

ILLINOIS POLLUTION CONTROL BOARD
November 6, 2003

MORY GABEL, MYRA GABEL, DON)
FOREMAN, MARSHA FOREMAN, and)
KEITH PINSONEAULT,)
)
Complainants,)
)
v.) PCB 03-38
) (Citizens Enforcement - Noise)
THE WEALSHIRE, INC., an Illinois)
corporation,)
)
Respondent.)

ORDER OF THE BOARD (by W.A. Marovitz):

This citizens enforcement action was brought by several individuals alleging illegal noise emissions from air conditioning units at respondent's Alzheimer's disease care facility. The facility is in Lincolnshire, Illinois, and complainants reside adjacent to the facility. Today the Board accepts complainants' amended complaint for hearing and denies respondent's motion to stay this proceeding. Below, the Board describes the relevant procedural history before turning to the amended complaint, the motion for stay, and the hearing.

PROCEDURAL HISTORY

On September 27, 2002, complainants Mory Gabel, Myra Gabel, Don Foreman, Marsha Foreman, and Keith Pinsoneault filed a complaint against respondent The Wealshire, Inc. (Wealshire). The Board accepted the complaint for hearing on November 7, 2002, and Wealshire filed an answer to the complaint on November 18, 2002.

On February 25, 2003, complainants filed an amended complaint with the hearing officer's leave, and on March 12, 2003, Wealshire filed an answer to the amended complaint.¹ Over the summer and spring of 2003, the parties discussed complainants' noise expert's report of sound emission measurements and respondent's remedial measures. On October 1, 2003, Wealshire filed a motion to stay this proceeding. Complainants filed a response to the motion on October 9, 2003, and Wealshire filed a reply on October 23, 2003.²

¹ The Board cites the amended complaint as "Am. Comp. at _."

² The Board cites the motion for stay as "Mot. at _," the response as "Resp. at _," and the reply as "Reply at _."

AMENDED COMPLAINT

Complainants' amended complaint is nearly identical to their original complaint, which the Board accepted on November 7, 2002. Complainants continue to allege that sound emissions from Wealshire's air conditioning units violate the nuisance noise prohibition and the daytime and nighttime numeric noise standards under the Environmental Protection Act (Act) (415 ILCS 5/24 (2002)) and the Board's rules (35 Ill. Adm. Code 900.102, 901.102(a), 901.102(b)). Am. Comp. at 2. Complainants also continue to seek an order from the Board requiring that Wealshire cease and desist from further violations and, more specifically, either move the air conditioning units to the opposite side of the facility (away from complainants' residences) or install sound barriers. *Id.* at 4.

The primary change to the original complaint was to allege that the violative noise emissions occurred in the "Spring, Summer, and early Fall" rather than year-round. Am. Comp. at 3. Before accepting the original complaint for hearing, the Board had found that the original complaint met the content requirements of the Board's procedural rules and was neither duplicative nor frivolous. *See Gabel v. The Wealshire, Inc.*, PCB 03-38, slip op. at 2 (Nov. 7, 2002). The change reflected in the amended complaint, concerning the alleged duration of the noise, in no way renders the complaint, as amended, insufficient, duplicative, or frivolous.

MOTION TO STAY

Wealshire moves the Board to stay this proceeding "to allow [Wealshire] to continue modifications to its air conditioning system and for an opportunity to conduct its own testing after the improvements to the air conditioning equipment have been made." Mot. at 1. Wealshire argues that under Sections 31(a), (b), and (c) of the Act (415 ILCS 5/31(a)-(c) (2002)), it should have been afforded an opportunity to remediate alleged pollution *before* a formal complaint was filed. *Id.* at 2. In its motion for stay, Wealshire states that it has implemented remedial measures during the pendency of this proceeding, including installing a sound insulation blanket. *Id.* at 3.

According to Wealshire, it may not be able to complete the remedial measures before the first frost. Mot. at 4. Wealshire states that to prevent water circulation pipes from freezing and bursting, the water in its air conditioning system must now be drained for the winter and replaced with ethanol. *Id.* Wealshire adds that the system cannot operate in its "winterized" condition. *Id.* Wealshire states that it will therefore be impossible to test how well its remedial measures have worked until the improvements are finished and the system re-starts in June 2004. *Id.*

Wealshire maintains that "[t]o proceed with discovery and a hearing before [it] has had an opportunity to modify the air conditioning system and to conduct its own independent final tests would impose an unreasonable and arbitrary hardship" on Wealshire. Mot. at 4. Wealshire argues that a stay will impose no hardship on complainants because the air conditioning system will be shut down until June 2004. Wealshire further argues that a stay will avoid wasting economic resources of the parties and the Board because "the modifications should satisfy the sound level complaints." *Id.* Wealshire concludes by stating that turning off the air conditioning system in the summer would force it to close its facility. *Id.* at 4-5

Complainants oppose the motion for stay and maintain that there is no need to wait until June 2004. Complainants state that, according to their noise expert, Greg Zak, the air conditioning system's fans, the main noise source, can still be operated and therefore measured for sound emissions after winterization. Resp. at 2. Complainants also state that, according to Mr. Zak, Wealshire's remaining remedial measures "will not have a significant effect on the problem." *Id.* at 3.

Complainants emphasize that their original complaint was filed over one year ago and state that they have complained to Wealshire about the noise, to no avail, for over two years. Resp. at 1-2. Complainants state that a stay of this proceeding until next June would cause them an undue hardship because they "would have to endure yet another full season of incredible noise emanating from these high-powered air conditioning units, which are adjacent to their property." *Id.* at 3. Complainants assert that Wealshire has yet to take any proper sound measurements and that complainants should not be "penalized" for Wealshire's "failure to take timely readings of the units." *Id.*

Without a motion for leave to file, Wealshire filed a reply to complainants' response. A movant cannot file a reply to a response as of right, but instead must seek leave of the Board or hearing officer. *See* 35 Ill. Adm. Code 101.500(e). The Board will allow the reply in this instance, however, to fully address the issue of the requested stay. The gist of the reply is set forth in an attached affidavit of Ralph Chapman, Operations Director of Wealshire. Mr. Chapman disputes the described conclusion of complainants' expert that the fans can be run after the air conditioning system is winterized. Reply, Affidavit at 2. Mr. Chapman maintains that to test the fans during winterization, the air conditioner's electrical system would have to be modified, which would pose an "unnecessary electrical and fire hazard and could potentially damage the entire system." *Id.*

The Board denies Wealshire's motion for stay. The original complaint in this case was filed over 13 months ago. Since then, another air conditioning season has come and gone. By its requested stay, Wealshire would have the Board delay the *start* of the discovery process and the *scheduling* of a hearing until June 2004, and possibly later, whenever Wealshire's consultant completes its sound measurements. The Board sees no reason why discovery cannot proceed now or why a hearing cannot thereafter be held.

Though a respondent's "subsequent compliance" is a factor in determining whether interference from noise is unreasonable (415 ILCS 5/33(c)(v) (2002)), it is not controlling on the issue of whether an alleged nuisance noise violation occurred. Likewise, numeric sound measurements that Wealshire plans to take next year after completing remedial measures cannot be dispositive of whether any nuisance noise violation occurred or continues, or whether numeric noise violations occurred in the past.

The Board has not ruled on whether Wealshire violated the Act or Board rules as alleged. Accordingly, it is premature to speculate, as Wealshire does, about what remedy, if any, may be required. To be clear, the Board at this point is in no way ordering Wealshire to cease and desist

from any activity or to implement remedial measures or, for that matter, to run its fans in the winter and measure their sound emissions.

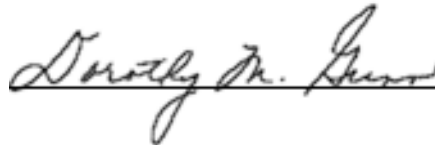
Finally, the Board notes that, contrary to Wealshire's assertion, the pre-enforcement process of Sections 31(a)-(c) of the Act does not apply to *citizen* enforcement actions brought under Section 31(d), like this one. The opportunity to meet and try to resolve alleged violations—the process called for by Sections 31(a)-(c)—is a prerequisite only to the Illinois Environmental Protection Agency referring a case to the Illinois Attorney General or State's Attorney for enforcement before the Board on behalf of the *State*.

HEARING

Consistent with its order of November 7, 2002, the Board directs the hearing officer to proceed expeditiously to hearing and to advise the parties that, in summary judgment motions and responses, at hearing, and in briefs, they should consider proposing a specific remedy for a violation, if any. See Gabel, PCB 03-38, slip op. at 1-2 (Nov. 7, 2002).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 6, 2003, by a vote of 6-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board