

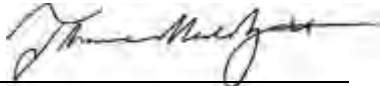
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL J. KORMAN	)	
	)	
Complainant,	)	
	)	
v.	)	CASE NO. PCB 2021-077
	)	
MEDLINE INDUSTRIES, INC.	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: Michael J. Korman  
2306 Sundrop Drive  
Glenview, IL 60026

PLEASE TAKE NOTICE that I have filed today with the Office of the Clerk of the Pollution Control Board, on behalf of Respondent Medline Industries, Inc., the following documents: (1) Appearance of Michael J. Hughes; (2) Appearance of Thomas N. Zahrt; and (3) Motion to Dismiss Complaint, copies of which are herewith served upon you.



Thomas N. Zahrt

Thomas N. Zahrt  
Neal, Gerber & Eisenberg LLP  
2 North LaSalle Street, Suite 1700  
Chicago, Illinois 60602  
312-269-8000  
tzahrt@nge.com

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served on the date of April 15, 2021, the attached Notice of Filing of Appearances and Motion to Dismiss Complaint upon the following persons by delivery of that document to Federal Express (Fed-Ex), a third-party mail carrier, by the time of 4:30 p.m. CT, with proper postage or delivery charges prepaid:

Michael J. Korman  
2306 Sundrop Drive  
Glenview, IL 60026



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Thomas N. Zahrt

Dated: April, 15, 2021

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL J. KORMAN	)	
	)	
Complainant,	)	
	)	
v.	)	CASE NO. PCB 2021-077
	)	
MEDLINE INDUSTRIES, INC.	)	
	)	
Respondent.	)	

APPEARANCE

I hereby file my appearance in this proceeding, as the lead attorney on behalf of Medline Industries, Inc.



---

Michael J. Hughes

Michael J. Hughes  
Neal, Gerber & Eisenberg LLP  
2 North LaSalle Street, Suite 1700  
Chicago, Illinois 60602  
312-269-8000  
mhughes@nge.com

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Michael J. Korman  
2306 Sundrop Drive  
Glenview, IL 60026

A handwritten signature in blue ink that reads "Michael J. Hughes". The signature is written in a cursive style and is positioned above a horizontal line.

---

Michael J. Hughes

Dated: April, 15, 2021

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL J. KORMAN	)	
	)	
Complainant,	)	
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v.	)	CASE NO. PCB 2021-077
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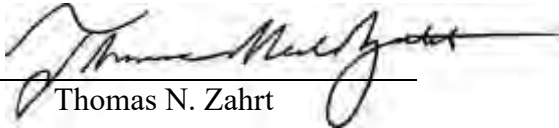
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Thomas N. Zahrt

Dated: April, 15, 2021

## BEFORE THE POLLUTION CONTROL BOARD

MICHAEL J. KORMAN,

Complainant,

v.

MEDLINE INDUSTRIES, INC.,

Respondent.

CASE NO. PCB 2021-077

**MOTION TO DISMISS COMPLAINT**

NOW COMES the Respondent, Medline Industries, Inc. (“Medline”) by and through its attorneys, Neal, Gerber & Eisenberg LLP, and for its Motion to Dismiss the Complaint filed by Michael J. Korman (“Mr. Korman” or “Complainant”), hereby states as follows:

**I. INTRODUCTION**

Medline moves this Board for dismissal of the instant Complaint on the grounds that it is frivolous in that it fails to state a cause of action upon which the Board can grant relief and also requests relief that the Board does not have the authority to grant. The Complaint concerns a development project undertaken by Medline at the corner of Alleghany Rd. and Peterson Rd. in Grayslake, Illinois (the “Project”). It is the second such Complaint filed by Mr. Korman regarding the Project, the first of which was dismissed by this Board’s own motion on March 4, 2021 as legally frivolous. The current Complaint is likewise deficient in that: (1) it fails to allege any actual violations of Medline’s National Pollution Discharge Elimination System Permit (the “NPDES Permit” or the “Permit”); (2) Medline has complied with the requirements of its NPDES Permit because its records are publicly available through state and local agencies; and (3) in seeking revocation of Medline’s Permit, despite alleging none of the requisite conditions for revocation, Mr. Korman seeks relief that the Board does not have the authority to grant.

## II. ARGUMENT

The Pollution Control Board's (the "Board") procedural rules require that complaints contain "[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," and a "concise statement of the relief that the complainant seeks." 35 Ill. Adm. Code 103.204. When the Board receives a complaint, it shall schedule a hearing unless the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212. A complaint is frivolous where it "request[s]...relief that the Board does not have the authority to grant" or where it where it "fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202. The frivolous provision "is designed to avoid expensive and time-consuming hearings on claims that cannot prevail even if the facts alleged are true." *Schrantz et al.*, Ill. Pollution Control Bd. Op. 93-161 at \*4 (Oct. 21, 1993). Illinois courts have further defined a frivolous pleading as "one that is either legally or factually deficient." *Winnetkans Interested in Protecting Environment (WIPE) v. Ill. Pollution Control Bd.*, 55 Ill. App. 3d 475, 481 (1st Dist. 1977). In addition, when ruling on a motion to dismiss, the Board takes all well-pled allegations as true, drawing inferences from those allegations in favor of the non-movant. *Kirkham*, Ill. Pollution Control Bd. Op 19-70 at \*4 (Feb. 28, 2019). However, a complaint is "insufficient" and susceptible to a motion to dismiss where it makes "legal conclusions unsupported by allegations of specific facts." *United City of Yorkville*, Ill. Pollution Control Bd. Op. 08-96 at \*17-18 (Apr. 2, 2009) (citing *La Salle Nat'l Tr., N.A. v. Vill. of Mettawa*, 249 Ill. App. 3d 550, 557 (2nd Dist. 1993)); see also *City of Des Plaines v. Pollution Control Bd.*, 60 Ill. App. 3d 995, 1000 (1978) ("[P]ure conclusions [], even in administrative proceedings, are insufficient.").



**A. Complainant's Allegations that Medline Violated its NPDES Permit are Speculative and Unsupported by Facts or Evidence**

First, the Complaint requests that the Board suspend or revoke Medline's NPDES Permit until it "is in full compliance with [that Permit]." (Comp. at 5). It alleges generally that Medline "has failed to comply with all conditions of [its NPDES Permit]." (*Id.*). Mr. Korman's allegations, however, are entirely unsupported by actual facts or evidence. The Complaint is devoid of any detailed or specific allegations regarding conduct that violated or even potentially violated the Permit terms and conditions. In addition, the allegations in the Complaint do not even assert that Medline has engaged in acts causing pollution as a result of the Project. In fact, the Complaint itself repeatedly acknowledges that the **Mr. Korman is unaware of any such pollution.** (*Id.* at 4-5). Instead, Mr. Korman identifies numerous ways in which Medline has *complied* with the requirements of its NPDES Permit, stating for example in Paragraph 5 that "[Medline]'s representative signed the [Notice of Intent] in the correct location," and that "[Medline]'s engineer paid the required fees associated with the permit." (*Id.* at 3). In response to Question 6 of the Board's Complaint Form—which asks complainants to describe the type of pollution alleged—Mr. Korman responded by saying "[a]t this time Complainant is unaware of any pollution at this project site." (*Id.* at 4). In response to Questions 7 and 8—which ask complainants to describe the duration/frequency of the pollution and the alleged "bad effects of the pollution" on human, animal, and plant life—Mr. Korman responded with: "The answer to this question is unknown." (*Id.* at 4-5).

Mr. Korman contends that his inability to allege any facts or evidence supporting the existence of pollution and "Clean Water Act violations" is the result of Medline's refusal to allow him direct access to its records, in supposed violation of the NPDES Permit requirements. (*Id.* at 4). He speculates in Paragraph 6 of the Complaint that "this lack of candor" from Medline "*may*

indicate a *possible* lack of transparency by [Medline], Respondent Civil Engineer, Respondent SWPPP Inspector or Respondent General Contractor,” and indicates that he finds this “troubling” given that “many other entities” have provided him with these types of records. (*Id.*) (emphasis added). Mr. Korman’s own statements further demonstrate that his Complaint is speculative in nature, in that it alleges no actual violations of the NPDES Permit, other than a baseless claim that Medline failed to make its inspection forms/reports available to the public.

Mr. Korman has displayed a track record of frivolous claims made before this Board. As far as Medline can discern, Mr. Korman has filed five Complaints before this Board since March of 2020, three of which have been dismissed as frivolous. Mr. Korman’s letter to Medline demanding access to its facilities and records, attached to the Complaint as Exhibit A, notes that he sought identical information from 48 other projects/businesses. (Comp., Ex. A). In the final paragraph of that letter, Mr. Korman informed Medline that a failure to respond to his requests would result in a Complaint before this Board. (*Id.*) It can be inferred that the “many other entities” which have allegedly provided Mr. Korman with records did so to avoid the needless expense associated with defending themselves from similarly baseless claims before this Board. It can also be inferred that if Mr. Korman had any evidence of permit violations, he would have called them to the attention of Medline or the IEPA at the time of his letter or his initial Complaint. In the instant case, Mr. Korman appears to be frustrated at Medline’s refusal of his request to visit the Project construction site. (*Id.*) As a result, he filed this second Complaint, despite his acknowledgements and admissions that he is unaware of any pollution whatsoever as a result of the Project or any specific conduct by Medline that violates the conditions of its NPDES Permit. (Comp. at 5). The Board should not allow Mr. Korman to abuse the Board’s procedures to engage in a fishing expedition. Medline therefore requests that the Board find that Mr. Korman’s

Complaint is frivolous in that it has failed to state a claim upon which relief can be granted, and dismiss the Complaint with prejudice.

**B. Medline Has Complied With All Aspects of its Permit, Including the Public Availability Requirement**

Complainant's sole allegation resembling a cognizable violation of Medline's NPDES Permit is his claim that, under Part IV.B.6 of the Permit, Medline "is required to make all completed inspection forms/reports required under [the Permit] available upon request to the public" and that Medline failed to do so in this case. (Comp. at 2). Mr. Korman focuses his claim on Medline's refusal to allow him to personally inspect the Project to review the relevant reports and documents. (*Id.* at 5; *see also* Comp., Ex. A). Here, Mr. Korman's claims fail because (1) Illinois courts define public availability to mean no more than the express requirements of the plain language of the regulation in question, and Medline has consistently filed all necessary documentation with state and local agencies; and (2) as demonstrated by the attachments to the Complaint, Medline appropriately directed Mr. Korman to seek information from the Illinois Environmental Protection Agency when he requested to review the "forms/reports required under [the NPDES Permit]."

First, Mr. Korman essentially claims that by denying his request to visit the Project and review inspection reports and SWPPP documentation associated with the NPDES Permit, Medline violated Part IV.B.6 of the Permit. (*See* Comp., Ex. F at 5). Mr. Korman's request goes beyond the plain language of the Permit, and instead seeks to impose a requirement upon Medline and other NPDES Permit holders that their inspection forms and reports are made available to *him*, as opposed to *the public* upon request. The court in *People v. Carpenter* addressed a significantly similar claim, wherein a state regulation required that "the list of temporarily approved evidentiary instruments" used by the state police in breath testing alcohol levels in drivers "shall be available

to the public.” 385 Ill. App. 3d 156, 159 (2nd Dist. 2008) (citing 20 Ill. Adm. Code 1286.210(c)). There, the driver of a vehicle who failed a sobriety test using an “evidentiary instrument” argued, and the trial court agreed, that because that instrument was not listed on the police website, it was not “available to the public” as was required under state regulations. *Id.* at 157. The *Carpenter* court reversed, finding that there was no requirement that the information be made available to the public *on the police website* “under the plain language of the regulation.” *Id.* at 167. Instead, the court elaborated on the plain meaning of “public” and “available,” reasoning:

The word “available” means “accessible or may be obtained.” (internal citation). “Public” is defined as “accessible to or shared by all members of the community.” (internal citation). As the State points out, there is no requirement that the list of temporarily approved instruments be posted on the Illinois State Police Web site or made available to the public in a certain fashion. *See Bonutti*, 338 Ill. App. 3d at 341 (where statutory terms are clear and unambiguous, the plain language as written must be given effect, without reading into it exceptions, limitations, or conditions that the legislature did not express).

...

***Had the drafters intended that the temporary approval list be available to the public in a particular fashion, the language would reflect such a manner or means of compliance.*** For example, section 2175.135(a) of Title 2 of the Administrative Code prescribes a specific means of making information available to the public: minutes from meetings of the Pollution Control Board “will be available to the public at the Clerk’s Office and on the Board’s Web site for at least 60 days.”

...

Unlike other provisions of the Administrative Code that specify how the information shall be available to the public, section 1286.210 does not designate how the temporary list shall be available to the public. Therefore, the trial court erred by concluding that the Department’s failure to post the temporary list on its Web site constituted a lack of compliance with the regulation.

*Id.* at 161-162 (some internal citations omitted).

Similarly, there is no language here—either from the Board or state regulations—elaborating upon the meaning of Section IV.B.6 of the NPDES Permit and its requirement that the

Stormwater Pollution Prevention Plan (“SWPPP”) and all completed inspection forms/reports required under [the Permit] should be available upon request to the public<sup>1</sup>. Thus, the plain language of the Permit must control.

On the issue of public availability, the plain language of the NPDES permit does not place the burden on the permittee to provide copies of inspection reports to any individual who requests them. Rather, the permit condition in question states as follows:

All stormwater pollution prevention plans and all completed forms/reports required under this permit are considered reports that shall be available to the public at any reasonable time upon request. However, the permittee may claim any portion of a storm water pollution prevention plan as confidential in accordance with 40 CFR Part 2.

Section IV.B.6. of NPDES Permit ILR10 (Comp. Ex. F, at 5). Unlike the immediately preceding language in Section IV.B.3. (which says that “*the permittee shall make plans available* upon request from this Agency” [referring to sediment and erosion plans, among other plans]) (emphasis added), Section IV.B.6. of the permit simply describes the types of documents that will be considered accessible or obtainable by members of the community, subject to claims of confidentiality by the permittee. The express language of this permit provision does not impose an affirmative obligation on the permittee to provide its records to the public. Rather, the plain language of Section IV.B.6. puts the permittee itself on notice that documents filed with a public agency, such as a SWPPP or other reports required by the permit, will be made available to members of the public if requested through a FOIA request or other public records request.

Further, even if the plain language of Section IV.B.6. is construed as a requirement to be followed by the permittee, in the present case, the SWPPP and all records and notices required by

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<sup>1</sup> As the *Carpenter* court explained, “available” means “accessible or may be obtained.” *Carpenter*, 385 Ill. App. 3d at 161. “Public” is defined as “accessible to or shared by all members of the community.” *Id.*; see also *Available*, MERRIAM-WEBSTER DICTIONARY (2021) (defining available as “accessible” or “obtainable”); *Public*, MERRIAM-WEBSTER DICTIONARY (2021) (defining public as “of, relating to, or affecting all the people or the whole area of a nation or state.”).

Medline's NPDES Permit have been, and remain, accessible and obtainable to members of the community. As Mr. Korman is aware (see Comp., Ex. C at 1-2), the SWPPP is available on the Illinois Environmental Protection Agency's ("IEPA") website. And, in accordance with the SWPPP (which Mr. Korman has in his possession), any and all required inspection forms, reports or other documents are submitted by Medline to either the IEPA or the Lake County Stormwater Management Commission ("Lake County")—public entities which allow individuals such as Mr. Korman to review such records through FOIA requests or in person. In doing so, Medline has met the requirements of the "plain language" of the Permit, allowing the public access to its inspection forms and reports upon request. On the other hand, in demanding *personal* access to this information, Mr. Korman, like the plaintiff in *Carpenter*, seeks to read into the Permit "exceptions, limitations, or conditions that the legislature did not express." *Id.* at 162.

Finally, when Mr. Korman wrote to Medline requesting access to the relevant forms/reports, Medline directed him to the IEPA, informing him that the "public information" he sought could be obtained through a FOIA request<sup>2</sup>. (Comp., Ex. B). In doing so, Medline went above and beyond the requirements of the Permit. The permit classifies all reports submitted to a state or local agency as public documents, to the extent required by the permit, but it does not mandate that Permit-holders direct individuals such as Mr. Korman to the appropriate agency serving as the repository of that publicly available information. (Comp., Ex. F at 5). Medline had no obligation beyond compliance with the inspection and reporting procedures outlined in its permit and its SWPPP. Because the permit and SWPPP require notices of intent and incident reports, among other things, to be filed with a public agency, Medline has satisfied the "public

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<sup>2</sup> Although Medline initially directed Mr. Korman to address his records request to the IEPA, which he subsequently did, it should also be noted that Medline's consultants submit weekly inspection reports for review to the Lake County Stormwater Management Commission, as requested by that agency. Thus, a well-crafted records request to Lake County should yield the information Mr. Korman seeks.

availability” condition of the Permit.

For these reasons, Medline has met its requirements that information be shared with the public under the Permit, and Mr. Korman therefore fails to state a claim upon which relief may be granted. This Court should therefore dismiss his Complaint with prejudice as frivolous.

**C. Complainant Requests Relief From the Board Which is Beyond its Authority Given the Lack of Any Factual or Evidentiary Support for His Claims**

Finally, given that Medline has complied with the conditions and requirements of its NPDES Permit, Mr. Korman’s request that this Board suspend or revoke that Permit asks the Board to grant relief which is beyond the its authority. In response to Question 9 of the Board’s Complaint Form, which requests information on the relief sought by a plaintiff, Mr. Korman cites 35 Ill. Adm. Code 309.182 as the grounds for his request that Medline’s Permit be suspended or revoked. (Comp. at 5). The Administrative Code permits the Board to revoke or suspend NPDES permits where (1) there exists a “[v]iolation of any terms or conditions of the permit (including, but not limited to, schedules of compliance and conditions concerning monitoring, entry and inspection)”; (2) the holder “obtain[ed] a permit by misrepresentation or failure to disclose fully all relevant facts”; or (3) “a change in any circumstance that mandates either a temporary or permanent reduction or elimination of the permitted discharge.” 35 Ill. Adm. Code 309.182.

Mr. Korman has failed to allege that Medline misrepresented or failed to disclose facts and likewise has alleged no change in circumstances whatsoever that would require a reduction or elimination of Medline’s permitted discharge. Rather, as highlighted above, the sole basis for his claim against Medline is his belief that Medline has failed to comply with its Permit by refusing to allow him personal access to its Project to review inspection reports and forms. (Comp. at 5). Medline had no obligation to permit *individuals* to review these documents. Rather, Medline provided all relevant and required information and reports to the IEPA and to Lake County. In

doing so, Medline has made those documents available *to the public*, as the plain language of its Permit requires. Mr. Korman's attempt to mischaracterize Medline's request that he contact those agencies to view the relevant documents as a Permit violation, is an attempt to add an additional condition to the Permit that neither the legislature, nor this Board, has authorized. Further, Mr. Korman repeatedly acknowledges that he is unaware of any pollution caused by the Project or Medline. (*Id.* at 4-5). Thus, because Mr. Korman has alleged no misrepresentation, no change in circumstances, and no actual violation of Medline's Permit, none of the conditions of 35 Ill. Adm. Code 309.182 have been met.

Medline therefore requests that this Board find that it lacks authority under 35 Ill. Adm. Code 309.182 to revoke or suspend Medline's NPDES Permit, and dismiss Mr. Korman's Complaint with prejudice as frivolous for failing to state a claim upon which relief can be granted.

WHEREFORE, Respondent Medline requests that this Court dismiss the Complaint as frivolous and with prejudice for failure to state a claim upon which relief can be granted.

By: /s/ Thomas N. Zahrt  
One of the Attorneys for Respondent

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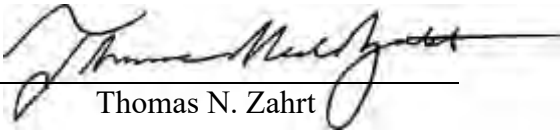
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Thomas N. Zahrt

Dated: April, 15, 2021