

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

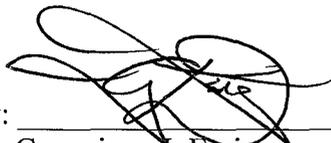
JON CHVALOVSKY,)	
)	
Complainant,)	
)	
v.	)	PCB NO. 2014-006
	)	(Citizens Enforcement – Noise)
EXELON, COM ED, EXELON CEO)	
CHRISTOPHER CRANE, and COM ED CEO)	
ANNE PRAMAGIORRE,)	
)	
Respondents.)	

NOTICE OF ELECTRONIC FILING

To: Jon Chvalovsky
9251 Latrobe Avenue
Skokie, IL 60077

B. Halloran – Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that on August 15, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois Respondents’ Motion to Dismiss, Appearance of Gabrielle Sigel, and Appearance of Genevieve J. Essig, copies of which are attached hereto and herewith served upon you.

By: 
Genevieve J. Essig

Gabrielle Sigel
Genevieve J. Essig
Attorneys for Respondents
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654-3456
Tel 312/923-2758

Dated: August 15, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JON CHVALOVSKY,)	
)	
Complainant,)	
)	
v.	)	PCB NO. 2014-006
	)	(Citizens Enforcement – Noise)
EXELON, COM ED, EXELON CEO)	
CHRISTOPHER CRANE, and COM ED CEO)	
ANNE PRAMAGIORRE,)	
)	
Respondents.)	

RESPONDENTS' MOTION TO DISMISS

Respondents, Exelon Corporation (“Exelon”), Commonwealth Edison Company (“ComEd”), Christopher Crane, and Anne Pramagiorre,¹ by and through their attorneys, Jenner & Block LLP, respectfully move the Illinois Pollution Control Board (the “Board”), pursuant to 35 Ill. Adm. Code 101.202 and 103.212, and prior Orders of the Board, to dismiss the complaint in this matter as “frivolous,” for failing to state a claim. In support of this Motion to Dismiss, Respondents state as follows:

1. On July 12, 2013, Mr. Jon Chvalovsky (“Complainant”), who resides at 9251 Latrobe Avenue in Skokie, Illinois, filed the present complaint (“2013 Complaint”) against the Respondents, attempting to allege noise emissions from a ComEd substation located near Mr. Chvalovsky’s house.²

¹ Respondents Exelon, Mr. Crane, and Ms. Pramagiorre are appearing solely for purposes of this Motion to Dismiss. Should Respondents’ motion not be granted on the merits, they respectfully request that Exelon Corporation, which does not own or control the equipment at issue and is the parent corporation to ComEd, and Mr. Crane and Ms. Pramagiorre, the individually named executives of Exelon Corporation and ComEd, be dismissed as improperly named parties to this action.

² For purposes of this Motion to Dismiss, the allegations in Mr. Chvalovsky’s Complaint are accepted as true. However, ComEd previously answered, principally denying the same allegations, the first time Mr. Chvalovsky filed a complaint before the Board. *See Answer*, Nov. 19, 2010, filed in *Chvalovsky v. Commonwealth Edison*, PCB No. 10-13.

Complainant's First and Amended Complaints Before the Board and Motion for Rehearing.

2. Four years ago, on August 6, 2009, Complainant filed a complaint attempting to allege noise pollution, from ComEd equipment near his home, naming as respondents ComEd and two other of its executives. *See* Complaint, Aug. 6, 2009, filed in *Chvalovsky v. Commonwealth Edison*, PCB No. 10-13 (“2009 Complaint”).

3. In a December 2, 2010, order in PCB No. 10-13, the Board declined to accept Complainant's 2009 case for hearing because it “fail[ed] to state a cause of action upon which relief can be granted,” and was, therefore, “frivolous.” Order of the Board, Dec. 2, 2010, PCB No. 10-13 (the “2010 Dismissal Order,” attached as Ex. 1 to this Motion to Dismiss), at 3. The Board found that the 2009 Complaint was deficient on many grounds, including that it attempted to allege violations of Sections 23 and 25 of the Illinois Environmental Protection Act (“the Act”), 415 ILCS 5/23, 25 (2008), which statutory provisions do not, in themselves, authorize a right of action. *Id.* at 2. As for Complainant's claim purporting to be under Section 24 of the Act, 415 ILCS 5/24, which, if properly pleaded, could be the basis for a cause of action, the Board found that, contrary to the requirements of Illinois law, the 2009 Complaint, “[did] not allege the violation of any Board noise regulation or standard.” *Id.* The Board, however, granted Complainant leave to file an amended complaint to attempt to cure the deficiencies identified in the 2010 Dismissal Order. *Id.* at 3.

4. On December 9, 2010, Complainant filed a letter with the Board, which the Board stated that it would construe as an amendment to his 2009 Complaint. *See* Order of the Board, Jan. 30, 2011, PCB No. 10-13 (the “2011 Dismissal Order,” attached as Ex. 2 to this Motion to Dismiss), at 1.

5. On January 30, 2011, the Board dismissed the amended complaint, finding that Complainant's 2009 Complaint, even as amended, failed to state a cause of action under Section 24 of the Act. 2011 Dismissal Order at 3. The Board noted that in Complainant's amended complaint, he alleged specific decibel level readings, "but without any citation to the Board's noise rules (numeric or nuisance), respondents cannot reasonably be expected to prepare a defense." *Id.* at 2. The Board informed Complainant of his rights to move to reconsider the Board's 2011 Dismissal Order and to appeal. *Id.* at 3.

6. On February 25, 2011, Complainant filed another letter with the Board, which the Board construed as a motion for reconsideration. Order of the Board, Apr. 7, 2011, PCB No.10-13 ("April 2011 Denial Order," attached as Ex. 3 to this Motion to Dismiss), at 1. On April 7, 2011, the Board found as follows:

The claims made in Mr. Chvalovsky's motion to reconsider were already made in his earlier filings and taken into account by the Board. Mr. Chvalovsky again asserts, for example, that (1) he began residing at his home in the 1950s, (2) he collected decibel level readings, and (3) the Board is just listening to respondents' "high price lawyers." Mot. at 1-2. As emphasized in the January 20, 2011 order and reemphasized now, the dismissal of this action was based solely upon the failure of Mr. Chvalovsky's pleadings to state a cause of action, not upon any allegations made by respondents. *See Chvalovsky v. Commonwealth Edison*, PCB 10-13, slip op. at 2 (Jan. 20, 2011). The Board finds that Mr. Chvalovsky's motion does not identify any newly discovered evidence, changes in the law, errors in the Board's application of existing law, or facts in the record overlooked by the Board.

Id. The Board, therefore, denied Complainant's motion for reconsideration. *Id.* Complainant did not appeal to the Appellate Court.

The 2013 Complaint Is Identical In All Legally Material Respects To The Previously Dismissed 2009 Complaint and Amended Complaint.

7. The Board's prior Orders dismissed Complainant's 2009 Complaint, including as amended, primarily because: (a) he attempted to state causes of action under Sections 23 and 25

of the Act, which cannot be the basis for an enforcement action; and (b) he failed to allege that a specific Board noise regulation or standard had been violated. Indeed, Complainant's 2009 Complaint and amended complaint did not reference a single Board regulation or standard under the Act. Complainant's 2013 Complaint is identical in this respect.

8. In the 2009 Complaint, Complainant used the pre-printed "Formal Complaint" form provided by the Board. In Paragraph 5 of that form, it calls for a complainant to allege the "specific sections of the Environmental Protection Act, Board regulations, Board order, or permit" alleged to have been violated. Complainant used that same form for his 2013 Complaint. A comparison of Complainant's allegations in 2009 to his allegations in 2013 shows the deficiencies being repeated in Paragraph 5:

Allegations in 2009 Complaint	Allegations in 2013 Complaint
415 ILCS 5-23	415 ILCS 5-23 from Ch. 111 ½, par. 1023
415 ILCS 5-24	415 ILCS 5-24 from Ch. 111 ½, par. 1024
415 ILCS 5-25	415 ILCS 5-25 from Ch. 111 ½, par. 1025 according to Environmental Protection Act

2009 Complaint, ¶ 5; 2013 Complaint, ¶ 5.

9. As shown above, the only differences between Paragraph 5 of the 2009 Complaint and Paragraph 5 of the 2013 Complaint are that the more recent complaint adds the old codification of the listed statutory provisions and adds the phrase "according to Environmental Protection Act." These differences have no legal effect, nor do they establish a claim under the law. More importantly, nowhere in the 2013 Complaint does Complainant allege a violation of, or even the existence of, a single Board standard or regulation.

10. Similarly, Complainant's vague description of the alleged pollution in Paragraphs 6 and 7 of the 2013 Complaint virtually duplicates the 2009 Complaint and is similarly legally deficient:

6. Describe the type of pollution that you allege . . . and the location of the alleged pollution. Be as specific as you reasonably can in describing the alleged pollution:

Allegations in 2009 Complaint	Allegations in 2013 Complaint
Transformer in power station in back of house 7 days a week, 24 hours a day	Noise pollution from substation at Church St. & Laramie, Skokie, IL 60077

7. Describe the duration and frequency of the alleged pollution. Be as specific as you reasonably can when you first noticed the alleged pollution, how frequently it occurs, and whether it is still continuing . . .

Allegations in 2009 Complaint	Allegations in 2013 Complaint
7 Days a week, 24 hours a day since installed	7 Days, 24 hours a day over 88 Decibels when installed 10 years or more ago. ³

2009 Complaint, ¶¶ 6-7; 2013 Complaint, ¶¶ 6-7.

11. Notably, the Board finds such statements insufficient to state a claim or to allow a respondent to prepare a defense, holding that “without any citation to the Board’s noise rules (numeric or nuisance), respondents cannot reasonably be expected to prepare a defense.”⁴ 2011 Dismissal Order at 2.

³ The 2013 Complaint also is impermissibly vague as to whether Complainant is alleging continuing pollution or pollution when equipment was “installed 10 or more years ago.”

⁴ Despite Complainant’s legally deficient claims, ComEd has attempted to address and mitigate Mr. Chvalovsky’s noise complaints since his first complaint was filed in 2009. As explained to the Board through pleadings in PCB No. 10-13, after Mr. Chvalovsky filed his first complaint, the respondents obtained five extensions of time to file an Answer, during which time period

The 2013 Complaint Should Be Dismissed As Legally “Frivolous.”

12. Under the Act and the Board’s rules, Respondents may move to dismiss a citizen complaint as “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, 103.212.⁵ As discussed above, Complainant’s new complaint, the 2013 Complaint, suffers from the same deficiencies as his 2009 Complaint, including as amended. Consistent with the Board’s prior rulings and Illinois law, the 2013 Complaint should be dismissed for failing to state a claim.

13. As the Board discussed in its 2010 Dismissal Order, “Section 23 is a legislative declaration, while Section 25 is an authorization for rulemaking. Neither of these provisions can be violated.” 2010 Dismissal Order at 2, citing *Strunk v. Williamson Energy, LLC (Pond Creek Mind #1)*, PCB 07-135, slip op. at 9 (Sept. 20, 2007) (Section 23), and *Gifford v. Am. Metal Fibers, Inc.*, PCB 08-13, slip op. at 3-4 (Sept. 20, 2007) (Section 25). The Board further stated:

Section 24 is capable of being violated, but “[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 3d 764, 768, 651 N.E.2d 555, 558 (2nd Dist. 1995). Instead, 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, quoting 415 ILCS 5/24 (emphasis provided by court). Accordingly, “Section 24 is not a stand-alone

ComEd invested time and resources to: (1) investigate the nature of the claimed noise issues; (2) investigate and implement options to attempt to mitigate claimed noise issues; and (3) communicate with Mr. Chvalovsky about the nature of the claimed noise impacts and potential options for reducing them. *See, e.g.*, Respondents’ Motion for an Extension of Time to Answer or Otherwise Respond, Sept. 30, 2010, PCB No. 10-13, at ¶¶ 6-7; *see* docket sheet in PCB No. 10-13. Only when such efforts appeared to be unable to assuage Mr. Chvalovsky did ComEd formally join issue by filing an Answer, ultimately leading to the Board’s dismissal of the 2009 Complaint, including as amended.

⁵ The 2013 Complaint was served on Respondents on July 17, 2013; thus, Respondents’ motion is timely filed within 30 days of service. 35 Ill. Adm. Code 103.212(b).

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).

2010 Dismissal Order at 2. In the 2010 Dismissal Order, the Board ruled that a complaint cannot be sustained when it “does not allege the violation of any Board noise regulation or standard,” and when all that it does is refer to the Act’s statutory provisions. *Id.* at 2.

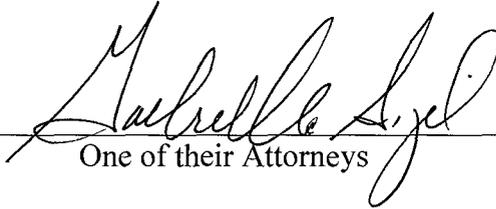
14. Moreover, simply stating a certain decibel level of noise, *e.g.*, “over 88 Decibels,” is not sufficient to state a claim when no Board regulation or standard is also alleged to have been violated. In 2010, after his first dismissal, Complainant sent an amending letter to the Board, in which he referred to certain decibel levels. Even after considering that letter as a formal amendment to the 2009 Complaint, the Board held that, without reference to the Board rule or regulation, the 2009 Complaint “remain[ed] deficient.” 2011 Dismissal Order at 1.

15. While ComEd regrets that one of its customers continues to harbor concerns, without more specific and legally sustainable allegations, Respondents respectfully request that this Board dismiss the 2013 Complaint for failure to state a claim cognizable under the law.

WHEREFORE, Respondents respectfully request that, pursuant to 35 Ill. Adm. Code 101.202 and 103.212, the Board dismiss the Complaint in this action as “frivolous” for failing to state a claim under Illinois law.

Respectfully submitted,

COMMONWEALTH EDISON, EXELON
CORPORATION, CHRISTOPHER CRANE, AND
ANNE PRAMAGIORRE

By: 
One of their Attorneys

Gabrielle Sigel
Genevieve J. Essig
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654-3456
Tel 312-923-2758

Dated: August 15, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JON CHVALOVSKY,)	
)	
Complainant,)	
)	
v.	)	PCB NO. 2014-006
	)	(Citizens Enforcement–Noise)
EXELON, COM ED, EXELON CEO)	
CHRISTOPHER CRANE, and COM ED CEO)	
ANNE PRAMAGIORRE,)	
)	
Respondents.)	

APPEARANCE

The undersigned, Gabrielle Sigel, an attorney, enters an appearance on behalf of Respondents, Exelon Corporation, Commonwealth Edison Company, Christopher Crane, and Anne Pramagiorre.



 Gabrielle Sigel

Gabrielle Sigel
Genevieve J. Essig
Attorneys for Respondents
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654-3456
Tel 312-923-2758

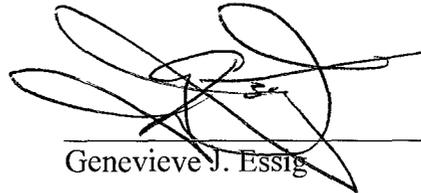
Dated: August 15, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JON CHVALOVSKY,)	
)	
Complainant,)	
)	
v.	)	PCB NO. 2014-006
	)	(Citizens Enforcement–Noise)
EXELON, COM ED, EXELON CEO)	
CHRISTOPHER CRANE, and COM ED CEO)	
ANNE PRAMAGIORRE,)	
)	
Respondents.)	

APPEARANCE

The undersigned, Genevieve J. Essig, an attorney, enters an appearance on behalf of Respondents, Exelon Corporation, Commonwealth Edison Company, Christopher Crane, and Anne Pramagiorre.



Genevieve J. Essig

Gabrielle Sigel
Genevieve J. Essig
Attorneys for Respondents
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654-3456
Tel 312-923-2758

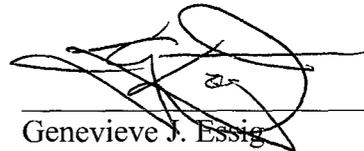
Dated: August 15, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JON CHVALOVSKY,)	
)	
Complainant,)	
)	
v.	)	PCB NO. 2014-006
	)	(Citizens Enforcement – Noise)
EXELON, COM ED, EXELON CEO)	
CHRISTOPHER CRANE, and COM ED CEO)	
ANNE PRAMAGIORRE,)	
)	
Respondents.)	

CERTIFICATE OF SERVICE

NOW COME the Respondents, Exelon Corporation (“Exelon”), Commonwealth Edison (“ComEd”), Christopher Crane, and Anne Pramaggiore, by and through their attorneys, and pursuant to the Board’s procedural rules, provide proof of service of the attached Respondents’ Motion to Dismiss, Appearance of Gabrielle Sigel, Appearance of Genevieve J. Essig, and Notice of Electronic Filing upon Jon Chvalovsky, 9251 Latrobe, Skokie, Illinois 60077, and the Illinois Pollution Control Board, James R. Thompson Center, 100 W. Randolph Street, Suite 11-500, Chicago, Illinois 60601, by having a true and correct copy affixed with proper postage placed in the U.S. Mail at Jenner & Block LLP, 353 North Clark Street, Chicago, Illinois 60654-3456, at or before 5:00 p.m., on August 15, 2013.



Genevieve J. Essig

Gabrielle Sigel
Genevieve J. Essig
Attorneys for Respondents
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654-3456
Tel 312/923-2758

Dated: August 15, 2013

Exhibit 1

ILLINOIS POLLUTION CONTROL BOARD

December 2, 2010

JON CHVALOVSKY,)	
)	
Complainant,)	
)	
v.	)	PCB 10-13
	)	(Citizens Enforcement - Noise)
COMMONWEALTH EDISON, FRANK)	
CLARK, and TIM JOHNSON,)	
)	
Respondents.)	

ORDER OF THE BOARD (by T.E. Johnson):

This is a citizen's enforcement action. Jon Chvalovsky, who resides at 9251 Latrobe Avenue in Skokie, Cook County, filed a complaint against Commonwealth Edison, Frank Clark, and Tim Johnson (respondents). The complaint concerns alleged noise emissions from a transformer behind Mr. Chvalovsky's house and transmission lines in the vicinity of Church Street and Laramie Avenue in Skokie, Cook County.

For the reasons below, the Board finds that the complaint is frivolous. The Board therefore declines to accept the complaint for hearing. The Board grants Mr. Chvalovsky leave, however, until January 3, 2011, to file an amended complaint to cure the deficiencies identified in this order. The Board will briefly describe the procedural history of this case before discussing Mr. Chvalovsky's complaint and the Board's ruling.

PROCEDURAL HISTORY

On August 8, 2009, Mr. Chvalovsky filed the complaint (Comp.) *pro se*. On September 4, 2009, respondents filed the first of their motions for extension of time to answer or otherwise respond to the complaint.¹ Mr. Chvalovsky filed no response to the motion, which the hearing officer granted on September 29, 2009, extending the deadlines for respondents to answer or otherwise respond to November 6, 2009.

Over the course of the next year, respondents filed four more extension motions, none of which were objected to by Mr. Chvalovsky. The last such motion was granted by hearing officer order of October 20, 2010, extending the deadlines for respondents to answer or otherwise respond to November 19, 2010. On November 19, 2010, respondents filed an answer to the complaint.

¹ The motion was accompanied by an appearance of counsel on behalf of all respondents.

DISCUSSION

Under the Environmental Protection Act (Act) (415 ILCS 5 (2008)), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2008); 35 Ill. Adm. Code 103. In this case, Mr. Chvalovsky complains of a power station "transformer buzzing . . . in back of [his] house in transmission lines on Church & Laramie, Skokie, IL." Comp. at 2; *see also id.* at 3. According to the complaint, the alleged pollution has persisted "since installed" and occurs "7 days a week 24 hours a day." *Id.* at 3; *see also id.* at 2. Mr. Chvalovsky maintains that the buzzing noise "keeps [him] from going to sleep" at night. *Id.* at 4; *see also id.* at 1. The complaint alleges the violation of Sections 23, 24, and 25 of the Act (415 ILCS 5/23, 24, 25 (2008)). *Id.* at 3. As relief, Mr. Chvalovsky seeks "[s]ome kind of sound proofing to muzzle noise to quiet the buzzing." *Id.* at 4.

Section 31(d)(1) of the 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) (2008); *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.* 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). Respondents have filed no such motion.

As noted, Mr. Chvalovsky's complaint alleges the violation of Sections 23, 24, and 25 of the Act (415 ILCS 5/23, 24, 25 (2008)). Section 23 is a legislative declaration, while Section 25 is an authorization for rulemaking. Neither of these provisions can be violated. Strunk v. Williamson Energy, LLC (Pond Creek Mine #1), PCB 07-135, slip op. at 9 (Sept. 20, 2007) (Section 23); Gifford v. American Metal Fibers, Inc., PCB 08-13, slip op. at 3-4 (Sept. 20, 2007) (Section 25).

Section 24 is capable of being violated, but "[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 3d 764, 768, 651 N.E.2d 555, 558 (2nd Dist. 1995). Instead, 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, quoting 415 ILCS 5/24 (emphasis provided by court). Accordingly, "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). Mr. Chvalovsky's complaint does not allege the violation of any Board noise regulation or standard.

Additionally, as pled in the complaint, both the timeframe in which the alleged pollution began and the frequency of the alleged sleep prevention are unclear. The Board's procedural rules require greater specificity. *See* 35 Ill. Adm. Code 103.204(c)(2).

Under these circumstances, the Board finds that Mr. Chvalovsky's complaint "fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202. The complaint is therefore "frivolous" and is not accepted for hearing.

To remedy the deficiencies described above, the Board allows Mr. Chvalovsky until January 3, 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. *See* 35 Ill. Adm. Code 101.302. Failure to so file will subject this case to dismissal. The amended complaint must comply with the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204. Further, a copy of the amended complaint must be served upon respondents, and proof that respondents were so served must be filed with the Board. *See* 35 Ill. Adm. Code 101.304. The time periods for respondents to file any motion attacking, or any answer to, the amended complaint will commence upon 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 Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 2, 2010, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board

Exhibit 2

ILLINOIS POLLUTION CONTROL BOARD

January 20, 2011

JON CHVALOVSKY,)	
)	
Complainant,)	
)	
v.	)	PCB 10-13
	)	(Citizens Enforcement - Noise)
COMMONWEALTH EDISON, FRANK)	
CLARK, and TIM JOHNSON,)	
)	
Respondents.)	

ORDER OF THE BOARD (by T.E. Johnson):

This is a citizen's enforcement action. Jon Chvalovsky, who resides at 9251 Latrobe Avenue in Skokie, Cook County, filed a complaint *pro se* against Commonwealth Edison, Frank Clark, and Tim Johnson (respondents). The complaint concerns alleged noise emissions from a transformer behind Mr. Chvalovsky's house and transmission lines in the vicinity of Church Street and Laramie Avenue in Skokie, Cook County. For the reasons below, the Board dismisses the case and closes the docket.

On August 8, 2009, Mr. Chvalovsky filed his complaint with the Board. For over a year thereafter, respondents sought, and received from the hearing officer, extensions of time to answer or otherwise respond to the complaint, all without objection from Mr. Chvalovsky. The last such extension expired on November 19, 2010, on which date respondents filed an answer to the complaint.

Section 31(d)(1) of the 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) (2008); *see also* 35 Ill. Adm. Code 103.212(a). In an order of December 2, 2010, the Board found that Mr. Chvalovsky's complaint is frivolous for failing to state a cause of action. The Board therefore declined to accept the case for hearing at that time. The Board nevertheless granted Mr. Chvalovsky leave to file, by January 3, 2011, an amended complaint to cure the original complaint's deficiencies, all of which were identified by the Board in the order. *See Chvalovsky v. Commonwealth Edison*, PCB 10-13, slip op. at 2 (Dec. 2, 2010). Mr. Chvalovsky filed a letter with the Board on December 9, 2010, which the Board construes as an amendment to his complaint.

Mr. Chvalovsky's amendment (Am. Comp.) does address the issue of when the alleged pollution began, one of the deficiencies of the original complaint. *See Chvalovsky*, PCB 10-13, slip op. at 2. After stating that he has lived in the Latrobe Avenue house since 1954, Mr. Chvalovsky alleges in his amendment that the noise has persisted since the transformer was installed 10 years ago. Am. Comp. at 2. The complaint, even as amended, however, remains deficient.

Mr. Chvalovsky's original complaint alleges the violation of Section 24 of the Act (415 ILCS 5/24 (2008)).¹ Section 24 reads as follows:

No 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 (2008).

As the Board observed in its December 2, 2010 order, "[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 3d 764, 768, 651 N.E.2d 555, 558 (2nd Dist. 1995). Instead, 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, quoting 415 ILCS 5/24 (emphasis provided by court). Accordingly, the Board stressed in its order of December 2, 2010, that "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). In determining that Mr. Chvalovsky's original complaint is frivolous for failing to state a cause of action, the Board found that the complaint "does not allege the violation of any Board noise regulation or standard." Chvalovsky, PCB 10-13, slip op. at 2.

Today the Board finds that Mr. Chvalovsky's amendment to his complaint also fails to allege the violation of any Board noise regulation or standard. Therefore, the amendment fails to adequately supplement the original complaint's allegation that respondents violated Section 24 of the Act. The amendment does mention decibel level readings, but without any citation to the Board's noise rules (numeric or nuisance), respondents cannot reasonably be expected to prepare a defense. *See* 35 Ill. Adm. Code 103.204. Because Mr. Chvalovsky has not properly pled a violation of the Act or any Board noise regulation or standard, the Board finds that the complaint, as amended, still "fails to state a cause of action upon which the Board can grant relief" and remains, by definition, "frivolous." 35 Ill. Adm. Code 101.202. Accordingly, the Board cannot accept this matter for hearing.

The Board's December 2, 2010 order cautioned Mr. Chvalovsky that the failure to remedy the deficiencies of the complaint through amendment would subject this case to dismissal. *See* Chvalovsky, PCB 10-13, slip op. at 2. Under the circumstances described above, the Board dismisses the case and closes the docket. The Board emphasizes that this dismissal is based solely upon the failure of Mr. Chvalovsky's pleadings to state a cause of action, not upon any allegations in respondents' answer, as Mr. Chvalovsky's amendment suggests. Nothing in this order precludes Mr. Chvalovsky from filing another complaint attempting to properly plead

¹ The original complaint also alleges the violation of Sections 23 (a legislative declaration) and 25 (a rulemaking authorization) of the Act (415 ILCS 5/23, 25 (2008)), neither of which can be violated, as found in the December 2, 2010 order. *See* Chvalovsky, PCB 10-13, slip op. at 2.

a noise violation. Any such complaint would be treated by the Board as a new case and assigned a new docket number.

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) (2008); *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 Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 20, 2011, by a vote of 5-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John Therriault, Assistant Clerk
Illinois Pollution Control Board

Exhibit 3

ILLINOIS POLLUTION CONTROL BOARD

April 7, 2011

JON CHVALOVSKY,)	
)	
Complainant,)	
)	
v.	)	PCB 10-13
	)	(Citizens Enforcement - Noise)
COMMONWEALTH EDISON,)	
FRANK CLARK, and TIM JOHNSON,)	
)	
Respondents.)	

ORDER OF THE BOARD (by T.E. Johnson):

On January 20, 2011, the Board issued an order dismissing this citizen's noise complaint as frivolous. Jon Chvalovsky, the *pro se* complainant, received the order on January 24, 2011. Any motion for Board reconsideration of an order must be filed within 35 days after receipt of the order, and any response to such a motion is due within 14 days after the filing of the motion. See 35 Ill. Adm. Code 101.520(a), (b). On February 25, 2011, Mr. Chvalovsky filed a letter, to which the respondents have not responded. The Board construes Mr. Chvalovsky's letter as a timely motion for reconsideration (Mot.) and, for the reasons below, denies the motion.

A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); see also 35 Ill. Adm. Code 101.902. In addition, a motion to reconsider may specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 3 (Feb. 19, 2004).

The claims made in Mr. Chvalovsky's motion to reconsider were already made in his earlier filings and taken into account by the Board. Mr. Chvalovsky again asserts, for example, that (1) he began residing at his home in the 1950s, (2) he collected decibel level readings, and (3) the Board is just listening to respondents' "high price lawyers." Mot. at 1-2. As emphasized in the January 20, 2011 order and reemphasized now, the dismissal of this action was based solely upon the failure of Mr. Chvalovsky's pleadings to state a cause of action, not upon any allegations made by respondents. See Chvalovsky v. Commonwealth Edison, PCB 10-13, slip op. at 2 (Jan. 20, 2011). The Board finds that Mr. Chvalovsky's motion does not identify any newly discovered evidence, changes in the law, errors in the Board's application of existing law, or facts in the record overlooked by the Board. The Board therefore denies Mr. Chvalovsky's motion for reconsideration.

The Board notes that Mr. Chvalovsky's motion includes multiple requests that an investigation of the alleged noise be carried out at his house. Mot. at 2. The motion seems to pose these requests alternately to the Board and the Illinois Environmental Protection Agency (Agency). *Id.* The motion generally appears to refer to the Board and the Agency interchangeably. Mot. at 1-2. To clarify in the event of any misunderstanding, the Board and the Agency have independent functions under the Act. *See, e.g.*, 415 ILCS 5/4, 5 (2008). The General Assembly has given the Board quasi-legislative power for adopting Illinois' environmental regulations, as well as quasi-judicial power for deciding contested environmental cases filed with the Board. The Board is not authorized to investigate a site for the purposes of gathering evidence to help a party establish or defend against alleged violations. The burden of proof in any enforcement action brought before the Board is upon the complainant, whether the complainant is a citizen or the State of Illinois. *See* 415 ILCS 5/31(c)-(e) (2008). While the Agency is authorized to and does investigate alleged violations, it is the Board's understanding that the Agency does not presently have the resources to operate a noise program.

Finally, Mr. Chvalovsky's motion states that he "wants to appeal this decision." Mot. at 2. It is unclear whether by "appeal," Mr. Chvalovsky is seeking Board reconsideration of, or Illinois Appellate Court review of, the January 20, 2011 dismissal order. Today's order denies reconsideration for the reasons provided above. Should Mr. Chvalovsky wish to seek Appellate Court review, the Board notes that the filing of Mr. Chvalovsky's motion to reconsider with the Board automatically stayed the 35-day period within which he could file a petition for review with the Appellate Court. That stay is lifted by this order's ruling on the motion to reconsider. *See* 35 Ill. Adm. Code 101.300(d)(2), 101.520(c), 101.906.

IT IS SO ORDERED.

Member C.K. Zalewski abstained.

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) (2008); *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 April 7, 2011, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board