ILLINOIS POLLUTION CONTROL BOARD
December 3, 1998

CHARTER HALL HOMEOWNER'S ASSOCIATION and JEFF COHEN,	)	
Complainants,	)	
v.	)	PCB 98-81
	)	(Enforcement - Citizens, Noise)
OVERLAND TRANSPORTATION SYSTEM, INC. and D.P. CARTAGE, INC.,	)	
Respondents.	)	

ORDER OF THE BOARD (by K.M. Hennessey):

This citizens' noise enforcement case comes before the Board on the motion of respondents Overland Transportation System, Inc. and D. P. Cartage, Inc. (collectively, respondents), for reconsideration and clarification of the Board's interim order of October 1, 1998 (Mot.). Complainants Charter Hall Homeowner's Association (Association) and Jeff Cohen (Cohen) (collectively, complainants) oppose the motion (Resp.) and move for leave to file an amended complaint. For the reasons set forth below, the Board denies respondents' motion for reconsideration and clarification and denies complainants' motion for leave to file an amended complaint.

Motion for Clarification

The Board designated its October 1, 1998 order as an interim order, and ordered the parties to hearing to address the issue of remedies, including penalties. Charter Hall Homeowner's' Association and Jeff Cohen v. Overland Transportation System, Inc. and D. P. Cartage, Inc. (October 1, 1998), PCB 98-81, slip op. at 25. The Board also stated the "Board findings of fact and conclusions of law in this interim opinion that are relevant to the issue of remedies, including civil penalties, may be relied upon by the parties for those purposes." Charter Hall, PCB 98-81, slip op. at 3.

In its motion for clarification, respondents state that they believe that the Board's order of October 1, 1998, is a final appealable order on liability. Mot. at 2. Respondents suggest that there may be no need for a hearing on remedies if the Board reconsiders that order or an appellate court reverses that order. *Id*. Respondents therefore request that the Board designate the October 1, 1998 order as a final and appealable order. *Id*.

Complainants note that respondents provide no authority for their assertion that the October 1, 1998 order is final and appealable. Resp. at 2. Complainants further argue that under Ill. S. Ct. R. 303(a)(1), only final orders are appealable to the appellate court. An order is "final" only if it ascertains and fixes absolutely and finally the rights of parties to a

lawsuit. See Cinch Mfg. Co. v. Rosewell, 255 Ill. App. 3d 37, 40, 627 N.E.2d 276, 279 (1st Dist. 1993). When an order mandates further hearings, the order is not final and appealable. See Honda of Lisle v. Industrial Commission, 269 Ill. App. 3d 412, 414, 646 N.E.2d 318, 320 (1st Dist. 1996). This principle has been applied to proceedings before the Board. See, *e.g.*, People v. Pollution Control Board, 190 Ill. App. 3d 945, 947, 547 N.E.2d 647, 649 (2d Dist. 1989).

The Board denies the motion for clarification. While the order allows the parties to rely on findings or fact and conclusions of law already established – such as the economic reasonableness of various abatement measures – in the next phase of these proceedings, that provision does not make the order final and appealable. The Board's order does not ascertain and absolutely fix the rights of the parties and, by its own terms, is not final and appealable.

Motion for Reconsideration

A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law[,] or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. The County Board of Whiteside County (March 11, 1993), PCB 92-156, slip op. at 2, citing Korugluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

Respondents move the Board to reconsider its findings, set forth in the October 1, 1998 order, that: (1) the Association has standing to sue; and (2) various measures to reduce noise are economically reasonable. The Board considers these arguments in turn.

The Association's Standing to Sue

In the October 1, 1998 order, the Board held that the Association had standing to sue. The Board also denied as moot complainants' motion for leave to add several residents of the Association as complainants if the Board found that the Association lacked standing to sue. Respondents now renew their claim that the Association lacks standing to sue. Complainants oppose this claim, and again move for leave to add several residents of the Association as additional complainants. Respondents oppose complainants' motion for leave to add additional complainants.

In denying the respondents' motion to dismiss the Association, the Board noted that under Section 31(d) of the Environmental Protection Act (Act), 415 ILCS 5/31(d) (1996), any "person" may bring a suit before the Board to enforce the Act. The Board further noted that the Act defines "person" to include "associations." The Board therefore concluded that the Association had standing to sue. Charter Hall, PCB 98-81, slip op. at 3.

In the motion for reconsideration, respondents argue that while it is true that "any person" may file a suit before the Board, that person must have standing to bring an action to satisfy the requirement that a justiciable controversy exist before the Board has jurisdiction to

hear a suit. Mot. at 2. Respondents further rely on Article XI, Section 2 of the 1970 Illinois Constitution, which provides:

> Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

Respondents claim that while this provision dispensed with the standing requirement for individuals, it did not do so for associations. Mot. at 3, relying on People v. Pollution Control Board, 129 Ill. App. 3d 958, 473 N.E.2d 452 (1st Dist. 1985). Accordingly, respondents argue that the Association must meet the requirements under Illinois law to show standing – *i.e.*, a recognizable interest in the dispute, peculiar to itself, and capable of being affected. Mot. at 4, relying on Underground Contractors Association v. City of Chicago, 66 Ill. 2d 371, 362 N.E.2d 298 (1977); Westwood Forum, Inc. v. City of Springfield, 261 Ill. App. 3d 911, 634 N.E.2d 1154 (4th Dist. 1994); and Cable Television and Communications Association of Illinois v. Ameritech Corporation, 288 Ill. App. 3d 354, 680 N.E.2d 445 (1st Dist. 1997). Respondents argue that the Association cannot meet these requirements and therefore should be dismissed. Mot. at 4. Finally, Respondents argue that Illinois State Chamber of Commerce v. Pollution Control Board, 49 Ill. App. 3d 954, 364 N.E.2d 631 (1st Dist. 1977), upon which complainants rely for the proposition that associations have standing under the Act, is distinguishable because it involved a regulatory proceeding, rather than an enforcement case like this case. Mot. at 4.

In response, complainants note that the cases on which respondents rely do not involve a constitutional grant of standing. Resp. at 5. Complainants further argue that by including associations within the definition of persons, the General Assembly extended the rights set forth in Article XI, Section 2 to associations. Resp. at 4. Complainants also argue that in Illinois State Chamber, the courts recognized the standing of associations to sue under the Act. Complainants also argue that People v. Pollution Control Board, upon which respondents rely, actually supports complainants because it establishes that "persons" have standing to seek redress for violations of the right to a healthful environment, without showing specific damages. Resp. at 5.

The Board finds that its earlier decision is consistent with Illinois law. As the Illinois Supreme Court recently explained, "federal principles of standing are grounded largely on the jurisdictional case and controversy requirements imposed by Article III of the United States Constitution." People v. $1,124,905 U.S. Currency and One 1988 Chevrolet Astro Van, 177 Ill. 2d 314, 328, 685 N.E.2d 1370, 1377 (1997) In Illinois, by contrast, "standing is a part of the common law." *Id*. at 328, 685 N.E.2d at 1377.

Because standing under Illinois law is a matter of common law rather than constitutional law, the General Assembly may enact statutes that grant standing in cases in which the common law would not. For example, in Illinois Telephone Association v. Illinois Commerce Commission, 67 Ill. 2d 14, 364 N.E.2d 63 (1977), the Illinois Supreme Court found that an unincorporated association had standing to sue, even without any showing that

the association itself sustained any damage, because the Public Utilities Act granted associations standing. See also Sandy Creek Condominium Association v. Stolt & Egner, 267 Ill. App. 3d 291, 296, 642 N.E.2d 171, 175 (2d Dist. 1994) (holding that an association had standing to sue under provisions of the Condominium Property Act). The Illinois Telephone court distinguished Underground Contractors on the grounds that the latter case was decided under the declaratory judgment statute rather than the Public Utilities Act. Illinois Telephone, 67 Ill. 2d at 25-26, 364 N.E.2d at 67.

Like the Public Utilities Act, the Act has "its own standing requirements." Illinois State Chamber, 49 Ill. App. 3d at 956, 364 N.E.2d at 633. These provisions distinguish this case from the cases upon which respondents rely, none of which involve a case brought under a statute with similar provisions on standing.

The Illinois State Chamber court addressed one of the Act's provisions on standing: Section 29, which grants associations standing to seek review of Board rules and regulations if adversely affected or threatened thereby. 415 ILCS 5/29 (1996). In Illinois State Chamber, the court granted the Illinois State Chamber of Commerce, a not-for-profit incorporation, standing to challenge certain noise pollution regulations. In so doing, the court stated that "a liberal construction" should be applied to the standing requirements of Section 29.

This case involves another of the Act's provisions on standing: Section 31(d), which grants "persons" – a term which includes associations – standing to enforce the Act even if the complainant did not sustain any damage from the alleged violation. 415 ILCS 5/31(d) (1996). The Board finds, therefore, that the Act grants associations standing. As the Board has previously held, Underground Contractors "has no consequence when citizen's enforcement actions are directly authorized by statute." Miehle v. Chicago Bridge and Iron Company PCB 93-150 (Nov. 4, 1993), slip op. at 7; see also Citizens for a Better Environment v. Citizens Utilities of Illinois PCB 74-367 (Jan. 9, 1975), slip op. at 1 (holding that the Act allows any citizen, including a not-for-profit corporation, to file an action to enforce the Act). The Board therefore denies the motion to reconsider.

Given that the Board reaffirms its ruling on standing, the Board denies as moot complainants' renewed motion to amend the complaint to add the residents who testified as complainants.

Economic Reasonableness of Various Abatement Measures

In the Board's October 1, 1998 order, the Board found that an airtight barrier, acoustically absorptive material and a sound-containing enclosure would be effective to control sound. The Board further found that it would be feasible for respondents to park trailers only on the east side of the facility, away from the Charter Hall residences.

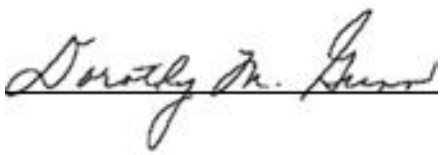
Respondents do not quarrel with these findings, but argue that there is no support in the record for the Board's findings that these abatement measures are economically reasonable. Mot. at 4. The Board disagrees. Thomas Thunder and Greg Zak were qualified as experts in sound control. Tr. at 355-356, 389. The testimony of both experts supports the Board's

findings that these measures are economically reasonable measures. See Tr. 373, 375-376, 403-405, 408-409, 411-414.

Respondents have not presented evidence that was not available at the time of the hearing, argued that there have been changes in the law, or pointed out any errors in the Board's application of existing law. Accordingly, there is no basis on which the Board may reconsider its earlier ruling, and the Board denies the motion to reconsider.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 3rd day of December 1998 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board