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ILLINOIS POLLUTION CONTROL BOARD

BONITA SAXBURY and RICHARD SAXBURY,	)	
Complainants,	)	
v.	)	**PCB 04-79**
	)	**(Citizens Enforcement-Noise)**
ARCHER DANIELS MIDLAND COMPANY, HULL, ILLINOIS DIVISION,	)	
Respondent.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board a Post-Hearing Brief of Archer Daniels Midland Company, a copy of which is herewith served upon you.

November 10, 2004

Archer Daniels Midland Company

BY: [signature]

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STATE OF ILLINOIS
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BONITA SAXBURY and RICHARD SAXBURY,	)	
Complainants,	)	PCB 04-79 (Citizens Enforcement – Noise)
v.	)	
ARCHER DANIELS MIDLAND, HULL, ILLINOIS DIVISION,	)	
Respondent.	)	

POST-HEARING BRIEF OF ARCHER DANIELS MIDLAND COMPANY

Bonita Saxbury is extremely bothered by the sound from fans used at the Archer Daniels Midland Company (ADM) elevator in Hull, Illinois. She is bothered to the extent that she feels she must leave her home to get away from it. That conclusion seems inescapable. She testified to that (R. 51), and she has spent a lot of time and effort trying to stop it. It is difficult to think of any reason she would have for doing that if it were not true. Unfortunately, it is just as hard for ADM to understand why the sound bothers her as much as it does, and why she feels that ADM is treating her as "a little bug that needed to be squashed." (Brief at p. 2).

The hearing in this matter and the Saxburys' brief are much less formal than in a typical Board proceeding, largely because, as the Saxbury's point out, while Bonnie is representing them, she is not an attorney and is not familiar with the Board proceedings and procedures. And that's fine. The Illinois Environmental Protection Act authorizes citizen suits and allows complainants to represent themselves so that they may be heard. Further, the Board has a long history of allowing considerable latitude to the participants in such proceedings. Given the case status, ADM believes a somewhat less formal response is appropriate on its behalf as well.

By way of background, ADM uses the Hull elevator for long-term grain storage (R. 63). Generally, wheat is brought in during the summer and soybeans in the fall (id.). To keep the grain "in condition" the temperature of the grain in the elevator must be kept close to the outside temperature (id.). When the temperature difference gets too large, the aeration fans are used to reduce that difference (id.).

The Saxburys moved into their residence across the street from the elevator in 1958 (R. 13) when Bonnie would have been about 16 years old. (See, R. 47). The elevator had

already been built by that time (R. 52). In the 1980s there were several other structures on the site, including a grain dryer that was sometimes run around the clock (R. 52). When the grain dryer was running, the sounds from the facility were much louder than they are now (id.). Bonnie was apparently living in Arizona at that time (R. 48), but Richard was still living there.

ADM purchased the Hull elevator in 1998 (R. 61). In that year, there were two portable top fans to draw off the moisture and three bottom fans (one fixed and two portable) used for aeration (R.61). Mrs. Saxbury's complaint in the fall of 2000 was the first time ADM received any complaint about noise from the elevator, and no one else has ever complained since that time, except for Richard Saxbury through the filing of the formal complaint in this matter (R. 62).

Contrary to Mrs. Saxbury's perception, ADM did not ignore the initial complaint. Appropriate ADM personnel visited the elevator, identified the fans as the most noticeable source of sound and decided on a policy of limiting fan usage to the hours of 8:00 a.m. to 5:00 p.m. as of October or November 2000 (R. 62). ADM also decided to modify the stationary fan which appeared to be the most significant source of sound. At a cost of approximately $100 in materials, ADM insulated the intake (R. 63). While the insulation helped some, ADM decided to remove that fan in 2002 which required modifications to the bin it served such that a quieter, portable fan could be hooked up to it as needed (R. 64-65).

ADM next built enclosures around the two portable bottom fans, insulated them and baffled the air intakes at a cost of approximately $650 plus labor (R. 65-66). In addition, ADM replaced the 3450 RPM motors in the top portable fans with 1750 RPM motors at a cost of $550 to $600 plus labor (id.). The modification of the top fans made the sound from those fans virtually unnoticeable at the road between the elevator and the Saxbury home (R. 66). Finally, ADM lengthened the air ducts to some of the bins so that it could limit the placement of the portable fan to either of two positions for serving the bins closest to the street at a cost of approximately $1,500 plus labor (R. 66-67). The two positions were selected on the basis of minimizing the amount of sound reaching the neighbors by using the bins as barriers (R. 67-68). In one of the positions (which she refers to as being behind the office), Mrs. Saxbury stated she could only hear it when it was being turned on or off (R. 49). In the other position the noise is reduced, but not as dramatically (R. 68). All of these actions were taken despite the fact that ADM did not believe the sounds from the elevator constituted a nuisance even before these improvements were made.

In summary, ADM has limited the hours of fan usage to normal weekday business hours. It has eliminated the fan which produced the most sound. It has virtually eliminated any sound from the top fans. It has greatly reduced the sound from the now-insulated and baffled portable fan in one of the positions in which it is currently used to the extent that Mrs. Saxbury can only hear it when it is turned on and off. When placed in the other position, the sound produced has been reduced through insulation and baffling and by its placement behind one of the bins (with respect to the Saxbury home).

Yet, none of this has satisfied Mrs. Saxbury. In fact, Bonnie finds this so unacceptable, she asks the Board to order the facility to cease operation and pay a one-time penalty of $50,000 plus $10,000 per day retroactive to the year 2000, thereby resulting in a total penalty of between $14 and $18 million dollars (depending on when in 2000 the penalty would be retroactive to). That would, of course, be by far the largest penalty ever imposed by the Board.

In making a determination of whether a noise nuisance exists, the Board proceeds with a two-step analysis. First, it determines whether the sound interferes with the enjoyment of life or any lawful business or activity. Zivoli v. Prospect Drive & Sport Shop, Ltd. (March 14, 1991), PCB 89-205, slip op. at 9. If the Board concludes that there is an interference, it next looks to whether the interference is unreasonable based on the factors set forth in Section 33(c) of the Act (415 ILCS 5/33(c)(1998)). Scarpino v. Henry Pratt Co. (April 3, 1997), PCB 96-110, slip op. at 15.

The only persons alleging any interference in their lives due to sounds from the elevator are the Saxbury's, and it is probably fair to infer that the only person truly feeling that way is Bonita Saxbury. Richard joined in the filing of the complaint, and at hearing he was certainly supportive of his sister. However, except for having signed the Complaint, he has never complained to ADM about the sounds from the elevator. There is no indication in the record that he ever left the house due to the noise except with his sister. Further, he does not hear very well and wears a hearing aid (R.13 and 18).

The sounds from the fan do bother Bonnie greatly and have affected her life, but there is a real question whether their impact on her bears any significant relationship to the sound volume. She does not, for example, appear to believe that the fans can only be on or off due to the sound varying from "fairly low" to "unbearable" despite the clear testimony that there are no other controls on the fans (Brief at p. 1 and R. 36). There is even reason to believe that on Christmas Eve of 2003 she may have found the sounds from the fan unbearable when the fan was not even running (Brief at p. 1 and R. 38 and 81-82).

Bonnie stated that "when you hear the noise, it makes you – after a while it goes on so long, it makes you very nervous… if you listen to it long enough, you might just really go over the edge" (R. 47). That may help explain how she could say that the actions ADM has taken have not reduced the sound levels immediately before acknowledging that now the top fans are "not the problem" and that when the portable fan is behind the office, "it doesn't bother" her (R. 49).

Sound does not rise to the level of interference if it is merely a source of aggravation. Kochanski v. Hinsdale Golf Club (July 13, 1989), PCB 88-16, slip op. at 14. The initial question for the Board to answer, therefore, is whether Mrs. Saxbury's reaction to the elevator sounds is due to an "aggravation" that has gotten out of hand, or whether the sound truly constitutes an interference. However, even if the Board should conclude that there is an interference with the enjoyment of life, based on the facts of this case, the

Board must conclude that such interference is not unreasonable based on an analysis of the Section 33(c) factors.

First, the character and degree of injury is minor. The fans are rarely used outside of the hours of 8:00 a.m. to 5:00 p.m. on weekdays. During much of the year, the fans are used little, if at all, since they are not needed. Significant usage of the fans is generally limited to July through November, and the amount of usage is generally a couple of days a week in the summer and early fall months and increases to as much as 4 or 5 days a week as winter arrives (R.76-77). Further, on the days they are operated, the fans are often not used during the entire working day (id.).

ADM also notes that only the Saxburys have complained of any interference with their enjoyment of life, despite the fact that four other homes are about as close as or closer to the facility than the Saxburys (R. 70), and the residents of each of those homes have filed public comments with the Board stating they are not bothered by the sounds from the elevator. (See, Public Comments 1-4 filed with the Board on November 1, 2004.) Those public comments include both letters and affidavits stating that the sounds from the elevator have never bothered them.

As the Board stated in Sweda v. Outboard Marine Corporation and the City of Waukegan (August 5, 1999), PCB 99-38, slip op. at p. 12:

> The fact that not everyone in the vicinity of a noise source is bothered by that noise will not *ipso facto* prevent a finding of noise pollution. (Citation omitted.) There comes a point, however, at which the evidence establishes that, whatever the complainant's subjective experience, there is no unreasonable interference when the noise source is viewed objectively. We conclude that this point has been reached in this case. Because the evidence indicates that most people in the affected area are not significantly bothered by the ... noise, the Board concludes that this factor supports a finding that the interference experienced is not unreasonable.

The Board should reach the same conclusion here where the Saxburys are the *only* ones complaining.

Second, both parties agree the elevator has significant social and economic value, and that the fans are a necessary part of the elevator's operation (R. 75). The elevator employs one full-time employee and two or three temporary employees from the town of 250 people (R. 70-71). It pays property taxes of approximately $20,000 per year and serves the farmers within a 20 to 25 mile radius (R. 71). It brings business to the local service station and restaurant, and it supplies 750,000 to one million bushels of grain to the ADM processing system annually (id.). The Colgroves stated that the elevator is "an asset to the livelihood of our town and the surrounding community" (PC4). Ms. Cox stated that the elevators presence "is not only approved by the vast majority of the residents, but very much appreciated" (PC3). Thus, this factor also supports a finding that any interference experienced is not unreasonable.

Third, the elevator is suitable to the area in which it is located and has priority of location. It was built in the early 1950s on a no longer existing rail spur on the southwest side of town in an agricultural area of Illinois (R.61). The Saxburys moved into their current residence in 1958, and as far as Bonnie can recall, the elevator was always there (R. 13 and 52). While there is some conflicting testimony regarding how the intensity of the sound from the facility may have varied over the years, based on the nature of the operations and equipment at the facility, it is reasonable to conclude, as Mr. Dimmit testified, that the sounds were much louder in the 1980s than they are now (R. 60). The Colgroves, Wards, Ms. Cox and Mr. Gill all stated that the sounds from the elevator now are either less noticeable or no more noticeable than when the moved in (see PC 1-4). Certainly, there is no evidence that anyone other than the Saxburys believes the elevator is unsuitably located.

The Board should also conclude, again despite some contrary testimony from the Saxburys, that the efforts ADM has made to minimize the sound from the facility have been effective, and that the present impact of the sound is much less than it was when Bonnie first complained to ADM. Even Richard testified that he "would trade this noise, the present noise, for the one we did have" before Bonnie's initial complaint (R. at 8 and 18). The Board should conclude that this factor also supports a finding that any interference is not unreasonable.

Fourth, it is not economically reasonable to reduce the sound emission further. There is no evidence in the record of any means of doing so. On the contrary, neither Mrs. Saxbury nor Mr. Dimmitt is aware of any such means (R. 52 and 70). The sound the Saxburys hear is not from the fan itself, but rather results from the movement of air through ducting from the fans to and through the bins (R. 78). The ducting must go to each of the bins on the elevator property which would make it very difficult and expensive to attempt to block while being able to move freely around the property. Again, the Board should conclude that this factor supports a finding that any interference is not unreasonable.

The fifth factor under Section 33(c) is subsequent compliance. However, since ADM believes that the elevator has always been in compliance during ADM's ownership, ADM will instead discuss its improved compliance. ADM has set forth, above, the various actions it has taken since Mrs. Saxbury first complained about the noise from the elevator. ADM has spent at least $2,800 in materials for these improvements. While the labor was performed by ADM such that it cannot attribute specific labor costs, a reasonable rule-of-thumb is that labor costs double overall project costs. Therefore, ADM has actually spent approximately $5,600 and placed self-imposed restrictions on its operating hours to reduce the impact of the sound on its neighbors despite the fact that it believes the facility has always been in compliance. It undertook these actions simply because the sound bothered Mrs. Saxbury. Based on the actions ADM has taken to reduce the sound levels, the Board should conclude that this factor supports a finding that any interference is not unreasonable.

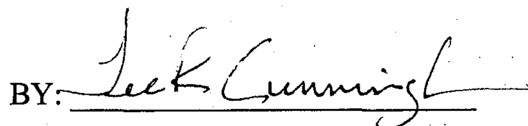
The Saxburys believe that ADM's efforts to reduce the sound levels prove a noise nuisance. The Saxburys ask: "If there was truly no problem, why would you [ADM] spend money to fix something that doesn't exist?" (Brief at p. 1). Bonnie refuses to believe it could be an attempt to be a good neighbor because "ADM is… trying to make money" (R. 50). Well, ADM is trying to make money, but ADM has found that being a good neighbor helps it make money because there is more value to spending money on improvements to its facilities than there is on spending money to fight its neighbors. In this case, unfortunately, despite all of ADM's efforts, Bonnie believes that the sounds from the elevator are "just as loud and obnoxious" as before the improvements were made (Brief at P. 1), leaving ADM no option other than proceeding to a Board decision.

It is now nearing the time for the Board to render its decision. ADM believes the Board could, on the basis of this record, find that there is no interference. Even if it does not, however, the Board should find that any interference was reasonable since each of the Section 33(c) factors supports such a finding.

However, ADM notes that a joint motion for a site visit remains pending before the Board. By Order dated October 7, 2004, the Board reserved ruling on that motion "until after the record has been fully developed at hearing." That has now occurred, and ADM renews its request due to its concern that if the Board were to find that no nuisance exists on the basis of the present record, the Saxburys may well feel that the result was due to their inability to retain a lawyer and a noise consultant to present their case fully rather than the fact that no nuisance actually exists. If, however, the Board were to visit the site, the Saxburys would know that there case had been heard.

WHEREFORE, Archer Daniels Midland Company respectfully renews its request for a site visit and further requests that the Board find that no noise pollution violation has occurred.

Archer Daniels Midland Company

BY: 

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Respondent.	)	

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Post-Hearing Brief of Archer Daniels Midland Company, by United States Mail, upon the following persons:

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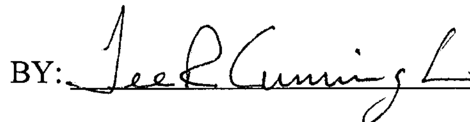
November 10, 2004

Archer Daniels Midland Company

BY: 

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