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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

**MAY 31 2005**

STATE OF ILLINOIS  
Pollution Control Board

<b>IN THE MATTER OF:</b>	)	
	)	
PROPOSED NEW AND UPDATED	)	
RULES FOR MEASUREMENT AND	)	R 03-09
NUMERICAL SOUND EMISSIONS	)	(Rulemaking – Noise)
STANDARDS	)	
AMENDMENTS TO 35 ILL. ADM.	)	
CODE 901- AND 910	)	

**NOTICE OF FILING**

TO: Ms. Dorothy M. Gunn	Division of Legal Counsel
Clerk of the Board	Illinois Environmental Protection Agency
Illinois Pollution Control Board	1021 North Grand Avenue East
100 West Randolph Street	Post Office Box 19276
Suite 11-500	Springfield, Illinois 62794-9276
Chicago, Illinois 60601	<b>(VIA FIRST CLASS MAIL)</b>
<b>(VIA HAND DELIVERY)</b>	

(PERSONS ON ATTACHED SERVICE LIST)

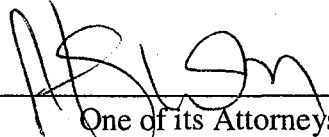
PLEASE TAKE NOTICE that on May 31, 2005, I filed with the Office of the Clerk of the Illinois Pollution Control Board an original and nine copies each of **Appearance of Patricia F. Sharkey and Comments of the Village of Bridgeview**, copies of which are hereby served upon you.

Dated: May 31, 2005

*PC#18*

Respectfully submitted,

VILLAGE OF BRIDGEVIEW

By:   
One of its Attorneys

Patricia F. Sharkey  
Mayer, Brown, Rowe & Maw LLP  
190 South LaSalle Street  
Chicago, Illinois 60603-3441  
(312) 782-0600

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STATE OF ILLINOIS  
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**IN THE MATTER OF:**

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RULES FOR MEASUREMENT AND  
NUMERICAL SOUND EMISSIONS  
STANDARDS  
AMENDMENTS TO 35 ILL. ADM.  
CODE 901- AND 910

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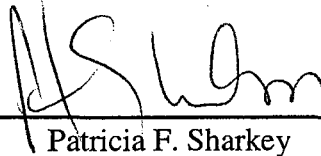
R 03-09  
(Rulemaking - Noise)

**ENTRY OF APPEARANCE OF PATRICIA F. SHARKEY**

NOW COMES PATRICIA F. SHARKEY, and hereby enters her appearance in this  
matter on behalf of the Village of Bridgeview.

Respectfully submitted,

By: \_\_\_\_\_



Patricia F. Sharkey

Dated: May 31, 2005

Patricia F. Sharkey  
Mayer, Brown, Rowe & Maw LLP  
190 South LaSalle Street  
Chicago, Illinois 60603-3441  
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ILLINOIS POLLUTION CONTROL BOARD**

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MAY 31 2005

STATE OF ILLINOIS  
Pollution Control Board

IN THE MATTER OF: )  
)  
PROPOSED NEW AND UPDATED RULES )  
FOR MEASUREMENT AND NUMERICAL ) R 03-09  
SOUND EMISSIONS STANDARDS ) (Rulemaking - Noise)  
AMENDMENTS TO 35 ILL. ADM. CODE )  
901 AND 910 )

**COMMENTS OF THE VILLAGE OF BRIDGEVIEW**

Bad science and misleading evidence should not be admissible in nuisance cases any more than it is in numeric violation cases.

By this rulemaking, which was initiated to codify scientifically supported standards for noise measurement, the Board on its own motion has apparently made a decision to codify unreliable science as admissible in nuisance cases. The Village of Bridgeview, the Illinois Association of Aggregate Producers, and now Dr. Schomer, have come forward to point out the troublesome nature of this decision. (See Public Comments # 10, 12 and 16.) Rather than codify the bad past practice of accepting unreliable noise measurements in evidence, the Board should take this opportunity to make it clear that a nuisance complainant, just like a complainant in a numeric violation case, bears the burden of presenting valid evidence supporting his or her claim. If he or she chooses to submit sound measurement evidence, it should be admitted only if it meets the criteria that will now be specified in Part 910. It is misleading to the complainant, prejudicial to the Board's decisions, and fundamentally unfair and costly to the defendant to adopt a rule granting special status to Radio Shack type sound measurements in nuisance cases.

Dr. Schomer states "There is really no substitute for clear, uniform standards." (Public Comment # 16, p. 7.) This is true as a legal matter as well as a scientific matter. Where noise measurements are considered as evidence in a legal proceeding, controlling case law and the rules of evidence require that those measurements must meet the standards for scientifically valid evidence. As Dr. Schomer's comments point out, Radio Shack "manufacturer's instructions" do not provide the information necessary to ensure valid measurements. (Public Comment # 16.) Evidence obtained based on "manufacturer's instructions" that don't reflect the accepted "principles and methods" for accurate sound measurement should be deemed "unreliable" and inadmissible before the Board just as it would be in a court of law. Daubert v. Merrell Dow Pharmaceuticals, Inc., 501 U.S. 579 (1993).

Noise measurement is a complicated business, as the Board itself recognizes and Dr. Schomer's latest comments make clear. (See Opinion and Order at p. 4 and Public Comment # 16.) Acoustics is, in fact, a *field of science* in which expertise is required. The standards for determining the reliability of scientific evidence must be applied before such evidence is admitted in an legal proceeding. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 501 U.S. 579 (1993), the Supreme Court held that a trial judge must play a "gate keeping" role to insure that "any and all testimony or evidence admitted is not only relevant but reliable." Daubert further stated that "In a case involving scientific evidence, evidentiary reliability will be based upon scientific validity." This is a matter of *admissibility*, not simply a matter of the weight to be attributed to the evidence. In matters of the admissibility of scientific evidence, the Board, like a court, is required to play a "gate-keeper" role, and to exclude purported scientific evidence that doesn't meet the standard of reliability. This principle is well expressed in Federal Rule of Evidence 701 which requires that experts may testify *only* "if (1) the testimony is based upon *sufficient facts or data*, (2) the testimony is the *product of reliable principles and methods*, and (3) the witness has *applied the principles and methods reliably* to the facts of the case." [emphasis added].

The Board recognizes the fundamental legal principle articulated in Daubert for noise cases alleging numeric violations, but retreats from a "sound science" approach when the same evidence is offered in a nuisance case. How can this be justified? The fact that this evidence may be offered by a lay person or is offered to "corroborate" other more subjective claims doesn't change the fact that it is purported scientific evidence which is not admissible except in compliance with the rules governing the admissibility of scientific evidence. Numeric measurements offered to "corroborate" nuisance allegations are either valid evidence or they are not. If invalid, they will mislead the decision maker.

By allowing "quick and dirty" sound measurements to be used in a nuisance case, the Board is actually encouraging unfounded lawsuits. Dr. Schomer points to an example of a citizen who was focused on noise from an air conditioner and confirmed his conclusion with readings from a handheld sound measuring device that gave misleading readings because they were not corrected for background noise. (Public Comment # 16.) The defendant in that case was required to defend itself and incur the expense of a professional noise expert to determine the true noise levels associated with the air conditioner because the complainant was allowed to bring a spurious suit based on inaccurate information at very little cost.

In its March 17, 2005 Opinion and Order (Proposed Rule. Second First Notice), the Board justifies holding noise measurements submitted in nuisance cases to a lower standard, saying: "The Board will assign appropriate weight to sound measurement data submitted in any nuisance noise complaint based on the information in the hearing record and in accordance with the provisions of the Act." (Id. p. 5) As noted above, the admissibility of evidence is a preliminary question on which the proponent bears a burden of proof. It is not a matter of assigning weight to the evidence.

How can the Board evaluate purported scientific evidence if the proponent of that evidence isn't required to demonstrate that it was obtained in accordance with sound scientific "principles and methods?" It would appear that the Board is relying on the defendant to find and expose the problems in a complainant's hand held sound measurements. This a fundamental shift in the burden of proof. Furthermore, what guarantee does the Board have that a defendant will have the means to hire a professional noise expert to rebut unreliable noise measurements taken by a complainant? As the Board knows, many noise complaints involve one resident complaining about another. In those cases, the Board's approach would shift the costs associated with sound measurements from the complaining resident to the defending resident – not just to a defending business. Unless the defendant hires a noise consultant to provide evidence of problems with a complainant's Radio Shack sound measurements, the Board won't have evidence to weigh or a record on which to determine the validity of those measurements. Without a record, can the Board question or discount the Radio Shack noise measurements later on its own initiative? Will the record support such a finding?

Dr. Schomer points out in his comments the very significant impact of factors such as ambient noise, wind and location can have on sound measurement. He also points out that the manufacturers instructions for the handheld, A-weighted monitoring devices with which he is familiar do not alert users to these factors. (Public Comment # 16.) He notes that measurements taken with such devices without accounting for ambient noise, wind and location may not even be "in the ballpark." Absent a Board rule telling a noise complainant that this information needs to be recorded and distinguished, complainants will not be alerted to the need for this information to support their measurements. For example, if the wind speed and direction at the time of the measurements was not recorded by the complainant, would the Board automatically discount the measurements in some fashion? If so, shouldn't the Board's rule make it clear that wind speed and direction must be recorded? Similarly, if ambient noise is not noted and distinguished, how can the Board or a defendant, for that matter, ever determine what noise source was actually being monitored and how to account for ambient noise. Simply put, the Board cannot know what the complainant doesn't know about those measurements. Again, if the Board would conclude that measurements that don't account for background noise are unreliable evidence, isn't it misleading to a nuisance complainant not to state that in the regulations?

The admission of "scientific" evidence which does not meet the standards required under Daubert also jeopardizes Board decisions on appeal. Any decision to admit scientific evidence is a matter subject to *de novo* review by the Appellate Court. Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128, 1129-30 (9<sup>th</sup> Cir.1991). Once "scientific" evidence has been admitted in the record without the required showing of admissibility, prejudice has occurred and the decision is subject to reversal regardless of whether the Board says it disregarded it.

All of the Daubert considerations, apply not only to the sound measurements themselves, but also to the party taking the sound measurements. As stated in Federal Rule of Evidence 701, reliability of evidence is premised in part on evidence that "the

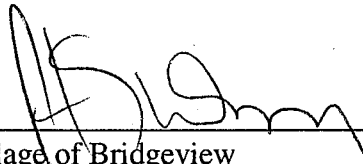
witness has *applied the principles and methods reliably* to the facts of the case.” In the Opinion and Order, the Board expressed concern that the record did not provide standards for determining the qualifications of professionals in the field of sound measurement. The Board was concerned that the requirement in the Agency’s Part 951 rules that persons taking sound measurements be “trained and experienced in the current techniques and principles of sound measurement and in the selection and operation of sound measuring instrumentation” is too vague. We believe that some standard is better than no standard and disagree that the Agency’s standard is too vague to be applied. But if the Board remains concerned about this standard, rather than adopt no standard, it should incorporate one or more of the standards provided in Dr. Schomer’s recent comments. Dr. Schomer indicates that there are a number of professional organizations that have established standards for education and experience in the field of noise measurement, including Board Certification by the Institute of Noise Control Engineering of the USA, Inc., membership in the Acoustical Society of America; and/or firm membership in the National Council of Acoustical Consultants.

### CONCLUSION

For all of the above reasons, the Board should reconsider its decision to allow Radio Shack type sound measurements or any other sound measurements that do not meet the standards proposed to be incorporated in Part 910 to be admitted to corroborate claims made in noise nuisance cases. Further, the Board should require that noise measurements used in any Board proceeding be taken by qualified professionals.

Attachment A hereto provides the regulatory language which the Village of Bridgeview proposes to amend and supplement the Board’s proposal language.

Respectfully submitted,



Village of Bridgeview  
By One of Its Attorneys

Patricia F. Sharkey  
Mayer, Brown, Rowe & Maw  
190 South LaSalle Street  
Chicago, Illinois 60603  
(312) 782-0600

ATTACHMENT A

PROPOSED AMENDATORY LANGUAGE

Section 910.101

Persons conducting or supervising sound measurements must be trained and experienced in the current techniques and principles of sound measurement and in the selection and operation of sound measuring instrumentation as evidenced by:

- a. Board Certification by the Institute of Noise Control Engineering of the USA, Inc.;
- b. Membership in the Acoustical Society of America; and/or
- c. Firm membership in the National Council of Acoustical Consultants .

Section 910.104      Measurement Techniques of 35 Ill. Adm. Code 900

Sound pressure level measurements are not required to establish a violation of 35 Ill. Adm. Code 900.102 (nuisance noise). However, sound pressure level measurements may be introduced as corroborating or rebuttal evidence when alleging a violation of 35 Ill. Adm. Code 900.102 is alleged. If sound pressure level measurements are ~~collected,~~ introduced, ~~manufacturer's instructions must be followed for the equipment used and 35 Ill. Adm. Code 910.105 may be used as guidance in gathering data.~~ such measurements must have been obtained in accordance with the measurement techniques provided in 35 Ill. Adm. Code 910.105 by or under the supervision of persons with the training and experience provided in 35 Ill. Adm. Code 910.101.

**CERTIFICATE OF SERVICE**

I, Patricia F. Sharkey, an attorney, hereby certify that I have served the attached **Appearance of Patricia F. Sharkey and Comments of the Village of Bridgeview**, upon:

Dorothy M. Gunn  
Clerk of the Board  
Illinois Pollution Control Board  
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Suite 11-500  
Chicago, Illinois 60601  
(Hand Delivery, Original + 9 copies)

Marie Tipsord  
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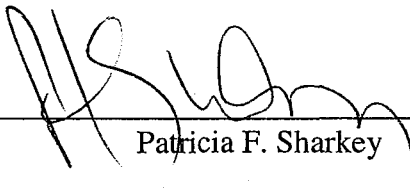
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as indicated above, by hand delivery or by depositing said document in the United States Mail, postage prepaid, in Chicago, Illinois on May 31, 2005.

  
\_\_\_\_\_  
Patricia F. Sharkey

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