

ILLINOIS POLLUTION CONTROL BOARD  
January 21, 2016

DAVID C. MILLER, MARK G. MILLER, )  
LISA E. MILLER, MICHELLE A. PAGE, )  
ANTHONY L. PAGE, RICHARD A. )  
KINTER, STACY L. KINTER, WALTER G. )  
FLESER, AND TAMMY JOHNSON, )  
)  
Complainants, )  
)  
v. ) PCB 16-55  
) (Citizens Enforcement - Noise)  
SUGAR CAMP ENERGY, LLC )  
)  
Respondent. )

ORDER OF THE BOARD (by C.K. Zalewski):

On October 6, 2015, David C. Miller, Mark G. Miller, Lisa E. Miller, Michelle A. Page, Anthony L. Page, Richard A. Kinter, Stacy L. Kinter, Walter G. Fleser, and Tammy Johnson (complainants) filed a complaint (Comp.) against Sugar Camp Energy, LLC (respondent). The complaint alleges that respondent violated numeric noise provisions of the Board’s noise rules at 35 Ill. Adm. Code 901.102. The complaint concerns noise allegedly emitted from respondent’s bleeder shaft fan at respondent’s coal mine facility located in Macedonia, Hamilton County.

On November 24, 2015, respondent filed an answer (Ans.) to the complaint with the Board stating “Respondent hereby specifically denies all allegations of violations and/or unreasonable noise pollution.” Ans. at 1. For the reasons below, the Board accepts the complaint for hearing.

**COMPLAINT**

The complaint alleges that respondent violated Sections 901.102 of the Board’s noise regulations (35 Ill. Adm. Code 901.102) with “noise emitting from a bleeder shaft fan.” Comp. at 4. The complaint alleges that “[t]he noise . . . is constant 24 hours a day and has occurred since November 2012 except for a few minor shutdowns for repairs.” *Id.* The complaint further alleges that the noise is “highly annoying and negatively affects activities outside the house. . . . The enjoyment of life and property in this environment is degraded immensely and it wears on the residents’ sleep and mental state.” *Id.* No specific, numeric sound level is alleged in the complaint.

The complaint requests that the Board issue an order “requiring the respondent to put a 90 degree bell housing on the end of the fan blower shaft to redirect the noise up into the air instead of directly at the Miller house.” Comp. at 5. Complainants also seek the peace and tranquility of the countryside restored to pre-bleeder fan quality. *Id.*

## **STATUTORY AND REGULATORY PROVISIONS**

Under the Environmental Protection Act (Act), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2014); 35 Ill. Adm. Code 103. Section 31(d)(1) of the Act provides that "unless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2014). Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b).

Section 901.102 of the Board's noise regulations establishes standards and limitations for sound emitted to specified land. 35 Ill. Adm. Code 901.102.

Section 910.105 of the Board's noise regulations establishes measurement techniques for the enforcement of standards in Part 901 and addresses matters including site selection, setting up instrumentation, operation of the measurement site, and instrument calibration. 35 Ill. Adm. Code 910.105.

## **DUPLICATIVE/FRIVOLOUS DETERMINATION**

Absent a motion by respondent alleging that the complaint is duplicative or frivolous as is the case here, the Board must still determine that the complaint is not duplicative or frivolous before accepting the complaint for hearing. 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. There is no evidence now before the Board that a complaint alleging a noise violation caused by the bleeder shaft fan at the respondent's coal mine is being adjudicated before the Board or in another forum. The Board finds that this complaint is not duplicative.

Next, the Board turns to whether the complaint is frivolous. As noted above, 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 Board finds that the complaint's alleged violation of numeric noise standards is a cause of action upon which the Board can grant relief. Regarding relief, Section 33(b) of the Act provides that the Board's final order may include an order to cease and desist from violations of the Act and regulations. 415 ILCS 33(b) (2014). In addition, the Board after finding a violation can order respondent to develop and implement a noise abatement plan. Anne McDonagh and David Fishbaum v. Richard and Amy Michelin, PCB 08-76, slip op. at 4 (July 10, 2008), citing Michael R. Pawlowski and Diane K. Pawlowski v. David Johansen and Troy Quinley, individually and d/b/a Benchwarmers Pub, Inc., PCB 99-82 (Apr. 4, 2000 and Sept. 21, 2000). Complainants' request that the Board order specific equipment installed by respondent to reduce the noise emitted from the bleeder shaft fan may be considered under Sections 33 of the Act as the case proceeds. Therefore, the Board finds that the complaint is not frivolous and accepts it for hearing.

## CONCLUSION

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty. The Board notes that it "has held that with alleged violations of a *numeric* noise standard, sound measurements of the alleged property-line-noise-source are required and must be taken with 'strict adherence to applicable measurement procedures.'" Kasella v. TNT Logistics N. Am., PCB 06-1, slip op. at 2 (Sept. 1, 2005) (emphasis in original), citing Charter Hall Homeowner's Ass'n. and Jeff Cohen v. Overland Transp. Sys. and D.P. Cartage, PCB 98-81, slip op. at 19 (Oct. 1, 1998); *see also* 35 Ill. Adm. Code 900.103(b), 910.105. It is the complainant in an enforcement action who has the burden of proof. 415 ILCS 5/31(e) (2014). "It is therefore the complainant, or more typically its noise consultant, who must accurately measure sound emissions in a case of alleged numeric noise violations." Kasella, slip op. at 3.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2014). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2014). Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id.* Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id.*

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any, and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if

any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 21, 2016, by a vote of 5-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

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John T. Therriault, Clerk  
Illinois Pollution Control Board