

ILLINOIS POLLUTION CONTROL BOARD

June 4, 2009

JERRY R. WEST II,)
)
 Complainant,)
)
 v.) PCB 09-45
) (Citizens Enforcement - Air)
 NOKOMIS QUARRY COMPANY,)
)
 Respondent.)

ORDER OF THE BOARD (by T.E. Johnson):

On January 5, 2009, Jerry R. West II (West) filed a complaint *pro se* against Nokomis Quarry Company (Nokomis Quarry). The complaint concerns limestone particles allegedly emitted from Nokomis Quarry's site located at 23311 Taylorville Road in Nokomis, Montgomery County. On February 5, 2009, Nokomis Quarry filed a motion to dismiss West's complaint. For the reasons below, the Board grants Nokomis Quarry's motion, dismisses the complaint, and closes the docket. The Board will describe the relevant procedural history of this case before discussing the pleadings and the Board's ruling.

PROCEDURAL HISTORY

As noted, West filed the complaint (Comp.) on January 5, 2009. On February 5, 2009, the Board issued an order directing West to file, by March 5, 2009, proper proof that he had served the complaint on Nokomis Quarry or its authorized agent. The Board's order did not accept the complaint for hearing and accordingly reserved ruling on whether the complaint is duplicative or frivolous.

On February 5, 2009, an appearance of counsel was filed on behalf of Nokomis Quarry, accompanied by the motion to dismiss (Mot. Dism.) the complaint. In the motion, Nokomis Quarry acknowledges that the complaint was served upon counsel for Nokomis Quarry on January 14, 2009. Mot. Dism. at 1.

On March 12, 2009, the Board received a pleading from West entitled "Plaintiffs [sic] Answer to Respondents [sic] Motion to Dismiss Formal Complaint filed by Jerrald West II" (Resp.). The Board considers this pleading as a response both to the Board's February 5, 2009 order and to Nokomis Quarry's February 5, 2009 motion to dismiss. In West's pleading, he notes, among other things, that Nokomis Quarry's motion acknowledges service of the complaint. Resp. at 2. West's pleading was U.S. Mail-postmarked on March 4, 2009, making the filing timely as a response to the Board's order. See 35 Ill. Adm. Code 101.300(b)(2) ("mailbox rule"). Responses to motions are due within 14 days after service of the motion, but the Board will accept West's pleading as a response to the motion for dismissal to avoid any potential for material prejudice. See 35 Ill. Adm. Code 101.500(d).

West filed public comments on March 17, 2009, and May 15, 2009.

PLEADINGS

West's complaint alleges that "multiple activities with limestone based products" have caused the emission of "fine particles," resulting in pollution. Comp. at 2-4. West requests numerous forms of relief, including an order assessing a civil penalty and mandating the cessation of "processes" that allow "fugitive particles." *Id.* at 4. West also asks for a Board order requiring "cities and states to use road material which does not aerosolize" and requiring an "acknowledgment by doctors for cumulative [sic] exposure." *Id.*

Nokomis Quarry moves to dismiss the complaint as frivolous and duplicative. Mot. Dism. at 3-4. Nokomis Quarry argues that while it is "difficult, if not impossible, to determine what Jerrald West is alleging and requesting," it "appears that the relief being sought is not relief the Board has the authority to grant." *Id.* at 5. Nokomis Quarry further argues that the complaint's allegations are "void of facts" that reasonably inform Nokomis Quarry of the manner and extent of any alleged violations. *Id.* at 4. Nokomis Quarry adds that the complaint is duplicative based on a dismissed Montgomery County Circuit Court action brought by West against Nokomis Quarry. According to Nokomis Quarry, the court action had "allegations identical or substantially similar" to those of the instant complaint. *Id.* Nokomis Quarry concludes that: "As indicated in his Montgomery County lawsuit and in this Complaint, the goal of Jerrald West is to obtain a money settlement with Nokomis Quarry Company." *Id.* at 5.

West responds to the motion by suggesting that his complaint properly pled "the relief sought" without "draw[ing] into question the Board's authority." Resp. at 3. West reiterates: "I will again describe the relief I am seeking. 6 Million Dollars for damages incurred both economic and none [sic] economic." *Id.* at 5. West's public comment of March 17, 2009, states that "[i]f there is any doubt based on the amount I have sought I offered in good faith to resolve this issue by reducing the amount to 100K." Also, in his response to the motion, West asserts that he has provided sufficient facts. Resp. at 4. Finally, West agrees that the circuit court action was "the same case" but maintains that the case has now been "refiled with an educated Pollution Control Board better suited to judge the facts." *Id.*

DISCUSSION

Legal Framework

Under the Environmental Protection Act (Act) (415 ILCS 5 (2006)), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2006); 35 Ill. Adm. Code 103. Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2006); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board

does not have the authority to grant” or “fails to state a cause of action upon which the Board can grant relief.” 35 Ill. Adm. Code 101.202.

The Act requires a complaint to “specify the provision of the Act or the rule or regulation or permit . . . under which [the respondent] is said to be in violation, and a statement of the manner in, and the extent to which [the respondent] is said to violate the Act or such rule or regulation or permit” 415 ILCS 5/31(c)(1) (2006); *see also* 415 ILCS 5/31(d)(1) (2006). The Board’s procedural rules require that a complaint include:

The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense. 35 Ill. Adm. Code 103.204(c)(2).

Even though “[c]harges in an administrative proceeding need not be drawn with the same refinements as pleadings in a court of law” (Lloyd A. Fry Roofing Co. v. PCB, 20 Ill. App. 3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974)), the Act and the Board’s procedural rules “provide for specificity in pleadings” (Roche v. PCB, 78 Ill. App. 3d 476, 481, 397 N.E.2d 51, 55 (1st Dist. 1979)) and “the charges must be sufficiently clear and specific to allow preparation of a defense” (Lloyd A. Fry Roofing, 20 Ill. App. 3d at 305, 314 N.E.2d at 354).

Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is frivolous or duplicative. *See* 35 Ill. Adm. Code 103.212(b). 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).

Board Ruling

The Board’s remedial authority includes the ability to impose civil penalties and to issue orders to cease and desist from violations. *See* 415 ILCS 5/33, 42 (2006). However, the Board finds that some of the relief requested by West is beyond the Board’s authority to grant. West seeks \$6,000,000 in damages and an order requiring that cities, states, and doctors undertake various measures. The Board lacks the authority to award money damages. *See Decatur Auto Auction v. Macon County Farm Bureau, Inc.*, PCB 93-192, slip op. at 2 (Dec. 16, 1993). Nor does the Board have the power to order actions by non-parties. *See Village of Montgomery v. Aurora Sanitary District*, PCB 79-269, slip op. at 1 (Mar. 20, 1980).

Further, West’s complaint fails to state a cause of action upon which the Board can grant *any* relief. The provision of the Act that Nokomis Quarry has allegedly violated is the definition of “air pollution” (415 ILCS 5/3.115 (2006)). Comp. at 3. The definition cannot be violated. *See Patterman v. Boughton Trucking and Materials, Inc.*, PCB 99-187, slip op. at 2 (Sept. 23, 1999) (alleged violations of definitions are frivolous). Additionally, although West *criticizes* Nokomis Quarry’s purported permits and a Board regulation on fugitive particulate matter (35

Ill. Adm. Code 212.301), he does not allege their violation. Comp. at 3. The complaint merely states that:

It appears as well that permits have been issued to pollute as a minor source. Measurement by the LB is deceiving since lime is very heavy. Title #35 Sec. 212.301 entitled fugitive particulate matter is flawed. *Id.*

West has therefore not alleged the violation of any provision of the Act that can be violated, nor has he alleged the violation of any permit or regulation. *See* 415 ILCS 5/31(c)(1), (d)(1) (2006); 35 Ill. Adm. Code 103.204(c)(1).

West's complaint is also factually deficient. *See* 415 ILCS 5/31(c)(1), (d)(1) (2006); 35 Ill. Adm. Code 103.204(c)(2). The complaint does not specify the dates or duration and frequency of the alleged emissions, or state whose health or enjoyment of life or property has allegedly suffered as a result of the emissions. In addition, the complaint is ambiguous about the nature of the "multiple activities" allegedly resulting in pollution and whether Nokomis Quarry alone is carrying out those activities. Comp. at 2. "Construing the complaint, however liberally, cannot generate those missing facts." United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 22 (Oct. 16, 2008).

Taking all well-pled allegations as true and drawing all reasonable inferences from them in favor of West, the Board finds that West's complaint is frivolous. West's circuit court case was dismissed for failing to state a cause of action. Mot. Dism., Exh. F at 2. Under these circumstances, the Board is not in a position to, and need not, determine whether the instant case is duplicative of the court case. The Board grants Nokomis Quarry's motion to dismiss West's complaint as frivolous. The Board accordingly dismisses the complaint and closes the docket.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 4, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk

Illinois Pollution Control Board