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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD


BARBARA STUART)
 And RONALD STUART)
)
 Complainants)
)
 FRANKLIN FISHER and)
 PHYLISS FISHER)
)
 Respondents)

PCB 02-164
Citizen Enforcement/Noise

NOTICE OF FILING

Bradley Halloran Hearing Officer 100 W. Randolph Ste 11-500 Chicago, Il. 60601	Dorothy Gunn Clerk of IPCB 100 W. Randolph Ste. 11-500 Chicago, Il 60601	David Harding Lopez & Harding 100 N. LaSalle St. Ste 1107 Chicago, Il. 60602	Bobby Petrungarro Will County States Attorney Office 14 W. Jeffereson Joliet, Il. 60432
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PLEASE TAKE NOTICE THAT ON July 13, 2004, The complainants, Ronald Stuart and Barbara Stuart filed with the Office of the Clerk of the Illinois Pollution Control Board, an original and ten copies of the attached "Reply Brief of Barbara Stuart and Ronald Stuart" a copy which is served upon you. Pursuant to 35 Ill. Admin. Code 101.103 (d), this filing is submitted on recycled paper.

 7/13/04

Barbara Stuart , Complainant

 7/13/04

Ronald Stuart, Complainant

Barbara Stuart and Ronald Stuart
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THIS FILING WAS SUBMITTED ON RECYCLED PAPER

JUN 14 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

BARBARA STUART and)	
RONALD STUART)	
)	
Complainants)	PCB 02-164
)	Citizens Enforcement/Noise
vs.)	
)	
FRANKLIN FISHER and)	
Phyllis Fisher)	
Respondents)	

REPLY BRIEF OF RONALD STUART AND BARBARA STUART

The complainants, Ronald Stuart and Barbara Stuart (collectively referred to as the Stuart's), file this reply brief with the Illinois Pollution Control Board ("**Board**") in support of their complaint against Frank Fisher and Phyllis Fisher.

OVERVIEW

On June 15, 2004 Frank Fisher and Phyllis Fisher served its brief on Barbara Stuart and Ronald Stuart. Fishers brief contains numerous factual inaccuracies, misquoted testimony of witnesses, and misdirected argument. Having failed to present any evidence whatsoever on the majority of issues, Frank Fisher now attempts to direct attention away from this shortfall by trying to discredit the character of the complainants. Frank Fisher at the same time refuses to address the actual matters at issue. We the complainants feel Mr. Fisher has made an ineffectual attempt to disregard our credibility and the factors related to the interference with the enjoyment of our life due to the noise of the propane cannons.

The Stuarts' provided credible testimony to demonstrate that Frank Fishers propane cannons used on his farm less than ¼ mile from the Complainants, cause noise emitting onto the Stuarts property causing unreasonable interference with the enjoyment of life. That evidence was clearly summarized in the Stuarts' initial post hearing brief. And there is no additional benefit in repeating it here in this final reply brief. We will touch on the subjects of concern in Frank Fishers reply brief, which we feel a need to address, and clarify for the Board.

From the first day I heard the sounds coming from the propane cannons, I have always compared the cannons to be similar to the sound of a shotgun.

Quotation by Ronald Stuart: **“In a time of such turmoil throughout our nation, one has to think about our basic rights. The rights that we fight for such as freedom, peace of mind and domestic tranquility are the true values in our lives.** Mr. Harding considers the quote written by Ronald Stuart as a quotation to “liken Frank Fisher as a terrorist”. Mr. Harding is the person who makes that assumption and uses those words. Ronald only wrote the quote. After his loss of his identical twin brother Donald on Dec. 2, 2003, and a best friend of 30 years on Christmas Day, Ronald has a different view on the true values of life. We all need to realize what a value domestic tranquility is to us in our short-lived lives. There is far too much chaos, and violence in this country. The propane cannons to us signify a sound which brings to mind violence, a gunshot sound.

Respondent neglects to allow the Board to see the entirety of the answer of our son, Michael Stuart. [TR42] The words WHEN THE CANNONS ARE RUNNING, was omitted giving one the impression we talk about the cannons all the time. We complain and are unhappy when they are in operation. That is what Michael said.

The Respondent reads into the final conclusion on the Judge Mathis tape, where Ron states; “we will pursue this until the cannons are stopped in our area, we have the support of many behind us.” This was no vow of vengeance against Frank; the problem is propane cannons do not belong in a rural residential area. Several times in the narrative testimony of Barbara Stuart, I have stated the case is about the cannons. Frank Fisher is the only one of the 5 produce farmers within a 25 radius who uses a cannon at his farm.

On page 3, paragraph 3 Respondent argues in his brief there is no evidence of the sound levels of the which Complainant complain. Again this information was discussed in the initial brief of the Complainants. Briefly I will review some of the evidence that has been presented:

1. Testimony of Ambient readings from Sound Expert Greg Zak. [TR 200-202]
2. Amicus Brief of States Attorney acknowledging the Will County Sheriff's Department of the propane cannon readings in the summer of 2002. It is of the belief of the States Attorney of Will County these cannons are a nuisance.
3. Complainants exhibit 3. Letter to Helen Gehring from the IEPA, authored by Greg Zak in 1979. Letter contains the sound measurements of two propane cannons taken by Greg Zak on a similar case related to cannon noise. The similarity of the case is based on the testimony of Greg Zak during the hearing. Rural setting, distance between the complainant and respondent being ¼ mile, open area, similar sound measurements, no sound barriers to block noise make the 1979 case and this one similar in nature [TR 203-211]
4. Log sheet of sound measurements taken with a calibrated Radio Shack Meter sold to Barbara Stuart by Greg Zak. Included is date, time, weather, and wind velocity.

5. Very specific instructions were given to me, Barbara Stuart over the phone, and at my home on the proper use of the device, and where to position myself for accurate sound measurements. All this is in the initial brief.
6. As an offer of proof is a Reed Joseph International copy of the Scare away 3 cannons that the respondent uses [Comp. Exh. 5]. The advertisement clearly states those particular cannons emit 130 decibels of noise when operated. Information obtained from the Reed Joseph Website. **Note:** At the location of the 1979 cannon case in Knox County, Greg Zak took sound measurements 30 feet from the Thunderbird Scare away and Zon cannons, measuring at 106 dBa [TR 205-208].
7. Gregory Zak during testimony indicates he properly instructed Barbara Stuart how to operate the calibrated Radio Shack sound meter, which he sold to her to take sound measurements. Greg Zak compares the measurements taken in 1979 cannon case and noted the measurements taken by Barbara Stuart to have similar Readings and that was part of the reason he would compare the two cases as being very similar. [TR 219]

This evidence confirms the disruptive nature of propane cannons. It is factual our normal ambient measurements are approximately 40 dBa, possibly as low as 33-35 dBa with winds below 20 m.p.h. When the cannons blast off we hear an impulsive sound registering at approximately 60 dBa. We have already discussed how these cannon blasts have caused such interference in our lives. How can the Respondent allow his own family members to pick crops when these cannons are only 20 to 30 feet away and still operating and say no one is bothered by the sounds of a 130-decibel blasting cannon? [TR 103]

Respondent feels the exhibits entered at the hearing substantiate his claim that we have not suffered interference with enjoyment of life. These exhibits he entered are mostly irrelevant to the case at hand.

BREAKDOWN OF RESPONDENTS EXHIBITS:

1. Answer to Request for Admission. Apparently we were not supposed to give a reason why we felt some of the request to admissions was irrelevant.
2. Second answer to Request for Admission. Yes or No.
3. Complainants' responses to interrogatories and request for production. It is worth noting the responses, which did have attachments for evidence, were not included in this submission. It does however give the Board an indication of what information was made available to the Respondent. And the evidence we had we were significant. By no means did we expect the Respondent or his attorney to complete the filing of this evidence for us.
4. Letter to Frank Fisher regarding a Breeding attempt of our dog, which failed. This letter was written when I was angry, and hurt over the death of our dog. I just returned from seeing my father with Terminal Lung cancer. No copies were ever sent to any other individual. Contrary to Mr. Harding calling us Dog Breeders, we are not dog breeders.

5. Letter to Mr. Fisher. The Will County Small Claims Court advised me, to send him a letter in writing requesting the amount of damages I was claiming.
6. Judge Mathis Series Arbitration Agreement. This case was centered on reimbursement for Veterinarian fees, cremation of our dog, and the loss of our dog. It was simply a small claims case.
8. All though accused of writing this letter to Mr. Fisher, **we did not**. And to this very day, I do not know who wrote it.
9. Objection to set Discovery Schedule and Hearing Date. The initial filing of the complaint was 3-24-02. Mr. Harding made a motion to dismiss the case, but the Board found the case not to be frivolous or duplicitous. Then he requested a hearing date Between August 1, and September 30, 2002. The Board approved our objection. Why this is an exhibit is unknown to us. We had very valid reasons for objecting to Mr. Harding's and Mr. Fishers requests.
10. July 21, 2002 Letter to neighbors regarding the loud cannons. It was not common knowledge to many people where this intrusive cannon noise was coming from. I was simply trying to help anyone if they were concerned. Only 8 letters were distributed, I don't know how Frank received a copy of this letter.
11. I requested a 20-day extension of time which Mr. Hal loran had no objection to. I was scheduled for a biopsy, and was ill at the time, and on bed rest. I have no idea why this would be submitted as an exhibit.
12. Mr. Harding was making inquiries about our case to Mr. Zak. I felt this to be unfair. Mr. Greg Zak informed me of Mr. Harding's attempts.
18. October 10, 2003 A letter to Mr. Harding, requesting a response from a previous letter in an attempt to resolve the noise nuisance issue with Frank Fisher. I never heard from Frank Fisher or Mr. Harding to look for a solution.
19. November 18, 2003 Request for extension of time. My husbands identical twin was in I.C.U. with gall bladder related Pancreatitis. He died on December 2, 2003. Copies were sent to all involved parties. I cannot understand why Mr. Harding would submit this as an exhibit. During cross-examination of Ronald Stuart Mr. Harding asked how his brother Don was doing. Ron replied "He's Dead". Mr. Harding knew of the death of Donald Stuart during several conversations with me and Mr. Hal loran prior to the hearing. Reference was made to this insensitive comment in our initial brief. This only makes us believe Mr. Harding thought we were exaggerating. It was from mid November until mid February that it seemed as though time slipped away from us due to Ron's brother dieing. **We simply were under an enormous amount of grief and despair, which caused us to fall behind in filing of papers to the Board. Mr. Hal loran was kind enough to accept most of these relevant and informative documents as Offers of Proof. We did the best we could at such a terrible time in our lives.**
20. A newspaper clipping from the Chicago Tribune about crows. Mr. Harding alleges I mailed this to him, which I did not. I never saw the article until the day of the hearing. It's an interesting article, however credit cannot be given to us for sending it to Mr. Harding.
22. And 23. Photos of damaged water melons (color) these are photos, which are allegedly, the watermelons destroyed at the Fisher Farm by crows. We had never seen these photos until March at the hearing. No sign of crows, we do not know if this is

Franks Farm. In Franks testimony he claims “crows don’t just hone in on one melon, they peck this one and that one”[TR 88] He also makes this same claim on the Judge Mathis show. This was further discussed in our initial brief regarding the type of animal, which could have destroyed the watermelons in these photographs.

24. 25, 26, & 27. All Letters to the Editor, written by Barbara Stuart. Covering issues related to the proposed Peotone airport. All these letters showed support of the wasting of natural resources including farmland. My letters in my opinion stated the facts, the truth, and never caused harm to anyone.

2. COMPLAINANTS OFFERED COMPETENT EVIDENCE INDICATING THERE WAS UNREASONABLE INTERFERENCE TO THE ENJOYMENT OF THEIR LIVES.

REASONABLENESS OF INTERFERENCE IF THERE WAS INTERFERECE

Respondent uses the excerpts from the Sweda case and Mr. Zaks’ equating of crows. He leads one to believe Greg Zak believes crow control problems must be begin with loud impulsive noise. Page 4 paragraph one. To begin Mr. Zak stated; “ cannons were designed to frighten birds or animals and any muffling of the device would—to the point where it would comply with Illinois regulations would, in my opinion, render it useless for frightening wildlife, and that’s based on my experience with wildlife and working in the noise are for the last 27 years that typically the wildlife seems to be more tolerant of noise than people do. [TR 332 4-12]. One needs to focus on Greg Zak’s words **COMPLY WITH ILLINOIS REGULATION. Do propane cannons violate the Illinois Regulations on noise and nuisance?**

Greg Zak gave testimony at the hearing on March 9, 2004, stating the above-mentioned Sweda case was not at all similar to this case of ours. Reasons being, the setting was urban, highly populated, tall buildings, and the complainant Mr. Sweda lived one mile from the location of the cannons. All this was discussed in our initial brief. There is no comparison of this case to that of the Sweda case.

We feel the evidence we offered was reliable, credible, and carefully researched concerning alternatives to the cannons. Frank Fisher is the only produce farmer using the outdated, loud cannon devices even though 5 other nearby produce farms exist, are larger in size, still they do not use propane cannons. And even more important is the fact he initiated the use of the device **after** the area in which he farms has increased with residential homeowners substantially over the past 20 years. We have already touched on the expertise and qualifications of the States experts on bird control and devices. These persons were mentioned and their expertise on control of bird damage speaks for itself. [Comp. Exh. 5] they offered better alternatives, reasonably priced, and stress the importance of evaluating the location in which cannons are used to protect the health, welfare and safety of people.

Fact, that these propane cannons are a nuisance to the health, safety and public welfare of the people of this County.

5. Property values, what will happen to investors of property and homes in the fastest growing town in Will County, Beecher, Illinois? And what about the homes to be built on Corning Road?
6. Watermelons are not a usual and customary crop in this “unique” area, according to the testimony of the Respondent Neither are propane cannons the Respondent also admits at the hearing. [TR 91]

4. COMPLAINANTS FEEL THERE IS A LACK OF SUITABILITY OF THE NOISE SOURCE TO THE AREA WHERE IT IS LOCATED

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

The Respondent openly admits in his post hearing Brief, **“The farm has priority, but the cannons do not”**. However contends there is little of effect that can be done to protect the crops from birds that does not involve the cannons. But has not demonstrated any “real” attempts to try different proven methods for crow damage control.

The lack of suitability of the propane cannons in our area is one of the major factors of this case. Using the propane cannons for bird control is not a common farming practice in this area. In reality the cannons are not used by anyone but Frank Fisher.

We have also addressed the issue of other bird control alternatives. The technology and the expertise of well-qualified bird control specialists is available to the Respondent to control the crows. We have taken so much of our time to learn if Frank Fisher has alternatives to the propane cannons. There is only so much we can do to convince him of the discomfort we feel when the cannons are operating, and the harm they cause us. Someone else hopefully will step in on our behalf and our neighbors to help us with this noise problem.

We can address ourselves as Complainants in this case, but we are also residents, neighbors, people and friends in this area. And we like the other residents were here long before the Respondent started operating the propane cannons. The Respondent Frank Fisher knew the area had already grown with a larger population and more residential homes, how could he possibility not think the loud sounds emitting from these cannons would not pose a problem to his own neighbors.

Frequency of the use of these loud disruptive cannon devices, still he does not believe what he is doing causes any real interference with Complainants' enjoyment of their lives. He feels his efforts have been accommodating.

We the Complainants did notice the Respondent used the cannons less in 2003. Were his actions accommodating to we the Complainants? No. Because any single day of the cannons in operation caused us undue, unreasonable discomfort in our lives. These words are supported by witnesses testimony and by the numerous documents we offered as proof to substantiate our claim to unreasonable interference with the enjoyment of our lives. In addition Gregory Zak a sound expert gave testimony in several areas, which are relevant to the factors of this case, already in our initial brief. Including the reliability of the meter, Barbara Stuart used, calibrated by Greg Zak, instructions of use by Greg Zak both by phone and at her home to support the log sheet [Comp.Exh.4] Readings which could prove to the Board a violation of Regulation 901.104 may have been committed [TR246-249] We do not want the Board to think we were not pleased by hearing the cannons less that year. We want the Board to know, when we did hear them go off we became disappointed and slipped back to our dreaded lifestyle of feeling placed in a prison. Hating each time we had to hear the gunshot blasts from these devices. Only one can understand the impact these devices have if you are forced to hear them day in and day out. One single day of the cannon noise, is too many days. It's not simple annoyance. It's a sound you just never get accustomed to. Never.

CONCLUSION

The similarity and consistency of the testimony of witnesses, neighbor Jerome Grossman, son Michael Stuart, and friend James O'Neil along with the Complainants testimony, Gregory Zak sound experts testimony, and evidence introduced at the hearing demonstrates that the noise from the propane cannons from the Frank Fisher caused an unreasonable interference with the enjoyment of life. This testimony and evidence introduced at the hearing demonstrates that the noise from the Frank Fisher farm violates the Illinois' numerical noise emission standards and constitutes an unreasonable interference with the lives of the Complainants Ronald and Barbara Stuart in violation of 35 Ill. Admin. Code s 900.102. Frank Fisher failed to present any evidence or testimony to disregard the evidence and testimony presented by the Stuarts'. Rather, Frank Fishers Brief presents misquoted testimony of the Complainants witnesses, bold attacks on the character of the Stuarts', unsupported conclusions or bald assertions that have no support whatsoever in the record. Therefore we request that the Board grant Ronald and Barbara Stuart the requested relief stated in our original brief.

Thank you for your patience and time in reviewing our reply to the Brief of Frank Fisher. Due to the discrepancies in the contents of the Respondents' Brief, it was necessary to clarify some issues for the Board to review.

PROOF OF SERVICE

PCB 02-164

I, the undersigned, on oath state that I have served on the date of July 13, 2004, the attached **Reply Brief of Barbara Stuart and Ronald Stuart**, by U.S. First Class Mail, with proper pre paid postage, upon the following persons:

Dorothy Gunn	Bradley Halloran	David Harding	Bobby Petrungarro
Clerk of IPCB	Hearing Officer	Lopez and Harding	Assistant States Attn.
100 W. Randolph St.	100 W. Randolph St.	100 N. LaSalle St.	Will County
Ste. 11-500	Ste 11-500	Ste. 1107	14 W. Jefferson St.
Chicago, Il. 60601	Chicago, Il. 60601	Chicago, Il. 60601	Joliet, Il. 60432

I, Barbara Stuart swear the information contained in these documents to be true to the best of my belief and knowledge.

Barbara Stuart

Barbara Stuart
(Complainant)

Notary Seal

SUBSCRIBED AND SWORN TO BEFORE ME THIS 13 day of July, 2004

Denise Majewski

Notary Public



ALL FILINGS WERE SUBMITTED ON RECYCLED PAPER