

ILLINOIS POLLUTION CONTROL BOARD
October 21, 2004

DAVID and JACQUELYN MCDONOUGH,)
)
Complainants,)
)
v.) PCB 00-163
) (Citizens Enforcement - Noise)
GARY ROBKE,)
)
Respondent.)

ORDER OF THE BOARD (by T.E. Johnson):

This case is before the Board on a motion to apply sanctions filed by David and Jacquelyn McDonough (McDonoughs) on September 7, 2004. On September 24, 2004, Gary Robke (Robke) filed a response to the motion. For the reasons set forth below, the Board denies the McDonoughs' motion.

BACKGROUND

The McDonoughs filed a complaint against Robke on March 27, 2000, alleging that Robke violated noise nuisance provisions under Section 24 of the Environmental Protection Act (Act) (415 ILCS 5/24 (2002)) and Section 900.102(a) of the Board regulations. 35 Ill. Adm. Code 900.102(a). The McDonoughs asserted that the violations were caused by Robke's operating a 24-hour self-service car wash in Mascoutah, Illinois. The McDonoughs stated that noise generated by the car wash equipment, patrons, and their vehicles unreasonably interferes with McDonoughs' enjoyment of life and property.

On March 7, 2002, the Board issued an order finding Robke in violation of Section 24 of the Act. 415 ILCS 5/24 (2002). On February 6, 2003, the Board issued an order directing Robke to, *inter alia*, construct an airtight barrier of uniform elevation that ran contiguously on the southern and western property line of the car wash. The barrier was required to be 12 feet high, consisting of a six-foot high berm topped with an airtight six-foot high fence constructed of a solid material with a minimum density of one pound per square foot. Robke was given 180 days to construct the wall. See McDonough v. Robke, PCB 00-163 (Feb. 6, 2003).

On September 4, 2003, the Board issued an order that stayed paragraph 3 of the February 6, 2003 order (requiring the construction of a noise wall and berm) until March 1, 2004. The Board directed the parties to participate in status conferences with the hearing officer every 30 days during the pendency of the stay, and noted that Board will consider whether Robke has made good faith efforts toward expeditious abatement of this noise nuisance when considering any further motions for an extension of the stay. On April 15, 2004, the Board granted an additional stay of paragraph three of the Board's February 6, 2003 order, giving Robke until September 1, 2004, to comply. Once again the parties were directed to participate in

status conferences as ordered by the hearing officer. In the April 15, 2004 order, the Board stated that it was aware of the McDonoughs' concerns, and that barring any unforeseen circumstances, would not grant further stays in this matter.

MOTION

In the instant motion, the McDonoughs assert that as of September 4, 2004, there is no construction started at the car wash. Mot. at 2. The McDonoughs contend that Robke's foot dragging has resulted in unnecessary delays, and that the final plan was agreed to months ago. *Id.* The McDonoughs assert that Robke is in violation of the Board's order and asks that the Board apply sanctions on the car wash as an incentive to take this matter seriously. *Id.*

Robke asserts that he has selected the fencing with approval of the McDonoughs and has called the City manager many times to spot flag the location of the City's easement. Resp. at 1. Robke contends that the building inspector is supposed to go to the site this week to mark the City's easement and approve the fence location, and that the Joint Utility Locating Information for Excavators located the utility lines on September 16, 2004. *Id.* Finally, Robke asserts that the parties expect to proceed with construction of the berm and fencing as soon as the City of Mascoutah (City) selects the location and approves the height. *Id.*

DISCUSSION

Board sanctions are provided for under Subpart H of the Board's procedural rules, and provide that the Board may order sanctions on any person unreasonably failing to comply with any order entered by the Board. *See* 35 Ill. Adm. Code 101.800(a). Section 101.800 lists potential sanctions, and states that in deciding whether to impose sanctions the Board will consider the relative severity of the failure to comply, the past history of the proceeding, the degree of delay, and the existence or absence of bad faith by the offending party. 35 Ill. Adm. Code 101.800(b) and (c).

Robke's failure to comply with the Board order is severe in that a found violation of the Act has not been remediated. However, a review of the past history of this proceeding reveals that sanctions are not appropriate at this time. The order in question has been stayed until September 1, 2004. In granting the stays on September 4, 2003, and April 15, 2004, the Board recognized that the record was unclear as to whether a variance from the City would be necessary, or obtainable, prior to the construction of a noise wall, and stated that Robke could attempt to modify the Board order as required. McDonough v. Robke, PCB 00-163, slip op. at 5-6, (Feb. 6, 2003), McDonough v. Robke, PCB 00-163, slip op, at 5, (Apr. 15, 2004).

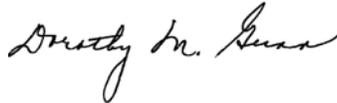
Also in the previous orders, the Board found that Robke appeared to be operating in good faith, was attempting to resolve the City's concerns with the location of the noise wall, had taken steps as ordered by the Board to mitigate the noise from its operations, and was participating in regular Board status conferences with Hearing Officer Sudman. The Board finds nothing in the record to indicate that Robke is no longer operating in good faith.

In the motion, the McDonoughs do not specify what type of sanction they would like imposed on Robke. The sanctions listed under Section 101.800(b)(5) are procedural in nature and contemplate an ongoing case, not a situation such as this where the Board has issued a final opinion and order. Further, Section 101.800 does not allow the Board to monetarily sanction the offending party. Logsdon v. South Fork Gun Club, PCB 00-177, slip op. at 3, (Dec. 19, 2002). *See also* Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, slip op. at 7, (Dec. 21, 2000).

Although the Board is not granting the motion to apply sanctions, it is cognizant of the McDonoughs' valid concerns regarding Robke's failure to comply with the Board order. Although Robke is progressing toward the ultimate construction of a noise wall as ordered by the Board, significant time has elapsed since the Board initially found Robke in violation of the Act in March 2002. As stated in the April 15, 2004 order, the Board will not grant further stays in this matter. The McDonoughs are not without recourse in this matter. Under the Act, a party may seek enforcement of a Board order in circuit court by injunction, mandamus or other appropriate remedy in accordance with Section 33(d) of the Act. *See* 415 ILCS 5/33(d) (2002).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 21, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board