

ILLINOIS POLLUTION CONTROL BOARD  
February 5, 2004

ANTHONY and KAREN ROTI, PAUL	)	
ROSENSTROCK, and LESLIE WEBER,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 99-19
	)	(Citizens Enforcement – Noise)
LTD COMMODITIES,	)	
	)	
Respondent.	)	

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

The Board issued a final opinion and order in this matter on July 24, 2003. On August 28, 2003, LTD Commodities (LTD) filed motions for reconsideration, modification, and stay (Mot. for Rec.). In a Board order dated September 4, 2003, the Board indicated that the final opinion and order in this matter is stayed until the final disposition of LTD's motion for reconsideration. On September 15, 2003, LTD supplemented its motions for reconsideration, modification, and stay (Mot. to Supp.). On October 16, 2003, the Board granted the complainants' former attorney, Steven Kaiser, leave to withdraw.

On December 4, 2003, Board Hearing Officer Brad Halloran sent a hearing officer order to the complainants' home addresses, attaching the Board's September 4, 2003 and October 16, 2003 orders, and indicating that respondents must either retain an attorney or represent themselves individually if they wished to further participate in this proceeding. To date, the complainants have not responded to the motions or the motion to supplement, and no attorney has appeared on behalf of the complainants. Today's order addresses LTD's motions for reconsideration and modification. For the reasons below, the Board grants LTD's motion for reconsideration, grants LTD's motion to supplement, and modifies the Board's final opinion and order accordingly.

**BACKGROUND**

The Board's February 15, 2001 interim opinion and order found that LTD violated the Board and the Environmental Protection Act's (Act) nuisance noise provisions and ordered the parties to proceed to hearing on the remedy. After holding hearings on the remedy on October 15 and 16, 2002, and on December 9, 2002, the Board issued a final opinion and order on July 24, 2003. The Board ordered LTD to cease and desist from further violations of the Act and Board regulations. Specifically, the Board ordered LTD to cease and desist from: (1) trucking operations during nighttime hours, between 10:00 p.m. and 6:00 a.m. at the Bannockburn facility; (2) using backup warning beepers at the Bannockburn facility and to replace any backup warning beeper used on a yard tractor with either a human spotter or a strobe light; and (3)

parking, standing, or idling trucks, tractors or semi-trailers on Lakeside Drive and the ramp connecting LTD's dock area with Lakeside Drive.

The Board's July 24, 2003 order provided that in the alternative, LTD may construct a noise barrier. The Board ordered the noise barrier to be: (1) built immediately north of LTD's dock area; (2) designed and constructed in accordance with good engineering practices and under the supervision of a qualified noise control engineer; (3) constructed out of certain sound absorbing material; (4) uniform elevation with a wall-top elevation of 710 feet above sea level; and (5) 520 feet in continuous length (and an additional 150 feet in length if LTD allows tractors or semi-trailers to resume parking, standing, or idling on Lakeside Drive or the ramp connecting Lakeside Drive to the staging area). The order also requires LTD to maintain the noise barrier in good condition.

Finally, the Board's July 24, 2003 order imposed a civil penalty of \$15,000 upon LTD for violating Section 24 of the Act and Section 900.102 of the Board's prohibition against nuisance noise. Roti, et al. v. LTD Commodities, PCB 99-19 slip op. at 15. Pursuant to LTD's August 28, 2003 motions for stay, reconsideration, and modification, the Board stayed the July 24, 2003 opinion and order on September 4, 2003, until final disposition of LTD's motion for reconsideration.

### **MOTION TO SUPPLEMENT**

In the motion to supplement, LTD attaches an email correspondence from Mr. Jack Voigt, Vice President of Distribution for LTD, to Cycle Logistics regarding the use of backup beepers at LTD Commodities as Exhibit A. Cycle Logistics, a yard tractor operator at LTD, states in the email that it cannot comply with LTD's request to turn off the backup beeper and use a human spotter instead. LTD requested that Cycle Logistics express its position in a letter. LTD attaches Cycle Logistics' letter as Exhibit B. LTD moves the Board to grant the motion because the attached exhibits support LTD's argument that it is unsafe to disconnect the backup beepers during daytime hours. The Board grants LTD's motion and accepts the attached exhibits.

### **MOTION FOR RECONSIDERATION AND MODIFICATION**

A party may move the Board to reconsider and modify its decision within 35 days after receiving a final Board order. 35 Ill. Adm. Code 101.520(a). Here, LTD does not ask the Board to reconsider its finding of violations or imposition of the \$15,000 civil penalty. LTD moves the Board to reconsider and modify the ordered restrictions on nighttime trucking operations and the alternative option to build a noise barrier.

### **Standard of Review**

In ruling on a motion for reconsideration or modification, the Board will consider factors including new evidence or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902; Jersey County Sanitation v. IEPA, PCB 00-82 (Sept. 20, 2001). In Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (Mar. 11, 1993),

the Board observed that “the intended purpose of a motion for reconsideration is to bring to the court’s attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court’s previous application of the existing law.” Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

“Reconsideration is not warranted unless the newly discovered evidence is of such conclusive or decisive character so as to make it probable that a different judgment would be reached.” Patrick Media Group, Inc. v. City of Chicago, 255 Ill. App. 3d 1, 8, 626 N.E.2d 1066, 1071 (1st Dist. 1993).

### **Modifications Requested**

LTD seeks the following modifications of the Board’s July 24, 2003 opinion and order:

1. Allow LTD to conduct nighttime trucking operations while it works with a noise consultant to examine ways to reduce noise at the site to the same level as offered by the wall proposed by Dr. Paul Schomer.
2. Allow LTD to conduct nighttime trucking operations while it works with a noise consultant on the following noise wall proposals: (1) a wall along the north and east property lines of the LTD property; and (2) to demolish the retaining wall and build a retaining wall and noise wall as a unified structure in the location of the current retaining wall.
3. Allow LTD to conduct nighttime trucking operations while it pursues a height variance from the Village of Bannockburn (Bannockburn).
4. Allow LTD to use the backup beeper on its yard tractor during daytime hours.
5. Clarify that the PCB’s decision regarding disconnecting backup beepers only applies to the yard tractor at LTD and does not apply to over-the-road trucks not owned or operated by LTD.
6. Allow LTD to load and unload trailers between 10:00 p.m. and 6:00 a.m. provided its truck dock doors are closed.
7. After Bannockburn has made its decision regarding the noise wall proposals, reopen hearing so that LTD may present evidence regarding the wall proposals submitted to Bannockburn and Bannockburn’s final decision.
8. After Bannockburn has made a decision regarding the noise wall proposals, reopen hearing to present findings and recommendations by Mr. Kamperman.
9. After Bannockburn has made its decision regarding the noise wall proposals, reopen hearing for consideration of an appropriate remedy. Mot. for Rec. at 2-3.

LTD moves the Board to reconsider and modify the July 24, 2003 order as discussed above. Should the Board deny LTD’s motion, LTD asks that the Board stay the effect of the February 15, 2001 and July 24, 2003 decisions pending appellate review. Mot. for Rec. at 12. LTD contends that pursuant to Supreme Court Rule 335(g), it must first apply for a stay of the decision with the Board pending review in the appellate court. Mot. for Rec. at 11. LTD requests

permission to reply to any response filed by the complainants, and other relief as is just an equitable. Mot. for Rec. at 12.

### **LTD's Arguments**

#### **Reliance on Interim Opinion and Order**

LTD argues that it relied upon the Board's findings in the February 15, 2003 interim opinion and order in preparing for the remedy phase of this matter. Mot. for Rec. at 3. LTD relied upon the Board's finding that "elimination LTD's nighttime operations would not be economically reasonable . . ." and that \$300,000 is a "significant sum" to construct a noise wall on LTD's property. Mot. for Rec. at 1. LTD claims it never expected the Board to order a noise wall in a location other than on the north property line at the cost of two to ten times the original \$300,000 estimate. Mot. for Rec. at 10. For these reasons, LTD contends it did not provide specific plans for a property line noise wall at the hearings on remedy in October 2002. *Id.*

#### **Restriction on Nighttime Trucking Operations**

LTD argues the Board erred in assuming LTD can operate without a night shift. Mot. for Rec. at 3. LTD argues that LTD president and CEO, Michael Hara, testified that eliminating LTD's second shift would "destroy" LTD. *Id.*; *citing* Int. Op. at 14. LTD contends that while it expected the Board would require it to build a noise wall, LTD felt assured it could continue to operate at nights while pursuing permission from Bannockburn to build the wall. Mot. for Rec. at 3. LTD continues that it needs to operate beyond 10:00 p.m. to ship customer orders during the holiday season. LTD further states that the 400 evening employees at the facility will have weekly gross earnings reduced by 25% based on the shorter work schedule. Mot. for Rec. at 4.

LTD argues the Board's definition of trucking operations is unnecessarily restrictive. LTD contends the truck docks have doors that can be closed while trailers are loaded and unloaded. LTD asserts that to the extent it can load and unload trailers behind closed truck dock doors, it should be allowed to do so between 10:00 p.m. and 6:00 a.m. Mot. for Rec. at 8.

#### **Location of the Noise Wall**

LTD argues the Board ordered LTD to build a wall in the location proposed by Dr. Schomer based on the misunderstanding that the Huff Company can feasibly build a wall in that location. Mot. for Rec. at 6. LTD contends Mr. Mitchell, from the Huff Company, testified that he cannot build a noise wall within the zone of influence of the existing retaining wall. Mr. Mitchell testified that construction of the noise wall must not interfere with the underground fabric that currently supports the existing retaining wall. Mot. for Rec. at 6. Further, LTD asserts that all parties agree a noise wall in the parking lot is not an effective solution. *Id.*

LTD further contends there is no guarantee Bannockburn will approve a noise wall in the location and of the proportions proposed by Dr. Schomer. Mot. for Rec. at 7. LTD argues that by allowing LTD to conduct nighttime trucking operations only if it builds a noise wall where proposed by Dr. Schomer, the Board has effectively permanently shut down LTD's nighttime

trucking operations. *Id.* Accordingly, LTD moves the Board to change its order to allow the option of a property line noise wall. *Id.* LTD contends that presenting two alternatives is more likely to result in an approval by Bannockburn. Mot. for Rec. at 8. In addition, a property line noise wall could be just as effective as a noise barrier in the location proposed by Dr. Schomer. Mot. for Rec. at 7.

### **Backup Beeper**

LTD argues that the Board erred in ordering LTD to cease and desist from using backup warning beepers at the Bannockburn facility at any time and replace any backup beepers with a human spotter or a strobe light. LTD contends it does not have control over all backup beepers at the site. Furthermore, LTD asserts all evidence in this case focused on the backup beepers being a nuisance at night. Mot. for Rec. at 8. LTD adds that a strobe light is a reasonable alternative to a backup beeper at night, but a dock pilot directing trucks during the day will slow down operations and the yard tractor will have to idle longer while a dock pilot determines if it is safe to backup. Mot. for Rec. at 9. LTD requests the Board modify the July 24, 2003 opinion and order to allow LTD to use the backup beeper between 6:00 a.m. and 10:00 p.m., and to clarify that backup beepers on over-the-road trucks need not be disconnected. *Id.*

### **New Noise Consultant**

Finally, LTD contends that subsequent to the Board's final opinion and order in this matter, LTD hired a new noise consultant, George Kamperman, P.E., to look at ways to reduce noise at the site. Mot. for Rec. at 10. LTD attached a letter from Mr. Kamperman stating his intent to investigate the site, record and analyze data, and propose a solution that would reduce LTD's noise emissions about 10 dBA. Mr. Kamperman states in his letter he will estimate the magnitude of noise reduction that may be accomplished at various sources and overall. Mot. for Rec. Exh. B. Mr. Kamperman states he would spend 40 hours of consulting time over one month to complete this initial proposal for LTD. *Id.*

### **Board Analysis**

The Board grants LTD's motions for reconsideration and modification. LTD has presented the Board with new facts not available when the Board issued its July 24, 2003 decision in this matter. In addition, because the complainants have not responded to LTD's motion for reconsideration, modification, and stay or motion to supplement, the complainants waive any objection to the Board granting the motions. *See* 35 Ill. Adm. Code 101.500(d). However, the Board does not make all of LTD's requested modifications as the record does not support all of the requested changes. As discussed below, the Board modifies the final order in this matter with regard to the definition of nighttime trucking operations, the location of the noise barrier, and the Board's order concerning backup beepers at the LTD facility.

### **Reliance on Interim Opinion and Order**

That LTD relied upon the Board's findings in the February 15, 2001 interim opinion and order that "eliminating LTD's nighttime operations would not be economically reasonable" and

that \$300,000 is “a significant sum” in preparing for the hearings on remedy are not new facts. LTD raised these issues at the hearings held on the remedy. Tr. at 156-57. The Board does not grant LTD’s motion for reconsideration based on these facts. Dr. Schomer’s report is dated April 26, 2002. *See* Tr. Cmpl. Exh. A1. Although LTD’s noise expert, Mr. Tom Thunder, does not recall the exact date he received the report, he testified at hearing it was some time in late Spring 2002. Tr. 12/9/02 at 125, 127. Thus, LTD’s noise expert was familiar with Dr. Schomer’s proposal for approximately five months prior to the October hearings on remedy and seven months prior to the hearing date in December. LTD produced no analyses or proposals in response to Dr. Schomer’s report. The Board maintains that the July 24, 2003 opinion and order incorporating Dr. Schomer’s proposal should not have come as a surprise to LTD.

At the hearings held on remedy in this matter, LTD did not present the Board with any information showing that ceasing nighttime trucking operations after 10:00 p.m. would “destroy” LTD. Again in LTD’s motion for reconsideration, LTD did not provide new information that would show that LTD suffers undue hardship. However, LTD did provide new information that changes the Board’s definition of nighttime trucking operations. LTD states it can load and unload trailers while the dock doors are closed. The Board grants LTD’s motion for modification regarding the Board’s definition and finds that LTD can load and unload trailers so long as the dock doors remain closed during the loading and unloading.

### **Location of Noise Barrier**

Regarding the location of the noise barrier, the Board notes again that LTD did not provide any information at the hearings on remedy on noise barriers at any location on the site. Furthermore, the Board’s order to build a noise wall in the location proposed by Dr. Schomer was not based on a misunderstanding as indicated by LTD, but rather on Dr. Schomer’s analysis that a noise wall built in such location would be the most effective at reducing noise from the site.

In the motion for reconsideration, LTD indicated that it hired a new noise consultant subsequent to the final opinion and order to investigate the situation on an expedited basis.

In the July 24, 2003 decision, the Board ordered LTD to cease and desist from further violations of the Act and Board regulations. The Board specified that LTD cease and desist from nighttime operations until and unless it builds a noise barrier that eliminates the nuisance noise violations the Board found in the interim opinion and order in this matter. The Board ordered that any noise wall built must be in accordance with Dr. Schomer’s specifications, as his analysis was the only one presented to the Board. The Board reaffirms that should LTD construct a noise barrier, the barrier must cause LTD to cease and desist from nuisance noise violations. However, the Board modifies the final order to allow LTD to construct a noise barrier in any location on its property so long as LTD complies with the Act and Board nuisance noise prohibitions.

### **Backup Beeper**

Regarding the use of a human spotter or strobe light in place of backup beepers at the LTD facility, the Board modifies the final order pertaining to over-the-road trucks only. LTD claims that “[a]ll evidence in this case focused on the backup beeper being a nuisance at night.” Mot. for

Rec. at 8. Accordingly, LTD moves the Board to modify the order and only require LTD to disconnect the backup beeper during nighttime hours. Mot. for Rec. at 9. Furthermore, LTD claims that a dock pilot directing trucks during the day will slow down trucking operations and the yard tractor will idle for a longer time. Mot. for Rec. at 8.

The Board finds that complaints about the noise from backup beepers described the noise as occurring throughout the day. The interim opinion and order shows that “Karen Roti testified that the beeping noise from LTD became much more prevalent beginning in August 1999, and lasted from about 5:30 a.m. until 12:30 p.m.” Int. Op. at 7; *citing* Tr. at 718-21. The Board also notes that LTD’s argument presents no new evidence regarding the use of a human spotter or strobe light in place of a backup beeper. LTD has been aware that federal Occupational Safety and Health Administration (OSHA) regulations require either backup warning devices or observers to guide trucks since at least 2001. Int. Op. at 14; *see* 29 C.F.R. 1926.601(b)(4)(i), (ii). In addition, the Board has previously held that a human spotter is an acceptable alternative to an audible warning device. Hoffman v. City of Columbia, PCB 94-146, slip op. at 9 (Oct. 17, 1996).

To the motion to supplement, LTD attached correspondence from Cycle Logistics, the operator of the yard tractor at the LTD facility, regarding disconnecting the backup beeper during the daytime hours. Mot. to Supp. at 1. The letter from Cycle Logistics to LTD states it cannot adjust the volume of the backup warning device on the spotter unit at the LTD facility. However, the letter does not address the issue at hand: whether Cycle Logistics can disconnect the backup beeper or install an on/off switch on the spotter unit. The Board finds LTD’s motion to supplement the motion for reconsideration provides no new information or evidence regarding the use of a strobe light or human spotter.

LTD also argues that it does not have authority to disconnect the backup beepers on over-the-road trucks that come to the LTD facility. Mot. for Rec. at 8. The Board did not consider this fact in the July 24, 2003 order, and modifies its order accordingly. The Board also finds that hearing transcripts indicate the complainants’ recommendation was only to turn off backup beepers on the yard tractors, and not the backup warning devices on individual tractors that come into and out of the LTD facility. *See* Oct. 15, 2002 Tr. at 61. The Board affirms that LTD must disconnect backup beepers on the yard tractors at the facility consistent with applicable federal and State law. However, the Board modifies the July 24, 2003 order to allow over-the-road trucks and tractors not owned or operated by LTD to continue to use backup warning devices at LTD’s facility.

### **CONCLUSION**

The Board grants LTD’s motion for reconsideration and modification based on new facts not considered at hearing, grants LTD’s motion to supplement, and modifies the Board’s final opinion and order in this matter accordingly. The Board affirms the July 24, 2003 order to disconnect the backup beeper on LTD’s yard tractor during day and nighttime hours. However, the Board modifies the order to allow over-the-road tractors and trucks not owned or operated by LTD to use backup warning devices at the Bannockburn facility.

In light of newly presented facts, today's order also clarifies that the restriction on LTD's nighttime operations does not include the loading and unloading of trailers between the hours of 10:00 p.m. and 6:00 a.m. provided the truck dock doors remain closed. The Board will not hold additional hearings on the issue of noise wall proposals. The Board modifies the July 24, 2003 opinion and order to allow LTD to construct a noise wall in any location between LTD's dock area and the north property line of LTD's Bannockburn site. In the event LTD constructs a noise wall, the Board requires that LTD present proposals consistent with federal and State law that cause LTD to cease and desist from nuisance noise violations at the Bannockburn facility.

For the parties' convenience, the Board sets forth below the final opinion and order, as amended, in its entirety. This supplemental opinion constitutes the Board's supplemental findings of fact and conclusions of law.

### **ORDER**

1. The Board incorporates its February 15, 2001 opinion and order, except as modified herein, as if fully set forth. That order finds that LTD Commodities (LTD) has unreasonably interfered with the enjoyment of life in violation of the nuisance noise prohibitions of 415 ILCS 5/24 (2002) and 35 Ill. Adm. Code 900.102.
2. LTD must cease and desist from any further violations of 415 ILCS 5/24 (2002) and 35 Ill. Adm. Code 900.102.
  - a. Within 40 days after receipt of this order, LTD must cease and desist from trucking operations during nighttime hours, between 10:00 p.m. and 6:00 a.m. at the Bannockburn facility. For the purposes of this order, trucking operations include the coupling and uncoupling of trailers, moving trailers with the yard tractor, and the loading and unloading of trailers, except when the loading and unloading of trailers occurs while truck dock doors remain closed.
  - b. Within 40 days after receipt of this order, LTD must cease and desist from using backup warning beepers at the Bannockburn facility on any yard tractor owned and operated by LTD. LTD must replace any backup warning beeper with either a human spotter or a strobe light in accordance with applicable State and federal law.
  - c. Within 40 days after receipt of this order, LTD must cease and desist from parking, standing or idling trucks, tractors or semi-trailers on Lakeside Drive and the ramp connecting LTD's dock area with Lakeside Drive.
3. If LTD constructs and completes a noise barrier in accordance with the following, it is not subject to paragraph 2.a., b., and c. of this order.



- a. The noise barrier may be built in any location between LTD's dock area and the north property line of LTD's Bannockburn site such that the barrier causes LTD to cease and desist from nuisance noise violations at the Bannockburn facility.
  - b. If the barrier is built immediately north of LTD's dock area, the barrier must be 520 feet in continuous length and must be of uniform elevation with a wall-top elevation of 710 feet. If the barrier is built in any other location, the height of the barrier must be calculated in accordance with International Standardization Organization document ISO 9613-2:1996 entitled "Acoustics-Attenuation of Sound During Propagation Outdoors-Part 2: General Method of Calculation" to achieve a reduction in noise emissions as specified in subparagraph (e) of this order.
  - c. The barrier must be designed and constructed in accordance with good engineering practices and under the supervision of a qualified noise control engineer.
  - d. The barrier must be constructed out of integral sound absorbing metal, concrete, concrete-lik, or other material with equal or greater integral sound absorbing properties.
  - e. The barrier must reduce LTD noise emissions at the Roti, Rosenstock, and Weber properties by 10 dB in the 1kHz octave band.
  - f. LTD must maintain the wall in good condition.
4. LTD must pay a civil penalty of \$15,000 for violating 415 ILCS 5/24 (2002) and 35 Ill. Adm. Code 900.102.
- a. LTD must pay this penalty by March 6, 2004, which is the 30th day after the date of this order.
  - b. LTD must by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Environmental Protection Trust Fund. The number, case name, and LTD's social security number or federal employer identification number must be included on the certified check or money order.
  - c. LTD 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

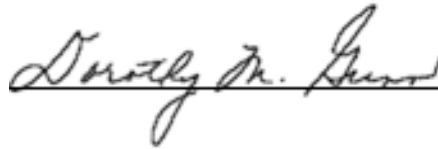
- d. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2002)) at the rate set forth in Section 1003(a) of the Income Tax Act (35 ILCS 5/1003(a) (2002)).

IT IS SO ORDERED.

Board Member T.E. Johnson 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) (2002); *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 supplemental opinion and order on February 5, 2004, by a vote of 3-1.

A handwritten signature in cursive script that reads "Dorothy M. Gunn". The signature is written in black ink and is positioned above a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board