ILLINOIS POLLUTION CONTROL BOARD
May 16, 1974

ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	PCB 72-114
vs.	)	
	)	
APEX SMELTING CO., INC.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by Mr. Seaman):

On April 10, 1974, Complainant in the above-captioned cause filed its Motion For Modification Of Final Order. The Motion has reference to our Opinion and Order in this matter, dated March 28, 1974.

Movant raises numerous difficult issues of law and fact. This is in part the result, we feel, of the inherent difficulties presented by the case itself. There were six public hearings in this matter. The issues were vigorously contested. Having sifted through the voluminous, and often contradictory, evidence of Record, we concluded that, with the exception of the Section 9(b) charge, Complainant had simply failed to sustain its burden of proof.

The issues presented by Movant were considered during our deliberations and, upon reconsideration, we perceive no reason to amend or modify our Opinion and Order.

However, comment on certain of the issues raised is appropriate.

Initially, Movant is troubled by the following language in our Opinion and Order (p. 11):

> We feel that some of the evidence proffered by Complainant tends to show violation of Rule 3-3.111. However, this Board cannot enter decisions on feelings. Complainant must prove its case.

Although we cannot see an ambiguity or alternative construction in the quoted paragraph, our intent was to express the conclusion that Complainant failed to adduce that quantum of evidence necessary to sustain its allegations. Clearly, evidence which tends to show violation may be insufficient, in itself, to prove violation. Evidence which tends to show violation may be weakened by relevant rebuttal. Viewing the Record as a whole, Complainant did not meet its burden.

Movant is further concerned that the subject Opinion and Order may "severely imperil any further use of AP-42." (Complainant's Motion, paragraph 8, p. 6). We stated in our Opinion and Order, page 9, as follows:

> Counsel for Complainant cites EPA v. Lindgren Foundry Co., PCB 70-1 for the proposition that standard emission factors may be used to show a prime facie case of violation. (R. 462). We agree. See also PCB 71-4, PCB 71-33 (consolidated) and PCB 71-297, PCB 71-335 (consolidated) . However, it is also true that substantial affirmative evidence that the specific pollution source involved or the circumstances relating to its operation are such as to make said source substantially different from the elements considered in the standard emission factor computation will shift the burden of proof to the party proffering the standard emission factors. In George E. Hoffman and Sons v. Illinois Pollution Control Board et al., decided December 28, 1973 by the Illinois Appellate Court, Third District, the court specifically rejected the contention of the Environmental Protection Agency that once standard emission factors are introduced, it then becomes the burden of the opposing party to prove it was not violating the regulation (3-3.111).

There is nothing legally novel about this statement, nor does it represent a departure from a line of Board decisions on the issue. Although standard emission factors may be introduced to make a prima facie case of violation, it would be patently inequitable to compare a complainant's apple with a respondent's orange; the futility and peril of comparing dissimilar operations is manifest.

Complainant's Motion For Modification Of Final Order is denied.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted on this 16th day of May, 1974 by a vote of 5-0.

Christan L. Moffett