ILLINOIS POLLUTION CONTROL BOARD
October 29, 1992

RONALD E. TEX and SUSAN D. TEX,	)	
	)	
Petitioners,	)	
	)	
v.	)	PCB 90-182
	)	(Enforcement)
S. SCOTT COGGESHALL and	)	
COGGESHALL CONSTRUCTION COMPANY,	)	
CHESTER BROSS, MIKE BROSS,	)	
JEFF BROSS and CHESTER BROSS	)	
CONSTRUCTION COMPANY,	)	
	)	
Respondents.	)	

JANE HARTLEY PRATT APPEARED ON BEHALF OF COMPLAINANTS

JAMES LLOYD APPEARED ON BEHALF OF RESPONDENT, COGGESHALL

CHARLES R. SVOBODA APPEARED ON BEHALF OF RESPONENT, BROSS

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

This matter is before the Board on the October 4, 1990, formal complaint filed by Ronald and Susan Tex (complainants) against S. Scott Coggeshall and Coggeshall Construction Company (collectively Coggeshall) and Chester, Mike and Jeff Bross and Bross Construction Company (collectively Bross). Public hearings were held in Macomb, Illinois on August 26, 1991, January 8, 1992, and January 9, 1992, at which no members of the public attended. The Bross respondents failed to participate at the January hearings nor did they file a post-hearing brief.

FACTS

Since 1980, complainants have resided in a single-family dwelling at 2001 West Jackson Street, Macomb, Illinois. Complainants' residence is located on Lot G of a parcel of property owned with James Tex, brother of Ronald Tex. (Tr. 8/26/92 at 29-31.) Other lots surrounding the Tex property include James Tex's residence, the Busby rental residence and two lots containing rental storage facilities. (Tr. 8/26/91 at 30-32, 79.) At one point, a motel was located on Lot A. (Tr. 8/26/91 at 79.) Complainants obtained a special use permit to erect their home on property zoned B-2 business by the City of Macomb. (Tr. 8/26/91 at 89.) Complainants' property is surrounded by an Elks Club, storage facilities, the Coggeshall Construction Company, a lumber yard, a gas company and a salvage yard. (Tr. 8/26/91 at 30-37,74, 80; Comp. Ex. 2.)

In 1985, Coggeshall Construction Company purchased an asphalt plant located in Dallas Texas, disassembled that plant and moved it to its current location in Macomb. (Tr. 1/9/92 at 223.) The asphalt plant is located approximately 390 feet from complainants' residence. (Tr. 8/26/91 at 32; Comp. Ex. 2.) Scott Coggeshall owns the property where the asphalt plant is located and Coggeshall Construction Company owns the plant itself. Coggeshall Construction Company operated the plant until a management and purchase agreement was entered into with Bross, who then operated the plant from September of 1989 through January 7, 1992. (Tr. 1/8/92 at 9; Tr. 1/9/92 at 213, 221, 262, 291-92; Resp. Ex. 10.) Coggeshall Construction Company is also engaged in the business of road construction. (Tr.)

Ronald Tex and Susan Tex testified that the noise from the asphalt plant vibrates the windows and floors and moves pictures and breaks glass in their home. (Tr. 8/26/91 at 42, 120.) The noise was described as "whining, roaring, a churning of machinery, generators and diesel engines" and as sounding "like a train." (Tr. 8/26/91 at 37-38, 105-06, 108.) According to Ronald, there is noise whenever the plant is operating and the noise varies from intolerable to extremely intolerable. (Tr. 8/26/91 at 39.) His children cannot tolerate the noise and cannot sleep when the plant is operating. (Tr. 8/26/91 at 41.) Ronald testified that he cannot use his backyard when the plant is operating. (Tr. 8/26/91 at 47.) Susan testified that she cannot sleep, that she and her daughter have headaches and she cannot entertain outdoors both because of the noise and dust emanating from the plant. (Tr. 8/26/91 107, 111, 115.) The dust from the plant covers everything, it stinks and burns the eyes. (Tr. 8/26.91 at 113-18.) Ronald testified that the noise occurs from sun-up to sun-down except on Sundays. (Tr. 8/26/91.) Susan testified that the noise begins anywhere between 7 a.m. to 10 a.m. (Tr. 8/26/91 at 112-113.) Both Ronald and Susan testified that neither the trains nor salvage yard near their property bother them. (Tr. 8/26/91 at 97-100, 140-42.) Ronald testified that the noise makes him irritable, he suffers more stress and that it has affected his entire lifestyle. (Tr. 8/26/91 at 39.) Relatives, neighbors and acquaintances of complainants substantiated the Texs' testimony (Tr. 8/26/92 at 178,187,207,221), including James Tex brother of Ronald Tex who lives on property adjacent to complainants.

Perry Cale, owner of the tow service and salvage yard north of and adjoining complainants' property, testified that he purchased his property from complainants in 1976. (Tr. 1/9/92 at 207.) Cale testified that his salvage yard is zoned I-2 industrial by the City of Macomb. (Tr. 1/9/92 at 207.) Cale testified that he operates his tow service and salvage yard six days a week from 8 a.m. to 5 p.m. unless it is summer and then he is usually "crushing cars until it is dark". (Tr. 1/9/92 at 208.) Cale describes his business as including the gasoline engine powered crusher as well as two forklifts and several trucks. (Tr. 1/9/92 at 208-209.) Cale testified that his

property is approximately 900-1000 feet from the Coggeshall plant and that he has never observed any vibrations from the plant. (Tr. 1/9/92 at 210.) Cale further testified that he has not had any problems with noise from the Coggeshall plant and does not have any problem conversing when the plant is operating. (Tr. 1/9/92 at 210-11.)

Monty DeCounter, president and owner of Western Illinois Equipment John Deere Dealership, testified that he had operated his equipment repair business from 1986 to 1990 on property which adjoined the Tex's to the south and the Coggeshall property to the north. (Tr. 1/9/92 at 277-278.) DeCounter testified that he had no problems conversing with his employees or customers because of the noise from the plant even though his building was 250 to 300 feet from the Coggeshall plant. (Tr. 1/9/92 at 280.) DeCounter further testified that he did not observe any noise vibration from the asphalt plant. (Tr. 1/9/92 at 280.)

ALLEGED VIOLATIONS

The complaint alleges that respondents have violated Sections 23 and 24 of the Environmental Protection Act (Act) prohibiting noise pollution. (Ill. Rev. Stat. 1991, ch. 111 1/2, pars. 1023 and 1024.) Although the complaint does not specifically allege numerical violations of the Board's noise regulations (35 Ill. Adm. Code 900 et seq.) testimony presented at hearing by Gregory Zak on behalf of complainants pertains to numerical noise violations. Complainants' post-hearing brief argues both a noise nuisance violation and a numerical noise violation as well as requesting relief from both alleged violations. Coggeshall has not objected to the allegation of a numerical noise violation and in fact, presented testimony and arguments regarding a noise study performed by it. Therefore, the Board will construe the arguments presented as an amendment to the complaint[1] address whether complainants have established a noise nuisance violation and a numerical noise violation.

On November 29, 1990, the Board entered an order construing complainants' response to Scott Coggeshall's motion to dismiss as a request to amend the complaint to add an allegation regarding dust pollution in violation of Section 9(a) of the Act. In its post-hearing brief, complainants ask that the Board find respondents in violation of Section 9 of the Act and Sections 201.121, 201.141 and 212.301 of the Board's air regulations. The language of the brief appears to indicate that petitioner is attempting, at the briefing stage, to allege numerical violations of the Board's air regulations. However, Section 201.121 merely provides that a permit is not a defense to a violation of the Act

[1] See 35 Ill. Adm. Code 103.210

or regulations. Section 201.121 does not prohibit or limit emissions in any way. Therefore, respondents cannot be in violation of this regulation. Additionally, although Section 201.141 prohibits air pollution and Section 212.301 prohibits the emission of fugitive particulate matter, complainants failed to present any evidence that the testing procedures outlined in Part 212 were followed in an attempt to show that respondents are in violation of any limitation in the Board's air regulations. Therefore, the Board will only address whether complainants have established an air nuisance violation.

Finally, in their post-hearing brief complainants allege that the emissions from the asphalt plant constitute odor violations in violation of Section 9 of the Act and Sections 201.102 and 201.141 of the Board's air pollution regulations. Section 201.102 does not prohibit air pollution, but merely defines it such that respondents cannot violate this regulation. As to the allegation that the odor violates the prohibition against air pollution in Section 201.141, complainants cannot raise such an allegation for the first time in their brief. While some testimony was given as to the odors emanating from the plant, complainants were never given leave to amend their complaint, as was done with the dust pollution allegation, to include alleged odor violations. Therefore, the Board finds that the allegation of odor pollution, raised for the first time in complainants' post-hearing brief, is not before the Board.

ANALYSIS

Numerical Noise Violation

Section 901.102(a) provides that no person shall cause or allow the emission of sound during daytime hours from property located on any Class A, B or C land to receiving Class A land in excess of certain enumerated allowable octave band sound pressure levels. The parties disagree as to the proper classification of complainants' property. The regulations adopt a standard land use coding manual (SLUCM). (35 Ill. Adm. Code Subtitle H Appendix B.) Complainants contend that their property should be classified as Class A such that the asphalt plant would be in violation of the allowable limits applicable to emissions from Class C land to Class A land. Coggeshall argues that complainants' property should be classified as Class B land and that based upon the limits imposed between Class B and Class C land, complainants have failed to establish a numerical violation.

Gregory Zak, noise technical advisor for the Illinois Environmental Protection Agency (Tr. 1/8/92 at 25) testified that in the early 1970's he was "involved and had input into the standard land use coding system." (Tr. 1/8/92 at 27.) Zak

testified that the SLUCM classifies property by use as opposed to local zoning and that, generally, Class A land is residential, Class B land is commercial and Class C land is heavy industrial. (Tr. 1/8/92 at 28.) Zak opined that the Coggeshall plant would fall under the category of "paving mixtures and blocks-manufacturing" and, therefore, be classified as Class C land. (35 Ill. Adm. Code 901.101(a) Appendix B at B-6 Code 2921.) Zak also opined that complainants' property (i.e., Lot G) is a "household unit" entitled to Class A protection (35 Ill. Adm. Code 901.101(a) Appendix B at B-1 Code 1100). (Tr. 1/8/92 at 79-80.)

Paul Ziegler, zoning officer for the City of Macomb, testified on behalf of Coggeshall. Ziegler testified that the Coggeshall plant is zoned I-2 industrial, complainants' property is zoned B-2 business and the surrounding property is zoned I-2 and B-2. (Tr. 1/9/92 at 192-94, 197; Resp. Ex. 5, 6.)

Jim Powers, an electrical engineer, testified that he performed a sound emissions study at the Tex/Coggeshall property line. (Tr. 1/9/92 at 231.) Powers opined that the Tex property (Lot G) is Class B land and the Coggeshall plant is Class C land. (Tr. 1/9/92 at 234-36.)

George Potter, a retired real estate appraiser and professor, testified that he was familiar with the property in question and the SLUCM. (Tr. 1/9/92 at 201.) Potter opined that the Coggeshall plant is Class C land and the Tex property is Class B land. (Tr. 1/9/92 at 201-02; Resp. Ex 9.) Potter testified that the Tex property fell under the category of "other dwelling and building services not elsewhere classified". (35 Ill. Adm. Code 901.101(b) Appendix B at B-17 Code 6349.) Potter also testified as to the difference between real and personal property and that, under Paragraph 71-1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1991, ch. 38, par. 71-1), the personal property located on the Coggeshall property is construction equipment. (Tr. 1/9/92 at 202-05; Resp. Ex. 9.)

In adopting the Standard Land Use Classification Manual, the Board stated the following:

> This rule provides the basic differentiation between land uses of varying noise sensitivity, classifying land uses both as potential noise emitters and noise receivers. The classes in order of decreasing sensitivity as receivers are roughly described by use as follows: Class A - residential and institutional; Class B - commercial and business; Class C - industrial.
>
> The classification of land is dependent on the actual use being made of the land, rather than on anticipated or planned use such as could occur if the classifications were

> based on zoning. This is not to say that zoning is not a factor in these regulations because it is, in implicit terms. Zoning largely determines land use which, in turn, determines the applicable noise regulations. Thus, the application of the regulations is based indirectly on local zoning decisions, and a conflict in land uses from a noise standpoint relates back to the zoning decision that determined the conflict.
>
> (In the Matter of: Noise Pollution Control Regulations (July 31, 1973) R97-2 at 23.)

The record establishes that complainants' residence, located on Lot G (Comp. Ex. 1), is a house intended for occupancy as separate living quarters as defined by the SLUCM. (35 Ill. Adm. Code 901.101(a) Appendix B-1.) Simply because complainants own other surrounding lots which are used as both commercial and residential rental property does not negate the fact that complainants parcel of property is in fact used as a "household unit" subject to Class A land protection. The Board's review of the record, the noise regulations and the policy behind adopting the SLUCM leads it to conclude that complainants' property (Lot G) is Class A land.

Coggeshall argues that it is exempt from the requirements of Section 901.102(a) because Section 901.107(d) exempts "sound emitted from equipment being used for construction". (35 Ill. Adm. Code 901.107(d).) Coggeshall relies on Paragraph 71-1 of the Criminal Code of 1961 to argue that equipment located at the asphalt plant is "construction equipment".

As opposed to relying on a provision in the Criminal Code of 1961 which makes it a misdemeanor to deface identification marks on construction equipment, the Board will look to its definition of "construction" set forth in Section 900.101 of the noise regulations. (35 Ill. Adm. Code 900.101.) The Board defines "construction" as the:

> on-site erection, fabrication, installation, alteration, demolition or removal of any structure, facility, or addition thereto, including all related activities including, but not limited to, clearing of land, earth-moving, blasting and landscaping.

In adopting the exemption for equipment used in construction, the Board noted, "[t]he exemption refers to the use of the equipment so that if similar equipment is used for different activities ... the exemption would not apply". (In the Matter of: Noise Pollution Control Regulations (July 31, 1973), R72-2 at 30.)

The equipment used at Coggeshall's asphalt plant does not fit the definition of equipment used for construction. The

production of asphalt at the plant does not entail the "on-site erection, fabrication, installation, alteration, demolition or removal of any structure". The Board's opinion in R72-2 makes clear that Coggeshall's asphalt plant is not exempt under 901.107(d) simply because some of the same equipment may be used at the asphalt plant and at a construction site. Additionally, merely because Coggeshall is also engaged in road construction does not render equipment used in producing asphalt "construction" equipment as defined by the regulations. Therefore, the Board rejects Coggeshall's argument that it is exempt from the requirements of 901.102(a).

Having concluded that complainants' property is Class A land and that the Coggeshall asphalt plant is Class C land not entitled to any exemption, the Board must determine whether complainants have established that sound emissions from the plant violate Section 901.102(a).

Gregory Zak testified that he prepared a study of the sound emissions from the plant received at complainants' property. (Tr. 1/8/92 at 39; Comp. Ex. 16.) Tests were performed on August 16, 1991, from 10:30 a.m. to 1 p.m. and August 19, 1991, at 5:20 a.m. to 7:30 a.m. (Tr. 1/8/92 at 40; Comp. Ex. 16 at 1-2.) Zak used a Larson-Davis 3100 Real Time Analyzer to perform the tests. (Tr. 1/8/92 at 40; Comp. Ex. 16 at 1-2.) The microphone used was a precision microphone meeting applicable ANSI standards. (Tr. 1/8/92 at 41; Comp. Ex. 16 at 1-2.) The microphone was angled at zero degrees and placed at a height four feet above the ground and located approximately 400 feet from the plant. (Tr. 1/8/92 at 41, 54; Comp. Ex. 16 at 1-2, 5.) The distance from the Tex residence to the microphone was approximately 90 feet. (Tr. 1/8/92 at 55; Comp. Ex. 16 at 5.) The study describes the atmospheric conditions and field calibrations. (Comp. Ex. 16 at 1-2; Tr. 1/8/92 at 41.) Zak testified that the equipment complies with the Board's testing procedures. (Tr. 1/8/92 at 44.)

Zak's study includes an octave band survey of data gathered from the emissions from the plant. (Comp. Ex. 16 at 3; Tr. 1/8/92 at 45.) The data described as Survey Site No. 1-1 represents the sound emissions, or raw sound values, measured without adjusting the raw data for ambient conditions. Site No. 1-2 refers to sounds levels measured during lunchtime, which reflect ambient conditions. Site No. 1-3 represents the correction for ambient sound which must be applied to the raw sound values. The data described as Site No. 1-4 represents the sound levels after the raw levels have been adjusted to remove the impact of ambient sound. These are the sound levels attributable to the asphalt plant. (Comp. Ex. 16 at 3; Tr. 1/8/92 at 46-48.) Zak compared the information from Site No. 1-4 to the numerical limits in Section 901.102(a) to arrive at the reduction needed for compliance. (Comp. Ex. 16 at 3; Tr. 1/8/92

at 48-50.) The study also includes a graphic representation of the above data and pictures showing the location of the microphone. (Comp. Ex. 16 at 4; Tr. 1/8/92 at 52, 58-60.)

Attachment A of the study is a printout of the memory of the 3100 Real Time Analyzer. (Comp. Ex. 16 Att. A.; Tr. 1/8/92 at 60.) The printout indicates proper calibration of the instrument, and indicates the type of sound band measurements being recorded. (Comp. Ex. 16 Att. A at 1, 3; Tr. 1/8/92 at 61, 69-70.) The printout also establishes that the analyzer took an L_{eq} measurement as required by Board regulations. (Comp. Ex. 16 Att. A at 5, 6; Tr. 1/8/92 at 62, 70, 73, 76.) Zak testified that the information in the printout was used to "compare the calibration at the beginning to the calibration at the end in order to establish whether or not the analyzer drifted sufficiently to have to throw the data away or make the data valid". (Tr. 1/8/92 at 63.) Zak testified that the information obtained in the printouts formed the basis of his conclusion that the plant was in violation of Section 901.102(a) and that reductions are needed. (Tr. 1/8/92 at 77-78; Comp. Ex. 16 at 3.) Testing done on August 19, 1991 was done solely to establish the integrity of the ambient levels at both third octave band and single octave band settings. (Comp. Ex. 16 Att. A at 13-16; Tr. 1/8/92 at 93-96.) Based upon the study, Zak opined that the Coggeshall plant was in violation of Section 901.102(a) of the Board's noise regulations. (Tr. 1/8/92 at 104.)

Jim Powers, an electrical engineer, prepared a sound emissions report on behalf of Coggeshall. (Tr. 1/9/92 at 229; Resp. Ex. 11-13.) Powers conducted a test on August 20, 1991, between 10:30 a.m. and noon at three different locations on the Tex property using a Rion Sound Level Meter Model NA-23. (Tr. 1/9/92 at 232; Resp. Ex. 11, 12.) Powers testified that the equipment was calibrated both before and after testing. (Tr. 1/9/92 at 233.) The report indicates atmospheric conditions and that the sound measurements were taken more than 25 feet from the property-line-noise source. (Comp. Ex. 11; Tr. 1/9/92 at 234.) The sound readings are in both dB and dB(A). (Tr. 1/9/92 at 238-40, 251-52; Comp. Ex. 12.) Powers testified that he believed L_{eq} measurements were taken, although he was not the person who actually performed the tests. (Tr. 1/9/92 at 250.) Powers classified the Tex property as Class B land and the plant as Class C and concluded that, with the exception of the 4,000 and 8,000 hertz readings, the plant was in compliance with Section 901.103 governing emissions from Class C to Class B land. (Tr. 1/9/92 at 242; Comp. Ex. 12.) Powers testified that he classified the Tex property based upon the B-2 zoning of the property by the City of Macomb. (Tr. 1/9/92 at 245.)

Zak testified that the Rion Model NA-23 used by Powers does not calibrate the microphone and is a Type II sound level meter

incapable of rendering an L_{eq} measurement. (Tr. 1/9/92 at 329 - 31; Comp. Ex. 17.)

Discussion of the Sound Measurement Data

One of the major problems that the Board frequently encounters in dealing with noise enforcement cases is the quality of sound measurement data presented to the Board in support of the claims made by the complainant or the respondent. In order to show compliance with, or establish a violation of the Board's sound emission standards for property-line-noise-sources at 35 Ill. Adm. Code 901.102, the sound emissions from the source must be measured in accordance with the Board regulations at 35 Ill. Adm. Code 900 and 901. These regulations prescribe procedures for the measurement of sound pressure levels, and specifications for the instrumentation used to measure sound levels. If the sound measurement data presented to the Board are obtained by methods which do not meet the applicable standards, then the validity of such data becomes questionable.

In the present case, the noise measurement data presented by Zak on behalf of the petitioners (Comp. Ex. 16) is a good example of valid sound measurement data. The instrumentation and the procedures used to measure the sound levels are in accordance with the Board regulations at 35 Ill. Adm. Code 900 and 901. First, the sound level meter used in the study, Larson-Davis 3100 real time analyzer (RTA), complies with the standards prescribed at 35 Ill. Adm. Code 900.103(b). (Tr. 1/8/92 at 44.) The Board notes that the RTA is a Type I precision device capable of measuring the full spectrum of sound frequencies specified in the Board regulations simultaneously and present the data in terms of L_{eq} averaging as defined at 35 Ill. Adm. Code 900.101.

Second, the sound measurement data included in the Zak study indicate that the sound levels have been recorded in accordance with the 1-hour L_{eq} requirement of 35 Ill. Adm. Code 900, i.e the sound levels have been measured at different octave band center frequencies on the basis of L_{eq} averaging over a period of one hour. (Comp. Ex. 16 Att. A at 5.) Also, the sound level measurements have been corrected for the presence of ambient sound as required by the Board regulations. (Comp. Ex. 16 at 3.) In this regard, the Board notes that only sound levels measured on the basis of L_{eq} averaging over a period of one hour and corrected for ambient sound can be compared with the allowable octave band sound pressure levels specified at 35 Ill. Adm. Code 901.102 to show compliance or non-compliance.

Finally, the Board notes that the Zak study appears to meet all the requirements of the Agency's regulations at 35 Ill. Adm.

Code 951[2], and includes all the necessary information that is needed to evaluate the sound level data to make a determination of compliance or non-compliance. The information in the report includes the weather conditions, octave band survey of the sound data in written and graphical forms, a map and pictures showing the location of the sound source and the measurement point, and a printout of the raw sound level data including calibration data from the memory register of the RTA.

Regarding the sound measurement data presented by Jim Powers on behalf of Coggeshall, the Board notes that information presented in the noise report, and the hearing testimony indicate that the instrumentation and procedures used to measure the sound levels are not in accordance with the Board regulations at 35 Ill. Adm. Code 900.103(b). (Resp. Ex. 11; Tr. 1/9/92 at 253-55, 329-31.) Therefore, the Board cannot consider the sound level data presented by Powers to make a determination of compliance or non-compliance. Also, since the Board has concluded that the Tex property is Class A land subject to the limitations of Section 901.102 (a), the conclusions reached by Powers based upon Section 901.103 are irrelevant to a determination of whether Coggeshall's Class C property is violating the allowable octave band sound pressure limits applicable to sound emitted to Class A land.

The following compares levels, measured in dB, allowed by Section 901.102(a) and those emitted from the plant as found by the Zak study:

Octave Band Center Frequency (Hertz)	Class C Land to Class A	Asphalt Plant
31.5	75	79
63	74	79
125	69	76
250	64	61
500	58	62
1000	52	61
2000	47	57
4000	43	54
8000	40	55

Based upon the sound emissions data prepared by Zak, the Board finds that complainants have established that emissions from the asphalt plant violated Section 901.102(a). In his post-hearing brief, Scott Coggeshall has again asked that he be dismissed as a respondent because "he is the mere owner of the

[2]Part 951 contains procedures for sound level measurements adopted by the Agency pursuant to 35 Ill. Adm. Code 900.103 for the purpose of enforcing Board's noise regulations at 35 Ill. Adm. Code 900 and 901.

land". As the Board stated in its December 20, 1990, order, Section 24 prohibits the emission of sound beyond the boundaries of a person's property in violation of the Board's noise regulations. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1024.) As the owner of the property on which the asphalt plant is located, Scott Coggeshall is in violation of Section 901.102(a). The record also establishes that Coggeshall Construction Company owns the plant itself. Therefore, Coggeshall Construction Company is also in violation of Section 901.102(a). The Board notes that on the days that the Zak tests were performed, the Bross respondents were operating the asphalt plant pursuant to their management and purchase agreement. (Tr. 1/9/92 at 291-92; Resp. Ex. 10.) As noted above, Bross failed to present any evidence at hearing, having left the January 8, 1992, hearing, nor did Bross file a post-hearing brief. Because the record establishes that the plant was in violation of Section 901.102(a) while being operated by Bross, the Bross respondents are also found in violation of Section 901.102(a).

Nuisance

Complainants allege that the respondents have violated Sections 9, 23 and 24 of the Act. In a "nuisance" case quantification of noise or dust is immaterial in determining whether such a violation has occurred. (Ferndale Heights Utilities Co. v. Illinois Pollution Control Board (1st Dist. 1976), 44 Ill. App. 3d 967, 358 N.E.2d 1224, 1228.) The Act and Board rules prohibit both noise and air pollution.[3]

With regards to "nuisance noise", the prohibitions in the Act and Board regulations turn on the degree to which the noise interferes with a complainant's normal activities. Thus, Section 900.102 of the Board's rules provides:

> No person shall cause or allow the emission of sound beyond the boundaries of his property . . . so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter.

The rules define "noise pollution" as "the emission of sound that

[3]Coggeshall has again raised the argument in its brief that complainants must prove that the general public is affected by the emissions from the plant. As the Board stated in its December 20, 1990, order, the Act grants individual citizens the authority to enforce the Act and regulations. Numerous Board opinions in noise nuisance cases also establishes that a complainants establishes a violation upon showing that he/she has suffered unreasonable interference. (eg cites)

unreasonably interferes with the enjoyment of life or with any lawful business or activity." 35 Ill. Adm. Code 900.101 (1987). Section 24 of the Act prohibits noise pollution in almost identical terms:

> 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.
>
> Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1024.

In addition, the prohibition against air pollution in Section 9(a) of the Act provides:

> No person shall cause or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants form other sources, or so as to violate regulations or standards adopted by the Board under this Act.
>
> Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1009.

Section 3.02 of the Act defines "air pollution" as:

> the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property or to unreasonably interfere with the enjoyment of life or property.
>
> Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.03.

Thus, under the Act and Board regulations, a noise or air violation has occurred if the complainant has proven that the complained of noise or dust has unreasonably interfered with the complainant's enjoyment of life or with his pursuit of any lawful business or activity.

With regard to the alleged violation of Section 24 of the Act, the Board has previously determined in "nuisance noise" proceedings that unreasonable interference is more than an ability to distinguish sounds attributable to a particular source. Rather, the sounds must objectively affect the complainant's life or business activities. (See Kvatsak v. St.

Michael's Lutheran Church (Aug. 30, 1990), PCB 89-182, 114 PCB 765, 773; Kochanski v. Hinsdale Golf Club (July 13, 1989), PCB 88-16, 101 PCB 11, 20-21, rev'd on other grounds, 197 Ill. App. 3d 634, 555 N.E.2d 31 (2d Dist. 1990)).

The Illinois Supreme Court held that the Board must consider the facts of the case in light of the factors outlined by 33(c) of the Act in determining whether unreasonable interference has occurred under the Act and Board rules. Wells Manufacturing Co. v. PCB (1978), 73 Ill. 2d 226, 232-33, 383 N.E.2d 148, 150-51 ("nuisance" air pollution; first four factors only); see Ferndale Heights Utilities, 44 Ill. App. 3d at 967-68, 358 N.E.2d at 1228. Those factors as set forth in Section 33 (c) of the Act are as follows:

(i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

(ii) the social and economic value of the pollution source;

(iii) 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;

(iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions . . . resulting from such pollution source; and

(v) any subsequent compliance.

Character and Degree of the Injury or Interference

Complainants testified that the sound from the asphalt plant vibrates the windows, floors and personal items in their home. The sound prevents them from using their backyard and interferes with their sleep and affects their health. Complainants also testified that the dust "mushrooms in a bomb on a regular basis" (Tr. 8/26/91 at 50) and covers everything in their yard. Complainants testified that the dust from the asphalt plant is different from dust from the dirt driveway in that it is "whiter and stickier" (Tr.). Susan testified that her eyes burn and she and her daughter have headaches from the dust. The testimony of James Tex and others who have visited the Tex residence substantiate complainants' testimony as to both the dust and the sound.

Perry Cale, owner of the salvage yard, and Monty DeCounter, owner of the John Deere Dealership, testified that they were not bothered by any noise or vibrations from the asphalt plant. (Tr. 1/9/92 at 210-11, 279.)

The record establishes that the asphalt plant is not operated on a year-round basis. In 1987, the plant was in operation 60 days, in 1988 it was operated 44 days, in 1989 it was in operation under Bross for 20 days, in 1990 under Bross the plant was operated 170 days and in 1991 Bross operated the plant 120 days. (Tr. 1/9/92 at 290-93.)

Social or Economic Value of the Source

The record indicates the asphalt plant, as opposed to Coggeshall Construction Company, employs approximately three people full time. (Tr. 1/9/92 at 302-03.) Coggeshall Construction Company employs approximately four full-time employees. (Tr. 1/9/92 at 304, 306.) Depending on the time of year, Coggeshall Construction Company employs approximately 40-80 laborers, operators, teamsters and iron workers and has a payroll of anywhere between $114,540 to approximately $975,000. (Tr. 1/9/92 at 294-96.)

Suitability or Unsuitability of the Source

The record establishes that the asphalt plant is zoned I-2 industrial and the Tex property is zoned B-2 business by the City of Macomb. Complainants obtained a special permit from the city to build their residence. Generally, other surrounding property is zoned ether industrial or business. A salvage yard, lumber company, nursery, gas company and storage facilities surround the Tex property.

As to priority of location, the record indicates that the Tex's built their home before the asphalt plant was constructed. However, prior to construction of the asphalt plant, a storage site for construction equipment and materials was located at the site. (Tr. 8/26/91 at 85-86; Tr. 1/9/92 at 263-64.)

Technical Practicability and Economic Reasonableness of Control

Zak testified to alternative methods of controlling sound emissions. He opined that erection of a barrier, such as a wall or fence, between the two properties would not solve the "16 hertz problem." (Tr. 1//8/92 at 104-05.) He also testified that re-engineering of the plant itself is not practicable because of the cost would exceed $100,000. (Tr. 1/8/92 at 106-10.) According to Zak, "[a]nother possibility which would still be expensive would be to encapsulate the plant in a reinforced concrete structure." (Tr. 1/8/92 at 110-11.) Lastly, Zak suggested moving the plant, which he estimated would cost

approximately $15,000. (Tr. 1/8/92 at 111-17.) Zak testified that he was familiar with the relocating of an asphalt plant in Springfield. (Tr. 1/8/92 at 116.)

Coggeshall introduced the testimony of Mike Hillyer, an estimator and manager, who stated he was familiar with the asphalt plant in Springfield and that he believed it would cost in excess of $60,000 to relocate the asphalt plant. (Tr. 1/9/92 at 320-22.) He also testified that he was not aware that the plant in Springfield had actually been moved and that, every time a plant is moved, it depreciates in value. (Tr. 1/9/92 at 321-23.)

Subsequent Compliance

The record does not indicate that there has been any subsequent compliance with the Act or regulations. The Board notes that although Coggeshall introduced evidence that it has the requisite air permits from the Illinois Environmental Protection Agency (Tr. 1/9/92 at 265-69), the air regulations make clear that the existence of a permit is not a defense to a violation of the Act or regulations. (35 Ill. Adm. Code 201.121.) As noted above, Bross failed to introduce any testimony at hearing.

Nuisance Finding

Complainants have shown the noise and dust emanating from the plant has interfered with their lives. However, the plant has social and economic value in that it employs persons in the area. The record clearly establishes that the plant is in an area zoned for industrial and is in a suitable location. The area was zoned for industry when the complainants built their home, although the plant was not at the present location. In addition, owners of adjacent properties testified at hearing that they were not bothered by noise from the asphalt plant. Therefore after considering the facts and circumstances of this case, including factors outlined in Section 33(c) of the Act, the Board finds that respondents' emissions of noise and dust do not constitute an unreasonable interference with complainants' enjoyment of life and lawful activity.

CONCLUSION

The Board finds that respondents have violated 35 Ill. Adm. Code 901.102(a). Noise from respondent's Class C property is violating the allowable octave band sound pressure limits applicable to sound emitted to Class A land. The Board further finds that the noise and dust emanating from respondent's facility do not constitute an unreasonable interference.

Therefore, the counts of the complaint alleging such violation are dismissed.

REMEDY

Having found a violation of 35 Ill. Adm. Code 901.102(a) the Board must determine the appropriate remedy. Section 33(b) of the Act provides that the Board may direct that respondents cease and desist from violations of the Act and regulations, impose civil penalties and order other appropriate relief. (Ill. Rev. Stat. 1991, ch. 111 1/2, pars. 1033(b), 1042(a).)

In its order of March 26, 1992, the Board noted that, at the January 8, 1992 hearing, complainants stated that in addition to seeking a cease and desist order, they also sought "any and all relief" available. (PCB 90-182 (March 26, 1992) at 2.) The Board declines, at this time, to impose a civil penalty. In determining the proper remedy, the Board must again examine the provisions of Section 33(c) or the Act. The Board notes that the complainants have requested that the Board order the respondents to cease and desist from the violations. At this time the Board believes that such a remedy is inappropriate as it is not clear from the record what actions respondent could take short of shutting down to cease and desist from the violation. Therefore, the Board will direct the respondents to study the economic reasonableness and technical practicability of the control options outlined by Gregory Zak as well as any additional options which it may deem appropriate to reduce the noise emanating from the plant. This study shall be filed with the Board no later than March 15, 1993.

ORDER

1.) The Board finds that respondents Bross, Scott Coggeshall and Coggeshall Construction Company have violated Section 901.102(a) of the Board's noise regulations.

2.) Respondents shall study the economic reasonableness and technical practicability of the control options outlined by Gregory Zak as well as any additional options which it may deem appropriate to reduce the noise emissions from the asphalt plant. This study shall be filed with the Board and served upon complainants no later than March 15, 1993. Complainants shall file a response with the Board and served upon respondent no later than April 15, 1993.

IT IS SO ORDERED.

Board Members Ronald Flemal and J. Theodore Meyer dissented. Board Member Michael Nardulli concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 22nd day of October, 1992 by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board