

ILLINOIS POLLUTION CONTROL BOARD
August 17, 2023

PEOPLE OF THE STATE OF ILLINOIS,)	
<i>ex rel.</i> Eric F. Rinehart, State’s Attorney)	
for Lake County, Illinois,)	
)	
Complainant,)	
)	
v.)	PCB 23-108
)	(Enforcement – Noise)
DEPARTMENT OF TRANSPORTATION)	
of the State of Illinois,)	
)	
Respondent.)	

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

On March 31, 2023, the People of the State of Illinois, *ex rel.* the State’s Attorney for Lake County (People), filed a one-count complaint against the Department of Transportation of the State of Illinois (IDOT). The complaint concerns noise caused by transverse rumble strips (TRS) installed in 2019 across the northbound lanes on a portion of United States Highway 41 (US-41) south of Park Avenue W in IDOT’s jurisdiction, and the residential area to the west of this portion of US-41, in Highland Park, Lake County.

The People have filed an amended complaint in this matter. IDOT has also filed a partial motion to dismiss the amended complaint. The People filed a response, and IDOT filed a motion for leave to file a reply in support of its motion.

For the reasons below, the Board grants IDOT’s motion for leave to file reply and accepts the reply but denies IDOT’s partial motion to dismiss. The Board concludes to accept the amended complaint for hearing.

FACTUAL AND PROCEDURAL BACKGROUND

On March 31, 2023, the People filed a complaint under Section 42 of the Environmental Protection Act (Act), which allows the State’s Attorney on its own motion to institute a civil action for an injunction. Section 42 anticipates a filing of a civil action by the State’s Attorney after a violation has been found. *See* 415 ILCS 5/42 (2022).¹ The Board found in its May 4, 2023 Order that the complaint met the Board’s content requirements but directed the People to file an amended complaint under Title VIII of the Act and the Board’s procedural rules within 30 days. *See* 35 Ill. Adm. Code 101.202, 103.204(c), (f), 103.212(c). On May 25, 2023, the People filed their first amended complaint (Am. Comp.).

¹ Section 42 is included in Title XII Penalties of the Act.

On June 26, 2023, IDOT timely filed a partial motion to dismiss the complaint (Mot. to Dis.). After requesting an extension, the People filed a response on July 18, 2023 (Resp.). On July 31, 2023, IDOT filed a motion for leave to file a reply in support of its partial motion to dismiss, accompanied by its reply (Reply).

IDOT'S REPLY IN SUPPORT OF MOTION TO DISMISS

IDOT seeks leave to file a reply in support of its motion to dismiss, claiming that its reply is necessary to avoid material prejudice. IDOT argues in the reply that its original motion to dismiss for failure to state a claim, brought under Section 103.212(b) of the Board's rules, should not be denied because it was mislabeled and brought under the wrong authority. Reply at 3; *see also*, 35 Ill. Adm. Code 103.212(b). IDOT's reply seeks to change the authority under which it initially brought its motion from Section 103.212(b) to Section 101.500. IDOT argues that it mislabeled its original motion, and that since the Board's rules allow it to bring a motion under the Illinois Code of Civil Procedure, it is not precluded from changing the authority for its motion to "failure to state a claim" under Section 901.102. Reply at 2-3. The People did not oppose the motion. The Board finds that granting IDOT leave to file its unopposed reply would prevent IDOT from facing undue prejudice. 35 Ill. Adm. Code 101.500(e). The Board grants IDOT's motion for leave to file a reply in support of its motion and takes the reply with the motion to dismiss below.

MOTION TO DISMISS

In its motion to dismiss, IDOT argues that the amended complaint should be dismissed pursuant to Section 103.212(b) of the Board's rules because the amended complaint is frivolous for failing to state a cause of action upon which the Board can grant relief. Mot. to Dis. at 5-6. IDOT argues that the People failed to allege a cause of action under Section 901.102 of the Board's noise pollution regulations because the sound study on which the complaint relies to establish a violation of the regulations measured sound in dBA rather than dB, and therefore did not conform to the requirements of Part 910 of the Board's noise pollution regulations. *Id.*, citing 35 Ill. Adm. Code 900.103(a). IDOT argues that because the sound study offered to support the allegations of the complaint was not done in accordance with Part 910, the complaint is frivolous because it does not establish a violation of Section 901.102. Mot. to Dis. at 4; *see also*, Reply.

Section 103.212(b) of the Board's regulations provides in its entirety:

Motions made by respondents alleging that a citizen's complaint is duplicative or frivolous must be filed no later than 30 days following the date of service of the complaint upon the respondent. Motions under this subsection may be made only with respect to citizen's enforcement proceedings. Timely filing the motion will, under Section 103.204(e), stay the 60 day period for filing an answer to the complaint.

35 Ill. Adm. Code 103.212(b) (emphasis added).

Section 103.212 clearly establishes rules for alleging that and determining whether a citizen's complaint is duplicative or frivolous. When the Board receives a citizen's complaint, *unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing.* 35 Ill. Adm. Code 103.212(a) (citing 415 ILCS 5/31(d)(1) (2022)). The Board will automatically set for hearing all complaints filed by the Attorney General or a State's Attorney on behalf of the People of the State of Illinois. 35 Ill. Adm. Code 103.212(c).

In their response, the People argue, first, that IDOT brought its motion to dismiss under a regulation that does not apply to complaints brought by the Attorney General or a State's Attorney on behalf of the People of the State of Illinois; and, second, that the amended complaint sufficiently alleges a violation of the Board's noise pollution regulations. Resp. at 2-3. In support of their arguments, the People assert that the cases IDOT cites to support its motion were citizen's enforcement proceedings and that the sound study commissioned by IDOT showed a violation of the Board's noise pollution regulations. *Id.*

IDOT's reply does not provide any arguments in support of a motion to dismiss for frivolousness. Rather, it argues that IDOT's original motion to dismiss for failure to state a claim, brought under Section 103.212(b) of the Board's rules, should not be denied because it was mislabeled and brought under the wrong authority. Reply at 3; *see also*, 35 Ill. Adm. Code 103.212(b). IDOT's reply seeks to change the authority under which it brings its motion from Section 103.212(b) to Section 101.500. IDOT argues that it mislabeled its original motion, and that since the Board's rules allow it to bring a motion under the Illinois Code of Civil Procedure, it is not precluded from changing the authority for its motion to "failure to state a claim" of violation of Section 901.102. Reply at 2-3. But IDOT does not identify any provision of the Code of Civil Procedure as the authority for its motion; IDOT only cites Section 101.500 of the Board's rules as the authority for its motion.

The Board's rules require all motions and responses to state the grounds upon which the motion is made and to concisely state the position or relief sought. 35 Ill. Adm. Code 101.504. An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. People v. Rogers O'Hare Motor Terminal Ltd. and Carolina Freight Carriers Corp., PCB 96-240, Rogers O'Hare Motor Terminal, Ltd. v. ABF Freight Sys., Inc., PCB 98-107 (Mar. 19, 1998) (consol.), citing Citizens for a Better Environment v. Reynolds Metals Co., PCB 73-173 (May 17, 1973). "[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).

Section 101.500 of the Board's rules describes rules and procedures for filing motions and responses before the Board. *See generally*, 35 Ill. Adm. Code 101.500. While subsection (a) gives the Board authority to entertain any motion the parties wish to file that is permissible under the Act or other applicable law, Part 101 of the Board's regulations, or the Code of Civil

Procedure, the remainder of Section 101.500 sets rules for filing motions and responses. *See, id.* IDOT's reply did not reference a provision of Part 101, the Act, or the Code of Civil Procedure as authority for bringing its motion to dismiss a People's complaint for frivolousness. *See generally*, Reply; *see also*, 35 Ill. Adm. Code 101.500(a), 103.212(b). The Board finds that the reply does not support or clarify the authority for IDOT's motion to dismiss. *See* 35 Ill. Adm. Code 101.500(e); 35 Ill. Adm. Code 101.504.

The People's amended complaint alleges that IDOT violated provisions of the Act and Board regulations and requests relief that the Board has authority to grant. The facts alleged in support of the noise pollution claims reference the Act and Board regulations IDOT allegedly violated; gives the dates, location, events, nature, extent, strength and duration of the violations; and concisely states the relief sought. *See* 35 Ill. Adm. Code 103.204(c). Even if the authority IDOT cited for its motion applied to actions brought by a State's Attorney's Office on behalf of the People, neither IDOT's original motion to dismiss nor its reply showed how the facts alleged in the amended complaint were frivolous. Rather, IDOT's motion plainly challenges the sufficiency of certain evidence offered in support of the facts alleged in the amended complaint. The proper vehicle for IDOT to challenge the evidence offered in support of these allegations is in responsive pleadings and in discovery.

Taking all well-pled allegations in the amended complaint as true and drawing all reasonable inferences from them in the light most favorable to the non-moving party, the Board cannot conclude that no set of facts could be proved that would entitle the People to relief. The Board finds that the allegations of the amended complaint did not fail to state a claim upon which the Board could grant relief, and denies IDOT's motion to dismiss.

FIRST AMENDED COMPLAINT

Under the Environmental Protection Act (Act) (415 ILCS 5 (2022)), the Attorney General and the State's Attorneys may bring actions before the Board to enforce Illinois' environmental requirements on behalf of the People. *See* 415 ILCS 5/31 (2022); 35 Ill. Adm. Code 101, 103. Here, while State's Attorney for Lake County filed its original complaint under Section 42 of the Act, the Board noted that the relief requested in the complaint is relief generally found under Title VIII of the Act.²

The People filed the amended complaint under Section 31 of the Act. Am. Comp. at 1. The amended complaint alleges the same violations of the Act and Board regulations as the original complaint: that IDOT violated Section 24 of the Act (415 ILCS 5/24 (2022)), and Sections 900.102 and 901.102 of the Board regulations (35 Ill. Adm. Code 900.102, 900.102). *Id.* at 8. As in the original complaint, the amended complaint alleges IDOT violated these provisions by emitting noise at a level greater than 75 decibels (dB) in the daytime and 69 dB in the nighttime; emitting noise in excess of levels permitted in Section 901.102 of the Board regulations beyond its property lines; and emitting noise beyond the boundaries of its property that is unreasonably interfering with the enjoyment of the life of the residents in the area in violation of the Board regulations. *Id.*

² See 5/4/23 Board Order discussing relief requested.

The People's amended complaint asks the Board to find that IDOT has violated Section 24 of the Act (415 ILCS 5/24 (2022)) and Sections 900.102 and 901.102 of the Board regulations (35 Ill. Adm. Code 900.102, 901.102); to order IDOT to cease and desist from further violations of the Act and Board regulations that were the subject of the complaint; and to assess a civil penalty of \$50,000 against IDOT for each violation of the Act and Board regulations and \$10,000 for each day of violation. Am. Comp. at 9. The People also ask that the Board award the People their costs, including attorney fees, expert witness and consultant fees expended by the People in pursuit of this action. *Id.* The amended complaint therefore does not allege new or different violations or request new or different relief.

The Board finds that the amended complaint meets the content requirements of the Board's procedural rules and accepts the amended complaint for hearing. *See* 35 Ill. Adm. Code 103.204(c), (f), 103.212(c); *see* 415 ILCS 5/31 (2022). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if IDOT fails within that timeframe 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 IDOT to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d).

The Board directs the hearing officer to proceed expeditiously to hearing. Upon its own motion or the motion of any party, the Board or the hearing officer may order that the hearing be held by videoconference. In deciding whether to hold the hearing by videoconference, factors that the Board or the hearing officer will consider include cost-effectiveness, efficiency, facility accommodations, witness availability, public interest, the parties' preferences, and the proceeding's complexity and contentiousness. *See* 35 Ill. Adm. Code 101.600(b), 103.108.

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.

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) (2022). 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) (2022). 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.

ORDER

1. The Board grants IDOT’s motion for leave to file a reply in support of its partial motion to dismiss the amended complaint for frivolousness.
2. The Board denies IDOT’s partial motion to dismiss.
3. The Board accepts the People’s amended complaint for hearing.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 17, 2023, by a vote of 3-0.



Don A. Brown, Clerk
Illinois Pollution Control Board