

App. 3d 163, 280 N.E.2d 512 (1st Dist. 1972). *See also* Shelton, PCB 96-53; Krautsack, PCB 95-143; Miehle, PCB 93-150.

Section 31 of the Act requires notice of a specific violation and a formal complaint. The formal complaint must specify the provision of the Act, regulation or permit and “the manner in, and the extent to which” the person is violating the Act, regulation, or permit. 415 ILCS 5/31(c)(1) (2000). Section 103.204(c) of the Board’s procedural regulations has similar guidelines (35 Ill. Adm. Code 103.204(c)).

COUNT I

Alleged Violations

Complainant alleged that Stein generally emitted dust, kish, metallic particles and other fugitive particulate matter from its facility. In particular, Stein allegedly caused some of the emissions by failing to water its grounds and some of the emissions came from the skimmer slag pit area. The alleged violations occurred at various times from 1997 to 2000 and on other dates. Complainant alleged that the emissions resulted in the deposition of particulate matter in nearby residential properties that unreasonably interfered with the use and enjoyment of real and personal property. Complainant alleged that, as a result, Stein caused air pollution in violation of Section 9(a) of the Act (415 ILCS 5/9(a) (2000)) and Section 201.141 of the Board’s regulations (35 Ill. Adm. Code 201.141). Am. comp. at 2-3.

Arguments

Stein claimed that all of complainant’s facts that are related to the allegations are deficient. Specifically, Stein argued that “these allegations are conclusory statements bereft of essential information regarding the events, nature, extent, duration, and strength of the alleged violations”. Stein claimed that when all of complainant’s conclusory statements are taken away, the facts remaining do not state violations of Section 9(a) of the Act and Section 201.141 of the Board’s regulations. Stein stated that the complaint does not meet the pleading requirements at Section 31(c) of the Act or Section 103.204 of the Board’s regulations. Mot. at 3-5, 6-7.

Both Stein and complainant argued about what constitutes a violation of Section 9(a) of the Act and Section 201.141 of the Board’s regulations and what complainant’s burden is in proving the alleged violations. Stein claimed that complainant had not alleged the specific elements of air pollution. Stein argued that its permit allows some fugitive particulate emissions below certain opacity levels. Stein claimed that the complaint is deficient because it lacks details about opacity levels and location of emissions. Stein cited other deficiencies in the complaint such as the lack of specific dates for the alleged violations. Mot. at 5-8; resp. at 3-4, 6.

Complainant alleged additional facts in support of count I in its amended complaint. Resp. at 3; am. comp. at 2-3.

Discussion

Section 9(a) of the Act and Section 201.141 of the Board's procedural regulations are similar. Both provisions generally state that no person shall cause, threaten, or allow the emission of any contaminant into the environment so as to cause air pollution or so as to violate applicable standards or regulations. "Air pollution" is defined at Section 3.02 of the Act as:

the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.

After examining the allegations in the complaint and the amended complaint and taking all well-pleaded allegations as true, the Board has determined that the well-pleaded allegations could conceivably result in a finding of violation of Section 9(a) of the Act and/or Section 201.141 of the Board's procedural regulations.

The Board also finds that the allegations with respect to count I meet the requirements of Section 31(c)(1) of the Act and Section 103.204 of the Board's regulations. Complainant states the manner and the extent of the alleged violations. The Board finds that to dismiss count I at this point would be premature and that complainant should be allowed to present its case at hearing.

COUNT II

Alleged Violations

Stein has a federally enforceable state operating permit (FESOP) allowing it to operate its facility. Complainant alleged that Stein ran its facility with an inadequate operating program to control fugitive particulate matter in violation of Section 9(b) of the Act (415 ILCS 5/9(b) (2000)) and Section 212.309(a) of the Board's regulations (35 Ill. Adm. Code 212.309(a)).¹ In addition, complainant alleged that Stein failed to maintain written records of control measures in violation of Special Condition 8(b) of Stein's FESOP, Section 9(b) of the Act, and Section 212.316(g)(4) of the Board's regulations (35 Ill. Adm. Code 212.316(g)(4)). Complainant cited two separate 1997 Illinois Environmental Protection Agency (Agency) inspections in which Stein did not have the proper records. Am. comp. at 4-7.

¹ The amended complaint states that Stein allegedly violated Section 9(a) of the Act here. However, the nature of the alleged violation, the fact that a similar paragraph in the original complaint alleged a violation of Section 9(b), and the fact that the language of Section 9(b) is quoted immediately after the allegation in the amended complaint leads the Board to believe that complainant meant to allege a violation of Section 9(b).

Arguments

Stein argued generally that count II does not state a claim for violation of Section 9(b) of the Act or Sections 212.309(a) and 212.316(g)(4) of the Board's regulations. Stein also stated that count II does not meet the pleading requirements in the Act and in the Board's regulations. Mot. at 8-10.

In the original complaint, complainant alleged that Stein failed to maintain the skimmer slag watering system, thus allowing excess emissions of fugitive particulate matter. Complainant did not cite any associated alleged violation of the Act, the regulations, or Stein's permit. Comp. at 6. Stein argued this point in its motion to dismiss, but complainant omitted the allegation from the amended complaint. Mot. at 8-9.

Stein claimed that complaint's allegation regarding failure to submit an acceptable operating program is conclusory and runs afoul of pleading standards in the Act and the Board's procedural regulations. Stein claimed that it did not know which operating program the complainant cited and thus could not respond to the allegations regarding Section 9(b) of the Act and Section 212.309(a) of the Board's regulations. Mot. at 9.

Stein cited Section 2-606 of the Illinois Code of Civil Procedure (735 ILCS 5/2-606 (2000)). Section 2-606 provides that

If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her.

Complainant disagreed with Stein's Section 2-606 argument. Complainant pointed out that Stein's alleged noncompliance was "founded on the absence of an acceptable document, not the existence of unacceptable documents." Complainant acknowledged that three unacceptable operating programs have been submitted but claimed that they do not have to be attached as exhibits pursuant to Section 2-606 because they are unacceptable documents. Resp. at 5, 6.

In its amended complaint, complainant attached a May 12, 1998 letter from the Agency to Stein in which the Agency rejected Stein's compliance commitment agreement due to several listed deficiencies in Stein's operating program. Am. comp. exh. B.

Stein argued that the allegation regarding failure to maintain written control measures lacked specific facts such as dates related to the alleged violations, a description of the written records, and complainant's discovery on these matters. Again Stein claimed that complainant failed to meet the pleading standards set forth in the Act, the Board's regulations, and the Code of Civil Procedure. Mot. at 10. Complainant alleged additional facts in the amended complaint that included the dates on which Stein failed to have written control measures. Resp. at 4; Am. comp. at 6-7.

Discussion

In the absence of a specific Board regulation, the Board may look to the Code of Civil Procedure. 35 Ill. Adm. Code 101.100. The Board finds in favor of the complainant regarding Section 2-606 of the Code of Civil Procedure. If complainant is alleging that there is not an acceptable operating program, then it need not attach to the complaint what it considers an unacceptable operating program. The existence of any acceptable operating program, and whether Stein operated its facility according to the program, are issues that should be discussed at hearing.

The Board also finds that the amended complaint, including the attached May 12, 1998 letter, are satisfactory pursuant to Section 31(c)(1) of the Act and Section 103.204 of the Board's regulations. Stein has enough information for it to respond to the alleged violations with respect to the operating program.

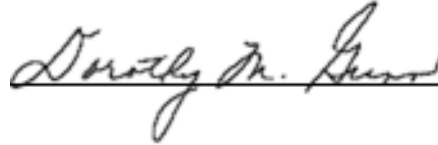
As it did for count I, the Board examines the allegations in count II and takes all well-pleaded allegations as true. In examining the well-pleaded allegations, the Board finds that complainant may have alleged facts which could lead to a finding that Stein violated Special Condition 8(a) of Stein's FESOP, Section 9(b) of the Act, and Sections 212.309(a) and 212.316(g)(4) of the Board's regulations. The Board finds that to dismiss count II at this point would be premature and that complainant should be allowed to present its case at hearing.

CONCLUSION

The Board finds that the allegations are well-pled enough for the complaint to survive Stein's motion to dismiss. Thus, the Board denies Stein's motion to dismiss. In so ruling, the Board makes no finding as to the merits of the complaint.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 15, 2001, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board