ILLINOIS POLLUTION CONTROL BOARD
November 6, 1975

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
NORTH SHORE SANITARY DISTRICT, a Municipal Corporation,	)	
	)	
Respondent.	)	
	)	PCB 74-223
	)	PCB 74-229
CITY OF HIGHLAND PARK,	)	(Consolidated)
	)	
Complainant,	)	
	)	
v.	)	
	)	
NORTH SHORE SANITARY DISTRICT,	)	
	)	
Respondent.		

Mr. Marvin I. Medintz and Mr. Dennis R. Fields, Assistant Attorneys General, appeared on behalf of the People;
Mr. Richard M. Hollander, Mr. Richard M. Kates, and Mr. Berle L. Schwartz, appeared on behalf of the City of Highland Park.
Mr. Murray R. Conzelman, Conzelman, Schultz, O'Meara and Snarski, appeared on behalf of the North Shore Sanitary District.

OPINION AND ORDER OF THE BOARD (by Mr. Zeitlin):

Case No. PCB 74-223 was filed by the People of the State of Illinois on June 14, 1974, charging Respondent North Shore Sanitary District, (NSSD), with violation of Section 9(a) of the Environmental Protection Act, (Act), from January 1, 1974 until the filing of the Complaint. Ill.Rev.Stat.,Ch.111-1/2, §1009(a)(1973).

Case No. PCB 74-229 was filed by the City of Highland Park (Highland Park), on June 17, 1974, charging NSSD with a general violation characterized as "AIR-ODOR" on June 1, 1974. A Motion to Consolidate the two cases was filed by the Attorney General on June 26, 1974, and the Pollution Control Board consolidated the two causes in an Order dated June 27, 1974.

An Amended Complaint was subsequently filed by the City of Highland Park on July 10, 1974, to expand the number of dates of alleged violation to include June 1, 16, 17, 21 and 28, 1974, and July 4 and 5, 1974. Also during the initial pleadings period, the Board on June 27, 1974 denied NSSD's Motion to Dismiss. Hearings were held in Highland Park on September 13, 1974, November 1, 1974, December 10, 1974, and January 10, 1975.

These consolidated cases concern alleged odor violations at the NSSD Clavey Road Sewage Treatment Plant, located in the City of Highland Park. For a more complete description of the location and function of the Clavey Road Plant, the reader is referred to the Board's prior Opinion and Order in PCB 70-7, 12, 13, 14, decided on March 31, 1971.

PRELIMINARY ISSUES

In this case the issue of conformity of the pleadings to the proofs elicited at hearing presents somewhat of a problem. In summary, the following dates were alleged as those of violation:

DATE(S) OF ALLEGED VIOLATION(S)	WHERE FIRST ALLEGED OR FIRST PUT IN AT HEARING
Jan. 1,'74 to June 14,'74 (inclusive)	People's Complaint of June 14, 1974
April 16, 1974	R.9
April 20, 1974	R.10
April 24, 1974	R.30
April 25, 1974	R.109,134
April 26, 1974	R.109,129
June 1, 1974	City's Complaint of June 17, 1974
June 11, 1974	R.130
June 16, 1974	City's Amended Complaint of July 10, 1974

June 17, 1974	id.
June 18, 1974	R.11
June 19, 1974	R.34
June 20, 1974	City's Ex.3, p.14
June 21, 1974	Amended Complaint
June 23, 1974	R.24
June 24, 1974	City's Ex.3,4.
June 27, 1974	R.111
June 28, 1974	Amended Complaint
"mid-June, 1974"	R.135
July 4, 1974	Amended Complaint
July 5, 1974	id.
August 15, 1974	R.95

These are dates for which some showing of odor violation has been attempted in testimony or submission of Exhibits. Several of these dates are not covered in any of the three Complaints. While discussions among counsel at the hearings indicated testimony regarding several of these dates cannot be seen as surprising to NSSD, we nonetheless must concur with Respondent that no foundation was laid in the pleadings for some of the testimony regarding alleged violations in June.

However, agreeing that there may have been surprise at the time of the first hearing in September, 1974, does not lead to a further agreement that the evidence introduced with regard to dates not covered in the complaints must be dismissed. First, the charges in an administrative proceeding need not be formulated with the precision required in a court. Joyce v. City of Chicago, 216 Ill.466, 75N.E.184(1905); Schyman v. Department of Registration and Education, 9Ill.App.2d 504, 133N.E.2d 551 (1956). Second, where the continuation of an administrative proceeding gives Respondent a full and adequate opportunity to respond to matters raised at hearing, or to recall and cross-examine witnesses at its leisure, there has been no fundamental unfairness or denial of due process. 1 Davis, Administrative Law 526 - 533. In this case, the "surprise" claimed by Respondent occurred at the hearing of September 13, 1974; the final hearing in the matter was held on January 10, 1975. Respondent had over four months in which to rebutt any matters raised at the September hearing, and in fact did so, partially, in its Exhibits 2 through 14. The Hearing Officer was correct in allowing the Complainants to enter the evidence regarding alleged violations on June 18, 19, 20, 23, 24, and 27, 1974. In keeping with Board Procedural Rule 328, and based on the actions of the parties, we find that the pleadings are here properly conformed to the proof.

In another preliminary matter, counsel for Respondent objected to the introduction of a considerable number of testimonial statements by citizens and to the introduction of certain citizen exhibits. Turning first to the statements of citizens, we find that there was no error by the Hearing Officer in allowing the various matters testified to by the citizens, even though many of the citizen statements were not relevant or competent for our consideration of the violations alleged. It is the intent of the Board to bring together at hearing all of the relevant facts on an individual matter, within limits dictated by reason and the limits of time at individual hearings. Some matters must later be disregarded, (eg., R.72). Others, even where not of use in determining the existance of a specific violation, may nonetheless be of assistance to the Board in fashioning an appropriate remedy.

Respondent also objected strongly to the introduction of a "health survey" compiled by a group of citizens, (Citizens Ex.1-5). The study attempted to show that the incidence of disease, particularly eye disease, is much higher in areas near the Clavey Road Plant. While the study is interesting, it is not competent as regards our findings in this case. We have not considered the study in arriving at a decision in this case, and decline to make any determination as to the merits of the study.

Counsel for Respondent also objected to the introduction of City's Exhibit 2, a calendar used by one witness to keep track of alleged dates when she was bothered by odors. The Hearing Officer refused to accept the calendar as an exhibit, but forwarded it to the Board nonetheless. In a limited manner, we must overrule the Hearing Officer. As will be shown in a later discussion regarding actual dates of alleged violation, the calendar's probity is quite limited, and actually gives little or no support to Complainants' cases. However, there is nothing in the record to indicate that the calendar should not have been accepted for whatever limited worth it might have.

In a final preliminary matter, we must resolve an objection to the introduction of Respondent's Ex.1, a copy of our Opinion and Order in a previous case concerning NSSD's Clavey Road Plant. Counsel for both Complainants apparently fear that Board consideration of the earlier cases involving Respondent would lead to reversible error, (R. 155-167; brief for City of Highland Park). The Board's Order in PCB 70-7, 11, 12, 13, 14 (1971) was evidently introduced by Respondent for two purposes:

a. Respondent wished to impeach the testimony of one witness, Mrs. Winston, based on the Board's findings and Order in the earlier case, as they related to her.

b. Respondent, apparently claiming collateral estoppel, wished to preempt further Board consideration of the factors enumerated in § 33(c) of the Act.

We may indeed take notice of our prior findings, particularly where the parties are essentially the same, many of the witnesses are the same, and the violation alleged is, in part, the same, (albeit for different dates). Respondent has asked expressly to have the prior cases' conclusions incorporated into the instant record. However, our findings on the violations alleged in this case may be based only on facts properly in the instant record. But we may, in fashioning an appropriate remedy, consider whatever appropriate facts are now before us.

In examining the merits of the instant case, we shall deal with each date of alleged violation chronologically. The record in this matter is somewhat complex, and is extremely disorganized. The testimony and exhibits regarding the alleged specific dates of violation are scattered throughout the record. In examining each date, Complainant's burden of proof to support its allegations for each date is fourfold:

1. Was there in fact an odor?

2. Was the odor caused by NSSD's Clavey Road Plant?

3. Did the odor result in interference with the lives, environment, enjoyment of property, etc., of the citizens affected?

4. Was such interference unreasonable, such unreasonableness being measured, in part, by the criteria in § 33(c) of the Act?

There is little question in the record of the first and third of these points. The record makes clear the fact that there was an odor in the area of the Clavey Road Plant, and that that odor caused significant interference with the lives and enjoyment of property of many of the witnesses. However, the record is not so clear in each case as regards point two and four, above.

The Complainants introduced a considerable amount of direct testimony in their attempts to establish specific violations. Stipulated testimony was simply read into the record. There were also several important exhibits. The City of Highland Park and the People introduced a number of police reports concerning the alleged violations, which reports showed both the name of the complaining citizen and the results of investigation by City police officers. These reports, City's Ex.3, were quite short and contained little information. The City also introduced a group of internal memoranda of Respondent NSSD's concerning alleged odor violations, (City's Ex.4). Respondent introduced its own log book pages from the Clavey Road Plant, (Respondent's Ex.2-14).

ALLEGED VIOLATION DATES

April 16, 1974. The allegation of violation for this date enters into the record at R.10. In testimony commencing there, one Joseph Levine stated that an odor of a "foul latrine" or "rotten eggs", (R.10), prevented him from performing his normal chores or enjoying his property. The City's Exhibit No. 3, which was not objected to, shows that police verification of Mr. Levine's odor complaint found that the smell did indeed originate at the NSSD Clavey Road Plant. (City's Exhibit 3 also shows four other odor complaints on the same day, some of which the police were unable to identify.)

Respondent's Exhibit 2, the Clavey Road Plant log for April 16, 1974, indicates that there was an odor from the Plant on that date, as a result of a "down final tank". Testimony presented by Respondent also indicates that there was an odor at the Plant on that date, caused by debris blocking the collector mechanisms in "final tank number four" at the Plant, which then had to be taken out of service, (R. 199, 171, 179).

The record contains considerable testimony concerning the odors from the Clavey Road Plant on that date. There can be no question that the odor on that date significantly interfered with the lives and property of many of the citizens in the surrounding area. (See also R. 22, 37-38, 9-95, and to a limited extent R. 82 et seq.)

April 20, 1974. The only actual testimony on this specific violation is that of Mr. Levine. The exhibits deal with this date in a cursory manner. Mr. Levine states only that there was an odor in the area of his home which forced him inside his house. The police report for that date also shows only that there was an odor in the area. The Plant log for that date, (Respondent's Ex.3), shows some mechanical difficulty for that date, but makes no mention of odors.

The record for this date is simply insufficient to allow any finding of volation. There is simply no showing that any odors which may have interfered with Mr. Levine were in any way connected to the NSSD Clavey Road Plant.

April 24, 1974. The testimony regarding violation on this date is weak, and would not alone support a finding of violation. Mrs. Facktor's testimony regarding a septic tank/rotten egg odor is insufficiently detailed regarding this date to connect the odor with the Clavey Road Plant, (R.30,31). Similarly, Mrs. Licata's testimony, even with a refreshed memory - - her notes of days with strong odors was later introduced as Complainants Ex.2 - - cannot, alone, support a violation for that date, (R.108,109). However, Respondent's Plant log for that date admits violation. Further, the Plant log for April 24, 1974, lends credibility to the multiple hearsay contained in the police reports for that date, (City's Ex.3, p.4). The corroboration between the reports of the police department and Respondent adds weight to the evidentiary value of each, and supports a finding of violation on that date.

April 25, 1974. Mrs. Licata's testimony of alleged violation on this date cannot, itself, support a finding of such violation. Mrs. Licata's testimony regarding the strength and effect of that alleged violation is far too generalized to support a finding of specific violation. She noted only that she wrote, "odor", on her calendar for that date, and that this would indicate a repetition of an odor that she had smelled is "always the same", (R.109). After then describing this odor as, "nauseating, foul, obnoxious, heavy...[p]oorly kept latrine outhouse smell", she states that the smell is intense when her calendar notes an odor in caps, with an exclamation point, or with some other comparative notation. We are not told whether any such notation was present on her calendar for April 25, 1974.

However, stipulated testimony regarding this date is seen in the record at R.134, 136 and 137-38. The stipulated testimony shows that there was certainly a severe odor in the area of the Plant, and that it seriously inconvenienced local citizens. (See also, supra, discussion on April 24, 1974.)

City's Ex.3, the police reports, showed four odor complaints on that date. Respondent's Ex.5, the Plant log for April 25, 1974, indicates that the plant personnel were able to pin down the source of the odor as the lagoon, and constitutes a partial admission of violation. In summary, the testimony and Exhibits indicate that the odor did originate at the Clavey Road Plant, and that it did significantly interfere with the enjoyment of life and property on the part of the local citizens.

April 26, 1974. The testimony of Mrs. Lieberman regarding the alleged violation on this date is quite clear, and easily supports a finding of actual violation. Mrs. Lieberman identified the smell as coming from the Clavey Road Plant, and that identification was never challenged, (R.129-132). On that date she and a group of guests were forced to abandon her yard and move indoors as a result of "tremendous odor", (R.130).

The Exhibits again support the finding of violation. The police reports, showing two odor complaints, indicated that the police were able to verify a very strong odor, and that the NSSD was notified. In the words of the Plant log for that date, (Respondent's Ex.6), "Aer. tanks quite ripe, odor around same very noticable".

June 1, 1974. This date was that for which a violation was alleged in Highland Park's original Complaint. The only evidence of any violation on this date comes from the stipulated testimony of Officer Marchinawski of the Highland Park Police Department. However, the stipulated testimony regarding that date of violation was withdrawn, (R.140), immediately after it was introduced, (R.139), by Complainant.

Additional evidence regarding an alleged violation on this date is found in a report by the Police Department of the City of Highland Park. That report, in its entirety, is as follows:

"June 1, 1974

8:55 PM - Mrs. Roberta Arden, 102 Winona, reported an odor of sewage in the area. Checked by Officer McKeever who reported sewage odor strong in the area.

Bill Koepsel notified."

This statement comes into the record as part of a report entitled, "Report of Odors - NSSD", and further stating, "Below is a report on Clavey Road odor complaints:". Where, as here, hearsay evidence is admitted without objection, it may be granted its natural probative value. 2 Davis, Administrative Law 289,294. Here, the only contrary evidence is likewise unsupported hearsay, contained in Respondent's Exhibit 7, constituting its "log book" for the Clavey Road Plant. The log for that date shows only the following entry from the 7 PM to 11 PM shift:

> (7-11) Routine. BB [operator's initials.] Mr. Koepsel came in on odor complaint at 10:00 PM and went with policeman, Officer McKeever, to site of complaint. Could find no odor.

Both exhibits are weak; both contain multiple levels of hearsay; both are reports prepared by the parties and are certainly subject to preparation as self-serving documents in contemplation of litigation.

There is simply not enough here to support a finding of violation. Even if we were to give a greater weight to the police report in this instance, it is simply not sufficient to show an odor violation. A statement that there is a "sewage odor strong" in an area, alone, does not adequately address the issue of the source of the odor.

June 11, 1974. A finding of violation for this date is supported entirely by the testimony of Mrs. Lieberman. Again, Mrs. Lieberman's testimony regarding the violation was identified by her personally as originating at the Clavey Road Plant, which she had personally visited: "I go there all the time", (R.132). While a portion of Mrs. Lieberman's testimony regarding the June 11, 1974 violation is hearsay, in which she related the reaction of 150 persons at an open house, to the odor, a finding of violation is possible from her testimony without the hearsay.

June 16, 1974. Violation on this date was first alleged in Highland Park's Amended Complaint. In this instance, the police report indicated that there was a "very faint odor" in the area of a complaining witness. Similarly, a "faint odor" is reported in Res.Ex.8, the STP log book, and a "very faint odor" in the City's Ex.4, a copy of a memorandum to Mr. Koepsel, NSSD's Engineer of Operations, from J.D. Styx, Superintendent of the Clavey Road Plant.

All of these hearsay exhibits were written following complaints by a Mrs. Schneider, who lives at 882 Timber Lane Road in Highland Park, approximately 3,000 feet from the STP. Contrary to the reports cited above for this date, Mrs. Schneider testified at the September 13, 1974 hearing to a "terrible odor" (R.41), which was quite strong, (R.42). She stated that the odor was like that of a "soiled diaper, or a stuffed-up toilet that was backing up right out in the street." (id).

Even in the aggregate, this testimony, with the exhibits, is insufficient to support a finding of violation. The causal connection between the testimony of Mrs. Schneider regarding a strong odor and the Clavey Road treatment plant is simply lacking.

June 17, 1974. The alleged violation on this date is supported by stipulated testimony from a Mr. Howard Zirn, who in the words of Respondent's internal communication on the subject, lives on the "second or third street west of our plant." (City's Ex.4, p.2). The stipulated testimony for this date indicates that the witness recognized the smell as that of a sewage treatment plant, and that the witness felt slightly nauseated as a result of the odor (R.138). In addition, City's Ex.4, at p.2, indicates that the NSSD felt that an odor could have been caused in that case as a result of "our sludge age, which has been carried too long." The police report covering that date, in City's Ex.3, is as follows:

"June 17, 1974

> 8:12 PM - Mr. Zirn, 366 Pines Circle, reports sewage odor coming from NSSD Plant on Clavey Road. Officer and operator from plant did notice odor. Mr. Koepsel contacted.
>
> 9:30 PM - Mr. Tannebaum, 246 Larkspur, reported sewage smell on Larkspur. Mr. Koepsel notified."

Again, the police report indicates that this "is a report on Clavey Road odor complaints". Respondent's Ex.9, the log sheet for Clavey Road Plant for that day states, "some odor present SE Wind very low overhead..." It is clear that this evidence does, in the aggregate, support a finding that there was an odor violation caused by the Clavey Road Plant.

June 18, 1974. The first allegation of violation on this date also appeared in the testimony of Mr. Levine, at R.11-19. Further testimony regarding this alleged violation is found in the testimony of Mrs. Licata at R.110-111. Even with Complainant's Exhibit 2, however, their testimony is unable to support a finding of violation. The evidence of violation on this date clearly shows that there was a strong odor in the area, and that it caused serious inconvenience to various individuals, but again there is simply insufficient evidence on the link between the odor and the plant to allow a finding of violation.

June 19, 1974. The alleged violation for this date was introduced in the testimony of Mrs. Nicholson, at R.34. Her testimony indicates that there was a serious odor in the area of her home on that date. Further testimony on the June 19, 1974 violation came from Mrs. Volin, who more directly linked the odor to the Clavey Road Plant. She gave evidence of an odor so severe that it limits the areas in which she can comfortably walk, (R.50). Further testimony regarding the same date was obtained from Mrs. Lipkin, (R.62), and again from Mrs. Licata, (R.110-111). Both witnesses testified to severe odors and severe interference with their enjoyment of life and property. In addition, the stipulated testimony of Mr. Zirn, (R.139-140), indicates an admission of violation by Respondent, as well as the existence of the odor itself.

In this instance, neither the police reports, (City's Ex.3), nor the Plant logs show any indication of violation, (Respondent's Ex.11). That, however, is overcome by the actual and stipulated testimony.

June 20, 1974. This date is mentioned only in City's Ex.3, the police reports, and no violation can be found.

June 21, 1974. Citizen testimony with regard to the violation alleged for this date is primarily that of Mr. Walker. Mr. Walker's testimony indicated that he smelled an odor like that of "decaying fish", similar to odors present on April 16, 1974 and June 23, 1974, (R.23). In addition, there is stipulated testimony as to an odor in the same general area, (R.139). However, neither of the witnesses' testimony with regard to the odor present on June 21, 1974 is shown as being connected to the Clavey Road Plant. Further, both the police reports, (City's Ex.3), and the Plant log, (Respondent's Ex.12), would indicate that any odor on that date came from a nearby swamp, and not from the Clavey Road Plant. No violation can be found. (See also City's Ex.4, p.3.)

June 23, 1974. The alleged violation on this date is supported in the record only by Mr. Walker's testimony, which does not show a relationship between the odors detected and the Clavey Road Plant. As was the case with the allegations for June 21, 1974, the police reports indicate either that reported violations could not be verified, or that they seemed to be coming from the nearby swamp, (R.23,24; City's Ex.3). (City's Ex.4 also shows no evidence of violation.)

June 24, 1974. The alleged odor on this date was not the subject of any testimony, but nonetheless can be found as a violation. City's Exhibits 3 and 4 support such a finding. The police report, (City's Ex.3), indicates that an odor violation on that date was verified by the Highland Park Police Department. City's Ex.4, a copy of NSSD internal memoranda, provides sufficient grounds alone for a finding of violation, and corroborates the statement in the police report that there was a "strong odor of human waste," emanating from the Clavey Road Plant.

June 27, 1974. This date is mentioned only in the police reports (City's Ex.3). No violation can be found.

June 28, 1974. The alleged violation on this date was one of those charged in Highland Park's Amended Complaint. The first citizen testimony regarding this date was that of Mrs. Facktor, who stated that she detected an odor between midnight and 6:00 AM which was sufficient to awaken her. Further testimony from Mrs. Volin was unsure as to the specific date, (R.48-50), but was buttressed by that of Mrs. Lipkin, (R.60-65), and Mrs. Salinas (R.68). In addition to the actual testimony of those witnesses, which alone might support a finding of violation, there is in addition the stipulated testimony of Officer Marchinowski, of the Highland Park Police Department. His testimony, (R.151), when taken with the police reports for that date, which are based on his findings, strongly supports a finding of violation, (City's Ex.3). Respondent's Ex.13, (the Plant log), while not amounting to an admission of violation, clearly allows for the possibility of a violation. In summary, a finding of violation for this date is well supported in the record.

July 1, 1974. This date is mentioned only in the police reports, (City's Ex.3). No violation can be found.

July 4, 1974. The alleged violation on this date was first charged in the City of Highland Park's Amended Complaint. However, the only evidence regarding the alleged violation is contained in the police reports (City's Ex.3). As noted above, we may take such hearsay for whatever natural probative value it may have. We feel that the police report, by itself, cannot support a finding of violation.

July 5, 1974. A violation on this date was also first charged in the Amended Complaint. But in this case, the police report of a verified odor complaint is complemented by the testimony of Mrs. Schoenwald, the originator of the complaint to the Highland Park Police (R.55-58). Mrs. Schoenwald testified to the severity of the odor, and to the fact that she was unable to keep her windows open because of it. (See also, R.138, regarding testimony of an odor over the weekend of July 4, 1974). A finding of violation is supported.

§33(c)

Respondent NSSD has expressly asked that the Board's conclusions in the earlier case of League of Women Voters v. NSSD, PCB 70-7, 12, 13, 14 (March 31, 1971) be included in our consideration of the factors in § 33(c) of the Act. Further, NSSD has stated that our earlier conclusions in that case are controlling here. We assume that NSSD's position is founded on our earlier statement that, "[t]he Clavey Road site is the most suitable one available; the expansion plans within the guidelines of this opinion should be carried out forthwith."

We disagree with Respondent that the factors in § 33(c) prohibit a finding of violation here, even with our earlier statement on the issue of suitability of site taken as controlling. To facilitate our analysis, we shall examine each of the factors in § 33(c) independently.

1. The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people. There is no question in this record that the odor emissions from the Clavey Road Plant are causing serious interference with the enjoyment of life and property of the citizens in the surrounding area. The record is replete with instances in which citizens were forced to remain indoors, usually with air conditioning running to filter out the odor. People's homes, occupations and hobbies were all interfered with in significant degree.

While we agree with Respondent's Brief that the reasonableness of this interference is to be measured in terms of the remaining subsections of § 33(c), we also note that the interference seen here would be difficult to justify.

2. The social and economic value of the pollution source. Respondent states in its brief that "[t]he social and economic value... is obvious and this Board permanently decided that question when it ordered the Respondent to proceed with the building of the plant." We disagree.

In our prior Opinion and Order, the Board decided that the Clavey Road Plant was necessary, in its present location, as the best solution available for a number of problems; our Order in League of Women Voters, supra, was primarily intended to save Lake Michigan, and to provide a source of water for the Skokie Drainage Ditch, into which the Plant discharges.

In addition to that need, the Board has also stated generally that "the social and economic value of a sewage treatment plant cannot be overestimated." EPA v. Township Public Utility, PCB 74-421, Opinion at 8 (July 10, 1975); see also, EPA v. Wheaton Sanitary District, PCB 74-351 (June 6, 1975); CBE v. North Elmhurst Sanitary District, PCB 74-285 (June 26, 1975).

In each of those cases, the Board stated that the relative value of a sewage treatment plant is decreased by improper operation or inadequate treatment which results in interference with the lives or property of surrounding citizens, or in damage to the environment. Clearly, the value of a sewage treatment plant may be outweighed by the damage caused.

3. 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. Respondent relied quite heavily on this subsection of § 33(c), both at the hearing and in its Brief. In fact, Respondent's cross-examination of the many witnesses testifying as to the odor problem was confined almost solely to the issue of priority in location.

First, the Board has previously stated that priority in location is not a blanket license to pollute. Buelo v. Barrington Sportsmen Unlimited, EPA v. Barrington Sportsmen Unlimited, (consolidated), PCB 74-303, 360 (March 13, 1975); EPA v. Incinerator, Inc., PCB 71-69, 2 PCB 505, 511 (1971). While the Clavey Road Plant obviously existed before many of its neighbors moved into the area, this principle is particularly applicable to the odor emissions here; NSSD has been ordered on several occasions to cease and desist odor pollution from the Clavey Road Plant, and has had more than sufficient time over the years to adjust its operations to minimize odors. Any priority defense of NSSD expired long ago.

Further, there is some question as to the question of priority in an absolute sense. The Board has previously stated that the priority of a polluter does not arise at the time of its arrival on a site. A nuisance, under § 33(c), can have priority only from the time that it becomes such a nuisance, or that adjoining properties might have notice that such a nuisance will arise. It is not clear from the record here that the odor nuisance at the Clavey Road Plant came into existance at the time the plant was built; instead, it seems quite likely - - and the Opinion in PCB 70-7, 12, 13, 14 so states - - that the odor problem commenced only when the Plant became overloaded. League of Women Voters, supra, Opinion at 24. That being the case, it is not clear that Respondent even has priority. See, CBE v. North Elmhurst, supra, Opinion at 7.

Respondent also relies heavily on the statement quoted above to the effect that the Clavey Road site "is the most suitable one available." In that regard, we need only note that that Opinion based that finding on an expectation that the plant could and would be operated in such a manner as minimize any odor emissions. We stated that, "the experts tell us that the odor problems will subside...", as the additions to the plant which were Ordered were constructed. The record here makes plain that the odors have not subsided. That being the case, our prior finding presents no defense for the odor emissions which are the subject of this case. Further, it is of course implicit in our earlier Opinion and Order that we based our Order on an expectation that the plant would be properly operated and maintained during the construction of the new facilities, and that Respondent would proceed to abate any violation with all deliberate haste. Our Order No. 2 required that NSSD, "cease and desist from polluting the air... to the extent reasonably possible until the construction of additional facilities which are required hereunder". Respondent has presented no evidence to show that it could not have prevented the odors testified to in this case. Indeed, the log sheets submitted as Exhibits by Respondent are inconclusive, and it is difficult to find that Respondent has been seriously attempting to deal with the odor problem.

4. The technical practicability and economic reasonableness of reducing or eliminating the emissions . . . from such pollution source. The Opinion in the League of Women Voters case, supra, incorporated into the instant record by Respondent, mandated a specific course of improvement and expansion for the Clavey Road Plant, which the Board found would serve to abate the odor problem. Even without considering League of Women Voters, we find that it is still economically reasonable and technically feasible to eliminate essentially all of the noxious odors originating at the Clavey Road Plant. Respondent states in its Brief that it is attempting to complete the work ordered by the Board. Order no. 2 in League of Women Voters implied a requirement of maximum effort to take all possible steps - - within the framework of the ongoing construction - - to minimize the odor during construction. This would require, very reasonably, that Respondent expend such further time and effort as is necessary to assure that the present operations at the plant are run sufficiently and efficiently to minimize further odor violations. Nor do we feel that one must expect noxious odors in conjunction with a sewage treatment plant; we instead find the opposite: if a plant is properly run, no serious odor problem will exist. To conclude consideration of this issue, we feel that the evidence here shows Respondent's failure to take all steps economically reasonable and technically feasible, and in keeping with our prior Order, to minimize odor emissions from its Plant during construction of the new facilities.

In summary, we find that the evidence here shows violation of § 9(a) of the Act on 10 specified dates. On each of those dates, noxious odors emitted by Respondent's Clavey Road Plant unreasonably interfered with the enjoyment of life and property of the residents in the vicinity of the Plant. The causes of the odor problem at Clavey Road are not unmanageable factors; the cures are clearly within the realm of technical feasibility and economic reasonableness. With its present controls, Clavey Road as now improved should be able to meet operating standards which will prevent odors without any significant additional expense.

PENALTY

The People ask as a remedy the maximum monetary penalty authorized under the Act, as well as a Cease and Desist Order. Highland Park, on the other hand, asks for no penalty, and instead asks that the Board order specific actions on the part of NSSD which the City feels will prevent future occurences like the violations which we have found here.

The record, (e.g., R. 179 et seq.), indicates that NSSD has brought specific air pollution controls on line since the dates of violation found above. For that reason, and to allow NSSD to apply all of its resources to abate existing violations, we find that a monetary penalty would not be appropriate here.

Since the entry of our Order in League of Women Voters, supra, NSSD has taken considerable steps to abate the serious problems at the Clavey Road Plant, in the area of odor covered by this case as well as in other areas. Testimony here indicated that some of the problems with odors at Clavey Road were generated as a result of the construction of the improved and expanded facilities there. In some areas which should have been kept closed to prevent the escape of noxious odors, workmen and plant employees repeatedly left doors and windows open. While we feel that these odors could have been prevented in the short term by proper operational and maintenance procedures, we also feel that they occurred while NSSD was taking many of the proper steps to provide a long term solution to the odor problem at Clavey Road.

In fact, in the recent case of NSSD v. EPA, PCB 75-302 (Oct. 16, 1975), we found the progress at the Clavey Road plant sufficient to allow a lifting of the sewer ban imposed in League of Women Voters. These improvements were accomplished at great expense pursuant to Orders of this Board and the Circuit Court. We feel that these improvements, along with the remainder of the remedies discussed below, (to take effect either immediately or after additional evidence has been submitted), will suffice to eliminate the odor problem at Clavey Road. While we must and do reprimand NSSD for the short term violations which we find here, which have preceded the completion of the Clavey Road plant improvements and the implementation of the additional monitoring and reporting requirements discussed below, a penalty would serve no actual purpose here; in this instance, public funds will be better applied to remedy the problem. Our Order will instead concentrate on elimination of the odor problem at Clavey Road, in an effort to restore, protect and enhance the quality of the environment in the area affected by Clavey Road.

REMEDIES

Highland Park asks the following relief:

1. NSSD to set up air pollution monitoring equipment at the Clavey Road Plant, such equipment to be the subject of a further Board Order regarding timing and specifications.

2. NSSD to initiate a monitoring result reporting system, available to city inspection.

3. NSSD to install automatic door closing devices at Clavey Road, and report on the effectiveness of sealing all windows at the plant.

4. NSSD to review its maintenance procedures for odor and air pollution control, and increase future internal record keeping on breakdowns, etc.

5. To make available to the City all existing records of air pollution which it presently has from a mobile monitoring unit, and be required to dispatch that unit to the site of future complaints.

Highland Park showed in its Ex.5 that Respondent has been subject, since May 15, 1970, to a Court Order requiring just such monitoring as the City now requests. People, et al v. NSSD, et al, Case no. 69 CH 179 (19th Circuit, Lake County, May 15, 1970).

Respondent claims that the solution to its admitted "problems" lies not in the installation of monitoring equipment, but in the completion of the plant expansions and modifications now under way, (Respondent's Brief at 2,5). Respondent pleads that we do not order any modifications of the plant, claiming that the plant is already being designed "by committee."

We feel that Highland Park is correct. First, it would appear that NSSD is tardy in fulfilling its duty to install the monitoring equipment required by the May 15, 1970 Court Order. Secondly, we feel that the remedy suggested by Highland Park is eminently practical for the given situation.

The instant record is simply insufficient to allow the entry of a final order on the subject of monitoring, however. Highland Park's suggested remedy may allow us to clear up the remaining questions. But the report or reports which we are requiring in our Order should be better organized and more thorough than the record seen thus far in this case.

The suggestion that automatic door closers be installed, and that the windows be sealed at the Clavey Road Plant seems reasonable. The record indicates that considerable quantities of odoriferous gases may escape through open windows, and defeat the slight negative pressure needed to ensure proper operation of the present and planned air pollution control facilities.

We will also require that NSSD significantly upgrade its present record keeping practices. The log sheets for the Clavey Road Plant which were seen in this record are simply inadequate. NSSD shall in the future detail the times, dates, problems, facilities, equipment, parts, and persons involved in all breakdowns at the plant, and in all situations where odor emissions are the result of plant operations. While it would not be possible, or practical, for us to detail all of the exact procedures to be observed under this requirement, we nonetheless feel that the requirement is reasonable. It is sufficient to note that without an adequate record of the problems encountered at the Plant, it is impossible to solve the Plant problems.

This Opinion constitutes the findings of fact and conclusions of law of the Board in this matter.

ORDER

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD THAT:

1. Respondent North Shore Sanitary District is found to have violated Section 9(a) of the Environmental Protection Act, in the manner, and at the times, detailed in the accompanying Opinion.

2. Respondent North Shore Sanitary District shall cease and desist such violations.

3. Respondent shall make available to the City of Highland Park and to the Environmental Protection Agency all of its present plans for air pollution monitoring facilities at its Clavey Road Plant, along with the results of all research and development efforts on that subject to date, and all operational reports and results concerning present or planned air pollution control facilities at that site.

4. Respondent and Complainants in this matter shall individually or jointly consider the adequacy of plans for air pollution monitoring facilities at Respondent's Clavey Road Sewage Treatment Plant. The parties shall invite and accept any participation by the Illinois Environmental Protection Agency in such consideration.

5. Respondent and Complainants in this matter shall, if agreement on the subject of future monitoring at the Clavey Road Plant can be reached, submit jointly to the Board a report to that effect within 90 days of the date of this Order; if such agreement cannot be reached, those parties shall individually submit to the Board, within 90 days of the date of this Order, reports detailing exactly their various positions on the matter.

6. Respondent shall upgrade its record keeping practices at the Clavey Road Sewage Treatment Plant in a manner consistent with the foregoing Opinion.

7. Respondent shall install automatic door closing mechanisms at its Clavey Road Plant, and shall either seal or otherwise ensure that the windows at the Clavey Road Plant remain shut at all times during normal operation.

8. Jurisdiction by this Board is retained in this matter in accord with paragraph 5 herein.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 6th day of November, 1975 by a vote of 4-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board