ILLINOIS POLLUTION CONTROL BOARD
March 19, 1987

WELLS MANUFACTURING COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 86-48
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

MR. JOSEPH S. WRIGHT, JR., OF MARTIN, CRAIG, CHESTER & SONNENSCHEIN, APPEARED ON BEHALF OF COMPLAINANT.

MR. GLEN C. SECHAN, ASSISTANT STATE'S ATTORNEY, MR. CAREY COSENTINO, ASSISTANT ATTORNEY GENERAL, MS. SUSAN SCHROEDER, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ATTORNEY, AND MR. JOSEPH R. PODLEWSKI, JR., ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ATTORNEY, APPEARED ON BEHALF OF RESPONDENT.

OPINION (by J. D. Dumelle, R. C. Flemal and B. Forcade):

This matter comes before the Board upon a Permit Appeal filed by Wells Manufacturing Company ("Wells") on April 1, 1986. Wells contends that it was improperly denied renewal of an air operating permit by the Illinois Environmental Protection Agency ("Agency") and prays for entry of an order requiring that the Agency issue the permit.

On March 5, 1987, the Board adopted the following Order:

> The February 28, 1986 denial by the Illinois Environmental Protection Agency of the December 5, 1985, Wells Manufacturing Company Request for Permit Renewal is affirmed.
>
> Today we submit our Opinion in support of that Order.

RECORD

Hearings were held in this matter at the Morton Grove Village Hall, Morton Grove, Illinois, on July 31, 1986, and September 11, 1986. The Hearing Officer estimates that approximately 150-200 persons were in attendance at the first

hearing and approximately 35-50 persons were in attendance at the second hearing. In addition to testimony from approximately 15 citizen witnesses, testimony was received from four Agency employees called as witnesses by Wells and four citizen witnesses called by the Agency.

Petitioner's Brief (hereinafter "Wells' Brief") was filed on November 12, 1986. Respondent's Brief (hereinafter "Agency Brief") was filed on December 17, 1986. Both briefs were timely filed according to the schedule set out by the Hearing Officer. The Hearing Officer also allowed Petitioner until January 12, 1987, to file a Reply Brief. The Reply Brief was filed on January 16, 1987.

In addition to the original Permit Appeal document, hearing transcripts, and briefs, the record in this matter includes six exhibits appended to the Permit Appeal (hereinafter "Appeal Ex."), and 349 exhibits[1] constituting the Agency Record[2] (hereinafter "Joint Ex."). The majority of the Joint Exhibits, approximately 250 in number, consist of complaint forms filed with the Agency concerning the facility in question. Approximately another dozen of these exhibits consist of letters and petitions filed with the Agency by citizens. All such materials were on file with the Agency, and hence available to the Agency, prior to the Agency's action in the instant matter. Several exhibits were also entered at hearing and were identified as Petitioner's and Respondent's exhibits.

We note that on September 20, 1986, S.T.O.P. ("Suburbs Turn Off Pollution") submitted to the Board a letter and approximately 81 pages of copies of newspaper articles. Neither of these items, in the form submitted to the Board, constitute materials before the Agency at the time of the Agency denial action, other than as some portion of these materials might be duplicated within the Agency's record. Since Board review on permit appeals is confined to the record before the Agency, and since there is no provision for admission of third party evidence in permit appeals before the Board, these have not been considered by us.

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[1] The numbers of the exhibits in the Joint Exhibits actually extend to and include number 353. No exhibits were submitted under the numbers 295, 297, 331, and 337.

[2] These exhibits were moved for admission jointly by Wells and the Agency (R. at 185).

BACKGROUND

Wells conducts an iron castings operation at its facility located at 7800 North Austin Avenue, Skokie, Illinois. The facility is located in an area of Skokie zoned for heavy industrial use. However, the facility is also located near both schools and residential areas, including parts of adjacent Morton Grove.

Wells has been in continuous operation at its Skokie facility since 1947. The facility therefore predates much of the adjacent residential area, as well as construction of at least the immediately adjacent school, Niles West High School.

One of the operations conducted at Petitioner's facility is a shell molding operation, which includes emission sources from shell molding, shell pouring, and baghouse equipment (hereinafter collectively "shell molding operation"). Shell molding is a process in which fine sand mixed with a resin is packed around a pattern that is to be duplicated in cast metal. Upon heating, the resin melts and bonds the grains of sand together. The sand thus retains the desired shape and can be used as a mold for creation of castings (Joint Ex. 334, p. 2). Wells admits that the shell molding process produces a "distinctive odor...characteristic of the resin" [used in the process] (Id., pgs. 2-3). The resin used is phenol formaldehyde (Id., p. 3).

Wells was granted a construction permit for the shell molding operation by the Agency on January 11, 1980. On May 4, 1981, the Agency also granted an initial operating permit.

On December 6, 1985, Wells submitted a first renewal application for the operating permit for the shell molding operation. Procedurally, the Agency provides that permit renewal applications may be initiated by the applicant returning to the Agency a signed copy of a two-page form provided by the Agency. As the form in question notes, this mechanism for application renewal is available to the addressed permittee "[i]f your operation is unchanged" and it is certified "that the original application information remains true, correct, and current" (Appeal Ex. 5; Joint Ex. 3). Wells' renewal application was of this form, and carried the required certification over the signature of Marshall K. Wells, Wells' President (Id.).

AGENCY DENIAL

By letter from the Agency dated February 28, 1986 (Appeal Ex. 6; Joint Ex. 1) Wells was notified that the renewal permit was denied. As reasons for denial, the Agency stated:

> The permit is DENIED because Section 9 of the Illinois Environmental Protection Act, and 35 Ill. Adm. Code 201.141 (formerly Rule 102) might be violated.
>
> The following are specific reasons why the Act and the Rules and Regulations may not be met:
>
> > The Agency has on file verified citizen odor complaints to the effect that the equipment described in the above-referenced application, either alone or in combination with other sources is causing, threatening, or allowing the discharge or emission of air contaminants, which are causing air pollution, in violation of 35 Ill. Adm. Code 201.141 (formerly Rule 102). These complaints allege emissions of odors into the environment from the facility are causing a public nuisance in the neighborhood. Until necessary measures are taken to correct these deficiencies, a permit cannot be issued for the above-referenced application. (Id., p. 1)

The Agency's denial letter further states that the "Agency would be pleased to re-evaluate [the] permit application" on receipt of written request and the submission of certain information and documentation (Id., p. 2).

The record indicates that at the time it was considering Wells' application, the Agency had before it more than 250 written citizen complaints, plus additional letters and petitions concerning the emission of odors from the Wells facility. (Joint Exhibits 6 to 224, 227 to 231, 234 to 236, 238 to 245, 247, 248, 250 to 263, 275 to 285, 343 to 350, 352, and 353). Approximately 90% of these complaints were authored and filed with the Agency in calendar year 1985[3].

Relying on the volume and substance of the citizen complaints, the Agency determined that Wells' permit for the shell molding operation could not be renewed, as the emissions from that process might be violating Section 9 of the Act and Section 201.141 of the air pollution regulations.

Sections 9(a) (of the Act) and 201.141 (of the air pollution regulations) contain similar language, and read in full as follows:

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[3]It is possible that more of the complaints on record were submitted to the Agency during 1985, but this cannot be determined as the remaining complaints are undated.

Section 9

No person shall:

a. Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;

Section 201.141 Prohibition of Air Pollution

No person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as, either alone or in combination with contaminants from other sources, to cause or tend to cause air pollution in Illinois, or so as to violate the provisions of this Chapter, or so as to prevent the attainment or maintenance of any applicable ambient air quality standard.

The term "air pollution", as used in these sections, is defined in Section 3(b) of the Act as

b. "AIR POLLUTION" is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.

LEGAL PRECEDENT

The statutory definition of "air pollution" has been interpreted on several occasions by the Illinois Supreme Court. See Wells Manufacturing v. Pollution Control Board, 73 Ill. 2d 226 (1978); Processing & Books, Inc. v. Pollution Control Board, 64 Ill. 2d 68 (1976); Mystik Tape v. Pollution Control Board, 60 Ill. 2d 330 (1975); Incinerator, Inc. v. Pollution Control Board, 59 Ill. 2d 290 (1974). Wells involved consolidated enforcement actions brought by the Agency and Citizens for a Better Environment against the same Wells facility that is at issue in the present proceeding. The Wells court said that in defining the level at which interference with the enjoyment of life or property becomes "unreasonable"

The Board must balance the costs and benefits of abatement in an effort to distinguish 'the trifling

inconvenience, petty annoyance or minor discomfort' from 'a substantial interference with the enjoyment of life and property'.

The court went on to say that the unreasonableness of alleged air pollution must be determined by the Board in reference to the statutory criteria found in Section 33(c) of the Act. 73 Ill. 2d at 232-233.
The criteria are:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

2. the social and economic value of the pollution source;

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; and

4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

STANDARD OF REVIEW IN PERMIT APPEAL PROCEEDINGS

The Board's historic approach in permit denial proceedings was best stated in Oscar Mayer & Co. v. IEPA, PCB 78-14, 30 PCB 397, 398 (1978)

"Under the statute, all the Board has authority to do in a hearing and determination on a Section 40 petition is to decide after a hearing in accordance with Sections 32 and 33(a) whether or not, based upon the facts of the application, the applicant has provided proof that the activity in question will not cause a violation of the Act or of the regulations.

In a hearing on a Section 40 petition, the applicant must verify the facts of his application as submitted to the Agency, and, having done so, must persuade the Board that the activity will comply with the Act and regulations. At hearing, the Agency may attempt to controvert the applicant's facts by cross-examination or direct testimony; may submit argument on the applicable law and regulations and may urge conclusions therefrom; or, it may choose to do

> either; or, it may choose to present nothing. The written Agency statement to the applicant of the specific, detailed reasons that the permit application was denied is not evidence of the truth of the material therein nor do any Agency interpretations of the Act and regulations therein enjoy any presumption before the Board."

Reviewing courts have affirmed the validity of this approach. For example, in Illinois Environmental Protection Agency v. Pollution Control Board, 118 Ill. App. 3d 772 (1933), the First District Appellate Court reviewed the Board's reversal of the Agency's imposition of certain conditions within some short term air construction and operating permits for a facility. The court stated that:

> The sole question before the Board in a review of the Agency's denial of a permit is whether the petitioner can prove that its permit application as submitted to the Agency establishes that the facility will not cause a violation of the Act. 118 Ill. App. 3d at 780.

See also IEPA v. IPCB, 138 Ill. App. 3d 550 (3rd Dist. 1985), aff'd _____ Ill. 2d _____ (1986) (Board need not apply manifest weight of the evidence standard in reviewing Agency permitting decisions).

Thus, the decision before the Board in the case at bar is to determine whether Wells has shown that the operating permit renewal application it submitted to the Agency establishes that no violations of Section 9 of the Act or of 35 Ill. Adm. Code 201.141 would result from the continued operation of the shell molding operation at the Wells facility.

THE SUPREME COURT WELLS DECISION AND SECTION 33(c) FACTORS

We note that Wells involved a combined permit appeal and enforcement action, whereas the instant matter involves a permit appeal alone. Because of this distinction, it is unclear which of the Wells determinations are properly applicable in the instant matter. This uncertainty pertains particularly to the function served by the Section 33(c) factors. Section 33(c) is located within Title VIII of the Act, which involves enforcement actions, and Section 33(c) is thereby plainly intended to apply in enforcement proceedings. It is less obviously certain that it may also apply, or be useful, in some permit appeals.

The particular issue faced by the court in Wells was that of drawing a distinction between "a trifling inconvenience, petty annoyance or minor discomfort" and "a substantial interference

with enjoyment of life and property". This distinction had necessarily to be drawn to allow the court to determine whether a violation had occurred, and thereby whether the enforcement action as brought was to be upheld or reversed. In drawing the distinction, the court applied the test conditions of Section 33(c), which were also before it as part of the combined proceeding. In so doing, the court weighed the 33(c)(1) degree of injury and interference against the 33(c)(2) value of the pollution source, 33(c)(3) suitability of the site source, and 33(c)(4) practicability and reasonableness of control factors.

Many of the same elements before the court in Wells are before the Board in the instant matter, although there is a key difference. Again, the allegations are to the "nuisance" provisons of the Act and the Board's regulations. And, therefore, again the distinction between "a trifling inconvenience, petty annoyance or minor discomfort" and "a substantial interference with enjoyment of life and property" must be drawn. Also, again, the appropriate test criteria upon which this distinction is to be made must be determined. The key difference is that the case at bar is solely a permit appeal, and that therefore the Board is required to determine whether the applicant has proven that a violation would not occur if the permit were to issue. We find it appropriate, as did the court, to apply the Section 33(c) tests in making this determination. In so doing, we would not establish, even if it believed we could, the general applicability of Section 33(c) in permit appeal cases. Rather, we believe that in those special cases where the alleged likely violations are to the so-called "nuisance" provisions of the Act or Board regulations, the Section 33(c) factors provide a useful, if not necessarily unique, set of criteria against which the allegations may be tested.

BOARD REVIEW

Citizen Testimony

Eighteen residents of the area surrounding the Wells facility presented testimony at hearing concerning the detrimental impact the facility's emissions have on their lives. The following summaries are representative of the testimony given by the citizen witnesses.

Ken Lisjeberg testified that the smell from those emissions has caused him to experience headaches, upset stomach, dizziness, and nausea (R. at 15), and has caused him to vomit mucus several times (R. at 16). He also stated that the odor has steadily increased in severity in recent years, although apparently decreasing somewhat in 1936, possibly due to the direction of prevailing winds (R. at 20-21).

Jack Galick, who is a chemist by profession, testified that the odor released by Wells' emissions is phenol formaldehyde (R. at 25). He indicated that he has suffered burning of the eyes and respiratory effects from the smell, even though he does not suffer from those problems generally (R. at 25-26).

Thomas Sokalski testified that his wife and two children have experienced coughing, nausea, sore throats, and irritated eyes from the Wells odors (R. at 53). Lorraine Biegart, Angie Adler, Mark Siegal, and James Davis all testified that, inter alia, the odors have definitely gotten worse over the past several years (R. at 56, 60, 77, 85, 89).

Nancie Cohen testified on behalf of the Agency that although she has lived since 1972 in a home three blocks north and a half block east of the Wells facility, she has only noticed the odors from Wells since 1981 (R. at 349-350). She further indicated that the odors have continually gotten worse since 1984 (R. at 353-354).

Carol Salinger also testified as an Agency witness. Mrs. Salinger is a teacher at Lincoln Junior High School in Skokie, and lives approximately five to six blocks west of the Wells facility (R. at 369-370). She has a degree in biochemistry and has worked as an organic chemist in an organic synthesis lab (R. at 371). She labels the odors as phenolic in nature, and says she can so identify it because of her training and familiarity with these types of products (Id.). Mrs. Salinger describes the Wells odors as "intolerable" and says they have caused her to experience headaches and nausea (R. at 370), the latter to the point where at times she cannot stay outside without fear of vomiting (R. at 383-384).

All of the witnesses whose testimony was summarized above submitted complaint forms to the Agency several months before Wells' permit application was denied. These forms and the allegations contained within them were therefore before the Agency at the time it denied Wells' permit application, and were ostensibly relied upon by the Agency in making its determination. We believe that the Hearing Officer correctly allowed the testimony of those Agency witnesses who were called to amplify upon joint exhibits contained in the Agency record. The Hearing Officer was similarly correct in ruling that the testimony of Agency witness Judy Sloan was inadmissible because it was not offered for the purpose of amplifying any portion of the Agency record.

Robert Hanrahan also offered testimony at hearing in this matter. Mr. Hanrahan did not submit a complaint form to the Agency prior to the latter's decision regarding Wells, so his comments were not relied upon by the Agency. Pursuant to 35 Ill. Adm. Code 105.102(a)(6) and 103.203 Mr. Hanrahan was entitled to

present testimony, however, and made the following comments. Mr. Hanrahan, who teaches at Niles West High School and lives three blocks from the Wells facility. He testified to the existence of a very sharp odor which has seemingly gotten worse over the past two to three years (R. at 36, 43). He described the odor as "very irritating", and one that "almost leaves a metallic taste in your mouth" (R. at 38). He also related a recent incident involving a neighbor of his who had tentatively sold his house, only to have the deal fall through when the potential purchaser noticed the odor from Wells (R. at 39). Hanrahan noted that the odor creates an economic problem for persons living near the Wells facility, as the homes in that area are valued in the $200,000 to $250,000 range (R. at 39-40).

Wells' Case in Chief

Wells contends that the Agency had no legal right to deny its permit application (R. at 93), and offers many arguments challenging the Agency's action. The discussion contained in this section will address only those arguments which relate to the crucial issue in a permit appeal before the Board: whether Wells has proven that a violation will not occur if the permit is issued.

First, Wells contends that the citizen complaints relating to the Wells odor were not verified by the Agency prior to the decision made by the Agency to deny the permit (Wells' Brief, p. 11). Harish Desai, Agency Unit Manager for the Chicago area, testified that the Agency considers a citizen complaint "verified" if it has been verified by personnel from the Agency's field operations section (R. at 150). Jean Damlos is the Agency field inspector assigned to the Wells facility. Ms. Damlos gave testimony, in response to questioning by counsel for Wells, concerning the findings of the various inspections she made of the Wells facility and the area surrounding it.

Ms. Damlos visited the area almost 30 times during 1985, and observed odors ranging in severity from "none" to "strong" (Wells' Brief, p. 21-22). When the results of these observations are summarized in an organized fashion, it is clear that Ms. Damlos most frequently observed no odor or odors of mild or moderate severity, as opposed to strong odors (Id.). Wells argues that Ms. Damlos is "the only trained observer and the only impartial observer to report" (Wells Brief, p. 22), and therefore that her findings, which in its view do not indicate that Wells is causing "unreasonable interference with the enjoyment of life or property", should be given more weight than those of citizens (Wells' Brief, p. 23).

Similarly, Wells disputes the accuracy of the citizens' complaints by relying on Ms. Damlos' testimony pertaining to the results of tests she conducted in the area with a piece of equipment called a Drager tube. Although Ms. Damlos conducted tests with the Drager tube on several occasions, the equipment never detected the presence of phenol or formaldehyde (R. at 259-260).

Second and more generally, Wells makes the argument that since the Agency issued an operating permit for the shell molding operation on May 4, 1981 (R. at 92), and because Wells has certified that all the information in that prior permit application "remains true, correct, and current..." (Joint Ex. 3), the contested permit in this case must issue. Wells bases this conclusion on the fact that the Agency, in making its determination regarding a permit application, issues the permit only after concluding that in doing so no violations of the Act or regulations will occur. Since the Agency so concluded in 1981, Wells opines, the Agency must so conclude again.

CONCLUSION

We believe it instructive at this juncture to again state the scope of review it is mandated to undertake in a permit appeal proceeding. The scope of review in these cases is extremely narrow, and focuses solely on the question of whether the petitioner has proven to the satisfaction of the Board that its application, in the form submitted to the Agency, establishes that the facility will not cause a violation of the Act (see p. 6, supra). For the reasons described below, we find that Wells has not made such a showing. We therefore affirm the Agency's February 28, 1986, denial of Wells' permit application. We conclude, after evaluating the unreasonableness of the air pollution alleged here with reference to the Section 33(c) criteria, that violations of Section 9(a) of the Act and Section 201.141 of the air pollution regulations might occur if the permit in question were to issue.

We give substantial weight to the citizen complaints due to the severe impacts alleged by the citizens and attributed by them to the odor from Wells. In the prior Wells case, the Board concluded:

> Taken as a whole, the citizen testimony indicates that there is, at times, an odor characterized as 'phenolic' emanating from the Wells facility. The testimony further indicates that the odor has an effect ranging from unpleasantness in most people to physically affecting the respiratory systems of people who are afflicted with respiratory problems or who are engaging in heavy exercise (emphasis added;

Environmental Protection Agency v. Wells Manufacturing Company, PCB 73-403 (consolidated), 20 PCB 135, 140, February 20, 1976).

The First District Appellate Court characterized the effect of the odor on citizen complainants as "mild discomfort". Wells Manufacturing Company v. Pollution Control Board, 48 Ill. App. 3d 337, 339 (1977).

However, the record in the case at bar indicates much more persuasively that Wells' emissions may cause unreasonable interference with the enjoyment of life or property and hence, air pollution. Many of the citizen complainants who testified at hearing in the present matter alleged physical effects from the Wells odors that are significantly more severe than simple "unpleasantness" or "mild discomfort". The record is replete with evidence from and/or concerning apparently otherwise healthy people who experience adverse respiratory effects simply as a consequence of exposure to the odors (R. at 25 and 53; see also Joint Ex. 64, 80, 88, 91, 92, 142, 168, 172, 173, 208, 210, and 211). There are also many references made in the record to other physical effects, such as burning of the eyes, nausea and vomiting, dizziness, sore throats, and headaches (R. at 15-16, 25-26, 53, and 370; also see Joint Ex. 56, 59, 64, 77, 80, 88, 91, 92, 118, 142, 145, 170, 176, 181, 184, 190, 194, 195, 209, 210, 212, 218, and 219). The citizen allegations, if accepted as true, indicate the existence of unreasonable interference with the enjoyment of life or property. Interference of the sort alleged in this case goes far beyond "trifling inconvenience, petty annoyance, or minor discomforts". We view the interference alleged by the citizen complainants as more approximately reaching the level of pervasive intrusion, affecting nearly every aspect of the lives of those living or working in close proximity to the Wells facility.

Moreover, there is evidence in the record to indicate that the odors emanating from Wells have increased in severity. As already discussed, many of the witnesses testified that the odors have increasingly worsened over the past several years (see p. 11; see also R. at 55, 60, 77, and 89, and Joint Ex. 117). Citizen allegations such as these are inherently contradictory to Wells' assertion that the information contained in its original application remains accurate (R. at 160).

The major thrust of Wells' efforts to diminish the weight of the citizen testimony focused on the examination of Jean Damlos, the Agency's field inspector assigned to the Wells facility (see p. 12-13). However, we believe that the testimony elicited from Ms. Damlos is not sufficient to meet Wells' objective. Simply because Ms. Damlos characterized the odors using terms of lesser severity than did some of the citizen complainants, it cannot be said that the citizens did not in fact smell what they allege to

have smelled. The citizens recorded their observations at different times and at different locations than did Ms. Damlos, and reported a much greater number of observations than did the field inspector. Moreover, as noted by the Agency, Ms. Damlos' characterization of the odors is generally no worse than "moderate" does not necessarily mean that those same odors did not constitute a "nuisance" (Agency Brief, p. 16). An attempt to determine the existence of a nuisance requires a legal conclusion, one that Ms. Damlos is not qualified to make.

Wells also elicited testimony from Ms. Damlos regarding tests she performed using Drager tubes, but this evidence was similarly unpersuasive. The ability of this equipment to detect the presence of phenols or formaldehyde in the area around Wells is not a sine qua non for the existence of the nuisance there. The Agency showed that Drager tubes have a threshold detection limit 100 times greater than the odor threshold (R. at 247-249), and that it is "very common" to be able to smell an odor yet not detect it with a Drager tube (R. at 249).

In light of the evidence in this record, we believe that the interference with the enjoyment of life or property presently occurring because of the emissions is more unreasonable than was that interference evaluated by the First District and Supreme courts in the earlier proceeding involving Wells. Restating this interpretation in terms of Section 33(c)(i), our perspective is that the "character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people" is more severe in the case at bar than that which was found to exist at the time of the previous case. It follows, therefore, that greater weight must be allocated to criterion Section 33(c)(i) in this proceeding than was possible on the basis of the evidence in the earlier case.

No assertions regarding criterion Section 33(c)(ii) or (iii) have been made in this which differ from those made in the previous proceeding. We therefore rely on the 1973 findings of the Supreme court on these factors, i.e. that the Wells facility is a socially and economically valuable employer and source of necessary industrial parts, and that the Wells facility is located in an area zoned for heavy-industrial use and has priority of location vis-a-vis the schools and homes which now exist in the area.

Regarding Section 33(c)(iv), there is evidence in the record that technically practicable methods of emission reduction are presently available. In 1985, a study was conducted of the Wells facility by the Cook County Department of Environmental Control (Joint Ex. 317). The stated purpose of the study was "to identify the potential source of odors, to enumerate the emissions as described in current literature and to discuss potential control approaches". The study offered five possible

control approaches, any of which might be utilized to reduce the odors emanating from the Wells facility. The approaches are:

1. A catalytic or direct flame afterburner with heat recovery

2. Chemical absorption scrubbers

3. Lower the tunnel oven operating temperature

4. Increase the cooling time of castings to reduce organic emissions in shakeout

5. Replace the phenolic resin molds with a new casting method such as one using physically bonded or third generation molds

Wells offered no testimony in response to these potential technological solutions contained in the Agency record. These alternatives were offered by a County agency, and therefore were not suggested for any pecuniary reasons, as was found to have been the case by the First District and Supreme courts in the earlier Wells proceeding[4]. We therefore find that the present record differs from the record of the prior Wells proceeding in that the former does establish that some technically practicable methods of reducing or eliminating the odors from the Wells facility do exist[5].

[4] There, testimony pertaining to the availability of technological control methods was offered by three sales representatives of competing firms selling such equipment (73 Ill. 2d at 237-238).

[5] We realize that Section 33(c)(iv) also requires economic reasonableness, as well as technical practicability, to be considered. The Agency record does contain the capital and operating costs for some of the control approaches proposed in the County report (Joint Ex. 318). The five and six-figure costs given for the various pieces of equipment, as shown in Joint Ex. 318, do not seem inherently unreasonable for a company the size of Wells. However, at this time the Board refrains from making a determination as to whether it would be economically reasonable for Wells to reduce or eliminate its oders through the use of any of the suggested equipment. The Board notes that Wells has previously conceded that for it, economic feasibility has not been a barrier to the installation of any emission-reduction equipment (73 Ill. 2d at 237).

Wells' second argument, that the Agency's prior granting of an operating permit is prima facie evidence that Wells complies with the Act and all regulations, is also flawed. The standards for issuance of renewal operating permits are identified in 201.162 as being those set forth in 201.160. The 201.160 standards are also those for issuance of an initial permit. Thus, it is clear that issuances of all permits, whether they be initial or renewal, are subject to the same tests. Moreover, it is clear that these tests are to be applied each and every time a permit is under review, irrespective of whether there is a prior history of granting of the permit. To conclude otherwise would be to conclude that an initially granted permit is a permanent license. This would be contrary to the whole intent of requiring periodic permit renewals, as well as contrary to the stated intent of 201.157 articulated at the time of its adoption:

> In the case of an operating permit the applicant must show ... that he is presently in compliance... (In the Matter of Emission Standards, R71-23, 4 PCB 298,303 (1972), emphasis added).

WELLS' ADDITIONAL ARGUMENTS

The Agency failed to inform Wells that its permit application was incomplete

Wells' argues that "[t]he IEPA is required to notify an applicant within 30 days of receipt of an application if the application is incomplete. 35. Ill. Admin. Code 201.153" (Wells' Brief, p. 4). Wells further contends that "[i]t is clear in this case that the IEPA (1) deemed the application incomplete, (2) failed to notify Wells, and (3) proceeded to deny the permit after an incomplete review" (Id.).

While we agree with Wells' position that notification of permit incompleteness is required when such is a matter of fact, we can find no merit with Well's position that this provision applied in the instant matter. Such notification requirements as may be imposed by 201.153 are for situations where the applicant has not provided the basic information which is specified in 201.152. There has been no contention by Wells that the permit application was incomplete in this regard. Rather, Wells seemingly adopts the position that the Agency's specification within the denial letter of additional information which would allow the Agency to reassess its denial action is an implicit acknowledgement that the permit was incomplete.

We note that there is clear distinction between whether a permit application is complete, and whether the information contained in the application is sufficient to warrant the outcome desired by an applicant. In the instant case, Petitioner

confuses the completeness of its application with the condition where the information as provided is sufficient to warrant granting of the permit.

As we noted above, the issue in an appeal of a permit denial is whether or not the permit applicant can prove that it presented sufficient facts to the Agency to show that the facility in question will be operated so that there will be no violation of the Act or rules. Having made its determination that Wells might be in violation of the Act and rules based on the complete permit application before it, the Agency was perfectly within its statutory mandate to deny the permit request without supplying prior notice to Wells that the permit application would be denied.

The Agency violated the letter and spirit of 35 Ill. Adm. Code 201.157

Wells submits that the Agency violated both the letter and the spirit of the 35 Ill. Adm. Code 201.157. The pertinent portions of Section 201.157 are:

> **Section 201.157 Contents of Application for Operating Permit**
>
> An application for an operating permit shall contain, as a minimum, the data and information specified in Section 201.152. ..... The Agency may adopt procedures which require data and information in addition to and in amplification of the matters specified in the first sentence of this Section, which are reasonably designed to determine compliance with this Chapter, and ambient air quality standards, which set forth the format by which all data and information shall be submitted. (underscores added).

Petitioner argues that, if the Agency is going to require more than the minimum permit application data and information as specified in 201.157, it may do so only after adoption of specific procedures.

The clear intent of the provision identified in the last sentence of this section is to allow the Agency the discretion to adopt procedures which require, as a general practice, the submission of more data and information in operating permit applications than the minimum required in construction permit applications (we note that 201.152 refers to construction permit applications). Whether or not the Agency has exercised this discretion would be germane to the instant matter only if the Agency were in fact requiring Wells to provide information beyond the ordinary as a condition of reviewing the permit

application. This is not the case. Rather, the additional information cited by the Agency is that information which it deems would be required of Wells to demonstrate that the record before the Agency was not of the nature to cause the Agency to conclude that violations of the Act or regulations might occur.

Nowhere does the Act or regulations prohibit the Agency from reconsidering an action if the applicant is able to provide information which successfully contests the record existing before the Agency. To the contrary, such supplementing of the record before the Agency is encouraged by the Act and regulations. Should an applicant find that satisfaction is not gained by so supplementing the Agency's record, or should the applicant choose not to supplement the record before the Agency, as is the case here, the applicant has recourse to appeal the Agency decision to the Board. If an appeal to the Board is made, as is also the case here, there is no change in the burden of proof, which remains that the applicant must prove that, if the permit is issued, no violation of the Act or regulations will result. The only distinction is that the judgement now resides with the the Board rather than with the Agency.

We do not, therefore, find merit in Well's argument that the Agency violated the letter and spirit of Section 201.157.

The Agency review process was fatally flawed

Wells contends that the Agency's review process was "fatally flawed" in that the procedures used in reviewing the application were "arbitrary and capricious" (Wells' Brief, p. 9). Wells reaches this conclusion in reliance on certain of the testimony given at hearing by Anton Telford, who was the Agency's primary permit analyst working on the Wells application (R. at 123-124, 127-128). Mr. Telford stated that in reaching his determination that Wells' application should be denied, he relied upon field inspector Damlos' reports and telephone conversations with her (R. at 302), and the "31(d)"[6] letter which had been sent to Wells approximately six months earlier (R. at 301). Mr. Telford also indicated that he was aware of the volume of citizen complaints the Agency had received, but did not "take the time to peruse [them] in depth" (R. at 335).

[6] This refers to a letter the Agency is required to send, under Section 31(d) of the Act, to all persons against whom an enforcement action is about to be filed. Section 31(d) specifies that such persons must be informed of the charges which are to be alleged, and must be given an opportunity to meet with Agency officials in an effort to resolve the conflict(s) which could lead to the filing of a formal complaint.

The issue of the appropriate standard of review in permit appeal proceedings before the Board has been adequately addressed (see pgs. 6-7, supra). The focus of review under that standard is on the information submitted by the applicant to the Agency. The Agency's decision-making process is not a subject of this analysis. As the Board has previously stated:

> The action of the Agency in the denial of a permit is not the issue; the issue is simply whether or not in the sole judgement of the Board the applicant has submitted proof that if the permit is issued, no violation of the Act of regulations will result. Environmental Protection Agency v. Allaert Rendering, Inc., PCB 75-80, 35 PCB 281, 283 (1979).

We add that even if it were to evaluate the procedures used by the Agency in evaluating Wells' application, it could not find that Wells has shown the Agency's process to have been "fatally flawed" or "arbitrary and capricious".

The Agency failed to verify citizen complaints

The points raised by Wells through this argument have been previously addressed (see pgs. 9-14, supra).

Wells has been prejudiced by the Agency's failure to adopt permit review procedures

Wells suggests that it has been prejudiced by the Agency's "failure to adopt permit review procedures in violation of Section 39(a) of the Act" (Wells' Brief, p. 13). Wells relies on the following language found in Section 39(a):

> When the Board has by regulation required a permit for the construction, installation, or operation of any type of facility, equipment, vehicle, vessel, or aircraft, the applicant shall apply to the Agency for such permit and it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of the Act or of regulations hereunder. The Agency shall adopt such procedures as are necessary to carry out its duties under this Section (emphasis added).

This line of inquiry again causes us to return to the question of the appropriate standard of review in permit appeals. Since this topic has already been exhaustively discussed, we will not restate the standard here. We will note, though, in order to specifically respond to this argument of

Wells, that the Board has long held that the Agency's procedures, criteria, and activities pertaining to its decisions on permit applications are not material to a Petitioner's burden of proof in a permit appeal. Allaert Rendering, Inc., 35 PCB 281; Oscar Mayer & Co., 30 PCB 397.

The citizen complaints bear scrutiny

For the most part, we have responded to the arguments made under this heading by Wells (see pgs. 9-14, supra). However, we cannot leave unanswered a misconception propounded by Wells, which exists in the record. On page 14 of its Brief, Wells discusses the citizen complaints which were received by the Agency and states:

> 91% (of them) did not name Wells as the subject of the complaint, were undated, dated May 14, 1985 or dated June 22 through June 24, 1985. It is no secret that a rally was held at the high school on June 24, 1985 (Tr. pp. 384-5) and that the balance of the forms were collected at that time.

This statement is utterly misleading to the extent it creates the impression that Wells was only infrequently named by citizens as the source of the odor problem they alleged. Fully 87% (239 out of 274) of the complaint forms filed positively identified Wells as the source of the odors. Furthermore, 18% of the forms (49 out of 274) were undated. Wells correctly points out that the vast majority of the forms are dated in May or June of 1985. However, Wells does not clearly identify, and we do not understand, the significance of this observation. Wells insinuates that many of the complaints were collected at a rally at Niles West High School, as if that somehow lessens the credibility of the complaints collected there and/or that of the citizens who submitted them. Wells suggests that these complaints are suspect, and says that "(t)here is nothing in this record to suggest that IEPA investigated or even inquired as to the circumstances under which these forms were solicited or gathered" (Wells' Brief, p. 14). If Wells believed that, for some reason related to the manner in which these complaints were collected, they should not have been afforded the weight they would otherwise be allotted, Wells had the burden of so showing in this case. Wells did not do so in any manner at hearing, and made only cursory, unsuccessful attempts to do so in its Brief.

The Agency and the Illinois Supreme Court have found Wells in compliance with the Act and applicable regulations

We have previously responded to this assertion as it pertains to the Agency (see p. 13, supra). Regarding the Supreme Court's prior findings, we are obviously aware that in 1978 that tribunal determined that Wells was not in violation of Section 9(a) of the Act. That fact, however, is not necessarily determinative as to whether the same facility may or may not be in compliance more than eight years later. We have shown how the factors within the calculus applied by the Supreme Court have changed, and how that reality has now altered the equation such that we cannot definitively find that Wells would be in compliance with Section 9(a) if the permit in question were to issue (see pgs. 10-14, supra).

A Section 9(a) violation cannot lie where a source is in compliance with the regulations governing its process

Wells stresses that because it is in compliance with 35 Ill. Adm. Code 212.321[7] and 245.121[8], it cannot be charged with violating Section 9(a) of the Act, a "general catch-all" provision (Wells' Brief, p. 16). Wells further contends that compliance with these sections provides it with a prima facie defense to a charge brought under Section 9(a) (Id., p. 17).

These arguments have no basis in law. The existence of a Section 9(a) violation is not in any way dependent on the presence of other violations of the Act or regulations. An emission source may very well be in compliance with the various regulations applicable to its process, yet nevertheless be causing unreasonable interference with the enjoyment of life or property. For example, a smokestack otherwise emitting legal emissions may cause a nuisance if located adjacent to a high-rise building or if subject to downdrafts from nearby structures. Moreover, although Section 9(a) may be accurately characterized as the "general" nuisance section, a transgression of the provisions of that section is no less a violation than is an exceedance of the limitations identified within any other section.

[7] This section specifies the allowable levels of particulate matter emissions from new process sources.

[8] This section outlines certain ways in which an objectionable odor nuisance may be determined to exist.

The concept of a "prima facie defense" is not applicable in a permit appeal, where the burden of proof is on the applicant. Assuming, arguendo, that the prima facie defense asserted by Wells existed, it nevertheless would be overcome in this instance by the volume of citizen complaints found in the Agency record.

The Agency failed to consider the Section 33(c) factors

Finally, Wells states that the Agency should have considered the factors enumerated in Section 33(c) of the Act, but did not. Wells argues that if the Agency had considered these factors, it could not have properly denied the permit application (Wells' Brief, p. 24). The Agency, on the other hand, believes it does not have to consider the 33(c) factors in reaching decisions on permit applications (Agency Brief, p. 22).

We believe, as a matter of logic, that the Agency should consider the 33(c) factors when considering whether a violation of Section 9(a) of the Act or Section 201.141 of the air pollution regulations may occur as a result of the issuance of a given permit. In determining whether to issue a permit pursuant to Section 39 of the Act, the sole criterion to be used by the Agency is whether a violation of the Act or regulations might occur if the permit issues. The Supreme Court's Wells decision clearly indicates that the analysis used to determine the existence of a statutory nuisance violation is served by application of the 33(c) factors. The Agency therefore should have reviewed those factors during the process of reviewing the application at issue in this case[9].

This shortcoming, however, is not fatal to the Agency's position. Again, the Board's review in permit appeal cases is not of the process used by the Agency in reaching its determination (see p. 17, supra). Rather, the Board's role is to decide for itself whether, based on the facts before the Agency, the applicant has shown that issuance of the permit will not cause a violation of the Act or regulations (see pgs. 6-7, supra). Thusly, the process used by the Agency in arriving at its decision to deny a permit application has no bearing on the outcome of a permit appeal. That is dependent solely upon the Board's findings on review.

[9] We note that the desirability of review of 33(c) factors by the Agency in instances of potential nuisance violations does not equate to a need for the Agency to develop the record necessary to make a 33(c) evaluation. Since the burden of proving that a violation will not occur is imposed by Section 39(a) of the Act on the permit applicant, it is the permit applicant who should provide the information.

SUMMARY

In sum, we conclude that for all the reasons given above, Wells has not met its burden of proving that no violation of the Act or air pollution regulations would result if the permit in question in this proceeding were to issue. The greater weight that must be ascribed to Section 33(c)(i) here than in the prior proceeding, due to the substantially greater interference with the enjoyment of life or property that is being caused by Wells' emissions today, results in a finding that Wells has not overcome the contention that its emissions might in fact cause a violation if permitted.

We note, however, that this decision will not in and of itself force Wells to cease its otherwise valuable activities and close its doors. The Agency has left open the possibility of reevaluating Wells' permit upon submission by the Petitioner of certain information specified in the Agency denial letter (Joint Ex. 1). Submission of this information, which is requested by the Agency for the purpose of allowing Wells to make its case that its emissions are not causing a violation of the Act and air pollution regulations, may be sufficient to overcome the Agency's determination made below (in the absence of such information) that Wells' emissions may be currently causing a nuisance violation.

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

Jacob D. Dumelle, Chairman

Ronald C. Flemal, Board Member

Bill Forcade, Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was filed on the 19th day of March, 1987.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board