

be attributable to property development and a lack of enforcement.” Comp. at 4 (emphasis in original).

The Complaint requests that “if the IEPA cannot repair the current NPDES permit process . . . the Board should consider filing for [w]ithdrawal of the NPDES [f]ramework pursuant to 40 CFR § 123.64.” Comp. at 4. The Complaint attaches Mr. Korman’s petition to the United States Environmental Protection Agency (USEPA) under the federal rules to withdraw its approval of the State of Illinois program for administration of the NPDES. Comp. at 6-7. Mr. Korman supported the USEPA petition with statistics that he did not include in the Complaint.

On September 25, 2020, IEPA filed a motion to dismiss (Mot.), alleging that the Complaint is duplicative and frivolous. On October 7, 2020, Mr. Korman filed his response (Response or Resp.), arguing that the Complaint is not duplicative, and the relief requested is “within the purview of the Board.” Resp. at 11. The Response also cites to federal regulations, alleges statistics related to over 7,000 NPDES permits, and includes a series of new requests for relief, which are addressed below. Resp. at 13-17.

IEPA did not request leave to respond to these new requests for relief.

RELEVANT STATUTES AND RULES

Citizens may file complaints and rulemakings before the Board, but they must satisfy the requirements of the Act and the Board’s procedural rules.

Citizen Enforcement Actions

In addition to providing that the Illinois Attorney General and the State’s Attorneys may file complaints with the Board, the Act authorizes *citizens* to bring enforcement actions before the Board alleging violations of the Act or Board regulations. Section 31(d)(1) of the Act provides:

Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order. *** Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing 415 ILCS 5/31(d)(1) (2018).

Section 31(c), referred to in the above-quoted passage, in turn states that the complaint “shall specify the provision of the Act, rule, [or] regulation . . . under which such person is said to be in violation and a statement of the manner in and the extent to which such person is said to violate the Act, rule,[or] regulation” 415 ILCS 5/31(c)(1) (2018). The Board’s procedural rules codify the requirements for the contents of a complaint, including the “dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations” and a “concise statement of the relief that the complainant seeks.” 35 Ill. Adm. Code 103.204(c).

Within 30 days after being served with a complaint, a respondent may file a motion with the Board to dismiss the complaint on the grounds that the complaint is frivolous or duplicative. 35 Ill. Adm. Code 103.212(b). The Board’s procedural rules define “frivolous” and “duplicative” as follows:

“Frivolous” means a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief.

“Duplicative” means the matter is identical or substantially similar to one brought before the Board or another forum.

35 Ill. Adm. Code 101.202.

Citizen-Initiated Rulemaking

A citizen-initiated rulemaking must meet the requirements of Section 28(a) of the Act:

Any person may present written proposals for the adoption, amendment, or repeal of the Board's regulations, and the Board may make such proposals on its own motion. If the Board finds that any such proposal is supported by an adequate statement of reasons, is accompanied by a petition signed by at least 200 persons, is not plainly devoid of merit and does not deal with a subject on which a hearing has been held within the preceding 6 months, the Board shall schedule a public hearing for consideration of the proposal. 415 ILCS 5/28(a) (2018).

In addition, the proposal must meet the requirements of Section 102.202 of the Board’s procedural rules, including:

- a) The language of the proposed rule, including any existing regulatory language proposed to be amended or repealed. Language being added must be indicated by underscoring, and language being deleted must be indicated by strike-outs. The proposed rule must be drafted in accordance with 1 Ill. Adm. Code 100.Subpart C;
- b) A statement of the reasons supporting the proposal, including a statement of the facts that support the proposal, and a statement of the purpose and effect of the proposal, including environmental, technical, and economic justification. The statement must discuss the applicable factors listed in Section 27(a) of the Act. The statement must include, to the extent reasonably practicable, all affected sources and facilities and the economic impact of the proposed rule;
- c) A synopsis of all testimony to be presented by the proponent at hearing;
- d) Any material to be incorporated by reference within the proposed rule under Section 5-75 of the IAPA;
- e) *A descriptive title or other description of any published study or research report used in developing the rule, the identity of the person who performed such study, and a description of where the public may obtain a copy of any such study or research report*

35 Ill. Adm. Code 102.202(a)-(e).

IEPA MOTION TO DISMISS

IEPA's motion to dismiss alleges that the Complaint is duplicative of both Mr. Korman's USEPA Petition and his enforcement action, Korman v. Illinois Dept. of Transportation, PCB 20-62 (IDOT Complaint),¹ as well as frivolous. Mot. at 3.

Duplicative Claims

IEPA argues that the Complaint is duplicative of other matters. Mot. at 3, *citing* 35 Ill. Adm. Code 101.202; Brandle v. Ropp, PCB 85-68, 1985 WL 21380, at *1 (June 13, 1985) (The Board granted the motion to dismiss given the complaint's allegations were "substantially similar" to those in a pending case before the Circuit Court). IEPA also noted that Section 2-619(3) of the Code of Civil Procedure allows for the dismissal of a complaint if "there is another action pending between the same parties for the same cause." Mot. at 3, *citing* 735 ILCS 5/2 619(3) (2018).

First, IEPA alleges that the Complaint is duplicative of the USEPA Petition because they are "based on the same set of facts and alleged violations, namely that Illinois EPA is not properly administering the General NPDES Permit" program. Mot. at 3. IEPA further alleges that the Complaint and USEPA Petition request "identical relief, specifically to withdraw approval for Illinois' administration of the NPDES program." Mot. at 3, *citing* Comp. ¶ 9, USEPA Pet. at ¶ 1.

Second, IEPA alleges that the Complaint is duplicative of the IDOT Complaint because both cases allege "problems with the Notices of Intent and other documents permittees must file and maintain as part of their coverage under the General NPDES Permit." Mot. at 4. IEPA further argues that "similar complaints with the Board against different entities is the type of duplicative cases the Board is seeking to prevent." Mot. at 4-5, *quoting* League of Women Voters v. North Shore Sanitary Dist., PCB 70-7, 1970 WL 3665 at *2 (Oct. 8, 1970) (a reason for banning duplicative complaints is a "fear that allowing private complaints might flood the Board with too many cases raising the same issue and unduly harass a respondent. The fear was not of one complaint before the Board but of many.").

Frivolous Claims

IEPA also argues that the Complaint is frivolous. Mot. at 5, *citing* 35 Ill. Adm. Code 101.202. IEPA further notes that Section 2-619(1) of the Code of Civil Procedure allows a complaint to be dismissed if "the court does not have jurisdiction of the subject matter of the action." Mot. at 5, *citing* 735 ILCS 5/2-619(1) (2018).

First, IEPA argues that the complaint fails to cite to any section of the Act upon which the Board can grant relief. Second, IEPA argues that the complaint's requested relief, withdrawing

¹ IEPA also referenced two other formal complaints Mr. Korman has filed with the Board against entities purportedly covered under the General NPDES Permit: (1) Korman v. Medline Industries, Inc., PCB 21-19; and (2) Korman v. GW Glenview, LLC, PCB 21-6 (together, the Korman Cases).

approval of the Illinois NPDES Program, is a matter of federal law that cannot be granted by the Board.

Alleged Violations of the Act

IEPA argues that the Complaint's citations to the Act do not state a cause of action upon which relief can be granted. IEPA identifies Section 11(a) and 11(a)(8)(b) of the Act as part of the legislative declaration, the violation of which is "not a proper cause of action upon which the Board can grant relief." Mot. at 6, *quoting* Rulon v. Double D Gun Club, PCB 03-7, 2002 WL 2012431 at *3 (Aug. 22, 2002). IEPA further explains that the other sections of the Act cited in the Complaint are not prohibitions. Section 13(b)(1) requires the Board to adopt implementing regulations for the NPDES program. Mot. at 6, *citing* 415 ILCS 5/13(b)(1) (2018). Section 39(q)(3) requires the development of an online portal for permit applicants. Mot. at 6-7, *citing* 415 ILCS 5/39(q)(3). IEPA concludes that "[g]iven the alleged violations of these sections of the Act are not causes of action upon which the Board can grant relief, these claims are frivolous." Mot. at 7.

Alleged Violations of the Federal Clean Water Act (CWA) and Regulations

IEPA argues that the NPDES program is a matter of federal law administered by USEPA under Section 1342(b) of the CWA. Mot. at 5, *citing* 33 U.S.C.A. § 1342(b). Because the administration of the NPDES program is a matter of federal law, rather than of the Act, IEPA argues that the Board does not have the authority to withdraw the approval of the Illinois NPDES program and cannot grant the requested relief. Mot. at 6, *citing* Flagg Creek Water Reclamation Dist. v. Village of Hinsdale, PCB 06-141, 2006 WL 2869930 at *8 (Sept. 21, 2006) ("the Board's powers are limited to those vested in it by the [Act]"); Rulon v. Double D Gun Club, PCB 03-7, 2002 WL 2012431 at *3 (Aug. 22, 2002) ("The Board's authority under the Act does not extend to allegations of violations of the federal statutes"). Rather, because USEPA controls whether to delegate its NPDES program to a state, IEPA asserts that one must petition USEPA under Section 123.64(b)(1) of the Code of Federal Regulations² to investigate a state's administration of that delegated NPDES program. Mot. at 5, *citing* 40 C.F.R. § 123.64(b)(1).

Mr. Korman's Response

The Response argues that the Complaint is not duplicative of the USEPA Petition, the IDOT Complaint, or either of the two Korman Cases. First, the Response argues that the USEPA Petition and the Complaint are not duplicative because they reference federal and state law respectively. Resp. at 10. Second, the Response argues that the Complaint is distinguished from the IDOT Complaint and Korman Cases because the Complaint "focus[es] on the [r]ulemaking process," whereas the IDOT Complaint and Korman Cases are "[e]nforcement in nature." Resp. at 10.

The Response argues that the Complaint is not frivolous because "amendments to NPDES permit procedures through the Construction General Permit program periodically is within the

² IEPA further notes that Mr. Korman filed the USEPA Petition under federal regulations. Mot. at 5, *citing* 40 C.F.R. § 123.64.

purview of the Board.” Resp. at 11. In support of this argument, the Response cites several examples of Board rulemaking dockets implementing USEPA amendments.³ Resp. at 11.

The Response also quotes federal regulations, and alleges statistics regarding over 7,000 Notices of Intent regarding missing information and Notices of Termination in non-compliance with NPDES rules. Resp. at 8-10, 13-14, 40 CFR § 123.62.

In addition to the relief requested by the Complaint, the Response makes several new requests for relief. The Response requests the Board treat all major USEPA updates and changes to NPDES programs equally, and direct IEPA to: (1) review the Stormwater NPDES Permit in order to add “the most current and timely regulations,” and submit to the Joint Committee on Administrative Rules (JCAR); (2) set up a schedule to review every other NPDES program; (3) develop robust training for municipal separate storm sewer system (MS4) reviewers and inspectors; (4) clarify or amend 35 Ill. Adm. Code 309.109 Public Notices; and (5) not conduct mass permit terminations of NPDES permits.⁴ Resp. at 14-17.

DISCUSSION

This order first addresses IEPA’s motion to dismiss in the context of the Complaint and original requested relief. It then addresses the additional relief requested for the first time in the Response. The additional requested relief is beyond the scope of the original Complaint, and Mr. Korman did not ask for leave to amend the Complaint. However, given that Mr. Korman is a pro se litigant and IEPA has not sought leave to respond, the order addresses these requests on the merits.

Complaint

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 In re Chicago Flood Litigation*, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997). “To determine whether a cause of action has been stated, the entire pleading must be considered.” *LaSalle National Trust N. A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993).

Duplicative

IEPA argues that the Board should treat cases as duplicative where the cases seek the same relief: (1) before different venues, citing different laws; or (2) from different parties before the Board.

³ USEPA Regulations (R21-16); Wastewater Pretreatment Update, USEPA Amendments (R21-15); UST Update, USEPA Amendments (R21-14); RCRA Subtitle C (Hazardous Waste) Update, USEPA Amendments (R21-13); RCRA Subtitle D (Municipal Solid Waste Landfill) Update, USEPA Amendments (R21-12); UIC Update, USEPA Amendments (R21-11); SDWA Update, USEPA Amendments (R21-10); Definition of VOM Update, USEPA Amendments (R21-9); Wastewater Pretreatment Update, USEPA Amendments (R21-8); RCRA Subtitle C (Hazardous Waste) Update, USEPA Amendments (R21-6); National Ambient Air Quality Standards, USEPA Regulations (R21-1); Definition of VOM Update, USEPA Amendments (R20-12); Definition of VOM Update, USEPA Amendments (R19-15).

⁴ This sentence paraphrases over two pages of additional requested relief.

First, the Complaint and the USEPA petition involve similar issues and both seek to withdraw approval for Illinois' administration of the NPDES program. "A complaint is . . . duplicitious if it is identical or substantially similar to one brought in another forum."⁵ Brandle v. Ropp, PCB 85-68, slip. op. at 1 (June 13, 1985) (finding that "the most expeditious and complete resolution of this issue will be accomplished at the court level."). However, these two actions allege violations of different laws. "[T]he State has several laws against pollution, and a complaint alleging violation of one of them does not preclude a complaint by another party alleging violation of another law." See League of Women Voters v. North Shore Sanitary Dist., PCB 70-7, slip. op. at 2 (Oct. 8, 1970). In this case, Mr. Korman has alleged violations of state laws before the Board and federal regulations before USEPA. Resp. at 10. For these reasons, the Board declines to find the Complaint duplicative of the USEPA petition.

Second, the Complaint and the IDOT Complaint and Korman Cases involve similar issues. However, the IDOT Complaint and Korman Cases target individual permit-holders and focus on the alleged deficiencies of NPDES filings for specific projects. The Complaint does not target an individual permit-holder or a specific project. Rather, the Complaint alleges that IEPA is not properly reviewing NPDES filings for projects under a general NPDES permit. The Response identifies this as the difference between a case "focused on the Rulemaking process" and cases that are "Enforcement in nature." Resp. at 10. The Board finds that the Complaint is sufficiently distinct from the IDOT Complaint and Korman Cases to not be duplicative.

Therefore, the Board is not persuaded by either of IEPA's arguments that the Complaint is duplicative.

Frivolous

IEPA argues that the Complaint is frivolous because: (1) it fails to cite to any section of the Act upon which the Board can grant relief; and (2) its requested relief, withdrawing approval of the Illinois NPDES Program, is a matter of federal law that cannot be granted by the Board.

First, the cited Sections of the Act in the Complaint are not enforceable prohibitions. Sections 11(a) and 11(a)(8)(b) are part of the legislative declaration of the Act. As such, violation of these Sections is "not a proper cause of action upon which the Board can grant relief." Rulon v. Double D Gun Club, PCB 03-7, slip. op. at 4 (Aug. 22, 2002).

Section 13(b)(1) requires the Board to adopt regulations that "are necessary or appropriate to enable the State of Illinois to implement and participate in" the NPDES program under the Federal Water Pollution Control Act. 415 ILCS 5/13(b)(1) (2018). While the Response cites several rulemaking dockets regarding USEPA amendments, these dockets are not citizen-initiated proceedings. Rather, these dockets are periodically opened by the Board to implement any amendments to USEPA regulations occurring in the six-month blocks identified in the case names.

⁵ Public Act 92-0574 amended Section 31(d) by substituting the word "duplicative" for "duplicitious." The Board and the courts had consistently interpreted "duplicitious" to mean "duplicative." See, e.g., Winnetkans Interested in Protecting the Environment v. IPCB, 55 Ill. App. 3d 475, 478, 370 N.E.2d 1176, 1179 (1st Dist. 1977); People v. State Oil Co., PCB 97-103, slip. op. at 3, n.2 (Aug. 19, 1999).

Section 39(q)(3) requires IEPA to develop an online portal for permit applicants. 415 ILCS 5/39(q)(3) (2018). The Complaint also alleges a failure to publish Permit No. ILR10 in the Federal Register or Illinois Register, but does not state how Section 39(q)(3) has been violated.⁶ Therefore, the Board finds that the Complaint does not cite any section of the Act upon which the Board can grant relief.

Second, the Act does not give the Board the authority to withdraw approval of the Illinois NPDES program. As administrator of the NPDES, USEPA has the authority under federal regulations to approve program revisions or order the commencement of withdrawal proceedings. *See* 40 C.F.R. §§ 123.62, 123.63, 123.64. This is acknowledged when Mr. Korman filed the USEPA petition under Section 123.64 of the federal regulations. 40 C.F.R. § 123.64. Further, the Response quotes Part 123.62 of the federal regulations in support of its arguments. Resp. at 8-10.

The Board's powers are limited to those vested in it by the Act and do not extend to enforcing exclusively federal law. *See Flagg Creek Water Reclamation Dist. v. Village of Hinsdale*, PCB 06-141, slip. op. at 8 (Sept. 21, 2006); *Rulon*, PCB 03-7, slip. op. at 4 (Aug. 22, 2002). Therefore, the Board does not have the authority to order the commencement of withdrawal proceedings like USEPA may under the federal regulations. *See* 40 C.F.R. § 123.64(b)(1). Nor is the Board the state body that would voluntarily withdraw from the NPDES program. Section 4(k)(1) of the Act designates IEPA as the "water pollution agency for the State for all purposes of the Federal Water Pollution Control Act." 415 ILCS 5/4(k)(1) (2018). So, it would be IEPA, not the Board, that would file to withdraw under Section 123.64 of the federal regulations. Because this is governed by federal regulations and not the Act, the Board cannot compel IEPA to take this action. Therefore, the Board finds that it cannot grant the relief requested in the Complaint.

Moreover, Illinois courts have found that the Act does not allow third parties to prosecute the Agency's alleged permitting violations before the Board, rather it enables citizens to bring complaints against permittees:

The focus must be upon polluters who are in violation of the substantive provisions of the Act, since it would be unreasonable [for IEPA] to investigate its own compliance with permit-granting procedures.

[A] citizen's statutory remedy is a new complaint against the polluter, not an action before the Board challenging the Agency's performance of its statutory duties in issuing a permit. *Landfill, Inc. v. IPCB*, 74 Ill. 2d 541, 556, 560-61, 387 N.E.2d 258, 263, 265 (1978); *see also Citizens Utilities Co. of Illinois v. PCB*, 265 Ill. App. 3d 773, 781, 639 N.E.2d 1306, 1312 (3rd Dist. 1994).

A complaint was brought before the Board alleging that a farm violated the Act by applying landscape waste to its fields and that IEPA violated the Act by permitting the farm to apply this waste. *See United City Yorkville v. Hamman Farms*, PCB 08-96, slip. op. at 16-17 (Oct. 16, 2008). The Board allowed the allegations against the farm to proceed but dismissed the allegations against IEPA for as beyond its jurisdiction. *See United City Yorkville*, PCB 08-96, slip. op. at 16-17 (Oct. 16, 2008), *citing Landfill, Inc.*, 74 Ill.2d at 556, 560-61, 387 N.E.2d at 263, 265; *Citizens Utilities Co. of Illinois*, 265 Ill. App. 3d at 781, 639 N.E.2d at 1312. The Complaint similarly alleges that IEPA

⁶ The Response does not address IEPA's argument concerning Section 39(q)(3) of the Act.

violated the Act by administering the NPDES program in an allegedly improper manner. For the same reasons as in United City Yorkville, the Board does not have jurisdiction over the allegations in the Complaint.

For these reasons, the requested relief cannot be granted and the Board finds the Complaint frivolous.

Additional Relief Requested in Response

The additional relief requested by the Response has the effect of amending the Complaint without leave. However, this is a pro se case and in the interest of efficiency, the Board addresses these additional requests for relief on the merits.

The Response states that “[t]his case is focused on the [r]ulemaking process for the NPDES program” rather than being “enforcement in nature,” and in effect requests the Board to initiate one or more rulemakings. Resp. at 10. Reviewing the Stormwater NPDES Permit in order to add “the most current and timely regulations,” developing robust training for MS4 reviewers and inspectors, amending 35 Ill. Adm. Code 309.109 Public Notices, and establishing rules to prevent mass permit terminations of NPDES permits all fit within the bounds of rulemaking.

However, a citizen-initiated rulemaking must: (1) be supported by an adequate statement of reasons; (2) be accompanied by a petition signed by at least 200 persons; (3) not be plainly devoid of merit; and (4) not deal with a subject on which a hearing has been held within the preceding six months. 415 ILCS 5/28(a) (2018). A rulemaking proposal must also meet the content requirements of Section 102.202 of the Board’s procedural rules. 35 Ill. Adm. Code 102.202. Neither the Complaint nor the Response meet the requirements of the Act or the Board rules for initiating a rulemaking. Accordingly, to the extent that the Response requests that the Board initiate one or more rulemakings, the Board on its own motion dismisses the requested relief for failure to meet the requirements of Section 28(a) of the Act and Section 102.202 of the Board’s rules.

The Response’s request for IEPA to “undertake a review of every other NPDES program” also appears to seek a series of rulemakings. Resp. at 16. As such, it also fails to meet the requirements of Section 28(a) of the Act and Section 102.202 of the Board’s rules. However, as written, this can also be interpreted as a request to open a series of investigations without alleged violations. The Board recently dismissed a similarly broad request in Mr. Korman’s complaint against IDOT. See Korman v. IDOT, PCB 20-62, slip op. at 1-2 (June 18, 2020) (“the Board on its own motion dismisses the requested relief to the extent that it seeks an order to examine all counties in the state for potential violations. This requests relief which the Board does not have the authority to grant.”). Without any alleged violations, such a request fails to meet the requirements of Section 31(c) of the Act (415 ILCS 5/31(c) (2018)) and Section 103.204(c) of the Board’s procedural rules (35 Ill. Adm. Code 103.204(c)). Therefore, to the degree that the Response is requesting an investigation without alleged violations, on its own motion the Board dismisses the Complaint as amended by the Response for failing to meet the requirements of Section 31(c) of the Act and Section 103.204(c) of the Board’s rules.

CONCLUSION

For the reasons specified above, the Board grants IEPA’s motion to dismiss the Complaint as frivolous. The Board on its own motion also dismisses the Complaint as amended by the Response for failing to meet the requirements of Sections 28(a) and 31(c) of the Act and the Board’s corresponding procedural rules. The Board closes this docket.

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) (2018); *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. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
People of the State of Illinois Arlene Hass 69 West Washington Street, Ste. 1800 Chicago, Illinois 60602 ahass@atg.state.il.us	Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601
Illinois Environmental Protection Agency Division of Legal Counsel 1021 North Grand Avenue East P.O. Box 19276 Springfield, Illinois 62794 Epa.dlc@illinois.gov	
Michael J. Korman 2306 Sundrop Drive Glenview, Illinois 60026 mike.korman@swpppaudit.com	

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 18, 2021, by a vote of 4-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board