

ILLINOIS POLLUTION CONTROL BOARD
September 3, 2015

SUSAN M. BRUCE,)
)
Complainant,)
)
v.) PCB 15-139
) (Citizens Enforcement – Water)
HIGHLAND HILLS SANITARY DISTRICT,)
)
Respondent.)
)

ORDER OF THE BOARD (by G.M. Keenan):

Susan M. Bruce’s January 16, 2015 complaint alleged that Highland Hills Sanitary District caused sewage discharges that flowed through her property on several occasions, against Board rules and a Board order. Highland Hills moved to dismiss that complaint on April 15, 2015.¹ The motion asserted, among other things, that Ms. Bruce failed to specifically state the address where the discharges occurred, as required by the Board’s rules for complaints at 35 Ill. Adm. Code 103.201(c)(2). In a June 4, 2015 order, the Board agreed and dismissed the complaint, but allowed Ms. Bruce to file an amended complaint that included her home address. Susan M. Bruce v. Highland Hills Sanitary Dist., PCB 15-139 (June 4, 2015) (June Ord.).

Highland Hills also argued that Ms. Bruce failed to specifically state when several of the discharges occurred and failed to describe the nature and extent of the discharges. The Board disagreed and found that, in these respects, the complaint gave enough information to permit Highland Hills to prepare a defense. In another argument, Highland Hills challenged a particular claim related to a prior Board order, Travieso v. Highland Hills Sanitary Dist., PCB 79-72 (Nov. 1, 1979). The Board agreed that this claim was frivolous, but explained how Ms. Bruce could properly plead it in her amended complaint.²

Ms. Bruce filed that amended complaint on July 8, 2015. It included her home address, elaborated on her allegations, and took other steps intended to cure the original complaint’s deficiencies. Highland Hills took issue with the amended complaint for many of the same reasons as before, including vague dates and descriptions of the discharges. On July 15, 2015, it moved to dismiss the amended complaint and moved for reconsideration of the parts of the Board’s June order that approved of the original complaint.

¹ On March 11, 2015, Highland Hills also moved to dismiss Ms. Bruce’s complaint for faulty service of process. But a later agreement allowed Ms. Bruce to properly serve the complaint. HO Ord. (Mar. 17, 2015).

² The Board’s June order also addressed a claim made under 35 Ill. Adm. Code 306.102(a). But Highland Hills does not presently challenge it, so it is not discussed here.

Highland Hills argues that the Board's June order erroneously applied existing law and therefore should be reconsidered. Highland Hills' motion does not convince the Board that it made an error, so the Board denies the motion. Furthermore, the additional information provided in Ms. Bruce's amended complaint cured the deficiencies present in the original complaint: she followed the Board's directions in its June order. Therefore, the Board also denies Highland Hills' motion to dismiss. We elaborate on the reasons for these findings below.

THE BOARD'S JUNE 4, 2015 ORDER

The Board's June order addressed Highland Hills' arguments in its motion to dismiss the original complaint. Its motions considered today reiterate many of those arguments, so a brief summary of the June order provides useful context to this Board order.

Legal Background

In June, like today, the Board considered a motion to dismiss a complaint. The Board's rules state that a complaint must contain the "dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the [Illinois Environmental Protection] Act and regulations" in order to "reasonably allow preparation of a defense." 35 Ill. Adm. Code 103.204(c)(2).

Location of the Alleged Discharges

The June order dismissed the original complaint because it did not identify the location of the alleged discharges. However, the order allowed Ms. Bruce to file an amended complaint with her home address, where the damage occurred. June Ord. at 6.

The Board then considered the other asserted deficiencies in the original complaint so Ms. Bruce could also address them in the amended complaint, if necessary. *Id.*

Dates of the Alleged Discharges

The original complaint alleged that discharges occurred four times on specific dates (*e.g.*, April 18, 2013), "twice in May 2013," and "three times in 2010." Comp. at 8. Highland Hills argued that Ms. Bruce must plead a month, day, and year for every alleged discharge to allow Highland Hills to prepare a defense. Mot. to Dis. at ¶¶ 6-8. However, the Board discussed past orders where it found pleadings with broad ranges of dates reasonably allowed the preparation of a defense.³ Thus, Ms. Bruce did not need to provide more specific dates in her amended complaint.

³ June Ord. at 6-7, discussing Schilling v. Hill, PCB 10-100 (Nov. 4, 2010) and Finley v. IFCO ICS-Chicago, Inc., PCB 02-208 (Aug. 8, 2002).

Nature and Extent of the Alleged Discharges

The Board also found no issue with how the original complaint described the nature and extent of the alleged discharges. Ms. Bruce originally alleged that discharges came from drains in her plumbing fixtures and equipment in her back yard, damaging her property. Comp. at 2. Highland Hills argued that Ms. Bruce needed to describe the nature of each specific instance and that describing the alleged discharges in general was insufficient. Mot. to Dis. ¶¶ 9-11. However, the Board stated that this general description adequately allowed Highland Hills to prepare a defense. June Ord. at 7.

The Travieso Order

Ms. Bruce originally requested that the Board enforce its order from the case Travieso v. Highland Hills Sanitary Dist., PCB 79-72 (Nov. 1, 1979), which also concerned sewer overflows in Highland Hills. However, the applicable provision, § 45(e) of the Environmental Protection Act, allows only those individuals who were parties to the earlier enforcement case to seek enforcement of the Board's order, and then only in a civil action.⁴ This caused a Ms. Bruce a problem for two reasons. First, proceedings before the Board are not considered civil actions.⁵ Furthermore, the original complaint did not say whether Ms. Bruce has any connection with the parties in Travieso. So, because the Board could not enforce Travieso, it found that claim frivolous.

However, the Board noted that § 31(d)(1) of the Environmental Protection Act empowers it to instead find that Highland Hills violated Travieso without finding that Ms. Bruce is connected to the parties in Travieso.⁶ The Board stated that if Ms. Bruce's amended complaint requested relief under this provision, then that claim would be properly pled.

HIGHLAND HILLS' MOTION FOR RECONSIDERATION

Ms. Bruce's amended complaint attempted to fix the pleading issues that the Board discussed in June. Highland Hills filed two motions challenging the amended complaint: another motion to dismiss and a motion for reconsideration of the June order.⁷

The motion for reconsideration asked the Board to change its findings that Ms. Bruce's original complaint provided sufficient detail on the dates and nature of the alleged discharges.

⁴ 415 ILCS 5/45(e) (2014).

⁵ People v. NL Indus., 152 Ill. 2d 82, 99-100, 604 N.E.2d 349, 356 (1992).

⁶ June Ord. at 8, discussing 415 ILCS 5/31(d)(1) (2014).

⁷ In Ms. Bruce's objection to this motion to dismiss, she stated that she would separately file her objection to the motion for consideration. However, the Board received no objection to the motion for reconsideration.

Mot. for Recons. at 7. In ruling on a motion for reconsideration, the Board considers “newly discovered evidence..., changes in the law, or errors in the [Board’s] previous application of existing law” to conclude whether its decision was in error.⁸

Highland Hills’ motion argues that the Board erroneously relied on two prior Board orders in finding that Ms. Bruce pled sufficiently specific dates, stating that those orders “are distinguishable from the present case.”⁹ However, while Highland Hills does note several factual distinctions, none demonstrates an exception to the Board’s general legal interpretation of its regulations: “[i]n a citizen enforcement action, a complaint can adequately allege pollution without having to give exact dates and times upon which the contaminants caused pollution...” Schilling, PCB 10-100, slip op. at 10.

Highland Hills also states that the Board erred by finding vague and unclear statements concerning the nature, extent, and duration of the alleged discharges in the amended complaint to be sufficiently specific. Mot. to Dis. Amd. Comp. at ¶¶ 16-22. Highland Hills argues that in making this finding, the Board erroneously relied on the same two prior Board orders. *Id.* at ¶ 22. However, the Board did not rely on these orders in its findings related to nature, extent, and duration. June Ord. at 7.

Therefore, the Board denies Highland Hills’ motion for reconsideration.

HIGHLAND HILLS’ MOTION TO DISMISS THE AMENDED COMPLAINT

Dates, Nature, Extent, and Duration of Alleged Discharges

Highland Hills also moved to dismiss Ms. Bruce’s amended complaint. Like the previous motion to dismiss, this motion argued that Ms. Bruce’s amended complaint also fails to sufficiently plead the dates, nature, extent, and duration of the discharges and the relationship between Ms. Bruce and the parties to the Travieso order. Mot. to Dis. Amd. Comp. at 2-3.

However, the Board has already found that Ms. Bruce’s original complaint sufficiently pled the dates, nature, extent, and duration. The amended complaint is no less specific than the original complaint, so for the same reasons laid out in the Board’s June order, these are not adequate grounds to dismiss the amended complaint.

The Travieso Order

The Board did, though, find Ms. Bruce’s Travieso claim inadequately pled. The amended complaint, as the Board suggested, asserts that Highland Hills violated Travieso. Amd.

⁸ People v. Packaging Personified, Inc., PCB 04-16, slip op. at 8 (Mar. 1, 2012), citing Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993) and Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154 (1st Dist. 1991). *See also* 35 Ill. Adm. Code 101.902.

⁹ Mot. to Recons. at ¶ 9-15, discussing Finley, PCB 02-208 and Schilling, PCB 10-100.

Comp. at ¶ 5. Yet, Highland Hills again challenges this claim, arguing that Ms. Bruce fails to describe her relationship with parties to Travieso. Mot. to Dis. Amd. Comp. at ¶ 8.

As the Board discussed in June, a Board order may only be enforced by parties to that proceeding. *See supra* p. 3. However, any person may allege a violation of a Board order. *Id.* Ms. Bruce's relationship to the parties to Travieso is not relevant to the revised claim, which is adequately pled.

Ms. Bruce's Objection to the Motion to Dismiss the Amended Complaint

The deadline for Ms. Bruce to file an objection to the motion to dismiss the amended complaint was July 27, 2015. Ms. Bruce requested an extension to this deadline on August 6, 2015. The Board grants this motion and considers the response timely filed.

CONCLUSION

A complaint is only the beginning of a proceeding. As the Board noted in June, charges in a complaint must be sufficiently clear and specific to allow preparation of a defense.¹⁰ But the complaint need not completely address all of Highland Hills' concerns, such as whether rain, construction, or conditions at a wastewater treatment plant might have caused the sewer incursions. Mot. for Recons. at ¶ 8.

Ms. Bruce must prove her allegations to ultimately obtain the relief sought. But a complaint must only provide adequate notice to the respondent. Ms. Bruce has done so by following the instructions given in the Board's previous order. For this reason, the Board denies Highland Hills' motion to reconsider the Board's June 4, 2015 order and motion to dismiss the amended complaint.

The Board finds that the amended complaint is not duplicative or frivolous. The Board also accepts for hearing Ms. Bruce's amended complaint. Highland Hills may file an answer to the amended complaint by November 3, 2015, the first business day after 60 days from the date of this order. A respondent's failure to file an answer within this timeframe may have severe consequences. Generally, if Highland Hills fails to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider Highland Hills to have admitted the allegation. *See* Ill. Adm. Code 103.204(d).

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

¹⁰ June Ord. at 5, citing Lloyd A. Fry Roofing Co. v. PCB, 20 Ill. App. 3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974).

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2014). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2014). Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id.* Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id.*

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 3, 2015, by a vote of 5-0.



Don A. Brown, Assistant Clerk
Illinois Pollution Control Board