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 OF BOARD MEMBERS J. ANDERSON, J. MARLIN AND J. T. MEYER

This Opinion provides our reasons for concurring with the Board's Order of March 5, 1987. In that Order, by a vote of 6-0, the Board affirmed the February 28, 1987 denial by the Illinois Environmental Protection Agency (Agency) of the request for permit renewal filed by Wells Manufacturing Company (Wells) on December 5, 1985.

RECORD

Wells initiated this appeal by the filing of a petition for review on April 1, 1986. 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 public comment received 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. Wells filed a reply brief on January 16, 1987.

In addition to the original petition for review, hearing transcripts (hereinafter "R.") 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 items should not be admitted into the record.

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,

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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 296, 297, 331, and 337.

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

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)

Prior litigation

Discussion of previous litigation involving the Board, the Agency, Wells and its neighbors is necessary to an appreciation of the many troublesome aspects of the instant permit appeal.

Odors from Wells' shell molding operation were the subject of enforcement cases brought against Wells in 1973 by the Agency and Citizens for a Better Environmental alleging violations of Section 9(a) of the Act. During the pendancy of these cases the Agency denied Wells an operating permit for a shell molding operation which pre-existed that at issue here (which received initial construction and operating permits in 1980 and 1981, respectively.)

These cases were consolidated by the Board and disposed of in a single decision, IEPA v. Wells Manufacturing, PCB 73-403, 73-418, 74-257 (consolidated), 20 PCB 135, February 26, 1976. After the lengthy discussion of the evidence presented in the enforcement cases, the Board found that in 1972 through 1974 Wells had violated Sections 9(a) of the Act by emitting odors from its foundry. The Board disposed of the permit appeal in a single sentence, stating that "Considering the evidence presented at the hearings and the foregoing discussion, the Agency properly refused Wells an operating permit".

In discussing the evidence presented at hearing, the Board stated that:

> "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; 20 PCB at 140".

In considering the factors contained in Section 33(c) of the Act, the Board found that social and economic value of the Wells facility was unrefuted. As to the suitability of its location, the Board noted that while in 1947 the area consisted of swampland, vacant land, farm land and land used by industry, beginning in 1950 the area became more residential in area, and

Niles West High School was built on land purchased from Wells. The Board finally found that three methods of odor abatement were technically feasible. Economic reasonableness was addressed by the Board only in passing, as the Board found that Wells had "effectively waived" its right for Board consideration of this issue.

On appeal, the Boards findings were reversed by the appellate court for the First District. Wells Mfg. Co. v. IPCB, 48 Ill. App. 3d 337 (1977). The First District's reversal of the Board's findings was affirmed by the Illinois Supreme Court. Wells Mfg. Co. v. IPCB, 73 Ill. 2d 226 (1978). In their decisions, each of these courts extensively discussed the enforcement cases, but devoted no more than a line or two to discussion of the operating permit appeal, which the Agency was ordered to issue.

For purposes of the present discussion, the noteworthy portion of the Supreme Court's opinion concern the Section 33(c(iii) "location suitability" and Section 33(c)(iv) "technical practicability/economic reasonableness of abatement measures" criteria. As to location, the Court noted that:

> "The Board further found that Wells has increased its size and capacity and production facilities subsequent to the construction of Niles West High School and some of the houses in the residential area. An industry cannot, of course, substantially increase its odorous emissions and simultaneously rely on its priority of location in the area as a mitigating factor. This sort of changed circumstance would, as the Board points out, undermine the industry's priority-of-location argument. The sketchy references in the record regarding those increases are, however, simply not sufficient to meet the Agency's burden of establishing that Wells has substantially increased its emission, in either volume or offensiveness, subsequent to the development of the high school or residential areas." 73 Ill. 2d at 237.

In discussing the technical practicability of abatement measures, the Court found that the burden was on the Agency "to come forward with evidence that emission reduction is practicable." The Court noted that the evidence in the record concerning the three abatement methods consisted of testimony by three salesmen, each of whom advocated his particular system while raising doubt about the efficiency of his competitor's systems. The Court therefore stated that:

> "Thus, as to the implementation of any particular technology, one expert assured success while two

> raised serious questions as to its practicability. We agree with the appellate court that this conflicting expert testimony does not support the Board's findings that any of the three methods would abate the foundry odors....
>
> Our review of the record persuades us the Board's action was contrary to the manifest weight of the evidence and was properly reversed by the appellate court. We also believe that court correctly ordered an operating permit be granted to Wells. Obviously, our opinion should not be read as a condonation of Wells' emissions. Rather, we believe the Agency failed to establish the unreasonableness of those odors as required in the Environmental Protection Act. 73 Ill. 2d at 238".

Odors and Response Activities in 1984 and 1985

Wells was granted a construction permit for the shell molding operation by the Agency on January 11, 1980. On May 4, 1981, the Agency granted an initial operating permit expiring April 9, 1986.

In the spring of 1984, residents living in the vicinity of Wells began to register complaints with the Village of Morton Grove and with the Agency concerning odors from Wells. This resulted in drive-by inspections of the facility on June 1, 18 and 20 by Jeanne Damlos, the Agency inspector who has been assigned to Wells since 1981. On each occasion Ms. Damlos noticed strong odors for about half a mile downwind of the facility. Joint Ex. 302. A meeting was held on August 13, 1984 between representatives of the Agency, Wells, and the Village. At the meeting, Wells explained that since June it had done a complete maintenance check of its baghouses and had installed additional collection hooding. A new procedure for handling complaints was instituted, which required the keeping of a log showing date and time of complaints, wind direction and intensity of odor. It was hoped that the log could be correlated with activities at the plant to determine the source of the problem. In concluding her report of this meeting, Ms. Damlos stated that "No further action is needed at this time." Joint Ex. 303.

However, beginning in approximately April, 1985, residents again began to complain to the Agency, as well as to the Village and USEPA, about noxious odors from Wells. As of December 20, 1985 the Agency had received over 250 written citizen complaints, plus additional letters and petitions concerning the emission of odors from the Wells facility. Joint Ex. 6-224-231, 234-236, 238-245, 247, 248, 250-263, 275-285, 343-350, 352-353.

Eighteen residents of the area surrounding the Wells facility presented comments or testimony at hearing concerning the detrimental impact the facility's emissions have on their lives. Summarized below are the statements of five area residents each of whom had filed complaints concerning odors from Wells.* These statements are representative both of the balance of the citizen comments and testimony at hearing, as well as of the written complaints.

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 1986, 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

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* 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.

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).

On May 2, 1985, Ms. Damlos inspected the facility in response to several complaints of strong phenol odors. Her report concerning the inspection noted that a strong phenol odor in the shell molding area. The report states that approximately a year previously, the shell molding area had been enclosed "so that the smoke and/or odors would not permeate the entire plant. The molding area is then exhausted to a baghouse which is exhausted outside." Ms. Damlos opined that the shell molding operation was the source of the odor complaints, and that the increase in complaints "could be due to 1) an increase in [operating] hours (from over the past 2-3 years) due to business picking-up and 2) an increase in the amount of material going to the baghouse from the one shell molding area since it was enclosed." Ms. Damlos noted that Wells had been investigating control options and was leaning toward installation of a cartridge type baghouse, but that due to the need to install a new electrical transformer to handle the power load, that six months would be necessary to complete the installation. Joint Ex. 304.

As a result of this inspection, on May 7, the Agency sent Wells a letter of inquiry concerning apparent non-compliance with Section 9(a) of the Act, which notified Wells of the Agency's intent to begin preparation of a formal enforcement case, and which requested Wells to attend a pre-enforcement conference on May 23, 1985. Joint Ex. 305. A June 6, 1985 letter from Wells to the Agency indicates that Wells did attend the conference; this letter also chronicled steps taken by Wells and steps to be taken by Wells in an attempt to control odors. Joint Ex. 306.

Notwithstanding Wells' efforts, odor complaints continued and residents of southeast Morton Grove and parents of Niles West High School students began to organize to cause the odor problem to be more vigorously addressed. They formed a group entitled "Suburbs Turn Off Pollution" (STOP) which held a rally on June 24, 1985 at the high school. Petitions and complaint forms were circulated; many of these complaints are included in this record. This rally was highly publicized in area newspapers; as reflected in Joint Exhibits 332, 333 and 334, both STOP and Wells received a high degree of coverage in the local newspapers between June and December, 1985.

On August 13, 1986, the Village of Morton Grove adopted Resolution 85-33 which "condemned" Wells' actions and directed two of the Village's Departments to consult with the citizens and

all appropriate enforcement agencies to correct the problem. Joint Ex. 312.

At some point during the course of the summer, four government agencies became involved in a joint investigation of the Wells situation: the Agency, USEPA, the Cook County State's Attorney and the Cook County Department of Environmental Control (County DEC). By September, the County DEC had completed what it titled "Wells Manufacturing Emission Study" which identified three potential sources of odor emissions from the shell molding operation: 11 molding machines whose exhaust is released uncontrolled, the uncontrolled core mold oven, or the shakeouts on the phenolic resin oven which are controlled by two baghouses. Five control approaches were suggested: an afterburner, chemical absorption scrubbers, and experimentation involving three possible process changes. Joint Ex. 317.

USEPA, the County DEC and the Agency each took various steps to monitor emissions from the facility. USEPA contracted for stack tests at the Wells facility at a cost of $48,000; the results of these tests, which were to be completed by January 1, 1986 are not included in this record. Joint Ex. 324. The record contains various sampling results and protocols produced by the County DEC and the Agency. Joint Ex. 326-330. Additionally, Jeanne Damlos continued her visits to the Wells facility and vicinity. Inspection reports and testimony concerning 24 visits between May 1, 1985 and October 27, 1985 are contained in this record. Joint Ex. 289-293, 298-301; R. 189-206, 229-239.

The 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.).

On some occasions, Ms. Damlos also conducted tests for the presence of phenol and formaldehyde in samples of ambient air using Drager tubes. See e.g. R. 105, 133-134, 194, 197-198, 231, 240. While these tests did not detect the presence of either chemical, the Drager tubes have a threshold detection limit 100 times greater than the odor threshold (R. 247-249), so that it is "very common" to be able to smell an odor yet not detect it with a Drager tube (R. 249).

The Permit Application and Denial

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.).

Mr. Anton Telford, the IEPA's metallurgical permit expert (R. 274-275) reviewed the Wells permit application on December 20, 1985, ten days after it was received (R. 289) and approximately two months before the permit was denied. At that time, Mr. Telford identified nine areas in which he believed more information was needed and so noted items (a) through (i) on page 2 of his Calculation Sheet (Joint Ex. 2, p. 3). Those missing items are characterized by this author as follows:

(a) an explanation of the use of the catalyst-hexamethylene-tetramine which "Jeanne Damlos states... was not part of the construction permit";

(b) a justification of the use of that catalyst through a stack test;

(c)(d)(e) monitoring, modeling and meteorological data; to substantiate Wells claim that it was not causing odors;

(f) an explanation as to whether there was "poor maintenance of aging equipment";

(g) a question of whether there was an increase or change in the use of catalysts or resins;

(h)(i) a need to compare "complaint lists and numbers" and reports from consultants.

Mr. Telford testified that he primarily consulted the following documents in reaching his decision to recommend denial:

(1) The original construction permit application (R. 301);

(2) the Pre-Enforcement Conference or 31(d) letter warning Wells of possible action (R. 301);

(3) The application for renewal which is Exhibit 5 to the Petition for Review (R. 301);

(4) The field inspectors' reports concerning Wells which are Exhibits 289, 290, 291, 292, 293, 294, 298, 299, 300, 301, 302, 303 and 304 (R. 302).

While Mr. Telford made a "quick perusal of some of the citizen complaints", and noted that there were a great number of them, he testified that he placed more reliance on the existence

of the 31(d) letter and various telephone conversations with Jeanne Damlos and other Agency personnel (R. 335-337).

Mr. Telford's concerns and recommendation to deny the permit were relayed to his superior, Harish B. Desai. Mr. Desai consulted with Mr. Telford and other Agency personnel prior to drafting the permit denial letter which he signed. R. 128, 181, 183, 301, 303. At no time prior to issuance of the denial letter was Wells contacted by the Agency and requested to provide additional information in response to the concerns identified by Mr. Telford. R. 292-294, 297, 299.

The Agency issued its denial letter on February 28, 1986.

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. (emphasis added) (Joint Ex. 1)

At hearing, Mr. Desai defined "verified" as meaning "that the field inspector has gone out and discussed and determined that only such and such an odor is coming from Wells". (R. 155). Mr. Telford defined a verified odor complaint as "one that is received in written form and verified by the field operators section". (R. 342).

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).

"If the Wells Manufacturing Company feels that they are not discharging or emitting air conteminants that are causing citizen's odor complaints then the company should submit detailed calculations showing that the amount and type of emissions from this source cannot cause citizen's odor complaints. Such calculations should include at least the following information:

(a) Material safety data sheet for each type of resin and other chemicals used in the shell molding process;

(b) Justification of emissions data by actual stack test reports;

(c) Ambient air monitoring data of chemicals emitted since 1/1/85;

(d) Modelling data of type of contaminants emitted since 1/1/85;

(e) Meteorological data since 1/1/85;

(f) Maintenance record of process equipment since 1/1/85;

(g) Detailed production and process weight rate record for each of the raw materials used since 1/1/85;

(h) Detailed log of complaints received from citizens since 1/1/85; and

(i) Reports from consultants about air emissions."

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 (1983), 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.

Wells' Assertions Of Error

Wells' challenges to this permit denial fall into two main categories. The first is that the manner in which the Agency procedurally denied this application was in contravention of various Board regulations, and so arbitrary and capricious as to amount to a denial of due process. The second is that the Agency

has misconstrued Section 9(a) of the Act and applied it to incorrect "facts" in determining that Wells has failed to meet its burden of proving, pursuant to Section 39, that Wells will not cause a violation of the Act. We will not deal with the arguments presented by Wells seriatim, as to do so obscures the principal practical issue which is posed.

When the operating permit was granted in 1981, it was on the basis of an Agency determination that Wells had demonstrated pursuant to Section 39(a) that the permitted activity "will not cause a violation of this Act or regulations thereunder". In submitting the renewal application certifying that its operation had remained unchanged, Wells hoped to demonstrate that its processes and resulting emissions are identical to those previously determined to be in compliance with the Act and regulations.

It is clear from the record in this case that as early as 20 days after the application's filing, that the Agency did not believe that the operation was unchanged, despite the certification, based on inspection reports and the increasing volume of recent citizen's complaints. The thrust of the denial letter is that the Agency would consider the application complete and sufficient for reconsideration upon the filing of the specified "necessary" information.

While, as Wells correctly alleges Telford did not fully explore the entirety of the information available to him, as have we, the Board Members, Telford did consider the most salient information: the citizens' complaints and the Damlos inspection reports. While in the ordinary course of events the mere existence of complaints and/or a 31(d) letter might not be sufficient to trigger a request for more information, the prudent permit reviewer could reasonably determine, based on the sheer volume of the complaints and a quick perusal of their contents that he was not faced with the ordinary situation. While Damlos' Drager sampling did not detect phenols or formaldehyde, her inspection reports did verify the existence of odors and operational changes in Wells operation such as enclosure of the shell molding operation.

We wish to note that, on the basis of this record it is impossible to determine whether 1) the enclosure of the shell molding operation, which Wells does not contest, is a de minimus change, 2) Wells has in fact used catalysts or resins different from those permitted as Damlos suggests, or whether Wells is using the same catalysts and resins with differing suppliers' product identification numbers as Wells suggests, 3) Wells has in fact increased production since 1981, or 4) the shell molding operation whose permit is at issue here is the sole source of offensive odors or is a source of odors in combination with the shell molding operation which was the subject of the prior Wells

litigation. However, considering the totality of the record, we believe that the Agency correctly determined that Wells submitted insufficient information to prove that circumstances were unchanged and that the facility could operate in compliance with the Act and regulations. The Agency's permit denial is affirmed.

Wells raises procedural challenges concerning the Agency's failure to advise it of defects in its submittal prior to the denial of the permit. There are two procedural mechanisms by which, and time-frames within which, the Agency may determine to deny a permit. The first is upon a determination that the application is incomplete to be made within 30 days of its filing, as provided by 35 Ill. Adm. Code 201.153. The second is upon a determination that the applicant has failed to prove compliance with the Act and regulations to be made within 90 days, pursuant to Section 39(a). Wells asserts that the Agency's failure to employ the Section 201.153 notification of incompleteness mechanism amounts to a denial of due process which in and of itself requires reversal of the permit denial. Related arguments are 1) that if the Agency is going to require more than the minimum permit application data and information as specified in Section 201.157, that the Agency may do so only after adoption of specific procedures, 2) and that the Agency has failed to adopt permit review procedures in violation of Section 39(a) of the Act.

At the outset, we wish to note that the Act does not embody a provision for "deterrence" of Agency procedural error by allowing for issuance of a permit without regard to environmental effects. 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 judgment 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 76-80, 35 PCB 281, 283 (1979).

However, there is some merit in addressing Wells' contention concering Section 201.158. Wells cites Sherex Chemical Co., Inc. v. IEPA, PCB 80-66, Oct. 2, 1980, affd. sub nom. IEPA v. IPCB, 100 Ill. App. 3d 730, 426 N.E. 2d 1255 (1981), wherein the Board held that:

> It would be a somewhat capricious exercise of its powers under the Act for the Agency to deny a permit on its merits for insufficiency of information proving nonviolation while knowing that if specific additional data or information were provided or were considered it could make a better-informed decision on the application.

Section 39(a) puts the burden of proving compliance on the applicant, but also puts a burden on the Agency where a permit is denied to give "specific reasons why the Act and the regulations might not be met if the permit were granted" as well as "the specific type of information...which the Agency deems the applicant did not provide". Under the Act, the Agency always bears a burden of analysis of an application and explanation of its deficiencies: this occurs whether the Agency denies a permit "outright" within 90 days or rejects it as incomplete within 30 days, since the incomplete application is treated as a permit denial for purposes of appeal.

Although not comparable in all respects, the regulations' provision of two timeframes for Agency action finds an analogy in the Board's handling of variance petitions. Where the Board early-on determines that the application is deficient on its face, it issues an Order to that effect and declares the petition to be subject to dismissal without further review. This action obviously does not precommit the Board to grant variance if information addressing the deficiencies is supplied. The Board could legally omit this step and wait until the end of the proceeding to deny a petition for failure to provide, for instance, any information concerning hardship or a compliance plan, but, even without specific provision for a "more information" procedure, the Board has consistently determined that the better course is to request the filing of the information prior to considering the application on its merits and prior to the date of decision.

Similarly, the Court in Sherex supra, 426 N.E. 2d at 1257, as well as the Board (in a Supplemental Opinion, 40 PCB 187, Dec. 19, 1980), found that the Agency has no statutory duty to request an applicant to provide additional information, but instead found that in some circumstances "the better practice would have been to request the additional information". This is one of those circumstances. In this case, the record is clear that the Agency had quickly determined, based on its own records, that the application was deficient on its face. Communication with Wells prior to denial could have obviated the need for this appeal, or at least have allowed for refinement of the issues in the event that Wells had chosen to supply the additional information.

We note that Wells has not been able to provide the Board with the additional information specified by the Agency in this denial letter, as the Board's review in this matter is limited to the record before the Agency. Wells remains, however, free to submit this information in any reapplication for an operating permit.

The last major area wich it is desirable to address is the dispute as to whether the Agency and the Board are required to consider Section 33(c) factors in considering a permit

application pursuant to Sectionh 39(a). It is clear from this record that the Wells operation produces odors which are offensive to the community and which interfere with the quality of life for Wells' neighbors. It is reasonable to believe on the basis of this record that the source of these odors is the shell molding operation. In the previous Wells litigation concerning the pre-existing shell molding operation, the Supreme Court essentially held that odors which are proven to be offensive could be found "reasonable" pursuant to 9(a) of the Act where the burden of proof concerning the Section 33(c) factors had not been met. Because the Board's stated basis for affirming the permit denial was the invalidated 9(a) finding of violation, the Supreme Court directed that the permit should issue. Due to the procedural posture of the case and the manner in which the issues were presented, the Court did not consider or address the issue of the inter-relationship, if any, between the Section 33(c) enforcement case factors and the Section 39(a) requirement that an applicant submit proof "that the facility will not cause a violation of this Act or rules thereunder."

Wells argues that the Agency should be required to employ Section 33(c) factors in determining whether to issue a permit where, as here, the existence of odors have been "verified" by inspectors. Initially, assuming arguendo the correctness of the assertion, it logically follows that the burden would be placed on the applicant to submit information to the Agency with its application information relative to all of the Section 33(c) factors. As Wells submitted no information here concerning, for example, the economic reasonableness and technical practicability of control options, a finding would be required that Wells had failied to meet its burden of proof pursuant to Section 39(a) that its odor emissions are "reasonable".

However, we do not believe that Section 33(c) can be legitimately employed in the permitting process. To do so would create a bastardized, in camera enforcement proceeding in which 1) the public cannot participate and 2) the "record" created is faulty. The record could be improperly slanted by either the Agency or the applicant. The applicant could largely control the record by its ability to provide selective information not subject to cross-examination. The Agency, for its part, could develope information also not subject to cross-examination, to rebut information developed by the applicant to insert it into the record, and then deny the permit. While the Agency's "adjudication" of violation based on the record which it to some extent controlled would be appealable to the Board, record deficiencies would have no ability to be remedied.

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

J. Anderson

J. Marlin

J. T. Meyer

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion of Board Members J. Anderson, J. Marlin and J. T. Meyer was filed on the 20th day of March, 1987.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board