ILLINOIS POLLUTION CONTROL BOARD
March 13, 1975

KENNETH BUELO, EDWARD K. HARDY, JR., EDWARD K. HARDY, III., and ROSS D. SIRAGUSA Complainants, v. BARRINGTON SPORTSMEN UNLIMITED, INC., et al, Respondents.	)	PCB 74-303
ENVIRONMENTAL PROTECTION AGENCY Complainant, v. BARRINGTON SPORTSMEN UNLIMITED, INC., and WALTER ULICK and VIRGINIA ULICK, Respondents.	)	PCB 74-360

Steven M. Rasher, Attorney, appeared for Complainants Buelo, Hardy Jr., Hardy, III, and Siragusa.
Frederic J. Entin, Assistant Attorney General, appeared for the Environmental Protection Agency.
James M. Boback, Attorney, appeared for Respondents.

OPINION & ORDER of the Board (by Mr. Zeitlin)

The Complaint in PCB 74-303 was filed by the above named complainants, all residents of the Village of Barrington, McHenry County on August 16, 1974. Those complainants alleged that Respondent Barrington Sportsmen Unlimited, Inc., (Barrington Sportsmen), had operated a private club in the Village of Barrington in violation of Rule 102 of the Pollution Control Board's Noise Pollution Control Rules and Regulations. That violation, alleged to have continued from the August 10, 1973 effective date of the Noise Pollution Control Regulation until the filing of the complaint, arose from the use of rifles, pistols, and shotguns by various individuals on the grounds of Barrington Sportsmen.

The Complaint in PCB 74-360, filed on October 3, 1974, was filed by the Environmental Protection Agency (Agency) and alleged an essentially similar violation of the Noise Pollution Control Regulations as was stated by the named complainants in PCB 74-303. Pursuant to a motion filed by the Agency with the Complaint in PCB 74-360, these two cases were consolidated to allow a single consideration and resolution of the matter by the Pollution Control Board (Board).

At a hearing held in the matter on January 17, 1975, the Agency moved that Respondents Walter and Virginia Ulick, the property owners of the site operated by Barrington Sportsmen, be dismissed. In its oral motion, the Agency stated its feeling that no finding in this matter should be made as to the Ulicks, and that it did not feel that the Ulicks should be party to a final Order by the Board. The motion of the Agency was uncontested.

At the January 17, 1975 hearing, the parties also entered a short stipulation. That stipulation covered various issues of fact, and describes testimony which the parties would have offered had a full hearing been held in this matter. Resolution of whether Barrington Sportsmen's activities, as complained of in these two cases, constituted a violation of Rule 102 of the Noise Pollution Control Regulations was left to the Board.

BACKGROUND

Respondent Barrington Sportsmen is a not-for-profit corporation under Illinois law which operated premises in Barrington as a trap-shooting range, skeet range and for individual hunting purposes. The members and guests of Barrington Sportsmen used those premises for such shooting activity seven days a week with particularly heavy use on holidays and weekends. Such shooting was carried on under the auspices of, and subject to control and regulation by, Barrington Sportsmen.

The property operated for shooting by Barrington Sportsmen was adjacent to single family residences occupied by, among others, the individual Complainants in PCB 74-303. The Stipulation in this matter included various testimony which would have been offered by the occupants of those dwellings. Such testimony would have included the fact that noise of gunshots from Barrington Sportsmen's property was intermittent to continuous every day of the week, and more frequent on weekends and holidays. The offered testimony would have been to the effect that such noise was distracting, disturbing, and bothersome to the surrounding residents when using their porches, patios, terraces, and yards. Further, such testimony would have been to the effect that noise from Barrington Sportsmen's premises interferred with conversations in those outdoor locations on the surrounding property, and interferred with the use and enjoyment of the surrounding residents' outdoor recreational facilities, including, in one case, a swimming pool. Such testimony would have also included statements to the effect that gunshot noise from Barrington Sportsmen's operation were disturbing to the guests of the named Complainants.

Respondent operated the Barrington property for fourteen years, and terminated its lease on that property on October 1, 1974. After October 1, 1974, Respondent moved its operation to Crystal Lake, Ill. Barrington Sportsmen's lease for the Crystal Lake property had been entered into on August 2, 1974, prior to the filing of the complaint in PCB 74-303. Since October 1, 1974, there have been only occasional shots heard on or near the property formerly operated by Barrington Sportsmen. Such shots, however, have not been the result of any activity by Barrington Sportsmen.

Respondent's activities which are the subject of the Complaints in this matter have been the subject of a law suit filed by a Ross D. Siragusa, who is also one of the named Complainants in PCB 74-303. That suit, case number 69-418, in the McHenry County Circuit Court, alleged that Respondent's activities constituted a common law nuisance. That case was decided for Respondent on March 19, 1974, with a finding that Respondent's activities did not constitute a common law nuisance. An appeal in the matter was subsequently dismissed.

Barrington Sportsmen stated in the stipulation that it does not feel that its activities constituted a violation of Rule 102 of the Noise Pollution Control Regulations. Respondent denies that the allegations contained in the two Complaints in this matter, even if proved, would constitute a violation of the standards established by the Board.

DISCUSSION

The Respondent in this matter has not chosen to refute or contradict the statements contained in the stipulation as to testimony which would have been offered by Complainants at a hearing. Respondent instead states that the substituted language of the stipulation does not contain the specificity necessary to conclude a violation of Rule 102. Further, Respondent states that it believes it has received judicial permission to operate its premises in the manner complained of, as evidenced by the court's finding in the suit brought by Complainant Siragusa.

The resolution of this case by the Board involves an essentially simple determination. There is no allegation that any of the numerical standards contained in Chapter 8, the Noise Regulations, as to specific activities or specific types of property have been violated. Instead, the Board must simply determine, based on the above described effects of Respondent's activities, whether such activities have unreasonably interfered with Complainants enjoyment of life, or with any lawful business or activity.

Rule 102 states that:

> No person shall cause or allow the emission of sound beyond the boundaries of his property so as to cause noise pollution in Illinois, or so as to violate any provisions of this chapter or the Illinois Environmental Protection Act.

Rule 101(j) defines noise pollution as: "The emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity." That these standards, established by the Board, are applicable here is plain upon a reading of Section 24 of the Environmental Protection Act:

> 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.

Section 25 of the Act limits the Board's authority in adopting such regulations only insofar as it must set maximum allowable limits on noise emissions which unreasonably interfere with the enjoyment of life.

Nor is the Board here bound in deciding this matter to follow the judicial opinion described above. Although the Board recognizes its responsibility to treat properly any judicial interpretation of its regulations, a finding that common law nuisance is not present in this case is not determinative of the regulatory violation alleged. There is no requirement that the Board find that Respondent's conduct amounted to a common law nuisance in order for it to find that Rule 102 may have been violated. Therefore, the court's finding in the above described law suit is inapplicable to our determination here.

Rule 102, when read with the definition of noise pollution in Rule 101(j), is not worded in traditional nuisance terms. The test, which here is whether Respondent's activities unreasonably interfered with the enjoyment of life or with any lawful activity, is instead a much stricter one. The Board is not bound by traditional concepts of tort, but is instead bound by the finding of the General Assembly in Section 23 of the Environmental Protection Act, to the effect that excessive noise creates serious consequences which are to be avoided or prevented. Illinois Coal Operators v. Pollution Control Board, __Ill.__, 319 N.E. 2nd 782,785 (1974). See also, City of Monmouth v. Pollution Control Board, 57 Ill. 2d 482,313 N.E. 2d 161,163 (1974);

Respondents here are not alleged to have violated any of the specific numerical standards set up under other rules to control noise pollution. But the Board, in adopting the Noise Pollution Control Regulations, realized that not every source of noise pollution would be subject to such numerical control. Rule 102, the general prohibitory rule, was designed to remedy just such situations as that present here. In the matter of Noise Pollution Control Regulations, R 72-2, 8 PCB 703,722 (1973).

The parties in arriving at the Stipulation in this matter did provide sufficient facts for the Board to reach a decision on the merits of the Case, as is required. E.P.A. v. Ralston Purina, PCB 71-88, 3 PCB 143 (1971); 6 PCB 3 (1972) By stipulating to testimony which would have been offered at a hearing, the parties have given us ample grounds to arrive at a finding of fact. By failing to provide contrary offers of proof, and instead relying on other theories of defense, Respondent has required the Board to take such "testimony" as unrefuted. See, e.g., E.P.A. v. Federal Paperboard PCB 72-372, 9 PCB 189 (1973). Insofar as Respondent here has not chosen to contradict the allegations in the stipulation, the Board must reach its decision based only on such allegations.

While Respondent states that it feels the complaints herein are the result of some special sensitivity on the part of the named complainants, such a statement is conclusory when offered with no other matters in support thereof. See, E.P.A. v. Soil Enrichment Materials Corp. PCB 71-272, 3 PCB 239 (1971). The Board is limited to stipulated facts, but not conclusions.

The Board must first determine whether such "testimony" is sufficient to constitute a prima facie case for the Complainants. Once this determination is made, if a prima facie case is found, it is the burden of the Respondent to come foreward with evidence or a sufficient defense. E.P.A. v. Freeman Coal Mining Co., PCB 72-315, 9 PCB 185,188 (1973). Respondent's burden, absent an affirmative defense, is the preponderance of the evidence. E.P.A. v. Container Stapler, PCB 70-18, 1 PCB 267,270 (1971).

In finding whether there has been a prima facie case made here, the Board must determine whether the unrefuted offer of testimony made by the Complainants is sufficient to prove two things. First, that testimony must show that there has been interference with the Complainants, in the manner discussed above. Second, the Board must determine that such interference was unreasonable. E.P.A. v. Rail-to-Water Transfer Co., PCB 72-466, September 5, 1974, Opinion at 3. The Board finds that both are present here.

Using the guidelines presented by Section 33(c) of the Act, as is required under the Illinois Coal Operators Opinion, the Board is unable to find from the evidence before it that Respondent's activities were excusable under the circumstances. 319 N.E. 2d at 787. The interference and injury here are uncontroverted. While the value of Respondent's recreational activities may be substantial, they are not of such character to outweigh the violated rights of individuals. Questions of the suitibility of Respondent's activities to the Barrington area, and the feasability of eliminating the interference here are mooted by Respondent's abandonment of the site. Even if the site was particularly suitable for shooting activities, the value of such activiities is outweighed by the rights of the Complainants. Respondent's movement to a new location would have constituted a practical method of eliminating its sound emissions at a time before this action was finally brought.

If Respondent's reliance on the lawsuit described above is to be seen as the offer of an affirmative defense, such reliance was ill founded. Nor can Respondent's allegation of prior user, if intended as a theory of affirmative defense, suffice here. While Section 33(c)(3) of the Act directs the Board to consider priority of use in reaching decisions on enforcement cases, such priority cannot constitute a permanent license. Respondent states in the Stipulation only that the named Complainants in PCB 74-303 have "occupied their homes for a period of less than 14 years", while it has been operating for 14 full years. Such an allegation of simple priority is insufficient, where nothing else is provided or alleged, to overcome Respondent's burden. E.P.A. v. Incincerator, Inc, PCB 71-69, 2 PCB 505, 511 (1971).

It cannot be argued that the uncontradicted allegations of the Complainants herein are unreasonable under the circumstances. The activities which Complainants state Respondent's activities interfered with constitute the normal and regular use of outdoor facilities associated with many residences. The use of patios, terraces, porches and backyards is common to most homeowners. If Respondent's activities unduly interfered with normal, social use of such residence-associated outdoor facilities, it constitutes a violation of Rule 102. See, E.P.A. v. Edward Hospital District, PCB 74-251, February 6, 1975, Opinion at 5. Insofar as Respondent has not rebutted or otherwise contradicted the allegations in the stipulation, a prima facie case has been made by Complainants, and the Board cannot do other than find a violation.

Further, it is also uncontradicted by Respondent that Respondent's activities interfered with normal conversations carried on by Complainants in the use of the outdoor facilities associated with their residences. There being no contrary indications in the stipulated facts, the Board again cannot do other than find a violation of Rule 102 in such activity. It is the intent of the Act, the Illinois Constitution, and the Rules and Regulations of the Pollution Control Board adopted pursuant to the authority given in those documents, that individuals be entitled to normally and peacefully enjoy their own premises with sufficient serenity as a part of the enjoyment of life, within the general environment of the State of Illinois. Ill. Rev. Stat., Ch. 111½, Sec. 2(b)(1973); Ill. Const. Art. XI, Sec. 2.

The Board has thus found that Complainants have shown a prima facie case, by demonstrating both interference and the unreasonableness of such interference. Having examined the defenses offered by Respondent, we have found them to be inadequate. Respondent's failure to present countervailing evidence, once faced with the burden of proof, leaves a clear finding of violation.

Despite such a finding of violation, however, it is clear that the violations which did exist have been remedied. Respondent has vacated the premises which are the subject of the complaints in this matter. Further, the stipulation contains statements by the Agency to the effect that Respondent's new facilities in Crystal Lake are not, at the present time, causing noise pollution so as to violate Rule 102 of the Board's Noise Pollution Control Regulations. It also appears that Respondent's plan to move to Crystal Lake was not the result of one or both of these enforcement actions, but instead resulted from independent decisions made prior to the filing of either. For that reason, and because Respondent may have in good faith, although mistakenly, believed that the prior lawsuit constituted a license to carry on its activities, the Board feels that a penalty would serve no real or useful design in this matter. It is the purpose of the Environmental Protection Act to restore, protect and enhance the quality of the environment. In the Opinion of the Board, this has been accomplished.

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

ORDER

IT IS THE ORDER of the Pollution Control Board that:

1. Respondent Barrington Sportsmen Unlimited, Inc. is found to have violated Rule 102 of the Board's Rules and Regulations for the control of noise pollution in the operation of its premises in the Village of Barrington during the period of August 10, 1973 to October 1, 1974.

2. Respondents Walter and Virginia Ulick are dismissed.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion & Order were adopted on the 13th day of March, 1975 by a vote of 4 to 0.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board