

JUN 15 2004

**STATE OF ILLINOIS
Pollution Control Board**

BARBARA STUART and RONALD)
STUART,)
Complainants,)
)
v.)
)
FRANKLIN FISHER and PHYLLIS)
FISHER,)
Respondents.)

No. PCB 02-164
Citizen Enforcement

To: Dorothy M. Gunn
Suite 11-500
100 W. Randolph St.
Chicago, IL 60601

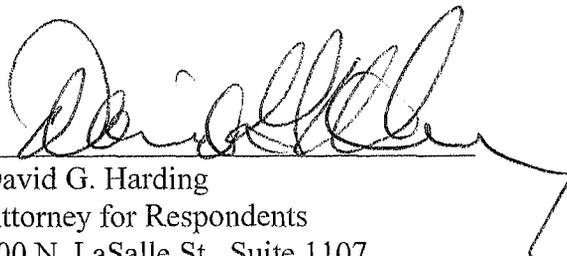
Barbara & Ronald Stuart
213 E. Corning Road
Beecher, IL 60401

Bradley P. Halloran
Suite 11-500
100 W. Randolph St.
Chicago, IL 60601

Bobby Petrunaro
14 W. Jefferson, Room 200
Joliet, IL 60432

NOTICE OF FILING

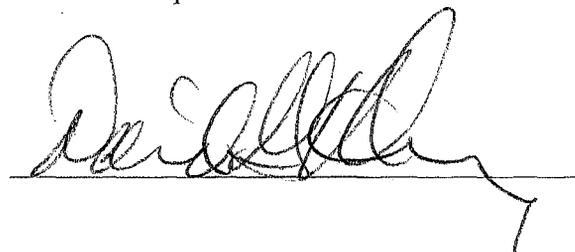
PLEASE TAKE NOTICE that I have, on June 15, 2004, filed with the Office of the Clerk of the Pollution Control Board the Respondent's Post-Hearing Brief, a copy of which is herewith served upon you.



David G. Harding
Attorney for Respondents
100 N. LaSalle St., Suite 1107
Chicago, IL 60602-3803
(312) 782-3039

CERTIFICATE OF SERVICE

I, David G. Harding, certify that on June 15, 2004, I served the attached Respondent's Post-Hearing Brief by delivery to Dorothy M. Gunn and Bradley P. Halloran at their address as shown above, and by pre-paid first class mail upon all others to whom directed to their addresses as shown above.



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CLERK'S OFFICE

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RESPONDENTS' POST-HEARING BRIEF

Respondents, Franklin Fisher and Phyllis Fisher, submit that for the following reasons, Complainants, Ronald Stuart and Barbara Stuart, have not presented a prima facie case for the relief requested in their Complaint. Respondents will discuss whether Respondents interfered with Complainants enjoyment of life; whether the interference, if any, was reasonable; the social and economic value of the source of the noise; the suitability of the noise source to the area where it is located; the technical practicability and economic reasonableness of reducing the noise, and; Respondents' actions since the filing of the Complaint to reduce the impact upon their neighbors. References to pages of the transcript of hearing held March 9, 2004 are in brackets.

Addressing the Amicus brief of the Will County State's Attorney, it is only necessary to note that the brief speaks only to the Will County ordinance and appears to accept the truth of certain assertions, a matter of no persuasive value in the board's deliberations, particularly given the accepted fact that Will County received complaints from Stuart before the board did. The Amicus brief makes no argument in relation to the Illinois Environmental Protection Act or the facts of this case, as presented at hearing and by exhibit. The Complainants' Post-Hearing Brief is similarly unhelpful. It does not discuss relevant areas of inquiry and does not speak in relation to the facts as established at the hearing. It simply seeks to place several exclamation points behind Complainants' expressed desires. Since this is the case, Respondents will not burden the Board with an

integral discussion of the record and the applicable law. However, Respondent will take pains to hit the high points.

INTERFERENCE WITH COMPLAINANTS' ENJOYMENT OF LIFE

Complainants signed their complaint on March 24, 2002, alleging at paragraph 4 that Franklin Fisher used two "bird (propane) cannon devices 1/3 mile from my home...Gunshot like noise ignites 30 sec to every minute X 14 hours per day from May to October." At paragraph 7, they allege, "On August 8, 2001 – Franklin Fisher began using two cannon devices..." No May, June or July had then passed since the commencement of Respondents' use of the propane cannons. It is characteristic of the exaggerations, evasions and emotional pleas for relief which the law does not afford which have plagued this case from the beginning, through the hearing, and even into the post-hearing briefing.

Barbara and Ronald Stuart have asserted throughout the pendency of this matter that the gunshots were fearsome and made them, their family and neighbors who have since moved away (most of which was unadulterated hearsay), believe that someone was shooting at them. At hearing, Ronald Stuart testified that he does not know whether anyone hunts on the railroad property between his home and the Fisher Farm. If gunshots bother him, and this is closer than the Fisher farm, how could he not know? He also testified that a neighbor who is a police officer periodically fires his gun in the area [132-133, 140], but this does not, apparently, bother him. Barbara Stuart likened the sounds to a breaking glass, bringing to mind the idea that someone might be cut, and then, irritating like a dripping faucet [158]. The Stuarts lead off that portion of their Post-Hearing Brief with an unattributed quotation to liken Franklin Fisher to a terrorist.

Young Michael Stuart testified that his doctor told him he should stay away from loud noises [30]. The conversations he overheard among the adults in his home were to the effect that, "...everybody's in a bad mood and they talk about it just saying those cannons are a horrible thing, made to hurt things [42]." He admitted that, while waiting

for the hearing to conclude, he had been in the hallway outside the hearing room, fixing his electric guitar [273].

The Stuarts originally sued Franklin Fisher in Will County Circuit Court for damages for the death of their dog, Samantha. That case was removed, by agreement, for arbitration in a very public forum, and the finding in that arbitration was that no liability could attach since Fisher had not acted negligently. At the close of that hearing, although they had executed a mutual release in anticipation of the hearing [Respondents' Exhibits 6 and 7], the Stuarts vowed to exact vengeance upon Fisher [Hearing Officer Exhibit 1].

Moreover, the Stuarts' conduct in this proceeding and their philosophy of continued complaining, threatening and harping at people who displease them is a strong indication that they have not suffered interference with enjoyment of life [168-170; Respondents Exhibits 1, 2, 4, 5, 8, 11, 20, 24, 25, 26, 27]. To view this from another point of view, the Stuarts blame Franklin Fisher for the loss of a breeding animal and have sued him, complained repeatedly to units of government, including politicians who have, given the coincidence of grammatical errors in their submissions, allowed Mrs. Stuart to write letters as Public Comments 1 and 2 over their signatures. Not satisfied with governmental action, the Stuarts have campaigned to raise their other neighbors against the Fishers [Exhibit 10].

There is no evidence of the sound levels of which Complainants complain. There is no evidence to support the threshold contention that the Respondents' activities have interfered with the Stuarts' enjoyment of life. What the Respondents have suffered is either sensitization by their perception that Franklin Fisher is responsible for the loss of one of their breeding animals, or in the context of their activities in relation to other activities which displease them, interference with their preferences and embarrassment at their inability to micro-manage the day-to-day activities of their neighbors [30, 118].

No case in Illinois has held that irritants equivalent to a dripping faucet or a distant popping sound [17], even including loss of sleep, when confined to daylight hours,

and for such a limited period - the beginning to middle of August to the middle to end of October - constitute an interference with enjoyment of life.

REASONABLENESS OF INTERFERENCE IF THERE WAS INTERFERENCE

The purpose of the cannons is to repel crows. That purpose is served. The excerpts from Sweda admitted into the record and Mr. Zak's equating of crows, by habit and stubborn attachment to an environment make it clear that any program of reducing or moving crow populations, must begin with loud, impulsive noise [234-235; 242-243; Sweda pages 210-211, 224 and 332].

Complainants offered no competent, admissible evidence on this issue. Although Mr. Zak was stipulated to be a pre-eminent expert in the field of noise/acoustics, he is not qualified as an expert in ornithology, and his experience as a tree-farmer hardly qualifies him to judge the feasibility of various methods.

SOCIAL AND ECONOMIC VALUE OF THE SOURCE OF THE NOISE

The source of the noise is a farm. In Illinois, farming is granted a primacy of value afforded to no other activity. 740 ILCS 70/1; 505 ILCS 5/19; 505 ILCS 75/2. Additionally, although the Stuarts sought and obtained a bar on Respondents' evidence of economic loss, Complainants opened the door and asked the question, and the propane cannons have reduced losses [101-102].

SUITABILITY OF THE NOISE SOURCE TO THE AREA WHERE IT IS LOCATED

The noise source is located on a forty acre farm. The farm and its various noise-producing implements and machines have been there for more than a generation. The propane cannons were added in 2001 to address a specific problem. The farm has priority, but the cannons do not. On the other hand, as noted above, there is little of effect that can be done to protect the crops from birds that does not involve the cannons. And given the nature and source of the Stuarts' crusade against the Fishers, it is likely that, even if the cannons are removed, there will be some other element of farming activity which will draw their wrath. Perhaps, their next complaint will be about all those

dangerous strangers coming into their neighborhood to harvest the produce.

TECHNICAL PRACTICABILITY AND
ECONOMIC REASONABLENESS OF REDUCING THE NOISE

As noted in the excerpts from Sweda and the testimony of Greg Zak, cited above, any effective program for repelling crows must begin with impulsive sounds. Muffling the sound renders the cannons useless. Removing the cannons removes the cornerstone of any effective bird-control program. The alternative methods suggested by the Stuarts without expert qualification are simply too time-consuming and labor-intensive [91].

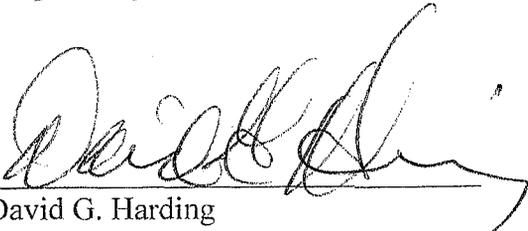
RESPONDENTS' ACTIONS TO REDUCE IMPACT ON THEIR NEIGHBORS

Franklin Fisher testified that he started out using both cannons every day and has since learned that a pattern of a couple of days on and a day off works nearly as well, and it has become his practice to use the cannons as little as possible, no more than necessary [90, 285-286]. Although Respondent has difficulty believing that what he is doing causes any real interference with Complainants' enjoyment of their lives, his efforts have been accommodating.

CONCLUSION

Respondents, Franklin Fisher and Phyllis Fisher, submit that the Complainants have not even approached making out a case of pollution, and they respectfully request that the Illinois Pollution Control Board so find.

Respectfully submitted,



David G. Harding
Attorney for Respondents
100 N. LaSalle St.
Suite 1107
Chicago, IL 60602-3803
(312) 782-3039