

ILLINOIS POLLUTION CONTROL BOARD
April 15, 2004

DAVID and JACQUELYN MCDONOUGH,)
)
Complainants,)
)
v.) PCB 00-163
) (Citizens Enforcement - Noise)
GARY ROBKE,)
)
Respondent.)

ORDER OF THE BOARD (by T.E. Johnson):

This case is before the Board on a motion to extend the stay filed by Gary Robke (Robke) on March 1, 2004. On March 11, 2004, David and Jacquelyn McDonough (complainants) filed a response to the motion. For the reasons set forth below, the Board grants Robke's motion.

BACKGROUND

The complainants filed a complaint against Robke on March 27, 2000, alleging that Robke violated noise nuisance provisions under Section 24 of the Environmental Protection Act (Act) (415 ILCS 5/24 (2002)) and Section 900.102(a) of the Board regulations. 35 Ill. Adm. Code 900.102(a). The complainants asserted that the violations were caused by Robke's operating a 24-hour self-service car wash in Mascoutah, Illinois. The complainants stated that noise generated by the car wash equipment, patrons, and their vehicles unreasonably interferes with complainants' enjoyment of life and property.

On March 7, 2002, the Board issued an order finding Robke in violation of Section 24 of the Act. 415 ILCS 5/24 (2002). On February 6, 2003, the Board issued an order directing Robke to, inter alia, construct an airtight barrier of uniform elevation that ran contiguously on the southern and western property line of the car wash. The barrier was required to be 12 feet high, consisting of a six-foot high berm topped with an airtight six-foot high fence constructed of a solid material with a minimum density of one pound per square foot. Robke was given 180 days to construct the wall. See McDonough v. Robke, PCB 00-163 (Feb. 6, 2003).

On September 4, 2003, the Board issued an order that stayed paragraph 3 of the February 6, 2003 order (requiring the construction of a noise wall and berm) until March 1, 2004. The Board directed the parties to participate in status conferences with the hearing officer every 30 days during the pendency of the stay, and noted that Board will consider whether Robke has made good faith efforts toward expeditious abatement of this noise nuisance when considering any further motions for an extension of the stay.

MOTION

In the instant motion, Robke asserts since the imposition of the stay, the parties have worked in good faith to resolve the dispute regarding the location of the noise wall, having met with the City of Mascoutah and obtained a proposal from the City engineers regarding relocation of the noise wall. Mot. at 1-2. Robke contends he received the City's proposed relocation of the noise wall on December 14, 2003, and has been in discussion with the City on the issue since that time. Mot. at 2.

Specifically, Robke asserts that discussion with the City have involved: (1) modifying the engineering proposal; (2) the purchase by the City of additional ground to widen the easement and take over the berm; and (3) whether financial assistance from the City in the form of a tax abatement or direct financing to assist in the cost of the project is possible. Mot. at 2. Robke contends that the City has recently suggested that Robke should submit its concerns, comments or revisions in writing to the City for further consideration. *Id.*

Robke asserts that in the interim, it has disarmed the beepers and replaced the motors in the vacuums with quieter motors as directed by the Board and has taken other steps to mitigate the noise emitting from its operations. Mot. at 2-3. Robke asserts it has participated in good faith in all of the status conferences held by the Board hearing officer, and requests an additional stay of 180 days to allow the parties to finalize a proposed resolution in this matter. Mot. at 3.

The complainants request that the motion to extend the stay be denied, and further ask that the Board order construction of the noise barrier in an alternate reasonable and necessary location within 90 days. Resp. at 1. The complainants state that the City indicated in a June 16, 2003 letter that underground utilities and electrical pedestals in the area could prohibit construction of the noise wall in the location ordered by the Board, but that the City was willing to work with the parties to find a solution. *Id.*

The complainant asserts that after an August 10, 2003 meeting with the parties, the City agreed to develop a plan for constructing the noise barrier to minimize interference with City utilities. Resp. at 1. The complainants assert that on December 14, 2003, the City proposed an approved plan for the noise wall that requires construction of the wall in the general location initially requested by complainants. Resp. at 2. The complainants assert that the available land for expansion of the car wash is limited, but that expansion potential on the north side of the car wash will be unaffected by the location of the noise wall. *Id.* The complainants assert that in the motion, Robke indicates a willingness to have the City buy property to the south for expansion and share costs in the project. The complainants asserts that expansion on the south side of the car wash would bring the unreasonable noises closer to their property, home and bedroom. *Id.*

The complainants argue that it is unclear that expansion at the car wash would provide any significant benefits to the car wash or the community, as it would enlarge capacity but provide no new customer service. The complainants argue that the wide-base requirements for a fence on top of the berm-type noise wall likely would have precluded future south expansion, as planned, even had the noise wall been located on the southern property line of the car wash. *Id.*

The complainants ask, in light of new findings, that the Board reconsider the decision that it would not be reasonable or necessary to locate the noise wall near the car wash. Resp. at 2.

The complainants contends that any additional delay in completing the noise barrier would, particularly with the peak business season approaching, be extremely detrimental to their quality of life. *Id.* Accordingly, the complainants request that the Board order Robke to construct, within 90 days, the noise wall as previously ordered but in a location north of the southern property line as approved by the City. Resp. at 2-3. The complainants argue that any agreements between Robke and the City regarding cost sharing for the project can be decided during the permit and construction process.

DISCUSSION

In Nielsen & Bainbridge v. IEPA, PCB 03-98 (Feb. 6, 2003), the Board found that motions to stay must be accompanied by sufficient information detailing why a stay is needed. The Board has discretion whether to grant or deny a motion for stay of a final Board order. See People v. ESG Watts, Inc., PCB 96-107 (Mar. 19, 1998); Village of Matteson v. World Music Theatre, et al, PCB 90-146 (Mar. 25, 1993).

In granting the stay on September 4, 2003, the Board recognized that the record was unclear as to whether a variance from City of Mascoutah would be necessary, or obtainable, prior to the construction of a noise wall, and stated that Robke could attempt to modify the Board order as required. McDonough v. Robke, PCB 00-163, slip op. at 5-6, (Feb. 6, 2003). Further, the Board gave Robke leave to file for an extension of the stay if necessary.

Robke has provided sufficient information detailing the need for a stay in this instance, and the Board grants the motion for an additional stay of 180 days. Robke appears to be operating in good faith, and is attempting to resolve the City's concerns with the location of the noise wall. In addition, the complainants do not dispute that Robke has taken steps as ordered by the Board to mitigate the noise from its operations, and has disarmed the beepers and replaced the motors in the vacuums with quieter motors. Robke has also participated in regular Board status conferences with Hearing Officer Sudman.

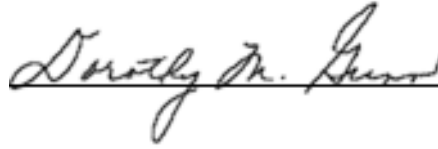
The Board is, however, cognizant of complainants' concerns. Although Robke is progressing toward the ultimate construction of a noise wall as ordered by the Board, significant time has elapsed since the Board initially found Robke in violation of the Act in March 2002. Barring any unforeseen circumstances, the Board will not grant further stays in this matter. Robke is expected to have the noise wall constructed on or before September 1, 2004.

CONCLUSION

As discussed above, paragraph three of the Board's February 6, 2003 order is stayed until September 1, 2004. The parties are directed to participate in status conferences as ordered by the hearing officer during the pendency of the stay.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 15, 2004, by a vote of 4-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board