ILLINOIS POLLUTION CONTROL BOARD
May 2, 1996

MR. LEW D'SOUZA and MRS. PATRICIA D'SOUZA, Complainants, v. MR. RICHARD MARRACCINI and MRS. JOANNE MARRACCINI, Respondents.	)))))))))))	 PCB 96-22 (Enforcement-Citizens-Noise)

MR. LEW D'SOUZA AND MRS. PATRICIA D'SOUZA APPEARED PRO SE ON BEHALF OF COMPLAINANTS

MR. RICHARD MARRACCINI AND MRS. JOANNE MARRACCINI APPEARED PRO SE ON BEHALF OF RESPONDENTS

OPINION AND ORDER OF THE BOARD (by J. Yi):

This matter is before the Illinois Pollution Control Board (Board) pursuant to a complaint filed by Mr. and Mrs. Lew D'Souza (Complainants) against Mr. And Mrs. Richard Marraccini (Respondents) on August 1, 1995. The Complainants have filed this citizen enforcement action pursuant to Section 31(b) of the Environmental Protection Act (Act). (415 ILCS 5/31(b)(1994.)

The Complainants allege that the Respondents violated the prohibition of noise pollution set forth in Sections 23 and 24 of the Act and the Board's regulations at 35 Ill. Adm. Code 900.102, 901.102(a) (b), in the operation of the Respondents' central air conditioning unit located at the side of their house at 552 Delmar Court, Elk Grove Village, Illinois. (415 ILCS 5/23 and 5/24 (1994).) The Complainants are requesting the Board to direct the Respondents to cease and desist from further violations of applicable statutes and regulations, pay for costs of bringing the action, and award damages for intentional injury. A hearing was held in this matter before Board Hearing Officer June C. Edvenson on December 12, 1995. No briefs were filed. For the reasons stated below, we find Respondents in violation of Section 24 of the Act and 35 Ill. Adm. Code 900.102.

APPLICABLE LAWS

The specific sections of the Act and the Board regulations on which the Complainants base their complaint are: Sections 23 and 24 of the Act, and 35 Ill. Adm. Code Sections 900.102 and 901.102(a) and (b) of the Board's regulations.

Section 23 of the Act states that: "[t]he General Assembly finds that excessive noise endangers physical and emotional health and well-being, interferes with legitimate business and recreational activities, increases construction costs, depresses property values, offends the senses, creates public nuisances, and in other respects reduces the quality of our environment. It is the purpose of this Title to prevent noise which creates a public nuisance."

Section 24 of the Act states that "[n]o person shall emit beyond the boundaries of his 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."

Section 25 of the Act states that "[t]he Board, pursuant to procedures prescribed in Title VII of the Act, may adopt regulations prescribing limitations on noise emissions beyond the boundaries of the property of any person and prescribing requirements and standards for equipment and procedures for monitoring noise and the collection, reporting and retention of data resulting from such monitoring." (415 ILCS 5/25 (1994).)

Section 900.102 of the Board regulations states that "[n]o person shall cause or allow the emission of sound beyond the boundaries of his property, as property is defined in Section 25 of the Act, so as to cause noise pollution in Illinois" [Section 900.101 has defined noise pollution to be "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity", or so as to violate any other provisions of this chapter.]

Sections 901.102(a) and (b) of the Board's regulations provide the limits of allowable noise levels, measured no less than 25 feet from any property-line-noise-source, during daytime hours and nighttime hours, respectively. Section 901.101 defines "property line-noise-source" as any equipment or facility or combination thereof which operates within any land use as specified by 35 Ill. Adm. Code 901.101. Such equipment or facility or combination thereof, must be capable of emitting sound beyond the property line of the land on which operated."

Section 33 (c) of the Act states that "[i]n making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:

1. The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

2. The social and economic values of the pollution source;

3. The suitability or unsuitability of the pollution source in the area in which it is located, including the question of priority of location in the area involved;

4. The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

5. Any subsequent compliance."

Section 42 (h) of the Act states that "[i]n determining the appropriate civil penalty to be imposed, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

1. The duration and gravity of the violation;

2. The presence or absence of the due diligence on the part of the violator in attempting to comply with the requirements of this Act and Regulations thereunder or to secure relief therefrom as provided by this Act;

3. Any economic benefits accrued by the violator because of delay in compliance with requirements;

4. The amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and

5. The number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator."

BACKGROUND

Both parties appeared pro se at the Board's hearing. The parties gave brief opening statements. The Complainants presented the testimonies of Mr. Lawrence Smith, Mr. Greg Zak and made statements of their own on the record. The Respondent , Mr. Marraccini, testified on behalf of the Respondents. There were no briefs filed in this matter.

In his opening statement, one of the complainants (Mr. D'Souza) summarized that they would show that the noise from their neighbor's air conditioning unit is excessive, that it interfered with their sleep and the enjoyment of their life and property. Mr. D'Souza then stated that they would summarize their attempts to work out the problem. Mr. D'Souza contended that the problem is that the air conditioning unit is located directly under the Complainants' bedroom window; that it is the very location that is causing it to be a nuisance. He further asserted that there is a reasonable solution to the problem but the Respondents have not done anything to abate the noise. Mr. D'Souza claimed that the Respondents inaction and disregard for their sleep has led to the hearing. Mr. D'Souza stated that the problem has existed for two and one-half (2½) years. (Tr. generally at 7.)[1] Mr. D'Souza further stated that the Complainants suggested that the unit be relocated to the back of the Respondents' house. He stated that the Complainants even offered to pay half the cost of correcting the problem and that the Respondent's own estimate of the case to relocate the unit is $500. (Tr. generally at 7.)

In the opening statement for the Respondents, Mr. Marraccini stated that no one, except the Complainants, seemed to feel there is a problem, and that he felt that moving the unit was not necessarily the solution. (Tr. generally at 8.) He further asserted that in their effort to do the right thing, in relation to the noise problem, they decided to completely replace the unit, at a price of about a thousand dollars. He further maintained that, to the best of his knowledge, the noise level of the new unit, as manufactured, is already above the "EPA standards". (Tr. at 9.) Additionally Mr. Marraccini stated that the unit is located in accordance with the ordinance of the Village of Elk Grove. (Tr. generally at 9.)

FACTS AND ARGUMENTS

Complainants

The Complainants first witness, Mr. Lawrence Smith, is a Registered Professional Engineer, in six states, and is certified by the Council of National Examiners in noise technology for industrial and manufacturing facilities and noise and vibration for mechanical systems. (Tr. at 15.) Mr. Smith testified that, in compliance to state law and procedures, and using equipment meeting American National Standards Institute standards and the Illinois Environmental Protection Agency (Agency) requirements, he took noise readings at two different times. Both readings were taken on July 21, 1995, one during daytime hours and one during nighttime hours. (Tr. at 14.) The measurements were taken at a 25 feet distance from the noise source and stated that the measurements exceeded the standards. (Tr. at 14-15.) Those readings are listed in Comp. Exh #2, and are explained by Mr. Zak's testimony.

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[1]The transcript of the hearing will be referred to as "Tr. at .", Complainants exhibits will be referred as "Comp. Exh #).

Under cross-examination by the Respondents, Mr. Smith indicated that the measurement should be taken at a point 25 feet from the property-line-noise-source and since the two houses are less than 25 feet apart, that the measurements were taken in the yard at a point 25 feet from the unit. (Tr. at 17.)

As Complainants' second witness, Mr. D'Souza called Mr. Zak. Mr. Zak is a Noise Technical Advisor of the Agency. (Comp. Exh. #3.) Under direct examination, Mr. Zak stated that in its present configuration, the emissions from the unit considerably exceeded the Board's standards especially for nighttime sound emissions. (Tr. at 26-27.) Mr. Zak noted that the houses are parallel to each other and that the unit is located approximately midway along the wall of the Respondents' house. (Tr. at 33.) Mr. Zak testified that this type of arrangement of walls, that are parallel to each other, tends to generate an echo, and would amplify the sound generating from the noise source. (Tr. at 33.)

Mr. Zak also stated solutions for these problems along with the feasibility of those solutions and the approximate costs. (Tr. generally at 34-37.) After talking about acoustical blankets and acoustical structures, and associated costs and effectiveness, Mr. Zak concluded that the best solution is to relocate the unit; he observed that it seemed quite feasible to relocate to the rear of the Marraccini residence. (Tr. at 35.)

During cross-examination, Mr. Zak stated that a manufacturer does not design an air conditioning unit specifically for Illinois regulations; further, because of poor zoning or poor planning, frequently an air conditioner is installed in an inappropriate location. (Tr. at 40.)

Finally, the Complainants testified that to the level of nuisance that the air conditioner is causing and prior attempts to solve the situation. Mrs. D'Souza stated that, especially during the cooling season, she was continuously awakened during the night, sometimes every hour on the hour, which affected her ability to sleep and had a detrimental affect on her professional life. (Tr. at 43, Comp. Exh. #5.) Mr. D'Souza stated that he has attempted for the last two and one-half (2½) years to resolve this problem with the Respondents to no avail. (Tr. generally at 47-56.)

In the closing statements, Mr. D'Souza argued that the record demonstrates that the Respondents' air conditioning unit is creating excessive noise which unreasonably interferes with the Complainants' enjoyment of life and property. (Tr. at 68.) Additionally, he maintained that the Respondents are in violation of the numeric limitations set forth at 35 Ill. Adm. Code 901.102(a) and (b). Finally, the Complainants assert that Respondents' actions are willful, knowing and repeated. (Tr. at 69.) The Complainants request the Board to order the Respondents to cease and desist from further violations, relocate the air conditioner so that it is no longer a nuisance, and award appropriate damages and costs. (Tr. at 69.)

Respondents

Mr. Marraccini states that "it's probably pretty evident that this unit breaks those laws" but contends that any "air conditioner purchased today technically is breaking the law based on those BEL ratings." (Tr. at 57.) Mr. Marraccini further asserted that they have tried to resolve the situation to no avail and that he does not feel it is necessary to relocate the air conditioner. (Tr. at 58-59.) However, Mr. Marraccini also stated that, if the Board finds that the air conditioner must be relocated, he will make every effort to remove the air conditioner. (Tr. at 59.)

Mr. Marraccini in his closing statement stated that moving the air conditioner will not resolve the alleged violation of the numeric limitations but if the Board finds that it is a nuisance that the Respondents will follow whatever is recommended. (Tr. at 70.) Finally, Mr. Marraccini stated that none of the actions taken by the Respondents were willful or done intentionally to affect anyone. (Tr. at 70-71.)

DISCUSSION

The complaint alleges a nuisance violation pursuant to Section 24 of the Act, Section 900.102 of the Board's regulations and numeric violation of Sections 900.102(a) and (b) of the Board's regulations. The Complainants claim that they are unable to enjoy the use of their property due to the excessive noise from the Respondents' air conditioner and that the air conditioner was in violation of the numeric limitations on July 21, 1995.

Nuisance violation

The threshold issue in any noise enforcement proceeding is whether the sounds have caused some type of interference with the complainants' enjoyment of life or lawful business activity. Interference is more than an ability to distinguish sounds attributable to a particular source. Rather, the sounds must objectively affect the complainants' life or business activities. (See e.g., Village of Matteson v. World Music Theatre Jam Productions, LTD. and Gierczyk Development, Inc., (April 25, 1991), PCB 90-146, Katsak v. St. Michael's Lutheran Church, (August 30, 1990) PCB 89-182; Zivoli v. Dive Shop, (March 14, 1991) PCB 89-205.) Based on the testimony and numeric noise readings, the Board finds that sound emanating from the Respondents' air conditioner caused an interference with the Complainants' enjoyment of life on numerous occasions. Testimony to the effect that the sound constitutes an interference solely because it could be heard is insufficient to support a finding beyond a "trifling interference, petty annoyance or minor discomfort." (Wells Manufacturing Co. v. PCB, 73 Ill.2d 226, 383 N.E.2d 148, 150 (1978).)

The Board finds that the testimony presented at hearing demonstrates the necessary interference. Complainants presented testimony of Mr. Smith who conducted numeric noise readings on July 21, 1995 which demonstrate that the Respondents' air conditioner was exceeding the Board's numeric noise limitations at least on that day. Mr. Zak of the Agency testified to the importance of the noise readings taken by Mr. Smith and that the location of the Respondents' air conditioner could cause amplification of the noise. Finally, the testimony of the Complainants along with the Comp. Exh. #5 demonstrates that the Respondents' air conditioner is interfering with the enjoyment of life and the use of their property.

Once the Board determines that interference is caused by a respondent's activity the Board must determine if that interference is unreasonable. The "reasonableness" of the noise pollution must be determined in reference to statutory criteria in Section 33(c). Wells Manufacturing Company v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148 (1978); Mystic Tape, Div. of Borden, Inc. v. Pollution Control Board, 60 Ill.2d 330, 328 N.E.2d 5 (1975); Incinerator, Inc. v. Pollution Control Board, 59 Ill.2d 290, 319 N.E.2d 794 (1974); City of Monmouth v. Pollution Control Board, 57 Ill.2d 482, 313 N.E.2d 161 (1974). However, complainants are not required to introduce evidence on these criteria. (Processing & Books v. Pollution Control Board, 64 Ill.2d 68, 351 N.E.2d 865 (1976).)

Sections 900.101 and 900.102, which apply here, were given judicial interpretation in Ferndale Heights Utilities Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 41 Ill. App. 3d 962, 358 N.E.2d 1224 (1st Dist. 1976). The First District Court held the regulatory language to be constitutional since sufficient standards could be comprehended from reading Section 24, the Board's regulations, and the guidelines for enforcement cases found in Section 33(c) of the Act. The Court affirmed the Board's finding of unreasonable interference with the enjoyment of life, in light of adequate testimony describing the noise; explaining the type and severity of the interference caused by the noise; and indicating the frequency and duration of the interference.

As stated above, the Illinois Supreme Court has directed the Board to consider the facts of a "nuisance" case in light of the factors outlined by Section 33(c) of the Act to determine unreasonableness. Wells Manufacturing Co. v. PCB, 73 Ill.2d 226, 232-33, 383 N.E.2d 148, 150-51 (1978) ("nuisance" air pollution; first four factors only). Furthermore, the Board in making its determinations and orders must consider the factors outlined in Section 33(c) of the Act. Therefore, we will discuss the factors of Section 33(c) with relation to the interference pursuant to the nuisance. The discussion of the Section 33(c) factors, which are listed on page 3, are as follows:

Character and Degree of the Injury or Interference

Section 33(c)(1) directs the Board to consider the character and degree of any interference caused by the noise emitted from the Respondents' air conditioner. The standard to which the Board refers is whether the noise substantially and frequently interferes with a lawful business activity, beyond minor trifling annoyance or discomfort. See, e.g., Brainerd v. Hagen, (April 27, 1989) PCB 88-171, 98 PCB 247. As stated above the Complainants presented evidence through testimony at hearing and Comp. Exh. #5 as to the character and degree of injury or interference. The Complainants state that the main interference or injury is that the noise prohibits them from sleeping through the night. The Comp. Exh. #5 demonstrates that the Complainants are affected by the air conditioner on a regular basis but at least on the days specified in the exhibit.

Social or Economic Value of the Source

With respect to Section 33(c)(2), there is no evidence in the record regarding the social and economic value of Respondents' air conditioning unit to the area. However, the Board does take notice of the social or economic value of the Respondents' ability to cool their home.

Suitability or Unsuitability of the Source, Including Priority of Location

With respect to Section 33(c)(3), the record demonstrates that the location of the air conditioner is not suitable and does not have location priority. Mr. Zak testified, the location of the air conditioner is most likely causing the noise to be amplified and a more suitable location would be at the back of Respondents' house. Although the Respondents argue that the location has been approved by the Village of Elk Grove, there is nothing in the record that indicates that such approval took into consideration the possible noise emissions.

Technical Practicability and Economic Reasonableness of Control

The focus of the Section 33(c)(4) inquiry into the technical practicability and economic reasonableness of control is what can be done about the purportedly offensive sounds. The record offers information regarding the technical feasibility or economic reasonableness of controlling the noise of the air conditioning unit. Mr. Zak testified that the most technically practical and economically reasonable control was to move the air conditioner to the Respondents' backyard. The record indicates that the estimated cost relocation is approximately $500 while that of other alternatives may be close to $3,000.

Subsequent Compliance

Section 33(c)(5) involves the issue of subsequent compliance. The record does not suggest that the alleged violation has been cured.

Summary of the Section 33(c) Factors

Based on the finding that the noise emitted from the Respondents' air conditioner interferes with the Complainants' enjoyment of life, and after consideration of the factors listed in Section 33(c) of the Act, the Board finds that the interference is unreasonable and constitutes a violation of Section 24 of the Act and 35 Ill. Adm. Code 900.102.

Numeric Violation

The Complainants, in addition to the nuisance violations, are alleging that the Respondents violated the numeric limitations set forth at 35 Ill. Adm. Code 901.102(a) and (b) on July 21, 1995. The record contains no evidence disputing that on July 21, 1995, the readings taken by Mr. Smith demonstrate an exceedence of the numeric limitations at 35 Ill. Adm. Code 901.102(a) and (b). As testified to by Mr. Zak of the Agency, the readings were done in an appropriate manner and they do demonstrate an exceedence. Since there is no evidence discrediting the evidence of an exceedence, we find that on July 21, 1995 the Respondents exceeded the Board's numeric limitations at 35 Ill. Adm. Code 901.102(a) and (b). However, the Board's regulations specifically exempt the applicability of the numeric limitations for noise emitted from land used for residential purposes. The Board's regulation at 35 Ill. Adm. Code 901.107(a) states that "Sections 901.102 through 901.106 inclusive shall not apply to sound emitted from land used as specified by SLUCM Codes 110, 140, 190, 691, and 742 except 7424 and 7425." SLUCM Code 110 is residential property; therefore, the numeric limitations do not apply to the Respondents' activities. Though the numeric limitations do not apply, we can look to the readings as guidance concerning character and degree of the alleged nuisance violation.

PENALTY AND REMEDY

As stated previously, the Complainants request the Board to direct the Respondents to cease and desist from further violations of applicable statutes and regulations; specifically, to order the Respondents to effectively and permanently reduce the noise by relocating the noise pollution source to a more suitable location; pay for costs of bringing the action, and award damages for intentional injury. In addition to any relief requested by Complainant, pursuant to Section 42 of the Act the Board may assess civil penalties.

Civil Penalties and Cost

In determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act. (People v. Berniece Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park, PCB 92-164 (April 20, 1994); IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71, 111 PCB 11

at 72 (May 10, 1990).) The Board must take into account the factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. (Wells Manufacturing Company v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148 (1978).) The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. In addition, the Board must bear in mind that no formulae exist, and all facts and circumstances must be reviewed. (Kershaw, supra, at 14; Barry supra, at 62-63.)

The Board has stated that the statutory maximum penalty "is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts". (Barry, supra at 72.) The formula for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act (415 ILCS 5/42(a) and (b) (1994)). Section 42(a) provides for a civil penalty not to exceed $50,000 for violating a provision of the Act, or Board regulations and orders, and an additional civil penalty not to exceed $10,000 for each day during which the violation continues. Section 42 (h) of the Act states that “[i]n determining the appropriate civil penalty to be imposed, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors; duration and gravity of the violation; the presence or absence of the diligence on the part of the violator in attempting to comply with the requirements of this Act and Regulations thereunder or to secure relief therefrom as provided by the Act; any economic benefits accrued by the violator because of delay in compliance with requirements; the amount of monetary benefit which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.” After careful consideration of the factors set forth in Sections 33(c) and 42(h) of the Act, the Board will not assess any civil penalties in addition to the costs associated with remedying the noise problem.

Additionally the Complainants request that the Board assess damages and award costs of the action against the Respondents due to the intentional injury. The Complainants do not cite to any provision of the Act or caselaw that would allow for the recovery of requested costs. For this reason, we do not award the costs of this action or any damages against Respondent.

Remedy

Mr. Zak testified that the most effective remedy is to relocate the air conditioning unit. Mr. Zak testified that an acoustical blanket or structure would be cost-prohibitive and that relocating the air conditioner to the back of Respondents' house is feasible and not a unique solution to the problem. The record also indicates that the approximate cost of relocating the air conditioner would be $500.00. The Respondents, during the hearing, stated five times that they would be willing to relocate or alleviate by whatever means to abate the noise violations. (See Tr. at 10,

59, 60, 62 and 70.) Mr. Zak testified that, due to the current location, the noise emissions may be amplified. After careful consideration of the entire record in this case, the Board finds that the relocation of the air conditioning unit is the best solution to the problem. Therefore, the Board will order the Respondents to move the air conditioner unit to the back of the house.

CONCLUSION

According to Title VI: Section 24 of the Act, the Complainants have a right to the enjoyment of their lives and property. We also believe that the Respondents have an interest in cooling their house. However, upon reviewing the evidence presented we have determined that Respondents' actions caused an unreasonable interference with the use of Complainants' property not just some petty annoyance or minor discomfort. For the reasons stated above, we find that the Respondents violated Section 24 of the Act and the Board's regulations at 35 Ill. Adm. Code 900.102.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

For the foregoing reasons, the Board hereby orders the Respondents, Mr. and Mrs. Marraccini to undertake and perform the following actions:

1. The Board finds that the Respondents, Mr. and Mrs. Marraccini are in violation of Section 24 of the Environmental Protection Act and 35 Ill. Adm. Code 900.102.

2. Respondents shall cease and desist from violations of Section 24 of the Environmental Protection Act and 35 Ill. Adm. Code 900.102.

3. Respondents shall remove and relocate the air conditioning unit currently located at the side of the house to the back of the house. The relocation shall be completed no later than 60 days from the date of this order.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41) provides for the appeal of final Board orders within 35 days of the date of service of this order. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Board, hereby certify that the above opinion and order was adopted on the ________ day of ___________________, 1996, by a vote of _______.

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Dorothy M. Gunn, Clerk
Illinois Pollution Control Board