

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

**CELESTE TAPIA AND MICHAEL W.
EDWARDS,**

Petitioner,

v.

MILLER CONTAINER CORPORATION,

Respondent.

PCB No. 2019-071

NOTICE OF ELECTRONIC FILING

To: Illinois Pollution Control Board
Attn: Clerk
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601-3218

Celeste Tapia
8621 35th Street West
Milan, Illinois 61264

Michael W. Edwards
8621 35th Street West
Milan, Illinois 61264

PLEASE TAKE NOTICE that on January 3, 2019, I electronically filed with the Office of the Clerk of the Illinois Pollution Control Board Respondent's **Motion to Dismiss**, a copy of which is hereby served upon you.

Dated: January 3, 2019

MILLER CONTAINER CORPORATION

By: /s/ A. Bruce White
One of Its Attorneys

A. Bruce White
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CELESTE TAPIA AND MICHAEL W. EDWARDS,)
)
)
 Petitioners,)
)
 v.)
)
 MILLER CONTAINER CORPORATION,)
)
 Respondent.)

PCB No. 2019-071

MOTION TO DISMISS

NOW COMES the Respondent, Miller Container Corporation (“Respondent”), by and through its attorneys, and respectfully moves the Board to dismiss Celeste Tapia’s and Michael W. Edwards’ (“Petitioners”) Complaint pursuant to 35 Ill. Adm. Code 101.202, 103.215 on the grounds that it is frivolous and fails to state a claim upon which the Board may grant relief. In support of this Motion, the Respondent states as follows:

1. Petitioners filed a Complaint on November 7, 2018 purporting to allege various noise violations they claim arise from Respondent’s activities.
2. By Order dated December 20, 2018, the Board allowed Respondent an extension of time until January 16, 2019 to file a Motion to Dismiss. Accordingly this motion is timely.
3. Under the Illinois Environmental Protection Act (the “Act”), and the Board’s Rules, Respondent may move to dismiss a citizen Complaint as “frivolous” if it requests “relief that the Board does not have authority to grant,” or “fails to state a cause of action upon which the Board can grant relief.” 35 Ill. Adm. Code 101.202, 103.215. This citizens’ noise Complaint is virtually identical to, and should be dismissed for the same reasons as the Board dismissed the noise complaints in *Chvalovsky v Commonwealth Edison*, PCB No. 10-13 (December 2, 2010) and *Chvalovsky v Commonwealth Edison*, PCB 14-6 (Order dismissing Complaint October 3, 2013, and Order dismissing Amended Complaint December 19, 2013).

3. In this case, Petitioners assert that their claim is based on alleged violations of Sections 23, 24, and 25 of the Act (415 ILCS 5/23, 24, and 25). *See* Complaint, at ¶ 5.

4. At pages four through five of the October 3, 2013 *Chvalovsky* decision in PCB 14-6, the Board explains that conclusory allegations asserting that Sections 23, 24, and 25 of the Act (415 ILCS 5/23, 24, 25 (2012)) have been violated—the same violations Petitioners purport to allege in this case (*see* Complaint at ¶ 5)—fail to set forth the basis for a claim.

5. The Board first explains that Sections 23 and 25 of the Act (415 ILCS 5/23 and 25) are a legislative declaration and authorization for rulemaking, respectively, and cannot be violated:

As stated, the complaint alleges the violation of Sections 23, 24, and 25 of the Act (415 ILCS 5/23, 24, 25 (2012)). Section 23 is a legislative declaration, while Section 25 is an authorization for rulemaking. Neither of these provisions can be violated. *Strunk v. Williamson Energy, LLC* (Pond Creek Mine #1), PCB 08-13, slip op. at 3-4 (Sept. 20, 2007) (Section 23); *Gifford v. American Metal Fibers, Inc.*, PCB 08-13, slip op. at 3-4 (Sept. 20, 2007) (Section 25).

Chvalovsky v Commonwealth Edison, PCB 14-6 (October 3, 2013, p. 4)

6. The Board then further finds that Section 24 of the Act is not a stand-alone provision, so no “violation” of Section 24 can occur without a violation of a Board noise regulation or standard:

Section 24 provides that “[n]o person shall emit beyond the boundaries of this property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act.” 415 ILCS 5/24 (2012).

Section 24 is capable of being violated, but “[t]he appellate court has previously stated that Section 24 is not a general statutory prohibition.” *Rulon v. Double D Gun Club*, PCB 03-7, Slip op. at 4 (Aug. 22, 2002), citing *Shepard v. Northbrook Sports Club and the Village of Hainesville*, 272 Ill. App 3d 764, 768, 651 N.E.2d at 555, 558 (2nd Dist. 1995). Instead, Section 24 prohibits the emission of noise “*so as to violate any regulation or standard adopted by the Board under this act.*” *Shepard*, 272 Ill. App. 3d at 768, 651 N.E.2d at 558, quoting 415 ILCS 5/24 (emphasis in original). Accordingly, “Section 24 is not a stand-alone provision, but a violation of certain Board noise regulations could result in a violation of Section 24.” *Rulon*, PCB 03-7, slip op. at 4, citing *Roti v. LTD Commodities*, PCB 99-19, slip op. at 2 (Nov. 5, 1998). The complaint

does not allege the violation of any Board noise regulation or standard (*see* Comp. at 3), which are codified beginning at part 900 of the Board's regulations (*see* 35 Ill. Adm. Code part 900 *et seq.*).

Chvalovsky v Commonwealth Edison, PCB 14-6 (October 3, 2013 at p. 4)

7. As in both *Chvalovsky* cases, Petitioners here failed to allege any violation of a Board noise regulation or standard. Accordingly as in both *Chvalovsky* cases, Petitioners here have failed to state a cause of action.

8. Also as in *Chvalovsky*, conclusory allegations that noise is causing loss of use and enjoyment of Petitioners' property by wearing on their nerves and causing anxiety, stress, irritability, anger, and stomach problems is impermissibly vague. PCB 14-6 (October 3, 2013 at ¶ 8). Section 103.204(c)(2) requires much greater specificity, including: "[t]he dates, location, events, nature, extent, duration and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations." *See Chvalovsky v Commonwealth Edison*, PCB 14-6 (October 3, 2013 at p. 4-5). *See also Chvalovsky v Commonwealth Edison*, PCB 14-6 (December 19, 2013, dismissing the Chvalovsky's Amended Complaint.)

9. For all the foregoing reasons, as further explained in the Board's *Chvalovsky* decisions, the Complaint in this action is frivolous by definition, 235 Ill. Adm. Code 101.202; and must be dismissed for failure to state a cause of action upon which the Board can grant relief.

WHEREFORE, Respondent, Miller Container Corporation, requests the Board to enter an Order dismissing the Complaint.

Dated: January 3, 2019

MILLER CONTAINER CORPORATION

By: /s/ A. Bruce White
One of Its Attorneys

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PROOF OF SERVICE

The undersigned attorney certifies, under penalties of perjury pursuant to 735 ILCS 5/1-109, that he caused copies of the foregoing **Notice of Filing** and **Motion to Dismiss** to be served electronically via the Illinois Pollution Control Board's online filing system or via First Class Mail, postage paid, from One North Wacker Drive, Chicago, Illinois, on the 3rd day of January, 2019 to:

Illinois Pollution Control Board
Attn: Clerk
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601-3218
(via electronic filing only)

Celeste Tapia
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Michael W. Edwards
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/s/ A. Bruce White

One of Its Attorneys