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ENFORCEMENT UNDER THE ILLINOIS POLLUTION LAW

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Illinois' 1970 Environmental Protection Act[1] was a sweeping revision of the state's pollution-control program. As I have indicated in an earlier article,[2] the substantive heart of the Act is a grant of authority to an independent, specialized pollution-control board to adopt regulations prohibiting environmental harm that is unjustifiable in light of the costs of prevention. Substantive and procedural issues affecting the exercise of this rule-making power were the subject of that article. But the setting of standards is only the first step; those standards, as well as the few prohibitions in the statute itself, must then be applied to individual polluters on a case-by-case basis. It is this process of enforcement with which the present article is concerned.

Voluntary compliance is of course the most desirable and probably the most common route to meeting the standards; if no one complied until prosecuted, enforcement costs would surely strangle the program. Both the specificity of standards and the threat of sanctions can help to promote voluntary compliance. The former is sought to be provided through the rule-making process and through a permit program that enables the discharger to determine in advance whether a projected pollution-control plan will meet the prosecutor's interpretation of the standards. The principal vehicle for the application of sanctions is the filing of a complaint before the Illinois Pollution Control Board, which has authority to impose money penalties or to order immediate compliance, which could result in a shutdown.

Variance provisions, commonly found in pollution laws, provide both a substantive safety valve for those with unusual difficulties of compliance and a procedural mechanism for determining in advance what the law requires.

The substantive and procedural problems presented by the three formal methods of applying the law and regulations—complaint, variance, and permit—are the subject of this article. It is my hope not only to gather together materials for the benefit of those affected by the Illinois law itself, but also to illuminate pervasive

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its conclusions should be taken with more than the usual grain of salt. In addition to presiding over the Board, I was a principal draftsman of the statute that set it up.

[1] ILL. REV. STAT. ch. 111½, §§ 1001 *et seq.* (1973).

[2] Currie, *Rulemaking Under the Illinois Pollution Law*, 42 U. CHI. L. REV. 457 (1975) [hereinafter cited as Currie].

problems of legislative drafting, administrative practice, and judicial interpretation that confront pollution-control efforts everywhere.

I. THE SUBSTANTIVE LAW

Because "no Board will be able to think of specific standards to govern every conceivable kind of harmful emission,"[3] the statute itself makes it illegal to[4]

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[3] Testimony of David P. Currie on H.B. 3788 Before a Subcomm. of the Exec. Comm. of the Ill. Sen., 76th Gen. Assem., at 9, May 25, 1970 (unpublished, copy in author's possession) [hereinafter cited as Currie Testimony].

[4] ILL. REV. STAT. ch. 111½, §§ 1009(a), 1012(a) (1973). The omission of any comparable provision for noise or solid wastes is considered in Currie, *supra* note 2. Section 18 requires that public water supplies be "safe in quality, clean, adequate in quantity, and of satisfactory mineral character for ordinary domestic consumption." ILL. REV. STAT. ch. 111½, § 1018 (1973). The generality of this language suggests the need for interpretation, but decisions so far generally have turned on more specific language in implementing regulations.

The statutory prohibition against air pollution was upheld against an argument of unconstitutional vagueness in Monmouth v. EPA, 57 Ill. 2d 482, 313 N.E.2d 161 (1974). This decision also held that the Board need not adopt regulations in order to activate the air-pollution provision, drawing an inference from the language of section 9(a) of the Act, which makes it illegal to emit contaminants "so as to cause . . . air pollution . . . or so as to violate regulations or standards adopted by the Board." ILL. REV. STAT. ch. 111½, § 1009(a) (1973). Nevertheless, the appellate court in Mystik Tape v. PCB, 16 Ill. App. 3d 778, 306 N.E.2d 574 (1st Dist. 1973), held that the statutory pollution ban must be refined by the setting of "standards" in quasi-judicial proceedings if not by regulation. *Id.* at 792, 306 N.E.2d at 586. The court relied upon Professor Kenneth Davis' argument in support of administrative standards, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.11, at 70 (Supp. 1970), and upon section 5(b) of the Act, which states that the Board "may" adopt regulations and "shall determine, define and implement the environmental control standards applicable in the State of Illinois . . . ." ILL. REV. STAT. ch. 111½, § 1005(b) (1973).

This was a startling decision since the structure of the Act strongly suggests that the cited provision merely means that it is the Board, rather than the other agencies, that will determine standards; section 5(b) appears in a part of the statute defining the functions of the Board as contrasted with those of the Environmental Protection Agency and the Illinois Institute for Environmental Quality, while later sections indicate the procedure to be followed in rule making and enforcement. If the court meant only that the Board was required to write opinions having "value as a precedent," 16 Ill. App. 3d at 792, 306 N.E.2d at 586, the holding would be innocuous enough, since, as the court noted, an opinion giving reasons was independently and sensibly required by section 33. *Id.* The Board in *Mystik* had neglected even to find that the interference with enjoyment of life or property was unreasonable, much less to say why. But it is by no means clear how specific such a "standard" would have to be to satisfy the appellate court, and it is precisely in situations in which there is too little information to permit the formulation of precise regulations that the general prohibitions against pollution are most useful. Moreover, the court added in dictum that violators of the general pollution section are entitled to a free bite:

> [c]ause or threaten or allow the discharge . . . of any contaminant into the environment in any State so as to cause or tend to cause air [or water] pollution in Illinois, either alone or in combination with contaminants from other sources . . . .

The Act also provides that no person shall[5]

> [c]ause or allow the open burning of refuse, conduct any salvage operation by open burning, or cause or allow the burning of any refuse in any chamber not specifically designed for the purpose and approved by the [Environmental Protection] Agency . . . .

Not surprisingly, these provisions have spawned problems of interpretation.

A. *Territorial Scope of the Law*

The absence of any local exemptions from the coverage of the Environmental Protection Act is significant in light of earlier provisions under which the state had very little to say about pollution in the Chicago, Illinois area: the statutes had exempted sources within Chicago's Metropolitan Sanitary District from many water laws[6] and required administrative exemption of localities with adequate air programs of their own,[7] which Chicago had been found to have.

At the time the new bill was introduced a bloody proceeding was in progress before the Air Pollution Control Board to determine whether or not Chicago's exemption should be revoked. As a sop to anticipated city opposition, the original bill made provision for a meaningless "certificate of primary responsibility" that would allow the state to step in whenever it chose.[8] This too would have wasted

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> [A] person found to have been an offender against the standards set by the order would have to be given a reasonable time within which to comply, *before* the assessment of any kind of penalty, or we would then agree with Mystik's contention as to failure of due process.

Id. at 796, 306 N.E.2d at 589. This is impossible to square with the Illinois Supreme Court's holding in Monmouth v. PCB, *supra*, that the uninterpreted prohibition of air pollution gives adequate warning to withstand due process objections. In any event, the supreme court in *Mystik*, while affirming on other grounds the decision setting aside the Board's order, disagreed with the appellate court on the question of standards:

> The Act does not require that a specific standard adopted by the Board be found to have been violated for there to be a determination either of air pollution or of prohibited conduct.

Mystik Tape v. PCB, 60 Ill. 2d 330, 335, 328 N.E.2d 5, 8 (1975).

[5] ILL. REV. STAT. ch. 111½, § 1009(c) (1973).

[6] Ch. 19, § 145.17, [1951] Ill. Laws 67th Gen. Assem. 1470.

[7] Ch. 111½, § 240.17, [1963] Ill. Laws 73d Gen. Assem. 3200.

[8] Ill. H.B. 3788, 76th Gen. Assem., § 45(b) (1970).

scarce resources in trying the City of Chicago rather than the polluters, and the drafters took advantage of industry objections to the wording to drop the whole thing at the last minute. Legislative history[9] and the explicit policy statement respecting creation of a "statewide program"[10] make clear that the whole state is included.[11]

In *EPA v. James McHugh Constr. Co.*[12] the Illinois Pollution Control Board rejected an argument by the City of Chicago that section 6(a) of the 1970 Illinois Constitution, which authorizes a "home rule unit" to "exercise any power and perform any function pertaining to its government and affairs," reinstated at least in part the exemptions the statute had removed:[13]

> Even the most cursory examination of the Constitution reveals that its purpose and effect are to confer governmental authority on local governments, not to limit state authority nor to exempt local governments from complying with state laws in their own proprietary functions. . . . [S]ection 6(i) makes clear that no unexpressed negation of state authority is intended by specifying that home rule powers are to be exercised "concurrently with the State."

The state supreme court approved the *McHugh* result, relying on a clause of the new constitution preserving preexisting laws "not . . . inconsistent with" its own provisions.[14]

Despite the clear legislative effort to provide for statewide state enforcement, it was more than 11 months before the Environmental Protection Agency (EPA) filed a single complaint against a Chicago polluter, as the Board pointed out with irritation in its second report.[15] Nevertheless, the EPA was adamant against delegating to the city any primary responsibility for administering the state permit

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[9] Governor Richard Ogilvie, Special Message on the Environment, at 6, April 23, 1970 [hereinafter cited as Ogilvie Message]; Currie Testimony, *supra* note 3, stating the bill in final form would

> eliminate local exemptions from state law so that we might for the first time have a state-wide pollution control program and fulfill our responsibilities under federal law.

Id. at 5.

[10] ILL. REV. STAT. ch. 111½, § 1002(a)(ii) (1973).

[11] *See also id.* §§ 1009(a), 1012(a), making it an offense to cause air or water pollution "in Illinois."

[12] 4 Ill. P.C.B. 511 (1972).

[13] *Id.* at 512.

[14] Chicago v. PCB, 59 Ill. 2d 484, 489-90, 322 N.E.2d 11, 15 (1974).

[15] D. Currie, Ill. Pollution Control Bd. Second Report 11, PCB Newsletter No. 25, June 30, 1971 [hereinafter cited as Second Report].

system, and, as a result, multiple applications meeting different requirements must be filed.[16]

Sections 9(a) and 12(a) explicitly extend protection against air and water pollution to Illinois victims who are injured by contaminants discharged in other states.[17] The need for such protection is clear, and Illinois' obviously legitimate interest in protecting its people and its resources from harm surely suffices to uphold the constitutionality of the provision.[18] In order to facilitate the filing of complaints against out-of-state sources, section 31(a) provides that in such cases "the extra-territorial service-of-process provisions of sections 16 and 17 of the Illinois Civil Practice Act shall apply."[19] Those sections, the so-called long-arm statute, of course do not explicitly mention complaints to enforce the pollution laws,[20] and an overly literal reading might find that the legislature had accomplished nothing at all, an inference which should not be drawn unnecessarily. The purpose of section 31(a) is obvious, and it should be held to make extra-territorial service available in pollution cases as it is in the cases enumerated in sections 16 and 17. The constitutionality of such service is no longer in doubt after the unmistakable dictum in *Ohio v. Wyandotte Chemicals Corp.*,[21] where the United States Supreme Court, in declining to exercise original jurisdiction over a complaint by Ohio against Canadian polluters, stressed that its dismissal did not leave the plaintiff without access to a sympathetic forum:[22]

> The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy . . . .

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16 *See* Ill. P.C.B. Reg. ch. 3, part IX (1970).

17 *See, e.g.*, section 9(a), which provides that:

> No person shall . . . [c]ause or threaten or allow the discharge or emission of any contaminant . . . in any State so as to cause or tend to cause air pollution in Illinois . . . .

ILL. REV. STAT. ch. 111½, § 1009(a) (1973).

18 *See, e.g.*, Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954); Richards v. United States, 369 U.S. 1, 15 (1962) (dictum). *See also* cases cited in R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS, ch. 3 (2d ed. 1975); B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 271 (1963).

19 ILL. REV. STAT. ch. 111½, § 1031(a) (1973).

20 The sections authorize out-of-state service for such matters as "the transaction of any business" or "the commission of a tortious act" within the state. ILL. REV. STAT. ch. 110, §§ 16, 17 (1973).

21 401 U.S. 493 (1971).

22 *Id.* at 500-01.

> [T]he State has charged Dow Canada and Wyandotte with the commission of acts, albeit beyond Ohio's territorial boundaries, that have produced and, it is said, continue to produce disastrous effects within Ohio's own domain. . . . [I]t is unlikely that we would totally deny Ohio's competence to act if the allegations made here are proved true. See, *e.g., International Shoe Co. v. Washington*, 326 U.S. 310 (1945) . . . .

Disappointingly, not once were the provisions respecting out-of-state polluters invoked before the Board during its early years, although the Attorney General on occasion filed court suits against out-of-state polluters under other laws.[23] However, a recent court-imposed penalty of $1,900,000 against an Indiana polluter was based on the Environmental Protection Act.[24]

B. *"Air" and "Water"*

"Air" and "water" are the environmental media the statute protects from pollution, and it may be thought that they are reasonably self-defining. The statute does not bother defining air, though "air pollution" is the presence of sufficient contaminants "in the atmosphere."[25] Already ambiguities appear. Is the emission of fluorocarbons from aerosol cans excluded if it damages only an ozone layer above what scientists define as the atmosphere? There seems no reason for any such distinction, for the goal seems to be to prevent harm in the transparent medium above land and water,[26] and a scientific definition, therefore, should not be imported.

A second question is whether the term "atmosphere" is used to distinguish outdoor air from the interior of buildings, an interpretation which on its face seems plausible. But the omissions of the qualifying word "outdoor," and of the explicit disclaimer of authority over the air "within commercial and industrial plants," which both

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[23] *See, e.g.*, Illinois v. Milwaukee, 406 U.S. 91 (1972) (federal common law).

[24] Metropolitan Sanitary Dist. v. Inland Steel Co., 8 E.R.C. — (Cir. Ct. Cook Co. 1975).

[25] ILL. REV. STAT. ch. 111½, § 1003(b) (1973).

[26] It probably would do no good to focus on the fact that destruction of the ozone layer will ultimately cause damage in the atmosphere, for the statute requires that the contaminants, not the damage, be present there. This suggests still another construction, namely, that it is sufficient that contaminants that will destroy the ozone above the atmosphere are present in the atmosphere before they do so. But this construction would not prohibit emissions from high-flying craft that might do identical damage. "Atmosphere" is an unfortunate term in light of our enhanced ability to harm ourselves by what we do in the wild blue yonder.

expressly graced the earlier air-pollution law,[27] would suggest the contrary. The inference that the omissions were deliberate is bolstered by the express provision in the noise section limiting liability to emissions "beyond the boundaries of [the emitter's] property."[28] This issue recently surfaced when a citizens' petition asked the Board to limit smoking in public places. The Board held itself without jurisdiction.[29] To hold that indoor air was included might have given the Board full authority over the air aspects of industrial hygiene. This, however, was already covered by a separate administrative scheme,[30] and there was no reason to think the General Assembly meant to duplicate it. If the suggestion was made that indoor air was included except to the extent of occupational exposures covered by other laws, the Board was not impressed.

Water pollution, in turn, is defined in terms of harm to "waters of the State,"[31] and "waters" means[32]

> all accumulations of water, surface and underground, natural and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.

Eliminated, one hopes, are quibbles about ownership, man-made lakes and canals, and underground sources; everything but the kitchen sink is protected. The difficulty with the definition is not underinclusion but overinclusion, for kitchen sinks are literally within it and, more important, so are sewers. Not surprisingly, the Board recoiled from an absurdly literal construction and rejected samples collected "where water drains from the irrigation field into a stream or ditch" crossing the defendant's land:[33]

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[27] Ch. 111½, § 240.2(c), [1963] Ill. Laws 73d Gen. Assem. 3192; ch. 111½, § 240.5-3, [1965] Ill. Laws 74th Gen. Assem. 3675.

[28] ILL. REV. STAT. ch. 111½, § 1024 (1973).

[29] Proposed Amendments to Air Pollution Regulations to Regulate Smoking in Public Places, Ill. P.C.B. Environmental Reg. No. 105, at 3 (July 10, 1975).

[30] ILL. REV. STAT. ch. 48, §§ 137.1 *et seq.* (1973).

[31] *Id.* ch. 111½, § 1003(n).

[32] *Id.* § 1003(o).

[33] EPA v. Koppers Co., 1 Ill. P.C.B. 579, 580 (1971). Inconsistently and unnecessarily, the Board in another case relied upon a broader definition of "waters" as one basis for upholding regulations limiting discharges to sewers because "any other construction would cripple our power to protect against pollution of the streams and soils." Mercury Standards, 1 Ill. P.C.B. 411, 420 (1971). The same opinion, however, more persuasively justified the regulation under section 13 as necessary to prevent the pollution of actual streams. An appellate court has accepted the latter argument. A. E. Staley Mfg. Co. v. EPA, 8 Ill. App. 3d 1018, 290 N.E.2d 892 (4th

> Whether this is a stream or not was never proved. The fact that it is bordered on both sides by the respondent's property does not excuse its pollution, since the statutes apply to waters "public or private." But if the discharge is to a ditch that is essentially a part of the treatment or discharge facilities, it may be unprotected; the law does not say sewage cannot be dumped into sewers.

Yet the Board has been careful to protect real streams from being used as treatment facilities:[34]

> We do not think the law allows a stream to be deprived of all protection against pollution simply by the construction of concrete beds, intermittent covers, and sheet pilings. If it did the law would provide no protection against the transformation of fine streams into festering open sewers.

There will probably always be a gray area between sewers to which one may discharge pollutants and streams to which one may not,[35] but that some such line must be drawn seems clear enough.

An interesting question of the scope of the Act was raised by a citizen complaint alleging that excessive infiltration of storm water into sanitary sewers had resulted in the backup of raw sewage into basements.[36] This unpleasant problem had earlier been considered by the Board in deciding whether or not to grant variances, for the statutory variance criterion of "unreasonable hardship"[37] appears to invite an analysis of all costs and benefits.[38] But what the statute

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Dist. 1972). However, the opinion upholding the mercury regulations does not make clear which of these theories the court accepted. Armstrong Chemcon, Inc. v. PCB, 18 Ill. App. 3d 753, 310 N.E.2d 648 (1st Dist. 1974).

[34] EPA v. Urbana, 5 Ill. P.C.B. 331, 337 (1972). The principles developed in construction of the statutory term "waters" were incorporated into the rule defining "waters" for purposes of Board regulations:

> [S]ewers and treatment works are not included except as specifically mentioned; provided, that nothing herein contained shall authorize the use of natural or otherwise protected waters as sewers or treatment works.

Ill. P.C.B. Reg. ch. 3, rule 104 (1970).

[35] For example, although presumably an independent pit dug for the purpose of cooling heated water would qualify as a treatment work exempt from discharge limitations, the Board held a cooling lake created by damming an existing stream was a "water" of the state protected by the statute and regulations. Central Ill. Pub. Serv. Co. v. EPA, 11 Ill. P.C.B. 677 (1974). Regulations recently adopted, however, make thermal limitations inapplicable to such lakes under certain conditions. *See* Water Quality and Effluent Standards Amendments, Cooling Lakes, Ill. P.C.B. Environmental Reg. No. 108, at 5-6 (Aug. 14, 1975).

[36] Donaldson v. Elmhurst, 9 Ill. P.C.B. 681 (1973).

[37] ILL. REV. STAT. ch. 111½, § 1035 (1973).

[38] *See, e.g.*, North Shore Sanitary Dist. v. EPA, 3 Ill. P.C.B. 541 (1972).

forbids is pollution of water, not pollution by water; however undesirable, to dump sewage in a basement is not the statutory offense of water pollution. One thing the Board did to avoid this ostensible gap was to hold that by allowing overflows the respondent had created a threat of water pollution[39] and deposited contaminants on land so as to create a water pollution hazard.[40] Clearly such holdings may be substantiated in particular cases,[41] but they scarcely follow automatically from the presence of sewage in basements. The Board also relied on a regulation forbidding excessive infiltration and overflows from sanitary sewers;[42] the general danger that such overflows may result in damage to streams should suffice to uphold the regulation[43] without the necessity for showing such a danger in the individual case.[44] Thus, by a roundabout route that focused on the danger of water pollution, the Board was able to back into protection against sewage in basements, a concern which the Act does not directly address. It would be better if the Board were given explicit authority over all environmental aspects of the process of sewage collection and disposal so that they could be handled in a unified way.[45]

C. *"Contaminants"*

Air and water pollution are defined as the discharge or presence of "contaminants" of such type and quantity as to cause prescribed adverse effects. To avoid prolixity and the danger of unintended omission in the face of the continuing development of new and harmful chemicals, the Act in section 3(d) defines contaminant as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source,"[46] *i.e.*, anything at all. It should not be thought that this universal definition renders it illegal to exhale or to pour clean water into a stream, for some tendency to cause

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[39] ILL. REV. STAT. ch. 111½, § 1012(b) (1973).

[40] *Id.* § 1012(d).

[41] *See* text accompanying notes 62-72 *infra.*

[42] Ill. P.C.B. Reg. ch. 3, rule 602(b) (1970).

[43] *Cf.* A. E. Staley Mfg. Co. v. EPA, 8 Ill. App. 3d 1018, 290 N.E.2d 892 (4th Dist. 1972).

[44] One could not hope to prevail, for example, on an argument that it was all right to go through a stop sign because there was no cross traffic at the moment of violation.

[45] *Cf.* ILL. REV. STAT. ch. 111½, §§ 1020-22 (1973), which give authority to the Board over the process of solid-waste disposal.

[46] ILL. REV. STAT. ch. 111½, § 1003(d) (1973).

harm is a minimum additional element of air or water pollution[47] and countervailing considerations such as the cost of control are expressly made relevant.[48] But no reason was perceived for making violation dependent upon the nature of the discharge, except insofar as it bears upon the important issues of harm and justification. Thus the words "solid, liquid, or gaseous" were added to emphasize that all matter is included; "energy" was used to avoid arguments over whether radiation or thermal pollution could be categorized as "matter;" and "odors" was included lest it be argued that they were distinct from their material source.

Yet the words literally may encompass more than what one generally thinks of as air or water pollution. While noise is scarcely to be considered "matter," it might be argued to be "energy," and it certainly is capable of damaging health or interfering with the enjoyment of life. However, the conclusion that noise can constitute air pollution would plainly be at variance with the structure of the Act, which authorizes noise regulation under a separate title.[49] More difficult to brush aside is the argument that the light emitted from sodium-vapor street lights causes air pollution because it may damage trees. Light is undoubtedly "energy," and the law should provide a remedy for the emission of unnecessarily harmful light, but I have my reservations that this falls within the purpose of the prohibition on air pollution. What the draftsmen had in mind was what the public has in mind: cases in which, speaking loosely, the air is made dangerous and harmful. To seize upon broad definitional language of modest purpose to expand state regulation into areas not traditionally thought of as pollution smacks too much of invading the province of the legislature. The noise example, while resolvable on narrower grounds of implicit statutory exception, brings this point home: surely if there had been no separate title regulating noise, the legislators would have been shocked to discover they had authorized noise abatement under the improbable heading of air pollution;[50] indeed the explicit attention given to noise even in the original bill, which did outlaw noise nuisances,[51] suggests the draftsmen thought air pollution did not cover it.

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47 *Id.* §§ 1003(b), (n).

48 *See* text accompanying notes 92-100 *infra.*

49 ILL. REV. STAT. ch. 111½, §§ 1023-25 (1973) (title VI). *See* Currie, *supra* note 2, at 462-64.

50 Stones are "matter" and with sufficient momentum they can cause injury to health or property; I still don't think throwing stones constitutes air pollution.

51 Ill. H.B. 3788, 76th Gen. Assem., § 24 (1970).

D. *Harm*

The first requirement of pollution under the statute is that the air or water be rendered harmful to some protected interest: "injurious to human, plant, or animal life, to health, or to property," "interfer[ing] with the enjoyment of life or property;"[52] "creat[ing] a nuisance," or[53]

> harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

The protected interests are probably broad enough: even without redundancies, "public welfare" and "enjoyment of life or property" seem to cover any significant injury to human concerns, while the explicit references to plant and animal life remove any argument about divergence between human and other interests.[54] Knottier problems of interpretation arise in determining what "interfere[s]" or is "injurious."

Sometimes it's easy. A massive fish kill[55] is plainly "detrimental . . . to . . . fish," and offensive odors[56] or soot on newly washed clothes[57] "interfere[s] with the enjoyment of life or property." But the Act also protects esthetic values,[58] and allegations of esthetic injury may be more difficult to evaluate. At one extreme, any discharge that displeases anyone interferes with his enjoyment. However, I do not think the discharge of clean air could be held harmful because a neighbor prefers it dirty. On the other hand, while I doubt it will ever be stopped, the practice of dyeing the Chicago River green in honor of St. Patrick should technically be held injurious to public welfare and to recreational uses of the river upon proof that it offends the sensibilities of a substantial number of pass-

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52 ILL. REV. STAT. ch. 111½, § 1003(b) (1973) (air pollution).

53 *Id.* § 1003(n) (water pollution).

54 *See* Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974).

55 *See, e.g.*, EPA v. Russell, Burdsall & Ward Bolt & Nut Co., 4 Ill. P.C.B. 701 (1972).

56 *See, e.g.*, EPA v. Monmouth, 3 Ill. P.C.B. 345 (1972), *rev'd on other grounds*, Monmouth v. PCB, 57 Ill. 2d 482, 313 N.E.2d 161 (1974).

57 *See, e.g.*, EPA v. Lindgren Foundry Co., 1 Ill. P.C.B. 11 (1970).

58 *See* ILL. REV. STAT. ch. 111½, §§ 1008, 1011 (1973) (finding that pollution "offends the senses" and stating the sections' purpose to be the protection of "the quality of life"). Governor Ogilvie's message recommending adoption of the Act expressly mentions esthetic interests. Ogilvie Message, *supra* note 9, at 2.

ers-by. Perhaps the safest course would be to deal with the problem of insignificant or idiosyncratic[59] injury in terms of the balancing of costs and benefits that other sections make necessary in all cases,[60] but there may be room for a narrow doctrine of de minimis harm that would facilitate dismissal of undeserving complaints without the burden of hearing.

Sometimes pollution is sought to be proved by measuring ambient concentrations of contaminants in the absence of evidence of actual harm. In a stream that has long been too polluted to support fish, or when the adverse health effects of an air pollutant appear only after years of incubation, this may be the best available evidence. Proof that contaminants are of such character and concentration as to be capable of causing cancer surely meets the statutory requirement that they be "injurious"; the words do not require, and the underlying policy does not permit, holding that the disease must actually have occurred in the individual case. The harmfulness of a contaminant, however, often depends not only upon its concentration but upon the duration of exposure, and this fact has given rise to proof problems. As the Board observed in a case in which grab samples showed elevated ammonia levels in a stream:[61]

> [T]he only proof as to the harmful nature of the observed ammonia concentrations . . . was that such levels would be toxic to fish if they persisted for 48 hours . . . , whereas the samples taken showed only that the levels were present at the instant the samples were taken. Statutory water pollution . . . is defined as rendering the waters "harmful . . . to fish . . . ." It is arguable . . . that this requires a showing that the concentration complained of existed for long enough to be harmful.

It seems plain that the instantaneous existence of a concentration requiring long exposure to inflict damage is not "injurious," so proof that exposure was too brief should defeat a finding of pollution. The real issue becomes one of burden of proof: under what circumstances may one reasonably infer from proof of a single high grab sample that the measured concentration persisted or will persist for the period required to inflict harm? Surrounding facts will be deter-

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59 *I.e.*, to the person who is unusually sensitive to a substance innocuous to most at the measured concentration. In his presence the concentration is clearly "injurious."

60 *See* text accompanying notes 92-100 *infra*.

61 EPA v. Urbana, 5 Ill. P.C.B. 331, 335 (1972). Finding other sufficient proof of pollution, the Board did not resolve the issue.

minative in each case: the isolated or continuing nature of the discharge; the rate of degradability of the contaminant; the expected dispersion by means of wind or clean water.

E. *"Threaten" and "Tend to Cause"*

It is an offense not only to discharge contaminants that cause pollution, but also to "threaten" to do so;[62] a discharge is unlawful not only if it causes pollution but also if it "tend[s]" to;[63] and water pollution is shown by a discharge that "is likely to" render the water harmful as well as by one that actually does.[64] These provisions, which aroused considerable industry opposition, were intended to have a prophylactic effect, for without them the Board would be required "to wait until the harm [had] already been done before taking action."[65]

Thus if it can be shown that a planned course of action, such as the operation of a new factory with inadequate pollution controls, will in fact violate the statute or regulations, it may be restrained in advance.[66] Moreover, the Board has applied the "threaten," "likely" or "tend" language to find violations when it is less than certain that actual pollution will result. In one case in which there was evidence that acid runoff from mine-waste piles was not great enough in normal weather to damage the receiving stream, the Board without indicating predicted concentrations found a "threat" of pollution on the basis of its conclusion that acid "can be easily flushed down the ditches in slugs after a heavy rainfall, causing immediate and severe damage to the receiving stream,"[67] and that[68]

> in a period of drought and low flow . . . , a normal rainfall could reasonably wash down enough contamination to cause pollution to the receiving stream because of its diminished dilution capacity.

Yet the Board was aware of the danger that words such as "likely to cause" and "tend to cause" might be stretched too far: "We do not hold that the mere presence of a potential source of

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62 ILL. REV. STAT. ch. 111½, §§ 1009(a), 1012(a) (1973).

63 *Id.*

64 *Id.* § 1003(n).

65 Currie Testimony, *supra* note 3, at 9.

66 This provision could, therefore, be used to support a citizen challenge to the issuance of a permit, see text accompanying note 443 *infra.*

67 EPA v. Ayrshire Coal Co., 4 Ill. P.C.B. 415, 419 (1972).

68 *Id.*

water pollutants on the land necessarily constitutes a 'threat' of water pollution";[69] the statute[70]

> cannot mean that every effluent containing high concentrations of contaminants is prohibited without further proof, for that would render meaningless the restricted definition of water pollution.

Thus, the Board held, a substantial risk of actual pollution must be shown:[71]

> Where as here, a large source of toxic contaminants is deposited or is maintained on the land in close proximity to the water . . . , which contaminants can readily reach the waters of the state in such quantities and concentrations or under such conditions as to cause pollution . . . , the risk of pollution . . . constitutes an unlawful threat.

There will of course be difficulties in determining what evidence is necessary to establish the requisite risk, but this formulation seems an appropriate reconciliation of the competing statutory policies and should be applied to all the various terms providing for violations short of actual pollution.[72] It might be preferable if the statute contained a single provision authorizing the abatement of present or projected activities creating a substantial likelihood of actual pollution.

F. *Strict and Vicarious Liability*

Vexing interpretive problems have centered on the words "cause or allow," which apply to open burning[73] as well as to the

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[69] *Id.* at 420.

[70] EPA v. James McHugh Constr. Co., 4 Ill. P.C.B. 511, 520 (1972). Technically, the Board in that case was discussing the related provision in section 12(d) making it unlawful to "deposit any contaminants on the land in such place and manner so as to create a water pollution hazard." ILL. REV. STAT. ch. 111½, § 1012(d) (1973). Similar considerations apply to both sections, although the language used in *McHugh* actually is more directly relevant to section 12(a). *See also* EPA v. Ayrshire Coal Co., 4 Ill. P.C.B. 415 (1972): "Nor does the threatened discharge of any kind of contaminants into the waters . . . necessarily 'tend to cause water pollution.'" *Id.* at 420.

[71] EPA v. Ayrshire Coal Co., 4 Ill. P.C.B. 415, 420 (1972).

[72] *See* EPA v. James McHugh Constr. Co., 4 Ill. P.C.B. 511 (1972) (section 12(d)).

[73] ILL. REV. STAT. ch. 111½, § 1009(c) (1973). Section 3(g) of the statute defines "open burning" as "combustion of any matter in the open," *id.* § 1003(g), but fortunately the term is not overly ambiguous. The contrast is with burning in an enclosed space such as an incinerator, and the prototype violation is the venerable practice of setting fire to piles of trash or garbage. (The regulations define open burning as combustion

> in such a way that the products of the combustion are emitted to the open air without originating in or passing through equipment for which a permit could be issued . . . .

more general provisions against air and water pollution.[74] Obviously included are deliberate violations, such as holding a match to a mound of leaves with the intention of burning them, and the settled proposition that ignorance of the law is no defense should be held to apply.[75] It may often be easy enough to show that a continuing violation is deliberate, but in the case of a single oil spill or refuse fire, an intent requirement could seriously frustrate enforcement. Violators do not always wait until state inspectors or disinterested citizens are present before striking the match or opening the valve; frequently the only evidence is that a fire occurred or that oil was spilled.[76]

Ill. P.C.B. Reg. ch. 2, rule 501(e) (1970). If the regulation ended after the word "equipment," it would reflect the statutory concept. The broader regulation is supported by the general rule-making authority in section 10.) The additional requirement of section 9(c) that the enclosure be one designed for refuse burning and approved by the Agency is intended to prevent burning in furnaces and other devices not equipped with adequate control equipment. But it is only "refuse" to which these prohibitions apply, and refuse is defined in section 3(k) as "any garbage or other discarded solid materials," ILL. REV. STAT. ch. 111½, § 1003(k) (1973). While this definition is broad enough to embrace diseased trees and fallen leaves as well as domestic and many industrial wastes, it unaccountably permits the combustion of anything liquid or gaseous, and the term "discarded" reinforces the implication that "refuse" includes only what the burner wishes to be rid of. While no subjective questions of intention seem to have arisen in this connection, the ban clearly does not extend to the burning of valuable substances such as fuels where the purpose is the generation of heat, the giving of visible warnings, the training of firefighters, or anything other than the destruction of unwanted material. The economic disincentive to destroy valuable materials may help to explain the statutory distinction. But the only practical consequence of the narrow definition of refuse is to give the Board greater flexibility in defining impermissible open burning of other materials; for the Board, quite properly invoking its authority under section 10 to make regulations to protect the air, has outlawed all open burning except as specifically authorized. Open Burning Regulations, 2 Ill. P.C.B. 373 (1971) (discussing Ill. P.C.B. Reg. ch. 2, part V (1970)).

Section 9(c) also prohibits conducting "any salvage operation by open burning." ILL. REV. STAT. ch. 111½, § 1009(c) (1973). "Salvage" is not defined, but a central target was the familiar practice of burning automobile bodies to remove upholstery and other impurities before recycling them to the steel mills. *See* EPA v. Neal Auto Salvage, Inc., 1 Ill. P.C.B. 71, 75 (1970).

[74] ILL. REV. STAT. ch. 111½, §§ 1009(a), 1012(a) (1973).

[75] *See generally* R. PERKINS, CRIMINAL LAW 920-25 (2d ed. 1969) [hereinafter cited as PERKINS]. The legitimate argument against punishing individuals for innocent acts made illegal by an imperfectly publicized regulation runs afoul of policy considerations imposing a duty on citizens to know the law. Moreover, the argument ignores the difficulties in disproving false assertions of ignorance. Claims of ignorance are probably best dealt with through a mitigation of penalties.

[76] The Pollution Control Board, seeing the danger that deliberate violations might otherwise go unpunished, took the position that the mere existence of a fire made out a prima facie case of deliberate burning in auto-salvage cases:

There is, however, nothing in the statute to suggest that pollution or refuse burning is punishable only if deliberate. The statute uses the words "cause or allow," eschewing such terms of scienter as "knowingly" or "intentionally." While the Board once said that "cause" "connotes a conscious and affirmative act,"[77] there is certainly a sense in which one can cause a fire without meaning to. The whole law of negligence attests to that, and indeed the language permits holding a person to have caused anything that arises out of his activities. The additional word "allow" could conceivably be read narrowly to require some degree of affirmative authorization, but more plausibly it suggests liability for a failure to prevent pollution or open burning. It is not likely the legislature meant to punish people who had no connection with an incident and no power to prevent it, but the natural interpretation is that a duty was imposed upon persons responsible for an activity to take at least reasonable precautions to prevent damage to the environment. Consequently the Board held that "the term 'allow' in the context used clearly embraces negligent operations as a basis for violation."[78]

> The presence of a burning truck in a salvage yard in consideration of the economic advantage of such burning and the history of salvage operations requires an explanation in defense. The Respondent has the facts in its possession . . . .

EPA v. Neal Auto Salvage, Inc., 1 Ill. P.C.B. 71, 75 (1970). It is not unusual for intent to be proved by circumstantial evidence, even in the face of an interested denial, *see, e.g.*, Morissette v. United States, 342 U.S. 246, 279 (1952) (dictum), but the evidence must be such as to justify inference of intention. While the scrap dealer's economic incentive to burn cars certainly makes intentional ignition one plausible inference from the existence of a fire in a salvage yard, the fact that "an auto salvage yard has an infinite potential for fires" due to the proximity of acetylene torches and gasoline, noted elsewhere by the Board, EPA v. McIntyre, 3 Ill. P.C.B. 223, 226 (1971), suggests a substantial possibility of unintended fire. It clearly cannot be said, as it sometimes is in applying the familiar doctrine of res ipsa loquitur, that a burning car body is the type of occurrence that "ordinarily does not happen" accidentally. *See* W. PROSSER, TORTS 214 (4th ed. 1971) [hereinafter cited as PROSSER]. A high frequency of fires may weaken the inference of accident, and the failure of the salvage operator to give satisfactory explanation may strengthen the inference of deliberate wrongdoing. This is little help if he swears it was an accident and gives plausible details. Moreover, an inference from silence may contravene the principle that a person's refusal to testify on self-incrimination grounds may not be used against him. *See* Griffin v. California, 380 U.S. 609 (1965). However, it may be significant that *Griffin* was a criminal case while the proceeding here is civil.

One appellate court has expressly held that "neither the occurrence of a fire nor its frequency is sufficient to justify the inference" that auto bodies had been set afire deliberately. McIntyre v. PCB, 8 Ill. App. 3d 1026, 1029, 291 N.E.2d 253, 256 (3d Dist. 1972).

[77] EPA v. McIntyre, 3 Ill. P.C.B. 223, 226 (1971) (dictum), *rev'd on other grounds*, 8 Ill. App. 3d 1026, 291 N.E.2d 253 (3d Dist. 1972).

[78] *Id.* Thus a violation was found when a negligent landfill operation created an

Moreover, in line with the general tendency to construe statutes creating nuisance-type or "public welfare" offenses as imposing strict liability in the absence of an explicit mens rea requirement,[79] the Board early and without discussion found water-pollution violations in oil-spill cases with no proof of intentional wrongdoing or even of negligence.[80] In a later opinion the Board addressed the issue squarely:[81]

> [L]iability for pollution or for violation of the regulations does not depend upon affirmative proof of negligence. . . . [T]he statute imposes an affirmative duty to keep offending quantities of contaminants out of the environment . . . , recogniz[ing] that to require proof of negligence would greatly impede the enforcement process and fail to achieve the goals of the pollution control program.

A reviewing court agreed, upholding an order against a landowner on the basis of evidence that drainage from mining waste piled on the land by a former owner caused pollution: the statute was *"malum prohibitum,"* and "lack of knowledge" was "no defense."[82]

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unnecessary fire hazard and inadequate efforts were made to extinguish the resulting blaze. EPA v. Cooling, 1 Ill. P.C.B. 85, 93 (1970). Moreover, in auto-salvage cases the Board has held that the occurrence of frequent fires alone creates an inference of negligence which shifts the burden to the respondent to show that the fires were accidental, EPA v. Cobin, 3 Ill. P.C.B. 69 (1971). One appellate court has agreed. Cobin v. PCB, 16 Ill. App. 3d 958, 969, 307 N.E.2d 191, 198 (5th Dist. 1974). Query whether the facts that acetylene torches are commonly used in processing abandoned cars and that there is often gasoline in the tanks suggest negligence, as the Board thought, or a significant likelihood of accidental fire.

[79] *See* PERKINS, *supra* note 75, at 799-809; Morissette v. United States, 342 U.S. 246, 250-63 (1952).

[80] EPA v. Yetter Oil Co., 3 Ill. P.C.B. 119, 121 (1971); EPA v. Valley Line Co., 3 Ill. P.C.B. 355, 356 (1972).

[81] Youth for Environmental Salvation v. Chicago, M., St. P. & P. R.R., 4 Ill. P.C.B. 697 (1972).

[82] Meadowlark Farms, Inc. v. PCB, 17 Ill. App. 3d 851, 861, 308 N.E.2d 829, 836 (5th Dist. 1974). *Accord,* CPC International, Inc. v. PCB, 24 Ill. App. 3d 203, 321 N.E.2d 58 (3d Dist. 1974) (dictum) (particulate regulation); Bath, Inc. v. PCB, 10 Ill. App. 3d 507, 294 N.E.2d 778 (4th Dist. 1973) (open burning of refuse). *But see* McIntyre v. PCB, 8 Ill. App. 3d 1026, 291 N.E.2d 253 (3d Dist. 1972):

> The motive, intent or purpose to institute or permit open burning for the purpose of disposing of refuse either by itself or as an incident to salvage must be shown before any statutory violation can be proved.

Id. at 1029, 291 N.E.2d at 255. Though *McIntyre* has been distinguished on the ground that the complaint there had alleged allowing open burning "knowingly," see Cobin v. PCB, 16 Ill. App. 2d 958, 968, 307 N.E.2d 191, 198 (5th Dist. 1974), the quoted language indicates the court in *McIntyre* construed the statute itself to require deliberate violation. In the case of salvage, there is more to be said for this interpretation. Rather than using the words "cause or allow," section 9(c) makes it unlawful

Given the absence of any explicit requirement of intention or negligence, the history of construction of similar statutes, the fact that environmental damage is as serious if accidental as if deliberate, the difficulties of proving intention or negligence, the fact that the stigma of infamous crime is not involved, and the common policy in statutes such as this to impose absolute liability in order to induce "a degree of diligence for the protection of the public which shall render violation impossible,"[83] this conclusion still seems to me correct.[84]

G. *The Cost of Compliance and Related Considerations*

To say that intentional or negligent wrongdoing need not be shown is not to say that every instance of harm to the environment

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to "conduct any salvage operation by open burning." ILL. REV. STAT. ch. 111½, § 1009(c) (1973). While even these words may be read to outlaw fires that occur in the course of salvage operations, they lend themselves more readily to the construction given them in *McIntyre*. For reasons given in the text, I think an ideal statute should impose absolute liability for fires in the course of salvage operations.

83 People v. Roby, 52 Mich. 577, 579, 18 N.W. 365, 366 (1884).

84 There is no relevant legislative history to aid us in interpreting this provision of the statute.

Another dimension of the problem of interpreting "cause or allow" is presented by cases concerning liability for the acts of others. The draftsmen assumed that the traditional principle of respondeat superior was applicable, as is implicit in the definition of "person" subject to the prohibitions to include corporations (section 3(i)), which act only through agents. The Board, however, construed the term "allow" to go beyond common law concepts of vicarious liability by holding landowners responsible not only for failure to take adequate precautions against illegal dumping (section 21(b)) by outsiders on their property, EPA v. Rafacz Landscaping & Sod Farms, Inc., 6 Ill., P.C.B. 31, 33 (1972); EPA v. Dobbeke, 5 Ill. P.C.B. 219, 220 (1972), but also for violations committed by lessees operating a landfill, EPA v. Clay Products Co., 2 Ill. P.C.B. 33 (1971). The Board also held a city responsible for violations by its independent contractor, EPA v. James McHugh Constr. Co., 4 Ill. P.C.B. 511 (1972), in furtherance of "the statutory policy that those in a position to prevent pollution must do so." *Id.* at 513. *See also* EPA v. Champaign, 2 Ill. P.C.B. 411 (1971), *rev'd on other grounds,* Champaign v. EPA, 12 Ill. App. 3d 720, 299 N.E.2d 28 (4th Dist. 1973):

> The use of the word "allow" expresses a legislative policy requiring affirmative action by the owner of such property as refuse dumps and sewers to prevent unnecessary pollution. This . . . does not mean the Board will impose monetary penalties every time somebody pours oil into a city's sewer . . . . , but . . . . it is the City's obligation to do what it can to prevent others from discharging inappropriate materials into its sewers.

Id. at 428-29. One appellate court has fixed limits to this principle by setting aside a penalty against a landowner for open burning by trespassers. The court reasoned that,

> from the fact that Alton and Southern may be presumed to know that salvage operations were being conducted on their land, it does not follow that they may be presumed to know that the operations were being conducted illegally.

Alton & So. Ry. v. PCB, 12 Ill. App. 3d 319, 320, 297 N.E.2d 762, 763 (5th Dist. 1973). Another has flatly read the common-law independent-contractor doctrine into

constitutes a violation of the statute. It would be madness to require the expenditure of millions to prevent a nickel's worth of damage, and the statute does not do so. Not only must the cost of compliance be taken into account in setting regulations,[85] but the statutory offense of air pollution is defined in part as the presence of such contaminants as "to unreasonably interfere with the enjoyment of life or property,"[86] suggesting on its face a comparison of costs and benefits. "Unreasonably" does not appear in the definition of every violation: water pollution is the discharge of contaminants that "create a nuisance or render such waters harmful or detrimental or injurious" to protected interests,[87] while air pollution includes the presence of contaminants "injurious to human, plant, or animal life, to health, or to property."[88] Relief on the ground of excessive cost of compliance, however, was intended to be afforded by the provision for "individual variances beyond the limitations prescribed in this Act" on proof that "compliance . . . would impose an arbitrary or unreasonable hardship."[89] While the variance provisions establish a separate declaratory procedure for determining the existence of unreasonable hardship,[90] the same hardship may be raised as a defense to a complaint.[91]

In the original bill it was clear that unreasonable hardship would excuse both statutory violations such as water pollution and offenses defined by regulation: a variance or defense was to be allowed on proof that "compliance with any provision of this Act, or any rule or regulation, requirement to [sic] order of the Board" would cause the requisite hardship.[92] The Board as well as litigants assumed that the final legislation similarly allowed variances from the statute itself.[93] In fact, however, the language was substantially modified during the course of the legislative process, so that variances are to be granted only upon proof that the requisite hardship would result

the statute without explanation. Aurora Metal Co., Faskure Div. v. PCB, 30 Ill. App. 3d 956, 961, 333 N.E.2d 461, 465 (1975).

85 ILL. REV. STAT. ch. 111½, § 1027 (1973).

86 *Id.* § 1003(b).

87 *Id.* § 1003(n).

88 *Id.* § 1003(b).

89 *Id.* § 1035.

90 *Id.* § 1037.

91 *Id.* § 1031(c).

92 Ill. H.B. 3788, 76th Gen. Assem., § 35 (1970) (variance); *see also* section 31(c): "compliance with the Act or with the Board's regulations." ILL. REV. STAT. ch. 111½, § 1031(c) (1973) (defense).

93 *See, e.g.*, Olin Corp. v. EPA, 1 Ill. P.C.B. 135 (1970); Deere & Co. v. EPA, 1 Ill. P.C.B. 129 (1970).

from compliance with "any rule or regulation, requirement or order of the Board."[94] This omission seems to have been purely accidental, rather than the work of industry lobbyists, for it tends to operate to industry's disadvantage.[95] It may be possible to ignore the omission as a typographical error.

Fortunately, however, while the omission of authority to vary the requirements of the statute itself may make the declaratory variance procedure unavailable, it does not mean people will have to incur unreasonable costs to avoid environmental harm. Section 33 (c) directs the Board, "in making its orders and determinations," to "take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved" and proceeds to give a nonexhaustive list of such facts including the "degree of injury" and the "technical practicability and economic reasonableness" of reducing the problem.[96] As the courts have held, these factors are an aid to determining whether interference with the enjoyment of life or property is "unreasonable," as required for certain categories of air pollution.[97] Moreover, they must also be considered in cases in which unreasonableness is not otherwise made an element of the statutory offense.[98] It was the presence of these provisions and the unsuspectedly narrow variance section that induced me to agree to the industry amendment inserting the word "unreasonably" for certain air-pollution offenses: since

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94 ILL. REV. STAT. ch. 111½, § 1035 (1973). The defense to a complaint requires a showing of unreasonable hardship due to compliance with "the Board's regulations." *Id.* § 1031(c). That this formulation is narrower than the one for a variance seems inexplicable but immaterial, for the respondent to a complaint may always file a counterpetition for variance, which will be consolidated with the complaint. *See* EPA v. Granite City Steel Co., 1 Ill. P.C.B. 315, 323-24 (1971).

95 It may still be possible to construe the statute as permitting variances from itself, for it does speak of variances "beyond the limitations prescribed in this Act." ILL. REV. STAT. ch. 111½, § 1035 (1973). Read as a whole, however, the provision for variances from the statute upon proof of hardship in meeting a regulation more plausibly means variances from the statutory requirement that the regulation be followed. The section does provide for proof respecting compliance with any "requirement" as well as order or regulation, but to read this term as embracing statutory requirements is difficult in light of the original bill, which referred separately to "any provision of this Act" and to "any rule or regulation, requirement to [sic] order of the Board." Ill. H.B. 3788, 76th Gen. Assem., § 35 (1970).

96 ILL. REV. STAT. ch. 111½, § 1033(c) (1973).

97 *See* Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 296, 319 N.E.2d 794, 797 (1974).

98 Sangamo Constr. Co. v. PCB, 27 Ill. App. 3d 949, 953-55, 328 N.E.2d 571, 574-75 (4th Dist. 1975) (air contaminants injurious to human, plant or animal life, to health or property).

the cost of compliance had to be considered anyway, saying so twice could make no difference. Unfortunately, this conclusion proved erroneous, as I shall demonstrate below;[99] but the essential fact remains that, as originally enacted, the Illinois statute did not require unreasonable measures to abate environmental harm, regardless of the definition of the particular offense charged.[100]

Recent events, however, have endangered this principle. In *Train v. Natural Resources Defense Council*,[101] the United States Supreme Court held that state variance provisions are permissible in plans for implementation of federal air-quality standards so long as they do not permit emissions that interfere with attainment or maintenance of the air-quality standard. On the basis of this decision the Illinois Board has required petitioners to plead (and, implicitly, to prove) that a variance will not cause violation of air-quality standards.[102] In policy terms this can only be described as a misguided requirement, for the costs of meeting an air-quality standard may

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[99] *See* text accompanying notes 349-60 *infra*.

[100] The requirement that the Board consider the relative costs and benefits of abating pollution may make largely semantic the Board's insistence that the statute does not require proof of negligence, for the essence of negligence is falling below a standard of reasonable care which is similarly based upon an assessment of costs and benefits. *See* Youth for Environmental Salvation v. Chicago, M. St. P. & P. R.R., 4 Ill. P.C.B. 697 (1972), where the Board emphasized that negligence need not be shown but acknowledged that the unreasonable hardship provisions would support a defense that offending emissions "could not practicably have been prevented." *Id.* at 699. One significant difference may be found in the burden of proof, which is discussed in the text accompanying notes 349-60 *infra*; a second may be found in the possible requirement of knowledge of the risk. Moreover, the Board has suggested that the defense may sometimes relate only to the remedy and not negate violation:

> It may be appropriate in some cases to refrain from imposing money penalties for purposes of deterrence or punishment, while requiring the respondent to pay for aquatic life damaged . . . , or to clean up an accidental oil spill, on the ground that doing so is a legitimate cost of doing business.

Youth for Environmental Salvation v. Chicago, M. St. P. & P. R.R., *supra* at 699. Similarly, it might accord with statutory policy to impose money penalties for accidental oil spills in the interest of inducing the highest degree of care, while recognizing that to shut down a facility responsible for such a spill would impose an unreasonable hardship. But the propriety of this approach, which is suggested by the phrasing of section 33(c) ("shall take into consideration . . . [i]n making its orders and determinations"), is perhaps more questionable in cases in which section 35 gives a flat right to a variance when the burden of compliance is unreasonable. ILL. REV. STAT. ch. 111½, §§ 1033(c), 1035 (1973). For exploration of this issue, see text accompanying notes 143-65 *infra*.

[101] 421 U.S. 60 (1975).

[102] *See, e.g.*, King-Seeley Co. v. EPA, 16 Ill. P.C.B. 505 (1975).

grossly exceed the benefits.[103] Similarly, in an effort to qualify the state to administer the federal permit program for water pollution, section 35 was unfortunately amended in 1973 to allow variances "only to the extent consistent with" the federal statute, which contains rigid deadlines with no provision for variances.[104]

Thus, subject to the limitations just noted, the cost of reducing environmental harm is a potential ingredient of every enforcement proceeding under the Illinois Act. But to say that cost is to be considered leaves much latitude; it is the weight given to cost in actual cases that will determine the success of the program. The following three sections explore the weight given to cost in three different contexts.

H. *The Variance Standard*

Without the safety valve of variances, even the most specific of regulations is likely to be Procrustean when applied to individual cases. Therefore, though generalized costs of abatement are considered in adopting regulations, the statute provides for relief even from numerical regulations if the hardship of compliance would, in the individual case, be "arbitrary or unreasonable."

The terms "arbitrary" and "unreasonable" suggest expenditures that cannot be justified by the resulting benefits to society. They require a comparison of the costs with the benefits. For example, an expenditure that would be wholly unreasonable to prevent the esthetic annoyance of a column of steam might be quite acceptable to prevent typhoid. "It is therefore essential in passing upon a variance petition," the Board held, "to compare the good effects of compliance with the bad."[105] In line with this interpretation and with the provision that the burden of proof is on the petitioner for a vari-

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[103] As a matter of law this requirement seems erroneous. The Illinois statute specifically requires consideration of unreasonable hardship. Contrary federal law would prevail under the supremacy clause, and section 110 of the federal statute clearly contemplates that states will not only adopt an adequate strategy but will enforce it, for it requires "assurances that the state will have adequate personnel, funding, and authority to carry out" the plan. 42 U.S.C. § 1857c-5(a)(2)(F) (1970). But nothing in the federal Act purports to require the states to enforce the plans they have submitted. If they fail to provide an adequate plan, the remedy is for the federal government to adopt its own; if the states fail to enforce a plan, the remedy is for the federal government to enforce it.

[104] Federal Water Pollution Control Act, § 311, 33 U.S.C. § 1311 (Supp. II, 1972).

[105] EPA v. Lindgren Foundry Co., 1 Ill. P.C.B. 11, 16 (1970).

ance,[106] the Board's procedural rules require a petition to contain a description of the unreasonable hardship claimed,[107]

> including a description of the costs that compliance would impose on the petitioner and others and of the injury that the grant of the variance would impose on the public . . . .

That this was not merely a matter of pleading was made clear when the Board denied a variance despite proof that compliance with particulate regulations might require a major railroad to close down its entire midwest operations:[108]

> [T]he petitioner must prove that the pollution caused by its continued violation is not so great as to justify the hardship that immediate compliance would produce. We cannot determine whether or not the costs of compliance significantly outweigh the benefits as the statute requires . . . unless we have some idea what the benefits are. For all we know on the present record, the railroad's shops may be an unbearable nuisance and health hazard.

"Arbitrary" and "unreasonable," moreover, are not merely words of comparison; they are also words suggesting a very strict standard, "a plain sense of disproportion":[109]

> "Arbitrary" and "unreasonable" are words used to express great deference and reluctance to interfere. They are words used to describe the limited scope of review of a jury's findings or of a judge's exercise of discretion. They are words used to describe the limited power of a court to set aside a statute on the ground it takes property without due process of law.

These words were carefully chosen after a significant legislative battle to reflect a grudging attitude toward variances, as the Board was at pains to point out in its early opinion in *EPA v. Lindgren Foundry Co.*:[110]

> The words "unreasonable" and "arbitrary" plainly suggest that the Board is not to examine in every case whether or not compliance would be a good thing. To do so would completely destroy the force of the regulations and encourage excessive litigation. Moreover, if the costs and benefits are anywhere near equal, simple fairness dictates that the burden should be borne

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106 ILL. REV. STAT. ch. 111½, § 1037 (1973).

107 Ill. P.C.B. Reg. ch. 1, rule 401(a)(2) (1970).

108 Norfolk & Western Ry. Co. v. EPA, 1 Ill. P.C.B. 281, 282 (1971). The denial was without prejudice to making the hardship defense in an enforcement proceeding. *Id.* at 284.

109 EPA v. Lindgren Foundry Co., 1 Ill. P.C.B. 11, 17 (1970).

110 *Id.* at 16-17.

by those who profit from the polluting operation rather than by the innocent neighbors. Accordingly, the statute creates a strong presumption in favor of compliance. A variance is to be granted only in those extraordinary situations in which the cost of compliance is wholly disproportionate to the benefits; doubts are to be resolved in favor of denial.

This position is compellingly supported by legislative history as well as by the language and policy of the Act. The original version of the bill provided for variances only if the costs of compliance "totally dwarf(ed)" the benefits. A proposed amendment sponsored by industry would have weakened this to allow variances whenever costs "outweigh(ed)" benefits. The Administration spokesman for the bill stressed before the Senate that this proposal was wholly unacceptable, for reasons indicated in this opinion.

When the present language was proposed as a third alternative, the Administration assured the Senate that the change preserved the substance of the original bill, and on this assurance the amendment was adopted.

Formulas such as "wholly disproportionate" and "totally dwarf" may express a mood, but their significance depends upon how individual Board members apply them to the facts of particular cases. Since each case turns on often complex facts, it is difficult to convey the flavor in summary form. In *Lindgren* itself the request was for permission to emit particulates in excess of regulation limits for seven months while installing control equipment on a foundry cupola. The evidence was extensive. On the one hand there was undisputed testimony that the plant would never operate again if forbidden to operate during construction of the control equipment; that the owners would lose some $70,000 they had invested in the business; that unsecured creditors would lose the opportunity for a settlement worth $75,000; and that an unspecified number of the nearly 100 former employees would be disadvantaged with respect to employment. On the other hand, there was evidence of significant injuries to the community:[111]

"It tracks in on my carpet. It is all over the window sills. It is the type of dirt that you cannot clean unless you get a cleaner on a cloth." . . . "I washed out a white blouse and hung it out on the line . . . and when I went out to get it, it was completely covered." . . . "I could not sit out in my back lawn when this smoke would come across . . . . You would be sit-

[111] *Id.* at 21.

> ting there, and all of a sudden, you would look down, and you are covered with soot. . . ."

The Board, which usually acted unanimously, denied the variance in *Lindgren* by a three-to-two vote. Unable to reduce the harm done to the neighbors "to a meaningful dollar figure," the Board balanced the hardships subjectively, invoking the heavy presumption against variances that it had set up in its opinion:[112]

> The hardships to the creditors and to Lindgren's former employees are substantial and regrettable, but they are not so great as to make it arbitrary to insist that Lindgren refrain from making miserable everyone in its vicinity. . . . The benefit from compliance will be very substantial, and it is by no means dwarfed by the concomitant cost.

The Board gave the owners' losses short shrift, since they had purchased the closed foundry with reason to know they could not operate it without complying or obtaining a variance. A dissenter, while agreeing that the hardship of compliance must be "significantly greater" than the benefits, found it so on an equally subjective basis:[113]

> There is no question that the community surrounding Lindgren will suffer some degree of harm . . . for seven months—chiefly during the colder season when outdoor recreational enjoyment would not be as severely affected. Weighed against the hardships imposed upon the present owners of Lindgren, the employees of Lindgren, the creditors of Lindgren and the community at large, such harm seems small indeed.

The result in *Lindgren* might lead one to believe the Board was very grudging indeed with variances. In fact, however, the Board regularly and unanimously granted variances allowing additional time to bring existing plants into compliance with control requirements, where there was a legitimate excuse for the delay. *Lindgren* was distinguished, for example, in *Ozark-Mahoning Co. v. EPA*,[114] a decision allowing six months to control emissions of fluorspar dust reportedly "at ground level, covering the entire residential area."[115] In *Lindgren*, the Board said, there had been "overwhelming citizen opposition to the grant of the variance," while in *Ozark-Mahoning*

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[112] *Id.* at 22.

[113] *Id.* at 28.

[114] 1 Ill. P.C.B. 121 (1970). For similar early cases see, *e.g.*, Medusa Portland Cement Co. v. EPA, 1 Ill. P.C.B. 237 (1971); Wagner Castings v. EPA, 1 Ill. P.C.B. 155 (1971); Nestle Co. v. EPA, 1 Ill. P.C.B. 97 (1970).

[115] 1 Ill. P.C.B. at 123.

"the residents who had initially complained . . . reportedly were reconciled to a short variance."[116] Emissions would have been "nearly seven times those allowed" in *Lindgren* but only "a third more than allowed" in *Ozark-Mahoning*.[117] The compliance period requested was "somewhat shorter" than in *Lindgren*, and compliance with the remaining schedule was "made more certain by the fact that the equipment is already paid for and on the premises."[118] Conversely,[119]

> largely because we deal here with the question of closing down an existing business . . . . , the hardship of throwing 181 persons out of work is considerably more significant than the hardship in Lindgren, where the plant had been closed for some months and the issue was reemployment of an undetermined number of former employees.

Finally, the owners' hardship in *Lindgren* had been "self-inflicted."[120]

That immediate hardship would be unreasonable, however, by no means justifies an indefinite variance. The statute plainly contemplates that the duration of the variance shall be proportioned to the need. Section 36(a) authorizes the Board in granting variances to "impose such conditions as the policies of this Act may require."[121] It provides, moreover, that conditions may be designed to assure prompt compliance by requiring, in cases in which "the hardship complained of consists solely of the need for a reasonable delay," the posting of "sufficient performance bond or other security to assure the correction of such violation within the time prescribed." Section 36(b) buttresses this conclusion by requiring "periodic progress reports" and by demanding a showing of "satisfactory progress" for extension of a variance beyond the first year.[122] Consequently the Board in granting variances typically required adherence to a tight compliance schedule, sometimes requiring overtime efforts in addition to the bond and progress reports specifically prescribed by statute.[123]

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116 *Id.* at 124.
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 ILL. REV. STAT. ch. 111½, § 1036(a) (1973).
122 *Id.* § 1036(b).
123 *See, e.g.*, Mattoon v. EPA, 1 Ill. P.C.B. 441, 445-46 (1971); Marquette Cement Mfg. Co. v. EPA, 1 Ill. P.C.B. 145, 148-53 (1971).

I. *Unreasonable Interference*

Like the variance standard of unreasonable hardship, the statutory definition of air pollution as unreasonable interference with the enjoyment of life or property requires a balancing of the costs and benefits of abatement. It could be argued by analogy to the variance standard that the word "unreasonably" imports a high degree of disproportion, and hence, requires that the harm done by emissions be greatly in excess of the cost of control. But a presumption in favor of allowing environmental harm should not be lightly inferred from a statute whose stated purpose is "to restore, protect and enhance the quality of the environment."[124] In this context "unreasonably" is the language of the law of nuisance, where there is no such presumption:[125]

> If the defendant, by taking reasonable steps, without too great hardship or expense, could reduce or eliminate the inconvenience to the plaintiff, and still carry on his enterprise effectively, his failure to do so may render him liable.

Harm to the plaintiff is unreasonable if it would be reasonable for the defendant to prevent it.

But this is not to say that there is the same strong presumption against environmental harm here as there is in the case of violation of the regulations. By defining pollution as harm[126] and providing for relief only if abatement would cause unreasonable hardship,[127] the original bill did express a reluctance to allow any harm at all; but the replacement of this language with the requirement that the interference be unreasonable suggests a change. Moreover, the high standard of unreasonable hardship announced by the Board in *Lindgren* was prompted in large part by fear that anything like an equal balancing of costs and benefits in a variance situation would "completely destroy the force of the regulations" by reducing each case to one of public nuisance.[128] This consideration is inapplicable to complaints under the general air-pollution provision, which is designed to permit case-by-case resolution of controversies outside the reach of specific regulations.[129] Consequently the Board defined

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124 ILL. REV. STAT. ch. 111½, § 1002(b) (1973).

125 PROSSER, *supra* note 76, at 599.

126 Ill. H.B. 3788, 76th Gen. Assem., §§ 1003(b), (o) (1970).

127 *Id.* § 1035.

128 EPA v. Lindgren Foundry Co., 1 Ill. P.C.B. 11, 16 (1970).

129 To the contrary it could be pointed out that the statute in its express policy

unreasonable interference on the basis of a relatively unweighted comparison of costs and benefits:[130]

> [A]ir contaminant emissions are "unreasonable" within the meaning of the Act when there is proof that there is an interference with life and property and that economically reasonable technology is available to control the contaminant emissions.

The degree of harm and the cost of compliance are not, however, the sole factors bearing upon the reasonableness of interference with the enjoyment of life or property. "[T]he unreasonableness of an alleged air-pollution interference," the Illinois Supreme Court said in *Incinerator, Inc. v. PCB*,[131] "must be determined by the Board with reference to the section 33(c) criteria."[132] That section lists the degree of harm and the cost of abatement as factors to be considered in determining the "reasonableness" of emissions, and it seems quite appropriate to view those factors as relevant to the determination of unreasonable interference as well. While the additional section 33(c) factors not mentioned by the Board—the "social and economic value of the pollution source" and the "suitability . . . of the pollution source to the area in which it is located, including the question of priority of location"[133]—might fairly be described as subsidiary considerations implict in the Board's formulation of a cost-benefit comparison, the Illinois Supreme Court seems to have disapproved of that formulation for its failure to take explicit cognizance of all the section 33(c) criteria.[134] Since nothing in judi-

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gives great weight to the reduction of environmental damage, and the Board's argument remains applicable that

> [i]f the costs are anywhere near equal, simple fairness dictates that the burden should be borne by those who profit from the polluting operation rather than by the innocent neighbors.

Id.

130 Moody v. Flintkote Co., 2 Ill. P.C.B. 341, 350 (1971). The Board's later standard, "Serious interference with the enjoyment of life . . . is unreasonable in the absence of proof that there is no economically justifiable method of preventing it," EPA v. Chicago Housing Authority, 4 Ill. P.C.B. 145, 149 (1972), differs only in respect to burden of proof. *See* text accompanying notes 351-62 *infra*.

The result in *Moody* also makes clear, as is implicit in the standard quoted from the opinion, that there may be unreasonable interference and thus an air-pollution violation, even though immediate compliance would cause unreasonable hardship. The hardship in such a case goes to the question of remedy. *See* text accompanying note 140 *infra*.

131 59 Ill. 2d 290, 319 N.E.2d 794 (1974).

132 *Id.* at 296, 319 N.E.2d at 797.

133 ILL. REV. STAT. ch. 111½, § 1033(c) (1973).

134 Mystik Tape v. PCB, 60 Ill. 2d 330, 337-38, 328 N.E.2d 5, 8-9 (1975).

cial opinions to date suggests the Board gave improper relative weight to the costs and benefits of abatement, the Board can easily incorporate the section 33(c) criteria into its test.

Although it is not apparent from the Board's test as quoted above, it should be clear from the words of the statute that in defining air pollution the absence of control technology is merely one factor to be considered under section 33(c) in weighing costs and benefits; it is not necessarily a complete defense. A contrary conclusion, as one court has observed,[135]

> would mean that a government would be powerless to restrict pollution regardless of its severity, even if it endangered lives so long as it was economically unreasonable or technically impracticable for an individual to continue to operate without polluting.

In other words, even the cost of a shutdown may be justified if the pollution is bad enough; the question is whether, considering the costs and the benefits in light of the section 33(c) factors, the harm done by the emission is unreasonable.

Again, however, formulas do not tell us how to decide real cases. In the opinion enunciating the above interpretation of the air-pollution standard the Board found unreasonable interference on the basis of tarry emissions which accumulated on cars, roofs, and shrubbery and made witnesses nauseous, their breathing difficult, their eyes water and their heads ache.[136] In a similar case, an order requiring the expenditure of some $200,000 to $250,000 to abate flyash, smoke, and odors from a large incinerator, was affirmed by the Illinois Supreme Court.[137] But an appellate court held a finding of unreasonable interference contrary to the manifest weight of the evidence where, according to the court, three to five million dollars would be required to eliminate an odor that "was simply 'not pleasant' or 'not very nice to breathe,' or 'caused [the witness'] nose to wrinkle.' "[138] Whether or not identical to the test for a variance,

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135 Chicago Magnesium Casting Co. v. PCB, 22 Ill. App. 3d 489, 493, 317 N.E.2d 689, 692 (1st Dist. 1974).

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

137 EPA v. Incinerator, Inc., 2 Ill. P.C.B. 505 (1971), *aff'd*, 59 Ill. 2d 290, 319 N.E.2d 794 (1974). Here, as in *Moody*, the respondent had agreed to install the equipment necessary to abate the statutory violation.

138 Mystik Tape v. PCB, 16 Ill. App. 3d 778, 803, 306 N.E.2d 574, 594 (1st Dist. 1974) (alternative holding). The Illinois Supreme Court, agreeing that the order should be set aside on other grounds, did not reach this question, 60 Ill. 2d 330, 328

the determination of unreasonable interference is highly subjective and highly dependent upon the facts of the individual case.[139]

J. *Section 33(c) and Sanctions*

In cases such as statutory water pollution, in which unreasonable interference is not an element of the offense and unreasonable hardship is not an express excuse, the cost of compliance and other section 33(c) factors are relevant only to the question of sanctions, and not to that of violation. In cases under the unreasonable interference standard, it could be argued that the section 33(c) factors have exhausted their office in determining the existence of a violation. But this would be very bad policy, for there are many cases in which an emission serious enough to warrant the installation of control equipment is not serious enough to justify the greater hardship of an immediate shutdown. It would also be inconsistent with the statutory pattern. Section 33(c) clearly provides for mitigation of sanctions in cases in which unreasonableness is not an element of the offense. To hold such mitigation unavailable when unreasonableness is an element would be backwards, since the evident legis-

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N.E.2d 5 (1975). The Board had characterized the evidence differently, referring to testimony that "the odor prevented residents from using their yards . . . and interfered with their indoor life when the windows were open," and quoting a company witness that the installation of a single incinerator, at a capital cost the record showed to be $200,000 (*see* Abstract of Record at 26, EPA v. Mystik Tape, 6 Ill. P.C.B. 503 (1973)), "would reduce the strength of odors significantly below any detectible levels at ground level." EPA v. Mystik Tape, 6 Ill. P.C.B. 503, 505, 510 (1973). There was some difficulty because the Board, despite an admonition to the Agency to stay within the allegations of the complaint, was found to have inadvertently relied on evidence relating to periods outside the complaint. Moreover, the company's abstract of record on appeal did not contain all the evidence relied on by the Board.

For other judicial assessments of the adequacy of evidence to show unreasonable interference see Sangamo Constr. Co. v. PCB, 27 Ill. App. 3d 949, 328 N.E.2d 571 (4th Dist. 1975); Darling & Co. v. EPA, 28 Ill. App. 3d 258, 328 N.E.2d 122 (1st Dist. 1975); People v. Gilbert & Bennett Mfg. Co., 25 Ill. App. 3d 168, 323 N.E.2d 96 (1st Dist. 1974); Weldon Co-operative Grain Co. v. PCB, 25 Ill. App. 3d 83, 322 N.E.2d 524 (4th Dist. 1975); Chicago Magnesium Casting Co. v. PCB, 22 Ill. App. 3d 489, 317 N.E.2d 689 (1st Dist. 1974); and Lloyd A. Fry Roofing Co. v. PCB, 20 Ill. App. 3d 301, 314 N.E.2d 350 (1st Dist. 1974), all upholding findings of air pollution. *See also* Allied Metal Co. v. PCB, 22 Ill. App. 3d 823, 318 N.E.2d 257 (1st Dist. 1974), and Lonza, Inc. v. PCB, 21 Ill. App. 3d 468, 315 N.E.2d 652 (3d Dist. 1974), upsetting such findings.

[139] Ticklish problems of the burden of proof and of the adequacy of Board findings have arisen in the administration of the unreasonable interference provision. *See* text accompanying notes 351-62 *infra*.

lative purpose was to make it more difficult for the complainant to prevail in cases of mere interference with the enjoyment of life or property. Nor do the words require such a result. The requirement that the relevant factors be considered in making both "orders" and "determinations" suggests that it may be necessary to consider those factors in determining both violation and sanction. In fact the Board, in the very opinion in which it found unreasonable interference with the enjoyment of life or property by the emission of tarry particulates, allowed several months of uncontrolled operation in order to avoid the hardships of an immediate shutdown.[140]

There remains for consideration the appropriate weight to be given the cost of compliance and other section 33(c) factors in passing on the question of sanctions unaided by the statutory tests of unreasonable interference or unreasonable hardship. Even though the variance provision appears inapplicable to statutory violations, the Board has consistently held that the weight afforded these factors is indicated by the variance standard of unreasonable hardship.[141] Arguably, however, the omission of an explicit provision for variances from the statute itself means that the weight of these factors in statutory cases is to be determined by a standard other than unreasonable hardship. Such a holding would not only make meaningful the otherwise inexplicable failure to allow variances from the statute itself, but it would also be consistent with the policy that permission to violate regulations should be especially difficult to obtain.[142] The irony of this suggestion, however, is against it: since it is difficult to imagine a standard stricter than unreasonable hardship, any other test would make it easier to get variances from the statute itself than to get those for which the statute explicitly provides. Therefore, the Board appears to me to have been right, although for the wrong reason, in adopting unreasonable hardship as the standard for balancing section 33(c) factors in statutory cases.

K. *The Bearing of Diligence*

As discussed above, when a polluter had done its best to com-

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[140] Moody v. Flintkote Co., 2 Ill. P.C.B. 341, 350-55 (1971). It so held under the misapprehension that the variance provisions were applicable, but for reasons given in the text the outcome was correct.

[141] *See id.* at 354; EPA v. Commonwealth Edison Co., 1 Ill. P.C.B. 207, 214 (1971).

[142] *See* EPA v. Lindgren Foundry Co., 1 Ill. P.C.B. 11 (1970); text accompanying note 110 *supra.*

ply, the Board was generally sympathetic to a plea for more time absent an overriding health hazard or other intolerable harm. Another prototypical case, however, was one in which, while the polluter's current schedule was all that could be expected, it had unjustifiably dragged its feet in the past. At one time the Board held that inexcusable past delays justified the denial of a variance even if the costs of immediate compliance dwarfed the benefits in the particular case:[143]

> The District alleges that the proposed time schedule is "reasonable." If the regulation had been adopted in 1971, we would agree; two years is an acceptable timetable for design and construction of tertiary facilities of this size. But the regulation was adopted in 1967, and no reasons are given for the District's inaction for nearly four years. One cannot qualify for a variance simply by ignoring the timetable and starting late. While compliance within the remaining time may be impossible, any hardship suffered as a result is, so far as is alleged, due to the District's own inaction. To allow a variance on the basis of the present allegations would establish the preposterous proposition that the very existence of a violation is a ground for excusing it.

To deny a variance, however, as the Board often emphasized, is not to order an immediate shutdown; it is merely to refuse to shield the polluter from an enforcement action.[144] The sanctions to be imposed for the unexcused violation still had to be determined on the basis of all factors made relevant by section 33(c) in the event a complaint was filed; and other decisions made it clear that shutdown was not what the Board had in mind.

In the leading case of *Marquette Cement Manufacturing Co. v. EPA*,[145] the Board again found that the request for more time stemmed from the company's own "inexcusable dilatory tactics" and accused it of having "publicly thumbed its corporate nose at the State of Illinois for at least one and a half years."[146] Nevertheless, a variance was granted contemplating nearly two years' continued operation during installation of precipitators because the harm done by continued emission of cement dust appeared small in comparison to the hardship which would result from throwing 400 people out of

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143 Decatur Sanitary District v. EPA, 1 Ill. P.C.B. 359, 360 (1971). *See also, e.g.*, Ozark-Mahoning Co. v. EPA, 1 Ill. P.C.B. 121, 126 (1970) (dictum).

144 *See, e.g.*, Norfolk & Western Ry. v. EPA, 1 Ill. P.C.B. 281, 284 (1971).

145 1 Ill. P.C.B. 145 (1971).

146 *Id.* at 150.

work. A money penalty was imposed for the delay.[147] As the Board explained in its second report, the policy of allowing more time while imposing money penalties was[148]

> a carefully considered response to the serious problem . . . of polluters whose present control programs are entirely adequate but who inexcusably delayed for long periods in getting them started. To deny the variance in such cases, while technically justifiable since the hardship is self-inflicted, would throw innocent employees out of work, often without sufficient compensating benefits [to the polluted community]; to ignore the delay would encourage future inaction and be unfair to those who complied when the time was ripe.

This course of action is clearly consistent with the statute. While section 35 flatly entitles the petitioner to a "variance" upon proof that immediate compliance would cause unreasonable hardship,[149] further provisions make it plain that a variance need not constitute a blanket amnesty for all transgressions past and future. Section 33(a), specifically made applicable to variance cases by section 37, gives the Board broad discretion in matters of remedy by authorizing it to enter "such final order . . . as it shall deem appropriate under the circumstances."[150] An "appropriate" final order is one that serves the statutory policy, which in turn demands penalties for delays in order to encourage compliance. Section 36(b), in requiring that "satisfactory progress" be shown for extension of any variance,[151] indicates that reasonable efforts toward compliance are contemplated. It would be plausible to deny the variance altogether: there is precedent in the zoning field for the Board's holding that self-inflicted hardship need not be given full weight,[152] and the discouragement of dilatory tactics is a benefit which can be considered in determining unreasonable hardship. Further, if, as the Board suggested, section 33's command to consider all factors bearing upon the reasonableness of the emissions is implicitly applicable to variance cases,[153] it may be unreasonable for the petitioner to continue

147 *See also* Kankakee Foundry Co. v. EPA, 4 Ill. P.C.B. 467 (1972), allowing additional time without prejudice to the imposition of penalties for past delays in a separate enforcement proceeding.

148 Second Report, *supra* note 15, at 12.

149 ILL. REV. STAT. ch. 111½, § 1035 (1973).

150 *Id.* § 1033(a).

151 *Id.* § 1036(b).

152 *See* D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 802 (1966).

153 EPA v. Commonwealth Edison Co., 1 Ill. P.C.B. 207, 214 (1970). "The weight to be given the section 33(c) factors" in such a case, the Board said, "is indi-

emitting contaminants with impunity if he could have complied by exercising diligence. Finally, if a variance is granted, there is nothing in the statute to suggest it must be absolute. The statute expressly provides that variances may be limited in time; similarly, they may be limited to certain pollutants, or they may permit the emission of only a certain quantity or concentration of contaminants. Similarly, it would seem consistent with the statutory language to issue variances limited to protection against an immediate shutdown and not against penalties for past delays, if only the shutdown would cause unreasonable hardship. Indeed the statute expressly authorizes the Board to make variances conditional upon such terms as "the policies of this Act may require,"[154] and, as I have argued earlier, penalties for past delays are necessary to promote compliance. Thus the Board may penalize past delays by denying a variance because the hardship is self-inflicted and not unreasonable, by issuing a variance only for the future, or by granting a variance without prejudice to the imposition of penalties for unjustified delay.

In contrast to its position that past delays should be dealt with by money penalties alone, the Board did not hesitate to threaten or even to order immediate shutdown as an incentive for the development of an adequate control program. In *GAF Corp. v. EPA*,[155] for example, the petitioner, for reasons the Board found unsatisfactory, was unable to state a firm date for commencing the second phase of its program. The Board not only imposed a large penalty for past delays but granted only a two-month variance to pursue a program the record indicated would take much longer to complete. The result was a miraculous withering away of obstacles the company had formerly deemed insurmountable, with Board approval of an extension providing for a firm and accelerated schedule.[156] Similarly, in *EPA v. Incinerator, Inc.*,[157] the Board found unconvincing an argument that control technology was unavailable, and the polluter was actually ordered to shut down. Thus motivated, the company within a week came up with a program for prompt compliance with the particulate regulations, with substantial reductions in the gross nuisance in the meantime. The Board approved the program with in-

cated by section 31(c): compliance is to be ordered unless, after considering these factors, such an order would impose an unreasonable hardship." *Id.*

154 ILL. REV. STAT. ch. 111½, § 1036(a) (1973).

155 1 Ill. P.C.B. 481 (1971).

156 GAF Corp. v. EPA, 2 Ill. P.C.B. 401 (1971).

157 2 Ill. P.C.B. 505 (1971), *aff'd*, 59 Ill. 2d 290, 319 N.E.2d 794 (1974).

terim limited operation,[158] leaving intact a $25,000 penalty that was affirmed on appeal.[159]

Thus the Board's selective use of the shutdown has proved highly effective. Whether or not it is good policy depends upon a consideration of the alternatives. The problem is to devise an appropriate remedy in cases in which the polluter has not proposed or complied with an adequate schedule for achieving compliance. One possibility is for the Board to impose a program of its own either as a part of its enforcement order or as a variance condition. This is all very well if the record supports a finding that the Board's program is suitable, but it may not, as in the case where the discharger's sole argument, ultimately unpersuasive, is that control technology is unavailable.[160] If a variance has been requested, the Board may grant it for a period less than that requested for failure of the petitioner to satisfy its burden of showing the need for the full period.[161] If the petitioner has not shown what period is required for compliance, the Board may deny the variance altogether[162] or, if satisfied that immediate compliance would be unreasonable, may grant a brief period in which to file a revised program.[163] In an enforcement proceeding the Board may order the submission of a program[164] or order further hearings to develop one.[165] Violation of such an order would of course subject the polluter to further sanctions, and if lack of diligence is found it may be appropriate to impose money penalties cumulating until receipt of a satisfactory program.

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158 EPA v. Incinerator, Inc., 3 Ill. P.C.B. 167 (1971).

159 Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 319 N.E.2d 794 (1974).

160 *Id.*

161 *See, e.g.*, Mattoon v. EPA, 1 Ill. P.C.B. 441 (1971).

162 *See, e.g.*, Mt. Carmel Pub. Util. Co. v. EPA, 1 Ill. P.C.B. 463 (1971), where with control technology concededly available at what the Board thought reasonable cost, the company instead had proposed to operate a boiler without controls for some five to ten years. A revised petition committing the company to a more acceptable program was later granted, Mt. Carmel Pub. Util. Co. v. EPA, 3 Ill. P.C.B. 25 (1971). Despite proof that immediate compliance would cause unreasonable hardship, the appellate court recently upheld the Board's denial of a variance for want of a compliance or research program in reliance on the authority given by section 36 to impose conditions, including "security" for the completion of the work, required by the purpose of the statute. Shell Oil Co. v. PCB, 24 Ill. App. 3d 549, 321 N.E.2d 170 (5th Dist. 1974).

163 GAF Corp. v. EPA, 1 Ill. P.C.B. 481 (1971).

164 *See, e.g.*, EPA v. Champaign, 2 Ill. P.C.B. 411 (1971).

165 *See, e.g.*, EPA v. Chicago Housing Authority, 4 Ill. P.C.B. 145 (1972).

At one extreme it could be argued that, as long as immediate shutdown would do more harm than good in the individual case, the sanction of money penalties or imprisonment should be imposed instead. Prevailing prosecutorial attitudes about white-collar crime, however, make jail a less than realistic possibility, and the statutory limit on penalties ($10,000 plus $1,000 per day in most cases under section 42) reinforces the argument that one ought not to be allowed to purchase the privilege of violating the law by paying fines; they may be cheaper than compliance. It does not seem difficult to conclude that policy demands the possibility of shutdown as the ultimate deterrent to an obstinate refusal to obey Board orders.

A more serious contention would be that the Board ought to invoke the shutdown sanction only after less drastic measures have proved unavailing. That is, the Board might take as its standard first step the ordering of further proceedings, by submission or hearing, looking to the development of a satisfactory program. In the event of further foot dragging, the Board might then impose penalties, threaten shutdown, and, if all else fails, order shutdown. On this analysis the Board was too quick to order a shutdown in the *Incinerator* case.

Once again, however, the legal and practical limits on the effectiveness of lesser penalties argue against such a conclusion. When the Board detects a pattern of continuing resistance to the law, it might justifiably infer that continued operation during the proceedings, even while penalties accumulate, may in a case involving a substantial control expenditure result in further delay and lack of diligence. Moreover, the shutdown is not permanent; for indeed, the polluter holds the keys to his plant in his own engineering department: if he submits an adequate program and adheres to it, he may operate once again. Thus, given the enormous shock value of the shutdown, the uncertainty of lesser remedies, and the power of the polluter to terminate his hardship by subscribing to a compliance schedule, policy seems to me to favor occasional use of the shutdown to galvanize the uncooperative.

Finally, the legality of the shutdown order in a case like *Incinerator* rests upon the statute's broad grant of authority to the Board to enter such order as it deems "appropriate,"[166] upon the relevance of diligence in determining the "reasonableness of the emissions"

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[166] ILL. REV. STAT. ch. 111½, § 1033(a) (1973).

under section 33(c),[167] upon the bearing of deterrence and self-inflicted hardship on the determination of unreasonable hardship,[168] and upon the statutory stress on adequate progress as a condition of extending a variance.[169]

L. *Penalty Policy*

Given the harshness of a shutdown, other sanctions are obviously necessary if the Act is to have any deterrent influence. Contempt penalties for the violation of an injunction enforcing a cease-and-desist order would begin to provide teeth, but they would leave the polluter free to violate the law until caught. Consequently the Act provides for the imposition of money penalties for violations of the statute or regulations as well as of Board orders.[170] While maximum limits are written into the statute,[171] the sole guidelines for determining the propriety and size of a penalty within these limits are the section 33(c) factors bearing on the "reasonableness" of the respondent's actions.[172] These guidelines were held sufficient to insulate the penalty provisions from constitutional attack on grounds of excessive delegation of authority.[173]

Considerations relevant to reasonableness in this connection emerged quickly in Board opinions: the gravity of the harm done by the polluter; the duration of the violation; his good faith; his ability to pay; the amount of money he saved by violating the law; uniform treatment of comparable cases. The application of these factors is far from automatic, but a few examples may help to convey the Board's approach to penalties.

The first penalty imposed by the Board was $1,000 for the open burning of a single truck, in an opinion establishing a civil penalty as the norm for deliberate violations:[174]

> [T]he cease and desist order . . . is not sufficient deterrent . . . . A cease and desist order standing alone would give po-

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167 *Id.* § 1033(c).

168 *Id.* §§ 1031(c), 1035.

169 *Id.* § 1036(b).

170 *Id.* § 1042.

171 The limits are $10,000 plus $1,000 per day for continuing violations. There is an exception for higher sums in the administration of the federal water-pollution permit program, pursuant to later amendment. If higher penalties are a good idea for these cases, they should be made available in others as well.

172 ILL. REV. STAT. ch. 111½, § 1033(c) (1973).

173 Waukegan v. PCB, 57 Ill. 2d 170, 311 N.E.2d 146 (1974).

174 EPA v. Neal Auto Salvage, Inc., 1 Ill. P.C.B. 71, 77 (1970).

> tential offenders a chance to violate the statute and regulations until they are caught. The offense in the Respondent's case is aggravated by the fact that it had just been denied a variance to do the thing it now has done. Salvage by open burning has been illegal in Illinois since 1965. It is time that it be stopped.

Later decisions tended to impose similar penalties for other open-burning or landfill violations by small-time individuals without much discussion,[175] except where mitigated by the defendant's poverty.[176]

The largest pure penalty inflicted by the Board to date came in *GAF Corp. v. EPA*,[177] where a total fine of $149,000, computed at the statutory maximum, was imposed for what was characterized as repeated and deliberate foot dragging in controlling an untreated discharge of three million gallons per day of waste whose oxygen demand was 20 times that permitted,[178]

> a greater pollution load on the river than if the entire population of the city of Joliet (78,623) were to dump its sewage untreated into the river. . . . The amount involved is none too large for such a large and profitable business, causing such enormous pollution, after such a history of disobedience.

Later, however, the Board accepted $50,000 in settlement of the *GAF* case, which had been appealed on grounds including the Board's lack of authority to impose penalties in variance cases:[179]

> $50,000 is a very considerable penalty, especially for no more than five months' delay in constructing treatment facilities. . . . $50,000 is equal to the largest penalty ever imposed by the Board in any other fully litigated case.[180] See Hemmerich

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[175] *See, e.g.*, EPA v. Charlett, 1 Ill. P.C.B. 233 (1971) ($1,500); EPA v. Amigoni, 1 Ill. P.C.B. 229 (1971) ($1,500); EPA v. Cooling, 1 Ill. P.C.B. 85 (1970) ($1,000).

[176] *See, e.g.*, EPA v. Koons, 1 Ill. P.C.B. 663, 664 (1971) ($100).

[177] 1 Ill. P.C.B. 481, 491 (1971).

[178] *Id.* at 481-82, 491.

[179] GAF Corp. v. EPA, 5 Ill. P.C.B. 525, 530-31 (1972) (footnotes in quote are those of this author).

[180] In a footnote, the Board said:

> In two instances we have approved settlements providing for the payment of larger sums under special circumstances: EPA v. Granite City Steel Co., . . . 4 P.C.B. 347 (1972), in which the company agreed to establish a $150,000 scholarship fund (presumably tax-deductible at least in part, unlike a straight penalty) as a result of a complaint alleging severe and long-standing air-pollution violations from multiple components of a large steel mill; and EPA v. Russell, Burdsall & Ward Bolt and Nut Co., . . . 4 P.C.B. 701 (1972), in which the company agreed to pay $40,000 in addition to the $13,499.96 estimated value of nearly 100,000 fish killed by a large cyanide discharge.

Id. at 531, n.1.

The *Granite City Steel* settlement provoked bitter opposition from educators and legislators who argued that the money should have gone to their local institution

> v. Lloyd A. Fry Roofing Co.,[181] . . . in which asphalt plant emissions estimated at seven times those permitted by the regulations since 1967 had "caused headache, nausea, burning to the eyes, nose and throat, coughing, upset stomach, and, in many instances, foreclosed outdoor activities." In Incinerator, Inc.,[182] . . . a penalty of $25,000 was imposed for unexcused failure since 1967 to control odors and particulate emissions at least three times those allowed from a large incinerator, which we found "with its frequent, almost daily, shower of particulate matter and the accompanying odors, constitutes nothing short of a nuisance to the neighborhood."[183] . . . In a case like this one it is not so much the dollar amount of the penalty as the fact of a substantial penalty that serves as notice to GAF and to others that the State is serious about enforcing the pollution laws.

The importance of setting a penalty high enough to make a violation more expensive than compliance was stressed in *EPA v. CPC International, Inc.*,[184] where a large company had burned dirty coal to cause excessive particulate emissions:[185]

> [T]he penalty question must be determined largely in terms of the degree of fault displayed by the company and in terms of the significant amounts of money CPC saved by burning inferior coal to the detriment of its neighbors. Given that the violation and consequent saving extended over many months of 1971, we could easily justify a penalty of $50,000 or more to assure that the company did not profit by overlooking its obligations to the public. But because this is a first offense, because

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rather than to the major state university. In a later case a divided Board rejected a settlement under which the accused polluter would have invested something like $25,000 in experimental equipment, which was not required by the regulations, but which the Agency wanted to see tested. To the surprise of the dissenters, the company then agreed to pay a straight $20,000 penalty. EPA v. Fansteel, Inc., 6 Ill. P.C.B. 295 (1972).

181 2 Ill. P.C.B. 581 (1971).

182 EPA v. Incinerator, Inc., 2 Ill. P.C.B. 505 (1971).

183 The Board also said:

> Comparing the seriousness of GAF's violations with that of Fry's is no exact science, but we do not think it immediately apparent that the one case was three times more serious than the other. Roughly equal treatment of persons similarly situated is fundamental to our law . . . . Our experience in that regard, especially in serious cases, was severely limited at the time GAF was first decided; the largest penalty we had previously imposed was $10,000, and that in a case involving well over a year's unexcused delay in controlling particulate emissions from a giant cement plant . . . [Marquette Cement Mfg. Co. v. EPA, 1 Ill. P.C.B. 145 (1971)].

5 Ill. P.C.B. at 531.

184 5 Ill. P.C.B. 541 (1972), *rev'd on other grounds*, 24 Ill. App. 3d 203, 321 N.E.2d 58 (3d Dist. 1974).

185 *Id.* at 545.

there is no suggestion it was deliberate, because no catastrophic pollution resulted, and because of the commendable attitude of CPC in correcting the problem once it recognized what was happening, we limit the penalty to $15,000.

The Board exhibited an express reluctance to impose substantial penalties on local governments. In *Springfield v. EPA*,[186] for example, the "rather nominal" penalty of $1,000 was assessed for significant housekeeping violations in the operation of a small sewage-treatment plant:[187]

> The City's offenses are gross and inexcusable. If the City were a private individual or corporation, we think a penalty in the amount of perhaps $20,000 would be appropriate. Taking money from the public treasury, however, must be a last resort, since it punishes the relatively innocent public and diverts funds from the task of cleaning up the waters, when municipal revenues are too limited to start with. On the other hand, we think it would be folly to lay down a policy of never imposing money penalties on public bodies, for such penalties are needed to deter violations. Moreover, a money penalty or two might have the effect of inducing the public to oversee more closely those who bear the responsibility for sewage treatment, and to replace them when they are remiss in their obligations. . . .

One member protested the distinction:[188]

> While it can be argued with some justification that the penalty on an individual or industry cannot be as easily passed along directly to users of the goods or services because of possible competition by other suppliers, the aggregate effect of assessing larger penalties will be to increase the burden on the public as surely as in the case of penalties for municipalities.

In one opinion the Board appeared to announce a partial amnesty for past delays as an inducement to current diligence, by penalizing a city only $100 for missing an interim deadline respecting construction of sewage-treatment facilities in consideration of, among other things, its exemplary future program:[189]

> Without condoning past lapses, we think it appropriate to encourage those who have fallen behind to make every effort to make up for it. We shall therefore look with some indulgence upon local governments that file programs in the immediate future that will result in compliance within a short time after the ultimate deadline. For those whose violations will substantially

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186 1 Ill. P.C.B. 397 (1971).

187 *Id.* at 402.

188 *Id.* at 406.

189 EPA v. Marion, 2 Ill. P.C.B. 701, 705-06 (1971).

> prolong pollution and who even now fail to come forward with as expeditious a program as is practicable, the penalties may be quite severe.

It seems fair to say that the courts have been rather exacting in reviewing penalties imposed by the Board. The Illinois Supreme Court has recognized that the Board is "vested with broad discretionary powers . . . in the imposition of civil penalties"[190] and has suggested that the standard for judicial review is whether a penalty is "arbitrary."[191] The subject was fully canvassed by that court in *Southern Illinois Asphalt Co. v. PCB*,[192] where the court announced that a penalty, like any other administrative order, would be set aside if it is "against the manifest weight of the evidence or where the agency has acted arbitrarily or capriciously and has thereby abused the discretion vested in it."[193] Thus while the courts are not free simply to substitute their judgment for the Board's, they have looked closely at the reasonableness of a penalty and have attempted to lay down some general legal principles to guide the Board's discretion.

The supreme court's basic conclusion in respect to the criteria for civil penalties is that they were not intended by the Act to be punitive. There are, the court said, independent criminal sanctions meant for that end: "[T]he fact that the Act contains two separate provisions imposing sanctions indicates the intention of the legislature to prescribe civil sanctions for a different purpose."[194] Moreover,[195]

> the legislative declaration of the purpose of the Act . . . indicates that the principal reason for authorizing the imposition of civil penalties . . . was to provide a method to aid the enforcement of the Act and that the punitive considerations were secondary.

It was the Board's position that penalties aid in the enforcement of the Act when they prod the particular respondent to comply with the law or deter others from violating it. The supreme court has not disagreed. In *Incinerator, Inc. v. PCB*[196] it approved with little discussion a penalty of $5,000 for failure to obtain a permit. In

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190 Monmouth v. PCB, 57 Ill. 2d 482, 490, 313 N.E.2d 161, 165 (1974).

191 Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 301, 319 N.E.2d 794, 800 (1974).

192 60 Ill. 2d 204, 326 N.E.2d 406 (1975).

193 *Id.* at 207, 326 N.E.2d at 408.

194 *Id., quoting from* Monmouth v. PCB, 57 Ill. 2d 482, 490, 313 N.E.2d 161, 166 (1974).

195 Monmouth v. PCB, 57 Ill. 2d 482, 490, 313 N.E.2d 161, 166 (1974).

196 59 Ill. 2d 290, 319 N.E.2d 794 (1974).

Monmouth v. PCB[197] it set aside a penalty for the emission of odors from a sewage lagoon because the state agencies were unable to suggest means of eliminating them, because the city had "cooperated in the implementation of every proposal" at "substantial expense," and because the problem had since been solved.[198] In *Southern Illinois Asphalt v. PCB* and its companion case,[199] the court set aside penalties for one violation described as an "inadvertent" failure to get a permit because of a misunderstanding with a contractor,[200] and for another violation in which the respondent "had been diligently trying to bring its operations into conformity with the rules."[201] Moreover, the court noted that in both these instances the violations had ceased before filing of the complaint.

Taken out of context, one sentence in the opinion might be read to make this latter circumstance a complete defense:[202]

> There was no need to assess a penalty in aid of the enforcement of the Act because Southern had ceased operating prior to the filing of the complaint.

This would be a disastrous holding, for it would allow everyone to pollute with impunity until sued; greater deterrence is surely necessary for the enforcement of the Act.

The court's emphasis on the "substantial mitigating circumstances"[203] of good faith indicate that no such rule was meant to be laid down. A standard of due diligence would probably not seriously impair enforcement, since all that can be expected is a good faith effort. To be sure, proof problems may somewhat reduce the deterrent force, but there is nevertheless substantial bite to the threat of penalties for failure to do all that is reasonable. And, as the supreme court noted, the Board itself had on occasion withheld penalties because the respondent was making an honest effort.[204]

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197 57 Ill. 2d 482, 313 N.E.2d 761 (1974).

198 *Id.* at 490, 313 N.E.2d at 166.

199 60 Ill. 2d 204, 326 N.E.2d 406 (1975).

200 *Id.* at 210, 326 N.E.2d at 409.

201 *Id.* at 216, 326 N.E.2d at 412.

202 *Id.* at 210, 326 N.E.2d at 409.

203 *Id.* at 209, 326 N.E.2d at 409.

204 *Id. See, e.g.*, EPA v. Beloit Foundry Co., 2 Ill. P.C.B. 719, 720 (1971); Employees of Holmes Bros. v. Merlan, Inc., 2 Ill. P.C.B. 405, 409 (1971). *See also* Youth for Environmental Salvation v. Chicago, M., St. P. & P. Ry., 4 Ill. P.C.B. 697, 699 (1972) (dictum). On the other hand, the Board also imposed relatively small penalties for significant oil spills with no proof of negligence, EPA v. Yetter Oil Co., 3 Ill. P.C.B. 119, 121 (1971); EPA v. Valley Line Co., 3 Ill. P.C.B. 355, 356 (1972),

From the standpoint of inducing compliance, however, it would be unfortunate if the standard of good faith were applied so as to make it unnecessary for a polluter even to exercise reasonable care to prevent violations. In *EPA v. CPC International, Inc.*,[205] for example, the Board imposed a substantial penalty for what it considered to be the inattentive use of high-ash coal, and mitigated the amount because there was "no suggestion" the offense was "deliberate."[206] The appellate court reversed, holding that the violation was "apparently not deliberate" and that it had been promptly corrected before the Board hearing. While conceding that "the lack of knowledge is no defense" and that arguably "CPC should have been more careful," the court observed that the Board had imposed lesser penalties in other cases "for violations which were deliberate and long-term."[207]

This observation introduces a second principle that promises to be of some significance in judicial review of Board penalties. In *Hill v. EPA*,[208] the Board had found a corporation and its present and former owners in violation of public water-supply regulations, but had assessed a penalty only against the former owner. The court set aside the penalty as "arbitrary and capricious" because "[t]here is nothing in the nature of the conduct of any of the parties to warrant treating one differently from the others."[209] The court did not mention the Board's explicit findings that the first owner had exhibited "continued indifference to the relevant regulations" and failed to take "steps of any nature to correct the situation." Nor did it mention the Board's findings that the present owner had been "acting with diligence to bring the operation into compliance," and that to penalize the corporation itself "would only work to the possible detriment" of the latter.[210] The principle invoked by the Illinois court seems a fundamental dimension of equal protection, and the

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in order, one supposes, to induce the highest degree of care. While the Board appeared to find no contradiction between these cases and those in which due diligence was held an excuse, the supreme court's opinions suggest the desirability of a reappraisal.

205 5 Ill. P.C.B. 541 (1972), *rev'd*, 24 Ill. App. 3d 203, 321 N.E.2d 58 (3d Dist. 1975).

206 *Id.* at 545.

207 CPC International, Inc. v. PCB, 24 Ill. App. 3d 203, 206-08, 321 N.E.2d 58, 61 (3d Dist. 1975).

208 16 Ill. App. 3d 323, 306 N.E.2d 323 (3d Dist. 1973).

209 *Id.* at 325, 306 N.E.2d at 324.

210 EPA v. Eastlawn Water Co., 6 Ill. P.C.B. 221, 224-25 (1972).

severity of sanctions in comparable cases seems a factor relevant to the Board's order under section 33(c).[211] Care should be taken to avoid an overly mechanical application of the test of consistency; not only should an agency be permitted some freedom to alter its policies over time, but it should also be given some latitude in dealing with relevant facts that are almost infinitely variable. Minor differences in treatment of apparently similar cases cannot be given decisive weight without inflicting a crippling burden of exactness on the Board.

M. *Special Problems of Municipal Sources*

Municipal government is probably our greatest single water polluter, for in most communities it assumes the task of collecting and disposing of human sewage. There are special problems of enforcement in municipal sewage cases. The first is to find adequate incentives to induce municipal officials to spend the taxpayers' jealously guarded funds to benefit people downstream; for the ultimate sanction of shutdown, which can be made a credible threat in many industrial cases, is not available here.

Money penalties are a possibility. But while the Illinois Board recognized (in dictum) that penalties can be adequate deterrents only if they make the cost of disobedience greater than that of compliance,[212] it not only failed to live up to its stated policy in general, but, as already noted,[213] unequivocally adopted a position of special reluctance to impose substantial penalties on municipal governments.

In the same opinion in which the Board announced its policy of leniency in penalizing municipalities, it made an alternative suggestion:[214]

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211 *See* Freeman Coal Min. Corp. v. PCB, 21 Ill. App. 3d 157, 313 N.E.2d 616 (5th Dist. 1974), where, in reducing a $5000 penalty to $500, the court relied on, among other factors, the imposition of a much lower penalty in a similar but distinct proceeding.

The United States Supreme Court recently expressed distressing indifference to consistency in imposing sanctions. In Butz v. Glover Livestock Comm. Co., 411 U.S. 182 (1973), the Court stated:

> We read the Court of Appeals' opinion to suggest that the sanction was "unwarranted in law" because "uniformity of sanctions for similar violations" is somehow mandated by the [Packers and Stockyards] Act. We search in vain for that requirement in the statute.

Id. at 186 (footnote omitted).

212 *See* text accompanying notes 179-85 *supra.*

213 *See* text accompanying notes 184-86 *supra.*

214 Springfield v. EPA, 1 Ill. P.C.B. 397, 402 (1971).

> A more effective and more direct means of deterring such violations in the future, which would have the advantage of punishing those responsible rather than diverting needed public funds, would be for the Agency to seek money penalties against the individuals within municipal government whose gross inattention to duty is responsible for the violations, or to put such individuals in jail.

The Agency did not adopt the Board's suggestion, which bristles not only with political overtones but also with legal difficulties, *e.g.*, determining the responsible individual and determining the scope of official immunity.

Section 46, carried over from prior law, endeavors to do something about the pervasive problem of raising funds for the construction of municipal sewage-treatment works by requiring the issuance of municipal bonds when needed to satisfy an order to abate a violation of the Act or regulations.[215] On its face this section dispenses with the obstructive normal statutory requirement of a referendum, which would have meant there could be no money unless citizens voted to tax themselves for works benefitting people downstream. The Board seized upon the reference to bonds up to "the limit imposed . . . by the Constitution" (five percent of assessed property within the municipality when the Act was adopted[216]) and the absence of such a limit in the new Constitution of 1970 to hold that section 46 required the issuance of bonds in excess of any statutory limits.[217] This interpretation ultimately prevailed over the argument that the reference to the "Constitution" meant the constitution in effect when the statute was passed.[218] But the General Assembly disagreed, amending the section to allow bonds only if they did not exceed "any limit which may be imposed upon such indebtedness."[219] Section 46 is enforceable by the Attorney General in an action for "mandamus, injunction, or other appropriate relief."[220] But compli-

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215 ILL. REV. STAT. ch. 111½, § 1046 (1973). The original provision applied only to a "municipality or sanitary district." Ch. 111½, § 46, [1970] Ill. Laws 76th Gen. Assem. 894. Efforts to remedy the unintentional omission of counties finally succeeded in 1973.

216 ILL. CONST. art. IX, § 12 (1870).

217 League of Women Voters v. North Shore Sanitary Dist., 1 Ill. P.C.B. 369, 381-82 (1971).

218 North Shore Sanitary Dist. v. PCB, 55 Ill. 2d 101, 302 N.E.2d 50 (1973).

219 ILL. REV. STAT. ch. 111½, § 1046 (1973), *formerly* ch. 111½, § 46, [1970] Ill. Laws 76th Gen. Assem. 894.

220 And not, as the Board at first thought, by a Board order to issue bonds. North Shore Sanitary Dist. v. PCB, 55 Ill. 2d 101, 105, 302 N.E.2d 50, 52 (1973).

ance with a court order still requires a realistic threat of sanctions, and the same legal, political, and policy problems would arise in such a case as in direct efforts to enforce the statute and regulations before the Board.

The Board did find, however, a potent enforcement tool in a practice of the Environmental Protection Agency: a moratorium on new connections to municipal sewer systems until improvements were made. The North Shore Sanitary District connection ban was not the first imposed by the Board,[221] but it was by far the most notorious, and it was in the opinion announcing it that the Board spelled out its legal justification for the prohibition:[222]

> To allow any new source of waste to be connected to the present District system . . . would be equivalent to authorizing the dumping of raw sewage directly into Lake Michigan or into the Skokie Ditch. . . . To attach new sewage sources to an overloaded plant is to violate the Environmental Protection Act's ban on water pollution.

The only court so far to pass upon a connection ban imposed by the Board echoed this reasoning in upholding the order:[223]

> Prohibiting additional connections after the lagoon is in operation while effluent standards are violated speaks for itself. Additional sewage should not be introduced into a plant that cannot adequately process its present load.

Prohibiting new sewer connections not only prevents the effluent from getting worse but also creates an incentive to improvement by subjecting local officials to political pressure from the construction industry and others adversely affected.[224] For example, in the North Shore connection ban case,[225] after the Board had forbidden new connections to sewers in the wealthy and growing North Shore suburbs of Chicago pending correction of inadequate treatment, the Sanitary District discovered that by adding an inexpensive lagoon

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221 *See* EPA v. Glendale Heights, 1 Ill. P.C.B. 217 (1971).

222 League of Women Voters v. North Shore Sanitary Dist., 1 Ill. P.C.B. 369, 384-85 (1971).

223 Citizens Utilities Co. v. PCB, 9 Ill. App. 3d 158, 162, 289 N.E.2d 642, 645 (2d Dist. 1972).

224 Mattoon v. EPA, 1 Ill. P.C.B. 441 (1971):

> It is not without significance that the sewer ban places an important incentive upon the City to get the job done as quickly as possible. In order to assure diligence it is desirable to make diligence in the interest of the City as well as of the suffering public.

Id. at 447.

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

and chemicals to its existing facilities it could in a short time effectively remove from its effluent the wastes of over 20,000 persons while pursuing its long-term building program. On the condition that these interim improvements be made, the Board rewarded resourcefulness with permission to use some of the increased capacity for new connections.[226]

But a finding of violation does not, under the statute, justify the automatic entry of an immediate cease-and-desist order. Even though unreasonable hardship is not made expressly an excuse for violating the statute itself, section 33(c) requires the Board to consider all relevant factors, including the cost of compliance, in entering all its orders and determinations. A prohibition on new sewer connections may impose considerable hardships on persons not directly responsible for the violations: builders and owners of new homes, clients of new businesses, etc. In the North Shore case there had been a full hearing on present pollution and on plans for plant improvement but not on the pros and cons of a connection ban. Yet the Board proceeded to conclude that the "considerable inconvenience" the ban would cause was "more than justified by the disadvantages of permitting increased pollution of the Lake" and made findings as to means of reducing the hardship:[227]

> [T]here is no reason why construction cannot proceed up to the point just prior to sewer connection during the period of the ban. . . . There are alternatives available to provide treatment for new sources while the District plants are being rebuilt. Package plants for sewage treatment are readily available to developers; lagoons may in some cases be permissible expedients; it may be possible to increase the effective capacity of existing secondary plants by the addition of coagulant chemicals or by the use of oxygen for aeration.

The North Shore connection ban produced a storm of opposition. Affected business and labor interests moved to intervene and to reopen the case, arguing they had been denied due process because their right to make sewer connections had been taken away in an action to which they had not been a party. The Board demurred:[228]

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226 North Shore Sanitary Dist. v. EPA, 3 Ill. P.C.B. 541 & 697 (1972). For other comparable histories see Mattoon v. EPA, 4 Ill. P.C.B. 653 (1972); EPA v. Danville Sanitary Dist., 2 Ill. P.C.B. 275 (1971) and 4 Ill. P.C.B. 673 (1972).

227 1 Ill. P.C.B. at 385.

228 League of Women Voters v. North Shore Sanitary Dist., 1 Ill. P.C.B. 576 (1971).

> One might just as well argue that all employees and customers, as well as any taxing jurisdiction, must be made parties to a case involving a possible shutdown of an industrial facility for pollution; the proceeding would become impossibly cumbersome.

Efforts by affected contractors to obtain judicial review of the ban failed because the court read section 41 of the Act, which allows review at the instance of "any party adversely affected by a final order . . . of the Board,"[229] to limit review to persons who had been parties before the Board.[230] Individual variance petitions were filed by the dozens and the Board held inquiry hearings seeking to determine a general policy with respect to connection bans. The General Assembly attempted to prevent future problems by amending section 33(c) to require public notice, intervention, and a "full and complete hearing" on the "social and economic impact" of any contemplated ban.[231]

Clearly the Board acted on the basis of incomplete information in the North Shore case. While it did utilize such evidence as was available in the record, it was on shaky ground in taking official notice of possible means of reducing the hardship imposed by the ban,[232] at least one of which was later shown to be of little practical use.[233] Moreover, the record revealed very little about the extent of the hardship the ban would impose. Given the adversary process established by the statute and the Board's position as a quasi-judicial arbiter required to rely on the record, it is arguable that the Board need make no effort to obtain a better record but may justifiably rely on the information put before it by the parties. The same adversary considerations, however, also support the view that the Board should not go beyond the relief requested by the complainant, and that the complainant must establish not only the existence of the violation but also the justification for the requested order. Indeed in one case, the Board, noting that the record was adequate to permit a determination of whether violations had taken place "but not to

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229 ILL. REV. STAT. ch. 111½, § 1041 (1973).

230 Lake County Contractors Ass'n v. PCB, 54 Ill. 2d 16, 294 N.E.2d 259 (1973).

231 ILL. REV. STAT. ch. 111½, § 1033(c) (1973), *formerly* ch. 111½, § 33(c), [1970] Ill. Laws 76th Gen. Assem. 890.

232 *Cf.* North Shore Sanitary Dist. v. PCB, 2 Ill. App. 3d 797, 277 N.E.2d 754 (2d Dist. 1972) (reversing the Board's decision in an unrelated case for reliance on matters outside the record).

233 *See* Wachta v. EPA, 2 Ill. P.C.B. 190AA (1971) (package treatment plants).

enable us to frame an intelligent order with respect to any remedial steps that may be called for," remanded to the hearing officer for further hearings as to means of disposing of the respondent's refuse without causing pollution.[234] The case for a similar procedure in the North Shore case was strong, especially since the connection ban appears to have been completely unexpected. The amended section 33(c) should remove any possibility that such an important measure will be imposed without notice and opportunity for a meaningful hearing in the future.[235]

That there were procedural flaws in the imposition of the North Shore ban does not mean that full consideration would have shown it to be unwarranted. The losses in the construction industry, while somewhat speculative, may be shown with some degree of accuracy on the basis of past statistics and market conditions. The harm to the environment from additional connections is likely to be more subjective. It should not be decisive that the marginal increase in pollution from any given connection might be very small, for, as one appellate court aptly observed in affirming the denial of a variance from a connection ban, "lines must be drawn somewhere even though each successive increase in the load in a sewer may have minimal effect."[236] Weighing the costs and benefits of a connection ban is no exact science, and considerable latitude must be left to the Board under the appropriate standard of review.[237] Among the benefits of the prohibition, moreover, must be counted the incentive it gives the polluter to clean up rapidly. For the statutory direction to the Board to enter such order "as it shall deem appropriate"[238] obviously implies consideration of whatever is necessary or appropriate to achieve the purposes of the Act, as connection bans have proved to be.

In 1973, in order that Illinois might qualify to administer the National Pollutant Discharge Elimination System (NPDES) for sources within its borders, section 43 was amended to provide ex-

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234 EPA v. Chicago Housing Authority, 3 Ill. P.C.B. 259 (1971).

235 Board rules provide for liberal intervention even apart from the new statutory provisions. Ill. P.C.B. Reg. ch. 1, rule 310 (1970).

236 Springfield Marine Bank v. PCB, 27 Ill. App. 3d 582, 587, 327 N.E.2d 486, 491 (4th Dist. 1975).

237 *Id.*

238 ILL. REV. STAT. ch. 111½, § 1033(a) (1973).

pressly for sewer connection bans.[239] Upon violation of an NPDES permit by a publicly owned or regulated "sewage works," new connections "may be prohibited" by the owning or regulating public body "pursuant to State law or local ordinance"[240] or "may be prohibited or restricted under the provisions of Title VIII of this Act"[241] providing for enforcement, and the Attorney General or State's Attorney "may proceed in a court of competent jurisdiction to secure such relief."[242] Insofar as the first provision authorizes voluntary limitation of new connections by the treatment-plant operator, it is not relevant here. The reference to public regulation appears to authorize the Illinois Commerce Commission or a comparable local body to limit connections, without providing any standards. Most crucial for present purposes are the further provisions for Board and court imposition of prohibitions. To simply say that connections may be restricted "under the provisions of" the enforcement title is ambiguous; the amendment may make connections illegal and refer only to the procedures prescribed in that title, or it may incorporate all the considerations that section 33 makes relevant to the issuance of any order. The latter construction seems the more plausible in terms of both language and policy. The final clause, authorizing the Attorney General to proceed in court "to secure such relief," could easily be read to make connection bans automatic. But it seems unlikely that the legislature intended this result in light of traditional equitable considerations, the general relevance of the cost of compliance under the Act, and the apparent incorporation of section 33 in the parallel provision for similar relief before the Board. I conclude that the amendments merely make express what was already implicit in the Act, namely, that a ban on new connections is one sanction that may be imposed upon a violation if warranted by all the factors made relevant by section 33.

As noted earlier, the Board spent a substantial portion of its time in passing upon petitions for individual variances from the North Shore sewer-connection ban. The cases in which the Board granted variances fell largely within three distinct categories. The first were cases in which expenditures had been made in reliance on the expectation of ability to connect to the sewers. The Board

239 ILL. REV. STAT. ch. 111½, § 1043 (1973), *formerly* ch. 111½, § 43, [1970] Ill. Laws 76th Gen. Assem. 893.

240 ILL. REV. STAT. ch. 111½, § 1043(i) (1973).

241 *Id.* § 1043(ii).

242 *Id.* § 1043(iii).

split three ways on this question in the early case of *Wachta v. EPA*.[243] A developer had purchased property, obtained sewer-connection permits, built streets and local sewers, and spent $4,000 on advertising the new subdivision before the Board announced its moratorium. At that time seven homes had been completed, one was under construction, and 19 others were planned. One member of the Board would have allowed all 27 lots to be connected on the ground that any impairment of the permit was a taking of property without due process.[244] The Chairman would have denied the variance entirely for want of proof that the added wastes would be insignificant compared to the developers' losses, noting that most of the money spent was not lost.[245] Finally, the opinion argued, the Constitution was no impediment:[246]

> The recipient of a liquor license can lose his entire investment when prohibition is voted; the company with a permit for equipment that emits air contaminants can be subjected to more stringent regulations later. It is . . . implicit in a Sanitary Water Board permit that it is subject to later changes in the law.

The majority took a middle course without much explanation, allowing connection of the eight homes completed or under construction at the time of the ban.[247]

Where expenditure in reliance on the ability to connect was the hardship claimed, the Board adhered generally to the line drawn in *Wachta*, with dissents whenever a case approached the line.[248] The

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243 2 Ill. P.C.B. 118A and 190A (1971).

244 *Id.* at 190AAA.

245 *Id.* at 118D.

246 *Id.* at 118E.

247 *Id.* at 190A.

248 When the sole commitment prior to the ban was the purchase of a lot, the variance was denied, and usually unanimously:

> In such cases the hardship is that incurred by every owner of undeveloped property in the District, namely, the postponement of the ability to build. To allow a variance in those cases would be to repeal the sewer ban in its entirety.

Scott Volkswagen, Inc. v. EPA, 2 Ill. P.C.B. 295 (1971). In Wagnon v. EPA, 2 Ill. P.C.B. 170A (1971), two dissenters would have granted the variance because $500 had been invested in house plans and a building contract signed: "Are we to penalize this person because the builder did not walk out to the property and scoop a shovel of dirt?" *Id.* at 170BBB. In Tauber v. EPA, 2 Ill. P.C.B. 317 (1971), the Chairman voted alone against connection of two old homes that had been ordered vacated because their septic tanks were a health hazard. Admitting the hardship was considerable, the dissenter thought it "identical to that of any new building that was under construction at the time the sewer ban was imposed." *Id.* at 318. Thus pushed, he wavered: "Since my vote is not necessary to grant this petition, I adhere to my previous position with the reservations suggested in this opinion." *Id.*

appellate court, however, has afforded greater protection to justifiable expectations. In *Wachta* it held the issuance of a permit decisive as to the whole case on an estoppel theory since the developer had made substantial expenditures in reliance.[249] In a later case it relied on the permit alone: under section 49(b), permits issued by the predecessor board "remain in full force . . . until superseded,"[250] and the sewer-ban order had not purported to revoke them; if it had, permit holders would have been entitled to notice and hearing.[251]

A second line of decisions granted variances on the basis of hardships unrelated to expenditures made in reliance on the ability to build. The first was the kind the Board would not be expected to deny—a request to construct an extra bathroom on the ground floor, without adding people, to accommodate children in wheelchairs.[252] Next came *McAdams v. EPA*:[253]

However, the majority did not always find the start of construction decisive. For example, although four members thought the case identical to *Wagnon*, above, where the purchase of plans was held insufficient, a variance was granted in Ciancio v. EPA, 2 Ill. P.C.B. 207 (1971), because the fifth and determinative member said orally he thought it decisive that Ciancio was prepared to chop down prized oaks to put in a septic tank if denied permission to connect. Conversely, in Seegren v. EPA, 2 Ill. P.C.B. 285 (1971), a three-to-two majority denied a connection for a completed building because a septic tank had been constructed: no connection was needed to permit occupancy. The court reversed, saying the septic tank was "at best an unsatisfactory, interim measure" because it would remove less organic matter than standard treatment and because the soil was overly permeable. 8 Ill. App. 3d 1049, 1052, 291 N.E.2d 347, 349 (2d Dist. 1972).

249 Wachta v. PCB, 8 Ill. App. 3d 436, 289 N.E.2d 484 (2d Dist. 1972).

250 ILL. REV. STAT ch. 111½, § 1049(b) (1973).

251 North Shore Sanitary Dist. v. PCB, 22 Ill. App. 3d 28, 316 N.E.2d 782 (2d Dist. 1974).

252 Haight v. EPA, 2 Ill. P.C.B. 63 (1971).

253 2 Ill. P.C.B. 297 (1971). But a line was drawn, for better or worse, in Patricia Development Corp. v. EPA, 2 Ill. P.C.B. 469 (1971), in which 23 new homes were sought to be connected on behalf of people whose housing situation was comparable to that of McAdams. The Board allowed connection of homes under construction and those for which purchasing commitments had been entered into, since by "abandoning the search for alternative quarters" the latter had increased the hardship of a denial. *Id.* at 469-70. But those whose commitments had come after the ban were denied, since they "were on notice that they must look elsewhere to build new homes. . . . In light of the possibility of constructing comparable homes with similar federal assistance elsewhere, we cannot open the door" without encouraging "open-ended increases in . . . pollution." *Id.* at 470. Cases like this may help to convince anyone with doubts of the desirability of considering the costs as well as the benefits of controlling pollution. *See also* Weinstein v. EPA, 2 Ill. P.C.B. 291 (1971) (woman of means with a "chronic knee problem" who wanted to move into her new one-story home to avoid stairs, denied unanimously); Congregation Am

> This family of four including two small children . . . resides in an apartment with one twelve-by-fourteen bedroom . . . , which the family has been asked to vacate. . . . The family income is quite modest. . . . [Mr. McAdams] has, however, qualified for federal mortgage assistance. . . . This is a far cry from the comfortable family that must wait two or three years for its dream house because of the sewer ban. This is a family that may have no place to live if the variance is denied. . . .

Still another line of grants was based on the fact that no net increase in sewage inflow would result from the new connection. Most obvious, perhaps, were cases in which an existing connection had been temporarily interrupted, as in the case of repair to a pretreatment facility.[254] But the connection ban also prompted innovative market and technological solutions. In one case the Board allowed connection of a new store that had bought the right of a next-door carwash to discharge to the sewers;[255] in another it endorsed the principle of a tank to hold wastes for discharge at night, when the treatment plant had excess capacity.[256]

At least partly in response to the difficulties of raising sufficient funds at the local level, the Federal Water Pollution Control Act provides for federal grants to the tune of 75 percent of the cost of constructing government-owned sewage-treatment works.[257] In the

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Echod v. EPA, 5 Ill. P.C.B. 61 (1972) (rabbi who had a bad leg, refused for religious reasons to ride on the Sabbath, and sought to move into a new home next to the synagogue, granted); Highland Park Hospital Foundation v. EPA, 3 Ill. P.C.B. 747 (1972) (on-site living quarters for hospital nurses on call, granted); Scott Volkswagen, Inc. v. EPA, 2 Ill. P.C.B. 295 (1971) (car dealer who thought he might lose his franchise if he did not move to a bigger building, denied: the Board did not believe he would lose it since nobody else could build a bigger building either and his was the only existing outlet in the area).

254 *See, e.g.*, Pfanstiehl Laboratories v. EPA, 3 Ill. P.C.B. 719 (1972). *See also* School Building Commission v. EPA, 2 Ill. P.C.B. 681 (1971), and Waukegan Park Dist. v. EPA, 3 Ill. P.C.B. 313 (1971), allowing connections because the same children would attend school, or play basketball, in older facilities in the same area if the variance were denied. In Park Manor v. EPA, 2 Ill. P.C.B. 321 (1971) the Board noted that wastes from a proposed nursing home "will place considerably less burden on treatment facilities" than did those from a funeral home formerly on the same site. *Id.* at 322. The Chairman dissented: "This is better than having both buildings discharging at the same time, but it is better still to have neither; for the plant can handle neither." *Id.* at 323.

255 E. N. Maisel & Assoc. v. EPA, 3 Ill. P.C.B. 253 (1971).

256 Mars Development Co. v. EPA, 2 Ill. P.C.B. 689 (1971). In fact the connection was refused because the tank was too small to avoid discharges on wet nights when the capacity of the treatment plant was exhausted.

257 33 U.S.C. § 1282 (Supp. II 1972).

early days, Congress authorized considerable appropriations for this program but actually appropriated much less. The 1972 amendments, to prevent this from happening, provide that "sums authorized to be appropriated . . . shall be allotted . . . among the States,"[258] that they "shall be available for obligation . . . on and after the date of such allotment,"[259] and that EPA approval of grant applications "shall be deemed a contractual obligation of the United States."[260] Having thus protected against its own second thoughts, Congress ran into an executive obstruction: President Nixon ordered allotments severely restricted to combat inflation.[261]

This history of broken federal promises has had a marked impact on the construction of municipal treatment facilities. The reaction of local officials was predictable: why spend the local voter's money if a little delay means the federal government will pay? The Pollution Control Board, however, flatly refused to accept delays in the availability of federal money as a defense, quoting with approval the following citizen testimony:[262]

> Municipalities were and are responsible for meeting the deadlines with or without the aid of state or federal assistance. The intent of the Federal and State Water Quality Standards and the position of the League is simple: The polluter is responsible for cleaning up his own mess. . . .

The EPA seems to have disagreed with the Board on this question, for it conspicuously failed to file complaints against the numerous municipalities its Director said were behind schedule. The Board took note of this development in a later opinion denying a variance:[263]

> We do not understand why the Environmental Protection Agency has permitted matters to reach this pass without filing a complaint. The Sanitary District has been in continuous violation of its deadlines for years, and nothing has been done. . . . Inattention to such flagrant violations can only encourage . . . further delays. . . .
>
> . . . We urge the Agency to take such steps as may be appropriate to assure that the regulations are obeyed.

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258 *Id.* § 1285(a).

259 *Id.* § 1285(b)(1).

260 *Id.* § 1283(a).

261 This action was held illegal in Train v. New York, 420 U.S. 35 (1975). The delays, however, have already occurred.

262 Mattoon v. EPA, 1 Ill. P.C.B. 441, 446 (1971).

263 Beardstown Sanitary District v. EPA, 6 Ill. P.C.B. 229, 238-39 (1972).

In 1973, after several changes in membership, the Board amended the regulations at EPA request to give an additional year to local treatment authorities eligible for federal grants,[264] and the deadline has since been extended to 1977.[265]

A final possibility for avoiding the difficulties of getting local governments to build needed treatment works is to follow Maryland's example and create a state corporation with authority to do the building itself and to charge the local government for doing so.[266] According to one study,[267] however, this corporation had not once exercised its authority to do this without a request from local government.

II. The Machinery of Enforcement

A. *The Agency and the Board*

The complexity of the field and the need for continuous, informed supervision made it desirable to establish a separate enforcement agency rather than rely solely upon the regular prosecutors. Once the further decision was made to rely principally upon an administrative rather than a judicial tribunal to hold hearings and determine whether violations had taken place, it seemed imperative to create a separate board to do so in order that no single body would be "both prosecutor and judge—a situation not consistent with the impartiality expected of an arbiter under the rule of law."[268] More interesting in the long run, although quite orthodox, was the decision to sidestep the courts as primary tribunals in the first instance.

While the exercise of quasi-judicial powers by administrators who do not enjoy the status of judges is a long-recognized phenomenon in this country, it remains a troubling one. Federal judges, for example, are constitutionally guaranteed tenure and irreducible salary[269] in order to safeguard their independence from other branches of the Government and thus ensure the faithful and objective discharge of their duties.[270] But expediency has significantly

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264 Water Pollution Regulation Amendments, 8 Ill. P.C.B. 591 (1973).

265 Proposed Amendment to Rule 409 of the Water Pollution Regulations, 18 Ill. P.C.B. 156 (1975).

266 Md. Nat. Res. Code Ann., §§ 3-101 et seq. (1974).

267 E. Haskell & V. Price, State Environmental Management 217 (1973).

268 Ogilvie Message, *supra* note 9, at 2.

269 U.S. Const. art. III, § 1.

270 *See* The Federalist Nos. 78-79 (A. Hamilton) [hereinafter cited as The Federalist].

eroded this important principle, so that tribunals whose members lack the constitutional protections may decide cases in the Territories[271] or the District of Columbia,[272] may resolve controversies "which from their nature do not require judicial determination and yet are susceptible of it,"[273] and may even act as trial forums in private disputes deemed inherently judicial, so long as judicial review is provided on questions of law.[274] Whatever its weaknesses, the election system for Illinois judges[275] at least subjects the judge to the general will rather than to other governmental branches; yet, as the state supreme court has noted,[276] this principle, too, has long been compromised by the creation of quasi-judicial agencies. Section 5(a) of the Environmental Protection Act bravely proclaims the Pollution Control Board "independent," separates it from the prosecutor, gives no one direct control over its decisions, and eliminates ex officio memberships that present conflicts of interest.[277] But, as Hamilton argued, the powers to reappoint and to alter salary are potent tools with which the executive or legislature can undermine that independence.[278]

Given these reservations as to the continued independence of a quasi-judicial board, one may fairly ask why the Act established such a board instead of providing for prosecution of violators exclusively in the courts. The arguments are well known: arbiters who spend full time on pollution matters will become more familiar with the complex and highly technical subject and thus will be less likely to reach mistaken results through misunderstanding; uniformity in applying the law will be promoted by centralizing most enforcement in a single trial forum; crowded court dockets may be avoided and streamlined procedures instituted; the combination of rule-making and adjudicatory power will promote consistent policy formulation; and, not least, the creation of a new tribunal permits selection of

271 American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828).

272 Palmore v. United States, 411 U.S. 389 (1973).

273 *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929).

274 Crowell v. Benson, 285 U.S. 22 (1932).

275 ILL. CONST. art. VI, § 12.

276 Waukegan v. PCB, 57 Ill. 2d 170, 311 N.E.2d 146 (1974).

277 ILL. REV. STAT. ch. 111½, § 1005(a) (1973).

278 THE FEDERALIST, *supra* note 270, Nos. 78-79. *See also* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES & COMMENTS 128-42 (6th ed. 1974) [hereinafter cited as GELLHORN], suggesting that any difference in presidential power over the decisions of executive departments and "independent" agencies may be more apparent than real.

personnel sympathetic to the purposes of the program.[279] There are countervailing considerations even if a specialized tribunal were given judicial status, which was not thought a realistic alternative in Illinois: the loss of diverse views, the loss of the outsider's and generalist's perspective, and most importantly the danger of capture by the interests sought to be controlled. These considerations have led me elsewhere to oppose the creation of specialized federal courts[280] and would lead me to argue against the establishment of a federal quasi-judicial tribunal to try pollution cases. But the alternative was not enforcement in the securely independent federal courts with their long tradition of excellence; rather it was enforcement by elected judges in the highly political tradition of Illinois. And although the history of other administrative agencies indicated a serious risk of progressive degeneration, the short-term advantages of enforcement by a new board appointed by a sympathetic governor seemed well worth having.

Once the competing considerations were resolved in favor of a quasi-judicial board, the way was open for perhaps the most important innovation of the Environmental Protection Act: the provision in section 33(b) expressly authorizing the Board itself to impose money penalties.[281] Under prior law, as is common in pollution-control and other administrative schemes, one had to go to court for the assessment of penalties.[282] The absence of administrative power to impose penalties presented a serious obstacle to the infliction of money sanctions: to obtain them it was necessary either to forgo the advantages of administrative procedure and expertise altogether or to pursue two separate proceedings.

The provision for administrative money penalties was the object of immediate and persistent constitutional challenges based upon ar-

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279 *See generally* GELLHORN, *supra* note 278, at 2-7.

280 *See* Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 62-88 (1975).

281 "Such order may include . . . the imposition by the Board of civil penalties in accord with Section 42 of this Act." ILL. REV. STAT. ch. 111½, § 1033(b) (1973). This provision is plain enough that the courts have generally not been troubled by the injunction in section 42(c) that penalties "may be recovered in a civil action" to be brought by the State's Attorney or Attorney General in the name of the people. *Id.* at § 1042(c). Reading the two sections together discloses alternative judicial and administrative forums.

282 Ch. 19, § 145.13, [1951] Ill. Laws 67th Gen. Assem. 469-70; ch. 111½, § 240.15, [1963] Ill. Laws 73d Gen. Assem. 3201.

guments that penalties could be imposed only by courts and only after trial by jury. Conflicting intermediate-court decisions on the first issue were resolved in favor of constitutionality in *Waukegan v. PCB*.[283] Relying on federal precedents and those of other states, the court stressed the procedural safeguards of the Act (including judicial review and the separation of prosecutor from arbiter) and found no constitutionally significant difference between the power to impose money penalties as such and the long-recognized authority of administrative tribunals to take actions such as license revocations (which "practically, though not formally, may be considered penalties"). The legislature, said the court, "may confer those powers upon an administrative agency that are reasonably necessary to accomplish the legislative purpose"—here to establish "a specialized statewide and uniform program of environmental control and enforcement."[284] The jury argument was rejected in *Monmouth v. PCB*[285] because the penalty provisions were meant to be civil, not criminal, and the constitutional civil jury right "has been consistently interpreted by this court as inapplicable to special or statutory proceedings unknown to the common law."[286]

In terms of the constitutionality of giving an agency authority that resembles judicial power, the Illinois Supreme Court seems correct in maintaining that there is no plausible basis for distinguishing the precedents. The issuance of prohibitory orders and the awarding of money damages,[287] long established as proper administrative responsibilities, appear as innately judicial as the imposition of penalties. More serious are arguments based upon the constitutional guarantees of trial by jury. The right to a jury in "criminal prosecutions"[288] is a substantial safeguard against the imposition of criminal sanctions without the concurrence of a cross section of the public. It is hard to believe the Illinois Supreme Court would allow the abolition of the jury in murder cases by the simple expedient of attaching to them the "civil" label. The decisive factor ought to be the consequences of an adverse determination. One might draw the line at imprisonment, which in general may be thought more serious than

283 57 Ill. 2d 170, 311 N.E.2d 146 (1974).
284 *Id.* at 179, 184, 311 N.E.2d 151, 153.
285 57 Ill. 2d 482, 313 N.E.2d 161 (1974).
286 *Id.* at 485, 313 N.E.2d at 163.
287 *See* Crowell v. Benson, 285 U.S. 22 (1932) (workmen's compensation).
288 ILL. CONST. art. I, § 8.

money penalties,[289] or at imprisonment for a "substantial" period.[290] Alternatively, one might distinguish "public welfare" offenses in which there is neither risk of imprisonment nor the stigma of conviction for an offense malum in se.[291] But the court should more carefully explain the distinction to make it clear that the important policy underlying jury trial is not simply being ignored.

Moreover, to characterize the infliction of money penalties as a "civil" sanction is not the end of the problem, for the Illinois Constitution guarantees a jury, "as heretofore enjoyed," in civil cases as well.[292] The state supreme court's statement that this right is "inapplicable to special or statutory proceedings unknown to the common law,"[293] if taken literally, leaves this important right a narrow vestige that makes no sense in policy; the implication is that even actions identical in policy terms to those for which a jury was required by common law do not require one if they were created by later statute. The United States Supreme Court has more persuasively interpreted a similar provision:[294]

> By *common law*, [the framers of the seventh amendment] meant . . . not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . .

According to this test the established propriety of administrative cease-and-desist orders furnishes no significant support for the compatibility of administrative penalties with the right to a civil jury, for

289 The United States Supreme Court has recently upheld the power of a federal judge to impose a $10,000 fine for criminal contempt without a jury, while refusing to say penalties never require juries. Muniz v. Hoffman, 422 U.S. 454 (1975). *See also* United States v. J. B. Williams Co., 498 F.2d 414, 421 (2d Cir. 1974) (request for $500,000 civil penalty not within sixth amendment). *Cf.* 28 U.S.C. § 2241 (1970), which makes the extraordinary remedy of habeas corpus available for collateral review of criminal convictions only if the petitioner is "in custody" or "committed for trial." The distinction is certainly inexact: compare a day's jailing with a million-dollar fine.

290 *See* United States v. Barnett, 376 U.S. 681 (1964) (dictum).

291 *See* PERKINS, *supra* note 75, at 692-710 (1957). *But see* Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974) arguing that protection such as jury trial should be required whenever penalties are not computed on the basis of harm done but rather to deter or punish.

292 ILL. CONST. art. I, § 13.

293 Monmouth v. PCB, 57 Ill. 2d 482, 485, 313 N.E.2d 161, 163 (1974).

294 Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830), *quoted and applied in* Curtis v. Loether, 415 U.S. 189, 193 (1974).

while judicial cease-and-desist orders (injunctions) were the staple business of equity, civil penalties (except for contempt for violation of a prior court order) were not.[295] However, the workmen's compensation cases[296] furnish powerful authority that, even in the award of private damages, the creation of an administrative agency may avoid the jury requirement. The United States Supreme Court only last year said: "The Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication."[297] I do not attempt to resolve the jury trial question here. Suffice it to say that, while the validity of administrative penalties is settled in Illinois (which obviously pleases me as a supporter of a strong pollution-control program), I think the constitutional problem is a good deal more serious than it was apparently perceived to be by the state supreme court, and I trust that distinctions will be developed that will keep the pollution precedents from significantly impairing the important constitutional protection of jury trial.

B. *Prosecution*

Section 31(a) provides that the Agency "shall" file a complaint if it finds a violation; prior law had used the plainly discretionary word "may." An appellate court has described the Agency's task under the new law as "mandatory."[298] One EPA director was heard to say that in urging the Attorney General to file EPA complaints he had stressed that the statute allowed no discretion, but he exercised some himself. Conceding that "82 percent of the state's municipal wastewater treatment plants would not meet deadlines . . . ," the Director said that it was his strategy nevertheless to "delay enforcement prosecutions against municipalities until water qual-

295 *See* Hepner v. United States, 231 U.S. 103 (1909); United States v. J. B. Williams Co., 498 F.2d 414, 422-23 (2d Cir. 1974): "In general 'there is a right of civil jury trial when the United States sues to collect a penalty.'" *Id.*, *quoting from* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.31[1], at 232-33 (1971).

296 *See, e.g.*, Grand Trunk Western Ry. v. Industrial Comm'n, 291 Ill. 167, 125 N.E. 748 (1919).

297 Curtis v. Loether, 415 U.S. 189, 193 (1974) (dictum), *quoting* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 90 (1965): "The concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder." *Id.* The relevance of this fact is not clear in the face of the constitutional command that certain matters must be decided by jury. *See also* Atlas Roofing Co. v. OSHRC, 518 F.2d 990, 1011-12 (5th Cir. 1975) (upholding administrative penalties against a civil jury argument).

298 Mystik Tape v. PCB, 16 Ill. App. 3d 778, 793, 306 N.E.2d 574, 586 (1st Dist. 1973) (dictum).

ity standards were revised and state money available to fund the state's share of local construction costs."[299]

Prosecutorial discretion is not easy to reconcile with the elaborate provisions in sections 35 and 36 which are intended to make formal, public and adversary the procedure for granting relief from burdensome regulations. A calculated refusal to prosecute may paralyze the most impressive regulations. Yet budgetary considerations may make total enforcement impossible, and the traditional reluctance of courts to find that prosecutors lack discretion makes it less than likely that an action to compel the Agency to prosecute would succeed.

Despite the express direction of sections 31(a) and (c) that "the Agency" should issue complaints and bear the burden of proof in Board hearings, the independently elected Attorney General argued at the first hearing on an EPA complaint that only he could constitutionally be heard as counsel for the Agency.[300] The Hearing Officer, speaking for the Board, "responded that the Attorney General was free to participate but that the Board would hear anyone designated by the Agency as a principal."[301] That case and the next few were presented by attorneys employed directly by the Agency, but the Attorney General later took over by informal agreement with the Agency.[302] While one layer of prosecutorial discretion may be a necessary evil, a second has nothing whatever to recommend it and can only result in reduced enforcement.[303]

Whether the Agency should have exclusive authority to file complaints, however, is a different question. "With the best will in the world," as Governor Ogilvie's message delicately put it, "no administrative agency can investigate every problem in the state or

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299 E. HASKELL & W. PRICE, STATE ENVIRONMENTAL MANAGEMENT 30 (1974) [hereinafter cited as HASKELL].

300 EPA v. Lindgren Foundry Co., 1 Ill. P.C.B. 11 (1970). The Attorney General cited an elderly decision striking down an appropriation to an executive agency to hire attorneys to represent it in court. Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915), *reaffirmed in* Stein v. Howlett, 52 Ill. 2d 570, 585-86, 289 N.E.2d 409, 417-18 (1972). *Stein* held unconstitutional a statute authorizing the Secretary of State to employ attorneys to render advisory opinions, relying on recodification of the provision that the Attorney General "shall be the legal officer of the state." ILL. CONST. art. V, § 15.

301 EPA v. Lindgren Foundry Co., 1 Ill. P.C.B. 11, 11 (1970).

302 *See* HASKELL, *supra* note 299, at 18.

303 *See id.* at 17-19, noting that the Agency and the Attorney General accused one another of being too lenient in prosecution policy.

present every point of view."[304] The statute contains several provisions designed to safeguard against the risk that the Agency may be overworked, unsympathetic, or crooked. First, section 42(d) authorizes the Attorney General or State's Attorney to sue without a request from the Agency.[305] The independence of these officials, while an obstacle to enforcement when concurrence in an Agency complaint is required, can in this situation promote a competition toward greater enforcement that may help to overcome the influences that retard prosecution.[306] Similarly, although the goals of uniformity and expertise support the view that the Board should have exclusive jurisdiction over complaints, a safeguard against an inadequate Board is provided by the alternate provision for judicial enforcement in section 42.[307] The most significant departure from tra-

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[304] Ogilvie Message, *supra* note 9, at 4.

[305] ILL. REV. STAT. ch. 111½, § 1042(d) (1973).

[306] For similar reasons section 45(a) of the Act preserves remedies against pollution under other laws. This means, for example, that the Attorney General may sue to abate "pollution" without regard to administrative proceedings under ILL. REV. STAT. ch. 14, § 12 (1973), enacted in 1969 at his request because of dissatisfaction with the vigor displayed by the regular agencies. It also means local governments may enforce their own pollution-control laws. The theory that the more avenues of enforcement are open, the more likely that someone will put an end to pollution was clearly a dominant reason, buttressed by the political power of the cities and the Attorney General.

> The State is in no position to put other pollution fighters out of business since it has never had an adequate program of its own. . . . And even if the State's program were fully operative and proven, we have no right to tell the cities and counties that they cannot protect the health of their own citizens.

Currie Testimony, *supra* note 3, at 7. But the issue is not without some complications. Quite apart from understandable industry pleas for a single ascertainable standard to satisfy and a single set of administrative costs, strict local regulations may interfere with a state program. Suppose numerous communities zone out sewage-treatment plants or sanitary landfills as undesirable. O'Connor v. Rockford, 52 Ill. 2d 360, 288 N.E.2d 432 (1972), held that a county could not invoke zoning laws to block a landfill that had been given a state permit on the basis that under the Environmental Protection Act "such operations be conducted only upon issuance of a permit from the Environmental Protection Agency." *Id.* at 367, 288 N.E.2d 436. This holding is responsive to the above policy concern but impossible to square with either the statutory policy of section 2(a)(iv) of encouraging local pollution programs, or with the fact that both applicable state regulations and the state permit in the case before the court explicitly required compliance with local zoning. Both the appellate court, Carlson v. Worth, 25 Ill. App. 3d 315, 322 N.E.2d 852 (1st Dist. 1974) (alternative holding), and the Board, Browning-Ferris Industries v. EPA, 18 Ill. P.C.B. 320 (1975), have expressly held that the Agency may not condition a permit on compliance with local zoning or licensing requirements, reading *O'Connor* to establish a complete preemption. Perhaps the answer is that the state should reserve authority to override local laws in those cases where such action is necessary to effectuate state environmental policy.

[307] As originally enacted, section 42 provided that any persons violating the Act,

ditional pollution laws in this respect, however, is the provision in section 31(b) allowing citizen complaints as an additional safeguard against inadequate prosecution.[308]

Board experience has revealed the citizen-suit provision to be of modest but significant value:[309]

> Fears lest opening the door to citizen complaints might flood the Board with frivolous cases have so far proved unfounded. . . . The responsibility for proving one's case seems to be a sobering one, to the point that, in my opinion, too few citizen complaints are being filed.

Yet the provision was thought to be having some good effects:[310]

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regulations, or Board orders should be liable for money penalties "which may be recovered in a civil action, and such person may be enjoined from continuing such violation as hereinafter provided." It went on to say that "such actions" should be brought by public prosecutors in the county of violation and in the name of the people. Ch. 111½, § 42, [1970] Ill. Laws 76th Gen. Assem. 893. One appellate court, either overlooking section 42 altogether in the face of an explicit dissent or silently misled by the "hereinafter provided" language, held that the courts had jurisdiction to grant injunctions against violations only under conditions specified in section 43, which authorizes an immediate injunction in cases of "extreme emergency creating conditions of immediate danger to the public health . . . ." People *ex rel.* Scott v. Janson, 10 Ill. App. 3d 787, 295 N.E.2d 140 (3d Dist. 1973). "Hereinafter" can just as easily be read to refer to the further provisions in section 42 itself respecting parties and venue. The reference to injunctions in section 42 is redundant if it refers only to section 43, and the "hereinafter" language was taken directly from the earlier Air Pollution Control Act, where it had clearly referred to party and venue provisions because when enacted that statute contained no emergency authority. *See* Ch. 111½, § 240.15, [1963] Ill. Laws 73d Gen. Assem. 3201. Not surprisingly, the supreme court reversed with little discussion, 57 Ill. 2d 451, 312 N.E.2d 620 (1974), and the statute has been amended to remove the possible ambiguity. ILL. REV. STAT. ch. 111½, § 1042(d) (1973). Yet the provision authorizing Board orders only after full trial, *id.* § 1033(a), confirms that the Board has no power to grant interim relief pending a hearing, see Lloyd A. Fry Roofing Co. v. EPA, 1 Ill. P.C.B. 585 (1971), so that when such relief is sought there must be two separate proceedings unless the complainant waives its right to go before the Board on the merits.

308 ILL. REV. STAT. ch. 111½, § 1031(b) (1973). The citizen, unlike the prosecutor, has no option to file in court in the first instance. He is omitted from section 42, *id.* at § 1042. See also the peculiar section 45(b), which authorizes "any person adversely affected in fact" (a limitation not found in section 31(b)) to sue for injunctive relief against violations and requires prior exhaustion of Board remedies: "[N]o action shall be brought under this section until 30 days after the plaintiff has been denied relief by the Board . . . ." under section 31(b), *id.* § 1045(b) (1973). One would expect such a denial to preclude judicial relief on the ground of res judicata, although so to hold would leave section 45(b) without any meaning. The original bill had not required exhaustion.

309 Second Report, *supra* note 15, at 11.

310 *Id.* Three of the most important citizen cases were Hemmerich v. Lloyd A. Fry Roofing Co., 2 Ill. P.C.B. 581 (1971); League of Women Voters v. North Shore

> Several of our most significant enforcement cases . . . have been brought by private citizens. Not only have the complaining citizens themselves responsibly discharged their obligation of presenting evidence in support of their allegations, but their filing has in several cases stimulated the intervention of the public prosecutor, which has resulted in a better record.

Because the lay presentation of technical evidence is particularly difficult, citizen suits may be most effective in cases that can be proved by sensory observations, such as oil slicks and odors. Even in the more technical cases, however, access to Agency files may produce the necessary information, and Agency personnel may be subpoenaed to interpret it. Since the whole purpose of the program is to protect the citizen, it is important that the opportunity for self-help through litigation exists even though primary reliance, for reasons of cost and expertise, must be placed upon the Agency.[311]

As a safeguard against harassment, section 31(b) requires the Board before setting a hearing to determine that a citizen complaint is neither "duplicitous" nor "frivolous."[312] Board rules establish a pretrial procedure for ascertaining whether a complaint is "frivolous," that is, whether it fails to state a cause of action.[313] The peculiar term "duplicitous," the Board said, reflected "the fear that allowing private complaints might flood the Board with too many cases

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Sanitary Dist., 1 Ill. P.C.B. 369 (1971); and Moody v. Flintkote Co., 2 Ill. P.C.B. 341 (1971).

311 The bill originally introduced in the House also contained an ambitious citizen-suit provision that went beyond traditional pollution and authorized the recovery of damages as well as preventive relief:

> Every person has the right to a clean, healthful environment. Any person has standing to sue in the courts of Illinois to secure compensatory, declaratory, or preventive relief against actual or threatened infringement of this right by governmental or private action. In any proceeding under this section, upon a showing that substantial damage to the environment has resulted or is likely to result from the acts or threatened acts of the defendants, the burden shall be upon the defense to show by a clear preponderance of the evidence that such damage is justified by countervailing benefits of the challenged action. If such proof is made, the plaintiff shall nevertheless be compensated for any damage, tangible or intangible, which he may suffer as a result of the challenged acts.

Ill. H.B. 3788, 76th Gen. Assem., § 49 (1970). *Cf.* the Michigan Environmental Protection Act, MICH. COMP. LAWS ANN. §§ 691.1201-07 (Supp. 1972). The 1970 Illinois Constitution, art. XI, § 2, gives every citizen the right to a healthful environment. In sharp contrast to the Michigan law, see Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003 (1972), the annotations to 1975 do not show it has been widely used. ILL. ANN. STAT. Art. XI, § 2 (Smith-Hurd Pocket Supp. 1975-76).

312 ILL. REV. STAT. ch. 111½, § 1031(b) (1973).

313 Ill. P.C.B. Reg. ch. 1, rule 306 (1970).

raising the same issue and unduly harass a respondent."[314] In one early case the Attorney General, having filed a suit in court under another statute before passage of the Environmental Protection Act, asked the Board to dismiss a citizen complaint against the same polluter as "duplicitous." The Board said such a holding "would turn established principles of administrative law [such as primary jurisdiction and exhaustion of remedies] squarely on their heads . . . . The fear was not of one complaint before the Board but of many."[315] But the statute is not clear as to just when there have been too many. The problem can be neatly solved by consolidation so long as the first complaint has not gone to trial, but, where this is not the case, a single Board decision should probably be held to bar additional complaints absent changed circumstances. The result will be to exclude complaints by persons who have not had their day before the Board, but that was the deliberate choice of the legislature in accepting citizen suits only with the "duplicitous" limitation. The possibility of collusive citizen suits in order to establish the absence of a violation is present, since, although the Agency is not subject to the ban on "duplicitous" complaints, a recent appellate court decision holds citizens and governments in privity for res judicata purposes under the Act.[316] In practice neither collusive nor repetitive complaints have been a problem; intervention[317] can protect against the former, and the deterrent of a costly proceeding which is almost certain to fail because of a prior Board decision would probably be sufficient to protect against the latter even if the statute did not forbid duplicitous complaints.

C. *Hearing Procedure*

Section 32 spells out a procedure for hearings on complaints before the Board which is similar to that found in court: right to

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[314] League of Women Voters v. North Shore Sanitary District, 1 Ill. P.C.B. 35, 36 (1970).

[315] *Id.* at 35-36.

[316] *See* Bulk Terminals Co. v. EPA, 29 Ill. App. 3d 978, 331 N.E.2d 260 (1st Dist. 1975), which held a city-imposed penalty precluded both the EPA and a citizen group from filing complaints before the Board, terming the latter a "private attorney general." *Id.* at 984, 331 N.E.2d at 264. This holding is questionable because not only may the interests of the citizen diverge from those of the state, but the statutory protection against "duplicitous" complaints is based on the assumption that res judicata is inapplicable when the parties differ.

[317] Ill. P.C.B. Reg. ch. 1, rule 310 (1970).

counsel, testimony, cross-examination, transcript,[318] oral and written argument.[319] Hearings are open to the public and the public is encouraged to participate.[320] In contrast to prior practice, section 33 (a) requires the Board to write an opinion in each case in order to inform the parties, facilitate judicial review, sharpen thought, and aid in the development of precedent.[321] Section 5(e) gives any party the right to subpoenas.[322] Board rules[323] elaborate on procedural matters, including useful prehearing conferences[324] and a limited right to discovery,[325] and ambitiously require the hearing to be held within 60 days after the filing of the complaint,[326] subject to a very strict rule allowing continuances only upon proof of "arbitrary and unreasonable hardship."[327] Judicial evidentiary rules are relaxed: any evidence may be received[328]

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318 The petty business of paying for transcripts of hearings has posed a continuing crisis for the Board. Legislative resistance to paying the considerable charges exacted by court reporters forced the Board for a time to require the parties to provide transcripts at their own expense. The inability of the EPA to absorb this unexpected cost meant that the "entire program virtually came to a halt." ILL. POLLUTION CONTROL BD. ANNUAL REP. 24 (1972) [hereinafter cited as ANNUAL REP.]. After the crisis passed, the Board retained the rule requiring parties to provide transcripts in variance cases. Ill. P.C.B. Reg. ch. 1, rule 410 (1970).

319 ILL. REV. STAT. ch. 111½, § 1032 (1973).

320 Section 32 provides, "Any person may submit written statements to the Board . . ." relating to the subject of the hearing, and "the Board may permit any person to offer oral testimony." *Id.* To attract the interested public, notice by newspaper is required; this, however, is notoriously ineffective. Notice by mail is required for those who have complained to the Agency within six months about the respondent and for anyone in the county who has requested notice of enforcement proceedings. *Id.* § 31(a). Pursuant to regulation, Ill. P.C.B. Reg. ch. 1, rule 307 (1970), the Board summarizes all complaints in a regular newsletter, now called the Environmental Register, which is available free of charge.

Concerned for the respondent's right to confront witnesses, the Board provided that written statements submitted in enforcement proceedings be stricken unless the person submitting the statement is available for cross-examination. Ill. P.C.B. Reg. ch. 1, rule 317 (1970).

321 ILL. REV. STAT. ch. 111½, § 1033(a) (1973).

322 *Id.* § 1005(e).

323 Ill. P.C.B. Reg. ch. 1 (1970).

324 *Id.*, rule 312.

325 *Id.*, rule 313.

326 *Id.*, rule 307. This requirement, which exists largely for the purpose of expediting enforcement, was correctly held not to be jurisdictional in George E. Hoffman & Sons, Inc. v. PCB, 16 Ill. App. 3d 325, 306 N.E.2d 330 (3d Dist. 1973).

327 Ill. P.C.B. Reg. ch. 1, rule 311 (1970).

328 *Id.*, rule 320. The courts have shown no eagerness to reverse for the erroneous admission of evidence as long as such evidence relates to matters within the scope of the complaint. *See* Mystik Tape v. PCB, 16 Ill. App. 3d 778, 306 N.E.2d 574 (1st Dist. 1973).

> which would be relied upon by a reasonably prudent person in the conduct of serious affairs which is reasonably reliable and reasonably necessary to resolution of the issue for which it is offered,

so long as it is not privileged.

But for an amendment offered by a friendly legislator, the Board would have foundered under the original bill's requirement that a Board member attend every enforcement hearing.[329] As adopted, section 32 permits such hearings to be conducted by a hearing officer alone. Hearing officers have so far been given purely ministerial functions in order to save time and to assure that Board members are not tempted to defer uncritically to the findings of their employees.[330] An appellate court, however, has cast doubt on the constitutionality of this effort to ensure that decisions are made by those chosen by the Governor and Senate to make them. The court noted a conflict of authority as to whether due process requires findings of fact to be made by one who has observed the demeanor of the witnesses, and added in dictum that the necessity for such findings was "self-evident" when "the only testimony as to 'pollution' was that of some neighbors complaining about noise, odor and inconvenience and this testimony was directly contradicted by others."[331] The Board, having rejected this due process argument in the same case,[332] instructed its hearing officers to file statements assessing the credibility of witnesses.

It is not clear whether or not this practice satisfies the court's objection. A disembodied statement as to credibility is not the same as a credibility judgment applied to and embodied within a finding of fact. But the court added that a hearing officer's findings would not be binding on the Board, as indeed they could hardly be consistent with the statutory command that the Board enter such order as it shall deem appropriate.[333] Since a hearing officer's finding could thus be ignored, to nevertheless require it be made is a hollow requirement that does not seem essential to due process. I should

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329 Ill. H.B. 3788, 76th Gen. Assem., § 32 (1970).

330 *See* Ill. P.C.B. Reg. ch. 1, rule 308 (1970) (hearing officer may not pass on motion to dismiss); *id.* rule 315 (defining authority of hearing officer).

331 Southern Illinois Asphalt Co. v. EPA, 15 Ill. App. 3d 66, 80, 303 N.E.2d 606, 616-17 (5th Dist. 1973). Affirming on other grounds, the supreme court did not speak to this issue. *Id.*, 60 Ill. 2d 204, 326 N.E.2d 406 (1975).

332 EPA v. Southern Ill. Asphalt Co., 1 Ill. P.C.B. 665 (1971). The opinion does not mention the issue.

333 ILL. REV. STAT. ch. 111½, § 1033(a) (1973).

think it far preferable to hold that due process does not require that demeanor evidence be brought before the decider at all.[334] In any case, credibility is usually of less significance in the often technical proceedings before the Board than it is in the typical criminal or civil case. It is to be hoped that the Board's ability to maintain control over its own statutory responsibilities will not be torpedoed in the relatively trivial interest of occasional demeanor evidence.

After considering the transcripts, Board members meet to consider their decision. Under section 5(a), which echoes a statute applicable to public bodies generally, Board meetings are open to the public.[335] Public meetings in general are commendable, but the failure to exempt discussion of pending individual cases was an oversight. There is a danger that, if the requirement is taken seriously, frank discussion may be inhibited to the detriment of good decision making. Board members should be encouraged to talk to one another about their business. Of course one common effect of public meeting statutes is to drive the real debates underground; I acquired personal knowledge of some of those as a member of the earlier Air Pollution Control Board.

Pollution Control Board members did not hesitate to talk informally outside of meetings, but we made an effort to conduct actual discussions of cases in public. Parties in the audience frequently interrupted to correct what they thought were misconceptions of the members; this tended to delay proceedings but also to improve the product. These meetings served the purpose of oral argument, which the Board generally eschewed in the interest of time, by giving the parties an opportunity to deal with issues the Board found troublesome. They also functioned in much the same way as the circulation of draft opinions. Thus the public meeting requirement, although it appears odd in this context, probably did more good than harm.

D. *Settlements*

Section 31(a) contemplates hearings on Agency complaints,

334 The famous opinion in Morgan v. United States, 298 U.S. 468 (1936) (Morgan I), holding that the decision maker must consider the record, expressly stated that an examiner's report was not essential to the validity of the order. *Cf.* Federal Administrative Procedure Act § 7(c), 5 U.S.C. § 556(d) (1971), which authorizes agencies, in determining claims for money or benefits or applications for initial licenses, to admit only written evidence in the absence of prejudice to a party.

335 ILL. REV. STAT. ch. 111½, § 1005(a) (1973).

but there is no indication that the parties may not waive their right to a hearing. Indeed the adversary nature of enforcement proceedings suggests that the parties may settle pending cases however they choose. Refusing to view itself as a wholly disinterested tribunal, however, the Board relied upon statutory language[336] and legislative history[337] to find itself "the final interpreter, subject to judicial review, of what is required to effectuate the policies of the Environmental Protection Act,"[338] with an "affirmative responsibility to see to it, through appropriate orders in matters brought before it, that the policies of the Act are carried out."[339] On the basis of this conclusion, Board regulations provide that "no case pending before the Board shall be disposed of or modified without an order of the Board," and require the parties to submit written statements of the reasons for a proposed settlement.[340] Such statements, the Board said,[341]

> must contain a full stipulation of the relevant facts pertaining to the nature, extent, and causes of the violations, the nature of the respondent's operations and control equipment, any explanations of past failures to comply, and details as to future plans for compliance, including descriptions of additional control measures and the dates for implementing them, as well as a statement of reasons why no hearing should be conducted. Opportunity will also be provided by the Board for individual citizens to express their views as is contemplated by the statute.

Stipulations submitted under this provision often avoided the costs of a full hearing,[342] but the Board did not hesitate to reject proposed

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336 *See, e.g.*, section 5(b), under which the Board is directed to "determine, define and implement the environmental control standards applicable in the State of Illinois," *id.* § 1005(b); section 33(a), which directs the Board to enter "such final order . . . as it shall deem appropriate" after considering the record, *id.* § 1033(a).

337 Governor Ogilvie declared:

> The principal job of defining what may or may not be done to the environment would be left, under the proposed act, to the new Pollution Control Board.

Ogilvie Message, *supra* note 9, at 5.

338 GAF Corp. v. EPA, 5 Ill. P.C.B. 525, 527 (1972).

339 *Id.*

340 Ill. P.C.B. Reg. ch. 1, rule 333 (1970).

341 EPA v. Marion, 1 Ill. P.C.B. 591, 592 (1971) (dictum). The holding was that the Attorney General could not settle a case without the approval of his client, the EPA. Ralston Purina Co. v. PCB, 27 Ill. App. 3d 53, 325 N.E.2d 727 (4th Dist. 1975), upheld the Board's rejection of a settlement containing insufficient facts on which to base section 33(a) findings.

342 *See, e.g.*, EPA v. Fansteel, Inc., 6 Ill. P.C.B. 295 (1972); EPA v. Tee-Pak Inc., 6 Ill. P.C.B. 141 (1972).

settlements that it believed were not consistent with statutory policy.[343]

In *GAF Corp. v. EPA*[344] the Board carried its policy of reviewing settlements a step further, asserting the authority to pass upon a proposal to settle an appeal from one of its decisions. The Board thought this extension was necessary to protect its authority over pending cases, for otherwise,[345]

> any time we rejected a settlement while the case was before us the parties could circumvent our policy by compromising our order on the basis of their original insufficient proposal.

Indeed, the Board continued,[346]

> the case for our evaluation of settlements may be even stronger after we have entered an order than before, since agreement to any modification would appear to constitute a variance from our order, which only this Board is authorized to grant.

The Board's concern with the adequate enforcement of the Act is obvious, but there are both practical and legal difficulties with its position regarding settlements. First, the rejection of a settlement does not guarantee that the Agency will proceed to prosecute the case vigorously; there is nothing the Board can do if the Agency simply fails to send witnesses to the hearing. In practice, however, the threat of adverse publicity has at least occasionally resulted in a tougher ultimate order following rejection of a settlement.[347] Even this sanction is reduced if the Agency or the Attorney General chooses to make unacceptable compromises before a complaint is ever filed. The one clear practical consequence of refusing to accept settlements is to leave the door open to citizen complaints. This together with the publicity value appears sufficient to establish that the practice can be of significant benefit.

However, there is a tension between the Board's asserted authority to reject settlements and the clear statutory policy of separating prosecutor from judge. The legal case for such authority is

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343 *See, e.g.*, EPA v. Packaging Corp. of America, 5 Ill. P.C.B. 91, 137 (1972).

344 5 Ill. P.C.B. 525 (1972).

345 *Id.* at 529.

346 *Id.* The Board refused to view as decisive the provision of the Administrative Review Act that made the Board a party to proceedings to review its orders, saying that the language allowed the Board "to view our position, like that of the judge whose decision is sought to be reviewed by a writ such as mandamus, as a purely formal one." *Id.* at 527, *citing* ILL. REV. STAT. ch. 110, § 271 (1973).

347 *Compare* EPA v. Packaging Corp. of America, 5 Ill. P.C.B. 91, 137 (1972), *with* EPA v. Packaging Corp. of America, 10 Ill. P.C.B. 197 (1973).

stronger in variance proceedings than in decisions on complaints, for the former are not truly adversary. While the Agency is required to investigate and to participate in order to avoid the danger of a one-sided record,[348] the Agency may properly recommend that a variance be granted. Yet[349]

> the statute is quite explicit that variances are to be granted only by the Board, and not by the Agency; complete deference to Agency recommendations in variance cases would effectively transfer that power to the Agency.

Since denial of a variance leaves the decision whether or not to prosecute up to the Agency, Board authority to reject consent variances does not involve it in the prosecutorial process. The line between enforcement and variance is greatly obscured, however, by the fact that an order directing delayed compliance is effectively a variance. Though the proceeding is an adversary one, and the intended consequence of rejecting a settlement may be to force EPA to prosecute, the uncritical acceptance of a settlement violates the statutory command that only the Board may grant variances. Perhaps the best way out of the dilemma is to recognize that rejecting a settlement does not force the Agency to prosecute but merely denies the Board's imprimatur, which would in all probability preclude the filing of a citizen complaint. Thus the Board's practice of evaluating settlements that would dispose of enforcement cases on the merits seems justified whenever delayed compliance is proposed, but the Board probably should not interfere with an Agency request for dismissal of a complaint without prejudice.

E. *Burden of Proof*

In an effort to simplify the task of prosecution, section 31(c) makes it sufficient for the complainant to show that a respondent has "caused . . . air or water pollution or . . . violated . . . any provision of this Act or any rule or regulation." The burden then shifts to the respondent "to show that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship."[350] Under the original bill this meant, as intended, that all the complainant had to prove was environmental harm; it was up to the polluter,

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[348] *See* text accompanying notes 381-94 *infra*.

[349] GAF Corp. v. EPA, 5 Ill. P.C.B. 525, 529 (1972).

[350] ILL. REV. STAT. ch. 111½, § 1031(c) (1973).

who ought to find out about such things,[351] to demonstrate that he could not reasonably be expected to abate it. This probably remains true for water pollution and for air pollution that is "injurious to human, plant, or animal life, to health, or to property," for in those cases harm alone satisfies the statutory definition of the offense and thus the words as well as the purpose of section 31(c). Section 33(c) factors,[352] including costs, which clearly bear upon the defense of unreasonable hardship in a regulation case,[353] should similarly be considered as mitigating factors to be proved by the respondent in statutory cases.[354] But the addition of the word "unreasonably" in the definition of other types of air pollution seems to mean, contrary to the policy underlying the original section 31(c), that in order to prove such a violation the complainant must show that the harm is unreasonable, thus implying that the harm done outweighs the cost of control.[355]

Conscious of this tension, the Board attempted to reconcile the language of the statute with its policy by using what amounted to a presumption: "[S]erious interference with the enjoyment of life . . . is unreasonable in the absence of proof that there is no economically justifiable method of preventing it."[356] Thus the Board conceded that the plaintiff had the burden of showing unreasonable harm but set a low threshold of what was necessary to meet it, implying that one may legitimately infer that an emission causes unreasonable harm from the fact that it causes serious harm.

There are two arguments against the Board's inference: that it is not justified by experience, and that its use is an effort to circumvent the plain statutory command that all elements of the offense be shown by the complainant. The latter objection is the more easily answered. The statute requires only that the complainant prove unreasonable interference with the enjoyment of life or property, not that he come forward with evidence on every factor that may bear

351 *See* Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 12 (1959) [hereinafter cited as Cleary].

352 *See* text accompanying notes 132-34 *supra*.

353 *See* EPA v. Commonwealth Edison Co., 1 Ill. P.C.B. 207, 214 (1971).

354 *See* Monmouth v. PCB, 57 Ill. 2d 482, 488-89, 313 N.E.2d 161, 165 (1974), finding air pollution based upon injury to property because "the sewage-lagoon system . . . discolored the paint on nearby houses," with no mention of technology or cost. *Id.*

355 "[T]he EPA had the burden of proving all essential elements of the type of air-pollution violation charged." Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 300, 319 N.E.2d 794, 799 (1974).

356 EPA v. Chicago Housing Authority, 4 Ill. P.C.B. 145, 149 (1972).

upon the question of unreasonableness. It does not say or even imply that circumstantial evidence is insufficient to demonstrate unreasonableness if such an inference may fairly be drawn. The real question is whether the inference of unreasonable interference may be fairly drawn from the fact of serious interference.

The unstated assumption underlying the Board's inference is that most serious harm can be prevented at a cost which is reasonable in light of the relevant section 33(c) factors. Significantly, the Board has furnished no data to support this empirical assumption. Nor, in contrast to whether automobiles commonly are driven through picture windows without negligence, can it be validated by the common experience of twentieth century adult life. Therefore, notwithstanding the statutory admonition of deference to Board findings which are not contrary to the manifest weight of the evidence,[357] I should expect a reviewing court to insist upon some expert explanation of the plausibility of the inference lest it serve in fact to relieve the complainant of its unfortunate statutory burden of proving unreasonable interference. The statute seems to make unavailable, in support of the Board's position, the familiar argument that the discharger is in a better position to know the facts relating to control technology and cost for his own operations,[358] for that appears to go to the question of which party should bear the burden of proof rather than to the quantum of proof required to satisfy it.

In sum, the insertion of the ostensibly redundant word "unreasonably" in the definition of certain types of statutory air pollution has probably made it necessary, as one court has clearly held, for the complainant to demonstrate affirmatively that damage can be prevented at reasonable cost.[359] The problem is further exacerbated by the tendency of the courts to hold that the complainant must introduce evidence on every factor made relevant by section 33

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[357] *See, e.g.*, Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 319 N.E.2d 794 (1974), interpreting the "prima facie true and correct" language of ILL. REV. STAT. ch. 110, § 274 (1973).

[358] *See* Cleary, *supra* note 351. It is, however, often mentioned as one basis for the doctrine of res ipsa loquitur. *See* PROSSER, *supra* note 76, at 226.

[359] Lonza, Inc. v. PCB, 21 Ill. App. 3d 468, 475, 315 N.E.2d 652, 657 (3d Dist. 1974) (alternative holding). *See also* Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 300, 319 N.E.2d 794, 799 (1974), describing as "not entirely without merit" the contention that the Agency had not sustained its initial burden of proving unreasonable interference but finding "any shortcomings" remedied by evidence adduced through the respondent's witnesses. The evidence referred to related largely to the technology and cost of control.

(c).[360] The result is to increase the costs of prosecution and to require proof by one party of facts more readily available to the other, a consequence particularly distressing when the complainant is a private citizen without expertise in pollution control. In fact, the drafting mistake with respect to burden of proof may render citizen complaints largely useless in the field of air nuisances, where they otherwise might have been of particular utility. For reasons relating merely to burden of proof and not to the substance of the law, the word "unreasonably" should be amended out of the definition of air pollution.

F. *Further Proof Problems*

Many discharge regulations impose numerical limitations on emissions in such terms as pounds per ton of process materials or grains per standard cubic foot of exhaust gas. Continuous monitoring would be the ideal means of demonstrating violations, and Illinois

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[360] Processing & Books, Inc. v. PCB, 28 Ill. App. 3d 115, 118, 328 N.E.2d 338, 341 (2d Dist. 1975) (alternative holding): "By failing to introduce evidence on each criteria [sic] of 33(c), the agency failed to meet its burden of proof." *Id.* *See also* Lonza, Inc. v. PCB, 21 Ill. App. 3d 468, 472, 315 N.E.2d 652, 655 (3d Dist. 1974) (dictum): examination of the section 33(c) factors "becomes part of complainants burden under section 31(c)." *Id.* The contrary conclusion was reached in Freeman Coal Min. Corp. v. PCB, 21 Ill. App. 3d 157, 170, 313 N.E.2d 616, 626 (5th Dist. 1974) ("The Board is not required . . . to require proof by the Agency relative to each of the factors enumerated in Section 33(c)"), a water-pollution case in which unreasonable interference was not a part of the complainant's case. The same is true of Ford v. EPA, 9 Ill. App. 3d 711, 720-21, 292 N.E.2d 540, 546-47 (3d Dist. 1973) (landfill regulations), decided prior to *Lonza*, by the same court.

A related problem is the necessity for express findings on the section 33(c) criteria under section 33(a), which requires a written opinion stating facts and reasons for the decision. Where the Board had failed even to find that an odor interference was unreasonable, the supreme court upheld a reversal based on the inadequacy of the opinion. Mystik Tape v. PCB, 60 Ill. 2d 330, 328 N.E.2d 5, 9 (1975) (alternative holding). In Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 299, 319 N.E.2d 794, 798-99 (1974), the supreme court declined to reverse, finding "substantial compliance" with the opinion requirement, although it concluded that "the Board was not as specific as it might have been in making written findings as to each of the section 33(c) criteria." *Id.* *See also* Sangamo Constr. Co. v. PCB, 27 Ill. App. 3d 949, 955, 328 N.E.2d 571, 575-76 (4th Dist. 1975) (stating that the Board "has a duty to make specific findings as to these criteria in its opinion" and finding substantial compliance); Processing & Books, Inc. v. PCB, *supra*, at 117-18, 328 N.E.2d at 340-41 (reversing for failure to make findings on each section 33(c) factor); Freeman Coal Min. Corp. v. PCB, *supra*, and Ford v. EPA, *supra*, both holding specific section 33(c) findings unnecessary in the absence of evidence in cases where unreasonable interference was not a part of the complainant's case.

regulations authorize the Agency to require such monitoring at the discharger's expense,[361] but it is by no means clear that this can be done for all pollutants at reasonable cost.[362] Next best is periodic sampling, or stack testing, for which techniques are available for at least some pollutants. Illinois authorizes the Agency both to conduct its own tests and to require the discharger to do so.[363] But the cost of such tests can be considerable: one judicial opinion reports cement-industry estimates that a stack test of the sort the federal agency had proposed would cost between $10,000 and $15,000 for each emission source.[364]

Aware of the cost and difficulty of proving actual emissions in air-pollution cases, the Board has consistently held it sufficient, in the absence of rebuttal, to show the published results of tests run on similar equipment under similar conditions:[365]

> To require an expensive stack test in the absence of any testimony suggesting that the standard emission factors are inaccurate or that the equipment in question is unique would be to impose an unreasonable burden on the enforcement process.

The Board took seriously its proviso that the inference from tests of other equipment could be rebutted by more direct evidence.[366]

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361 Ill. P.C.B. Reg. ch. 2, rule 106(a) (1970); *see also id.* ch. 3, rule 501.

362 The Board has said:

> [T]he record . . . does not tell us what devices are available at what cost to do the job. . . . The Agency's field experience will enable it to make an expert determination.

Emission Regulations, 4 Ill. P.C.B. 298, 305-06 (1972).

363 Ill. P.C.B. Reg. ch. 2, rule 106(b) (1970); *see also id.* ch. 3, rules 501, 502.

364 Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 401 n.99 (D.C. Cir. 1973).

365 EPA v. Lindgren Foundry Co., 1 Ill. P.C.B. 11, 12-13 n.3 (1970). The Board's air regulations now specifically provide for this practice. Ill. P.C.B. Reg. ch. 2, rule 108 (1970).

366 The Board said:

> [T]he railroad presented evidence to show that the standard emission factors did not give an accurate picture of its particular operations. The company's witness testified that emissions are affected by a number of factors admittedly not taken into account by the Agency. Most significantly, he testified, emissions are substantially reduced when, as in N&W's operation, the coal used has a low percentage of small particles . . . and the "burning rate"—btu's per square foot of grate—is low. . . . Small particles are more likely to become airborne, and high burning rates require more air, which increases turbulence and thus emissions. The Company's witness then introduced the results of tests performed with equipment similar to its own and operating with similar fuel size and burning rate, showing emissions from the boiler itself to 0.5 lb/mbtu. . . . Conceding that variations in btu content of the coal could have made N&W's boiler emissions 0.625 lb/mbtu on this basis, . . . he stated . . . , and EPA also assumed . . . , that 40% of the dust settled out in the stack, so that even with the btu correction the company's evidence indicates there was no violation.

EPA v. Norfolk & Western Ry., 1 Ill. A.P.C.B. 614A, 614B (1971). Such was the

Some doubts as to the legality of the Board's practice were engendered by the appellate court decision in *George E. Hoffman & Sons, Inc. v. PCB*.[367] The Board had found the respondent had emitted contaminants in excess of the prescribed number of pounds per hour "subsequent to July 1, 1970," on the basis of tests of similar equipment operating at rated capacity. The court vacated the order for want of evidence:[368]

> The complainant made no effort to prove any particular amount of particulate discharge or any actual rate of operation of the plant. . . .
>
> We are unable to agree with the Agency that the regulation proscribes the mere operation of the asphalt plant at any or all levels of input hereby because, as shown by tables of average or estimated projections, the plant is potentially capable of producing impermissibly high levels of particulate discharge. . . . [W]e also reject the Agency's contention that once such tables are introduced it then becomes the burden of appellant to prove it was not violating the regulation. Requiring the appellant to assume such a burden . . . is of doubtful propriety in view of the nature of the sanctions which the Board is authorized to impose.

A quick reading might suggest that *Hoffman* forbids reliance on standard emission factors altogether and requires individual source testing in every case. Such a holding, if accepted by the Illi-

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basis for the reversal of a Board order in Allied Metal Co. v. PCB, 22 Ill. App. 3d 823, 832, 318 N.E.2d 257, 263-64 (1st Dist. 1974) (alternative holding).

367 16 Ill. App. 3d 325, 306 N.E.2d 330 (3d Dist. 1973).

368 *Id.* at 330, 306 N.E.2d at 333-34. The court devoted some space to a discussion of regulation 3-3.113 of the old Air Pollution Control Board (still in force at the time of the alleged offense under section 49 of the Act, ILL. REV. STAT. ch. 111½, § 1049(c) (1971)), which provided that measurement of particulate emissions could be made according to a designated stack-testing procedure "or other procedures approved by the Technical Secretary, and generally accepted by persons knowledgeable in the state of the art." Former Ill. P.C.B. Reg. 3-3.113, *quoted in* George E. Hoffman & Sons, Inc. v. PCB, *supra* at 329, 306 N.E.2d at 333. Observing that there had been no approval of standard emission factors by the Technical Secretary, whose office had been abolished by the new law, the court said the regulation "should have been complied with" but that it was "unnecessary to determine the effect of the failure to secure approval of the procedure because in our opinion the procedure itself is insufficient." *Id.* at 329-30, 306 N.E.2d at 333. Thus the language of the old regulation does not seem to have been the basis for the decision, and the amendment to the Board's regulations expressly adopting emission-factor practice (*see* note 365 *supra*) probably does not affect the court's opinion. The Board had held the old regulation "merely specifies a standard method so there will be uniformity when stack testing is employed; it does not require a stack test in every case." EPA v. Chicago Housing Authority, 4 Ill. P.C.B. 145, 147 (1972).

nois Supreme Court, would seriously cripple enforcement and would seem to invade the province of the trier of fact in drawing reasonable inferences from circumstantial evidence. The opinion, however, shows that what concerned the court most was the failure to show that the tests on which the Agency relied were really representative of the respondent's operation. The court's emphasis is on the distinction between what Hoffman's machine was capable of emitting and what it did emit. The court does not deny that standard factors may be used to show what the equipment would emit at full capacity, but emphasizes the lack of evidence that it was so operated. Such evidence is often available,[369] and presumably the Agency may require it to be compiled.[370] The supreme court's decision in *Incinerator, Inc. v. PCB*,[371] strongly suggests that tests on similar equipment may form the basis for the finding of a violation when a proper foundation is laid. The case upheld a finding of particulate violation on the basis of calculations made by an EPA engineer from[372]

> a number of factors, including operating information supplied by appellant, his own background and experience in engineering and mathematics, and certain tables and charts appearing in Federal publications which were objected to by appellant.

The emission-factor method is thus a valuable aid to enforcement, but a limited one. Without stack tests[373]

> it is often possible to demonstrate violations by calculation in the absence of adequate control equipment, but it is not so easy to prove by calculation whether or not adequate equipment is operating as it should.

Even a stack test, moreover, may not resolve all problems. In *EPA v. Central Illinois Light Co. (CILCO)*,[374] stack tests taken on two separate occasions showed emissions in excess of the particulate standard. The Board first rejected the company's argument that compliance should be determined on a long-term average basis and found a violation even on monthly averages, relying on[375]

> CILCO's own data for monthly average operating loads . . . , CILCO's method for estimating reduced-load emissions from

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369 *See, e.g.*, EPA v. Sangamo Constr. Co., 6 Ill. P.C.B. 83, 83-84 (1972).
370 *See, e.g.*, Ill. P.C.B. Reg. ch. 2, rule 107 (1970).
371 59 Ill. 2d 290, 319 N.E.2d 794 (1974).
372 *Id.* at 301, 319 N.E.2d at 799.
373 Emission Regulations, 4 Ill. P.C.B. 298, 306 (1972).
374 6 Ill. P.C.B. 149 (1972).
375 *Id.* at 150.

> the test results . . . , and CILCO's method for calculating allowable emissions . . . .

The Board then proceeded to resolve a more general question as to the evidentiary value of a stack test:[376]

> Moreover, apart from violations shown by CILCO's actual operating data, we cannot accept the company's argument that a stack test proves nothing unless the Agency establishes the precise times at which the boilers were operated at loads high enough to cause violations of the standard. We believe the introduction of the results of a properly conducted stack test showing a violation under load conditions within the normal capacity of the boilers shifts the burden to the Respondent to show that the conditions under which the test was taken were not representative and that the boilers are in fact not operated at such levels as to cause violations. Not to accept the representative nature of test conditions in the absence of contrary proof would place insurmountable obstacles in the way of enforcement by requiring the Agency to conduct daily stack tests in order to prove a continuing violation.

The appellate court reversed without mentioning either the stack tests or the company's operating data, treating the case exactly as it had *Hoffman*:[377]

> The respondents attempted to prove alleged violations of air pollution by the testimony of Mr. Wennmacher, who made certain calculations as to "expected" emission levels of the respondent's boilers and plant, and that these "expected" emissions were based upon maximum load operating conditions of the boilers . . . and not on how they were actually used. . . . It is elementary that one should be found guilty for what one does and not for what one can do. It is clear from the record that there is a total absence of evidence that would reflect when the petitioner was in violation or for how long.

It is easy enough to dismiss this holding as the result of a misunderstanding of the record, but the underlying problem remains: how persuasive is a stack test? It seems fair to assume, as the Board did, that a properly conducted test is representative of a machine's performance under similar conditions. But to assume that the machine was operated under the same conditions as those under which it was tested, as the Board said it would do in *CILCO*, seems far less plausible in terms of experience and is clearly contrary to the

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376 *Id.* at 152-53.

377 Central Illinois Light Co. v. PCB, 17 Ill. App. 3d 699, 701-02, 308 N.E.2d 153, 154-55 (3d Dist. 1974).

reasoning of the court in *Hoffman*. In *CILCO* itself the court should have found the operating data in the record to be adequate. The significance of the case, however, is its warning that even when there is a stack test there must be a showing that it was performed under (or can be translated into) actual operating conditions.

G. *Variances*

Substantively, a variance is a safety valve against the rigors of Procrustean regulations.[378] Procedurally, it is a declaratory device for determining one's obligations without having to act at one's peril. The polluter who thinks his noncompliance justified by unreasonable hardship is free to lie low and take his chances on making a defense if prosecuted.[379] To forbid his doing so might avoid delay in compliance, but it would also trap the unwary and thus probably be unacceptable.[380] But, on the basis of the policy underlying the modern provisions for declaratory judgments,[381] section 35 authorizes the Board to grant variances upon the polluter's petition in advance of the filing of any complaint. The unfortunate and apparently unintended omission of authority to grant variances from the statute itself has been discussed above; a declaratory variance is available only with respect to the necessity for meeting a "rule or regulation, requirement or order of the Board."[382]

Variance procedure[383] is tied essentially to complaint procedure; it is quasi-judicial. As suggested in an earlier discussion, however, it is not strictly adversary, and therefore certain special procedures are provided.[384] Experience under the prior air-pollution

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378 *See* text accompanying notes 104-05 *supra*.

379 ILL. REV. STAT. ch. 111½, § 1031(c) (1973).

380 *Cf.* Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 48 (1975), discussing the provision of the Clean Air Act, 42 U.S.C. § 1857h-5(b) (Supp. III, 1973), requiring an immediate attack upon the validity of certain federal regulations.

381 See the statement of Professor Borchard that by refusing to determine the legality of proposed conduct in advance a court in effect "informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it." *Hearings on* H.R. 5623 *Before a Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong. 1st Sess. 75-76 (1928), *quoted in* Steffel v. Thompson, 415 U.S. 452, 468 n.18 (1974).

382 ILL. REV. STAT. ch. 111½, § 1035 (1973).

383 *Id.* § 1037.

384 Section 37's requirement that variance petitions be filed only with the Agency is awkward because delays within the Agency or in the mails may postpone getting the hearing machinery in motion and prevent the Board from deciding variance cases

law had been that, all too often, the only information before the Board was that presented by the interested petitioner. A studied effort was made in drafting the statute to provide, as nearly as practicable, for a proceeding in which possible objections to the requested variance could be fully aired. As in the case of complaints, notice must be given by newspaper and to citizens who have requested it. Recognizing that interested persons may often fail to see such notices, section 37 further requires the Agency to[385]

> investigate such petition, consider the views of persons who might be adversely affected by the grant of a variance, and make a recommendation to the Board as to the disposition of the petition.

This procedure proved both invaluable and insufficient. Late recommendations and failure to support the allegations in recommendations with proof were constant Board complaints.[386] Devising a better safeguard against the danger of decisions upon one-sided records in variance cases poses a continuing challenge to the ingenuity of the draftsman.[387]

A further provision designed in part to ameliorate the possibility that there may be no adversary in a variance case is the section 37 prescription that "the burden of proof shall be on the petitioner."[388] Since a variance may be granted only upon "proof that compliance . . . would impose an arbitrary or unreasonable hardship,"[389] which in turn requires a comparative assessment of costs and benefits, the petitioner's burden[390] extends not only to his own hardship but also to the harm that grant of the variance would inflict on the public.

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within the required time after filing (*see* text accompanying notes 409-17 *infra*). Board rules require filing with the Board as well. Ill. P.C.B. Reg. ch. 1, rule 401 (1970).

385 ILL. REV. STAT. ch. 111½, § 1037 (1973).

386 *See* International Harvester Co. v. EPA, 6 Ill. P.C.B. 49, 50-51 (1972); Commonwealth Edison Co. v. EPA, 5 Ill. P.C.B. 101, 112 (1972).

387 In total contradiction to the statutory policy that variances shall be granted only after public and formal proceedings, a later amendment to section 39 authorizes the Agency to issue permits under the federal water-pollution program "to allow discharges beyond deadlines established by this Act or by regulations of the Board without the requirement of a variance." The amendment also fails to specify what substantive standards are to be applied in suspending such deadlines. It represents a giant step backward. ILL. REV. STAT. ch. 111½, § 1039(b) (1973), *amending* ILL. REV. STAT. ch. 111½, § 1039 (1972).

388 ILL. REV. STAT. ch. 111½, § 1037 (1973).

389 *Id.* § 1035.

390 *See* text accompanying notes 105-07 *supra*.

In order to avoid unnecessary hearings, the Board developed a pretrial screening procedure for determining whether or not a variance petition stated facts which, if proved, would entitle the petitioner to a variance. Thus, procedural rule 401 requires the petition to include[391]

> a concise statement of why the petitioner believes that compliance . . . would impose an arbitrary or unreasonable hardship, including a description of the costs that compliance would impose on the petitioner and others and of the injury that the grant of the variance would impose on the public,

and rule 405 directs the Board to authorize a hearing, other requirements being satisfied, unless it finds that "even if all the facts alleged in the petition are true, the petitioner is not entitled to a variance."[392] Pursuant to its decision that good faith efforts to comply were essential to the establishment of unreasonable hardship,[393] the Board held these too must be pleaded under rule 401.[394]

For a time the Board tended to enforce these pleading requirements rather strictly, dismissing petitions failing adequately to allege community harm or diligence.[395] Its expectation was that either a more complete petition would then be filed or the enforcement agency would take the dismissal, if not the filing of the variance petition, as the impetus for lodging a complaint. This expectation was unfounded. The Board said:[396]

> unfortunately the result of our policy of dismissing insufficient petitions [such as those failing to allege adequate reasons for past delays] has been that the cases tend not to be refiled; they disappear, and we do not get to establish a timetable for compliance.

The paucity of complaints led the Board to modify its policy:[397]

> [I]n light of the present importance of variance cases as an enforcement tools, we cannot afford to lose so many cases, so our

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391 Ill. P.C.B. Reg. ch. 1, rule 401(a)(2) (1970).

392 *Id.*, rule 405(b)(1). Section 37 gives the Board discretion to forgo variance hearings in the absence of timely written objection to the grant of the variance. On occasion the Board has granted simple variances, to which there was no objection, on the basis of affidavits and the Agency's recommendation, as contemplated by rule 405(b)(2). *See, e.g.*, Venable v. EPA, 3 Ill. P.C.B. 175 & 317 (1971).

393 *See* text accompanying notes 142-43 *supra*.

394 *See, e.g.*, Decatur Sanitary Dist. v. EPA, 1 Ill. P.C.B. 359, 360 (1971).

395 *Id.*

396 Second Report, *supra* note 15, at 12.

397 *Id.*

> policy recently has been to overlook pleading deficiencies wherever possible . . . .

By employing the authority given in section 36(a) to impose upon the grant of variances "such conditions as the policies of this Act may require,"[398] the Board utilized the variance procedure as an enforcement tool[399] in order to offset the perceived lack of complaints. A typical variance order would be conditioned on adherence to a schedule for achieving compliance, complete with interim as well as final deadlines; on the filing of periodic progress reports "to assure that [the petitioner] . . . is living up to its promised schedule and so that prompt corrective action can be taken if it is not";[400] and, as the statute requires, on the posting of a bond or other security in an amount "high enough to make it more unattractive to default than to spend the money for control equipment"[401]—often an amount just exceeding the cost of the equipment—in order "to provide an additional incentive to the variance holder to meet his deadlines, by imposing the threat of forfeiture if he does not."[402]

Most controversial was the following practice first employed in *Marquette Cement Mfg. Co. v. EPA*:[403]

> [T]he purposes of the statute require that we impose as a further condition of this variance the provision that Marquette pay to the State of Illinois the sum of $10,000 as a penalty for its inexcusable dilatory tactics. . . . [The variance was granted because to close the plant would cause unreasonable hardship, but] [t]o ignore these violations would frustrate the purpose of the statute to "restore, maintain, and enhance the purity of the air" (§ 8), by encouraging delays that are prejudicial to the entire control program.

In *Marquette* the Board imposed the penalty condition on its own motion. In a later case it construed an Agency recommendation for a penalty condition as a countercomplaint. The courts held the statute did not authorize penalty conditions:[404]

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398 ILL. REV. STAT. ch. 111½, § 1036(a) (1973).

399 *See* Second Report, *supra* note 15, at 11-12 (1971); ANNUAL REP., *supra* note 318, at 8 (1972).

400 Marquette Cement Mfg. Co. v. EPA, 1 Ill. P.C.B. 145, 149 (1971).

401 *Id.* at 350.

402 *Id.* Bonds may also be, and typically are, required when compliance programs are set in orders resulting from complaints. *See* ILL. REV. STAT. ch. 111½, § 1033(b) (1973); EPA v. Beloit Foundry Co., 2 Ill. P.C.B. 719 (1971).

403 1 Ill. P.C.B. 145, 150-51 (1971).

404 *See, e.g.*, Citizens Utilities Co. v. PCB, 9 Ill. App. 3d 158, 165, 289 N.E.2d 642, 647-48 (2d Dist. 1972).

> [W]e think that the legislative reference in section 37, which governs variances, to the procedure sections of the Act (Title VIII, sections 32, 33(a) . . .), excluding any reference to enforcement orders and penalties indicates a specific intent to exclude penalties as a part of the conditions of the grant of a variance.

The Board chose not to seek further review, recognizing the difficulty of reconciling penalty conditions, at least when imposed on its own motion, with the statutorily mandated separation of prosecutor from judge.

The unavailability of penalty conditions does not mean the Board must forgo its substantive policy of penalizing past delays while refusing to close down polluters who are now attempting to comply.[405] On the one hand, the Board could simply resume its practice of refusing variances on the ground of inexcusable delay,[406] and leave the question of remedy for decision in the event of an enforcement proceeding. Or, with greater regard for the statutory policy favoring declaratory statements, the Board might grant the variance to the extent of permitting future operations without prejudice to a possible complaint seeking money penalties for past delay.[407] The rule against penalty conditions leaves the question whether to seek penalties in the hands of the prosecutor, where it belongs, however painful that may be to those on the Board who would like to see more vigorous enforcement.[408]

In *Standard Brands, Inc. v. EPA*,[409] the Board conditioned a

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405 *See* text accompanying notes 143-55 *supra*.

406 Decatur Sanitary Dist. v. EPA, 1 Ill. P.C.B. 359 (1971).

407 *See, e.g.*, EPA v. Kankakee Foundry Co., 5 Ill. P.C.B. 571 (1972); Kankakee Foundry Co. v. EPA, 4 Ill. P.C.B. 467, 468-69 (1972).

408 In light of the reasoning of the appellate court in Citizens Utilities Co. v. PCB, 9 Ill. App. 3d 158, 163-64, 289 N.E.2d 642, 646-47 (2d Dist. 1972), it might have been possible to uphold the legality of penalty conditions:

> [I]f a petitioner considers the conditions too onerous and therefore decides not to proceed with the variance, the conditions may not be enforced. . . . [C]onditions . . . would not be binding until the petitioner accepts the variance upon the terms imposed.

Id. In other words, penalties could not be collected from an unreconciled petitioner without the filing of a subsequent complaint; the penalty condition would merely be a declaratory judgment as to what the Board would do if a complaint were filed.

Of course if penalty conditions had been upheld in the face of a lax prosecution policy, the informed polluter would seldom have risked filing for a variance. It was partly for this reason that the Board required operating permits for most sources and conditioned their issuance on either compliance or variance. Ill. P.C.B. Reg. ch. 2, rule 103(b) (1970); *id.* ch. 3, rules 903, 921(a).

409 1 Ill. P.C.B. 505 (1971).

variance allowing additional time to bring boilers into compliance upon the elimination of odors from a sewage digester: "We have previously imposed conditions for a variance beyond the scope of the subject matter of the variance request."[410] This seems to carry the authority to impose conditions too far, and once again invade the prosecutor's province, for the conditions to be imposed are those relevant to the variance itself. A variance petition should not be taken as a roving commission for the Board to enforce the law without a complaint against all nonconforming sources under the petitioner's control.

Prior law had provided protection for the petitioner and an incentive for quick Board action by deeming a variance request granted if not denied within 60 days after filing.[411] On the theory that the public should not be penalized for the sloth of the administrators, the original bill changed "granted" to "denied."[412] The period was mercifully extended to 90 days when at industry's request the bill was amended back to read "granted."[413] Democrats focused upon this provision as a major sellout. Ninety days proved to be a very tight schedule, what with notice requirements, preparation of the Agency's recommendation, time for the petitioner to study the recommendation, and often a several weeks' wait for the transcript. Board efforts to have the period extended to 120 days foundered because both parties in the General Assembly refused to yield as to whether inaction should result in a grant or denial.

The Board dealt with pressing time problems by asking petitioners to waive their right to a decision within 90 days, and such a waiver has been upheld.[414] But at least one variance request was automatically granted because it evaded the Board's machinery for timely decision making.[415] The opinion, which discusses the entire problem in some detail, is a revealing view into the aggravation that petty procedural provisions can cause in the daily operation of an administrative agency. Later, when the refusal of the Senate to confirm two recess appointments that had been made before the election of a new governor left the Board without a quorum for four weeks,

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410 *Id.* at 513.

411 Ch. 111½, § 240.12, [1962] Ill. Laws 73d Gen. Assem. 3199-200.

412 Ill. H.B. 3788, 76th Gen. Assem., § 38 (1970).

413 Ill. H.B. 3788, Sen. Amend. No. 1, 76th Gen. Assem., § 38 (1970).

414 Agrico Chemical Co. v. PCB, 13 Ill. App. 3d 45, 49-50, 299 N.E.2d 803, 806 (5th Dist. 1973).

415 Kelberger v. EPA, 5 Ill. P.C.B. 477 (1972).

four additional variances were granted by default under the 90-day rule.[416] The General Assembly then relented to the extent of allowing the Board an extra 30 days when the Board was without a quorum.

In *Holiday Inns, Inc. v. PCB*[417] the court refused on grounds of mootness to review the denial of a variance "because of the expiration of the period of time for which the variance was requested or could have been granted under section 36,"[418] which limits variances to one year.[419] If this holding is taken literally, it will put virtually all variance decisions beyond judicial review, for that process commonly takes more than a year. Even termination of the violation for which variance was sought should not moot the request so long as the possibility of prosecution for the past offense remains, for declaratory judgments as to the legal effect of past transactions are quite common. The court's contrary position was based upon its perception that "the grant of a variance does not foreclose enforcement proceedings."[420] Sometimes this is true, for, as observed above, the Board can and does grant variances to the extent of permitting future operations without prejudice to the later imposition of penalties. But the Board may and often does go further, holding that the petitioner's position is justifiable and at least implying that therefore it should not be penalized for its late compliance.[421] Since the petitioner in *Holiday Inns* was arguing for just such a result, the case ought not to have been held moot. The court's apparent view

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416 Weinstein v. EPA, 6 Ill. P.C.B. 529 (1973).

417 27 Ill. App. 3d 704, 327 N.E.2d 364 (5th Dist. 1975).

418 *Id.* at 707, 327 N.E.2d at 367.

419 ILL. REV. STAT. ch. 111½, § 1036(b) (1973). An obvious precaution against long-term impairment of the environment resulting from a single bad decision, this provision must be read in connection with the further provision that variances may be extended upon subsequent petition, provided that "satisfactory progress has been shown." *Id.* at § 1036(b). Since more than a year is often required to construct large pollution-control facilities, the Board's practice was to approve a longer program subject to reexamination after each year. *See, e.g.*, Marquette Cement Mfg. Co. v. EPA, 1 Ill. P.C.B. 145, 148 (1971). A misguided amendment to conform to the federal water-permit program allows water-pollution variances for five years at a time. ILL. REV. STAT. ch. 111½, § 1036 (1973), *formerly* ch. 111½, § 36 [1970] Ill. Laws 76th Gen. Assem. 873.

420 Holiday Inns, Inc. v. PCB, 27 Ill. App. 3d 704, 708, 327 N.E.2d 364, 368 (5th Dist. 1975).

421 *See, e.g.*, Sandoval Zinc Co. v. EPA, 1 Ill. P.C.B. 453, 454 (1971). *See also* Mt. Carmel Pub. Util. Co. v. EPA, 1 Ill. P.C.B. 463, 469 (1971), describing a variance as a "shield against enforcement cases."

that a variance never gives any protection to the successful petitioner threatens to destroy the very purpose of the variance provisions.

H. *Permits*

In theory, enforcement could be carried out exclusively through the filing of complaints against offenders. The Environmental Protection Act, however, authorizes the Board to adopt regulations requiring permits for the construction or operation of equipment "capable of causing or contributing to" air or water pollution or designed to prevent it.[422] The Act also requires permits even without Board regulation for certain water-pollution sources,[423] for public water supplies,[424] for nuclear generating stations and nuclear fuel reprocessing plants,[425] and, upon adoption of substantive standards for such operations, for the collection and disposal of solid wastes.[426] Section 4(g) empowers the Agency to administer most of these permit systems;[427] section 39 directs it to issue permits upon proof that the proposed facility will comply with the statute and regulations, and authorizes the imposition of conditions "necessary to accomplish the purposes of this Act";[428] section 40 provides a right to appeal the denial of a permit to the Board;[429] sections 9(b) and 12(b)

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422 ILL. REV. STAT. ch. 111½, §§ 1010(c), 1013(c) (1973). The noise provisions, *id* §§ 1023-25, are inconsistently silent as to permits. The Board's noise regulations, understandably, are too. Ill. P.C.B. Reg. ch. 8 (1970).

423 ILL. REV. STAT. ch. 111½, § 1012(c) (1973).

424 *Id.* § 1015.

425 *Id.* § 1025(a).

426 *Id.* § 1021(e).

427 *Id.* § 1004(g). The lack of an adversary at the initial stage and the consequent need for technical staff capable of performing independent investigations dictate that this job not be entrusted to the Board.

428 *Id.* § 1039. The original statute did not explicitly make it unlawful to violate the conditions of a permit. Where the condition merely restates what the statute or regulations also require, there is no problem. Beyond this, the Board once held that, by operating in excess of the rate the Board thought the permit implicitly prescribed, a respondent had effectively operated without a permit in violation of the statute itself, since the permit did not authorize what the respondent was doing. EPA v. Sangamo Constr. Co., 6 Ill. P.C.B. 83, 85 (1972). The appellate court reversed on the limited ground that the permit did not limit the rate of operation, Sangamo Constr. Co. v. PCB, 27 Ill. App. 3d 949, 328 N.E.2d 571 (4th Dist. 1975). Alternatively, the statutory authority to impose conditions, ILL. REV. STAT. ch. 111½, § 1039 (1973), would seem to imply that the conditions must be adhered to, and therefore that a violation of a permit condition is a violation of the statute itself. Any doubts on this score were cleared up by a 1973 amendment authorizing both Board complaints, *id.* §§ 1030, 1031, and court actions, *id.* § 1042, for violations of permit conditions as such.

429 ILL. REV. STAT. ch. 111½, § 1040 (1973).

make it unlawful to construct or to operate without a permit when a permit is required by Board regulations.[430] Current regulations, in turn, require permits for many sources discharging to air or water and for related control equipment,[431] and activate the statutory permit requirement by providing standards for refuse-disposal operations.[432]

Permit requirements are expensive for both the state and the discharger, and vehement industry complaints have been registered over the amount of paperwork allegedly involved. Very likely the burden could be reduced considerably, and if that were done the benefit of the permit program would probably be found to outweigh the unavoidable cost. One function of the program is to facilitate collection of information essential both to surveillance of individual sources and to determining what measures will be needed to achieve ambient quality goals. Another is to assure regulatory attention to a large number of sources on a regular basis, rather than leaving enforcement to the vagaries of public complaint. A related advantage, especially in the case of permits for new sources, is to minimize the likelihood that harm will be done before the polluting nature of the source is discovered. From the point of view of the applicant, a permit system, by providing an opportunity for advance government clearance of contemplated construction, gives valuable assurance against the risk of later expensive modifications. This is a consideration of particular importance when the potential investor is confronted with vague standards such as "air pollution" or "significant deterioration" that can be given specific content by individual application to permit cases. Finally, and not least, a permit system significantly eases the task of enforcement by shifting the burden to the discharger to show compliance with the law.

Although the Agency is authorized to conduct hearings on permit applications,[433] it may also follow the less formal procedure of resolving the case through an evaluation of the detailed written infor-

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430 *Id.* §§ 1009(b), 12(b).

431 Ill. P.C.B. Reg. ch. 2, rule 103 (1970); *id.* ch. 3, rules 901-07.

432 *Id.* ch. 7.

433 *Id.* ch. 2, rule 103(e); *id.* ch. 3, rule 961(a). A challenge to these regulations was rejected in Commonwealth Edison Co. v. PCB, 25 Ill. App. 3d 271, 276, 323 N.E.2d 84, 88 (1st Dist. 1974), on the ground that the Agency may hold hearings anyway under section 39's authority to adopt such "procedures as are necessary" to carry out the permit program. ILL. REV. STAT. ch. 111½, § 1039 (1973).

mation submitted by the applicant.[434] Even in a hearing there is nothing to indicate that the Agency must introduce evidence on its own. By contrast, when a dissatisfied applicant appeals the denial of a permit to the Board,[435] the statute provides for a quasi-judicial hearing along the model of enforcement and variance cases.[436] The difficulties of structuring such a hearing were sharply presented to the Board in *Soil Enrichment Materials Corp. v. EPA*:[437]

> The Agency filed with us the materials that had been before it in denying the permit and asked that the hearing be cancelled since the only material the Board should consider was that which had been before the Agency. SEMCO responds that the statute and rules require a hearing. . . .
>
> The statute does require a hearing . . . , but the crucial question is what is the scope of the hearing. Clearly the issue is whether the Agency erred in denying the permit, not whether new material that was not before the Agency persuades the Board that a permit should be granted. To allow an applicant to bypass the Agency by presenting its case for a permit only before the Board on appeal would undermine the Agency's authority to make permit decisions in the first instance.
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> SEMCO acknowledged this on oral argument but maintains that the hearing must afford an opportunity to examine materials or persons on whom the Agency relied apart from the matter submitted by the applicant. The Agency does not dispute this but contends the appellant must first show such outside matter was relied on before a hearing is called for. We think the appellant is entitled to a hearing to determine whether or not such material was relied upon and further to explore what it discovers.

Similarly ticklish problems are presented whenever informal administrative action is subjected to judicial review,[438] and the subject has

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434 *See* Ill. P.C.B. Reg. ch. 2, rules 103(a)(2), (b)(3) (1970); *id.* ch. 3, rule 911.

435 Board regulations provide that

> an applicant may consider any condition imposed by the Agency in a Permit as a refusal by the Agency to grant a Permit, which shall entitle the applicant to appeal the Agency's decision to the Board pursuant to Section 40 of the Act.

Id. ch. 2, rule 103(k); *id.* ch. 3, rule 924. This seems correct as a matter of interpretation of the Act and would follow even in the absence of the regulations, since by imposing conditions the Agency has refused to give the applicant what he requested. The policy of the statute certainly supports review under those circumstances.

436 ILL. REV. STAT. ch. 111½, § 1040 (1973).

437 5 Ill. P.C.B. 715, 715 (1972).

438 *See* Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 54-61 (1975).

constitutional overtones since due process may be held to require a "hearing" before final administrative refusal of a permit.[439]

Without attempting to get to the bottom of this quagmire, which would require an article in itself, I would tentatively suggest that a partial answer may be: 1) to require the Agency to state in writing its reasons for denying the application, so as to afford meaningful opportunity for rebuttal information to be presented to the Agency; 2) to permit cross-examination of any experts or other witnesses identified by the Agency in its statement; and 3) to refuse to consider anything the Agency may have relied on by way of evidence that is not contained in the application or adequately disclosed in the statement of reasons. Cross-examination of Agency personnel as to their mental processes[440] should be avoided as burdensome and likely to be unproductive.[441] The subject is ripe for further study.

The statute makes no comparable provision for review of the Agency's grant of a permit. One receiving a permit for activity that allegedly violates the law can be charged with causing or threatening to cause such a violation in a citizen complaint under section 31(b),[442] and the regulations expressly provide that the existence of a permit is no defense to such a complaint.[443]

Section 25(a), which requires a permit for construction of "a nuclear steam-electric generating facility or a nuclear fuel reprocessing plant,"[444] was the product of a House amendment and fits very untidily into the statutory scheme. It is largely redundant in that most of what it authorizes could have been accomplished under powers relating to air and water pollution and to solid wastes. It does not apply to facilities in operation before enactment of the statute. It places one permit power in the Board while all others are in the Agency. It makes no provision for Agency participation before the Board, and the Agency set up no radiation section. In commenting on the possibility of further legislation, the Board suggested that[445]

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439 *See* Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963) (bar admission); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (liquor license).

440 *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

441 *Cf.* United States v. Morgan, 313 U.S. 409 (1941).

442 ILL. REV. STAT. ch. 111½, § 1031(b) (1973).

443 Ill. P.C.B. Reg. ch. 2, rule 103(h) (1970); *id.* ch. 3, rule 925.

444 ILL. REV. STAT. ch. 111½, § 1025(a) (1973).

445 Commonwealth Edison Co., 4 Ill. P.C.B. 445, 449 (1972).

> some official be given the duty and ability to gather and present facts before the deciding agency. One of the weaknesses of Title VI-A [section 25(a)] was that it did not create a true adversary situation, and therefore the Board was left too often to decide essentially on the basis of the applicant's own case.

Yet, because it required rather than merely permitted regulation, and because it placed the initiative on the potential polluter, section 25(a) forced the Board to impose significant radiation limits (stricter than the Atomic Energy Commission's (AEC) by a factor of at least 100 in one important regard) that otherwise it would in all probability never have got around to.[446]

Affected companies argued unsuccessfully before the Board that the radiation field was preempted by federal statutes authorizing regulation by the AEC (now the Nuclear Regulatory Commission).[447] The United States Supreme Court, however, found complete preemption without bothering to write an opinion,[448] and the Board thereupon vacated its permits and dismissed pending applications, holding that the nonradiation powers granted by section 25(a) also fell as merely incidental.[449] But the facilities installed under the short-lived program remain, and the AEC has since tightened its standards.

I. *Information, Private and Public*

Adequate information concerning activities capable of causing pollution is indispensable both to enforcement and to planning, and the Agency is empowered to collect it. Section 4 authorizes the acquisition of data by such methods as inspection and the required keeping and submission of records.[450] There are constitutional overtones here which reflect the tension between the needs of enforcement and the interest in privacy. The Agency's entrance on private property to search for evidence of violations implicates the

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446 *See, e.g.*, Commonwealth Edison Co. (Dresden # 3), 1 Ill. P.C.B. 278A (1971).

447 *Id.*

448 Minnesota v. Northern States Power Co., 405 U.S. 1035 (1972).

449 Commonwealth Edison Co., 4 Ill. P.C.B. 445 (1972). The appellate court, ignoring the fact that the Board's action had mooted the controversy, nevertheless found preemption in Commonwealth Edison Co. v. PCB, 5 Ill. App. 3d 800, 284 N.E. 2d 342 (3d Dist. 1972).

450 ILL. REV. STAT. ch. 111½, § 1004 (1973). Board regulations adopted pursuant to further statutory authorization (*e.g., id.* §§ 1010(g), 1013(i)) supplement this authority. *See, e.g.*, Ill. P.C.B. Reg. ch. 2, rule 107 (1970); *id.* ch. 3, rules 501-02.

fourth amendment, and the required submission of incriminating information implicates the fifth amendment.[451]

Cases such as *See v. Seattle*[452] and *Camara v. Municipal Court*[453] establish that searches under laws relating to the public health are not outside the protection of the fourth amendment. However, these decisions should not prove a serious obstacle. The Court has recently held it lawful to enter premises from which the public is not excluded in order to view smoke plumes.[454] More importantly, it has made clear that, because of the need for "routine periodic inspections," search warrants under public health laws may be issued without information as to probable violations in the individual building.[455] And apparently, even the warrant requirement may be dispensed with unless the offending conditions are "relatively difficult to conceal or to correct in a short time."[456] Moreover, the Court has also suggested that consent to periodic inspections may be made a condition of the issuance of a license or permit to engage in a regulated activity.[457]

Since most large polluters are private or public corporations, the self-incrimination problem is often taken care of by the longstanding holding that the privilege does not extend to corporations.[458] For other respondents, the court must delve into the swamp bounded on the one hand by the amorphous required-records doctrine[459] and on the other by cases like *Marchetti v. United States*,[460] which held the Government could not require an individual to report his own illegal gambling.

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451 The statute makes no effort to determine the constitutional limits. Instead, in a compromise provision reflecting Manufacturers' Association and ACLU objections to an earlier draft, section 4(d) authorizes entry "in accordance with constitutional limitations." ILL. REV. STAT. ch. 111½, § 1004(d) (1973).

452 387 U.S. 541 (1967).

453 387 U.S. 523 (1967).

454 Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

455 Camara v. Municipal Court, 387 U.S. 523, 535-36 (1967). In addition, off-site ambient measurements may often give probable cause to believe that a violation is taking place on the premises to be searched.

456 United States v. Biswell, 406 U.S. 311, 316 (1972).

457 Thus, the Court said:

> When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection.

Id.

458 *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 74-75 (1906).

459 *See* Shapiro v. United States, 335 U.S. 1 (1948).

460 390 U.S. 39 (1968).

The other side of the information coin is that, without access to information in government files, the public cannot evaluate either the pollution problem or the government's performance, and private citizens may have great difficulty in prosecuting complaints. Past practice had indicated difficulty in obtaining such information from agencies in Illinois, and section 7 of the Environmental Protection Act provides for public inspection and duplication of public files, with exceptions for trade secrets, "secret manufacturing processes or confidential data," internal agency communications, and matter "privileged against introduction in judicial proceedings."[461] Much depends, of course, on the attitude with which these rather loose terms are administered. The word "confidential" in unsympathetic hands could disembowel a provision whose purpose was to make disclosure the rule, subject to narrow exceptions. In 1973, in order to enable Illinois to participate in a permit program under the federal water-pollution statute, a separate subsection was tacked on providing that, for purposes of that program alone, only "trade secrets" may be protected against disclosure, and that "effluent data may under no circumstances be kept confidential."[462] The restriction on private communications among Agency personnel seems unfortunate since it may inhibit debate and since facts rather than Agency opinions are usually of primary importance to the public. Conversely, effluent data is of maximum importance to the public and seems likely to present a relatively small danger of revealing significant trade secrets. I would recommend extending the explicit provision for disclosure of discharge information to all operations under the Act; there is no reason for different disclosure rules in water and in air pollution, and the section should be rethought and rationalized.

J. *Judicial Review*

Despite an express constitutional provision allowing the General Assembly to authorize direct appellate court review of administrative orders, as federal law commonly does, the state Administrative Review Act[463] provides for review in a trial court. The Environmental Protection Act authorizes review of Board orders in accordance with that statute, "except that review shall be afforded directly in the Appellate Court for the District in which the cause of action

461 ILL. REV. STAT. ch. 111½, § 1007(a) (1973).
462 *Id.* § 1007(b).
463 *Id.* ch. 110, § 268.

arose and not in the Circuit Court."[464] As the Governor's message noted, direct review accelerates the decision-making process: "There is no need for a trial court hearing to review board orders, since the Administrative Review Act limits review to questions of law."[465] A later bill that would have encumbered the system with trial-court review was vetoed.

In accordance with settled interpretation of the Administrative Review Act,[466] courts have declared that considerable deference should be paid to Board findings. Such findings will be set aside only if against the "manifest weight" of the evidence even on such ultimate issues as whether there was unreasonable interference with the enjoyment of life[467] or whether unreasonable hardship was shown.[468] This makes eminent sense, since it was precisely to make such judgments on the basis of experience that the specialized Board was set up.[469] Of course it is the judges, not abstract formulas, who in the end determine just how much deference will be given.

The original bill would have allowed review on the petition of any "person adversely affected" by a Board order,[470] but as enacted section 41 includes only a "party affected."[471] Reasons for the change were not recorded. The Illinois Supreme Court, aware that

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[464] *Id.* ch. 111½, § 1041.

[465] Ogilvie Message, *supra* note 9, at 4.

[466] ILL. REV. STAT. ch. 110, § 274 (1973): "The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." *Id.*

[467] Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 296, 319 N.E.2d 794, 797 (1974).

[468] Seegren v. EPA, 8 Ill. App. 3d 1049, 1052, 291 N.E.2d 347, 349 (2d Dist. 1972).

[469] *Cf.* Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944):

> When Congress establishes an administrative agency and lays down general standards for it to follow, the agency has the function of filling in the interstices which have been deliberately left open. The duty of the courts in reviewing the administrative decision for error of law is to see that the agency has stayed within the bounds for the exercise of discretion fixed by Congress, and that it has applied the statutory standards and no others. As long as the agency does so, the courts are not to substitute their judgment . . . .

Id. at 105-07. *Cf.* G. HENDERSON, THE FEDERAL TRADE COMMISSION (1924):

> It would be absurd for a court to consider de novo the engineering questions involved in a determination of the Chief of Engineers of the Army that a bridge is an unreasonable obstruction to navigation . . . . Whether these are analytically questions of law or questions of fact, the very purpose of the legislature was to create a competent expert tribunal to decide them, and this purpose is clearly defeated if a court proceeds to substitute its lawyers' judgment for judgment of such a tribunal.

Id. at 96-98.

[470] Ill. H.B. 3788, 76th Gen. Assem., § 41 (1970).

[471] ILL. REV. STAT. ch. 111½, § 1041 (1973).

its interpretation made the "party affected" provision redundant,[472] held that use of the word "party" incorporated the Administrative Review Act standard of limiting review to those who had been parties below. The court was influenced by the fact, clearly not conclusive, that the Administrative Review Act does not allow the introduction of evidence that was not in the administrative record.[473]

Evaluation of judicial performance in reviewing Board decisions is found throughout this article. Two cases deserve special mention here, partly because they cannot be found in the official reports. In *North Shore Sanitary Dist. v. PCB*[474] the appellate court set aside a Board order denying a variance, citing as its sole ground the Board's improper reliance on information that was not in the record.[475] Following this reversal, the Board reevaluated the evidence, excising the material that had been held improper, and once again denied the variance.[476] The appellate court thereupon notified the

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[472] The section also mentions "any party to a Board hearing." *Id.*

[473] Lake County Contractors Ass'n v. PCB, 54 Ill. 2d 16, 294 N.E.2d 259 (1973); ILL. REV. STAT. ch. 110, § 274 (1973).

Section 41 also allows review on behalf of any person denied "a variance or permit." ILL. REV. STAT. ch. 111½, § 1041 (1973). Taken literally, this would allow the unsuccessful applicant to bypass the explicit section 40 procedure for Board review of the denial of a permit and go directly to the appellate court. The frequent absence of a quasi-judicial record (*see* text accompanying notes 433-41 *supra*), the prohibition on new evidence in a judicial review proceeding (*see* text accompanying note 473 *supra*), and the statutory policy of obtaining the views of the expert Board indicate that what was intended was judicial review of the Board's refusal to order the Agency to issue a permit, or the denial of a permit by the Board itself in a nuclear case under title VI-A.

[474] 2 Ill. App. 3d 797, 277 N.E.2d 754 (2d Dist. 1972).

[475] The precise flaw in the Board's procedure is not clear. At the end of the hearing the respondent had stipulated that "the Board may take judicial notice of its own files and records, and its own orders." *Id.* at 802. This was a rather important practice in view of the desirability of avoiding the repetition of evidence already taken in related proceedings, for example, on issues of the availability of technology. Pursuant to the stipulation, the court said, "the Agency could have included portions of its files and records but did not do so," and its failure to do so "preempted this Court from reviewing evidence that may have been considered by the Board." *Id.* Since the Board referred to specific portions of its files in the opinion, it seems likely that the mistake was the Agency's inadvertent omission of those portions from the record certified to the reviewing court. In any event the difficulty can be cured by greater attention to formalities in bringing such materials to the attention of the Board and the court. A more serious problem arises if a party objects to the introduction of records of rule-making proceedings or cases to which he was not a party because of the unavailability of cross-examination or the absence of quasi-judicial limitations on the introduction of evidence.

[476] North Shore Sanitary Dist. v. EPA, 3 Ill. P.C.B. 731 (1972).

parties that, in its earlier notice denying a petition for rehearing, it had amended its initial order to direct "that the variance requested by the petitioner as set forth in the opinion herein be allowed."[477] Quite apart from questions as to the timing of the court's action, nothing in the court's opinion supports the entry of judgment for the petitioner. To hold, as the court did, that the Board had erred in relying on evidence not in the record does not mean the district was entitled to a variance. The burden was on the district to prove that compliance would inflict unreasonable hardship, and the court nowhere said it had done so. The proper remedy for relying on improper evidence is a remand for further proceedings.[478]

In *Glen Oak Cemetery Co. v. EPA*,[479] the Board dismissed without hearing four variance petitions for failure to state "facts which, even if proved, would justify the relief sought"[480]—that is, for failure to state a cause of action. The appellate court reversed in four identical one-sentence orders, remanding with instructions that the relief sought be granted.[481] But the finding that a complaint is adequate does not dispense with the necessity for proving the facts alleged, and those facts must be proved before the administrative body, not before the reviewing court.[482] Once again the proper procedure would have been to remand for further proceedings.[483]

III. CONCLUSION

The foregoing survey suggests something of the breadth of issues confronting those engaged in or affected by a pollution-control program. All things considered, the Illinois statute seems to have worked reasonably well so far despite numerous deficiencies in drafting due to time limitations, insufficient foresight, and the necessity for compromise. Not surprisingly, the Board's performance reflects

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477 Letter from Howard K. Kellett, Clerk, to Murray R. Conzelman, March 13, 1972, in PCB file of *North Shore Sanitary Dist. v. EPA*, No. 71-36.

478 *See* McCottrell v. Benson, 31 Ill. App. 2d 367, 178 N.E.2d 144 (4th Dist. 1961); McCaffery v. Civil Serv. Bd., 7 Ill. App. 2d 164, 129 N.E.2d 257 (1st Dist. 1955).

479 4 Ill. P.C.B. 125 (1972).

480 *Id.*

481 *See, e.g.*, Glen Oak Cemetery Co. v. PCB, No. 57259 (1st Dist. Ill. App. April 13, 1972).

482 ILL. REV. STAT. ch. 110, § 274 (1973).

483 This was done upon reversal of a comparable dismissal in Robert E. Nilles, Inc. v. PCB, 17 Ill. App. 3d 890, 894, 308 N.E.2d 640, 643 (2d Dist. 1974).

occasional instances of what now appears to have been excessive zeal, though on the whole I think its early record a good one. Judicial review has been uneven, sometimes interfering excessively with the Board's exercise of judgment and at other times deferring too uncritically.

It is my hope that this depiction of the Illinois experience will furnish a partial basis for the future drafting of better statutes in Illinois and elsewhere with respect to pollution, and that some lessons we have learned in this program may be of assistance in fashioning administrative programs in other fields where similar problems arise.