

ILLINOIS POLLUTION CONTROL BOARD
September 23, 1999

GINA PATTERMANN, LISA COLLINS, and DEEN COLLINS,)	
)	
)	
Complainants,)	
)	
v.)	PCB 99-187
)	(Enforcement - Noise, Air, Citizens)
BOUGHTON TRUCKING AND MATERIALS, INC.,)	
)	
Respondent.)	
)	

ORDER OF THE BOARD (by N. J. Melas):

This matter is before the Board on the June 17, 1999 filing of a citizens enforcement complaint. On June 29, 1999, Boughton Trucking and Materials, Inc. (Boughton) filed a motion for a 35-day extension of time to file motion to dismiss as duplicitous/frivolous and an affidavit in support of the motion. The Board granted the motion for extension of time. Boughton timely filed a motion to dismiss (motion) with the Board on August 3, 1999, along with a memorandum of law in support of the motion (memo) and an affidavit of Boughton attorney Tom Wilson. On August 18, 1999, complainants filed a motion for leave to file a late response to motion to dismiss, and on September 21, 1999, complainants filed a response to motion to dismiss as frivolous (response). Also on September 21, 1999, Boughton filed a motion for leave to file reply and reply regarding complainants' motion to dismiss the complaint as frivolous (reply). The Board grants both complainants' motion for leave to file a late response and Boughton's motion for leave to file reply.

Of the three named complainants (Gina Pattermann, Lisa Collins, and Deen Collins), only Pattermann signed the June 17, 1999 complaint. In the same Board order granting the motion for extension of time, the Board granted complainants the opportunity to file an amended complaint either signed by each complainant or by his or her attorney. See Pattermann v. Boughton (July 22, 1999), PCB 99-187. On August 13, 1999, complainants timely filed an amended complaint (complaint) signed by the three named complainants.

For the reasons below, the Board finds that the alleged violations of Sections 3.02 and 23 of the Illinois Environmental Protection Act (Act) and Section 201.102 of the Board's rules are frivolous in that the sections, by their terms, cannot be violated. The Board finds that the remaining alleged violations of the Act and the Board's rules are neither duplicitous nor frivolous, so that the balance of the complaint is accepted for hearing.

BACKGROUND

The facility in question is located in Plainfield, Will County, Illinois. Complainants state that the noise from Boughton's rock crushers and trucking operations and the dust from Boughton's rock crushers and dynamite blasting operations violates several provisions of the Illinois Environmental Protection Act and the Board's rules. Comp. at 2. Specifically, complainants allege that Boughton is violating Sections 3.02, 9, 23, and 24 of the Act (415 ILCS 5/3.02, 9, 23, and 24 (1998)) and Sections 201.102, 201.141, 900.102, 901.102(a), 901.102(b), and 901.104 of the Board's rules (35 Ill. Adm. Code 201.102, 201.141, 900.102, 901.102(a), 901.102(b), and 901.104). Complainants request that the Board order Boughton to cease and desist from further violations of the Act and the Board's rules and also request that the Board impose a fine on Boughton to discourage further non-compliance. Comp. at 3.

DUPLICITOUS/FRIVOLOUS DETERMINATION

Section 103.124(a) of the Board's procedural rules implements Section 31(b) of the Act. 415 ILCS 5/31(b) (1998). This Section directs the Board to determine whether or not a citizens enforcement complaint is duplicitous or frivolous. This Section further states that if the complaint is duplicitous or frivolous, the Board shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the complaint is duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings. 35 Ill. Adm. Code 103.124(a).

Duplicitous

An action before the Board is "duplicitous"¹ (*i.e.* duplicative) if the matter is identical or substantially similar to the one brought in from another forum. Brandle v. Ropp (June 13, 1985), PCB 85-68. The Board has not identified any other cases, either substantially similar or identical to this matter, pending in other forums. Additionally, Boughton's motion to dismiss has not brought any potentially duplicitous matters to the Board's attention. Based on the record before the Board, none of the allegations in the complaint are duplicitous.

Frivolous

An action before the Board is frivolous if it requests relief which the Board cannot grant. Lake County Forest Preserve District v. Neil Ostro, Janet Ostro, and Big Foot Enterprises (July 30, 1992), PCB 92-80. Boughton states that the complaint is frivolous for nearly all of the alleged violations of the Act and the Board's rules. Boughton asks that the Board dismiss those allegations that it finds to be frivolous. Mot. at 3-4; Memo at 7-8. The Board will address each alleged violation to determine if it is frivolous.

Definitions

Complainants allege that Boughton has violated Section 3.02 of the Act and Section 201.102 of the Board's rules. 415 ILCS 5/3.02 (1998); 35 Ill. Adm. Code 201.102. Section 3.02 of the Act defines air pollution, and Section 201.102 of the Board's rules contains a series of definitions related to air pollution. The Board cannot grant relief from a definition. Therefore the alleged violations of Section 3.02 of the Act and Section 201.102 of the Board's rules are frivolous, and the Board dismisses them.

Section 23 of the Act

Complainants allege that Boughton has violated Section 23 of the Act. 415 ILCS 5/23 (1998). Section 23 is merely the General Assembly's statement of purpose for the Title VI of the Act, the Title which addresses noise. See Mot. at 2; Memo at 3. Again, like the definition sections in the Act and the Board's rules, Section 23 contains neither a directive nor a prohibition. The Board cannot grant relief here because there can be no violation of Section 23. Brunson v. MCI Worldcom, Inc. (January 7, 1999), PCB 99-71. The alleged violation of Section 23 is frivolous, and the Board dismisses it.

Air Pollution

Complainants allege that Boughton has violated Section 9 of the Act and 201.141 of the Board's rules. 415 ILCS 5/9 (1998); 35 Ill. Adm. Code 201.141. Section 9 of the Act references several prohibited acts that result in air pollution while Section 201.141 is a general prohibition of air pollution. *Id.* Boughton contends that the complaint is deficient on these points because it lacks specificity. Mot. at 2; Memo at 4. The Board finds that the allegations are specific. The Board is able to grant relief from violations of Section 9 of the Act and 201.141 of the Board's rules. The alleged violations are not frivolous, and the Board will not dismiss them.

¹ The Board and the courts have consistently read the term "duplicitous" as "in the sense of being duplicative." See Winnetskans Interested in Protecting the Environment, 55 Ill. App. 3d 475, 479, 370 N.E.2d 1176, 1178, 1179 (1st Dist. 1977); Roti v. LTD Commodities (September 3, 1998), PCB 99-19, slip op. at 2.

Numeric Noise Limitations

Complainants allege that Boughton has violated Section 901.102(a) of the Board's rules which lists daytime decibel limits for emitting noise from one property to another. 35 Ill. Adm. Code 901.102(a). Boughton contends that the complaint "lacks specific information regarding the limitations exceeded, the time or frequency of such exceedance, or the procedures used to record such exceedance" for a numeric noise limitation. Mot. at 3; see also Memo at 4. Boughton cites Charter Hall Homeowner's Association v. Overland Transportation System Inc. (October 1, 1998), PCB 98-81 to support its proposition. However, in the duplicitous/frivolous determination for Charter Hall, the Board found that none of the numeric noise allegations were frivolous. Charter Hall (January 22, 1998), PCB 98-81. The Board is able to grant relief from violations of Section 901.102(a) of the Board's rules; declines to find that this alleged violation is frivolous; and therefore will not dismiss it.

In the original June 17, 1999 complaint, complainants alleged that Boughton is violating Section 900.102(b) of the Board's rules. Boughton responded that Section 900.102(b) does not exist and asked that the allegation be dismissed. In the amended August 13, 1999 complaint, complainants corrected the allegation and allege that Boughton is violating Section 901.102(b) which lists nighttime decibel limits. 35 Ill. Adm. Code 901.102(b). The alleged violation of Section 901.102(b) is not frivolous.

General Prohibitions on Noise Pollution

Complainants allege that Boughton has violated Section 24 of the Act and Section 900.102 of the Board's rules. 415 ILCS 5/24 (1998); 35 Ill. Adm. Code 900.102. Both of these provisions are general prohibitions on noise pollution. *Id.* Boughton claims that these allegations are frivolous for several reasons, including: Boughton had priority of location because its quarrying operations at the site have been ongoing since 1983; Boughton has previously objected to residential development near its property; complainants had notice of Boughton's operations; and there is a lack of evidence regarding numeric noise violation. Mot. at 3; Affidavit at 1; Memo at 5-7. In both complainants' response and Boughton's reply, the parties debate the siting of Boughton's quarry and the siting of nearby residential subdivisions. Neither complainants' nor Boughton's arguments here are persuasive in a frivolous determination. The Board is able to grant relief in this instance, declines to find that the alleged violations of Section 24 and Section 900.102 are frivolous, and declines to dismiss these alleged violations.

Impulsive Sound

Complainants allege that Boughton is violating Section 901.104 of the Board's rules, which restricts impulsive sound emissions. 35 Ill. Adm. Code 901.104. Boughton does not address this allegation because complainants raise it for the first time in the amended complaint. The Board finds that this allegation is not frivolous.

CONCLUSION

The Board finds that, pursuant to Section 103.124(a) of the Board's rules, the alleged violations of Sections 3.02 and 23 of the Act and Section 201.102 of the Board's rules are frivolous. Those allegations are dismissed. The Board finds that the remaining alleged violations of the Act and the Board's rules are neither duplicitous nor frivolous, so that the balance of the complaint is accepted for hearing. The alleged violations accepted for hearing are: Sections 9 and 24 of the Act and Sections 201.141, 900.102, 901.102(a), 901.102(b), and 901.104 of the Board's rules.

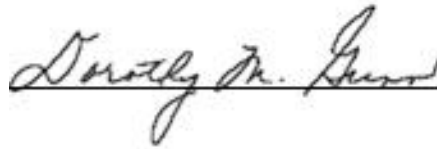
The Board accepts this matter for hearing. The hearing must be scheduled and completed in a timely manner consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with this order and Section 103.125 of the Board's rules. 35 Ill. Adm. Code 103.125. The Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer.

The assigned hearing officer shall inform the Clerk of the Board of the time and the location of the hearing at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days after the hearing.

Any briefing schedule shall provide for final filings as expeditiously as possible. If, after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if, after an attempt the hearing officer is unable to consult with all of the parties, the hearing officer shall unilaterally set a hearing date. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 23rd day of September 1999 by a vote of 6-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn". The signature is written in black ink and is positioned above a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board