ILLINOIS POLLUTION CONTROL BOARD
July 10, 2008

ANNE MCDONAGH and DAVID FISHBAUM,	)	
Complainants,	)	
v.	)	PCB 08-76
	)	(Citizens Enforcement - Noise)
RICHARD and AMY MICHELON,	)	
Respondents.	)	

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

On April 18, 2008, Anne McDonagh and David Fishbaum (complainants) filed a complaint against Richard Michelon and Amy Michelon (respondents or Michelons). Complainants allege that the Michelons violated the numeric noise provision of the Board's noise rules at 35 Ill. Adm. Code 901.102(a). Complainants further allege that the source of the allegedly offensive noise is the three five-ton air conditioners located eight feet from complainants' property line. The complaint concerns complainants' property located at 1464 Linden Avenue, and respondents' property located at 1474 Linden Avenue, in Highland Park, Lake County. For the reasons below, the Board finds that the alleged violation is neither duplicative nor frivolous. The Board accepts the complaint for hearing but strikes that portion of the relief request seeking reimbursement for "clean-up costs".

Under the Environmental Protection Act (Act) (415 ILCS 5 (2006)), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2006); 35 Ill. Adm. Code 103. 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).

Here, on May 1, 2008 complainants filed proof of service on the complainants on April 15, 2008. The Michelons timely filed a motion to dismiss on May 9, 2008. Complainants filed a response in opposition on June 9, 2008.

THE COMPLAINT

The April 18, 2008 *pro se* complaint (Comp.) alleges that the Michelons' three air conditioning units each have a decibel (dB) rating of 79. Since 2006, the units have been operated 170 days per year, 24 hours per day, and make noise from 30-50 percent of the time. Comp. para. 4. The complaint describes that a loud, high-pitched noise is emitted when the air conditioners "kick on", which is about six to ten times per hour in the summer. The complaint relates that the units "run loud" for two to three minutes, run quieter for two to three minutes, then go off, with the cycle repeating about two minutes later. Comp. paras. 5-6.

Complainants assert that, when only one of the respondents' units is running, the noise exceeds the daytime and nighttime numeric noise limits of, respectively, 57 and 47 dB. *See* 35 Ill. Adm. Code 901.102(a). Complainants also assert that the daytime limit must also be corrected for the presence of a prominent discrete tone as described in 35 Ill. Adm. Code 901.106. Complainants state that attached to the complaint is a letter dated June 8, 2007 reporting the results of noise monitoring on May 29, 2007 by the firm Acoustic Associates, Ltd. Comp. para. 5 and unlettered attachment.

The complainants assert that the noise disturbs their sleep, thinking, television watching, and use of their backyard and front porch as well as various rooms in their home. Complainants report that they have rebuilt interior walls on the north side of their home, installed noise-reducing windows, and taken other noise abatement steps. Comp. paras. 8-9.

Complainants seek an order requiring the Michelons to stop violating Board rules by reducing noise and eliminating the prominent discrete tone from their air conditioning units. Complainants also "expect reimbursement for these 'clean up' costs" for noise abatement. Comp. at para. 9.

THE MICHELONS' MOTION TO DISMISS

Complaint Allegedly Duplicative and Frivolous

The Michelons' attorney filed a motion to dismiss (Mot.) on their behalf on May 9, 2008. The motion first asserts that the complaint should be denied as frivolous and duplicative. In summary, the dismissal grounds stated were that:

> Claimants (sic) expressly agreed to have the compressors placed exactly where they are. Thus, Complainant (sic) has waived any right to now complain of the location of the compressors. Not only should the Complainant's (sic) claim be bared (*sic*) because of the foregoing, it is frivolous and it is also duplicitous in light of the Highland Park, Illinois Zoning Board [Zoning Board] proceedings. Mot. at 4 (footnote omitted).

The motion recites that the Michelons applied to the Zoning Board on May 13, 2005 because they sought to "place their air conditioning compressors for their newly constructed home on the side yard of their property which is directly adjacent to the Complainant's property". *See* Mot. at 2 and Exhs. A and B Application for Zoning Relief and legal notice, and Exh. C "rendering" of compressors' location and installation. After discussion of the issue at a

transcribed July 21, 2005 public meeting (Exh. E), the Zoning Board adopted an ordinance granting the request on July 21, 2005. *See* Mot. Exh. D. The ordinance granted variations, subject to conditions regarding conformance with plans and issuance of a building permit, so that:

> Petitioners [the Michelons] will be allowed to construct a structure to encroach 3.0 feet into the total combined side yard of 25 feet, in order to locate air conditioner units in the side yard for a new single family residence. *Id.* at 3.

The motion relates that the Michelons contacted the complainants by letter prior to the Zoning Board meeting, and that complainants agreed to side-yard placement of the compressors in a written July 2, 2008 statement. Mot. at 4 and Exh. F. The motion also attaches the transcript of the Zoning Board meeting reflecting the Michelons statements on behalf of their request, including complainants' request that the compressors be placed in the side yard rather than the rear yard. Mot. at.4 and Exh. E at 9.

The motion requests that the Board accordingly dismiss the complaint, citing Rocke v. IPCB, 397 N.E. 2d 51, 56 (1979). The motion additionally notes that the Michelons have already "gone to great expense" and "have spent thousands of dollars in upgrades to their compressors even thought the compressors are state of the art. Mot. at 3, and Group. Exh. G.

Complaint Allegedly Procedurally Defective Under 35 Ill. Adm. Code 103.204(f)

As an alternative dismissal ground, the motion asserts that the complaint fails to comply with the Board's procedural rule at 35 Ill. Adm. Code 103.204(f). That rule provides that:

> Any party serving a complaint upon another party much include the following language in the notice: "Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have questions about this procedure, you should contact the hearing officer assigned to this proceeding, the clerk's office or an attorney. 35 Ill. Adm. Code 103.204(f).

The motion asserts that "[a]s a procedural matter the Complainant's (sic) Complaint fails to comply with the aforesaid section and therefore should be dismissed." Mot. at 5.

COMPLAINANTS' RESPONSE

In their June 9, 2008 response to the motion to dismiss (Resp.), the complainants dispute the accuracy of some of the facts stated in the motion's background section, specifically 1) that the air conditioners were "state of the art" and the quietest available, 2) the assertion that complainants "expressly requested" side-yard placement of the units, 3) that complainants had heard similar units while running, and 4) that the Michelons had spent "thousands of dollars on upgrades", asserting that their receipts reflected only some $255 for items that were not routine

maintenance costs. Resp. at 2-4. Complainants additionally included photos of, and $1903.46 in invoices concerning, soundproofing they have done in their bedroom. *Id.* at 4, and Attach. E.

Complainants also disagree with the argument that their complaint is frivolous. They assert that "the noise problem is egregious", and that, in the zoning proceeding, they did not waive any exceedence of State noise limits. The complainants argue that their complaint is not duplicative because:

> Whereas placement [of the air conditioners] is within the authority of the Zoning Board of appeals, they do not have the authority to allow (nor did they rule that) the air conditioners to exceed (sic) the Illinois laws regarding noise. In fact, Mr. Wiczer [the Michelons' attorney] provided assurances that the units would not be heard. *"It is going to be invisible. You are not going to hear it: you are not going to smell it; you are not going to see it"*. (ZBA pp.11-12) This has not been the case. As such, the complaint is not duplicative. Resp. at 5 (italics and citation in original).

Complainants also assert that their complaint was properly served in April 2008, and that it included the required "Notice to Respondent". Resp. at 4-5.

BOARD ANALYSIS AND FINDINGS

The Board first addresses the assertion that the complaint fails to comply with 35 Ill. Adm. Code 103.204(f). After examination of the complaint, the Board finds that it does contain the "Notice to Respondent" including the language of 35 Ill. Adm. Code 103.204(f). Complainants have satisfied this procedural requirement.

The Board next turns to whether the complaint is duplicative. Again, 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. There is no evidence that a complaint of noise violation is being adjudicated in another forum. The Board finds that this complaint is not duplicative.

Finally, the Board turns to whether the complaint is frivolous. As previously stated, 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.* The Board finds that the numeric noise violation alleged here is one upon which the Board can grant relief. The Board can order respondents to cease and desist from violations, and has often required respondents to develop and implement a noise abatement plan. *See, e.g.*, Michael R. Pawlowski and Diane K. Pawlowski v. David Johansen and Troy Quinley, individually and d/b/a Benchwarmers Pub, Inc., PCB 99-82 (Apr. 4, 2000 and Sept. 21, 2000).

However, the Board strikes as frivolous one portion of the relief requested by complainants: reimbursement for costs of soundproofing renovations to their home. This relief is in the nature of money damages, which Section 33(c) of the Act does not allow the Board to award in cases before it. *See* 415 ILCS 5/33(c) (2006), discussed below at p. 5.

The Board allows the complaint, and the remaining relief requested, to proceed to hearing. In so doing, the Board reminds complainants that proof of numeric noise violations, as opposed to noise nuisance violations, requires strict adherence to noise measurement protocols.[1]

PROCEDURAL DIRECTIONS

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. 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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[1] *See, e.g.*, Robert F. Kassela Jr. & Kellie R. Kassela v. TNT Logistics North America Inc., PCB 06-001, slip op. at 2-3 (Sept. 1, 2005) (emphasis in original), in which the Board stated:

> 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 3 numeric noise standards); *see also* 35 Ill. Adm. Code 900.103(b). It is the complainant in an 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*.

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.

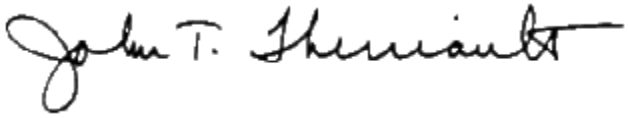
With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by 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.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board