

ILLINOIS POLLUTION CONTROL BOARD
February 28, 2019

SUSANNE M. KIRKHAM and)
STEVEN C. KIRKHAM,)
)
Complainants,)
)
v.) PCB 19-70
) (Citizen's Enforcement - Water)
VILLAGE OF POPLAR GROVE, ILLINOIS,)
)
Respondent.)

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

This citizen's enforcement action was initiated with the filing of a *pro se* complaint (Comp.) by Susanne M. Kirkham and Steven C. Kirkham (Kirkhams) on November 7, 2018, against the Village of Poplar Grove (Village). The Kirkhams' complaint concerns the Village's sanitary sewer system in Boone County. The complaint alleges the Village violated the Illinois Environmental Protection Agency (Agency) water pollution regulations, resulting in the overflow of raw sewage in the Kirkhams' residential basement.

On December 18, 2018, the Village filed a motion to dismiss the complaint as inadequately pled and frivolous. The Kirkhams filed a response to the motion (Resp.) on January 23, 2019, which is after the 14-day period provided by the Board's procedural rules to respond to a motion (*see* 35 Ill. Adm. Code 101.500(d)). The response claims the Kirkhams were not served and were therefore unaware that the motion was filed. Resp. at 1. The Board reads the Kirkhams' apology and explanation for the timing of the filing as a motion to file, grants the motion, and considers the response timely filed.

For the reasons explained below, the Board grants the Village's dismissal motion, but allows the Kirkhams 30 days to file an amended complaint curing the deficiencies specified in this order. Below, the Board first provides summaries of the complaint and motion to dismiss, then discusses and rules upon the motion.

SUMMARY OF COMPLAINT

The Kirkhams allege that the Village violated the "Illinois Recommended Standards for Sewage Works" of the Environmental Protection Agency (Agency) at Section 370.450, Emergency Operations (35 Ill. Adm. Code 370.450). The Kirkhams allege that raw untreated sewage backed up into their residential basement. Comp. at ¶ 6. The sewage backup is alleged to have flooded the basement and left residual sewage when the water receded. Comp. at ¶ 6; Comp., Exh. 2. The Kirkhams allege that the sewage backup "left an odor and unknown bacteria and mold" (Comp. at ¶ 8), requiring the clean-up, repair, and rebuilding of "the finished basement to its previous state" (Comp. at ¶ 9). In support, the Kirkhams attached 5 exhibits with

their complaint. The Kirkhams are requesting \$13,862.12 to reimburse them for clean-up and repair costs. Comp. at ¶ 9. The Kirkhams also request the Board “require any corrective action to prevent reoccurrences.” *Id.*

SUMMARY OF MOTION TO DISMISS

The Village makes two arguments in support of its motion. First, the Village argues that the complaint fails to provide specific information regarding the alleged discharge including specific dates, nature, extent, and duration of the discharge. Mot. at 1-2. And second, the Village asserts the complaint fails to state a cause of action and should therefore be dismissed as frivolous. Mot. at 2-3.

DISCUSSION

Below, the Board first discusses the Village’s arguments that the Kirkhams’ complaint is inadequately pled; then, the Board considers the Village’s argument that the complaint is frivolous.

The Complaint is Not Inadequately Pled

The Board’s procedural rules provide the requirements for filing a complaint. 35 Ill. Adm. Code 103.204. Section 103.204(c)(2) requires a complaint contain “[t]he dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations.” 35 Ill. Adm. Code 103.204(c)(2).

The Village asserts that the Kirkhams’ complaint does not provide specific dates or describe the nature, extent, and duration of the alleged raw sewage discharge. Mot. at 1-2. But the Kirkhams’ complaint contains the required information of 35 Ill. Adm. Code 103.204(c)(2).

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)).

First, the complaint establishes the date of the alleged violation. Exhibit I of the complaint is a letter to residents sent by the Village regarding “Sanitary Sewer Back-up – Bel Air Subdivision”. Comp., Exh. I. The letter identifies April 28, 2018 as the date that sanitary sewer backup was experienced by residence. *Id.* And the duration can be reasonably inferred to be between the date cited in Exhibit I and the date of May 1, 2018 in the itemized mitigation breakdown in Exhibit III.

Second, the complaint establishes the nature and extent of the alleged discharges and consequences. Exhibit II of the complaint consists of 13 color photos documenting the extent of the alleged backup in the residence, identifying each space impacted by the alleged sewage backup. Comp. at Exh. II. And Exhibits III and IV provide itemized breakdown of the work to cleanup, repair, and replace the damaged basement. Com. at Exh. III and IV. The Kirkhams also explain that the itemized breakdowns also identify work based on a loss categorization. Resp. at 1; *see* Comp., Exh. III (listing “CAT 2” and “CAT 3” losses).

The Board finds the Kirkhams’ complaint is adequately pled. The Board now considers whether the Kirkhams’ complaint should be dismissed as frivolous.

The Complaint Fails to State a Cause of Action

Section 31(d)(1) of the Illinois Environmental Protection Act (Act) provides that “[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing.” 415 ILCS 5/31(d)(1) (2016). 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.” 35 Ill. Adm. Code 101.202.

The Village asserts that Part 370 is a recommended standard, not a required standard, and therefore cannot be violated. Mot. at 3. The Village argues that because the Kirkhams do not cite to any other statute, rule, or Board order, the complaint fails to state a cause of action and should be dismissed as frivolous. *Id.* The Board agrees.

Part 370 of the Agency’s regulations “establish criteria for the design and preparation of plans and specifications for wastewater collection and treatment systems.” 35 Ill. Adm. Code 370.100. Part 370 provides the criteria and requirements used by the Agency when evaluating an application for the waste water collection system’s permit. *See* 35 Ill. Adm. Code 370.110; *see also* 35 Ill. Adm. Code 309.241(b) (standards for permit issuance). “[T]he instructions to a permit application [] cannot be violated for purposes of enforcement under the Act.” Welch v. Dekalb Sanitary District, PCB 12-131, slip op. at 4 (Oct. 18, 2012). Thus, Section 370.450, which the Village is alleged to have violated, does not set requirements that can be violated for purposes of enforcement. To proceed with their complaint, the Kirkhams must look to another provision of the Act, permit, or Board regulation or order and amend their complaint accordingly.

CONCLUSION

The Board grants the Village’s motion and dismisses the complaint. Should the Kirkhams want to amend their complaint, they must do so by Friday, March 29, 2019, which is 30 days from the date of this order. Failure to timely file by this date will result in the Board dismissing this case and closing the docket.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 28, 2019, by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive style with a large, looped initial "D".

Don A. Brown, Clerk
Illinois Pollution Control Board