

ILLINOIS POLLUTION CONTROL BOARD  
July 21, 2011

PETER AREDOVICH, )  
)  
Complainant, )  
)  
v. ) PCB 09-102  
) (Enforcement - Noise )  
ILLINOIS STATE TOLL HIGHWAY )  
AUTHORITY, )  
)  
Respondent. )  
)

OPINION AND ORDER OF THE BOARD (by G.L. Blankenship):

On April 28, 2009, Mr. Peter Arendovich filed a citizen's enforcement complaint against the Illinois State Toll Highway Authority (ISTHA). *See* 415 ILCS 5/31(d) (2010); 35 Ill. Adm. Code 103.204. The complaint alleges that ISTHA failed to prevent noise pollution created by cars traveling across the I-355 extension between the 135th Street bridge and Archer Avenue in Lemont from reaching Mr. Arendovich's home. Mr. Arendovich alleges that ISTHA has violated Section 900.102 (35 Ill. Adm. Code 900.102) of the Board's regulations.

On December 23, 2010, ISTHA filed a motion for summary judgment. Mr. Arendovich responded by filing a motion for judgment on March 28, 2011. On April 29, 2011, ISTHA filed a reply in support of its motion for summary judgment, requesting that Mr. Arendovich's motion for judgment be stricken in its entirety. Today the Board addresses ISTHA's motion for summary judgment, Mr. Arendovich's motion for judgment and ISTHA's motion to strike Mr. Arendovich's motion for judgment. For the reasons described below, the Board finds that there are disputed issues of material fact and that neither party is entitled to judgment as a matter of law. Accordingly, the Board denies ISTHA's motion for summary judgment and Mr. Arendovich's motion for judgment. The Board also denies ISTHA's motion to strike Mr. Arendovich's motion for judgment in its entirety.

In the opinion and order below, the Board first reviews the procedural history of the case and summarizes the evidence presented by both parties. The Board then presents the applicable Board regulations governing the case. Finally, the Board summarizes the arguments presented by both parties in their respective motions and discusses both parties' arguments before issuing its conclusion.

**PROCEDURAL HISTORY**

On April 28, 2009, Peter Arendovich filed a citizen's enforcement complaint (Comp.) against ISTHA pursuant to Section 900.102 (35 Ill. Adm. Code 900.102) of the Board's regulations. On May 27, 2009, ISTHA filed a motion for an extension of time in which to

respond. The Board granted this motion on June 18, 2009, giving ISTHA until July 15, 2009 to file a reply<sup>1</sup>.

On July 15, 2009, ISTHA filed a motion to dismiss Mr. Arendovich's complaint, alleging that the complaint was frivolous. Thirteen exhibits (Mot. Dismiss Exh. A - M) accompanied ISTHA's motion. On July 29, 2009, Mr. Arendovich requested an extension of time to respond to the motion to dismiss. The Board granted this motion and extended the response deadline to September 15, 2009.

On September 9, 2009, Mr. Arendovich filed an amended complaint (Am.Comp.) adding new allegations under 23 CFR Part 772.13(c) and 23 USC § 109(h). The amended complaint included four exhibits (Am. Comp. Exh. A-D). On October 19, 2009, ISTHA moved to dismiss the amended complaint because the Board did not have jurisdiction over the alleged violations of federal law. On October 29, 2009, Mr. Arendovich filed a motion for an extension of time to respond to the motion to dismiss. The Board granted this motion and set a response date of December 2, 2009. Mr. Arendovich filed a response to ISTHA's motion to dismiss the amended complaint on November 24, 2009.

On December 17, 2009, the Board granted ISTHA's motion to dismiss the portions of Mr. Arendovich's amended complaint that alleged violations of federal rules. However, the Board accepted for hearing the other parts of the complaint concerned with ISTHA's alleged violations of Board rules.

On February 5, 2010, ISTHA filed its answer to Mr. Arendovich's amended complaint. On June 4, 2010, Mr. Arendovich filed a response to the hearing officer's order of May 6, 2010, which directed Mr. Arendovich to answer interrogatories from ISTHA that he had not yet addressed.

On November 11, 2010, ISTHA filed a letter construed as a motion for an extension of time to file a motion for summary judgment. The Board granted this motion and set a deadline of December 17, 2010. On December 23, 2010, the Board received ISTHA's Motion for Summary Judgment (ISTHA Mot.). Also on December 23, 2010, ISTHA submitted a letter requesting that its motion for summary judgment be filed *instanter* and noted that Mr. Arendovich did not object to the filing. On December 30, 2010, the hearing officer granted ISTHA's request to file the motion for summary judgment *instanter*. On March 28, 2011, Mr. Arendovich responded by filing a Motion for Judgment. (Arend. Mot.) On April 29, 2011, ISTHA filed a reply in support of its motion for summary judgment.

### **SUMMARY OF EVIDENCE**

In the following Summary of Evidence, the Board first describes the history and current use of the I-355 extension. The Board then describes ISTHA's responses to Mr. Arendovich's

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<sup>1</sup> The Board notes that, since it treats Mr. Arendovich's motion for judgment as its own motion and not a response to ISTHA's motion for summary judgment, ISTHA's reply is in effect treated as a response to Mr. Arendovich's motion.

allegations and offered evidence and then lists the measures ISTHA has taken to reduce noise emissions from the I-355 extension.

### **History and Use of the Highway**

The I-355 extension, which connects Interstate Route 55 to Interstate Route 80 and travels through Cook, Will and DuPage Counties, has appeared in various transportation plans since 1962. Mot. Dismiss Exh. B at 1. In 1993, the Illinois State Legislature formally authorized ISTHA to examine the feasibility of constructing the roadway. *Id.* The Illinois Department of Transportation (IDOT) completed an Environmental Impact Statement (EIS) in 1996. *Id.* Conservation groups successfully challenged this EIS in 1998 and a federal court invalidated the Federal Highway Administration's (FHA) approval of the EIS. *Id.* In response to the court's concerns, IDOT published a Final Environmental Impact Statement (FEIS) in September 2001. *Id.* The FHWA approved this FEIS on February 25, 2002. *Id.* at 24.

The I-355 extension officially opened on November 11, 2007. Comp. at 2. On an average day, 65,320 vehicles cross the 135<sup>th</sup> Street bridge portion of the I-355 south extension. ISTHA Mot. at 12. The extension allows people in the Southwest suburbs to commute to DuPage County and other western suburbs. Mot. Dismiss Exh. C at 58. ISTHA claims that the extension reduces travel times for I-355 users and reduces congestion on other north/south suburban highways. *Id.* at 59.

### **Mr. Arendovich's Evidence Regarding the Extent of Noise Pollution**

In 2009, Mr. Arendovich hired S & V Solutions, an acoustical engineering firm, to study the noise from the I-355 extension. Am.Comp. at 2. Mr. Arendovich alleges that these figures were taken in accordance with the measurement requirements of Board regulation 900.103 (35 Ill. Adm. Code 900.103). Am.Comp. at 2.

In a letter to Mr. Arendovich dated June 13, 2009, David Larson, an acoustical consultant with S & V Solutions, explained that he measured sound levels coming from the 135th Street Bridge at Mr. Arendovich's balcony, which is 340 feet from the bridge. Am. Comp. Exh. C at 1. Mr. Larson also measured the noise from the bridge at a position on Mr. Arendovich's lot that was 120 feet from the bridge. *Id.* Data was collected from both positions at several different times. *Id.* One test was made over the course of four hours with measurements at 10 second intervals. *Id.* Another test was made for 27 minutes with an interval length of one second. *Id.* at 2. Each of these tests was performed five times at different periods of the day. *Id.*

Mr. Larson concluded that heavy trucks generate "86 db at a distance of 50 ft. from the source." Am. Comp. Exh. C at 3. He also stated that "it is very unlikely the noise will dissipate to legal levels 150 ft. away, nor at 350 ft. by [Mr. Arendovich's] bedroom where the reading were [sic] taken." *Id.* In determining the legality of the sound levels, Mr. Larson refers to noise levels set forth in "Title 23." *Id.* Finally, Mr. Larson stated that "[o]n charts #74 through #79 the high point which is above 65 db correlates with heavy trucks noise decibels (db) and heavy truck traveling frequencies, passing by a given point." *Id.*

In the amended complaint, Mr. Arendovich claims that “FHWA regulations contained in IDOT’s Traffic Noise Assessment Manual at 2-2 indicate that the maximum dBA for residential areas is 67 dBA.” Am. Comp. at 3. Attached to the amended complaint as Exhibit D is a copy of IDOT’s FHWA Noise Abatement Criteria (NAC), which suggests that 67 dBA in residential areas creates a need for some abatement measures. Am. Comp. Exh. D. However, the NAC are not used as “goals for noise attenuation design criteria,” but rather as “noise impact thresholds for considering abatement when they are approached, met, or exceeded.” *Id.*

### **ISTHA’s Response Answer to Mr. Larson’s Evidence**

ISTHA argues that Mr. Larson’s testimony contains two fatal flaws. ISTHA Mot. at 8. First, ISTHA claims that Mr. Larson made measurements in accordance with Title 23 of the Code of Federal Regulations, rather than any specific Board regulations. ISTHA Mot. at 8. In addition, ISTHA states that Mr. Larson was “unaware of specific Illinois’ [sic] testing procedures and does not appear to have made an effort to comply with the State of Illinois Measurement Guidelines.” *Id.* ISTHA further alleges that Mr. Larson was unaware of state measuring guidelines and failed to account for noise not generated by highway traffic. *Id.* at 9.

ISTHA also provided further evidence of its own. Exhibit L, titled “Interstate 355: Post Construction Noise Abatement Evaluation” measured decibel levels ranging from 59 dBA to 69 dBA on “Archer Avenue to north of 135th Street from January 20, 2008 to January 22, 2008. Mot. Dismiss Exh. L.

### **Measures Taken to Mitigate Traffic Noise**

In September 2001, IDOT completed its final Supplemental Environmental Impact Statement (SEIS) with regard to the construction of the I-355 extension. Mot. Dismiss Exh. B at 1. While a prior environmental impact statement in 1996 recommended noise abatement measures at six locations along the I-355 extension, including one near Mr. Arendovich’s residence, the final SEIS reduced the number of locations to four and excluded noise abatement measures along 135th Street because such construction was “no longer deemed reasonable and feasible.” *Id.* Mot. Dismiss Exh. B-2 at 4-13.

In 2002, the FHWA reviewed the final SEIS and signed a record of decision allowing the project to move forward, despite the fact that the final SEIS did not include any abatement measures near Mr. Arendovich’s residence. Mot. Dismiss Exh. B. at 24. However, after re-evaluating noise abatement needs in 2005, ISTHA decided to construct a sound barrier near Mr. Arendovich’s residence along 135th Street. Mot. Dismiss Exh. K at 25.

ISTHA created plans to build a noise wall 2,450 feet in length and 14 feet in average height along the 135th Street portion of the I-355 extension. Mot. Dismiss Exh. K at 25. ISTHA claims that this plan was made “in large part to satisfy the Complainant’s continuing complaints relating to noise concerns.” ISTHA Mot. at 4. Shortly thereafter, ISTHA hosted several local meetings, at which Mr. Arendovich often voiced his concerns. ISTHA Mot. at 4.

After further re-evaluation and allegedly in response to Mr. Arendovich's complaints, ISTHA adjusted its plans and built a larger wall (2,560 feet long and 15.8 feet in average height) for 135th Street along the I-355 extension. Mot. Dismiss Exh. H at 2. Finally, in response to further concerns on the part of Mr. Arendovich and his neighbors, ISTHA built a supplemental wooden wall on the north end of the bridge that is 240 feet long and 10 feet high. Mot. Dismiss Exh. I at 1.

### **SUMMARY OF AMENDED COMPLAINT**

In the sections below, the Board first summarizes Mr. Arendovich's allegations before addressing the remedy requested by Mr. Arendovich and ISTHA's response to the remedy.

#### **Mr. Arendovich's Allegations**

Mr. Arendovich lives at 1388 Gordon Lane in Lemont, Cook County. Comp. at 1. His home is approximately 350 feet from the point where the highway crosses the 135th Street bridge. Am. Comp. Exh. C at 1. Mr. Arendovich alleges that the noise pollution is caused by traffic along the I-355 extension "in the area between 135th Street and Archer Avenue, specifically on the 135th Street Bridge." Comp. at 2. Mr. Arendovich states that the 135th Street Bridge is "540 feet long and does not have a sound barrier." *Id.* He alleges that the noise pollution started immediately after the I-355 extension opened in November 2007. *Id.*

Mr. Arendovich claims that "[t]he noise is so frequent that the IPCB [decibel (db)] requirements are violated every minute of every day of the year," though he does not specifically state which decibel level restrictions have been violated. Comp. at 2. He further states that the noise has created an "unreasonable interference" with his property and interferes with both his sleep and the sleep of others in the area. *Id.* This lack of sleep "endangers the physical and emotional health and well-being of the families in this area." *Id.*

Mr. Arendovich has lodged numerous complaints with ISTHA about the alleged noise pollution and attended several meetings when the highway was in the planning stages. ISTHA Mot. at 4. On January 23, 2009, Mr. Arendovich sent a letter to FHWA concerning the noise from the highway. Mot. Dismiss Exh. K. In response, the FHWA stated that ISTHA implemented all the noise abatement measures required by the FEIS. *Id.*

#### **Remedy Requested by Mr. Arendovich**

To remedy the alleged noise pollution, Mr. Arendovich requests that respondents "install a sound barrier wall from the beginning of the bridge on 135th Street up to Archer Avenue at a height that will minimize noise entering our property." Comp. at 3. Mr. Arendovich claims that currently "there is a short wooden wall of 240 feet in length and an average of 10 feet high on the bridge or approximately [sic] 540 feet in length. The remaining 300 feet on the 135 Street Bridge does not have any sound barrier installed." *Id.*

### **ISTHA's Response to Requested Remedy**

In response to Mr. Arendovich's request for an additional sound barrier, ISTHA claims such construction would be "prohibitively expensive and potentially difficult to construct." ISTHA Mot. at 14. ISTHA estimates that the construction of an 18 foot sound barrier, per Mr. Arendovich's request, would cost \$756,000. *Id.* Further, ISTHA claims the area in question may not be able to support the weight of extra barriers and that there is no guarantee it would "satisfy" Mr. Arendovich. *Id.*

### **APPLICABLE STATUTES AND BOARD REGULATIONS**

Section 24 of the Environmental Protection Act (Act) provides that:

No person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act. 415 ILCS 5/24 (2002).

Similarly, the Board's noise nuisance prohibition is found at Section 900.102 and provides:

No person shall cause or allow the emission of sound beyond the boundaries of his property, as property is defined in Section 25 of the [Act] so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter. 35 Ill. Adm. Code 900.102.

The term "noise pollution" is defined in 35 Ill. Adm. Code 900.101 as "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity."

In determining whether noise pollution has unreasonably interfered with a person's enjoyment of life, the Board follows a two-part inquiry. First, the Board must find that some type of sound has caused an interference with the complainant's enjoyment of life. Zivoli v. Prospect Dive & Sport Shop, Ltd. (March 14, 1991), PCB 89-205. Next, the Board looks to whether the interference is unreasonable, which is determined using Section 33(c) of the Act, which states:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:

- (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;

- (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (v) any subsequent compliance.

### **MOTIONS FOR SUMMARY JUDGMENT**

In the sections below, the Board first addresses the standard for ruling on a motion for summary judgment. The Board then summarizes both parties' motions for summary judgment and finally summarizes ISTHA's reply in support of its motion for summary judgment.

#### **Summary Judgment Standard**

Summary judgment is appropriate when the pleadings, depositions, admissions on file and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation" and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). "Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis which would arguably entitle [it] to a judgment." Sutter Sanitation, Inc. et al. v. IEPA, PCB 04-187, slip op. at 9 (Sept. 16, 2004); citing Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Where the parties file cross-motions for summary judgment, "they agree that no issues of material fact exist and invite the court to decide the issues presented as questions of law." Village of Oak Lawn v. Faber, 378 Ill. App. 3d 458, 462, 885 N.E.2d 386 (1st Dist. 2007). "However, the mere filing of cross-motions for summary judgment does not preclude a determination that triable issues of fact remain." *Id.*

In determining whether to grant a motion for summary judgment, the Board must look to the burden of proof in an enforcement action and the arguments presented by the parties.

#### **Burden of Proof**

Section 31(e) of the Act states the burden of proof applicable to enforcement proceedings before the Board:

In hearings before the Board under this Title the burden shall be on the Agency or other complainant to show either that the respondent . . . has violated or threatens to violate any provision of this Act or rule or regulation of the Board or permit or term or condition thereof. 415 ILCS 5/31(e) (2010).

The Board may only find in the complainant's favor if he has proven each element of the claim by a preponderance of the evidence. Processing and Books, Inc. v. PCB, 64 Ill. 2d 68, 75-76, 351 N.E.2d 865 (1976); Village of South Elgin v. Waste Management of Illinois, Inc., PCB 03-106 (Feb. 20, 2003), *citing* People v. Fosnock, PCB 41-1, slip op. at 19 (Sept. 15, 1994); People v. Chalmers, PCB 96-111, slip op. at 4 (Jan. 6, 2000). A proposition is proved by a preponderance of the evidence when it is probably more true than not. Village of South Elgin, slip op. at 19; *citing* Nelson v. Kane County Forest Preserve, PCB 94-244 (July 18, 1996).

## **ARGUMENTS**

### **ISTHA's Motion for Summary Judgment**

ISTHA first argues that the Board does not have subject matter jurisdiction over Mr. Arendovich's claim. ISTHA states that its decisions to construct sound barriers are discretionary and therefore, under The Toll Highway Act, are "not subject to review by the courts or by any administrative agency of the State." ISTHA Mot. at 6, *citing* 605 ILCS 10/32 (2010). Through its approval of the project's FEIS in 2002, FHWA made a final decision that a wall at this location was unnecessary. ISTHA Mot. at 6. As a result, ISTHA alleges that Mr. Arendovich's action is thwarted by both res judicata and the fact that ISTHA's decision to not include additional noise abatement along the I-355 extension is an unreviewable action. ISTHA Mot. at 6.

ISTHA also argues that the Board lacks subject matter jurisdiction in this matter because: (1) vehicles, not pavement, generate sound, so the highway is not at fault for the alleged noise pollution; (2) Mr. Arendovich failed to allege a noise level in violation of a specific Illinois law or Board regulation; and (3) Mr. Arendovich's noise level testimony was not performed in accordance with Board measurement guidelines. ISTHA Mot. at 7-9.

Finally, ISTHA argues that existing Board Regulations do not support the construction of a new sound barrier. ISTHA cites Petrosius, et al. v. ISTHA, PCB 04-36 (2007), to support its claim that the Board must conduct a two-step analysis to determine if noise emissions rise to the level of a nuisance. ISTHA Mot. at 10. For a violation to occur, the Board must find that the noise interferes with the enjoyment of the complainant's life, and using the factors found in Section 33(c) of the Act, the Board must find that the interference is unreasonable. ISTHA Mot. at 10, *citing* Petrosius at 16.

On the first factor, ISTHA states that, even if the noise emissions interfere with Mr. Arendovich's enjoyment of life, the interference is not unreasonable under the 33(c) factors. ISTHA claims that the noise emissions interfere with only a few residents, and that the general benefits of the I-355 extension outweigh the noise emissions that reach Mr. Arendovich and his neighbors. ISTHA Mot. at 11. ISTHA also claims that the social and economic value of the I-



355 extension is “enormous,” stating that, on average, 65,320 vehicles cross the 135th Street bridge every day. *Id.* at 12.

Next, ISTHA states that the particular area is suitable for the highway, as evidenced by decades of extensive research into the feasibility of the highway’s current location. ISTHA Mot. at 12-13. ISTHA argues that it would be technically impractical and economically unreasonable to further reduce the level of noise emissions reaching Mr. Arendovich’s home. *Id.* at 14. ISTHA estimates that expanding the current wall to a height of 18 feet, per Mr. Arendovich’s request, would cost \$756,000 in construction costs alone. *Id.* Finally, ISTHA states that it has constructed two separate walls to serve as sound barriers in order to satisfy Mr. Arendovich and therefore the “substantial compliance” factor weighs in ISTHA’s favor. *Id.* at 15.

### **Mr. Arendovich’s Motion for Judgment**

In response to ISTHA’s motion for summary judgment, Mr. Arendovich offers a number of arguments in his motion for judgment. Mr. Arendovich states that he bought the land on which his house is currently built in 1987 and began building the home in 1989. Arend. Mot. at 1. He states that ISTHA received legislative approval to construct the I-355 extension in 1993. *Id.* While ISTHA was preparing its FEIS, Mr. Arendovich and his neighbors filed two separate petitions against the construction of the road. *Id.* Mr. Arendovich claims that, while creating a supplemental FEIS, ISTHA modified its plans to reduce the costs of the road, including eliminating plans to construct a sound barrier on the 135th Street bridge. *Id.* at 2.

Mr. Arendovich further argues that ISTHA’s actions violated FHWA guidelines. Arend. Mot. at 2. He alleges that ISTHA has “failed to oblige to the rules of FHWA.” *Id.* at 3. While Mr. Arendovich acknowledges that ISTHA constructed a 240 foot wall on the bridge after listening to citizen complaints, he claims that this wall was necessary to minimize noise that was reaching a neighbor’s house, rather than his home. *Id.* at 4.

Mr. Arendovich requests that ISTHA extend the sound barrier on the 135th Street bridge to a height of 16 feet. *Id.* at 5. Mr. Arendovich claims that the addition of this extension and the construction of a 250 foot wall by the Garb family’s home will bring the highway into compliance with FHWA regulations. *Id.*

While he did not explicitly mention the 33(c) factors of the Act in his motion, Mr. Arendovich alleged in his complaint that noise from the I-355 extension created an “unreasonable interference with the use and enjoyment of his property.” Comp. at 3. Furthermore, the noise “interferes with our sleep” and “endangers the physical and emotional health and well-being of the families in the area.” *Id.* Mr. Arendovich also alleges that the noise level reaching his home could be as high as 80 decibels. *Id.*

Finally, at the end of the motion for judgment, several of Mr. Arendovich’s neighbors signed their names, including Mary Pytlewsky, Boris Nitchkoff, A. Garb, F. Cisneros and J. Pytlewsky. Arend. Mot. at 6. The group asks that the Board “give judgment in our favor” so that ISTHA “can comply by reducing the noise level generated on our property.” *Id.*

## **ISTHA's Reply in Support of its Motion for Summary Judgment**

In its reply, ISTHA alleges that Mr. Arendovich did not submit any admissible evidence in response to ISTHA's motion for summary judgment and that the motion for judgment should be struck in its entirety. Reply at 2. ISTHA states that Mr. Arendovich's motion "consists of conclusions and arguments which are unsupported by facts admissible as evidence" and therefore "must be stricken in its entirety." *Id.*

## **DISCUSSION**

### **ISTHA's Motion for Summary Judgment**

In its motion for summary judgment, ISTHA claims it is eligible for judgment as a matter of law for five primary reasons. The first four arguments claim that the Board lacks subject matter jurisdiction for the following reasons: (1) ISTHA's decision to construct or not construct sound barriers is a discretionary decision and not subject to review by the Board; (2) vehicles, not pavement, generate sound, so the highway is not at fault for the alleged noise pollution; (3) Mr. Arendovich failed to allege a noise level in violation of a specific Illinois law or Board regulation; and (4) Mr. Arendovich's noise level testimony was not performed in accordance with Board measurement guidelines. ISTHA Mot. at 6-9. Finally, ISTHA argues that the noise from the I-355 extension does not unreasonably interfere with Mr. Arendovich's enjoyment of life, and thus ISTHA should obtain judgment as a matter of law. *Id.* at 10. These arguments are addressed below.

### **Subject Matter Jurisdiction**

ISTHA contends that its decisions about the construction of sound barriers during the initial stages of a highway project are discretionary. Mr. Arendovich's complaint, however, alleges a violation of 35 Ill. Adm. 900.102, which prohibits noise pollution. The Board has jurisdiction over claims arising under this regulation. *See Petrosius, et al. v. ISTHA*, PCB 04-36 (2007). Although Mr. Arendovich's allegations that ISTHA has violated FHWA regulations have already been dismissed by the Board, the Board focuses here on the complainant's allegations relating to Section 900.102. The Board is not reviewing ISTHA's past decisions to construct sound barriers. Rather, the Board is reviewing whether the I-355 extension is currently emitting sounds that rise to the level of nuisance noise pollution.

In its motion for summary judgment, ISTHA relies in part on *Petrosius*, where the Board determined that noise coming from a highway did not constitute noise pollution under Section 900.102. *Petrosius*, PCB 04-36 (2007). In *Petrosius*, the Board exercised its jurisdiction over an alleged violation of 35 Ill. Adm. Code 900.102 and ISTHA accepted the Board's ability to issue such a ruling, acknowledging the Board's jurisdictional power over such a complaint. Precedent therefore shows that the Board has subject matter jurisdiction over alleged violations of Section 900.102.

### **Liability for Alleged Noise Pollution**

To support ISTHA's claim that it is not at fault for the alleged noise pollution because vehicles, not pavement, generate sound, ISTHA cites a previous case in which the Appellate Court refused to rule that ISTHA would be liable for air pollution caused by cars traveling on a theoretical highway that had not yet been built. Illinois State Toll Highway Authority v. Kam, 293 N.E.2d 162, 166, 9 Ill.App.3d 784, 790 (2nd Dist. 1973). The Court held that vehicles cause air pollution, not the highway. *Id.* The statute in question required highway authorities to obtain an emissions permit if a proposed road was "capable of causing or contributing" to air pollution. *Id.*

The statute in Kam differs from the regulation in this case. Section 900.102 of the Board's regulations forbids an entity from "causing or allowing the emission of sound beyond the boundaries of [its] property." 35 Ill. Adm. Code 900.102. ISTHA argues that, "[w]ithout the passing vehicles, there would be no sound generated by the highway." ISTHA Mot. at 7. However, ISTHA is allowing these vehicles access to the highway extension. Therefore, even if ISTHA's highway is not *causing* the sound, ISTHA is "*allowing* the emission of sound beyond the boundaries of [its] property." (emphasis added).

For these reasons, the Board has subject matter jurisdiction over ISTHA's alleged noise pollution.

### **Noise Level in Violation of Specific Illinois Law or Board Regulation**

The Board acknowledges that Mr. Arendovich has failed to allege a specific violation of a Board regulation governing numeric decibel levels. His complaint, however, alleges a violation of 35 Ill. Adm. Code 900.102, which governs nuisance noise violations. Therefore, the primary issue is whether the noise unreasonably interferes with Mr. Arendovich's enjoyment of life. While precise decibel levels may help show the character and degree of the alleged noise pollution, a certain decibel threshold is not required to prove a nuisance noise violation. Mr. Arendovich has argued that the noise emissions from the I-355 extension unreasonably interfere with his enjoyment of life, as prohibited by 35 Ill. Adm. Code 900.102, which is a specific Board regulation. The decibel levels he continues to cite may factor into the 33(c) analysis.

### **Noise Level Measurements in Accordance with Board Measurement Guidelines**

Mr. Arendovich's complaint alleges that the noise from the I-355 extension constitutes nuisance noise pollution under Section 900.102 of the Board's regulations. The Board construes his testimony regarding decibel levels as an argument relating to a single factor - the Board's determination of the overall character and degree of the noise emissions. Mr. Arendovich's noise technician may not have followed Board measurement guidelines, but the figures he obtained raise a material question as to the extent of the noise emissions. Notwithstanding the technician's decibel measurements, Mr. Arendovich's other allegations, *e.g.* interference with sleep and endangerment of physical and emotional health, raise the question of whether the tollway may be unreasonably interfering with his enjoyment of his property.

### **Unreasonable Interference**

Summary judgment is appropriate when the pleadings, depositions, admissions on file and affidavits disclose that there is no genuine issue as to any material fact. Gleason, 181 Ill. 2d at 483. In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Id.* Regardless of who may prevail under a preponderance of the evidence, the granting of summary judgment should only be granted if ISTHA’s right to the relief “is clear and free from doubt.” *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). In his motion for judgment, Mr. Arendovich offers some arguments that raise doubt about ISTHA’s claims related to the character and degree of the noise emissions and the economic reasonableness of constructing more sound barriers. Mr. Arendovich alleges that the noise from the highway is constant and prevents him from sleeping. Comp. at 3. He also claims that ISTHA has ample funds to enhance the current sound barriers. ISTHA Mot. at 3. If these claims are true, then Mr. Arendovich has provided a plausible factual basis under which he may arguably be entitled to legal relief. This doubt is enough to create some uncertainty that the unreasonable interference factors weigh in ISTHA’s favor. Therefore, there remains a possibility that noise emissions from the I-355 extension may, in fact, amount to noise pollution. As a result, the Board cannot at this time grant ISTHA judgment as a matter of law.

### **Conclusion**

Summary judgment may only be granted when there are no issues of material fact and the moving party’s right to relief is free from doubt. While Mr. Arendovich’s presentation may appear flawed, he has raised disputed issues of material fact including, but not limited to, the character and degree of the noise reaching his home and the technical feasibility and economic reasonableness of further noise abatement measures. When taking all of the facts in a light most favorable to Mr. Arendovich, ISTHA has not shown that the noise emissions reaching Mr. Arendovich’s home do not constitute a nuisance noise violation. As a result, ISTHA is not eligible for judgment as a matter of law and its motion for summary judgment is denied.

### **Mr. Arendovich’s Motion for Judgment**

In his complaint, Mr. Arendovich alleges that ISTHA has violated Section 900.102, but fails to make arguments for each of the “unreasonable interference” factors. Instead, he issues vague charges about ISTHA’s finances and continues to cite violations of FHWA decibel standards over which the Board has no jurisdiction. In order to argue that the unreasonable interference test is met, Mr. Arendovich must, at the very least, address each factor. Mr. Arendovich’s motion for judgment fails to prove as a matter of law that the noise from the I-355 extension amounts to nuisance noise pollution under Section 900.102. Similar to the Board’s analysis of ISTHA’s motion for summary judgment above, when taking all facts in a light most favorable to the non-movement, ISTHA has raised enough arguments to show that there is a genuine issue of material fact and that Mr. Arendovich is not eligible for judgment in his favor at this time. Therefore, Mr. Arendovich’s motion for judgment is denied.

**ISTHA's Motion to strike Mr. Arendovich's Motion for Judgment**

In its reply to Mr. Arendovich's motion for judgment, ISTHA alleges that Mr. Arendovich did not submit any admissible evidence in response to ISTHA's motion for summary judgment and that the motion for judgment should be struck in its entirety. Rep. at 2.

The Board acknowledges ISTHA's position that a number of the allegations in Mr. Arendovich's motion for judgment are unresponsive to the motion for summary judgment or relate to claims already dismissed by the Board. The Board will only consider those portions of the motion for judgment that the Board deems relevant to the claims raised in this case. Mr. Arendovich does include certain allegations within his motion for judgment which directly relate to his unreasonable interference claim. Therefore, the Board denies ISTHA's motion to strike the motion for judgment in its entirety.

**CONCLUSION**

For the reasons stated above, the Board denies ISTHA's motion for summary judgment and denies Mr. Arendovich's motion for judgment. The Board denies ISTHA's motion to strike Mr. Arendovich's motion for judgment in its entirety. The Board directs the hearing officer to proceed to hearing in this matter.

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 21, 2011, by a vote of 5-0



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board