

2003 WL 137447 (Ill. Pol. Control Bd.)

Illinois Pollution Control Board

State of Illinois

GLADYS L. KNOX AND DAVID A. KNOX, COMPLAINANTS

v.

TURRIS COAL COMPANY AND AEI RESOURCES, INC., RESPONDENTS

PCB 00-140

January 9, 2003

(Citizens Enforcement - Noise)

*1 Charles J. Northrop of Sorling, Northrup, Hanna, Cullen and Cochran appeared on behalf of the Complainants; and J. Randall Cox of Feldman, Wasser, Draper & Benson appeared on behalf of the Respondents

OPINION AND ORDER OF THE BOARD

On February 25, 2000, Gladys L. Knox and David A. Knox (complainants) filed a formal noise complaint against Turriss Coal Company (Turriss) and AEI Resources, Inc. (AEI). The complaint concerns noise emanating from a mine ventilation fan located on a Turriss facility adjacent to the complainants' residence located in Williamsville, Sangamon County. In the complaint, the complainants allege that respondents violated Section 24 of the Act (415 ILCS 5/24 (2000)) *amended by* P.A. 92-0574, eff. June 26, 2002, and 35 Ill. Adm. Code 900.102, 901.102(a) and (b) of the Board's noise regulations.

A hearing was held on June 11, 2002, in Springfield before Board Hearing Officer Brad Halloran. The complainants filed a post-hearing brief on August 7, 2002. On September 9, 2002, the respondents filed for additional time to file their post-hearing brief. The complainants filed a response to the motion for extension of time on September 11, 2002. The respondents filed their post-hearing brief on September 20, 2002. The complainants filed their reply brief on October 2, 2002.

On October 9, 2002, the respondents filed a motion for leave to file a surreply brief accompanied by a surreply brief. The complainants filed a motion to strike the motion for leave to file a surreply brief and an objection to the surreply brief on October 9, 2002.

Based on the evidence presented in this proceeding, the Board finds that the noise emanating from the Turriss facility in Williamsville does not constitute a violation of the numeric noise regulations or unreasonably interfere with the enjoyment of the complainants' property.

STATUTORY BACKGROUND

Section 24 of the Act provides:

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 the Act. 415 ILCS 5/24 *amended by* P.A. 92-0574, eff. June 26, 2002.

Section 33(c) of the Act provides that:

Case 54-17-11

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:

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;

*2 iv. The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

v. Any subsequent compliance. 415 ILCS 5/33(c) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002.

Section 900.101 Definitions

Noise pollution: the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity. 35 Ill. Adm. Code 900.101.

Section 900.102 Prohibition of Noise Pollution

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. 35 Ill. Adm. Code 900.102.

Section 901.102 Sound Emitted to Class A Land

a) Except as elsewhere in this Part provided, no person shall cause or allow the emission of sound during daytime hours from any property-line-noise-source located on any Class A, B or C land to any receiving Class A land which exceeds any allowable octave band sound pressure level specified in the following table, when measured at any point within such receiving Class A land, provided, however, that no measurement of sound pressure levels shall be made less than 25 feet from such property-line-noise-source.

Octave Band Center Frequency (Hertz)	Allowable Octave Band Sound Pressure Levels (dB) of Sound Emitted to any Receiving Class A Land from		
	Class C Land	Class B Land	Class A Land
31.5	75	72	72
63	74	71	71
125	69	65	65

250	64	57	57
500	58	51	51
1000	52	45	45
2000	47	39	39
4000	43	34	34
8000	40	32	32

b) Except as elsewhere in this Part provided, no person shall cause or allow the emission of sound during nighttime hours from any property-line-noise-source located on any Class A, B or C land to any receiving Class A land which exceeds any allowable octave band sound pressure level specified in the following table, when measured at any point within such receiving Class A land, provided, however, that no measurement of sound pressure levels shall be made less than 25 feet from such property-line-noise-source.

Octave Band Center Frequency (Hertz)	Allowable Octave Band Sound Pressure Levels (dB) of Sound Emitted to any Receiving Class A Land from		
	Class C Land	Class B Land	Class A Land
31.5	69	63	63
63	67	61	61
125	62	55	55
250	54	47	47
500	47	40	40
1000	41	35	35
2000	36	30	30
4000	32	25	25
8000	32	25	25

Section 901.106 Prominent Discrete Tones

*3 a) No person shall cause or allow the emission of any prominent discrete tone from any property-line-noise-source located on any Class A, B or C land to any receiving Class A, B or C land, provided, however, that no measurement of one-third octave band sound pressure levels shall be made less than 25 feet from such property-line source.

b) This rule shall not apply to prominent discrete tones having a one-third octave band sound pressure level 10 or more dB below the allowable octave band sound pressure level specified in the applicable tables in Sections 901.102 through 901.104 for the octave band which contains such one-third octave band. In the application of this sub-section, the applicable table for sound emitted from any existing property-line noise source to receiving Class A land, for both daytime and nighttime operations shall be found in Section 901.102(a).

BACKGROUND

On February 25, 2000, the complainants filed a formal noise complaint against Turriss and AEI Resources, Inc. (AEI). The complaint concerns noise emanating from a mine ventilation fan located on a Turriss facility adjacent to the complainants' residence. In response to the complainants' noise concerns, Turriss and the complainants met a number of times to discuss the situation. Tr. at 171-172. Turriss initially installed the ventilation fan with an upcast device designed to deflect noise up in the air. Tr. at 171. After the complainants notified Turriss about the noise complaint, Turriss contacted Greg Zak for his input. Tr. at 171. Zak recommends that Turriss hire Dr. Schomer to discuss abatement methodology. Tr. at 112.

Pursuant to the advice of Schomer, Turriss first attempted to close the upcast device that was open toward complainants' residence. Tr. at 171-72. Turriss then received permission from State mine regulators to install belting on the fan evase to dampen the noise. Tr. at 172, 177. In addition, steel plating and additional belting was installed around the evase, and belting was placed on the roof house to further dampen the sound. Tr. at 178-79. Dr. Schomer took noise measurements and recommended additional remedies to reduce the noise. Tr. at 175. Per the advice of Schomer, Turriss removed the upcast device and installed a silencer on the ventilation fan. Tr. at 171, 176.

In January 2002, the parties exchanged discovery. A pre-hearing conference was held on June 3, 2002. This matter proceeded to hearing on June 11, 2002. At hearing, Turriss moved to bar the testimony of Greg Zak.¹ Tr. at 7. Zak was called to testify on the complainants' behalf at hearing. Tr. at 68. Zak testified that he toured the Turriss facility on May 10, 2001, and December 3, 2001. Tr. at 74. Prior to hearing he visited the complainants' residence on May 22, 23, and 25, 2002. Tr. at 82. As a result of his investigations, he prepared a written report dated June 2, 2002, titled "Noise Emission from the Turriss Coal Company Mine Vent Fan to an Abutting Residential Area." Tr. at 83. The hearing officer accepted the exhibit into evidence over objections by Turriss. Tr. at 86.

PRELIMINARY MATTERS

Turriss' Motion to Bar the Testimony and Report of Greg Zak

*4 At hearing, Turriss made a motion to bar the testimony and report of Knox's noise expert Greg Zak. This issue was addressed in an August 8, 2002 Board order in which the Board upheld the hearing officer's decision to allow the testimony and report into evidence. In its brief, Turriss renews the motion. Turriss asserts that it is revisiting the issue because the Board has been falsely led to believe that Turriss was afforded the opportunity to interview Zak when, in fact, the very opposite happened. Turriss Br. at 6.

In reply, complainants assert that Turriss was repeatedly advised that Zak would take noise readings and prepare a report prior to hearing. Reply at 3. Complainants contend that Turriss was given the report on the same day that it was received by complainants, that Turriss had eight days to review the report prior to hearing, that Zak was thoroughly cross-examined on the report at hearing, that no claim of prejudice has been made, and that Turriss made no attempt to compel the deposition of Zak or otherwise seek the assistance of the hearing officer. *Id.* Knox also asserts that Zak was identified as a witness six months prior to hearing, and that Turriss made no attempt to depose him. *Id.*

The Board considers Turriss' motion to bar testimony as a motion to reconsider the Board's August 8, 2002 decision. In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law. 35 Ill. Adm. Code 101.902. Motion for reconsideration must be filed within 35 days after receipt of the Board order. 35 Ill. Adm. Code 101.520. The Board accepts the motion even though not timely filed. However, Turriss has not raised any issues that were not before the Board when they addressed Turriss' motion on August 8, 2002, and the motion is denied.

Complainant's Motion to Conform Pleadings to Proof

At hearing, complainants moved to amend the complaint to conform to the proof and add a violation of Section 901.106 of the Board's noise regulations. Tr. at 150. Complainants assert that it first discovered the potential violation in Zak's noise report, and therefore Turriss has been aware of the potential violation as long as complainants has. Tr. at 150; Knox Br. at 3. Complainants argue that the amendment of pleadings to conform to the proof introduced at trial is allowed under the Code of Civil Procedure. Knox Br. at 2.

Complainants argue that in Illinois there is a liberal policy of allowing material amendments to a complaint to conform to the proof adduced at trial. Knox Br. at 2-3, *citing Zook v. Norfolk & Western Ry Co.*, 268 Ill. App. 3d 157, 205 Ill. Dec. 231 (4th Dist. 1994). Complainants argue that when a motion to conform proof to pleadings adds greater specificity to the law violated, and the proof reflects such violations, it is an abuse of discretion not to allow the amendment. Knox Br. at 3, *citing Village of Wadsworth v. Kerton*, 311 Ill. App. 3d 829, 244 Ill. Dec. 560, 571 (5th Dist. 2000).

*5 Complainants assert that the motion does not represent any attempt to surprise or otherwise prejudice Turriss, and that Turriss has not identified any surprise or prejudice. Knox Br. at 3; Reply at 3. Complainants argue that Turriss had an opportunity to cross-examine on the new allegations, and did so, at hearing. Reply at 4.

Turriss asserts that complainants may not amend the complaint at such a late date. Turriss bases its objection, in part, on the manner in which the production of Zak's noise report was made and the non-availability of Zak prior to the hearing. Turriss Br. at 8. Turriss argues that complainants could have amended the complaint once they received the report, but instead used the tactic of surprise in making an oral motion to conform the pleadings to proof at hearing. Turriss Br. at 8-9. Turriss asserts that amending pleadings to proof is not encouraged or permitted in circumstances where such allowances would cause prejudice or surprise to either party. Turriss Br. at 9.

The Board grants complainant's motion to conform pleadings to proof. Amendments to pleadings to conform to the proof submitted are to be liberally allowed within the sound discretion of the hearing body. *See Fitchie v. Yurko*, 212 Ill. App. 3d 541, 577, N.E.2d 538 (4th Dist. 1991), *Zook v. Norfolk & Western Ry Co.*, 268 Ill. App. 3d 157, 205 Ill. Dec. 231 (4th Dist. 1994). Here, the nature of proof required to defend an alleged violation of Section 901.106 is not materially different from defending the already pled alleged violation of 35 Ill. Adm. Code 901.102(b). Turriss has not shown any prejudice resulting from the amendment. Accordingly, the motion is granted.

Turriss' Failure to Answer the Complaint

In its brief, complainants moved to have all material allegations of the complaint deemed admitted because Turriss did not file an answer to the complaint within 60 days as required by Board rules. Knox Br. at 3-4. Turriss correctly responded that under the procedural rules in effect when the complaint was filed, the allegations of the complaint were deemed denied. Turriss Br. at 9. In its reply, complainants withdrew the argument on this point. Reply at 4. The issue is now moot and will not be addressed by the Board.

Turriss' Motion for Leave to File Surreply Instantly

Turriss asserts that complainants' reply brief had several factual misstatements and erroneous characterizations of either the record, evidence, controlling law or Turriss' position on the merits. Mot. at 1. Turriss argues that for the sake of clarity in the record, and as an aide to the Board, it has filed and served a surreply to address these issues. Mot. at 2. Turriss asserts that the filing of the surreply will not delay the disposition of these proceedings. *Id.*

Complainants reply that neither the hearing officer's established briefing schedule, nor the Board's procedural rules allow for surreply briefs. Obj. at 1. To allow Turriss, argues complainants, to take a second bite of the apple would be unjust, and that simple fairness dictates that the complainants should have the last opportunity to brief the Board in this matter. Obj. at 2.

*6 The Board denies Turriss' motion for leave to file a surreply. Although surreplies are not allowed for in the Board's procedural rules, the Board has accepted surreplies in the past in order to correct misstatements and material errors. See CDT Landfill v. City of Joliet, PCB 98-60 (Mar. 5, 1998). Turriss' surreply is not limited to correcting misstatements and material errors, but makes additional substantive arguments not necessitated by information or legal theories raised for the first time in complainant's reply brief. The Board finds that allowing the surreply would prejudice complainants. The surreply is also in violation of the briefing schedule set by the hearing officer in this matter, and is denied.

NOISE EMISSIONS TESTIMONY

Complainants

Mr. David A. Knox

Mr. Knox resides at 8214 East Main Street, Williamsville. He bought the property in November of 1975, and moved into the house in 1976. Tr. at 15. He originally purchased the four acres where the residence and buildings are located, and has added land since that time, so the property now consists of 94 acres. Tr. at 16.

Mr. Knox described the noise from the fans as an underlying background noise that is very noticeable. Tr. at 29. He testified that the noise can be heard on any portion of his property depending on wind direction and moisture in the air. Tr. at 30. He is aggravated when he awakes during the night and, if the windows are open, he hears the noise. *Id.* He testified that if awakened at night, the noise prevents him from falling back to sleep. Tr. at 29-30, 64. Mr. Knox testified that, although the noise level used to be considerably higher, it is still a problem today. Tr. at 26. He testified that currently, if the windows are closed, noise cannot be heard inside his house unless the wind is "just right," but that if the windows are open, the noise can be heard. *Id.* He testified that he probably runs the air conditioning slightly more in warm weather; when the noise dictates, he closes the windows. Tr. at 27.

Mr. Knox testified that he used to have wood decks stretching across the south side of his house, but that the deck was taken out in January 2002. Tr. at 18. He testified that the deck was removed partially because it was not enjoyable to use it due to the noise level, and partially because the flooring needed to be replaced. Tr. at 18-19. Mr. Knox testified that two to three years after he built the house, he built a duck pond for recreational purposes such as fishing. Tr. at 21. He testified that his family used the pond for ice-skating and sledding parties during the winter and for fishing anytime the water was not iced. Tr. at 21. Mr. Knox testified that the duck pond has always been a getaway place where he likes to relax. The duck pond is stocked with fish that he feeds daily. Tr. at 22.

Mr. Knox testified that his use of the duck pond has diminished in the last couple of years, and that the solitude that was there has diminished tremendously. Tr. at 22. He testified that because of the noise from Turriss' fans, being at the duck pond is not as enjoyable as it used to be. *Id.* Mr. Knox used to spend an hour at the pond three to four evenings a week, but because of the noise now only spends, on average, one evening a week at the duck pond. Tr. at 22. He testified that the noise from the fans affects conversation at the pond. Tr. at 38. Mr. Knox testified that conversation is understandable, but the background noise is present - that participants don't have to scream at each other, but would have to speak in "somewhat of an elevated level." Tr. at 38. He testified that he has noticed a marked decrease in the number of pheasant and quail visiting the duck pond. Tr. at 30.

*7 Mr. Knox testified that visiting is possible inside the shed without any great difficulty, but that the noise would be much the same as if you were living in a home close to an interstate highway or a railroad track where you hear the traffic going by. Tr. at 39. Mr. Knox testified that the sheds are used for storage and repair of machinery, general maintenance of farm equipment, and welding. Tr. at 19-20. Mr. Knox testified that he stores farm implements and supplies in his sheds in the course of his agricultural operation. Tr. at 41. He also has grain bins located there. Tr. at 42.

Mr. Knox testified that although he performs repair work for neighbors, he does operate a commercial enterprise out of the sheds. Tr. at 20. He testified that he works with a Mr. Kirby under the assumed name of K & K, and does welding work in his sheds, for which he is paid for his time. Tr. at 41-42.

He testified that normal conversation is possible in his backyard, but that background noise will be present. Tr. at 39-40. He testified that with the furnace on and the windows closed, the noise could not be heard in most cases unless the wind is direct. Tr. at 46.

Mrs. Gladys L. Knox

Mrs. Knox testified that the noise from the ventilation fan sounds like a whirring noise. Tr. at 63. She testified that the noise is constantly present and is an aggravation, that it is always there; and that "you can't go anywhere on the property that you don't hear that racket." Tr. at 63. She testified that although the noise is more tolerable than before, if the windows are open, the "racket" can be heard. Tr. at 64.

Mrs. Knox testified that if she wakes up in the middle of the night she would have trouble getting back to sleep, and that this happens a couple of times per week. Tr. at 65. She testified that the sounds from the pheasant and quail that she used to hear so much of is lessened. *Id.* Mrs. Knox testified that the noise from Turriss' fans is an aggravation to her, that she enjoys peace and quite and no longer has that. Tr. at 66.

Mr. Gregory Zak

Mr. Zak testified that he is a noise control engineer and a former employee of the Illinois Environmental Protection Agency (Agency), who has worked on several tens of thousands of complaints involving noise over the years. Tr. at 67-68. He said the noise from Turriss' facility is produced by the actual fan itself, by the electric motor of approximately 1,000 horsepower driving a vane axial fan, and that the physical act of the fan blades cutting through the air creates the noise. Tr. at 78.

Zak describes the noise as similar to a vacuum cleaner. Tr. at 89. Zak testified that he is familiar and complied with the Agency's sound level measurement procedures pursuant to 35 Ill. Adm. Cod 951.104. Tr. at 89. He took noise measurements at the duck pond. Zak selected the duck pond for measurement because he was informed by Mr. Knox that it was one of the complainant's main areas of recreation, and also the area they were probably most disturbed by noise emissions. Tr. at 144. Zak testified that the complainants' residence, including the duck pond, should be classified residential. Tr. at 73, 116, 132, 145. Zak testified that he found violations of Section 901.102(b) at 125 Hz, 250 Hz, 1K Hz, 2K Hz and 4K Hz. Tr. at 95, Knox Ex. 2. Zak testified that he found a violation of 35 Ill. Adm. Code 901.106. Tr. at 100.

*8 Zak testified that in his opinion the noise from Turriss' ventilation fan unreasonably interferes with the Complainant's enjoyment of their property. Tr. at 101.

Mr. Walter F. Schultz

Mr. Schultz is an engineer employed by Turriss. Tr. at 152. He testified that he was able to have a normal conversation 50 feet away from the fan. Tr. at 186. He also testified that he was able to hold a normal conversation in Mr. Knox's yard. Tr. at 187.

ARGUMENT

Complainants' Brief

The complainants assert that the noise from Turriss' ventilation fan has violated nuisance and numeric standards.

Noise Nuisance

Complainants contend that the noise from the fan unreasonably interferes with the use and enjoyment of their property. Knox Br. at 11. Further, assert complainants' noise from the fan penetrates their homes and at times prevents them from falling asleep, compels them to close their windows when company comes to visit, has prohibited the use of their deck, and prevents them from using their pond that was created and used extensively prior to the presence of Turrils' fan. Knox Br. at 11-12, 14.

The complainants also contend that the noise from the fan has resulted in loss of wildlife such as pheasant and quail. Knox Br. at 14. The complainants argue that noise expert Greg Zak testified that sound measurements taken were consistent with the complainants being disturbed in their home, because of the ability of low frequency noise to penetrate structures such as residences. Knox Br. at 15. Also, complainants note that Zak testified that the noise from the ventilation fan unreasonably interfered with their use and enjoyment of their property.

The complainants admit that Turrils has some economic value, but urges that considerations of any such value should not come at the complainants' expense. Knox Br. at 16. Complainants assert that because they purchased their property in 1975 and the fan started operation in 1999; they have clear priority of location. Knox Br. at 17. Further, complainants state that, but for Turrils, the area remains rural and that given this rural nature, Turrils' facility is inconsistent with the surrounding area.

The complainants assert that Zak recommended the construction of a structure over the existing housing of the fan and attached building to remedy the noise. Knox Br. at 19. Complainants contend that Zak testified such a structure would reduce the noise emissions and provide a 10 dB reduction at the 125 Hz level, and likely more at higher frequencies. *Id.* Complainants argue that Turrils did not present any expert testimony on the true costs or reasonableness of the structure, and has not provided the Board any supportable cost figures. Knox Br. at 19-21. And, complainants assert that Turrils' quick estimate of the cost of such a structure was not based on any specific engineering or design plans, or made by a noise engineer. Knox Br. at 19. The complainants calculated the construction costs at \$37,000 - significantly less than the \$470,000 estimated by Turrils. Knox Br. at 19-20. The complainants argue that Turrils should not be allowed to avoid their obligations as established by the Act and disrupt the complainants' peace of mind simply by claiming the solution costs too much money. Knox Br. at 20.

*9 The complainants assert that Turrils' efforts to reduce noise emissions have not eliminated the interference to the complainants, and that the noise will only increase as operations at the mine progress further southwest and the fan must work harder to supply the necessary air and exhaust. Knox Br. at 21.

Numeric Violations

The complainants contend that a threshold issue that may be raised by Turrils is the classification of the complainants' property. The complainants assert that no dispute can exist that the Turrils property falls within Class C. Knox Br. at 22. The complainants contend that their property is properly classified as Class A or residential property. *Id.* The complainants argue that Class A property specifically includes farm homes. *Id.* Further, the complainants maintain that although their sheds are used for storage and repair of machinery, they do not constitute a commercial enterprise and that no business is conducted from the sheds. *Id.*

The complainants assert that Greg Zak specifically testified that their property was residential based on his knowledge and experience in the noise field. Knox Br. at 23. The complainants contend that Zak compared the four-acre property as equivalent to a much smaller typical subdivision yard. *Id.* The complainants assert that Turrils provided no testimony on the classification of the property. *Id.*

The complainants contend that Zak's testimony shows a significant deviation (a 4 dB exceedance) at the 125 Hz level. Knox Br. at 24. The complainants argue that this represents more than a doubling of sound energy. *Id.*

The complainants assert that Zak's testimony identifies a violation of the Board's regulations on prominent discrete tones. Knox Br. at 24. The complainants contend the limit was exceeded by 7 dB and that this is a significant exceedance of over four times the allowable sound energy. *Id.*

Turriss' Brief

Numeric Violation

Turriss first addresses the classification of complainants' property. Except for their actual, physical home, asserts Turriss, the complainants' property should be classified as agricultural. Turriss Br. at 10. Turriss contends the Standard Land Use Coding System (SLUCM) codes make clear that if a house is located on the farm, only the house is considered Class A property while the rest of the property is considered Class C. *Id.*

At best, asserts Turriss, the house may be Class A, but the farm is Class C and the duck pond is unclassified. Turriss Br. at 13. Turriss contends that only measurements taken at the complainants' house could have a proper bearing on this case, and that readings taken on an unclassified water are of no import. Turriss Br. at 14.

Turriss argues that Section 901.106 of the Board's regulations does not prohibit the emission of prominent discrete tones to unclassified property, and that they have been unable to locate any guidance from the Board as to how Section 901.106(b) should be applied with respect to tones emitted to Class C property. Turriss Br. at 15, 16. Turriss contends that the complainants' use of 59 dB as the limit for allowable sound energy from Class C to Class A property at 125 Hz is not correct, and that 69 dB should be used instead. Turriss Br. at 17.

*10 Turriss maintains that no daytime 901.102(a) violations are noted anywhere on the property, and that minimal nighttime 901.102(b) violations are alleged only on the unclassified duck pond remote from complainant's residence. Turriss Br. at 18. Turriss asserts that all the measurements upon which the alleged violations are predicated were taken well beyond the residential dwelling at the duck pond. Turriss Br. at 19.

Nuisance Violation

Turriss argues that the complainants have put on virtually no consistent body of testimony to support an allegation they have suffered a nuisance as a result of any noise from Turriss. Turriss Br. at 19. Turriss asserts that even if, *arguendo*, there has been some degree of interference, there has been no showing of an unreasonable interference. Turriss Br. at 23.

Turriss contends that Mr. Knox acknowledged the noise didn't prevent him from going to sleep at night, nor did he report any instance when it woke him in the night. Turriss Br. at 19. Turriss also asserts that Mr. Knox acknowledged that Turriss has cooperated with him on the noise abatement issue and has made improvements. *Id.* Turriss argues that the centerpiece of complainants' complaint is the dislike of any fan noise by the duck pond which happens during regulatory daytime hours when the fan is unquestionably in compliance with Section 901.102(a) numeric limits even though the limits do not apply to the property. *Id.*

Turriss contends that the complainants' ability to go to sleep has not been affected since the mine altered the pitch on the fan blades, and that this fact is not surprising in light of Mr. Knox's demonstrated ability to sleep in the mine. Turriss Br. at 20. Turriss asserts that the record reveals that the only noise ever to have actually awakened Mr. Knox has been coyotes. *Id.*

Turriss maintains that the deck on the south side of the house was not abandoned because of noise, but because the flooring on the deck had become rotten. Turriss Br. at 20. Turriss contends that Mr. Knox has acknowledged that he can carry on a normal conversation with someone down by the duck pond or in the equipment shed, and that the transcript contains no evidence that Mr. Knox has ceased to use his duck pond for recreational purposes. Turriss Br. at 20-21.

Turriss asserts it spent approximately \$125,000.00 to meet the concerns expressed by the complainants. Turriss Br. at 3. Turriss asserts that the complainants consistently report an improvement after Turriss took measures to abate the noise. Turriss Br. 21. Turriss does not believe that there is an existing unreasonable interference with the complainants' ability to utilize their own property or lead normal lives, or that the record in this proceeding supports such a claim. Turriss Br. at 22. Turriss contends that the complainants' ability to entertain is unimpaired and that they report no changes in their sleep schedules or patterns. *Id.*

Turriss next addresses the 33(c) factors even though it contends no unreasonable interference has occurred. Turriss argues that it is clear that Turriss has high social and economic value, and employs 215 people; 75 percent of whom live within 35 miles of the mine. Turriss Br. at 24-25. Turriss asserts that it had to locate where it did because of access to roads and the mine. Turriss Br. at 26. Turriss argues that complainants' residence is an isolated residence in an otherwise agricultural area, and that Turriss' property is properly zoned for its use. *Id.*

*11 Turriss contends that it has devoted serious resources to attempt to satisfy the complainants' concerns, and has made considerable improvements to the noise situation at the mine. Turriss Br. at 26-27. Turriss asserts that the complainant glossed over the technical feasibility and economic reasonableness of the solution proffered by Zak. Turriss Br. at 27.

Complainant's' Reply Brief

Complainants argue that Turriss' analysis of the site classification issue is worthy of Procrustes himself. Reply at 4. Complainants assert that Turriss has presented no testimony or evidence that the property would be classified as C, and that the only commentary on the issue was hearsay statements not admitted for the truth of the matter asserted. *Id.* Complainants contend that the only testimony on the question of classification is from Zak who testified that the complainants' property is A property. Reply at 5. Complainants contend it is not trying to include their entire 90 acres of farmland as A property, but merely that portion they use as residence and yard. Reply at 5. Complainants assert that neither the machine sheds, nor ducks and geese raised at the pond, serve a commercial purpose. *Id.* Complainants conclude that the entire four-acre portion of the complainants' property, including the duck pond, is properly classified as A property. Reply at 6.

Complainants assert that given the ventilation fan runs constantly, there is ample evidence in the record to find that the complainants are disturbed throughout the day. Reply at 7. Complainants contend that the deck has not been used as a result of the constant noise, and that the deck is being rebuilt on the opposite side of the house in an effort to shield the deck from noise. Reply at 8.

The complainants assert that although they still garden and use their shed, they do these things in spite of the noise and should be commended for trying to maintain a normal life in the face of such constant noise harassment. Reply at 8. Complainants contend that Turriss has unreasonably interfered with the use and enjoyment of the complainants' property and that the evidence in this case demonstrates a clear and ongoing nuisance violation. *Id.*

DISCUSSION

The complainants have alleged that respondent violated Section 24 of the Act and 35 Ill. Adm. Code 900.102, 900.102(a) and (b), and 901.106. The Board will first address the alleged numeric violations - 35 Ill. Adm. Code 900.102(a) and (b), and 901.106.

Numeric Violations

To determine whether the respondent violated any section of 35 Ill. Adm. Code 901, complainants must take sound measurements in strict conformance with the procedures set forth in Section 900.103(b). 35 Ill. Adm. Code 900.103. The record shows the measurements were taken in accordance with the Board's procedures.

Next, the Board must address the threshold issue of classification of the complainants' property. In order to determine whether or not a numeric violation exists, it is necessary to first classify the receiving and emitting property. Property is classified pursuant to SLUCM incorporated into the Board's noise regulations at 35 Ill. Adm. Code Part 901, Appendix B.

*12 Property can be classified Class A, B, C or U. Generally, Class A signifies residential property, Class B is commercial, and Class C is agricultural. U denotes a land unclassified in 35 Ill. Adm. Code 901.101. The SLUCM code extensively lists what types of properties fall into each category. Both parties agree that Turriss' property is properly classified as Class C under the SLUCM code.

Although not conclusive of the issue, complainants' 94-acre farm is zoned agricultural. The majority of complainants' property is agricultural and falls within Class C. *See* SLUCM code 8120. Further, the SLUCM code is clear that, as a farm home, complainants' residence is specifically included within Class A. SLUCM code 110, footnote 2 provides that "farm homes are also included under "household units" and should be identified separately from the remainder of the farm which is coded under 'agricultural,' code 81." 35 Ill. Adm. Code Section 901. Appendix B, code 110, footnote 2. However, classification of the remainder of the approximately four-acre parcel containing complainants' residence, tool sheds and duck pond is at issue. Specifically at issue is classification of the duck pond where the noise measurements were taken.

The north edge of the duck pond is located approximately 345 feet south of the house. The wharf where the measurements were taken is approximately 393 feet south of the house. Plaintiff's Ex. 2, page 11. Between the duck pond and the complainants' residence are two steel sheds. Mr. Knox uses the sheds for storage and repair of machinery and farm equipment and supplies. He is also compensated financially for the welding work he does out of one of the sheds. The Board finds that the sheds are properly classified as Class C - used for other agricultural and related activities. *See* SLUCM code, 819.

The duck pond is effectively separated from the complainants' residence by the sheds. Ponds are not specifically provided for in the SLUCM code. However, the classification that best describes the duck pond is code 939 - other water areas, NEC.² Accordingly, the Board finds that the duck pond is Class U.

The noise measurements upon which the alleged violations were based were taken at the duck pond - an unclassified property. Since the duck pond is not a classified property, the alleged numeric violations do not apply. Accordingly, the Board finds no numeric violations as alleged in the complaint.

Nuisance Noise Violations

Complainants also allege that Turriss violated Section 24 of the Act and Section 900.102 of the Board regulations. 35 Ill. Adm. Code 900.102; 415 ILCS 5/24 (2000). Together these provisions constitute a prohibition against nuisance noise pollution. Charter Hall Homeowner's Association and Jeff Cohen v. Overland Transportation System, Inc., and D. P. Cartage, Inc., PCB 98-81 (Oct. 1, 1998) (Charter Hall), citing to Zivoli v. Prospect Dive and Sport Shop, Ltd., PCB 89-205 (Mar. 14, 1991) (Zivoli) slip op. at 8. In determining whether noise emissions rise to the level of a nuisance noise pollution violation, the Board performs a two-step inquiry. First, the Board determines whether or not the noise constitutes an interference in the enjoyment of complainants' lives and second, considering the factors enunciated in Section 33(c) of the Act, the Board determines whether or not the interference is unreasonable. Charter Hall slip op. at 19-21. The following discussion will address first whether complainants have established that the noise emanating from the ventilation fan constitutes an interference with the enjoyment of life and second, whether the noise emissions constitute an unreasonable interference in their lives.

Interference With Enjoyment of Life

*13 The Board has stated that if there is no interference there can be no nuisance noise violation. Zivoli slip op. at 9. Accordingly the Board must first determine whether the sounds have interfered with the enjoyment of life. Furlan v. University of Illinois School of Medicine, PCB 93-15 (Oct. 3, 1996), (Furlan) slip op. at 4. The Board has held that the following

disturbances constitute interference: sleeplessness from nightclub noise (Manarchy v. JJJ Associates, Inc., PCB 95-73, (July 18, 1996) slip op. at 10); noise interfering with sleep and use of yard (Hoffman v. Columbia, PCB 94-146, (Oct. 17, 1996) (Hoffman) slip op. at 5-6, 17); and, trucking operation noise impacting sleep, watching television and conversing (Thomas v. Carry Companies of Illinois, PCB 91-195 (Aug. 5, 1993), slip op. at 13-15).

The complainants testified that the noise from Turriss' ventilation fan causes prevents them from falling back to sleep, and that the use of the duck pond has diminished in the last couple of years because of the noise.

Discussion

As previously stated the Board has found that if there is no interference there can be no nuisance noise violation. Zivoli slip op. at 9. Therefore, the first step in the Board's inquiry about a nuisance noise violation is whether or not the sounds have interfered with the enjoyment of life. Furlan slip op. at 4. Only if there has been an interference does the Board proceed to the second inquiry of whether the noise unreasonably interferes with the enjoyment of life.

The Board has previously found that compliance with the numerical noise standards does not present an absolute bar to finding of violation of the general nuisance noise prohibitions. See Village of Matteson v. World Music Theatre, et al., PCB 90-146 (Apr. 25, 1991). However, noise measurements have been used to substantiate or refute a nuisance noise claim, even if they do not meet all Board requirements that would apply in a case alleging a numeric violation. See Charter Hall Home Owners Association v. Overland Transportation System, PCB 98-81 (Oct. 1, 1998). The Board will consider the noise measurements accordingly.

The Board has determined that noise interfering with sleep and use of yard (Hoffman) and trucking operation noise impacting sleep, watching television and conversing (Thomas v. Carry Companies of Illinois) does constitute an interference. Here, the noise impacts the sleep of the complainants.

The Board finds that the noise emissions from the school do interfere with the complainants' enjoyment of life. Accordingly, the Board must consider if the emissions unreasonably interfere with the complainants' enjoyment of life.

Unreasonable Interference, Section 33(c) Factors

The remaining issue is whether the noise from the ventilation fan has unreasonably interfered with the complainants' enjoyment of life. Whether an interference is unreasonable is determined by examining the factors set forth in Section 33(c) of the Act. The Board need not find against respondent on each factor to find a violation. See Wells Manufacturing Company v. PCB, 73 Ill. 2d 226, 233, 383 N.E.2d 148, 151 (1978) (Wells Manufacturing); Processing and Books, Inc. v. PCB, 64 Ill. 2d 68, 75-77, 351 N.E.2d 865, 869 (1976); Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 296, 319 N.E.2d 794, 797 (1974). The Board will now consider each of the Section 33(c) factors.

The Character and Degree of Injury to, or Interference With the Protection of the Health, General Welfare and Physical Property of the People

*14 In assessing the character and degree of interference that the noise emissions from the ventilation fan caused, the standard applied by the Board is whether the noise "substantially and frequently interferes" with the enjoyment of life, "beyond minor or trifling annoyance of discomfort." Charter Hall, slip op. at 21, citing Kvatsak v. St. Michael's Lutheran Church, PCB 89-182 (Aug. 30, 1990), slip op. at 9.

As previously indicated, the complainants assert that the noise from the fan unreasonably interferes with the enjoyment of their lives and properties. They specifically point to impacts in the enjoyment of their duck pond and deck, as well as impacts on

their abilities to get back to sleep if awakened. Knox Br. at 7. The complainants highlight that the noise is constant, and argue that the noise will only increase with time. Knox Br. at 13.

Discussion

In determining the character and degree of injury caused by the noise emissions from the plant the Board must examine whether the interference was substantial and frequent.

The evidence submitted by the complainants on the interference caused by the noise is inconsistent. Mr. Knox testified that the noise from the fans affects conversation at the pond, but that conversations are possible even though the background noise is present. Tr. at 38. Both of the complainants testified that the noise sometimes prevents them from going back to sleep if awakened, but neither complainants testified that the noise ever caused them to wake up. In addition, Mr. Knox testified that he cannot hear the noise if the windows on the house are closed or unless the wind is just right.

As previously stated, the Board may consider noise measurements in a nuisance noise claim. The measurements taken by Zak were not taken at the house, but approximately 390 feet away at the duck pond. The Board finds that the noise measurements are inconclusive, and do not substantiate or refute whether the interference was substantial and frequent.

The complainants have not proven that the noise emissions from Turriss' ventilation fans substantially and frequently interfere with their enjoyment of life. They have not shown that the noise in question is anything more than a minor annoyance. The noise in question was characterized as an aggravation by both complainants. Based on the evidence before it, the Board finds that noise emissions do not substantially and frequently interfere with the complainants' enjoyment of life, and weighs this factor in favor of the respondents.

The Social and Economic Value of the Pollution Source

In assessing this factor, the Illinois Supreme Court has looked to the number of persons that the respondent employed and whether respondent is an important supplier to a particular market. Wells Manufacturing, 73 Ill. 2d at 235-36. The Board has similarly looked to such factors as the number of employees at a facility and the total wages and taxes that a respondent paid. Charter Hall at slip. op. 23-24.

*15 The complainants do not disagree that Turriss has some economic value. Knox Br. at 16. However, they argue the Board should be cautious about finding social value in the public user's participation, as end product consumers. *Id.* Turriss argues that it has high social and economic value, that it employs 215 local people and pays approximately one million dollars per year in both payroll taxes and state and local taxes. Turriss Br. at 25.

Discussion

In addition to the taxes paid and the people employed, the record indicates that Turriss supplies a number of Illinois municipalities and State institutions with coal. The Board finds that Turriss does have significant social and economic value to the community, and weighs this factor in favor of the respondents.

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

Suitability of location is not the only factor the Board examines under this factor. Roti v. LTD Commodities, PCB 99-19 (Feb. 15, 2001) (Roti) slip. op. 26. The Board also looks to priority of location; however industry cannot rely on priority of location as a mitigating factor if emissions are substantially increased. Roti slip op 27 citing Wells Manufacturing 73 Ill. 2d 237. Thus,

the Board examines suitability of the location of the source, priority of location and whether emissions have increased when weighing this factor.

Turriss' facility is located in an agricultural area, and is properly zoned. Tr. 188. The fan was located in its current location, in part, because of the access to roads, and partially because of the need to be located near pre-existing mine development. Tr. at 168, 202. The complainants purchased their property in 1975, and have been living there since 1976. Tr. at 15. Turriss did not purchase the property where the fan is located until 1997. Tr. at 24.

Discussion

When weighing this factor, the Board must consider the suitability of the pollution source to its location, including priority of location. Turriss' ventilation fan is located in an area the record establishes to be primarily agricultural. Tr. at 188. The record clearly shows that complainants have priority of location. Although Turriss' facility is suitable to its location, the complainants' priority of location cannot be ignored. Accordingly, the Board weighs this factor neutrally, in favor of neither party.

The Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Emissions, Discharges or Deposits Resulting from Such Pollution Source

In considering this factor, the Board must determine whether technically practicable and economically reasonable means of reducing or elimination noise emissions from Turriss' ventilation fan are readily available to respondent. See Charter Hall slip op. at 24.

The complainants' noise expert, Greg Zak, recommended the construction of a structure over the existing housing of the silencer, the evase, the fan and the attached buildings. Knox Br. at 19. Zak testified that such a structure would reduce the noise emissions significantly. Tr. at 102, 140. Turriss argues that complainants simply gloss over the technical feasibility and economic reasonableness of Zak's solution. Turriss Br. at 27. Turriss contends that the \$37,000 complainants posit the structure will cost does not accurately reflect the true cost of the building Zak is recommending. Turriss Br. at 27. Turriss presented evidence that the building will likely cost approximately \$470,000. Tr. at 182.

Discussion

*16 The Board finds that the record does not reflect the proposed remedies to be technically practicable or economically reasonable. The evidence in the record on the cost of the proposed remedy is vastly divergent. In addition, the evidence suggests that the proposed remedies may not be technically feasible.

Schultz, an engineer for Turriss, testified that mine safety regulations prohibit the construction of anything combustible within 100 feet of the fan. Tr. at 218. Wood, therefore, could not be used in the construction. *Id.* This would support Turriss' contention that the monetary figures offered by Zak are inaccurate. Technical issues also exist in that any building surrounding the fan must be designed and approved to comply with requirements regarding a potential explosion in the mine. Regulations require that the fan be placed in a certain location in case of an explosion. Schultz testified that Turriss would have to obtain Mine Safety and Health Administration approval prior to the construction of any building over the fans. Tr. at 185.

The Board finds that the remedies suggested by the complainants are not technically practicable and economically reasonable solutions to the address the noise from the fans. Accordingly, this factor is weighed in favor of the respondents.

Any Subsequent Compliance

Under this factor, the Board analyzes the respondent's attempts to address the emissions that have led to the alleged violations of the Act or the Board's regulations. The record shows that Turriss has engaged in substantial remedial efforts to alleviate the

noise. After the complainants notified Turriss about the noise complaint, Turriss contacted Zak and Schomer to discuss abatement methodology. Turriss made significant efforts to reduce the noise including the closure of the upcast device, the installation of belting on the fan evase, the installation of steel plating and additional belting around the evase, the placement of belting on the roof house, and the installation of a silencer. The record indicates the respondent spent approximately \$25,000 trying to resolve the noise issue. Tr. at 179-80.

The complainants do not dispute that Turriss has attempted to reduce the noise emissions. Knox Br. at 21. Both complainants agree that Turriss took steps that have drastically reduced the noise from the fan. Tr. at 26, 64.

The Board finds that the respondent made a considerable effort to alleviate noise emissions from the fan, and weighs this factor in favor of the respondents.

Summary of Findings on Unreasonable Interference

The Board finds that the noise from Turriss' ventilation fan has not unreasonably interfered with the complainants' lives. The complainants have not proven that the noise substantially interferes with their lives. In addition, Turriss has significant social and economic value. No practical solutions that are economically reasonable to alleviate the interference were evidenced, and the Turriss has vigorously attempted to address the complainants' complaints about noise. Accordingly, the Board finds that respondent did not violate Section 24 of the Act and 35 Ill. Adm. Code 900.102.

CONCLUSION

*17 Based on the record before the Board, the Board finds that the respondent did not violate Section 24 of the Act and 35 Ill. Adm. Code 900.102, 901.102(a) and (b) or 901.106. The Board finds that sound emanating from the ventilation fan did not unreasonably interfere with the complainants' enjoyment of their lives and property. This opinion constitutes the Board's finding of fact and conclusions of law. The Board dismisses the case and closes the docket.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a)(2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

T.E. Johnson

Footnotes

- 1 The transcript of the June 11, 2002 hearing will be cited as "Tr. at ____"; the complainants' post-hearing brief will be cited as "Knox Br. at ____"; Turriss' post-hearing brief will be cited as "Turriss Br. at ____"; the complainants' reply brief will be cited as "Reply at ____"; Turriss' motion for leave to file surreply instanter will be cited "Mot. at ____"; complainants' motion to strike motion for leave to file surreply brief and objection to respondent's surreply brief will be cited as "Obj. at ____"
- 2 NEC is an abbreviation for 'not elsewhere coded' in the SLUCM code. *See* 35 Ill. Adm. Code 901.Appendix B, code 110, footnote 5.

2003 WL 137447 (Ill.Pol.Control.Bd.)