

State of Illinois
Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

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STATE OF ILLINOIS
Pollution Control Board

<http://www.ipcb.state.il.us/>

In The Matter Of:)

Anne McDonagh & David Fishbaum)

1464 Linden Avenue)

Highland Park, IL 60035)

)

Complainant(s),)

)

v.) PCB 2008 - 076

Richard and Amy Michelin) (For Board use only)

1474 Linden Avenue)

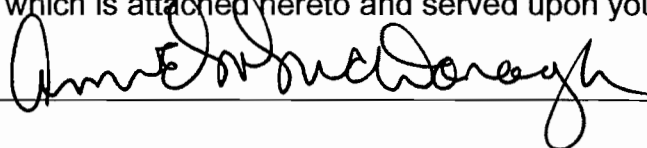
Highland Park IL 60035)

Respondent(s))

NOTICE OF FILING TO:

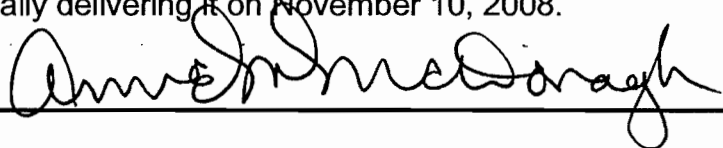
Eliot Wiczer, Wiczer & Zelmar,
500 Skokie Valley Road, Suite 350
Northbrook IL 60067

PLEASE TAKE NOTICE THAT ON November 10, 2008, THE UNDERSIGNED MAILED to the State of Illinois Pollution Control Board, James R. Thompson Center, 100 W. Randolph Street, Suite 11-500, Chicago, IL 60601, a copy of Complainants' Motion to Bar Respondents' Expert's Opinions, a copy of which is attached hereto and served upon you.



CERTIFICATE OF SERVICE

I, Anne McDonagh, do state that I have sent a copy of this Filing and Response to be served upon the persons named above by personally delivering it on November 10, 2008.



COMPLAINANTS' MOTION TO BAR RESPONDENTS' EXPERT'S OPINIONS

The Complainants in Case 2008-076, Anne McDonagh and David Fishbaum, file this request to Bar Respondents' Expert from offering any opinions in this case (or filing an untimely report) due to Respondents' failure to comply with a PCB Hearing Officer order to make their expert disclosures by October 15, 2008. Respondents' unexplained and inexcusable delay effectively denies Complainants adequate time for depositions and document preparation that the parties have been ordered to complete by November 30, 2008.

BACKGROUND

Anne McDonagh and David Fishbaum, owners of a residence in Highland Park, Illinois, filed a Complaint in April of 2008 alleging that the three air conditioners of the Respondents, Richard and Amy Michelin, violated the State of Illinois Noise Code (ref: 35 Ill. Adm. Code 35, Subtitle H.)

Acoustic Associates (Complainants' Expert) report found:

- a. Noise is 18 decibels higher than allowed in Illinois at night (Sec. 901.102b).
- b. Prominent Discrete tone is present, making noise additional 10 decibels over limit (Sec. 901.106)
- c. "Acoustic beating characteristic" "exacerbates the nuisance." [See Expert Report, Appendix A]

Complainants' Expert's Report was delivered to Respondents with Complaint on April 15, 2008.

Once PCB accepted the case for hearing, Respondents specifically requested the right to enter the Complainants' property to take their own Expert readings. Complainants timely granted permission for Respondents to enter property to take readings. [See Complainants' Signed Response, Appendix B]

Both parties were Ordered by the Hearing Officer to report Expert findings to the other party by October 15, 2008. All Depositions were ordered completed by November 30, 2008. [See Hearing Officer's 9/11/08 Order, Appendix C]

The very same day that Hearing Officer Bradley Halloran entered his Order, Complainants sent a letter to Respondents listing many dates suitable for acoustical testing on Complainants' property prior to Order's expert disclosure deadline. [See 9/11/08 Letter, Appendix D]

CURRENT SITUATION

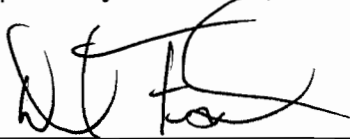
Despite Complainants' reminders and granting of permission for testing, Respondents have failed to conduct any tests, disclose any expert opinions, or produce any expert report. They did not request an extension of time from the Hearing Officer. Nor did they ever contact Complainants' to notify them that testing would be done. Now that the weather is turning cold, Respondents' Air Conditioners seem to be turned off for the season and any testing could not fairly represent warm weather levels of activity and noise. While Respondents have submitted the resume of an individual in Indiana, that is the extent of their "Expert" information. They have not disclosed a single expert opinion, despite knowing full well that the Hearing Officer had mandated October 15th as the due date for all expert disclosures.

Respondents have been aware of the need to conduct their own testing and retain an expert (if they chose to contest this case) since April 15, 2008, when they were served with the complaint. That is a full six months before the Hearing Officer's Order's October 15, 2008 deadline for full expert disclosures. That was more than adequate time for testing and an assessment to take place. The air conditioners were turned on within hours of the Respondents being served with the complaint (April 15, 2008) and were running until at least October 10, 2008.

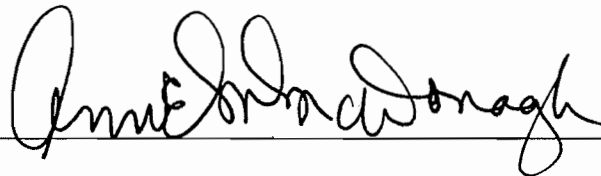
REQUEST

Due to the Respondents' failure to produce this report--stalling this case and ignoring a written order of the Hearing Officer—we respectfully ask the PCB to bar Respondents from submitting an expert report or allowing the expert to testify at the hearing.

Respectfully submitted,



David J. Fishbaum



Anne McDonagh

9-Nov-08

November 9, 2008

Date

APPENDIX A

Acoustic Associates, Ltd.



Specialists in Hearing and Acoustics

1278 W. Northwest Hwy - Suite 904, Palatine, Illinois 60067
Office: 847-359-1068 • Fax: 847-359-1207
Website: www.AcousticAssociates.com
E-mail: info@AcousticAssociates.com

Tom Thunder, AuD, FAAA, INCE - Principal
Roger Harmon, BSEE, PE - Acoustical Engineer
Steve Hallenbeck, AuD, FAAA - Audiologist
Steve Thunder, BSE Cand. - Engineering Intern

June 8th, 2007

Anne McDonagh
1464 Linden Ave.
Highland Park, IL 60035

Re: Noise Emissions

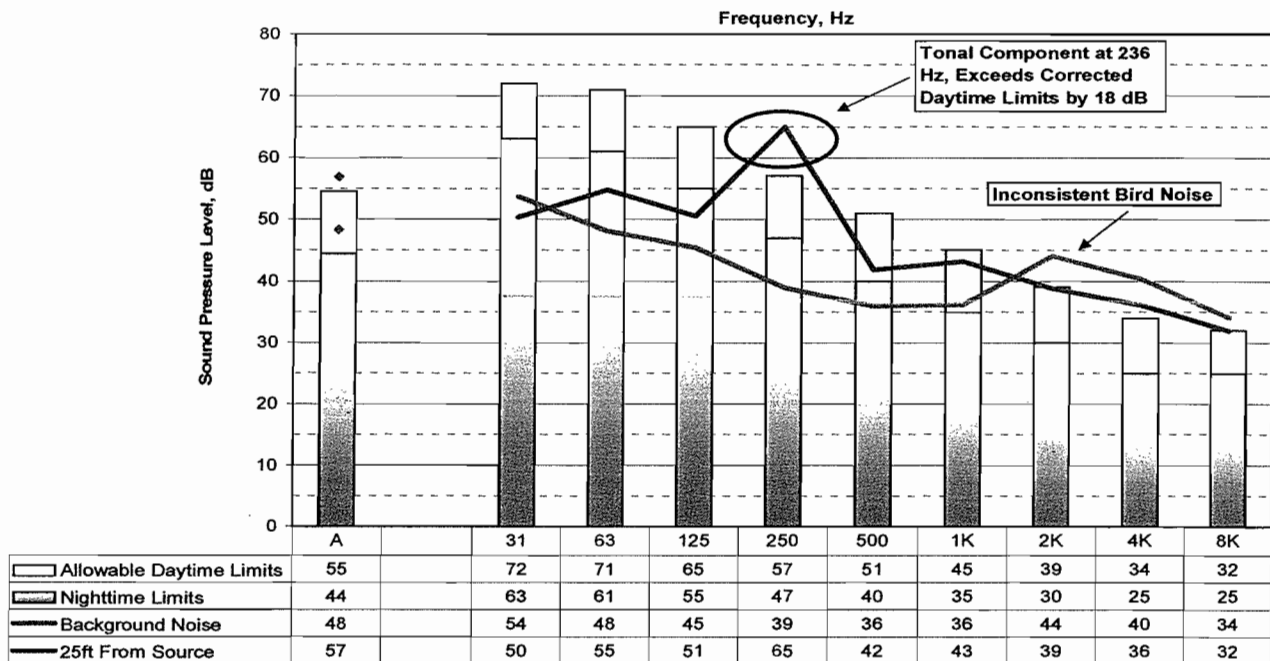
Dear Mrs. McDonagh:

This letter reports the findings of our recent noise assessment of the A/C units next to your property. As you asked we have assessed this noise relative to the State of Illinois noise code (ref: 35 Ill. Adm. Code Subtitle H). Under this code, your residence is classified as Class A (residential) land and the neighboring home from which the noise is emitting is also classified as Class A (residential) land. Since the measurements were taken at approximately 11:30 AM, the applicable code here is Section 901.102a which pertains to residential noise radiated to another residential property during daytime hours (7am - 10pm). Although the limits are specified in each of nine octave frequencies, the overall (total) limit often used for simple monitoring purposes is 55 dBA. Also, it was found that there was a Prominent Discrete Tone. Accordingly, Section 901.106 of the code also applies. This applies a -10 dB correction to the frequency at which the tone occurs.

To conduct our study, we set up our equipment next to the house that was being disturbed, 25 ft from the source. Our equipment consisted of a high precision sound level meter connected to a digital recorder. A calibration tone was placed on the recording so that the recording could be accurately analyzed in our laboratory. The recording began around 11:30 AM on Tuesday, May 29, 2007. Our intern was on site documenting his recordings and observing acoustic surroundings. It was indicated that the noise being recorded at the time was representative, although it was even louder on other occasions.

In our lab analysis, we generated 1/3-octave and octave frequency spectra. The 1/3-octaves were used to determine the presence on a Prominent Discrete Tone, as required by IL code. And the octave bands were used to present the data in a simplified form. The resultant octave band frequency spectrum is shown in FIGURE 1. The overall level of this spectrum is 57 dBA. As seen in the figure, the octave level at 250 Hz (65 dB) far exceeds the Illinois daytime limit of 57 dB, as well as the nighttime limit of 47 dB. Furthermore, when the daytime limit is corrected for the presence of the prominent discrete tone (-10 dB), it exceeds the allowable limit by 18 dB. It is also necessary to correct the levels due to background noise. In this case the correction was 0 dB. As shown in FIGURE 1, the background noise is far below the measurement level (greater than 10 dB) at 250 Hz.

Figure 1- A/C Noise



There are a total of 3 A/C units. But at the time of the measurement, there was only one unit running. The second unit was the same as the first, so a 3 dB increase in the noise level can be expected when the second unit is running at the same time as the first unit. The 3rd unit, however, was not the same as the other two. Therefore, an increase in the noise when all three units run is likely, but we can not predict by how much. At the time of the test, it was 80 degrees outside and the units were determined to have about a 50% duty (on-off) cycle after an hour of measurement /observation. On hotter days it can be assumed that the duty cycle will increase therefore increasing the noise. During the measurements one unit ran part of the time and two units ran part of the time. Therefore, data from only one unit running was taken and then extrapolated to an equivalent of a 1-hour measurement.

The character of this noise can also contribute to the nuisance. In addition to the annoyance of the tonal quality of the noise, there is also an acoustic beating characteristic where the level of the hum oscillates. This characteristic exacerbates the nuisance. The beating is likely caused by the 2 A/C units running at nearly the same speed creating the beating effect. Note, that there is no beating when just one unit is running.

I hope this report meets your expectations in addressing this noise issue. We appreciate the opportunity of working with you and ask that you call us if you have any questions.

Sincerely,

Steve Thunder
Purdue University Acoustical Engineering Intern

Reviewed by,

Tom Thunder, AuD, INCE
Acoustical Engineer and Audiologist

APPENDIX B

WICZER
& ZELMAR, LLC
— ATTORNEYS AT LAW —

BERNARD WICZER
MICHAEL A. ZELMAR
ELLIOT S. WICZER
TRESSA A. PANKOVITS
JOHANNAH K. HEBL*

*Admitted in Wisconsin

1 page 9/11/08
Attn:
Brad Halloran

Attn: Mr. Elliot Wiczer
This was faxed on 8/30/08
& 8/31/08 to
Mr. Wiczer.

Suite 350
500 Skokie Boulevard
Northbrook, Illinois 60062
Telephone (847) 849-4800
Facsimile (847) 205-9444
www.wiczerzelmar.com

August 14, 2008

Anne McDonagh
David Fishbaum
1464 Linden Avenue
Highland Park, IL 60035

PCB-08-76

Re: McDonagh & Fishbaum v. Michelin

Dear Ms. McDonagh and Mr. Fishbaum:

Pursuant to Mr. Halloran's Order I am proposing the following discovery schedule:

1. Written discovery to be propounded on or before ~~August 31~~ ^{Sept. 5}, 2008;
2. Expert disclosures to be completed by October 15, 2008; and
3. All depositions to be completed by November 30, 2008.

In addition, based on the State of Illinois testing standards, measurements by our clients' expert are required to be taken from your property. Please let me know if you have any objection to our expert entering on to your property for the limited purpose of taking the required measurements.

If you have no objection to the foregoing, please sign a copy of this letter acknowledging your agreement that I will submit this letter as part of our discovery plan. Thank you.

I have no objection to your expert entering our property though I need to be on site during process.

I am free most days but

ESW:hr

I would ask that testing

Very truly yours,

Elliot S. Wiczer

AGREED:

Anne McDonagh

daytime noise
street construction is
completed, likely by 8/29.
thank you. Evening
hours would be fine.

We were
out of
town 8/13-22.

APPENDIX C

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SEP 11 2008

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD
September 11, 2008

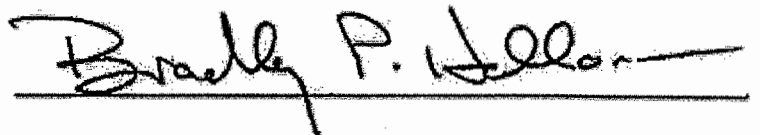
ANNE MCDONAGH and DAVID)	
FISHBAUM,)	
)	
Complainants,)	
)	PCB 08-76
v.)	(Citizens Enforcement – Noise)
)	
RICHARD and AMY MICHELON,)	
)	
Respondents.)	
)	
)	

HEARING OFFICER ORDER

On September 11, 2008, all parties participated in a telephonic status conference with the hearing officer. The complainants represented that discovery is proceeding. The agreed discovery schedule is as follows. Written discovery must be propounded on or before September 5, 2008. Expert disclosures must be completed on or before October 15, 2008. All depositions must be completed on or before November 30, 2008. Complainant has agreed to allow respondents expert witness access to their property for completion of sound measurements.

The parties or their legal representatives are directed to appear at a telephonic status conference with the hearing officer on November 13, 2008, at 9:00 a.m. The telephonic conference must be initiated by the complainant, but each party is nonetheless responsible for its own appearance. At the conference the parties must be prepared to discuss the status of the above-captioned matter and their readiness for hearing.

IT IS SO ORDERED.



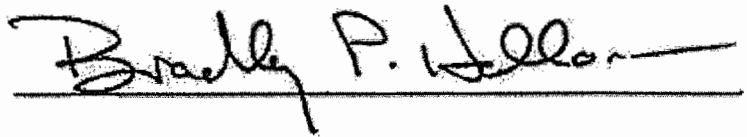
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
312.814.8917

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on September 11, 2008, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on September 11, 2008:

John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601
312.814.8917

PCB 2008-076
David Fishbaum
Anne McDonagh & David Fishbaum
1464 Linden Avenue
Highland Park, IL 60035

PCB 2008-076
Amy Michelin
Richard Michelin
1474 Linden Avenue
Highland Park, IL 60035

PCB 2008-076
Elliot S. Wiczer
Wiczer & Zelmar, LLC
500 Skokie Blvd.
Suite 350
Northbrook, IL 60062

APPENDIX D

Anne McDonagh and David Fishbaum
1464 Linden Avenue
Highland Park, IL 60035

September 11, 2008

Elliot Wiczer
Wiczer & Zelmar LLC
500 Skokie Blvd., Suite 350
Northbrook IL 60062

Mr. Wiczer:

We gave our approval August 30, 2008 for your expert to enter our property for the purpose of testing the noise. I asked to be notified in advance so I can be present during the testing. I am home a lot so this should not be cumbersome.

We will be home and available for testing to be done on Friday, Sept. 12th and all of next week (Sept. 15-19.)

We will be traveling four days of the following week, Monday through Thursday, Sept. 22-25.

Friday, Sept. 26th and Monday, Sept. 29th, I will be at home if testing is scheduled.

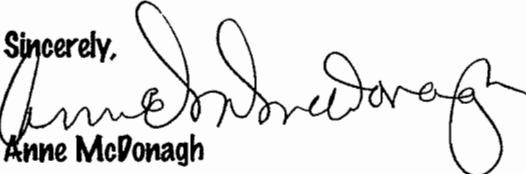
Religious holidays for us fall on Sept. 30th and October 1st so those days are not good.

October 2-8th are acceptable days for testing.

We will again be travelling from October 9th through to October 15th, so the last available date for testing would be Wednesday, October 8th.

I can be reached at 847-433-6971 or at AnneMcDonagh@comcast.net or via fax at 847-433-1344 but please call to confirm we have received any faxes sent.

Sincerely,


Anne McDonagh

Faxed: 4:31pm
THURSDAY 9/11/08
CONFIRMED by machine

Melissa
confirmed
receipt
9/11/08
4:34pm.