

ILLINOIS POLLUTION CONTROL BOARD
March 22, 1990

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

MR. L. LEE PERINGTON APPEARED ON BEHALF OF COMPLAINANT.

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

This matter comes before the Board upon a complaint filed September 12, 1989 by Brian J. Peter. The complaint alleges that Respondent, the Geneva Meat and Fish Market and its owner, Gary Pikulski, are in violation of the Board's prohibition against noise pollution found at 35 Ill. Adm. Code 900.102 and 901.102.

Hearing was held January 17, 1990 at the Geneva City Hall, Kane County, Illinois. Respondent did not appear at hearing, nor has he otherwise participated in this matter in any form.

APPLICABLE REGULATIONS

Title VI of the Illinois Environmental Protection Act ("Act"), Ill. Rev. Stat. 1987, ch. 111 $\frac{1}{2}$, par. 1023 et seq., provides procedures and standards for noise control. Sections 23 and 24 of that Title provide:

Section 23

The General Assembly finds that excessive noise endangers physical and emotional health and well-being, interferes with legitimate business and recreational activities, increases construction costs, depresses property values, offends the senses, creates public nuisances, and in other respects reduces the quality of our environment.

It is the purpose of this Title to prevent noise which creates a public nuisance.

Section 24

No person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act.

These statutory sections are implemented in administrative law in two ways. First, the Board has adopted at 35 Ill. Adm. Code 900.102 a general, "narrative" standard:

Section 900.102 Prohibition of Noise Pollution

No person shall cause or allow the emission of sound beyond the boundaries of his property, as property is defined in Section 25 of the Illinois Environmental Protection Act, so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter.

Noise pollution is defined at 35 Ill. Adm. Code 900.101 as:

Noise pollution: the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity.

In effect, Section 900.102 thereby establishes a regulatory public nuisance standard for noise control using the statutory phrase "unreasonable interference with the enjoyment of life or with any lawful business or activity".

The statutory sections of the Act are also implemented via the numerical emissions standards found at 35 Ill. Adm. Code 901.102 et seq. In pertinent part, Section 901.102 establishes limits on noise emitted to residential land (Class A land) from commercial land (Class B land). Limits are expressed as maximum allowable sound pressure levels, measured in decibels ("dB"). The decibel scale is such that a 10-unit increase in dB level is equivalent to an approximate doubling in the perceived loudness of a sound. Section 901.102 also recognizes that perception of sound and annoyance related to sound are dependent on both frequency (pitch) of the sound and the circumstances under which the sound is heard. As regards the latter, noises are more readily perceived, and hence potentially more disturbing, during the sleeping hours. Thus, Section 901.102 establishes different levels of allowable emissions as a function of sound frequency, as well as different allowable emissions for daytime (7 AM to 10 PM) and nighttime (10 PM to 7 AM) hours. Numerical limitations to Class A land from Class B land are as follows:

Octave Band Center Frequency (Hertz)	Allowable Emissions Level (dB)	
	Day	Night
31.5	72	63
63	71	61
125	65	55
250	57	47
500	51	40
1000	45	35
2000	39	30
4000	34	25
8000	32	25

35 Ill. Adm. Code 900.102 establishes a more general "narrative" prohibition against causing or allowing noise pollution within the State of Illinois.

BACKGROUND

Mr. Peter resides at 117 North 5th Street, Geneva, Illinois in a home owned by his mother and grandmother ("Peter residence"); he has resided at this location for approximately four years (R. at 7-8). The Board finds that the Peter residence is located on Class A land, pursuant to 35 Ill. Adm. Code 901.101(a).

The Peter residence is located immediately north of property occupied by the Geneva Meat and Fish Market, located at 425 Hamilton Street, Geneva, Illinois. The Board finds that the Geneva Meat and Fish Market property is Class B land, pursuant to 35 Ill. Adm. Code 901.101(b).

The Geneva Meat and Fish Market building was constructed in 1987 (R. at 8). Among the features of the building are refrigeration units¹ located on top of the building and certain piping facilities located along the wall of the building which faces the Peter residence. The refrigeration units are located approximately 30 to 35 feet beyond the property line between the Peter residence and the Geneva Meat and Fish Market (R. at 16, 24-5); the Peter residence is approximately 15 feet from the property line (R. at 16). The refrigeration units are at

¹ Although commonly described in the record as "refrigeration units", the same objects are also sometimes referred to as "fans" or "air-conditioning" units. For purposes herein the term "refrigerations units" is used in the generic sense for the roof-top units located on the building housing the Geneva Meat and Fish Market, as depicted in Group Exhibit A.

approximately the same height as the upstairs of the Peter residence, occupied by Genevieve Carlson (Id.).

The piping facilities in question consist of four PVC pipes which exit the rear wall of the Geneva Meat and Fish Market and connect upward to the refrigeration units (R. at 18).

ALLEGATIONS

Mr. Peter alleges that noises emitted from the Geneva Meat and Fish Market property to the Peter residence property are in violation of both the nuisance provision of 35 Ill. Adm. Code 900.102 and the numerical limitations of 35 Ill. Adm. Code 901.102. Mr. Peter further alleges that the source of the noises are refrigeration units located on top of the Geneva Meat and Fish Market building and the piping facilities located at the rear of the building.

In support of the allegation of violation of the nuisance provision Mr. Peter narrated of various experiences, as follows:

Q. Now, Mr. Peter would you tell the Hearing Officer when you first started recognizing that there was some sort of a noise problem emitting from the Geneva Fish and Meat Market (sic)?

A. On the 5th of November, 1987.

* * * * *

A. What is significant about that date is they were also loading the meat into the meat locker, basically, in the meat market, and it was on that date, or the following day, that they turned on their refrigeration units, and it is a newly constructed building, and I was there when they pretty much lit off the refrigeration units, and the noise was quite significant. (R. at 27)

* * * * *

Q. Brian, the noise that you are alleging is emitted from his property, tell the Hearing Officer what effect that had on your ability to use and enjoy your property?

A. Well, from the date they turned the units on, the first thing you hear in the morning when you get up is the fans, the noise; and the last thing you hear when you fall asleep is the noise. (R. at 30)

* * * * *

Q. Your testimony is this fan is emitting this noise from on top of the roof?

A. Yes.

Q. The fan is on how many hours a day?

A. 24 hours a day. The refrigeration unit on top of the building emits a noise.

Q. What effect does this noise have on your ability to use and enjoy your property?

A. I very distinctly remember times getting up from bed where the noise is so loud that I can't sleep. You don't know what to do. You go into the living room, you hear it there. You go into the kitchen, you hear it there.

You wake in the middle of the night, you hear the noise and you can't fall back to sleep.

Q. Could you describe to the Hearing Officer what the noise sounds like to you?

A. The noise that emits from the top of the building sounds like a forced draft fan, they are used in the boiler rooms of ships. It is a very, very high pitched, rushing sound.

There is also now during the winter a noise that seems to emit from these PVC pipes, very, very low frequency, and it sounds like a train always passing by in the distance. They come on intermittently.

So in addition to the sound of the fan 24 hours a day, you have these heat pumps, exhaust from these PVC pipes that cycle on and off, sometimes four on at the same time, sometimes one, sometimes two.

And the combination of these sounds make it very difficult to sleep. Also, we used to enjoy the backyard of our property. We used to like to have picnics, and the noise from the refrigeration was so irritating that we stopped having picnics.

On July 2nd, 1988, we were eating outside and I become so upset that I called the Geneva Police Department, registered a complaint about the noise. (R. at 31-33)

* * * * *

Q. Have you received complaints from the tenant on the second floor, Genevieve Carlson, regarding this matter?

A. Yes. The noise affects Genevieve Carlson considerably, because the refrigeration units are on the same level as her bedroom, and she complains very, very much about the noise, her ability to sleep, her ability to enjoy relaxing in her home. (R. at 33)

Mr. Peter further presented the testimony of Genevieve Carlson. Ms. Carlson has resided in the upstairs of the Peter residence, with address 117 1/2 North 5th Street, Geneva since 1948 (R. at 99). Ms. Carlson's bedroom and dining room are located at the same height as the refrigeration units (R. at 16). Ms. Carlson testified to the nature of the noises emitted from the Geneva Meat and Fish Market as follows:

Q. Now, the noise that comes from that unit, how does it affect your ability to use and enjoy your property or your life style?

A. It comes right in -- well, I can't keep my bedroom window open. I can't keep these windows open because it grinds and grinds and makes so much noise that you just can't stand it.

When you put your head on the pillow, it vibrates when you lay your head on the pillow, it just vibrates. I got ear plugs. I have got other stuff to stick in my ears. ... I put a pillow over my head, go out and sleep in the davenport of the living room, go to the front, and it still roars through there.

Can't go out on the sun porch because that's got too much windows. The only place I could figure I could go is jump in the bathroom and pull a cover over me.

Q. How long of a time --

A. It just keeps going all the time. In the daytime, you can't keep your windows open because it is roaring all the time. (R. at 100-101)

* * * * *

Q. Tell the Hearing Officer how you would describe the sound that you hear?

A. It is just a loud roaring sound. It keeps grinding, grinding, grinding. When it is windy it gets worse sometimes, especially if its blowing toward the house. It just keeps on. (R. at 103)

* * * * *

Q. You hear the sound not only from 10:00 o'clock in the morning to 7:00 o'clock at night, also from 7:00 o'clock at night until 10:00 o'clock in the morning?

A. It never stops. It just keeps going and going and going. (R. at 105)

In support of his allegations that noise emitted from the Geneva Meat and Fish Market exceeds the quantitative standards of 35 Ill. Adm. Code 901.102, Mr. Peter presents the results of six acoustical analyses conducted by Shiner and Associates at the request of Mr. Peter². The first analysis (Exh. G) was conducted during the daytime hours of June 21, 1988; the second through sixth were conducted within an approximate one-hour span during the nighttime hours of January 13, 1990 (Exh. H). The analyses were made in apparent conformity with the requirements of 35 Ill. Adm. Code.Part 901.

Among other pertinent information, the June 21 analysis was made prior to erection of a partial barrier around the refrigeration units; the January 13 analyses were made subsequent to erection of the barrier (see following). The January 13 analyses were also made at two different locations on the Peter property, the first approximately 5 feet within the property at a location similar to that occupied on June 21 date ("center location"), and the second at the rear of the Peter property at approximately the same distance from the property line (R. at 85-6). Additionally, the January 13 analyses were made when varying numbers of the "compressors" associated with the PCV pipes were operating (R. at 89-90). Results of the analyses, with the standards of Section 901.102 repeated for references, are as follows:

² There is reference in the record to yet another acoustical analysis, conducted as the behest of the City of Geneva (R. at 60; Exh. L). Results of this analysis have not been entered into the instant record.

	Octave Band Center Frequency (Hertz)								
	31.5	63	125	250	500	1000	2000	4000	8000
<u>Standards</u>									
Daytime	72	71	65	57	51	45	39	34	32
Nighttime	63	61	55	47	40	35	30	25	25
<u>June 21, 1988 (Day)</u>									
Center	61	64*	65*	68**	56**	54**	51**	49**	42**
<u>January 13, 1990 (Night)</u>									
Center - no compressor	61	57	53	49*	40	36*	32*	30*	29*
Center - 1 compressor	55	65*	57*	50*	41*	39*	33*	34*	32*
Center - 2 compressors	59	66*	59*	50*	41*	39*	30	30*	29*
Rear - 1 compressor	52	68*	59*	48*	42*	41*	37*	32*	29*
Rear - 2 compressors	50	72**	61*	49*	43*	41*	35*	31*	27*

* Level in excess of Section 901.102 nighttime standards

** Level in excess of Section 901.102 daytime and nighttime standards

Mr. Brian L. Homans, the acoustical engineer who conducted the three acoustical analyses, also appeared as witness for Complainant (R. at 72 et seq.). Mr. Homans testified to the methodology used to conduct the analyses. Mr. Homans additionally testified, that in his expert opinion, the source of the noise emissions from the Geneva Meat and Fish Market property are produced in combination from the refrigeration units, which principally contribute to excess noise emissions in the high-frequency bands, and from the PVC piping, which principally contributes to excess noise emissions in the low-frequency bands (R. at 89-92).

In addition to the instant action, Mr. Peter attests that he has pursued various attempts at remedies at the local level, including several personal discussions with Mr. Pikulski (R. at 28, 29), complaints registered with the Geneva Police Department (R. at 33, 40), discussions with the Geneva Building Commissioner and Department of Public Works (R. at 43, 46-7), a request to appear before the Geneva Zoning Board of Appeals (R. at 43, 46), and discussion with Mr. Peter's alderman (R. at 48)³; Mr. Peter has also pursued the matter with the Illinois Environmental Protection Agency (R. at 44, 47).

³ Mr. Peter also has brought the matter before the Kane County Board of Review for a tax reassessment based in part on depreciation in the Peter property related to the increase in ambient noise (Exh. C). The Board of Review ruled favorably on Mr. Peter's request, reducing the 1983 assessment approximately 19% (\$5,793) (Exh. B-D).

These and other actions apparently caused a meeting to be convened on September 29, 1989, at which various officials of the City of Geneva, Mr. Peter, and Mr. Pikulski were present (R. at 59-60). Accordingly to Mr. Peter, it was at that time agreed that a sound barrier was to be erected around the refrigeration units (R. at 60-1). Mr. Peter further testifies that between October 10 and approximately October 19, 1989 a wooden barrier was indeed constructed in such manner as to partially enframe the refrigeration units (61-2). However, Mr. Peter contends that, although the wooded barrier has caused some reduction in noise emissions received on his property, it is insufficient to produce compliance with the noise pollution regulations, as attested to by the noise measurements made on January 13, 1990 and by the continued presence of "bothersome" noise audible within his residence (R. at 63-5).

Throughout this matter, although well-apprised of the nature of the instant allegations through service of the Complaint and notification of hearing, Mr. Pikulski has made no appearance nor made any defense.

FINDINGS OF VIOLATION

The Board finds that the un rebutted testimony of Mr. Brian Peter and Ms. Genevieve Carlson clearly establish an unreasonable interference with their enjoyment of life, and that such unreasonable interference is caused by noise emissions from the Geneva Meat and Fish Market, owned by Gary Pikulski. Thereto, the Board finds the Geneva Meat and Fish Market and Gary Pikulski are directly responsible for noise emissions from the Geneva Meat and Fish Market which cause a frequent, pervasive, and substantial interference with the enjoyment of life of Brian L. Peter and Genevieve Carlson. The Board will evaluate the factors in Section 33(c) of the Act to determine if such interference is unreasonable.

The Board further finds that acoustical analysis of noise emissions made on January 13, 1990, as aforementioned, establish that noise emissions from the Geneva Meat and Fish Market exceed the noise limitations specified at 35 Ill. Adm. Code 901.102(b) as these emissions are received on the property occupied by Brian L. Peter and Genevieve Carlson. Thereto, the Board finds that the Geneva Meat and Fish Market and Gary Pikulski to be in violation of 35 Ill. Adm. Code 901.102(b).

SECTION 33(c) FACTORS

Having found violations to exist, and prior to making further orders and determinations, the Board is charged under Section 33(c) of the Act (Ill. Rev. Stat. 1987, ch. 111¹/₂, par.

1033(c)) to take into consideration all the facts and circumstances bearing on the reasonableness of the emissions. Such consideration is to include:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
2. the social and economic value of the pollution source;
3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source;
5. any economic benefits accrued by a noncomplying pollution source because of its delay in compliance with pollution control requirements; and
6. any subsequent compliance.

(Section 33(c) of the Act)

The Board considers these factors as follows:

As regards Section 33(c)(1), the Board finds the injury to and interference with the health and general welfare of Mr. Peter and Ms. Carlson to be substantial. Deprivation of sleep constitutes one of the most serious of injuries short of trauma. The instant circumstance is further aggravated by the continuous, 24-hour-a-day, nature of the noise pollution, which allows for no respite, and causes the active invasion of the very home of Complainant and tenant Carlson at all times.

In the absence of the appearance of Respondent, the Board is without direct evidence which bears on the matter of the social and economic value of the noise pollution source pursuant to Section 33(c)(2). The Board will nevertheless accept that, as a business which has evidently maintained itself for a period in excess of two years, the Geneva Meat and Fish Market possesses social and economic value.

The Peter residence demonstrably has priority of location, as such bears on Section 33(c)(3). In the case of tenant

Carlson, residency predates the noise source by approximately 40 years. Mr. Peter's personal residency evidently predates the noise source by approximately one year (R. at 7-8), with an uncertain prior period of ownership by the Peter family. In general, it would appear that the instant circumstance is an example of commercial development adjacent to a residential area.

As with the matter of social and economic value of the noise pollution source, no evidence has been entered into the immediate record which bears on the technical practicability and economic reasonableness of the reducing or eliminating the emissions found at Section 33(c)(4). However, the Board, in its extensive experience with noise pollution matters, is well aware that it is technically practical to eliminate noise pollution from a wide variety of stationary sources, including sources such as present here. Technically practical methods may include any or all of re-engineering equipment to eliminate the source of the offensive noise, relocating the noise source, imposition of effective sound-reduction barriers, and installation of appropriate silencers. The Board addresses the matter of economic reasonableness below.

As regards Section 33(c)(5), allegations of noise pollution by Mr. Peter, as herein found to exist in fact, have been made since the initial operation of the refrigeration units at the Geneva Meat and Fish Market in November 1987. To the extent that these violations have been in existence since November 1987, Geneva Meat and Fish Market and Gary Pikulski have for more than two years evaded the costs associated with compliance, and have therefore accrued economic benefits commensurate with that absence of expenditure.

Notwithstanding Respondent's apparent attempts at achieving compliance through construction of the aforementioned plywood barrier, there has been no compliance to date. Hence, the Board finds that the factor of Section 33(c)(6) of the Act is not germane to the instant matter.

Based on evaluation of all the evidence and the factors in Section 33(c), the Board finds that the noise emissions from the Geneva Meat and Fish Market unreasonably interfere with the enjoyment of life of Brian L. Peter and Genevieve Carlson, and are therefore in violation of 35 Ill. Adm. Code 900.102.

REMEDY

In consideration of the foregoing, the Board finds that several actions are required, and these shall be so ordered. The actions include:

- 1) Immediate initiation of a compliance program, which shall include by dates certain:
 - a) identification of an effective program;
 - b) implementation of the program; and
 - c) demonstrated attainment of compliance.
- 2) Cease and desist by Respondent of violations of the Act and of the Board's rules and regulations regarding noise pollution.
- 3) Apprising of Complainant of all actions taken by Respondent in response to today's action.
- 4) Retaining of jurisdiction by the Board during the pendency of the above actions so that the Board may oversee that its Order is carried out.

As regards the matter of the most economic reasonable compliance method, the Board notes that it cannot determine on the basis of the facts before it which of the several technically practicable strategies and their many variations would produce the most economically reasonable and effective alternative for the Geneva Meat and Fish Market. Accordingly, the Board will direct Respondent to take what it views as the economic alternative, with the only proviso that the choice effectuate compliance.

The Board will today levy no monetary penalty against Respondent, but reserves the option pursuant to in Section 42 of the Act to levy a civil penalty up to \$10,000 and an additional penalty up to \$1,000 for each day during which violation continues⁴, should Respondent fail in any measure to promptly, expeditiously, and efficaciously carry out any of the provisions of the Order today entered. The Board cautions that it will tolerate no disregard of today's Board determinations, as such previous disregard may to date be evidenced in Respondent's failure to appear before this Board.

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

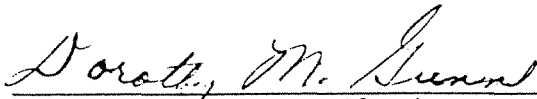
⁴ The Board notes that P.A. 86-1014 was recently enacted to increase the minimum penalty to \$10,000 and the maximum penalty to \$50,000. This public act has an effective date of July 1, 1990.

ORDER

1. The Board finds that Geneva Meat and Fish Market and Gary Pikulski ("Respondent") have violated 35 Ill. Adm. Code 900.102 and 901.102.
2. Respondent shall immediately initiate a compliance program to ensure that compliance with all applicable Board regulations shall be attained. The program shall include:
 - a) Identification of noise abatement alternatives, including but not limited to installation of noise abatement equipment.
 - b) A report describing each alternative, and indicating which alternative Respondent will use to abate the noise and achieve compliance, shall be sent to the Board and Complainant, Brian J. Peter, not later than April 30, 1990.
 - c) The noise abatement alternative shall be in operation not later than June 1, 1990.
 - d) Compliance with all applicable Board regulations shall be demonstrated. Respondent shall send a report to the Board and Complainant, Brian J. Peter, showing that compliance has been demonstrated not later than June 15, 1990.
3. Respondent shall cease and desist from violations of 35 Ill. Adm. Code 900.102 and 901.102 of the Board's regulations effective upon attainment of compliance, but in no case later than June 15, 1990.
4. The Board will retain jurisdiction in this matter pending receipt of the reports. Failure to comply with the provisions of this Order may subject Respondent to civil penalties.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Interim Opinion and Order was adopted on the 22nd day of March, 1990, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board