ILLINOIS POLLUTION CONTROL BOARD
September 1, 2005

VINCENT and JENNIFER NERI,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 05-213
	)	(Citizens Enforcement – Noise)
TNT LOGISTICS NORTH AMERICA INC.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by A.S. Moore):

On June 13, 2005,Vincent and Jennifer Neri (the Neris) filed a complaint against TNT Logistics North America Inc. (TNT).[1] The complaint concerns sound emissions from TNT's tire warehouse distribution facility located at 25850 S. Ridgeland Avenue in Monee, Will County. The Neris allege that TNT's sound emissions exceed the Board's numeric noise standards. For the reasons below, the Board accepts the complaint for hearing.

COMPLAINT AND ANSWER

Under the Environmental Protection Act (Act) (415 ILCS 5 (2004)), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2004); 35 Ill. Adm. Code 103. According to the complaint in this case, trucking activity at TNT's warehouse distribution facility is emitting noise in violation of Board regulations. Specifically, the Neris allege that the noise comes from trucks entering and exiting the facility, trailers being connected, disconnected, and dragged, trailers hitting the loading docks, air brakes, air horns, and diesel engine revving and idling. The Neris assert that the noise persists 24 hours a day, 7 days a week, 365 days a year. The complaint further states that the noise has disrupted the sleep of the Neris and their children and caused them to not enjoy their "home life" or "outdoor living." Complaint at 4.

The complaint alleges that TNT is violating several provisions of the Board's numeric noise regulations: Section 901.102 ("Sound Emitted to Class A Land"); Section 901.103 (Sound Emitted to Class B Land"); Section 901.104 ("Impulsive Sound"); and Section 901.106 ("Prominent Discrete Tones") (35 Ill. Adm. Code 901.102, 901.103, 901.104, 901.106). The Neris ask the Board to order TNT to "control noise at all times of day." Complaint at 4. The Board finds that the complaint meets the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(c), (f).

[1] The complaint refers to respondent as "TNT Logistics." In its August 5, 2005 answer, however, respondent refers to itself as "TNT Logistics North America Inc." As reflected in this order, the Board has amended the caption of this case to reflect respondent's full name. Future filings must use this amended caption.

A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if the respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider the respondent to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d).

Here, TNT timely filed an answer on August 5, 2005. In its answer, TNT denies that it has violated the numeric noise standards. Further, TNT pleads, as a purported affirmative defense, that although it operates the facility to warehouse and distribute tires, TNT does not own or operate the trucks that haul trailers of tires to and from the facility. Answer at 3-4.

DUPLICATIVE OR FRIVOLOUS

Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2004); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. *See* 35 Ill. Adm. Code 103.212(b). TNT has filed no motion with the Board. Nothing before the Board indicates that the complaint is duplicative or frivolous.

The Board notes that five other citizen complaints against TNT have been filed recently with the Board, each alleging that noise from the various trucking activities at the Monee facility violates the same numeric noise provisions the Neris allege. *See* John and Linda Maracic v. TNT Logistics North America Inc., PCB 05-212; Wayne Haser v. TNT Logistics North America Inc., PCB 05-216; Ken Blouin v. TNT Logistics North America Inc., PCB 05-217; Kenneth E. Medema v. TNT Logistics North America Inc., PCB 05-220; Robert F. Kasella Jr. and Kellie R. Kassela v. TNT Logistics North America Inc., PCB 06-1. As explained below, none of these complaints, however, is duplicative of the others.

The Neris and the citizen complainants in the other five noise enforcement actions pending against TNT allege violations of *numeric* noise standards, not violations of the *nuisance* noise prohibition. The Board has held that with alleged violations of a *numeric* noise standard, sound measurements of the alleged property-line-noise-source are required and must be taken with "strict adherence to applicable measurement procedures." Charter Hall Homeowner's Association v. Overland Transportation System, Inc., PCB 98-81 (Oct. 1, 1998) (complainant's noise consultant's sound measurements failed to comply with measurement procedures for numeric noise standards); *see also* 35 Ill. Adm. Code 900.103(b).[2] It is the complainant in an

[2] A rulemaking is pending before the Board that would amend the sound measurement procedures. *See* Proposed New and Updated Rules for Measurement and Numerical Sound Emission Standards Amendments to 35 Ill. Adm. Code 901 and 910, R03-9.

enforcement action who has the burden of proof. *See* 415 ILCS 5/31(e) (2004). It is therefore the complainant, or more typically its noise consultant, who must accurately measure sound emissions in a case of alleged numeric noise violations. *See, e.g.*, Charter Hall, PCB 98-81. In contrast, with an alleged violation of the *nuisance* noise prohibition (35 Ill. Adm. Code 900.102), sound measurements are not required, and complainants usually rely instead on testimony to try to prove a violation. *Id*.

Most significant for this discussion, in attempting to demonstrate a numeric noise violation, the sound measurements must be taken *within the receiving land*. *See, e.g.*, 35 Ill. Adm. Code 901.102(a) ("emission of sound . . . when measured at any point within such receiving Class A land"). Accordingly, each of the six citizen complaints against TNT is alleging numeric noise violations at a *different* property. Thus, even if a violation of a numeric standard is proven at one receiving property, there may not be an exceedence of that standard at another receiving property. The complaints against TNT are therefore not duplicative of each other.

HEARING

The Board accepts the Neris' complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2004); 35 Ill. Adm. Code 103.212(a). The Board directs the hearing officer to proceed expeditiously to hearing. In separate orders, the Board today is accepting the other five complaints against TNT for hearing. *See* Maracic, PCB 05-212 (Sept. 1, 2005); Haser, PCB 05-216 (Sept. 1, 2005); Blouin, PCB 05-217 (Sept. 1, 2005); Medema, PCB 05-220 (Sept. 1, 2005); Kasella, PCB 06-1 (Sept. 1, 2005). The Board directs the hearing officer to manage these cases so as to allow for the most efficient use of the resources of the Board and the parties.

Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2004). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do, if anything, to address the violation, and second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently come into compliance.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that

the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

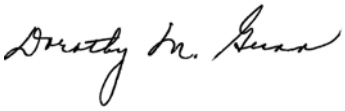
With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by the "lowest cost alternative for achieving compliance." The amended Section 42(h) also requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary of unreasonable financial hardship."

Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform." SEPs are also added as a new Section 42(h) factor (Section 42(h)(7)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency" (Section 42(h)(6)). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of non-compliance. A respondent establishing these criteria is entitled to a "reduction in the portion of the penalty that is not based on the economic benefit of non-compliance."

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 1, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board