ILLINOIS POLLUTION CONTROL BOARD
December 19, 2002

MICHAEL D. LOGSDON, DARRELL E. MANN, KATHY MANN, RUSSELL SPILLMAN, MARILYN SPILLMAN, RITA MARTIN, ALVIN W. ABBOTT, KATHY ABBOTT, DIANA COLLINS, and DAVE COLLINS,	)	
Complainants,	)	
v.	)	PCB 00-177
	)	(Citizens Enforcement - Noise)
SOUTH FORK GUN CLUB,	)	
Respondent.	)	

PHILIP R.VAN NESS OF WEBBER & THIES, P.C., APPEARED ON BEHALF OF COMPLAINANTS.

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

On April 25, 2000, Michael D. Logsdon, Darrell E. Mann, Kathy Mann, Russell Spillman, Marilyn Spillman, Rita Martin, Alvin W. Abbott, Kathy Abbott, Diana Collins, and Dave Collins (complainants) filed a citizen enforcement complaint (Comp.) against respondent South Fork Gun Club (South Fork or gun club), a not-for-profit corporation. Complainants allege that South Fork violated numerical impulsive sound limits and nuisance noise prohibitions of the Environmental Protection Act (Act) and Board regulations. 415 ILCS 5/24 (2000); 35 Ill. Adm. Code 900.102 and 901.104. Complainants further allege that the noise resulted from shooting activities at the South Fork Gun Club located in Kincaid, Christian County.

As discussed below, the Board sanctions the respondent for failing to comply with hearing officer orders. The Board finds that noise produced by South Fork Gun Club unreasonably interfered with the complainants' enjoyment of life and property, but finds no violation of its numerical noise standards. The Board orders South Fork to cease and desist from further violations of the Act and to pay a civil penalty of $3,000.

PROCEDURAL BACKGROUND

Complainants filed a complaint on April 25, 2000. On the same day, respondent filed a motion to dismiss, alleging that the Board lacked subject matter jurisdiction over the complaint under the Premises Liability Act. On July 27, 2000, the Board found the alleged violations of the Premises Liability Act frivolous, dismissed them, and accepted the noise pollution complaint for hearing. On October 27, 2000, the complainants requested South Fork to admit facts, produce documents and tangible items, and issued their first set of interrogatories to South Fork.

On November 20, 2002, South Fork filed a motion to substitute counsel. South Fork's second counsel withdrew on May 28, 2002.

During the pendency of this proceeding, Mr. Logsdon, the Manns, the Abbotts, and the Collins filed a declaratory judgment action in Christian County Circuit Court. The complainants received a temporary injunction against defendant Village of Kincaid on January 9, 2002, in the circuit court for the Fourth Circuit. *See* Comp. Exh. 8 at 5.

On September 6, 2002, a circuit court of the Fourth Judicial Circuit granted the complainants in this proceeding a permanent injunction order. Comp. Exh. 8. Fourth Circuit Judge Spears reasoned that when South Fork requested a petition for special use from Christian County ordinance, Section 33 (1968), to practice skeet or trap shooting as required by law, it misidentified the parcel of real property to be rezoned. *Id*. at 3-4. The court found that neither South Fork nor the Village of Kincaid, therefore, ever had proper authority to allow skeet or trapshooting on the gun club property. The court concluded by permanently enjoining South Fork from allowing skeet or trapshooting on its property unless and until Christian County issues it a proper permit to do so.

Board Hearing Officer, Steven Langhoff, conducted a hearing on September 26, 2002. At the hearing, the complainants presented six witnesses, five of whom are complainants in this matter. The hearing officer found all witnesses credible. *See* hearing officer order dated October 3, 2002. The complainants also presented 13 exhibits, all of which were admitted.

At the request of the complainants, the Board subpoenaed Mr. Timothy Binegar, President of the South Fork Gun Club, to appear at the September 26, 2002 hearing. The subpoena was sent by certified mail on September 12, 2002. After the United States Postal Service attempted to deliver the subpoena on September 13 and September 18, 2002, the subpoena was returned unclaimed on September 28, 2002. An attorney appeared at the hearing on behalf of South Fork to request a continuance. The hearing officer denied the respondent's motion as untimely and prejudicial to the complainants. Mr. Binegar arrived at the hearing, but left a short time after the hearing began.

Because Mr. Binegar was not present when called to testify at hearing, the hearing transcripts contain no evidence presented by South Fork. Therefore, the Board will consider evidence supporting the complainants' arguments and requested remedy presented in South Fork's absence and in the complainants' closing brief. *See* 415 ILCS 5/33(c). The complainants filed a closing brief on October 31, 2002 (Comp. Br.). South Fork submitted a closing *brief* on November 22, 2002 (Resp. Br.). The individual who filed South Fork's closing brief did not make an appearance before the Board as an attorney. 35 Ill. Adm. Code 101.400(a)(4).

PRELIMINARY MATTERS

Sanctions

In addition to remedies, the complainants ask the Board to impose a monetary sanction of an unspecified amount against Mr. Binegar, President of the South Fork Gun Club.

Complainants made a motion for sanctions at hearing and the hearing officer supported the motion (*see* the hearing report dated October 3, 2002). The Board has authority to impose sanctions on parties for failure to comply with Board orders and regulations. Section 101.800 of the Board's procedural rules provides that the Board may impose sanctions where a party unreasonably fails to comply with a hearing officer or Board order, including a subpoena issued by the Board. 35 Ill. Adm. Code 101.800. Under Section 101.800, the Board may consider factors including the relative severity of the refusal of failure to comply, the past history of the proceeding, and the degree to which the proceeding has been delayed or prejudiced by the alleged violations.

The complainants argue the Board should sanction Mr. Binegar for abuse of process. The complainants and hearing officer in this case state that Mr. Binegar behaved disrespectfully and inappropriately at the hearing held on September 26, 2002. Tr. at 148. The United States Postal Service made three attempts to deliver the subpoena sent by complainants to Mr. Binegar without success. Mr. Binegar nonetheless arrived at the hearing with an attorney he hired the day prior to hearing. The attorney requested a continuance but his motion was denied. The Board further notes that Hearing Officer Steven Langhoff informed the respondent in hearing orders dated April 22, 2002 and May 20, 2002 that the gun club must be represented by an attorney before the Board.

The Board agrees that these actions are sanctionable. Mr. Binegar ignored two hearing officer orders advising him he could not represent the gun club. His last minute retention of an attorney appears to have been solely for the purposes of delaying the hearing. Additionally, Mr. Binegar left the hearing before called to testify at hearing by the complainants who attempted to subpoena him.

Section 101.800 does not allow the Board to monetarily sanction the offending party (*see* Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, slip op. at 7 (Dec. 21, 2000), where the Board eliminated language allowing the Board to sanction the offending party with reasonable costs incurred by the moving party in obtaining an order for sanctions). However, Section 101.800(b)(5) provides that the Board may strike an offending person's pleading or other document. 35 Ill. Adm. Code 101.800(b)(5). Therefore, the Board strikes South Fork's closing *brief* as a sanction for failing to comply with hearing officer orders.

South Fork is Not Exempt from the Act or Board Rules

The Board stated in a July 27, 2000 order that if South Fork could prove that their activities were amateur or professional sporting events and that the club existed prior to January 1, 1994, the Act and Board regulations would not apply, and thus, the alleged noise violations would be frivolous. The Board has previously found a skeet and trapshooting club exempt from noise standards. Sheppard v. Northbrook Sports Club, PCB 94-2 (May 5, 1994). Under Sections 25 and 3.25 of the Act, if South Fork was established in 1968 and existed ever since, it would be exempt from Board noise regulations. Section 25 of the Environmental Protection Act provides, in pertinent part, that "[n]o Board standards for monitoring noise or regulations prescribing limitations on noise emissions shall apply to any organized amateur or professional sporting activity except as otherwise provided in this Section." 415 ILCS 5/25

(2000). "Organized amateur or professional sporting activity" is defined, in pertinent part, at Section 3.25 of the Environmental Protection Act:

> an activity or event carried out at a facility by persons who engaged in that activity as a business or for education, charity or entertainment for the general public, including all necessary actions and activities associated with such an activity. This definition includes, but is not limited to, (i) rifle and pistol ranges, licensed shooting preserves, and skeet, trap or shooting sports clubs in existence prior to January 1, 1994. 415 ILCS 5/3.25 (2000).

Although the gun club was incorporated in 1968, that corporation was dissolved from 1981 through 1999, when it reincorporated. *See* Comp. Group Exh. 6A, 6B. The gun club did not exist on January 1, 1994. Therefore, the club is not exempt from Board noise regulations under Sections 25 and 3.25 of the Act, and the Board finds that the violations alleged by the complainants are not frivolous.

FACTS

Complainants

The complainants live in a rural area in Taylorville near Lake Kincaid. The Collins, Logsdon, Zini, and Martins' properties all border Lake Kincaid. The Mann and Abbotts' properties are located nearby, but are not adjacent to the lake. Mr. Logsdon's property is about 600 to 700 feet away from the shooting area of the gun club. Comp. Exh. 1.

South Fork Gun Club

Mr. Binegar is president of the South Fork Gun Club and a member of the Christian County Board. Respondent's trap shooting and rifle club is a not-for-profit organization located in Kincaid, Christian County. The record does not establish how many people South Fork employs or how many people visit the club. South Fork's articles of incorporation state the purposes of the club include promoting interest and education in the field of firearms and firearms safety and control, gun collection, amateur gunsmithing, and the promotion and fostering of safe hunting practices. Comp. Exh. 6A. South Fork advertises in the local newspapers for membership and various shoots. Tr. at 27.

South Fork incorporated the gun club on February 15, 1968, and Christian County granted the club a special use permit on March 8, 1968, for the purposes of trapshooting. *See* Comp. Group Exh. 7A. The Secretary of State then dissolved the corporation on July 1, 1981, for South Fork's failure to file an annual report. Comp. Exh. 6B. The gun club reincorporated on January 5, 1999 (Comp. Group Exh. 6A), but the club did not request another special use permit, nor did the original special use permit cover the real property at issue.[1] *See* Comp. Exh. 8, at 3.

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[1] A Fourth Judicial Circuit court found the permit void *ab initio* on September 6, 2002, due to an error in the legal description of the property.

Since 1968, Christian County's zoning laws have required that skeet or trap shooting special use permits be granted only for properties at least 1,320 feet or more away from any residence. Comp. Exh. 7B, at 23. The record does not disclose the exact distances between the gun club and the neighboring residences. However, a map from the Christian County zoning office (Tr. at 17) shows the acreage and lengths and widths in feet of the complainants' parcels of land in relation to the location of South Fork. Comp. Exh. 1. The Board finds that the map, the complainants' testimony, and testimony from the Christian County zoning officer, Mr. Rahar, establish that South Fork is closer than 1,320 feet from the residences. Tr. at 69; Tr. at 153-54.

Shooting occurred regularly at South Fork from Fall 1998 through 2001. South Fork was temporarily enjoined from skeet or trapshooting activities on January 9, 2002. The Fourth Circuit later issued a permanent injunction on September 6, 2002, which prevents South Fork from such activities unless and until it receives a special use permit. Comp. Exh. 8. South Fork held a rock concert on Friday, September 27, 2002, that lasted from about 8:45 p.m. to 1:25 a.m.. Subsequent to the hearing, Mr. Logsdon signed a sworn affidavit stating that South Fork held another loud party at the gun club on October 18, 2002. Comp. Br. Attachment A.

Noise Emissions Testimony

In summary, complainants' testimony is that while the shooting was occurring, they could not entertain guests inside or outside of their houses; wildlife left the area; they could no longer fish on the lake adjacent to their properties; they were deprived of sleep; and became irritable, stressed, and of bad humor. Each individual's testimony is set forth below.

Mr. Michael Logsdon

Mr. Logsdon moved into his Taylorville home in August of 1996. Tr. at 15. Mr. Logsdon stated that shooting at the gun club sometimes started at 8:30 a.m. and continued until 10:00 p.m. or 12:00 a.m.. Tr. at 28. Mr. Logsdon also said the volume of shooting varied, and sometimes there were as many as 16 rounds per minute being fired off for several hours at a time. Tr. at 29.

Mr. Logsdon took numeric noise measurements with an analog sound meter from Radio Shack on May 30, 2000, at the Collins' property between 1:30 p.m. and 1:39 p.m., and on his own property between 7:15 p.m. and 7:55 p.m. Comp. Exh. 3. Mr. Logsdon read the Board rules and consulted with Mr. Greg Zak, at the time a noise specialist employed by the Illinois Environmental Protection Agency, about how to properly take the readings. Tr. at pp. 35-36. The noise readings were made at least 25 feet away from any structures. Tr. at 32. Mr. Logsdon wrote the results down on paper while he was taking decibel readings with the meter. Tr. at 36; Comp. Exh. 3. The A-weighted readings averaged 70 decibels (dB) on Mr. Collins' property and 74 dB on his own property.

Regarding his physical health, Mr. Logsdon stated he cannot sleep while there is shooting going on at the gun club. He began to take antidepressants to control his anxiety because of the shooting. Tr. at 47. Furthermore, Mr. Logsdon's children could no longer play in the yard because of the loud noises. On one occasion, a shell landed on them while they were out in a

boat on the lake. Tr. at 45, 48. Mr. Logsdon wrote a letter to the gun club and the village, signed by several neighbors, complaining about the shooting in November of 1999. Comp. Exh. 4.

Mr. Alvin and Mrs. Kathy Abbott

Mr. Abbott moved into his current home in Taylorville on September 30, 1982. Tr. at 82. Mr. Abbott made a video of the gun club from his property on June 9, 2000 at around 7:30 or 8:30 p.m. Mr. Abbott also made an audio recording from the video. Comp. Exh. 10. The video shows the weather conditions were slightly overcast with little to no wind and also shows the shooting noises coming from South Fork measured in the upper 60s to low 70s dB range. Comp. Exh. 10.

The shots coming from the gun club property kept Mr. Abbott awake at night. Tr. at 92. He believes his lack of sleep was a safety hazard to those he worked with at the Formosa Chemical Plastics chemical plant. At home, he had to close down the swimming pool in his back yard and has become hard of hearing in the past two years. Tr. at 93. Mr. Abbott takes medicine to calm his nerves when there is shooting at the gun club. Tr. at 94. Like her husband, Kathy Abbott also works nights. She usually goes to bed around 5:00 p.m., but gets no sleep when shooting is going on at the gun club. Tr. at 100. The lack of sleep also affected her work and put her in a bad mood. Tr. at 101.

Mr. Darrell Mann

Mr. Darrell Mann moved into his current Taylorville residence in April of 1997. Tr. at 106. Mr. Mann worked several jobs, but had to take a leave of absence from his position as deputy sheriff of Christian County because of lack of sleep due to shooting at the gun club. Tr. at 119. He also feels his tension and lack of sleep put the safety of his coworkers at his coal mining job in jeopardy. Mr. Mann's doctor prescribed him Paxil and Xanax for his nerves. Mr. Mann said pellets from the gun club actually hit him and his children when they were on Mrs. Martin's property nearby. Tr. at 111. Mr. Mann's daughter's grades went from A's to B's while there was shooting at the gun club. The grades went back up to As when the shooting stopped. Tr. at 123. Mr. Mann also recorded sound readings on his property using the same sound meter that Mr. Logsdon used on May 20, 2000 between 4:36 p.m. and 4:41 p.m. Tr. at 112; Comp. Exh. 12.

Mr. Dave Collins

Complainant Dave Collins moved into his Taylorville home in March of 1986. Tr. at 133. Mr. Collins stated that his work at Doctor's Hospital in Springfield required him to go to bed at 8:30 a.m. on a normal day. However, when there was shooting, he got no sleep at all. He says the shooting causes him stress and prevents him from enjoying the use of his home. Both he and his wife were on medicine to calm their stress due to the shooting. Tr. at 143.

APPLICABLE LAW

Section 24 of the Environmental Protection Act prohibits a person from emitting noise beyond her property 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 33(c) of the Act provides 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:
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> i. The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
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> ii. The social and economic value of the pollution source;
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> 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;
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> 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).

Section 900.101 Definitions

> Noise pollution: 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.

Section 900.102 Prohibition of Noise Pollution

> 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

Section 901.104 of the Board's rules sets daytime and nighttime decibel standards for the emission of impulsive sounds. 35 Ill. Adm. Code 900.102 and 901.104.

DISCUSSION

Section 901.104 Numeric Noise Standards and Measurements

Complainants allege that South Fork violated both applicable daytime and nighttime impulsive noise standards (50 dB and 45 dB, respectively, when sound is emitted to Class A land) found at Section 901.104 of the Board's rules. 35 Ill. Adm. Code 901.104. To determine whether the respondent violated any section of 35 Ill. Adm. Code 901, complainants must take sound measurements in strict conformance with the procedures set forth in Section 900.103(b). 35 Ill. Adm. Code 900.103. Together Sections 900.103(b) and 901.104 require, in part, that measurements are based on a Leq averaging over a one-hour period, made less than 25 feet from the property line noise source, A-weighted for impulsive sound, and corrected for ambient or background noise. *See* Anthony and Karen Roti *et al*. v. LTD Commodities, PCB 99-19, slip op. at 19-20 (Feb. 15, 2001).

The Board finds no violation of Section 901.104 of the Board's regulations because the complainants did not follow every required procedure in taking sound measurements. Because the complainants' property is residential, the Board finds it is Class A land. See 35 Ill. Adm. Code 901.101(a), 901.Appendix B. Additionally, the Board finds that South Fork is a property line noise source. 35 Ill. Adm. Code 900.101. Although complainants used the proper measuring instrument, calibrated the noise monitoring machine correctly, and made measurements from the proper distance away from the noise emission source and from other objects in the vicinity, the complainants' reports and testimony confirm they did not make the measurements using the required reference time of one-hour intervals. Therefore, without strict adherence to the Board procedures, the Board cannot find a violation of the impulsive sound property line emissions at Section 901.104.

Nuisance Noise Violation

Complainants also allege that South Fork violated Section 24 of the Act and Section 900.102 of the Board regulations. 35 Ill. Adm. Code 900.102; 415 ILCS 5/24; Comp. Br. at 3. Together these provisions constitute a prohibition against nuisance noise pollution. Charter Hall Homeowner's Ass'n and Jeff Cohen v. Overland Transp. Sys., Inc., and D.P. Cartage, Inc., PCB 98-81, slip op. at 19 (Oct. 1, 1998); *citing* Zivoli v. Prospect Dive and Sport Shop, Ltd., PCB 89-205, slip op. at 8 (Mar. 14, 1991). In determining whether noise emissions rise to the level of a nuisance, the Board performs a two-step analysis. Young v. Gilster-Mary Lee Corp., PCB 00-90, slip op. at 8-9 (Sept. 6, 2001). First, the Board must determine whether the noise interferes with the complainants' enjoyment of life and property. *Id*. Second, the Board must consider the factors provided in Section 33(c) of the Act to determine whether the interference is unreasonable. *Id.; citing* Charter Hall, PCB 99-81, slip op. at 19-21. As discussed below, the Board finds that the noise that came from South Fork interfered with the complainants' enjoyment of life and that the interference was unreasonable.

Interference With Enjoyment of Life

The Board has previously held in nuisance noise proceedings that unreasonable interference is more than the complainants' ability to distinguish sounds attributable to a

particular source. Rather, the noise must objectively affect the complainant's life or business activities. *See* Hoffman v. City of Columbia, PCB 94-146, slip op. at 15-16; Zivoli, PCB 89-205, slip op. at 9.

Sounds emanating from the gun club clearly and objectively affected the complainants' life and use of their property. Complainants Mr. Logsdon, Mr. and Mrs. Abbott, Mr. Mann, and Mr. Collins all complained of interferences with their sleep and stated they and their families had reduced use of their property because of shooting at the gun club. Mr. Logsdon, Mr. Abbott, Mr. Mann and Mr. Collins and his wife all began taking anxiety medications after shooting began at the gun club.[2] The Board finds that the noise created by the gun club constitutes an interference with the complainants' enjoyment of life and property.

Unreasonableness of Interference

The second step in the nuisance noise analysis is to determine whether the noise from South Fork unreasonably interfered with the complainant's enjoyment of life. The Board considers each factor set forth in Section 33(c) of the Act, but need not find against the respondent on each factor to find that the noise was unreasonable. *See* Wells Manufacturing Co. v. PCB, 73 Ill. 2d 266, 233, 383 N.E.2d 148, 151 (1978); Processing and Books, Inc. v. PCB, 64 Ill. 2d 68, 75-77, 351 N.E.2d 865, 869 (1976). For the reasons set forth below, the Board fnds South Fork's noise was an unreasonable interference.

The Character and Degree of Injury. Under this factor, the Board assesses whether the noise "substantially and frequently interferes" with the complainants' enjoyment of life and property, "beyond minor or trifling annoyance or discomfort." Kvatsak v. St. Michael's Lutheran Church, PCB 89-182, slip op. at 9 (Aug. 30, 1990).

The Board found above that the complainants' noise measurements and logs cannot be used to prove a violation of the Board's numeric noise limits. However, the measurements and logs can be used as evidence to prove that South Fork violated applicable nuisance noise provisions, so long as they are technically justified. Young, PCB 00-90, slip op. at 14. The Board finds the complainants' measurements are credible evidence. The sound measuring device was properly calibrated. The complainants took sound measurements on May 28, 2000 at the Martins' property between 4:16 p.m. and 4:26 p.m. and on the Manns' property between 4:36 p.m. and 4:41 p.m., and on May 30, 2000, at the Collins' residence between 1:30 p.m. and 1:40 p.m. and at the Logsdon's back porch between 7:15 p.m. and 7:55 p.m. The decibel levels ranging between 70 and 74 dB show that noises coming from South Fork were very loud and frequent.

Shooting at South Fork occurred sometimes 12 to 14 hours per day, 5 days a week. The complainants have proven physical effects resulting from the noise. Shooting noises have

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[2] The Board does not consider complainants' testimony of taking anti-anxiety medication as a result of the shooting a medical opinion. *See* Young, PCB 00-90, slip op. at 11, 15.

disrupted the sleep of Mr. Logsdon, Mr. and Mrs. Abbott, Mr. Mann, and Mr. Collins. All of the same complainants experienced increased anxiety and tension and had to start taking medication to calm their nerves due to the shooting. Mr. Mann's daughter's grades suffered while the shooting was occurring. The complainants' families could no longer play or entertain outside because of the noise. The Board weighs this factor against South Fork.

The Social and Economic Value of the Pollution Source. The record does not establish how many people South Fork employs or how many people visit the club. Furthermore, nothing in the record indicates the gun club has furthered the goals set forth in South Fork's articles of incorporation by offering instruction or education to the public. The record states only that South Fork advertised in the local newspaper for membership and various shoots. There also is nothing in the record stating that the gun club returns proceeds to the community or is otherwise of economic value. Thus, while the gun club may have had social value to its members, its manner of operation negatively impacted its neighbors in the community. The Board weighs this factor neither in favor of nor against the respondents.

The Suitability or Priority of Location. South Fork does not have priority of location. South Fork was incorporated in 1968. The gun club was administratively dissolved by the Secretary of State in 1981 and not reincorporated until 1999. South Fork argues that "just because the Gun Club did not operate for several years and did not pay the annual franchise tax with the Illinois Secretary of State," nothing stops South Fork from paying the unpaid taxes and bringing the corporation into good standing. Resp. Br. at 1-2.

This argument has no merit. Illinois law provides that dissolution of a not-for-profit corporation ends its existence. 805 ILCS 105/112.30. A domestic corporation may be revived with all powers, duties, and obligations as if it had not been dissolved if the corporation reinstates within five years of being administratively dissolved. 805 ILCS 105/112.45. However, South Fork did not reinstate until 18 years after it was administratively dissolved. Complainants started moving into the area in 1982 and all of the complainants had moved in by 1997. Therefore, complainants already lived in the area when South Fork began shooting again in the fall of 1998 and reincorporated in 1999. The Board finds that complainants had priority of location.

South Fork is also not suitable to its location because the special use permit it obtained in 1968 is void and because the permit violates its own stated restriction on proximity. On September 6, 2002, a Fourth Judicial Circuit court found that South Fork's permit for special use was void *ab initio* due to an error in the legal description of the real property. Comp. Exh. 8.

In addition, the gun club is too close to the complainants' properties. When South Fork incorporated in 1968, the gun club property's zoning was changed from agricultural to special use for skeet and trap shooting purposes. When the club was reincorporated in 1999, the surrounding property was zoned residential. The Christian County's zoning ordinance, in effect since the time of South Fork's reincorporation in 1999, states that the county board may authorize a petition for special use for the purposes of skeet or trap shooting only if the use is not closer than 1,320 feet from any residence. Comp. Exh. 7B, at 23; Comp. Exh. 8 at par. 6. As discussed above, the gun club is located within 1,320 feet of the neighboring residences.

Therefore, when the gun club reincorporated, its petition for special use was void *ab initio*, as found by the Fourth Circuit. The Board weighs this factor against South Fork.

The Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Emissions. Under this factor, the Board looks at whether South Fork could have employed readily available, practical, and reasonable means to reduce or eliminate the allegedly offensive noise. Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 298-299, 319 N.E.2d 794, 798 (1974); Scarpino v. Henry Pratt Co., PCB 96-110, slip op. at 20 (Apr. 3, 1997).

The complainants ask the Board to order South Fork to cease and desist from causing any further noise pollution whether occurring day or night. The record contains no evidence that noise reduction is technically impracticable or economically unreasonable. The Board weighs this factor against the respondents.

Any Subsequent Compliance. Under this factor, the Board considers whether South Fork has attempted to ameliorate the situation by reducing emissions that caused the alleged violations of the Act and Board regulations. Since the complainants filed this case in April, 2000, complainants contend that South Fork did nothing to reduce the noise coming from the gun club until it was temporarily enjoined from shooting activities by a Fourth Judicial Circuit court in January, 2002. Subsequently, South Fork was permanently enjoined from conducting skeet or trapshooting on the gun club's property by the same court on September 6, 2002. Subsequent even to the permanent injunction, South Fork obtained a permit to host a concert on the premises on September 20, 2002 from 9 p.m. until 12 a.m. Tr. at 75. The concert lasted until approximately 1:25 a.m.

The Board finds that South Fork made no effort to remedy the shooting noises until they were enjoined by a court of law. The Board weighs this 33(c) factor against South Fork.

Again, in conclusion, the Board finds that noise from South Fork unreasonably interfered with the complainants' enjoyment of life and their property. The Board will now consider the complainants' requested remedy.

REMEDY

Cease and Desist Order

Complainants request the Board to enter a cease and desist order. The complainants also request that the Board order South Fork to pay a civil penalty of $174,600, and sanction Mr. Binegar individually with a monetary penalty. Having considered the 33(C) factors, the Board will order South Fork to cease and desist from any further violations of the nuisance noise prohibitions of 415 ILCS 5/24 (2000) and 35 Ill. Adm. Code 900.102 and 901.104. As discussed above, the Board also sanctions respondents by striking the respondents' closing brief. Therefore, the remaining issue for the Board to decide is whether South Fork must pay a civil penalty.

Civil Penalty

The formula for the maximum penalties that the Board may assess is at Section 42(a) of the Act, which states in pertinent part:

[A]ny person that violates any provision of the Act or any regulation adopted by the Board . . . shall be liable to a civil penalty not to exceed $50,000 for the violation and an additional civil penalty of not to exceed $10,000 for each day during which the violations continues . . . . 415 ILCS 5/42(a) (2000).

Pursuant to Section 42(a) of the Act, the Board could impose a civil penalty of $50,000 for each of the two violations. Additionally, Section 42(a) would allow the Board to impose further civil penalties of $10,000 per day for each day the violation continued. The Board found above that the violations occurred for over three years.

In determining the appropriate civil penalty, the Board must also consider the record in light of the factors set forth in Section 33(c) and Section 42(h) of the Act, which may either mitigate or aggravate the penalty assessment.

Section 42(h) of the Act states that "in determining the appropriate civil penalty to be imposed, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors: (1) the duration and gravity of the violation; (2) the presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act; (3) any economic benefits accrued by the violator because of delay in compliance with requirements; (4) the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator."

Complainants argue that based on a review of the Section 42(h) factors, the Board should impose a penalty of not less than $174,600 on South Fork. Complainants reason that five days of shooting a week from 1999 through 2001, at $200 per day, over nearly three and a half years (a total of 873 days since shooting only occurred on 90 days in 1998), equals a monetary penalty of $174,600. Comp. Br. at 12.

In considering penalty issues, the Board looks to its own past precedent. The Board has imposed a $15,000 civil penalty on a respondent for causing nuisance noise violations. Charter Hall Homeowner's Assoc. v. Overland Transp. Sys., Inc., PCB 98-81 (May 6, 1999). In Charter Hall, the violations occurred for more than two years and the respondent did not retain a noise control expert nor did it implement any of the several reasonable measures available to reduce the noise.

After careful review of the 42(h) and Section 33(c) factors and relevant Board opinions, the Board finds that a civil penalty is warranted in this case. The Board found above that the noise coming from South Fork unreasonably interfered with the complainants' enjoyment of life. Any social value of the gun club to its members was undercut by the negative impact on its

neighbors. Furthermore, the Board found that the degree of injury was severe and that the complainants had priority of location. The respondent has not shown that the noise nuisance cannot be abated in an economically reasonable and technically feasible manner. Even after the filing of this complaint, South Fork was not diligent in attempting to comply with the requirements of this Act. The violations lasted for more than three years and significantly interfered with the complainants' enjoyment of life and use of their property.

Nonetheless, the $174,600 penalty requested by the complainants would be excessive. South Fork is a not-for-profit corporation intended for purposes of recreation and education.

Charter Hall is also distinguishable from this proceeding so as to warrant a smaller penalty here. The respondent in Charter Hall had 32 trucking terminals throughout the Midwest, including five in Illinois. A larger penalty was needed in that case to deter the respondent, as well other similarly situated entities. In assessing all of the relevant factors, and to deter further violations by South Fork and other entities similarly situated, the Board finds a civil penalty of $3,000 is appropriate. South Fork must pay this amount of civil penalty to the Environmental Trust Fund.

CONCLUSION

Based on the record before the Board, consisting of evidence presented at hearing and arguments set forth in their closing brief, the Board finds that complainants proved that South Fork committed nuisance noise violations. Therefore, the Board finds that South Fork Gun Club violated Section 24 of the Act and Section 900.102 of the Board regulations, by causing an unreasonable interference with the complainants' enjoyment of life and their property. The Board orders South Fork to cease and desist from further violations of the Act and Board regulations. In addition, the Board orders South Fork to pay a civil penalty of $3,000.

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

ORDER

1. The Board finds that South Fork has violated Section 24 of Act (415 ILCS 5/24) and 35 Ill. Adm. Code 900.102.

2. South Fork must pay a civil penalty of $3,000 no later than January 18, 2003, which is the 30th day after the date of this order. South Fork must pay the civil penalty by certified check or money order, payable to the Environmental Protection Trust Fund. The case number, case name, and South Fork's social security number or federal employer identification number must be included on the certified check or money order.

3. South Fork must send the certified check or money order to:

   Illinois Environmental Protection Agency
   Fiscal Services Division
   1021 North Grand Avenue East

P.O. Box 19276
Springfield, Illinois 62794-9276

5. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2000)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2000)).

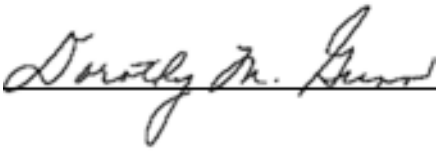
6. South Fork must cease and desist from the alleged violations.

IT IS SO ORDERED.

Board Member W.A. Marovitz dissented.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 19, 2002, by a vote of 5-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board