

ILLINOIS POLLUTION CONTROL BOARD
May 6, 1999

CHARTER HALL HOMEOWNER'S)	
ASSOCIATION and JEFF COHEN,)	
)	
Complainants,)	
)	
v.)	PCB 98-81
)	(Enforcement - Citizen, Noise)
OVERLAND TRANSPORTATION)	
SYSTEM, INC. and D.P. CARTAGE, INC.,)	
)	
Respondents.)	

BILL S. FORCADE AND STEVEN M. SIROS, OF JENNER & BLOCK, APPEARED ON BEHALF OF COMPLAINANTS; and

MARK J. STEGER, OF MCBRIDE, BAKER & COLES, APPEARED ON BEHALF OF RESPONDENTS.

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

This citizens' enforcement action concerns noise from a trucking terminal in Palatine, Illinois. Respondent Overland Transportation System, Inc. leases the trucking terminal to respondent, D.P. Cartage, Inc., which operates the facility. Respondents are owned by Vitran Corporation and have been combined. The Board refers to Overland Transportation System, Inc. and D.P. Cartage, Inc. collectively as "Overland" or respondents.

Complainants are Charter Hall Homeowner's Association and Jeff Cohen. The homeowner's association is comprised of residents, including Jeff Cohen, who reside in a development immediately west of the trucking facility. Complainants allege that respondents emit noise from the trucking terminal that violates the Board's numeric sound limits. Complainants also allege that the noise unreasonably interferes with the enjoyment of life in violation of the Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* (1996), and the Board's regulations.

In an interim opinion and order dated October 1, 1998, the Board found that complainants failed to establish that respondents violated the Board's numeric sound limits. However, the Board found that respondents emitted noise that unreasonably interfered with the enjoyment of life. The Board therefore found that respondents had violated the Act and the Board's regulations. The Board then ordered the matter to hearing on an expedited basis to address the issue of remedies, including civil penalties.

In this final opinion and order, the Board requires respondents to perform certain measures to abate noise, to pay a civil penalty of \$15,000, and to cease and desist from further violations.

PROCEDURAL MATTERS

Below, the Board discusses the procedural history of this case and addresses a motion that respondents have filed.

Overview

Hearing Officer Jack Burds held the first hearing in this matter from May 12, 1998, through May 14, 1998.¹ In its interim opinion and order of October 1, 1998, the Board found that respondents emitted noise from the trucking terminal that unreasonably interfered with the enjoyment of life in violation of the Act and the Board's regulations. The Board ordered a second hearing to "address appropriate remedies, including civil penalties" Charter Hall Homeowner's Association and Jeff Cohen v. Overland Transportation System, Inc. and D.P. Cartage, Inc. (October 1, 1998), PCB 98-81, slip op. at 25.

On November 5, 1998, respondents moved the Board to reconsider and clarify the Board's interim opinion and order (motion to reconsider). The Board denied the motion to reconsider on December 3, 1998.

Hearing Officer John Knittle held the second hearing in this matter on December 8, 1998. Complainants presented six witnesses: five residents and one noise expert. Complainants offered two exhibits, both of which were admitted. Respondents presented no witnesses and offered no exhibits.² Complainants and respondents filed posthearing briefs.³

Motion

At the December 8, 1998 hearing, Overland moved the hearing officer to allow it to introduce, at some later date, evidence regarding remedies. Overland proposed to offer this evidence through a written filing or at another hearing. The hearing officer denied the motion. Tr.2 at 5-7, 10-11.

In its response brief, Overland moves the Board to reverse the hearing officer's decision and order another hearing on noise abatement measures or that Overland prepare and file a noise abatement report, allowing complainants an opportunity to comment. Overland acknowledges that it agreed to the December 1998 hearing dates, but states that if the Board

¹ The transcript of the first hearing is cited as "Tr.1 at _." Complainants' exhibits from the first hearing are cited as "Comp. Exh. _;" respondents' exhibits from the first hearing are cited as "Resp. Exh. _."

² The transcript of the second hearing is cited as "Tr.2 at _." Complainants' exhibits from the second hearing are cited as "Comp. Exh. RH_."

³ Complainants' first posthearing brief is cited as "Comp. Br. at _;" respondents' response brief is cited as "Resp. Br. at _;" complainants' reply brief is cited as "Reply Br. at _."

had granted Overland's motion to reconsider, the hearing would have been postponed. For that reason, Overland believed it was a "waste of its resources to engage a noise consultant" to prepare for the December 1998 hearing. Resp. Br. at 2-3. In support of its motion, Overland cites several Board cases in which the Board, after finding a violation, ordered the respondent to evaluate noise abatement measures before the Board imposed a remedy. Resp. Br. at 3-4 (citing Zarlenga v. Partnership Concepts (May 9, 1991), PCB 89-169; Village of Matteson v. World Music Theatre (April 25, 1991), PCB 90-146; Tex v. Coggeshall (October 29, 1992), PCB 90-182; Madoux v. B & M Steel Service Center, Inc. (December 2, 1993), PCB 90-148).

Complainants oppose Overland's motion. Complainants state that Overland had an opportunity to present evidence on remedies at the December 1998 hearing and chose not to do so. Complainants assert that Overland made a litigation strategy decision not to present testimony at that hearing and that remedies should not be delayed because of Overland's poor judgment. Reply at 2-3.

The Board denies Overland's motion. The Board's interim opinion and order was issued over two months before the December 1998 hearing dates, which were scheduled in October 1998 with Overland's agreement. But Overland never moved to postpone the hearing. Instead, Overland waited until the day of the scheduled hearing to present a motion seeking an opportunity to introduce evidence on remedies at a later date.

The cases that Overland cites do not support its motion. In those cases, the Board did not have an adequate record to order specific abatement measures. See Partnership Concepts, PCB 89-169, slip op. at 18; World Music, PCB 90-146, slip op. at 37; Coggeshall, PCB 90-182, slip op. at 16; Madoux v. B & M Steel Service Center (May 21, 1992), PCB 90-148, slip op. at 14. Here, Overland was afforded an opportunity to present evidence on remedies, but chose not to take advantage of that opportunity. Given these circumstances, the Board affirms the hearing officer's ruling and denies Overland's motion.

COMPLAINANTS' REQUESTED RELIEF

Complainants' request for relief is extensive. For purposes of later discussion, the Board summarizes that requested relief.

Cease and Desist

Complainants ask the Board to order Overland to immediately cease and desist from all future violations of the Act, Board regulations, and Board orders. Complainants request that this order include but not be limited to causing or allowing sound emissions in violation of (1) various numeric sound limits in the Board's regulations, (2) the Board's prohibition against generating nuisance noise, and (3) site-specific sound limits that complainants ask the Board to establish. Comp. Exh. RH 1 at 1.

Noise Abatement Structures and Materials

Complainants request that the Board order Overland to construct two types of noise abatement structures at the facility and add acoustically absorptive material to certain structures. Specifically, complainants request that Overland construct an airtight, solid brick or wooden barrier, at least one inch thick and at least 22 feet high, around the entire northern, western, and southern perimeter of the facility. Complainants request that Overland construct an airtight, sound containing building or structure to totally enclose the west side loading docks. Complainants also request that the Board order Overland to add acoustically absorptive material to the entire surface of the eastern side of the western wall of the barrier and to the entire surface of the western side of the facility building. Finally, complainants ask the Board to order Overland to complete these activities within 60 days of the Board's order. Comp. Exh. RH 1 at 1.

Cease Certain Operations

Complainants ask the Board to order Overland to cease parking trailers on the west side of the facility. Complainants also want the Board to prohibit Overland from "hammering or banging or other repair work" except when such activities are conducted within a sound containing building or structure. Complainants ask the Board to order Overland to cease these activities within ten days of the Board's order. Comp. Exh. RH 1 at 1-2.

Sound Limits

Complainants request that the Board order Overland to comply with various numeric sound limits in the Board's regulations and site-specific sound limits. To determine if Overland exceeds any of these sound limits, complainants ask the Board to order Overland to install and operate a sound recording device and to take continuous nighttime sound measurements in accordance with site-specific measurement procedures that the Board establishes. Comp. Exh. RH at 2-3.

Upon Charter Hall's written request, Overland would have to retain a qualified noise expert to analyze specified tapes and prepare a report up to two times per year. In addition, Overland would have to deliver specified tapes to Charter Hall upon written request. Comp. Exh. RH 1 at 3-4.

Supervision of Noise Expert

Complainants ask the Board to order Overland to retain a qualified noise expert who would have to file certain certifications with the Board regarding the noise abatement structures and materials and the sound recording device. Comp. Exh. RH 1 at 4-5.

Performance Bond and Predetermined Penalties

Complainants request that the Board order Overland to post a \$50,000 performance bond or other security with the Board. Overland would forfeit the amount of the security if it fails to perform any of the required tasks on time. Comp. Exh. RH 1 at 5.

Complainants also ask the Board to order Overland to pay predetermined penalties for any future violations of the Board's order. Specifically, Overland would have to pay \$1,000 for each day that it violates any requirement regarding the noise abatement structures and materials or changes in operations. Overland would have to pay \$2,500 for each day that it fails to operate the sound recording device as required or fails to analyze tapes as required. Finally, Overland would have to pay \$5,000 for each day that it exceeds any of the sound limits set forth in the Board's order. Comp. Br. at 24.

Civil Penalties

Complainants ask the Board to order Overland to pay a civil penalty of \$157,700. Comp. Br. at 23.

FINDINGS OF FACT

In its interim opinion, the Board made various findings of fact that are incorporated by reference. In this section of the opinion, the Board will make additional findings of fact regarding (1) an airtight barrier, (2) acoustically absorptive material, (3) sound containing enclosures, (4) trailer parking, and (5) Overland and its attempts to control noise. The Board's findings of fact regarding the first four items are based on the testimony of Greg Zak (Zak) of the Illinois Environmental Protection Agency. Zak is an expert in noise control and human response to noise. Tr.1 at 389; Tr.2 at 48.

Airtight Barrier

Zak recommended that Overland build an airtight, solid brick or wooden barrier around the northern, western, and southern perimeter of the facility. To be an effective sound barrier, the barrier must be at least one inch thick. It also must be high enough to break the line of sight between the trucks at the western loading dock and the highest roof gutter on the eastern eaves of the residences that abut the facility. Tr.2 at 49-50, 63-64, 78, 81-82, 142-143; Comp. Exh. RH 2.

The barrier will help abate the noise generated when respondents hitch, drag, load, and unload trailers. Tr.2 at 81-83. The barrier must be constructed on the western, northern, and southern perimeters to be effective. All three sides of the barrier must have the same elevation to be effective. Tr.2 at 63-66, 69-70.

To be effective, the western wall of the barrier must be located at the western perimeter of the facility. It must extend from the east-west chain link fence located at the northern perimeter of the facility to the east-west chain link fence located at the southern perimeter of the facility. Tr.2 at 66-67, 132-133, 141; Comp. Exh. 1; Comp. Exh. RH 2. It is unclear

from the record whether the approximately eight to ten foot tall berm located just east of the backyards of the residences is part of Overland's property. Tr.2 at 144. The barrier could be located either on or off the berm as long as it breaks the line of sight described above. Tr.2 at 143-144.

To be effective, the southern wall of the barrier must be located where the east-west chain link fence is located at the southern perimeter of the facility. It must extend from the western wall to the eastern edge of the facility. Tr.2 at 66, 114-116, 132-133; Comp. Exh. 1.

To be effective, the northern wall of the barrier must be located at the northern perimeter of the facility where the east-west chain link fence, including the facility's entrance gate, is located. It must extend from the western wall to the eastern edge of the facility. The northern perimeter fence has the facility's entrance gate. Tr.2 at 68, 114-116, 132-133; Comp. Exh. 1; Comp. Grp. Exh. 2, Photo 23. The barrier would do very little, however, to abate the noise generated when respondents hitch and drag trailers parked to the north of the northern wall of the barrier. Tr.2 at 134-135.

Acoustically Absorptive Material

Zak recommended that Overland install acoustically absorptive material on the entire surface of Overland's side of the western wall of the airtight barrier described above and on the entire surface of the western side of the facility building. Tr.2 at 49-50, 78-79, 81-82, 136-137. The acoustically absorptive material will help abate the noise generated when respondents hitch, drag, load, and unload trailers. Tr.2 at 81-83.

Sound Containing Enclosures

Zak recommended that Overland install airtight enclosures, such as collapsible rubber gaskets, on each of the bays of the western loading dock. Tr.2 at 49-50, 80-82, 136-137. Overland could install the enclosures, as well as the barrier and acoustically absorptive material described above, within 60 days. Tr.2 at 49-50.

The enclosures will help abate the noise generated when respondents load and unload trailers. To be effective, the enclosures must seal the backs of the trailers against the loading dock. Tr.2 at 81-84, 136-137.

It is not uncommon for enclosures intended to control noise to be ineffective. For example, enclosures may have gaps or may be made of material that is too thin. Tr.2 at 52. To avoid such problems, a noise control engineer should oversee the project. Tr.2 at 53.

Trailer Parking

Zak recommended that Overland stop parking trailers on the west side of the facility. Tr.2 at 85-86. It would not be unreasonable for Overland to cease parking trailers in that location within ten days. Tr.2 at 54-55. This operational measure will help abate the noise generated when respondents hitch and drag trailers. Tr.2 at 86. This change, along with the barrier, enclosures, and acoustically absorptive material described above, are necessary to abate the nuisance noise. Tr.2 at 74, 80-86.

Overland and Its Attempts to Control Noise

Overland has 32 trucking terminals throughout the midwest. The Palatine facility is one of Overland's five trucking terminals in Illinois. Tr.1 at 470-471; Resp. Exh. 1. Overland has undertaken several measures at the Palatine facility to try to control noise.

Overland placed carpeting, gummed rubber, and hard rubber under the dock plates to try to minimize the double bang sound that respondents generate when they drive forklifts over the dock plates. None of these measures were successful. Tr.1 at 487-488. The record does not reveal when Overland took these measures or how much they cost.

When the rubber tires of its forklifts wear down to a certain thickness, Overland replaces the tires with new, quieter tires. Tr.1 at 499. It is unclear when Overland began this practice or how much it costs.

In an effort to reduce noise from the engine and exhaust of its approximately ten to 12 year old yard spotter, Overland spent \$1,200 to \$1,500 to insulate the engine and modify the exhaust system. These measures did not adequately reduce noise. Overland did this work in the summer of 1997. In February 1998, Overland purchased a new, quieter yard spotter for approximately \$44,000. Tr.1 at 482-483, 509-510. Overland disconnected the device on the new yard spotter that automatically made a beeping sound when the vehicle was put in reverse. Tr.1 at 500. The record does not disclose when Overland disconnected this device.

Overland installed new overhead doors on its shop area in an effort to minimize noise from repair work. Tr.1 at 490. It is unclear when Overland installed the new doors or how much they cost. If any repair work is done outside, it is done on the east side of the facility. Tr.1 at 490. The record does not reveal when Overland began this practice.

Overland instructed its employees to connect pup trailers only on the east side of the facility. Tr.1 at 490-491. It is unclear when Overland began this practice.

Overland meets with its drivers twice per month and with its dock workers once per week. At these meetings, Overland emphasizes to its employees that it has residential neighbors and that Overland employees should not generate any unnecessary noise. Overland has been conducting these meetings since it began its operations. Tr.1 at 492-493.

The facility currently is adjusting its staffing and operations to try to comply with a new company policy to have all trailers loaded and leaving the facility by 9:00 p.m. Tr.1 at

498-499. The record did not disclose when these adjustments would be complete or how much they would cost.

Overland did not retain a noise expert to evaluate the facility's noise sources. Tr.1 at 510-511.

DISCUSSION

In this section, the Board determines the appropriate remedy for Overland's violations. The Board first considers the noise abatement measures that the Board will order Overland to undertake. The Board then discusses complainants' request for a performance bond and predetermined penalties. Lastly, the Board addresses whether to impose a civil penalty on Overland and, if so, in what amount.

In determining the appropriate remedy, the Board must consider the factors set forth in Section 33(c) of the Act. See 415 ILCS 5/33(c) (1996). The Board's findings on the Section 33(c) factors from the interim opinion are incorporated by reference and summarized below.

1. Character and Degree of Injury to, or Interference with the Protection of the Health, General Welfare and Physical Property of the People. Noise from the trucking facility substantially and frequently interfered with the residents' enjoyment of life. The Board weighs this factor against Overland.
2. Social and Economic Value of the Pollution Source. The trucking facility has social and economic value. The Board weighs this factor in Overland's favor.
3. Suitability or Unsuitability of the Pollution Source to the Area, including Priority of Location. The residents were on notice that the trucking facility may be a minor annoyance. However, the annoyance was substantial and resulted from Overland's decision to intensify operations at the facility. Moreover, Charter Hall and many of the residents were present before Overland took over the facility. The trucking terminal, as Overland has operated it, is unsuitable to the area. The Board weighs this factor against Overland.
4. Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Emissions Resulting from the Pollution Source. Overland could have implemented several technically practicable and economically reasonable noise control measures several years ago. The Board weighs this factor against Overland.
5. Subsequent Compliance. The evidence shows that the noise problem persisted as of the May 1998 hearing. The Board weighs this factor against Overland.

In light of these findings, the Board will determine the appropriate remedy.

Noise Abatement Measures

Physical Changes

The Board will require Overland to install the airtight barrier, airtight enclosures, and acoustically absorptive material. The Board already has found that these measures are economically reasonable and technically feasible. See Charter Hall, PCB 98-81, slip op. at 14. These measures will help abate the noise generated when respondents hitch, drag, load, and unload trailers. This is the noise of which the residents have primarily complained.

These measures are consistent with Board orders in similar cases. For example, the Board has required a trucking terminal to construct a sound barrier to address nuisance noise. See Thomas v. Carry Companies of Illinois (May 19, 1994), PCB 91-195, slip op. at 3. In addition, the Board has ordered a respondent to install an enclosure and insulation to abate nuisance noise. See Christianson v. The American Milling Co., (March 11, 1992), PCB 90-59, slip op. at 3-4 (enclosure); Madoux v. B & M Steel Service Center, Inc. (November 19, 1992), PCB 90-148, slip op. at 5-7 (insulation).

The airtight barrier must run contiguously on the northern, western, and southern boundaries of Overland's facility. However, the northern wall may have an opening at and no wider than the current chain link fence gate that serves as the entrance to the facility from Northwest Highway. The barrier must be of uniform elevation and must be higher than the line of sight from the highest roof gutter on the eastern eaves of the Charter Hall residences to the highest point among trailers at the western loading dock.

The Board will require Overland to construct an airtight enclosure, such as a collapsible rubber gasket, on each of the bays of the western loading dock where a trailer may park for loading or unloading. Overland must ensure that the back of each trailer that parks at a western loading dock bay is sealed within the airtight enclosure during loading and unloading. See American Milling, PCB 90-59, slip op. at 3-4 (requiring doors of sound containing structure to be closed during unloading of railcars and trucks).

The Board also will require Overland to add acoustically absorptive material to the entire surface of the eastern side of the western wall of the barrier and to the entire surface of the western side of the facility building.

The Board will require that Overland design and install these noise abatement structures and materials in accordance with good engineering practices (including good noise control engineering practices) and under the supervision of a qualified noise control engineer. The Board also will require that Overland maintain these structures and materials in good condition.

The Board will require Overland to have the barrier, enclosures, and acoustically absorptive material in place within 120 days of this order. While Zak testified that it was possible for Overland to complete these measures within 60 days, he did not testify that it was reasonable to require Overland to do so. It is also unclear from the record whether the 60-day period included time for bidding and contracting, or was simply construction time. Requiring these activities to be complete within 120 days also is consistent with Board precedent. See

Carry Companies, PCB 91-195, slip op. at 3 (requiring sound barrier to be completed within just over four months).

Changes in Operations

Overland caused significant nuisance noise when it hitched trailers and dragged improperly hitched trailers. The Board already has found that restricting the parking of trailers to the east side of the facility is economically reasonable and technically feasible. The Board will require that Overland cease parking trailers on the west side of the facility. The Board also will require that Overland cease parking trailers north of the east-west line of the chain link fencing currently on the north side of the facility, in order to ensure that all trailers will be parked within the airtight barrier. Overland must cease parking trailers in these locations within ten days of this order. The Board previously has required a trucking terminal to restrict its operations in order to abate nuisance noise. See Carry Companies, PCB 91-195, slip op. at 3.

Complainants did not establish that repairs of truck cabs, yard spotters, and trailers at the facility cause nuisance noise. Accordingly, the Board will not require Overland to conduct all of its repair work in a sound containing building or structure, as complainants request. See Hoffman v. City of Columbia (October 17, 1996), PCB 94-146, slip op. at 19 (Board refused to order respondent to perform noise abatement measures that were designed to reduce noise from a source that was not demonstrated to be causing the nuisance). The Board notes that Overland already has installed new overhead doors on its repair shop area and has limited its outside repair work to the east side of the facility.

Sound Limits

The Board will not order Overland to comply with numeric sound limits or to record its sound emissions to determine if they exceed those limits. Overland is already subject to the Board's various numeric sound limits and complainants did not show that Overland has violated those limits.

The Board acknowledges that it imposed requirements similar to those complainants request to address nuisance noise in Village of Matteson v. World Music Theatre (February 25, 1993), PCB 90-146, *aff'd sub nom. Discovery South Group, Ltd. v. Pollution Control Board*, 275 Ill. App. 3d. 547, 656 N.E.2d 51 (1st Dist. 1995). However, the record before the Board in World Music did not support requiring the installation of sound barriers, enclosures, or absorptive materials. See World Music, PCB 90-146, slip op. at 24, 29-31, 40, 47. In this case, the latter measures are indicated and the record shows they will address the problem. Given that these measures should be effective, the Board does not believe it necessary to require the extensive recording that complainants request.

Cease and Desist

The Board will order Overland to cease and desist from any further violations of the nuisance noise prohibitions of 415 ILCS 5/24 (1996) and 35 Ill. Adm. Code 900.102. This is

consistent with Board orders in similar cases, in which the Board has ordered a respondent to implement specific abatement measures and to cease and desist from further violations. See Carry Companies, PCB 91-195, slip op. at 3; B & M Steel, PCB 90-148, slip op. at 6-7.

Complainants also ask the Board to order Overland to cease and desist from violating numerous other provisions of the law that complainants either never alleged or never proved that Overland violated. The Board will not order Overland to cease and desist from violating a provision of the law that it was not proven to have violated.

Performance Bond and Predetermined Penalties

The Board cannot conclude from this record that a performance bond or predetermined penalties are necessary to ensure that Overland will timely install the barrier, enclosures, and acoustically absorptive material. For example, while it has not eliminated the nuisance noise, Overland has implemented numerous measures to try to minimize its noise. Of course, Overland will be subject to substantial civil penalties under Section 42(a) of the Act if it fails to comply with the Board's order.

Civil Penalties

The maximum penalties the Board can assess are established in Section 42(a) of the Act, which provides in pertinent part:

[A]ny person that violates any provision of this Act or any regulation adopted by the Board . . . shall be liable to a civil penalty not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day during which the violation continues 415 ILCS 5/42(a) (1996).

In its interim opinion and order, the Board found that noise from Overland's facility had unreasonably interfered with the residents' enjoyment of life in violation of Section 24 of the Act and the Board's regulations at 35 Ill. Adm. Code 900.102. Pursuant to Section 42(a) of the Act, the Board could impose a civil penalty of \$50,000 for each of these two violations. In addition, for each of these two violations, Section 42(a) permits the Board to impose a civil penalty of \$10,000 for each day the violation continues. The Board found in its interim opinion that the noise problem began when Overland took over the trucking terminal in November 1995 and was continuing as of the time of the May 1998 hearing. The Board also found that Overland's noise disturbs complainants' witnesses almost daily.

In making a penalty determination, the Board must consider the factors set forth in Section 33(c) of the Act. The Board's consideration of the Section 33(c) factors are set forth on page 8 and will not be repeated here.

The Board also may consider the factors set forth in Section 42(h) of the Act. That section authorizes the Board to consider any matter of record in mitigation or aggravation of penalty, including but not limited to the following factors:

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 the 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 future 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. 415 ILCS 5/42(h) (1996).

Below, the Board considers each of these factors.

1. Duration and Gravity of Violation. The trucking facility noise has interfered with the lives of many residents. The disturbances occur almost every day and throughout Overland's a.m. and p.m. shifts, which run late into the night and start early in the morning. The noise has disrupted the residents' sleep and limited normal activities in and around their homes. The disruptions are severe and have been going on since Overland's arrival in November 1995.

Noise from the facility woke up one witness approximately 146 times over approximately ten months in 1996 and 1997. Another witness was awakened by the noise approximately 122 times over approximately four and one-half months in 1996 and 1997. The trucking facility noise woke up or kept up another witness or her husband approximately 284 times over approximately nineteen months in 1996, 1997, and 1998.

The Board weighs this factor against Overland.

2. Diligence in Attempting to Comply. The residents have made various requests to Overland over the years that it reduce its noise. For example, residents met with Overland officials in May 1996 and May 1997. At the latter meeting, the residents specifically suggested that Overland build a soundproof fence and enclose the loading dock.

While Overland did not implement those measures, it has implemented a number of measures to try to minimize its noise. However, the record does not reveal when Overland undertook many of these measures or how much most of them cost. In addition, many of the measures were not designed to reduce the noise generated when respondents hitch, drag, load, and unload trailers.

Overland did not retain a noise control expert to help it minimize its noise. Overland reasonably could have implemented the specific noise abatement measures that the Board will order today several years ago.

On balance, the Board weighs this factor against Overland.

3. Economic Benefits Accrued. Overland gained some economic benefit by not implementing various noise control measures. See IEPA v. Allen Barry, individually and Allen Barry, d/b/a Allen Barry Livestock (May 10, 1990), PCB 88-71, slip op. at 77 (discussing the cost savings of delayed compliance based on the time-value of money). The Board weighs this factor against Overland.
4. Penalty Amount That Will Deter Further Violations and Aid in Enhancing Voluntary Compliance. The Board finds that a substantial penalty is necessary to deter further violations by Overland and to enhance voluntary compliance by Overland and others similarly subject to the Act. Noise from the trucking facility has interfered with the ability of many residents to enjoy their lives in and around their homes. The disturbances are severe and have been going on for several years even though the residents asked Overland for relief and Overland could have employed technically practicable and economically reasonable measures to abate the nuisance noise.

However, the Board cannot find that the \$157,700 penalty that complainants propose is necessary to deter further violations and enhance voluntary compliance. First, Overland did voluntarily undertake a number of measures to try to reduce its noise. Second, while complainants argue that their proposed penalty is warranted based on the gross profits of Overland's parent company, Vitran Corporation (Reply Br. at 23), they have not established that Vitran Corporation is responsible for these violations or adequately demonstrated that this information is relevant to the penalty to be imposed on Overland. Finally, the Board notes that \$95,400 of the proposed \$157,700 penalty is for violations allegedly continuing after the May 1998 hearing. Comp. Br. at 21-23. The December 1998 hearing was limited to the issue of remedies, including civil penalties. Accordingly, the Board cannot consider evidence regarding alleged ongoing violations after the first hearing.

5. Previously Adjudicated Violations. The record contains no evidence of previously adjudicated violations of the Act by Overland. The Board weighs this factor in Overland's favor.

Considering all of the above factors, the Board finds that a penalty is warranted and that \$15,000 is an appropriate penalty amount. This determination will aid in enforcement and is consistent with Board precedent. For example, in Gott v. M'Orr Pork, Inc.

(April 16, 1998), PCB 96-68, the Board imposed a \$2,500 penalty on a company because odor from its hog confinement building and outdoor waste lagoon had unreasonably interfered with neighboring residents' enjoyment of life and property in violation of the Act and Board regulations. See M'Orr Pork, PCB 96-68, slip op. at 1, 15-16. In M'Orr Pork, as in the instant case, the pollution disturbed a number of residents repeatedly in and around their homes. In making a penalty determination in that case, the Board weighed the factors of Sections 33(c) and 42(h) for and against the respondent in much the same way it has weighed them for and against Overland. *Id.* at 11-14.

However, several important distinctions between M'Orr Pork and this case call for a larger penalty here. First, in M'Orr Pork, the odor problem had continued for approximately one year. *Id.* at 11, 13. The noise problem in this case had continued approximately two and one-half times that long as of the May 1998 hearing.

Second, the respondent in M'Orr Pork had obtained assistance from specialists in controlling hog odor, had undertaken numerous measures directed at the sources of odor, and had mitigated the odor. *Id.* at 2-9. In contrast, Overland has failed to implement any of several readily available, reasonable measures to reduce the noise emissions at issue. In addition, Overland did not retain a noise control expert, and many of the measures that Overland has implemented were not directed at the noise of which the residents have primarily complained. See Allen Barry, PCB 88-71, slip op. at 35-36, 76-80 (discussing the significance for penalty determinations of (1) the availability of reasonable control technology and (2) behavior that reflects diligence and that is reasonably directed toward compliance); see also World Music, PCB 90-146, slip op. at 52-54, 58 (respondent companies failed to try diligently to eliminate nuisance noise; the Board imposed a \$13,000 penalty).

Finally, the respondent in M'Orr Pork had one confinement and lagoon operation. Overland has over 30 trucking terminals throughout the midwest, including five in Illinois. A larger penalty is necessary in this case to deter Overland, which is a larger entity, and similarly situated entities. See 415 ILCS 5/42(h)(4) (1996).

CONCLUSION

As discussed above, the Board will order Overland to cease and desist from further violations and to perform specific noise abatement measures. The Board also will order Overland to pay a civil penalty of \$15,000 for violating the Act and the Board's regulations.

The Board incorporates by reference its findings of fact and conclusions of law from its interim opinion. This final opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. The Board finds that Overland Transportation System, Inc. and D.P. Cartage, Inc. (collectively Overland) have unreasonably interfered with the enjoyment of

life in violation of the nuisance noise prohibitions of 415 ILCS 5/24 (1996) and 35 Ill. Adm. Code 900.102.

2. Overland must cease and desist from any further violations of 415 ILCS 5/24 (1996) and 35 Ill. Adm. Code 900.102.
3. Overland must construct an airtight barrier on its property at 419 West Northwest Highway, Palatine, Illinois. Except as described in paragraph 3(e) of this order, the barrier must run contiguously on the northern, western, and southern boundaries of Overland's facility. The barrier must be completed within 120 days of the date of this order.
 - a. The barrier must be designed and installed in accordance with good engineering practices (including good noise control engineering practices) and under the supervision of a qualified noise control engineer.
 - b. The barrier must be constructed of solid brick or wood and must be at least one inch thick at all points.
 - c. The barrier must be of uniform elevation. The barrier must be higher than the line of sight from the highest roof gutter on the eastern eaves of the Charter Hall residences that abut Overland's facility (*i.e.*, from 605 to 699 Charter Hall Drive) to the highest point among trailers parked in each of the bays of Overland's western loading dock.
 - d. The western wall of the barrier must be located at or near Overland's western property boundary. The northern end of the western wall must be at or near the east-west line of the chain link fencing currently on the north side of Overland's facility. The southern end of the western wall must be at or near the east-west line of the chain link fencing currently on the south side of the facility.
 - e. The northern wall of the barrier must be located at or near the location of the chain link fencing currently on the north side of Overland's facility. The eastern end of the northern wall must be at or near the eastern boundary of the facility. The northern wall may have an opening at and no wider than the current chain link fence gate that serves as the entrance to the facility from Northwest Highway.
 - f. The southern wall of the barrier must be located at or near the location of the chain link fencing currently on the south side of Overland's facility. The eastern end of the southern wall must be at or near the eastern boundary of the facility.
 - g. Overland must maintain the barrier in good condition.

4. Overland must add acoustically absorptive material to the entire surface of the eastern side of the western wall of the barrier described in paragraph 3(d) of this order. Overland must add acoustically absorptive material to the entire surface of the western side of the facility building. All acoustically absorptive material must be in place within 120 days of the date of this order.
 - a. All acoustically absorptive material must be installed in accordance with good engineering practices (including good noise control engineering practices) and under the supervision of a qualified noise control engineer.
 - b. Overland must maintain all acoustically absorptive material in good condition.
5. Overland must construct an airtight enclosure on each of the bays of Overland's western loading dock where a trailer may park for loading or unloading. All airtight enclosures must be in place within 120 days of the date of this order.
 - a. Overland must ensure that the back of each trailer that parks at a western loading dock bay is sealed within the airtight enclosure during loading and unloading of the trailer.
 - b. All airtight enclosures must be designed and installed in accordance with good engineering practices (including good noise control engineering practices) and under the supervision of a qualified noise control engineer.
 - c. Overland must maintain all airtight enclosures in good condition.
6. Within ten days of the date of this order, Overland must cease parking any trailer on the west side of its facility and cease parking any trailer north of the east-west line of the chain link fencing currently on the north side of the facility.
7. Overland must pay a civil penalty of \$15,000 for violating 415 ILCS 5/24 (1996) and 35 Ill. Adm. Code 900.102. Overland must pay this penalty within 30 days of the date of this order. Such payment must be made by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Illinois Environmental Protection Trust Fund, and must be sent

by First Class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 N. Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

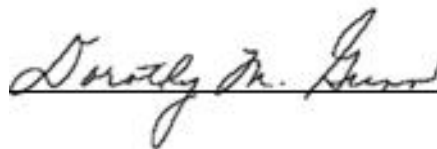
The certified check must clearly indicate on its face this case name and docket number, along with the appropriate Federal Employer Identification Number(s). Any such penalty not paid within the time prescribed will accrue interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act (35 ILCS 5/1003(a) (1996)), as now or hereafter amended, from the date payment is due until the date payment is received. If the time for payment is stayed during the pendency of an appeal, interest will not accrue during such stay.

IT IS SO ORDERED.

Board Member M. McFawn abstained.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) 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 6th day of May 1999 by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written in black ink. The signature is positioned above the printed name and title.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board