ILLINOIS POLLUTION CONTROL BOARD
July 10, 2008

KYLE NASH,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 07-96
	)	(Citizens Enforcement - Noise)
KAREN SOKOLOWSKI,	)	
	)	
Respondent.	)	

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

This matter has a long history, which the Board will not repeat here. By order of February 21, 2008, the Board allowed Kyle Nash an opportunity to amend her March 26, 2007 complaint to amend a noted deficiency. Ms. Nash filed an amended complaint on March 7, 2008, and on May 29, 2008 filed proof that the complaint was served on the respondent Karen Sokolowski[1] on May 1, 2008. Respondent has not since filed a motion to dismiss the complaint or any other filing.

In her March 7, 2008 amended complaint (Am. Comp.), Ms. Nash alleges that Sokolowski violated the nuisance noise provision of Section 24 of the Environmental Protection Act (Act) (415 ILCS 5/24 (2006)) and Section 900.102 of the Board's noise rules at 35 Ill. Adm. Code 900.102. Am. Comp. Para 5. Nash further alleges the source of the allegedly offensive noise, first audible in the Spring of 2006, is the wind chimes variably hanging on Sokolowski's front porch and/or in her back yard. The complaint concerns Nash's property located at 1630 W. 33rd Place, Chicago, Cook County. The Sokolowski property is located at 1634 W. 33rd Place, Chicago, Cook County. For the reasons below, the Board finds that the amended complaint is neither duplicative nor frivolous and accepts the amended complaint for hearing.

According to Ms. Nash's complaint, since spring 2006 Ms. Sokolowski's wind chimes have generated noise resulting in an unreasonable interference with the use and enjoyment of Ms. Nash's property. Ms. Nash alleges that "[w]henever there is any kind of breeze . . . noise can be heard incessantly 24 hours a day often for days and days at a time". Am. Comp. para. 7. Ms. Nash claims the noise interferes with her sleep and that of her two sons, and that their health has been negatively affected in various ways. Ms. Nash claims to have experienced a marked loss of enjoyment of life and property, as well as decreased performance and productivity at home and school. (Ms. Nash and her eldest son work out of their home, while the other son is a

[1] The Board also received another noisy wind chime amended complaint filed by Ms. Nash simultaneously with the filing of this one: Kyle Nash v. Louis Jimenez, PCB 07-97. The Board is today also issuing an order in that case.

college student who studies at home.) Am. Comp. para. 8. Ms. Nash asks the Board to enter "an order that the respondent stop polluting". Am. Comp. para. 9.

Section 31(d)(1) of the Act provides that "unless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2006). Section 103.212(a) of the Board's procedural rules implements Section 31(d)(1) of the Act. 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. 35 Ill. Adm. Code 103.212(b). As previously stated, on May 29, 2008 Ms. Nash filed proof of service on the respondent on May 1, 2008. The Board has not received a motion from Ms. Sokolowski alleging that the complaint is duplicative or frivolous. Further, no evidence before the Board indicates that the complaint is duplicative or frivolous.

The Board accepts the complaint for hearing. See 415 ILCS 5/31(d)(1) (2006); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a 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).

The Board directs the hearing officer to proceed expeditiously to hearing.[2] 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) (2006). 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 eliminated the violation.

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[2] The Board notes that the hearing officer currently has a status conference scheduled in this case on July 24, 2008. Among other things, the hearing officer is directed to determine whether Ms. Nash is renewing her November 16, 2007 *pro se* motion for summary judgment "as is", or whether she intends to file an amended motion. If complainant does not intend to amend the motion, the hearing officer is directed to reflect that decision in his order following the status conference, and to set a due date for the filing of any response by Ms. Sokolowski.

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.

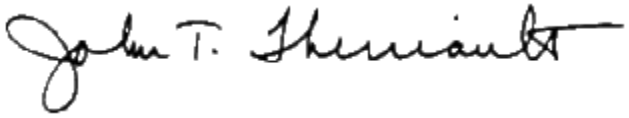
With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by 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 or 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 "voluntarily 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, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 10, 2008, by a vote of 4-0.



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John T. Therriault, Assistant Clerk
Illinois Pollution Control Board