ILLINOIS POLLUTION CONTROL BOARD
January 11, 1990

WILL COUNTY ENVIRONMENTAL NETWORK,	)	
Complainant,	)	
v.	)	PCB 89-64 (Enforcement)
GALLAGHER BLACKTOP,	)	
Respondent.	)	

INTERIM OPINION AND ORDER OF THE BOARD (by B. Forcade):

On April 13, 1989, Will County Environmental Network (hereinafter "WCEN") filed a complaint with the Board charging Gallagher Blacktop ("Gallagher") with noise violations. The complaint and attachment cite provisions of Section 24 of the Environmental Protection Act (hereinafter "the Act") and 35 Ill. Adm. Code 900.102. A hearing was held on July 7, 1989. At hearing, the hearing officer provided that if briefs were to be filed they would be due simultaneously on August 7, and replies would be due simultaneously on August 21. Closing statements were made at hearing, but the question of whether briefs would be filed was left open. No briefs were received by the Board.

Gallagher has its main offices in Thorton, Illinois. It operates asphalt plants in Thorton, Chicago, and Joliet. The Joliet plant, on Brandon Road, is the subject of this action. Gallagher bought the plant in December, 1972, from Delta Construction Company which was owned by Lincoln Stone Quarry. Gallagher currently leases the land upon which the plant is located from Lincoln Stone. It appears that the property in question was first zoned for industrial use in late 1970 and that Delta Construction Company built and operated an asphalt plant at that location from 1971 until late 1972 when it was sold to Gallagher. The plant area would appear to be approximately 400 feet by 600 feet. The area is primarily residential; the blacktop plant is the only industrial facility within several miles of the complaining witnesses' property. (See Generally, R. 8, 32-33, 71-74; Complainant's Ex. 3; Complainant's Ex. 5)

The finished product from the Gallagher plant is called blacktop or hot mix asphalt. It is made from aggregate and a refined petroleum product called petroleum asphalt. The aggregate must be dried and heated for the petroleum asphalt to coat it properly. The material is thermoplastic. The blacktop or hot mix asphalt enters the trucks from the plant at about 310 degrees. As it cools it sets up and gets hard. It is used for the resurfacing of old roadways and to create new ones. Most of the products go into public works projects, including the State of Illinois, County of Will, and City of Joliet. (R. 71-77).

There are three different sources of noise that are discussed in this proceeding. The first source is the burner on the dryer used to heat the petroleum asphalt/aggregate mix. The second source is the back up whistle on the caterpillar loader that is used to move material around inside the facility. The third source of noise is the trucks that move gravel into the facility and hot mix asphalt away from the facility. (R. 73-74, 86-87, 107-108).

WCEN asserts that noise from the facility unreasonably interferes with their enjoyment of life. They seek an order from this Board to prevent excessive noise and a prohibition against starting the plant before seven o'clock in the morning. In addition, WCEN seeks an order requiring use of the quietest trucks to haul gravel from the quarry, a requirement to construct an earthen berm to abate the noise, a requirement that Gallagher use flagmen instead of the back up whistle on the caterpillar, and a prohibition against the grinding operation. WCEN also seeks a civil penalty.

NOISE

Title VI of the Act provides the procedures and standards for noise control. Sections 23 and 24 of that Title provide:

> Section 23
>
> The General Assembly finds that excessive noise endangers physical and emotional health and well-being, interferes with legitimate business and recreational activities, increases construction costs, depresses property values, offends the senses, creates public nuisances, and in other respects reduces the quality of our environment.
>
> It is the purpose of this Title to prevent noise which creates a public nuisance.
>
> Section 24
>
> 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 this Act.

The Board has implemented these statutory sections in two ways. First, the Board has adopted specific numerical limitations on the characteristics of sound that may be transmitted from source to receiver. The second method of implementing the noise provisions of the Act are found in 35 Ill. Adm. Code 900.101 and 900.102.

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.

* * * *

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.

In effect, these two sections adopt a regulatory public nuisance provision for noise control using the statutory phrase "unreasonable interference with the enjoyment of life or with any lawful business or activity" as the standard. The pleadings, testimony and exhibits of the complainants, regarding noise, are founded in this public nuisance theory.

The judicial interpretation of Sections 900.101 and 900.102, which is most closely related to the facts of this case, is Ferndale Heights Utilities Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 144 Ill.App.3d 962, 358 N.E.2d 1224 (First District, 1976) (hereinafter "Ferndale"). In that case, which involved the exact statutory and regulatory language at issue in the instant proceeding*, the Board found that Ferndale Heights Utilities Company had violated the regulatory public nuisance standard in their operation of a pumping station. On appeal, Ferndale Utilities argued that the regulatory language of Section 900.102 was unconstitutional in that it did not contain sufficient standards for determining what constitutes "noise pollution" and argued that the narrative testimony at hearing lacked sufficient specificity to sustain a finding of violation of noise pollution.

The Ferndale court found the regulatory language, when viewed in the entire statutory framework, including the factors

* Prior to codification in the Illinois Administrative Code, Section 900.101, "Noise Pollution" was found at Illinois Pollution Control Board, Rules and Regulations, Chapter 8, Rule 101(j). Section 900.102 was Rule 102 of that same Chapter. The actual regulatory language was not modified.

listed in Section 33(c) of the Act, was sufficiently specific to pass constitutional muster. In evaluating the adequacy and specificity of the citizen testimony, the court stated:

> Ferndale next asserts that the Board's order should be reversed because its finding of a violation of Rule 102 is contrary to the manifest weight of the evidence. Specifically, Ferndale argues that the Pierson testimony failed to provide dates and times of noises, failed to show any disturbance in his house, failed to show physical damage to himself or any person or property, failed to show that he never lounged or entertained guests in his yard and failed to show when and how often he did not lounge or entertain guests in his yard. Other alleged testimonial deficiencies involve failure to cite dates and times when activities such as patio parties were prevented or when the various witness' sleep was interrupted. However, agency witnesses used such terms as "almost constant this summer," "five times this past summer" and "awakened once or twice this year" to describe generally how often they were disturbed by the noise emanating from the pumping station. Terms such as "a great source of irritation", "disturbing," "like ten air conditions running at the same time" and "[like] a lawnmower running all day under my window" were used to describe the effect of this sound upon the individuals.
>
> Based upon such testimony, the Board properly found that the character and degree of interference with the enjoyment of life and lawful activity occasioned by sounds emanating from Ferndale's pumping operations to be "unreasonable." Our review of the record does not mandate a contrary conclusion. (Id.)

These statutory, regulatory and judicial standards provide the guidance by which the Board must evaluate the record in this proceeding.

The first witness for WCEN was Mr. Robert Whitler. Mr. Whitler lives at 1815 Brandon Road and shares a common fenceline with the blacktop plant just north of him. He has lived at that location since 1943, 28 years prior to the construction of the blacktop plant. Mr. Whitler described the noises that bothered him:

> The big noise from the plant is the big gas burner. At one time they had a plywood housing around it and it helped some.

* * * *

> Another noise that makes my blood boil because it is totally unnecessary is the back up whistle on the [caterpillar]. They have been whistling all over the place especially when they have been bringing in tons and tons of the old blacktop grindings... (R 19-20)

A large part of the problem described by Mr. Whitler related to the starting time and the duration of the noise:

> To be more specific, first, they wake us up two or three hours before we need to get up, 3:30 a.m., July 19, 1987, I went over and complained to the operator and talked to the owner the next day. They let up for a while but by September they were back to 4:30 a.m. startups again and trucks by six a.m.
>
> * * * *
>
> These four and five a.m. start ups continued the rest of the year. 'Til November the 19th and then at 5:10. Only one start up even near seven a.m. and that was 6:30. [1988] was no better. May the 2nd, they started at 4:30 a.m.
>
> Early start ups continued until on the tenth of June I talked to the supervisor, by the name of Jerry and asked what Gallagher meant by a few times [of early start ups]. He said twenty. Early start ups continued until on July 7th, I called Mr. Gallagher in his bed at five a.m. to wake him up as he had me. I told him he was way past his 20 days. The rest of the year, most were started around 6:05. But 1989 started off again with a 5:04 start up. This was on Saturday, March 25.
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> * * * *
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> The last time only two weeks ago, 22nd of June. (R. 13-16)

Mr. Whitler introduced a calendar. (Complainant's Ex. 6; discussed at R. 27-31). That exhibit lists 42 days between September 1, 1987 and November 30, 1987 with a starting time between 4:00 a.m. and 6:00 a.m.

In addition, Mr. Whitler describes the noise as having an adverse impact during the day, "second, this noise goes on all

day. We cannot enjoy the out-of-doors, the big burner roaring in our ears steadily, the noisy trucks they use to haul gravel.... They have caused my baby grandchild to cry out and hold her ears." (R. 15-16). Mr. Lesley Marr provided corroboration of the earlier testimony, based on his visits to Mr. Whitler's property, "the times I have heard it, it sounds like the passing of a lone freight train and boy, that whistle is reminiscent of a steam locomotive whistle which can be very distracting. "(R. 42).

Mr. Dan Whitler of 1807 Brandon Road, another complainant's witness, shares a property line with Gallagher. He stated that the blacktop plant was so loud he thought the furnace had blown up and that the noise often awakens him from an early morning sleep. (R. 44-46). Another resident of that same household testified also:

> My name is Tina Crusak and I live right next to the blacktop. With my uncle Dan. And he has his windows shut but I have to have my windows open because it's on the second floor, my bedroom is, and I could see the trucks out my window also, pulling into the blacktop and pulling out from the blacktop and I wish I kept documentation and I should be doing that so I will do that from now on. But they have woke me up several times very early in the morning, 4:30, five o'clock, six o'clock in the morning wake up. And I go, oh my good, -- and I am a school teacher and also take summer classes and also waitress on my weekends, so my time to get to sleep is very precious to me and it is distressing because I am not getting enough sleep. (R. 55-56).

Ms. Crusak described how she could not hear someone talking on the phone when her window was open and the plant was running and how she could not go swimming outside or sit outside on the porch because it was "so noisy and unbearable" (R. 56). She described the 4:30 and 5:00 a.m. start ups as quite frequent during April and May of 1989.

The respondent provided one witness at hearing, Mr. Donald Gallagher. Mr. Gallagher has been with the company for over 30 years, and is presently the vice-president. Mr. Gallagher presented several points regarding noise from the subject facility, including (1) that the facility was tested for compliance with numerical limitations in 1973, 1974, and 1984, and that operational levels have not changed since the numerical testing showed compliance; (2) that the back up whistle on the caterpillar is required by OSHA but that they are working with OSHA to secure approval of posting signs instead of back up whistles; (3) that Gallagher does not own the trucks and therefore cannot control how loud the trucks are or control the

back up alarms on the trucks; and finally (4) that the hours of operations at the present facility are minimal to meet existing needs of the company.

The respondent's primary focus was on the sound tests conducted at the facility:

> [By Gallagher's Attorney] ...when were sound tests conducted at the plant ?
>
> [Mr. Gallagher] Yeah, in '73 and '74, we conducted them ourselves. It was the first year of operation. Our plant superintendent at that time did the testing. Subsequent, in 1984 as a result of your complaint, we had it retested and the gentleman that performed those tests is a professional registered engineer -- so -- Mr. Westerly.
>
> Q. And what were the results of the tests in 1984 and in '73 and '74 ?
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> A. Well, they are shown in -- in one exhibit but it basically showed us in compliance, at the property line on, with the 61 dBs, on the A [scale]
>
> Q. Now, in those tests were taken, now those tests were taken when the plant was in full operation ?
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> A. Right. Yeah, I just want to make one little comment on that. The rate at which the plant operates doesn't vary very much. And if it did, I don't think, it's a significant sound level change....It sounds the same, no matter what, it's just a big burner. (R. 89-90)

The "one exhibit" Mr. Gallagher refers to seems to be Complainant's Exhibit 2. That exhibit consists of three pages. The first is a July 16, 1984 letter from Mr. Major Hearn Jr., of the Illinois Environmental Protection Agency ("the Agency") to the Delta Construction Company reciting complaints about their Brandon Road asphalt plant. The relevant sentences from that letter are:

> The State of Illinois has adopted regulations governing the amount of noise that can be emitted from asphalt plant to residential property. Those maximum emission levels are 61 dB(A) during the daytime hours of 7 A.M. to 10 P.M. and 51 dB(A) during the nighttime hours of 10 P.M. to 7 A.M.

The second page of that exhibit is a one-page letter to Mr. Major Hearn Jr. of the Agency, from Delta Construction Company dated July 27, 1984. This letter, and its one-page map attachment, appears to be about the subject facility and states in relevant part:

> Pursuant to your July 16th letter, concerning noise emissions from our asphalt plant on Brandon Road, we have taken some sound level measurements. The sound levels at various points around the asphalt plant are shown on the enclosed map.
>
> We also took readings in the front yard of Mr. Fred Wilhelmi of 1808 Brandon Road and in front of the Whitler residence of 1815 Brandon Road. In both locations, the sound levels were [plus or minus] 50 dB(A). Therefore, we do not feel that our emissions levels are in violation of EPA regulations and, in the event of any further complaints, encourage a meeting with an EPA representative to take joint sound readings.

The attached map appears to show sound levels of 92 dB(A) at the dryer, 68 dB(A) along the northern plant boundary, 59-61 dB(A) along the western plant boundary, and 59 dB(A) along the southern plant boundary.

The Board notes several problems with Gallagher's reliance on numerical sound measurements as a defense to the noise nuisance action. First, compliance with one set of regulations (the numerical noise emissions values) does not present an absolute bar to a finding of violation regarding another set of regulations (the general nuisance noise prohibitions).

Second, the numerical noise measurements taken by Gallagher are for the years 1973, 1974, and 1984. The complainant's nuisance action is for the years 1987, 1988, and 1989. Thus, the respective claims represent substantially different time periods.

Third, the numerical noise values asserted by Gallagher do not show "compliance" with the numerical noise limitations of the State of Illinois. The original noise regulations that apply here were adopted by the Board in R72-2, In the Matter of : Noise Pollution Control Regulations, Order of July 23, 1973; Opinion of July 31, 1973, as Rule 202 and Rule 203. Those rules provided maximum allowable octave band sound pressure levels for nine octave band center frequencies. The single number A weighted scale for noise measurement was never adopted by this Board as a regulatory standard. These 1973 octave band pressure levels were codified at 35 Ill. Adm Code 901.102. In 1987, the Board adopted amendments which provided that the particular regulatory

standards should be measured based on one-hour Leq measurement techniques, see R83-7, In the matter of : General Motors Corp. Proposed Amendments to 35 Ill. Adm. Code 900.103 and 901.104, January 22, 1987. Gallagher's "A scale" noise measurements do not show compliance with any past or present numerical regulatory standard of the Board.

Gallagher's remaining arguments regarding the OSHA whistle requirements, control over the trucks, and minimal hours of operation address the issue of why the noise is at a certain level, not how loud the noise might be or what interference it might be causing nearby residents.

Based on the above cited evidence, the Board finds that noises emanating from Gallagher's facility, specifically from the dryer, from the back up whistle on the caterpillar and from trucks in the facility, are causing interference with the sleep and normal leisure time activities of adjacent residents. Further, the Board finds this interference is frequent and severe.

Section 33(c)

The Board may find severe and frequent interference with the enjoyment of life solely based on testimony describing the impacts of noise. However, to evaluate whether those noise impacts are "unreasonable," the Board must evaluate a series of factors listed in Section 33(c) of the Act:

> Section 33
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> * * * *
>
> c. 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:
>
> 1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> 2. the social and economic value of the pollution source;
>
> 3. 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;

4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

5. any economic benefits accrued by a non-complying pollution source because of its delay in compliance with pollution control requirements; and

6. any subsequent compliance.

The "reasonableness" of the noise pollution must be determined in reference to these statutory criteria. Wells Manufacturing Company v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148 (1978); Mystic Tape, Div. of Borden, Inc. v. Pollution Control Board, 60 Ill.2d 330, 328 N.E.2d 5 (1975); Incinerator, Inc. v. Pollution Control Board, 59 Ill.2d 290, 319 N.E.2d 794 (1974); City of Monmouth v. Pollution Control Board, 57 Ill.2d 482, 313 N.E.2d 161 (1974). However, complainants are not required to introduce evidence on these points. Processing & Books v. Pollution Control Board, 64 Ill.2d 68, 351 N.E.2d 865 (1976).

In evaluating the first of the Section 33(c) factors, the Board finds there is a frequent and severe interference with sleep and normal leisure activities of adjacent residents caused by noise from Gallagher's facility. This interference goes far beyond trifling interference, petty annoyance or minor discomfort. The noise constitutes a substantial interference with the enjoyment of life and property.

Concerning the second of the Section 33(c) factors, the Board finds that Gallagher is of substantial social and economic benefit in that it provides valuable services and employs people. However, the social and economic benefit is significantly reduced by the nature of noise emissions from the property.

The third Section 33(c) factor concerns suitability of the pollution source to the area in which it is located and priority of location. The record contains very little descriptive information on the area beyond complainants' and defendant's property. While the property which Gallagher's facility occupies was originally zoned for residential use, that zoning use was changed and the facility appears to be in compliance with current zoning uses. The Board finds that Gallagher's facility is suitable for the area in which it is located if noise problems can be reduced to acceptable levels.

On the priority of location issue, the Board finds that complainants have the clear priority. The record is undisputed

that local area residents generally, and several complainants in particular, lived in the area in 1943 and the facility in question was developed in 1972. (R. 8.)

Concerning the fourth of the Section 33(c) factors, the Board finds that there are technically feasible and economically reasonable methods of making some reductions in noise levels, that Gallagher has begun to implement some of these measures, but that the record is insufficient to support a detailed Order commanding what specific steps must be taken, by what certain time, and what steps will be necessary to completely cure the problems.

On the fifth Section 33(c) factor, the record is devoid of information on any economic benefits which may have accrued to Gallagher because of delays in compliance. The Board notes that the report required by this Interim Order should contain some information on the economic costs of compliance.

On the last of the Section 33(c) factors, the record clearly indicates that Gallagher had not come into compliance as recently as two weeks prior to the hearing in this enforcement proceeding. (R. 13-16).

Additionally, the Board finds that to curtail all activities before 7:00 a.m. might amount to an Order for Gallagher to cease operation at this facility. However, lack of a technologically feasible method of reducing the pollution is not an absolute defense to a finding of violation by this Board. Wells, supra, Chicago Magnesium Casting Co. v. Pollution Control Board, 22 Ill.App.3d. 489, 317 N.E.2d 689 (First District, 1974). The Board believes that the report required in today's Order will provide information on specific workable methods of reducing the noise problems to acceptable levels without facing the difficult closure issue.

Based on the Board findings of substantial interference with the enjoyment of life and after consideration of the factors listed in Section 33(c), the Board finds that noise emissions from Gallagher's facility are unreasonable and constitute a violation of 35 Ill. Adm. Code 900.102 and Section 24 of the Environmental Protection Act.

Additional Information

Throughout this proceeding, steps were mentioned which would have the effect of reducing the noise emissions from Gallagher's facility. These include:

1. Operational changes, such as no start up prior to 7:00 a.m.;

2. Replacing the caterpillar back-up whistle with a flagman or signs;

3. Building an acoustical barrier along the perimeter; and

4. Enclosing the dryer burner area.

While these options were mentioned at hearing, certain informational deficiencies exist. Therefore, the Board will order Gallagher to prepare a report describing the background situation, and evaluating, to the maximum extent possible, the type and degree of noise reductions possible by changes in operation (for example, rerouting truck traffic) or construction of noise reduction devices. As background, this report should contain an accurate and current representation of the facility, paths for vehicles, property lines, and locations of noise sources and complainants' properties. Within the time constraints imposed by this Order, the report should attempt to characterize numerically the background noise levels; pre-noise reduction operational noise levels; and post-noise reduction operational noise levels as much as possible, whether by measurement, calculation, or estimation.

This report should be prepared by a competent individual or firm, and should evaluate all methods of control (not just those already discussed). Each control option should include anticipated noise reductions, cost of implementation and an estimate of a reasonable time for implementation.

The Board believes that a special comment is warranted as it pertains to the back up noise devices and the Occupational Safety and Health Administration ("OSHA"). There was no question that certain devices were installed to meet OSHA standards. In this proceeding both complainants' and respondent's testified that alternative non-noise producing methods of compliance with the OSHA standards may be permissible under certain circumstances. These alternatives may or may not be viable here. The Board intends that in the report required by this Interim Order, such alternatives be explored and explained. The Board in no way intends to require Gallagher to violate OSHA requirements or risk worker safety.

The Board will retain jurisdiction in this case pending receipt of the report, and final disposition of this matter. The report is to be filed with the Board and complainants not later than March 31, 1990. Unless a motion requesting a hearing on the contents of the report is received by April 21, 1990, the Board will proceed to issue a final Order regarding compliance as soon as possible thereafter. Any determination regarding civil penalties will be deferred until the final Order.

This Interim Opinion constitutes the Board's initial findings of fact and conclusions of law in this matter.

Order

1. The Board finds that Gallagher Blacktop has violated 35 Ill. Adm. code 900.102, as well as Section 24 of the Environmental Protection Act.

2. Gallagher is ordered to submit to the Board and complainants, not later than March 31, 1990, a report on methods of reducing or eliminating noise pollution at its facility consistent with the Opinion.

3. The Board will retain jurisdiction in this matter pending receipt of the report. Unless a motion for hearing on the contents of that report is received by April 21, 1990, the Board will proceed to issue a final Order in this matter.

IT IS SO ORDERED

Board Member J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Interim Opinion and Order was adopted on the 11th day of January, 1990, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board