

ILLINOIS POLLUTION CONTROL BOARD  
October 3, 2013

JON CHVALOVSKY, )  
)  
Complainant, )  
)  
v. ) PCB 14-6  
) (Citizen's Enforcement - Noise)  
EXELON, COM ED, EXELON CEO )  
CHRISTOPHER CRANE, and COM ED CEO )  
ANNE PRAMAGIORRE, )  
)  
Respondents. )

ORDER OF THE BOARD (by J.D. O'Leary):

Jon Chvalovsky (complainant) filed a *pro se* complaint against Exelon Corporation (Exelon), Commonwealth Edison Company (ComEd), Exelon CEO Christopher Crane, and ComEd CEO Anne Pramagiorre (collectively, respondents). The complaint alleges noise pollution violations from a ComEd electrical substation behind Mr. Chvalovsky's residence, which is located at 9251 Latrobe, Skokie, Cook County. Respondents moved to dismiss the complaint as "frivolous."

For the reasons below, the Board finds that the complaint is, by definition, frivolous. The Board therefore grants the respondents' motion to dismiss. Below, the Board provides the procedural history of this case before summarizing Mr. Chvalovsky's complaint and the respondents' motion to dismiss. The Board then discusses the pending motion before reaching its conclusion on it.

**PROCEDURAL HISTORY**

On July 12, 2013, Mr. Chvalovsky filed a *pro se* citizen's complaint (Comp.).

On August 15, 2013, respondents timely filed a motion to dismiss the complaint as "frivolous" (Mot.) for failing to state a claim pursuant to 35 Ill. Adm. Code 103.212. The same filing included an appearance by attorneys Gabrielle Sigel and Genevieve J. Essig of Jenner & Block LLP on behalf of the four respondents. Complainant has not filed a response to the motion.

**SUMMARY OF COMPLAINT**

The complaint alleges that a ComEd electrical substation behind his residence at 9251 Latrobe in Skokie, Cook County, is emitting noise in violation of various provisions of the Environmental Protection Act (Act) (415 ILCS 5 (2012)). Comp. at 2, 3. Specifically, the complaint alleges violations of "415 ILCS 5-23 from Ch. 111 ½, par. 1023; 415 ILCS 5-24 from

Ch. 111 ½, par. 1024; 415 ILCS 5-25 from Ch. 111 ½, par. 1025 according to Environmental Protection Act.” *Id.* at 3. According to the complaint, the duration and frequency of the alleged noise pollution is “7 days, 24 hours a day, over 88 decibels when installed 10 years or more ago.” *Id.* The complaint states that the alleged noise pollution has had a detrimental effect on human health by causing sleep deprivation. *Id.* at 4. The Complaint seeks a Board order compelling respondents to perform noise abatement measures. *Id.*

### **SUMMARY OF RESPONDENTS’ MOTION TO DISMISS**

In their motion, respondents argued that complainant filed a complaint on August 6, 2009, alleging noise emissions from a transformer behind his house and transmission lines in the vicinity of it. Mot. at 2, citing Jon Chvalovsky v. Commonwealth Edison, PCB 10-13 (Aug. 6, 2009). Respondents further argued that the Board declined to accept the 2009 complaint for hearing because it failed to state a cause of action on which relief could be granted and was therefore frivolous. Mot. at 2, citing Jon Chvalovsky v. Commonwealth Edison, PCB 10-13, slip op. at 3 (Dec. 2, 2010). Respondents stated that the Board granted complainant leave to amend the complaint to cure deficiencies identified in the December 2, 2010 order. Mot. at 3, citing Jon Chvalovsky v. Commonwealth Edison, PCB 10-13, slip op. at 3 (Dec. 2, 2010). Respondents argued that, on December 9, 2010, complainant submitted a letter construed by the Board as an amended complaint. Mot. at 2, citing Jon Chvalovsky v. Commonwealth Edison, PCB 10-13 (Dec. 9, 2010).

Respondents stated that the Board declined to accept the amended complaint for hearing because it failed adequately to supplement the original complaint, still failed to state a cause of action on which relief could be granted, and remained frivolous. Mot. at 3, citing Jon Chvalovsky v. Commonwealth Edison, PCB 10-13, slip op. at 2 (Jan. 20, 2011). Respondents further stated that complainant submitted a letter construed by the Board as a motion for reconsideration. Mot. at 3, citing Jon Chvalovsky v. Commonwealth Edison, PCB 10-13 (Feb. 25, 2011). Respondents stated that the Board denied the motion. Mot. at 3, citing Jon Chvalovsky v. Commonwealth Edison, PCB 10-13, slip op. at 1 (Apr. 7, 2011).

Respondents claimed that the Board declined to accept the 2009 complaint because it alleged violations of Section 23 and 25 of the Act (415 ILCS 5/23, 25 (2012)), which cannot be violated, and because it failed to allege violation of a specific Board regulation under Section 24 of the Act (415 ILCS 5/24 (2012)). Respondents argued that the same deficiencies are repeated in the instant complaint. Mot. at 4; *see* Comp at 3.

Respondents also claimed that descriptions of the alleged noise emission in the 2009 complaint are effectively duplicated in the instant complaint. Mot. at 5. Respondents argued that the Board found the 2009 allegations insufficient to state a claim or allow preparation of a defense. *Id.* Respondents cited the Board’s statement that, “without any citation to the Board’s noise rules (numeric or nuisance), respondents cannot reasonably be expected to prepare a defense.” Mot. at 5, citing Jon Chvalovsky v. Commonwealth Edison, PCB 10-13, slip op. at 2 (Jan. 20, 2011).

Respondents argued that, because it suffers from the same deficiencies as the previous complaint, the instant complaint “should be dismissed for failing to state a claim.” Mot. at 6. Respondents stated that, in dismissing the complainant’s previous complaint, the Board stated that “Section 23 is a legislative declaration, while Section 25 is an authorization for rulemaking. Neither of these provisions can be violated.” Mot. at 5, citing Jon Chvalovsky v. Commonwealth Edison, PCB 10-13, slip op. at 3 (Dec. 2, 2010). Respondents also cited the Board’s statement 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, 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.’ Mot. at 6-7 (citations omitted).

Respondents argued that, in dismissing the complainant’s previous complaint, the Board stated that it cannot accept an alleged violation of Section 24 of the Act that “does not allege the violation of any Board noise regulation or standard” and refers only to the statutory provision. Mot. at 7, citing Jon Chvalovsky v. Commonwealth Edison, PCB 10-13, slip op. at 2 (Dec. 2, 2010).

Respondents acknowledged that the complaint refers to a noise level of “over 88 decibels” (Comp. at 3) but argued that this reference “is not sufficient to state a claim when no Board regulation or standard is alleged to have been violated.” Mot. at 7. Respondents claimed that the amended complaint filed by complainant in PCB 10-13 on December 9, 2010, also referred to specific decibel levels, but the Board declined to accept that complaint for hearing. Mot. at 7, citing Jon Chvalovsky v. Commonwealth Edison, PCB 10-13, slip op. at 2 (Jan. 20, 2011).

Respondents concluded by requesting that, “without more specific and legally sustainable allegations,” the Board dismiss the instant complaint “for failure to state a claim cognizable under the law.” Mot. at 7.

### **DISCUSSION**

Under the Act, any person may bring an action before the Board to enforce Illinois’ environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2012); 35 Ill. Adm. Code 103. In this case, the complainant alleges “noise pollution from [a] substation at Church Street and Laramie, Skokie, IL 60077.” Comp. at 2. Complainant describes the duration and frequency of the alleged pollution as “7 day[s] 24 hours a day over 88 decibels when installed 10 years or more ago.” Comp. at 2. Complainant asserts that the alleged noise pollution has had the bad effects of “sleep deprivation and health.” Comp. at 3. Complainant specifically alleges violations of “415 ILCS 5-23 from Ch. 111 ½ par. 1023; 415 ILCS 5-24 from Ch. 111 ½ par. 1024; 415 ILCS 5-25 from Ch. 111 ½ par. 1025 according to Environmental Protection Act.” Comp. at 2. As relief, complainant seeks “muffling noise to safe level as to sleep normal.” Comp. at 3.

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) (2012); *see also* 35 Ill. Adm. Code 103.212(a). A citizen 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 (definition of “duplicative”). A citizen 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.* (definition of “frivolous”).

Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. *See* 35 Ill. Adm. Code 103.212(b). Respondents did so here, alleging that the complaint is frivolous for failing to state a claim. In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g., Beers v. Calhoun*, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* Mot. at 1 n.2 (“[f]or purposes of this Motion to Dismiss, the allegations in Mr. Chvalovksy’s Complaint are accepted as true.”).

As stated, the complaint alleges the violation of Sections 23, 24, and 25 of the Act (415 ILCS 5/23, 24, 25 (2012)). 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 08-13, slip op. at 3-4 (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 provides that “[n]o person shall emit beyond the boundaries of this 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 (2012).

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 at 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 in original). 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). The complaint does not allege the violation of any Board noise regulation or standard (*see* Comp. at 3), which are codified beginning at part 900 of the Board’s regulations (*see* 35 Ill. Adm. Code part 900 *et seq.*).

Additionally, as pled in the complaint, the allegation of the frequency of the alleged sleep deprivation is impermissibly vague. The Board’s procedural rules require greater specificity: “[t]he dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint

must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense.” 35 Ill. Adm. Code 103.204(c)(2).

Taking all well-pled allegations as true and drawing all reasonable inferences from them in favor of complainants, the Board finds that the complaint is frivolous because it fails to state a cause of action on which the Board can grant relief. Accordingly, the Board grants the respondents’ motion to dismiss this enforcement action.

In order to remedy the deficiencies described above, the Board allows complainant until Monday, November 4, 2013, 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 requirement of the Board’s procedural rules. *See* 35 Ill. Adm. Code 103.204. In addition, a copy of the amended complaint must be served upon respondents, and proof of service upon respondents must be filed with the Board. *See* 35 Ill. Adm. Code 101.304. The deadline 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).

### CONCLUSION

The Board finds that the complaint “fails to state a cause of action upon which the Board can grant relief.” 35 Ill. Adm. Code 101.202 (definition of “frivolous”). Accordingly, the complaint is, by definition, “frivolous.” *Id.* The Board therefore grants the respondents’ motion to dismiss the complaint but allows complainant 30 days to file an amended complaint addressing the deficiencies described above. Failure to file a timely amended complaint will result in the Board’s dismissing the case and closing the docket.

IT IS SO ORDERED.

Board Member J. A. Burke abstains.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 3, 2013, by a vote of 3-0.



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John T. Therriault, Clerk  
Illinois Pollution Control Board