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.	)	

DISSENTING OPINION (by T.E. Johnson):

I respectfully dissent with the majority opinion. As was discussed in the majority opinion, the Board performs a two-step test to determine whether noise emissions rise to the level of a nuisance noise pollution violation. First, the Board determines if the noise constitutes an interference in the enjoyment of complainants' lives, and second, the Board considers Section 33(c) of the Environmental Protection Act (Act) (415 ILCS 5/33(c) (2002)) in determining whether the interference is unreasonable. I agree with the majority's opinion regarding step one of the test, and find that the noise emissions do interfere with the complainants' enjoyment of life. However, after a review of the evidence presented, I am not convinced that the complainants have met their burden of proof in showing that the emissions unreasonably interfere with their enjoyment of life using the factors listed in Section 33(c).

UNREASONABLE INTERFERENCE, SECTION 33(C) FACTORS

The complainants have the burden of proving a violation of the Act or Board regulations. The Board may only find in the complainants' favor if they have proven each element of the claim by a preponderance of the evidence. People v. Chalmers, PCB 96-111, slip op. at 4 (Jan. 6, 2000). 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) 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 Character and Degree of Injury, 33(c)i

The Board's first consideration under Section 33(c) concerns the character and degree of injury or interference resulting from the emission. I do not believe this factor should have been weighed in favor of the complainants. As the majority opinion correctly states, 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, and is beyond a minor or trifling annoyance of discomfort. *See*

Charter Hall, slip op. at 21, citing Kvatsak v. St. Michael's Lutheran Church, PCB 89-182 slip op. at 9 (Aug. 30, 1990).

A review of the testimony reveals that the complainants have not adequately shown that the noise in question is beyond a trifling annoyance. At hearing, the complainant Ms. Stuart characterizes the noise emissions as a "dripping faucet, you know, that's not high in decibels, but it's still very annoying." Tr. at 158. The other complainant, Mr. Stuart, testified "I'm hard of hearing so it makes it easier for me than it would for the rest of the family, but I don't enjoy the noise." Tr. at 116. Julie Barton, the respondents' daughter, lives closer to the noise source than the complainants, but testified that the noise does not bother her or either of her two children. Tr. at 106. As a result of this, and other testimony given at hearing, I am not convinced that the use of the propane cannons substantially and frequently interfered with the Stuarts' enjoyment of life or with any lawful business or activity. I would, therefore, weigh this factor in favor of the respondents.

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

The Board's second consideration under Section 33(c) involves social and economic value. While no testimony as to the dollar value of the crop was provided at hearing, Mr. Fisher gave uncontroverted testimony that without the use of the propane cannons, the birds ate one half of his melon crop, and that the cannons have effectively stopped the avian destruction of his crop. Thus, I agree with the majority that the operation of the cannons results in a social or economic value, and I weigh this factor in favor of the respondent.

The Suitability of the Pollution Source, 33(c)iii

The Board's third consideration under Section 33(c) is 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. Neither party disputes that the respondents have priority of location. However, Mr. Fisher acknowledges that he started using the propane cannons after the complainants moved to the area. The Illinois Supreme Court has stated that when complainants move to the nuisance, they are put on notice of the possibility that some of the existing emissions present "could affect them, and this fact considerably diminishes the potency of their complaints." Wells Mfg. Co. v. PCB, 73 Ill. 2d 226, 236, 383 N.E.2d 148, 152 (Ill. 1978).

The Board has recognized this importance in prior Board decisions. In Dettlaff v. Boado, PCB 92-26 (July 1, 1993), the Board cited to Wells Manufacturing in determining that the noise emissions in Dettlaff did not constitute unreasonable interference. The Board stated that complainants should have been aware of the possibility of noise from the respondent when they moved into the area, and that a further influencing factor was that the respondent's property was zoned commercial at the time the complainants moved. Dettlaff, slip op. at 13.

The respondents have priority of location in this case. Even though the propane cannons were introduced after the complainants moved into their house, the complainants must anticipate that moving next to a farm may result in some farm-related noise. I believe that noise emanating from farm-related activities is suitable to a farm in an agricultural location. Accordingly, the

priority of location and the farm's compliance with the zoning code indicate that the farm is suitable for its location, and this factor should be weighed in favor of the respondents.

The Technical Practicability and Economic Reasonableness of Reducing Emissions, 33(c)iv

The fourth issue to consider under Section 33(c) is the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the alleged pollution source. As stated in the majority opinion, when considering this factor, the Board must determine whether technically practicable and economically reasonable means of reducing or eliminating noise emissions from the respondent's facility are readily available to the respondent. Once again, the complainants bear the burden of proving by a preponderance of the evidence that emission reduction is practical and reasonable.

The testimony in this case shows that no other method of control deters the crows from ravaging Mr. Fisher's melon crop. Tr. at 97. The use of netting has been shown ineffective, as has the use of scarecrows and foil plates. Tr. at 91-92, 97. Mr. Fisher testified that the alternatives suggested by the complainants were cost prohibitive or ineffective. Therefore, I disagree with the majority's finding that technically practicable alternatives for bird control exist, and I would weigh this factor in favor of the respondents.

Any Subsequent Compliance, 33(c)v

The Board has found that this factor is not relevant to a determination as to whether the noise experienced by a complainant is unreasonable, because no need for compliance exists until a noise is determined to be unreasonable. Sweda v. Outboard Marine Co., PCB 99-38 (Aug. 5, 1999). However, the Board has considered a respondent's efforts to reduce noise emissions before any violation has been determined as a mitigating factor. *See* Sweda, slip op. at 13.

The record shows that the respondents have undertaken a number of voluntary steps in an effort to reduce noise emissions. The respondents did reduce the use of the propane cannons from six months of the year to approximately three months of the year. Further, the respondents now use only one cannon instead of two. Respondents no longer fire the cannons every day as before, but only fire them about one half of the time they did before the complaint was filed. The complainants concede that in 2003, the cannons were used less frequently than 2001 and 2002, but argue that any day the cannons are in use causes them undue, unreasonable discomfort. However, the fact remains that respondents have made a number of good faith efforts to reduce the noise, and this fact should be weighed in favor of the respondents.

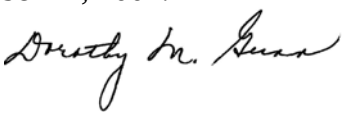
CONCLUSION

I find that the respondents' use of the propane cannons has not unreasonably interfered with the complainants' lives. The noise emissions do not substantially and frequently interfere with the complainants' enjoyment of life, the respondents' farm is suitably located with priority of location, has social and economic value, and the complainants have not shown that technically practicably and economically reasonable solutions are available to alleviate the interference. In addition, the respondents have exhibited good faith in attempting to reduce the noise emissions.

For these reasons, I respectfully dissent.

Thomas E. Johnson
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on September 21, 2004.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board