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Roy M. Harsch

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THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM IN ILLINOIS: THE STATE ASSUMES DIRECT AUTHORITY

Gail C. Ginsberg*
Roy M. Harsch**

The Federal Water Pollution Control Act of 1972 established uniform nationwide pollution standards and encouraged the states to assume primary authority for administration of the program within their boundaries. The United States Environmental Protection Agency transferred this authority to Illinois in October 1977. In this Article, the authors describe the framework of the federal and Illinois water pollution control programs and the obstacles which Illinois environmental agencies had to overcome in order to assume regulatory authority. Although several problems have resulted in a slowdown in permit processing and enforcement, the authors conclude that Illinois has the necessary regulatory mechanisms to satisfactorily administer the state's water pollution control program.

The need for vigorous, enforceable pollution control laws in this country has been strongly enunciated by the Congress of the United States in the 1970's. Nowhere has there been a more explicit statement of the federal concern for environmental protection than in the Federal Water Pollution Control Act of 1972.¹ While establishing a goal of national uniformity with federally imposed standards as a minimum level of attainment, Congress spoke forcefully of its intent to involve the states in a primary role in regulating water pollution. In 1977, Congress further amended the statute to provide for an even greater measure of state responsibility.² Five years after passage of the 1972 Act, Illinois finally assumed primary authority for regulation of water pollution within its boundaries.

* Chief, Legal Support Section, Enforcement Division, Region V, U.S. Environmental Protection Agency. B.A., Brown University; J.D., American University.

** Associate, Martin, Craig, Chester & Sonnenschein; formerly Chief, Engineering Unit, Enforcement Division, Region V, U.S. Environmental Protection Agency, B.S., Iowa State University; J.D., University of Iowa; M.S. (Environmental Engineering), University of Iowa.

Ms. Ginsberg and Mr. Harsch state that this Article was written in their private capacities, and that no official support or endorsement by the Environmental Protection Agency, any other agency of the Federal Government or Martin, Craig, Chester & Sonnenschein is intended or should be inferred.

1. 33 U.S.C. §§ 1251-1376 (Supp. II 1972).

2. On December 15, 1977, both houses of Congress enacted these amendments, generally known as the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977). The Act was signed into law by President Carter on December 27, 1977.

This Article will describe the 1972 Act's National Pollutant Discharge Elimination System (NPDES) permit program, Illinois' permit program prior to its adoption of NPDES, and the means by which Illinois overcame the obstacles which inhibited assumption of NPDES authority for five years. The effect of the state's assumption of authority on permittees within Illinois will be discussed, highlighting any changes in permittees' relationship to the state and federal governments. The Article will conclude with a brief description of problems which have arisen as a result of Illinois' administration of the NPDES program, and solutions will be proposed when possible.

THE STATUTORY SCHEME: THE NATIONAL
POLLUTANT DISCHARGE
ELIMINATION SYSTEM

The Clean Water Act (CWA) renders illegal the discharge of any pollutant except in compliance with certain enumerated sections of the Act.³ "Discharge of a pollutant" is specifically defined as limited to that which comes from a "point source,"⁴ which is further defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."⁵

Strangely, the Act has no explicit requirement that a "discharger" (regulatory euphemism for "polluter") of pollutants apply for a permit, although section 1311 of the Act clearly makes it illegal to discharge pollutants without a permit. This legislative omission at one time led to claims that NPDES permits were unnecessary for those who complied with the rest of the Act's substantive provisions. The Seventh Circuit put to rest this pipe dream in *United States Steel v. Train*.⁶ U.S. Steel had argued that the Act could be interpreted as not requiring a permit to discharge pollutants. The company relied upon a prior decision of the Seventh Circuit in support of this position.⁷ The court rejected this interpretation in a footnote:

As the Supreme Court observed in *EPA v. California ex rel. State Water Resources Control Board*, . . . "Under NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. To the extent that language

3. 33 U.S.C. § 1311(a) (Supp. II 1972) provides: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

4. *Id.* § 1362(12).

5. *Id.* § 1362(14).

6. 556 F.2d 822 (7th Cir. 1977).

7. See *Stream Pollution Control Bd. of Indiana v. United States Steel Corp.*, 512 F.2d 1036, 1042-43 (7th Cir. 1975).

in our earlier opinion in *Stream Pollution Control Board of Indiana v. U.S. Steel Corp.* may be read as inconsistent with this interpretation of the Act, it is of course no longer controlling.”⁸

NPDES permits have often been referred to as “licenses to pollute,” or alternatively, as orders for the abatement of pollution. Actually, they prescribe limitations on pollutants contained in the water discharged (effluent) by the particular permittee.⁹ Where those limitations are not immediately attainable, the permits prescribe interim limitations and schedules for attainment of compliance, generally for purposes of constructing necessary wastewater treatment equipment. Permits also establish various monitoring and reporting requirements to demonstrate compliance with substantive provisions or to inform the regulatory agencies of instances of non-compliance.¹⁰ All terms and conditions of a permit are considered by the federal Environmental Protection Agency to be fully enforceable.

Except for an initial interim period of state administration,¹¹ the federal government, through the Environmental Protection Agency has responsibility for implementing the Act's NPDES permit requirements unless and until that responsibility is formally transferred to a qualifying state government.¹² As long as the federal EPA is the permitting authority, the state can affect permits issued to individual dischargers within its boundaries primarily through the certification process created by section 1341.¹³ By denying certification, a state can effectively prohibit a polluter from obtaining the legal authority to discharge pollutants within that state.¹⁴ The state also has the option of waiving certification or conditioning a grant of certification to include such requirements as it deems necessary.¹⁵

8. 556 F.2d at 830 n.3 (citations omitted).

9. These limitations are defined by federal and state laws or regulations. *See, e.g.*, federal effluent guidelines, 40 C.F.R. §§ 401.10-460.12 and state water quality standards promulgated pursuant to Section 1313 of the Clean Water Act.

10. *See generally* 40 C.F.R. §§ 125.21-.28.

11. *See* 33 U.S.C. § 1342(a)(5) (Supp. II 1972).

12. *Id.* § 1342(a). Regulations relating to the substance of NPDES permits and procedures for issuance are found at 40 C.F.R. §§ 125.1-.54 (1977).

13. 33 U.S.C. § 1341 (Supp. II 1972), in pertinent part, provides as follows:

(a)(1) Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1316, and 1317 of this title . . . No license or permit shall be granted if certification has been denied. . . .

14. The availability of an appeal process to contest a state's denial of certification has been a matter of some concern. *See Consolidation Coal Co. v. EPA*, 537 F.2d 1236 (4th Cir. 1976).

15. 33 U.S.C. §§ 1341(a)(1), 1341(b) (Supp. II 1972); 40 C.F.R. §§ 123.1-.30. The ability of a state to condition certification has been interpreted broadly by the federal EPA,

*The Federal-State Relationship Under
The Clean Water Act*

Congressional intent that the states should assume primary responsibility for controlling water pollution within their boundaries is expressed several times in the Clean Water Act (CWA),¹⁶ and specifically includes the NPDES permit program.¹⁷ Although the permit program initially is administered by the United States Environmental Protection Agency, the Federal Water Pollution Control Act of 1972 allows the transfer of authority to state government and establishes the criteria for the transfer.¹⁸ Review of federal EPA action in

which will not question a state's certification requirements. *See, e.g.*, Decisions of the U.S. EPA General Counsel, Nos. 13, 14, 17, 25, & 58.

16. *See, e.g.*, the Clean Water Act's "Declaration of Goals and Policy," which states "the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution. . . ."

33 U.S.C. § 1251(b)(Supp. II 1972).

The Clean Water Act encourages cooperative activities and uniform laws among the states for the purpose of pollution control. *Id.* § 1253. Federal research programs are to be conducted in cooperation with the states. *Id.* § 1254. Federal grants are available for these purposes. *Id.* §§ 1255, 1256. Federal grant funds for the construction of publicly-owned sewage treatment works are allocated on a state-by-state basis. *Id.* § 1285. The states bear the principal burden in the development and implementation of regional waste treatment management plans. *Id.* § 1288.

The 1977 amendments also provide that certain portions of the dredge and fill permit program may be transferred to states which qualify. The Clean Water Act of 1977, Pub. L. No. 95-217, § 67(g)(1), 91 Stat. 1601 (1977).

17. The NPDES permit program has been described many times before. *See, e.g.*, Zener, *The Federal Law of Water Pollution Control*, FEDERAL ENVIRONMENTAL LAW 682 (E. Dolgin & T. Guilbert eds. 1974).

18. The statutory criteria to be satisfied by a state in order to qualify for the NPDES program include: certain minimum permit conditions which the state must have authority to impose, 33 U.S.C. § 1342(b)(1) (Supp. II 1972); monitoring and inspection authority comparable to section 1318 of the CWA, *id.* § 1342(b)(2)(A); public notice and opportunity for public hearing on each permit application, *id.* § 1342(b)(3), as well as notice to the Administrator, *id.* § 1342(b)(4); a system by which other states which may be affected by the issuance of a particular permit have an opportunity to make recommendations with respect to that permit, *id.* § 1342(b)(5); consideration of anchorage or navigational impacts, *id.* § 1342(b)(6); enforcement authority, including civil and criminal penalties, *id.* § 1342(b)(7); and requirements as to discharges from publicly owned treatment works, *id.* § 1342(b)(8). Regulations promulgated by the U.S. EPA pursuant to authority of section 1314(b)(2) define these criteria in greater detail in accord with the guidance provided in section 1314(h). One such regulation prohibits a conflict of interest by requiring that one in a position of approving permit applications cannot receive (or have received during the previous two years) a significant portion of his income, directly or indirectly, from permit holders or applicants. 40 C.F.R. §§ 124.1-.94 (1977).

Procedurally, a state which desires to administer the NPDES permit program for discharges to navigable waters within its jurisdiction submits an application from the Governor of the state to the Administrator of the federal EPA. The application must describe the proposed program and include a statement from the attorney general or comparable authority to the effect that the state has laws in effect which enable it to carry out the program as described. *See* 33 U.S.C. § 1342(b) (Supp. II 1972); 40 C.F.R. §§ 124.31-.37 (1977). The federal EPA has 90 days from the date of application (or any revisions thereof) in which to either approve the state program and suspend federal permit issuance or notify the state of any modifications or revisions needed to

transferring NPDES authority to a state agency lies in the federal courts of appeal.¹⁹

Once the NPDES program has been transferred to a state, the potential for federal presence in a state program still exists. Congress intended that federal pollution control laws be applied uniformly so as to guarantee nationwide minimum levels of pollution control. If individual states desire to impose standards more stringent than the minimum level set by federal statute and regulation, that right is specifically preserved by the Act.²⁰ Other sections of the Act, however, assure that the states will not operate the permit program less stringently than would the federal government. Of particular significance is section 1342(d), which establishes the federal EPA's review authority over permits proposed by state agencies and provides that no permit shall issue over a federal objection.

In the exercise of its review capacity for states with NPDES authority, the federal agency has had occasion to object to the issuance of a small number of permits. In most cases, the grounds for the objection have been conducive to negotiation among the discharger, the state and the federal EPA. Accordingly, the permit could be re-submitted to the federal EPA with appropriate revisions, and receive federal concurrence for issuance. In those cases in which resolution of federal objections was not achieved, the dischargers generally have petitioned the court of appeals for review of federal action.²¹

bring the state proposal in line with the requirements of the statute and guidelines. *Id.* § 1342(c)(1). During the 90 day period, the federal EPA reviews the state proposal and, if it appears to be approvable, gives public notice (e.g., through newspaper publications) of the state's application and holds a public hearing to receive comments. If no problems arise, the NPDES program is formally transferred by a letter from the Administrator to the Governor. 33 U.S.C. § 1342(c)(2) (Supp. II 1972) provides an admonishment to states with NPDES authority that any state program must at all times be conducted in accordance with statutory and regulatory requirements. Finally, section 1342(c)(3) provides a mechanism for rescinding a state program which does not fulfill its obligations.

The instrument which defines the scope of a particular state's NPDES program is known as the Memorandum of Agreement (MOA). The signatories are the Administrator of U.S. EPA, the Regional Administrator, and the Director of the State Program. The MOA sets forth the state's commitments as to program administration and the areas for which the federal EPA retains an oversight capacity. In addition to setting forth the broad policies within which the state will administer the program, the MOA details certain information which the state must supply to U.S. EPA and establishes the basis for the federal agency's continuing review of the state program. Also included in the MOA are commitments by the federal government for funding and other types of assistance to the state.

19. 33 U.S.C. § 1369(b)(1)(F). (Supp. II 1972).

20. *Id.* § 1370.

21. The Agency's record of sustaining its vetoes through the court of appeals has been somewhat less than successful. *See, e.g.,* Republic Steel Corp. v. Train, 557 F.2d 91 (6th Cir. 1977), *vacated and remanded*, Costle v. Republic Steel Corp., 98 S. Ct. 761 (1978); Marathon

The above review procedure may have only historical significance. Section 65 of the 1977 amendments to the CWA expanded section 1342(d) to establish new procedures for federal veto of state permits and to provide for federal issuance of permits when state-proposed permits are unacceptable.²² The federal EPA adopted regulations to implement section 1342(d) as amended. These regulations specify both procedural and substantive criteria for objections to state permits.²³

The federal review authority may also affect the day-to-day operation of any state NPDES program and, in many cases other than Illinois, has served as a source of considerable friction. As a result of the federal Agency's internal needs and external responsibilities (e.g., to Congress) numerous demands are placed upon the state agencies. These demands primarily concern priorities and reporting requirements. Other states with NPDES authority have chafed at these requirements. Illinois has not yet had an opportunity to fully experience this aspect of the federal-state relationship.

Another source of federal-state friction is in the area of funding. State programs are reviewed formally by the federal EPA on an annual basis, and program plans are developed for each fiscal year. Certain portions of these programs may be funded by federal grants. Where a state fails to perform satisfactorily or fails substantially to meet its annual commitments (e.g., for issuance or enforcement of permits), federal grant funds may be withheld. Although this remedy is rarely used, it is an obvious impairment to a smooth federal-state working relationships.²⁴

Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977); Ford Motor Co. v. EPA, 567 F.2d 661 (6th Cir. 1977). There have been no cases of U.S. EPA vetoes of state proposed permits presented to the Seventh Circuit.

In addition, the Ninth Circuit recently held that jurisdiction to review U.S. EPA vetoes of state permits does not lie in the courts of appeal, but instead must be pursued at the district court level under Section 10 of the Administrative Procedure Act. *Washington v. EPA*, 11 ENVIR. REP. (BNA) 1339 (March 6, 1978).

22. Henceforth, when the Administrator objects to a proposed permit pursuant to 33 U.S.C. § 1342(d)(2) (Supp. II 1972), he shall, if the state so requests, conduct a public hearing to consider the objection. Within thirty days of the completion of a hearing or within ninety days of the objection if there is no hearing, if the state has not resubmitted the permit to meet the federal objection, the Administrator may issue the permit under section 1342(a). The Act is also amended to require that whenever the Administrator objects to the issuance of a permit, he shall state the reasons for the objection as well as the limitations and conditions which would be imposed in a permit issued by the Administrator. *Id.* § 1342(d). (In fact, this latter procedure was probably the practice in most veto cases to date. However, Congress has now made it a specific requirement.)

23. See 43 Fed. Reg. 22160-22168 (May 23, 1978).

24. See generally 33 U.S.C. § 1256 (Supp. II 1972); See also 40 C.F.R. § 130.40-44 (1977).

It is difficult to generalize about the federal-state relationship in order to project how Illinois will fare. The quality of the relationship varies widely among the six states in Region V. If there is any fact upon which to base a prognosis for Illinois, it is the long delay in assuming the NPDES program. To the extent that this delay served to resolve problems internal to the state and problems between Illinois and federal EPA, and to establish lines of communication between the two entities, it may auger well for a favorable federal-state relationship in Illinois.

PROGRAM WITHDRAWAL

The discussion up to this point has focused on transferring authority for the issuance and enforcement of NPDES permits to the state government. Congress, however, had the foresight to realize that a state program might not operate as anticipated and therefore provided for rescission of a state permit program following a public hearing and an opportunity to institute corrective actions.²⁵ The 1977 amendments providing for transfer of section 1344 permit authority to qualifying states also provides for withdrawal of authority.²⁶

There is also a possibility of what is, in effect, partial withdrawal of a state NPDES program. Section 1319(a)(2) provides for a period of federal enforcement of a state program. In order to implement section 1319(a)(2), the Administrator first must make a finding of widespread violations which appear to result from the state's failure to enforce effectively and then give notice to the state. If the failure persists beyond the thirtieth day, the Administrator is to give public notice of such finding and assume enforcement responsibility within the state until the state satisfies the Administrator that it will resume effective enforcement. This authority has never been exercised in Region V.

The Illinois Program

Illinois, which has been in the forefront of water pollution control among the states, established a state water quality program in 1929 and a wastewater treatment permit system in the 1930's.²⁷ The state also has adopted an advanced set of effluent standards and water

25. 33 U.S.C. § 1342(c)(3) (Supp. II 1972). An Ohio citizens' group recently has sued the U.S. EPA for withdrawal of Ohio's NPDES program. *See Rivers Unlimited v. Costle*, No. 78-48 (S.D. Ohio, filed January 30, 1978).

26. Clean Water Act of 1977, Pub. L. No. 95-217, § 67(i), 91 Stat. 1566 (1977).

27. ILL. REV. STAT. ch. 19, § 129 (1929).

quality (instream) standards.²⁸ The passage of the Illinois Environmental Protection Act²⁹ and the addition of an environmental article to the state constitution³⁰ greatly enhanced the emphasis on environmental issues within the state. Strangely enough, despite its avant garde posture in pollution control, Illinois was the last of the six states in Region V to apply for and to acquire NPDES authority.³¹

The program created under the 1972 federal legislation was not necessarily viewed as a positive force in states such as Illinois which already had sophisticated water pollution control programs.³² Prior to 1972, the Illinois Pollution Control Board had adopted a comprehensive system of water pollution control regulations.³³ Almost uniformly, Illinois law and regulations required the discharger to comply much sooner and with more stringent limitations than required under federal law.³⁴ Under the Illinois Act, the Illinois EPA

28. ILLINOIS POLLUTION CONTROL BOARD RULES AND REGULATIONS, CHAPTER 3; WATER POLLUTION CONTROL, Parts II & IV [hereinafter cited as CHAPTER 3].

29. ILL. REV. STAT. ch. 111½, §§ 1001-1051 (1975).

30. ILL. CONST. art. XI.

31. The U.S. EPA is divided into ten regions, each of which is responsible for specified states. The Regional Administrator or his delegatee is the principal federal officer responsible for transferring NPDES authority to a qualified state or for running the program in states which have not received authorization. Illinois, Indiana, Ohio, Wisconsin, Michigan, and Minnesota comprise Region V.

32. For instance, construction grant funding of municipal sewage treatment plants were greatly impaired by the federal program. See 33 U.S.C. § 1282 (Supp. II 1972). Illinois adopted a bonding program to provide the capital needed to build sewage treatment plants for municipalities at a rate much quicker than that available under the federal construction grant funding program. It had been planned that those municipalities which would not receive immediate funding through either the federal or state construction grant fund programs could utilize the bond funds to build their needed sewage treatment plants and then wait until their federal construction grant materialized. This program never was implemented, however, because of the change in the federal construction grant program which disqualified any program started prior to the actual award of a construction grant. This, coupled with the presidential impoundment of construction grant funds, had the predictable result of inhibiting early compliance with the state requirements for municipalities. When combined with a construction-related inflation rate approaching 12%, this situation reduced the number of projects that could be funded with a given amount of construction grant money. Many municipalities, by waiting for their 75% federal construction grant, are approaching the point where they will have incurred more expenses than they would have if they had elected to build the project on their own and forego the 75% federal grant.

33. The effluent standards imposed concentration limitations on discharged pollutants to ensure that water quality standards would be met in the receiving stream. In general, industries had until December 31, 1973 to comply with the standards, while municipalities had schedules that varied upon the identity of receiving water. CHAPTER 3, Part IV. The 1972 federal Act established July 1, 1977 as the date of compliance with the more restrictive of the federally established nationwide effluent limitations for industries and municipalities or more stringent state requirements. 33 U.S.C. § 1311(b) (Supp. II 1972).

34. For example, the Illinois limitations on discharges from sewage treatment plants are as much as six times as stringent as the federal standards.

was to administer the state discharge permit program.³⁵ Rulemaking, variance and enforcement authority was vested in the IPCB.³⁶

A number of problems were presented by the Illinois water pollution control scheme even before the state formally applied for NPDES authority. The Illinois permit program, prior to the delegation of the NPDES program, required that a discharger obtain an operating permit before it could discharge contaminants into state waters.³⁷ Superimposed over this state operating permit requirement was the federal NPDES permit requirement of the 1972 Act.³⁸ As a first step toward preparing Illinois to assume NPDES authority, the Illinois General Assembly in 1973 directed the IPCB to eliminate the state's permit program in order to avoid redundancies within the system.³⁹

In furtherance of the legislation providing the IPCB with authority to adopt NPDES regulation, the Illinois EPA proposed revisions to the IPCB Rules and Regulations⁴⁰ on October 1, 1973.⁴¹ Public notice was given on the proposed regulations, and four days of hearings were held on the proposal. On January 16, 1974, however, the Director of the Illinois EPA requested that the IPCB "temporarily defer action on the NPDES regulations" pending a review of the matters by the state pollution agency.⁴² This review was conducted, and

35. See ILL. REV. STAT. ch. 111½, § 1004(g) (1975).

36. *Id.* § 1005.

37. *Id.* § 1039(a); See also CHAPTER 3, Rule 902.

38. 33 U.S.C. § 1342 (Supp. II 1972).

39. This directive served to guide the IPCB through its process of enacting the NPDES regulations. In order for Illinois to administer the NPDES permit program, it was first necessary to amend the Illinois Environmental Protection Act. House Bill 1585, introduced in 1973, contained the proposed legislative authority for the Illinois NPDES. This bill was signed into law on September 14, 1973. Section 13(b) of the amended Act directs the IPCB to adopt:

[r]equirements, standards, and procedures which, together with other regulations adopted pursuant to this Section 13, are necessary or appropriate to enable the State of Illinois to implement and participate in the National Pollutant Discharge Elimination System (NPDES) pursuant to and under the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500). All regulations adopted by the Board governing the NPDES program shall be consistent with the applicable provisions of such federal Act and regulations pursuant thereto, and otherwise shall be consistent with all other provisions of this Act. . . .

ILL. REV. STAT. ch. 111½, § 1013(b) (1975). Thus the IPCB was provided a broad mandate to revise the existing scheme of water pollution control to ensure that Illinois could be granted authority to administer the NPDES program by the U.S. EPA.

40. See CHAPTER 3 and ILLINOIS POLLUTION CONTROL BOARD RULES AND REGULATIONS, CHAPTER 1: PROCEDURAL RULES [hereinafter cited as CHAPTER 1].

41. See note 39 and accompanying text *supra*. The proposed regulations designed to develop a state NPDES program were consolidated with a proposal from USEPA and were designated R 73-11 and R 73-12 by the IPCB.

42. See letter from IPCB Chairman Dumelle to Illinois EPA Director Briceland.

a substantially revised proposal was submitted.⁴³ Following publication of the amended proposal, a hearing was scheduled for March 13, 1974 to recommence the regulatory process of adopting NPDES regulations.

At the beginning of the hearing held on March 13, 1974, a Motion to Suspend Proceedings was filed by the Illinois EPA. One supporting argument for this suspension was a January 30, 1974 comment from the federal EPA that the Illinois EPA proposal was "exceedingly cumbersome." This motion was denied by the IPCB on March 14, 1974. The Board cited its directive from the general assembly to adopt the regulations necessary to allow Illinois to participate in the NPDES program:

We regard it as our duty to adopt regulations which will assist in implementing NPDES for Illinois, coordinate the appropriate regulations, and thereby avoid a dual permit system in this State. A suspension of these proceedings would thwart this purpose of the Governor and the Legislature.⁴⁴

The IPCB prepared a substantial revision of the Illinois EPA's proposal based upon the public comments and testimony it had received. A unique IPCB proceeding was conducted when the Board held a "give and take" session on the record to invite the federal EPA to express its views on the Board's proposal.

During 1973, a major problem had surfaced in the federal operation of the NPDES program in Illinois, creating a great deal of pressure from the federal EPA and from dischargers for Illinois to assume authority of the NPDES program. As previously discussed under federal administration of the NPDES, the Illinois EPA had responsibility for certifying that the discharges for which NPDES permits were sought complied with all applicable state requirements. Because of the previously discussed slowdown in Illinois compliance, many dischargers were in violation of the state effluent limitations. Therefore, the Illinois EPA refused to certify NPDES permits unless the discharger had obtained a variance from the IPCB, or was in fact in compliance. As a result, few federal NPDES permits were issued. This, in all probability, was one of the major reasons prompting the Illinois EPA to propose NPDES regulations.

After considerable pressure by the federal EPA, and possibly because of the presence of a new director of the Illinois EPA, a com-

43. The revised proposal was submitted on January 30, 1974.

44. See PCB 73-115 (March 14, 1974). In addition, it must be understood that while the Illinois EPA was drafting and certifying NPDES permits for issuance by the federal EPA, the IPCB was without any role with respect to the NPDES program.

promise was reached: the Illinois EPA was to certify that the *final limitations* contained in the proposed permit complied with the applicable state requirements. This slight change in certification format allowed the federal EPA to begin issuing the vast majority of NPDES permits in Illinois. Concurrent with the resolution of this certification question was an agreement that the Illinois EPA would draft NPDES permits for issuance by the federal EPA. These two developments, plus the resource-intensive nature of the NPDES program, quieted the immediate pressure for Illinois EPA to obtain the NPDES permit program and probably led to the January 16th, 1974 request to defer action and the March 13, 1974 motion to dismiss by the Illinois EPA.

Adoption of the NPDES regulations by the IPCB⁴⁵ was accompanied by a substantial review of the basic Illinois structure

45. The NPDES regulations were adopted on August 29 and September 5, 1974. Two appeals were taken from the IPCB adoption of the NPDES Regulations with somewhat conflicting results. In *Peabody Coal Co. v. Pollution Control Board*, 36 Ill. App. 3d 5, 344 N.E.2d 279 (5th Dist. 1976), the court held that Rule 910(a)(6) (of Chapter 3) was invalid and void as unauthorized delegation of the IPCB's rulemaking authority. The opposite result was reached in *U.S. Steel Corp. v. Pollution Control Board*, 52 Ill. App. 3d 1, 367 N.E.2d 327 (2d Dist. 1977), in which the court upheld the grant of authority to the IEPA to determine what permit conditions were necessary to insure compliance with federal and state regulations. The court found that this did not constitute an impermissible redelegation of authority from the IPCB to the IEPA. The *U.S. Steel* court also found that: (1) the IPCB's regulations are not limited to the minimum necessary to comply with federal standards, (2) the NPDES regulations are to be reviewed under the arbitrary and capricious standard, (3) NPDES permits may be effective upon issuance, rather than after permit appeal review, and (4) NPDES permits are strict authorizations to discharge only those pollutants included in the permit and are not general authorizations to discharge with restrictions only on those pollutants specified in the permit. *Id.*

The *Peabody Coal* court also found that compliance with Rule 410(b) would not be technically feasible and economically reasonable for a substantial number of Illinois dischargers. 36 Ill. App. 3d at 13, 344 N.E.2d at 285. The *U.S. Steel* court applied Rule 410(b), declining to apply that alternative test. See also *Shell Oil Co. v. Pollution Control Board*, 37 Ill. App. 3d 264, 274-76, 346 N.E.2d 212, 221-22 (5th Dist. 1976) and *Illinois Coal Operators Ass'n v. Pollution Control Board*, 59 Ill. 2d 305, 310, 319 N.E.2d 782, 785 (1974), both of which upheld the arbitrary and capricious test.

Another issue requiring resolution before Illinois NPDES regulations were finalized was the applicability of the permit requirement to animal feedlots. Animal feedlots and other livestock operations are point sources under federal law and therefore must obtain NPDES permits. 40 C.F.R. § 124.11(g)(1) (1977) and 40 C.F.R. § 124.82 (1977). Illinois was required to adopt regulations requiring such permits before it could be authorized to administer the NPDES program. Prior to passage of the 1972 federal Act, Illinois had attempted to control livestock wastes. The first regulations were published on June 23, 1972, as proposed Animal Waste Regulations. See ILLINOIS POLLUTION CONTROL BOARD, In the Matter of CHAPTER 5; AGRICULTURE—RELATED POLLUTION, SECTION 1; LIVESTOCK WASTE REGULATIONS, R 79-9 (November 14, 1974). Six public hearings were held, and widespread, active opposition was encountered. Coupled with the absence of federal guidelines, this reaction led the Illinois EPA to request that the proposals be tabled in order to permit redrafting. The request was granted and the Agricultural Advisory Committee was convened by the Illinois Institute for Environmental

for water pollution control. The IPCB determined that continuation of the existing structure, including the distinct separation of functions between it and the Illinois EPA, would best serve the interests of Illinois. The basic regulatory structure was retained to the maximum extent upon rejection of the early Illinois EPA proposal which limited IPCB permit appeals to a review of the record. The Illinois EPA had argued that if *de novo* review were to be afforded at the IPCB level the state agency's resources would only allow it to conduct informal hearings. Nonetheless, the IPCB retained the *de novo* review provided by sections 32 and 33(a) of the Illinois Environmental Protection Act.⁴⁶

Another major conflict between the existing state regulatory structure and the federal scheme, arising from the requirement for schedule of compliance provisions in NPDES permits, also was resolved by the IPCB.⁴⁷ Early Illinois EPA proposals included no limitations on this authority, which blurred the distinction between the variance authority of the IPCB and permit issuing authority of the Illinois EPA. The availability of such extended compliance schedules also ignored the existing compliance dates for both industrial and municipal discharges. The prior Illinois process would have required the discharger to obtain a variance before a permit could be obtained. The final NPDES regulations represented a compromise wherein the Illinois EPA could issue a permit containing a compliance schedule requiring compliance at the earliest feasible date but not later than July 1, 1977, as specified by federal law.⁴⁸ Extensions of this original

Quality. After consideration, a revised proposal was submitted to the IPCB on November 6, 1973.

The final regulations were adopted on September 5, 1974, as CHAPTER 5: AGRICULTURE-RELATED POLLUTION, SECTION 1: LIVESTOCK WASTE REGULATIONS, and should serve to control water pollution from agricultural wastes associated with animal feeding operations. These regulations track the federal requirements but contain one interesting maverick. Prior to requiring a permit for small operations (less than 100 cows for example), an enforcement action must be commenced before the IPCB, proving that the discharger is a "significant polluter." *Id.*, Rule 203. Equally significant is that the adoption of these regulations cleared the last obstacle to qualifying Illinois for assumption of NPDES authority.

46. ILL. REV. STAT. ch. 111½, §§ 1032, 1033(a) (1975). This review was in furtherance of the directive contained in HB 1585, legislation enacted in 1973 to give Illinois agencies the necessary authority to administer the state's NPDES program. See note 39 and accompanying text *supra*.

47. Section 39(b) of the Illinois Environmental Protection Act states, in part:

The Agency, subject to any conditions which may be prescribed by Board regulations, may issue NPDES permits to allow discharges beyond deadlines established by this Act or by regulations of the Board without the requirement of a variance, subject to the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) and regulations pursuant thereto.

ILL. REV. STAT. ch. 111½, § 1039(b) (1975).

48. CHAPTER 3, Rule 910(h)(6).

compliance schedule beyond 90 days would require a variance from the IPCB.⁴⁹

In addition, certain problems inherent in the federal-state relationship arose to interfere with the smooth transfer of NPDES authority to Illinois. For example, the question of the federal-state relationship after the state had assumed authority had been of concern to Illinois long before its formal application was filed. Of particular concern was the federal power to veto state-proposed NPDES permits discussed above. The resolution of this problem was accomplished through the Memorandum of Agreement (MOA).⁵⁰ To address Illinois' concerns, language was inserted in the MOA to the effect that Illinois permits would not be vetoed on the basis of a federal EPA construction of state laws or regulations which differed from a state interpretation as contained in:

- (1) A formal order of the Illinois Pollution Control Board pursuant to a regulatory, enforcement, variance or permit appeal proceeding;
- (2) A formal order by any State court; or
- (3) Administrative determinations by the Agency made under authority contained in the Illinois Environmental Protection Act or Illinois Pollution Control Board Regulations.⁵¹

This concession to the state was qualified by a specific retention of authority to object to permits on the basis of federal law or regulation "or any provisions of a federally approved 208 plan or federally approved or promulgated water quality standard."⁵² The state felt that a limitation on federal veto authority would avoid a situation in which the Illinois EPA would be caught between contradictory requirements imposed by the federal EPA and by the IPCB or a state court. In reality, however, most situations in which this conflict would arise probably are encompassed within the stated exceptions to the exclusion, water quality standards or 208 plans.⁵³

Once Illinois submitted its formal application to administer the NPDES program,⁵⁴ other types of problems became apparent. For

49. *Id.*, Rule 913.

50. See note 18 *supra*.

51. Memorandum of Agreement, Part III, at 7.

52. *Id.* at 8.

53. Areawide plans for pollution control are developed pursuant to the Federal Water Pollution Control Act and are enforceable through NPDES permits. 33 U.S.C. § 1288 (Supp. II 1972). The federal Act also provides that no NPDES permit shall be issued which conflicts with an areawide plan approved pursuant to the Act. *Id.* § 1288(e).

54. Illinois' formal application to administer the NPDES program was received on July 22, 1977, setting in motion a comprehensive review by the U.S. EPA of the state's proposed pro-

example, an obstacle arose at the public hearing on Illinois' application for NPDES authority concerning the Illinois EPA's use of the federal government's national penalty policy in state enforcement proceedings. This policy is intended for use in air and water pollution enforcement actions nationwide, whether the action is in a state or federal forum.⁵⁵ Its goal is to penalize the noncomplying polluter by extracting as penalties at least the equivalent of the economic savings recognized by noncompliance.⁵⁶ Other factors, such as harm to the environment, purposefulness of noncompliance or dischargers' ability to pay may be considered to adjust this equivalent figure. A company that has not put into operation the requisite pollution control equipment by the required date has had available for other uses the funds it should have expended to meet its legal obligations, and may have gained an economic advantage over competitors that did comply. The national penalty policy seeks to deprive the noncomplying polluter of the economic advantage so achieved.

The questions relating to national penalty policy which were raised at the Illinois NPDES hearing by one group may be summarized as follows:

- (1) Whether Illinois has sufficient legal authority to utilize the U.S. EPA national penalty policy?
- (2) Whether the requirement that Illinois apply the federal EPA national penalty policy should be specifically included in the Memorandum of Agreement?

gram. Similar reviews had been conducted at various times in the past. The federal government was obligated to insure that the state had all requisite authority to administer the NPDES program at the time of formal application, in fulfillment of the U.S. EPA's own statutory obligation. 33 U.S.C. § 1342(b) (Supp. II 1972).

Once the review of the application had been completed, the federal EPA issued a public notice of the application and of a public hearing scheduled to consider the application. The public hearing was held September 7, 1977. In contrast to the public hearings which had preceded the NPDES turnover to the other five states in Region V, public participation in Illinois was low and not particularly vocal. In fact, only three formal statements were presented at the hearing in addition to the Agency's official statement. Fewer than a dozen written comments were received. All comments delivered at the hearing, or in writing, were evaluated and answered by the Agency. One can only speculate as to why a citizenry which has been historically active in environmental matters greeted the NPDES turnover to Illinois with such complacency. One possible explanation is that the public had full opportunity to participate in the rulemaking proceedings before the Illinois Pollution Control Board and had therefore expressed its views at the formative stages of the Illinois NPDES program.

55. See *Civil Penalty Policy*, dated April 11, 1978 (available in the Chicago regional office of U.S. EPA).

56. See comparable provisions in § 125(g); the Clean Air Act Amendments, Pub. L. No. 95-95, 91 Stat. 685 (1977) (to be codified in 42 U.S.C. § 7401).

The answer to the first question depends at least in part on an interpretation of the Illinois Environmental Protection Act, which supplies the standard for all orders and determinations of the Illinois Pollution Control Board, including the assessment of civil penalties.⁵⁷

In informal communications, both the Illinois EPA and members of the Attorney General's staff indicated that the federal agency's penalty policy would not be inconsistent with their interpretation of the state statute. Furthermore, the state asserted its intent to seek penalties in line with the national penalty policy. Although the Illinois Environmental Protection Act does not specifically authorize imposition of penalties based on economic savings, the state indicated it would have no problem adopting the policy.

One interested group, Business & Professional People for the Public Interest, sought to have reference to the economic savings penalty policy inserted into the Memorandum of Agreement. Although committed to the policy, both federal and state agencies were reluctant to rephrase a previously executed document, a step which neither agency felt was necessary as a matter of law or policy. The controversy was eventually resolved by the federal EPA Administrator's letter to the Governor of Illinois effecting the formal program transfer. In the letter, the Administrator explained that the state would henceforth have primary enforcement responsibility. The Administrator's letter continued:

If the U.S. EPA determines that [state] enforcement action is not timely or appropriate, we retain the power to proceed as would be the case without such an agreement. Our interpretation of "timely and appropriate" includes the current EPA economic penalty policy or future Agency policy on enforcement matters. . . .⁵⁸

57. ILL. REV. STAT. ch. 111½, § 1033(c) (1975). The statute directs the Board to consider "all the facts and circumstances bearing on the reasonableness of the . . . discharges," and sets forth certain nonexclusive criteria. None of the specific criteria bear directly on the question of economic savings from noncompliance. Nothing in the statute, however, would appear to preclude using economic savings as the basis for civil penalty assessments.

58. Letter of October 23, 1977 from Douglas M. Costle (Barbara Blum, Acting) to Illinois Governor James R. Thompson (available in the Chicago regional office of U.S. EPA). It is still too early to evaluate the Illinois enforcement program. Prior to the program transfer, U.S. EPA had initiated enforcement actions against the most egregious water pollution violators in the state. It will take some time before the state's commitments are put to the test. Since Illinois was the first state to acquire NPDES authority after the penalty policy was developed, it is possible that future federal/state NPDES Memoranda of Agreement, including revisions thereof, specifically will refer to the national penalty policy.

Another public interest group, Citizens for a Better Environment (CBE), raised a challenge to the NPDES transfer on the question of public participation. CBE had made a similar challenge in Wisconsin several years after that state received NPDES authority. CBE had formally requested the Administrator to withdraw the NPDES program until such time as Wisconsin law specifically provided a citizen right of intervention in enforcement actions brought in state courts. The 1972 Federal Water Pollution Control Act permits any citizen to intervene as a matter of right in enforcement actions brought *in a court of the United States*.⁵⁹ On the basis of the exclusive statutory language, the federal EPA took the position that it had no authority to require Wisconsin to provide for citizen right of intervention in state court actions. Consequently, CBE sought judicial review of the federal refusal to withdraw the Wisconsin program.⁶⁰

CBE sought informally and through written comment to have the Illinois NPDES application rejected in the absence of a provision similar to the one sought in the litigation concerning the Wisconsin program. CBE recognized that the Illinois Constitution and other Illinois laws and regulations allow for citizen initiation of or intervention in pollution enforcement matters. The group, however, was apparently concerned that in the absence of a specific federal requirement the state legislature or administrative agencies could revoke these rights.⁶¹ The federal Environmental Protection Agency, consistent with its position in the Wisconsin case, adhered to its interpretation of the Act and approved the Illinois program without a federally mandated guarantee of citizen intervention in state proceedings.

On October 23, 1977, the Deputy Administrator of the federal EPA formally approved Illinois' request for NPDES authority by letter to the Governor.⁶² The approval was conditioned upon Illinois' ad-

59. 33 U.S.C. § 1365(b)(1)(B) (Supp. II 1972).

60. See *Citizens for a Better Environment v. United States Environmental Protection Agency*, No. 77-1791 (7th Cir. 1978) (Petition dismissed May 15, 1978, unpublished order). Review was sought pursuant to 33 U.S.C. § 1369(b)(1)(D) (Supp. II 1972), by filing in the court of appeals.

61. Bill Forcade, staff attorney for CBE, in a September 13, 1977 letter to U.S. EPA Regional Administrator George Alexander, even went so far as to suggest that these rights would be revoked in Illinois as a result of pressure from "monied industrial interests" (letter is available in the Chicago regional office of the U.S. EPA).

62. On January 17, 1978, CBE filed a Petition for Review in the Seventh Circuit Court of Appeals pursuant to 33 U.S.C. § 1369 (b)(1)(D) (Supp. II 1972), objecting to the U.S. EPA's grant of NPDES authority to Illinois for the reasons previously noted. See *Citizens for a Better Environment v. United States Environmental Protection Agency*, No. 78-1042 (7th Cir. 1978).

ministration of the program in compliance with federal law and regulation and with the national penalty policy. As of October 23, 1977, the federal EPA transferred all pending permit applications to the Illinois EPA and suspended federal permit issuances in the state.⁶³ The federal agency did retain jurisdiction, however, of all ongoing adjudicatory hearings and certain other permit proceedings as well as pending administrative and judicial enforcement actions.⁶⁴ Otherwise, Illinois acquired full responsibility for all NPDES activities within the state, with the exception of federal facilities.⁶⁵

IMPLICATIONS FOR ILLINOIS PRACTICE

There are a number of implications for practitioners representing permittees or potential permittees in Illinois resulting from the state's assumption of authority for the NPDES permit program. The most obvious implication is that the permittee and his counsel will be dealing, in the first instance, with the Illinois EPA rather than the federal EPA. This does not, in fact, represent a drastic change for many Illinois permittees which have in the past dealt with the state agency for state permits. Furthermore, the Illinois EPA staff was instrumental in drafting many of the NPDES permits issued by the federal EPA prior to the transfer of permit authority.

63. The transfer was authorized by 33 U.S.C. § 1342(c) (Supp. II 1972).

64. On September 7, 1977, the Enforcement Division of the U.S. EPA sent the Illinois EPA a list of actions which would be retained for federal action. Enforcement cases and permit challenges constituted the majority of these actions. The list was updated on October 25, 1977, immediately following the NPDES transfer to Illinois.

65. As with all MOA's for states which acquired NPDES authority prior to the 1977 Amendments, the Illinois MOA exempts from state permit issuance and enforcement authority all activities relative to federal facilities (e.g., military bases and national laboratories). Section 313 of the Clean Water Act, prior to the 1977 amendments, provided that all federal departments, agencies, or instrumentalities which have jurisdiction over pollutant discharges "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." 33 U.S.C. § 1323 (Supp. II 1972). The Supreme Court has held that federal facilities are subject to the substantive but not to the procedural requirements of state law. *See Environmental Protection Agency v. California ex. rel. State Water Resources Control Board*, 426 U.S. 200 (1976). The U.S. EPA interpreted Section 313 as preserving authority for issuance and enforcement of NPDES permits in the federal Agency while requiring that such permits embody all substantive requirements of state law. Although the Supreme Court apparently ratified the U.S. EPA interpretation, there was always a tension between federal and state authorities over the regulation of federal facilities.

The 1977 amendments attempt to clarify this ambiguous situation. Early reactions to the new amendments, however, reflect the creation of new ambiguities. For example, section 61(a) of the 1977 amendments purports to make federal facilities subject to state substantive and procedural requirements. It was unclear whether states with NPDES authority could immediately commence issuance and enforcement of federal facilities permits, or whether a further delegation was required (particularly since the MOA's specifically exempt federal facilities from state jurisdiction). The current U.S. EPA interpretation is that specific delegation from the federal to

After five months of NPDES authority, the Illinois EPA had issued public notice of one permit application and had not issued a single permit. This was due, in part, to the initial time lag caused by the physical transfer of the applications and the hiring and training of necessary staff. At the end of eight months the track record has improved only slightly. A procedural problem relating to public notice also had developed. When the IPCB adopted the NPDES regulations, it was required to include the existing federal public notice requirements for permit actions.⁶⁶ These requirements later were substantially revised by the federal EPA to save expense and to reduce delay. On September 30, 1977, the Illinois EPA requested that the IPCB amend the NPDES rules⁶⁷ to conform the Illinois NPDES permit public notice requirements to the less onerous federal public notice requirements. On December 20, 1977, the IPCB enacted a change which permitted public notice to be given by posting or mailing the notice, rather than by publishing the notice in a newspaper.

The IPCB's revision to the public notice provisions was snarled by a process designed to impose legislative control over state administrative agencies which were thought to be creating overly burdensome procedures.⁶⁸ On March 30, 1978, the IPCB finalized the revisions and filed them with the Secretary of State. The Illinois EPA could then begin to issue public notices on the several hundred permit actions currently pending.

Once the Illinois EPA has begun to issue an NPDES permit, the discharger can appeal that issuance to the IPCB by filing a permit appeal.⁶⁹ As noted earlier,⁷⁰ the appeal will set in motion *de novo* review before the Board. This procedure differs substantially from the review available to permittees under the federal system. Previously, Illinois dischargers who received NPDES permits from the federal agency were accustomed to seeking review through an adjudicatory

state authorities is required and may be accomplished by amendment to the existing MOA's.

66. See CHAPTER 3, Rule 906.

67. The IPCB had retained jurisdiction.

68. The regulation revision was to have been effective when filed with the Secretary of State. A 1977 amendment to the Illinois Administrative Procedures Act, however, requires that after January 1, 1978, all regulatory rules must be filed with the Secretary of State, who will refer the proposed rules to the Joint Committee on Administrative Rules and then publish the proposal in the Illinois Register. After a forty-five day comment period, if the committee has approved the rules, the administrative agency may finalize the rule. The rule modification was published in the Illinois Register on February 3, 1978. On February 21, 1978, the Committee decided that it had no objection to the proposed rule.

69. A permit appeal is filed in accordance with CHAPTER 3, Rule 911 and CHAPTER 1, Rule 502(b).

70. See note 46 and accompanying text *supra*.

hearing within the permit-issuing agency.⁷¹ The bifurcation between issuing and reviewing authorities presented by the Illinois system may present new problems, although there certainly will also be advantages.⁷²

Quite unexpectedly, soon after it received NPDES authority, the Illinois EPA expressed a very restrictive view of its authority to modify NPDES permits. The Illinois EPA took the position that only the IPCB could modify NPDES permits for cause. Under federal administration of NPDES, permits were routinely modified by the federal EPA where grounds for modification existed. It was expected that the state EPA would modify permits as well. Although the Illinois EPA's narrow interpretation of its permit modification jurisdiction is technically correct, it applies only to a limited number of permit modifications.⁷³

If a discharger cannot comply with an Illinois water pollution requirement, it may be possible to obtain relief by filing a variance petition with the IPCB.⁷⁴ The statutory test for routine state variances is the existence of an arbitrary or unreasonable hardship.⁷⁵ Under the federal system, variances are not available to allow a discharger time to comply. Instead, this is accomplished solely by a schedule of compliance which may in no case exceed a statutory deadline.⁷⁶

The first interpretation of the interrelationship of variances granted by the IPCB and subsequent NPDES permit modifications by the Illinois EPA pursuant to Rule 914 of CHAPTER 3 is found in *City of Monticello v. Illinois Environmental Protection Agency*.⁷⁷ In granting a variance, the IPCB distinguished Rule 912 from 914 and ordered the Illinois discharger to apply for a modification based upon the variance within 30 days of the IPCB's decision. It also ordered the Illinois EPA to issue a modified NPDES permit consistent with

71. See generally 40 C.F.R. § 125.36.

72. One problem may arise from the fact that the IPCB will not be as familiar with the circumstances surrounding a particular permit as the Illinois EPA, and will therefore require a complete education. On the other hand, it may be advantageous to review the permit before a body which presumably is free of institutional bias.

73. Rule 912 (of CHAPTER 3) was written to encompass 40 C.F.R. § 124.45(b) which is an enforcement-type action. See Opinion of the IPCB In the Matter of NPDES Regulations, R 73-11 & 12 (December 5, 1974).

74. See ILL. REV. STAT. ch. 111½, § 1037 (1975); CHAPTER 1, Rule 401.

75. ILL. REV. STAT. ch. 111½, § 1035 (1975).

76. Variances in the federal system are generally of a permanent nature and are used only to obtain relief from federal effluent guidelines for a particular industry on the basis of "fundamentally different factors." See, e.g., 40 C.F.R. § 423.12(a) (1977).

77. PCB 77-305 (February 16, 1978).

the IPCB's order. In adopting this interpretation, the IPCB established that in all subsequently filed variances, the petitioner seeking a variance must plead and prove that the relief sought complies with all federal requirements. In addition, there must be a showing of arbitrary or unreasonable hardship. The IPCB also required the Illinois EPA to respond to these allegations with respect to future variance petitions by verifying that the variance request is consistent with federal requirements.⁷⁸

Several questions remain unanswered at the present time. One is whether the Illinois EPA will modify NPDES permits to reflect IPCB variances without additional public notice, in light of prior public notice of the variance request and the issuance of the variance at a public meeting of the IPCB. Given the revised public notice procedures and the right of citizens to intervene or comment on variance proceedings, little would appear to be gained by the additional public notice requirement. Significant changes, however, could require notice to other affected states and federal agencies pursuant to the Rules.⁷⁹

Another question is whether the Illinois EPA can modify a NPDES permit upon application by the discharger where no variance has been sought nor is needed. Such a modification typically could be sought for changes in conditions that do not cause a violation of applicable Illinois requirements but are not authorized by the existing NPDES permit (e.g., a monitoring requirement). Thus far, the Illinois EPA has hidden behind Rule 912 stating that only the IPCB can modify permits. It appears that the Illinois EPA again has confused its permit-issuing function with the IPCB's enforcement responsibility. In order to avoid the totally unworkable result of this position, the Illinois EPA developed a procedural anomaly wherein the applicant for a modification would be required to sign a voluntary termination agreement of its existing NPDES permit. Presumably, with this in hand the Illinois EPA then would issue the modified NPDES permit as a new permit. The discharger would have agreed only to seek an appeal of that portion of its NPDES permit it sought to have modified in those cases where the Illinois EPA did not issue the proposed modification.

78. *Id.* at 2. The Illinois EPA also was required to include "such interim effluent limitations as may reasonably be achieved through the application of best practicable operation and maintenance practices in the existing facilities." *Id.* The IPCB recognized the limitation imposed by the U.S. Congress upon its variance authority by stating that "the Board is authorized to grant variances from NPDES permit provisions only when the relief is in compliance with applicable provisions of the Federal Water Pollution Control Act." *Id.*

79. CHAPTER 3, Rule 908.

This elaborate procedure is not necessary. The IPCB and the legislature clearly intended the Illinois EPA to be free to process modification requests where changes in circumstances warranted a change in NPDES permits.⁸⁰ Care must be given, however, to separate changes that would trigger the new source provisions of the Clean Water Act.

The Illinois procedure is in clear contrast with the federal procedures. Applications for permit modifications are processed by the federal Environmental Protection Agency in an abbreviated manner, similar to the process used in applications for new permits, without a requirement for total assurance. If the modifications are determined to be justified, and if they constitute a major change, they are subject to public notice. If the modifications are minor changes, no public notice is issued. The adjudicatory hearing provisions also apply to permit modifications, except that a modification appeal does not stay the effectiveness of the contested permit provisions unless the federal EPA, in its discretion, stays the provision. This permit modification procedure presently is being included in a proposed revision of the federal NPDES regulations. In dicta accompanying the promulgation of the Illinois public notice requirements, the IPCB stated that the revisions were necessary to allow the agency to process more expeditiously the pending permit modification requests.⁸¹

Another significant change facing Illinois practitioners is the abandonment of the previously voluntary compliance program of the Illinois EPA. The Illinois EPA has been reorganized to administer the NPDES permit program.⁸² Regional authority is being consolidated in a NPDES unit under the Springfield Central Office. This group will issue all NPDES permits and will review all discharger self-monitoring reports and notices of noncompliance submitted by the permittees. If there is evidence of a violation that is not severe, the NPDES Unit may issue a compliance inquiry letter (CIL).⁸³ If an unsatisfactory response is received to this letter, or if the violation is more significant, the NPDES Unit will refer the violation to Illinois' EPA's Enforcement Programs Division for appropriate action, such as the preparation and transmittal of a litigation package for prosecution by the Illinois Attorney General's Office.

80. This issue is involved in *Derby Meadows v. EPA*, PCB 77-153 (filed March 2, 1978) which has been interpreted by the Illinois EPA as endorsement for its termination/reissuance procedure of permit modification.

81. In the Matter of NPDES Revisions, R 73-11 & 12 (December 20, 1977).

82. This has been done consistent with the Memorandum of Agreement. For a discussion of the MOA, see note 18 and accompanying text *supra*.

83. On limited occasions, the Regional Office may issue a CIL where an inspection is anticipated.

The federal EPA will oversee the enforcement aspects of the Illinois EPA conduct of the NPDES program. This overview includes file audits, review of major permits and evaluation of enforcement actions. As of May, 1978, the NPDES program in Illinois had been very inactive. The public notice and modification problems, as well as the problems inherent in staff reorganization have led to a predictable major slowdown in the level of permit processing and enforcement that was previously carried out by the federal EPA.⁸⁴

CONCLUSION

Federal oversight of the Illinois NPDES program continues because of the congressional mandate that state permit programs be no less stringent than those administered by the federal government. Coupled with this goal of national uniformity is the equally important goal of state primacy. Illinois has now made its contribution to the attainment of that goal by assuming authority of its NPDES program.

84. A major unresolved problem still exists. Salary constraints imposed upon the Illinois EPA have limited both the quantity and quality of people attracted to the IEPA. Basically, the problem can be summarized as the recruitment of people with the prospect of 1974 wages. Hopefully, this unfortunate problem will soon be remedied by the Governor and the Legislature. An initial round of 14 enforcement actions were filed by the Illinois Attorney General in May 1974.