

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL J. KORMAN,)	
)	
Complainant,)	
)	
v.)	PCB No. 20-62
)	(Citizen Enforcement – NPDES, Water)
ILLINOIS DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Respondent.)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that today, September 11, 2020, I filed Respondent's 2-615 Motion to Strike Complainant's Bill of Particulars in the above-referenced matter with the Clerk of the Illinois Pollution Control Board, a copy of which is attached hereto and herewith served upon you via e-mail.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF
TRANSPORTATION

By: /s/ Arlene R. Haas
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CERTIFICATE OF SERVICE

Michael J. Korman v. Illinois Department of Transportation, PCB 20-62 (Citizen)

I, ARLENE R. HAAS, an Assistant Attorney General, do certify that I caused a copy of the foregoing Notice of Filing and Respondent's 2-615 Motion to Strike Complainant's Bill of Particulars to be served by electronic mail with receipt notification requested to all the individuals listed on the attached service list, on this September 11th, 2020.

/s/ Arlene R. Haas

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**RESPONDENT’S 2-615 MOTION TO STRIKE
COMPLAINANT’S BILL OF PARTICULARS**

NOW COMES RESPONDENT, the Illinois Department of Transportation (“IDOT”), through its attorney, KWAME RAOUL, Attorney General of the State of Illinois, pursuant to Section 101.500 of the Pollution Control Board’s General Rules (“General Rules”), 35 Ill. Adm. Code 101.500 (2018) and Section 2-615 of the Code of Civil Procedure, 735 ILCS 5/2 615 (2018), and hereby moves the Pollution Control Board (“Board”) to strike Complainant, Michael Korman’s (“Complainant” or “Korman”) Response to Demand for Bill of Particulars. In support of its Motion to Strike, IDOT states as follows:

I. INTRODUCTION

Korman filed the Complaint against IDOT on March 3, 2020, a citizen enforcement action, and improperly served IDOT. Section 101.304(g)(5) of the General Rules, 35 Ill. Adm. Code 101.304(g)(5) (2018), provides that IDOT must be served at:

Office of the Chief Counsel
DOT Administration Building
2300 S. Dirkesen Parkway, Room 300
Springfield, IL 62764

Instead, Korman served the Complaint on IDOT's district office in Schaumburg, IL, and thus, IDOT's Chief Counsel did not become aware of Korman's Complaint until approximately June 22, 2020. On July 15, 2020, the Office of the Attorney General received a request from IDOT for representation in this matter.

The Complaint concerns National Pollutant Discharge Elimination System ("NPDES") permit coverage for IDOT's construction project which will expand the Willow Road overpass that flies over Lehigh Road and the Soo Line in Glenview, Illinois, IDOT Contract 60N83. IDOT submitted a Stormwater Notice of Intent Information for Construction Activities and a Storm Water Pollution Prevention Plan ("SWPPP") for the project to the Illinois Environmental Protection Agency ("Illinois EPA"). On June 18, 2019, Illinois EPA notified IDOT that the project's storm water discharges were covered under Illinois EPA's General NPDES Permit for Storm Water Discharges From Construction Site Activities, General NPDES Permit No. ILR10.

After a review of the Complaint, IDOT filed a Demand for a Bill of Particulars on August 5, 2020, pursuant to Section 5/2-607(a) of the Code of Civil Procedure, 735 ILCS 5/2-607(a) (2018). The Complaint did not adequately inform IDOT of Korman's claims. Therefore, IDOT requested that Korman provide a bill of particulars for Paragraphs 5, 6, 7, and 8 of his Complaint, and IDOT identified in the Demand for a Bill of Particulars the specific defects in those paragraphs.¹

Korman filed his Response to Demand for a Bill of Particulars on August 17, 2020 ("Bill of Particulars").² The Bill of Particulars is a four-page single spaced document without page

¹ The Complaint in this matter is comprised of Mr. Korman's responses on the Formal Complaint form available on the Illinois Pollution Control Board's website. See <https://pcb.illinois.gov/Resources/ComplaintForms>

² Korman filed a Response to a Motion to Dismiss Complaint in response to Respondent's Demand for a Bill of Particulars. However, he filed his Response to Demand for Bill of Particulars once Respondent pointed out that a motion to dismiss the complaint had not been filed by Respondent.

numbers. Approximately half of the document has numbered paragraphs with the rest of the paragraphs remaining unnumbered, and thereby, makes it very difficult for Respondent to reference specific parts of the Bill of Particulars in this Motion to Strike.

IDOT respectfully requests that the Board enter an order striking all of Respondent's Bill of Particulars and requiring Korman to file a bill of particulars that fully and clearly responds to IDOT's Demand for a Bill of Particulars.

II. ARGUMENT

A. **THE BILL OF PARTICULARS IS UNRESPONSIVE TO IDOT'S DEMAND FOR A BILL OF PARTICULARS AND USES AN IMPROPER FORM**

Korman fails to identify in the Bill of Particulars which of the Complaint's paragraphs he is elaborating on when stating the allegations in the Bill of Particulars. IDOT's Demand for a Bill of Particulars specifically requested that Korman particularize Complaint Paragraphs 5, 6, 7, and 8. Nowhere in the Bill of Particulars does Korman refer to these paragraph numbers of his Complaint. Instead, IDOT is left to guess what parts of the Complaint Korman is seeking to particularize in his Bill of Particulars.

Compounding the inability to align the Bill of Particulars' allegations with those of the Complaint is the Bill of Particulars' incoherent mix of allegations intermingled with statements about Korman's credentials and motivations. Approximately half of the Bill of Particulars lacks paragraph numbers or any clearly identifiable way to reference Korman's allegations.

The Board stated upon review of a motion to strike in *United City of Yorkville v. Hamman Farms*, 2008 WL 4742379 (PCB 08-96) that: "[T]he Act and the Board's procedural rules 'provide for specificity in pleadings'. . . and 'the charges must be sufficiently clear and specific to allow preparation of a defense.'" *Id.* at ¶ 11 (*citing Rocke v. PCB*, 78 Ill. App. 3d 476, 481, 397 N.E.2d

51, 55 (1st Dist. 1979); *Lloyd A. Fry Roofing Co. v. PCB*, 20 Ill. App. 3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974)).

Section 101.100(b) of the General Rules, 35 Ill. Adm. Code 101.100(b) (2018), also states that “the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board’s procedural rules are silent.” Furthermore, “[t]he Board has often looked to Illinois civil practice for guidance when considering motions to strike or dismiss pleadings.” *United City of Yorkville*, 2008 WL at ¶ 12.

To assure that pleadings state “clear and specific” charges, Section 2-603(b) of the Code of Civil Procedure, 735 ILCS 5/2-603(b) (2018) provides as follows:

Each separate cause of action upon which a separate recovery might be had shall be stated in a separate count or counterclaim, as the case may be and each count, counterclaim, defense or reply, shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation.

Section 2-612(a) of the Code of Civil Procedure, 735 ILCS 5/2-612(a) (2018) also states:

If any pleading is insufficient in substance or form the court may order a fuller or more particular statement. If the pleadings do not sufficiently define the issues the court may order other pleadings prepared.

Although the Board may allow some latitude in a citizen enforcement case, the pleading must be drafted in a clear manner and with specificity so the opposing party may appropriately respond. *Lloyd A. Fry Roofing Co. v. PCB*, 20 Ill. App. 3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974). Additionally, “[a] bill of particulars is deemed to be part of a complaint which it particularizes.” *City of Chicago v. Hertz Commercial Leasing Corp.*, 38 Ill. App.3d 835, 839, 349 N.E.2d 902, 905 (1st Dist. 1976), *aff’d*, 17 Ill. Dec. 1, 375 N.E.2d 1285 (Ill. 1978), *cert. denied*, 439 U.S. 929 (1978). Therefore, a bill of particulars, even in a citizen enforcement case, should

identify which complaint paragraphs it is particularizing and be written in the same clear and organized form required of all other pleading.

The Board should strike, pursuant to Section 2-615 of the Code of Civil Procedure, all of Korman's Bill of Particulars because it fails to respond to Respondent's Demand for a Bill of Particulars and lacks a coherent form.

B. THE BOARD LACKS JURISDICTION OVER THE CAUSES OF ACTION IN THE BILL OF PARTICULARS

Korman alleges in the Bill of Particulars deficiencies in the Illinois EPA issued General NPDES Permit for Storm Water Discharges From Construction Site Activities governing all such activities in the state of Illinois ("General NPDES Permit") and Illinois EPA's administration of the General NPDES Permit. Korman alleges problems in the General NPDES Permit at the bottom of the first page of the Bill of Particulars:

In accordance with ("IAW") the IEPA-signed General NPDES Permit for Storm Water Discharges From Construction Site Activities with an effective date of August 3, 2018, which is deficient in the following list:

At the bottom of the third page of the Bill of Particulars, Korman alleges Illinois EPA's inability to administer the General NPDES Permit:

I believe that the IEPA is ill-equipped and/or understaffed to properly review the Notices of Intent, the attendant SWPPP documents and is unable to enforce the USEPA delegated Construction Permit program. This is before any inspections might occur in the field. I believe that the MS4 communities believe it is IEPA's responsibility to inspect projects while IEPA thinks it is delegating enforcement to the MS4. This allows owners, contractors and subcontractors to appear to be compliant without actually needing to be compliant. This results in massive Construction (*sic*) generated pollution across the state of Illinois.

Similarly, Mr. Korman states at the bottom of the Bill of Particulars' fourth and final page as follows:

Finally, if the IEPA is, in fact, ill equipped to handle the current volume of Notices of Intent I would urge the Pollution Control Board to consider asking the United States Environmental Protection Agency to step in and run NPDES Compliance efforts in the State of Illinois . . .

The Board does not have the authority to adjudicate Korman's apparent cause of action regarding the Illinois EPA's administration of the General NPDES Permit. "[T]he Board's powers are limited to those vested in it by the Environmental Protection Act." *Flagg Creek Water Reclamation District v. Village of Hinsdale*, 2006 WL 2869930 ¶ 8 (PCB 06-141). Section 5(d) of the Environmental Protection Act, 415 ILCS 5/5/(d) (2018) states as follows:

The Board shall have authority to conduct proceedings upon complaints charging violations of the Act, any rule or regulation adopted under this Act. . .

Section 402 of the federal Clean Water Act ("CWA"), 33 U.S.C.A. § 1342 (2019), authorizes the NPDES permit program administered by the United State Environmental Protection Agency ("USEPA"). Pursuant to Section 402(b) of the CWA, 33 U.S.C.A. Section § 1342(b), USEPA may delegate its authority to administer the NPDES program to states. If a citizen wishes USEPA to investigate a state's administration of a NPDES program, the citizen must petition USEPA in accordance with USEPA's procedures for withdrawing state programs set forth at 40 C.F.R. § 123.64(b)(1). Korman's cause of action challenging Illinois EPA's administration of the General NPDES Permit must be brought pursuant to federal law and regulations, and thus, the Board does not have jurisdiction over these claims.

Furthermore, by alleging deficiencies in Illinois EPA's administration of the General NPDES Permit, Mr. Korman is stating a cause of action against Illinois EPA and not IDOT, the Respondent in this matter. Given the Board does not have jurisdiction over causes of action challenging Illinois EPA's administration of the General NPDES Permit and these claims fail to state a cause of action against IDOT, the Board should strike, pursuant to Section 2-615 of the

Code of Civil Procedure, Korman's causes of action in the Bill of Particulars pertaining to Illinois EPA's administration of the General NPDES Permit.

C. THE BILL OF PARTICULARS CONTAINS ALLEGATIONS THAT ARE IMMATERIAL

Korman begins the Bill of Particulars by stating that "he moves this Board to hear the Formal Complaint through the established PCB Hearing Process . . ." and continues to discuss procedural matters. This appeal to the Board for a hearing is irrelevant to a response to the Demand for a Bill of Particulars. Similarly, Korman in Bill of Particulars Paragraph 11 discusses "some exceptional tools" available to IDOT to deal with erosion and sediment control. This section is also immaterial to the Bill of Particulars.

On the Bill of Particular's fourth and final page, Korman discusses at length his service in the United States Navy, his time on the Village of Glenview Plan Commission, and his training in stormwater pollution prevention planning. He also, documents other formal and informal complaints he has filed with the Board. All of this information is completely irrelevant in a response to the Demand for a Bill of Particulars.

Korman states in Bill of Particulars Paragraph 15 that: "I find this demand for a Bill of Particulars to be a heavy-handed effort by the State of Illinois and the Department of Transportation to over-burden a Citizen Complainant." This statement is unnecessary and inflammatory.

The Illinois Supreme Court stated in *Doe v. Coe*, 2019 IL123521 that "[a] party may move to strike immaterial matter from a complaint. "*Id.* at ¶ 24 (citing 735 ILCS 5/2-615(a)), *see also*, *Browning v. Heritage Ins. Co.*, 33 Ill.App.3d 943, 948, 338 N.E.2d 912, 916 (2d. Dist. 1975) (if necessary facts in a complaint are "encumbered with unnecessary matter," the immaterial allegations are amenable to being struck).

Given Korman's Bill of Particulars contains a substantial number of allegations and statements that are immaterial and encumber it with extraneous material, the Board should strike, pursuant to Section 2-615 of the Code of Civil Procedure, those sections of the Bill of Particulars.

III. CONCLUSION

WHEREFORE, Respondent, ILLINOIS DEPARTMENT OF TRANSPORTATION, respectfully requests that the Board: (1) strike Complainant, MICHAEL KORMAN's, Response to Demand for Bill of Particulars, (2) order Complainant to fully and clearly respond Respondent's Demand for a Bill of Particulars, (3) stay Respondent's obligation to answer the allegations set forth in the Complaint until this Motion is resolved and Respondent provides a complete and proper Bill of Particulars, and (4) grant such other relief as the Board deems appropriate.

Respectfully Submitted,

/s/ Arlene R. Haas

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