

ILLINOIS POLLUTION CONTROL BOARD
October 5, 1982

ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY,)
)
Complainant,)
)
v.) PCB 81-143
)
RONALD WHEELER AND ROBERT WHEELER,)
individually, and doing business as)
WHEELER GARAGE AND COAL HANDLING)
OPERATION,)
)
Respondents.)

GLENDOLYN W. KLINGLER, ROBERT MUELLER, ASSISTANT ATTORNEY GENERALS,
FRANCIS GEHRT, TECHNICAL ADVISOR, APPEARED ON BEHALF OF COMPLAINANT.

MARK D. HOCKMAN, LEITER, LEITER & SAHN, APPEARED ON BEHALF OF
RESPONDENTS.

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

This matter comes before the Board on a September 14, 1981 Complaint brought by the Illinois Environmental Protection Agency (Agency). The Complaint, as amended on December 17, 1981, alleges that the Respondents, Ronald Wheeler and Robert Wheeler III, individually and as a partnership, operated the Wheeler Garage and Coal Handling Operation in violation of the air and noise provision of the Illinois Environmental Protection Act (Act) and Chapter 8: Noise Pollution of the Board's Rules and Regulations. Specifically, the Complaint alleges that the Respondents caused or allowed emissions of coal dust into the environment sufficient to injure the health and property and enjoyment of the same by persons in the affected area, in violation of Section 9(a) of the Act. It further alleges that the Respondents violated the noise prohibitions found in Section 24 of the Act and Rule 102 of Chapter 8, and the noise emission limitations contained in Rule 202 of Chapter 8.

Hearings were held on March 9 and 10, 1982. At hearing on March 9, the Agency amended its Complaint. Respondents were no longer alleged to have been acting as a partnership and the charge that Respondents violated Rule 202's noise emission limitations on October 21, 1980 was deleted. At hearing on March 9, 1982, the parties decided to negotiate a stipulated settlement. The hearing was adjourned with the understanding that the next day's hearing would be for the purposes of making public the terms of

the Proposed Settlement and admitting testimony from individuals affected by the alleged noise and air violations. At the March 10, 1982 hearing, the Proposed Settlement was summarized for the record and audience. Testimony was given by numerous citizens against and on behalf of the Respondents. The Statement of Facts and Proposed Settlement was filed with the Board on April 26, 1982. That same day, five motions were filed by the Respondents, along with a Stipulation signed by both parties that these motions would be withdrawn upon the Board's acceptance of the Proposed Settlement. On June 10, 1982 the Board found the terms of the Proposed Settlement generally acceptable, but questioned whether the stipulated penalty could be deposited in the Environmental Protection Trust Fund established by P.A. 81-951. The Proposed Settlement was therefore rejected and returned for further action. On July 15, 1982 the Agency filed a Motion for Reconsideration which addressed the question raised by the Board. Reconsideration was granted on August 18, 1982.

The Statement of Facts now before the Board contains conflicting averments by the parties, which were substantiated by the testimony offered at the March 10 hearing. Since resolution of these conflicts would necessitate a lengthy and perhaps futile hearing, the Board will consider the Proposed Settlement.

Respondent Robert Wheeler III owns and operates a coal storage and distribution business at 1675 East Walnut Street, Canton, Illinois. Surrounding this business are residential homes on South 17th Street, a trailer park, and crop-producing fields. Employing approximately 18 to 20 full-time people, this facility's operations include unloading, moving and reloading coal with a front end-loader. In the Statement of Facts, the Agency alleges that these activities occur on any day of the week and at any time, including after midnight until 4:00 a.m. The noise violations attributed to the equipment operating are supported by sound readings taken by Agency personnel on Wednesday, May 20, 1980 and Sunday, December 7, 1980 (Exhibits B and D of the Proposed Settlement). These readings indicate that the sound emitted from Respondents' facility to the adjacent residential property, that is from Class C Land to receiving Class A Land, exceeds the daytime limits set out in Rule 202 of Chapter 8. In support of the alleged 9(a) violation, the Agency submitted photographs it claimed evidenced coal dust being generated by Respondents' activities and then travelling and settling on the homes and property adjacent to the facility (Exhibits G and H of the Proposed Settlement).

On the other hand, the Respondents state that Robert Wheeler III has exclusive control of the business and Ronald Wheeler has never owned, operated or been authorized to operate the facility. Robert Wheeler III further contends that he does not operate the facility before 7:00 a.m. or after 10:00 p.m. and that week-end operation is essential to the business. Respondent Wheeler III

had independent noise tests conducted on Saturday, March 6, 1982 which he claims establish that the operation is within the limits set out in Rule 202. Further, he challenges the admissibility of the May 20, 1980 tests conducted by the Agency and the results obtained in the Agency's December 7, 1980 test, but provided no reasons. As for the 9(a) violation, Robert Wheeler III argues that the photographs offered by the Agency depict airborne dirt from the nearby plowed fields, rather than coal dust generated by his operations.

There is great citizen concern in this action, as evidenced by the Pollution Complaint Forms filed with the Agency by the residents of South 17th Street in Canton, Illinois (Exhibit F of the Proposed Settlement) and the testimony given at the March 10 hearing. Residents described coal dust infiltrating their backyards, outdoor swimming pools, and home interiors and aggravating respiratory and other health ailments. They also testified that the noise from the facility disturbed nighttime sleep, disrupted backyard gatherings, and indoor television and radio listening. (R. 60-74; 80-85; 88-89; 96-97.) Other interested persons, including nearby residents and Respondents' employees, testified that the Respondents' operation did not cause them noise or coal dust problems.

In the Statement of Facts, Robert Wheeler III, averred that a new front end-loader has been purchased, the old front end-loader has been modified to reduce sound, and that calcium-chloride and oil is regularly spread on portions of the facility to reduce blowing coal dust. The employees testifying March 10, 1982 cited these efforts.

The Proposed Settlement Agreement provides that Ronald Wheeler be dismissed as a Respondent in this action. The terms intended to resolve the alleged violations provide the Respondent with two alternatives. The Respondent shall move the coal storage and distribution operation to a different location by June 1, 1982 or shall construct a coal dust barrier and a noise barrier at the present facility in accordance with specifications agreed to by Respondent and the Agency. The noise barrier will be erected only if proved necessary by an Agency noise test to be conducted no later than April 1, 1982. In the event that the operation is not moved, the Respondent further agrees to take additional measures, including but not limited to, oiling the coal, watering the coal pile, and treating the coal pile with calcium-chloride when weather conditions aggravate air pollution attributable to coal dust (Stip. 1 and 2). The Respondent shall also pay a stipulated sum of \$2,500.00 to the Environmental Protection Trust Fund.

The Board finds the Proposed Settlement Agreement acceptable under Procedural Rule 331 and finds that Respondent, Robert Wheeler III, has violated Sections 9(a) and 24 of the Act, and Rules 102 and 202 of Chapter 8: Noise Pollution. Since the stipulated date,

June 1, 1982, for either moving the operation or otherwise modifying the operation has passed (Stip. 2.A), the Board will require that Respondent comply with the terms of Stipulation 2.A no later than April 1, 1983. This will allow Respondent sufficient time to move or construct the barriers, and afford the nearby residents relief prior to the spring and summer seasons. Similarly, the Agency, if it has not already done so, is required to conduct noise tests pursuant to Stipulation 2.B no later than November 1, 1982.

As stated above, the Board was concerned about the statutory authority to deposit stipulated sums into the Environmental Protection Trust Fund (Fund) in lieu of a penalty. The language of Section 61 of the Act provides that the "[Environmental Protection Trust Fund] Commission may accept, receive or administer on behalf of the State any grants, gifts, loans or other funds made available to the Commission from any source for purposes of environmental protection and related enforcement programs." Penalties assessed by the Board are similarly intended to aid in the enforcement of the Act. Therefore, it is appropriate that a stipulated penalty be deposited in the Fund. Although the Board will accept Stipulation 4, it notes that it is deficient pursuant to Section 61 of the Act. Section 61 further provides that funds received are to be appropriated by the General Assembly to the Fund, "provided that such monies shall be used only for the purposes for which they are contributed and any balance remaining shall be returned to the contributor..." The Proposed Settlement failed to designate any specific purpose for the funds. The Board will therefore correct the deficiency and designate that the stipulated sum is for the purpose of cleaning up abandoned landfill sites found within Illinois. The Board also notes that although this Section provides that unused monies be returned to the contributor, the Act does not specify any length of time in which the fund must be used. To assure that the funds are not returned to the Respondent, the Board requires that Respondent waive his rights to any return of the contributed monies.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. The Respondent, Robert Wheeler III, has violated Rules 102 and 202 of Chapter 8: Noise Pollution and Sections 9(a) and 24 of the Illinois Environmental Protection Act.
2. Within 90 days of this Order, Respondent shall, by certified check or money order payable to the Illinois Environmental Protection Trust Fund, pay the stipulated penalty of \$2,500.00, which is to be sent to:

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

3. Within 90 days of this Order, Respondent Robert Wheeler III shall file with the Illinois Environmental Protection Agency a waiver to any return of any amount of money paid to the Environmental Trust Fund.
4. The Parties shall comply with all the terms and conditions of the Proposed Settlement filed on April 26, 1982, which is incorporated by reference as if fully set forth herein, except as amended by the Board. As amended, the Parties shall comply as follows:
 - a. Respondent Robert Wheeler III shall either relocate the coal distribution and storing aspect of the business or construct a coal dust barrier to the specifications agreed upon by the parties as will result in compliance with the Environmental Protection Act and Pollution Control Board Regulations contained in Chapter 2: Air Pollution no later than April 1, 1983; and
 - b. The Illinois Environmental Protection Agency shall conduct noise tests to determine Respondent's present compliance with Pollution Control Board Regulations of Chapter 8: Noise Pollution, Rule 202. If it is determined that Respondent is not in compliance, and Respondent elects to remain at the present site, Respondent shall construct a noise barrier to the specifications agreed upon by the Parties as will result in compliance with the aforesaid Rule 202, no later than April 1, 1983.
5. Within 90 days of this Order, Respondent Robert Wheeler III shall file the following Certificate of Acceptance of the Stipulated Agreement as modified by this Order with the Illinois Environmental Protection Agency.

CERTIFICATE

I, (We), _____, having read the Order of the Illinois Pollution Control Board in PCB 81-143, dated _____, understand and accept the said conditions thereto binding and enforceable.

 Petitioner

 By: Authorized Agent

Title


Date

- 6. The five motions filed by Respondent on April 26, 1982 are hereby dismissed pursuant to the Stipulation filed that same day.

IT IS SO ORDERED.

Chairman J. Dumelle dissented.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 5th day of October, 1982 by a vote of 4-1.



 Christan L. Moffet, Clerk
 Illinois Pollution Control Board