

ILLINOIS POLLUTION CONTROL BOARD
June 15, 1995

DECATUR AUTO AUCTION,)
)
 Complainant,)
)
 v.) PCB 93-192
) (Enforcement - Air)
 MACON COUNTY FARM BUREAU,)
 INC., MACON COUNTY FAIR)
 ASSOCIATION, and MACON)
 COUNTY HORSEMEN'S)
 ASSOCIATION,)
)
 Respondents.)

CHARLES HUGHES, KEHART SHAFTER HUGHES & WEBBER APPEARED ON BEHALF OF COMPLAINANT;

RICHARD HEAVNER, HEAVNER HANDEGAN & SCOTT APPEARED ON BEHALF OF THE MACON COUNTY FARM BUREAU INC. AND THE DECATUR MACON COUNTY FAIR ASSOCIATION;

LEROY MOYER APPEARED ON BEHALF OF THE ILLINOIS HORSEMEN'S ASSOCIATION.

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

On October 14, 1993, the Decatur Auto Auction (Auto Auction) filed a formal complaint alleging that respondents the Macon County Farm Bureau, Inc. (Farm Bureau), the Macon County Fair Association (MCFA), and the Macon County Horseman's Association (Horsemen's Association) are discharging dust in violation of Section 9 of the Environmental Protection Act (Act) (415 ILCS 5/9), and Section 212.301 of the Board's regulations (35 Ill. Adm. Code Section 212.301). By order dated December 16, 1993 the Board struck a portion of the complaint seeking money damages, and accepted the matter for hearing. Hearing was held on May 26, 1994, and was continued on the record to June 6, 1994.

BACKGROUND

The Decatur Auto Auction is located on a 10-acre site at 1991 West Mound Road, Decatur, Illinois. Approximately 75 to 80 percent of the site is paved, although there is a parking lot located at the east end of the property which is covered with white rock. The main office is located in the center of the property, and a reconditioning shop is located at the west end. The property is bounded by farmland to the north and east, Bachrach's corporate headquarters to the northeast, a machine shop to the west, and by the Macon County Fairgrounds to the south.

The Auto Auction provides a meeting place and reconditioning service for buyers and sellers of automobiles, and generates most of its revenues from buyers' and sellers' fees. The Auto Auction is open 24 hours a day seven days a week, although its main business hours are from 9 a.m. to 5 p.m. Monday through Friday, and from 9 a.m. to noon on Saturday. The Auto Auction employs approximately 70 to 80 people, half of which are part-time employees.

The Auto Auction has two sales per week: the first takes place at 6 p.m. on Mondays, and the second takes place at 11 a.m. on Fridays. The Auto Auction sells approximately 700 vehicles per week, selling approximately 300 at the Monday sale and 400 at the Friday sale. Although the vehicles for sale can be brought to the lot at any time, approximately 75 to 85 percent come in the day before the sale. Approximately 85 percent of the vehicles are brought to the site in clean condition and ready for sale. For the remainder, the Auto Auction offers a reconditioning service where it washes and waxes the vehicles, shampoos the carpets, details the engine compartment, cleans the trunk, and dresses the tires.

Respondent MCFA is a not-for-profit organization which organizes the Macon County Fair, and which leases the Macon County Fairgrounds, including a three-quarter mile dirt racetrack located on the Fairgrounds site. MCFA leases the property on which the fair is held, including the racetrack, from respondent Farm Bureau for \$2000 per year. The fair has been held at this site each year since 1955.

The MCFA sub-leases the racetrack and buildings with stalls to the Horsemen's Association for \$4000 per year. The Horsemen's Association is an organization consisting of people that own and train horses at this location. The Horsemen's Association leases approximately 50 to 60 stalls for \$30.00 per month. (Tr. at 143.) Under the terms of the lease agreement with the MCFA, the Horsemen's Association is responsible for maintaining the racetrack.

The racetrack is a three-quarter mile dirt racetrack which is used for training horses for harness racing. The horses that train at the site pull small carts called sulkies. Approximately 50 - 60 horses train at the site seven days a week, 51 weeks per year. The track is closed to the horses for one week a year during which time the MCFA holds an antique auto show at the track. The track is periodically maintained by a truck or tractor which pulls drag equipment, which scrapes and smooths out the surface of the racetrack.

Complainant alleges that respondents have violated Section 9(a) of the Environmental Protection Act and 35 Ill. Adm. Code 212.301 by discharging dust into the atmosphere and onto

complainant's property. Complainant alleges that the dust is discharged from the racetrack when the horses run upon it, and when the drag equipment is used to smooth the surface of the track. Complainant alleges that the discharges of fugitive dust can be eliminated through administration of a dust suppressant treatment program which includes two major treatments per year, with additional maintenance as necessary, at an incremental cost to respondents of \$2,500 per year.

Complainant seeks an order of the Board requiring respondents to cease and desist from violations of the Act and Board regulations, directing respondents to institute a continuing program for the treatment of the dirt track with acceptable dust suppressive chemicals, and requiring respondents to appoint an on-site coordinator responsible for overseeing treatment and maintenance of the track.

STATUTORY FRAMEWORK

Section 9(a) of the Act provides:

No person shall:

- (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, . . . or so as to violate regulations or standards adopted by the Board under this Act;

(415 ILCS 5/9 (1992).)

Section 3.02 of 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 unreasonable interfere with the enjoyment of life or property.

(415 ILCS 5/3.02 (1992).)

Two types of actions are possible based on violations of Section 9 of the Act: "nuisance" violations, where the complained of emissions unreasonably interfere with the complainant's life, health or property, or unreasonably interfere with the complainant's enjoyment of life, and violations of the standards set out in the Board's air regulations. In this action, complainant has alleged both types of violation.

NUISANCE VIOLATION

In determining whether respondents have violated Section 9(a) of the Act so as to cause a nuisance violation, the Board must determine whether respondents have emitted dust so as to unreasonably interfere with the complainant's enjoyment of life or pursuit of any lawful business or activity. "The Board must balance the costs and benefits of abatement in an effort to distinguish 'the trifling inconvenience, petty annoyance or minor discomfort' from 'a substantial interference with property.'" (Wells Manufacturing Co. v. Pollution Control Board 73 Ill.2d 226, 232, 383 N.E.2d 148, 150, *citing* Processing and Books, Inc. v. Pollution Control Board (1976), 64 Ill.2d 68, 77, 351 N.E.2d 865.)

The Illinois Supreme Court has directed the Board to consider the factors outlined by Section 33(c) of the Act when determining the unreasonableness of the alleged air pollution in a nuisance action. (Wells Manufacturing Co. v. Pollution Control Board 73 Ill.2d 226, 232 - 233, 383 N.E.2d 148, 150 - 151 (1978).) The Section 33(c) factors are as follows:

- (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;
- (iii) 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;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions . . . resulting from such pollution source; and
- (v) any subsequent compliance.

(415 ILCS 5/33(c) (1992).)

The Board need not find against the respondent on each of the statutory criteria, and is not precluded from considering additional relevant factors. (Wells Manufacturing at 151.)

Character and Degree of Interference

Complainant asserts that the prevailing winds during drier weather are from a southerly direction, coming from the south,

southeast, or southwest, at an average wind velocity of 5 - 12 miles per hour. Complainant asserts that, when the winds are from a southerly direction, dust generated from the racetrack is blown onto the Decatur Auto Auction.

Complainant asserts that the dust discharged by respondents coats automobiles which have been cleaned for upcoming auctions, infiltrates electronic equipment causing breakdowns, makes it difficult for employees to breath, and results in the Auto Auction making additional expenditures for materials, labor, and wear and tear on its equipment.

Complainant introduced into evidence two video tapes made by Mr. Harry Polen, a dealer representative at the Auto Auction, and the father of Steve Polen, the Auto Auction's owner. The first video (video #1) is a compilation of video recordings. There is some dispute as to the exact time period covered by the video, although it apparently covers a period of several years prior to 1994. (Tr. at 56.) Video #1 shows horses pulling sulkies circling the track, generating dust which can be seen blowing in clouds, and crossing onto the Auto Auction property. It also shows close-up views of cars with words written in the dust covering the cars. The second video (video #2) was taken on one day in May 1994, and shows similar activities, as well as a tank truck watering the track. Harry Polen testified that the occurrences on both tapes were not unusual, and represented accurate depictions of conditions at the site. Steve Polen also testified as to the accuracy of the tapes in depicting conditions at the site. (Tr. at 56 - 57.) Complainant also introduced into evidence photographs showing dust being generated by horses pulling sulkies and a tractor pulling drag equipment, as well as the build-up of dust in its computer equipment. (Exs. 4,5, 8-11.)

At hearing, complainant presented the testimony of Mr. Bob Stortzum, an inspector with the Illinois Environmental Protection Agency's (Agency) Bureau of Air. Mr. Stortzum testified that he has visited the site at least once per year since 1987, and that upon inspecting the racetrack, he found between a half-inch and an inch of loose dirt on top, and that the track surface was in need of dust suppressant treatment. (Tr. at 108.) Additionally, he testified that upon inspecting the racetrack on May 20, 1994, he personally observed fugitive dust being generated and crossing the property line from the fairgrounds onto the Auto Auction property, causing air pollution in violation of Section 9(a) of the Act and Section 212.301 of the Board's air regulations. (Tr. at 107; 120.)

Mr. Stortzum testified that the dust emissions would be emitted onto the Auto Auction property approximately fifty percent of the time. He further testified that if a suppressant program with two major treatments per year, with minor maintenance in between, was undertaken and maintained, it would

effectively deal with the problem. Mr. Stortzum testified that the Agency had requested respondents to establish an on-site coordinator responsible for treating and maintaining the track, but that no such person has been designated.

During Mr. Stortzum's testimony, complainant introduced into evidence a series of letters sent between the Agency and respondents which document the history of complaints against the site. The letters cover a time period from May 13, 1987, to June 29, 1993, and include two pre-enforcement letters issued pursuant to Section 31(d) of the Act. These letters were admitted into evidence without objection. (Exh. 14.)

Respondents have not contested Mr. Stortzum's qualifications as an expert, nor contested his testimony that the dust emitted from the racetrack crossed onto the Auto Auction site in violation of the Board's regulations. Furthermore, although respondents have asserted that segments of video #1 are over four years old, and that video #1 is not relevant to the current situation (Respondents Br. at 3), they have not contested complainant's assertion that video #2 accurately portrays conditions at the site. Rather, respondents assert that a comparison of video #1 to video #2 shows that the dust problem has decreased over the years. Respondents also point out that complainant admitted at the June 6, 1994 hearing that the problem was less severe in 1994. (Respondents Br. at 3.)

At hearing respondents presented several possible alternative sources for the dust at complainant's site. There was testimony that dust was generated by customers of the auto auction when using an asphalt test strip located on the fairgrounds property to test cars. Respondents introduced into evidence several photographs showing cars driving on the test strip, generating dust. (Respondent's Ex. 6 - 12.) However, it was uncontested that complainants have not used the test strip since August 28, 1992. (Tr. at 84.) There was also testimony that dust was generated by complainants when a sweeping machine swept the site. However, it was also uncontested that the site was swept on only one such occasion. Furthermore, there is a white rock area on the east end of the Auto Auction, which complainant admits occasionally generates dust. However, it is uncontested that the white rock area has been treated and that dust from that area does not blow onto the Auto Auction site.

Respondents further assert that it is uncontested that the track has been treated on an annual basis since 1987, and that this treatment has been performed on a voluntary basis. They also point out that they have never been found in violation of any laws by the Agency. Additionally, respondents assert that, subsequent to the hearing in this matter, the track was treated in June 1994, and that the track is not now in violation of the law.

We find that complainant has demonstrated that respondents have emitted dust onto complainant's property which interferes with complainant's business activities. The evidence demonstrates that respondents have emitted such dust over a period of years, causing added expense for complainant's business. Although several other possible sources of dust have been alleged, none of these have been shown to cause an on-going problem. The evidence demonstrates that the racetrack is the main source of dust emissions. Furthermore, Agency inspector Stortzum testified that the track was not properly maintained, and that he observed conditions which he believes evidenced violations of the Act. While respondents have treated the track at least once per year since 1987, clearly based upon the testimony and pictorial evidence provided at hearing, that treatment program has not been sufficient to avoid fugitive dust emissions onto complainant's property.

The Social and Economic Value of the Pollution Source

The record establishes that the MCFA is a not-for-profit organization which organizes the Macon County Fair, which has been held at the fairgrounds location since 1955. The MCFA leases the racetrack and stalls to the Horsemen's Association, which in turn leases the stalls to horse owners that train the horses at the site. We find that the MCFA provides a public benefit by organizing and holding the county fair. We also find that the Horsemen's Association's use of the site provides a benefit for members of its organization. Complainant does not dispute the social value of the racetrack if the track is maintained so as to avoid nuisance conditions.

Suitability of the Pollution Source to the Area

As previously mentioned, the fairgrounds has been the site of the Macon County Fair since 1955. Surrounding land uses include farming, residential housing, and commercial land uses, including the Auto Auction, Bachrach's corporate headquarters, and a machine shop. The Auto Auction was not established at its present location until 1986. We therefore find that the Auto Auction was on notice of the possibility that some annoyances from the pre-existing racetrack could affect its operations, although the racetrack's priority of location does not constitute an absolute defense. (Wells Manufacturing Co. v. Pollution Control Board, 383 N.E.2d 148, 152, 73 Ill. 2d 226 (1978).)

However, complainant has not asserted that the fairgrounds is inappropriately located. Rather, the complaint is based on the grounds that the racetrack is inappropriately maintained, and that it is this inappropriate maintenance which is causing the violations. Accordingly, we conclude that the racetrack, if properly maintained, represents an appropriate use for the area in which it is located.

Technical Practicability and Economic Reasonableness of Reducing or Eliminating Emissions

Respondents do not dispute the technical practicability of treating the track so as to avoid dust emissions. In fact, as both parties agree, the track has been treated once per year since 1987. The parties also agree that when the track is properly treated it does not cause violations of the Act. However, the parties disagree over whether it is necessary to treat the track one additional time each year, and who should bear the cost for additional treatment.

As previously mentioned, Mr. Stortzum testified that a dust suppressant treatment program with two major treatments per year with minor maintenance in between, would effectively control dust emissions from the racetrack. Mr. Stortzum also testified that each dust-suppressant treatment costs approximately \$2,500. Since respondent's are currently treating the track once per year, the incremental cost of achieving compliance would be the cost of one additional treatment per year. This estimate includes the labor cost of application; if the respondents were to apply the dust suppressant themselves, the cost would be lower.

Respondents presented evidence that the MCFA is currently \$50,000 in debt. However, as complainant points out, it is uncontested that it is the Horsemen's Association that is ultimately responsible for maintaining the track. Currently, the Horsemen's Association charges its members \$30.00 per month. Complainant presented evidence that the cost of treatment, assuming that 50 stalls are rented, breaks down to \$50.00 per horse, which would further break down to \$4.16 per month or 13 cents per day per horse. Respondents have not contested the validity of these estimates.

Subsequent Compliance

Respondents assert that they began a treatment program in 1987, and that they have treated the track at least once per year since that time. Respondents assert that they treat the track on an as-needed basis. Respondents assert that the dust problem has decreased each year, and point out that Steve Polen, owner of the auto auction, admitted that the dust problem had been less severe in 1994 prior to the June 6th hearing than it had been in previous years. Furthermore, respondents assert that they treated the track after the June 4, 1994 hearing, which subsequently brought the site into compliance.

While respondents have treated the track subsequent to the June 4, 1994 hearing, we find that they have not instituted measures which will assure long-term compliance with the Act and Board regulations. Respondents have treated the track once per

year since 1987, yet there is evidence that there have been continuing problems since that time. We therefore find that respondent's subsequent compliance does not obviate complainant's need for permanent and continuing relief.

Nuisance Violation - Finding

We find that respondents have emitted fugitive dust emissions so as to cause a nuisance in violation of Section 9(a) of the Act. While respondents have implemented a once per year treatment program since 1987, that program has been insufficient to avoid dust emissions onto complainant's property in violation of the Act. While the track is an appropriate use for the site upon which it is located, the track's neighbors have a right to expect that the track will be properly maintained. As Agency inspector Stortzum testified, respondents have not maintained the track in an appropriate condition. A properly maintained track would not have one-half to one inch of loose dirt on top, but would instead appear sealed.

We therefore find that it is necessary to direct respondents to undertake additional control measures, so as to avoid future violations of the Act. We find that such a program is technically feasible, and that it is economically reasonable for respondents, who are causing the emissions, to bear the economic burden of undertaking such a program. While respondents have indicated that the MCFA is in debt, it is uncontested that the Horsemen's Association bears responsibility for maintaining the track. We further find that the cost of such treatment is not unreasonable.

Having done so, we note the similarity to the facts and examination of the Section 33(c) criteria in Hargrove v. Tammsco, Alexander County Commissioners; Donald Jordan Trucking Co.; and Marquette Gravel Co., PCB 87-19 (June 16, 1988) citing Incinerator Inc. v. PCB, Id. In Hargrove, the Board found that the dust from defendant's gravel road did interfere with the residents neighboring the gravel road. However, upon examining whether such interference was unreasonable, the Board concluded that it was not. In so finding, the Board noted that such finding was "not to say that dust resulting from inappropriate or improperly applied surface materials cannot result in a violation". Such is case here. The dust from defendant's track has interfered with complainant's property. That interference is unreasonable in light of the Section 33(c) factors because defendants have failed to maintain the track when to do so is economically and technically reasonable.

REGULATORY VIOLATION

Complainant has specifically alleged that respondents have discharged dust in violation of Section 212.301 of the Board's

air regulations (35 Ill. Adm. Code Section 212.301), which addresses discharges of fugitive particulate matter. Section 212.301 provides:

No person shall cause or allow the emission of fugitive particulate matter from any process, including any material handling or storage activity, that is visible by an observer looking generally toward the zenith at a point beyond the property line of the emission source.

(35 Ill. Adm. Code 212.301.)

As described above in reference to the nuisance violations, the two video tapes introduced into evidence by complainant show horses pulling sulkies circling the track, generating dust which can be seen blowing in clouds, and crossing onto the Auto Auction property. They also show close-up views of cars with words written in the dust covering the cars. Complainants also introduced photographs of dust collected in the office computers, and testimony about the repeated failure of the office time clock and the manufacturer's refusal to replace it after the third breakdown, and about the need of employees to often shield their faces or turn away from blowing dust from the track. (Tr. at 71.)

As described above, Agency inspector Stortzum testified that upon inspecting the racetrack, he found a half-inch to an inch of loose dirt on top, and that the track surface was in need of dust suppressant treatment. (Tr. at 108.) He testified that a properly maintained track would instead appear sealed. (Tr. at 113.) Additionally, he testified that upon inspecting the racetrack on May 20, 1994, he personally observed fugitive dust being generated and crossing the property line from the fairgrounds onto the Auto Auction property, causing air pollution in violation of Section 9(a) of the Act and Section 212.301 of the Board's air regulations. (Tr. at 107; 120.)

Respondents have not contested Mr. Stortzum's qualifications as an expert, nor have they contested his testimony that the dust emitted from the racetrack crossed onto the Auto Auction site in violation of the Board's regulations. Furthermore, although respondents have asserted that segments of video #1 are over four years old, and that video #1 is not relevant to the current situation (Respondents Br. at 3), they have not contested complainant's assertion that video #2 accurately portrays conditions at the site. In fact, their witness, Don Collins, testified upon cross-examination that the videos are accurate and that if the wind is blowing right and the track is dry, dust goes on complainant's property. (Tr. at 209.) Respondents do assert that a comparison of video #1 to video #2 shows that the dust problem has decreased over the years, and that complainant

admitted the problem was less severe in 1994. (Respondent's Br. at 3.)

Respondents further assert that it is uncontested that the track has been treated on an annual basis since 1987, and that this treatment has been performed on a voluntary, as-needed basis. They also point out that they have never been found in violation of any laws by the Agency. Additionally, respondents assert that, subsequent to the hearing in this matter, the track was treated in June 1994, and that the track is not now in violation of the law.

We find that the uncontested evidence shows that respondents have emitted dust onto complainant's property in violation of 35 Ill. Adm. Code 212.301. While respondents claim to now be in compliance with the Act, pursuant to Section 33(a) of the Act, subsequent compliance does not constitute a defense or bar to enforcement for a violation of the Act. (See Illinois Environmental Protection Agency v. Barry, PCB 88-71 (May 10, 1990) at 42-43.)

CONCLUSION

We find that respondents have violated Section 9(a) of the Act, both by emitting dust so as to cause a nuisance, and by emitting dust in violation of 35 Ill. Adm. Code 212.301. We further find that these emissions have unreasonably interfered with complainant's business and have caused complainant economic hardship.

Section 33 of the Act authorizes the Board to issue such order as it deems appropriate under the circumstances. We therefore direct respondents to undertake a treatment program which includes two major treatments per year, with additional maintenance as necessary so as to avoid a violation of the Act. Furthermore, we direct respondents to designate an on-site coordinator responsible for overseeing proper maintenance of the track. Complainant has not sought the imposition of a penalty, and we therefore do not consider penalty issues in this matter.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

Respondents, the Macon County Farm Bureau, Inc., the Macon County Fair Association and the Macon County Horseman's Association shall undertake all measures necessary to cease and desist from further violations of Section 9 of the Environmental Protection Act and Section 212.301 of the Board's regulations (35 Ill. Adm. Code Section 212.301). In addition, the respondents shall undertake the following measures to reduce dust emissions:

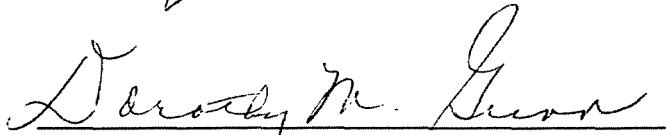
1. Establish a dust suppressant treatment program with two major treatments per year, with additional treatment and maintenance as necessary so as to avoid violations of the Act and Board regulations.
2. Designate an on-site coordinator responsible for overseeing the treatment and maintenance of the track. The name of such individual shall be provided to the Illinois Environmental Protection Agency (Agency) and the Decatur Auto Auction, and shall be available upon public inquiry.

IT IS SO ORDERED.

Board Members G. Tanner Girard and J. Theodore Meyer dissented, and Board Member Emmett Dunham II concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246. "Motions for Reconsideration".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 15th day of June 1995, by a vote of 4-2.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board