ILLINOIS POLLUTION CONTROL BOARD
February 27, 1992

JAMES W. TURNER, SR.,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 91-148
	)	(Enforcement)
DON FRANKE,	)	
	)	
Respondent.	)	

JAMES W. TURNER APPEARED PRO SE.

FRANK MILES OF HAYES, SCHNEIDER, HAMMER, MILES & COX APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter comes before the Board on the August 21, 1991 filing of a formal complaint filed by complainant James W. Turner, Sr. (Turner) against the respondent, Don Franke (Franke), pursuant to 31(b) of the Environmental Protection Act (Act) (Ill. Rev. Stat. 1991 ch. 111 1/2, par. 1031(b)). Turner alleges that the noise emitted from Franke's property unreasonably interferes with complainant's enjoyment of life and lawful activity. (Section 24 of the Act; 35 Ill. Adm. Code 900.102.) The Board today finds that Franke violated Section 24 of the Act and 35 Ill. Adm. Code 900.102, and orders Franke to cease and desist from further violations, as discussed below.

BACKGROUND

The Kingsley Court[1] is an area located in the City of Normal, Illinois (the City or Normal). The area is primarily residential, although some restaurants are located on Kingsley Street (Turner Exh. B). Six fraternities[2] occupy houses or apartment buildings in the Kingsley Court area. Other student housing is also located in the area. The area also includes private residences, some of which are not occupied by students (Turner Exh. B, and Tr. 41, 47). The record discloses that prior to the filing of the complaint, sounds emitted from student rental property were the subject of town meetings and correspondence between private home owners, ISU, the police department, and the City since the time student housing was

[1] Kingsley Court was formerly called Morgan Court, and is sometimes called by either name in the transcript.

[2] The local university is Illinois State University (ISU).

brought into the area in the early 1980s (Tr. 27, and see generally, testimony of Lucille Miller, Tr. 36-45).

Turner filed similar complaints against two other property owners in the area (PCB 91-146 and PCB 91-147). Hearing was held on all three complaints in Normal, on October 23, 1991, at which members of the public attended.

Franke's property is located at 711 Kingsley Court, commonly known as Building #1. The property is occupied by Sigma Alpha Epsilon fraternity (Turner Exh. B; Tr. 7).

MOTIONS AND PRELIMINARY ARGUMENTS

At hearing, Franke presented a written motion (joined in by Chicago Title & Trust Company, Trustee, Trust No. 1086573 (the Trustee), the respondent, in the related case, PCB 91-146). That motion requests that the Board declare 35 Ill. Adm. Code 900.102 void as exceeding statutory authority. The Board denies the motion. The respondents presented no authority for declaring the regulation void. Furthermore, this issue previously has been addressed by the courts in Ferndale Heights Utilities Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, (1st Dist. 1976), 41 Ill.App.3d 962, 358 N.E.2d 1224. (See discussion in the Applicable Regulations section of this opinion.) Although respondents present some factual differences between the Ferndale case and the case at bar, the Board finds that these are minor factual differences which do not affect the issue of statutory authority.

Allegations were also presented in briefs by respondents Franke and the Trustee that noise measurements in accordance with Section 901.102 were not taken, hence the complaint should be dismissed (Franke Br. 2-3[3]). The Board finds that this complaint was brought pursuant to Section 900.102, and is a "noise nuisance" action. The compliant does not need to rely on noise measurements to be brought under this Section, and does not fail because no noise measurements were taken. (See Applicable Regulations section of this opinion.)

APPLICABLE REGULATIONS

Title VI of the Act establishes procedures and standards for noise control. Section 23 of Title VI sets forth the legislature's purpose of preventing noise which causes a public nuisance. Section 24 of Title VI prohibits the emission beyond one's own property of noise that unreasonably interferes with another person's enjoyment of life or lawful activities. The

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[3] Citations to the briefs are noted by party thusly: Trustee Br. X. Citations to the complaint are noted as: compl., par. X.

Board's authority to adopt noise regulations is found in Section 25.

Section 23 and 24 of Title VI provide as follows:

> 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 sections of the Act in two ways. First, the Board has adopted specific numerical limitations on the characteristics of sound that may be transmitted from source to receiver. As no numerical test data were presented in this matter, those portions of the regulations are not at issue. 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
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> 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 complainant, regarding noise, are founded in this public nuisance theory, rather than in terms of noise levels which exceed specific sound emissions levels[4].

Section 900.101 and 900.102 were given judicial interpretation in Ferndale, supra. In that case, the appellate court held the regulatory language to be constitutional since sufficient standards could be comprehended from reading Section 24, the Board's regulations, and the guidelines for enforcement cases found in Section 33(c) of the Act. In discussing whether Section 900.102 is contrary to the terms of the Act, the court found nothing in the Act to preclude prosecution of noise pollution under the rule. The court affirmed the Board's finding of unreasonable interference with the enjoyment of life, in light of adequate testimony describing the noise; explaining the type of severity of the interference caused by the noise; and indicating the frequency and duration of the interference. Despite conflicting testimony, the court upheld the Board's finding that the interference was unreasonable.

The Board has adopted the Ferndale court's approach to noise pollution in cases that involve unreasonable interference rather than numeric limitations. In a 1985 case finding a violation of Section 24 of the Act and of Section 900.102 of the Board's rules, the Board reached this conclusion:

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[4] Noise enforcement cases previously decided by the Board include: Kaji v. R. Olson Mfg. Co., Inc. (1981) PCB 80-46, aff'd, (1982), 109 Ill. App. 3d 1168, 441 N.E.2d 188; Citizens of Burbank v. Clairmont Transfer Co. (1986), PCB 84-125; John W. Eirlich v. John Smith (1987), PCB 85-4; Thomas & Lisa Annino v. Browning-Ferris Industries (1988) PCB 97-139; Anthony Kochanski v. Hinsdale Golf Club (1989), PCB 88-16, rev'd, (1990), 197 Ill. App. 3d 634, 555 N.E.2d 31; William Brainerd v. Donna Hagen et al. (1989), PCB 88-171; Brian J. Peter v. Geneva Meat and Fish Market (1990), PCB 89-151; Will County Environmental Network v. Gallagher Asphalt (1990), PCB 89-64; Kvatsak v. St. Michael's Lutheran Church (1990), PCB 89-182; Zivoli v. Prospect Dive and Sport Shop (1991), PCB 89-205; Village of Matteson v. World Music Theatre (1991), PCB 90-146; Christianson v. American Milling (Nov. 21, 1991) PCB 90-59; Zarlenga v. Bloomingdale Partners (May 9, 1991 and February 27, 1992), PCB 89-169.

> This testimony meets the Ferndale standard of providing a description of the noise, explaining the type and severity of interference caused by the noise (sleep interruption) and providing information on the frequency and duration of the interference. This type of testimony must be provided in any proceeding for the Board to make a finding regarding interference with the enjoyment of life.
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> ***
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> Based on the above-cited evidence, the Board finds that noises emanating from Overnite's facility, specifically from vehicle movement, maintenance, horns and the public address system, are causing interference with the sleep and normal leisure time activities of adjacent residents. Further, the Board finds this interference is frequent and severe.
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> Citizens of Burbank v. Overnite Trucking (1985), PCB 84-124, 65 PCB 131, 136, 138.

Section 33(c) Factors

As the Ferndale court notes, in order to make a determination concerning the reasonableness of the noise emissions, the Board must consider the statutory factors found in Section 33(c) of the Act. That section provides as follows:

> 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:
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> 1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
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> 2. the social and economic value of the pollution source;
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> 3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question or priority of location in the area involved;
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> 4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

5. any subsequent compliance.

Section 33(c) of the Act.

These factors guide the Board in reaching a decision on whether or not noise emissions rise to the level of noise pollution, which, by definition, unreasonably interfere with the enjoyment of life, and which is proscribed by the Act and regulations. The Illinois courts have held that the reasonableness of the interference with life and property must be determined by the Board by reference to these statutory criteria. Wells Manufacturing Company v. Pollution Control Board (1978), 73 Ill.2d 225, 383 N.E. 2d 148; Mystic Tape, Div. of Borden, Inc. v. Pollution Control Board (1975), 60 Ill.2d 330, 328 N.E.2d 5; Incinerator, Inc. v. Pollution Control Board (1974), 59 Ill.2d 290, 319 N.E. 2d 794; City of Monmouth v. Pollution Control Board (1974), 57 Ill.2d 482, 313 N.E.2d 161. However, complainants are not required to introduce evidence on each of these points. Processing & Books v. Pollution Control Board (1976), 64 Ill.2d 68, 351 N.E.2d 865.

COMPLAINT

The complaint alleges that loud music, amplified music, and "loud hollering" that occurs during parties held by the fraternity occupant constitutes noise that interferes with the complainant's enjoyment of life and lawful activity. The complaint alleges that the noise emitted mainly occurs during the school year "between 10 p.m. to well after midnight" and occurs at least several times during the week and on all weekend days. The complaint further alleges that the noise has occurred since 1985 to the present. (compl., pars. 4-7.) Specific dates included in the complaint and attachments pertaining to the Building #1 site are April 7, 1988, April 24, 1988, August 13, 1987, September 3, 1987, April 8, 1991, April 27, 1991, May 2, 1991, May 9, 1991, and July 13, 1991. Noises included loud music, shouting, and screaming; times ranged from late evening to past 1:25 a.m.

The complaint alleges that Turner and his family have suffered ill effects as a result of the noise. These include hypertension, loss of sleep due to noise occurrences at night, inability to hear at normal levels, diminishing of the quality of life and environment, and the sale of neighbors' homes at a loss. (compl., par. 8.)

The complaint and some testimony at hearing discuss other allegations associated with the parties, such as litter, public urination, and property damage (Tr. 65, 78; compl., par. 4). These allegations do not pertain to the noise regulations, any other regulations of the Board, or provisions of the Act. Accordingly, the Board strikes all information in the record that

discusses matters over which the Board does not have jurisdiction to determine.

HEARING

In support of his allegations, Turner presented several witnesses at hearing. Since the three complaints filed were consolidated for hearing, testimony was presented by witnesses on all the buildings involved. This discussion includes only that testimony necessary to a discussion of the Building #1 site.

O.V. Lancaster testified that he and his wife bought their home at 701 Kingsley in 1972. He stated that the area was "peaceful and quiet" until the "early 1980s" when nearby vacant land was developed with the addition of four three-story student living houses occupied by fraternities (referred to as buildings 1, 2, 3, and 4 or by lot number), and the conversion of some other property to a fraternity house (known as 904 Hovey Avenue). (Tr. 61).

Lancaster kept a log of occurrences of "party noise". His testimony includes references to occurrences at Building #1, and includes loud shouting, drum noise, and amplified music occurring on:

4/24/86	10:40 to 3:35 a.m. the party sounds equal to a carnival. He complained to police)
9/10/86	1:09a.m.raucous shouting screaming and cheering, called police)
9/17/91	11:45 p.m. to 12:10 a.m. amplified music
9/20/91	11:48 p.m. starting to get noisy
10/11/91	11:55 p.m. stereo, drums, shouting, called police

Lancaster stated that he reported his concerns to local authorities, explaining that his sleep was "continuously disturbed by loud screaming, shouting, thumping drums and/or extremely amplified music -- either live or recorded. Each frequently lasting until the early hours of the morning and often several nights in the course of a week." (Tr. 71-72.)

In his brief, Franke seeks to use excerpts from Lancaster's log to rebut noise reports in the complaint (Franke Br. 6).

Although portions of the log were read by Lancaster into the record, the entire document, including the narrative of the incidents cited by Franke in his brief, was never made part of the record at hearing or otherwise.

Ms. Buffey Overby testified that she is a full-time Illinois State University student, and that she and her husband have lived at 706 Osage street since August 1990. She stated that she needs to study and that the problem is continuous. She stated that "the noise coming from Kingsley Court sometimes beginning Wednesday through Saturday is so loud in [her] house that [she is] not able to study there". (Tr. 85.)

Ms. Elizabeth Chambers testified that she and her family moved from 709 Kingsley because they were not sleeping, and that the noise was "unbelievable" (Tr. 91). She stated that she moved approximately seven years ago, having stayed in the house on Kingsley one year after the students moved in the area. She stated that Sigma Nu fraternity (occupant of the 904 Hovey Avenue site), had been in the area two years before other fraternities moved in. She stated that the Sigma Nu fraternity by itself was not all that bad, but that other fraternities were directly behind their property. (Tr. 91-93).

Ms. Mildred Moore testified that a letter was sent to neighbors of Kingsley Court from the fraternities' Greek specialist on November 13, 1990, stating that the fraternities understand the extent of the problem and are "interested and ready to do something to help alleviate" the neighbor's concerns (Tr. 97). She testified concerning party noise and loud music that occurred after the November 13 letter was sent:

Date and time	Location	Type of Sounds
11/14/90 12 midnight	KC[5] area	very loud music
11/15/90 10 p.m. - past 12 midnight	KC area	very loud music
11/17/90 10 p.m. - 2:30 a.m.	KC area	very loud music & drum beating
11/19/90 to 2:15 a.m.	KC area	loud drums
11/20/90 11 p.m. - past 12 midnight	KC area	very loud music
11/27/90	KC area	very loud music

[5] Kingsley Court

until after 2 a.m.

11/28/90

11/29/90 until 3 a.m.	KC area	very loud music
12/1/90 past 1:30 a.m.	KC area	noise unbearable
1/19/91 past 11 p.m.	Building #1	very loud music

1/23/91 Second Meeting With Neighbors

1/26/91 past 12 midnight	Building #1	very loud music
2/2/91 past 12 midnight	KC area	very loud music
2/9/91 10:30 p.m. - 2:30 a.m.	KC area center court	very loud music & fireworks

2/11/91 Third Meeting With Neighbors

2/25 & 16/91 at night	not given	loud noise & music
2/21/91 after 12 midnight	Building #3	yelling, partying, & noise
2/22/91 past 12 midnight	Building #1	very loud--rest and sleep impossible
2/23/91 continuing	Building #1	very loud music & noise

2/23/91 Fourth Meeting With Neighbors

Ms. Moore described the effect of the sounds on herself and the neighbors:

> Noise unbearable. *** The noise has continued. Disrupting the neighbors peace and rest. There are families who have ill members in their homes. There are workers who need to get up early to go to work. There are small children who do not need their rest disrupted. *** This is intolerable. *** Rest and sleep is impossible (sic).

(Tr. 96-99.)

Mr. Norman Anderson testified that he lives at 703 Kingsley. He testified that they have "put up with a lot of this noise for years" (Tr. 101). He also stated that the "noise is so loud that it breathes through the walls of your house and there is no way to get away from it ***" (Tr. 101-02).

At points during the hearing, the attorneys for respondents in PCB 91-146 and PCB 91-148 joined in objecting to certain dates of alleged noise occurrences attested to by witnesses. The objection was based on the fact that these dates were not disclosed prior to hearing through discovery and in the complaint, resulting in alleged surprise. The hearing officer gave the respondents opportunity to come back on another date to rebut anything they had heard. The attorney for respondent Franke refused, stating that no rebuttal is necessary. (Tr. 122.) The Board finds that there was an opportunity to cure any alleged surprise; therefore the objection fails.

In his brief, Franke argues in rebuttal that Turner and his neighbors are an "unsatisfied fringe" of the population of Morgan Court, and that hundreds of people who live in or near Morgan Court are not complaining about the noise. (Franke Br. at 9-10.) The Board finds that these arguments do not rebut that any of the occurrences took place as attested to by the complainant's witnesses.

DISCUSSION

Before beginning its evaluation, the Board observes that some of the testimony details noise complaints concerning the Kingsley Court area in general without naming a specific building or buildings from which the noise was emanating. The record is clear that sleep and rest were regularly disturbed and that the inability to carry on activities, such as studying, occurred due to student parties in the area. However, the general nature of some of the evidence presents a problem of proof of violation, because the complaints are brought against specific individuals and each of the buildings and properties are individually owned. Irrespective of the general nature of some of the testimony, the Board finds that the record also contains occurrences where the complaint and witnesses identified specific buildings from which the sounds emanated.

The testimony at hearing establishes that the sounds emitted from the Building #1 property have caused interference with the complainant's enjoyment of life and lawful activities. The witnesses from the Kingsley Court area consistently described the loud playing of music, drum beating, and loud shouting that occurred most often until well past 12 midnight. The witnesses also testified that these sounds frequently interfered with

sleep, studying, and normal enjoyment of life. Having found that the sounds have interfered with Turner's enjoyment of life and lawful activity, the next issue is whether the interference is unreasonable. As stated above, sounds do not violate the Act or Board regulations unless they cause an unreasonable interference with the enjoyment of life or lawful business activity. The reasonableness of the noise must be determined in consideration of factors set forth in Section 33(c) of the Act.

Therefore, the Board will proceed with its consideration of the five statutory criteria of Section 33(c) in reaching a determination on whether the sounds emitted from Building #1 unreasonably interfere with life and lawful business activities.

Section 33(c) Analysis

Section 33(c)(1) directs the Board to consider the character of the interference caused by the noise emissions from Building #1. The issue here is whether the noise substantially and frequently interferes with the use and enjoyment of life and property.

As regards Building #1, the Board finds that the record shows eighteen separate instances where Building #1 was specifically identified as the source of some or all of the sounds emitted. The record also contains testimony that the noise emanating from Building #1 disturbed the rest and sleep of Turner and other witnesses. The Board finds that this interference goes beyond trifling interference, petty annoyance, or minor discomfort. The Board does not find evidence that the hypertension, as alleged in the complaint, occurred as a result of the noise. Likewise, no evidence was presented that property values were diminished as a result of the noise, although one person testified that her family moved from the area as a result of the noise. However, based upon the record, the Board finds that the noise emissions from Building #1 are frequent and severe and constitute a substantial interference with the enjoyment of life and property of the complainant. In addition, in review of the information on attempts to stop the noise that were to no avail throughout the years, and the description of noise occurrences contained in the record, the Board finds that the noise problem is continuous as alleged.

Concerning the second of the Section 33(c) factors, the Board finds that the Biulding #1 site has social value as a residence for a social fraternity. However, that social value is significantly reduced by the negative impact of the noise emissions from the property to the surrounding community.

The third Section 33(c) factor concerns the suitability of the pollution source to the area in which it is located and priority of location. There is no evidence in the record that

the site does not comply with current zoning uses. The Board finds that the Building #1 site is suitable for the area in which it is located if noise problems can be reduced to acceptable levels, so that the impact no longer negatively affects surrounding property.

On priority of location, the Board finds that the record is clear that some of the current residents were there first. Building #1 was constructed or converted for use by the fraternity the 1980's. The record indicates that the residents of the houses generally have priority of location over the current residents of Building #1.

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 such as turning the sound down or redirecting stereo speakers, holding live concerts in another location such as a theater with proper noise reduction devices, or limiting the time and duration of parties.

Regarding the fifth Section 33(c) factor, the record shows that Building #1 has not come into compliance. Although some methods of noise reduction may have been discussed at meetings between the neighbors, residents, and university and city officials, no acceptable solution has been reached and the noise continues to occur at the same frequency and intensity.

Based upon evaluation of all the evidence and the factors of Section 33(c), the Board finds that the noise emissions from Biulding #1 unreasonably interfere with the enjoyment of life of Turner and his neighbors.

The Board finds that while Franke did not cause such emissions, Franke allowed such emissions to occur in violation of 35 Ill. Adm. Code 900.102. The phrase "cause or allow" as used in the Act has been interpreted by the courts. Although the type of pollution in the instant matter is different, we believe that the same principles apply.

The meaning of the phrase "cause or allow", as used in Section 12(a) of the Act, has been determined by the Illinois Appellate Court, Third District, in Freeman Coal Mining Corp. v. Illinois Pollution Control Board (1974), 21 Ill. App. 3d 157, 313, N.E. 2d 616. In Freeman, the petitioner was an owner of a coal mine that maintained a mine refuse pile. Rainfall upon the pile resulted in an acidic contaminant which washed into an unnamed waterway causing water pollution. (Id. at 618). The petitioner argued that it could not be held liable for "allowing such discharges because the discharges were the result of a natural force beyond the control of the petitioner" (Id. at 619) In its decision in Freeman, the court restated that the Act is

malum prohibitum and no proof of guilty knowledge or mens rea is necessary to a finding of guilt. The court went on to say, that the fact that the discharges were unintentional, or occurred despite efforts to prevent them, is not a defense. The owner of the property that creates the pollution has a duty, imposed by the legislature, to take all prudent measures to prevent the pollution. The efforts by the landowner to control or treat the pollution go to the issue of mitigation, not to the primary issue of liability. (Id. at 621.)

In Bath, Inc. v. IPCB (1973), 10 Ill. App. 3d 507, 294 N.E.2d 778, the fourth district was faced with the issue of whether respondents had caused or allowed burning:

> On the issue of the finding as to the existence of underground burning, the petitioners assert that neither they or other witnesses knew the cause of the underground burning, and implicit in their argument is that a violation cannot be predicated upon the existence of burning in the absence of a finding that the petitioners by their affirmative act caused, or intended, the burning. This argument is not persuasive. The rule prohibits burning except in an approved incinerator and the balance of the rules relate to a handling of the refuse in the landfill so as to eliminate burning. It is not an element of a violation of the rule that the burning was knowing or intentional. We hold that knowledge, intent or scienter is not an element of the case to be established by the Environmental Protection Agency at the hearing before the Pollution Control Board upon the issue of burning. In this connection, see 46 A.L.R.3d 758, and the cases there collected.
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> (Id. at 781.)

A more detailed explanation of the rationale was provided by the Fifth District in a subsequent case involving "cause or allow" in regard to water pollution. In Meadowlark Farms v. IPCB (1974), 17 Ill. App. 3d 851, 308 N.E.2d 829, the Court stated at pp. 836-837:

> Petitioner further argues that it has not caused, threatened or allowed the discharge of contaminants within the meaning of section 12(a) of the Act (Ill. Rev. Stats. 1971, ch. 111½ par.1012(a)). Petitioner contends that its mere ownership of the surface estate from which the discharge originates is the only relationship to the transaction responsible for the discharge and that to expect the petitioner to exercise control to prevent pollution would be unreasonable. In conjunction, the petitioner states that its lack of

knowledge that the discharge of contaminants was occurring is a defense to the complaint. We find these arguments without merit. To clarify this issue, it should be noted that the petitioner was charged with causing or allowing the discharge of contaminants so as to cause or tend to cause water pollution in Brush Creek and tributary in violation of Section 12(a) of the Environmental Protection Act and certain rules of SWB-14 of the Sanitary Water Board's rules and regulations. Petitioner was not charged with creating the refuse piles or with responsibility for the operation of the Peabody 43 mine which results in the creation of the refuse pile. The Pollution Control Board merely found that the petitioner had ownership of the surface rights of the property which was the source of the violation, that the evidence showed that the pollution had its source on that property and that fish were killed, and that the petitioner had the capability of controlling the pollutional discharge. Therefore, petitioner was found to have violated section 12(a) of the Act, as well as violating the other rules and regulations related to water pollution. The findings of the Board were correct.

We have found that the petitioner was the owner of the refuse piles which were the source of the pollutional discharge, but to see how the petitioner violated the Act, we must look to the Act itself. Section 12(a), which petitioner was found guilty of violating, states that:

> "No person shall: (a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act; * * *"

Petitioner admits that seepage from the refuse pile containing AMD had created a flow in the tributary of Brush Creek and that the fish died as a result of the AMD seepage. Furthermore, soon after the petitioner was given notice of its violation, Amax Coal Co., a division of the petitioner's parent company, investigated the charges and began an abatement program. The unquestioned pollution proves sufficiently that the petitioner allowed the discharge within the meaning of section 12(a).

> Petitioner's so-called lack of knowledge that the discharge existed provides no defense. The Environmental Protection Act is malum prohibitum, no proof of guilty knowledge or mens rea is necessary to a finding of guilt. In Bath, Inc. v. Pollution Control Board (1973), 10 Ill. App. 3d 507, 284 N.E.2d 778, the Fourth District Appellate Court was faced with this precise issue with regard to air pollution. Bath, Inc. the owner of a landfill, was found in violation of certain rules and regulations dealing with landfills, was fined $2000, and ordered to stop underground burning in violation of the Refuse Disposal Law (Ill. Rev. Stat. 1967, ch. 111½, [Sections] 471-476). Under section 49(a) [sic] of the Environmental Protection Act (Ill. Rev. Stat. 1971, ch. 111½ [par.] 1049(c) the Refuse Disposal Law remained in effect. The defendant Bath asserted that it had no knowledge of the cause of the burning and argued that a violation could not be predicated upon the existence of burning in the absence of a finding that the defendant by its affirmative act caused or intended the burning. The rule which was violated prohibited burning except in an approved incinerator. That court found that it was not an element of the violation that burning was knowing or intentional, and therefore held that knowledge, intent or scienter was not an element of the case to be established by the E.P.A. at a hearing before the Pollution Control Board upon the issue of burning. This rule has also been applied in other jurisdictions with regard to water pollution. (State v. Kinsley (Gloucester County Ct. 1968), 103 N. J. Super. 190, 246 A. 2d 764, aff'd (Super. Ct. 1969), 105 N. J. Super. 347, 252 A. 2d 224.) We feel that the same reasoning applies here; that knowledge is not an element of a violation of section 12(a) and lack of knowledge is no defense.

More recently, this theory was reiterated by the Third District in Perkinson v. IPCB (1989), 187 Ill. App. 3d 689, 546 N.E.2d 901 at 336:

> In Hindman v. Environmental Protection Agency (5th Dist. 1976) 42 Ill. App. 3d 766, 1 Ill. Dec. 481, 356 N.E.2d 669, the operator of landfill site was held accountable for a fire that was not started by either the operator or his employees. The court relied upon the Meadowlark Farms case and upon Bath, Inc. v. Pollution Control Board (4th Dist. 1973) 10 Ill. App. 3d 507, 294 N.E.2d 778, and ruled that a violation is not predicated upon proof of guilty knowledge or intentional harm. In the Bath case, the owner of a landfill was held to be responsible for underground

> burning even though the cause was unknown and not the result of the owner's affirmative act.
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> The case before us is controlled by the long line of precedent in Illinois which holds that the owner of the source of the pollution causes or allows the pollution within the meaning of the statute and is responsible for that pollution unless the facts established the owner either lacked the capability to control the source, as in Phillips Petroleum or had undertaken extensive precautions to prevent vandalism or other intervening causes, as in Union Petroleum. Here Perkinson plainly had control of the lagoons and the land where the pollution discharge occurred. The PCB concluded that he is liable for the pollution that had its source on his land and in a waste facility under his control. Under well-established Illinois law, that is sufficient to support a finding of a violation of the Environmental Protection Act.
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> (Id. at 336.)
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> (See also County of Jackson v. Taylor (1991), AC 89-258, 118 PCB 37.)

Franke has claimed that he would not be able to control his tenants and the guests of his tenants (See Franke Br. 7, 9-10). In support of his argument, Franke presented portions of leases for the property that, among other things, contain clauses requiring the residents to abide by the rules and regulations of the State of Illinois. (Franke Exhs. 1-4.) The Board is not persuaded. Franke has cited no case law or other authority on why he could not exercise control over the property to stop a violation of the Act and Board's regulations from occurring, should he choose to do so. Additionally, there are no facts or other information in the record that Franke lacked the capability to control the source of the noise emissions.

REMEDY

Turner requests as relief that the Board rule that:

> the noise pollution be stopped and a mandate be served upon the city manager, the Police Chief and all of their agents to enforce the noise pollution laws of the State of Illinois, as well as the landlord described as the respondent in this formal complaint (sic).
>
> compl. par. 9

The Board construes this as a request for a cease and desist order against the respondent. Turner failed to name the City or police department as parties, and even if named, the Board is not

empowered under the Environmental Protection Act to require that an entity enforce the noise pollution regulations of the State of Illinois.

Having found Franke in violation, the Board will accordingly order Franke to cease and desist from allowing the noise emissions. In addition, the Board has set out that technically feasible and economically reasonable means of reduction of the noise emissions exist. The Board notes that it cannot determine on the basis of the facts before it which of the several technically practicable strategies and their many variations would produce the most effective compliance alternative for Franke. Accordingly the Board will direct Franke to take what it views as the most effective alternative, with the only proviso that the choice effectuate compliance.

The Board will today levy no monetary penalty against Franke, but notes that pursuant to Section 42 of the Act, the Board is empowered to levy civil penalty up to $50,000 per violation and an additional penalty up to $10,000 for each day the violation continues. Should future violations be found concerning the site, penalties may be imposed.

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

ORDER

1. The Board finds that on April 24, 1986; September 10, 1986; August 13, 1987; September 3, 1987; April 7, 1988; April 24, 1988; January 26, 1991, February 23, 1991; February 22, 1991; April 8, 1991; April 27, 1991; May 2, 1991; May 9, 1991; July 13, 1991; and September 17, 1991; Don Franke (Franke) has violated Section 24 of the Act and 35 Ill. Adm. Code 900.102.

2. Franke is hereby ordered take necessary steps to comply with Section 24 of the Act and 35 Ill Adm. Code 900.102 at all times, and to cease and desist from further violations of the Act and Board regulations.

IT IS SO ORDERED.

Board Members J. Anderson, J. T. Meyer, and B. Forcade concurred.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1991 ch. 111½ par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 27th day of February, 1992, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board