

ILLINOIS POLLUTION CONTROL BOARD

DALE L. STANHIBEL,)
)
Complainant,)
)
Vs.)
)
TOM HALAT d/b/a TOM'S) PCB 07-17
VEGETABLE MARKET) (Citizens Enforcement-Air, Noise)
)
Respondent.)
)
)
)

NOTICE OF FILING

To: Mr. Dale L. Stanhibel
10328 Fleetwood Street
Huntley, Illinois 60142

Please take notice, that I have on January 8, 2006 filed with the Office of the Clerk of the Pollution Control Board the attached **MOTION TO DISMISS OR, IN THE ALTERNATIVE MOTION FOR JUDGMENT ON THE PLEADINGS**, a copy of which is herewith served upon you.



Steven J. Greeley, Jr.

CERTIFICATE OF SERVICE

I, Steven J. Greeley, an attorney, on oath state that I mailed a copy of the above documents to the above-named person(s) at the above-designated address by depositing same in the U.S. Mail in Marengo, Illinois, on or before the hour of 5:00 p.m., on January 9, 2006, with proper postage prepaid.



Steven J. Greeley, Jr.

FRANKS, GERKIN & McKENNA P.C.
Attorneys for Respondent
19333 E. Grant Hwy., P.O. BOX 5
MARENGO, IL 60152
Telephone (815) 923-2107

ILLINOIS POLLUTION CONTROL BOARD

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MOTION TO DISMISS OR, IN THE ALTERNATIVE MOTION FOR JUDGMENT ON THE PLEADINGS

NOW COMES, the Respondent, Thomas C. Halat, by and thru his attorneys Franks, Gerkin & McKenna, P.C., and for his motion states as follows:

I. REQUEST FOR DISMISSAL UNDER 735 ILCS 5/2-619 (a) (9) AS AUTHORIZED BY 35 ILL. ADM. CODE SECTION 101.500

1. Petitioner filed his formal complaint in this matter on September 18, 2006, which is incorporated herein by reference.
2. Paragraph six of that motion alleges “(noise-air) air-the release of propane in the air” “noise”-the firing off of four propane cannons 9:30 a.m. to 5:30 p.m. in Tom’s Halat Sooth (sic) lot 10214 Algonquin Road, Huntley, Illinois 60142.
3. Paragraph seven alleges that said propane cannons were utilized “Aug-Sept-Oct-2005-late summer early fall Aug-Sept-Oct-2006-late summer early fall seven day’s week from-dawn-to-dusk every few seconds-still continuing as of 9/14/2006.”
4. Under Section 735 ILCS 5/2-619 (a) (9) as authorized by 35 Ill. Adm. Code Section 101.500 a motion to dismiss may be brought when “the claim asserted against defendant is barred by other affirmative matter avoiding the illegal effect or of defeating the claim.”

5. As indicated in the Affidavit of Thomas C. Halat, attached hereto and incorporated by reference as Exhibit A, permits were obtained through the Illinois Department of Natural Resources/Illinois Conservation Police at all times in which propane cannons were utilized on the property of Tom's Farm Market and Greenhouses, Inc. At no time were cannons utilized without a permit.

6. 520 ILCS 5/2.37, which was first enacted in 1988, gives specific authority to the Illinois Department of Natural Resources and the Illinois Conservation Police to issue permits specifying the means and methods by which wildlife may be removed.

7. The State of Illinois, through the Illinois Department of Natural Resources and the Illinois Conservation Police have permitted the use of the propane cannons by Tom's Farm Market and Greenhouses, Inc., therefore, those agencies have utilized it's specific authority to allow the cannons despite any possible conflict with the Pollution Control Act under 415 ILCS 5/24 which was originally adopted prior to 1988 and is a more general statute then 520 ILCS 5/2.37. See Skip Johnson v. State Electoral Board, 53 Ill. 2d 256, 290 N.E. 2d 886 (1972) ("Where two statues conflict, the more recent is deemed to take precedence over the earlier.") See also Sierra Club v. Kenney, Ill. 2d 110, 429 N.E.2d 1241 (1981), ("Where two statues conflict, the specific statue controls over the general statue").

WHEREFORE, Thomas C. Halat, hereby requests that the case be dismissed pursuant to the above referenced statute and any other or further relief that this Board deems just and equitable.

II. REQUEST TO DISMISS BASED ON THE FILING OF A FRIVOLOUS COMPLAINT UNDER 35 ILL. ADM. CODE 101.202 AND A REQUEST FOR DISMISSAL AND OR JUDGMENTON THE PLEADINGS UNDER 35 ILL. ADM. CODE 101.500, BASED ON 735 ILCS 5/2-615.

1-7. Paragraphs one thru seven are re-alleged and are incorporated herein by reference.

8. This Board has the authority to dismiss a complaint as frivolous on it's own motion or on the motion of the respondent under 35 Ill. Adm. Code 103.202 (b) and the Board has the authority to dismiss pursuant to 735 ILCS 5/2-615 when a pleading is "substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified manner, or that designated material matter be stricken out, or that necessary parties be added, or that designated mis-joined parties be dismissed, and so forth."

9. A complaint is frivolous under 35 Ill. Adm. Code 101.202 when it requests "relief that the Board does not have authority to grant, or a Complaint that fails to state a cause of action upon which the Board can grant relief".

10. As a preliminary matter, the complainant has not named the correct respondent in this action, as stated in the Affidavit of Thomas C. Halat, attached hereto and incorporated herein by reference, Thomas C. Halat is the President of Toms' Farm Market and Greenhouses, Inc., therefore, any reference to Tom's Vegetable Market is a misnomer as no such business entity called Tom's Vegetable Market exists at the address of 10214 Algonquin Road, Huntley, Illinois 60142 as alleged in the complaint.

11. The complaint is also substantially insufficient in law and is frivolous as defined above because:

- (A) No specific conduct of Thomas C. Halat is personally alleged in the complaint;
- (B) The complainant fails to allege how the release of propane in the air, even if released, creates air pollution under 415 ILCS 5/24 and 35 Ill. Adm. Code 900.102;
- (C) No affect should be given to the allegations contained in the complaint, based on the clearly contradictory statements in paragraphs six and seven regarding the times of the alleged propane cannon noise. In paragraph six, complainant alleges the firing off of four propane cannons from 9:30 a.m. to 5:30 p.m. in Tom Halat's South lot 10214 Algonquin Road, Huntley, Illinois 60142. However, in paragraph seven, the complainant alleges that the propane cannons are utilized "from-dawn-to-dusk". This Board can take judicial notice of the fact that the times alleged in paragraph six are inconsistent from the dawn to dusk statement in paragraph seven because through all times alleged in the complaint dawn to dusk is not exactly between 9:30 a.m. and 5:30 p.m. Through all periods of time from August thru October of each year dawn precedes 9:30 a.m. and thru most of that period of time dusk is later then 5:30 p.m;
- (D) The statements were averred under oath therefore, the inconsistencies should nullify the allegations and all allegations in the complaint should not be considered as stated in Shipherd v. Field, 70 Ill. 438 (1873) ("That which is contradictory shall be rejected";)
- (E) Also, the complaint in this matter is too vague and does not state a cause of action because it fails to identify the specific acts by individuals and the specific dates on which those acts occurred, and the specific instance which caused a violation of the identified statutes. Specifically, under 415 ILCS 5/24, no facts were stated alleging unreasonable interference with the enjoyment of the plaintiff's life or with any lawful business or activity of the plaintiff. Specifically, the allegation "headache-nervous=my five year old beagle has to be sedated- I can't enjoy my own backyard or patio for the last two years-the noise and loud loud popping sound" is not sufficient to identify any specific effect on the plaintiff. The above quoted statement in the complaint does not identify to whom any headache or

nervousness has occurred or how the sound has caused the complainant to fail to be able to enjoy his backyard or patio for the last two years;

- (F) In addition, the complaint has failed to allege how 35 Ill. Adm. Code 900.102 was allegedly violated as no violation of any noise emission have been made in the complaint which exceed those established by statute and in the administrative code;
- (G) Also, under paragraph ten of the complaint, the complainant cites "Stewart v. Fisher, PCB-02-164 Citizens Enforcement-Noise" as a substantial similar case that is already pending before the Board against this respondent for the same alleged pollution. The Stewart v. Fisher matter does not involve either of the respondents and should be stricken from the complaint.
- (H) Overall, the complainant has not submitted a complaint which meets the standard required of a complaint to be comprehensible or based in fact or law to allow this Board to grant the relief requested to the complainant.

WHEREFORE, the Respondent, Thomas C. Halat, hereby requests that the matter be dismissed or that Judgment enter in favor of Thomas C. Halat and against the complainant and any further or other relief that this Board deems just and equitable.

Respectfully Submitted,
FRANKS, GERKIN & McKENNA, P.C.

By: _____


Steven J. Greeley, Jr.,

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ILLINOIS POLLUTION CONTROL BOARD

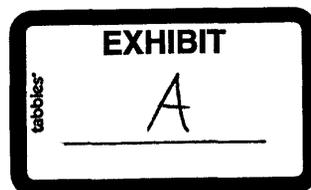
November 2, 2006

DALE L. STANHIBEL,)
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TOM HALAT d/b/a TOM'S) PCB 07-17
VEGETABLE MARKET) (Citizens Enforcement-Air, Noise)
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AFFIDAVIT

I, Thomas C. Halat, on oath, hereby affirm:

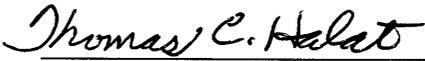
1. That I am the Respondent in the above entitled and matter and I am President of Tom's Farm Market and Greenhouses, Inc.
2. Tom's Farm Market and Greenhouses, Inc. does not do business as Tom's Vegetable Market as alleged in the Complaint in this matter incorporated herein by reference.
3. I, as an agent of Tom's Farm Market and Greenhouses, Inc. obtained nuisance animal removal permits from the Illinois Conservation Police/Illinois Department of Natural Resources to allow for the use of propane canons as a way to remove redwing black birds from the property.
4. No propane canons were utilized at any other time besides those times authorized by said permits, copies of which are attached hereto and incorporated by reference as group exhibit A.
5. All permits obtained were in full force and effect for all dates and times in which propane canons were utilized and propane cannons were specifically authorized as a device able to be utilized under all permits. In 2005, propane cannons were utilized in the southern portion of the property located at 10214 Algonquin Road, Huntley, Illinois 60142 which is adjacent to the property of the complainant, from August 4, 2005 to September 4, 2005. No cannons were utilized at that location in August prior to the issuance of the permit nor were any utilized after the permit expired on September 4, 2005, as no need for animal removal existed at the time.



6. In 2006, propane cannons were only utilized for removal of redwing black birds during the period of time authorized by the permit, September 8, 2006 to October 8, 2006. No propane cannons were utilized before or after these dates in 2006 as no need for animal removal existed because the sweet corn planted in that area was not attracting redwing black birds prior to September 8, 2006 and the crops were picked prior to October 8, 2006.

FURTHER AFFIANT SAYETH NOT

Respectfully Submitted,
Thomas C. Halat

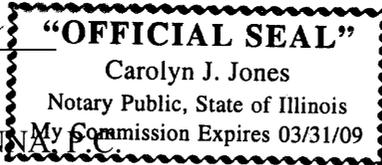


Thomas C. Halat

SUBSCRIBED and SWORN to
before me this 3 day
of Jan 2007.



Notary Public



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