

ILLINOIS POLLUTION CONTROL BOARD
July 8, 1998

SCOTT and SHELLY BEHRMANN,)	
)	
Complainants,)	
)	
v.)	PCB 98-84
)	(Enforcement - Noise - Citizens)
OKAWVILLE FARMERS ELEVATOR -)	
ST. LIBORY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J. Yi):

This matter is before the Board on respondent's June 19, 1998 motion to dismiss the second amended complaint. On December 11, 1997, the Board received a citizen's enforcement complaint filed by Scott and Shelly Behrmann (Behrmanns). The Board denied Okawville Farmers Elevator - St. Libory's (Farmers Elevator) first motion to dismiss on March 19, 1998, and ordered this matter to proceed to hearing. On April 2, 1998, the Board accepted the Behrmanns' first amended complaint. On June 4, 1998, the Board accepted the Behrmanns' second amended complaint. Farmers Elevator filed the above noted motion to dismiss on June 19, 1998. The Behrmanns filed their response on June 24, 1998.

MOTION TO DISMISS

In the motion, Farmers Elevator asserts that the amended complaint adds allegations that truck noise and traffic from trucks coming to Farmers Elevator's grain elevator are part of the sound emissions alleged to be in violation of 901.102(a) and (b). 35 Ill. Adm. Code 901.102(a),(b). The motion argues that the Behrmanns make no allegation that the trucks are owned or operated by the Farmers Elevator, and, in addition, fail to identify who owns or operates the trucks.

Respondent argues that sound emission standards for motor vehicles are not governed by Section 901, but are regulated separately under Section 902. See 35 Ill. Adm. Code 902 *et seq.* Farmers Elevator next asserts that traffic levels for the property owned by both parties in this matter are permitted by the Zoning Code for the Village of St. Libory, Illinois, and that both premises are zoned C-1; commercial district. Finally, the motion asserts that the complaint fails to state what causes or creates the alleged impulsive sound or prominent discrete tones. Farmers Elevator asks that those parts of the amended complaint dealing with truck and traffic noise be stricken, or in the alternative, that the complainants be required to amend the complaint.

In response, the Behrmanns assert that Farmers Elevator misconstrues the allegations in the amended complaint. The Behrmanns state that the subject of the amended complaint is the

truck noise generated on respondent's premises, and not truck noise and traffic from trucks coming to the grain elevator. The Behrmanns further note that the trucks responsible for the noise are present on Farmers Elevator's property at the request of Farmers Elevator, and that the identity of the owners of the trucks is the subject to an as yet unanswered discovery request. Farmers Elevator is responsible for its business activities, argues the Behrmanns, including truck noise emanating from Farmers Elevator's premises.

The Behrmanns assert that Farmers Elevator's business is not commercial, but industrial. Regardless of the zoning of the premises, posit the Behrmanns, no person or business has the right to interfere with the use and enjoyment of another person's property. The Behrmanns highlight portions of the Zoning Code which permit use provided that all such operations create no undue noise, odor, dust, smoke, vibration or other similar nuisance; allow use if it does not create a disturbing influence to the use and occupancy of adjoining properties; and state that unreasonably offensive noises due to intermittence, beat frequency or shrillness shall be muffled so as not to become a nuisance to adjacent uses. Resp. at 3. The Behrmanns assert that Section 902 addresses the operation of motor vehicles on highways, not on private business premises, and is inapplicable. Finally, the Behrmanns argue that it is clear that the complaint alleges that Farmers Elevator's operation of its industrial grain elevator business is what causes or creates the noise pollution in question.

The Behrmanns note previous Board decisions support their contention that Farmers Elevator is accountable for the noise emitted by the trucks on its business premises, regardless of whether Farmers Elevator owns or operates the trucks. The Behrmanns cite IEPA v. Quincy Foods, Inc. (April 2, 1981), PCB 78-299; and Thomas v. Carry Companies of Illinois (August 5, 1993), PCB 91-195, for this proposition.

DISCUSSION

A complaint should not be dismissed unless it clearly appears that no set of facts could be proven that would entitle a complainant to relief. The Board will take all well-pleaded allegations in the complaint as true. Gorden Krautsack v. Bhogilal Patel, Subhas Patel, and Electronic Interconnect, Inc. (June 15, 1995), PCB 95-143, Miehle v. Chicago Bridge and Iron Co. (November 4, 1993), PCB 93-150.

The amended complaint alleges, *inter alia*, that noise pollution is caused by the numerous large trucks and semi tractor trailers that travel on the respondent's driveway, and that the noise generated in the operation of the grain elevator has resulted in an unreasonable interference with the use and enjoyment of complainant's property. This allegation, if accepted as true, is sufficient to find the violations alleged in the amended complaint. The Board therefore denies respondent's motion to dismiss.

The Behrmanns are not alleging a violation of 35 Ill Adm. Code 902 governing sound emission standards and limitations for motor vehicles. However, this does not invalidate the Behrmanns' properly pled violation of 35 Ill. Adm. Code 901.102. A violation of Section 901.102 can lie under the facts alleged in the amended complaint.

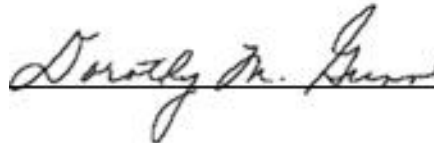
The amended complaint does not name specific owners or operators of the trucks alleged to have caused noise pollution, but this is not necessary to prove a violation of the Act or associated regulations. The amended complaint does allege that the trucks are causing noise pollution while traveling Farmers Elevator's driveway, and the identity of the operators of the trucks is the subject of a tendered discovery request.

CONCLUSION

As previously stated, Farmers Elevator's motion to dismiss is denied. The parties are directed to proceed to hearing with all due expediency.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 8th day of July 1998 by a vote of 5-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board