ILLINOIS POLLUTION CONTROL BOARD
January 21, 2016

MATT GILL,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 16-68
	)	(Citizens Enforcement - Noise)
CHS INC. – CARROLLTON FARMERS ELEVATOR,	)	
	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J.D. O'Leary):

On December 15, 2015, Matt Gill (complainant) filed a complaint (Comp.) against CHS Inc. – Carrollton Farmers Elevator (respondent). The complaint alleges that respondent violated numeric noise provisions of the Board's noise rules at 35 Ill. Adm. Code 901.102(a) and 901.102(b). The complaint concerns noise allegedly emitted from respondent's temporary flat grain storage facility and new grain storage bin to complainant's residence, both of which are located in Carrollton, Greene County.

On December 21, 2015, complainant filed proof of service on the respondent on December 14, 2015. Respondent has not filed a motion alleging that the complaint is duplicative or frivolous. *See* 35 Ill. Adm. Code 103.212(b) (30-day deadline). For the reasons below, the Board accepts the complaint for hearing but strikes complainant's request for relief to the extent that it seeks stipulated civil penalties for future violations.

COMPLAINT

The complaint alleges that respondent violated Sections 901.102(a) and 901.102(b) of the Board's noise regulations (35 Ill. Adm. Code 901.102(a), 902.102(b)) by operating blowers at its new grain storage bin at noise levels exceeding regulatory limits. Comp. at 3. The complaint alleges that "[t]he existing flat storage unit has been used for several seasons" and that noise pollution has occurred "every year beginning with the fall corn harvest and continues intermittently until the corn is removed from the storage units in the spring." *Id*. The complaint further alleges that a new storage bin was constructed in the summer of 2015. *Id*. The complaint states that "[t]here are 10 blowers on the bin and only 1 or 2 have begun operation. I am concerned that when all of the blowers are in operation, the noise levels will be even higher than they are now." *Id*.

The complaint alleges that "the sound level significantly exceeds the octave band center frequency (hertz) at 500, 1000, and 2000 Hz ranges." Comp. at 3. The complaint further alleges that "[s]ound pressure level measurements were made on three occasions between December 1, 2015 and December 10, 2015 during nighttime hours and were up to 14 dB over the limit

specified at 35 Ill. Adm. Code 901.102(b)." *Id*. The complaint states that "[t]he noise pollution has affected my family's quality of life, caused sleep problems for wife and myself and decreased my property's value." *Id*. The complaint adds that "[s]ound pressure level measurements were made using 35 Ill. Adm. Code 910.105 [Measurement Techniques for 35 Ill. Adm. Code 901] as guidance in gathering data." *Id*.

The complaint requests that the Board issue an order providing three forms of relief. First, petitioner seeks an "order requiring the respondent to stop exceeding the noise levels allowed by the Ill. Adm. Code. . . ." Comp. at 4. Second, petitioner requests that the order establish "stipulated fines (civil penalties) for any future violations. . . ." *Id*. The complaint notes that the Act establishes civil penalties of up to $50,000 for a violation and up to $10,000 for each day a violation continues. *Id*., citing 415 ILCS 5/42(a) (2014). Finally, petitioner requests that,

> [i]n order to demonstrate continuous compliance, the respondent should be required to provide third party noise monitoring which conforms to 35 Ill. Adm. Code 910.105 [Measurement Techniques for 35 Ill. Adm. Code 901], including monthly testing in any calendar month in which the blowers operate for more than seven days. The testing should be conducted at the closest residential receiving land or the respondent's property lines, since there are other residential property owners closer to the noise source than my residence. An annual compliance report sent to the IPCB and published in a local newspaper should also be required. Comp. at 4.

STATUTORY AND REGULATORY PROVISIONS

Under the Environmental Protection Act (Act), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2014); 35 Ill. Adm. Code 103. Section 31(d)(1) of the Act provides that "unless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2014). Section 103.212(a) of the Board's procedural rules implements Section 31(d)(1) of the Act. 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b).

Section 33 of the Act addresses the Board's determinations and final orders. Subsection (c) provides factors relating to the reasonableness of a violation for the Board to consider in making determinations and issuing orders. 415 ILCS 5/33(c) (2014).

Section 42 of the Act addresses civil penalties. Subsection (h) provides matters of record for the Board to consider in determining an appropriate civil penalty. 415 ILCS 5/42(h) (2014).

Section 901.102 of the Board's noise regulations establishes standards and limitations for sound emitted to specified land. 35 Ill. Adm. Code 901.102.

Section 910.105 of the Board's noise regulations establishes measurement techniques for the enforcement of standards in Part 901 and addresses matters including site selection, setting up instrumentation, operation of the measurement site, and instrument calibration. 35 Ill. Adm. Code 910.105.

BOARD DISCUSSION

Duplicative/Frivolous Determination

The Board first addresses whether the complaint is duplicative. As noted above, a complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. There is no evidence now before the Board that a complaint alleging a noise violation by this respondent is being adjudicated before the Board or in another forum. The Board finds that this complaint is not duplicative.

Next, the Board turns to whether the complaint is frivolous. As noted above, a complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202. The Board finds that the complaint's alleged violation of numeric noise standards is a cause of action upon which the Board can grant relief. Regarding relief, Section 33(b) of the Act provides that the Board's final order may include an order to cease and desist from violations of the Act and regulations. 415 ILCS 33(b) (2014). In addition, the Board after finding a violation can order respondent to develop and implement a noise abatement plan. Anne McDonagh and David Fishbaum v. Richard and Amy Michelon, PCB 08-76, slip op. at 4 (July 10, 2008), citing Michael R. Pawlowski and Diane K. Pawlowski v. David Johansen and Troy Quinley, individually and d/b/a Benchwarmers Pub, Inc., PCB 99-82 (Apr. 4, 2000 and Sept. 21, 2000). Complainant's request that the Board order third party noise monitoring as an element of abatement may be considered under Section 33 of the Act as the case proceeds.

However, the Board strikes as frivolous one element of the relief requested by complainants: "stipulated fines (civil penalties) for any future violations." Comp. at 4. Under Section 33(c) of the Act, the Board issues a final order after due consideration of the record. 415 ILCS 5/33(c) (2014). In determining an appropriate civil penalty, the Board is authorized to consider various matters of record in mitigation or aggravation of the amount. 415 ILCS 5/42(h) (2014). Under these provisions, the Board cannot perform these analyses prospectively, and it concludes to strike this element of the requested relief as frivolous. Having struck the request for stipulated civil penalties for future violations, the Board finds that the complaint as so modified is not frivolous and accepts it for hearing.

Procedural Direction

As described above, the Board accepts the complaint for hearing after striking a request for relief deemed frivolous. *See* 415 ILCS 5/31(d)(1) (2012); 35 Ill. Adm. Code 103.204, 103.212(a).

The Board notes that it "has held that with alleged violations of a *numeric* noise standard, sound measurements of the alleged property-line-noise-source are required and must be taken with 'strict adherence to applicable measurement procedures.'" Kasella v. TNT Logistics N. Am., PCB 06-1, slip op. at 2 (Sept. 1, 2005) (emphasis in original), citing Charter Hall Homeowner's Ass'n. and Jeff Cohen v. Overland Transp. Sys. and D.P. Cartage, PCB 98-81, slip op. at 19 (Oct. 1, 1998); *see also* 35 Ill. Adm. Code 900.103(b), 910.105. It is the complainant in an enforcement action who has the burden of proof. 415 ILCS 5/31(e) (2014). "It is therefore the complainant, or more typically its noise consultant, who must accurately measure sound emissions in a case of alleged numeric noise violations." Kasella, slip op. at 3.

A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if respondent fails by that deadline to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider respondent to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d).

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2014). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-

disclosed" the violation. 415 ILCS 5/42(h) (2014). Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id*. Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id*.

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any, and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 21, 2016, by a vote of 5-0.

John T. Therriault, Clerk
Illinois Pollution Control Board