

ILLINOIS POLLUTION CONTROL BOARD
June 15, 1995

DECATUR AUTO AUCTION,)
)
Complainant,)
)
v.) PCB 93-192
) (Enforcement-Air)
MACON COUNTY FARM BUREAU, INC.,)
MACON COUNTY FAIR ASSOCIATION,)
and MACON COUNTY HORSEMEN'S)
ASSOCIATION,)
)
Respondents.)

DISSENTING OPINION (by J. Theodore Meyer and G. Tanner Girard):

We respectfully dissent from the majority's opinion and order which found respondents in violation of Sections 9(a) of the Illinois Environmental Protection Act (Act), and Section 212.301 of the Board's regulations. (35 Il. Adm. Code 212.301.) The majority's opinion and order directed respondents to initiate a continual dust suppression program, and required respondents to appoint an on-site coordinator for overseeing the treatment and maintenance of the racetrack.

Section 9(a) of the Act provides:

No person shall:

- (a) Cause or threaten to allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, . . . or so as to violate regulations or standards adopted by the Board under this Act. (415 ILCS 5/9 (1992).)

As the majority correctly stated, violations of Section 9(a) can be addressed in two types of actions: nuisance violations, and violations of the Board's air regulations standards.

First and foremost, we believe that respondents' racetrack and stable are exempt from a nuisance action under the Act pursuant to Illinois' Farm Nuisance Suit Act, which provides in pertinent part:

No farm or any of its appurtenances shall be or become a private or public nuisance because of any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year, . . . provided that the provisions of this Section shall not apply whenever a nuisance results from the

negligent or improper operation of any farm or its appurtenances. (740 ILCS 70/3 (1992).)

In this section, "farm" is defined as:

. . . any parcel of land used for the growing and harvesting of crops; for the feeding, breeding and management of livestock; for dairying or for any other agricultural or horticultural use or combination thereof. (740 ILCS 70/2 (emphasis added).)

The racetrack in question houses, feeds and manages between 50 and 60 horses in its stables on a yearly basis. Therefore, respondents' racetrack falls under the definition of "farm" found in Illinois' civil liabilities statutes. In addition, the racetrack was established in 1955, in a clearly rural area. The businesses currently adjacent to the racetrack and fairgrounds are "changed conditions . . . occurring after the farm has been in operation for more than one year". (Id.) Finally, we do not find evidence in this record of negligent or improper operation of the racetrack. Respondents voluntarily apply a dust suppressant to the track each year. In addition, dust blown from one property to another is a common phenomenon in rural areas; Decatur Auto Auction cannot be heard to complain when it knowingly came to this condition.

Secondly, even if the racetrack was not considered a farm, and therefore exempt from a nuisance suit, after considering the Act's Section 33(c) factors, we are not persuaded that the track dust unreasonably interferes with complainant's pursuit of its business. (See Wells Manufacturing Co. v. Pollution Control Board, 73 Ill.2d 226, 383 NE.2d 148(1978).) No one disputes the socio-economic value of the racetrack, its location suitability or the fact that it has priority of location. However, the majority found that the character and degree of harm suffered by complainant due to poor maintenance of the track justified further financial expense to reduce the emissions. We disagree.

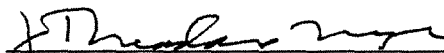
Since 1987, respondents have recognized that dust is generated from their racetrack and have voluntarily undertaken a dust suppressant treatment program. This program decreased the amount of dust blown from the track and kept the track in compliance with the Act; however, it did not eliminate dust emissions completely. Complainants are asking Horsemen's Association, the party responsible for the track's maintenance, to spend \$5,000 for two treatments per year, or about one third of its annual fee income. In addition, the opinion and order directs respondents to appoint an on-site coordinator to oversee the treatment and maintain the track, which may create additional expense. These added expenses are to be undertaken with no guarantee that dust emissions will be reduced to complainant's satisfaction. (See Tr. at 121-123.) What is to stop complainant

from repeatedly suing respondents, asking for three, four, or five treatments per year? Since respondents are voluntarily complying with the Act, and the added expense does not guarantee a solution to the dust emissions, we find that respondents did not create a nuisance violation.

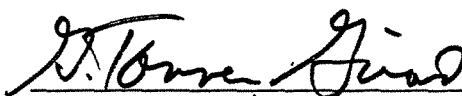
Finally, we consider whether or not respondents violated any Board regulations. Section 212.301 prohibits fugitive emissions from "any process including any material handling or storage activity". "Process" is defined in the American Heritage Dictionary as a system of operations utilized in production. From its plain language, Section 212.301 only applies to industrial operations. A racetrack located on county fairgrounds is not an industrial operation. Further, the Agency testified at hearing that "fugitive dust is really only a problem if it's causing a complaint situation because you have fugitive dust going on all the time." (Tr. at 96.) Therefore, Section 212.301 is inapplicable to the case at bar.

As a final note, we emphasize that complainant knowingly bought property in a rural area next to a track where horses have been racing since 1955. Surely they were aware that horses and sulkies create dust on dirt tracks. If complainant was bothered by the dust, several options could have been implemented to alleviate the problem.

For the reasons set forth above, we dissent.



J. Theodore Meyer
Board Member



G. Tanner Girard
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was filed on the 3rd day of July, 1995.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board