

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PAUL CHRISTIAN PRATAPAS,)
)
 Complainant,)
)
 v.)
)
 CHARLES BUILDING AND)
 DEVELOPMENT; AND OZYNGA)
 CONCRETE YARD #281)
)
 Respondents.)

Case No. PCB 2023-062


APPEARANCE

NOW COMES HINSHAW & CULBERTSON LLP, and hereby enters its Appearance as counsel for Ozinga Ready Mix Concrete, Inc., which was provided a copy of a Complaint brought against a non-entity referred to as "OZYNGA CONCRETE YARD #281", in the above-entitled cause of action.

Dated: 12-16-2022

OZYNGA READY MIX CONCRETE, INC.,
an Illinois corporation

By: HINSHAW & CULBERTSON LLP

By: 
 Richard S. Porter
 One of Its Attorneys

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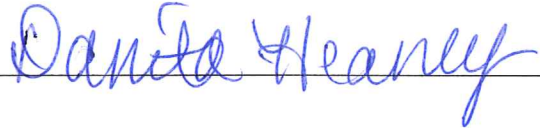
AFFIDAVIT OF SERVICE

The undersigned certifies that on December 16, 2022, she served a copy of the foregoing

Appearance upon the following:

Paul Christian Pratapas
1330 E. Chicago Avenue #110
Naperville, IL 60540

by depositing a copy thereof, enclosed in an envelope, in the United States Mail at 100 Park Avenue, Rockford, Illinois 61101, proper postage prepaid, at or about the hour of 5:00 o'clock p.m., addressed as above.

A handwritten signature in blue ink, reading "Daniela Heaney", is written over a horizontal line.

HINSHAW & CULBERTSON LLP
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815-490-4900

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PAUL CHRISTIAN PRATAPAS,)	
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Complainant,)	Case No. PCB 2023-062
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v.)	
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CHARLES BUILDING AND)	
DEVELOPMENT; AND OZYNGA)	
CONCRETE YARD #281)	
)	
Respondents.)	

MOTION TO DISMISS COMPLAINT

NOW COMES Ozinga Ready Mix Concrete, Inc. which was provided a copy of a Complaint brought against a non-entity referred to as “OZYNGA CONCRETE YARD #281”, through its attorneys Hinshaw & Culbertson, LLP, pursuant to 735 ILCS 5/2-301 and 35 Ill. Adm. Code 101.400, 735 ILCS 5/2-301 and 35 Ill. Adm. Code 101.400, 35 Ill. Adm. Code 103.212(b), to challenge the Complainant’s service of the Complaint on Respondent and to attack the Complaint as frivolous, and in support thereof states as follows:

BACKGROUND

1. On November 22, 2022, the Complainant, Paul Christian Pratapas, filed a Complaint herein PCB 2023-062 (“Complaint”) with the Illinois Pollution Control Board (“Board”). According to the Illinois Board’s docketing website, between July 2022 to December of 2022, the Complainant has filed 20 separate “Citizen Complaints” against various entities pursuant to 415 ILCS 5/31(d). Like the other 19 Citizen Complaints filed by the Complainant this year, the Complaint in this matter was drafted on a Complaint Form provided by the Illinois Pollution Control Board. The Complaint lists as Respondents “Charleston Building and Development; and Ozynga Concrete Yard #281.” The Complaint alleges violations of “415 ILCS

5.12(a)", 415 ILCS 5/12(d), and 35 Ill. Adm. Code 304.141(b) which are alleged to have taken place on November 18, 2022.

2. The Illinois Pollution Control Board ("Board") has the authority to conduct proceedings upon complaints charging violations of the Illinois Environmental Protection Act ("Act"), any rule or regulation adopted under the Act, any permit or term or condition of a permit, or any Board order. 415 ILCS 5/5(d). The Board shall hold a hearing on a Complaint, unless it determines that the Complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b). A 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.* Courts and the Board have held that a factually or legally deficient complaint is a frivolous complaint. *Winnetkans Interested in Protecting Environment (WIPE) v. Illinois Pollution Control Board*, 55 Ill. App. 3d 475, 370 N.E.2d 1176 (1st Dist. 1977); *Gutesha v. Johnson Concrete Co. and Elmer Larson, Inc.*, 1993 Ill. ENV LEXIS 545.

3. For the reasons set forth below, the Board should declare the Complaint frivolous, decline to accept the Complaint for Hearing, and enter an order dismissing this matter in its entirety with prejudice. See 35 Ill. Adm. Code 103.212(b).

IMPROPER SERVICE

4. As set forth in the Complainant's "Proof of Service", it is uncontested that the Complainant, a party to this action attempted to personally serve Respondent Ozinga with the Complaint in this matter. While the Board Rules allow for personal service, they are silent on who may effectuate personal service. 35 Ill. Adm. Code 101.304. Pursuant to 35 Ill. Adm. Code 101.100, in such instances the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance.

5. The Rules of Civil Procedure are clear and unambiguous, a private person making service cannot be a party to the action. *Gocheff v. Breeding*, 53 Ill. App. 3d 608, 609, 368 N.E.2d 982, 983 (5th Dist. 1977). 735 ILCS 5/2-202. When service is carried out in a manner inconsistent with the statute, the service is invalid and no jurisdiction over the defendant is acquired. *Id.*

6. Here, the record is abundantly clear, the Complainant is a private person and party to the action. The Complainant's sworn statement establishes that he attempted to personally effectuate service upon Respondent. This method of service is contrary to the applicable law and thus invalid. 735 ILCS 5/2-202. The Board therefore has no authority to grant the relief request and this Board must enter an order in which it finds the Complaint frivolous and declines to accept the Complaint for hearing.

FAILURE TO SUE A PERSON

7. The Illinois Environmental Protection Act ("Act") and the Board's rules provide that a Complainant "may file with the Board a complaint, against any person allegedly violating the Act, any rule or regulation, any permit or any Board order." 415 ILCS 5/31(d) (emphasis added); 35 Ill. Adm. Code 103.200 ("Under Section 31 of the Act, an enforcement proceeding may be commenced by any person."); 35 Ill. Adm. Code 103.106.

8. The Illinois Environmental Protection Act defines the term "person" as "any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns." 415 ILCS 5/3.315.

9. The Act and the Board's Rules further provide that the Board shall set a complaint for hearing unless the Board determines that the Complaint is duplicative or frivolous. 415 ILCS 5/31(d)(1); 35 Ill. Adm. Code 103.212(a). A 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.” 35 Ill. Adm. Code 101.202.

10. Upon information and belief, according to the records of the Illinois Secretary of State’s Office, “Ozynga Concrete Yard #281” is not a corporation or partnership registered to do business in the State of Illinois. Accordingly, there is no legal entity by the name of “Ozynga Concrete Yard #281” and such is not a “person” as defined under the Act or Board Rules. 415 ILCS 5/3.315.

11. As an administrative agency, the Board is subject to the limitations imposed to it by the Act. 415 ILCS 5/5. Section 5(d) of the Act provides the Board authority to conduct hearings on complaints brought by any person against any other person, alleging violations of State authorities. *Id.* “Ozynga Concrete Yard #281” is not a person. The Board therefore has no authority to grant any relief as it relates to any of the Complainant’s allegations against “Ozynga Concrete Yard #281”.

12. As it relates to “Ozynga Concrete Yard #281”, the Board must find that it does not have jurisdiction over this matter, that the Complaint is frivolous and refuse to accept the Complaint for hearing. 415 ILCS 5/31(d)(1)

FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

13. The Board’s minimum pleading requirements for Complaints require factual specificity rather than mere conclusions. *See* 35 Ill. Adm. Code 103.204(c). Section 103.204(c) provides that a Complaint must contain:

- a. A reference to the provision of the Act and regulations which the respondents are alleged to be violating;

b. The 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; and

c. A concise statement of the relief that the complainant seeks.

35 Ill. Adm. Code 103.204(c)(emphasis added).

14. The Complaint simply fails to meet these standards, and should be deemed frivolous. With respect to Section 103.204(c)(1), Complainant failed to meet this standard as he erroneously alleged a violation of “415 ILCS 5.12(a)” which is not a proper citation to any Illinois statute this Board has the authority to enforce.

15. Further, at Paragraph 5 of the Board’s Form Complaint, the Complainant was directed to “Describe the type of pollution that you alleged (e.g., air, odor, water, sewer back-ups, hazardous waste) and the location of the alleged pollution. Be as specific as you reasonably can in describing the alleged pollution.” In response to this direction, the Complainant provided the following conclusory and vague allegation:

Water and Safety. Ozynga is washing out trucks on the ground of a public street and the build site. Trackout also on Hobson Road createing (sic) safety issue.

Compl. at ¶5.

16. As explained in more detail below, these allegations fall well short of establishing “water pollution” as it is defined under the Act. 415 ILCS 5/3.545. Further, the alleged “safety issue” is a completely undeveloped conclusion that is unsupported by any facts. This allegation fails to provide the Board and the Respondent any guidance on what, if any, statutes or regulations the Respondents have allegedly violated or how the alleged actions caused the alleged violations.

These undeveloped and unclear allegations clearly fail to meet the specificity required under 35 Ill. Adm. Code 103.204(c).

17. Next, at Paragraph 6 of the Complaint, where the Complainant was directed to “Describe any bad effects that you believe the alleged pollution has or has had on human health, on plant or animal life, on the environment, on the enjoyment of life or property or on any lawful business or activity” the Complainant provided another conclusory and vague allegation:

The negative environmental impacts of concrete washout are widely known and the reason for the regulations. Hobson Road is one of the busiest streets in Naperville. Leaving track out significantly increases the risk of accident on that stretch.

Compl. at ¶6.

18. Again, these allegations are open ended conclusions unsupported by any facts or evidence. The Complaint’s vague and unsupported conclusions fail to provide the Respondent with notice of “the nature, extent, duration and strength of discharges or emissions and consequences” of its alleged violations as required under 35 Ill. Adm. Code 103.204(c). Section 103.204(c) of the Board’s Rules require a complaint to provide sufficient details to inform “respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense.” *Id.* Clearly the Complaint fails to meet that standard. Even under the lessened pleading standards for administrative proceedings, a complaint based on conclusions alone, such as this one, is insufficient to state a cause of action. *See City of Des Plaines v. Pollution Control Board*, 60 Ill. App. 3d 995, 377 N.E.2d 114 (1st Dist. 1978). The Complaint is therefore factually deficient and should be dismissed by the Board as frivolous. 1993 Ill. ENV LEXIS 545

19. Furthermore, it is well settled that a claim brought under 415 ILCS 5/12(a) or (d) must allege water pollution. *People ex rel. Ryan v. Stonehedge, Inc.*, 288 Ill. App. 3d 318 (2nd Dist. 1997); *People v. Professional Swine Management, LLC et al*, PCB 10-84, 2012 Ill. ENV LEXIS 55 (holding that a Complaint must reference “waters of the state” to assert a valid claim

under Section 12.); *Tri-County Landfill Co. v. Illinois Pollution Control Board*, 41 Ill. App. 3d 249, 353 N.E.2d 316 (2nd Dist. 1976); 415 ILCS 5/3.550. The term “water pollution” is defined under the Act as “the discharge of any contaminant into Illinois waters as will or is likely to create a nuisance or render such waters harmful to public health, safety, or welfare.” *Western Springs v. Pollution Control Board*, 107 Ill. App. 3d 864, 865, 438 N.E.2d 458, 459 (1st Dist. 1982). Relatedly, when interpreting the Clean Water Act, the United States Supreme Court has determined that the term “waters” is not a reference to water in general, but is specifically limited to “relatively permanent, standing or flowing bodies of water and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” *Rapanos v. United States*, 547 U.S. 715, 719 (2006).

20. Therefore, to bring an action under 415 ILCS 5/12(a) or (d), a Complainant must identify a permanent body of water within the State that has or will become unusable as a result of the acts or omissions of the respondent. *Central Illinois Public Service Co. v. Pollution Control Board*, 116 Ill. 2d 397 (1987). The Complaint makes no mention or reference to any waters of the state, whatsoever. Therefore, even if the allegations were to be proven, the Complaint fails to state a cause of action upon which relief could be granted as it fails to identify any waters of the state that were impacted, let alone polluted or threatened with pollution, by the alleged acts or omissions of the Respondent. *Protecting Environment (WIPE)*, 55 Ill. App. 3d 475 (1st Dist. 1977) (holding that a complaint which fails to state the manner in which and the extent to which a person violated the Act or rules constitutes a frivolous complaint.); *Gutesha v. Johnson Concrete Co. and Elmer Larson, Inc.*, 1993 Ill. ENV LEXIS 545 (Holding “a complaint is frivolous if it is either legally or factually deficient, or fails to state a cause of action upon which relief can be granted.”)

21. Moreover, the Complainant's reference to roadway safety – an area outside the Board's authority to regulate – is yet another example of the Complainant's complete failure to state a cause of action upon which the Board may grant relief. *See* 415 ILCS 5/5(d) (Board's authority is limited to violations of the Act and regulations, permits and orders issued thereunder.)

THE BOARD HAS NO AUTHORITY TO GRANT THE REQUESTED RELIEF

22. Relatedly, because there is a complete lack of factual allegations to support a finding that any law or regulation has been violated by Respondent, the Board has no authority to grant the relief request by the Complainant. The Board's Rules provide that a complaint which seeks relief that the Board does not have the authority to grant, such as this one, is a frivolous complaint that shall not be set for hearing. 35 Ill. Adm. Code 103.212(a).

23. Further, the Complainant brought this action under the citizen complaint provision of 415 ILCS 5/31(d) in which he alleges a single one time incident that he frames as a violation of the Section 5/12(a) and (d) of the Act and Section §204.141(b) of the Board's Rules. This alleged violation consists of a wholly past, one-time violation, limited exclusively to November 18, 2022.

24. However, the law is clear that a citizen, such as the Complainant, lacks standing to bring enforcement actions for wholly past, one time violations of the Act. *See Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). The framework of the Act and Board regulations are designed to enforce standards in a manner consistent with the Clean Water Act. *See* 415 ILCS 5/39. In *Gwaltney*, the United States Supreme Court held that with respect the Clean Water Act, “the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past.” 484 U.S. 49, 52 (1987) (holding that the Clean Water Act “does not confer jurisdiction over citizen suits for wholly past violations”.)

25. The Complainant's authority to bring an action is strictly limited to those allowed and authorized by the Act and its regulations. *Glisson v. City of Marion*, 188 Ill. 2d 211 (1999). The plain language of Section 103.204(c) is consistent with the Court's ruling in *Gwaltney* as it requires a Complainant to identify *ongoing* violations of the Act or its regulations. At Section 103.204(c) the Board's Rules require a Complainant to reference "the provisions of the Act that Respondents are alleged to be *violating*." (Emphasis added). 35 Ill. Adm. Code 103.204(c)(1). The Board's use of the term "violating" makes clear that any violations must be of a "continuous or intermittent" nature, which is consistent with the law set forth in *Gwaltney*. 484 U.S. 49, 52 (1987).

26. The Complaint does not reference or allege any continuing violations of the Act, or any rule, permit or order issued thereunder. For such violations, the State has the authority to bring enforcement actions, but the Complainant, as a citizen, does not. *See Modine Manufacturing Co. v. Pollution Control Board*, 193 Ill. App. 3d 643 (2nd Dist. 1990) (approving the State's action to impose and recover fines for wholly past violations.). Accordingly, because the Complainant lacks standing, the Board lacks authority to grant the relief request, making the Complaint frivolous.

CONCLUSION

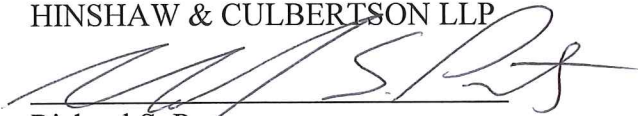
27. The Complaint clearly meets the Board's definition of "frivolous" as it is legally and factually deficient and fails to state a cause of action upon which relief may be granted. 35 Ill. Adm. Code 103.212(a). As such, the Board's regulations proscribe the Board from setting the Complaint for hearing and require the Board to issue an order declining to accept the Complaint for hearing and declaring the Complaint frivolous. 35 Ill. Adm. Code 103.212(b); *City of Des Plaines*, 60 Ill. App. 3d 995; *Winnetkans Interested in Protecting Environment (WIPE) v. Illinois Pollution Control Board*, 55 Ill. App. 3d 475, 370 N.E.2d 1176 (1st Dist. 1977).

WHEREFORE for the foregoing reasons, Ozinga Ready Mix Concrete, Inc., moves the Illinois Pollution Control Board for an order in which it declines to set the Complaint for hearing and dismisses the Complaint as frivolous.

Dated: 12-16-2022

OZINGA READY MIX CONCRETE, INC.,
an Illinois corporation

By: HINSHAW & CULBERTSON LLP

By: 
Richard S. Porter
One of Its Attorneys

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AFFIDAVIT OF SERVICE

The undersigned certifies that on December 16, 2022, she served a copy of the foregoing Motion to Dismiss Complaint upon the following:

Paul Christian Pratapas
1330 E. Chicago Avenue #110
Naperville, IL 60540

by depositing a copy thereof, enclosed in an envelope, in the United States Mail at 100 Park Avenue, Rockford, Illinois 61101, proper postage prepaid, at or about the hour of 5:00 o'clock p.m., addressed as above.

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

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