

ILLINOIS POLLUTION CONTROL BOARD  
October 20, 2011

MARK LILLY, )  
)  
Complainant, )  
)  
v. ) PCB 12-16  
) (Citizens Enforcement - Air)  
CITY OF ROCK FALLS, ILLINOIS, )  
)  
Respondent. )

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

On July 19, 2011, Mark Lilly filed a complaint against the City of Rock Falls, Illinois (the City). *See* 415 ILCS 5/31(d) (2010); 35 Ill. Adm. Code 103.204. Mr. Lilly alleges that the City violated Sections 9(a) and (c) of the Environmental Protection Act (Act), 415 ILCS 5/9(a), (c), and Sections 237.120 and 237.110 of the Board’s regulations, 35 ILCS 237.120, 237.110. Mr. Lilly further alleges that the City violated these provisions by causing or allowing the open burning of domicile waste and yard waste. The complaint concerns the City of Rock Falls located in Whiteside County.

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). The City filed a motion requesting that the Board not accept the complaint for hearing (Motion) on August 12, 2011. Mr. Lilly filed a response to the motion (Response) on August 19, 2011. For the reasons below, the Board grants the motion. However, the Board grants Mr. Lilly 30 days to file an amended complaint.

**THE COMPLAINT**

Mr. Lilly alleges that the City is violating Sections 9(a) and (c) of the Act, 415 ILCS 5/9(a), (c), and Sections 237.110 and 237.120 of the Board’s regulations, 35 ILCS 237.110, 237.120. Compl. at 1.

**Open Burning of Domicile Waste/Refuse**

Mr. Lilly includes in the complaint 13 photographs which he alleges prove the open burning of domicile waste and refuse in order to facilitate disposal. Compl. at 4-8. The photographs allegedly depict scenes of various burn sites throughout Rock Falls some of which consist of various plastics, building materials and brightly colored refuse. *Id.* Mr. Lilly contends that these photographs “do not represent isolated incidences” but rather the practice “is apparent throughout Rock Falls [and] occurs daily, year round, day and night, by many.” Compl. at 8.

Mr. Lilly alleges that the City is violating Section 237.120(b) because the burned materials satisfy the description of domicile waste and are being burned in a municipality which is a restricted area. Compl. at 8. Mr. Lilly contends that this activity is banned under Section 237.120 and that the toxic chemicals released from burning much of the waste also cause air pollution. *Id.*

Mr. Lilly states that the City is violating Section 237.110 because it is obligated under this section to enforce Section 237.120 prohibitions, something which Mr. Lilly alleges the City has not done. Compl. at 8.

Mr. Lilly contends that the City is violating Section 9(a) of the Act by refusing to enforce the open burning prohibition outlined in Section 237.120 and by allowing the discharge of contaminants into the environment that tend to cause air pollution in violation of Board regulations. Compl. at 8. Lastly, Mr. Lilly alleges that the city has violated Section 9(c) of the Act by allowing the open burning of refuse which results in air pollution. *Id.*

### **Open Burning of Yard Waste**

Mr. Lilly states that Rock Falls currently permits, by ordinance, the year-round burning of yard waste from 10:00 a.m. until sunset. Compl. at 9. Mr. Lilly contends that several provisions of Section 237.120 of the Board's regulations render the exemption allowing the open burning of landscape waste inapplicable to Rock Falls. *Id.*

Mr. Lilly includes five photographs in support of his claims. Compl. at 9-11. The images include alleged depictions of landscape waste being hauled onto a property from outside of the property to be burned and smoke clouds caused by burning piles "a few feet away" from homes in a residential area. *Id.* at 9-10. Mr. Lilly also questions how much of the yard waste and refuse from neighboring Sterling, which prohibits the open burning of yard waste, is being transported to Rock Falls to be burned. Compl. at 9.

Mr. Lilly contends that, under Section 237.120(c) of the Board's regulations, the open burning of landscape waste is prohibited in municipalities with a population in excess of 2,500 or adjoining a municipality with a population in excess of 2,500. Compl. at 10. Mr. Lilly cites a 2009 government census indicating that Rock Falls had a population of 9,268 and neighboring Sterling had a population of 15,053. *Id.*, citing <http://factfinder.census.gov>. Mr. Lilly also cites to "EPA supplied information" regarding leaf burning in his contention that the yard waste incineration "indisputably causes air pollution." Compl. at 11. Mr. Lilly states that the "unregulated burning year round, including the burning of refuse and 'rec' fires" causes the air quality in the community to be "abhorrent." *Id.* Mr. Lilly contends that this open burning is injurious to health and produces a nuisance. *Id.*

Mr. Lilly states that the City is violating Section 237.120(c) because the yard waste is transported from other property to be burned in Rock Falls, it is "impossible for the . . . smoke of yard waste to be dissipated to a safe level in a residential area with a population over 9,000," Rock Falls is a prohibited area for landscape waste burning and the burning causes air pollution. Compl. at 12.

Mr. Lilly contends that the City is violating Section 237.110 because the City is obligated to enforce Section 237.120(c) prohibitions which it is not doing because the open burning of yard waste is rampant despite Rock Falls being disqualified from exercising an exemption permitting the open burning of yard waste under Section 237.120(c). Compl. at 12.

Mr. Lilly states that the City is violating Section 9(a) of the Act by allowing the discharge of contaminants into the environment that tend to cause air pollution in violation of Board regulations 237.120(c) and 237.110. Compl. at 12. Lastly, Mr. Lilly contends that the City is violating Section 9(c) by encouraging and implicitly condoning the open burning of refuse by local residents. *Id.*

### **“Rec” Fires**

Mr. Lilly contends that no Rock Falls ordinance permits recreational fires yet the City routinely permits these fires throughout the City and at night. Compl. at 13. Mr. Lilly includes five photographs of alleged “rec” fires in Rock Falls. *Id.* at 13-14. These photographs depict, for example, a “dangerously high flame” and former “rec” fire locations “strewn with beer cans and fueled by an unknown substance.” *Id.* at 13. Mr. Lilly states that these fires “exceed the intended purpose of the campfire exemption and present a danger to the community.” *Id.* at 14. Mr. Lilly contends that it is inconsistent to allow these fires in an area where the law prohibits the open burning of yard waste and refuse. *Id.*

Mr. Lilly contends that the City is violating Section 237.120(e) because the “rec” fires exceed the intended scope of the regulation allowing such an exemption and the fires are not being set “in conjunction with legitimate campfires or associated recreational activities and/or cooking.” Compl. at 14. Mr. Lilly also contends that the City’s allowance of the open burning of unknown fuels and other illegal materials is inconsistent with the laws prohibiting the burning of refuse in any municipality. *Id.*

Mr. Lilly states that the City is violating Section 237.110 of the Board’s regulations by not enforcing its obligation to prohibit illegal burning by permitting these “rec” fires. Compl. at 14. It is Mr. Lilly’s position that the City should be enforcing a ban on refuse and landscape waste incineration, including a prohibition on recreational fires. *Id.*

Mr. Lilly states that the City is violation Section 9(a) of the Act by tending to cause air pollution through a failure to prohibit recreational fires and causing the release of contaminants from the burning of refuse and other “dangerous, forbidden fuels” in recreational fires. Compl. at 15. Mr. Lilly further contends that the City is violating Section 9(c) of the Act by permitting the open burning of refuse through the City’s failure to enforce a ban on residents throwing beer cans and other refuse into the recreational fires and allowing prohibited materials to be used to ignite the fires. *Id.*

### **The City's Burn Policies**

Mr. Lilly states that the current burn policies in Rock Falls permit open incineration of any item twenty-four hours a day without restriction and that burning not allowed under the yard waste exception is permitted as a recreational fire. Compl. at 15. Mr. Lilly states that the cumulative effect of this burning “presents a serious health and environmental threat.” *Id.*

Mr. Lilly concedes that the Illinois Municipal Code allows communities such as Rock Falls to choose any means of disposal of refuse, garbage and ashes it desires, but that it does not exempt such municipalities from laws regulating the environment. Compl. at 15. Mr. Lilly states that the City has “made a mockery of Illinois environmental laws” and that it is appropriate for the City “to pay for the harm they are currently inflicting on the environment and unwilling, many-times disabled, citizens.” *Id.*

### **Relief Requested**

Mr. Lilly requests the maximum civil penalty allowed, consisting of a \$50,000 fine for each violation proved and an additional \$10,000 penalty for each day during which each violation continues. Compl. at 15, citing 415 ILCS 5/42.

### **THE CITY'S MOTION THAT THE BOARD NOT ACCEPT THE COMPLAINT FOR HEARING**

The City contends that the complaint “is frivolous because it seeks relief which [the Board] does not have the authority to grant, and further fails to state a cause of action upon which [the Board] can grant relief.” Mot. at 1.

The City argues that the complaint does not allege that the City is violating any relevant provision of the Act or regulations promulgated thereunder. Mot. at 1. The City states that the complaint rather alleges that the City's policies permit citizens to violate the Act or regulations and that the City is “effectively circumventing regulations designed to protect the environment and the health and safety of its citizens.” *Id.* The City contends that the Board “does not have the authority to invalidate a municipality's ordinances, or to require a municipality to enforce its ordinances, or to adopt or enforce any specific policies, rules, or regulations.” *Id.*

The City also argues that neither the Act nor regulations promulgated thereunder prohibit the City from allowing its citizens to burn landscape waste generated from the citizen's land or to utilize recreational fires. Mot. at 1-2, citing 415 ILCS 5/9 and City of Lake Forest v. Pollution Control Board, 146 Ill. App. 3d 848, 100 Ill. Dec. 301 (2nd. Dist. 1986).

### **MR. LILLY'S RESPONSE TO MOTION**

Mr. Lilly contends that the City's motion fails to address the argument presented in the complaint. Resp. at 1. Mr. Lilly states that the complaint clearly lists violations of the Act and Board regulations and facts supporting those allegations. *Id.*

Mr. Lilly states that the complaint does not request that the Board invalidate ordinances or order adoption or enforcement of specific policies or regulations. Resp. at 1. Rather, the complaint “requests the payment of money only for violations proved.” *Id.* Mr. Lilly deems City of Lake Forest irrelevant to his complaint. *Id.*

Mr. Lilly states that “[t]he issue is not whether [the City] can be forced to prohibit the described burning.” Resp. at 1. Rather, the claim is that “this waste disposal option . . . is not free.” *Id.* Mr. Lilly notes that civil penalties can be assessed against prohibited burning and that the Board’s authority to grant this relief is specifically outlined in 415 ILCS 5/42. Resp. at 1.

Mr. Lilly argues that the City misrepresents the complaint and asks the Board to deny the motion and accept the complaint for hearing. Resp. at 1.

### **STATUTORY BACKGROUND**

Section 9 of the Act states, in relevant part, that no person shall:

- (a) Cause 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;

\* \* \*

- (c) Cause or allow the open burning of refuse, conduct any salvage operation by open burning, or cause or allow the burning of any refuse in any chamber not specifically designed for the purpose and approved by the Agency pursuant to regulations adopted by the Board under this Act; except that the Board may adopt regulations permitting open burning of refuse in certain cases upon a finding that no harm will result from such burning, or that any alternative method of disposing of such refuse as to justify the pollution that would result from such burning[.] 415 ILCS 5/9(a), (c).

Part 237.110 of the Board’s regulations states:

It shall be the obligation of local governments as well as of the Environmental Protection Agency (Agency), to enforce by appropriate means the prohibitions of this Part. 35 Ill. Adm. Code Part 237.110.

Part 237.120 of the Board’s regulations states:

The following activities are not in violation of Section 9(c) of the Act (Ill. Rev. Stat. 1981, ch. 111 1/2, par. 1009(c)) or of this Part unless they cause air

pollution as defined in the Act. Nothing in this Section shall exempt such activities from applicable local restrictions.

\* \* \*

- b) The open burning of domicile waste, but only:
  - 1) On the premises on which such waste is generated; and
  - 2) In areas other than restricted areas; and
  - 3) When atmospheric conditions will readily dissipate contaminants; and
  - 4) If such burning does not create a visibility hazard on roadways, railroad tracks or air fields.
  
- c) The open burning of landscape waste, but only:
  - 1) On the premises on which such waste is generated; and
  - 2) When atmospheric conditions will readily dissipate contaminants; and
  - 3) If such burning does not create a visibility hazard on roadways, railroad tracks or air fields; and
  - 4) In those areas of the State which are not in the following prohibited areas:
    - A) Municipalities having a population in excess of 2,500 according to the latest federal census.
    - B) Municipalities of any size which adjoin a municipality having a population in excess of 2,500.
    - C) All municipalities wholly within 40 air miles (64.5 kilometers) of Meigs Field, Chicago, Illinois.
    - D) All municipalities wholly within 20 air miles (32.3 kilometers) of McKinley Bridge connecting St. Louis, Missouri and Venice, Illinois.
    - E) Rural areas 305 meters (1,000 feet) or less from a municipality in which open burning of landscape waste is prohibited.

\* \* \*

- e) The burning of fuels for legitimate campfire, recreational and cooking purposes, or in domestic fireplaces, in areas where such burning is consistent with other laws, provided that no garbage shall be burned in such cases.

\* \* \*

### **Duplicative or Frivolous**

Section 31(d) of the Act (415 ILCS 5/31(d) (2010)) 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.” *Id.*; *see also* 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.* A respondent may file a motion alleging that the complaint is duplicative or frivolous within 30 days after being served with a complaint. 35 Ill. Adm. Code 103.212(b).

### **DISCUSSION**

Mr. Lilly alleges that the City has violated Parts 237.110 and 237.120 of the Board’s regulations and Sections 9(a) and (c) of the Act.

### **Relief Requested**

As a preliminary matter, the Board addresses the relief sought by Mr. Lilly and the City’s contention that the complaint “seeks relief which [the Board] does not have authority to grant.” Mot. at 1. The City states that the Board “does not have authority to invalidate a municipality’s ordinances, or to require a municipality to enforce its ordinances, or to adopt or enforce any specific policies, rules, or regulations.” *Id.* Mr. Lilly states in his complaint that the relief he seeks is “the maximum civil penalty allowable under, 415 ILCS 5/42, consisting of a \$50,000 fine for each violation proved and an additional \$10,000 penalty for each day during which each violation continues.” Compl. at 15. Mr. Lilly does not request that the Board “invalidate [the City’s] ordinances, or . . . require [the City] to enforce its ordinances, or . . . adopt or enforce any specific policies, rules, or regulations” as contended in the City’s motion. It is well established that the Board may apply civil penalties for violations of the Act. *See* 415 ILCS 5/5(d), 42 (2010). Accordingly, the Board does have the authority to grant the relief requested by Mr. Lilly.

### **Violations of Board Regulations**

Mr. Lilly cites two Board regulations which he alleges the City is violating. However, the Board does not have authority to enforce these regulations against the City.

Section 237.110 states that “it shall be the obligation of local governments as well as of the Environmental Protection Agency (Agency), to enforce by appropriate means the prohibitions of this Part.” 35 Ill. Adm. Code Part 327.110. This language is a declaration and cannot be violated. *See Terri D. Gregory v. Regional Ready Mix, LLC*, PCB 10-106 (Aug. 19, 2010) (finding a complaint frivolous where citizen complainant alleged violations of legislative declarations not capable of being violated).

Similarly, Section 237.120 lists activities that are not in violation of Section 9(c) of the Act. This section is intended as a guideline for exemptions from Section 9(c) violations. While a party not meeting one of these exemptions may be in violation of Section 9(c) of the Act, the party cannot be in violation of Section 237.120 for not meeting one of the listed exemptions. *See Gina Patterman, et al., v. Boughton Trucking and Materials, Inc.*, PCB 99-187, slip op. at 2 (May 18, 1995) (finding portion of citizens complaint frivolous where Board section, by its terms, cannot be violated).

Sections 237.110 and 237.120 of the Board’s regulations are not “cause[s] of action upon which the Board can grant relief.” Accordingly, the Board grants the City’s motion to not accept the alleged violations of Board regulations for hearing because these allegations are frivolous.

### **Violations of the Act**

Mr. Lilly contends that the City has violated Sections 9(a) and (c) of the Act. Compl. at 8, 12, 15. The City states that “to the extent complainant complains of open burning of landscape waste, and recreational fires, neither the Act nor the regulations promulgated thereunder prohibit the City from allowing its citizens to burn landscape waste generated from the citizen’s land, or to utilize recreational fires.” Mot. at 1-2.

The Board has previously held that “the mere presence of [an] ordinance is not evidence of a violation of Sections 9(a) and (c) of the Act.” *Jane Graham and Kathy Creech v. City of Paris*, PCB 97-79, slip op. at 2 (Dec. 19, 1996). The Board cannot find the City in violation of Sections 9(a) and (c) of the Act for causing, threatening or allowing air pollution or open burning on private property simply because the City has an ordinance which is not being followed by its citizens. It is the property owners, not the City, who would be in violation.

Further, while the complaint alleges violations of Sections 9(a) and (c) of the Act, the complaint states that a number of these violations result from the City’s violations of the Board’s regulations, *e.g.* Compl. at 8 (alleging violations of Section 9(a) and (c) of the Act for failing to enforce Section 237.120). As noted previously, because these regulations are not “cause[s] of action upon which the Board can grant relief,” the Board cannot find the City in violation of Sections 9(a) and (c) of the Act for not enforcing those Board regulations.



However, Mr. Lilly's complaint has indicated at least one instance where a possible violation of Sections 9(a) and (c) of the Act is being committed by the City. Compl. at 11. Other photographs included in the complaint indicate possible violations, but the complaint is unclear as to where the acts are occurring or if the City is the party committing these Acts. While the Board cannot hold the City liable for the actions of its citizens, the Board can hear claims against the City for violations of Sections 9(a) and (c) committed by the City. *See City of Paris*, slip op. at 2 (Dec. 19, 1996) (“[T]he Board notes that the decision in *City of Lake Forest* does not curtail the Board’s authority to hear citizens enforcement cases involving violations of the open burning prohibitions found in the Act and Board regulations.”).

Because the complaint is unclear as to the acts performed by the City in violation of Sections 9(a) and (c) of the Act, the Board grants Mr. Lilly 30 days to amend the complaint to remedy the deficiencies described above.

### **Conclusion**

For the reasons discussed above, the Board grants the City’s motion and does not accept for hearing the alleged violations of Parts 237.110 and 237.120 of the Board’s regulations. The Board also grants the motion to not accept for hearing the alleged violations of Sections 9(a) and (c) of the Act. However, the Board grants Mr. Lilly 30 days from the date of this order to file an amended complaint to remedy the deficiencies in the Section 9(a) and (c) violations alleged in the complaint.

### **ORDER**

The Board grants the City of Rock Falls, Illinois (the City), its motion to not accept for hearing the alleged violations of Parts 237.110 and 237.120 of the Board’s regulations and Sections 9(a) and (c) of the Environmental Protection Act because the allegations are frivolous.

Mr. Lilly has until Monday, November 21, 2011, which is the first business day following the 30th day after the date of this order, to file an amended complaint with the Board remedying the deficiencies described above in the alleged Section 9(a) and (c) violations. The amended complaint must comply with the content requirements of the Board’s procedural rules. *See, e.g.*, 35 Ill. Adm. Code 103.204. Further, a copy of the amended complaint must be served upon the City and proof that the City was so served must be filed with the Board. *See* 35 Ill. Adm. Code 101.302, 101.304. The time periods for the City to file any motion attacking, or any answer to, the amended complaint will commence upon the City’s receipt of the amended complaint. *See* 35 Ill. Adm. Code 101.506, 103.212(b); *see also* 35 Ill. Adm. Code 103.204(e).

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 20, 2011, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board