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THE ILLINOIS ENVIRONMENTAL PROTECTION ACT: THE BURDEN OF PROOF BECOMES CLEARER

BY

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During the past several years, the problems created by air pollution have been given widespread attention and have been the subject of much state and federal legislation.[1] Air pollution, however, is not a recent phenomenon[2] nor are the various remedies which exist against a polluter. At common law, various actions were available, including the action of nuisance which afforded a plaintiff damages for the harm caused by the pollution and, in appropriate cases, injunctive relief against future acts causing pollution.[3] In 1970, the Illinois General Assembly enacted the Environmental Protection Act.[4] One of the purposes of the Act was to make it easier for a person harmed by air pollution to seek and obtain relief.[5]

Since its enactment, however, confusion has existed among the appellate districts in Illinois concerning what facts a complainant must prove in order to meet his burden of proof. Several appellate courts have examined certain sections of the Act and have imposed a fairly heavy burden.[6] Other courts have examined these same sections and have come to an opposite

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1. *See* E. HASKELL & V. PRICE, STATE ENVIRONMENTAL MANAGEMENT (1970) which analyzes several states' pollution laws. As far as federal air pollution regulation is concerned, The Clean Air Act, 42 U.S.C. §§ 1857 et seq. (1970) is the most important statute.

2. *See, e.g.*, COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY-FIRST ANNUAL REPORT (1970).

3. For a summary and explanation of the various private remedies for air pollution, *see* Fitzpatrick, *Private Legal Remedies to Air Pollution in Illinois*, 59 ILL. B.J. 746 (1971).

4. ILL. REV. STAT. ch. 111 1/2, §§ 1001-51 (1975) [hereinafter referred to as the Act]. It was passed partly in response to the directive by the United States Congress in the Clean Air Act Amendments, 42 U.S.C. § 1857c-5 (1970) whereby each state was required to submit a plan implementing national primary and secondary ambient air standards.

5. *See* note 25 *infra* and the accompanying text for a more complete discussion of legislative intent behind the burden of proof provisions of the Act.

6. Processing & Books v. Pollution Control Bd., 28 Ill. App. 3d 115, 328 N.E.2d 338 (1975); Aurora Metal Processing Co. v. Pollution Control Bd., 30 Ill. App. 3d 956, 333 N.E.2d 461 (1975); Lonza, Inc. v. Pollution Control Bd., 21 Ill. App. 3d 468, 315 N.E.2d 652 (1974).

conclusion. Recently, however, the Illinois Supreme Court, in *Processing and Books, Inc. v. Pollution Control Board*,[7] not only eliminated this confusion, but also provided an answer to the question of the function of certain sections of the Act in enforcement proceedings before the Illinois Pollution Control Board.

The object of this article is fourfold. First, it will compare the burden of proof placed upon a plaintiff in the common law action of nuisance with that imposed upon a complainant under the Act. Second, it will discuss the conflicting decisions of the appellate courts relative to this burden. Third, the article will examine the recent Illinois Supreme Court decision in *Processing and Books*. Finally, it will explore relevant decisions of the Illinois Pollution Control Board and attempt to show how the Supreme Court's decision will affect future enforcement proceedings, if at all.

COMMON LAW NUISANCE

At common law, an individual harmed by air pollution could resort to the private action of nuisance for relief. This action would lie where a person who possessed a right in real property suffered some injury as a result of certain types of interferences with the enjoyment of his property.[8] In order for the interference to be actionable, however, it must have been unreasonable.[9] The test for unreasonableness adopted by the Illinois courts was whether to an ordinarily reasonable person of ordinary habits and sensibilities the contamination of the air was physically offensive to the senses and thus rendered the enjoyment of life uncomfortable.[10] Thus, for example, in *Feder v. Perry Coal Company*,[11] the plaintiff stated a cause of action by alleging that defendant's slag pile operations caused fumes and gasses to pass over onto his property, thereby rendering his habitation uncomfortable. And, in the more recent case of *Schatz v. Abbott Laboratories, Inc.*,[12] evidence as to noxious odors, the necessity of keeping the house closed and the interference with normal entertainment in the home was sufficient to sustain a cause of action for nuisance.

Under the common law action of nuisance, a plaintiff needed to show only that the invasion of his property or the interference with the enjoyment of

7. Processing & Books v. Pollution Control Bd., 64 Ill. 2d 68, 351 N.E.2d 865 (1976).

8. *See generally* 29 I.L.P. *Nuisances* §§ 1-2 (1957).

9. Feder v. Perry Coal Co., 279 Ill. App. 314 (1935). For a complete discussion of the factors needed to maintain a nuisance action see Note, *The Law of Nuisance in Illinois*, 43 CHI-KENT L. REV. 173 (1967).

10. *See, e.g.*, Patterson v. Peabody, 3 Ill. App. 2d 311, 122 N.E.2d 48 (1954) and Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Comm'n, 34 Ill. 2d 544, 216 N.E.2d 788 (1966).

11. 279 Ill. App. 314 (1935).

12. 131 Ill. App. 2d 1091, 269 N.E.2d 308 (1971), *rev'd on other grounds*, 51 Ill. 2d 143, 281 N.E.2d 323 (1972).

his property was caused by the defendant and that the invasion or interference was unreasonable to the ordinary person. The defendant, in turn, introduced evidence on all matters which would tend to show the reasonableness of his conduct.[13] The trier of fact would then conclude from the evidence presented by both plaintiff and defendant whether or not the interference was sufficiently unreasonable so as to sustain an action in nuisance.

The common law action of nuisance, however, was not without difficulties. First, the plaintiff was required to either be a landowner or to have an interest in land since the gravamen of a private nuisance action was founded on an injury to land.[14] Second, the Illinois appellate courts have held that a certain amount of inconvenience from pollution was inevitable in industrial areas. Where adjoining landowners suffered because of the operation of the plant or factory, no recovery was allowed unless the odors or contaminations were greater than was necessary.[15] Finally, the action of a private nuisance created a considerable financial burden on a plaintiff.

THE ENVIRONMENTAL PROTECTION ACT

In 1970, Illinois adopted a comprehensive plan for the protection of the environment with the enactment of the Environmental Protection Act.[16] One of the unique features of the Act is that it creates three administrative bodies which are charged with the regulation and coordination of all environmental control activities within the state.[17]

Of these three bodies, the Agency and the Board are the most important in terms of power and authority to regulate pollution. The Agency is empowered to investigate violations of the Act or of any regulations promulgated thereunder and to propose and present enforcement cases before the Board.[18] In addition to the Agency, "any person" can file a complaint charging a violation of the Act or any regulation.[19] Thus, the class of those

13. The defendant would present favorable evidence on such factors as its social and economic value to the community, priority of location in the area, suitability in the area, technological unfeasibility of alternate methods of operation and good faith and lack of wilfulness. *See generally* 29 I.L.P. *Nuisances* § 17 (1957).

14. *See, e.g.*, O'Connor v. Aluminum Ore Co., 224 Ill. App. 613 (1922).

15. Gardner v. Int'l Shoe Co., 319 Ill. App. 416, 49 N.E.2d 328 (1943), *aff'd*, 386 Ill. 418, 54 N.E.2d 482 (1944).

16. ILL. REV. STAT. ch. 111 1/2, §§ 1001-51 (1975).

17. ILL. REV. STAT. ch. 111 1/2, § 1004(a) (1975) creates the Environmental Protection Agency [hereinafter referred to as the Agency]. ILL. REV. STAT. ch. 111 1/2, § 1005(a) (1975) creates the Pollution Control Board [hereinafter referred to as the Board]. ILL. REV. STAT. ch. 111 1/2, § 1006 (1975) creates the Illinois Institute for Environmental Quality.

18. ILL. REV. STAT. ch. 111 1/2, §§ 1004(e) and (f) (1975). Additionally, ILL. REV. STAT. ch. 111 1/2, § 1030 (1975) directs the Agency to cause an investigation upon receipt of any information of an alleged violation of the Act or regulations.

19. ILL. REV. STAT. ch. 111 1/2, § 1031(b) (1975). Additionally, ILL. REV. STAT. ch. 111 1/2, §§ 1043 and 1044 (1975) allow the States Attorney or Attorney General to seek relief in a court of competent jurisdiction under certain specified circumstances.

persons who can seek the abatement of pollution has been enlarged from those having interests in real property to any individual who suffers injury because of pollution.

The Board itself acts in a quasi-judicial fashion and conducts hearings upon complaints brought before it.[20] This quasi-judicial power conferred upon the Board is circumscribed by the provisions of sections 31,[21] 32[22] and 33[23] which set forth certain procedures to be employed in any enforcement proceeding. Section 31(c)[24] of the Act establishes the burden of proof which a complainant must meet in order to make out a prima facie case against the respondent. The section provides:

> In hearings before the Board under this Title the burden shall be on the Agency or other complainant to show either that the respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of this Act or any rule or regulation of the Board.

In his discussion of this section of the Act its draftsman, Professor David P. Currie, the first Chairman of the Board, states:

> [T]he intention of these burden of proof provisions was to simplify the task of prosecution by requiring the complainant to show harm . . . and by leaving it to the polluter . . . to show that he cannot reasonably be expected to comply.[25]

A complainant may charge a respondent with a violation of section 9(a)[26] itself or of a regulation adopted by the Board pursuant to sections 10[27] and 27.[28] Where the complainant alleges a violation of section 9(a), difficulties arise. Section 3(b) of the Act defines air pollution as "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."[29] A problem is created by the use of the word "unreasonable" in defining what type of interference constitutes air pollution. As noted above in the discussion of the common law action of

20. ILL. REV. STAT. ch. 111 1/2, § 1005(d) (1975).
21. ILL. REV. STAT. ch. 111 1/2, § 1031 (1975).
22. ILL. REV. STAT. ch. 111 1/2, § 1032 (1975).
23. ILL. REV. STAT. ch. 111 1/2, § 1033 (1975).
24. ILL. REV. STAT. ch. 111 1/2, § 1031(c) (1975).
25. D. CURRIE, CASES AND MATERIALS ON POLLUTION 134 (1975) [hereinafter cited as CURRIE].
26. ILL. REV. STAT. ch. 111 1/2, § 1009(a) (1975) reads:
No person shall:
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.
27. ILL. REV. STAT. ch. 111 1/2, § 1010 (1975).
28. ILL. REV. STAT. ch. 111 1/2, § 1027 (1975).
29. ILL. REV. STAT. ch. 111 1/2, § 1003(b) (1975).

nuisance,[30] the term "unreasonable" was defined in a certain way and certain evidence was required in order to prove that an interference was unreasonable. How the term "unreasonable" should be interpreted in the Act, however, is unclear. Much of this uncertainty is derived from the language of section 33(c) which provides:

> In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
>
> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> (ii) the social and economic value of the pollution source;
>
> (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; and
>
> (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.[31]

Section 33(c) sets out four factors which have a bearing upon the "reasonableness" of an interference by a respondent. This raised a basic question: was a complainant required to present evidence on all four of these factors and that all four must be resolved in its favor in order to make out a prima facie case of air pollution? Or was it sufficient, as Professor Currie states,[32] that the complainant show only some sort of "harm" in order to make out its case in chief and let the respondent then offer favorable evidence on the four factors in an attempt to show that the interference was reasonable and therefore did not amount to air pollution? In other words, what was the function of the section 33(c) factors in an air pollution enforcement proceeding?

Additionally, if the section 33(c) factors were not elements of a complainant's burden of proof in an air pollution case, what facts was he required to show in order to make out a case? The Illinois appellate courts have been in conflict on these questions. Several cases have held that the four section 33(c) factors were necessary elements of a complainant's burden of proof while others have held that they were not. The next section will examine some of these cases.

30. *See* note 9 *supra* and the accompanying text.
31. ILL. REV. STAT. ch. 111 1/2, § 1033(c) (1975).
32. CURRIE, *supra* note 25, at 134.

SECTION 33(C) CONSTRUED AS NECESSARY ELEMENTS OF A COMPLAINANT'S CASE-IN-CHIEF

The Appellate Courts for the Second and Third Districts have held that the complainant has the burden of presenting favorable evidence on the section 33(c) factors in order for it to make out a case that the respondent has unreasonably interfered with the enjoyment of life or property. In the Second District case of *Processing and Books, Inc. v. Pollution Control Board*,[33] Processing and Books was found guilty of operating its egg farm in violation of section 9(a) of the Act. Conflicting testimony was offered in the hearings before the Board as to the source and the unreasonableness of odors of chicken manure and burnt chickens which emanated from the farm. Processing and Books offered evidence tending to refute the Agency's evidence of the source of the emissions as well as the testimony relative to its financial investment, expense of relocation, suitability of the present site and the financial feasibility of alternate processing methods. The Board found that Processing and Books had violated section 9(a) and imposed a fine.

On appeal to the appellate court, Processing and Books urged reversal of the Board's order on the grounds that its decision did not take into account the four section 33(c) factors. The court found that the Board's written opinion only considered section 33(c)(i) dealing with the character and degree of the interference and did not indicate that any of the other three factors had been taken into account.[34] The court found this to be understandable, since the Agency did not offer any evidence on two of these factors. The court held that "[b]y failing to introduce evidence on each criteria of section 33(c), the agency failed to meet its burden of proof."[35]

This interpretation of the necessary elements of a complainant's case was further developed in the later case of *Aurora Metal Company v. Pollution Control Board*,[36] where the Agency brought a complaint before the Board, charging the petitioner with violating section 9(a) of the Act by discharging phenolic odors, sand particles, and fragments so as to unreasonably interfere with the enjoyment of life and property. In its opinion, the Board considered only section 33(c)(i) and it failed to mention the other three section 33(c) factors. The Agency, in fact, had offered no evidence relative to the criteria enumerated in sections 33(c)(ii) and (iv). Aurora Metal presented evidence on section 33(c)(iv) by showing that it was making a sincere effort to reduce and eventually eliminate the emissions, but the Board concluded that even if the

33. 28 Ill. App. 3d 115, 328 N.E.2d 338 (1975), *rev'd*, Processing & Books, Inc. v. Pollution Control Bd., 64 Ill. 2d 68, 351 N.E.2d 865 (1976).

34. 28 Ill. App. 3d at 118, 328 N.E.2d at 341.

35. *Id.*

36. 30 Ill. App. 3d 956, 333 N.E.2d 461 (1975).

company were successful in this respect, new odor problems might be created.

The appellate court reversed the Board's order and set aside its fine on several grounds. First, it found that the Board's statements concerning the creation of new odor problems was not supported by the record. No evidence was adduced which supported the claim that by the company's method of reducing emissions a new odor pollution might be created.[37] Second, by failing to present any evidence on sections 33(c)(ii) and (iv), the Agency did not meet its burden of proof in showing that the petitioner had unreasonably interfered with life or property.[38]

In support of its holding, the court reasoned that the essential elements of proving a violation of "unreasonable interference" were proof that first, the respondent caused or allowed particular emissions, and second, that such emissions were unreasonable. In order to prove the second element, the court held that a complainant must offer evidence on each of the four section 33(c) factors since it is this section of the Act which outlines ". . . the reasonableness of . . . emissions . . ."[39]

The Appellate Court for the Third District adopted two opposing positions on the question of the relation of the section 33(c) factors to a complainant's burden of proof under the Act, holding first that the factors were not part of a complainant's case-in-chief, and later, that they were. In the early case of *C.M. Ford v. Environmental Protection Agency*,[40] Ford sought review of an order in which the Board found it guilty of violating the Act by the operation of a solid refuse disposal site, and imposed a fine of $1,000. On appeal, Ford contended that the Board failed to comply with section 33(c) of the Act. Ford argued that this section required the Board to hear evidence on all four factors and that the section placed a burden on the complainant in the enforcement proceeding to introduce evidence on each of these factors.[41] Ford urged the reversal of the Board's order on the ground that except for a finding that the continued maintenance of the dump would create a public hazard, the evidence in the case showed that the Board did not take into consideration the section 33(c) factors.

In rejecting these contentions, the court examined sections 33(c) and 31(c) of the Act. First, the court noted that the burden is on a complainant to prove a violation of a provision of the Act.[42] Then, leaving unanswered the

37. *Id.* at 960, 333 N.E.2d at 465.
38. *Id.*
39. *Id.*
40. 9 Ill. App. 3d 711, 292 N.E.2d 540 (1973).
41. *Id.* at 720, 292 N.E.2d at 546.
42. *Id.*

question of what facts must be shown by the complainant in order to meet this burden, the court merely stated that once the complainant has shown such a violation, the burden is on the respondent to show that compliance with the Board's orders or regulations would impose an arbitrary or unreasonable hardship.[43] In order to prove such a hardship, the respondent may offer evidence on each of the section 33(c) factors. The court said that where such evidence has been presented by the respondent, it is incumbent on the Board to consider it before entering any orders or making any determination. Where the respondent, however, fails to present any evidence on the four factors, the Board is not required to consider them in reaching its decision.[44]

The court's holding in *Ford* was short-lived. In *Lonza, Inc. v. Pollution Control Board*,[45] Lonza was found guilty of violating section 9(a) of the Act by discharging certain contaminants from its facilities. The Board found that these unreasonably interfered with the enjoyment of life and property. The Agency presented the testimony of four residents who lived near the petitioner's facilities. The Board found Lonza guilty of causing air pollution and imposed a fine.

On appeal, Lonza argued that the evidence presented in the proceeding was insufficient to support the finding that it violated the Act. In responding to this argument, the court first examined section 3(b) of the Act and found that this section created a two-pronged test for determining whether a respondent caused or threatened to cause air pollution. The respondent's emissions must cause injury to human, plant or animal life, and they must also unreasonably interfere with the enjoyment of life or property.[46] Reference must be made to the four section 33(c) factors in order to determine whether the interference with life or property is unreasonable. The court then concluded that because it is the duty of the complainant to prove that the respondent caused air pollution, and because a necessary prerequisite to a showing of air pollution is proof of the section 33(c) factors, a complainant must introduce evidence relative to all of these factors in order to sustain its burden of proof.[47] The court then found that the Agency had failed to meet its burden under section 31(c).

From the foregoing, it is clear that the Second and Third Districts treated section 33(c) factors as the necessary elements of a complainant's case. In

43. *Id.* at 720-21, 292 N.E.2d at 546.

44. *Id.* The Appellate Court for the First District, in Mystik Tape, Inc. v. Pollution Control Bd., 16 Ill. App. 3d 778, 306 N.E.2d 514 (1973), *aff'd in part and rev'd in part*, 60 Ill. 2d 330, 328 N.E.2d 5 (1975), specifically chastized the Third District for this holding. And, in Incinerator, Inc. v. Pollution Control Bd., 59 Ill. 2d 290, 319 N.E.2d 794 (1974), such a reading of section 33(c) was disapproved. *See* text at note 75 *infra*.

45. 21 Ill. App. 3d 468, 315 N.E.2d 652 (1974).

46. *Id.* at 471, 315 N.E.2d at 654.

47. *Id.* at 472, 315 N.E.2d at 655.

reaching this result, these courts employed a three-step reasoning process. Initially a complainant has the burden of proving that the respondent unreasonably interfered with the enjoyment of life or property. Because section 33(c) sets forth four factors which the Board must consider in determining the reasonableness of the respondent's activities the complainant must offer evidence on each of these factors in order to make out its case of unreasonable interference. The courts in the other appellate districts, however, disagreed with this reasoning process, as will be shown in the next section of this article.

SECTION 33(C) AS A BURDEN FOR THE RESPONDENT AND THE BOARD

The appellate courts in the First and Fourth Districts (and to a certain extent the Fifth District) took an opposite view from that of their counterparts in the Second and Third Districts on the question of the burden of proof. Their position may be summarized as follows. Although the plaintiff must of course prove that the respondent's emissions unreasonably interfered with the enjoyment of life or property, the section 33(c) factors are not necessary elements of the complainant's burden of proof. The courts in these districts have not specified, however, what the elements of the complainant's burden are. The section 33(c) factors are items of mitigation. Evidence concerning them must be presented by the respondent or known by the Board through its own expertise. Where the respondent fails to present evidence on all of the factors, the Board must nevertheless consider them before it can determine if respondent's interference was unreasonable.

The following discussion will show what types of interferences have been held to be unreasonable and how, in certain cases, the Board's consideration of the section 33(c) factors has relieved a respondent of monetary penalties even though it found that respondent's emissions unreasonably interfered with enjoyment of life or property.[48]

48. The problems involved where neither party before the Board presents evidence on one or more factors is only touched upon in this paper. See text at note 92 *infra*. The cases which have been and will be discussed involve situations where evidence on all four factors has been presented so that the court upholds the Board's order or where evidence has been presented on every factor but the court finds that it is insufficient to support the Board's finding on a particular factor. For an example of the latter situations, *see* C.P.C. International v. Pollution Control Bd., 32 Ill. App. 3d 747, 336 N.E.2d 601 (1975), discussed at note 60 *infra*.

Where neither party presents evidence on a certain section 33(c) factor, the Board is empowered to subpoena such documents and books as it may need to make a finding on the missing factor, ILL. REV. STAT. ch. 111 1/2, § 1005(e) (1975). Additionally, the Board, as a practical matter, takes "quasi-judicial notice" of certain data which are relevant on certain section 33(c) factors. On this point see the discussion of the Board's treatment of the section 33(c) factors at note 80 *infra* and the accompanying text. Finally, a private conversation with Mr. Vincent P. Flood, Jr., an Administrative Assistant to the Illinois Pollution Control Board, revealed that in certain instances the Board will construe a certain factor against a party who has evidence on that factor in its possession and does not come forward with it.

The Appellate Court for the First District has decided several cases concerning a complainant's burden of proof where the respondent was charged with violations of section 9(a) of the Act. In *Mystik Tape, Inc. v. Pollution Control Board*,[49] Mystik Tape sought review of the Board's order which found a violation of section 9(a) and imposed a fine. At the hearing before the Board, the Agency introduced the testimony of several neighboring residents who said that they had noticed odors coming from Mystik's facilities on several occasions. These witnesses variously characterized the odors as "sharp, acrid, smelling like burning adhesive," "sweet" or similar to "rubber or burning rubber." The Board stated that although the emissions did not cause any property damage or force anyone to seek medical attention, they nevertheless interfered with the comfort and enjoyment of life of the nearby residents, constituted a nuisance, created a burden on the community and, therefore, violated section 9(a) of the Act.[50] Even though extensive testimony was introduced by Mystik relative to its social and economic value, priority of location and absence of any technologically and economically feasible alternatives, the Board found it guilty and imposed a fine.

The First District Appellate Court set aside the Board's order, basing its decision on two grounds. First, the testimony elicited at the hearing failed to show that the witnesses suffered any harm to either person or property. Additionally, no witness testified that he was forced to curtail any of his normal daily routines or activities.[51] The court found that evidence of the mere noticing of an odor, without more, is insufficient to support a specific finding that a respondent's emissions unreasonably interfered with the enjoyment of life or property.[52] Second, the Board's opinion did not indicate that it had taken into account the factors outlined in sections 33(c)(ii), (iii) and (iv) or the evidence presented by Mystik relative to them.[53] The court stated that section 33(c) set forth both the meaning of and the basis for a finding of unreasonableness, and that the Board must consider these factors before it can find that a respondent's emissions were unreasonable.[54]

In *Mystik Tape* the court found that the complainant failed to prove its case against Mystik. This finding, however, was based, in part, upon the failure of the Agency and its witnesses to show any harm or interference.

49. 16 Ill. App. 3d 778, 306 N.E.2d 574 (1973), *aff'd in part and rev'd in part*, 60 Ill. 2d 330, 328 N.E.2d 5 (1975). For a discussion of the Supreme Court's treatment of the case see note 74 *infra*.

50. Environmental Protection Agency v. Mystik Tape, Inc., 6 Ill. P.C.B. 503 (1973).

51. 16 Ill. App. 3d at 803, 306 N.E.2d at 594.

52. *Id.*

53. *Id.* at 799, 306 N.E.2d at 591.

54. *Id.* At first glance it may appear that by stating that section 33(c) provides the meaning of the term "unreasonable" the court follows the position of the courts for the Second and Third Districts. As discussed below, however, later decisions of the First District apparently reject any such position. *See* note 55 *infra* and the accompanying text.

Moreover, the court did not find that the Agency failed in its burden because it failed to introduce evidence on the factors contained in sections 33(c)(ii), (iii) and (iv).

The decision in *Mystik Tape* is an example of a situation where a complainant failed to prove a case of unreasonable interference with its activities. In *Chicago Magnesium Casting Company v. Pollution Control Board*,[55] the First District Appellate Court again examined the complainant's burden of proof. Chicago Magnesium was found guilty of emitting sulphur into the air so as to cause discomfort to several nearby residents.

Evidence introduced during the hearing showed that at the time of the emissions, no other process was technologically available for petitioner other than the one which it employed and which allowed the sulphur to escape. Some time after the period of the violations and considerably before the Agency brought its complaint before the Board, a new process was perfected which eliminated the emission of sulphur. Chicago Magnesium adopted this new process and thereby curtailed the emissions.

On appeal, the First District Court upheld the finding of the Board that Chicago Magnesium caused pollution in violation of section 9(a), but the court vacated the fine.[56] In taking this action, the court rejected Chicago Magnesium's argument that if it is not technologically practical or economically feasible to reduce or eliminate pollution, there can be no finding of a violation of the Act.[57] Rather, the court stated that these were only two factors which, by themselves, were not determinative of the question whether a respondent's emissions caused an unreasonable interference.[58]

In *Chicago Magnesium*, the complainant met his burden of proof by introducing evidence that the suphur emissions caused physical discomfort. The case differs from *Mystik Tape* in which the only testimony presented showed that the complainant's witnesses noticed odors which had no more effect than to cause the witnesses to "wrinkle up" their noses.[59] Thus, physical discomfort would appear to meet the standards of the complainant's burden of proof under section 31(c). Additionally, the court in *Chicago Magnesium* rejected the idea that the section 33(c) factors are the elements of proof of a complainant's case-in-chief. The court upheld the Board's determination that Chicago Magnesium caused air pollution in violation of Section 9(a) of the Act and at the same time it vacated the order imposing the fine. In doing this, the court apparently interpreted the words "orders" and "deter-

55. 22 Ill. App. 3d 489, 317 N.E.2d 689 (1974).
56. *Id.* at 495, 317 N.E.2d at 694.
57. *Id.* at 493, 317 N.E.2d at 692.
58. *Id.*
59. 16 Ill. App. 3d 778, 802, 306 N.E.2d 574, 593.

minations'' in section 33(c) as relating solely to those orders and determinations which the Board may make once the fact of a violation has been found and not to the finding of a violation in the first instance. Although the court rejected Chicago Magnesium's argument that a favorable finding on 33(c)(iv) relieved a respondent of liability for causing air pollution, it did vacate the fine imposed by the Board since Chicago Magnesium had no practical alternative to allowing sulphur emission and, once such an alternative method was developed, it was installed by the company.[60]

The Fourth District, as well as the First District, took the position that the section 33(c) factors did not constitute the elements of the complainant's case-in-chief. In *Sangamo Construction Co. v. Pollution Control Board*,[61] Sangamo was found guilty of violating section 9(a) of the Act. At the hearing before the Board, several businessmen, whose offices were located in close proximity to Sangamo's concrete and asphalt plants, testified that odors which emanated from these plants interfered with the daily operation of their businesses sometimes causing them to send employees home early and at other times causing the employees to feel nauseated. Other businessmen testified that the emission of dust was so severe at times that they were forced to curtail certain painting operations.

All of the testimony introduced indicated that when Sangamo's facilities were not in operation, these problems ceased. Evidence relative to the social and economic value of the pollution source was introduced. It showed that

60. Chicago Magnesium's conduct in the operation of its facility obviously indicated a good faith effort on its part to comply with the Act. Besides this fact, however, the decision shows how a favorable finding on one factor can keep the Board from assessing any penalty.

One other First District decision merits attention since it shows the scope of the inquiry which the Board must make into the section 33(c) factors. In C.P.C. International v. Pollution Control Bd., 32 Ill. App. 3d 747, 336 N.E.2d 601 (1975), C.P.C. was found guilty of violating section 9(a). In its opinion, the Board indicated that it took into account the testimony of both residents of the area in which the plant operated and of experts relative to the effects of the emissions and evidence concerning the size of the plant, its physical characteristics and the number of persons employed there. This latter testimony was taken in an apparent attempt to satisfy the requirements of section 33(c)(ii) dealing with the social and economic value of the pollution source. In reversing and remanding the case to the Board for further consideration, the appellate court found that the testimony introduced concerning section 33(c)(ii) was not sufficient in that the Board did not inquire into the potential hardships which would be imposed upon the company by any cease and desist order entered by the Board. Additionally, there was no statement in the opinion showing that the Board had considered any evidence relative to the suitability of the location of the plant to its area or any testimony concerning the feasibility and availability of alternate ways of discharging particles from its operations. The court stated that although there is *evidence in the record* relative to each of the section 33(c) factors, the court cannot, without a clear indication in the Board's opinion that such factors were considered, determine what evidence, if any, meets the standards of the section. *Id.* at 752, 336 N.E.2d at 603. The decision thus indicates that the Board's findings on the section 33(c) factors should be fairly specific. On this point, *see* Incinerator, Inc. v. Pollution Control Bd., 59 Ill. 2d 290, 319 N.E.2d 794 (1974), where the Board's findings, although not as specific as they could have been, were nevertheless upheld, the court expressing a caveat that in the future it would expect more specificity in the Board's opinion relative to the section 33(c) factors.

61. 27 Ill. App. 3d 949, 328 N.E.2d 571 (1975).

Sangamo had closed down both plants and had laid off its employees. Furthermore, it had no plans to reopen one of these plants. Additionally, the Board found that the absence of any nearby residences was a mitigating circumstance in favor of Sangamo. On the question of technological feasibility, the Board found that although Sangamo had installed various pollution control devices, the installation was an afterthought and should have been done when the plants were first constructed. On that record, the Board held that Sangamo had caused air pollution in violation of section 9(a) and it imposed a $5,000 fine.

The Appellate Court upheld both the Board's finding of a violation of section 9(a) and its imposition of the fine. The court held that the testimony elicited before the Board concerning the damage caused by Sangamo's emissions was sufficient to enable the complainant to meet its burden of proof under section 31(c).[62] Thus, the disruption of neighboring businesses and the accompanying curtailment of their normal operations constituted ample unreasonable interference so as to sustain a finding that Sangamo caused air pollution.

The court was somewhat unclear, however, on the question of the function of the section 33(c) factors. First, it stated that the factors were relevant guides to the Board in determining whether a respondent emitted contaminants which not only unreasonably interfered with the enjoyment of life or property but which also were injurious to human, plant or animal life, to health or property.[63] Second, the court found that section 33(c) acted as a guarantee against any arbitrariness on the Board's part.[64] Finally, as the First District Court in *Chicago Magnesium* found, the Fourth District Court in *Sangamo* held that a favorable finding on one factor (here, the suitability of the pollution source to the area in which it was located) would not insulate a respondent against a finding of a violation of section 9(a). By affirming the Board's finding of a violation where the complainant did not present evidence on every section 33(c) factor, the court in *Sangamo* adopted the view that the

62. *Id.* at 955, 328 N.E.2d at 576.

63. *Id.* at 953, 328 N.E.2d at 575. This case expands on the holding in Incinerator, Inc. v. Pollution Control Bd., 59 Ill. 2d 290, 319 N.E.2d 794 (1974), in which the supreme court held that section 3(b) of the Act, ILL. REV. STAT. ch. 111 1/2, § 1003(b) (1975), created two types of pollution: that which causes injury and that which unreasonably interferes with the enjoyment of life or property. The court held that the section 33(c) factors were relevant to the proof of only the latter type of pollution. *Id.* at 296, 319 N.E.2d at 797. The appellate court in *Sangamo* held that section 33(c) was relevant to the proof of the injurious type of pollution. The supreme court has yet to hold this.

64. 27 Ill. App. 3d at 953-54, 328 N.E.2d at 575. The court, in reaching this conclusion, apparently picks up on the language of the supreme court in City of Waukegan v. Pollution Control Bd., 57 Ill. 2d 170, 182-83, 311 N.E.2d 147, 152 (1974) which states that section 33(c) acts as a safeguard against any arbitrary or capricious imposition of fines by the Board.

four factors do not constitute the necessary elements of a complainant's case-in-chief.[65]

The above discussion has examined the views of those appellate districts which have taken the position that the introduction of evidence on the section 33(c) factors is not required of a complainant in order for it to meet its burden of proof in a case charging that a respondent's emissions unreasonably interfered with the enjoyment of life or property. Some general observations can be made as to the views of the First and Fourth Districts concerning both what the complainant must prove and the function of section 33(c). First, a complainant need not introduce evidence on every section 33(c) factor in order to sustain its burden of proof under section 31(c). Second, to make out a case, evidence of more than just recognition of odors or contaminants must be presented. Testimony of physical discomfort, interruption of normal business activities and the curtailment of business functions has been sufficient to allow the Board to find that the complainant has met its burden under section 31(c). Finally, the preceding discussion has shown how the courts in at least the First and Fourth Districts have held that the section 33(c) factors are items of evidence which the respondent must introduce in order to mitigate or avoid any penalties which the Board may impose. Thus, even though the Board may be justified in finding that a respondent has caused pollution, consideration of section 33(c) may militate against the imposition of a fine. It is clear that the position of the appellate courts in the First, Fourth (and possibly the Fifth) Districts was completely opposite to that taken by the Second and Third Districts.

65. The Appellate Court for the Fifth District has not decided a case which has discussed the question specifically raised in this article. It has, however, discussed section 33(c) in several non-air pollution cases. For example, in Cobin v. Pollution Control Bd., 16 Ill. App. 3d 958, 307 N.E.2d 191 (1974), Cobin was found guilty of violating section 9(c) of the Act, ILL. REV. STAT. ch. 111 1/2, § 1009(c) (1975), which prohibits open burning. The court upheld the Board's finding since it was convinced that the four factors had been considered by the Board. The court also held that a favorable finding on one factor did not preclude the Board from finding a violation of section 9(c). 16 Ill. App. 3d at 965, 307 N.E.2d at 196. In Freeman Coal Mining Corp. v. Pollution Control Bd., 21 Ill. App. 3d 157, 313 N.E.2d 616 (1974), the court held that the Board was not required to make express findings on or to require proof by the Agency relative to each of the section 33(c) factors. *Id.* at 170, 313 N.E.2d at 626. The case, however, involved a charge of causing water pollution which is defined in ILL. REV. STAT. ch. 111 1/2, § 1003(n) (1975) as follows:

> WATER POLLUTION is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

The importance of these two decisions lies in the inference they suggest that section 33(c), by being a relevant guide in cases where "unreasonable" is not involved in defining a violation of the Act or a particular type of pollution, has nothing to do with the complainant's burden of proof. In fact, the courts which employ the section 33(c) factors in non-unreasonable interference situations view the factors as items which a respondent may introduce in its own defense.

THE SUPREME COURT'S DECISION IN *Processing and Books v. Pollution Control Board*

The conflict among the appellate districts concerning the elements of a complainant's case-in-chief under the Act was finally settled by the Illinois Supreme Court in *Processing and Books, Inc. v. Pollution Control Board.*[66] The court reversed the decision of the Second District Appellate Court,[67] and held that a complainant is not required to introduce evidence relative to all four section 33(c) factors in order to meet his burden of proof under section 31(c). In reaching this decision, the court examined section 3(b) of the Act and found that the use of the word "unreasonable" created problems in deciding what facts a complainant must prove in order to make out his case-in-chief. Additionally, the court looked at its prior decision in *Incinerator, Inc. v. Pollution Control Board*[68] where it had held that a complainant bore the burden of persuasion on the essential elements of the offense charged. The supreme court, in *Processing and Books*, rejected the holding that the section 33(c) factors were the elements to be proved by a complainant. The court stated that such an interpretation of section 3(b) would place a more stringent burden on a complainant than it would bear in a common law nuisance action.[69] However, it would also frustrate the purpose of the Act which is to establish a unified system of enhancement and restoration of the quality of the environment.[70]

The decision in *Processing and Books* states what the elements of a complainant's burden of proof are not. Does it help to determine what they are? The court answers this question when it states:

> In our opinion the word "unreasonably" as used in section 3(b) was intended to introduce into the statute something of the objective quality of the common law, and thereby exclude the trifling inconvenience, petty annoyance of minor discomfort.[71]

It would thus appear that the test for unreasonableness under the Act is the same as that in a common law nuisance action: Whether to a person of ordinary habits and sensibilities the contamination of the air was physically offensive and rendered the enjoyment of life or property uncomfortable.[72] The role of the section 33(c) factors in a case before the Board now becomes clearer. In a common law action of nuisance, a plaintiff made out his case by showing that the defendant had unreasonably interfered with the enjoyment of life or property. The defendant then had an opportunity to present evidence in

66. 64 Ill. 2d 68, 351 N.E.2d 865 (1976).
67. 28 Ill. App. 3d 115, 328 N.E.2d 338 (1975).
68. 59 Ill. 2d 290, 319 N.E.2d 794 (1974).
69. 64 Ill. 2d 68, 351 N.E.2d 865 (1976).
70. *Id.*
71. *Id.*
72. *See* note 10 *supra.*

mitigation of its conduct.[73] Such evidence included the social and economic value of the pollution source, the suitability of the pollution source to the area where it was located, and the lack of ability or finances to develop other less offensive methods of operation. Based upon both the plaintiff's and defendant's evidence, the jury could decide whether the interference was so unreasonable as to warrant an award of damages.

The section 33(c) factors, then, are merely the statutory equivalents of the defenses available to a party in an action for nuisance. After a complainant has made out a case of unreasonable interference, the burden of presenting evidence relative to the section 33(c) factors falls upon the respondent. If the respondent presents such evidence, the Board must weigh it along with the complainant's evidence to determine if a fine or other action is warranted.[74]

What if the respondent fails to adduce evidence on the section 33(c) factors or introduces evidence on some but not all of them? The Illinois Supreme Court in *Incinerator* held that the Board must consider these factors and indicate that it has done so by specifically stating the facts and reasons leading to its decision.[75] In *Processing and Books* the court did not discuss this question. Therefore, if there is no evidence, or insufficient evidence is adduced, can the Board make a determination that the respondent caused air pollution, or impose a fine on him?

The Board takes notice of facts known to it through its own expertise and makes findings on section 33(c) factors even when a party before it has failed to present evidence on them. The next section of this article will be devoted to an exploration of the Board's "notice."

SECTION 33(C) AS CONSTRUED BY THE BOARD

One question which results from the decision in *Processing and Books* is whether the Board's own construction of section 33(c) is in accord with the holding of the Illinois Supreme Court. As will be seen, the Board's practice is already in accord with *Processing and Books.*

73. *See* note 8 *supra* and the accompanying text for a discussion of the common law nuisance action.

74. 59 Ill. 2d 290, 296, 319 N.E.2d 794, 797 (1974). In Mystik Tape, Inc. v. Pollution Control Bd., 60 Ill. 2d 330, 328 N.E.2d 5 (1975), *aff'g in part and rev'g in part*, 16 Ill. App. 3d 778, 306 N.E.2d 574 (1973), the supreme court reiterated its position that the unreasonableness of a respondent's emissions must be tested against the four section 33(c) factors. The court agreed with the appellate court that the Board has not considered all of the factors. However, the court remanded the case to the Board for further consideration of evidence on section 33(c). 60 Ill. 2d at 338, 328 N.E.2d at 9. In S. Ill. Asphalt Co. v. Pollution Control Bd., 60 Ill. 2d 204, 326 N.E.2d 406 (1975), the court held that section 33(c) created relevant standards which the Board must consider in mitigation or aggravation when determining what action to take, if any, against a respondent. The court also commented, "We have recently held that the provisions of section 33(c) establish the criteria for determining an unreasonable interference with the enjoyment of life or property as that phrase is used in section 3(b) of the Act." 60 Ill. 2d at 208, 326 N.E.2d at 408 (citation omitted).

75. 59 Ill. 2d at 296, 319 N.E.2d at 797.

The Board has taken different positions on the question of what function section 33(c) has in its decisionmaking process. In one early decision,[76] the Board stated that air contaminant emissions were unreasonable where there was proof of an interference with life and property and that economically reasonable technology was available to control the emissions. Several subsequent opinions adopted this definition.[77] The Illinois Supreme Court, in *Mystik Tape*[78] expressly disapproved of this definition, stating that it omitted consideration of the other section 33(c) factors. Thus, the Board was forced to develop an alternate test for "unreasonable."

The approach which the Board now takes to the section 33(c) factors can be illustrated by its decision in *Citizens for a Better Environment v. North Elmhurst Sanitary District.*[79] The Board's opinion summarized the testimony of six persons who resided near a sewage treatment plant owned and operated by the respondent. All of the evidence showed that because of poor operation of the plant, respondent caused odors to escape into the air. Such odors caused the witnesses to stay indoors, to keep their windows closed, to curtail the use of their pools and patios and disrupted their outdoor parties. Respondent showed that the plant was too small for the job it was intended to do and that it planned to shut the facility down and pump the sewage to its main plant.

The Board found that the improper operation of the plant unquestionably resulted in a violation of section 9(a), based upon the testimony of the witnesses and the injuries and inconveniences caused by the odors.[80] Only after it made this finding did the Board then state that in reaching its conclusion it had examined the section 33(c) factors. The Board concluded that although a sewage treatment plant has great social and economic value when properly run, improper operation which causes pollution diminishes its value. As to the question of priority of location, the Board stated that the fact that the respondent was in the area before the complaining witnesses were does not constitute a license to pollute. Moreover, even if the plant was suited to the area where it is located, an improperly operated plant is unsuitable to any area. Finally, respondent was already engaged upon a course of action to eliminate the odors. Thus, the Board found that technologically feasible alternatives were available to the respondent. Because respondent was taking steps to eliminate the odors, the Board imposed no penalty, but did prescribe a time limit for the completion of a pumping station.

76. Moody v. Flintkote Co., 2 Ill. P.C.B. 341 (1971).

77. *See, e.g.*, Environmental Protection Agency v. Chicago Housing Authority, 4 Ill. P.C.B. 145 (1972), Environmental Protection Agency v. American Generator and Armature Co., 3 Ill. P.C.B. 373 (1972) and Employees of Holmes Bros. v. Merlan, 2 Ill. P.C.B. 405 (1971).

78. 60 Ill. 2d 330, 337-38, 328 N.E.2d 5, 9 (1975).

79. 17 Ill. P.C.B. 387 (1975).

80. *Id.* at 393.

Several interesting observations can be made about this case. First, the only evidence which the complainant introduced was the testimony of residents of the area concerning the degree of interference caused by respondent's emissions. The complainant introduced no evidence relative to the factors set forth in sections 33(c)(ii), (iii) and (iv). Furthermore, the record in the case is silent as to exactly what evidence the respondent presented except that the treatment plant was inadequate and was being phased out of operation. The Board, nevertheless, made specific findings relative to the section 33(c) factors. It first found that an improperly operated sewage treatment plant loses its social and economic value since it causes rather than abates pollution.[81] This conclusion by the Board was apparently based upon its own perception and expertise and not upon evidence presented by the parties in the case.

Second, the Board stated that an improperly operated sewage treatment plant was unsuitable to any area.[82] This was an apparent attempt to satisfy section 33(c)(iii) although the respondent offered no evidence on this point. Again the Board used data from its own experience and knowledge in order to make a specific finding on one of the factors. Finally, the Board noted that the respondent had already undertaken an economically and technologically feasible alternative to polluting by constructing a new sewage pumping station.[83] Thus, the respondent's own admissions permitted the Board to make a finding on the section 33(c)(iv) criteria.

Other Board decisions take an approach similar to that in *North Elmhurst Sanitary District.*[84] In one recent opinion, however, the Board appears to adopt the rule laid down by the Second and Third Appellate Districts that a complainant must present evidence on all four section 33(c) factors. In *People of the State of Illinois v. North Shore Sanitary District* and *City of Highland*

81. *Id.*
82. *Id.*
83. *Id.* at 394.
84. An interesting issue involving noise pollution, as defined in section 24, ILL. REV. STAT. ch. 111 1/2, § 1024 (1975), was presented in Buelo v. Barrington Sportsmen Unlimited, Inc., and Environmental Protection Agency v. Barrington Sportsmen Unlimited, Inc., 16 Ill. P.C.B. 111 (1975), two cases consolidated before the Board. Evidence showed that the complaining witnesses could not engage in normal outdoor activities while the respondent's members were engaged in skeet-shooting and hunting. The Board found that the respondent caused noise pollution. In reaching this decision, the Board stated that a complainant had a much stricter burden of proof than under the common law action of nuisance. It then held that in order to make out a prima facie case, the complainant must show that there has been an interference and that the interference was unreasonable. And in determining whether the interference was unreasonable, the Board must use the section 33(c) guidelines. *Id.* at 115. In *Buelo*, the Board was faced with the unrefuted allegations of the complainant. The respondent offered no contradictory evidence. The Board considered the factors relative to priority and suitability of location and social value but it concluded that since no evidence was presented on them by the respondent, the complainant had made out a prima facie case. *Id.* at 115.

Park v. North Shore Sanitary District,[85] two cases which were consolidated, the Board stated that a complainant's burden of proof in showing an unreasonable interference is fourfold. The complainant must establish that there was an odor, that it came from respondent's facilities, that the odor caused an interference and that " . . . such interference [was] unreasonable, such unreasonableness being measured, in part, by the criteria in section 33(c) . . ." [86] The Board then examined the testimony of complainant's witnesses and found that the evidence that the odors unreasonably interfered with the enjoyment of life or property was sufficient to find a violation of section 9(a).[87] In defense, the respondent relied only upon the Board's findings in a prior case[88] that its site was the most suitable one available and that a sewage treatment plant has a great deal of social and economic value to the community. The Board held that this evidence did not preclude a finding of a violation.

Although the Board stated that the complainant must prove that an interference was unreasonable by reference to the section 33(c) factors, the complainant's evidence in *North Shore Sanitary District* touched only on section 33(c)(i).[89] Evidence on the other factors was either introduced by the respondent or quasi-judicially noticed by the Board. Thus, where no evidence is presented on a particular factor, the Board employs its own knowledge and expertise to fill the gap. The Illinois Supreme Court in *Processing and Books* did not express an opinion as to the permissibility of such a procedure. It merely held that the evidence presented by both parties before the Board was sufficient to support a finding that the respondent caused air pollution.[90] The court noted, however, that the Board's opinion was handed down before its decision in *Incinerator, Inc.*, and therefore a lack of specificity in its findings was allowed.[91] Additionally, the supreme court found that the Board in *Processing and Books* had considered all of the section 33(c) factors even

85. Ill. P.C.B. 74-223 and Ill. P.C.B. 74-229 (consolidated) (November 6, 1975).

86. *Id.* at 6.

87. The Board summarized the testimony in a chronological order on a day by day basis. The witnesses called by the Agency were residents of Highland Park who lived near respondent's Clavey Road plant. The witnesses generally testified that the odors generated by the plant caused them to abandon outdoor activities, to cancel or curtail patio parties and at times to almost be nauseated. Some of this testimony was corroborated by "log books" of the respondent which noted that certain operational breakdowns occurred at the same times as complaints of odors were made. Other testimony consisted of reports of the police department which investigated complaints from various residents concerning the odors. Some of these reports, however, were unsupported by other testimony and were, therefore, found to be insufficient to sustain a finding of a violation.

88. League of Women Voters v. North Shore Sanitary Dist., 1 Ill. P.C.B. 369 (1971).

89. One possible explanation for the Board's statement that the complainant has the burden of proving the unreasonableness of a respondent's emissions by means of the section 33(c) factors is that this case, if appealed, would be heard by the Appellate Court for the Second District since the cause of action arose in Highland Park, Lake County. *See* ILL. REV. STAT. ch. 111 1/2, § 1041 (1975).

90. 64 Ill. 2d 68, 351 N.E.2d 865 (1976).

91. *Id.*

though, as stated by the appellate court, the parties had not presented evidence on each one.[92] Impliedly, then, the court would allow the Board to use its own knowledge and expertise in arriving at a finding on the section 33(c) factors where the parties themselves do not present evidence on these factors.

CONCLUSION

This article has examined the decisions of the Illinois appellate and supreme courts, and those of the Illinois Pollution Control Board in order to determine what a complainant must prove to make out a prima facie case of air pollution. The confusion on this point among the appellate districts has been resolved by the Illinois Supreme Court in *Processing and Books*, which held that the complainant need not offer evidence on every section 33(c) factor in order to make out his case-in-chief. This decision will substantially ease the burden on a person who seeks the abatement of air pollution. First, as the supreme court pointed out, the decision reverses those courts which would place a more stringent burden of proof on a complainant than he would have had in the common law action of nuisance.[93] Second, the decision brings the

92. The appellate court's decision was based on the fact that the parties had not presented evidence on all 33(c) factors, Processing & Books, Inc. v. Environmental Protection Agency, 28 Ill. App. 3d 115, 118, 328 N.E.2d 338, 340-41 (1975).

93. *See* note 13 *supra* and the accompanying text for a discussion of the burden of proof in a nuisance action. The position of the Second and Third Districts would have posed an additional problem. The whole idea of an enforcement proceeding is that the question of whether a person caused or threatened to cause air pollution should be decided in an adversary context, wherein one party presents evidence showing the unreasonableness of the other party's conduct and the other party introduces evidence showing that its conduct was reasonable under all of the circumstances. Ideally, a complainant would present evidence which would tend to show that not only did the respondent's conduct unreasonably interfere with the enjoyment of life or property or cause physical discomfort but that it was also unreasonable in light of the four section 33(c) factors. In many cases, however, requiring the complainant to present evidence on all four factors would be tantamount to forcing it to present evidence which would tend to disprove the very fact which it is attempting to prove. For example, where the respondent's operations have very little social or economic value (or where the respondent has made no good faith efforts to comply with the Act) the complainant will not be prejudiced by being required to introduce this evidence since the lack of economic or social value (or of good faith) will strengthen a case of unreasonableness.

Where the pollution source, however, has social and economic value, the complainant must introduce evidence of this value. Thus, it will be presenting evidence tending to disprove the very fact it wants to prove, namely that respondent's emissions were reasonable in light of its social and economic value. The objections to requiring a complainant to present evidence tending to prove and, at the same time, disprove its case are pointed out by the Agency and the Board in Respondents'-Petitioners' Petition for Leave to Appeal to the Supreme Court at 15, Processing & Books, Inc. v. Pollution Control Bd., 28 Ill. App. 3d 115, 328 N.E.2d 338 (1975):

> It is highly unlikely that, in this context, evidence of reasonableness presented by the complainant will be as comprehensive as that presented by the respondent. The complainant will understandably only attempt a cursory presentation of evidence of reasonableness so as to meet it Processing and Books "burden of proof.". . .
> . . . [N]o respondent would be expected to be satisfied with the job his opponent has done for him. Invariably, the respondent would proceed to put on all available evidence of the reasonableness of the emission in a far more complete and persuasive manner. That part of the complainant's case which purports to introduce evidence of reasonableness is illusory and of no value in presenting that issue in a manner which will be of any aid to the trier of fact in making a determination according to section 33(c). Therefore, to require the complainant to introduce evidence as to all of the factors of section 33(c) is a duplicitous and meaningless task which would serve only to unnecessarily lengthen and confuse the proceedings.

burden of proof sections of the Act in accord with the intent of the legislature.[94] Third, it restores the legislative goals of providing a statewide program of restoration and enhancement of the environment and placing the adverse effects of pollution squarely on the polluters.[95] Finally, by its holding that a complainant is not required to introduce the equivalent of an environmental impact statement, the court recognized that effective pollution control depends upon an uncomplicated enforcement procedure which insures fairness to all parties.

94. CURRIE, *supra* note 25, at 134.
95. ILL. REV. STAT. ch. 111 1/2, § 1002(b) (1975).

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