ILLINOIS POLLUTION CONTROL BOARD
January 7, 1999

ROY K. JOHNSON,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 98-31
	)	(Enforcement - Citizens, Air, Noise)
ADM-DEMETER, HOOPESTON DIVISION,	)	
	)	
	)	
Respondent.	)	

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

In this citizen's enforcement case, complainant Roy K. Johnson (Johnson) alleges that respondent ADM-Demeter, Hoopeston Division (ADM) violated the Environmental Protection Act, 415 ILCS 5/1 *et seq*. (1996) (Act) through its operations at and around a grain elevator in Hoopeston, Vermilion County, Illinois. Specifically, Johnson alleges that ADM violated the Act's prohibitions against air and noise pollution. See 415 ILCS 5/9 and 24 (1996).[1]

ADM moves for summary judgment on several grounds. The parties have fully briefed the motion.[2] The Board denies the motion, in part because the record reveals material issues of fact as to (1) the extent of ADM's control over the alleged sources of pollution; and (2) whether noise from ADM's trackmobile creates an unreasonable interference. These issues of fact preclude summary judgment. The Board also finds that neither the exemption of ADM's rail car switching engine from numerical noise limits, nor the traffic laws, preclude Johnson from pursuing the claims set forth in the complaint.

STATEMENT OF FACTS

The following facts are undisputed unless described otherwise. Furthermore, the Board has considered facts set forth in the parties' affidavits only to the extent that the affidavits meet the requirements of Illinois Supreme Court Rule 191(a) (145 Ill. 2d R. 191(a)). Although Supreme Court Rule 191(a) is not a Board rule, the Board may look to it for guidance. See 35

[1] Johnson also claims that ADM has violated Sections 8, 10, 23, 25, and 27 of the Act. None of these sections of the Act create a cause of action. Accordingly, the Board strikes these references from the complaint.

[2] ADM filed a Motion for Summary Judgment and Memorandum in Support of its Motion for Summary Judgment (Mem.) on September 18, 1998. Johnson filed a Memorandum in Opposition to the Motion for Summary Judgment (Mem. Opp.) on October 8, 1998. ADM filed a Reply in Support of its Motion for Summary Judgment (Reply) on October 21, 1998.

Ill. Adm. Code 101.100(b). Supreme Court Rule 191(a) requires that affidavits submitted in support of and in opposition to a motion for summary judgment:

> [S]hall be made on the personal knowledge of the facts; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. 145 Ill. 2d R. 191(a).

The Setting

Johnson lives at 715 North Market Street, Hoopeston, Illinois. See Exhibit A to Mem. Opp., Affidavit of Roy K. Johnson (Johnson Aff.) at 1. He has lived there since July 14, 1961. *Id*.

There are two grain elevators in the vicinity of Johnson's residence, both of which ADM operate. One of these facilities is several hundred yards south of Johnson's residence (the south ADM facility). Johnson Aff. at 3. The south ADM facility began operations sometime before 1986. *Id*.

ADM's other grain elevator is 600 feet north of Johnson's residence (the North Market Street facility). Johnson Aff. at 1. It consists of a business office, weigh scales, roadways, elevators, and related structures. *Id*. A corporate predecessor of ADM began operations at the North Market Street facility in 1986. *Id*.

Various roads and railroad tracks are located near Johnson's residence. North Market Street, a paved street, is 40 feet in front of and to the east of Johnson's residence. Johnson Aff. at 1. Railroad tracks are located approximately 560 feet behind Johnson's residence. See Exhibit A to Mem., Affidavit of Charles Smith (Smith Aff.) at 3. These tracks were at this location before the North Market Street facility or Johnson's residence were built. *Id*. These tracks also cross North Market Street about 900 feet from Johnson's residence. *Id*. A spur rail line also runs from the North Market Street facility to south of the south ADM facility, parallel to and east of the main railroad tracks. Johnson Aff. at 5.

Traffic on the Railroad Tracks

ADM receives one rail shipment per week on average. Smith Aff. at 1. ADM has never loaded more than three 65-car trains in a week. *Id*. In its busiest year, ADM loaded the equivalent of 40 65-car trains. *Id*.

On average, over 30 trains per day, in addition to those that are traveling to or from the grain elevator, pass by Johnson's residence. Smith Aff. at 3. It takes these trains approximately 90 seconds to pass by Johnson's residence. *Id*.

These trains also cross a road located 900 feet from Johnson's residence. Smith Aff. at 3. Each time a train passes by this intersection, it blows a train whistle. *Id*. When a train is heading south, it blows its whistle for at least ten seconds while directly behind Johnson's residence. *Id*.

The Trackmobile

ADM uses a rail car switching engine, known as a trackmobile, to maneuver rail cars that arrive at the ADM facility. Smith Aff. at 1. Smith states that the trackmobile passes in front of Johnson's residence two times, or at most three times, per shipment. *Id*. at 2. Therefore, Smith states, the trackmobile passes in front of Johnson's house only two times, and at most nine times, per week. *Id.* Smith also states that it takes approximately 15 seconds for the trackmobile to pass in front of Johnson's residence, and that on average, the trackmobile is in front of Johnson's residence for approximately 30 seconds per week, and for no more than two minutes and 15 seconds. *Id*. The trackmobile also may pass in front of Johnson's house twice a year for maintenance. *Id*. at 2. However, Johnson states that ADM operates the trackmobile on North Market Street during the day and the night, including in between 10:00 p.m. and 7:00 a.m. Johnson Aff. at 6.

The remainder of the rail car switching operation is conducted on the railroad tracks. Smith Aff. at 2. Smith states that when the trackmobile is on the railroad tracks, it is not operated directly behind Johnson's residence. *Id*. Johnson disputes this, stating that when ADM operates the trackmobile on the tracks behind Johnson's residence, it does so for hours at a time, during both day and night, including from 10:00 p.m. to 7:00 a.m. Johnson Aff. at 6.

ADM now uses a trackmobile that can maneuver more rail cars than a smaller trackmobile that ADM previously used. Smith Aff. at 2-3. The current trackmobile therefore requires fewer passes in front of Johnson's home and minimizes the time that the trackmobile is driven past Johnson's residence. *Id*. Johnson does not directly dispute this statement, but does state that he has never observed the trackmobile maneuver 65 railroad cars at once. Johnson Aff. at 6. Instead, Johnson has observed the trackmobile maneuver smaller strings of railroad cars that are subsequently rejoined. *Id.*

Smith is not aware of any other piece of specialty equipment or trackmobile that can perform the functions of ADM's current trackmobile with less noise. Smith Aff. at 2. Smith also is not aware of any better muffling device for the trackmobile other than that which the manufacturer has designed and installed in ADM's current trackmobile. *Id.* ADM recently replaced the muffler with a newer version of the same model, recommended by the manufacturer, as a preventative maintenance measure. *Id.* Smith states that ADM has ensured, and will continue to ensure, that the muffler is in good working order. *Id*.

When the trackmobile maneuvers cars behind Johnson's residence, the noises that the trackmobile emits are accompanied by noises that the rail cars emit when being maneuvered, opened, filled, and closed. Johnson Aff. at 6. These noises include squeaking and screeching of wheels, banging of access hatches, and the serial impulsive sounds of coupling devices when

struck against each other. *Id*. These noises are plainly audible in Johnson's bedroom when he has the doors and windows closed and the blinds drawn. *Id*.

North Market Street

When ADM commenced operations at the North Market Street facility, Johnson observed a substantial increase in commercial and farm vehicle traffic on North Market Street associated with the transport of grain to and from the North Market Street facility. Johnson Aff. at 2. For example, because the south ADM facility does not have a weigh station, grain trucks that arrive from the south and are unloaded at the south ADM facility must travel to and from the North Market Street facility several times. Johnson Aff. at 4. The increased traffic continues today. *Id.*

After operations began at the North Market Street facility, Johnson observed an increase in the volume of airborne grain dust in the vicinity of North Market Street, including on his residence and property. Johnson Aff. at 3. The volume of grain dust in the vicinity of Johnson's home increases when the winds are from the direction of North Market Street. *Id*. The volume of grain dust varies directly with the volume of rail and truck traffic to and from the North Market Street facility. *Id*. Most of the grain dust comes from uncovered grain trucks and other farm vehicles traveling to and from the North Market Street facility. *Id.*

After ADM began operations at the North Market Street facility, the volume of road dust in, on, and around Johnson's residence increased. Johnson Aff. at 4. The volume of dust also increases when the winds are from the north-northwest, which is the direction of the North Market Street facility. *Id.*

ADM uses third-party independent contractors to haul some grain on a load-by-load basis. Smith Aff. at 4. ADM has verbal agreements with these contractors. *Id*. The remaining grain is hauled by trucks owned and operated by independent third parties, most of whom are local farmers who do business at the grain elevator. *Id*.

The only vehicle that ADM itself owns or operates, besides the trackmobile, is a flatbed truck at the grain elevator. Smith Aff. at 4. Three or four times a year, ADM uses it to carry an average of about 50 bushels of grain collected from clean-up operations. *Id*. Other than this truck, ADM does not own or operate any trucks that are used to transport grain to and from the North Market Street elevator. *Id*.

ADM displays two notices at the entrance to the scale office at the grain elevator, one that instructs haulers to comply with the Illinois Vehicle Code regulations regarding tarpaulins on trucks, and one that instructs haulers to comply with all traffic laws. Smith Aff. at 5. However, ADM has not refused to accept uncovered loads or referred uncovered loads to law enforcement agencies. Mem. Opp. at 6-7, citing ADM's Response to Respondent's Second Request to Admit. ADM has not corresponded to grain truck owners or operators that it will refuse to accept for delivery grain from vehicles that are uncovered, and has never maintained records of whether arriving grain truck loads are covered. Mem. Opp. at 6-7, citing ADM's Response to Respondent's Second Request to Admit.

The Grain Elevator

The North Market Street facility has a rail loading station that is approximately 1150 feet north of Johnson's residence. Smith Aff. at 3. ADM controls dust at the station with a combination of suction and mineral oil spray. *Id*. Smith claims that most or all of the grain dust that enters Johnson's property is from traffic that passes in front of his residence, not the elevator at the North Market Street facility. Id. at 3-4.

ADM does not own the trains used to load out grain at the North Market Street facility, and does not control when they arrive at the facility. Smith Aff. at 4. To remain competitive, ADM must load rail cars when they arrive. *Id*. However, to expedite loading, and reduce nighttime loading, ADM replaced a 6,400 bushel per hour loading/receiving leg with a 20,000 bushel per hour loading/receiving leg. *Id*.

ADM recently replaced the dust collector with a quieter fan and added a muffling device to it. Smith Aff. at 5. In December 1995, ADM also changed its vehicle unloading policy to minimize noise from idling trucks. *Id*. ADM now requires trucks to remain on the north end of the facility, the area of the facility farthest from Johnson's residence. *Id*. However, ADM has not yet had to implement this policy because no trucks have delivered grain during nighttime hours since December 1995. *Id*.

ADM has two Zimmerman grain dryers and one DeLux grain dryer at the North Market Street facility. Smith Aff. at 5. ADM has not operated the DeLux dryer at night for several years, and uses it infrequently as a back-up dryer. *Id*. ADM has constructed a sound barrier to minimize the noise from the DeLux dryer. *Id*.[3]

ADM has paved a gravel area on the North Market Street facility.[4] Smith Aff. at 3. Most of the on-site roadway is unpaved, however. Johnson Aff. at 4. Johnson has observed that

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[3] Smith also states that an acoustical engineer conducted sound testing that shows that the grain elevator operates within applicable daytime noise levels set forth in Board regulations. Smith Aff. at 4. The engineer concluded that a dust collector silencer and controls on the number of idling trucks that gather south of the weigh scales would avoid exceedences of applicable nighttime noise levels. *Id*. Smith also states that an acoustical engineer tested one of the dryers, manufactured by DeLux, and found that its noise levels were within the Board's daytime noise levels. Smith Aff. at 5. The Board will disregard these statements, however, because they do not meet the requirements of Illinois Supreme Court Rule 191(a). Specifically, these statements are conclusory and ADM has not provided a factual basis for these statements. See Cole Taylor Bank v. Corrigan, 230 Ill. App. 3d 122, 129, 595 N.E.2d 177, 182 (1st Dist. 1993) (reversing summary judgment granted in reliance upon an affidavit that contained conclusions without any supporting evidence).

[4] Smith states that IEPA determined that this measure was sufficient to control dust under 35 Ill. Adm. Code 212.461(b)(5). Smith Aff. at 3. Smith also states that ADM's rail loading stations passed an Agency opacity test conducted on May 29, 1998. *Id*. The Board disregards

vehicles operating on these unpaved areas churn up large volumes of airborne road dust. *Id*. Since 1986, when the North Market Street facility began operating, the volume of road dust in, on, and around Johnson's residence has greatly increased. *Id.* The volume of road dust in the vicinity of Johnson's home increases when the prevailing winds are from the direction of the North Market Street facility. *Id*. There are no other facilities in that area that routinely experience heavy traffic on unpaved roadways. *Id*. at 4-5.

Effects of Traffic and Grain Elevator Operations

Since the North Market Street facility began operating, Johnson has seen large quantities of grain dust filling the air and covering the ground in the vicinity of his residence, including on his property. Johnson Aff. at 2. Some of the grain dust that Johnson has observed has a red color from the grain, unlike ordinary dirt and road dust. *Id*. The volume of grain dust near Johnson's home increases when the prevailing winds are from the north-northwest, which is the direction of the North Market Street facility. *Id*. Johnson also has observed clouds of grain dust billowing from the rail car loading station. *Id*.

Because of the airborne dust associated with the North Market Street facility, Johnson finds breathing difficult. Johnson Aff. at 7. The dust covers lawn furniture, food, and drink. *Id*. For these reasons, Johnson is "unable to conduct normal activities" in his yard. *Id.* Johnson also is unable to leave the doors and windows of his home and garage open because the dust would damage his belongings. *Id*.

Since the North Market Street facility began operating, Johnson has heard loud and mostly continuous mechanical noises from the facility. Johnson Aff. at 2. Because of these noises, Johnson is unable to enjoy normal activities in his back yard, even during daylight hours, because the noises occasionally interfere with normal speech. *Id*. at 7-8. Johnson also finds the noises annoying when he hears them for an extended period of time. *Id*. at 7-8.

When the trackmobile operates, along with other heavy equipment on North Market Street, Johnson cannot leave the doors or windows of his residence open because the noise interferes with normal speech, listening to television or radio broadcasts, and other activities in his home. Johnson Aff. at 8. When the trackmobile operates in the evening or at night, along with grain trucks and other heavy vehicles on North Market Street, Johnson is unable to get to sleep or to remain asleep. *Id*. at 6-7.

Johnson also claims that because of the dust from the North Market Street facility, he has "experienced aggravation of medical conditions, including upper respiratory congestion, headaches, fatigue and sleeplessness, for which I am receiving treatment from my physician." Johnson Aff. at 7. The Board will disregard this statement, however, because Johnson does not show that he is qualified to offer a medical opinion as to the cause of the illnesses he describes. See Draper and Kramer Incorporated v. Pollution Control Board, 40 Ill. App. 3d 918, 921-922, 353 N.E.2d 106, 109 (1st Dist. 1976) (reversing finding of air pollution based on injury to health

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these statements because they do not meet the requirements of Illinois Supreme Court Rule 191(a).

when no scientific testimony introduced on causation); Gott v. M'Orr Pork (Feb. 20, 1997), PCB 96-68, slip op. at 13 (finding no unreasonable interference with complainant's health from hog odors when complainants failed to introduce medical testimony or other scientific proof linking their illnesses to odors).

Responses of Other Government Agencies

Johnson complained to the Illinois Environmental Protection Agency (Agency) about noise and dust from traffic going to and from the North Market Street facility. Johnson Aff. at 5. The Agency replied as follows:

> Emissions from vehicle traffic going to and from ADM's facility in Hoopeston appears to be the major source of particulate matter based on your complaint. Based upon the Act and the applicable section of the Motor Vehicle Code, the appropriate remedy would be for the local police to issue citations to those vehicles that are in violation of 625 ILCS 5/15-109.1. Excessive noise was not detected at the facility during operation. Exhibit B to Mem., Letter dated June 5, 1997, from the Agency to Roy K. Johnson (Agency Letter) at 2.

Johnson also complained to the Office of the State's Attorney for Vermilion County. Johnson Aff. at 5. Assistant State's Attorney Norman R. Werth replied that "short of a specific instance in which a truck is too loud (*i.e.*, no muffler), there is no basis for prohibiting or limiting the traffic. Primary responsibility for enforcing traffic regulations (noise, speed, weight limits, etc.) lies with the Hoopeston Police Department, since the road involved is a city street." Exhibit C to Mem., Letter dated August 11, 1995, from the Office of the State's Attorney for Vermilion County to Roy Johnson (State's Attorney Letter) at 2.

DISCUSSION

ADM moves for summary judgment on several grounds. First, ADM argues that it is not legally responsible for the alleged noise and dust that trucks and trains in the area generate because it does not own or operate those vehicles, with minor exceptions. ADM further argues that it is not legally responsible for the alleged noise and dust because it does not control the roadways or rail road lines that trucks and trains in the area use. Second, ADM argues that noise from the trackmobile does not violate the Act because the trackmobile is exempt from the Act's numerical noise limits and ADM uses the trackmobile only as necessary. Third, ADM argues that because the noise and dust that its operations generate is not unreasonable, and ADM has taken all reasonable measures to minimize dust and noise, it has not violated the Act.

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and

in favor of the opposing party." *Id*. Summary judgment "is a drastic means of disposing of litigation," therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id*., citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

With these standards in mind, the Board addresses each of ADM's grounds for summary judgment below.

Responsibility for Noise and Dust from Traffic

In his complaint, Johnson alleges, among other things, that ADM has violated Sections 9 and 24 of the Act. Section 9 of the Act provides in part:

> No person shall:
>
> (a) Cause or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act . . . . 415 ILCS 5/9(a) (1996).

The Act defines "air pollution" as "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." 415 ILCS 5/3.02 (1996). Dust is a contaminant. 415 ILCS 5/3.06 (1996).

Under Section 9(a) of the Act, ADM can be held liable for "causing or allowing" air pollution. ADM argues that it because it does not own or operate most of the trucks and trains that pass Johnson's home, it cannot be held to have "caused or allowed" any air pollution that these vehicle generate. Mem. at 5-9.

For similar reasons, ADM argues that it also cannot be held liable under Section 24 of the Act for any noise pollution that these vehicles create. Section 24 of the Act provides in part:

> 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. 415 ILCS 5/24 (1996).

The Board regulation upon which Johnson relies is Section 900.102, which provides:

> 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 Environmental Protection Act,

> so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter. 35 Ill. Adm. Code 900.102.

The regulations define noise pollution as "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity." 35 Ill. Adm. Code 900.901. Furthermore, the Act provides that "the boundaries of . . . property" includes both real property and personal property; therefore, personal property (including vehicles) can be a source of noise pollution even when operated on highways. 415 ILCS 5/24 (1996).

In the motion, ADM argues that it cannot be held to have "caused or allowed" the noise pollution of which Johnson complains because ADM does not own or operate most of the vehicles that Johnson alleges to have created the noise pollution. Mem. at 5-9.

In support of its arguments on Johnson's noise and air pollution claims, ADM relies upon Madoux v. B & M Steel Service Center (May 21, 1992), PCB 90-148. In that case, complainants resided approximately 100 yards away from respondent B & M Steel Service Center's (B & M Steel) facility. Many trucks making deliveries to and from B & M Steel facility passed by complainants' homes on a gravel road. As these trucks braked at an intersection near complainants' home, they made braking sounds. Complainants alleged that because of these noises, along with other noises, B & M Steel violated Section 24 of the Act.

In considering these claims, the Board found:

> [T]here are noises generated in the complainants' area that are not attributable to B & M Steel operations. These include the noises from saws and chippers or debarkers in use at the neighboring sawmill and trucks not clearly owned or operated by B & M Steel on Sawmill Road. Sounds generated by trucks or other sources in the area that are not under the control of B&M Steel are irrelevant. Madoux, PCB 90-148, slip op. at 8.

ADM argues that because others own or operate almost all of the trucks and trains that pass Johnson's house, similar to the situation in Madoux, the Board cannot hold ADM responsible for the noise and dust those trucks and trains generate. Mem. at 5-7.

The Board disagrees. As Johnson notes, under Madoux, it is not ownership and operation of the trucks and trains that is dispositive, but ADM's control of those trucks and trains. ADM admits that it has hired at least some of the trucks that deliver grain to and from its North Market facility, and the Board has held that under the Act, a respondent may be held liable for the acts of its independent contractor. For example, in EPA v. James McHugh Construction Co. (May 17, 1972), PCB 71-291, the Board found the City of Chicago (City) liable for "allowing" water pollution that its independent contractors caused. In so doing, the Board observed,

> The statute makes it unlawful not only to "cause" but also to "allow" pollution. We think this language goes beyond the common law and imposes an affirmative duty on persons in a position of potential control to take action to prevent

> pollution. We hold that the common law of independent contractors is not incorporated as such into the statute, but that the question for our decision is whether, in light of statutory policy, a respondent is in such a relationship to the transaction that it is reasonable to expect him to exercise control to prevent pollution. McHugh, PCB 71-291, slip op. at 3.

In support of its finding that the City could reasonably have been expected to exercise control to prevent pollution, the Board noted that the City's contract with its independent contractor required the contractor to construct a settling basin, and that the City had an engineer on site at all times to ensure that the contractor adhered to the contract specifications. McHugh, PCB 71-291, slip op. at 4-5. See also Forest Preserve District of DuPage County v. Mineral and Land Resources Corporation (December 18, 1997), PCB 96-84, slip op. at 4 (applying the same test of liability to claims involving an independent contractor).

In this case, ADM has verbal agreements with independent contractors that ADM uses to haul some grain on a load-by-load basis. Smith Aff. at 4. Johnson notes that ADM has failed to take any action to require grain truck owners or operators – including its independent contractors – to keep their grain loads covered. Mem. Opp. at 6-7, citing ADM Responses to Respondent's Second Request to Admit. Johnson's affidavit therefore raises the question of whether ADM reasonably could have prevented its independent contractors from creating the alleged air and noise pollution.

Johnson also claims that independent third parties using ADM's North Market Street facility create noise and air pollution. In considering these types of claims, the Illinois courts apply a test similar to the test the Board has used regarding independent contractors: "The analysis applied by the courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution." People v. Fiorini, 143 Ill. 2d 318, 346, 574 N.E.2d 612, 623 (1991). For example, in Hindman v. EPA, 42 Ill. App. 3d 766, 769, 356 N.E.2d 669, 672 (5th Dist. 1976), the court held an operator of a landfill liable for "causing or allowing" open burning, even though the fire apparently was started by trespassers. In Phillips Petroleum Co. v. Pollution Control Board, 72 Ill. App. 3d 217, 220-21, 390 N.E.2d 620, 623 (2d Dist. 1979), however, the court found that respondent had not caused or allowed air pollution when a railroad car carrying respondent's anhydrous ammonia leaked because the evidence did not show that respondent "exercised sufficient control over the source of the pollution in such a way as to have caused, threatened, or allowed the pollution." As these cases suggest, decisions under this standard "will necessarily be dependent upon the particular circumstances of each individual case." Castellari v. Prior (May 28, 1987), PCB 86-79, slip op. at 3. See, *e.g.*, Bath Inc. v. Pollution Control Board, 10 Ill. App. 3d 507, 510, 294 N.E.2d 778, 781 (4th Dist. 1973) (owner of landfill held liable for open burning even though owner did not know of the cause of the burning); Montgomery County v. Crispens (February 1, 1996), AC 95-43 (trustee of land trust that owned site held liable for open burning at the site when trustee operated the site).

Johnson raises questions of fact that are relevant to this inquiry as well. Johnson notes that his home is located between two ADM facilities, and that only the North Market Street

facility has a weigh scale and a business office. As a result, a truck might have to make several trips by his home to deliver a single load of grain to the south ADM facility. Mem. Opp. at 2-3, citing Johnson Aff. at 3-4. Because "only ADM has control over the placement, equipment and configuration of its operations, and the frequency and timing of shipments between them, it necessarily follows that to that extent it effectively dictates the nature and frequency of truck traffic on the street in front of Mr. Johnson's residence." Mem. Opp. at 3. It is not clear what portion of the air and noise pollution that Johnson complains of is connected to ADM's operations, but Johnson's affidavit does raise the question of whether ADM could and reasonably should exercise control over others to prevent the alleged air and noise pollution. Accordingly, the Board cannot ADM grant summary judgment.

The Board notes that both parties have relied in part on Aurora Metal Co. v. Pollution Control Board, 30 Ill. App. 3d 956, 333 N.E.2d 461 (2d Dist. 1975). In that case, an independent carrier, Beck Transport Co. (Beck), delivered sand to Aurora Metal Co., Faskure Division (Faskure), a manufacturer of resin coated sand used in the foundry industry. Plaintiffs sued Faskure for causing air pollution in violation of Section 9(a) of the Act. At hearing, witnesses testified that Beck had caused some of the air pollution, and the Board held Faskure liable for the pollution that Beck caused.

The appellate court reversed the Board, holding:

> The operation of the trucks by Beck was not done under the supervision of an Faskure personnel. As soon as it came to Faskure's attention in October of 1972, Faskure terminated Beck's services. Faskure cannot be held liable for Beck's actions in the absence of evidence that Faskure failed to exercise reasonable care in selecting Beck to perform that service. Aurora Metal, 30 Ill. App. 3d at 961, 333 N.E.2d at 465, citing Gomien v. Wear-Ever Aluminum, Inc., 50 Ill. 2d 19, 21, 276 N.E.2d 336, 339 (1971).

Gomien, upon which the Aurora Metal court relies, applied the Restatement of Torts to determine liability for acts of an independent contractor. Without discussing McHugh or similar cases, the Aurora Metal court appears to have assumed that the Act incorporates the common law of independent contractors. No other court has done so, and it is not clear that the Board should read the Act as the Aurora Metal court did in light of more recent cases, including the Illinois Supreme Court's decision in Fiorini. Even if the Board were to rely on Aurora Metal, however, Johnson's affidavit raises a factual issue as to whether ADM exercised reasonable care when selecting its independent contractors.

Effect of Traffic Laws

ADM also argues that Johnson should rely on traffic laws to address his complaints and that ADM has no duty to enforce those laws. Mem. at 8-9. ADM argues that the Agency and the State's Attorney agreed that Johnson should rely on the traffic laws to address his complaints, and that ADM was not responsible for enforcing those laws.

The Board finds that while enforcement of the traffic laws could address some of Johnson's complaints, those laws do not preclude Johnson from suing under the Act. Neither the Agency nor the State's Attorney suggested otherwise; the State's Attorney instructed Johnson that he was "free to pursue any remedies available to you, including an action before the Illinois Pollution Control Board or civil litigation." State's Attorney Letter at 1. Furthermore, while the Board agrees that it is not ADM's obligation to enforce the traffic laws, a question remains as to whether it would be reasonable and possible for ADM to exercise control over the sources of the air and noise pollution of which Johnson complains.

ADM also notes that many of the trucks that pass Johnson's residence are exempt from the requirement to cover their loads pursuant to 625 ILCS 5/15 - 109.1, and that under Act, this statute supersedes the Board's regulations at 35 Ill. Adm. Code 212.315. See 415 ILCS 5/10(e) (1996) ("the Board shall not adopt or enforce any regulation requiring the use of a tarpaulin or other covering on a truck, trailer, or other vehicle that is stricter than the requirements of Section 15-109.1 of the Illinois Vehicle Code. To the extent that it is in conflict with this subsection, the Board's rule codified as 35 Ill. Admin. Code, Section 212.315 is hereby superseded."). Section 212.315 of the Board's regulations provides:

> No person shall cause or allow the operation of a vehicle of the second division as defined by Ill. Rev. Stat. 1981, ch. 95 ½, pars. 1-217, as revised, or a semi-trailer as defined by Ill. Rev. Stat. 1981, ch. 95 ½, pars. 1-187, as revised, without a covering sufficient to prevent the release of particulate matter into the atmosphere, provided that this rule shall not pertain to automotive exhaust emissions.

Section 15-109.1 of the Illinois Vehicle Code, which is entitled "Covers or tarpaulins required for certain loads," provides in part:

> No person shall operate or cause to be operated, on a highway, any second division vehicle loaded with dirt, aggregate, garbage, refuse, or other similar material, when any portion of the load is falling, sifting, blowing, dropping or in any way escaping from the vehicle.
>
> This Section shall not apply to . . . implements of husbandry or other farm vehicles while transporting agricultural products to or from the original place of production. 625 ILCS 5/15-109.1 (1996).

This claim also does not provide any basis for summary judgment. Johnson is suing under Section 9(a) of the Act, not under Section 212.315 of the Board's regulations, nor any other regulation that requires the use of coverings or tarpaulins. Indeed, Johnson does not ask the Board to require ADM to use coverings or tarpaulins. See Complaint at 11. Accordingly, Section 5/10(e) of the Act does not apply.

<u>The Trackmobile</u>

ADM argues that the trackmobile is exempt from numeric limits and therefore cannot create noise pollution. Mem. at 9-10. ADM further argues that it is used only when necessary and therefore cannot be considered an unreasonable interference. *Id*. at 10-12

The exemption that ADM relies upon is set forth in 35 Ill. Adm. Code 902.140(7), which exempts "any special mobile equipment" from the numerical sound limitations. The Board's rules define "special mobile equipment" as "every vehicle not designed or used primarily for the transportation of persons or property and only incidentally operated or moved over a highway." 35 Ill. Adm. Code 900.101. ADM states that the primary function of the trackmobile is to move railcars on railroad tracks, not to transport persons or property. ADM further notes that it operates the trackmobile on the roadways only incidentally. Accordingly, ADM argues, the trackmobile is "special mobile equipment" and exempt from the Board's numeric limits. Mem. at 10. ADM notes that Johnson does not contest this point. *Id*.

ADM then argues that because the Board has exempted the trackmobile from numerical noise limits, "the Board's rules have implicitly deemed the necessary operation of such equipment to be reasonable, despite the noise generated therefrom." Mem. at 10. ADM further notes that Johnson has not alleged that the trackmobile has been used any more than necessary or in an inappropriate manner. *Id*. Otherwise, ADM argues, "the exemption from the numerical limits would be meaningless because the necessary and proper operation of that equipment would still constitute a nuisance." Reply at 6.

The Board finds that the trackmobile's exemption from numerical limits is not a defense to ADM's alleged violation of Section 24 of the Act. ADM has cited no case law for this proposition, and the Board is aware of none. Indeed, the Board has found violations of Section 24 even in cases in which numerical standards did not apply, or in which violations of numerical standards had not been proven. See, *e.g*, Charter Hall Homeowner's Association and Jeff Cohen v. Overland Transportation System, Inc. and D.P. Cartage, Inc. (October 1, 1998), PCB 98-81 (finding a violation of Section 24 of the Act even though complainant did not prove alleged violation of numeric standards); Shelton v. Crown (October 2, 1997), PCB 96-53 (finding a violation of Section 24 of the Act even though respondent had an exemption to certain numeric standards); Manarchy v. JJJ Associates, Inc. (July 18, 1996), PCB 95-73 (finding a violation of Section 24 of the Act even though complainant failed to prove alleged violation of numeric standard).

Although the exemption does not provide ADM a defense to Johnson's noise pollution claim, it is not meaningless. A violation of numerical limits is relatively easy to prove. A violation of Section 24, on the other hand, requires proof that the noise has unreasonably interfered with life or enjoyment of property, and further requires the Board to consider the factors set forth in Section 33(c) of the Act. See Ferndale Heights Utilities Company v. Pollution Control Board, 44 Ill. App. 3d 962, 358 N.E.2d 1224 (1st Dist. 1976) (upholding Board finding of violation of Section 24 when Board considered Section 33(c) factors); Sneed v. Farrar, First Bank & Trust Company (Feb. 25, 1993), PCB 91-183, slip op. at 13 ("Evidence of a possible numerical violation does not, in itself, automatically result in a finding of nuisance violation.") Thus, it is not

inconsistent to hold ADM to the requirements of Section 24 even though the trackmobile is exempt from numerical limits.

ADM also contends that because it uses the trackmobile only when necessary, any interference from the trackmobile is limited. Mem. at 11. ADM also notes that no other equipment can perform the work of the trackmobile more quietly, and that it has taken steps that have minimized the amount of time that the trackmobile is driven by Johnson's residence and the noise that the trackmobile produces. Mem. at 11-12. Finally, ADM argues that the interference from the trackmobile is especially insignificant when compared to the noise from the many trains, unrelated to ADM's business, that pass by Johnson's home every day. Mem. at 12.

All of these contentions are factual. Johnson disputes how often the trackmobile is used, the effect of the noise from the trackmobile, and the relative contribution of the noise from the trackmobile to noise in the area. Mem. Opp. at 10. These factual disputes preclude summary judgment. *Id*.

Remaining Claims

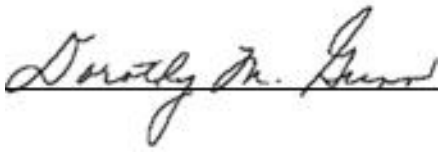
ADM claims that once Johnson's claims regarding traffic and the trackmobile are disregarded, what remains does not rise to the level of an unreasonable interference. Given that the Board has found that these claims may not be disregarded, the Board finds no basis in this argument for granting summary judgment.

CONCLUSION

The Board denies ADM's motion for summary judgment.

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 7th day of January 1999 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board