ILLINOIS POLLUTION CONTROL BOARD
March 7, 2002

DAVID and JACQUELYN MCDONOUGH,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 00-163
	)	(Citizens Enforcement – Noise)
GARY ROBKE,	)	
	)	
Respondent.	)	

DAVID AND JACQUELYN MCDONOUGH APPEARED ON THEIR OWN BEHALF; and

STEPHEN R. WIGGINGTON OF WEILMUENSTER & WIGGINGTON, P.C. APPEARED ON BEHALF OF GARY ROBKE.

INTERIM OPINION AND ORDER OF THE BOARD (by S.T. Lawton, Jr.):

On March 27, 2000, complainants David and Jacquelyn McDonough filed a complaint against respondent Gary Robke over noise caused by a 24-hour self-service car wash in Mascoutah, St. Clair County. Complainants state that noise generated by the car wash equipment, patrons, and their vehicles unreasonably interferes with complainants' enjoyment of life and property. Complainants allege that this activity violates noise nuisance provisions under Section 24 of the Environmental Protection Act (Act) (415 ILCS 5/24 (2000)) and Section 900.102(a) of the Board regulations (35 Ill. Adm. Code 900.102(a)).[1]

In this interim opinion, the Board finds that Robke violated these noise nuisance provisions for the reasons expressed below. However, the Board requires more information prior to determining an appropriate remedy. The Board accordingly orders Robke to consult with a noise expert and provide options to reduce the noise pollution from the car wash as well as an analysis of the effectiveness of each option.

PROCEDURAL HISTORY

1 Complainant alleges that respondent also violated Section 23 of the Act (415 ILCS 5/23 (2000)) and Sections 11-505, 12-601, 602, and 611 of the Illinois Vehicle Code (625 ILCS 5/11-505, 12-601, 602, 611 (2000)). The Board cannot find a violation of Section 23 of the Act (415 ILCS 5/23 (2000)) because this section only contains a legislative objective as opposed to prohibitions on activity. *See* 415 ILCS 5/23 (1998); Walsh v. Koplas, PCB 00-35, slip op. at 2 (Sept. 23, 1999). The Board also declines to consider potential violations of the Illinois Vehicle Code because these allegations are outside of the scope of the Act and Board regulations, as specified in Section 5 of the Act (415 ILCS 5/5 (2000)).

Complainants filed their complaint with the Board on March 27, 2000. Respondent filed an answer to the complaint on December 4, 2000. The Board held a hearing in this matter on November 13, 2001 before hearing officer Steven Langhoff. Complainants filed their post-hearing brief on December 11, 2001. Respondent filed his post-hearing brief, which included a motion to exclude undisclosed opinion testimony, on January 11, 2002. Complainants did not file a response to respondent's motion.

PRELIMINARY MATTERS

Respondent included a motion to exclude undisclosed opinion testimony in his January 11, 2002 brief. The motion contains two arguments. First, respondent argues that the Board should strike undisclosed opinion testimony by Greg Zak. Resp. Br. at 3-6. Second, respondent states that the Board should strike undisclosed opinions of the complainants because Supreme Court Rule 213 requires the disclosure of all opinion testimony regardless of the source. Resp. Br. at 6. The Board will discuss each argument in turn.

Admission of Opinion Testimony by Greg Zak

Robke's Contentions

Respondent alleges that it served Supreme Court Rule 213(g) interrogatories and a first request for production of documents on October 11, 2000. Respondent states that complainants filed a response to the interrogatories on February 12, 2001, identifying Greg Zak as their only opinion witness. Complainants' response to the interrogatories stated that the subject matter of Zak's expected testimony involved the quantitative characteristics of noise resulting from car wash operations and patron activities. Resp. Br. at 3. His opinion was to be based on noise decibel measurements and videotapes. *Id.* Respondent contends that complainants then elicited testimony from Zak at hearing that was not disclosed to respondent in response to its 213(g) interrogatories.

Respondent alleges that Zak gave undisclosed opinion testimony on the following issues:

1. [T]he noise levels testified to during the hearing (emphasis in original) by Mr. McDonough would unreasonably interfere with activities such as falling asleep with the windows closed [sic], relaxing in the yard, or reading on the porch. Tr. at 53, 54.

2. [W]ithin a reasonable degree of scientific certainty he believed the noise could be eliminated or reduced by building a barrier. Tr. at 55-56.

3. [A] noise barrier of approximately 150' in length running parallel with the McDonough property with an additional 75' wing running along another boundary constructed at least 12' high of ½ " thick plywood would be necessary to block the noise. Tr. at 57-58.

4. [T]he estimated cost of constructing the barrier would be $12,000 - $15,000. Tr. at 59.

5. [T]he car wash should be closed from 10:00 p.m. to 7:00 a.m. because exhaust noise is typically in the 125-hertz octave band. In his opinion that particular octave band does not lend itself to work well with barriers because it is a low frequency band. Tr. at 59.

6. [T]he facility should have an electronic timer cutting the power off at 10:00 p.m. and simultaneously turning a light on a small sign saying that the facility is closed and that the owner should install a no trespassing sign along with appropriate language regarding the owners' willingness to prosecute people who do trespass. Tr. at 60.

Respondent stated that most of Zak's undisclosed opinions resulted from a site inspection on the morning of the hearing. Resp. Mot. at 3. Respondent specifically points to testimony concerning the calibration, accuracy, and usefulness of the digital sound level meter used by complainants in this matter.

Respondent alleges that it objected to all of the above testimony by Zak on the grounds that it was undisclosed opinion testimony. The hearing officer granted a continuing objection to all of Zak's undisclosed opinion testimony. Tr. at 55, 56, 63. Respondent states that Mr. McDonough admitted that he did not previously disclose Zak's opinions to the respondent, and that Zak admitted that he was not familiar with opinions disclosed pursuant to Supreme Court Rule 213 by McDonough. Resp. Mot. at 4.

Respondent also filed a motion *in limine* at the beginning of the hearing to bar any admission, reference to, or evidence, which in part requests:

1. To prohibit the complainant from attempting to admit any statements, photographs, drawings, videos, documents, or other tangible objects or items heretofore requested of the complainant which have not heretofore been produced by the complainant other than used as demonstrative materials or aides [sic].

2. To preclude any reference, evidence or argument regarding any numerical measurement testing of sound which may have been conducted by any consultant or retained opinion witnesses which has not been produced by complainant.

The hearing officer granted these two counts of the motion *in limine*, and struck any testimony at hearing that fell under the above two categories. Tr. at 2.

In summary, respondent argues that the undisclosed opinion testimony constituted a surprise and severely prejudiced respondent in his defense of this case. Resp. Mot. at 6. Respondent states that the Board has previously barred Zak's opinion testimony under

similar circumstances because it deprived the respondent the opportunity to fully prepare its case. Sweda v. Outboard Marine Corp., PCB 99-38, slip op. at 3 (Aug. 5, 1999).

Board Determination

The Board procedural rules concerning discovery state that "the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent." 35 Ill. Adm. Code 101.616, citing 35 Ill. Adm. Code 101.100(b). The Board regulations do not specify requirements for written interrogatories.

"Supreme Court Rule 213 requires that, upon written interrogatory, a party must disclose the subject matter, conclusions, opinions, qualifications, and all reports of a witness who will offer any opinion testimony." McGrew v. Pearlman, 304 Ill. App. 3d 697, 705, 710 N.E.2d 125, 130 (1st Dist. 1999).

Rule 213(g) specifically covers opinion witnesses, providing that:

> An opinion witness is a person who will offer any opinion testimony. Upon written interrogatory, the party must state:
>
> (i) the subject matter on which the opinion witness is expected to testify;
>
> (ii) the conclusions and opinions of the opinion witness and bases therefor; and
>
> (iii) the qualifications of the opinion witness; and provide all reports of the opinion witness. 134 Ill.2d R. 213(g).

Additionally, Supreme Court Rule 213(i) provides that "[a] party has a duty to seasonably supplement or amend a prior answer or response whenever new or additional information subsequently becomes known to that party." 134 Ill.2d R. 213(i).

The Board has not incorporated the substance of Rule 213(g) into its procedural rules. However, it will continue to be guided by the principle of preventing injustice to the parties as a result of unfair surprise. *See* 134 Ill.2d R. 213(g), Committee Comments. The Board will not, however, strike otherwise admissible testimony due to failure to precisely meet technical requirements of Supreme Court Rules. For the reasons explained below, the Board, upon complete review of the record, grants the motion concerning expert testimony in part, but denies it in part.

The Board finds that testimony concerning Zak's opinions that were based upon a site inspection on the morning of the hearing were properly stricken from the record. However, the Board finds that the respondent had ample warning about the substance of Zak's opinion on available remedies. Mr. McDonough stated in his closing argument and in his post-hearing brief that counsel for respondent was present at a telephone conference with Zak prior to hearing when

options such as the proposed sound barrier and electrical shut-offs were discussed. Tr. at 96; Comp. Br. at 6-7. Respondent neither objected to his comment nor rebutted his statement.

The occurrence of this conversation would preclude any argument that the respondent would be surprised by these opinions, and did not have the chance to evaluate Zak's suggestions prior to hearing. The record also includes testimony by Robke that he approached the City to determine the maximum height of a fence that he could build to help reduce noise. Tr. at 84, 90. When asked whether Robke investigated the possibility of building a fence as a barrier between the two properties, Robke testified that Trost Plastics offered to build either a plastic or wood fence along the length of the property line, as Zak had previously stated earlier. However, Robke stated that the City code limited the height of the fence to 6 feet tall. Tr. at 84.

Although the opinions by Zak concerning remedies were disclosed orally instead of in writing, the Board finds that complainants' and Zak had provided them to the respondent prior to hearing. The Board finds that the hearing officer properly excluded this specific line of testimony in light of the fact that the *pro se* complainants did not provide responsive information at the time that the respondent made the objection to Zak's testimony. However, the Board has reviewed the record in its totality, and finds that the substance of Zak's testimony specifically concerning remedies, as previously discussed with counsel for the respondent, should not be stricken. The Board accordingly finds that Zak's testimony solely concerning possible remedies will remain a part of the record.[2]

Admission of Opinion Testimony by Mr. and Mrs. McDonough

Robke's Contentions

Respondent also argues that the Board should strike undisclosed opinion testimony by Mr. and Mrs. McDonough in accordance with Supreme Court Rule 213(g). Respondent alleges that "[c]ontrary to the requirements of Supreme Court Rule 213(g) complainants did not disclose any opinions they had personally relating to the operations of the car wash or the noise associated with the car wash." Resp. Mot. at 3. Respondents state that Supreme Court Rule 213 requires the disclosure of all opinion testimony regardless of the source. Resp. Mot. at 6.

Board Determination

The complainants did not directly respond to respondent's motion. However, the Board finds that they previously disclosed the information at issue concerning their opinions to respondents as supplemental discovery in accordance with Supreme Court Rule 213(i). The complainants filed this February 12, 2001 letter to respondent as exhibit C9 at hearing, and respondents did not object to its submission. Complainants stated at the outset of the letter that

[2] The Board notes that it does not consider testimony concerning undisclosed cases, which discuss particular remedies to be included in this category. *See* Tr. at 57. Although these documents are public knowledge, they are referred to as part of the foundation for Zak's opinion concerning the appropriate remedy in this matter. Tr. at 56.

they filed the facts and opinions contained therein as additional discovery regarding this noise case. Exh. C9 at 1.[3] The complainants specifically provide details covering the layout and zoning of the surrounding area, where and when they spend time in their home and on their lot, the proximity of their property to the respondent's car wash, a description of the car wash equipment and associated noises, as well as other relevant information that they testified to at hearing. Exh. C9 at 1-4.

The complainants' statements include the opinions that they find the noise to be unacceptable, highly disturbing, annoying, highly stressful, excessive, and an interference with their enjoyment of life. Exh. C9 at 3-4. The complainants also give their opinion as to acceptable remedies to the problem, including: the installation of a high sound barrier, mufflers on the vacuums, and sound baffles on the wash bays; disabling the beeping device on equipment; closing operations from 10:00 p.m. to 8:00 a.m.; and hiring an attendant to monitor activity and noise levels on the site. Exh. C9 at 4.

The complainants filed their supplemental discovery on the same date that they provided their answers to respondent's interrogatories. Both pleadings were provided to the respondent prior to the March 31, 2001 discovery deadline, as proposed in the August 28, 2000 hearing officer order. The Board accordingly denies respondent's motion to strike the complainant's opinion testimony on the grounds that it was disclosed to the respondent prior to hearing.

FINDINGS OF FACTS

At hearing, complainants presented testimony of three witnesses. Mr. McDonough testified about late-night disturbances, while Mrs. McDonough testified about weekday events. Zak testified in relevant part about potential noise abatement remedies. Robke testified on his own behalf, and did not call any other witnesses. The only disputed issue in the facts is whether the sound originates from the car wash or from Route 4, which is adjacent to the complainants' home. The Board finds that the complainants sufficiently proved that the sound at issue emanates from respondent's car wash, as expressed below.

In 1992, complainants purchased their home at 751 North Jefferson in Mascoutah, Illinois. Tr. at 35. Mr. McDonough testified that when he bought the property, the seller had reserved the remainder of the three-acre tract for residential development. Tr. at 35. The complainants' home was bordered by farmland on three sides and Route 4 to the west until 1998. The complainants live four miles from Mid America Airport and six miles from Scott Air Force Base. Complainants work outside the house from 8:00 a.m. to 6:00 p.m. on weekdays. Tr. at 35. They previously spent a considerable amount of their spare time tending a vegetable garden and tree farm on their property. Tr. at 19; Exh. C9 at 1.

In 1997, Mr. McDonough learned that the entire tract surrounding his home was to be turned into a predominately commercial development as a part of a tax increment financing district. Tr. at 36. The plan largely consisted of retail development, but also included apartments

[3] Petitioners filed supplemental discovery with the Board on February 12, 2001, which is referred to as "Exh. C9 at ___."

and a retirement facility. Tr. at 36. Although complainants' property remained in a residential zone, the zoning surrounding their property changed from agricultural to B2 commercial. Tr. at 40. In 1998, St. Elizabeth's hospital built a medical clinic on the south side of the complainants' property that operates from 9:00 a.m. to 5:00 p.m. on weekdays. Tr. at 38, 71. Soonafter, McDonald's opened a restaurant to the south of the medical clinic. Tr. at 39, 71. Mr. McDonough testified that he has no problems with noise from Route 4, the medical clinic or the nearby McDonald's.

The Mascoutah Car Wash

Robke established the Mascoutah car wash on the complainants' northern border in 1998. Tr. at 70. Robke testified that the property was zoned B2 commercial when he purchased it for the car wash. *Id.* He alleged that the car wash fit that zoning classification, and that the City granted him a permit to build the car wash at that location. *Id.* Robke testified that he built the carwash in response to requests by Mascoutah residents for a car wash in their area. Tr. at 69.

Mascoutah Car Wash operates 24-hours a day, 7 days a week. Tr. at 73, 91. It consists of four wash bays equipped with hand-held high-pressure spray wands and one automatic wash bay with a high-pressure washer. Tr. at 21. The car wash also has three vacuum stations with a total of six vacuums that are currently equipped with the quietest motors that the vacuum company manufactures. Tr. at 21, 80. Robke constructed the car wash of eight-inch split-faced block, with a garage door on one side of the facility. Tr. at 74-75. Robke testified that he could not install doors on the second side of the bays because of the risk of asphyxiation from car fumes when both doors are closed. Tr. at 75. According to the complainants, the car wash maximum capacity observed on numerous occasions is approximately 18 vehicles. Exh. C9 at 2.

Robke testified that he was attracted to his present location because of the traffic flow off of Route 4 and Interestate 64. Tr. at 69, 70. Robke testified that Route 4 was modified a few years prior to the hearing in this matter. Tr. at 42, 43. Mr. McDonough testified that Route 4 has always been a major route. Since it was rerouted, it has a bit more traffic during peak hours. Tr. at 43. Robke testified that, according to the Illinois Department of Transportation, the 1999 average daily traffic count for Route 4 was 6,800 cars per day. Tr. at 79; Exh. R3.

Robke stated that he contributes to Mascoutah by providing a requested service as well as by paying taxes to the City of Mascoutah and the State of Illinois. Tr. at 69, 86. Robke testified that he pays sales tax on the vending machines and real estate tax for the car wash property. Tr. at 86. Robke also alleged that he paid the City on average $800 a month for water and sewer services, and $400 a month for electric services provided by the City. Tr. at 86.

Car Wash Proximity to Complainants' Home

The car wash is constructed on a large concrete pad. The south edge of the pad is approximately 50 feet from the property line and 95 feet from complainants' house. Tr. at 20, Exh C9 at 3. The maximum distance from any point on the pad to complainants' home is 250 feet. Tr. at 21. The front porch and windows to the complainants' master bedroom on the north wall of their home face the car wash. Tr. at 21; Exh. C9 at 1, 3. Complainants built a 7-foot

berm at their own expense in November 1998 to block the view and dampen the noise from the car wash. Tr. at 21; Exh. C9 at 1. However, Mr. McDonough testified that the berm did not have the effect that they had hoped. Tr. at 21.

Description of Noise

Since Robke built the car wash in 1998, Mr. McDonough testified that he experienced problems with noise from the wash equipment, patrons, and the patrons' vehicles. Tr. at 13. Complainants testified that the equipment generates several kinds of noise. The coin-operated car wash bays and vacuums both generate high-pitched beeps. Tr. at 22; Exh. C9 at 2. Specifically, the vacuum units beep every time a patron inserts a coin into the 75-cent machine. The vacuums run for three minutes, and then beep ten times. Tr. at 23. The car wash bays are also equipped with warning beepers. Exh. C9 at 2. The vacuums, themselves, create a drone and hiss during their four minutes of operation. Tr. at 22. The car wash bays, and in particular, the automatic bay, produce noise that complainants allege is problematic when they are in their yard. Tr. at 22. Complainants alleged that all vacuum and wash bay noise occurs approximately 100 to 200 feet from their bedroom window and porch. Exh. C9 at 2. Finally, the complainants allege that the garbage pickup causes a lot of noise when the dumpster slams shut at very early hours. Tr. at 26.

Mr. McDonough testified that the vehicles at the car wash generate the most prevalent noise. Tr. at 22. Mr. McDonough alleged that vehicles, including motorcycles, off-road two and four wheelers, high performance vehicles and trucks, utilize the car wash facility. Tr. at 23. He stated that the most frequent noise emanates from loud engines and mufflers. Tr. at 22-25. Patrons also play radios at very loud levels, screech their tires when entering or maneuvering around the car wash, and honk their horns while washing their vehicles. Tr. at 23. Mr. McDonough testified that patrons further cause noise by slamming their trunks and car doors. Tr. at 26. Mr. McDonough stated that, while these noises are slightly less frequent, they were still quite prevalent. *Id.*

Complainants also said that the car wash patrons, themselves, produce noise while at the car wash. Tr. at 13. Complainants stated that they hear loud voices yelling late at night. Tr. at 26; *see* Exh. C5 at 6, 7, 9. Complainants documented on Monday, December 6, 1999, that they heard "men yelling like coyotes" after 10:00 at night, and that on Monday, July 31, 2000, they heard people yelling and girls screaming at 11:00 p.m. Exh. C5 at 17, 19. Complainants also documented people yelling, honking their horns, racing engines, and creating other types of noise from 10:30 p.m. to 12:00 a.m. on Wednesday, September 8, 1999. Exh. C5 at 6. On that instance, the complainants alleged that they called the police for assistance. Tr. at 25; Exh. C5 at 6.

Complainants created a log of noises from the car wash from August 23, 1999 to December 22, 1999, and again from July 30, 2000 through September 28, 2000. Tr. at 24. Mr. McDonough testified that the complainants kept the log to show the frequency and types of noises that occur at the car wash. Tr. at 24. Mr. McDonough stated that they kept the log in their bedroom next to the bed, and wrote down disturbances after they had gone to bed for the evening and before they woke up for work. Tr. at 24. Specifically, they would log noise that

occurred on weeknights between 10:00 p.m. and 6:00 a.m. Tr. at 26. The complainants alleged the windows were closed when they logged the occurrences. Tr. at 24. The complainants estimated that the total number of late-night or early morning noise disturbances from the car wash amounts to 128 instances between August 23, 1999 and December 23, 1999. *See* Exh. C5, C6. The log corroborates the frequency and types of noise testified to by the complainants.

Credibility of Numeric Noise Measurements

Mr. McDonough testified that he took numeric noise measurements with a Radio Shack sound level meter between December 12, 2000, and the November 27, 2001 hearing. Mr. McDonough described at hearing the process that he used to measure sound from the car wash:

> In terms of the process of using this meter to gain reliable measurements, Mr. Zak indicated that the meter should be held flat in the hand with the microphone pointed in the direction of the noise source, and then the dial turned to the appropriate noise level that was coming from the emitter. Also, he indicated that the weighting should be set to either A-weighting or C-weighting with a fast response. The other point was that the meter had to be held a minimum of 25 feet from the common property boundary. Tr. at 28-29.

Mr. McDonough alleged that he "performed the steps as Mr. Zak had instructed on numerous occasions." Tr. at 30. He testified that he took all measurements from behind the bedroom window with the window open, and that the distance from the common property line was approximately 45 feet. Tr. at 30. Mr. McDonough stated that the measurements show that the noise from the car wash is "always unreasonable and often illegal." Tr. at 31. The respondent contends that the Board should bar the sound measurements taken by complainants because there is "no indication as to what particular day any of [the] noise measurements were taken on, what the weather conditions were, and whether the instrument was properly calibrated on that particular day." Tr. at 31.

Interference

Mr. McDonough testified that, "since the car wash was built and opened for business in early fall of 1998, the noise levels from car wash equipment, patrons' vehicles, and the patrons themselves, have created a noise environment around our home that is unreasonable, illegal, and totally unacceptable to us." Tr. at 13. Mr. McDonough alleged that the noise unreasonably interfered with complainants' daily activities, including relaxing or working in their yard, opening their windows, and sleeping. Tr. at 13.

Mr. McDonough stated that "[t]he problems with the noise are whenever we are faced with it." Tr. at 41. However, Mr. McDonough testified that the most disturbing and stressful noise is that which "either wakes you up while you are sleeping or prevents you from falling asleep while you are drifting off." Tr. at 19, 27, 41. Mr. McDonough alleged that they were either awakened from sleep or disturbed while falling asleep between 11:15 p.m. and 6:00 a.m. on weekdays on 19 individual dates within a four-month period. Tr. at 27-28; s*ee* Exh. C5, C7. He testified that weekends had heavier traffic than weekdays. Tr. at 24. Mr. McDonough stated

that their bedroom windows were closed when documenting these instances. He testified that they could no longer sleep with their windows open. Tr. at 24. Mr. McDonough alleged that "two days in a row was the maximum of the Monday through Friday period that we were not disturbed by one noise or another over that . . . period." Tr. at 25; Exh. C5, C6.

Mr. McDonough testified that the "vehicles with horns and squealing tires and loud radios are certainly the most intense noise emitters." Tr. at 43-44. He stated that the car wash equipment, itself, has never awakened the complainants from sleep. Tr. at 44.

Mrs. McDonough presented testimony on daytime and weekend disturbances. She testified that they cannot open their windows on nice days. When they are outside, they are inundated with a "constant barrage of noise . . . ." Tr. at 66-67. Mrs. McDonough alleged that she doesn't use the porch much due to the noise, but does not have a choice on whether to continue with yard work. Tr. at 67. Mr. McDonough testified that they spend hours over many weeks during October and November harvesting a good crop of pecans from their tree farm. Tr. at 19.

Respondent's Efforts to Achieve Noise Reduction

Respondent Robke contends that he has taken several steps to reduce noise from the car wash. The first action taken was to place stickers that say "no loud music" on each vacuum and three signs that state "no loitering" on light poles on the site. Tr. at 80. Robke testified that he also replaced four of the six vacuum motors with quieter models so that all of the vacuums contained the most quite model motor available by that manufacturer. Tr. at 80. Robke alleged that he spent from $20 to $25 for each of the four vacuum motors. Tr. at 80. Robke stated that he also moved a soda machine off of the south end of the site to discourage kids from congregating at the car wash after school. Tr. at 81.

Robke continues to have a person who cleans up the site two to three hours a day. Tr. at 81. However, the site remains unattended from 21 to 22 hours a day. Tr. at 91. Robke testified that he requested the police to patrol the area more frequently. Tr. at 81.

Robke also installed four security cameras on the site, and placed a sign on the door to the equipment room that advises people are under surveillance. Tr. at 81-83. However, he agreed that the security cameras do not contain sound meters or microphones, and do nothing to address the sound issue at the site. Tr. at 92.

Robke has received a $6,437.06 estimate from Trost Plastics to build either a plastic or wood fence along the length of the property line. Tr. at 84-85; Exh. R5. Robke testified that the City will only allow him to build a fence that is a maximum height of six feet. Tr. at 84. When asked if Robke requested a variance for a higher fence, Robke stated that he did not do so. Tr. at 90.

Complainants' Suggested Noise Abatement Measures

Zak, a noise expert retained by complainants, testified that, in his opinion, a sound barrier extending along the property line that was 12 feet high and 200 feet long, with an additional 75-foot wing on the west end of the site to deflect sound, would effectively reduce daytime noise. A fence that is properly constructed of half-inch outdoor grade plywood, flush with the ground, fitted air tight, and caulked where necessary would cost approximately $12,000 to $15,000. Tr. at 58-59. However, Zak testified that, due to the nature of exhaust noise or radio noise that is base type or very low frequency, the barrier would fail to provide sufficient reduction at night. Tr. at 59. Zak stated that the car wash should suspend operations between 10:00 p.m. and 7:00 a.m. Zak suggested that the facility install an electronic timer that cuts the power to the facility at 10:00 p.m., and simultaneously turns on a lit sign that the facility is closed. Tr. at 60. Zak also testified that the respondent should post a no trespassing sign, and prosecute people who trespass and create enough noise that the complainants make a phone call. Tr. at 60. Zak estimated that a timer would cost between $10 to $200.

Zak testified that a more expensive alternative would be for Robke to hire a security person to watch the site at night. Tr. at 60-61. Zak estimated that a security person may cost in excess of $15,000 to $20,000 a year. Complainants also suggested that Robke install mufflers on the vacuums and sound baffles on all wash bays, and that he disable all beeping devices on the wash equipment. *See* Exh. C9 at 4.

DISCUSSION

Complainants alleged that Robke runs a car wash that causes noise pollution in violation of Section 24 of the Act (415 ILCS 5/24 (20000), and Section 900.102(a) of the Board regulations (35 Ill. Adm. Code 900.102(a)). These two provisions constitute a prohibition against "nuisance noise" pollution. Charter Hall Homeowner's Association and Jeff Cohen v. Overland Transportation System, Inc., and D. P. Cartage, Inc., PCB 98-81, slip op. at 19 (Oct. 1, 1998), citing to Zivoli v. Prospect Dive and Sport Shop, Ltd., PCB 89-205, slip op. at 8 (Mar. 14, 1991).

Section 24 of the Act states that:

> No 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. 415 ILCS 5/24 (2000).

Section 900.102(a) of the Board regulations provides that:

> No person shall cause or allow the emission of sound beyond the boundaries of his property, as property is defined in Section 25 of the Illinois Environmental Protection Act, so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter. 35 Ill. Adm. Code 900.102(a).

Noise pollution is defined by the Board regulations as "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity." 35 Ill. Adm. Code 900.101.

The Board performs a two-part inquiry to determine whether noise emissions amount to nuisance noise pollution. Young v. Gilster-Mary Lee Corp., PCB 00-90, slip op. at 8-9 (Sept. 6, 2001). The Board first determines whether the noise constitutes an interference in the enjoyment of the complainants' lives. *Id.* Second, the Board considers factors under Section 33 of the Act (415 ILCS 5/33(c) (2000)) to decide whether the interference is unreasonable. *Id.*, citing Charter Hall, PCB 99-81, slip op. at 19-21.

Interference with Enjoyment of Life

The Board first addresses the threshold issue of whether the noise from the Mascoutah car wash interfered with complainants' enjoyment of life. *See* Furlan v. University of Illinois School of Medicine, PCB 93-15, slip op. at 4 (Oct. 3, 1996). Noise must objectively affect the enjoyment of life to be considered interference. Anthony Roti, Paul Rosenstrock, and Leslie Weber v. LTD Commodities, PCB 99-19, slip op. at 24 (Feb. 15, 2001), citing Hoffman v. City of Columbia, PCB 94-146, slip op. at 5, 6, 17 (Oct. 17, 1996). "Testimony to the effect that 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.'" D'Souza v. Marraccini, PCB 96-22, slip op. at 5-6 (May 2, 1996), citing Wells Manufacturing Co. v. PCB, 73 Ill.2d 226, 383 N.E.2d 148, 150 (1978).

The Board has held that the following disturbances constitute interference: sleep deprivation, impact on watching television and conversing, and the inability to open windows due to noise from a trucking operation (*see* Charter Hall, PCB 99-81, slip op. at 20; Thomas v. Carry Companies of Illinois, PCB 91-195, slip op. at 13, 15 (Aug. 5, 1993)); noise interfering with complainants' sleep and use of their yard (Hoffman, PCB 94-146, slip op. at 5, 6, 17); and sleep deprivation and impacted studying from loud music and yelling at a fraternity house (Turner v. Edmiston, PCB 91-147, slip op. at 7-8).

In this case, the complainants allege that they were either awakened from sleep or were prevented from going to sleep between 11:15 p.m. and 6:00 a.m. on 19 different weekdays within a four-month period. Tr. at 27-28; *see* Exh. C5, C7. Mr. McDonough testified that the types of disturbances varied from engine and muffler noises, radios blaring, squealing tires, loud voices yelling, vacuum noise, horn blowing, and dumpster pickup. Tr. at 26. Complainants contend that weekends have heavier traffic than weekdays. Tr. at 24. Complainants cannot sleep with their windows open. The complainants also allege that they cannot enjoy the use of their patio or screened-in porch, and are disturbed while tending their vegetable garden and tree farm. Tr. at 13, 19, 66-67.

The Board finds no merit in Robke's contention that noise from the car wash did not interfere with Mrs. McDonough's life. Robke argues that there is insufficient evidence on record concerning Mrs. McDonough because she did not testify about noise occurring on weekends or weekday evenings. Resp. Br. at 14. However, it is clear from the record that the complainants

split their testimony into daytime and nighttime disturbances, rather than trying to give exhaustive statements concerning the interference at all times during the week. While Mr. McDonough testified about weekday evenings, he directed Mrs. McDonough to specifically provide more details about how their weekend days and outdoor activities are affected by daytime noise. Tr. at 66. Mr. McDonough also testified as to how the noise affected both of their lives. For instance, he discussed how the noise woke both of them up or kept them from sleeping, and described how they, not he, kept the log of noise occurrences. Tr. at 24.

The Board further finds that the interference is ongoing. Robke argues that there was no evidence presented that the complainants are still impacted by noise from the car wash after respondent posted signs prohibiting loud noise, replaced vacuum motors with quieter motors, and installed video cameras on the site. Resp. Br. at 14. However, Mr. McDonough described at hearing how the noise has been unacceptable since Robke built the car wash in 1998. Tr. at 13. He testified that the steps taken by the respondent were not effective. Tr. at 43. Complainants also stated in their post-hearing brief that "Mascoutah Car Wash continues to operate, now as before, emitting unreasonable noise of substantial and frequent nature, and has shown little effectual initiative in taking action towards noise abatement." Comp. Br. at 6.

Based on the above facts, the Board finds that there is credible evidence in the record that shows that both complainants were impacted by the noise. The Board accordingly finds that the complainants experienced interference with the enjoyment of their lives.

Unreasonable Interference, Section 33(c) Factors

The remaining issue is whether the noise from the Mascoutah Car Wash unreasonably interferes with the complainants' enjoyment of life. The Board determines whether an interference is unreasonable by considering the factors listed in Section 33(c) of the Act. *See* 415 ILCS 5/33(c) (2000). Furlan, PCB 93-15, slip op. at 4, citing Wells Manufacturing, 73 Ill.2d at 233, 383 N.E.2d at 151. Complainants are not required to introduce evidence on each of these factors. LTD Commodities, PCB 99-19, slip op. at 25. The Board can find a violation even if it does not find against the respondent on every factor. LTD Commodities, PCB 99-19, slip op. at 25, citing Wells Manufacturing, 73 Ill.2d at 233, 383 N.E.2d at 151. Section 33(c) of the Act states that:

> In 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:
>
> i. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> ii. the social and economic value of the pollution source;
>
> iii. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

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

v. any subsequent compliance. 415 ILCS 5/33(c) (2000).

The Board will analyze each of the Section 33(c) factors in turn.

The Character and Degree of Injury

The Board assesses the character and degree of injury by determining whether the noise from respondent's facility "'substantially and frequently interferes' with the enjoyment of life 'beyond minor or trifling annoyance or discomfort.'" LTD Commodities, PCB 99-19, slip op. at 25, citing Kvatsak v. St. Michael's Lutheran Church, PCB 89-182, slip op. at 9 (Aug. 30, 1999).

The complainants introduced logs that indicate that they were disturbed by noise from Robke's car wash on 128 occasions between August 23, 1999, and December 23, 1999 alone. *See* Exh. C5, C6. The logs also show that the noise disturbed the complainants' sleep from 11:15 p.m. to 6:00 a.m. on 32 occasions between the same dates. Mr. McDonough testified that the car wash either woke the complainants or prevented them from sleeping on 19 different weeknights within the four-month period. Tr. at 27-28; s*ee* Exh. C5, C7. He alleged that "two days in a row was the maximum of the Monday through Friday period that we were not disturbed by one noise or another over that . . . period." Tr. at 25; Exh. C5, C6.

The complainants also allege that they no longer use their porch or patio due to the noise, and are affected by sound from the car wash when they tend to their vegetable garden or tree farm. Tr. at 13, 66-67. Mrs. McDonough testified that they cannot open their windows on nice days, and are "inundated with a constant stream of noise" when in their yard. Tr. at 66-67.

The complainants introduced numeric noise measurements to corroborate their testimony about the severity of the noise. The respondent objected to introducing the measurements at hearing because they did not comply with Board regulations and applicable standards by the American National Standards Institute. Tr. at 11. The respondent argued that the complainants did not indicate on "what particular day any of [the] noise measurements were taken on, what the weather conditions were, and whether the instrument was properly calibrated on that particular day." Tr. at 31.

Although the complainants did not allege a numeric noise violation, they can introduce noise measurements to substantiate their noise nuisance claim. Gilster-Mary Lee, PCB 00-90, slip op. at 14. However, the measurement procedures must be technically justified. *Id.* The Board finds that the complainant's measurements are not credible evidence. Complainants did provide admissible testimony as to whether the measuring device was properly calibrated, and did not specify the dates of the measurements. The Board accordingly will not consider these measurements when evaluating the character and degree of injury.

The respondent contends that the noise from the car wash does not substantially or frequently interfere with the complainants' enjoyment of life because the noise originates from vehicles on Route 4. Mr. McDonough testified that, since Route 4 was rerouted, it has a little bit more traffic during peak hours. Tr. at 43. However, the Board finds that the character of the noises testified to by complainants are more consistent with what one would hear at a car wash, rather than vehicles traveling along on Route 4. Mr. McDonough testified that, since the car wash opened in 1998, they are disturbed by radios blaring, people yelling, horns honking, tires screeching, engines revving, garbage pickup, and sounds from car wash equipment. Tr. at 26. Mr. McDonough gave an example of an instance where, from 11:15 to 11:35 at night, they heard people playing loud radios, honking their horns, and racing their engines. Tr. at 25. On that particular evening, they contacted the police at midnight after being disturbed by noise at the car wash for over an hour and half. *Id.*

In light of complainants' testimony that they are routinely deprived of sleep and cannot enjoy the use of their porch or patio because of noise emanating from Robke's car wash, the Board finds that the noise substantially and frequently interferes with the lives of the complainants. The Board accordingly finds that the noise is of sufficient character and degree to be unreasonable.

Social and Economic Value of the Pollution Source

In assessing this factor, the Illinois Supreme Court has looked to the number of persons that the respondent employed and whether respondent is an important supplier to a particular market. Wells Manufacturing, 73 Ill. 2d at 235-36, 383 N.E.2d at 152. The Board has similarly looked to such factors as the number of employees at a facility and the total wages and taxes that a respondent paid. Charter Hall, PCB 99-81, slip op. at 23-24.

Robke testified that he built the car wash in response to local requests for a car wash in the area. Tr. at . Since the area previously lacked such a facility, he is an important supplier to this particular market, which includes people in Mascoutah and travelers along Route 4. Tr. at 69. Although Robke does not employ attendants, he does pay part-time employee to clean up the site for approximately two to three hours a day.

Robke also pays taxes to the City of Mascoutah or the State of Illinois. Robke did not testify to the amount of local and state taxes that he pays as a result of the car wash. Robke additionally alleged that he pays approximately a monthly rate of $800 for water and sewer and $400 for electric services to the City of Mascoutah. The Board accordingly finds that Robke provided sufficient evidence to show that the Mascoutah Car Wash has some social and economic value.

Suitability of the Pollution Source to the Area

The Board finds that this factor is about evenly weighted between the parties. The complainants have priority of location in that they bought their home in 1992, six years prior to when Robke build the Mascoutah Car Wash. Tr. at 35. When the complainants purchased their property, the surrounding farmland was zoned agricultural. Tr. at 18, 40. Mr. McDonough

testified that the seller stated that the adjacent tracts would undergo residential development, and that he had no knowledge that Route 4 would be rerouted and handle increased traffic flow. Tr. at 36.

However, priority of location is only one aspect of suitability, and is not the sole factor in determining whether a pollution source is suitable to a certain location. *See* LTD Commodities, 99-19, slip op. at 27, citing Oltman v. Cowan, PCB 96-185, slip op. at 3, 5 (Nov. 21, 1996). The Board also finds that the Mascoutah Car Wash is suited to its location. In 1997, the zoning in the area surrounding the complainants' home changed from agricultural to B2 commercial, and the City of Mascoutah approved a large commercial and residential development in the area. Tr. at 36, 40. The Mascoutah Car Wash is properly zoned and permitted in this commercial area. Tr. at 70.

Traffic has also increased on Route 4 after it was rerouted a few years ago. Tr. at 43. Since the car wash is located directly off of Route 4 and four miles from Interestate 64, it has the advantage of drawing both local and passing traffic. Tr. at 69-70.

The Board takes into account that respondent built the Mascoutah Car Wash in close proximity to complainants' home. The cement pad that cars drive onto when using the car wash is approximately 95 to 250 feet from complainants' residence. Tr. at 20-21. Complainants allege that the seven-foot berm that they constructed as a barrier between the two properties is ineffective in reducing noise from the car wash. Tr. at 21.

Technical Practicability and Economic Reasonableness of Reducing or Eliminating Noise Emissions from the Pollution Source

In considering this factor, the Board must determine whether technically practicable and economically reasonable means of reducing or eliminating noise emissions from the Mascoutah Car Wash were readily available to Robke. *See* Charter Hall, PCB 98-81, slip op. at 24; Gilster-Mary Lee, PCB 00-90, slip op. at 18. The Board finds that the parties have presented several options that may be technically practicable and economically reasonable to effectively reduce or eliminate noise at the car wash.

Noise wall. Both parties suggest the construction of a noise wall to reduce sound emissions. Greg Zak, a noise expert, testified on behalf of the complainant as to the effectiveness of a 12-foot tall and 200 foot long wood fence along the property line. Although he stated the fence would effectively contain emissions during the daytime, it would not completely eliminate low frequency or bass-type noise at night. Tr. at . Zak stated that the average cost of an effective barrier would range from $12,000 to $15,000.

Robke also suggested the construction of a noise barrier. He stated that the maximum height allowable for a fence by the City of Mascoutah was 6 feet high. As a result, Robke stated that he received a $6,437.06 estimate from Trost Plastics for the construction of a 6-foot high plastic or wooden fence for 200 feet along the property line of the parties.

Ceasing Night-time Operations. Complainants suggested that Robke could cease operating from 10 p.m. at night until 7 a.m. in the morning. Zak testified that Robke could purchase a timer to turn off the car wash equipment and signal that the car wash was closed. Robke argues that this would amount to an unconstitutional taking of his business by the government without citing to legal authority. However, Robke did not provide evidence of the amount of business that would be affected by this option.

Night-time Security. Zak also suggested that Robke could hire a security person to monitor the site at night. Zak estimated that this would cost in excess of $15,000 to $20,000 a year.

Dampening Devices for Car Wash Equipment. Complainants also suggested that Robke install mufflers on the vacuums and sound baffles on all wash bays, and that he disable all beeping devices on the wash equipment. *See* Exh. C9 at 4.

Subsequent Compliance

The complainants assert that there has been no subsequent compliance. Robke disagrees and points to several "good faith efforts" made to reduce noise emissions. The Board finds that Robke has made some attempts to reduce noise emissions. For example, Robke indicated that he spent between $80 and $100 to replace four of six vacuum motors to ensure that all of the vacuums contained the quietest motor available from the manufacturer. Robke also posted signs and stickers, and moved a soda machine that could attract kids after school, to reduce loud music and loitering at the car wash. Robke testified that he also installed surveillance cameras on the site, but admitted that the cameras do not help to eliminate noise emissions.

Notwithstanding, the complainants testified that the measures taken by Robke are ineffective, and that the noise continues to disrupt their lives. The Board finds that the respondent's good faith abatement efforts have not eliminated the interference.

CONCLUSION

The Board finds that the noise from the Mascoutah Car Wash has unreasonably interfered with the complainants' lives. Although the car wash is suitably located and has some social and economic value, the noise substantially interferes with the lives of the complainants. Complainants have priority of location. Finally, there are practical untried solutions, which are economically reasonable to alleviate the interference. Having found that there is unreasonable interference, the Board finds that Robke violated Section 24 of the Act (415 ILCS 5/24 (2000)) and 35 Ill. Adm. Code 900.102(a).

Having found a violation of the Act, the Board now turns to consideration of the appropriate remedy for this unreasonable interference.

REMEDY

The complainants do not seek a civil penalty in this proceeding. Rather, they ask the Board to require Robke to take steps to eliminate the noise emissions from Mascoutah Car Wash. Complainants request an order directing Robke to undertake control measures that they suggested, as by Zak in his testimony.

The Board is not convinced that the record supports adoption of all of the control measures suggested by the complainants. For example, the economic reasonableness of shutting down the Mascoutah Car Wash between the hours of 10:00 p.m. and 7:00 a.m. is at issue. The record additionally contains contradictory suggestions on an appropriate noise wall between the parties.

The Board finds that the record in this proceeding is not sufficient for the Board to determine what steps are reasonable to reduce the noise emissions. The Board will direct that Robke file a report within 120 days of the date of this order that details a plan for reducing the noise emissions reaching the complainants' residence. Robke must consult with a noise expert, and provide both options to reduce the noise emissions as well as information about the effectiveness of each suggestion. After the respondent files his report, the complainants will have up to 60 days to respond. The Board will then either direct this matter to hearing, if necessary, or issue a final order detailing how the noise reduction shall take place.

This interim opinion and order constitutes the Board's interim findings of facts and conclusions of law.

ORDER

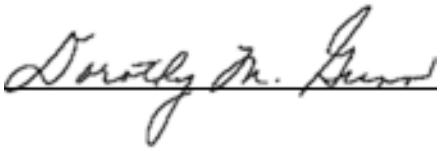
1. The Board finds that Robke violated Section 24 of the Environmental Protection Act (Act) (415 ILCS 5/24 (2000)) and 35 Ill. Adm. Code 900.102(a).

2. Robke is hereby ordered to retain a noise expert and prepare a report detailing what steps can be taken to alleviate the noise emissions reaching complainants' residence. Such report is to be filed with the Board and served on the complainants on or before July 5, 2002. The complainants may file a response to the report on or before September 3, 2002.

IT IS SO ORDERED.

Board Member M. Tristano dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on March 7, 2002, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board