ILLINOIS POLLUTION CONTROL BOARD
December 18, 1986

CITIZENS OF BURBANK and PEOPLE OF THE STATE OF ILLINOIS, ex. rel., RICHARD M. DALEY,	)	
Complainants,	)	
v.	)	PCB 84-125
CLAIRMONT TRANSFER COMPANY,	)	
Respondent.	)	

CAROL HARDING, APPEARED FOR CITIZENS OF BURBANK;

LYNN WORLEY, ATTORNEY-AT-LAW, APPEARED FOR PEOPLE OF THE STATE OF ILLINOIS.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a August 13, 1984, enforcement complaint filed by Citizens of Burbank ("Citizens")* against Clairmont Transfer Company ("Clairmont"). The complaint alleges violations of Section 23 and 24 of the Environmental Protection Act ("Act"), regarding noise pollution and Sections 8 and 9 of the Act, regarding air pollution stemming from Clairmont's trucking terminal. Ill. Rev. Stat. 1985, ch. 111½, pars. 1001 et seq.

This matter was set for hearing along with another noise and air pollution enforcement case, PCB 84-124, brought by the Citizens against Overnite Trucking. However, counsel for Clairmont filed a letter with the hearing officer indicating that Clairmont had filed a Petition in Bankruptcy under Chapter 11 of the Federal Bankruptcy Code and an Order for Relief was entered by the U.S. Bankruptcy Court for the Northern Division of the Western District of Michigan on November 30, 1984 (Hearing Officer Letter of December 20, 1984). The Order for Relief invokes the automatic stay provision of Section 362 of the Bankruptcy Code (11 U.S.C. Section 362) and, accordingly, stayed the Citizen's enforcement suit before the Board.

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*"Citizens" consists of residents from five (5) locations near Clairmont including: Mr. & Mrs. James Harding, Mr. & Mrs. Vincent Bavirsha, Mr. & Mrs. Ken Myslik, Mr. & Mrs. Edward Myslek and Mr. & Mrs. Frank Lojas. As the complainants were identified by signature only, the Board apologizes for any misspelling of names.

On March 15, 1985, the People of the State of Illinois ("People"), by their attorney, Richard M. Daley, State's Attorney of Cook County, filed a complaint against Clairmont and petitioned the Board to intervene in PCB 84-125. The petition was brought pursuant to the Act which authorizes the State's Attorney to institute court actions in the name of People to restrain violations of the Act and regulations thereunder. Section 362(b)(4) of the Bankruptcy Code provides an exception to the automatic stay when an action to protect health and welfare is brought by a unit of government. The Board granted People's petition to intervene as full parties, thus allowing the enforcement action to proceed (Board Order, April 4, 1985). Hearing was held on June 18, 1985. Respondent Clairmont did not appear at hearing and it was adduced from citizen testimony that Clairmont was no longer operating at the facility (R. 8,29,35).

The Board, on August 28, 1986, issued an order requesting that the parties file a report regarding the status of Clairmont's bankruptcy proceeding, whether Clairmont was presently in operation or would be in the future, and what remedy the complainants sought against Clairmont. The People responded on September 26, 1986, that Clairmont is not now doing business anywhere in Illinois, that Citizens sought no remedy against Clairmont but that a new trucking company is using the space formerly occupied by Clairmont and creating a nuisance. Clairmont responded on October 6, 1986, that it is no longer operating at the facility and that it is in the process of total liquidation under the Bankruptcy Code. On October 24, 1986, the People moved to voluntarily dismiss the complaint. The People state that since Clairmont has ceased to operate at the facility and all assets have been sold, injunctive relief is no longer necessary and that there are no outstanding issues or existing controversies between the parties.

In Illinois, a plaintiff, in a civil proceeding, has an unqualified right to dismiss an action without prejudice up until hearing or trial on the matter unless a counter claim has been pleaded by a defendant. 110 Ill. Rev. Stat. 2-1009(a). In Village of South Elgin v. Waste Management, et al., 64 Ill. App. 3d 570, 381 N.E.2d 782 (2nd Dist., 1978), the court held that while the Civil Practice Act was not directly applicable to proceeding before an administrative body, the rules guiding the courts of Illinois do provide the "outer bounds" of what an administrative agency can do regarding motions for voluntary dismissal. Id. at 782-3. Under Illinois law, a motion for voluntary dismissal of a plaintiff's suit after trial has begun is addressed to the discretion of the court and is reversible only for abuse of discretion. Newlin v. Forseman, 103 Ill. App. 3d 1038, 432 N.E.2d 319 (1982).

Under Bauman v. Advance Aluminum Casting Corporation, 27 Ill. App. 2d 178, 169 N.E.2d 382 (1960), once trial or hearing

has begun, plaintiff cannot dismiss the suit except by consent or on motion, specifying grounds for the dismissal, supported by affidavit and then only on terms to be fixed by the court. Even if compliance with the Civil Practice Act is achieved, the voluntary dismissal by plaintiff is discretionary with the trial court. In Bauman, the court denied a motion for voluntary dismissal after trial as it would constitute an abandonment of the proceeding that would leave the court without the power to enter judgment. The court found this result "untenable." 69 N.E.2d at 385.

The People's motion for voluntary dismissal is denied. Illinois law provides that after trial or hearing this type of motion is discretionary with the court. These principles are applicable to the Board under Village of South Elgin. The matter before the Board has proceeded to hearing, evidence has been taken and the record is closed. In the instant situation, there are compelling reasons for the Board to exercise its discretion by denying the motion. First, there are adequate facts in the record to decide this case on the merits; to grant the motion at this stage could leave the Board without the power to enter a judgment. As the court in Bauman stated, this result is untenable. This is especially true in an enforcement action before the Board since it would frustrate the purposes of the Act and discourage citizen enforcement suits. Second, while the facts and law of this case certainly limit the utility of a Board finding of violation and imposition of a remedy, there is still some good purpose served by such action. As the record shows, the noise and air pollution problem experienced by the citizens is a recurring problem associated with the site, as well as the actual operational practices of the trucking company. A Board Opinion and Order that contains findings of fact and findings of violation could be used in fashioning a remedy before the appropriate zoning authority or in chancery court. At a minimum, a Board Opinion and Order will document through factual findings in an adjudicatory context, the nature of the problem associated with this area and the validity of the Citizens' complaint.

The facility in question, which was operated by Clairmont, is a trucking terminal located at 6767 West 75th Street, in Bedford Park. Corporate headquarters of Clairmont is in Escanaba, Michigan. The facility occupies a two square block area between 75th Street and 77th Street. It is bordered on the north by prairie (R. 33). The repair shop and fueling area are located at the southern end of the property, abutting 77th Street (R. 7-8, 14). 77th Street is unique in that it is only half as wide as an ordinary street (R. 10). The trucking facility abuts one side of the narrow street and the residences of many of the Citizens are directly across the narrow street (R. 10). The precise details of Clairmont's operation and type of business are not available as Clairmont, although properly served and notified, failed to attend the hearing (R. 3).

The complainants in this proceeding are residents from the area near Clairmont's facility. Witnesses provided testimony that they lived within a half-a-block and a block from the facility (R. 8, 14, 21, 28 & 35). The Citizens are residents of the City of Burbank, while the facility is located in Bedford Park (R. 24). Testimony presented from the Citizens indicates that the houses and many of the complaining witnesses themselves were predecessors to any trucking facility and that the houses used to border prairie (R. 16, 19, 25, 26-27 & 31).

The complaints in this proceeding allege that Clairmont's operations violate statutory provisions respecting noise and air pollution. These two aspects will be evaluated separately.

NOISE

Title VI of the Act provides the procedures and standards for noise control. Sections 23 and 24 of that Title provide:

TITLE VI: NOISE

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.

Ill. Rev. Stat. 1985, ch. 111½, pars. 1023 and 1024.

The Board has implemented these statutory sections in two ways. First, the Board has adopted specific numerical limitations on the characteristics of sound that may be transmitted from source to receiver. As no numerical test data were presented in this matter, those portions of the regulations are not at issue. The second method of implementing the noise

provisions of the Act are found in 35 Ill. Adm. Code Sections 900.101 and 900.102.

> Section 900.101 Definitions
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> Noise pollution: the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity.
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> * * *
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> Section 900.102 Prohibition of Noise Pollution
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> 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.

In effect, these two sections adopt a regulatory public nuisance provision for noise control using the statutory phrase "unreasonable interference with the enjoyment of life or with any lawful business or an activity" as the standard. The pleadings, testimony and exhibits of the complainants, regarding noise, are founded in this public nuisance theory.

The judicial interpretation of Sections 900.101 and 900.102 which is most closely related to the facts of this case is Ferndale Heights Utilities Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 44 Ill. App. 3d 962, 358 N.E.2d 1224 (1st Dist., 1976). In that case, which involved the exact statutory and regulatory language at issue in the instant proceeding*, the Board found that Ferndale Heights Utilities Company had violated the regulatory public nuisance standard in their operation of a pumping station. On appeal, the Utility Company argued that the regulatory language of Section 900.102 was unconstitutional in that it did not contain sufficient standards for determining what constitutes "noise pollution" and argued that the narrative testimony at hearing lacked sufficient specificity to sustain a finding of violation

*Prior to Codification in the Illinois Administrative Code, Section 900.101, "Noise Pollution" was found at Illinois Pollution Control Board, Rules and Regulations, Chapter 8, Rule 101(j). Section 900.102 was Rule 102 of that same Chapter. The actual regulatory language was not modified.

of noise pollution. The Ferndale Court found the regulatory language, when viewed in the entire statutory framework, including the factors listed in Section 33(c) of the Act, was sufficiently specific to pass constitutional muster. In evaluating the adequacy and specificity of the citizen testimony, the court stated:

> Ferndale next asserts that the Board's Order should be reversed because its finding of a violation of Rule 102 is contrary to the manifest weight of the evidence. Specifically, Ferndale argues that the Pierson testimony failed to provide dates and times of noise, failed to show any disturbance in his house, failed to show physical damage to himself or any person or property, failed to show that he never lounged or entertained guests in his yard and failed to show when and how often he did not lounge or entertain guests in his yard. Other alleged testimonial deficiencies involve failure to cite dates and times when activities such as patio parties were prevented or when the various witness' sleep was interrupted.
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> However, agency witnesses used such terms as "almost constant this summer," " five times this past summer" and "awakened once or twice this year" to describe generally how often they were disturbed by the noise emanating from the pumping station. Terms such as "a great source of irritation," "disturbing," "like ten air conditioners running at the same time" and "[like] a lawnmower running all day under my window" were used to describe the effect of this sound upon the individuals.
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> Based upon such testimony, the Board properly found that the character and degree of interference with the enjoyment of life and lawful activity occasioned by sounds emanating from Ferndale's pumping operations to be "unreasonable." Our review of the record does not mandate a contrary conclusion. Id. at 1228-1229.

These statutory, regulatory and judicial standards provide the guidance by which the Board must evaluate the record in this proceeding.

At hearing, Mr. James Harding testified:

A. It's like living on the expressway, all the constant noise all the time, a lot of pollution all the time, never stops.

Q. And what type of noise?

A. Trucks idling, racing their motors.

Q. Have you actually heard trucks racing their motors?

A. Yes.

Q. Have you heard trucks racing their motors at night?

A. Yes.

Q. What hours?

A. Twenty four hours, all the time. (R. 13)

Mr. Vincent Bavirsha testified:

A. Well, Clairmont at the time had trucks that had a different kind of a starter, I don't know what it did but it whined when it started a truck, it would sound like a turban [sic] and I don't care what part of the day or what part of the night, if you were asleep you heard it. I did. And I'm about a better than a half a block away. (R. 17-18)

Mr. Kenneth Myslik testified:

They have air starters and at night when they would start their trucks it's a very high-pitched piercing sound that would just penetrate a house.

Q. Do they start their trucks very often?

A. Most of the time they left them running all the time.

Q Is there noise associated with the trucks running?

A. Yes, it is.

Q. Do the trucks move in the terminal?

A. Yes. (R. 27)

* * *

recently I was in bed at night, it was about 10:30 at night and I heard them blowing their horns and one would blow his horn and the other one would blow his horn and then the first one would blow his horn twice and the other one would blow the horn twice and it was like they were playing a game and it was during sleeping hours. (R. 29)

The People also presented testimony from Robert Roache, the supervisor of Enforcement for the Cook County Environmental Control Division ("CCECD"). People introduced a number of exhibits comprised of citizen noise and air pollution complaints received by the CCECD about Clairmont, as well as tickets issued by the CCECD against Clairmont (People's Exhibits 3 thru 11). CCECD investigations found noise of 72-73 decibels taken from in front and along residential homes in air area where complaints had been received which violated the 58 decibel limitation (R. 41-42).

This testimony meets the Ferndale standard of providing a description of the noise, explaining the type and severity of interference caused by the noise (sleep interruption) and providing information on the frequency and duration of the interference. This type of testimony must be provided in any proceeding for the Board to make a finding regarding interference with the enjoyment of life.

Mr. James Harding described the effect of the noise and air pollution on his home life: "Well, with the noise and air pollution we have to keep our windows closed in the summertime because you can't enjoy nothing because all the fumes are coming in there and at the dinner time you can hear the windows vibrating from the noise from the truck" (R. 13-14).

Mrs. Marlene Myslik testified:

Q. Is there anytime that the noise is particularly bad?

A. Yes, when you are getting very tired and everything is quiet, you would hear it more and I would hear it. (R. 32).

Testimony indicated that while there were other trucking firms operating in the area, the noise from Clairmont was identifiable and distinguishable due to the older equipment used

by Clairmont, the unique high pitched starters used and general arrangement and operation of the terminal (R. 9, 11, 20-21, 30-32). Clairmont also pre-existed other trucking firms in the area (R. 11, 20). Additionally, when Clairmont ceased to operate at the facility, witnesses testified to a noticeable decrease in noise and air pollution in the general area (R. 9, 20-21, 29, 34-35).

Based on the above-cited evidence, the Board finds that noises emanating from Clairmont's facility, specifically from vehicle start-up, idling, movement, maintenance and horns caused interference with the sleep and normal leisure time activities of adjacent residents. Further, the Board finds that this interference was frequent and severe prior to Clairmont's ceasing operations at the facility.

ODOR

The Environmental Protection Act, Board regulations and judicial interpretations adopt a similar approach to controlling odor problems. The Act defines and prohibits unreasonable interference with the enjoyment of life or property from odors.

> Section 3
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> b. "AIR POLLUTION" is 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.
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> Section 9
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> No person shall:
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> a. Cause or threaten to 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.

Ill. Rev. Stat. 1985, ch. 111½, pars. 1003 and 1009.

Board regulations at 35 Ill. Adm. Code Sections 201.102, "Air Pollution" and 201.141 "Prohibition of Air Pollution" contain identical language to the Act. Similar judicial interpretations apply to the "unreasonable interference" odor pollution cases. See: Incinerator, Inc. v. Pollution Control Board, 59 Ill.2d 290, 319 N.E.2d 794 (1974); Mystic Tape, Div. of Borden, Inc. v. Pollution Control Board, 60 Ill.2d 330; 328 N.E.2d 5 (1975); Processing & Books v. Pollution Control Board, 64 Ill.2d 68, 351 N.E.2d 865 (1976).

The hearing testimony on odor is similar in character to the testimony on noise. Mrs. Carol Harding described how the trucks' idling and moving in the terminal caused her entire yard to be "gassed up." The fumes were: "Heavy, diesel type fumes. I mean its got to the point where you're actually eating with fumes in your home at night" (R. 7).

Mr. Bavirsha testified that:

> The trucks would run twenty-four hours a day in the wintertime, they wouldn't shut them off. They continually ran and ran and in a stagnate [sic] day, it would be like a fog in your yard, in the whole neighborhood. You could actually see the fumes in the area (R. 21).
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> * * *
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> I like birds, I have a feeder in the yard. And ever since the trucking terminal, even going back as far as Dorin [another trucking terminal], the birds in the yard slowly start disappearing ... And with both terminals going, it was less and less birds (R. 18).

Mr. Myslik testified that:

> You could always smell diesel fumes in the area in wintertime, especially when there was very little air movement, there was a great cloud in the area and you can just smell the diesel fumes (R. 28).

Based on the above-cited evidence, the Board finds that odors from Clairmont's facility, specifically truck start-up, fueling and idling, caused interference with food consumption, comfort and general leisure time activities of adjacent residents. Further, the Board finds that this interference was frequent and severe.

Section 33(c)

The Board may find severe and frequent interference with the enjoyment of life solely based on testimony describing the impacts of noise or odor. However, to evaluate whether those noise or odor impacts are "unreasonable," the Board must evaluate a series of factors listed in Section 33(c) of the Act:

> c) In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
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> 1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
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> 2. the social and economic value of the pollution sources;
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> 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; and
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> 4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such source.

The "unreasonableness" of the noise or odor pollution must be determined in reference to these statutory criteria. Wells Manufacturing Company v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148 (1978); Mystic Tape; Incinerator Inc.; City of Monmouth v. Pollution Control Board, 57 Ill.2d 482, 313 N.E.2d 161 (1974). However, complainants are not required to introduce evidence on these points. Processing & Books.

In evaluating the first Section 33(c) factor, the Board finds that there was frequent and severe interference with sleep, food consumption, and normal leisure activities of adjacent residents caused by noise and odor from Clairmont's facility. This interference goes far beyond trifling interference, petty annoyance or minor discomfort. The noise and odors constituted a substantial interference with the enjoyment of life and property.

Concerning the second factor, the Board finds that Clairmont is no longer socially or economically valuable, as it has ceased to operate at the facility and is presently in the process of liquidation. If the facility had been viable and operating at the present time, the Board would find some social and economic value of the pollution source. However, the social and economic value of a facility such as Clairmont's is reduced by the noise and odor emissions.

Regarding the third factor, the Board finds, first, that the trucking terminal, as operated by Clairmont, was unsuited to the area in which it was located. The close proximity of residences to the facility in combination with the equipment and operating practices of Clairmont created a severe noise and odor problem. Second, that complainants have the clear priority. It is undisputed in the record that local area residents generally, and several of the complainants in particular, lived in the area prior to construction and operation of the Clairmont facility and that the facility site was originally open prairie (R. 16, 19, 25, 26-27 & 31).

Concerning the final factor, the Board is unable to thoroughly review the technical practicability of reducing air and noise emissions, as little information is available in the record. Clairmont failed to appear at hearing and provide testimony on the nature of its operation. The Board notes that there may be technically feasible methods of reducing noise and air emission from this type of source, such as: changing over to quieter, less polluting equipment; relocating repair and fueling sites to areas within the facility that do not border on residences; modifying traffic patterns and operating practices within the facility; constructing sound deadening berms and walls; and prescribing reasonable hours of operation. However, as Clairmont has failed to respond or appear in this matter, no specific information regarding Clairmont's operation or ability to reduce noise and odor emission is available in this record other than completely ceasing trucking operations. In such a situation, the Board is left with a limited choice of remedies. Regarding the economic reasonableness of reducing emissions, the Board notes that Clairmont has ceased operations due to bankruptcy and eventual liquidation.

Based on the Board findings of substantial interference with the enjoyment of life and after consideration of the factors listed in Section 33(c), the Board finds that noise emissions from Clairmont's facility were unreasonable and violated 35 Ill. Adm. Code 900.102 and Section 24 of the Environmental Protection Act. Based on the Board findings of substantial interference with enjoyment of life and after consideration of the factors listed in Section 33(c), the Board finds the odor emissions from Clairmont's facility were unreasonable and violated 35 Ill. Adm. Code 201.141 and Section 9 of the Environmental Protection Act.

The Board is limited by both the law and facts of this case as to the remedy it may fashion. As Clairmont is in bankruptcy, an action to collect money could not be maintained under the automatic stay. However, penalties or fines imposed before the Bankruptcy petition was filed would not be subject to the stay or dischargeable. Quasi-injunctive relief in the form of a cease and desist order is authorized under the Act and is permitted under the Bankruptcy Code. At hearing, the People and the Citizens acknowledged that Clairmont was no longer operating at the site in question. The People requested that some form of administrative cease and desist order be issued that would attach to the land and bind all future owners (R. 52). No statutory or case law citations for the exercise of this authority were cited (R. 53). The Board clearly does not have such authority to fashion an in rem remedy that binds future owners of the land. Only Clairmont has been sued and found in violation of the Act and regulations. The Board is without jurisdiction to bind parties not before it in this proceeding.

The Board is aware of the recurring problem that the Citizens face. The record in this proceeding and its companion case Citizens of Burbank v. Overnite Trucking Inc., PCB 84-124, indicates that every few years a different trucking company moves into the same general facility area and causes a similar air and noise pollution problem. The Citizen's efforts to remedy the problem through discussion with the facility operator, complaints to the CCECD, IEPA and Board are frustrated when the old operator leaves and a new operator moves in to the site. The People's, September 26, 1986, status report indicates that a new trucking terminal is operating at the old Clairmont site and is allegedly creating a noise and air nuisance. The noise and air pollution problem appears to be intrinsic in the operation of a trucking terminal and its proximity to the Citizens' residents.

Unfortunately, the Board is unable to fashion a totally satisfactory remedy in these circumstances. All persons are prohibited from violating the Act and Board regulations and are under a duty not to maintain a nuisance on their property. However, the nature of a nuisance action involves a case-by-case determination of unreasonableness. In the instant case, the Board finds that Clairmont's operation of the trucking terminal constitutes a nuisance under the Act and regulations. The Board notes that the ultimate remedy for the Citizens may be through some form of zoning change or chancery court remedy that runs with the real property. To this end, the Board has made findings of fact and violation regarding the noise and air pollution emissions from the Clairmont facility and has documented the continuing nature of the problem. The Board also orders Clairmont to cease and desist from all trucking operations at the Bedford Park facility. It is these trucking activities that caused the unreasonable interference with the Citizens' sleep, food consumption, normal leisure activities and general

welfare. It is the Board's hope that this Opinion and Order may be of some use to the People and Citizens in pursuing a complete remedy to the noise and air pollution problem, before the appropriate zoning authority, or court of competent jurisdiction.

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

ORDER

1. The Board finds that Clairmont Transfer Company has violated 35 Ill. Adm. Code Section 900.102 and 201.141, as well as Sections 24 and 9 of the Environmental Protection Act.

2. Clairmont Transfer Company shall cease and desist from all trucking operations at the facility located at 6767 West 75th Street, in Bedford Park, Illinois.

IT IS SO CRDERED.

Chairman J.D. Dumelle concurred and Board Member J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 18th day of December, 1986, by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board