

ILLINOIS POLLUTION CONTROL BOARD
February 28, 1991

BRIAN J. PETER,)
)
 Complainant,)
)
 v.) PCB 89-151
) (Enforcement)
 GENEVA MEAT AND FISH MARKET,)
 GARY PIKULSKI and JODY C. BOYER,)
)
 Respondent.)

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

As an initial matter, the Board changes the caption in this proceeding to reflect the name of an additional Respondent, Jody C. Boyer, who, through her attorney, has been responding to Board Orders, and who is the current owner of the property (See report filed April 27, 1990).

On January 24, 1991, Respondent filed a motion to reconsider the Board's December 20, 1990 Order in this proceeding and to hold a hearing. In the alternative, Respondent requested from the Board an adjusted standard from the applicable noise regulations.

Complainant filed its reply on February 4, 1991, arguing that the motion to reconsider is not timely as it was filed more than 35 days after the Board's Opinion and Order of March 22, 1990¹. In the alternative, Complainant argues that the October 23, 1990 readings taken by the consulting engineers indicate continued violations of the Board's nighttime noise regulations, and asks the Board to impose penalties as indicated by the Act.

The Board finds that Respondent's motion to reconsider is timely. Respondent's motion contains arguments which address specific findings contained in the December 20, 1990 Order, and is not merely a motion to reconsider the March 22, 1990 Opinion and Order. However, the Board finds that Respondent presents no new material facts which would convince the Board to change the December 20, 1990 Order. Respondent continues to argue that the

¹In the March 22, 1990 Opinion and Order, the Board found Respondent in violation of 35 Ill. Adm. Code 900.102 and 901.102 of the Board's regulations, and ordered Respondent to cease and desist from such violations.

consulting engineers' report shows compliance has been achieved, except for noise attributable to street traffic and insects.

In its December 20, 1990 Order, the Board found that the Report of Abatement Procedures and consulting engineer's report submitted by Respondent on November 1, 1990 showed continued exceedances of the Board's nighttime noise regulations, noting that some of the exceedances were attributable to rooftop fans and furnaces. The Board gave Respondent until January 30, 1991 to demonstrate compliance with the regulations, and further stated that penalties may be imposed.

Based upon the above, the Board denies the motion to reconsider. Furthermore, Respondent has not demonstrated compliance at any time between March 22, 1990, the date of the initial Board Order finding Respondent in violation and the date of this Order. In that Opinion, the Board reserved its option under Section 42 of the Illinois Environmental Protection Act ("Act"), to levy a civil penalty for continuing violations of the Board regulations.

MAXIMUM PENALTY

As stated in the Board's March 22 Opinion, the penalty provisions under Section 42 of the Act provide for civil penalties up to \$10,000 per violation, with an additional \$1,000 per day for each day during which violation continues². Since the record indicates violations from 1987 to the present, the maximum penalty which could be imposed would be quite large.

STATUTORY FACTORS

As discussed in the March 22, 1990 Opinion and Order, the Board is charged under Section 33(c) of the Act to take into account all the facts and circumstances bearing on the reasonableness of the emissions, with such consideration including:

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

²The penalty provision at the time of the Board's March 22, 1990 Opinion and Order contained the amounts indicated here. That provision has been amended effective July 1, 1990 to increase the amounts to \$50,000 per violation and \$10,000 for each day such violation continues. The Board will here apply the penalty provision in effect on March 22, 1990.

the question of priority of location in the area involved;

4. the technical practicability and economic reasonableness or reducing or eliminating the emissions, discharges or deposits resulting from such pollution source;
5. any economic benefits accrued by a noncomplying pollution source because of its delay in compliance with pollution control requirements; and
6. any subsequent compliance.

(Section 33(c) of the Act)

In determining whether a penalty should now be imposed, the Board again considers the Section 33(c) factors:

As regards Section 33(c)(1), the Board refers to the findings of its March 22, 1990 Opinion and Order, where the Board found substantial interference with the health and general welfare of Complainant.

For Section 33(c)(2), the Board again accepts that the Respondent's facility has social and economic benefit, although that benefit is diminished by the fact that continuing violations exist.

For Section 33(c)(3), the Complainant has been found to have priority of location. There is no information as to the suitability of location of Respondent's facility, except that noise from the facility is impacting the adjacent residence occupants. However, the record does not indicate any noncompliance with local zoning ordinances.

For Section 33(c)(4), since the Board's March 22 Opinion, the record now contains information that modifications have been made which have reduced the numerical noise limits. As discussed in Respondent's April 27, 1990 report, these include installation of a plywood enclosure for rooftop condensers, ninety-degree elbows fitted to the exhausts of the heat pumps, and disconnection of three rooftop air cooled condensers. The report further indicates that the ownership of the property had changed, and that the disconnection of the three condensers was due to a change in business requirements, rather than due to desire to reduce the noise.

Also pertaining to Section 33(c)(4), notwithstanding these building modifications, the numerical noise limits continue to be exceeded, and no information has been offered as to whether the failure to meet the limitations are the result of a technical impracticability. Also, no information has been submitted that

all further possible adjustments which would result in compliance are economically unreasonable. However, Respondent has requested an adjusted standard in the instant motion. The Board notes that Respondent is free to file a petition for adjusted standard or site specific rule meeting the requirements for such petitions pursuant to Sections 106.705 or 102.141 of the Board's procedural rules.

As regards Section 33(c)(5), the violations have continued since November 1987, and Respondent has been accruing the economic benefits of operation of its facility without compliance. However, the Respondent has spent certain unreported funds in installing equipment in an attempt to achieve compliance.

Notwithstanding Respondent's attempts to achieve compliance through installing some noise reduction equipment, compliance has not been achieved to date, and no indication has been made that compliance would be forthcoming.

The Board must also consider the factors in Section 42(h) in determining whether a penalty shall be imposed. Section 42(h) states:

1. the duration and gravity of the violation;
2. the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
3. any economic benefits accrued by the violator because of delay in compliance with requirements;
4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and
5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.

Respondent continues to operate equipment that results in exceedances of the Board's noise regulations. However, reductions which can be considered substantial reductions have occurred due to installation of noise abatement devices and the discontinued use of some refrigeration units, which are not needed by the present occupant. Therefore, the gravity of the violation can be considered to be lessened, though continuing.

Subsequent to the finding of violation by the Board on March 22, 1990, Respondent has exhibited due diligence in attempting to comply with the requirements of the Act and Board regulations through installation of noise abatement equipment and monitoring noise levels.

Again, Respondent has accrued economic benefit of revenues associated with continued operation of equipment which results in violations of the Board's regulations, as discussed regarding Section 33(c)(5).

The record does not disclose any previously adjudicated violations of the Act by Respondent.

CONCLUSION

The Board finds that a penalty of \$1000.00 is appropriate in this instance, based on the duration of the violations and to serve to deter further violations and otherwise aid in enhancing voluntary compliance by the Respondent or others similarly situated. The \$1000.00 violation is also indicated by review of the Section 42(h) factors discussed above, the Section 33(c) factors as discussed above and in the Board's March 22, 1990 Opinion, and supported by the findings of continued violation indicated in Board Orders to date.

Specifically, the Board's review indicates substantial interference with the health and general welfare of Complainant, and violations of the applicable noise regulations which date back to 1987 and are continuing. There is also no evidence that compliance is either technically impractical or economically unreasonable. Therefore, the Board may impose a higher penalty under the Act. However, although the Board may impose a larger penalty, under the Act, Respondent's abatement attempts, though unsuccessful to achieve compliance, yielded some substantial reduction in noise levels, causing the gravity of the violations to be lessened. These actions further indicate good faith and due diligence which mitigate against a higher penalty.

By today's action, the Board renders its Supplemental Opinion and Final Order and closes this docket. Any effort to enforce any Board Orders now flows to the Circuit Court.

This Opinion, in conjunction with the March 22, 1990 Opinion, constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

- 1) a) Respondent shall pay the sum of \$1000.00 within 60 days of the date of this Order. Such payment shall be by certified check or money order payable to the Treasurer of the

State of Illinois, designated to the Environmental Protection Trust Fund, and shall be sent by first class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

- b) Respondent shall also write its Federal Employer Identification Number or Social Security Number on the certified check or money order.
 - c) Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (Ill. Rev. Stat. ch. 120, ¶10-1003); as now or hereafter amended, from the date payment is due until the date payment is received. Time for payment stayed during the pendency of an appeal shall also stay the accrual of such interest during the period of the stay.
- 2) Respondent shall cease and desist for violations of 35 Ill. Adm. Code 900.102 and 901.102 of the Board's regulations.
 - 3) The docket in this matter is hereby closed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989 ch. 111 1/2 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.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion and Final Order was adopted on the 28th day of February, 1991, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board