

ILLINOIS POLLUTION CONTROL BOARD

January 21, 1999

MICHAEL R. PAWLOWSKI and DIANE K.)	
PAWLOWSKI)	
)	
Complainants,)	
)	
v.)	PCB 99-82
)	(Enforcement - Citizen, Noise)
DAVID JOHANSEN and TROY QUINLEY,)	
individually and d/b/a BENCHWARMERS)	
PUB, INC.,)	
)	
Respondents.)	

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

On December 18, 1998, Michael and Diane Pawlowski (complainants) filed a complaint against David Johansen and Troy Quinley, individually and d/b/a/ Benchwarmers Pub, Inc. (respondents). Complainants allege that respondents are violating Sections 23 and 24 of the Environmental Protection Act (Act) (415 ILCS 5/23 and 24 (1996)) and the Board noise regulations at 35 Ill. Adm. Code 900.102. On December 29, 1998, the respondents filed a motion "requesting that the Board deny case for hearing." On January 6, 1999, the Board received a motion to file a response to the motion *instanter* and the response. The motion to file *instanter* is granted.

Section 103.124(a) of the Board's procedural rules, which implements Section 31(b) of the Environmental Protection Act (415 ILCS 5/31(b)), provides:

***If a complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the Board agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings. 35 Ill. Adm. Code 103.124.

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. Brandle v. Ropp (June 13, 1985) PCB 85-68. An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. Citizens for a Better Environment v. Reynolds Metals Co. (May 17, 1973) PCB 73-173.

Respondents maintain that: 1) the allegations are not sufficient to allow each separate respondent to admit or deny the allegations; 2) that the requested relief asking that the hours of operation be limited is beyond the Board's authority to grant and; 3) that the complainants moved to the nuisance. Complainants assert in their response that the individually named respondents are the "primary shareholders, officers, and/or directors" of Benchwarmers, Inc. and complainant has "no duty to separate or specifically allege individual acts." The Board disagrees with the respondents. The complaint clearly states which portions of the Act are alleged to have been violated and what activities took place at the premises which led to the alleged violations. The allegations are sufficient to allow each of the respondents to either admit or deny the allegations.

Respondents also argue that the requested relief is beyond the Board's authority to grant. Section 33(b) of the Act specifically allows the Board to order that a respondent "cease and desist" from violations of the Act. Therefore, the Board may, if a violation is found, order the respondents to cease and desist violations and such order may necessitate limited hours of operation. Therefore, the requested relief is within the Board's authority to grant.

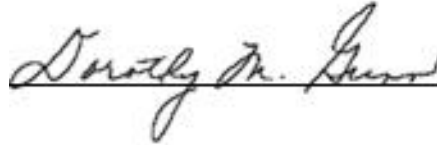
Finally respondents maintain that the complainants did "come to the nuisance" and therefore, the request to cease and desist is frivolous because no special circumstances exist to warrant the relief requested. Respondents may, if a violation is found, argue pursuant to Section 33(c) of the Act that the premises are suitable to the location and have priority of location. At this time, the Board cannot find that the requested relief is frivolous.

The Board denies the respondents' motion to dismiss and accepts this matter for hearing. At this time, the Board finds that the complaint is neither duplicitous or frivolous. This matter is set for hearing. The hearing must be scheduled and completed in a timely manner, consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with this order and the Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 21st day of January 1999 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board