

ILLINOIS POLLUTION CONTROL BOARD  
June 8, 1989

IN THE MATTER OF: )  
)  
DUPLICITOUS OR FRIVOLOUS ) RES 89-2  
DETERMINATION )

RESOLUTION OF THE BOARD: (by R. C. Flemal)

Section Section 31(b) of the Environmental Protection Act (Act), states that when a citizen's enforcement complaint is filed:

Unless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing...

Ill. Rev. Stat. 1987 ch.  
111 1/2, par. 1031(b).

Also, Board regulations in part provide:

If a complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings.

If the Board rules that the complaint is not duplicitous or frivolous, or if the complaint is filed by the Agency, the Chairman shall designate a Hearing Officer and the Clerk shall notify the parties of such designation.

35 Ill. Adm. Code 103.124

The Board defined duplicitous in Brandle v. Ropp, PCB 85-68, 54 PCB 253 (1985) as follows:

Duplicitous is not defined in the Act but has been interpreted to apply to complaints which duplicate allegations identical or substantially similar to

matters previously brought before the Board. Winnetkans Interested in Protecting the Environment (WIPE) v. Illinois Pollution Control Board, 55 Ill. App. 3d 375, 370 N.E. 2d 1176 (1st Dist. 1977). A complaint is also duplicitous if it is identical or substantially similar to one brought in another forum.

Frivolous has been construed by the Board to mean "failure to state a cause of action upon which relief can be granted" Citizens for a Better Environment v. Reynolds Metals Co., PCB 73-173, 8 PCB 46 (1973). The Board can grant relief by ordering a Respondent to stop the polluting activity and by imposing a fine. The Board cannot grant monetary compensation for damage done to health or property and it cannot impose criminal sanctions such as a jail term. Thus, any request for monetary compensation or the imposition of criminal sanctions would be considered frivolous.

To date, the Board has based its determination on whether or not a citizen enforcement complaint is duplicitous or frivolous from information submitted orally at the "11:00 call" at Board meetings.

If neither party is present when the case is called, the Board looks at the complaint and any other relevant information, and decides whether the action is duplicitous or frivolous<sup>1</sup>. The Board would prefer not having to make such an uninformed decision. The difficulties of the present procedure include having the parties attend the Board meeting, the information given by the parties is not secured under oath, and the possibility of misinformation due to the parties not clearly understanding what the determination means and its consequences. Thus, the Board believes an improved procedure is warranted to provide more written information to the parties prior to a determination and to eliminate the need for the physical presence of the parties at the Board meetings.

Therefore, upon the adoption of this resolution, this "11:00 call" is eliminated and the following procedure is the method by which the necessary information shall be gathered for the Board to make the required duplicitous or frivolous determination. This resolution is applicable to any person, other than the Illinois Environmental Protection Agency (Agency) and the

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<sup>1</sup>The duplicitous or frivolous determination does not have to be made when the Agency or the Attorney General is the Complainant.

Attorney General, as defined in Section 3.26 of the Environmental Protection Act (Act)<sup>2</sup>.

NEW PROCEDURE

For all citizen enforcement complaints received on or after the adoption of this resolution, a citizen requesting information in person, by phone, or by mail concerning the filing of a complaint before the Board, shall receive the following six (6) documents:

- 1) An informational letter (Exhibit A)
- 2) An informal complaint form (Exhibit B)
- 3) A formal complaint form (Exhibit C)
- 4) A Certificate of Service form (Exhibit D)
- 5) A copy of the Environmental Protection Act
- 6) A copy of the Board's Procedural Rules

Upon the adoption of this resolution, the Clerk's office will not accept the existing complaint form. When the Clerk's office receives an existing complaint form, except complaints filed by the Agency or the Attorney General, the Clerk's office will send to the citizen the six documents described above.

The difference between the informal complaint and the formal complaint is that if the citizen chooses the informal complaint route, the complaint is referred to the Agency. The Agency then determines whether it will prosecute the case. The formal complaint, if accepted, holds the citizen responsible for prosecuting the entire case for presentation to the Board.

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<sup>2</sup> Section 3.26 of the Act provides:

"Person" is any individual, partnership, co-partnership, firm, company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.

Ill. Rev. Stat. 1987 ch.  
111 1/2 par. 1003.26.

## I. INFORMAL COMPLAINT PROCESS

If, after reading the standard cover letter (Exhibit A), the citizen chooses to complete the informal complaint form (Exhibit B), the completed informal complaint form may be mailed either to the Agency or to the Board. If the Board receives the completed informal complaint form, the Board will forward it to the Agency. Based upon the information received, the Agency will decide whether to act as the prosecutor and file its own enforcement complaint.

## II. FORMAL COMPLAINT PROCESS

If the citizen chooses to complete the formal complaint form, he or she shall file the completed formal complaint form with the Board. The citizen will be designated as Complainant and must comply with all procedural rules as set forth in 35 Ill. Adm. Code 103, Subpart B. This includes the requirement that the Complainant serve on the Respondent or his authorized agent a copy of a notice and complaint by registered or certified mail. Proof of service shall be made by affidavit of the person making personal service, or by properly executed registered or certified mail receipt. Proof of service of the notice and complaint shall be filed with the Clerk's office immediately upon completion of service.

Once the Respondent has been served with a copy of the complaint, language in the complaint form will inform the Respondent of his or her rights concerning the duplicitous and frivolous determination and the time allowed to respond. If the Respondent believes the complaint is duplicitous or frivolous, he or she shall file an appropriate motion stating the basis for such belief, including any necessary affidavits and supporting documents. If no response is received within two weeks from the date of service, the Board will interpret the silence to mean the Respondent does not believe the action to be either duplicitous or frivolous<sup>3</sup>.

### DISTRIBUTION

To ensure that affected persons are made aware of this Resolution, the Board will:

- a) Mail a copy of this Resolution to all persons on the R88-5 notice list; and

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<sup>3</sup> The Board may grant a Respondent a reasonable extension of time to file its motion if the Board determines that the Respondent has shown good cause for additional time to obtain information pertaining to the frivolous or duplicitous determination.

- b) Publish the text of this Resolution in the Environmental Register.

Finally, the Board would appreciate any assistance that the environmental bar, industry and trade associations, and environmental groups can give in making this information known to their members.

IT IS SO RESOLVED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Resolution was adopted on the 8<sup>th</sup> day of June, 1989, by a vote of 6-0.

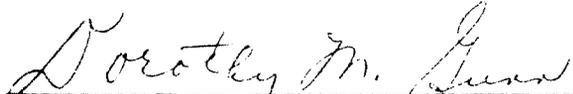
  
\_\_\_\_\_  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

EXHIBIT A

Date

Dear:

Please read this informational letter in full before making any decisions regarding the filing of your complaint. Enclosed are two pollution complaint forms, a Certificate of Service form and copies of the Environmental Protection Act and the Board's Procedural Rules. If you wish to pursue a complaint, you must choose to fill out one or the other of the complaint forms completely, but not both. The Environmental Protection Act and the Board's Procedural Rules are to assist you in determining the Respondent's specific violation(s).

If you choose to complete the informal complaint form, please return the completed form to the Illinois Pollution Control Board (Board). The Board will then refer the informal complaint to the Illinois Environmental Protection Agency (Agency) for review and investigation. Alternatively, you may inform the Agency of the pollution problem directly. In either case, it is then up to the Agency to investigate the problem and to take action as it sees fit. Therefore, please provide as much information as possible concerning the pollution source, the type of pollution involved, the frequency and duration of the pollution events and the location. This information will help facilitate a thorough evaluation and investigation.

The Agency will inform you of the results of the investigation. The report may state, among other things, that 1) the problem has been resolved, 2) the problem has not been resolved, and the Agency intends to bring an enforcement action before the Board or a court, or 3) the problem has not been resolved, but the Agency either does not plan to or cannot quickly bring an enforcement action before the Board or a court.

If you are not satisfied with the results of the informal complaint, or choose not to file an informal complaint, you may file a formal complaint.

In a formal complaint the Complainant assumes the responsibility to actively proceed with the case. Neither the Board nor the Agency can directly assist you by conducting investigations or providing legal advice. If you choose to initiate a formal complaint you will be required to prepare and file documents with the Board and required to make a formal presentation at the hearing. Board employees cannot prepare these documents for you or speak on your behalf. A Complainant

may, although it is not necessary, hire an attorney to help prepare the case (pollution sources usually hire attorneys to defend them in this type of action). However, the Complainant is responsible for any attorney fees, duplicating costs, travel expenses, etc.

If you wish to pursue a formal complaint, please complete the formal complaint form. You must then file the original and nine (9) copies of the Complaint and notice with the Clerk of the Board. This may be done in person or by mail.

Also, one (1) copy of the complaint and notice must be served on each party complained against (Respondents) by either registered mail, certified mail or by personal service. You may not use any other type of service. The notice is to be directed to the Respondent notifying him/her/them of the filing of the attached complaint and that attendance at a hearing, at a date set by the Board, may be required.

If you serve the Respondent by either certified or registered mail, you must provide the Board with a copy of the receipt. Preferably, the receipt should be attached to the completed Certificate of Service form; however it may be mailed without the form. If you choose to personally serve the Respondent or his authorized agent, you must return to the Board an affidavit that you have served the Respondent. The affidavit must state who was served the complaint and notice and when it was served; it must also be signed by the person making service and notarized. (Refer to 35 Ill. Adm. Code 103.122(a) and (b) and 103.123(a) of the enclosed Board Procedural Rules).

Once the Clerk's office receives the complaint and the return receipt or affidavit, the complaint is assigned a docket number. The case is then scheduled for initial review by the Board at a Board meeting. The initial review of the case is to determine whether the complaint is duplicitous or frivolous. Duplicitous means that a similar case is pending in another court or in another action before the Board. Frivolous means that the requested relief is beyond the Board's authority to grant. The Board has the authority to impose fines and to order the Respondent to cease and desist the polluting activity after following certain procedures. The Board does not have the authority to grant monetary compensation to a complainant for damage to health or property, or to order the polluting activity to cease while the case is pending. If the Complainant wishes to collect monetary compensation for damage done to health or property or to force the pollution source to cease and desist polluting while the case is pending, a suit must be filed in the circuit court.

If the Board finds that the complaint is either duplicitous or frivolous, the Board will dismiss the complaint and notify the Parties of its decision. The losing party may then seek relief

in the circuit court (Ill. Rev. Stat. ch. 111 1/2, Section 1045(b)) or may file an appeal of the Board's decision with the appellate court for the district in which the claim arose. (Id. Section 1041(a)).

If a formal complaint is found to be neither frivolous nor duplicitous, the Board will authorize the matter for hearing and appoint a Hearing Officer. The Hearing Officer will then contact the parties to set a hearing date and location. At hearing, the Complainant is required to present argument, sworn testimony, and evidence to support the alleged violations of the Environmental Protection Act or the Board regulations.

If you have any questions regarding these procedures, please contact me at 312/917-3629.

Very truly yours,

Adaleen Hogan  
Assistant Clerk of the Board

AH:dw  
Enclosures

EXHIBIT B

STATE OF ILLINOIS  
POLLUTION CONTROL BOARD  
100 W. RANDOLPH STREET, SUITE 11-500  
CHICAGO, ILLINOIS 60601

INFORMAL COMPLAINT

1. Your Name, Address, and Phone: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Phone \_\_\_\_\_

2. Place where you can be contacted during normal business hours (if different from above): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Phone \_\_\_\_\_

3. Name and Address of Respondent (Alleged Polluter) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Phone \_\_\_\_\_  
(if known)

4. Type of Pollution (Check one or more)  
\_\_\_\_\_ Noise            \_\_\_\_\_ Air (including odors)  
\_\_\_\_\_ Water            \_\_\_\_\_ Hazardous Waste  
\_\_\_\_\_ Garbage          \_\_\_\_\_ Drinking Water  
\_\_\_\_\_                    \_\_\_\_\_ Sewer back-ups  
\_\_\_\_\_ Other (Please describe:)

\_\_\_\_\_  
\_\_\_\_\_

5. Describe the source and location of pollution (be as specific as you can)

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6. Describe the duration of pollution (when was it first noticed and how frequently does it occur, including any particular time of day if occurs)

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7. Provide any additional information which would help in the investigation of this pollution.

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**Note:** A copy of this informal complaint will be forwarded to the Illinois Environmental Protection Agency for investigation. You will be informed of the results of their investigation.



2. Place where you can be contacted during normal business hours (if different from above):

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Phone \_\_\_\_\_

3. Name and Address of Respondent (Alleged Polluter)

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Phone \_\_\_\_\_  
(if known)

4. Describe the type of business or activity which you allege (believe) is causing pollution (for example, manufacturing company, grain elevator, home repair shop) \_\_\_\_\_

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5. List specific Sections of the Environmental Protection Act and/or Board regulations which you allege (believe) are being violated. \_\_\_\_\_

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6. Describe the type of alleged pollution (for example air, odor, noise, water, drinking water, sewer back-ups) and the location of the alleged pollution. Be as specific as possible in describing the pollution discharge or emission.

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7. Describe the duration and frequency of the alleged pollution. Be as specific as possible about when you first noticed the alleged pollution, how frequently it occurs, and whether it is still continuing; include dates and/or times of day if available.

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8. Describe any bad effects which you believe the alleged pollution has on human health, plant or animal life, or the environment.

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9. Describe the relief you wish the Board to grant (for example, an order that the Respondent stop polluting, perform a specific action, make a specific change in its operation, and/or pay a money penalty; the Board cannot order Respondent to pay you money damages, attorney's fees or any out-of-pocket expenses which you incur by filing this complaint.)

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10. State whether you know if there is any court or other forum in which you are or anyone else is suing or complaining against this Respondent for the same alleged pollution discharge or emission.

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11. CERTIFICATION (Optional but encouraged)

I \_\_\_\_\_ having read the above do hereby swear and attest that I have read the forgoing and I have filled out the above form accurately and to the best of my knowledge.

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Subscribed to and Sworn  
before me this \_\_\_\_\_ day  
of \_\_\_\_\_, 19 \_\_\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires  
\_\_\_\_\_

**NOTE: THIS FORM MUST BE INCLUDED IN THE SERVICE TO RESPONDENT**  
**INFORMATION FOR RESPONDENT RECEIVING COMPLAINT**

The Board will not accept this complaint that has been served upon you if the case is determined to be either duplicitous or frivolous. Duplicitous means that a similar case is pending in another court or in another action before the Board. The response to question #10 in the complaint states the opinion of the Complainant(s) on this issue.

Neither can the Board accept the complaint if the action is frivolous. Frivolous means that the requested relief is beyond the Board's authority to grant. For example, the Board has the authority to order the Respondent(s) to cease and desist the polluting activity and order a fine after following certain procedures. The Board does not have the authority for example to grant monetary compensation to the Complainant for damage to health or property. Also, the Board cannot order the polluting activity to cease while the case is pending, except under special circumstances. The response to question #9 in the complaint states the opinion of the Complainant(s) on this issue.

If you believe this case is duplicitous or frivolous, please file a motion with the Board within two weeks from the date of service. The motion must state the basis for which the motion is made and a concise statement of the relief sought. Memoranda, affidavits, and any other relevant documents should accompany the motion. If more time than two weeks is necessary to gather supporting evidence, please indicate this within the two weeks and state your reasons as well as the amount of additional time needed. Upon good cause, the Board may grant an extension at its next Board meeting.

Ten (10) copies of the motion must be filed with the Clerk of the Board with proof of service. Service may be done either personally or by First Class United States mail. Mail service is presumed completed four days after mailing.

If no response is received by the Board within two weeks, the Board, at its discretion, may find that the complaint is not duplicitous or frivolous and may accept the case for hearing.

If you have any questions, please contact the Assistant Clerk of the Board, Adaleen Hogan, at (312) 917-3629.

EXHIBIT D

CERTIFICATE OF SERVICE

The undersigned, being first sworn, states that an original copy of the complaint and a copy of the notice of filing was mailed, or personally served, to the Respondent of this action at the below listed address on this date \_\_\_\_\_ by: (Check appropriate line)

\_\_\_\_\_ Certified Mail (attach copy of receipt)

\_\_\_\_\_ Registered Mail (attach copy of receipt)

\_\_\_\_\_ Personal Service

RESPONDENT'S ADDRESS

NAME: \_\_\_\_\_

STREET: \_\_\_\_\_

CITY, STATE AND ZIP: \_\_\_\_\_

\_\_\_\_\_  
Complainant(s)

SIGNED AND SWORN to before me  
this date \_\_\_\_\_

\_\_\_\_\_  
Notary Public

ILLINOIS POLLUTION CONTROL BOARD  
June 8, 1989

IN THE MATTER OF: )  
 )  
JAMES ESAREY, ) AC 88-90  
 ) (IEPA NO. 9212-AC)  
Respondent. )

ORDER OF THE BOARD (by J. Marlin):

This matter comes before the Board upon the Respondent's, James Esarey's, June 1, 1989 Motion For Leave To File Respondent's Brief Instanter. This motion is hereby granted.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 8<sup>th</sup> day of June, 1989 by a vote of 6-0.

  
\_\_\_\_\_  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

