

ILLINOIS POLLUTION CONTROL BOARD
December 20, 2007

GEORGE R. STRUNK,)	
)	
Complainant,)	
)	
v.)	PCB 07-135
)	(Citizens Enforcement – Air, Noise,
WILLIAMSON ENERGY LLC (POND)	Water)
CREEK MINE #1),)	
)	
Respondent.)	

ORDER OF THE BOARD (by A.S. Moore):

In response to a Board order issued August 8, 2007, and directing him to file an amended complaint, complainant George Strunk (Strunk) on October 18, 2007, filed various documents that the Board construes as an amended complaint. On November 9, 2007, respondent Williamson Energy, LLC (Williamson Energy) filed its second motion to dismiss. Williamson Energy claims that, as a result of various procedural and substantive deficiencies, the amended complaint fails to comply with the Board's regulations or the Board's August 8, 2007 order and should be dismissed in its entirety. Strunk filed no timely response to the motion.

For the reasons described below, the Board grants Williamson Energy's second motion to dismiss and dismisses the amended complaint in its entirety.

Below, the Board first provides the procedural history of this case, the applicable statutory provisions, and a summary of the documents included in Strunk's filing of October 18, 2007. The Board next summarizes Williamson Energy's arguments in the second motion to dismiss before addressing Strunk's untimely response. The Board then analyzes Williamson Energy's arguments before granting the second motion to dismiss.

PROCEDURAL HISTORY

On June 11, 2007, Strunk filed a citizens enforcement complaint (Comp.). On July 5, 2007, Williamson Energy filed a motion to dismiss.

In an order dated August 9, 2007, the Board directed Strunk to file either a sworn certificate of service or other proof of service on Williamson Energy by Monday, September 10, 2007, or face dismissal of this proceeding. On August 15, 2007, Strunk filed a sworn certificate of service stating that he had served Williamson Energy by personally serving a Mr. Plumley on June 5, 2007.

In an order dated September 20, 2007, the Board partially granted and partially denied Williamson Energy's first motion to dismiss and directed Strunk to file an amended complaint

within 30 days. On October 18, 2007, Strunk in response to the Board's September 20, 2007, order filed various materials the Board construes as an amended complaint (Am. Comp.). On November 9, 2007, Williamson Energy filed its Second Motion to Dismiss (Mot.). On December 3, 2007, Strunk filed a response to Williamson Energy's second motion to dismiss.

STATUTORY AND REGULATORY BACKGROUND

Section 9(a) of the Environmental Protection Act (Act) provides that no person shall

[c]ause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act. 415 ILCS 5/9(a) (2006).

Section 9(b) of the Act provides that no person shall

[c]onstruct, install, or operate any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit. 415 ILCS 5/9(b) (2006).

Section 12(a) of the Act provides that no person shall

[c]ause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act. 415 ILCS 5/12(a) (2006).

Section 12(b) of the Act provides that no person shall

[c]onstruct, install, or operate any equipment, facility, vessel, or aircraft capable of causing or contributing to water pollution, or designed to prevent water pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit. 415 ILCS 5/12(b) (2006).

Section 12(d) of the Act provides that no person shall "[d]eposit any contaminants upon the land in such place and manner so as to create a water pollution hazard." 415 ILCS 5/12(d) (2006).

Section 24 of the Act provides that

[n]o person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act. 415 ILCS 5/24 (2006).

Section 101.304 of the Board's procedural regulations provides in pertinent part that "[p]arties in Board adjudicatory proceedings are responsible for service of all documents they file with the Clerk's Office." 35 Ill. Adm. Code 101.304(b). Section 101.304 also provides in pertinent part that "[p]roof of proper service is the responsibility of the party filing and serving the document. An affidavit of service or certificate of service must accompany all filings of all parties." 35 Ill. Adm. Code 101.304(d).

Section 103.204(f) of the Board's procedural regulations provides that

Any party serving a complaint upon another party must include the following language in the notice: "Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney." 35 Ill. Adm. Code 103.204(f).

SUMMARY OF ORIGINAL COMPLAINT AND FILING CONSTRUED AS AMENDED COMPLAINT

Original Complaint

In his original complaint, Strunk first alleged that, in the course of operating a coal mine, prep plant, and shipping facility, Williamson Energy has caused pollution in the form of "dust from coal stack & refuse pile & haulage roads around mine site." Comp. at 3. Second, Strunk alleged that Williamson Energy has contaminated water with run-off from its coal stack and refuse. *Id.* Third, Strunk alleged that Williamson Energy causes noise pollution in the operation of belts, transfer points, mobile equipment, trucks, and trains. *Id.* Strunk also claimed that Williamson Energy causes light pollution by directing lights from the mine site toward his home. *Id.*

Strunk claimed that the pollution he alleged began "when mine construction started and it has gotten worse since coal production has started." Comp. at 3. Regarding the consequences of the alleged pollution, Strunk first claimed that coal dust harms human, animal, and plant life and also harms the finish on homes, barns, and automobiles. *Id.* Second, Strunk expressed the belief that runoff "is causing water pollution to creeks and waterways." *Id.* at 2. Third, Strunk characterized noise as "very disturbing at all times of day and night when mine is operating." *Id.* Strunk further stated that "[t]he noise disturbs our peaceful atmosphere we once knew causing unrest and stress on humans and wildlife." *Id.* at 3. Fourth, Strunk claimed that light is directed toward his home nightly, "making it difficult to sleep or enjoy the night sky." *Id.* at 2. Strunk further claimed that "[t]he lights keep me awake often and invade my privacy." *Id.* at 3.

As relief from the violations he has alleged, Strunk stated that he seeks to have the Board “order mining operation to be stopped until all my complaints are corrected thereby giving me back the safe environment I had before the mine started.” Comp. at 4.

Filing Construed as Amended Complaint

In his October 18, 2007 filing, Strunk states in the form of a letter that he responds to the Board request for additional information regarding alleged violations of Sections 9(a), 9(b), 12(a), 12(b), 12(d), and 24 of the Act (415 ILCS 5/9(a), 9(b), 12(a), 12(b), 12(d), 24 (2006)). Am. Comp. at 1. Attached to this statement are 19 photographs and the following documents:

1. A letter dated January 3, 2006 from the Illinois Department of Natural Resources (DNR) regarding Notice of Violation Number 37-05-05 and assessing Steelhead Development Company a penalty of \$1,225.00. Am. Comp. at 2; citing 62 Ill. Adm. Code 1845.12.
2. A “Violation Assessment Worksheet” showing computation of the assessment regarding Notice of Violation Number 37-05-05 with regard to Steelhead Development Company. Am. Comp. at 3.
3. An “Assessment Explanation” regarding Notice of Violation Number 37-05-05 regarding Steelhead Development Company. Am. Comp. at 4.
4. DNR Notice of Violation Number 37-05-05 regarding Steelhead Development Company and finding violation of DNR mining-related provisions. Am. Comp. at 5, citing 62 Ill. Adm. Code 1817.46(b)(3) (Siltation Structures).
5. A Letter dated April 17, 2007 from Williamson Energy to DNR addressing investigation of Strunk’s April 16, 2007 allegation of fugitive coal dust. Am. Comp. at 6.
6. A “Concerned Citizen Receipt and Report Form” addressing an August 13, 2007 report of dust and noise from Strunk. Am. Comp. at 7.
7. A five-page document entitled “Daily Log Observations of Pond Creek Mine #1 by George or Diana Strunk” (Am. Comp. at 8-12), which Strunk describes as “a copy of my daily journal.” Am. Comp. at 1.

WILLIAMSON ENERGY’S SECOND MOTION TO DISMISS

In its second motion to dismiss, Williamson Energy argues that Strunk’s amended complaint is procedurally and substantively deficient and should be dismissed in its entirety on those bases. Mot. at 3, 5. Below, the Board summarizes Williamson Energy’s arguments regarding procedural requirements and substantive issues.

Procedural Requirements

Williamson Energy states that the Board's August 8, 2007 order required that Strunk's amended complaint "must comply with all applicable requirements, including but not limited to those listed at 35 Ill. Adm. Code 103.204 and those pertaining to proof of service." Mot. at 2. Williamson Energy notes that Section 103.204(f) requires Strunk to include in his amended complaint or in a notice accompanying it the following language:

Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney. Mot. at 2, citing 35 Ill. Adm. Code 103.204(f).

Williamson Energy argues that Strunk's amended complaint does not comply with this rule. Mot. at 2. Williamson Energy argues that this "clear deficiency" requires dismissal of the amended complaint. Mot. at 2, citing Stanhibel v. Halat, PCB 07-17 (Mar. 1, 2007).

Williamson Energy further argues that Strunk has not served this amended complaint on Williamson Energy or its counsel. Mot. at 2. Williamson Energy states that it discovered that an amended complaint had been filed with the Board by reviewing the Board's Web site. *Id.* at 2-3. Williamson Energy argues that "[i]t is Complainant's obligation to notify Respondent of certain filings so that Respondent can respond timely." *Id.* at 3. Williamson Energy suggests that it is not its responsibility periodically to review the Board's Web site in order to determine whether an amended complaint or any other pleading has been filed with the Board. *See id.* Williamson Energy states that the procedural rule requiring service, as reflected in the Board's August 8, 2007 order, serves "an important purpose." *Id.* "The Complainant's failure to properly notify Respondent of filings will serve only to further delay this matter and potentially prejudice Respondent in the event a 'deadline' is missed because of a lack of notice." *Id.* On these bases, Williamson Energy argues that Strunk's amended complaint "should be dismissed." *Id.*

Substantive Requirements

Williamson Energy argues that the Board's procedural rules provide minimum substantive requirements that a complaint must meet. Mot. at 3. Williamson Energy further argues that these requirements are intended to provide a respondent with information sufficient for the preparation of a defense. *Id.*, citing Stanhibel v. Halat, PCB 07-17, slip. op. at 5 (Mar. 1, 2007); *see* 35 Ill. Adm. Code 103.204(c)(2). Williamson Energy claims that the complaint must refer to the provisions of the Act that the respondent has allegedly violated. Mot. at 3, citing 35 Ill. Adm. Code 103.204(c)(1). Williamson Energy further claims that the complaint must specify "the dates, location, events, nature, extent, duration, and strength of the discharges or emissions." Mot. at 3, citing 35 Ill. Adm. Code 103.204(c)(2). Claiming that Strunk has failed to specify these legal and factual grounds, Williamson Energy argues that Strunk's complaint is "clearly deficient and should be dismissed." Mot. at 3.

Below, the Board summarizes Williamson Energy's arguments regarding each of the authorities and allegations cited in Strunk's amended complaint.

Sections 9(a) and 9(b)

Williamson Energy argues that, with regard to Section 9(a) of the Act, Strunk's amended complaint refers to "dust." Mot. at 3. Williamson Energy further argues that, in apparent support of this reference, Strunk's amended complaint includes a "Concerned Citizens Receipt and Report Form" and a "Daily Log Observations of Pond Creek Mine #1 by George or Diana Strunk." *Id.* at 3-4; *see* Am. Comp. at 7, 8-12. Williamson Energy claims that [n]either of these documents provide sufficient information to satisfy the requirements of [Section] 103.204(c)(2)." Mot. at 4. Specifically, Williamson Energy claims that they do not "identify the nature, extent, strength, or duration of the dust 'problem' as required." *Id.*

Williamson Energy argues that, while Strunk alleges a violation of Section 9(b) of the Act (415 ILCS 5/9(b) (2006)), "that provision prohibits a variety of activities without a *permit*." Mot. at 4 (emphasis in original). Williamson Energy further argues that Strunk "makes no allegation that Respondent is operating without a *permit* (which is not the case)." *Id.* (emphasis in original). Williamson Energy claims that, in the absence of any allegation pertaining to permit violations, "any claim that Section 9(b) has been violated cannot be sustained and should be dismissed." *Id.*

Section 12

The amended complaint refers to Section 12(a), 12(b), and 12 (d) of the Act, which refer to water pollution. Am. Comp. at 1, citing 415 ILCS 5/12(a), 12(b), 12 (d) (2006). Williamson Energy claims that the amended complaint refers only to a DNR "Notice of Violation" sent to Steelhead Development Company. Mot. at 4; *see* Am. Comp. at 2-5. Arguing that this notice found no violation of Section 12, Williamson Energy claims that the amended complaint "makes no other allegations concerning any violation of Section 12." Mot. at 5. Williamson Energy argues that Strunk has failed to satisfy the requirements of 35 Ill. Adm. Code 103.204(C)(2) because he "has provided no dates of any other water problems; no creeks or waterways have been identified; nor is any nature or extent or consequences of any discharge [] identified." *Id.* Consequently, Williamson Energy argues that any allegation of a violation of Section 12 should be dismissed. *Id.*

STRUNK'S RESPONSE TO SECOND MOTION TO DISMISS

On December 3, 2007, Strunk filed a response to Williamson Energy's second motion to dismiss. The Board's procedural rules provide that, "[w]ithin 14 days after service of a motion, a party may file a response to the motion." 35 Ill. Adm. Code 101.500(d). Attached to Williamson Energy's second motion to dismiss is proof of service showing that a copy of the second motion to dismiss was served on Strunk on November 9, 2007. Furthermore, Strunk's response includes no indication that Strunk has served the response on Williamson Energy. *See* 35 Ill. Adm. Code 101.304(d). Regarding the issue of service, the Board notes that its August 9, 2007 order in this proceeding directed Strunk to file a sworn certificate of service or other proof

of service of the original complaint on Williamson Energy or face dismissal. The Board finds that Strunk's response was not filed on a timely basis and did not comply with the Board's procedural rules regarding service on Williamson Energy, and the Board declines to consider Strunk's response to the second motion to dismiss.

BOARD ANALYSIS

Under Section 101.500(d) of the Board's procedural rules, "[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion." 35 Ill. Adm. Code 101.500(d).

The Board above found that Strunk's response to Williamson Energy's second motion to dismiss was not timely and did not comply with procedural requirements regarding service and declined on those grounds to consider the response. Despite Strunk's failure to file a timely response that satisfied those requirements, the Board below first addresses its standard of review before analyzing the allegations and arguments in the amended complaint and the second motion to dismiss.

Standard of Review

Caselaw clearly establishes the Board's standard of review. The Board takes all well-pled allegations in the complaint as true in ruling on a motion to dismiss. Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 900, 577 N.E. 2d 1205, 1210 (1st Dist. 1991) (citations omitted); People v. Sheridan Sand & Gravel Co., PCB 06-177, slip op. at 4 (Sept. 7, 2006), People v. Pattison Associates, LLC and 5701 S. Calumet, L.L.C., PCB 05-181, slip op. at 4 (Sept. 15, 2005), People v. Stein Steel Mills Services, Inc., PCB 02-1, slip op. at 1 (Nov. 15, 2001), Shelton v. Crown, PCB 96-53 (May 2, 1996), Krautsack v. Patel, PCB 95-143, slip op. at 2 (June 15, 1995), Miehle v. Chicago Bridge and Iron Co., PCB 93-150, slip op. at 5 (Nov. 4, 1993).

"[D]ismissal of the complaint is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief." Sheridan Sand & Gravel, PCB 06-177, slip op. at 4; *see also* Pattison Associates, PCB 05-181, slip op. at 4; Stein Steel Mills, PCB 02-1, slip op. at 1; Shelton, PCB 96-53; Krautsack, PCB 95-143, slip op. at 2; Miehle, PCB 93-150, slip op. at 5.

Procedural Requirements

In its September 20, 2007 order, the Board directed Strunk to file an amended complaint complying with all applicable requirements including, but not limited to, those listed at 35 Ill. Adm. Code 103.204 and those pertaining to proof of service. Section 103.204(f) of the Board's procedural regulations provides that

Any party serving a complaint upon another party must include the following language in the notice: "Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney." 35 Ill. Adm. Code 103.204(f).

The amended complaint does not include this required language either in the amended complaint itself or in any notice or other document attached to it. Consequently, the Board finds that Strunk has failed to comply with the requirements of 35 Ill. Adm. Code 103.204(f).

More significantly, the Board notes that Section 101.304 of the Board's procedural regulations provides in pertinent part that "[p]arties in Board adjudicatory proceedings are responsible for service of all documents they file with the Clerk's Office." 35 Ill. Adm. Code 101.304(b). Section 101.304 also provides in pertinent part that "[p]roof of proper service is the responsibility of the party filing and serving the document. *An affidavit of service or certificate of service must accompany all filings of all parties.*" 35 Ill. Adm. Code 101.304(d) (emphasis added).

The record contains no evidence that Strunk has served his amended complaint on Williamson Energy. Consequently, the Board finds that Strunk has failed to comply with requirements regarding proof of service. In this regard, the Board again notes that its August 9, 2007 order in this proceeding directed Strunk to file a sworn certificate of service or other proof of service of the original complaint on Williamson Energy or face dismissal.

Substantive Requirements

In its September 20, 2007 order, the Board granted Williamson Energy's motion to dismiss allegations relating to violations of Sections 8, 9.5(c), and 23 of the Act (415 ILCS 5/8, 9.5(c), 23 (2006)) and allegations relating to light. In the same order, the Board denied Williamson Energy's motion to dismiss allegations relating to violations of Sections 9(a), 9(b), 12(a), 12(b), 12(d), and 24 of the Act. 415 ILCS 5/9(a), 9(b), 12(a), 12(b), 12(d), 24 (2006). Although it declined then to dismiss allegations that Williamson Energy had violated those provisions, the Board found that those allegations did not comply fully with the Board's procedural rules. Accordingly, the Board directed Strunk to file an amended complaint curing these deficiencies. Specifically, the Board required that the amended complaint comply with all applicable requirements, including but not limited to those listed at 35 Ill. Adm. Code 103.204.

Section-by-section below, the Board analyzes the amended complaint to determine whether Strunk has satisfied Board's order and complied with the procedural rules.

Section 9

After reviewing the documents filed by Strunk on October 18, 2007, the Board cannot conclude with regard to air violations that the amended complaint complies with the Board's

procedural rule requiring that Strunk provide “[t]he dates, location, events, nature, extent, 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). In addition, the Board notes that Section 9(b) of the Act (415 ILCS 5/9(b) (2006)) prohibits the performance of various acts without a permit. After reviewing the documents submitted by Strunk, the Board cannot conclude that his amended complaint alleges air permit violations with sufficient specificity to satisfy 35 Ill. Adm. Code 103.204(c). Accordingly, the Board grants Williamson Energy’s second motion to dismiss with regard to alleged violations of Sections 9(a) and 9(b) of the Act (415 ILCS 5/9(a), 9(b) (2006)).

Section 12

After reviewing the documents filed by Strunk on October 18, 2007, the Board cannot conclude with regard to water violations that the amended complaint complies with the Board’s procedural rule requiring that Strunk provide “[t]he dates, location, events, nature, extent, 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). Accordingly, the Board grants Williamson Energy’s second motion to dismiss with regard to alleged violations of Sections 12(a), 12(b), and 12(d) of the Act (415 ILCS 5/12(a), 12(b), 12(d) (2006)).

Section 24

With regard to alleged noise violations of Section 24 of the Act (415 ILCS 5/24 (2006)), the Board in its September 20, 2007 order noted that “[t]he appellate court has previously stated that Section 24 is not a general statutory prohibition.” Rulon v. Double D Gun Club, PCB 03-7, slip op. at 4 (Aug. 22, 2002), citing Shepard v. Northbrook Sports Club and the Village of Hainesville, 272 Ill. App 3rd 764, 768, 651 N.E.2d 555, 558 (2nd Dist. 1995). The Board further noted that Section 24 prohibits the emission of noise “*so as to violate any regulation or standard adopted by the Board under this Act.*” Shepard, 272 Ill. App. 3d at 768, 651 N.E.2d at 558 (emphasis in original); *see* 415 ILCS 5/24 (2006). “Section 24 is not a stand-alone provision, but a violation of certain Board noise regulations could result in a violation of Section 24.” Rulon, PCB 03-7, slip op. at 4, citing Roti v. LTD Commodities, PCB 99-19, slip op. at 2 (Nov. 5, 1998).

Although the September 20, 2007 order denied Williamson Energy’s motion to dismiss the alleged violation of Section 24, the Board stated that an amended complaint alleging a noise violation must be consistent with the caselaw, including but not limited to those decisions described in the preceding paragraph. The Board also stated that an amended complaint alleging a noise violation must also comply with the Board’s procedural rules, including 35 Ill. Adm. Code 103.204(c).

After reviewing the documents filed by Strunk on October 18, 2007, the Board cannot conclude that Strunk has alleged violation of a Board noise regulation that could result in a violation of Section 24. The same review leaves the Board unable to conclude that the amended complaint complies with the Board’s procedural rule requiring that Strunk provide “[t]he dates, location, events, nature, extent, 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). Accordingly, the Board grants Williamson Energy’s second motion to dismiss with regard to alleged violations of Section 24 of the Act (415 ILCS 5/24 (2006)).

CONCLUSION

Because the complainant has failed to comply with procedural requirements, particularly by failing to serve the amended complaint on the respondent; because the substance of the amended complaint fails to contain sufficiently specific information to satisfy the requirements of 35 Ill. Adm. Code 103.204(c)(2) and in one case fails to state a cause of action; and because the complainant’s failure to file a timely response to the second motion to dismiss, the Board grants Williamson Energy’s second motion to dismiss, dismisses the amended complaint in its entirety, and closes the docket.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board’s procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 20, 2007, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board