

ILLINOIS POLLUTION CONTROL BOARD
August 5, 1999

LAWRENCE C. SWEDA,)
)
 Complainant,)
)
 v.) PCB 99-38
) (Enforcement - Noise, Citizens)
 OUTBOARD MARINE CORPORATION)
 and the CITY OF WAUKEGAN,)
)
 Respondents.)

LAWRENCE C. SWEDA APPEARED *PRO SE*;

THOMAS LUPO AND SUSANNAH A. SMETANA, OF SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, APPEARED ON BEHALF OF RESPONDENT OUTBOARD MARINE CORPORATION; and

HEIDI J. AAVANG, OF DIVER, GRACH, QUADE & MASSINI, APPEARED ON BEHALF OF RESPONDENT THE CITY OF WAUKEGAN.

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This case is before the Illinois Pollution Control Board on a complaint filed on August 21, 1998, by complainant Lawrence C. Sweda against two respondents, Outboard Marine Corporation (OMC) and the City of Waukegan (City). The complaint alleges noise pollution in violation of Sections 23 and 24 of the Illinois Environmental Protection Act (Act) (415 ILCS 5/23, 24 (1998)) and two of the Board's noise regulations, 35 Ill. Adm. Code 900.102 and 901.104. The complaint is based on noise from propane cannons used by respondents to frighten away seagulls that would otherwise nest at respondents' facilities near Waukegan harbor.

The respondents each filed motions to dismiss this matter as frivolous. In an order adopted on September 17, 1998, the Board dismissed the alleged violations of Section 23 of the Act but concluded that the other claims in the complaint were not frivolous, and directed the parties to proceed to hearing. A hearing was held before Board Hearing Officer John Knittle on April 19 and 20, 1999, in Waukegan, Lake County, Illinois. Respondents filed posthearing briefs on May 28, 1999. Complainant did not file a posthearing brief or reply brief.

After reviewing the record, the Board concludes that respondents' actions do not constitute a violation of 35 Ill. Adm. Code 900.102. The Board further finds the evidence insufficient to establish a violation of 35 Ill. Adm. Code 901.104. Having found no violation of Section 900.102 or Section 901.104, the Board finds no violation of Section 24 of the Act. Section 24 prohibits any person from emitting noise "beyond the boundaries of his property . . . so as to violate any regulation or standard adopted by the Board." (Emphasis added.)

MOTION TO EXCLUDE TESTIMONY

A procedural issue requires resolution before we turn to the merits of this case. On May 28, 1999, OMC filed a motion with the Board seeking to exclude the opinion testimony of Greg Zak. Zak, noise advisor for the Illinois Environmental Protection Agency, was called by Sweda and testified on his behalf. The basis of OMC's motion was that Sweda failed to disclose the opinions to which Zak would testify by the discovery deadlines set by the hearing officer, and consequently OMC was unable to prepare its defense. For the reasons that follow, the Board grants OMC's motion.

On December 22, 1998, the hearing officer issued an order setting hearing dates and a discovery schedule. The hearing was originally scheduled for April 7 and 8, 1999. To accommodate this hearing date, the order required all written discovery to be filed and served by January 11, 1999. Responses were to be filed by February 11, 1999, with all discovery completed by March 1, 1999.

On December 24, 1998, OMC propounded its first set of interrogatories to Sweda. OMC's Interrogatory 3 provided:

Identify each and every expert, including noise experts, with whom you have communicated or consulted or whom you have retained. With regards to each expert, state the following:

* * *

- d. Describe in detail the substance of all facts, assumptions, opinions, and conclusions about which the expert is expected to testify; identify each document (i.e., textbooks, treatises, articles) which support the substance of the facts or opinions about which the expert witness is expected to testify; identify the information and documents that were provided to the expert for use in this matter; identify each document the expert witness has prepared and which summarizes the facts or opinions about which the expert is expected to testify and provide all reports of the expert[.]

Sweda responded to OMC's interrogatories on February 4, 1999, identifying Zak as an expert with whom he had communicated or consulted. For his specific response to item 3(d), Sweda put "Do not know."

Shortly thereafter, the respondents jointly moved to extend the discovery schedule for an additional 30 days, based on asserted deficiencies in Sweda's discovery responses, including the failure to describe the nature of Zak's opinion testimony. "Motion to Extend Hearing Officer's Discovery Schedule and Hearing Date" at 3. Respondents argued that they needed this information to determine whether to depose Zak and, if so, regarding what issues. *Id.* Sweda opposed the motion to extend. On March 9, 1999, the hearing officer issued an order extending the deadline for completing discovery to March 26, 1999, and rescheduling the hearing to the week of April 19, 1999. (These extensions were shorter than requested by respondents.) OMC's posthearing motion indicates that Zak was deposed on March 25, 1999. The deposition transcript is not part of the record.

By an order issued March 30, 1999, the hearing officer set additional deadlines for exchanging witness lists and expert opinions (April 9, 1999) and filing motions *in limine* (April 13, 1999). Sweda filed "Complainant's Witness List and Expert Opinions" on April 7, 1999, but still did not disclose any specific opinions of Zak. He stated rather that Mr. Zak would testify as to "his knowledge of [PCB] 99-38 as Noise Advisor with [the Illinois Environmental Protection Agency], including testing presented during the April 19 and 20, 1999 Hearing." In a subsequent motion *in limine*, OMC moved to exclude undisclosed opinion testimony of Zak.

At hearing, after argument by the parties, the hearing officer denied the motion *in limine*, but allowed the respondents to object to any specific testimony of Zak. Tr. at 12. The hearing officer also pointed out to respondents' counsel that they could make their objection to the Board, as OMC has now done. Tr. at 17. Sweda did not file a response.

OMC's interrogatories and the hearing officer's March 30, 1999, order placed Mr. Sweda under an obligation to disclose the opinions of any expert witnesses by at the very latest April 9, 1999. It appears that Sweda was unable to disclose Zak's opinions because Zak had not yet formed those opinions at the time of the disclosure deadlines. According to OMC, at his deposition Zak testified that he had formed no opinions. "Motion of Respondent Outboard Marine Corporation to Exclude Opinion Testimony of Greg Zak" at 2. We note that Sweda

has argued throughout these proceedings, with some success, for a fast track to hearing. See, *e.g.*, Sweda's "Pleading Regarding the Discovery Schedule," filed on December 10, 1998. While such a fast track results in a quicker resolution of the case, it also imposes a burden on the complainant, to prepare his own case more quickly.

OMC was entitled to know the substance of any opinion testimony to be offered by Zak. By failing to disclose this information as required by the hearing officer's orders, Sweda deprived OMC of the opportunity to fully prepare its case. Without knowing what Zak would say, OMC could not ensure that any necessary rebuttal witnesses would be present, or that any necessary rebuttal documents would be available. In this case, since no opinions were disclosed in discovery, no opinions should have been presented at hearing. Accordingly, the Board grants OMC's posthearing motion to exclude opinion testimony of Zak.

STATUTES AND REGULATIONS

OMC and the City are alleged to have violated Section 24 of the Act (415 ILCS 5/24 (1998)) and Sections 900.102 and 901.104 of the Board's noise regulations (35 Ill. Adm. Code 900.102 and 901.104). (As noted above, alleged violations of Section 23 of the Act were dismissed on respondents' motions.) Section 24 provides:

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.

Section 900.102 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.

"Noise pollution" is defined in 35 Ill. Adm. Code 900.101 as "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity."

Section 901.104 establishes the following specific numerical noise standard:

Except as elsewhere in this Part provided, no person shall cause or allow the emission of impulsive sound from any property-line-noise-source located on any Class A, B or C land to any receiving Class A or B land which exceeds the allowable A-weighted sound levels specified in the following table, when measured at any point within such receiving Class A or B land, provided, however, that no measurement of sound levels shall be made less than 25 feet from such property-line-noise-source.

Classification of Land on which Property-Line- Noise-Source is Located	Allowable A-weighted Sound Levels in Decibels of Impulsive Sound Emitted to Receiving Class A or B Land		
	Class B Land	Class A Land	
		Daytime	Nighttime
Class A Land	50	50	45
Class B Land	57	50	45
Class C Land	61	56	46

FACTS

At hearing, two witnesses, John Neff and Greg Zak, testified on Sweda's behalf. Sweda also presented his own testimony. OMC presented ten witnesses; the City presented four.

Respondents' Facilities

Outboard Marine Corporation was created in approximately 1936 when two existing companies, Johnson Motors and Everett Motors, merged and combined operations. Tr. at 136. Prior to consolidation, Johnson Motors had operated on a portion of the Waukegan lakefront since approximately 1925. *Id.*

OMC's operations currently are located in an industrial campus north and east of Waukegan harbor. The OMC campus includes a vacant piece of property which was the former site of a coking plant. Tr. at 146-47. The site, approximately 30 acres of open field, is contaminated. Tr. at 373-74. The area is fenced, with access to the site controlled by the United States Environmental Protection Agency (USEPA). Tr. at 180, 374. OMC's use of the property is limited to activities permitted by USEPA. Tr. at 180. The area is generally referred to as either the "coke plant site" or the "Superfund site."

Several OMC buildings are located close to the coke plant site. East of the site is OMC's Information Technology building and its parking lot, and the OMC Environmental Health and Safety building. Tr. at 141; OMC Exh. 2. South of the site is OMC Plant 1, which is separated from the site by a parking area. *Id.* The parking area is used for transportation of goods, employee access, parking and training purposes. Tr. at 141. Approximately 600 to 700 OMC employees work in and around Plant 1. Tr. at 140-141.

To the south of OMC's campus is the City of Waukegan's water treatment plant. Tr. at 145; OMC Exh. 1. The water treatment plant is located on Waukegan harbor, less than half a mile from the coke plant site. Tr. at 540. Among the facilities at the plant are sedimentation basins, which are raised enclosures with grass on top. Tr. at 542. The sedimentation basins run parallel to the south wall of OMC's Plant 1 building, separated from it by a parking lot. Tr. at 543.

Respondents' Use of Propane Cannons

In 1995, OMC began to experience problems related to the presence of a breeding colony of seagulls located on the coke plant site. In the spring of 1998, at the suggestion of a bird control expert, OMC implemented a program involving use of noisemaking propane cannons to drive the gulls off the site. During the nesting season, the cannons were fired from approximately 7:00 or 8:00 a.m. until approximately 6:00 p.m., sometimes as late as 8:00 p.m. Tr. at 166. The program continued in 1999, beginning in early March. Tr. at 70.

The City began having its own problems with gulls nesting on the sedimentation basins in 1998. The City consulted with OMC regarding its bird control program, and ultimately borrowed a propane cannon from OMC for use on the sedimentation basin. Tr. at 545. The City fired the cannon from approximately 7:30 or 8:00 a.m. until approximately 4:30 or 5:00 p.m. from mid-April to late May or early June. Tr. at 548. The City implemented an alternative program in 1999, and is no longer using the cannon. Tr. at 551.

Cannon Noise Issues

Sweda claims that noise generated by respondents' use of cannons has unreasonably interfered with the use and enjoyment of his property and endangered his physical and emotional health and well-being. Beginning in mid-March of 1998, Sweda was aware of the cannons firing, which he described as "comparable to a 4th of July fireworks display," "blasts," or "loud booming noises." Tr. at 31-32. Sweda has lived at 923 N. County St. in Waukegan, Illinois, for twenty-five years. Tr. at 30. He lives with his wife and two dogs. *Id.* His home is approximately a mile northwest of the respondents' sites. OMC Exh. 2. Between the Sweda home and the respondents' facilities are Waukegan Harbor, a railroad line, an expressway and Sheridan Road. *Id.*

In addition to presenting his own testimony, at hearing Sweda called John Neff as a witness. Neff has lived for 30 years at 320 Stewart in Waukegan with his wife. Tr. at 97, 104. Neff's house is several blocks from Sweda's house, and around two miles from the OMC site. Tr. at 97-98. He and his wife began noticing the cannon noise in late March or April, 1998, when they began working outside in their gardens. Tr. at 104-05. He characterized the cannon noise as sounding like a gunshot. *Id.*

Adverse Impacts of Cannon Noise

Effects on Mr. Sweda. Sweda found the noise from the cannons very intrusive. He testified that the noise prevented him from engaging in the following activities on and around his property: conversing, sitting outside, reading, listening to music, talking on the phone, cooking outside, entertaining, picking up litter, playing with dogs, playing with the neighbor's child, starting the grill, gardening, thinking, resting, sleeping, napping, bird and squirrel watching, cleaning his car, taking groceries out of the cars, getting the mail, taking the garbage out, putting water out for the birds and squirrels, writing letters, making notes on wildlife behavior, cleaning the garage, putting storms and screens in, having a cup of coffee or tea, cleaning up after the dogs, getting the newspaper, picking up litter, moving lawn chairs, putting bird feed up, taking compost material out to the yard, putting laundry on the line to dry, and taking laundry down, taking the dog out or in, working the dogs, watching for sunrise or sunset, and watching and listening to a storm come and go. Tr. at 36; Sweda Exh. 2. Mr. Sweda considers these activities necessary for well-balanced physical and emotional health. Sweda Exh. 2. After the cannons stopped firing for the year, it took Mr. Sweda until late July to be able to go outside and relax, without anticipating the disruption of cannon fire. Tr. at 42-43. The cannons began again on March 4, 1999, and varied in volume from extremely loud (as last year) to less loud, as on sporadic days when it appeared respondents were trying to mute the noise with barriers. Tr. at 70.

Effects on Mr. Neff. Neff considers the sound "a real annoyance." Tr. at 117. He was most upset by the repetitive nature of the sound, and its similarity to gunfire. Tr. at 105-06. Neff is a high school football coach, and testified that the noise is especially troublesome to him because he has lost several players to gunfire. Tr. at 106. Neff testified that the noise disrupted the tranquility of his yard, and sometimes he and his wife had difficulty carrying on conversations across their yard due to the noise. Tr. at 110. He admitted, however, that he and his wife ate outside some days last spring and summer, and they continued to garden outside. Tr. at 116.

Comparison to Other Noise Sources. Sweda testified that the cannons were louder than a car starting in the driveway, louder than a plane flying overhead, louder than trains (sometimes). Tr. at 81. (There is a train yard several blocks from Sweda's house. Tr. at 91.) Pounding and hammering noises from construction were occasionally louder than the cannons, but they were not as upsetting to Sweda because they were "normal" and "acceptable" noises. Tr. at 83. Sweda explained the difference between "normal, acceptable" noises and other noise:

Normal acceptable noises are that I've lived there for 25 odd years and it's just simply through observation of what acceptable noises are or what regular kinds of noises are in terms of expectations of you know that you're not moving into a drop-forge area or you know you're not moving into an O'Hare Airport. You have reasonable assurances that in your own mind as—making a decision as to a place of residence is one choice. And that's what I'm saying in terms of I chose the area. We chose the area because of its ambiance as well as what the house and property was. Tr. at 91-92.

Like Sweda, Neff placed significance on the character of the noise, finding it incompatible with his expectations:

I expect to hear certain noises when I go downtown. I expect to hear certain noises in my front yard. You know, I expect to hear certain noises on the 4th of July, but to go in your back yard—I think all of us understands [sic] what a

backyard is. And you go in your backyard, first of all, when you're by yourself and you're raking and doing those things you want to do and you want some quiet time, you want some privacy, you want some relaxation, this is totally disrupted by that number 1. Number 2, to associate it as I do in my particular experience with a community full of violence and gun problems, we lose a number of teenagers every year to that. That's the second factor. And then the third thing, when my wife and myself are out in the yard, of course she's on one side of the yard. I'm in another part of the yard and there are times when we try to carry on conversations. Sometimes you can't hear each other, but more than that, the serenity, the violation of privacy that takes place and can you accept it? Maybe if you're perfectly healthy and everything is right, you can roll with it, but you shouldn't have to.

* * *

There are other noises but, you know, there are other noises, but first of all, you expect certain kinds of noises and they don't take place all the time. And they're not connected with violence and they're not—you know, you go out [sic] your front yard, you expect to hear certain things. You go down, you expect hear certain things. I don't expect to hear something like this constantly when I go in my backyard. Tr. at 109-111.

Respondents' Evidence

In response to Sweda's claims, OMC and the City introduced evidence regarding the problems which prompted their attempts to control the gulls and the process that led to their use of the propane cannons. Respondents also offered the testimony of witnesses who live or work in and around the area, concerning the effects of the cannons on their lives. Finally, OMC offered the testimony of a sound expert who measured sound levels near Sweda's house.

OMC's Program

Development of Gull Problems at OMC. The coke plant site was a nesting area for seagulls. Beginning in 1995, the number of birds on the site increased dramatically, and as the gull reproductive season wore on, OMC began to get complaints from employees. Tr. at 149. Gull chicks were finding their way onto the roadways and parking lots. Tr. at 150, 292. Nesting gulls were damaging roofs. Tr. at 151.

The number of gulls further increased in 1996. Tr. at 151. In spite of the use of gull distress noisemakers, the problems continued. Tr. at 151, 153. The nature of the complaints now involved gulls bombarding cars with feces and adult gulls, protective of chicks, "dive bombing" humans. Tr. at 153. Other complaints raised the health hazard issue due to the amount of bird feces. Tr. at 153-54.

OMC began looking into different ways to control the gulls. Tr. at 377. In 1997, OMC put wire grids over portions of the coke plant site. Tr. at 378. This moved the gulls off those areas, but they just moved east to another part of the site. Tr. at 379. OMC contacted several agencies, including the U.S. Department of Agriculture, Animal Damage Control, and the U.S. Fish and Wildlife Service. Animal Damage Control visited the site in the summer of 1997, and recommended applying to Fish & Wildlife for a permit to take (shoot) gulls, which OMC did. Tr. at 381. In March of 1998, Fish & Wildlife issued a permit allowing OMC to take up to 100 ring-billed gulls, up to 20 herring gulls, and to destroy 500 nests and eggs. Tr. at 383-84.

Dr. Southern's Survey and Recommendations. Also in 1997, OMC hired a bird control consultant, Dr. William E. Southern. Tr. at 154-55. Southern is an animal behavior scientist specializing in ornithology, the study

of birds. Tr. at 191-92. He was a professor at Northern Illinois University from 1959 to 1990; since 1990 he has worked as an environmental consultant, specializing in bird control programs. Tr. at 192-94.

In early June 1997, Southern made a site visit and found a "well-established" colony of around 2,500 pairs of gulls nesting in the area known as the Superfund site. Tr. at 196-97. He prepared a report for OMC in which he evaluated the problem and recommended possible solutions. OMC Exh. 3. He described the problem and the need to relocate the gulls as follows:

Gulls nesting at this corporate location in sizeable numbers are a definite nuisance because they defecate on vehicles in parking lots adjacent to the colony, chicks wander into traffic and are killed thereby causing public concern, and the presence of nesting birds interrupts the required monitoring of wells within the Superfund site on which they are nesting. Long-term nesting of gulls in this location also raises concerns about employees possibly being exposed to the fungus that causes histoplasmosis in humans. The spores of this organism have been documented to develop in organically rich soils in some gull colonies when soil conditions are optimal. A gull colony in close proximity to a corporate facility such as this where hundreds of people work is undesirable.

The presence of the gull colony at this location also complicates the proposed remedial action for this Superfund site. Work on the site is expected during the next year or so and continued gull use of the area could compromise work schedules. Whatever work is done under Superfund guidelines undoubtedly would alter the landscape thereby necessitating the gulls to move. The question, therefore, is not if the gulls should be moved but when and how. OMC Exh. 3 at 2 (emphasis in original).

Southern testified that, in general, gull colonies are not compatible with areas of human activity. Tr. at 197. Although he pointed out that gulls have educational value and in a proper location a gull colony would be an asset, next to an industrial facility like OMC, he considered it a detriment. *Id.* He identified several factors contributing to this conclusion and identified a number of potential adverse effects a gull colony can have. Many of the adverse effects he mentioned were in fact experienced by OMC and other businesses near the gull colony.

Problems Associated with Gull Colonies. The adverse effects a gull colony can have on nearby human establishments, according to Southern, are numerous. Potential health risks associated with gull colonies stem from the fact that gull fecal matter, highly concentrated around breeding colonies, carries high levels of coliform bacteria. Tr. at 198. Gulls also often carry salmonella. *Id.* There is also a health risk from histoplasmosis, which is caused by a fungus that thrives in areas where there is a lot of fecal matter. Tr. at 198-99. The condition can cause serious problems, and in some cases can be lethal. Tr. at 199. Southern additionally expressed concern over potential contamination of water at the City's water treatment plant. Tr. at 225.

Another problem is odor, caused by both accumulating fecal matter and decaying bodies of dead birds. Tr. at 201. The odor intensifies on wet days and will carry on a breeze. Tr. at 201-02. Fecal matter can become very slippery when wet, creating a hazard in parking lots. Tr. at 202. Dr. Southern also testified that gull chicks can create problems. By wandering, they create a distraction in the parking lot. Tr. at 202-03. Many are hit by cars. Tr. at 150, 292. Furthermore, adult gulls protecting the chicks create problems by dive bombing humans. Tr. at 200. Even wearing head protection, a person can still get hit very hard. Tr. at 201.

Gulls can also cause property damage. On flat roofs they peck at the tar, pecking holes in the roofs. Tr. at 203. They also carry nesting material up onto roofs, which clogs up drain pipes and can cause associated water damage. Tr. at 203-04. Thomas Elsen, manager of facilities operations and security at OMC, Tr. at 258, testified that the gulls caused extensive damage to the roof of the Plant 1 building by pecking holes ranging from the diameter

of a beak up to two feet in diameter and six or seven inches deep; these holes allow water to penetrate the roof membrane and leak into the building. Tr. at 262. He also noted that feathers drawn into air conditioning intakes necessitated changing filters more often. Tr. at 265. Also, at the Information Technology building, OMC had to purchase deodorant blocks to mask the odor coming into the building. Tr. at 265.

Other witnesses also testified regarding the problems experienced in fact around the coke plant site. John Battisfore, who works in the Information Technology building at OMC, testified regarding the mess caused by bird droppings on cars, stating that the prevalence of bird droppings required daily cleaning of his car, and that the bird droppings had caused discoloration of the car's paint. Tr. at 287-290. Battisfore testified to being disturbed by the presence of dead chicks in the parking lots, and that the birds dive bombed people, hitting their heads and clothing with droppings. Tr. at 292. Gerald Larson, president of Larson Marine Services, Tr. at 422, also testified as to problems from gull droppings, including the need to wash cars and boats. Tr. at 429-30. Larson testified that gull droppings made the docks around Larson Marine Services slippery when they were wet, necessitating washing of the docks. Tr. at 430. (Larson Marine Services is located directly north of the coke plant site. Tr. at 423-24; OMC Exh. 2.) Theresa Fisel, who works for OMC in a building near Plant 1, Tr. at 305, testified that the prevalence of gull fecal matter and feathers in the area had aggravated her asthma. Tr. at 312-315.

Mark Pfister, an aquatic biologist with the Lake County Health Department in Waukegan, Tr. at 523-24, testified that Waukegan South Beach was closed far more often due to fecal coliform bacteria in the water than either of the other public beaches in the area. Tr. at 528-29. (Waukegan South Beach, including a boardwalk and a parking area, is located to the east of the coke plant site and immediately across a road from OMC. Tr. at 142, 524; OMC Exh. 1, 2.) Pfister believes the larger gull population near Waukegan South Beach, and the corresponding greater amount of fecal matter, was a factor behind the greater fecal coliform counts at the south beach. Tr. at 531. Daniel Chamernik, in charge of overseeing the grounds at the beach, Tr. at 448-49, testified that during 1997 the beach also had a problem with dead gulls and gull chicks "all over the place." Tr. at 451-52. Mr. Chamernik testified that at one point beach personnel were picking up from 10 to 13 dead gulls a day. Tr. at 452. The beach also had problems with gulls getting into picnic baskets and garbage cans. Tr. at 455.

Dr. Southern's Recommendations. Southern explained that a gull colony is established after gulls nest on a property for a year or two. Tr. at 204-05. The attachment of gulls to an established colony is very strong. The birds will tolerate extreme amounts of distraction or injury—almost anything short of death—before they will leave a colony. Tr. at 205. The attachment to a site grows with each year of having nested there. *Id.* Gull colonies grow from year to year; growth of 10 to 20 percent per year is not uncommon. Tr. at 206. The OMC site could easily hold 20,000 birds or more. Tr. at 207. As the colony grows, the risk of contaminants reaching the public beach via the gulls would increase also. *Id.*

The nesting season is approximately 11 or 12 weeks long; it takes that long for gulls to build a nest, lay eggs, incubate the eggs and rear the young. If one prevents the gulls from actually starting the nesting process, it is unlikely that any of them would continue to try to nest much after the early part of June. In fact, if the gulls do not achieve a critical mass of birds on the ground, the colony may break up sooner than that. Tr. at 222-23.

Based on his visit to the site, Southern recommended a program emphasizing pyrotechnic noise-makers, *i.e.*, propane cannons supplemented by pistol-fired whistlers and "bird booms." The pyrotechnics are the most dependable way of moving gulls quickly. Tr. at 208-10. He figured that it would probably take around three years to break the gulls' nesting habit. Tr. at 209. Southern recommended a minimum of six propane cannons, supported by hand-fired pyrotechnic devices. OMC Exh. 3 at 7.

Southern considered other methods of bird control, but, for various reasons, ruled them out. He testified that lethal control methods are not necessarily effective. Tr. at 214, 220. He also discussed use of more wires across the site. In this case, however, due to the environmental contamination at the coke plant site, wires could not be erected. Tr. at 238-39. In any event, barriers such as overhead wires become less effective over time due to the birds' attachment to the site: the gulls walk under the wires. Furthermore, even when wires are used, this solution would normally be buttressed by use of pyrotechnics. Tr. at 218. Finally, Southern concluded that use of other

animals to control the bird population would not work at the OMC site. While dogs have been used at some sites to chase birds off, Southern ruled out this method at the OMC site because it is too large, and it is contaminated. *Id.* Southern further testified that use of birds of prey is not considered an effective method of driving gulls off a colony site: when the bird of prey leaves, the gulls return. *Id.*

Procedures Implemented by OMC and Results. Rather than the six cannons recommended by Southern, OMC purchased four cannons. Three were set up, and one was held in reserve. Tr. at 165. The cannons and pyrotechnics were effective: very few nests were built after the program began, and by the middle of June 1998, the birds were no longer returning to the site. Tr. at 391-92. There were virtually no chicks in 1998. Tr. at 168. OMC turned the cannons off in early June 1998 because the birds were not nesting on the site. Tr. at 392-93. As of the date of Southern's testimony (April 19, 1999), there were no gulls at the OMC site. Tr. at 227. He opined, however, that if OMC ceased its use of pyrotechnics that day, birds would start nesting again almost immediately. Tr. at 224.

Other witnesses testified that since the cannon program was instituted the problems associated with the gulls have lessened. Thomas Elsen testified that since the cannon program started damage to the buildings has been minimal. Tr. at 268. Mark Pfister testified that in 1998, there were only seven beach closures at Waukegan South. Tr. at 531-32. Pfister credits the relocation of the gulls with the reduction in bacteria. Tr. at 532. Daniel Chamernik likewise testified that in 1998 the problems at the beach were not as bad. Tr. at 460.

City of Waukegan Program

Jeffrey Musinski, director of the water division for the City of Waukegan, testified regarding the City's gull removal efforts. Tr. at 539-40. In the spring of 1998, Musinski noticed a significant increase in the number of gulls nesting on the water treatment plant's settling basin. The number of birds increased from approximately a dozen pairs to over a hundred pairs in 1998. Tr. at 541-44. The water plant borrowed a propane cannon from OMC and set it up on the basin. Tr. at 545. Almost overnight the gulls were gone. Tr. at 546.

The City considered other alternatives, but determined that they could not be implemented at the time. Musinski testified that the City could not use wires because of the need for access to the area. Tr. at 547. He also testified that repairs and improvements were necessary before dogs could be brought into the area, and that this prevented the City from using the dogs during the 1998 nesting season. Tr. at 550. This year the City did put a dog out on the fenced grounds, which has been 100% effective. Tr. at 551-52. The City is no longer using the cannon. Tr. at 554.

Reactions of Other Waukegan Residents

OMC and the City, in rebuttal of Sweda's claims, introduced a number of witnesses who lived or worked around the OMC campus and/or Sweda's house but were not bothered by the noise.

Daniel Hirsch lives at 527 N. Sheridan Rd. in Waukegan. Tr. at 399-400. He owns an engineering company, Lakewise, Inc., and has his office in his home. He works from roughly 7:00 a.m. to around 6:00 p.m. Tr. at 401. Hirsch's house is approximately 900 yards from OMC's facility, considerably closer than Sweda's house. Tr. at 403; OMC Exh. 1. Hirsch first noticed the cannon noise from OMC's gull removal operation in March of 1998. Tr. at 416. He can hear the cannons on his deck and occasionally in his house. Tr. at 415. He described the noise as sounding like small arms discharge, or a firecracker in the distance. Tr. at 416. He can converse outside in a normal tone while the cannons are firing. Tr. at 416. The noise does not interfere with activities either outdoors or inside the house, such as watching television, listening to the radio, or talking on the phone. Tr. at 417-18. If anything else is making noise (*i.e.*, TV, radio, conversation) it drowns out the noise of the cannons. Tr. at 418. Hirsch found noise from the gulls themselves, the railroad, the highway, and the civil defense siren "considerably louder and more disruptive" than the cannons. Tr. at 419.

William Noff lives at 928 N. County St. in Waukegan; he has lived there for seven years. Tr. at 436. He lives across the street from Sweda. Tr. at 438. He hears the cannons in his house and yard, and described the sound as like the popping of a paper bag. Tr. at 443-44. Noff entertains, barbecues, and does yard work in his yard. Tr. at 442. The noise from the cannons has not interfered with any of Noff's outdoor activities, or with talking on the phone inside. Tr. at 444.

Similarly, Craig Linn lives at 915 Sheridan Road in Waukegan, within three or four blocks of Mr. Sweda. Tr. at 556, 561. Although he can hear the cannons from his yard, they blend in to other noise from the nearby expressway or railroad, so he did not remember a specific date when he first noticed them. Tr. at 558. He has never had any trouble conversing with his wife or children in the back yard while the cannons were firing. Tr. at 559.

People working in the vicinity of the cannons also reported no problems from the noise. Larson Marine Services, located directly north of OMC and the gull colony site, has approximately 50 employees, and a large number of them work outside from March through November. Tr. at 423-426. Larson Marine employees have never complained about the noise from the cannons. Tr. at 433. Mr. Larson's office is approximately 300 to 400 yards from the cannons, and he cannot hear the cannons inside his office. Tr. at 432. He can hear them if he is outside, but can talk in a normal voice with the cannons firing. Tr. at 432, 433. John Battisfore and Lisa Bongiovanni, who work at OMC in close proximity to the cannons, testified that they had had conversations outside in a normal tone of voice while the cannons were firing. Tr. at 294, 397. Bongiovanni also testified that the noise of the cannons has never interfered with her phone conversations in her office. Tr. at 398.

Numerical Testing

After Sweda filed his complaint, OMC retained Brian Homans to measure and assess the noise from the cannons at a point near Sweda's house and compare those results with the Board's regulatory standards. Tr. at 471. Homans is an acoustical engineer with Shiner & Associates, Inc. Tr. at 462-63. He is an expert in environmental acoustics with considerable experience taking sound level measurements, including field testing impulsive sound. Tr. at 467-68. Mr. Homans took measurements from a site close to Sweda's house, between Sweda's house and the OMC site, and approximately the same distance from Sheridan Road as Sweda's house. Tr. at 471-72. He took measurements on March 4, 1999, and again on March 15, 1999. Tr. at 475.

The A-weighted level measured by Homans was less than the Section 901.104 daytime limits by 11 dB (45 dB versus 56 dB). Tr. at 499-500; OMC Exh. 10. Homans determined that the cannons have a slight effect (1dB) on ambient noise levels. Tr. at 503; OMC Exh. 10. The noise from airplanes was louder than the noise of the cannons. Tr. at 504-05.

DISCUSSION

Any violation of Section 24 of the Act must be predicated on a violation of one of the Board's noise regulations. We thus consider whether the evidence establishes either of the alleged violations of regulations.

35 Ill. Adm. Code 900.102

The Board's inquiry in cases alleging noise pollution is two-part. First, the Board determines whether there has been interference with enjoyment of life or with any lawful business or activity. If interference is found, the Board then decides whether the interference is unreasonable. Regarding the first part of the inquiry, the Board has held:

The threshold issue in any noise enforcement proceeding is whether the sounds have caused some type of interference with the complainant's enjoyment of life or lawful business or activity. If there is no interference, no "nuisance noise"

violation is possible. 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. Zivoli v. Prospect Dive & Sport Shop, Ltd. (March 14, 1991), PCB 89-205, slip op. at 9.

Interference

Although the law does not protect a person from noise which is merely a source of aggravation, Kochanski v. Hinsdale Golf Club (July 13, 1989), PCB 88-16, slip op. at 14, in this case we conclude that the irritation experienced by Sweda and Neff rises to the level of interference with their enjoyment of life. We therefore examine whether such interference is unreasonable.

Reasonableness

In determining whether interference is unreasonable, the Board weighs the factors listed in Section 33(c) of the Act (415 ILCS 5/33(c) (1998)), to the extent the record contains evidence relevant to those factors. Scarpino v. Henry Pratt Co. (April 3, 1997), PCB 96-110, slip op. at 15; Charter Hall Homeowners' Assoc. v. Overland Transportation Systems, Inc. (October 1, 1998), PCB 98-81, slip op. at 21.

Section 33(c) provides:

- 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:
 - 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, discharges or deposits resulting from such pollution source; and
 - v. any subsequent compliance.

Section 33(c)(i): Character and Degree of Injury. An important inquiry in examining the character of any interference is objectivity. The Illinois Supreme Court, in Processing and Books, Inc. v. Pollution Control Board, 64 Ill. 2d 68, 351 N.E.2d 865 (1976), interpreted the word "unreasonably," as used in the Act, to impose an element of objectivity on the analysis of interference:

There is little that any person can do which does not in some degree "interfere with the enjoyment of life or property" of other persons. The very act of breathing consumes oxygen. In our opinion the word "unreasonably" . . . was intended to introduce into the statute something of the objective quality of the common law, and thereby exclude trifling inconvenience, petty annoyance or minor discomfort. *** [I]t removes the possibility that a defendant's conduct

may be measured by its effect upon those who are inordinately timorous or belligerent. 351 N.E.2d at 869.

Although the court in Processing and Books was interpreting the air pollution provisions of the Act, based on the analogous language in the definition of noise pollution we have consistently found this analysis applicable in noise pollution cases as well. See, e.g., D'Souza v. Marraccini (May 2, 1996), PCB 96-22; Village of Matteson v. World Music Theater (February 25, 1993), PCB 90-146; Zarlenga v. Partnership Concepts (May 9, 1991), PCB 89-169 (all citing Wells Manufacturing Co. v. Pollution Control Board, 73 Ill.2d 226, 232, 383 N.E.2d 148, 150 (1978), which in turn cites Processing and Books).

In this case, there is considerable evidence, in the form of testimony of local residents and OMC employees, that the noise from the cannons did not generally interfere with enjoyment of life or lawful business or activities in the noise-impacted community as a whole. The fact that not everyone in the vicinity of a noise source is bothered by that noise source will not *ipso facto* prevent a finding of noise pollution. Discovery South Group, Ltd. v. Illinois Pollution Control Board, 275 Ill. App. 3d 547, 554-55, 656 N.E.2d 51, 57 (1st Dist. 1995). There comes a point, however, at which the evidence establishes that, whatever the complainant's subjective experience, there is no unreasonable interference when the noise source is evaluated objectively. We conclude that this point has been reached in this case. Because the evidence indicates that most people in the affected area are not significantly bothered by the cannon noise, the Board concludes that this factor supports a finding that the interference experienced is not unreasonable. See Bolender v. Monticello Bus Service (May 21, 1992), PCB 91-136.

Section 33(c)(ii): Social and Economic Value of the Source. The Board finds the social and economic value of the source in this case to be high. By dispersing the gull colony that formerly nested on the coke plant site, the cannons prevent or mitigate a wide variety of negative effects of the colony's presence. The positive effects of the cannon program inure to the benefit of the general public as well as local businesses such as OMC and Larson Marine and their employees, inasmuch as bacterial contamination at the public beach is reduced, as is the risk of contamination of the public water supply. The Board accordingly concludes that this factor also supports a finding that the interference experienced is not unreasonable.

Section 33(c)(iii): Suitability of the Source and Priority of Location. Sweda and Neff clearly have priority of location. They lived in their current homes long before the propane cannon program was initiated in 1998. The cannons do not, however, appear to bother other people, including people who live and work closer to the noise source than Sweda or Neff, which suggests that the noise source is not unsuitable to its location. From the evidence in this case, it appears that the cannons are separated from the residential areas of Waukegan by (a) the width of Waukegan Harbor, (b) the railroad, (c) the expressway, and (d) Sheridan Road. Thus, both distance and intervening noise sources lessen the impact of the cannons on local residents. The Board finds that the cannons are suitable for their location, and concludes that this factor supports a finding that interference is not unreasonable.

Section 33(c)(iv): Technical Practicability and Economic Reasonableness of Reducing Emissions. The testimony of Southern established that the cannons are the most efficient and effective method of dispersing the gulls, and explained why other programs would be ineffective. See *supra*, pp. 12-13. Based upon this testimony, and the complications created by the environmental contamination at the gull colony site, the Board finds that alternatives to the cannon program are not technically practicable or economically reasonable at the OMC site. This factor therefore supports a finding that interference is not unreasonable.

The City has now implemented a new program—use of dogs—which has obviated the need for the cannon. Musinski testified, however, that repairs and improvements were necessary before dogs could be brought on to the property, and that this prevented the City from using the dogs during the 1998 nesting season. He also testified that the City could not use wires because of the need for access to the area. Based on this testimony, the Board finds that, pending the repairs and improvements necessary to accommodate dogs at the water treatment plant, other bird control measures were not technically practicable. Accordingly the Board concludes that this factor supports a finding that interference was not unreasonable with respect to the City as well.

Section 33(c)(v): Subsequent Compliance. This factor is not relevant to a determination about whether the interference experienced by Sweda or Neff was unreasonable. Unless such interference is determined to be unreasonable, there can be no violation and thus no "subsequent compliance." Nevertheless, we note that the City stopped using the cannons after 1998 when dogs were introduced at the water treatment plant site, and that OMC projects that the cannon program will be finite in duration, and presumably will cease once the gulls' attachment to the site has been broken and they have relocated elsewhere.

After evaluating the Section 33(c) factors, the Board finds that the interference caused by OMC's or the City's use of propane cannons to displace gull colonies is not unreasonable.

Conclusion.

Based on the foregoing analysis, the Board concludes that neither OMC nor the City has violated Section 900.102.

35 Ill. Adm. Code 901.104

Sweda presented no evidence that the impulsive sound from the propane cannons exceeded the decibel levels set in Section 901.104. The only evidence on this subject is the testimony of Homans, who determined that the noise from the cannons, when measured near Sweda's house, did not exceed the daytime limits for sound emitted from class C to class A land. Tr. at 499-500. The Board finds no violation of Section 901.104 based on the evidence in this record.

CONCLUSION

Upon review of the record in this case, the Board finds no violations of 35 Ill. Adm. Code 900.102 or 901.104. Having found no violation of a noise regulation or standard, the Board finds no violation of Section 24 of the Act.

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

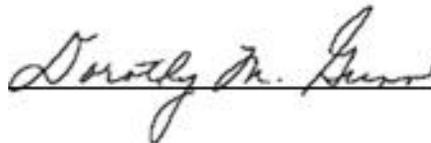
ORDER

The Board finds no violation of 35 Ill. Adm. Code 900.102 or 901.104, and accordingly no violation of 415 ILCS 5/24, by either Outboard Marine Corporation or the City of Waukegan.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 5th day of August 1999 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board