

ILLINOIS POLLUTION CONTROL BOARD
August 3, 2023

PAUL CHRISTIAN PRATAPAS,)
)
 Complainant,)
)
 v.) PCB 23-60
) (Citizens Enforcement - Water)
 LEXINGTON TRACE LLC,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Van Wie):

On November 18, 2022, Paul Christian Pratapas (Mr. Pratapas) filed a citizen’s complaint (Comp.) against Lexington Trace by Lexington Homes, whose proper name is Lexington Trace LLC (Lexington). The complaint concerns Lexington’s residential construction project located at 3S490 Barkley Avenue in Warrenville, DuPage County. Lexington has filed a motion to dismiss this complaint (Mot. to Dis.).

The Board first addresses the procedural background of this matter, including the issue of service on Lexington. The Board then addresses Lexington’s pending motion to dismiss the complaint on the grounds of frivolousness. The Board grants Lexington’s motion to dismiss for frivolousness, in part, but gives Mr. Pratapas time to amend his complaint or face dismissal of the complaint; and strikes three of Mr. Pratapas’ requests for relief.

PROCEDURAL BACKGROUND

On January 6, 2023, Lexington filed a motion for rule to file out of time and extension of time to file motion to dismiss the complaint (Mot. for Ext.). On January 23, 2023, Lexington filed a motion requesting that the Board not accept the complaint for failure to properly serve the complaint on Lexington, and a motion to dismiss the complaint for frivolousness. Mr. Pratapas did not file a response to the motions.

On June 1, 2023, the Board granted Lexington’s motion for rule to file out of time and extension but directed Mr. Pratapas to file the required proof of service of the complaint on Lexington no later than July 3, 2023, or face dismissal of the complaint for failure to properly serve. *See* 35 Ill. Adm. Code 101.304(c), (d); *see also* 35 Ill. Adm. Code 103.204(a). The Board reserved ruling on Lexington’s motion to dismiss until and unless service of the complaint was perfected.

On June 27, 2023, Mr. Pratapas filed a certified mail receipt accompanied by the original Notice of Filing of this complaint and a Certificate of Service indicating that he sent the complaint to Lexington’s registered agent via certified mail on June 26, 2023 (Cert. Serv.). On

July 7, 2023, Mr. Pratapas filed the signed certified mail return receipt indicating that Lexington's registered agent received the mailing on June 29, 2023 (Cert. Rec.).

The Board finds that Mr. Pratapas timely filed the required proof of service of the complaint on Lexington. *See* 35 Ill. Adm. Code 101.304(d). Because service has been corrected, the Board now turns to Lexington's pending motion to dismiss for frivolousness.

LEXINGTON'S MOTION TO DISMISS FOR FRIVOLOUSNESS

Lexington motions to dismiss the complaint on the grounds that the complaint is frivolous because it fails to state a cause of action upon which relief can be granted. Mot. to Dis. at 2. Lexington first argues that the complaint's allegations are conclusory and do not include specific facts relating to the location, events, nature, extent, duration, and strength of the alleged pollution are not adequately plead in the complaint. Mot. to Dis. at 5-6. Lexington further asserts that the photographs attached to the complaint actually show clear evidence of protected pretreatment basins and controlled concrete washout area in an enclosed contaminant area with no free-flowing sediment or sediment laden water. *Id.* at 6. Lexington continues that the consequences of the pollution alleged in the complaint are not well-plead because they are not supported by relevant factual statements and/or are outside the Board's jurisdiction. *Id.* at 6-7. Lexington also argues that requests for relief numbered 3, 4, 6 and 7 should be stricken as frivolous because they request relief that the Board does not have the authority to grant. *Id.* at 7.

Next, Lexington argues that the complaint fails to allege water pollution as defined under the Illinois Environmental Protection Act (Act) (415 ILCS 5 (2022)) because the complaint contains no allegation that any contaminant or pollutant was discharged into waters of the State or into a well. Mot. to Dis. at 8 (citing 35 Ill. Adm. Code 309.102(a)). Lexington argues the complaint is frivolous because it fails to identify a water of the State of Illinois that was or will be impacted or threatened by pollution by Lexington's acts or omissions. *Id.* at 9.

Lastly, Lexington argues that the complaint alleges wholly past violations of the federal Clean Water Act (CWA) (33 U.S.C. 1251, et seq.). Mot. to Dis. at 10. Because Section 12(a) of the Act addresses water pollution identical to provisions of the federal CWA, Lexington argues that Mr. Pratapas has no standing to bring a complaint for relief that address wholly past violations of the CWA per U.S. Supreme Court ruling and the Board's regulations. *Id.* (citing Gwaltney of Smithfield, Ltd v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987); *see also*, 35 Ill. Adm. Code 103.204(c)(1)). Lexington argues that it is consistent with the Board regulations and Board precedent to not allow a citizen to maintain an action for wholly past violations. Mot. to Dis. at 11 (citing, e.g., Modine Mfg. Co v. Pollution Control Bd., 193 Ill. App. 643, 648 (2d. Dist. 1990); Environmental Law and Policy Center v. Freeman United Coal Mining Co. and Springfield Coal Co., LLC, PCB 2011-002 (July 15, 2010); Shelton v. Crown, PCB 96-53 (Oct. 2, 1997); *see also*, 35 Ill. Adm. Code 103.204(c)(1)).

DISCUSSION

Under 415 ILCS 5/31(d)(1) (2022), the Board will dismiss complaints that are frivolous. "Frivolous" is defined in the Board's rules as, "any 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.” 35 Ill. Adm. Code 101.202(b). The Board’s procedural rules require complaints to include “dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations.” 35 Ill. Adm. Code 103.204(c)(2).

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); *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). “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), citing *A, C & S*, 131 Ill. 2d at 438 (“the whole complaint must be considered, rather than taking a myopic view of a disconnected part[.]” *A, C & S*, quoting *People ex rel. William J. Scott v. College Hills Corp.*, 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982)).

“[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief.” *Smith v. Central Illinois Regional Airport*, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003); *see also Chicago Flood*, 176 Ill. 2d at 189, 680 N.E.2d at 270 (“[T]he trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party.”); *People v. Peabody Coal Co.*, PCB 99-134, slip op. at 1-2 (June 20, 2002); *People v. Stein Steel Mills Services, Inc.*, PCB 02-1, slip op. at 1 (Nov. 15, 2001).

Lexington seeks to dismiss the complaint for frivolousness. The complaint alleges that Lexington “is building a new neighborhood of multi-family housing without adequate and required BMPs”. Comp. at 1. Mr. Pratapas states that he photographed the alleged violations on or around April 21 and 24, 2022, and attached photographs of what appear to be construction site(s) to the complaint. Comp. at 3, 11-24. The complaint does not provide the location of the violation(s).

The complaint alleges that Section 12(a) and (d) of the Act (415 ILCS 5/12 (a), (d) (2022)) and Section 304.141(b) of the Board’s regulations were violated (35 Ill. Adm. Code 304.141(b)). *Id.* at 3. Section 12(a) provides in its entirety that no person shall “[c]ause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.” 415 ILCS 5/12(a) (2022). Section 12(d) provides in its entirety that no person shall “[d]eposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.” 415 ILCS 5/12(d) (2022). Section 304.141(b) of the Board’s regulations provides in its entirety that:

No person may discharge any pollutant subject to, or which contributes or threatens to cause a violation of, any applicable federal or state water quality standard, effluent standard, guideline or other limitation, promulgated pursuant to the CWA or the Act,

unless limitation for such a pollutant has been set forth in an applicable NPDES Permit. However, the Agency may, by permit condition, provide that the permittee may discharge pollutants present in its water supply intake sources in concentrations not greater than the concentrations in the intake sources, or which are added in trace amounts by normal domestic water usage.

35 Ill. Adm. Code 304.141(b).

However, as described above, the complaint lacks any details describing the location, extent, duration or strength of the alleged violations and only cites general violations, such as toxic concrete washout and sediment laden water in the street and inlets. *Id.* The complaint states that the site of the pollution has a “special management area [complainant] believe[s] to be a wetland”. *Id.* Regarding the negative effects of the alleged pollution, the complaint states that these are “widely documented and part of the reason for the NPDES permit program”, that there is likely fraud involving inspection reports and contractor certifications, and that this poses a risk to Canadian Geese using the area during migration. *Id.* The complaint does not specify what applicable federal or state water quality standard for a pollutant was violated.

In his complaint, Mr. Pratapas requests that the Board grant the following relief:

1. Find that Lexington violated its permit;
2. Assess a civil penalty of \$50,000 against Lexington for each violation of the Act and Regulations and an additional civil penalty of \$10,000 per day for each day of each violation;
3. Investigate into fraudulent inspection reports and contractor certifications;
4. Void permits for the site until such time as the builder ceases to pollute the surrounding groundwater and surface water and any SWPPP deficiencies related to signage, certifications, inspections, and designated concrete washout area design/implementation are fixed;
5. Issue an order stating SWPPP plan(s) for sediment BMPs and concrete washout areas must be implemented as presented and approved unless documented otherwise with standards being found in the Illinois Urban Manual;
6. Prohibit the permitting of additional sites for Lexington until all deficiencies identified above and in pictures are addressed and corrected and a new contractor hired for inspections; and
7. Make recommendations for criminal charges.

Comp. at 4.

The Board has broad statutory authority to grant relief. Of the relief requested here, the Act gives the Board authority to find a violation of the Act. 35 Ill. Adm. Code 101.106(b); *see* 415 ILCS 5/33 (2022). Section 42(a) of the Act gives the Board authority to impose civil penalties for violations of the Act and Board regulations. 415 ILCS 5/42(a) (2022). The Board after finding a violation can order a respondent to develop and implement an abatement plan. *See, e.g., Gill v. CHS, Inc. – Carrollton Farmers Elevator*, PCB 16-68, slip op. at 3 (Jan. 21, 2016), citing *McDonagh and Fishbaum v. Michelin*, PCB 08-76, slip op. at 4 (July 10, 2008);

Pawlowski v. Johansen and Quinley, individually and d/b/a Benchwarmers Pub, Inc., PCB 99-82 (Apr. 4, 2000 and Sept. 21, 2000). If the complainant proves a violation, the Board can consider these requests for mitigation as an element of abatement under Section 33. *See* 415 ILCS 5/33 (2022). In the event of finding a violation of the Act or Board regulations, the Board has the authority to grant items 1, 2 and 5 of the requested relief.

The Board does not have the authority to investigate fraudulent SWPPP inspection reports and contractor certifications. *See* 35 Ill. Adm. Code 101.106(b). The Board also does not have the authority to issue injunctions or to void permits. *See generally*, 415 ILCS 5/33(b) (2022). The Board is also not authorized to make recommendations for criminal charges. *See* 35 Ill. Adm. Code 101.206(b). The Board therefore lacks the authority to grant the relief requested in items 3, 4, 6, and 7. The Board strikes these requests for relief as frivolous. 35 Ill. Adm. Code 101.202.

The Board finds that the complaint fails to meet the pleading requirements and does not accept the complaint for hearing. *See* 35 Ill. Adm. Code 103.204(c). The complaint does not include specific facts that allege the release of a contaminant into the environment so as to cause or tend to cause the pollution of a water of the State of Illinois. Rather, the complaint makes conclusory statements and guesses that wetlands are affected by construction activity. The complaint also fails to provide any location of the violations alleged in these conclusory statements. Finally, because it does not give the location of the alleged pollution or describe how respondent is or was affiliated with the activity described, the complaint fails to state a cause of action against respondent on which the Board can grant relief. 35 Ill. Adm. Code 101.202(b); 35 Ill. Adm. Code 103.204(c)(2). The Board gives Mr. Pratapas until September 5, 2023, the first business day after 30 days from the date of this order, to amend his complaint as to the specificity of the violations, or face dismissal of the complaint.

ORDER

1. The Board grants Lexington's motion to dismiss for frivolousness as it relates to requests for relief numbered 3, 4, 6 and 7, and strikes these requests for relief.
2. The Board directs Mr. Pratapas to amend his complaint for specificity no later than September 5, 2023, or face dismissal of the complaint.

IT IS SO ORDERED.

Board Member M.D. Mankowski abstained.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 3, 2023, by a vote of 3-0.



Don A. Brown, Clerk
Illinois Pollution Control Board