ILLINOIS POLLUTION CONTROL BOARD
February 7, 1980

ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 79-4
	)	
EVERGREEN BATH & TENNIS, INC.,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by Mr. Goodman):

On January 10, 1979 the Illinois Environmental Protection Agency (Agency) filed a complaint against Evergreen Bath & Tennis, Inc. (Evergreen) alleging that Evergreen violated Rule 202 of the Board's Noise Regulations by causing or allowing sound emissions from its facility to Class A receiving land at least 25 feet away which exceeded those listed in the rule at the 500, 1,000, 2,000, 4,000, and 8,000 Hertz octave band center frequencies. Said violation would constitute concurrently a violation of Section 24 of the Environmental Protection Act (Act).

Count II of the Agency's complaint similarly alleges a nighttime violation at all Hertz octave band center frequencies listed in Rule 203 of the Board's Noise Regulations except the 31.5 level frequency. Said violation would constitute concurrently a violation of Section 24 of the Act. Count III alleges that continued daily and nightly operation of Evergreen's air conditioning units during the summer months caused sound emissions beyond the bounds of Evergreen's property so as to cause air pollution and a consequent violation of Rule 102 of the Board's Noise Regulations and Section 24 of the Act.

Evergreen, a Delaware corporation, is licensed to do business within the State of Illinois; the transactions which constitute the subject matter of this complaint arose within Cook County, at 2700 West 91st Street, Evergreen Park, Illinois. Hearing was held on December 11, 1979. Evergreen owns and operates nine air conditioners, eight of which are 15-ton units and one of which is a 25-ton unit. The eight are used for eight tennis courts and the one is used in a racquetball section of the facility (R.88; Joint Ex.1). During warm weather the facility is open from 6:30 a.m. to 12:30 a.m. (18 hours) (R.13-14).

Evergreen is owned by Ms. Joan Andrews and Mr. John L. Bartolomeo; Andrews serves as General Manager and Bartolomeo as President. Bartolomeo is an architect by profession (R.13) and has sent communications to the Agency as a representative of the firm Bartolomeo and Hansen from October 12, 1979 through December 4, 1979 regarding this case (R.Ex.2). In Evergreen's November 15, 1977 letter to the Agency responding to the Agency's Major Hearn, Jr.'s telephone conversation with Bartolomeo, Evergreen had identified Bartolomeo as its "Architect/Owner" (R.Ex.2).

Evergreen received complaints from at least one neighborhood landowner (Mr. Almquist) before the Agency on July 19, 1977 notified it of its apparent violation (R.79-80) according to measurements taken by Ronald Koziol of the Agency on July 12, 1977 (R.19). This letter of violation requested a response either verifying or denying the apparent violations within 15 days (C.Ex.1). The record is devoid of any evidence of such response. On August 17, 1977 Hearn by letter requested Evergreen's presence at a compliance conference on September 21, 1977, to be confirmed within 10 days, before the Agency would forward the matter to its Enforcement Division (C.Ex.2). Evergreen replied on August 19, 1977 stating that it had moved its largest air conditioning unit to the roof, that this should solve the problem, but that they would attend the conference anyway (R.53-54; R.Ex.2).

At the conference, Andrews was informed by Hearn that moving the unit did not solve the problem because he had made subsequent readings (R.34-35). Bartolomeo had "authorized" Andrews to move the unit thinking it would solve the problem; after learning of the subsequent readings he called Hearn and they discussed shrouds for the units (R.65-66). Bartolomeo had no technological basis for deciding that moving the unit to the roof would reduce the sound emission level (R.81-82).

At the conference, compliance methods were discussed (R.54-55); Hearn suggested Evergreen hire a competent consultant (R.32-34). An agreement was made to take readings on September 27, 1977. After receiving the results of these readings Evergreen was to meet with the Agency to draw up a compliance plan and schedule, but in the interim Evergreen was to insulate either the interior walls of the barriers of the four units or the metal wall of the building (C.Ex.3). The Agency sent the September 27, 1977 reading results to Evergreen on October 17, 1977 with a request that Evergreen submit the compliance schedule, to be incorporated into a formal compliance agreement, by November 7, 1977 (C.Ex.4). The record shows no evidence of such compliance schedule. It also shows no evidence of interim insulation as agreed to by Evergreen.

On November 9, 1977 Hearn called Bartolomeo to recommend that he contact a professional acoustical consultant (R.37), as he had advised Andrews at the compliance conference (R.33-34).

During this call Bartolomeo identified himself as an engineer for Evergreen's architects. Bartolomeo advised that he was working on a hooded structure design; Hearn advised lining the interior with absorptive material; Bartolomeo agreed and said he would "recommend" the linings; Bartolomeo said more time was needed for design and fabrication, asking that Evergreen be given additional time to formulate a compliance plan and schedule and agreeing to put such request in writing as soon as possible (R.Ex.1). Andrews so requested such additional time on November 15, 1977 (R.Ex.2).

On December 19, 1977 Bumgarner of the Agency issued a formal Notice of Violation demanding Evergreen respond in writing to the steps being taken to comply with the violation (C.Ex.5). On January 10, 1978 Evergreen responded, citing (1) Andrews' August 19, 1977 letter advising of moving the largest unit; (2) problems with getting the manufacturer of the units to assume "responsibility" since it had led Evergreen to believe the units would meet "all environmental requirements"; (3) by the November 9, 1977 phone conversation with Hearn, and Andrews' letter of November 15, 1977, Evergreen was of the understanding it had "ample" time to "experiment" with hoods; and (4) since Evergreen's contractor was still working, at Evergreen's expense, Evergreen wanted to wait until a cooling cycle could occur and allow a complete study of one unit before completing a study of all four units (R.Ex.2).

Clatt of the Agency responded on January 18, 1978 that the response was insufficient if the words waiting "until a cooling cycle ..." meant waiting until warmer weather which could bring more citizen complaints. Clatt notified Evergreen that because of the insufficiency the Agency will pursue an enforcement action through the Office of the Attorney General (C.Ex.6).

From this point to the date of the complaint in this action--covering approximately a year's time--the record is practically devoid of what occurred relative to this matter. Andrews testified she had been trying to elicit responsibility and/or assistance from the manufacturer and/or the installer, each of which in turn pointed the finger at the other (R.56-57). A contractor's draft of a shroud in late 1977 or early 1978 (R.Ex.6) was thought by Bartolomeo to be an impractical solution since it would require cutting a hole in the roof for ventilation (R.67-69). Until late 1978, Bartolomeo never sought out consultants or contractors other than the heating and ventilation contractor, whom Bartolomeo had never thought of as an acoustical expert (R.82-83) even though he had relied in part on that same contractor's representation that the units would meet environmental regulations (R.62-64, R.Ex.5).

During the harsh Winter of 1978-1979, all five units plus duct work were destroyed; concomitant operational problems weren't discovered until the snow had melted (R.70). However,

placing shrouds on the tops of the ducts could have prevented some of the damage to the ducts, and the storms did not preclude the hiring of an acoustical consultant (R.84). It was not until a September, 1979 meeting that Bartolomeo felt that Evergreen would "get some realistic progress" from the Agency (R.72). It was not until after this September, 1979 meeting with the Attorneys General that Bartolomeo began actively seeking additional contracting bids (R.Ex.2).

In 1975, sound emissions were represented by Evergreen to be, at a 60-dB unit rating, 40 dB at a distance of 17 feet and 33 dB at a distance of 50 feet, these two sites being those of the nearest neighboring homes (R.Ex.5). The Agency alleged sound emissions in July and September, 1977 of between 29 (8,000 Hertz octave band frequency) and 58.5 (500 band) in violation of the daytime levels established in Rule 202, and between 39 (8,000 band) and 65 (63 band) in violation of the nighttime levels established in Rule 203. Allegations were made on the basis of measurements taken at 25 feet or more (C.Ex.7-10). Under Section 42 of the Act Evergreen is potentially liable for $20,000 for violations of both Rules 202 and 203, and $3,000 for the three days during which violations occurred.

Under Section 33(c) of the Act, the Board must consider certain circumstances bearing upon the reasonableness of these sound emissions. The character and degree of injury has been annoyance to owners and occupiers of Class A land. Although there is no evidence that Evergreen had priority of location, which might tend to support a finding of its suitability to the area in which it is located, it is doubtful that Evergreen's units, installed at least after July, 1975, were in operation before any of the complaining neighbors had moved into the neighborhood. However, even assuming Evergreen's operations had priority of location, there is strong evidence of the technical practicability of control methods as well as of economic reasonableness. Bartolomeo knew about the availability of shrouds, of insulating the units' interiors, of erecting additional barriers, and of insulating the roof. There were many steps either Bartolomeo or Andrews could have taken subsequent to their being notified of an alleged violation in 1977 and prior to the institution of this enforcement action in 1979. Lastly, no issue is raised concerning the social and economic value of Evergreen as a tennis club.

The Agency's readings of September 7, 1977, taken after the largest unit had been moved to the roof, showed continuing violations. However, on September 21, 1977, sound emissions at the 4,000-band level ranged from 34.5-43.0 dB. Bartolomeo testified that noise levels vary with problems incurred with the units (R.80). But there is no evidence in the record that fluctuations in sound emissions occurred regularly, or that they occurred on the dates of the Agency measurements. The record as a whole indicates a desire on the part of Evergreen to hold the sellers and services of their units responsibile for their present problems.

In their post-hearing briefs, both Evergreen and the Agency addressed primarily the issue of whether and in what circumstances good faith efforts at compliance may preclude the imposition of any penalty as not aiding in the enforcement of the Act. Does the emitter have to actively proceed with plans for compliance? Does justifiable reliance on the manufacturer of the point source negate liability? Does the issue of the defense of good faith arise only in the context of a minimal and unsubstantial violation of the Act? (See, Southern Illinois Asphalt Co. v. PCB, 60 Ill.2d 204 (1975); EPA v. Beloit Foundry Co., 2 PCB 719 (1971); City of Matoon v. EPA, 1 PCB 441 (1971); Chicago Magnesium Casting Co. v. PCB, 22 Ill.App.3d 489 (1st Dist.1974).)

Polluters must actively proceed with plans for compliance when requested to do so by the Agency, or must be prepared to defend their actions in enforcement complaints. Evergreen did little after Koziol's letter of July 19, 1977 notifying it of violations until almost ten months after this enforcement action was filed against it, and these actions were taken by Bartolomeo and Hansen, its architect's engineers. It was aware of possible solutions but it did little or nothing to institute any of them. It instead repeatedly and consistently tried to hold the manufacturer and/or servicer of the units responsible because of their representations that the units when installed would meet environmental regulations. Reliance by Evergreen on such representations may be material to a contract made on the basis of such representations but is immaterial to demonstrate good faith efforts at compliance with the Act, the Board's regulations, or the directives of the Agency. Good faith efforts are always material in mitigation or aggravation and can arise in any action for violations whether they be minimal violations or egregious ones.

The Board finds Evergreen to have been in violation of both Rules 202 and 203 and therefore in violation of Section 24 of the Act.

The Board will order Evergreen to cease and desist from violations on or before June 1, 1980. The Board orders Evergreen to pay a civil penalty of $750. Because Evergreen had from on or about July 19, 1977 through January 10, 1979 to cooperate with the Agency, and because during this period Evergreen had knowledge of various possible control technologies but found fault with every one of them, refusing to institute any, payment of such penalty will aid in the enforcement of the Act; it will impress upon Evergreen and other emitters that one must choose and install control technologies within a reasonable time after being informed of a violation.

ORDER

1. Evergreen Bath & Tennis, Inc. shall cease and desist from violations of Rules 202 and 203 and Section 24 of the Act on or before June 1, 1980;

2. Evergreen Bath & Tennis, Inc. shall pay a penalty of $750. Penalty payment by certified check or money order payable to the State of Illinois shall be made to:

Fiscal Services Division
Illinois Environmental Protection Agency
2200 Churchill Road
Springfield, Illinois 62706

3. Evergreen Bath & Tennis, Inc. shall devise and institute a compliance plan in cooperation with the Illinois Environmental Protection Agency by June 1, 1980.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 7-17 day of February, 1980 by a vote of 4-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board