

ILLINOIS POLLUTION CONTROL BOARD
September 16, 2004

BARBARA and RONALD STUART,)
)
 Complainants,)
)
 v.) PCB 02-164
) (Citizens Enforcement - Noise)
 FRANKLIN FISHER and PHYLLIS FISHER,)
)
 Respondents.)

BARBARA and RONALD STUART APPEARED *PRO SE*; and

DAVID G. HARDING APPEARED ON BEHALF OF RESPONDENTS.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

The Board today rules on a complaint alleging that noise produced by propane cannons for bird control on a farm in rural Will County violates provisions of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2002)) and Board regulations. Based on the evidence in the record the Board finds that a nuisance noise violation did occur and orders that the respondent cease and desist from further violations. The following opinion will set forth the procedural background, the statutory background, the facts, and analysis of the arguments as well as the reasons for the Board's decision.

PROCEDURAL BACKGROUND

On April 3, 2002, Barbara and Ronald Stuart (Stuarts) filed a complaint against Franklin Fisher (Fisher) alleging that the respondent violated Sections 23 and 24 of the Act (415 ILCS 5/23, 24 (2002)) and 35 Ill. Adm. Code 900.102 and 901.102 of the Board's regulations. Complainants further alleged violations of the Humane Care for Animals Act (510 ILCS 70/3.01, 3.02, and 3.03 (2002)). The alleged violations occurred from August 8, 2001 through October of 2001. On May 16, 2002, the Board dismissed the alleged violations of Section 23 of the Act (415 ILCS 5/23 (2002)) and the alleged violations of the Humane Care for Animals Act (510 ILCS 70/3.01, 3.02, and 3.03 (2002)) as frivolous. *See Stuart v. Fisher* PCB 02-164 (May 16, 2002). The Board accepted the remaining allegations for hearing. *Id.*

On November 4, 2002, the Stuarts filed an amended complaint (Am. Comp) seeking to add Phyllis Fisher as a respondent. Phyllis Fisher is the legal owner of the property and the mother of Franklin Fisher. Tr. at 96, 97, 144; Am.Comp. at 1. On December 19, 2002, the Board granted that motion. *See Stuart v. Fisher* PCB 02-164 (Dec. 19, 2002).

On March 9, 2004, hearing was held before Board hearing officer Bradley Halloran. On May 3, 2004, the Stuarts filed a post-hearing brief (Br.). On June 15, 2004, Fisher filed a post-

hearing brief (Resp. Br.). On July 15, 2004, the Stuarts filed a reply (Reply). On May 6, 2004, the Will County State's Attorney's office (Will County) filed an *amicus curiae* brief (*Amicus*).

At hearing, the hearing officer sustained several objections to the admissibility of evidence. *See e.g.*, Tr. at 11, 49, 191. The hearing officer allowed the submission of the evidence as an offer of proof. Pursuant to the Board's rules, any "objection to a hearing officer ruling made at hearing . . . will be deemed waived if not filed within 14 days after the Board receives the hearing transcript." 35 Ill. Adm. Code 101.502(b). Neither party raised objection to the hearing officer's rulings; therefore, any evidence presented as an offer of proof is not a part of this record.

STATUTORY AND REGULATORY BACKGROUND

Under the Environmental Protection Act (415 ILCS 5/1 *et seq.* (2002)) and the Board's regulations, there are two types of noise violations. First, numeric violations are prohibited and occur if the decibel level of noise exceeds the standards in 35 Ill. Adm. Code 901.102. Second, nuisance noise violations are prohibited and occur if noise is emitted beyond the boundaries of a property so as to unreasonably interfere with the enjoyment of life, lawful business or activity of another party. The Board uses the factors in Section 33(c) of the Act (415 ILCS 5/33(c) (2002)) to determine if the noise unreasonably interferes with the enjoyment of life, lawful business or activity of another party. Charter Hall Homeowner's Association and Jeff Cohen v. Overland Transportation System, Inc., and D. P. Cartage, Inc., PCB 98-81 (Oct. 1, 1998) (Charter Hall). The Board sets forth the relevant statutory and regulatory sections below.

Section 24 of the Act provides:

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 the Act. 415 ILCS 5/24 (2002)

Section 33(c) of the Act provides that:

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. 415 ILCS 5/33(c) (2002)

Section 900.101 Definitions

Noise pollution: the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity. 35 Ill. Adm. Code 900.101.

Section 900.102 Prohibition of Noise Pollution

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 Illinois Environmental Protection 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.

Section 901.102 Sound Emitted to Class A Land

- a) Except as elsewhere in this Part provided, no person shall cause or allow the emission of sound during daytime hours from any property-line-noise-source located on any Class A, B or C land to any receiving Class A land which exceeds any allowable octave band sound pressure level specified in the following table, when measured at any point within such receiving Class A land, provided, however, that no measurement of sound pressure levels shall be made less than 25 feet from such property-line-noise-source.

Octave Band Center Frequency (Hertz)	Allowable Octave Band Sound Pressure Levels (dB) of Sound Emitted to any Receiving Class A Land from		
	Class C Land	Class B Land	Class A Land
31.5	75	72	72
63	74	71	71
125	69	65	65
250	64	57	57
500	58	51	51
1000	52	45	45
2000	47	39	39
4000	43	34	34
8000	40	32	32

- b) Except as elsewhere in this Part provided, no person shall cause or allow the emission of sound during nighttime hours from any property-line-noise-source located on any Class A, B or C land to any receiving Class A land which exceeds any allowable octave band sound pressure level specified in the following table, when measured at any point within such receiving Class A land, provided, however, that no measurement of sound pressure levels shall be made less than 25 feet from such property-line-noise-source.

Octave Band Center Frequency (Hertz)	Allowable Octave Band Sound Pressure Levels (dB) of Sound Emitted to any Receiving Class A Land from		
	Class C Land	Class B Land	Class A Land
31.5	69	63	63
63	67	61	61
125	62	55	55
250	54	47	47
500	47	40	40
1000	41	35	35
2000	36	30	30
4000	32	25	25
8000	32	25	25

FACTS

At hearing, seven people testified in this proceeding. The following section will detail the relevant general facts, summarize testimony from the March 9, 2004 hearing, and describe the public comments.

General Facts

The Stuarts moved to 213 East Corning Road, Will County, in the summer of 1999. Tr. at 26, 180-81. Fisher's farm is at 25 West Corning Road and has been in the Fisher family since 1925. Tr. at 85. The Stuarts' west property line is two-tenths of a mile from Fisher's east property line. Tr. at 159, 188-89. A 24-acre parcel of abandoned rail line, which is overgrown with trees and shrubs, separates the two tracks (Tr. at 279-80) as well as two other properties. Tr. at 140-45, Pet.Exh. 2. The Fisher property is 80 acres and is rectangular in shape. Tr. 92, 280. Fisher farms approximately 75 acres. Tr. at 92.

After moving away from the family farm for a period of time, Fisher returned and has lived on the farm since 1971. Tr. at 85-86. In approximately 1999, Fisher changed the type of farming taking place to produce truck farming and began growing melons in 2000. Tr. at 86-88. Mr. Fisher stated that crows were attracted to the melons and about half the crop of melons was lost to the crows. Tr. at 88.

In response to the problem with the crows, Fisher incorporated propane cannons in the running of the farm in 2001. Tr. at 38, 88. He purchased two propane cannons and used both cannons to frighten crows away from the melons. Tr. at 89-90. Mr. Fisher stated that both cannons were used “pretty much all the time” the first year. Tr. at 90. After that first year, only one cannon was used because all the melons were placed in one area. *Id.* Also, the cannon would be used for two or three days and then not be used for a day or two. *Id.* Mr. Fisher testified that from sunrise to sunset for a three-month period the cannons are used. Tr. at 93.

Testimony at Hearing

Michael Stuart

Michael Stuart, the 14-year old son of complainants, testified that prior to moving to their home on Corning Road, they had lived in the suburbs. Tr. at 26. Michael testified that the suburbs were too noisy and they moved to Beecher because “it was quiet and simple and easy.” *Id.* After moving in, Michael would swim, play soccer, and even play golf in the back yard of their home. Tr. at 26-27.

Michael remembers the cannons beginning to fire around 5 a.m. one morning. Tr. at 27-28, 39. Since the cannons have been in use, Michael no longer goes outdoors, and he does not want to go outdoors. Tr. at 28. Michael stated that the cannons operate from dawn until dusk except in the winter. Tr. at 42.

Michael has a hearing problem in his left ear and both ears are affected by the cannons. Tr. at 29. Michael stated that his ears ring every time the cannons are fired and he compared the sound to someone aiming a gun at the side of his head. *Id.* Michael’s doctor has advised him to stay away from loud noises including music. Tr. at 30.

Michael is embarrassed to have friends over and his friends make comments regarding the noise. Tr. at 30-31. Michael also testified that the family owns six dogs and the dogs are upset by the noise. Tr. at 31. Michael indicated that the dogs go to the bathroom in the house and are afraid to be outside. Tr. at 31-32. Michael also stated that he turns up the fan in his room and blocks the noise out by sleeping. Tr. at 34.

JR Grossman

JR Grossman owns property at 357 East Corning Road where he works; he does not live there. Tr. at 51. Mr. Grossman’s property is one-half to three-quarters of a mile from the eastern edge of the Fisher farm. Tr. at 77. Mr. Grossman is a professional glass artist and uses one building on the East Corning property for that purpose. *Id.* Mr. Grossman also breeds German Shepherds for service work, has beehives, and maintains a small orchard on the property. *Id.* Mr. Grossman purchased the property in 1993, and described the area as quiet and away from any urban sprawl. Tr. at 52.

Mr. Grossman heard the cannons when the cannons first fired. Tr. at 53. Mr. Grossman stated that the cannons ran all summer in the summer of 2001, although he was not aware of where the sound was coming from. Tr. at 54. After seeing the Stuarts on the Judge Mathis television show¹, Mr. Grossman contacted the Stuarts. Tr. at 54-55. The sounds from the cannons made Mr. Grossman feel anxious and cause the windows to rattle. Tr. at 55, 61.

Mr. Grossman describes the sound as a loud booming, percussive echoing, like fireworks. Tr. at 63. The sounds interrupt Mr. Grossman's work by interrupting his concentration. *Id.* Mr. Grossman notes that the sound can be phased out but when you do hear the noise, his concentration is disrupted. *Id.*

Mr. Grossman testified that there are several produce farmers in the area. Tr. at 70. Some of the farmers grow pumpkins and melons. *Id.* Mr. Grossman has been in the area since the early 1980s and he has never heard propane cannons until now. *Id.*

James O'Neil

James O'Neil, who has visited the Stuarts, testified concerning the noise from the cannons. Tr. at 80-81. Mr. O'Neil testified that he visited the property before the Stuarts bought the property and again when the cannons were in use. Tr. at 82. Mr. O'Neil stated that the sounds of the cannons scared him and he believed there were hunters in the fields with guns. *Id.* Mr. O'Neil also had his nephew with him and his nephew was also frightened by the noise. *Id.*

Julie Barton

Julie Barton lives at 25 West Corning Road. Tr. at 105. Ms. Barton is Fisher's daughter. Tr. at 96. Ms. Barton testified that she was not disturbed by the sound of the cannons. Tr. at 105-7.

Ronald Stuart

Ronald Stuart testified that he first heard the noise from the cannons in late summer at daybreak as he was letting the dogs out. Tr. at 109-10. At the second firing of the cannon, one dog ran into a gate and then into the house. Tr. at 110. The dog broke her back running into the gate. Tr. at 132. The cannons continued on until after 9 p.m. that night. Tr. at 114. Mr. Stuart

¹ Hearing Officer Exhibit 1 is a videotape of the Judge Mathis television show. The Judge Mathis show is a television show that contacts individuals with claims in courts throughout the United States and asks the parties to agree to dispute resolution on the television show. The Stuarts had filed a claim for damages concerning fatal injuries to their dog. The Stuarts and Fisher agreed to have that dispute resolved before Judge Mathis. The parties have stipulated to the authenticity of the tape (*see* Tr. at 14) and the hearing officer ruled the videotape was relevant (*see* Mar. 31, 2004 hearing officer order). The issues under consideration by Judge Mathis included discussion of the noise from the cannons; however the decision by Judge Mathis involved damages for the fatal injuries to the Stuarts' dog. Thus, the issues before the Board are distinct from the decision in the proceeding before Judge Mathis.

found where the sound was emanating from and asked Fisher to stop using the cannons. *Id.* Mr. Stuart returned a week later and again asked Fisher to refrain from using the cannons. Tr. at 115. Mr. Stuart concedes that since the cannons first were used, there has been an improvement. Tr. at 129.

Mr. Stuart testified that the sound startles the animals on his property which include both dogs and horses. Tr. at 116-17. Specifically, one of the dogs will not go outside when the cannons are firing while two go out and come right back in the house. Tr. at 117. The Stuarts also had chickens. Tr. at 116-17. However, when Fisher began using the cannons the hens stopped laying eggs. *Id.* The Stuarts no longer have chickens. Tr. at 117.

Mr. Stuart testified that he does hear gunshots in the neighborhood, but he does not allow hunting on his property. Tr. at 132-33. Mr. Stuart indicated that a police officer lives down the road and will occasionally fire his weapon for 15 to 20 minutes at a time. Tr. at 133. Mr. Stuart is unaware as to whether or not hunting is allowed on the railroad right of way. Tr. at 132.

Mr. Stuart also testified as to conversations with neighbors about the sound of the cannons. Tr. at 147-51. Mr. Stuart indicated that one neighbor's daughter, who was two or three years old, was frightened by the noise and her parents did not let her go out because of her fear. Tr. at 147-48. These neighbors moved out of their home and another family moved in to the home. Tr. at 148-49. The second family also complained to Mr. Stuart about the noise and they were worried about their horse. Tr. at 149-50. They also eventually moved. Tr. at 151.

Barbara Stuart

Barbara Stuart testified that the reason for this enforcement action was because she wants to be able to enjoy her property. Tr. at 155-56. Ms. Stuart indicated that she wants to be able to go "back outside and garden again." Tr. at 156. Ms. Stuart feels that she cannot enjoy guests and she is concerned about potential hearing loss for her children. *Id.* The cannons wake her up every morning at 5:30, so she loses two hours of sleep every day. *Id.* Ms. Stuart also testified that the effect on her pets is of deep concern to her and she stated the pets' behavior affects her. Tr. at 157.

Ms. Stuart indicated that the sound of the cannons had a negative impact. Tr. at 158. Ms. Stuart compared the sound to a dripping faucet, "not high in decibels, but it's still annoying." *Id.* Ms. Stuart indicated she has called the police a number of times to complain about the noise. Tr. at 167-69. Ms. Stuart is trying to move forward and have a more pleasing and pleasurable area in which to live. *Id.*

Greg Zak

Mr. Greg Zak testified on behalf of the Stuarts and the parties stipulated that he was a noise expert. Tr. at 196. Mr. Zak visited 213 East Corning Road on August 2, 2002. Tr. at 198. The purpose of his visit was to examine the area and to measure the ambient sound in the area. Tr. at 198. Mr. Zak toured the property with Ms. Stuart. *Id.* He walked the property, observed the general area, and drove the east/west road. *Id.* He observed a church, various homes, and

farms in the area. *Id.* Mr. Zak noted home sites of three to five acres and farm fields. Tr. at 199. Mr. Zak would classify the area as “very rural residential type of area” that was transitioning to a residential area with large lots. *Id.*

The traffic pattern was also very light according to Mr. Zak. Tr. at 199. He estimated that the pattern was on the order of a vehicle every twenty minutes or so. *Id.* Mr. Zak noted that he could not hear the traffic from Route 1. Tr. at 202.

Mr. Zak took measurements to establish the ambient noise level in the area. Tr. at 200. Mr. Zak prepared a report (Report), which was filed on September 11, 2003, as a part of the discovery process in this proceeding. The sound reading for ambient noise, measured in dBa, was 43.5, with a 20-mile an hour wind. Tr. at 201, Report at 2. Mr. Zak opined that such a reading would characterize the area as a very quiet area. Tr. at 201. Mr. Zak further opined that with no wind the ambient level would probably have been around 33 to 35 dBa. *Id.* Mr. Zak testified that the background noise was in essence wind noise and some birds singing. Tr. at 202, 203. He did not notice any dogs barking or machinery running. Tr. at a202-03.

In 1979, Mr. Zak was involved in another case (Coffman et al. v. Gehring et al. Cir.Ct. Knox County 79-CH-48 (Knox County Case))² involving the use of propane cannons in a rural area. Tr. at 203. That case was in Knox County and Mr. Zak worked for the Illinois Environmental Protection Agency at the time. *Id.* In that case, Mr. Zak took measurements of the propane guns being fired and also a 12-gauge shotgun. Tr. at 208, Comp.Exh. 3. Mr. Zak found that the propane cannons being shot produced “considerably more energy” than the blast from the shotgun. Tr. at 209. Mr. Zak also noticed that the two types of sounds were different, with the propane cannon having a lower frequency that can penetrate a house. Tr. at 210. Mr. Zak stated that the facts of the Knox County case and this one are very similar. Tr. at 234.

Mr. Zak also testified that in 1999 he participated in a case before the Board involving propane cannons. Tr. at 234. That case was Sweda v. Outboard Marine Corporation and City of Waukegan, PCB 99-38 (Aug. 5, 1999) (Sweda). *Id.* Mr. Zak stated that Sweda was “entirely different because it happened in a very urban type setting as opposed to a rural setting.” Tr. at 234-35.

Franklin Fisher

The cannons are used to scare away crows from the melon crop. Tr. at 275-77. Crows will take a chunk out of one melon, but will not necessarily eat the entire melon. Tr. at 274-75, Resp.Exh. 22, 23. Mr. Fisher testified that the cannons have never been used at night and the closest the cannons have been to the Stuarts’ lot line is 1900 feet. Tr. at 276, 277. In 2001, Mr. Fisher started using the cannons in August and the cannons were in use until around Halloween, everyday. Tr. at 277, 285. However, in 2002 and 2003, the cannons were used sporadically. Tr. at 285, 286. The cannons do not need to be fired everyday to effectively protect the melon crop

² On March 9, 2004, the hearing officer denied a motion to incorporate the Knox County Case documents into this docket, as the Knox County Case was not a case decided by the Board. The Board however takes administrative notice of the Knox County Case.

from the crows. Tr. at 285. When the cannons are used, the cannons are turned on and fire all day. Tr. at 286. Mr. Fisher indicated that the 99.9% of the time, the cannons were not used during the church services held at the church down the road. *Id.*

Mr. Fisher testified that he works the farm with his nephew and his niece and nephew receive the income. Tr. at 90, 104. Fisher's workers were not bothered by the sounds of the cannons. Tr. at 103-4. Mr. Fisher also testified that to his knowledge no other farmer in the area uses propane cannons; however the other produce farmers do not raise melons. Tr. at 98. Mr. Fisher claimed that alternative methods such as netting and scarecrows are either not cost effective or ineffectual. Tr. at 90-92.

Mr. Fisher also testified that the use of the cannons "made a difference" in the business. Tr. at 95. He stated that "the proof of the pudding is in the eating thereof" however there are no records to support Mr. Fisher's belief. Tr. at 94-95.

Public Comments

In addition to hearing testimony, the record includes six public comments. Two comments were received from elected officials. Mr. J. Philip Novak (PC1), State Representative for the 79th District submitted a comment on September 12, 2003.³ Mr. W. Lee Deutsche (PC2), Will County Board Commissioner submitted a comment on February 4, 2004. Four additional comments in the form of affidavits were placed in the record at the hearing. Those comments were from Mr. Wayne Genis (PC3), Mr. David Pilotto (PC4), Mr. David Stuart (PC5), and the Stuarts (PC6). The following paragraphs will summarize the comments.

The elected officials noted that the area is a mixed agricultural and residential area. PC1 and 2. Both comments suggest that a balance between the agricultural use and residential use must be found. Also, both asked that if a noise violation is found, that the Board help to develop an alternative which will balance the uses of the area. *Id.*

Mr. Genis lives at 125 E. Corning Road, which is one of the properties between the Fisher farm and the Stuarts. PC3 at 1; Pet.Exh 2. Mr. Genis supports the Stuarts' testimony. PC3. Mr. Genis indicates that the cannons disturb his sleep, interfere with watching television, and bother his animals. PC3 at 1. Mr. Genis was unable to attend the hearing so he provided the affidavit and he urges the Board to consider using his comments. PC3 at 2.

Mr. Pilotto has visited the Stuarts when the cannons have been emitting noise. PC4. Mr. Pilotto has witnessed the disturbances in the Stuarts' life style and his own nephew has been affected by the noise from the cannons. *Id.* Mr. Pilotto stated that he was aware of the Stuarts' inability to participate in outdoor activities when the cannons are running and he has seen the effect of the noise on the Stuarts' pets. *Id.*

³ Chairman Novak submitted this comment while serving as State Representative for the 79th District and sometime prior to being appointed to the Board. Chairman Novak has recused himself from deliberations and abstained from voting on this matter.

David Stuart has suffered embarrassment due to the noise emissions from the cannons. PC5 at 1. David has lost sleep and has difficulty focusing on books and mechanical tasks due to the noise. *Id.*

The Stuarts submitted a public comment which includes a petition signed by neighbors indicting their displeasure with the noise from the cannons. PC 6. Also included is a letter from Carol Henricks indicating she could hear the sound of the cannons two miles away at her home. *Id.*

ALLEGED VIOLATIONS

The Stuarts allege that Franklin Fisher and Phyllis Fisher violated Section 24 of the Act (415 ILCS 5/24 (2002)) and 35 Ill. Adm. Code 900.102 and 901.102 of the Board's regulations. Section 24 of the Act (415 ILCS 5/24 (2002)) and 35 Ill. Adm. Code 900.102 constitute a prohibition against "nuisance noise" pollution. Section 901.102 is the Board's numeric noise standards.

PHYLLIS FISHER

The Stuarts amended the complaint to add Phyllis Fisher as a respondent in this matter. However, none of the evidence presented establishes that Phyllis Fisher caused or allowed the alleged violations. Therefore, the Board finds that Phyllis Fisher did not violate Section 24 of the Act (415 ILCS 5/24 (2002)) and 35 Ill. Adm. Code 900.102 and 901.102 of the Board's regulations.

DISCUSSION AND FINDINGS ON NUMERIC NOISE VIOLATIONS

In order for the Board to find that a violation of the numeric noise standards occurred, the record must include sound measurements. Although Ms. Stuart did take sound measurements, Ms. Stuart failed to provide that evidence to Fisher's counsel before the hearing commenced in this matter. The hearing officer properly excluded the evidence from the hearing and the Stuarts failure to object to the hearing officer's order waives any objection (*see* 35 Ill. Adm. Code 101.502(b)). Because the record contains only measurements for ambient sound taken by Mr. Zak, there is no evidence of violations of 35 Ill. Adm. Code 901.102 in the record. Also, Will County indicated in the *amicus curiae* brief that measurements were taken by Will County and Will County's technical standards were not violated. *Amicus* at 2. The Board therefore finds that there is no evidence in the record that Fisher violated 35 Ill. Adm. Code 901.102.

DISCUSSION AND FINDINGS ON NUISANCE NOISE VIOLATIONS

As indicated above Section 24 of the Act (415 ILCS 5/24 (2002)) and 35 Ill. Adm. Code 900.102 constitute a prohibition against "nuisance noise" pollution. Charter Hall, citing to Zivoli v. Prospect Dive and Sport Shop, Ltd., PCB 89-205 (Mar. 14, 1991) (Zivoli) slip op. at 8. In determining whether noise emissions rise to the level of a nuisance noise pollution violation, the Board performs a two-step inquiry. First, the Board determines whether or not the noise constitutes an interference in the enjoyment of complainants' lives and second, the Board

determines whether or not the interference is unreasonable, considering the factors enunciated in Section 33(c) of the Act (415 ILCS 5/33(c) (2002)). Charter Hall slip op. at 19-21

The following discussion will first address whether complainants have established that the noise emanating from the propane cannons on Fisher's property constitutes an interference with the enjoyment of life or with any lawful business or activity. Second, the Board will discuss whether or not the noise emissions emanating from the propane cannons on Fisher's property constitute an unreasonable interference in the Stuarts' lives or with any lawful business or activity.

Interference With Enjoyment of Life or With any Lawful Business or Activity

The Board has stated that if there is no interference, there can be no nuisance noise violation. Zivoli slip op. at 9. Accordingly the Board must first determine whether the sounds have interfered with the enjoyment of life or with any lawful business or activity. Furlan v. University of Illinois School of Medicine, PCB 93-15 (Oct. 3, 1996), (Furlan) slip op. at 4. Some examples of cases where the Board has found nuisance noise violations include: sleeplessness from nightclub noise (Manarchy v. JJJ Associates, Inc., PCB 95-73, (July 18, 1996) slip op. at 10; noise interfering with sleep and use of yard (Hoffman v. Columbia, PCB 94-146, (Oct. 17, 1996) (Hoffman) slip op. at 5-6, 17); and, trucking and plant noise impacting sleep, use of the home and concentration (Young v. Gilster-Mary Lee, PCB 00-90 (Sept. 6, 2001) (Gilster-Mary Lee) slip op. at 10).

Stuarts' Argument

The Stuarts rely on the testimony of Michael Stuart, Jim O'Neil and their own perceptions. Br. at 6-7. Specifically, Michael indicated he no longer goes outside and he is embarrassed to have his friends over. Tr. at 28, 30-31. Mr. O'Neil stated that the cannons scared him. Tr. at 82. Mr. Stuart testified as to the effect the sound has on the animals (Tr. at 116-17) and Ms. Stuart testified that the cannons would wake her (Tr. at 156). The testimony of Mr. Grossman also indicates that the noise effects his concentration (Tr. at 63).

Fisher's Argument

Fisher argues that there is no evidence to support the contentions of the Stuarts that the noise from the cannons interfered with the enjoyment of life. Resp.Br. at 3. Fisher asserts that what the Stuarts have suffered is "either sensitization by their perception" that Fisher is responsible for the death of a "breeding animal" or "interference with their preferences and embarrassment at their inability to micro-manage the day-to-day activities of their neighbors." Resp.Br. at 3, citing Tr. at 30, 118. Fisher maintains that no case in Illinois has held that "irritants" including loss of sleep during daylight hours constitute and interference. Resp.Br. at 3-4.

Board Analysis and Decision

The Board has determined that noise interfering with sleep and use of yard (Hoffman) and trucking noise impacting sleep, use of the home and concentration (Gilster-Mary Lee) does constitute an interference. And although the Board is cognizant of the concerns set forth in Fisher's brief concerning the motives of the Stuarts, the Board is convinced that the noise emanating from the propane cannons interfere with the Stuarts' enjoyment of life or with any lawful business or activity. Michael Stuart and Mr. Grossman both indicated that they were adversely affected by the noise. Tr. at 28, 30-31, 34, 63. Mr. Grossman lost concentration. Michael Stuart no longer invites friends over and does not spend time outside. *Id.* Ms. Stuart has lost sleep and Mr. Stuart has encountered problems with the animals. Tr. at 116-17, 156. These facts are sufficient to find that the sound emissions from the propane cannons on Fisher's property interfere with complainant's use of their property and thus the enjoyment of the property.

Having found that the noise emissions from the plant interfere with the complainants' enjoyment of life or with any lawful business or activity, the Board must consider if the emissions unreasonably interfere with complainants' enjoyment of life or with any lawful business or activity.

Unreasonable Interference, Section 33(c) Factors

Whether an interference is unreasonable is determined by examining the factors set forth in Section 33(c) of the Act. The Board need not find against respondent on each factor to find a violation. *See Wells Manufacturing Company v. PCB*, 73 Ill. 2d 226, 233, 383 N.E.2d 148, 151 (1978) (*Wells Manufacturing*); *Processing and Books, Inc. v. PCB*, 64 Ill. 2d 68, 75-77, 351 N.E.2d 865, 869 (1976); *Incinerator, Inc. v. PCB*, 59 Ill. 2d 290, 296, 319 N.E.2d 794, 797 (1974). The Board will now consider each of the Section 33(c) factors.

The Character and Degree of Injury to, or Interference With the Protection of the Health, General Welfare and Physical Property of the People (Section 33(c)(i))

In assessing the character and degree of interference that the noise emissions from the propane cannons caused, the standard applied by the Board is whether the noise "substantially and frequently interferes" with the enjoyment of life, "beyond minor or trifling annoyance of discomfort." *Charter Hall*, slip op. at 21, citing *Kvatsak v. St. Michael's Lutheran Church*, PCB 89-182 (August 30, 1990), slip op. at 9.

Stuarts' Argument. The Stuarts assert that the use of the cannons create a "dangerous" situation in that the cannons create a hardship for the Stuarts and their neighbors. Brief at 2. The Stuarts maintain that their recreational activities are curtailed outdoors and the sound has a negative impact on their pets. *Id.* The Stuarts rely on their own testimony, including testimony by Ms. Stuart that her sleep is interrupted, to support their argument. Brief at 7.

The Stuarts argue that the evidence provided is reliable and credible. Reply at 7. The Stuarts also maintain that they have provided evidence concerning alternatives to the cannons. *Id.* The Stuarts argue that Fisher is the only produce farmer in the area to use propane cannons.

The Stuarts further point out that Mr. Zak's testimony distinguished the facts of this case from Sweda v. Outboard Marine Corporation and City of Waukegan, PCB 99-38 (Aug. 5, 1999) (Sweda). Reply at 7. The Stuarts argue that Mr. Zak stated that to muffle the sound of the cannons to comply the requirements of the Illinois regulations would render the cannons useless. *Id.* The Stuarts argue that one should focus on Mr. Zak's words "comply with Illinois regulations." *Id.*

Fisher's Argument. Fisher asserts that the Stuarts offered no competent, admissible evidence on the level of interference of the noise source. Resp.Br. at 4. Fisher argues that the purpose of the cannons is to repel crows and that purpose is served. *Id.* Fisher maintains that any program for reducing or moving crows must rely on loud impulsive noises. *Id.* Fisher compares this case to Sweda because of Mr. Zak's testimony that crows are similar to seagulls. Resp. Br. at 4, citing Tr. at 234-35, 242-43. However, Fisher takes issue with Mr. Zak's expertise on the feasibility of alternative methods for control of crows, noting that Mr. Zak is not an expert in ornithology. *Id.*

Board Analysis and Decision. The evidence in the record is undisputed that during 2001, the propane cannons were fired from 5:30 a.m. until dusk everyday, starting in August. Tr. at 109-10, 286. After that, Fisher indicated more sporadic use of the propane cannons. Tr. at 285, 286. The evidence is also undisputed that the area is a mixed farm and residential area with very little ambient noise. Tr. at 199. The Stuarts and Michael indicated that the cannons curtailed their outdoor activities. Ms. Stuart has lost sleep due to the sound emissions. Tr. at 156. Mr. Grossman loses concentration when working. Tr. at 63. Mr. Genis has also lost sleep. PC3. Furthermore, Will County offered the opinion that the sound emanating from the propane cannons "violate the spirit" of Will County's noise ordinance. *Amicus* at 2.

Fisher relies on Sweda to support the argument that the evidence is insufficient in this case. However, as Mr. Zak pointed out, the facts in Sweda are quite different than the facts of this case. Tr. at 234-35. First, in Sweda, the distance from the noise source to complainant was approximately one mile. Sweda slip. op. 11. Second, the area between the noise source in Sweda and the complainant lessened the impact of the noise. Sweda slip. op. 38. Finally, the occupants of several local residences testified in Sweda that the noise did not interfere with their activities. Sweda slip. op. 34-38. Thus, the Board finds that Sweda is factually distinguishable.

The Board is more persuaded by Mr. Zak's testimony that this case is similar to the Knox County case. *See* Tr. at 234-35. First, the Knox County case involved a rural area, as is the case here. Second, the distance between the emission source in the Knox County case was one-quarter mile, which is also similar to the two-tenths of a mile between properties in the instant case. Tr. at 203. For these reasons, the Board finds that the Knox County case is more on point in this matter.

The Board is convinced that, particularly in 2001, the interference was substantial and frequent. The Board finds that the loss of sleep, inability to use and enjoy property, loss of concentration when working, and adverse effect on domesticated animals including horses who may be startled when used for riding, in total result in a substantial interference with the occupants of the neighboring properties. The fact that the cannons were in operation from sunrise to sunset for several months in 2001 establishes frequent interference. Therefore, the Board finds the use of the propane cannons substantially and frequently interfered with the Stuarts' enjoyment of life or with any lawful business or activity.

The Social and Economic Value of the Pollution Source (Section 33(c) (ii))

In assessing this factor, the Illinois Supreme Court has looked to the number of persons that the respondent employed and whether respondent is an important supplier to a particular market. Wells Manufacturing, 73 Ill. 2d at 235-36.

Stuarts' Argument. The Stuarts assert that the record contains no evidence of economic value. Brief at 9; Reply at 8. The Stuarts argue that they attempted to ascertain if the cannons had improved the crop turnout and Fisher could provide no records on that issue. Brief at 9. The Stuarts also take issue with this factor because Fisher does not "receive the rewards" from the farming operation. Brief at 9; Reply at 8.

Fisher's Argument. Fisher argues that the source of the noise is a farm and farming is granted primacy of value. Resp.Br. at 4, citing 740 ILCS 70/1; 505 ILCS 5/19, 75/2 (2002). Fisher also maintains that the use of the cannons have reduced losses suffered by Fisher. Resp.Br. at 4, citing Tr. at 101-02.

Board Analysis and Decision. There is very little evidence in the record regarding the economic value of the property. However, Mr. Fisher did testify that the use of propane cannons had made a difference in the business. Tr. at 94-95. The testimony indicates that there are workers, but the number of those workers was not included. Mr. Fisher also testified that the income from the farm goes to his niece and nephew. Tr. at 90, 104. The Board finds that the farm has social and economic value; however, as noted above, there is little evidence in the record to quantify that value. Therefore, there is also little evidence quantifying the economic or social value of the operation of the propane cannons, although Mr. Fisher has testified that the cannons make a difference. Therefore, the Board finds that there is social or economic value in the operation of the propane cannons.

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 (Section 33(c)(iii))

Suitability of location is not the only item the Board examines under this factor. Roti v. LTD Commodities, PCB 99-19 (February 15, 2001) (Roti) slip. op. 26. The Board also looks to priority of location; however industry cannot rely on priority of location as a mitigating factor if emissions are substantially increased. Gilster-Mary Lee slip. op 17, citing Roti slip op 27 and Wells Manufacturing 73 Ill.2d 237. Thus, the Board examines suitability of the location of the source, priority of location and whether emissions have increased when weighing this factor.

Stuarts' Argument. The Stuarts argue that the area surrounding the Fisher farm is becoming more residential and Fisher was aware of this when he began using the cannons. Brief at 10. The Stuarts note that Fisher concedes that the cannons were introduced after the Stuarts moved to the area. *Id.* The Stuarts assert that because of the area, use of the cannons is not suitable to the area. Reply at 9.

Fisher's Argument. Fisher notes that the noise source is located on a "forty-acre farm" and the farm and "various noise-producing implements and machines" have been on the farm for over a generation. Resp.Br. at 4. Fisher concedes that the cannons were added in 2001 and although the farm has priority of location, the cannons do not. *Id.* Fisher argues that there is "little of effect that can be done to protect the crops from the birds that does not involve cannons." *Id.*

Board Analysis and Decision. The area surrounding the Stuarts' home and the Fisher farm is a mixed-use area with both farms and residences. Tr. at 199. In 1999, the Fisher farm began to grow produce for sale. Tr. at 86-88. In 2001, after the Stuarts had moved to their home, propane cannons were placed into service on the Fisher farm. Tr. at 38, 88. No other farmer in the area uses such an implement. Tr. at 70. Based on these facts, the Board finds that the pollution source is not suitable for the area. The noise generated is unlike anything in the area and the Stuarts do have priority of location. Furthermore, although Mr. Fisher testified that there has been a positive effect on his business, the record lacks any indication of what might happen to his business if Fisher ceased using the cannons. Therefore, the Board finds that Fisher's operation of propane cannons is unsuitable to the area.

The Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Emissions, Discharges or Deposits Resulting from Such Pollution Source (Section 33(c)(iv))

In considering this factor, the Board must determine whether technically practicable and economically reasonable means of reducing or elimination noise emissions from the propane cannons is readily available to respondent. See Charter Hall slip op. at 24.

Stuarts' Argument. The Stuarts point to exhibit 2 for alternatives to propane cannons.⁴

Fisher's Argument. Fisher argues that Mr. Zak's testimony and Sweda establish that any effective program for repelling crows must begin with impulsive sounds. Resp.Br. at 5. Fisher asserts that muffling the cannons would render the cannons useless and removing the cannons eliminates the foundation of the bird-control program. *Id.* Fisher asserts that the alternatives suggested by the Stuarts would be too time consuming and labor intensive. Resp. Br. at 5, citing Tr. at 91.

Board Analysis and Decision. As indicated above, the Board disagrees that Sweda is persuasive in this matter. Mr. Fisher testified that certain alternatives were cost prohibitive or

⁴ The Stuarts offered additional arguments on alternative methods for bird control. However, the references were to evidence not admitted at hearing.

ineffective, but did not introduce any specific economic facts. The record does include information that alternative bird control methods are available to Fisher. Therefore, the Board finds that there are technically practicable alternatives for bird control.

Any Subsequent Compliance (Section 33(c)(v))

Under this factor, the Board examines any actions by the respondent to alleviate the emissions.

Stuarts' Argument. The Stuarts concede that in 2003, the cannons were used less frequently than 2001 and 2002. Reply at 11. However, the Stuarts argue that any day the cannons are in use causes “undue, unreasonable discomfort” for the Stuarts. *Id.*

Fisher's Argument. Fisher notes that the cannons were used every day when the cannons were first introduced. Resp.Br. at 5. Since the introduction of the cannons, Fisher contends he has been accommodating. *Id.* The cannons are used in a pattern of a couple days on, then a day off; this seems to work to keep the crows away, according to Fisher. *Id.* Fisher maintains the cannons are used “as little as possible, no more than necessary.” *Id.*

Board Analysis and Decision. The record establishes that during 2001, the first year of operation of the two propane cannons, Fisher fired them daily from August through October. Tr. at 38, 90, 114. In 2002 and 2003, Fisher operated one propane cannon and did not fire the cannons every day. Tr. at 90. Fisher's reduced use of the cannons appears to be an attempt to limit potential violation of the Act. However, the cannon is left on from early morning until dusk when the cannon is in use and the testimony establishes that the noise from the cannons still interferes with the neighbors. Thus, the Board finds that there has not been subsequent compliance with the prohibition of noise pollution found in the Act.

Summary of Findings on Unreasonable Interference

After weighing the Section 33(c) factors above, the Board finds that the noise from Fisher's propane cannons has unreasonably interfered with the Stuarts' lives. Although the Fisher farm is suitably located and has social and economic value, the noise source is not. The use of the propane cannons for entire daylight hours beginning at sunrise substantially interferes with complainants' lives. Having found that there was an unreasonable interference, the Board finds that respondent violated Section 24 of the Act (415 ILCS 5/24 (2002)) and 35 Ill. Adm. Code 900.102.

Having found a violation of the Act (415 ILCS 5/1 *et seq.* (2002)) and Board regulations, the Board now must determine the appropriate remedy.

REMEDY

The remedy sought by the Stuarts includes five points. Brief at 1. First, the Stuarts ask that Fisher be ordered to cease and desist from any further violations. *Id.* Second, the Stuarts ask that Fisher be directed to use an alternative method for bird control, specifically no auditory

devises. *Id.* Third, the Stuarts ask for stipulated penalties if Fisher fails to comply with the Board order. *Id.* Fourth, the Stuarts ask that Fisher be directed to post a performance bond to ensure compliance with the Board's order. *Id.* Fifth, the Stuarts ask the Board to require that Fisher implement a remediation plan specified by the Stuarts. *Id.*

The Board is not persuaded such an extensive remedy is warranted in this case. The Board will order Fisher to cease and desist from using the propane cannons, which will eliminate the unreasonable interference caused by noise from the propane cannons. The record is insufficient for the Board to develop or adopt an order directing alternative methods for bird control or a remediation plan. Also, at this time, the Board is not convinced that stipulated penalties or a performance bond are necessary. Therefore the Board will order Fisher to cease and desist from further violations of the Act (415 ILCS 5/1 *et seq.* (2002)) and Board's rules by ceasing and desisting the use of the propane cannons on the property.

CONCLUSION

The Board finds that there is no evidence in the record that Phyllis Fisher caused or allowed violation of Section 24 of the Act (415 ILCS 5/24 (2002)) and 35 Ill. Adm. Code 900.102 and 901.102 of the Board's regulations. The Board also finds that there is no evidence in the record that Franklin Fisher violated the numeric noise standards of Section 901.102 of the Board's regulations.

The Board finds that the use of propane cannons as a method for bird control on the Fisher farm results in noise pollution which unreasonably interferes with the Stuarts' enjoyment of life or with any lawful business or activity. Therefore, the Board finds that Franklin Fisher violated Section 24 of the Act (415 ILCS 5/24 (2002)) and 35 Ill. Adm. Code 900.102. The Board directs Franklin Fisher to cease and desist from further violations of the Act (415 ILCS 5/1 *et seq.* (2002)) and Board regulations rules by ceasing and desisting the use of the propane cannons on the property.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board finds that Franklin Fisher violated Section 24 of the Act (415 ILCS 5/24) and 35 Ill. Adm. Code 900.102.
2. The Board finds that Franklin Fisher did not violate 35 Ill. Adm. Code 901.102.
3. The Board directs Franklin Fisher to cease and desist from further violation of the Environmental Protection Act and Board regulations rules by ceasing and desisting the use of the propane cannons on the property.
4. The Board finds that Phyllis Fisher did not violate Section 24 of the Act (415 ILCS 5/24 (2002)) and 35 Ill. Adm. Code 900.102 and 901.102.

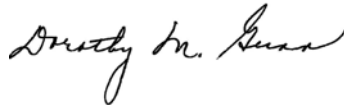
IT IS SO ORDERED.

Chairman J.P. Novak abstained.

Board Member T.E. Johnson dissented.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/31(a) (2002)); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 16, 2004, by a vote of 3-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board