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George E. Bullwinkel

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ENVIRONMENTAL LAW—THE UNEASY ACCOMMODATION BETWEEN STATE AND FEDERAL AGENCIES

George E. Bullwinkel*

While Illinois was one of the first states to enact a comprehensive system of environmental statutes and regulations, the federal government has been progressing rapidly, and has even taken the lead in several important areas. This Article explores the rapidly changing relationship between state and federal environmental regulatory and enforcement programs, focusing on the actual and potential conflicts between state and federal agencies which have been avoided, or at least postponed, through mutual cooperation. In addition, it examines the specific procedures which are used by the respective agencies in enforcing environmental legislation.

Illinois environmental law emerged from its adolescence in July, 1970, with the passage of the Illinois Environmental Protection Act of 1970¹ (the Illinois Act). Prior to this legislation, pollution control in Illinois, if not of the common law nuisance variety, was relegated to a variety of boards and agencies having uncertain jurisdictions, confusing standards, and a motivation for the task which was questionable at best.²

The Illinois Act ambitiously launched a trio of new institutions: the Pollution Control Board (the Board), the Environmental Protection Agency (the Agency) and the Illinois Institute for Environmental Quality.³ As most industries and their lawyers are now aware, the Board sits both as a legislative, rule-making body for the consideration and adoption of regulations, and as an adjudicatory tribunal for granting variances and dealing with violations.

* Partner, Keck, Cushman, Mahin & Cate, Chicago, Illinois. The author acknowledges with appreciation the many hours of discussion and assistance generously provided by attorneys for the various environmental agencies discussed herein, including Ronald J. Ganim, David A. Ullrich, Jeff R. Diver, Delbert Haschemeyer, and Richard W. Cosby, among others.

1. ILL. REV. STAT. ch. 111 ½, §§ 1001-51 (1973).

2. See Klein, *Pollution Control in Illinois—The Formative Years*, 22 DEPAUL L. REV. 759, 759-60 (1973).

3. ILL. REV. STAT. ch. 111 ½, §§ 1004-06 (1973).

The Agency issues construction and operating permits and enforces the Act and the rules through the investigation and prosecution of violations before the Board. The third body, the Institute for Environmental Quality, furnishes technical backup to both the Board and the Agency.⁴

The Board viewed rule-making as its first priority in 1970 and promptly set forth to catalog into a single, comprehensive set of regulations the vast array of emissions which emanate from the everyday activities of Illinois citizens and industries.⁵ But at the same time that the Board was filling its docket with rule-making proceedings, it was lamenting its lack of adjudicatory matters involving enforcement actions, variances, and appeals from permit denials.⁶

One method of enforcement was soon obviated when the Board learned that it was without power to impose monetary penalties as a condition of granting a variance.⁷ Its appetite for enforcement, however, remained undiminished.⁸ When the Board ended its second full year in June, 1972, it had assessed \$422,861.96 in penalties; a figure equal to about half of its own operating budget.⁹ Since fiscal 1972, however, the Board's overall importance as an instrument of enforcement seems to have declined.¹⁰

4. For a general discussion of these three institutions see Klein, *supra* note 2, at 761-64.

5. See generally, 2 ILL. POLLUTION CONTROL BD. ANN. REP. (1971).

6. Unfortunately, the result of our policy of dismissing insufficient petitions for variance has been that the cases tend not to be refiled; may disappear, and we do not get to establish a timetable for compliance. An Agency complaint could clearly be in order in such cases. But in light of the present importance of variance cases as enforcement tools, we cannot afford to lose so many cases, so our policy recently has been to overlook pleading deficiencies wherever possible and to call to the parties' attention the additional elements that must be proved at hearing.

Id. at 12.

7. *Citizens Util. Co. v. Pollution Control Bd.*, 9 Ill.App.3d 158, 289 N.E.2d 642 (2d Dist. 1972).

8. The Board's largest attempted penalty was levied in April, 1971 against GAF Corporation, a Joliet roofing manufacturer that had missed deadlines in completing its wastewater treatment facilities. The original penalty of \$149,000 was vacated and a new fine of \$50,000 assessed in September, 1972. *GAF Corp. v. EPA*, #71-11, 5 PCB 525 (October 3, 1972).

9. 4 ILL. POLLUTION CONTROL BD. ANN. REP. 16 (1974).

10. Several cases have been sent back to the Board by the courts for redetermination of penalty, with the clear implication that punitive penalties were neither necessary nor

The pattern of adjudicatory matters before the Board reflects this trend. Enforcement cases, which can be brought by either the Agency or interested citizens,¹¹ have never matched the 1972 record level of 209 cases. Only 140 cases were tried in 1973, 132 cases in 1974, and 173 cases in 1975. More dramatically, total penalties assessed in fiscal year 1975 (ending June 30, 1975) were \$247,323.60, or only 58 percent of the fiscal 1972 bench mark.¹²

The cause of this apparent decline in enforcement activity before the Board is not entirely attributable to a contagion of compliance among polluters, nor to the reluctance of the Agency to prosecute.¹³ Under a grudging 1971 agreement between the Agency and the Illinois Attorney General, all enforcement actions must be initiated by a referral from the Agency to the attorney general, who then files the case on the Agency's behalf.¹⁴ The interposition of the attorney general between the Agency and the Board supposedly screens out the Agency's less well-prepared cases.¹⁵

In light of this agreement the Agency itself also carries out a

proper to carry out the purpose of the Act. See *Southern Ill. Asphalt Co., Inc. v. Pollution Control Bd.*, 60 Ill. 2d 204, 326 N.E.2d 406 (1975); *City of Monmouth v. Pollution Control Bd.*, 57 Ill.2d 482, 313 N.E.2d 161 (1974); *CPC Int'l, Inc. v. Pollution Control Bd.*, 24 Ill.App.3d 203, 321 N.E.2d 58 (3d Dist. 1975). The Board must take into account the considerations in ILL. REV. STAT. ch. 111 ½, § 1033(c) (1973) in making any penalty determinations. *Incinerator, Inc. v. Pollution Control Bd.*, 59 Ill. 2d 290, 319 N.E.2d 794 (1975).

11. ILL. REV. STAT. ch. 111 ½, § 1031(b) (1973) provides that any person may file a complaint meeting the same statutory requirements imposed on the Agency, and unless the Board determines that the complaint is "duplicitous or frivolous" it must schedule the hearing and conduct further proceedings in the same way as if the Agency had been the complainant.

12. 5 ILL. POLLUTION CONTROL BD. ANN. REP. (unpublished draft, 1975). Fiscal 1976, however, has started with a flurry of new enforcement activity, principally against defendants who have persistently failed to secure operating permits.

13. Prosecutorial discretion, however, does play a significant role in the Agency's enforcement procedure. See text accompanying notes 64-68 *infra*.

14. This is in contrast to appearances by the Agency as respondent in variance requests and appeals of permit denial, where the Agency still appears in its own behalf with its own staff attorneys as counsel. The merits of this arrangement with the attorney general are set forth in Immel, *Pollution Control in Illinois—The Role of the Attorney General*, 23 DEPAUL L. REV. 961, 967-72 (1974). But see Klein, *supra* note 2, at 772-74.

15. The attorney general, on the other hand, can and will take a case to the Board or the courts without so much as a by-your-leave from the Agency, usually in connection with a case of significant public interest. ILL. REV. STAT. ch. 14, § 12 (1973). See *People v. Inland Steel Co.*, Docket No. 71CH259 (Cir. Ct. Cook Cty. Sept. 8, 1975).

screening process, perhaps, in some cases, contrary to the apparently mandatory provisions of the Act. Section 31(a) of the Illinois Act provides that if its investigation discloses that a violation may exist, the Agency shall issue a written notice and formal complaint calling for a hearing before the Board.¹⁶ Read literally, the Agency would seem to have a non-discretionary duty to initiate enforcement proceedings whenever it suspects or surmises that a violation has occurred. As a practical matter, however, the Agency presently ignores the mandatory provisions of section 31(a) of the Illinois Act and tries to refer to the attorney general only cases which it believes to be thoroughly investigated and backed up with solid evidence.

AIR—STATE PROGRAMS, BUT FEDERAL LIMITS

During the same period in which Illinois was developing its system for environmental protection, Congress and the United States Environmental Protection Agency (EPA) worked to produce a wholly new legislative structure to deal with the majority of states which, unlike Illinois, needed strong federal incentives to speed the awakening of their environmental consciences. The effect of these federal requirements on both the structure and inner workings of the Illinois system has been significant.

The Clean Air Act Amendments of 1970¹⁷ set up a complicated program for attainment of nationally imposed primary and secondary air quality standards within a fixed time after the submission of approvable state implementation plans (SIP's).¹⁸ In addition, EPA was simultaneously considering and promulgating its own standards of performance for certain classes of air emission sources as required by the Clean Air Act,¹⁹ which could be delegated to the states for enforcement.²⁰

Illinois submitted its implementation plan and in due course it was approved by the Administrator on May 31, 1972.²¹ Illinois

16. ILL. REV. STAT. ch. 111 ½, § 1031(a) (1973).

17. 42 U.S.C. §§ 1857-58 (1970).

18. *Id.* § 1857c-5. See Comment, *State Implementation Plans and Air Quality Enforcement*, 4 *ECOLOGY L. Q.* 595 (1975).

19. 42 U.S.C. §§ 1857c-6 to c-7 (1970).

20. *Id.*

21. 40 C.F.R. § 52.722 (1974). Although it is now probably moot, there was at one time

then had three years, or until May 31, 1975, to achieve those standards.²² Strictly interpreted, any amendment to a state SIP has to be submitted to EPA for approval; otherwise the original provisions prevail.²³ A source, therefore, may have applied for and been granted a state variance, but still be subject to enforcement under the federally enforceable SIP. Such a result might occur if EPA did not agree with a state's action in granting the variance, or if a citizen chose to initiate such a case on his own.²⁴

What has happened in the case of the Illinois SIP has been something short of literal compliance with the Clean Air Act. A number of project completion schedules were initially submitted and published as SIP revisions,²⁵ but since that time the Board's considerable work in hearing and granting variance requests has been reported to EPA only sporadically; without the formality of a communication from the governor, as is required for an SIP amendment.²⁶ Even in instances where the Agency informally reported its variance proceedings to EPA, the Agency's letters have simply accumulated on a desk at EPA Region V headquarters. Since the Board had taken the position that no variance could extend past the federally required compliance date of May 31, 1975, EPA assumed that the issue of variances acting as SIP amendments would become moot on that date. It did not. Indeed, the matter has taken on new significance since the Supreme Court decision in *Train v. Natural Resources Defense Council*,

some question as to whether the Illinois SIP applicable to Chicago had ever been approved at all. With the passage of the attainment date of May 31, 1975, the issue has apparently not been raised. In light of *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), allowing variances which will not interfere with attainment or maintenance of the federal air quality standard, the issue may never come up.

Any appeal of the federal approval of the Illinois SIP had to be filed within 30 days after such approval. 42 U.S.C. § 1857h-5(b)(1) (1970); *Granite City Steel Co. v. EPA*, 501 F.2d 925 (7th Cir. 1974). If the issue becomes unappealable it may possibly be raised as a defense to an enforcement action. *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975).

22. Certain revisions to the Illinois SIP were submitted in 1973 in the form of compliance schedules for a number of particular emission sources, none of which had completion schedules effectively greater than the three year attainment period provided by federal law. 39 Fed. Reg. 28155 (1974).

23. 42 U.S.C. § 1857c-5(a)(3)(1970).

24. *Id.* § 1857h-2(a).

25. See note 22 *supra*.

26. 42 U.S.C. § 1857c-5(f)(1)(1970).

Inc.,²⁷ holding that states can now grant variances past their federally required attainment dates if the variances in question do not interfere with the attainment and maintenance of federal minimum standards. Revised federal regulations for the approval of such variances have been proposed but not yet promulgated.²⁸

EPA's Enforcement Procedures

Federal air enforcement procedure is simple and direct. The Clean Air Act authorizes a very powerful tool called, in EPA jargon, a "Section 114 letter."²⁹ With such a letter an EPA attorney-engineer team can require the source to test its emissions and supply up-to-date data, which may differ from the data in the file of the state agency. If the source refuses, the refusal itself becomes a ground for prosecution. Region V has sent hundreds of Section 114 letters in the last three years.

If the response to the Section 114 letter appears to show a violation of federally enforceable state regulations, a Section 113 Notice of Violation³⁰ is sent. The accused violator must then be offered a conference to discuss all relevant facts in his case.³¹ EPA takes the leading role in this procedure, although the appropriate state agencies are invited to, and usually do, attend. Region V has had such conferences in all cases except where waived pursuant to an agreed settlement and order. Most of the Region V cases resulting from Section 113 violation notices have ultimately been resolved by the issuance of an agreed compliance order which has the appearance, if not the effect, of a federal variance.

If the conference does not result in an acceptable compliance program, the EPA attorney-engineer team may either recommend that the Regional Administrator issue a formal order requiring the source to meet a given timetable of compliance, or go directly to federal court. If an order is issued by EPA and violated, litigation may also follow. A formal litigation report including all facts, law, possible defenses and the position of the

27. 421 U.S. 60 (1975).

28. 40 Fed. Reg. 21046 (1975); *id.* at 14876.

29. 42 U.S.C. § 1857c-9(a)(1970).

30. *Id.* § 1857c-8(a)(1).

31. *Id.* § 1857c-8(a)(4).

appropriate state agency is prepared and sent on a roundabout journey, starting with the EPA regional director, and then to EPA in Washington where it is reviewed and turned over to the Department of Justice. If approval is encountered at each stage, then the prosecution is initiated by the United States Attorney, usually where the violation occurred.

WATER—A FEDERAL PROGRAM FOR STATE ADMINISTRATION

Not satisfied with its previous water legislation, Congress wiped the books almost clean in 1972 by enacting the Federal Water Pollution Control Act Amendments of 1972³² (FWPCA). This legislation broke new ground by setting specific goals of waste treatment to be met by all industries by clearly defined dates. Rather than giving states an arbitrary length of time to meet the new treatment standards after approval of implementation plans, as in the Clean Air Act, the FWPCA flatly stated that effluent dischargers must achieve the "best practicable control technology currently available" by July 1, 1977, and "the best available technology economically achievable" by July 1, 1983,³³ with the latter intended to eventually result in "the national goal of eliminating the discharge of all pollutants."³⁴ To this end each state was required to submit an approvable designation of water quality standards.³⁵ EPA, for its part, was required to develop and publish national standards of performance applicable to (1) specified categories of new sources,³⁶ (2) toxic waste effluents,³⁷ and (3) facilities for pretreatment of sewage prior to discharge into publicly owned treatment works.³⁸ As for existing facilities, EPA was obliged to issue guidelines for methods of controlling pollution from existing sources.³⁹ EPA is progressing toward completion of most of its congressionally dictated tasks. Its performance

32. 33 U.S.C. §§ 1251-1376 (Supp. III, 1973), *amending* Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-65 (1970).

33. *Id.* § 1311(b).

34. *Id.* § 1251(a)(1).

35. *Id.* § 1313(a).

36. *Id.* § 1316(b).

37. *Id.* § 1317(a).

38. *Id.* § 1317(b).

39. *Id.* § 1314(b).

standards, effluent standards and guidelines stand superimposed upon existing Illinois regulations as "do-not-exceed" limitations for industrial discharges.⁴⁰

The vehicle for enforcement of the FWPCA, the National Pollution Discharge Elimination System (NPDES),⁴¹ intends to take the place of the ancient and sporadically enforced "Refuse Act."⁴² While NPDES may have filled a regulatory vacuum in many states, the space was already occupied in Illinois. In contrast to EPA's air emission standards, which could be engrafted upon existing regulations by familiar Board procedures of public notice, hearing and enactment,⁴³ NPDES required the promulgation of new substantive discharge regulations and interfered with the state permit procedure as well.

The economics of federal monetary assistance make the imposition of these federal requirements difficult to decline.⁴⁴ Whereas federal disapproval of a state plan designed to achieve air quality standards may result in the unilateral promulgation of a federal implementation plan, the state may in theory refuse to go along.⁴⁵ This leaves EPA with the job of policing its own regulations; a task which it has shown itself to be ill-equipped to handle.⁴⁶

40. In theory, the guidelines for existing sources could be exceeded in an appropriate case but given the apparent attitude of EPA, a discharge permit containing such relaxed restrictions could not be issued. In practice, dischargers capable of doing better than the guidelines are required to maintain at least the same degree of performance.

41. 33 U.S.C. §§ 1342(a)-(k) (Supp. III, 1973). See Freeborn, *Illinois Environmental Law—The New Assault on Water Pollution*, 24 DEPAUL L. REV. 481, 494-98 (1975).

42. Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1970). Enforcement under this act was suspended until December 31, 1975. *Id.* § 1342(k) (Supp. III, 1973). Now that this suspension is expired, prosecution under the Refuse Act is again possible, including *qui tam* suits by citizens claiming a share of the informer's fee.

43. ILL. REV. STAT. ch. 111 ½, §§ 1026-29 (1973).

44. Cooperation with the Clean Air Act and NPDES programs brings with it substantial federal money for the operation of state pollution control programs. In Illinois, the expected Agency budget for fiscal year 1976 will include about 50 percent federal money for the air program and nearly 25 percent for the water program, not to mention the \$1.8 billion in federal grants for water treatment plant construction.

45. See, e.g., *Maryland v. EPA*, 8 ERC 1105 (4th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975); *Arizona v. EPA*, 521 F.2d 825 (9th Cir. 1975). Cf. *Pennsylvania v. EPA*, 500 F.2d 246, 256 n.17 (3d Cir. 1974).

46. In California, for example, EPA had ordered, *inter alia*, restrictions on gasoline sales and vehicle registrations, ordered retrofit of catalyts into existing cars, and banned operation of motorcycles during daylight hours in certain months. 40 C.F.R. §§ 52.241-.245

Statutory changes reflecting NPDES requirements were enacted by the Illinois legislature in 1973, and the Board promptly enacted what it hoped would be suitable regulations. The Agency will be unable, however, to take over the granting of NPDES permits until formal approval by EPA and the filing of an appropriate letter of authority with the Illinois Secretary of State.⁴⁷

The federal engine, driving the NPDES program in Illinois, is located in EPA's Region V Chicago headquarters, which has responsibility for the states of Illinois, Wisconsin, Indiana, Michigan, Minnesota and Ohio. Region V has thus far issued approximately 11,000 NPDES permits in these states. Federal permit regulations under FWPCA provide an appeal procedure commencing with an adjudicatory hearing before an EPA law judge appointed by the Administrator⁴⁸ and thereafter proceeding to the Regional Administrator for initial decision, possible appeal to the Administrator in Washington, and then directly to the United States Court of Appeals on the record generated at the hearing.⁴⁹ Of these 11,000 permits, less than 400 appeals have been lodged with EPA, and of these only about 150 are presently active from Illinois and Indiana dischargers.

It is astonishing that only *two* of the perhaps 250 appeals that have been resolved thus far by Region V have actually resulted in a hearing before a law judge.⁵⁰ The rest have been negotiated to a conclusion which was at least sufficiently satisfactory to the discharger so that the discharger agreed to dismiss the petition for review. It is difficult to tell who relented. Many requests for adjudicatory hearing result from minor disputes as to procedural matters, arithmetic errors in conversion from one system of units to another, and conflicting reporting schedules.

More basic disputes such as the technical validity of discharge

(1974). EPA unsuccessfully argued that it could force California to comply by injunction or by holding state officials in civil contempt. *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975).

47. *State of Illinois Pollution Control Board Regulations*, ch. 3 (Water Pollution), Rule 916. When this will happen depends on the resolution of the present deadlock between the Agency and EPA on the final authority of EPA to veto a given NPDES permit. See text accompanying notes 55-57 *infra*.

48. 40 C.F.R. § 125.36 (1975).

49. 33 U.S.C. § 1369(b)(1) (Supp. III, 1973).

50. U.S. Steel Gary Works, NPDES-V-027(AH); American Can Co., NPDES-V-001(AH).

limitations and water quality standards for receiving waters are regarded by EPA, and its law judges, as beyond the scope of its hearing jurisdiction. EPA has taken the position that new source effluent standards and water quality standards must be challenged, if at all, within 90 days of promulgation.⁵¹ Whether this appeal limitation applies to the guidelines for existing sources seems questionable, but a discharger might choose to challenge these in the district courts under the provisions of the Administrative Procedure Act.⁵² A similar provision requiring immediate challenge to the validity of state regulations is contained in the Illinois Act.⁵³

The Illinois Agency takes credit for drafting the effluent limits in each of the approximately 2,500 candidates for NPDES permits in the state. The Board's effluent regulations have been consistently applied except where the applicable federal limitation or guideline is more restrictive, in which case the federal limit has been used. If the application of these minimum standards still does not result in achievement of federally approved water quality standards for the receiving body of water, the Agency plans to allocate shares of the allowable effluent load among the affected dischargers.

When present work on Illinois basin planning is finished 14 river basins in Illinois will be identified and classified according to segments. Other allocation situations may eventually be encountered. This is particularly true for certain problem pollutants including total suspended solids, total dissolved solids, phosphorus, iron and pH. The present first round of NPDES permits will not reflect such future allocation requirements, but both EPA and the Agency contemplate that when these permits come up for renewal in five years,⁵⁴ stricter standards will be applied which,

51. 33 U.S.C. § 1369(b)(1) (Supp. III, 1973).

52. 5 U.S.C. §§ 551-76 (1970). See *CPC Int'l, Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975). There is some authority to support the right to challenge such regulations at the enforcement stage. See *Reichhold Chem., Inc. v. EPA*, 8 ERC 1207 (7th Cir. 1975); *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839 (7th Cir. 1975).

53. ILL. REV. STAT. ch. 111 ½, § 1041 (1973).

54. NPDES permits can embody variances from state standards for up to five years. 33 U.S.C. § 1342(b)(1)(b) (Supp. III, 1973). Illinois law provides for a five year variance for water, ILL. REV. STAT. ch. 111 ½, § 1036(b) (1973), and has recently been amended to allow a five year variance for air, P.A. 79-1064 (Sept. 22, 1975), amending ILL. REV. STAT. ch. 111 ½, § 1036(b) (1973).

at least in theory, will allow consideration of projected population increases and eventual achievement of the 1983 FWPCA water quality standards.

Michigan, Wisconsin, Ohio, Minnesota and Indiana (all of the Region V states except Illinois) have at this writing been granted authority to issue NPDES permits. EPA has in each instance, however, retained the right to approve prior to issuance, which is in effect a veto power.⁵⁵ It is this issue that is the bone of contention between Illinois and EPA on finally turning over NPDES authority to the Agency. Illinois is unlike any other state in the Region V group in that it has a detailed and finely balanced review process which provides for an administrative hearing and making of a record before the Board, and judicial review in the appellate court, and conceivably, in the Illinois Supreme Court. One can imagine the consternation that would follow a thorough state review of a given permit on the basis of Illinois law and regulations, only to have the result nullified by the fiat of an EPA regional administrator on his own interpretation of federal requirements, whereupon the whole process would start again in the United States Court of Appeals.⁵⁶ The Agency is now pressing the Administrator to waive his veto power, as he is authorized to do.⁵⁷

EPA's Enforcement Procedures

Once an NPDES permit is issued, and no appeal is pending, there remains the problem of enforcement. Detecting violations is relatively easy because each permit contains detailed testing and reporting requirements and to that extent is virtually self-enforcing. The Illinois Agency sends regular reports on each discharger to EPA quarterly, and in some instances monthly. EPA's compliance branch analyzes these reports and if a probable violation is noted, it is referred to the EPA enforcement section for review. Once again an attorney-engineer team reviews the case. If a violation is apparent, EPA customarily checks with state authorities to determine what action is being taken or planned.

55. 33 U.S.C. § 1342(d)(2) (1973).

56. *Id.* § 1369(b)(1).

57. *Id.* § 1342(d)(3).

If, in EPA's judgment, the state response is inadequate EPA may take the case to court.⁵⁸

In water cases EPA can refer the matter directly to the United States Attorney in the judicial district involved, with no need for referral to EPA in Washington.⁵⁹ He has the right to refuse the case and EPA may proceed with its own attorneys, if it so chooses.⁶⁰ A permit violation case is relatively straightforward because the discharger either has a permit or not, and if a permit has been issued a water discharge can easily be measured against it. The validity of the permit and the reasonableness of its conditions are not capable of challenge at this point. According to EPA, they should have been challenged in an administrative proceeding at the time the permit was issued, or the underlying effluent guidelines and water quality standards should have been challenged within the appropriate time after enactment. Approximately 35 water enforcement cases have been referred by Region V to litigation in fiscal year 1975, and several more have been referred as of this writing.

Quite apart from EPA, the Illinois Agency has sought to bring several water dischargers before the Board, alleging that the Illinois Act was also violated by their failure to have, or abide by the terms of, an NPDES permit. The Board at first dismissed such cases for want of jurisdiction,⁶¹ because Illinois lacks NPDES permit-issuing authority. At this writing, however, the Board has agreed to take a second look at the question in light of section 12(f) of the Illinois Act⁶² which can be read to apply even in the absence of Illinois' NPDES authority.⁶³

THE AGENCY'S NEW BAG OF TRICKS

Enforcement of Illinois law and regulations by the Agency late last year became affected with a conscious policy of prosecutorial discretion. A suspected violation may be uncovered from citizen

58. *Id.* § 1319(b).

59. *Id.* § 1366.

60. *Id.*

61. *See, e.g.,* EPA v. Freeman United Coal Mining Co., PCB #75-22 (August 28, 1975).

62. ILL. REV. STAT. ch. 111 ½, § 1012(f) (1973).

63. EPA v. Village of Springerton, PCB #75-337 (reconsideration granted October 30, 1975).

complaints, reports from the facility itself, or the Agency's periodic inspections. Agency personnel are directed to report their findings at a monthly enforcement meeting attended by an Agency attorney and the Agency's manager for the affected region. Depending on the seriousness of the apparent violation one of the following graduated enforcement steps may be taken, each of which falls short of filing a formal complaint with the Board.

At the lowest level of response the regional manager may send a form letter to the facility noting "apparent" violations and offering the opportunity to verify, dispute or discuss the matter, including a program of correction. If the matter is the subject of a monthly enforcement meeting and the Agency attorney agrees that one or more violations can be proven, a separate Agency file is opened on the matter and, depending on the perceived attitude of the facility management and its prior history, one of three formal notices is sent.

The mildest notice is Form 3, "Notice of Compliance Conference," requesting representatives of the facility to attend a conference not less than 28 days from the date of notice to discuss the validity of the alleged violations and a compliance program. If the company appears with its attorney, Agency policy prevents discussion of the matter further unless Agency attorneys are also present. If the Notice of Compliance Conference does not suffice, Agency officials in Springfield may cause either a Form 4 "Notice of Violation," or a Form 5 "Enforcement Notice" to be issued. These are official-looking documents bearing a caption, an EPA docket number, and several paragraphs of simulated legal language commencing with "Now comes the Illinois Environmental Protection Agency. . . ." Each is signed by the manager of the enforcement section and followed by a formal proof of service form and notarization. The enforcement notice goes furthest, carrying the additional signatures of the division manager and the director, and promising that "AN ACTION WILL BE PROMPTLY FILED AGAINST YOU, SEEKING SUCH CIVIL OR CRIMINAL ORDERS AND PENALTIES AS PROVIDED BY LAW."⁶⁴

64. Woe unto the bill collector who uses such tactics. *See, e.g.*, William M. Libman, t/a Better Business Service, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,376 (FTC 1968). *See also* 16 C.F.R. § 237.1 n.7 (1968).

This compliance program has not been in operation long enough for the Agency to ascertain its effectiveness, but its initial estimates indicate that perhaps as many as 90 percent of all apparent violations are corrected promptly, without the need of formal action by the Board. The Agency justifiably takes credit for achieving compliance and EPA could hardly care less that the matter was resolved in a "station-house adjustment" type of procedure rather than having been launched into the ponderous and time-consuming hearing procedures of an overworked and often understaffed Board.⁶⁵

The Agency's use of prosecutorial discretion as part of its enforcement policy also fits into EPA's scheme for air pollution enforcement. EPA has the authority to initiate its own enforcement procedures regardless of the activity of the appropriate state agency.⁶⁶ Such procedures are required by statute to provide an opportunity to confer concerning the alleged violation⁶⁷ and state and local agencies having jurisdiction are invariably brought in. The result is almost always an agreed order, usually consented to and signed by not only the accused facility, but the state and local authorities as well. Where the Agency has signed a compliance program approved by EPA there is hardly any point in pursuing the same matter before the Board. The discharger is subject to immediate EPA enforcement in the event that the agreed order is violated.

The accused facility may still have at least a theoretical interest in bringing the Board's attention to its problem through a variance petition to avoid the rather remote possibility of citizen enforcement at the state level. While a citizen could also in theory bring a case in the United States District Court to abate the alleged violation and impose the statutory penalties,⁶⁸ it defies common experience to expect that the district court will impose penalties or an abatement program different from that already

65. The Board has an authorized strength of five members. ILL. REV. STAT. ch. 111 ½, § 1005(a) (1973). However, it has often been forced to limp along with less than full membership, including a time in December, 1972 when it had less than a quorum due to the resignation of Chairman Currie.

66. 42 U.S.C. § 1857c-8(a) (1970).

67. *Id.* § 1857c-8(a)(4).

68. *Id.* § 1857h-2.

agreed to by both EPA and the Agency and, most likely, the applicable local authority as well.

THE BOARD'S NEW ROLE IN A CHANGING WORLD

When the Board opened its doors for business in 1970 its horizons were limited only by the broad mandate of the Act to enact and enforce a comprehensive set of regulations governing air and water emissions, public water supplies, solid waste disposal, noise and atomic regulation. In the five years that followed, the Board has constantly encountered new limitations of federal preemption, and now is faced with the Agency's use of prosecutorial discretion in lieu of variances. It thus finds itself working in a box of ever decreasing dimensions. The Board's authority to regulate radioactive discharges has been curtailed.⁶⁹ It can enact air and water regulations only if they are equal to or more stringent than those set by EPA.⁷⁰ The granting of operating permits for facilities discharging into the waters of the state, which are now effectively the waters of the United States,⁷¹ has been wholly preempted by EPA and will be returned only when the Agency has obligated itself to follow the EPA-determined guidelines, new source standards and procedural requirements. Even then, it is still subject to EPA approval and the program can be withdrawn for cause.⁷²

To the extent that a discharger into Illinois waters exceeds specific Illinois effluent standards, but meets the interim conditions of his NPDES permit, he effectively has a variance from state regulations, at least until Illinois receives its own permit issuing authority. Neither the Agency nor any citizen can complain that the discharger lacks a state permit, since the state has no authority to issue permits other than NPDES. The Agency

69. See *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

70. National standards for new air emission sources are required by 42 U.S.C. § 1857c-6 (1970); new source standards for water discharges are to be set under 33 U.S.C. § 1316 (Supp. III, 1973); and guidelines for existing water sources are to be enacted under *id.* § 1314(b). Restrictions on motor vehicle standards are prohibited except for California which can obtain a waiver to enforce standards more strict than those set by EPA. 42 U.S.C. § 1857f-6a(b) (1970).

71. *Natural Resources Defense Counsel, Inc. v. Train*, 8 ERC 1433 (D.C. Cir. 1975); *Natural Resources Defense Counsel, Inc. v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975).

72. 33 U.S.C. § 1342(c)(3) (Supp. III, 1973).

appears to only have retained a few scraps of its former power in that it can issue construction permits for facilities which may require NPDES permits, but for which such permits have not yet been issued.⁷³

In the area of air emissions the Board still retains its jurisdiction to find violations and exact the statutory penalties in cases brought to it by the Agency or any citizen,⁷⁴ but even this depends on the initiative of either the Agency or a citizen to start the proceeding. Citizen enforcement, while preserved and protected by specific statutory authority in both the Illinois Act, the Clean Air Act and FWPCA, is less a threat than it once appeared. Of the 173 enforcement cases initiated before the Board in fiscal 1975, only 27, or about 20 percent, were at the behest of persons other than the Agency.⁷⁵ With virtually no investigatory or other information gathering capability, citizens are at a great disadvantage in discovering violations which may not be detectable by sight or smell. Even then a successful case may well depend upon scientific proof of noncompliance, with a specific numerical standard which a citizen is ill-equipped to provide. The citizen's only reasonably accessible source of information is the files of the Agency itself⁷⁶ which in turn are almost always derived from the discharger's own tests and reports.

If the Board's enforcement docket is diminishing, it can probably blame both the Agency and declining citizen interest for its lack of business. It cannot, however, complain that the purpose and intent of the Illinois Environmental Protection Act is being deflected. The ultimate goal of compliance is apparently being achieved through other means, particularly EPA's constant surveillance and readiness to assume the role of prosecutor if prompt compliance is not forthcoming.

With regard to rule-making, one can sympathize with the Board that subsequent federal activity has rendered moot many

73. *State of Illinois Pollution Control Board Regulations*, ch. 3 (Water Pollution), Rule 951.

74. ILL. REV. STAT. ch. 111 ½, § 1031(b) (1973).

75. 5 ILL. POLLUTION CONTROL BD. ANN. REP. (unpublished draft, 1975). In the prior year only 132 cases were filed of which 25 percent were non-Agency. This marks the first net increase in enforcement cases in the five years since the Board was formed.

76. ILL. REV. STAT. ch. 111 ½, § 1007(a) (1973).

of the hours, days and even months spent in hearings, deliberations and drafting directed to the first comprehensive set of pollution control regulations and procedures ever put together by a state government.⁷⁷ Where Illinois regulations are more strict it is clear that they will govern in any given situation, but the variance procedure for both air and water emissions has, for the moment, been effectively preempted by the informal working relationship currently enjoyed by the Agency and EPA. When and if Illinois assumes NPDES authority the Board may yet have a chance to assume most, if not all, of its former adjudicative authority.

The Board can blame itself for its loss of air variance business by its refusal to consider air variance petitions without specific allegations or proof that the requested variance will not conflict with the principles of *Train v. Natural Resources Defense Council, Inc.*,⁷⁸ namely, that the variance will not prevent or interfere with the attainment or maintenance of national air quality standards. The Board has rejected as insufficient dozens of petitions which did not contain such allegations.⁷⁹ The Agency, on the other hand, seems willing to play the game without approval of each variance as part of the Illinois SIP. Such a variance would then be a "state" variance and, at least arguably, entitled to federal recognition through the previous federal approval of Illinois variance procedures, which were part of the original package submitted and approved as Illinois' SIP.

It is painfully obvious that the federally mandated achievement of primary air quality standards within three years of the approval of the Illinois SIP did not occur. Congress too seems to have recognized this fact and the Clean Air Act stands a substantial chance of being materially changed in the current session. Until this happens the petitioner for an air variance bears the impossible burden of proving a negative; that his emission does not contribute to the violation of an air quality standard which

77. Even more effort will be required in light of the recent amendments to the Illinois Act requiring a separate economic analysis for each regulation, P. A. 79-790 (Sept. 5, 1975), amending ILL. REV. STAT. ch. 111 ½, § 1027 (1973), and to require regulations permitting intermittent control of sulfur oxide sources, P. A. 79-1099 (Sept. 26, 1975), amending ILL. REV. STAT. ch. 111 ½, § 1010 (1973).

78. 421 U.S. 60 (1975).

79. See, e.g., *Joslyn Mfg. & Supply Co. v. EPA*, #74-427, 16 PCB 581 (May 8, 1975).

obviously is being violated, yet which may be violated anyway whether or not the petitioner's variance is granted.

When Illinois is granted NPDES authority, and when the Board again begins to consider air variance petitions without regard to the impossible standards of proof which it seems to have drawn from *Train v. Natural Resources Defense Council, Inc.*,⁸⁰ it will again be able to return to the important business of minding the environment in Illinois.

80. 421 U.S. 60 (1975).