

ILLINOIS POLLUTION CONTROL BOARD  
March 3, 2016

GARY L. POLCHOW, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 15-157  
 ) (Citizens Enforcement – Air, Water)  
 VILLAGE OF RANKIN, )  
 )  
 Respondent. )

ORDER OF THE BOARD (by J.A. Burke):

Gary L. Polchow brings this complaint under Section 31 of the Environmental Protection Act (Act) (415 ILCS 5/31(d)(1) (2014)), which authorizes any person to enforce Illinois' environmental requirements in an action before the Board. Mr. Polchow alleges that the Village of Rankin (Village) violated various provisions of the Act by openly burning waste at a Village public works property in Vermilion County. The Village moves to dismiss the entire complaint. For the reasons below, the Board grants in part and denies in part the Village's motion to dismiss. The Board's hearing officer will set a date for a hearing.

**PROCEDURAL BACKGROUND AND  
PRELIMINARY MATTERS**

On February 9, 2015, Mr. Polchow filed a *pro se* complaint using the Board's pre-printed complaint form against the Village concerning the Village's open burning activities. The Village answered the complaint on May 18, 2015. On August 6, 2015, the Village moved to dismiss the complaint (Motion).

Section 101.506 of the Board's procedural rules requires that motions to dismiss a complaint must be filed within 30 days of service of the complaint unless the Board determines that material prejudice will result. 35 Ill. Adm. Code 101.506. Mr. Polchow filed various statements with the Board regarding service using certified mail as well as hand-delivering the complaint to Village officials at Village Board meetings. In an order dated March 19, 2015, the Board noted that the complaint was served on the Village Clerk and all Village Board members at the Village Board's March 5, 2015 meeting. Polchow v. Village of Rankin, PCB 15-157, slip op. at 2 (Mar. 19, 2015). The Village filed its motion on August 6, 2015, at least five months after the complaint was served. The Village did not request leave to file the motion beyond the 30-day requirement in Section 101.506.

After the August 6, 2015 filing of the Village's motion, Mr. Polchow worked to obtain attorney representation and the Board delayed ruling on the motion to allow Mr. Polchow time to secure representation. On December 14, 2015, William Drew filed an appearance to represent Mr. Polchow. The hearing officer then set a deadline for Mr. Polchow to respond to the

Village's motion to dismiss, and Mr. Polchow timely filed his response to the motion (Resp.) on January 29, 2016.

Under these circumstances, the Board finds that material prejudice would result if the Village is barred from filing its motion to dismiss. As discussed below, the complaint cites statutory sections that cannot be violated. To avoid material prejudice to the Village in preparing its defense to the complaint, as well as in the interest of judicial economy in preparing for hearing in this matter, the Board considers the Village's motion to dismiss and Mr. Polchow's response.

### **DISCUSSION**

The Board looks to Illinois civil practice law for guidance when considering motions to dismiss. 35 Ill. Adm. Code 101.100(b). The Illinois Supreme Court directs that, as to motions to dismiss, "the proper inquiry is whether the well-pleaded facts of the complaint, taken as true and construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." Loman v. Freeman, 229 Ill.2d 104, 109 (2008). "It 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 (2003).

Accordingly, the Board begins by reviewing the complaint to consider whether the allegations when taken as true are sufficient to state a cause of action. Mr. Polchow alleges that the Village violated Sections 3.115, 3.270, 9(a), 9(c), and 9(f) of the Act (415 ILCS 5/3.115, 3.270, 9(a), 9(c), 9(f) (2014)). Compl. at ¶5. Mr. Polchow alleges that the Village violated these sections by burning yard waste mixed with items such as chemicals, gas, oil, diesel fuel, plastic and rubber at a public works site. *Id.* at ¶¶4, 6. Mr. Polchow continues that this burning resulted in smoke and rain water runoff from the waste pile flowing into a creek, affecting wildlife. *Id.* at ¶6. Mr. Polchow alleges that this occurred twice a week for two years and is ongoing. *Id.* at ¶7. Mr. Polchow asks the Board to order the Village to stop open burning, perform clean up, and remove hazardous waste and soil. *Id.* at ¶9.

### **Definitions and Section 8 of the Act**

As noted by the Board in its March 19, 2015 order, Sections 3.115 and 3.270 of the Act are definitions, not requirements that can be violated. Polchow v. Village of Rankin, PCB 15-157, slip op. at 2 (Mar. 19, 2015). The Board therefore grants the Village's motion to dismiss the alleged violations of Sections 3.115 and 3.270 of the Act. The Board notes that Mr. Polchow also cites to Sections 3.125 and 8 of the Act. Compl. at ¶5. Section 3.125 is a definition and Section 8 is a statement by the General Assembly on the purpose of the air pollution provisions of the Act. 415 ILCS 3.125, 8 (2014). To the extent Mr. Polchow is claiming violations of Sections 3.125 and 8 of the Act, the Board dismisses these claims because these sections cannot be violated.

### **Section 9(a)**

Section 9(a) of the Act prohibits any person from causing, threatening, or allowing discharge of a contaminant into the environment so as to cause air pollution. 415 ILCS 5/9(a) (2014). Section 3.115 of the Act defines “air pollution” as “the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.” 415 ILCS 5/3.115 (2014). The Village argues that the complaint does not specify what the contaminants are, if any, or that the air is polluted in any manner. Mot. at 2. Mr. Polchow alleges that chemicals, gas, oil, diesel fuel, plastic, and rubber were mixed with yard waste and burned at a Village public works property. Compl. at ¶6. Mr. Polchow contends that the open burning creates smoke and chemicals in the air that harm public health and wildlife. Compl. at ¶¶6, 8. These allegations, in a light most favorable to Mr. Polchow, form a cause of action under Section 9(a) of the Act. Therefore, the Board denies the Village’s motion to dismiss the alleged violation of Section 9(a) of the Act.

### **Section 9(c)**

Section 9(c) of the Act prohibits open burning of refuse except as allowed by Board regulation. 415 ILCS 5/9(c) (2014). Section 3.385 of the Act states that refuse means waste. 415 ILCS 5/3.385 (2014). Section 3.535 of the Act defines waste as “any garbage, sludge from a waste treatment plant . . . or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from . . . community activities.” 415 ILCS 5/3.535 (2014).

The Village argues that the complaint is insufficient because it does not allege that the Village burned refuse or waste, and pictures attached to the complaint do not show refuse or waste being burned. Mot. at 2-3. The Village further contends that non-landscape items are removed from landscape waste prior to burning. *Id.* at 1. As noted above, Mr. Polchow alleges that the Village burned unsorted yard waste mixed with items such as chemicals, gas, oil, diesel fuel, plastic, and rubber. Compl. at ¶6. Mr. Polchow supports his complaint with photographs that he asserts show landscape waste in piles mixed with non-landscape waste. Mr. Polchow alleges that the Village burned these non-landscape items together with yard waste. *Id.* at ¶¶4, 6; Resp. at 1, 2. Whether non-landscape waste was removed from landscape waste prior to open burning is a question we cannot resolve based on the pleadings. When taking the facts in a light most favorable to Mr. Polchow, there is a cause of action under Sections 9(c) of the Act. Therefore, the Board denies the Village’s motion to dismiss the alleged violation of Sections 9(c) of the Act.

### **Section 9(f)**

Section 9(f) of the Act (415 ILCS 5/9(f) (2014)) contains four exemptions from air pollution prohibitions, however, the complaint does not refer to any specific exemption. The exemptions relate to the sale of used oil for burning or incineration; spraying asbestos; burning landscape waste; and grain elevators. *Id.* The Village contends this claim should be dismissed because Mr. Polchow does not allege that the Village burned any kind of oil, as required to find a violation under Section 9(f). Mot. at 3. The Board finds that Mr. Polchow does not allege that the Village sells any used oil for burning or incineration. The Board further finds that the

complaint contains no allegations relating to asbestos or grain elevators. Therefore, the Board grants the Village's motion to dismiss alleged violations of Section 9(f).

The third paragraph of Section 9(f) allows burning of landscape waste "at sites provided and supervised by any unit of local government, except within any county having a population of more than 400,000." 415 ILCS 5/9(f) (2014). "Landscape waste" is "all accumulations of grass or shrubbery cuttings, leaves, tree limbs and other materials accumulated as the result of the care of lawns, shrubbery, vines and trees." 415 ILCS 5/3.270 (2014). The Village argues that this provision allows local government to burn landscape waste, and Mr. Polchow has not pled facts to overcome this provision. Mot. at 2, 4. Again, Mr. Polchow alleges that the Village burned yard waste mixed with items such as chemicals, gas, oil, diesel fuel, plastic, and rubber. Compl. at ¶6. Chemicals, gas, oil, diesel fuel, plastic, and rubber are not landscape waste, and burning these materials is not exempted. When taking the facts in a light most favorable to Mr. Polchow, this exemption does not preclude Mr. Polchow's claims under Section 9 of the Act.

### **Intentional Burning**

The Village contends that, if the Village mistakenly burned non-landscape waste, such burning must be intentional to be actionable. Mot. at 4. The Village argues that Mr. Polchow has not pled facts to show that chemicals, rubber, and other non-landscape material were intentionally burned. *Id.* The Village cites People v. Joliet Railway Equipment Co., 108 Ill.App.3d 197 (3d Dist. 1982), for the proposition that outdoor burning must be intentional to violate the statute. Memo. at 2. Here, Mr. Polchow alleges that a Village employee burned yard waste mixed with chemicals, gas, oil, diesel fuel, plastic, and rubber. Compl. at ¶4. The Village acknowledges that it burns landscape waste under an employee's observation. Ans. at 2-3; Mot. at 1. The Board cannot, based on the pleadings, determine whether burning the non-landscape waste was unintentional. Joliet Railway does not support dismissing the complaint at this time.

### **Date of Alleged Violations**

The Village contends that the complaint does not specify the dates of the alleged violations. Mot. at 3. Mr. Polchow alleges that this activity occurred twice a week for two years and, while not specifying the two-year period, alleges that the activity is still continuing. Compl. at ¶7. The Board finds this sufficiently informs the Village of the duration and frequency of the alleged violations.

### **Board Finding**

The Board dismisses the alleged violations of Sections 3.115, 3.270, 3.125, 8, and 9(f) of the Act. However, the Board denies the Village's motion to dismiss the alleged violations of Sections 9(a) and 9(c) of the Act.

### **HEARING**

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is to develop a clear, complete, and concise record. 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) (2014). 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. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2014). Section 42(h) 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 or unreasonable financial hardship." *Id.* Such penalty, however, may be off-set in whole or in part by a supplemental environmental project. *Id.*

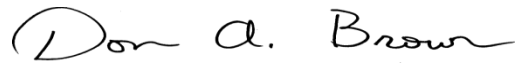
Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position 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 dismisses the alleged violations of Sections 3.115, 3.125, 3.270, 8, and 9(f) of the Act. The Board denies the Village's motion to dismiss the alleged violations of Sections 9(a) and 9(c) of the Act. The Board directs its hearing officer to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 3, 2016, by a vote of 5-0.

A handwritten signature in cursive script that reads "Don A. Brown".

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Don A. Brown, Assistant Clerk  
Illinois Pollution Control Board