 5.

Complaint as Duplicative

The second ground the Contractors assert for dismissal is a pending lawsuit in Shelby County filed February 11, 2008 and still pending in December 2010. Con. Mot. at 4, and Exh. A-B. The Contractors contend that:

> The genesis of this Complaint before the Pollution Control Board is the Complainant's (to date unsuccessful) attempts to prosecute a lawsuit against the Respondents in state court in Shelby County. That suit remains pending, and as can be seen by the exhibits attached to the Respondent's Motion to Dismiss, is based upon identical facts. Both the Environmental Protection Act and Illinois law forbid splitting one's cause of action and bringing two separate claims in two separate jurisdictions for what is in essence the same activity. That, too, is a basis for dismissal of this claim. Memo at 5.

The Water Company's Motion to Dismiss

The Water Company's (WC Mot.), motion to dismiss was the first motion to dismiss received by the Board, on December 13, 2010. Rather than filing a memorandum in support of the motion, the Water Company adopted the Contractor's memorandum. WC Mot. at 4.

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[3] "Contaminant" is defined as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." 415 ILCS 5/3.165 (2008).

In the motion, this respondent claims that the complaint is frivolous and duplicative, and therefore should be dismissed. WC Mot. at 1. Specifically, respondent argues that there is no violation of the Act alleged in the complaint because there was no open dumping, and the telephone cable components are not waste or construction or demolition debris. WC Mot. at 3. Also citing the pendency of the Shelby County circuit court action, the Water Company requests dismissal of Mayer's complaint, and that the Water Company "recover its costs." WC Mot. at 4.

The Engineers' Motion to Dismiss

The Engineers' motion to dismiss (Eng. Mot.) was filed December 15, 2010. As did the Water Company, rather than filing a memorandum in support of the motion, the Engineers adopted and incorporated by reference the Contractor's memorandum. Eng. Mot. at 5.

In the motion, this respondent also claims that the complaint is frivolous and duplicative, and therefore should be dismissed. Eng. Mot. at 1. Specifically, respondent argues that there is no violation of the Act alleged in the complaint because there was no open dumping, and the telephone cable components are not waste or construction or demolition debris. WC Mot. at 3-5. Also citing the pendency of the Shelby County circuit court action, the Engineers request dismissal of Mayer's complaint, and that they too recover its costs. Eng. Mot. at 5.

As to the complaint's specific allegations against them, the Engineers state:

> That in Count Ill, Paragraph 7 of the Complainant's Complaint, the Complainant alleges that this Respondent, Milano & Grunloh Engineers, LLC, provided construction, inspection and observation for the benefit of the Complainant, Scott Mayer. This allegation is incorrect in that this Respondent did not have any Contract with the Complainant but, rather, had a contract with Lincoln Prairie Water Company. There was no relationship between this Respondent and the Complainant and, therefore, this Respondent owed no duty to the Complainant to inspect and observe the construction work being performed by the Respondent, Korte & Luitjohan. Eng. Mot. at 3.

Complainant's Responses In Opposition

On December 29, 2010, complainant filed a request for an unspecified amount of additional time to respond to the motions to dismiss. On January 3, 2011, Mayer filed identical responses in opposition to each of the three motions. As no objection to the filings has been made, the Board accepts and considers the responses.

Complaint Not Frivolous

As to the "frivolous" arguments, complainant first quotes the language of Section 3.305 of the Act "open dumping", 3.385 "refuse" and 3.160 "construction or demolition debris." Complainant asserts that they must be given their "plain and ordinary meaning" to effect the legislature's intent, citing People ex. rel Madigan v. Lincoln Ltd., 383 Ill. App. 3d 198, 890 N. Ed. Ed 975, 980 (1st Dist. 2008). Mayer asserts that he has

> never alleged that the components of telephone cable do not create an environmentally dangerous condition and are not pollutants, nor has Complainant asserted that they constitute "non-hazardous, uncontaminated materials" as alleged by respondent. Resp. at 2-3.

Mayer notes that, while "telephone wire" is not specifically listed within the definition of "construction or demolition debris," that Section 3.160 does list "electrical wiring" plus other itemized materials alleged in the complaint. Resp. at 3. Moreover, Mayer asserts that the complaint charges that each respondent has "dumped demolition debris on the real estate owned by complainant." *Id.*

Complaint Not Duplicative

Mayer agrees that there is a pending circuit court lawsuit "concerning identical acts." Resp. at 3. He states that the court there ruled that "at common law, the Complainant would only be allowed diminution in value of the real estate as his damages as opposed to the cost of restoration of the real estate." *Id.* On October 26, 2010, Mayer, by his attorney, argued to the circuit court that he would be prejudiced if limited to such relief. On the same day, the court issued an order directing that he file a complaint with this Board within 30 days, and vacated an order setting jury trial on the action on February 21, 2011. *Id.* While the response does not make the premises of the court's ruling clear, the response does cite to case law involving exhaustion of administrative remedies, citing Decatur Auto Auction v. Macon County Farm Bureau, Inc., 255 Ill. App. 3d 679, 627 N.E. 2d 1129, 1132 (4th Dist. 1993) (restraining order re dust caused by open dirt race track properly denied where no complaint filed with Pollution Control Board).

BOARD ANALYSIS

Discussion

As discussed below, the Board finds that the complaint is neither duplicative nor frivolous, and is accepted for hearing.

Complaint not Duplicative

Based on the record currently before the Board, none of the allegations in the complaint here are duplicative as to any respondent. The complaint here alleges violations of the Environmental Protection Act. While the circuit court action may arise from the actions complained of here, that action does not allege violations of the Act. Instead, the circuit court action seeks punitive damages for several causes of action over which the Board has no jurisdiction: contract violations, reckless disregard, and negligent misrepresentation, and requests punitive damages.

Complaint not Frivolous

The Board also finds that the complaint is not frivolous. Paragraphs 5 through 7 of the complaint allege that respondents, in the course of trenching across the south side of Mayer's property, "shredded into various sized pieces, a telephone cable running the length of said trench, leaving pieces of wire, aluminum and plastic cable coating in the field," which materials were initially dumped along side the trench and thereafter, bulldozed into the open trench." The Contractors, as well as the other two respondents, assert that the complaint demonstrates that the telephone cable components were in the ground when the respondents began work in 2005, and were "placed back in the ground (albeit in a different condition) after the work was done." Con. Mot. at 2.

Taking the complaint's allegations in the light most favorable to the non-movant, it is clear that the complaint alleges that during the course of trenching on a utility easement the respondents disturbed and shredded intact telephone cable, reducing it to its component wire, aluminum, and plastic cable coating. Rather than removing these telephone cable components, respondents buried them.

The Mayer property is not a licensed sanitary landfill. The Board is not prepared at this time to find that respondents' actions do not amount to "consolidation of refuse from one [] source[] at a disposal site" within the meaning of the open dumping provision at 415 ILCS 5/3.305. The shredded telephone cable components could easily fit within the meaning of that portion of the definition of construction or demolition debris including "electrical wiring and components," as referenced in the claimed violation of Section 21 (p).

The Board accordingly finds that Mayer may proceed to hearing to prove violations of the Act and resulting entitlement to the primary relief he seeks: an order requiring respondents to remediate the contamination, at a cost claimed to be $647,000. Comp. at 16, para. 29(B). But, the Board on its own motion strikes that portion of the relief request (Comp. at 16, para. 29(C)) seeking an award to complainant of his costs and attorney fees. The Board is unaware of, and complainant fails to cite, any statutory authority that would allow the Board to award such costs and fees to any complainant other than the State's Attorney or Attorney General in specific cases. *See, e.g.* 415 ILCS 5/42(f).

Hearing and Answer

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2008); 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) (2008). 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' motions to dismiss the complaint as duplicative or frivolous. But, the Board on its own motion strikes that portion of the relief request (Comp. at 16, para. 29(C)) seeking an award to complainant of his costs and attorney fees.

The Board accepts this complaint for hearing. 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 April 7, 2010, by a vote of 5-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board