

ILLINOIS POLLUTION CONTROL BOARD

July 8, 1998

ROY K. JOHNSON,)	
)	
Complainant,)	
)	
v.)	PCB 98-31
)	(Enforcement - Air - Noise - Citizens)
ADM-DEMETER, HOOPESTON)	
DIVISION,)	
)	
Respondent.)	

ORDER OF THE BOARD (by K.M. Hennessey):

In this case, complainant Roy K. Johnson (Johnson) alleges that respondent ADM-Demeter, Hoopeston Division (ADM), which owns and operates a grain elevator in Hoopeston, Illinois, has violated the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* (1996) (Act). Specifically, Johnson alleges that ADM has created air and noise pollution in connection with its grain elevator operations.

On June 2, 1998, ADM filed a motion to dismiss the complaint, or in the alternative, to strike portions of the complaint. On June 18, 1998, Johnson filed a memorandum opposing the motion. In this order, the Board denies the motion because it is untimely and because ADM has not shown that it will suffer material prejudice if the motion is denied as untimely.

BACKGROUND

Complainant Roy K. Johnson (Johnson) lives at 715 N. Market Street in Hoopeston, Illinois, and has lived there for over 35 years. Complaint (Comp.) at 2, 8. On August 21, 1997, Johnson filed a complaint¹ alleging that in 1986, ADM began an open grain and elevator storage operation on North Market Street in Hoopeston, a few hundred yards from his home. Comp. at 4, 8. Johnson alleges that the street leading to the grain elevator is approximately 40 feet from his home, and that railroad tracks that the grain elevator uses run a few hundred feet behind his house. Comp. at 4.

Johnson alleges that the grain elevator, and accompanying train and truck traffic and rail car switching engine, have created air pollution in violation of Sections 8, 9, and 10 of the Environmental Protection Act (Act), 415 ILCS 5/8, 9, 10 (1996). Comp. at 3. He also alleges that the grain elevator operations have created noise pollution in violation

¹ Johnson originally named the City of Hoopeston as an additional respondent. The Board dismissed the City of Hoopeston by order dated October 2, 1997.

of Sections 23, 24, 25, and 27 of the Act, 415 ILCS 5/23, 24, 25, 27 (1996), and 35 Ill. Adm. Code 900.12 of the Board's regulations. Comp. at 3.

ADM filed a motion (Mtn.) on June 2, 1998, in which it asks the Board to dismiss the complaint for failure to state a claim upon which relief can be granted, or in the alternative, to strike all portions of the complaint referring to noise or air pollution from truck and train traffic and the rail car switching engine. Mtn. at 1. Johnson filed a memorandum in opposition to the motion (Resp.) on June 18, 1998. According to the certificate of service, Johnson mailed the memorandum in opposition on June 16, 1998. On June 26, 1998, ADM filed a motion for leave to file a reply to Johnson's memorandum.

DISCUSSION

As an initial matter, ADM concedes that the motion was not filed within 14 days of the filing of the complaint, as the Board's rules require. Mtn. at 1; 35 Ill. Adm. Code 103.140(a). However, ADM argues that the Board allows motions to dismiss or strike to be filed after 14 days if material prejudice will result otherwise. Mtn. at 1-2.

In this case, ADM argues that material prejudice will result if ADM is not allowed to file this motion because "it will be forced to incur the expense of preparing to defend itself at hearing against claims that are not the legal responsibility of ADM." Mtn. at 2. ADM states that it did not bring the motion immediately because Johnson had not retained an attorney to file the initial complaint and latitude is typically afforded to such litigants. Mtn. at 2. ADM states that now that Johnson has retained counsel, and ADM has conducted some limited discovery, ADM better understands the complaint. Mtn. at 2. ADM claims that this limited discovery shows that "the overwhelming majority of the Complaint is not related to activities over which ADM has control." Mtn. at 2. Finally, ADM notes that the Board allowed the late filing of a motion to dismiss in People v. Geon (October 2, 1997), PCB 97-62, and should do so here as well.

In Geon, respondent filed a motion to dismiss more than 14 days after an amended complaint was filed but before filing any other document regarding the amended complaint. The respondent in Geon argued that the complainant's failure to comply with Section 31 of the Act deprived the Board of jurisdiction over the case. The Board found that "material prejudice would result if Geon were denied an opportunity to challenge the amended complaint on jurisdictional grounds" Geon, PCB 97-62, slip op. at 8.

The Board does not find any material prejudice here. ADM's motion does not address the Board's power to hear this case, as did the motion in Geon. Furthermore, on this type of motion to dismiss or strike, the Board may consider only the well-pleaded allegations of the complaint, in the light most favorable to the non-movant. Conway v. Johnson (August 7, 1997) PCB 97-221, citing Uptown Federal Savings &

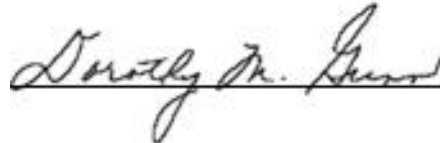
Loan Assoc. v. Kotsiopoulos, 105 Ill. App. 3d 444, 434 N.E.2d 476 (1st Dist. 1982); see also Davis v. Weiskopf, 108 Ill. App. 3d 505, 509, 439 N.E.2d 60, 63 (2d Dist. 1982) (on a motion to dismiss, a court may not consider supporting affidavits). But ADM's motion relies on facts set forth in an affidavit of Charles Smith (Smith), plant manager of the grain elevator. These facts are not alleged in the complaint and the Board could not consider them if it were to rule on the merits of the motion. The Board therefore finds that its denial of the motion as untimely will not materially prejudice ADM.

The Board emphasizes, however, that it could consider Smith's affidavit in support of a motion for summary judgment. This order does not preclude ADM from presenting Smith's affidavit in support of a motion for summary judgment.

Because the Board denies ADM's motion, Johnson's response is moot (and in any event, was untimely filed because it was not filed or mailed within seven days of Johnson's receipt of ADM's filing; see 35 Ill. Adm. Code 103.104(c) and 103.123(c)). The Board also denies ADM's motion for leave to file a reply to Johnson's memorandum.

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 8th day of July 1998 by a vote of 5-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board