Pollution Control in Illinois - The Formative Years

Steven N. Klein

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Steven N. Klein, Pollution Control in Illinois - The Formative Years, 22 DePaul L. Rev. 759 (1973)
Available at: https://via.library.depaul.edu/law-review/vol22/iss4/3

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsullivan6@depaul.edu, c.mcclure@depaul.edu.
I. INTRODUCTION

The decade which began in 1960 with John F. Kennedy’s pledge to conquer the moon also saw the beginnings of a monumental national effort to master our earthly environment. Scholars, lawmakers and laymen alike realized that environmental degradation had become a clear and present danger to our health and welfare; that technologies to control or abate offensive discharges would have to be developed at once; and that an effective legal foundation upon which to build, implement and enforce the needed controls would have to be adopted. The urgency and determination with which some states approached this task paralleled the moon crash-program, and Illinois was unquestionably in the forefront in the battle to conquer environmental pollution.

This article will examine several key provisions of the Illinois Environmental Protection Act of 1970, some fundamental principles and precedents established by the Illinois Pollution Control Board, and the major problem areas which have confronted that agency in its formative years.

II. THE HISTORY

Prior to July of 1970, Illinois’ program to protect its environment was haphazard at best. There was a pollution control division within the Illinois Department of Public Health, and there were separate administrative boards with jurisdiction over air and water pollution respectively. These boards were composed essentially of part-time...
unpaid volunteers, chosen largely to represent specific interest groups. Their staffs were generally under-budgeted. In enforcement cases, the board members sat as judges and their own staffs acted as prosecutors presenting the case to them for decision. Under this legislative scheme, neither board could invoke any truly effective sanction. The agencies had no power to assess penalties against polluters because the enabling legislation had neglected to give them the teeth necessary to put some bite into their regulations.

To add to the confusion, separate and distinct programs were established to deal with solid waste disposal, radiation and the protection of public water supplies. No program whatsoever existed to cope with noise pollution. Finally, both the city of Chicago and the Metropolitan Sanitary District of Greater Chicago were exempted from compliance with state air and water pollution regulations.

Many of these clear deficiencies were at least partially remedied by the Illinois Environmental Protection Act of 1970 (the "Act"), culminating what President Nixon's Council on Environmental Quality characterized as "the most innovative State reorganization program" in the nation in the area of environmental protection. The Act completely overhauled the state's machinery for combating pollution by establishing three new and powerful administrative agencies, each with authority over the entire field of pollution control (air, water, solid waste, noise, radiation, thermal, public water supplies, etc.) and each with jurisdiction throughout Illinois. The three agencies are the Environmental Protection Agency ("EPA"), the Pollution Control Board ("Board") and the Institute for Environmental Quality ("IEQ"). While all three agencies were created as independent entities, they must, by both necessity and design, rely to a certain extent on the expertise developed in and by the other agencies. Therefore, they are intimately interrelated in some respects while remaining totally separate and apart in others.

2. ILL. REV. STAT. ch. 111½, § 240.1 et seq. (1963); ch. 19, § 145.1 et seq. (1951).
5. THE COUNCIL ON ENVIRONMENTAL QUALITY, SECOND ANNUAL REPORT ON ENVIRONMENTAL QUALITY 52 (August, 1971).
III. THE AGENCIES

The Environmental Protection Agency was created within the executive branch of the state government and performs the duties of the previous Department of Health divisions of sanitary engineering and laboratories. The EPA is charged with the duty of investigating and identifying pollution sources and conditions; preparing, filing and prosecuting pollution enforcement cases before the Board; and making and supporting proposals for new or modified discharge regulations. When the three agencies first came into existence during the summer of 1970, the EPA had its own legal staff of six to ten lawyers who, working closely with their own field investigators, scientists, and technicians, both prepared and personally prosecuted the cases before the Board. This enabled the EPA’s own “in-house” personnel to develop and pursue a case from beginning to end, swiftly and effectively. Policy decisions were simplified: the EPA determined which cases it would investigate based upon information provided by its own staff; EPA attorneys filed and prosecuted the cases before the Pollution Control Board as a party complainant; and the program functioned pretty much as it was intended to function.

In addition to its primary duties, the EPA monitors air and water quality, noise and land pollution, and identifies and investigates sources of pollution. It trains operators of solid waste disposal sites and municipal sewage treatment plants; it serves as the conduit through which federal funds are dispensed to local communities to construct or improve treatment facilities, declares pollution “episodes” when emergency conditions exist, and has the authority to seal pollution sources.

The Pollution Control Board is a quasi-judicial administrative adjudicative agency composed of five full-time, “technically-qualified” members appointed by the Governor with the advice and consent of the Senate. The Board, which incorporates the pre-existing part-time air and water pollution boards, has two principal functions: it acts as a judge in deciding pollution enforcement cases brought by

the EPA or by private parties, and in variance petitions brought by polluters; and it adopts statewide discharge regulations or pollution standards.\textsuperscript{10} The Board appoints hearing officers to conduct most of its enforcement and variance cases, and decides the cases based strictly upon its review of the written record and transcript of the proceedings. Hearing officers play no role whatsoever in the decision-making process since they are not “technically-qualified,” not subject to the careful appointment process which determines the selection of board members, and not fully aware of the body of precedents established by the Board in all its former decisions. They do, however, rule on the admissibility of evidence, credibility of witnesses, and conduct of the hearings. Hearing officers are chosen strictly on the basis of merit, without regard to political considerations and are paid $100.00 per day plus expenses to perform their duties. They are guided in their tasks by the Board’s procedural rules\textsuperscript{11} and by a packet of guidelines developed by the Board’s legal personnel to assist officers in specific areas.\textsuperscript{12}

In enforcing its regulations or adjudicative decisions, the Board has been granted extensive quasi-judicial powers. Under section 1033(b) of the Act, the Board can impose affirmative action conditions upon violators (such as a requirement to install a pollution control device), order individual pollution sources shut down, and impose penalties for violations, including substantial monetary penalties.\textsuperscript{13} A recent appellate court decision\textsuperscript{14} has sustained the constitutionality of the imposition of monetary penalties by the Board in enforcement cases, holding that this does not constitute an improper delegation of judicial power to an administrative agency.\textsuperscript{15}

Although the Board is given broad authority to adjudicate pollu-

\textsuperscript{10} ILL. REV. STAT. ch. 111 ½, § 1005(b)-(e) (1970).

\textsuperscript{11} State of Illinois Pollution Control Board Regulations, ch. 1 (Procedural Rules), adopted (October 8, 1970).

\textsuperscript{12} State of Illinois Pollution Control Board, HEARING OFFICER PACKET (1970).

\textsuperscript{13} ILL. REV. STAT. ch. 111 ½, §§ 1033(a)-(i), 1042 (1970).


\textsuperscript{15} But cf. Citizens Utilities Co. v. Illinois Pollution Control Board, 9 Ill. App. 3d 158, 289 N.E.2d 642 (1972), holding that the Illinois Environmental Protection Act did not confer upon the Pollution Control Board the authority to impose monetary penalties as conditions affixed to the grant of a variance from pollution laws, rules or regulations.
tion cases, it is not the final arbiter. Title XI of the Act provides:

[A]ny party adversely affected by a final order or determination of the Board may obtain judicial review . . . within thirty-five days after entry of the order or other final action complained of, pursuant to the provisions of the “Administrative Review Act,” . . . except that review shall be afforded directly in the Appellate Court for the District in which the cause of action arose and not in the Circuit Court. 16

The inclusion of the direct review provision in the Act vitiated the necessity of having to retry the entire pollution case on appeal and represented tacit admission of the desirability of accelerating the process of judicial review in this type of case.

One of the most unique and attractive highlights of the Act is its emphasis on public openness, involvement and participation. All meetings of the Board are required to be open to the public 17 and all files, records, and data of the EPA, the Board and the IEQ must be made available to reasonable public inspection. 18 In the regulatory area, the Act provides that any individual or group may present written proposals for amendment or repeal of any of the Board’s regulations, or for adoption of new regulations, and adds:

If the Board finds that any such proposal is supported by an adequate statement of reasons, is accompanied by a petition signed by at least 200 persons, is not plainly devoid of merit and does not deal with a subject on which a hearing has been held within the preceding 6 months, the Board shall schedule a public hearing for consideration of the proposal. 19

Section 1031(b) of the Act establishes the innovative concept of the citizen suit. 20 Under this section, any citizen may file, with the Board, a complaint against any other person allegedly violating the Act or any rule or regulation adopted thereunder, and unless the Board determines that the complaint is either frivolous or duplicative, a hearing on the charge must be held. The clear value of such a system is that it serves as a safeguard against governmental inaction attributable to either budget limitations or the political considerations of an elected prosecutor.

Finally, section 1032 of the Act provides that all enforcement hearings (prosecutions) shall be open to the public, and that “any person may submit written statements to the Board in connection

17. ILL. REV. STAT. ch. 111 1/2, § 1005(a) (1970).
20. ILL. REV. STAT. ch. 111 1/2, § 1031(b) (1970).
with the subject thereof. In addition, the Board may permit any person to offer oral testimony.”

During its first three years of operations, the Board has found that the public participation provisions of the Act have had the salutary effects of spreading concern for pollution problems, and disseminating information on environmental questions. Occasionally, the EPA has taken over the prosecution of a suit originally instituted by private parties.

The Institute for Environmental Quality is an entirely new agency designed to conduct research into specific areas of environmental concern; to perform environmental resource planning; to store and retrieve environmental data; and to act as a technical staff for the Board, the EPA and other agencies. In defining the scope of the IEQ's duties, the legislature specifically provided:

It is not the intent of this Act that the Institute should engage in abstract scientific research nor generally undertake the investigation of particular cases for presentation before the Board, except where long-range goals may dictate a special need.

The adoption of the Environmental Protection Act sketched the legal framework within which environmental law in Illinois would have to be made. On this foundation, the Board constructed many significant substantive and procedural precedents in nearly 700 cases decided during its first three years of operations. It is essential for the attorney practicing environmental law in Illinois to have, at a minimum, a basic familiarity with the principles established by the Board in several key cases.

IV. THE PRECEDENTS

A. REGULATORY

1. Housecleaning: The Board began its operations, during the summer of 1970, armed with a body of rules and regulations adopted by its predecessor agencies. Section 1049(c) of the Act continued these rules in effect until repealed, amended or superseded by new measures adopted by the Board. The Board's first priority, therefore, was to begin housecleaning operations with a view toward elim-

23. Id.
inatating some of the unnecessary regulations, updating and strengthen-
ing others, and filling in the gaps which previously had existed in
the state’s anti-pollution program. Accordingly, regulations were
adopted during the first few months requiring the removal of phos-
phates from wastes discharged into Lake Michigan;\(^{25}\) setting strict
mercury discharge standards;\(^{26}\) substantially revising the rules appli-
cable to air pollution emergency episode situations;\(^{27}\) and accelerat-
ing the dates by which secondary treatment of sewage would be
required for sources located on the Mississippi River.\(^{28}\)

2. Water Pollution: In the field of water pollution control, the
Board has established a comprehensive, two-pronged regulatory pro-
gram. The water quality standards are designed to protect entire
streams and bodies of water,\(^{29}\) and the effluent standards cover a
wide range of chemical constituents and are designed to force dis-
chargers to capture harmful contaminants at the point of discharge.\(^{30}\)
These two sets of standards form the heart of Illinois’ program to
combat water pollution. Underlying this regulatory scheme is the
concept that all dischargers should employ a minimum level of treat-
ment sufficient to prevent pollution, while at the same time allowing
for anticipated growth in industrial and municipal sources as well as
in population. The scheme also recognizes that sources located in
certain highly congested areas of the state will require stricter con-
trols so that the water quality standards applicable to the receiving
stream will not be exceeded. The yardstick applied by the Board in
determining whether or not to adopt specific regulations pertaining
to water pollution (or to any other area of the Board’s regulatory
authority) is, among other things, the “technical feasibility and eco-

\(^{25}\) State of Illinois Pollution Control Board Regulations, ch. 3 (Water Pollu-
tion-Phosphorous Standards), adopted as R70-6 (January 6, 1971).

\(^{26}\) State of Illinois Pollution Control Board Regulations, ch. 3 (Water Pollu-
tion-Mercury Standards), adopted as R70-5 (March 31, 1971).

\(^{27}\) State of Illinois Pollution Control Board Regulations, ch. 2, part IV (Air
Pollution-Episodes), adopted as R70-7 (December 9, 1970).

\(^{28}\) State of Illinois Pollution Control Board Regulations, ch. 3 (Water Pollu-
tion-Water Quality Standards for the Mississippi River), adopted as R70-3 (January 6,
1971).

\(^{29}\) State of Illinois Pollution Control Board Regulations, ch. 3, part II (Water

\(^{30}\) State of Illinois Pollution Control Board Regulations, ch. 3, part IV (Water
Pollution-Effluent Standards), adopted as R70-8 (January 6, 1972).
nomic reasonableness of . . . reducing the particular type of pollution\textsuperscript{31} under consideration.

The combined effluent and water quality standards cover all discharges to Illinois waterways and, for the first time in Illinois history, provide a uniform, comprehensive and coherent statewide water pollution control plan. The regulations pertain to both hazardous substances (such as arsenic, cyanide, cadmium, fluoride, lead, zinc and mercury) and nuisance substances (such as oils and phenols). As a result, Illinois is one of the first states to have adopted such a comprehensive and progressive program to protect its waters.

3. Air Pollution: After numerous public hearings, the Board adopted extensive air pollution regulations designed to achieve and implement federal ambient air quality standards.\textsuperscript{32} The regulations greatly strengthened existing standards governing the emission of particulate matter (essentially smoke and dust). They also established standards for the first time limiting the emissions of sulfur dioxide, carbon monoxide, nitrogen oxides and hydrocarbons (organic materials) from stationary sources. Combined with regulations adopted by the Board governing open burning,\textsuperscript{33} and with anticipated federal controls on motor vehicle emissions, Illinois should by 1975 be able to attain the levels of minimum air quality acceptability set by the federal government.

The Board had also proposed a regulation which would have had the effect of banning the residential and commercial use of coal in small uncontrolled burners within the city of Chicago by mid-1975. The Board reasoned that this was the only way in which minimum federal air quality standards could be met, by that time, in the Chicago metropolitan area. But a Cook County Circuit Court judge enjoined the Board from adopting the measure.\textsuperscript{34} In view of the restriction placed upon the state, the federal Environmental Protection Agency

\textsuperscript{31} ILL. REV. STAT. ch. 111 1/2, § 1027 (1970).
\textsuperscript{32} State of Illinois Pollution Control Board Regulations, ch. 2, part II (Air Pollution-Emission Standards and Limitations for Stationary Sources), \textit{adopted as R71-23} (April 13, 1972).
\textsuperscript{33} State of Illinois Pollution Control Board Regulations, ch. 2, part V (Air Pollution-Open Burning), \textit{adopted as R70-11} (September 2, 1971); \textit{as amended R72-11} (November 8, 1972).
\textsuperscript{34} Roth-Adam Fuel Co. v. Pollution Control Board, 72 CH 1484 (Cir. Ct. County of Cook) (1972); the Board appealed the circuit court's order and the appellate court reversed and set aside the injunction. 10 Ill. App. 3d 756, 295 N.E.2d 321 (1973).
has made clear its intention of adopting a regulation for the Chicago-area which would have the same effect.\(^{35}\)

4. **Other Matters:** Other significant measures adopted by the PCB have included regulations governing the use and application of asbestos and asbestos products in Illinois,\(^{36}\) and regulations designed to control air and water pollution at mine sites.\(^{37}\)

The Board has also considered various other regulatory proposals but has determined that additional study and substantiation is necessary before they can be adopted. For example, regulations dealing with fertilizer application to farmlands and the resultant water pollution caused by land runoff were referred to the IEQ for further study;\(^{38}\) a proposal to ban phosphates in all detergents throughout Illinois was rejected;\(^{39}\) a proposal to limit the emission of noise from toys sold in Illinois was rejected;\(^{40}\) and a detailed plan to control pollution from animal feedlots and milking operations was tabled.\(^{41}\)

In addition, the Board has pending before it regulations designed to control noise emissions from stationary sources,\(^{42}\) pollution at landfill and solid waste disposal sites,\(^{43}\) and litter attributable to beverage containers.\(^{44}\) Furthermore, pending legislation would effectuate the regionalization of sewage treatment facilities.\(^{45}\)

B. **ADJUDICATIVE**

The Board has established significant substantive and procedural precedents in its first few years of operations. As a newly created

---

\(^{35}\) 40 C.F.R. § 52.726 (July 27, 1972) (Regulations proposed by Federal Environmental Protection Agency).

\(^{36}\) State of Illinois Pollution Control Board Regulations, ch. 2, part VI (Air Pollution-Asbestos and Spray Insulation and Fireproofing), adopted as R71-16 (January 6, 1972).


\(^{38}\) In the matter of Plant Nutrients, R71-15 (March 28, 1972).

\(^{39}\) Phosphate Ban in Detergents, R71-10 (March 14, 1972).

\(^{40}\) In the Matter of Citizens Against Noise, Toy Noise Proposal, R72-16 (October 31, 1972).


\(^{42}\) Proposed Noise Regulations for Stationary Sources, R72-2.

\(^{43}\) Proposed Landfill and Solid Waste Disposal Regulations, R72-5.

\(^{44}\) Proposed Beverage Container Regulations, R71-24.

\(^{45}\) Proposed Sewage Treatment Plant Regionalization Regulations, R70-17.
quasi-judicial entity, it has been able to establish its own rules of procedure and then to create a body of supporting case law and precedents in an area in which none had existed before. The sweeping powers given to the Board under the Environmental Protection Act have enabled it to exercise quasi-legislative rule-making authority, and then to be able to enforce its own regulations through the exercise of quasi-judicial enforcement authority.

But, consistent with the policy of the Act to separate the functions of the three new environmental state agencies, the Board may not initiate or prosecute enforcement actions before itself, but may only adjudicate when cases are brought before it by the EPA, some other state or local agency, or a private citizen. This is entirely as it should be, since combining the rule-making, prosecutorial and adjudicative functions into one agency might work a basic unfairness on those accused of pollution violations.

The Board has consistently held that the Act expressly created a unified statewide program, thereby abolishing all pre-existing local exemptions. As such, the city of Chicago and the Metropolitan Sanitary District of Greater Chicago are now subject to the jurisdiction of the state in the field of environmental control, and, therefore, must comply with the state's permit programs and may be penalized for failure to comply with state regulations. In addition, the Board has rejected the argument that the city of Chicago, as a home rule unit under the new Illinois Constitution is immune from Board jurisdiction, pointing out that while the constitution intended to confer governmental authority on local governments, it did not intend to limit state authority or to exempt local governments from complying with state law.

In a case brought by a citizen environmental group, the Board

46. ILL. REV. STAT. ch. 111 1/2, § 1031(a)-(c) (1970).
47. In the matter of Exemptions for Sanitary Districts and Exemptions for Political Subdivisions, R70-1 (October 8, 1970); American Generator and Armature Co. v. EPA, # 71-329, 3 PCB 373 (January 6, 1972).
50. Y.E.S. v. Chicago, M., St. P. & Pac. R.R., # 71-254, 4 PCB 697 (June 27, 1972).
established an important precedent relating to the measure of proof to be applied in pollution enforcement cases. The Board held that, since the Act simply makes it illegal to "cause or allow" pollution, or to exceed standards set in the Board regulations, there is no need to make an affirmative showing of "negligence" in order to prove a violation. Nevertheless, the Board has indicated that mitigating evidence relating to the arbitrary or unreasonable hardship to which an individual petitioner or respondent would be subject if compliance were required, as well as the technical feasibility or economic reasonableness of meeting particular standards, would be appropriate and admissible. But the Board has also held that in order to be entitled to a variance, a petitioner must show not only that compliance would impose an arbitrary or unreasonable hardship, but also that non-compliance would not have an unacceptably detrimental effect on the neighboring community.

In dealing with sister state agencies, the Board has applied the same principles noted in the cases involving local governmental entities; namely, that the Act was intended to apply with equal vigor to all, without exception, and that most significantly, "the State should ensure that its own hands are clean before penalizing others for soiling the environment." Several decisions have set forth the principle that a governmental entity which takes upon itself the function of conducting sewage or wastes through a system it both operates and controls, also assumes the duty of policing that system to assure that harmful contaminants are not even accidently discharged into it, regardless of who is the discharger.

Indicative of the vast power exercised by the Board, substantial money penalties have been imposed against violators, and major commercial operations have been shut down pending installation of control equipment, all as part of the Board's efforts to cope with

51. Id.
53. EPA v. City of Champaign, # 71-51C, 2 PCB 411, 415 (September 16, 1971).
54. EPA v. City of Urbana, # 71-365, 5 PCB 331 (September 6, 1972); EPA v. Airtex Products, Inc., # 71-325, 3 PCB 591 (February 3, 1972); EPA v. City of Champaign, # 71-51C, 2 PCB 411 (September 16, 1971).
55. GAF Corp. v. EPA, # 71-11, 5 PCB 525 (October 3, 1972); EPA v. Russell, Burdick, & Ward Bolt & Nut Co., # 71-369, 4 PCB 701 (June 27, 1972).
Illinois' growing pollution problem. In one case, involving a southern Illinois steel company, the respondent was ordered to establish a $150,000 scholarship fund for environmental education at the University of Illinois.

Perhaps the most serious and pervasive pollution problem in Illinois involves inadequate sewage treatment facilities, with old and decaying sewers feeding into plants either presently overloaded or on the verge of becoming so. In attempting to deal with this problem, the Board has endorsed and applied the highly controversial interim remedy of the sewer connection ban: prohibiting, on a temporary basis, further connections to sewers serving inadequate sewage treatment facilities. Such bans have been applied in several large Illinois communities such as Danville, Mattoon, and throughout the entire North Shore Sanitary District, the latter encompassing virtually all of Lake County and the attractive suburbs near Lake Michigan, from Chicago north to the Wisconsin line. Application of this remedy has generated a raft of opposition from the construction industry and from individuals desirous of building homes, since occupancy permits cannot be obtained if the particular construction is not permitted to hook on to a sanitary sewage system. A recent appellate court decision upheld the Board's authority to impose such sewer connection bans.

The Board has recognized the localized hardship created by imposition of a sewer connection ban, but has weighed into the balance the potential harm to an affected body of water or natural resource if the ban is not imposed. In addition, experience has shown that application of the ban has had the immediate effect of creating a great deal of local public pressure to improve the sewage treatment situation, and the corresponding effect of inspiring local officials to devise progressive and effective clean-up programs which apparently

56. Lloyd A. Fry Roofing Co. v. EPA, # 71-4, 33, 2 PCB 581 (October 14, 1971); EPA v. Incinerator, Inc., # 71-69, 2 PCB 505 (September 30, 1971).
59. City of Mattoon v. EPA, # 71-8, 1 PCB 441 (April 14, 1971).
60. League of Women Voters v. North Shore Sanitary District, # 70-7, 12, 13, 14, 1 PCB 369 (March 31, 1971).
had never occurred to them before. 62 In cases of individual hardship, variances allowing petitioners to connect to an overloaded plant have often been granted. 63

Application of a sewer connection ban as an interim remedial measure has proven to be an effective method of dealing with sewage water pollution. It is not difficult, therefore, to envision expansion of the concept underlying this remedy to other areas.

Much has been said about an impending power crisis facing the United States and, indeed, even the world. 64 The numerous individual pollution cases involving power generating facilities have underlined the potential harm these stations can do to our environment. 65 Given these considerations, and the apparent remoteness of a unified, nation-wide network of "clean" power sources, the application of localized power connection bans—prohibitions on connections of new or expanded sources to individual generating facilities—is a strong likelihood.

As originally adopted, title VI-A of the Environmental Protection Act required that permits for the construction and operation of new nuclear facilities, such as nuclear power or fuel recovery plants, had to be obtained from the Board. 66 The United States Supreme Court has held, however, that only the Atomic Energy Commission may regulate in the area of radioactive emissions, 67 and consequently, the Board has ruled that title VI-A is totally invalid. 68

---

62. Danville Sanitary District v. EPA, # 72-161, 4 PCB 673 (June 14, 1972); City of Mattoon v. EPA, # 72-64, 4 PCB 653 (June 6, 1972); North Shore Sanitary District v. EPA, # 71-343, 3 PCB 541 (January 31, 1972).

63. See Patricia Development Corp. v. EPA, # 71-161, 2 PCB 469 (September 16, 1971); Park Manor Nursing Home v. EPA, # 71-190, 2 PCB 369 (September 2, 1971); Tauber v. EPA, # 71-171, 2 PCB 317 (August 13, 1971); Wachta v. EPA, # 71-77, 2 PCB 117, 190A (Order—July 12, 1971; Opinion—August 5, 1971).


65. See Central Illinois Public Service Co. v. EPA, # 71-261, 262, 263, 264, 3 PCB 689 (March 2, 1973); Commonwealth Edison Co. v. EPA, # 71-129, 2 PCB 627 (October 14, 1971); Illinois Power Co. v. EPA, # 71-193, 195, 196, 197, 198, 2 PCB 547 (September 30, 1971).


V. THE PROBLEMS

A. INVOLVEMENT OF ATTORNEY GENERAL'S OFFICE

In approximately March, 1971, the original tri-agency concept became diluted when the Office of the Attorney General of Illinois insisted upon being the representative of the EPA in all pollution proceedings before the Board. The then Attorney General, William J. Scott, apparently based his claim on the theory that he was the attorney for all state agencies and, therefore, the EPA could only prosecute its cases through his office. In a meeting with former Governor Ogilvie, Attorney General Scott managed to secure for his office the right to file, prosecute and presumably publicize the EPA's cases for it before the Board, while also retaining his "independent" powers to pursue any given polluter in a court of law.69 The immediate result was the emasculation and demoralization of the EPA legal staff, and the dilution of both the effectiveness and independence of the EPA in its judgment and performance. The long-term result has, for the most part, been the insufficient and inadequate prosecution of pollution cases for the EPA.

Cases are now investigated and prepared by the EPA's field staff, and then turned over to the Attorney General's office. It is the Attorney General who decides whether a case should or should not be filed, be given high priority or low, settled or contested. The time lapse between investigation, preparation, and prosecution has become excessive,70 and cases which the EPA feel should be filed languish in the Attorney General's office. Most unfortunately, political and public relations considerations have been added to the state's environmental protection program, which had in the past been hailed as a model of objectivity and effectiveness. These problems may be inherent whenever prosecution is in the hands of an elected public official.

70. The first variance ever automatically granted by the Board because the statutory 90-day limit for variance decisions had been exceeded occurred in Kelberger v. EPA, # 72-177, 5 PCB 477 (September 26, 1972). The Board said it could not "fathom" how the EPA and the Attorney General's Office had managed to take over 100 days to prepare and file a two-page recommendation, especially in view of the fact that the recommendation contained nothing more than a recitation of the allegations in the petition and a one-paragraph opinion on the propriety of granting petitioner the requested variance. Id. at 481.
More specifically, the involvement of the Attorney General's office has created some serious conflicts of interest which may jeopardize the viability of the entire program. There are many examples, and the following, both hypothetical and real, are but a few:

1. Respondent polluter and Attorney General, acting on behalf of EPA, agree to a settlement proposal, calling on respondent to pay a nominal penalty, and install barely adequate control devices within an extended period of time. The proposal is submitted to the Board, and is correctly rejected. Respondent appeals, and the Board has to be represented in the appellate court by the Attorney General, who has already gone on record supporting the settlement proposal.\(^7\)

2. Petitioner seeks variance to discharge heated water into receiving stream. Under the law, the EPA is required to file its recommendation on the request before the Board,\(^7\) and based upon its in-house technical evaluation, the EPA would recommend that the variance be granted. But the issue has political overtones. The Attorney General, for political reasons, has taken a militant anti-pollution stand and, in order to be consistent, he refuses to represent the EPA. If the theory of independent powers and prerogatives is correct, the prosecutor can ignore the advice of the technicians.

3. The Attorney General, as attorney for the complainant (EPA) represents a client (EPA) before another client (the Board), whom he must also represent if an appeal should be taken from the Board's decision. A clear conflict of interest has arisen.

4. EPA prepares a case against a major polluter, turns it over to Attorney General's office for prosecution. Attorney General refuses to file, due to sensitivity of subject, issue, or some other political or personal consideration; not to mention delays involved in the actual presentation of cases which all agree should be filed.

The present ineffective manner in which enforcement is carried out is the result of a political arrangement, and was certainly not envisioned by the Environmental Protection Act. The statute empowered the EPA to prosecute its own cases before the Board, while recognizing that the Attorney General's office could initiate its own lawsuits, either before the Board or in court. Furthermore, the Act authorized the Attorney General to "represent" the Board on appeal; to collect fines assessed by the Board; and to seek injunctive relief

---

71. This situation arose in Packaging Corp. of America v. EPA, # 71-352, 72-10, 5 PCB 91, 137 (Order—August 8, 1972; Opinion—August 15, 1972). A settlement proposal submitted to the Board by the Office of the Attorney General was so thoroughly inadequate that it was summarily rejected. The Attorney General then issued a statement indicating that the Board had turned down the "E.P.A.'s" offer, deploring the inability of the Board to finally resolve the pollution involved, and stating that he would immediately transfer the case to a local circuit court for relief. See also EPA v. Petersen Sand & Gravel, Inc., # 71-381, 5 PCB 93 (August 8, 1972); EPA v. City of Silvis, # 71-157, 2 PCB 677 (October 18, 1971).

where an emergency created the need for immediate action. The Attorney General insisted upon, and was ultimately granted the right to prosecute all cases for the EPA before the Board notwithstanding the fact that the Attorney General's office lacked the technical or engineering skill to adequately handle such cases.

Since the Environmental Protection Agency is established within the executive branch of state government and is really an arm of the Governor's office, relinquishment of some of its powers and responsibilities by political agreement to the Attorney General's office not only defeats the purpose of the Environmental Protection Act, but also deprives the Governor of an important area of his authority. It is, therefore, vital for the Governor to reassert the authority of the EPA to prosecute cases before the Board.

A healthy spirit of competition was both intended and achieved when, under the terms of the Environmental Protection Act, both the EPA and the Attorney General were given the authority to prosecute pollution cases; the former before the Board, the latter both before the Board and in court. In addition, the more governmental entities which are authorized to prosecute polluters, the more likely it is that effective prosecution will be achieved. That has all changed now, and, in my view, the environment has suffered for it, as has the integrity of the Governor of Illinois and his authority to combat pollution. Since the problem is essentially a political one which would exist regardless of the personalities involved, it is one which requires a political solution.

B. PLANNING AND COORDINATION

All three pollution agencies must work closely together. They must share information and expertise, and must avoid working at cross purposes if the program is to succeed. Therefore, compatibility of the directors of all three agencies is vital. The Chairman of the Board serves at the pleasure of the Governor, while the directors...
of the EPA and Institute serve fixed terms.\(^7\) Clearly, all three agency heads should serve at the Governor’s pleasure, in order to assure that compatibility among such offices continues in the event the administration changes.

In addition, no single agency, or representative of the Governor, has the final responsibility to assure coordination, planning, or evaluation of the activities of the three agencies. Thus, the agencies could conceivably be working in the same or different areas, for conflicting or similar purposes, at the same or different time. A strong state environmental planning office is, therefore, absolutely essential.

Since there are three agencies, having separate but related responsibilities, the danger exists that no one agency, person, or entity is ultimately responsible for the cohesive development and the proper performance of the state’s pollution control program. The public, too, is often confused as to which agency or person is responsible for stopping the buck. An environmental planning office, as referred to above, answerable directly to the Governor, may be the answer.

In addition to the obvious benefits to be derived from the creation of a supervisory agency, which would assure uniformity and compatibility in the operation of all the pollution agencies, such a body might also fill a vital gap in the present program: statewide land-use planning jurisdiction and authority. While the Illinois Environmental Protection Act has supposedly created a “unified, statewide” pollution program, and while regional planning agencies with mostly advisory authority exist throughout Illinois, no single or central body has the final say in determining land-use planning questions as they affect our environmental quality.\(^7\)

The problems thus created are clear. At this time, no agency has the power to halt construction of an airport, or a road, or a baseball park, merely because it is going to be constructed in the wrong place, and would be better situated someplace else. The Pollution Control Board cannot halt construction of a tollway extension through farmlands on the ground that cars will use the road and cause air pollution, because to that extent all roads indirectly cause air pollution.

---

\(^7\) ILL. REV. STAT. ch. 111\(\frac{1}{2}\), §§ 1004(a), 1005(a), 1006 (1970).

\(^7\) In Farmers Opposed to Extension of the Illinois Tollway v. Illinois State Toll Highway Authority, # 71-159, 2 PCB 461 (September 16, 1971), the Board noted that its jurisdiction did not extend to questions of land use or land use planning.
because no pollution can be shown prior to construction, and because the same pollution will exist no matter where the road is put.\(^{77}\)

A land-use planning agency, from which a permit to construct any project which has the potential of degrading our environment must first be obtained, would solve this problem. The planning agency would determine whether the project is being planned for the right place in terms of a uniform, statewide (not regional) master plan of development. The pollution control agencies would oversee the project, after it has been completed, and would verify that it is, in fact, not damaging the environment. The planning agency, like the pollution agencies, must have the teeth to enforce its directives and development plans, and must not be relegated to the role of an advisory body whose programs may be ignored with impunity.

C. ENVIRONMENTAL OMBUDSMAN

As previously noted, one of the unique features of Illinois' Environmental Protection Act is its emphasis on public participation and involvement. Citizens are authorized under the Act to file and prosecute complaints against polluters on their own, with or without the assistance or involvement of the Agency, the Attorney General, or any other entity. This right may be exercised free of charge, as there are no filing fees, and no requirement that they pay the respondent's costs should they fail to sustain the burden of proof. The catch is that they must bear the burden of proof; they must be able to prepare and present sufficient evidence to the Board to convince it to impose orders or penalties against the respondent. In regulatory matters, private citizens submitting a petition signed by 200 persons, can require the Board to conduct hearings,\(^{78}\) but it will be somewhat more difficult to amass sufficient technical materials to prevail in view of the often tremendous opposition raised by industries that may be affected by the new rules. And in enforcement cases, although a private citizen may file the case, he will often be confronted by a battery of company lawyers, technicians, and experts. Practically speaking, it is difficult for a private citizen to win a meaningful pollution case before the Board, unless he: (1) is supported by an organization; or (2) is merely charging a violation which does not

\(^{77}\) Id.

\(^{78}\) ILL. REV. STAT. ch. 111\(1/2\), § 1028 (1970).
require extensive investigation or proof, such as the failure by respondent to obtain a permit; or (3) alleges failure to file a program plan with the state as required by the regulations.

One solution would be the creation, by the state, of an office of the Environmental Ombudsman, or even an environmental "legal-aid" program. Such a program would be unique in the nation, and would afford Illinois residents a readily accessible and visible vehicle to use in order to become more actively involved in the state's efforts to clean up the environment. The office would be staffed by environmental lawyers and technicians whose only function would be to advise and assist the public in the prosecution of their pollution suits, free of charge. Citizens could still approach the EPA with their informal complaints. The Attorney General could still handle their referrals and be effective when immediate injunctive relief is required. The office of the Environmental Ombudsman would be available also and it, unlike the EPA or the Attorney General, would have absolutely no function to perform other than assisting citizens in the prosecution of pollution enforcement cases, or in the presentation and support of proposed pollution regulations or standards requested by the public.

Ideally this office would be created within the executive branch; staff members would be appointed strictly on the basis of merit and the director would be an appointee of the Governor, serving at the pleasure of the Governor, but removable for cause only after a public hearing.

D. PESTICIDES

Regulation of the use and application of pesticides in Illinois comes under the jurisdiction of an entity known as the Inter-Agency Pesticide Council. This is a gap in the authority of the Pollution Control Board as wide as the land-use planning gap. As concern over the use and application of pesticides, insecticides, herbicides, and fungicides grows, so too should our efforts to ensure that our anti-pollu-

79. An "Environmental Lawyers Clinic" was established in Chicago on March 19, 1973. The Clinic is composed of volunteer attorneys contributing their services part-time and free of charge to citizens wishing to file anti-pollution suits. It is unfunded, and is in no way related to any governmental or quasi-governmental entity.
VI. Conclusion

Illinois' efforts to develop and implement an effective environmental protection program have yielded excellent and measurable results. Problems and frustrations have existed, as they must in every monumental social movement. What has emerged, now that the formative years have passed, is a state which has made the requisite commitment to improve its environment and has established the necessary legal and administrative foundation to do the job. Illinois has embarked on a vigorous enforcement campaign to rectify the environmental damage already done and to minimize the danger to our future.

80. Most, if not all, of the credit for Illinois' success in establishing an environmental protection program which has won nation-wide acclaim, is due to the principal draftsman of the Environmental Protection Act and the first chairman of the Illinois Pollution Control Board, David P. Currie. Prof. Currie's brilliance, integrity, imagination, creativity and aloofness from the political and public relations arenas enabled the state's program to function smoothly and efficiently during its first few years.