ILLINOIS POLLUTION CONTROL BOARD
May 10, 1990

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Complainant,	)	
v.	)	PCB 88-71 (Enforcement)
ALLEN BARRY, individually and ALLEN BARRY, d/b/a ALLEN BARRY LIVESTOCK, Respondent.	)	

MS. PAM CIARROCCHI, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF THE COMPLAINANT; AND

MR. DONALD A. MANZULLO, P.C., APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on the April 19, 1988 complaint of the Attorney General, filed on behalf of the Illinois Environmental Protection Agency ("Agency"). The complaint alleges that respondent, Allen Barry, individually and d/b/a Allen Barry Livestock ("Allen Barry") violated Sections 12(a), (d) and (f) of the Illinois Environmental Protection Act ("Act"); the water quality standards in 35 Ill. Adm. Code 302.203 and 302.212; the effluent standards of 35 Ill. Adm. Code 304.105; and the operational rules and permit requirements for agriculture related pollution in 35 Ill. Adm. Code 501.403(a), 501.404(b)(1) and 502.104. The Agency complaint details the violations in four counts described below. A Stipulation and Proposal for Settlement was filed April 12, 1989, leaving the issue of a penalty for the Board's decision here.

Procedural History

Hearing is mandatory pursuant to Section 33 of the Act and the case was accepted for hearing at the April 21, 1988 Board meeting. Hearing was held on January 10, 1989, and continued to March 14, 1989. No member of the public was in attendance. The parties filed the executed Stipulation and Proposal for Settlement on April 12, 1989. The Agency's post-hearing brief in support of a penalty was filed May 1, 1989. Allen Barry's brief in opposition to a penalty was filed May 22, 1989.

The Facility

Allen Barry owns and operates a livestock operation, known as Allen Barry Livestock in Ogle County, Illinois. The confinement operation handles more than 300 brood cows and slaughter or feeder cattle on an ongoing basis. The facility includes feedlots and at least one manure storage pile. A man-made drainage ditch collects runoff from these. Runoff, via a man-made drainage ditch and in part via direct drainage, to an unnamed tributary to Mill Creek in Ogle County is the subject of this enforcement action.

Complaint: Counts I through Count IV

Count I alleges that on or about July 27, 1982, and continuing intermittently through April, 1988, Allen Barry violated Section 12(a) and (d) of the Act. Those subsections govern the discharge or deposit of contaminants which cause or tend to cause water pollution or which create a water pollution hazard. Allen Barry's operations allegedly discharged contaminants, livestock waste and feedlot runoff into the unnamed tributary of Mill Creek. Agency personnel witnessed this discharge on July 27, 1982, November 5, 1985, April 22, 1987, and February 18, 1988. The discharge allegedly altered the chemical and biological nature of the water resulting in harmful or injurious conditions for fish or aquatic life and harmful conditions for public health.

Count II alleges that Allen Barry has confined more than 300 brood cows and cattle in its ongoing operation while at no time possessing a National Pollutant Discharge Elimination System ("NPDES") permit for the related discharges. This is an alleged violation of Section 12(f) of the Act, which requires an NPDES permit for point source discharges. On or about July 27, 1982 through April, 1988, Allen Barry also allegedly violated 35 Ill. Adm. Code 501.403(a), 501.404(b)(1), and 502.104. These sections require that livestock facilities maintain diversion dikes, walls or curbs to control surface waters and contain runoff; that manure stacks be managed to prevent runoff and leachate from entering state waters; and that NPDES permits be obtained for facilities of a certain size which discharge pollutants into navigable waters directly or through man-made devices.

Count III alleges that Allen Barry violated the Water Quality Standard regulating unnatural sludge as found in 35 Ill. Adm. Code 302.203 and the effluent standard stated in 35 Ill. Adm. Code 304.105 regulating effluents which cause a violation of water quality standards. The Agency alleges that on or about July 27, 1982 and continuing through April, 1988, Allen Barry's operations caused or contributed to murky, brownish, or turbid water and manure odors in the unnamed tributary. These conditions were specifically noted by the Agency on July 27, 1982, November 5, 1985, and April 22, 1987. Allen Barry thereby allegedly violated Section 12(a) of the Act and 35 Ill. Adm. Code 302.203 and 304.105.

Count IV alleges that Allen Barry violated Section 12(a) of the Act and 35 Ill. Adm. Code 304.105 also noted in Count III and the particular water quality standard for ammonia nitrogen. Pursuant to 35 Ill. Adm. Code 302.212, ammonia nitrogen may not exceed 15 mg/l (milligrams per liter). On November 15, 1985 and on February 18, 1988, levels of 59.0 mg/l and 18.5 mg/l were recorded. The Agency alleges that on or about July 27, 1982 through April, 1988, Allen Barry therefore was in violation of Section 12(a) of the Act and 35 Ill. Adm. Code 302.212 and 304.105 including, but not limited to, the two particular dates above.

The Agency alleges that the violations described in Counts I through IV above were continuing violations from July 27, 1982 through the April, 1988 complaint date and that they will continue unless halted by the Board. The relief requested is that the Board direct Allen Barry to cease and desist from further violations, that the Board assess a penalty not to exceed $10,000 for Count I violations and $1,000 per each day during which the violations continued.

Stipulation

The Stipulation and Proposal for Settlement (with Exhibits A through F) was executed in March of 1989 and filed with the Board on April 12, 1989. It sets forth facts noted in the facility description above and acknowledges that pursuant to Section 31(d) of the Act, notice of apparent violations was given to Allen Barry by letters dated October 15, 1982 and December 18, 1985. (Exhibits A and B.) The following additional facts are stipulated by the parties.

Allen Barry's livestock operation, a sole proprietorship, discharged runoff from its feedlots. Those discharges require a NPDES permit. At no time has Allen Barry possessed, nor has the Agency issued, an NPDES permit for those discharges. Allen Barry caused, threatened or allowed contaminants, livestock waste and feedlot runoff, to be discharged upon the land and into the unnamed tributary of Mill Creek, a water of the State of Illinois, so as to cause or tend to cause water pollution in Illinois. These discharges were observed on or about July 27, 1982, November 5, 1985, April 22, 1987, and February 18, 1988, by Agency personnel who witnessed the direct discharge of livestock waste and feedlot runoff into the unnamed tributary which intersects and runs through Respondent's property from south to north and empties into Mill Creek. (Ex. C).

On July 27, 1982; November 5, 1985; April 22, 1987; and February 18, 1988, water samples were taken at and around Allen Barry's facility. These samples showed violations of water quality standards contained in the Board regulations for unnatural sludge and ammonia nitrogen. (Ex. D).

The Terms of Settlement provide that it shall be a full settlement of the action filed by the Agency and Allen Barry's liability for all violations alleged in the complaint. The Agency contends, and Allen Barry admits, that the facts as set out in the Complaint constitute the following violations of the Act and Board Regulations:

Count I: Section 12(a) and 12(d) of the Act as these sections relate to livestock waste;

Count II: Section 12(f) of the Act and 35 Ill. Adm. Code 501.403(a) and 502.104;

Count III: Section 12(a) of the Act and 35 Ill. Adm. Code 302.203 and 304.105;

Count IV: Section 12(a) of the Act and 35 Ill. Adm. Code 302.212 and 304.105.

Allen Barry does not admit the violation of 35 Ill. Adm. Code 501.404(b)(1) alleged in Count II. That section regulates handling and storage of livestock waste in temporary manure stacks to prevent runoff and leachate problems.

Allen Barry agrees to cease and desist from any and all violations of the Act and Board regulations. As a remedial course of action, Allen Barry agrees to submit to the Agency by April 25, 1989 specifications for the construction of a livestock waste handling facility, in accordance with the Act and Board regulations. Such construction must be implemented by Allen Barry within 180 days after Agency approval and must be completed in accordance with Agency approved specifications no later than August 1, 1990.

Allen Barry agrees to apply for and obtain an NPDES permit concurrent with the start of construction of its livestock waste handling facility. With respect to the unnamed tributary on the eastern portion of his property, within 180 days of approval of this settlement, Allen Barry agrees to do the following:

1. place a fence 25 feet from each side of the tributary;

2. plant dense vegetation within this 25-foot area;

3. maintain one area for crossing this tributary; and

4. maintain a vegetative cover on pasture.

Allen Barry agrees to act in accordance with all terms and conditions of all permits issued by the Agency.

The parties have not stipulated to a civil penalty to be paid by Allen Barry for violations of the Act and regulations. The Agency requests a penalty of up to $10,000 and Exhibits A through E in support of a penalty. Allen Barry argues that no penalty is necessary and provided Exhibit F in support of that position. Exhibits A through F amount to about 78 pages of various documents, including correspondence since 1982 and inspection reports.

Statutory Penalty Authority

As part of a final order in an enforcement case, Section 33(b) empowers the Board to impose civil penalties in accordance with Section 42 penalty provisions. Generally, Section 42(a) and (b) of the Act provides for potential civil penalties of up to $10,000 per violation and up to $1,000 per day. However, certain violations, such as of Section 12(f), carry a $10,000 per day penalty. Subsections 42(a) and (b) provide in pertinent part:

> a. Except as provided in this Section, any person that violates any provisions of this Act or any regulation adopted by the Board, or any permit or term or condition thereof, or that violates any determination or order of the Board pursuant to this Act, shall be liable to a civil penalty of not to exceed $10,000 for said violation and an additional civil penalty of not to exceed $1,000 for each day during which violation continues;[1] ....
>
> b. Notwithstanding the provisions of subsection (a) of this Section:
>
> 1. Any person that violates Section 12(f) of this Act or any NPDES permit or term or condition thereof, or any filing requirement, regulation or order relating to the NPDES permit program shall be liable to a civil penalty of not to exceed $10,000 per day of violation; ....
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> Ill. Rev. Stat. ch. 111½, par. 1042.

In an enforcement action Section 31(c) of the Act places the burden of proof on the Agency or other complainant to show either

[1] Effective January 1, 1990 penalty amounts increased to $50,000 per violation and $10,000 per day, but these amounts are not applicable to the violations here, which are from the earlier 1982-1988 time period.

that the respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of [the] Act or any rule or provision of the Board. If such proof has been made, the burden shall be on the respondent to show that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship.

How this burden of proof is carried was explained by the Illinois Supreme Court in Incinerator, Inc. v. Pollution Control Board, 59 Ill.2d 290, 319 N.E.2d 794, 799 (1974). There, the court stated that "the EPA had the burden of proving all essential elements of the type of air pollution violation charged, and the Board must then assess the sufficiency of such proof by reference to the Section 33(c) criteria, basing thereon its findings and orders." The Supreme Court later clarified this in Processing & Books, Inc. v. Pollution Control Board, 64 Ill.2d 68, 351 N.E.2d 865 (1976). In that case, the court stated that the Incinerator Inc. case was not intended to place on the Agency "the burden of proving, by evidence which it offered, the unreasonableness of the respondents' conduct in terms of each of the four criteria mentioned in Section 33(c)." That interpretation would "frustrate the purpose of the Act" and "also render redundant or contradict the allocation of the burdens of proof in Section 31(c). Processing & Books, 351 N.E.2d at 869 (emphasis added).

As to the Board's responsibility to evaluate the evidence offered, the Illinois Supreme Court requires that unreasonableness of the alleged pollution must be determined with reference to the criteria stated in Section 33(c). Wells Manufacturing Company v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148 (1978), citing Mystik Tape v. Pollution Control Board, 60 Ill.2d 330, 328 N.E.2d 5 (1975), Incinerator, Inc., 59 Ill.2d 290 (1974) and City of Monmouth v. Pollution Control Board, 57 Ill.2d 482, 313 N.E.2d 161 (1974). However, this does not require that the Board find against the respondent with respect to each of the Section 33(c) criteria. Nor does it mean, "that the Board is precluded from considering additional relevant factors." Wells Manufacturing Company, 383 N.E.2d at 151. See also, Southern Illinois Asphalt Company, Inc. v. Pollution Control Board, 60 Ill.2d 204, 326 N.E.2d 406, 408 (1975) directing the Board to consider all the facts and circumstances. As noted below, Section 33(c) specifically directs the Board to consider all facts and circumstances in enforcement cases. Section 33(c) provides:

> c. In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

2. the social and economic value of the pollution source;

3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source;

5. any economic benefits accrued by a non-complying pollution source because of its delay in compliance with pollution control requirements; and

6. any subsequent compliance.

Section 33(a) of the Act requires that the determinations which the Board makes pursuant to Section 33(c) above must be in a written opinion describing the facts and reasons for the decision. The Board's findings are subject to review pursuant to Section 41 of the Act. The standard of review of the Board's decisions is the manifest weight of the evidence. This means that, in carrying out its quasi-judicial function in enforcement cases, the Board's decision will be upheld unless contrary to the manifest weight of the evidence. Wells Manufacturing Company, 383 N.E.2d at 151.

Some enforcement cases result in settlements. The Board's regulations set forth procedures for settlement of enforcement cases at 35 Ill. Adm. Code 103.180. In a 1986 air pollution case involving a $20,000 stipulated penalty, the Fifth District decided that "the Board has the statutory authority to accept settlement agreements in enforcement cases where findings of violation are precluded by the terms of the stipulation and proposal but where the respondent is ordered to pay a stipulated penalty and to timely perform agreed upon compliance activities." Chemetco, Inc. v. Illinois Pollution Control Board, 140 Ill.App.3d 283, 488 N.E.2d 639, 643 (5th Dist. 1986). The court noted that consistent with the primary goal of enhancing the environment, "settlements that do not contain a finding of violation but do impose a penalty and a compliance plan may more

expeditiously facilitate this enhancement." Id. (emphasis added). This same conclusion was also reached by the Third District in Archer Daniels Midland v. Pollution Control Board, 140 Ill.App.3d 823, 489 N.E.2d 887 (3d Dist. 1986), where the parties stipulated to a penalty but not to a finding of violation. Although the cases discussed below involve contested penalties, the Chemetco case does present encouragement for settlements involving penalty issues, which, in general, the Board favors. The Allen Barry case involves a Stipulation and Proposal for Settlement as to the violations only, and leaves open the issue of a penalty.

Discussion of Penalty Determination

The Board believes that, in order to properly address the penalty issue in this case, a broad overview of Illinois, federal and some other states' penalty determinations is necessary to guide the Board in this, and future decisions. The following discussion is intended to articulate the Illinois approach to penalties since the Board has at times been faced with conflicts among the reviewing courts, and the Illinois Supreme Court has not addressed the Board's imposition of civil penalties since 1978. To summarize and clarify the current framework for the Board's penalty decisions, a comprehensive analysis will follow, concluding with a discussion of how the law applies to the facts of the Allen Barry case. This discussion will proceed in accordance with the Table of Contents below. These discussions are intended only to briefly summarize the case law, and not to provide holdings or new interpretations of those cases.

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I. OVERVIEW OF ILLINOIS LAW ON CIVIL PENALTIES

To provide a framework for appellate review of the Board's penalty decisions, a summary of a comprehensive list of Illinois Supreme Court and Appellate Court cases follows. A total of 42 cases are briefly discussed in two sections: (A) Illinois Supreme Court cases and (B) Illinois Appellate Court cases. Each case will be referred to by a numbering system, [1] through [42], and the summary of each case will be captioned with a heading for the case name. The summary of each case is intended as a reference point for the Board's discussion of Penalty Factors, which begins on page 35 herein. This survey of Illinois Cases begins with a 1974 Illinois Supreme Court decision and continues through early 1990 decisions. The outcomes in a number of these decisions would have been impacted by subsequent statutory amendments to Sections 33 and 42 of the Act. However, the cases are presented from a historical perspective and not in terms of precedent for the Board's decisions. The new legislative directives to the Board are discussed separately in the section labeled "Illinois Legislative Intent." Cases which predate the amendments, therefore, must be viewed in the time frame in which the courts issued those opinions.

A. Illinois Supreme Court Cases

[1] The City of Waukegan Case

The Illinois Supreme Court first acknowledged the Board's authority to impose monetary penalties in 1974. See City of Waukegan v. Pollution Control Board, 57 Ill.2d 170, 311 N.E.2d 146 (1974) affirming fines of $1,000, $250 and $250. In that refuse disposal case, the court determined that penalties are constitutional and consistent with the state goal to preserve and improve the environment, and that Section 33(c) provides protection against arbitrariness and serves to guide the Board in imposing penalties. However, the Illinois Supreme Court later noted that, "[o]bviously the General Assembly did not intend that the Pollution Control Board should impose a monetary fine in

every case of a violation of the Act or regulations." Southern Illinois Asphalt Co. v. Pollution Control Board, 160 Ill.2d 204, 326 N.E.2d 406, 408 (1975) (described in detail infra) [Case No. 4].

[2] The City of Monmouth Case

The guiding principle articulated by the Illinois Supreme Court is that civil penalties should aid enforcement of the Act and that "punitive considerations were secondary." City of Monmouth v. Pollution Control Board, 57 Ill.2d 482, 313 N.E.2d 161, 166 (1974). In this 1974 air pollution case involving emissions from the City of Monmouth's sewerage lagoon system, the Supreme Court of Illinois found that a $2,000 penalty could not aid enforcement where the city cooperated with the Agency and no technological method was available to effectively cure the problem. Various attempts were made, but none resolved the violation until after enforcement proceedings began. The Supreme Court concluded that since "the City, at substantial expense, cooperated in the implementation of every proposal, and that through the City's efforts the problem appears to have been solved, we hold that the Board erred in imposing the fine." City of Monmouth v. Pollution Control Board, 313 N.E.2d at 166.

[3] The Incinerator, Inc. Case

In the case of Incinerator, Inc. v. Pollution Control Board, 59 Ill.2d 290, 319 N.E.2d 794 (1974), the Illinois Supreme Court upheld civil penalties of $25,000 for air pollution violations resulting from refuse incinerator operations. Substantial amounts of flyash, heavy smoke emissions and foul odors unreasonably interfered with the enjoyment of life and property in the area, in violation of the Act and rules and regulations. Corrective measures were not technically impracticable or economically unreasonable. The Board was found to have properly evaluated the unreasonableness of the interference in light of Section 33(c) factors, although, in the future, the Board was instructed to be more specific in making written findings as to the criteria in Section 33(c) of the Act.

The Incinerator court referred to the Board's review of key facts relevant to Section 33(c) factors in its decision to uphold the Board's assessing a $20,000 penalty. The harm to the public was found to be a substantial interference with the enjoyment of life and property over an extended period of time. The social and economic value of the pollution source was evaluated in terms of alternative available incinerators and disposal facilities, the time required to obtain and install pollution control equipment, and the impact of a close down on the 25 employees affected. Regarding the suitability or unsuitability of the pollution source to its locale, evidence on zoning, uses of property in the area, and the nature of nearby industries was considered. The Board also heard testimony on the number of

homes and buildings which predated the facilities, as well as those constructed later. Another important factor was the availability of technically practicable, although not fully perfected, devices to eliminate the air pollution problem and a clear ability to pay for this equipment. The Supreme Court was not persuaded by appellant's arguments that the pollution control systems were either technically impracticable or economically unreasonable. The Board's consideration of these factors amounted to substantial compliance with the Act's requirement that Section 33(c) criteria be analyzed in Board determinations in enforcement cases. An additional $5,000 penalty for failing to file a required plan for reducing emissions was affirmed as being neither arbitrary or excessive.

[4] The Southern Illinois Asphalt Company Case

In Southern Illinois Asphalt Co. v. PCB, 60 Ill.2d 204, 326 N.E.2d 406 (1975) (two cases consolidated), the Illinois Supreme Court held the penalties inappropriate as abuses of the Board's discretion. The court found that the penalties would not aid enforcement, but were punitive. In the first case involving a $5,000 fine for violation of air pollution permit requirements, the appellant had ceased its asphalt plant operations prior to the Agency's filing of the complaint. Furthermore, when it did operate, although lacking a permit, the plant operated within the Board's emission standards. The failure to obtain a permit was inadvertent and in good faith reliance that the installer of its pollution control equipment had applied for and obtained a permit.

In the second case, involving a $11,000 penalty for water pollution from cyanide discharges from an auto parts manufacturer, the court found that the violations ceased five months prior to the filing of the complaint. Furthermore, the company "had been diligently trying to bring its operations into conformity... and was not dilatory or recalcitrant." The penalty was held "purely punitive" under these circumstances. Southern Illinois Asphalt, 326 N.E.2d at 412.

The court concluded as to both cases that "the General Assembly intended to vest the Board with broad discretionary powers in the imposition of civil penalties"; however, the record showed "substantial mitigating circumstances" which required that no penalty be imposed. Southern Illinois Asphalt, 326 N.E.2d at 409. Both cases involved cooperative efforts and violations which ended well before the filing of the complaints. The court found, therefore, that the penalties could not aid enforcement of the Act.

While acknowledging that the Board has discretionary authority to levy civil penalties in enforcement cases, the Supreme Court offered a note of caution. "Implicit in the grant of the discretionary authority to impose monetary civil penalties in varying amounts is the requirement that the severity of the

penalty should bear some relationship to the seriousness of the infraction or conduct." Southern Illinois Asphalt, 326 N.E.2d at 408. This directs the Board to consider the overall significance of the violation as part of a penalty determination.

[5] The Mystik Tape Case

In Mystik Tape, Division of Borden, Inc. v. Pollution Control Board, 60 Ill.2d 330, 328 N.E.2d 5 (1975), an air pollution (odor) case, a $3,500 penalty was upheld by the Illinois Supreme Court. Mystik was found to have violated the Act and rules and regulations by installing certain equipment after it had been denied permits for doing so. The permit violation warranted a penalty since the facts were unlike those of Southern Illinois Asphalt [Case No. 4], where one company showed good faith and its failure to obtain a permit was purely inadvertent. Also, Mystik's behavior was not analogous to that of the other company in Southern Illinois Asphalt, [Case No. 4], whose conduct was not dilatory or recalcitrant. Although the case was remanded to the Board for reconsideration of the alleged air pollution violation based on the factors set forth in Section 33(c), the penalty was upheld for the clear violation of the relevant permit requirements. Citing to Incinerator, Inc. [Case No. 3], the court found that the penalty was not arbitrary or oppressive. The court also reaffirmed "the power of the Board to impose civil penalties primarily as a method to aid enforcement of the Act," citing Southern Illinois Asphalt, [Case No. 4], and City of Monmouth, [Case No. 2]. Mystic Tape, 328 N.E.2d at 10.

Without a detailed discussion as to how the penalty would aid enforcement or how each factor of Section 33(c) applies to the failure to obtain permits, the Mystik Tape court affirmed the penalty for the permit violation. The Mystik Tape court noted that Mystik applied for permits for: (1) odor-counteractant devices and (2) a spreader. The Agency denied the permits because the former equipment was believed to only mask the odors and the latter equipment was considered a potential source of pollution needing pollution control devices. The penalty issue in this case thus seems to relate in part to whether there is an apparent risk of present or future air pollution. This is in contrast to the mere technical compliance with permit requirements sought by the Agency in the case of Southern Illinois Asphalt, [Case No. 4], where air pollution was not an issue. Mystik installed the equipment despite the permit denials and, therefore, the fine was not arbitrary or oppressive since the permit violation was knowing, and not an inadvertent failure to meet a technical requirement.

[6] The Metropolitan Sanitary District Case

The Illinois Supreme Court reiterated the theme of aiding enforcement of the Act in another 1975 case. In that case, the

Metropolitan Sanitary District of Greater Chicago independently initiated plans to construct compliant facilities to cure water pollution problems. The district had not been "dilatory or recalcitrant." It "fell victim to inter-agency conflicts (i.e., extensive negotiations with the Northeastern Illinois Planning Commission and the Sanitary District of Elgin) resulting in delays which made it impossible...to prevent the violations..." Under these circumstances, the penalties totaling $6,000 were found to be "purely punitive" and not an aid in enforcement of the Act. Metropolitan Sanitary District v. Pollution Control Board, 62 Ill.2d 38, 338 N.E.2d 392, 397 (1975).

[7] The Processing & Books, Inc. Case

The Illinois Supreme Court upheld a $3,000 penalty in a 1976 case involving air pollution from odors emitted from an egg and poultry farm. Processing & Books, Inc. v. Pollution Control Board, 64 Ill.2d 68, 351 N.E.2d 865 (1976). The court found that the Board decision predated the court's decision in Incinerator, Inc., [Case No. 3], and, therefore, although the Board did not make specific findings on each of the (then four) factors in Section 33(c) of the Act, this did not warrant reversal since the Board's order made clear that each factor was considered. The court found that, for more than one mile outside the farm, "respondents seriously interfered with the enjoyment of life and property in ways which could have been prevented." Processing & Books, Inc., 351 N.E.2d at 870. The court noted that the operation had substantial social and economic value. However, the great increase in the size of the operation, the related negative impact on the area, and the availability of corrective measures (which respondents did not begin until after the complaint was filed), supported the Board's finding that a penalty was appropriate.

[8] The Wells Manufacturing Company Case

The 1978 case of Wells Manufacturing Company, 73 Ill.2d 226, 383 N.E.2d 148 (1978), involved a $9,000 penalty for alleged odor-related air pollution emitted from an iron foundry. In a detailed analysis of Section 33(c) factors, the Illinois Supreme Court reversed the Board's decision as being against the manifest weight of the evidence. The court described the task of evaluating a Section 9(a) air pollution case in terms of a balancing test. "The Board must balance the costs and benefits of abatement in an effort to distinguish the trifling inconvenience, petty annoyance or minor discomfort from a substantial interference with the enjoyment of life and property." Wells Manufacturing Company, 383 N.E.2d at 150, citing Processing & Books Inc., [Case No. 7]. Section 33(c) must be used to guide the Board in this determination.

The Supreme Court found that much evidence had been developed below concerning the character and extent of the harm pursuant to Section 33(c)(i). The Board focused on citizen testimony and concluded that the "odors 'unreasonably interfered with the enjoyment of life and property'." Wells Manufacturing Company, 383 N.E.2d at 152. Regarding Section 33(c)(ii), the company indisputably was making a major social and economic contribution by employing approximately 500 persons and supplying parts to numerous industries. Section 33(c)(iii), involving the appropriateness of the pollution source to its locale raised several areas of dispute. Although the Supreme Court agreed that the company's "priority of location does not achieve the level of an absolute defense," it was "impressed with its significance" here. Wells Manufacturing Company, 383 N.E.2d at 152. The nearby residential area and high school were developed later with notice that the adjacent area was zoned for heavy-industrial use. The high school was even built on land acquired from the foundry. Expansions to the foundry were made after the school was constructed and after some homes were built. The court held that this weighs against the priority of location argument but that the proof that emissions had increased was insufficient to meet the Agency's burden on this point. The final criteria in Section 33(c)(iv) regarding the technical practicability and economic reasonableness of pollution controls ultimately favored the company. Financial considerations were not at issue. However, the court held that the Agency had the burden "to come forward with evidence that emission reduction is practicable", Wells Manufacturing Company, 383 N.E.2d at 153, and conflicting expert testimony on three methods of abatement and an inadequate record on a fourth method defeated Agency assertions of technical practicability. The court concluded that these factors, taken together, did not establish the unreasonableness of the odors. Hence, no violations had occurred and the penalties were inappropriate.

B. Illinois Appellate Court Cases

1. Air Pollution Cases

Air pollution violations involving Section 9 of the Act have been the subject of many contested penalty cases. These cases may be subdivided somewhat into the two types of violations covered by Section 9(a) based on the alternative definitions of air pollution offered in Section 3.02. That section defines air pollution both in terms of injury and in terms of interference with life or property as follows:

> "AIR POLLUTION" is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.

Section 3.02 of the Act (emphasis added).

[9] The Allied Metal Company Case

Allied Metal Co. v. Illinois Pollution Control Board, 22 Ill.App.3d 823, 318 N.E.2d 257 (1st Dist. 1974) was an early air pollution case where a $2,500 penalty was appealed. The fine had been imposed for violations of Section 9(a) of the Act, particulate emission regulations and permit requirements. The court reversed the Board's decision finding Section 9(a) and emission violations as being against the manifest weight of the evidence. Furthermore, the Board had failed to consider the "reasonableness" factors of Section 33(c), which this court held to be mandatory to establishing these violations. The permit violation for construction of a potential emission source was upheld and on that issue the court remanded for redetermination of the penalty. For the permit violation alone, the Board reassessed the penalty at $750 upon remand.

[10] The Sangamo Construction Company Case

In Sangamo Construction Company v. Pollution Control Board, 27 Ill.App.3d 949, 328 N.E.2d 571 (4th Dist. 1975), the court affirmed the finding of a violation of Section 9(a) for odors and dust emanating from petitioner's asphalt and concrete plants and for operating without a permit. The Fourth District extended the Supreme Court's rationale in Incinerator Inc., [Case No. 3], which held that air pollution causing interference must be considered in light of Section 33(c) factors before a violation is established. The district court held that both types of air pollution violation must be proved through an analysis of Section 33(c) factors. Sangamo Construction, 328 N.E.2d at 575. The court stated that the Board correctly found a Section 9(a) violation, but finding that only one plant had operated without a permit, remanded for reimposition of the fine. A $5,000 fine had been imposed for the three violations, and on remand to the Board, the fine was reduced to $4,000.

The Sangamo case approaches Section 33(c) as part of the proof of a Section 9(a) violation. However, as discussed below, in the Aluminum Coil Anodizing case, 40 Ill.App.3d 785, 315 N.E.2d 612, 615 (2d Dist. 1976) [Case No. 11], some courts have found that Section 33(c) is part of the penalty determination and not part of the proof of a Section 9(a) air pollution violation where harm or injury occurred.

[11] The Aluminum Coil Anodizing Corporation Case

In a 1976 odor case, involving the first type of Section 9(a) air pollution violation, the Second District upheld a $1,500 penalty against an anodizing plant. The court observed that this

violation, which was injurious in its effect, involves a different burden of proof than air pollution which intrudes on or interferes with life. "By its terms proof of the essential elements of air pollution of the first type set forth by section 3(b) does not require any showing by the complainant of the unreasonableness of the emissions involved, in contradistinction to air pollution of the second type set forth in section 3(b)." Aluminum Coil Anodizing Corporation v. Pollution Control Board, 40 Ill.App.3d 785, 315 N.E.2d 612, 615 (2d Dist. 1976). In this case, the company's emissions were associated with foul odors, various health ailments, and property damage. Air pollution of the first type was established based on testimony regarding its injurious effects including instances of breathing difficulties, headaches, coughing, and eye irritations; spotting on aluminum doors and plants in the area; and deterioration of a nearby roof.

The court found that the Board's opinion reflected due consideration of Section 33(c) factors. The court noted that the company's not having received complaints might be a mitigating factor. However, the record also showed no good faith efforts to achieve compliance between the date of the complaint and the closing of the plant over one year later, despite available technology to control the odors. The penalty, therefore, was appropriate, and not excessive and would "serve to aid in the enforcement of the Act by working to secure voluntary compliance with the Act in other cases, especially by ACA at its new facility." Aluminum Coil Anodizing, 315 N.E.2d at 619 (emphasis added).

[12] The Lloyd A. Fry Roofing Company Case

In 1974, the First District affirmed the finding of a violation in the nature of the second type of air pollution, that is, unreasonable interference with life and property in a case involving smoke and odors from an asphalt roofing plant. Lloyd A. Fry Roofing Company v. Pollution Control Board, 20 Ill.App.3d 301, 314 N.E.2d 350 (1st Dist. 1974). Headaches, nausea, and eye and throat irritations were associated with the emissions. The court found that evidence regarding Section 33(c) factors was sufficient to support the Board's findings. Besides the impact above, the Board heard evidence on the operation of the plant, the presence of other pollution sources in the area, and, notably, the availability of pollution control devices to asphalt plants in general and their usage at petitioner's other plants. The court affirmed the Section 9(a) violation, but the case was remanded for reconsideration of the $50,000 penalty since the court reversed the Board's finding of a violation of the Board's rules and regulations. On reconsideration, the Board assessed a reduced penalty of $10,000.

[13] The Bresler Ice Cream Company Case

In contrast with the Lloyd A. Fry Roofing case [Case No. 12], a number of cases involving the second type of Section 9(a) violation (i.e., interference) were decided by the appellate courts with the conclusion that civil penalties should not be sustained. In Bresler Ice Cream Company v. Illinois Pollution Control Board, 21 Ill.App.3d 560, 315 N.E.2d 619 (1st Dist. 1974), the court found that an air pollution violation in the nature of unreasonable interference with the enjoyment of life or property resulted from the release of flyash and odors from petitioner's incinerator. However, the record did not support the $1,500 penalty since petitioner ultimately carried the burden of proof as to mitigating circumstances. Notably, the company showed good faith in voluntarily attempting to abate the pollution in terminating use of the incinerator prior to the complaint being filed, and in agreeing to refrain from future use. The violation was held to be "de minimus," with no impact on health. The facts stipulated to by the parties "evince a sincere desire ... to cooperate... This attitude should have been noted and encouraged by the Board." Bresler Ice Cream, 315 N.E.2d at 621. As a further note, the court compared the subject penalty to a $1,000 penalty levied in another case for solid waste dumping violations which posed health risks. It concluded that petitioner's case was a far less serious situation for which the Board imposed a disproportionate penalty. The court gave a clear signal to the Board to look for violator's good faith conduct and for consistency in its disposition of penalty cases.

[14] The Chicago Magnesium Casting Company Case

The First District reached the same conclusion in another 1974 air pollution case involving a $1,000 fine for odors generated by a foundry. The court found that the company had worked with the county agency, conducted studies, attempted to mask the odors, and then abandoned the offending chemical six months before the complaint was filed. Although a Section 9(a) violation was found, the court held that a penalty would not aid enforcement of the Act given the cooperative efforts shown, the lack of reasonable means to control odors[2] prior to the company's use of a new chemical, and the fact that compliance was achieved six months prior to the complaint. Chicago Magnesium Casting Company v. Illinois Pollution Control Board, 22 Ill.App.3d 489, 317 N.E.2d 689 (1st Dist. 1974).

[2] The court noted, however, that "economic reasonableness and technical practicability are but two factors to be considered by the Board in determining whether or not the Act has been violated." Chicago Magnesium Casting, 317 N.E.2d at 692. These do not rise to the level of a complete defense.

[15] The CPC International, Inc. Case

CPC International, Inc. v. Illinois Pollution Control Board, 24 Ill.App.3d 203, 321 N.E.2d 58 (3d Dist. 1975) represents another Section 9(a) air pollution case, this time involving regulatory standards for particulate levels. In this case, the Third District found that a violation occurred, but the $15,000 penalty assessed by the Board was vacated. As in Bresler Ice Cream, [Case No. 13], and Chicago Magnesium Casting, [Case No. 14], the petitioner acted promptly to correct the problem. The violations were minor and were remedied before the Board's decision. The penalty was arbitrary and excessive when compared to three prior Board decisions imposing fines of $3,000 to $10,000 "for violations which were deliberate and long-term." CPC International, Inc. 321 N.E.2d at 61. The court also observed that three adjacent industrial plants had received variances and emitted higher levels of particulates than the petitioner, and that this should be a major consideration in a penalty determination. This, too, bears on the court's evaluation of the Board's even-handedness in penalty cases.

[16] The Arnold N. May and Hillview Farms, Inc. Case

In a 1976 case involving odors from the application of sludge and feedlot wastes to farmland, a penalty was again vacated on appeal. In Arnold N. May and Hillview Farms, Inc. v. Pollution Control Board, 35 Ill.App.3d 930, 342 N.E.2d 784 (2d Dist. 1976), the Board's findings of violations of both types of Section 9(a) air pollution and Section 12(b) water pollution permitting requirements were upheld. However, the $2,500 penalty was vacated as being against the manifest weight of the evidence and not an aid in enforcement of the Act. The court disagreed with the conclusion which the Board drew from its analysis of Section 33(c) factors. The court noted that the Board found minimal impact on health and the environment. Furthermore, the court found that the Board's emphasis on "discomfort and inconvenience caused to neighbors over a long period of time" from the offensive odors could not support a penalty when the remaining three of the four Section 33(c) factors favored the petitioners.

[17] The Draper and Kramer, Incorporated Case

In the case of Draper and Kramer, Incorporated v. Illinois Pollution Control Board, 40 Ill.App.3d 918, 353 N.E.2d 106 (1st Dist. 1976), the court reversed both the violation of Section 9(a) and the $1,000 penalty for the alleged discharge of a toxic mist from petitioner's cooling tower. The emissions were said to result in eye, ear, nose, throat and skin irritations. However, the court found that the described interference with life could not be attributed conclusively to petitioner's equipment. The

court noted that use of the chemical purportedly responsible was discontinued, but the physical complaints continued for almost nine more months. Petitioner also took prompt and cooperative action to prevent any further release of the spray upon learning at hearing that the spray itself, and not just the chemical, was objectionable. Neither the record nor the complaint had previously focused the violation on other than the one chemical. The court concluded that, under these circumstances, the penalty could not aid enforcement of the Act.

[18] The Marblehead Lime Company Case

Contrasting with the above cases, a penalty of $20,000 was affirmed in a 1976 case for a Section 9(a) air pollution violation which unreasonably interfered with life and property. In Marblehead Lime Company v. Pollution Control Board, 42 Ill.App.3d 116, 355 N.E.2d 607 (1st Dist. 1976), petitioner's lime manufacturing plant subjected area residents to constant fallout of dust which blanketed nearby property indoors and outdoors and caused skin, eye and throat irritations and breathing problems. The court concurred with the Board's evaluation of Section 33(c) factors, noting several mitigating factors. In finding no abuse of the Board's discretion to impose a penalty, the court highlighted the extent of the negative impact of the pollution and the availability of "housekeeping and maintenance" alternatives to control it. "The penalty was imposed after extensive hearings which indicated that petitioner, for a long period of time, had interfered with the enjoyment of life and property in ways that reasonably could have been avoided." Marblehead Lime, 355 N.E.2d at 612, 613. Thus, as in Lloyd A. Fry Roofing, [Case No. 12], the accessibility of pollution control procedures or equipment weighs heavily in favor of a penalty.

[19] The Hillside Stone Corporation Case

In another case involving the second type of air pollution, the First District reduced a penalty from $10,000 to $2,000. In Hillside Stone Corporation v. Illinois Pollution Control Board, 43 Ill.App.3d 158, 356 N.E.2d 1098 (1st Dist. 1976), the unreasonable interference with life and property due to heavy dust emission from the limestone quarry was much like that in Marblehead Lime, [Case No. 18]. After affirming the finding of the violation based on sufficient evidence on the Section 33(c) criteria, the court agreed with the petitioner that the fine was excessive. Evidence that petitioner had taken substantial steps to control emission, had spent $600,000 to control pollution, and had already paid a $10,000 fine as a result of a suit by the Cook County Department of Environmental Control persuaded the court to reduce the fine to $2,000. This amount was considered "adequate to aid enforcement of the Act and as a warning to Hillside of the necessity properly to maintain its equipment and to avoid delay

in the filing of a corporate approved plant for compliance." Hillside Stone, 356 N.E.2d at 1102.

[20] The Joliet Railway Equipment Company Case

In a 1982 case involving air pollution and open burning in violation of Section 9(a) and (c), the Third District court upheld a $10,000 penalty assessed, not by the Board, but by the Circuit Court of Will County. People of the State of Illinois v. Joliet Railway Equipment Co., 108 Ill.App.3d 197, 483 N.E.2d 1205 (3d Dist. 1982). Although the case was remanded with respect to injunctive relief granted, the lower court's penalty was affirmed as being supported by the evidence. The record included testimony of dizziness, vomiting, nausea, headaches, and tearing of the eyes in connection with a fire at petitioner's salvage yard. The regular operations resulted in repeated instances of fires and of toxic fumes emissions.

2. Water Pollution Cases

[21] The Meadowlark Farms, Inc. Case

In a 1974 water pollution case, the Board assessed a minor $141.66 penalty against the owner of surface rights in land on which coal mining refuse piles produced seepage containing acid mine drainage. Meadowlark Farms, Inc. v. Illinois Pollution Control Board, 17 Ill.App.3d 851, 308 N.E.2d 829 (5th Dist. 1974). The seepage entered a tributary of a larger stream, resulting in periodic fish kills from the contaminated flow. The $141.66 penalty was assessed for the value of the fish kill, and not under the Board's discretionary powers to assess penalties of up to $10,000 per violation and $1,000 per day. However, the court determined an important enforcement issue, finding that the owner of the water pollution source need not be shown to have created the hazard nor to have had knowledge of the discharge. "The Environmental Protection Act is malum prohibitum, no proof of guilty knowledge or mens rea is necessary to a finding of guilt." "[K]nowledge is not an element of a violation of Section 12(a) and lack of knowledge is no defense." Meadowlark Farms, 308 N.E.2d at 837.

[22] The Freeman Coal Mining Corporation Case

Citing Meadowlark Farms, [Case No. 21], the Fifth District again found a water pollution violation where a mine refuse pile on petitioner's land produced acidic runoff in the case of Freeman Coal Mining Corporation v. Illinois Pollution Control Board, 21 Ill.App.3d 157, 313 N.E.2d 616 (5th Dist. 1974). The court held that the water pollution threatened the health and welfare of the surrounding residents, may have made nearby crop land unproductive, and seriously impacted the fish and insect

population of the stream and adjacent vegetation. The totality of circumstances, however, did not support the $5,000 penalty assessed by the Board. The court reduced the penalty to $500 based on numerous mitigating circumstances, including petitioner's efforts and expenses to control the pollution through a water treatment system, the Board's use of a performance bond to ensure compliance, and the disproportionate size of the penalty compared to the less than $200 penalty in Meadowlark Farms, [Case No. 21].

[23] The Allaert Rendering, Inc. Case

Water pollution violations and related permit violations were the subject of an appeal in Allaert Rendering, Inc. v. Illinois Pollution Control Board, 91 Ill.App.3d 153, 414 N.E.2d 492 (3d Dist. 1980). The Board assessed a $3,000 penalty in connection with the wastewater treatment system of petitioner's rendering plant. Petitioner's highly contaminated lagoons created a hazard of water pollution to surface waters from flooding. The court held that it was not necessary to show actual pollution had already occurred since Section 12(a) of the Act prohibits the threat of contamination. Flooding, which was shown to have previously occurred, could reoccur. The court also found that the lagoons were illegally constructed and operated without permits. Given the environmental risks and the five-year history of delayed compliance with the Act and regulations, the court approved the penalty in a cursory statement, noting that "[t]he Board stated that it found the amount of the fines to be '... the minimum necessary to ensure future compliance...'" Allaert Rendering, 414 N.E.2d at 497. The court affirmed the penalty, finding no abuse of discretion in either its imposition or amount.

[24] The Archer Daniels Midland Case

In Archer Daniels Midland v. Illinois Pollution Control Board, 119 Ill.App.3d 428, 456 N.E.2d 914 (4th Dist. 1983) [Case No. 24a], petitioner appealed a sizable $40,000 penalty imposed for water pollution and NPDES permit violations, which resulted in fish kills and oily scum problems at a nearby lake. Contamination resulted from storm water discharges carrying organic material from petitioner's soybean and corn germ extraction plants and vegetable oil refinery. The Board assessed a $40,000 penalty after hearing evidence on the environmental impact on violations occurring from 1976 through 1981, on petitioner's efforts and $4,500,000 in expenditures for pollution control, on an Agency calculation of possible savings from non-compliance ranging from about $53,000 to $108,000, and on other factors such as the social and economic value of the pollution source and its suitability to the area. On appeal, the court remanded the case for redetermination of the penalty. The court found that the Board erroneously relied on evidence of the savings to

petitioner, which the court believed was based on spurious assumptions and lacked adequate foundation. At hearing, the Agency's witness testified that he used computer generated calculations, based on USEPA's "Noncompliance Penalty Formulae," which ultimately were too complicated to explain. Also, in response to the Board's assertion that $40,000 was de minimus given petitioner's financial strength, the court stated:

> We are not aware of any authority which makes the ability to pay the proper basis for a civil penalty and in the case of a multiplant corporation, it ignores any internal accounting system which might attribute the entire penalty to one profit center.
>
> Archer Daniels Midland, 456 N.E.2d at 99.

The court then distinguished Wasteland Inc., 118 Ill.App.3d 1041, 456 N.E.2d 964 (3d Dist. 1983), [Case No. 34], which gave support to a penalty which reflected savings from noncompliance. That case focused more on the violator's "continuing blatant disregard" of environmental laws, which this court believed contrasted substantially from the facts here. The court went on to emphasize that the Board inadequately considered the major efforts and $4,500,000 in expenditures already made and the willingness of petitioner to spend another $1,000,000 if that would remedy the problem.

On remand, the Board imposed a $32,500 penalty, after rejecting a $15,000 settlement proposed by the Agency and petitioner. That decision was appealed, and in Archer Daniels Midland v. Pollution Control Board, 149 Ill.App.3d 301, 500 N.E.2d 580 (4th Dist. 1986) [Case No. 24b], the court reduced the penalty to $15,000. The court based this decision on the substantial mitigating factors, including the large sums spent, and to be spent, towards compliance, good faith in reporting the violations, and value to the community. The court believed "$15,000 is adequate to aid in enforcement of the Act and to serve as a deterrent to ADM against future violations." Archer Daniels Midland, 500 N.E.2d at 584 (4th Dist. 1986) [Case No. 24b] (emphasis added). Noticeably, the court limited the scope of the deterrent effect to this petitioner only, and concluded that a much smaller penalty than the Board assessed would achieve that end.

[25] The Russell Perkinson, d/b/a Porkville Case

In a case involving the discharge of liquid swine waste into a stream, the Third District upheld a $10,000 penalty as well as an additional $10,376 for the value of 101,219 fish killed. Russell Perkinson, d/b/a Porkville v. Illinois Pollution Control Board, 135 Ill.Dec. 333, 543 N.E.2d 901 (3d Dist. 1989). In 1983 and 1984 petitioner's swine farm, which had experienced prior

seepage problems with its waste lagoons, discharged waste to an adjacent field where drain tiles connected to a discharge pipe carried the waste into a stream. The Board assessed respective fines of $10,000 and $1,000 for 1983 and 1984 violations of the Act, rules and regulations and NPDES permit conditions requiring notification of any discharge. Costs assessed for the 1983 and 1984 fish kills were $10,376.84 and $443.26. Petitioner appealed the 1983 fines and costs as an abuse of the Board's discretion.

In affirming the Board's decision, the court found that the violations did not require proof of knowledge or intent regarding the discharges. See Russell Perkinson, 543 N.E.2d at 904, citing Meadowlark Farms, [Case No. 21]; Hindman, [Case No. 28]; Freeman Coal Mining, [Case No. 22]; and Bath Inc., 10 Ill.App.3d 507, 294 N.E.2d 778 (4th Dist. 1973) [Case No. 34]. Furthermore, the court observed that although petitioner claimed that a trench constructed by vandals caused the 1983 violations, the court found no evidence that petitioner tried to prevent vandalism or lacked the capability to control the source of pollution.

> The case before us is controlled by the long line of precedent in Illinois which holds that the owner of the source of the pollution causes or allows the pollution within the meaning of the statute and is responsible for that pollution unless the facts establish the owner either lacked the capability to control the source, as in Phillips Petroleum or had undertaken extensive precautions to prevent vandalism or other intervening causes, as in Union Petroleum.
>
> Russell Perkinson, 543 N.E.2d at 904, citing Phillips Petroleum Co. v. Illinois Environmental Protection Agency, 72 Ill.App.3d 217, 390 N.E.2d 620 (2d Dist. 1979) and Union Petroleum Corp. v. United States, 651 F.2d 734, (Ct. Cl., 1981).

Furthermore, the continuing seepage from the lagoon also supported the Board's order. The court pointed out that the $10,000 penalty assessed was less than the Agency had requested and referred to the violation as a "major pollution event."

3. Permit Violation Cases

[26] The Highlake Poultry Inc. Case

Penalties assessed for violations of various permitting requirements have been the basis of a number of reversals of Board decisions. In the case of Highlake Poultry Inc. v. Pollution Control Board, 25 Ill.App.3d 956, 323 N.E.2d 612 (2d Dist. 1975), the petitioner began construction of a sewage

treatment plant without a permit. The court reversed penalties totalling $2,500 upon a showing that the Agency contributed to delays in securing a permit, and the petitioner had been cooperative and had achieved substantial compliance. Showing little tolerance for this particular enforcement action the court stated:

> It appears, further, that in this case a relatively small business was being put to considerable trouble and expense, was trying to cooperate with the various governmental bodies which seemed to be aligned against it, and was ultimately penalized for being too early rather than too late in making improvements to its sewage treatment system, on the instigation of an agency responsible in some measure for the company's predicament.
>
> Highlake Poultry, 323 N.E.2d at 615.

[27] The Freeman Coal Mining Case

Other cases reinforce the Second District's implication in Highlake Poultry, [Case No. 26], that permit violations in the face of good faith efforts and substantial compliance expenditures present a weak case for a penalty finding. The case of Freeman Coal Mining v. Illinois Pollution Control Board, 29 Ill.App.3d 441, 330 N.E.2d 524 (5th Dist. 1975) demonstrates that the appellate courts are not always impressed with the seriousness of permit violations, which may appear to be more form than substance when genuine efforts toward compliance have been made.

The Freeman Coal Mining case involved violations of both permit requirements and regulatory standards for air pollution (density of smoke) established by the Board's predecessor agency, the Air Pollution Control Board. The court remanded the decision to the Board on the basis that only two of three alleged violations could be sustained. It directed the Board to reevaluate the $1,500 penalty in light of the reduced number of violations and mitigating factors. The court specifically noted that with respect to the petitioner's failure to secure permits on a timely basis, "in determining the penalty for such violation, the Board should take into consideration that the installation of the multiclones was part of the approved ACERP" (Air Contaminant Emission Reduction Program). Freeman Coal Mining, 380 N.E.2d at 529. On remand the penalty was reduced to $850.

[28] The Hindman Case

In Hindman v. Environmental Protection Agency, 42 Ill.App.3d 776, 356 N.E.2d 669, (5th Dist. 1976), the court reduced penalties for open burning of refuse at a landfill and for permit violations by 60%, on finding some mitigating circumstances and good faith efforts at compliance. The court reduced the arguably nominal penalties from $250 and $500 to $100 and $200. In dropping the open burning fine to $100, the court stated that "the fine of $250 could not prevent the recurrence of fires for which he was not fully responsible." As to the permit violation, the court added that "a fine of $200 would have accomplished what the $500 fine sought to accomplish and would have been more closely related to the nature of the violation involved." Hindman, 356 N.E.2d at 672. This case illustrates a reluctance of the court to impose fines and the difficulty faced by the Board in setting amounts which might encourage compliance in similar circumstances.

[29] The Harris-Hub Company, Inc. Case

In another permit violation case, the First District found that the good faith, inadvertent failure to obtain a permit in the absence of a pollution violation could not support a $500 penalty. In Harris-Hub Company, Inc. v. Pollution Control Board, 50 Ill.App.3d 608, 365 N.E.2d 1071 (1st Dist. 1977), the court found that the company's good faith was shown by changing the plant's heating system, installing an afterburner, ceasing to burn refuse entirely, and beginning a plan to convert forklift trucks and tractors from gas or diesel to electric power. The company had a good faith belief that no permit was required and was not recalcitrant. It had also begun the permit application process before the complaint was filed, and the record did not reveal any economic advantage gained from its failure to obtain a permit. In a forceful commentary on seeking a penalty for permit violations, the court stated:

> Here, however, it is apparent that the resources of the EPA and the PCB would have been better served by obtaining compliance by polluters rather than by seeking the sanctions of a civil penalty for a technical noncompliance by Harris.
>
> Harris-Hub, 365 N.E.2d at 1074 (emphasis added).

[30] The Darrel Slager, d/b/a Rapid Liquid Waste Case

Darrel Slager, d/b/a Rapid Liquid Waste and Rubbish Removal v. Illinois Pollution Control Board, 96 Ill.App.3d 332, 421 N.E.2d 929, (1st Dist. 1981) presents the kind of case in which

the courts readily uphold a penalty for a permit violation. Here a $1,000 penalty was affirmed where petitioner showed "conscious disregard" of an Agency warning and the liquid wastes posed "an especially great hazard to the environment because of their tendency to spread quickly and react with other wastes." Darrel Slager, 421 N.E.2d at 934. Giving a measure of support for the function of permits, the court noted that, "one of the reasons for the permit requirement is to enable the Agency to supervise economically safe disposal methods for such substances." Penalties, therefore, may be most appropriate where safety hazards and the Agency's need to regulate those risks are at issue. [See also: R.E. Joos Excavating Co. v. Environmental Protection Agency, 58 Ill.App.3d 309, 374 N.E.2d 486 (3d Dist. 1978) [Case No. 31], affirming $1,500 penalty for operating a refuse disposal site without a permit; Pielet Bros. Trading, Inc. v. Pollution Control Board, 110 Ill.App.3d 752, 442 N.E.2d 1374 (5th Dist. 1982) [Case No. 32], affirming $7,500 penalty for operating a solid waste management site without a permit and other violations for on-site practices and open burning on a 80 acre automobile shredding and junk site.]

[33] The Wasteland, Inc. Case

In a 1983 case also involving a solid waste landfill site, a $75,000 penalty was upheld for numerous violations of the Act and regulations where operations were far beyond the scope of the permit. Wasteland, Inc. v. Illinois Pollution Control Board, 118 Ill.App.3d 1041, 456 N.E.2d 964 (3d Dist. 1983). Among other violations, the firm accepted unpermitted refuse, carried on salvage operations, failed to properly cover the waste, caused leachate problems, and handled almost three times the amount of waste estimated in its permit application. The court summarized the facts as "a case of continuing blatant disregard for requirements and procedures designed to protect the environment while permitting useful operations." Wasteland, Inc., 456 N.E.2d at 976. The court found that real dangers were present with these extensive violations, and this gave support to the "severity of the punishment." Id.

The court noted that the civil penalty was not in excess of the maximum $10,000 per violation and $1,000 per day, given that violations were committed for over a year. The court also found it was within the Board's discretion to assess this penalty in light of the Board's finding that Wasteland had saved $17,000 to $25,000 by burying unpermitted wastes and saved $45,000 due to violations occurring at a paper recovery site. This penalty was found by the court to aid enforcement of the Act, "for through penalties upon those who blatantly disregard applicable rules and regulation, others who might consider cutting corners at the expense of the environment, are deterred." Id. Here, where the court did not find good faith efforts at compliance, and the violators benefited at the clear expense of the environment, the court favored a high penalty which might deter others as well as

the violators. (For an early case involving violations of landfill rules and regulations for spreading, compaction, cover, salvage, and for underground burning, see Bath, Inc. v. Pollution Control Board, 10 Ill.App.3d 507, 294 N.E.2d 778 (4th Dist. 1973) [Case No. 34]. The case did not involve permit violations, but did support a $2,000 penalty for illegal landfill practices, including burning, which the court held did not require proof of knowledge, intent, or scienter.)

[35] The Citizens Utility Company of Illinois Case

Another example of the courts general reluctance to impose penalties for permit violations absent a showing of actual pollution or harm is found in Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, 127 Ill.App.3d 504, 468 N.E.2d 992 (3d Dist. 1984). In this case, the NPDES permit for operation of, and discharges from, a sewage treatment plant was allegedly violated due to inadequate operation and maintenance practices. The court reversed the $1,000 penalty, finding that no adverse environmental impact had occurred.

[36] The Standard Scrap Metal Company Case

In Standard Scrap Metal Company v. Pollution Control Board, 142 Ill.App.3d 655, 491 N.E.2d 1251, 1259 (First District, 1986), the court found that the company's operation of a furnace and incinerator for nine years and the associated air pollution "exhibited a blatant disregard for the rules and procedures designed to protect the environment." Affirming a $30,000 penalty, the court held that petitioner had acted in bad faith and that the permit violation had been accompanied by heavy smoke emissions which "endangered the public health and safety," "created a safety hazard" on the nearby highway, and caused nearby workers to become ill. Standard Scrap Metal, 491 N.E.2d at 1256.

The court found support for the amount of the penalty in the Board's consideration of Section 33(c) factors as well as the savings derived from noncompliance and the company's history of profits spent for officers' compensation instead of pollution controls. The court cited Wasteland, Inc., [Case No. 33], where the violations had also involved "dangers to the environment" and the "petitioner was a private party who reaped an economic benefit from violations." Standard Scrap Metal, 491 N.E.2d at 1257, 1258. (But see also: Archer Daniels Midland (1983), [Case No. 24a], where the Fourth District rejected the savings evidence and assertion of financial ability to pay.) The court likewise adopted the Wasteland, Inc., [Case No. 33], reasoning that the fine would aid enforcement of the Act by deterring others. The court noted with favor that the Board considered Standard Scrap's financial condition as a mitigating factor. However, the court also allowed the Board to take judicial notice of petitioner's

noncompliance with an earlier Board order, requiring the installation of pollution control devices, as a matter in aggravation. The court noted that it was inconsequential that the petitioner was a different legal entity than that in the earlier order, finding that petitioner was the successor-in-interest to the first entity. Standard Scrap Metal, 491 N.E.2d at 1258.

Ascribing more significance to permit violations than some other court opinions have, the First District stated:

> Contrary to Standard Scrap's contention, violation of the Act's permit requirements is not a mere "paper" or "minor" violation. Rather, the violation of a permit requirement goes directly to the heart of the state's enforcement program and ability to protect against environmental damage. The permit program is a method through which the State of Illinois can control emitters of contaminants into the atmosphere, as well as emissions that may result in the presence of contaminants in the environment.... [T]he Act provides that where a permit requirement imposes an arbitrary or unreasonable hardship, a party can seek and obtain a variance from the permit requirement.
>
> Standard Scrap Metal, 491 N.E.2d at 1256 (emphasis added).

The court went on to note that despite Agency efforts, Standard Scrap did not comply with permit requirements and did not appeal its permit denials or seek a variance. The court seemed to be addressing these points in the context of lack of good faith, but it should be noted that failure to seek a variance was held by the Second District in 1990 to be an inappropriate element in a consideration of Section 33(c) factors. See Modine Manufacturing, 193 Ill.App.3d 643, 549 N.E.2d 1379 (2d Dist. 1990). [Case No. 38] below.

[37] The Trilla Steel Drum Corporation Case

A 1989 appeal involving a $10,000 penalty for the failure to secure an operating permit for manufacturing operations which resulted in VOM emissions ended in reversal and remand on the issue of the penalty. Trilla Steel Drum Corporation v. Pollution Control Board, 180 Ill.App.3d 1010, 536 N.E.2d 788 (1st Dist. 1989). The penalty was based on the lack of a permit and not on any finding of violation of emission regulations or of bad faith. Standing alone, then, the permit violation was found to be an inadequate basis for what the court labeled "the maximum penalty of $10,000." Id., 536 N.E.2d at 791 (emphasis added).

The court did not explain how it calculated that $10,000 would be the maximum penalty for a violation of the Act for a period in excess of 15 months. In the court's view, the record showed that the violation lacked the requisite seriousness to warrant this penalty. This was found to be especially true since an expired permit and a variance application pending at the time of the complaint put Trilla within "the regulatory awareness of the Agency." "The Board has not shown that Trilla's omission has harmed in a serious manner either the information gathering or oversight roles of the Agency." Trilla Steel Drum, 536 N.E.2d at 790. Discouraging the use of a penalty as a general deterrent to violations, the court advised that "[t]he Board should not attempt to make an example of Trilla since such a practice has been expressly disapproved of by this court..." Id., at 791 citing Southern Illinois Asphalt [Case No. 4] and City of Chicago v. Illinois Pollution Control Board, 57 Ill.App.3d 517, 373 N.E.2d 512 (1st Dist. 1978) [Case No. 39]. This case illustrates how, absent proof of actual or threatened harm, most large penalties for permit violations have not been affirmed by the courts.

[38] The Modine Manufacturing Company Case

Modine Manufacturing Company v. Pollution Control Board, 193 Ill.App.3d 643, 549 N.E.2d 1379 (2d Dist. 1990), was an appeal of a $10,000 civil penalty imposed by the Board on remand after an earlier appeal. The $10,000 penalty was imposed for operating without a permit in violation of Section 9(b) of the Act.

The 1990 court opinion noted that beginning in late 1981, Modine's emission levels were found by the Agency to exceed regulatory limits. Despite efforts made by Modine, emissions remained excessive and the renewal of its operating permit was denied in 1983. Contact with the Agency and corrective efforts continued, with Modine also spending $22,000 in 1984 and $310,000 in early 1985 to achieve compliance. At a June 1985 pre-enforcement meeting, the parties agreed that Modine would replace its pollution control process with one based on technology it purchased at the $310,000 cost above, and that the Agency would refrain from bringing an enforcement action for emission violations. The Agency brought an enforcement action in February, 1986 and the Board imposed a $10,000 fine for operating without a permit since October, 1983 and for violations of particulate emission limitations. In the original appeal, the court found that the Agency could not pursue the emissions violation and remanded to the Board on the sole issue of the appropriate penalty for the permit violation. Id., 549 N.E.2d at 1381, citing Modine Manufacturing Company v. Pollution Control Board, 176 Ill.App.3d 1172, 549 N.E.2d 359 (1988). On remand, the Board imposed a $10,000 penalty for the permit violation alone. Modine appealed the Board's decision and the court reduced the fine to $1,000.

The Second District rejected appellant's argument that a penalty could not aid enforcement since the violation had ended before the complaint was filed. "[W]e decline to hold categorically that penalties may not be imposed for wholly past violations." Modine Manufacturing, 549 N.E.2d at 1382, citing City of East Moline v. Pollution Control Board, 136 Ill.App.3d 687, 693, 483 N.E.2d 642 (3d Dist. 1985) [Case No. 41]. However, when the court reviewed the Board's decision, the court found that although some penalty could be sustained, the amount was influenced by not only Section 33(c) factors, but Modine's good faith, candor, cooperation, sincere efforts and expenditure of substantial amounts of money to remedy the problem. Modine Manufacturing, 549 N.E.2d at 1384. The court found that $1,000, and not $10,000, was in keeping with the Supreme Court's ruling in Southern Illinois Asphalt, [Case No. 4], that all the facts and circumstances bearing on the reasonableness of the complained of conduct and the seriousness of the infraction must be considered in a penalty determination. Citing Trilla Steel Drum, [Case No. 37], the court found that Modine had become a part of the regulatory program and, therefore, the Board's estimate of the seriousness of the failure to secure a permit was of diminished importance. Interestingly, the court also found that Modine's failure to seek a variance was not relevant to the Board's evaluation of technical practicality or economic feasibility. This was a "procedural consideration" only, which the court found excusable. Modine Manufacturing, 549 N.E.2d at 1383. Again, a permit violation without attendant harm or bad faith did not support a large penalty, much less the statutory fine of up to $10,000 per violation, which the court here referred to as the "maximum penalty of $10,000," while noting that the Board had argued that the statute also provides for a $1,000 per day additional penalty. Id., 549 N.E.2d at 1384 (emphasis added). As in Trilla Steel Drum, [Case No. 37], the court did not explain how it calculated that $10,000 would be the maximum penalty for several years of non-compliance with the permit requirements.

4. Local Government Cases

Penalty cases involving local governments reflect a certain deference to the needs and workings of those governing bodies. The courts seem to recognize the nature of the economic impact of a civil penalty on the community. Compliance alternatives are perhaps more limited for a public body considering the range of public services which must be delivered consistently to the public. Among other services, water, sewer, and garbage collection are important health services provided by local governments. Their costs are borne by the public and the ability to finance them involves a variety of issues, such as the health of the local economy, the availability of bond financing and the possibilities of state or federal aid. Pollution control measures and any penalties for violations also raise these questions. Looking to these facts, the courts seem to allow less latitude to the Board where the Board has attempted to impose

penalties for violations of environmental laws. The appellate case law therefore shows a pattern of frequently reduced or vacated penalties.

[39] The City of Chicago Case

In 1978, the First District reversed a $10,000 penalty for operation of a municipal incinerator without a permit in violation of Section 9(b) of the Act, and for air pollution and particulate emissions which violated Section 9(c). The court found that "[f]irst, petitioner demonstrated a sincere desire to eliminate, or at least reduce, stack emissions.... Secondly, the Board's Order failed to consider economic and technological factors." City of Chicago v. Illinois Pollution Control Board, 57 Ill.App.3d 517, 373 N.E.2d 512 (1st Dist. 1978). The court was favorably impressed by petitioner's studies and efforts to minimize air pollution with respect to all its facilities, and not just the one involved here. Furthermore, to modify the incinerator in question would require a two year shutdown or inordinate expense, given that the City had decided to abandon it and develop a new plant. The court found that the Board had assessed a large penalty despite mitigating circumstances and the failure of the Agency to request a penalty. "Consequently, we believe the Board's primary purpose was to make an example out of petitioner. Such a purpose is improper and in this case violates the requirement that the penalty bear some relationship to the seriousness of the infraction." City of Chicago, 373 N.E.2d at 516.

One more caveat was delivered by the court. That was a caution to the Board in cases involving local government. "Many of the considerations facing petitioner directly involved the public sector. The public would be the ultimate loser if petitioner were to shutdown operations." City of Chicago, 373 N.E.2d at 516 (emphasis added).

[40] The City of Moline Case

In The City of Moline v. Pollution Control Board, 133 Ill.App.3d 431, 478 N.E.2d 906 (3d Dist. 1985), the court vacated a $90,000 fine imposed by the Board for water pollution violations associated with the city's sewage treatment plant. The court agreed that the city had violated the Act, regulations, and its NPDES permit. However, the court found that the serious pollution problems were substantially cured before the complaint was filed. The court concluded, therefore, that the penalty could not aid enforcement of the Act. It reversed the penalty, highlighting two facts:

> Two significant facts dictate against the imposition of any mandatory penalty by the Board. First, the ends sought did not necessarily require the bringing of the instant complaint. In working with Moline to solve its problems, the IEPA chose an effective and appropriate course of action. Instead of jumping the gun in September 1980 and bringing an action against an obvious polluter, the IEPA took the prudent course of seeking alternative means to assure compliance. The maintaining of this course produced, if not with any great immediacy, the initially desired result. This was particularly appropriate in that the IEPA was dealing with neither a wilful and callous pillager of the environment nor a private party for whom delayed compliance would translate into personal gain. Second, one must consider the identity of the respondent. The burden of the fine would be borne by the taxpayers of Moline. While the Board points out that the under-assessment of these taxpayers was a contributing reason for Moline's noncompliance, it would serve no useful purpose to punish them further for the violations charged. It should also be noted that an increase by 165% in sewer assessments was necessary to finance the measures instituted by Moline.
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> City of Moline, 478 N.E.2d at 908, 909 (emphasis added).

The court seemed to be distinguishing municipalities which make some efforts at compliance from private parties who might personally profit from noncompliance. Economic gain from noncompliance might be relevant in assessing a penalty, but the court implied that this factor is not as meaningful for a municipality, since the benefit is not personal in nature. The court reached this conclusion despite the Board's finding that Moline's delayed compliance resulted in savings in excess of $1.3 million. (See IEPA v. City of Moline, 60 PCB 01, 17, PCB 82-154, Sept. 6, 1984.) The court also observed that the burden of a penalty would be borne by the taxpayers who ultimately pay for the municipality's environmental programs. The court seemed sympathetic to Moline's situation, and, therefore, reversed the $90,000 fine completely, even though the Board had calculated the maximum penalty at $43,697,000.

[41] The City of East Moline Case

The case of City of East Moline v. Pollution Control Board, 136 Ill.App.3d 687, 483 N.E.2d 642 (3d Dist. 1985) involved violations of permits and of various regulations governing the city's sanitary landfill, such as clay cover requirements, control of leachate and vectors (animals/insects), and dumping practices. The court reduced the penalty from $30,000 to $10,000, finding that many of the violations had ended before enforcement proceedings began (including some of which were cured by the issuance of permits). It also held that the Agency's conduct from the early 1970's until 1980 "represent[ed] an accommodation to and an acceptance of an inappropriate level of compliance which can not now be characterized as bad faith." City of East Moline, 483 N.E.2d at 648. The court was willing to impose a penalty for violations which were related to "conditions existing at the time the enforcement proceedings were instituted," which ..."might well promote compliance with the violated sections of the regulations." Id. at 648. A penalty might then help bring about a municipality's compliance if enforcement relates to violations of a current nature.

[42] The City of Freeport Case

In a 1989 decision, the Second District showed much less deference where a City's sanitary sewer backed up and overflowed into homeowners' yards and flooded basements over a 20-year period. In City of Freeport v. Pollution Control Board, 135 Ill.Dec. 644, 544 N.E.2d 1 (2d Dist. 1989) a $10,000 penalty was affirmed based on the court's concurrence with the Board's evaluation of Section 33(c) factors. The court noted that the long-standing violations imposed "an extreme inconvenience on homeowners as well as health risks." City of Freeport, 544 N.E.2d at 4. The Board found that the solutions were neither technically impracticable or economically unreasonable. Firmly supporting the Board's decision, the court also noted that the Board had authority to impose a fine of $1,000 per day, but did not.

C. Penalty Factors Derived From Illinois Case Law

The courts have reviewed the Board's penalty decisions by balancing statutory and other factors relevant to the reasonableness of the pollution offense. The statutory guidelines are delineated in Section 33(c)(1) through (6). The other considerations are discussed in the cases under the Section 33(c) directive to consider all the facts and circumstances. Some of these factors addressed in the body of case law are good faith, any deterrent effect of a penalty, economic benefits of noncompliance, ability to pay, and cessation and duration of a violation. Court-enunciated principles on these factors are discussed below.

1. Statutory Factors

The six statutory criteria of Section 33(c) to be considered in enforcement cases provide only the starting point in a penalty determination. The statute specifically states that "the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to" the six criteria. See also Modine Manufacturing, [Case No. 38], and Southern Illinois Asphalt, [Case No. 4]. Those enumerated factors may be characterized as (1) harm, (2) social and economics value, (3) appropriateness of location of the pollution source, (4) technical practicability and economic reasonableness of pollution control, (5) economic benefits of noncompliance, and (6) any subsequent compliance. The courts have not weighted these factors in terms of relative importance. However, in keeping with the Supreme Court's emphasis in Southern Illinois Asphalt, [Case No. 4], on the seriousness of the offense or infraction, physical ailments or serious health risks have generally warranted imposing penalties. See Marblehead Lime, [Case No. 18] Darrel Slager, [Case No. 30], Wasteland, Inc., [Case No. 33]. On the other hand, permit violations, absent bad faith or harm, generally have not been sufficient to support a penalty. See Southern Illinois Asphalt, [Case No. 4], Harris-Hub, [Case No. 29]. Another key fact, the availability of control technology that is not prohibitively costly, has generally justified a penalty. See Aluminum Coil Anodizing, [Case No. 11]; Lloyd A. Fry Roofing, [Case No. 12]; Standard Scrap Metal, [Case No. 36]. However, no formulae exist, and essentially, the Board must make a case-by-case determination.

2. Good Faith

The courts have found evidence of the presence or absence of good faith to be a very significant determinant of a penalty. Good faith has not been found to be a matter of intent, since intent or guilty knowledge is not a necessary element to finding a violation. Rather, good faith has been inferred from behavior which reflects diligence and which is reasonably directed towards the goal of achieving compliance. The acceptable efforts have included hiring engineers to find a cure for pollution, attempting to secure permits, installing pollution control equipment at considerable expense, and abandoning offensive practices all together. See, e.g., City of Chicago, [Case No. 39], Harris-Hub, [Case No. 29], Archer Daniels Midland, [Case No. 24], Modine Manufacturing, [Case No. 38].

The quantum of good faith effort to achieve success may have fallen short of successful pollution abatement, and yet the court has found that no penalty was justified, even though some violation had been found. Bresler Ice Cream, [Case No. 13], Chicago Magnesium Casting, [Case No. 14], CPC International, [Case No. 15], Arnold N. May, 16]. Bad faith or blatant disregard of environmental laws, however, strongly supports a

penalty. See Wasteland, Inc., [Case No. 33], Standard Scrap Metal, [Case No. 36].

3. Other Considerations

a. Aiding Enforcement by Deterring Others

Some conflict exists over whether deterring others from violating environmental laws is an appropriate element in assessing civil penalties. In the 1976 case, Aluminum Coil Anodizing, [Case No. 11], the court explained that a $1,500 penalty would aid enforcement "by working to secure voluntary compliance with the Act in other cases, especially by ACA at its new facility. Id., 315 N.E.2d at 619 (emphasis added). Here, the company had made no good faith efforts at curing an odor problem for over one year after the complaint was filed. In the absence of further explanation from the court, the penalty might be considered as generally deterring similar bad faith in others, and thereby, indirectly fostering compliance.

Similarly, in 1983 the court in Wasteland, Inc., [Case No. 33], held that the $75,000 penalty for blatant disregard of landfill rules and regulations would aid enforcement since "others, who might consider cutting corners at the expense of the environment, are deterred." Id., 456 N.E.2d at 976. This position was specifically adopted in 1986 by the First District in Standard Scrap, [Case No. 36]. That court found that a $30,000 penalty for the bad faith violation of air pollution laws would aid enforcement of the Act by deterring others.

However, in 1989 the First District admonished the Board not "to make an example" of a company against whom the Board assessed a $10,000 penalty for failure to secure an operating permit. Trilla Steel Drum, 536 N.E.2d at 791. In this case neither harm in the form of excessive emissions nor bad faith was proved. The court relied on the Supreme Court decision in Southern Illinois Asphalt, [Case No. 4], and its own decision in City of Chicago, [Case No. 39], both of which involved permit violations. In both of these early cases, the courts found that in light of all the facts and circumstances, the violations were not sufficiently serious to justify the penalties, and the primary purpose of a penalty is to aid enforcement of the Act. In the City of Chicago, [Case No. 39], the First District reversed a $10,000 penalty since it believed that despite the City's substantial efforts, the Board's primary purpose "was to make an example out of petitioner. Such a purpose is improper..." Id., 373 N.E.2d at 516. Thus, while the Board has some appellate court support for assessing penalties which might deter others, some Illinois decisions suggest that this cannot be the Board's primary purpose in assessing penalties, although higher penalties may be warranted for relatively more serious violations or those evidencing bad faith.

b. Economic Benefit From Non-Compliance

Independent of the 1987 statutory amendment requiring consideration of economic benefits, some appellate courts have acknowledged that the Board may consider whether a violator has gained an economic benefit or cost savings from delayed compliance as part of a penalty determination. In Wasteland, Inc., [Case No. 33], total cost savings of $62,000 to $70,000 were considered in affirming a $75,000 penalty for blatant violations of landfill requirements. Similarly, in Standard Scrap Metal, [Case No. 36], the court noted that "in Wasteland, as in this case, the petitioner was a private party who reaped an economic benefit from violations." Id., 491 N.E.2d at 1258. In affirming a $30,000 penalty for nine years of blatant violations, the court supported the Board's reliance on an Agency estimate of cost savings of approximately $104,500. The court found that the evidence showed "a substantial economic savings by Standard Scrap at the expense of the public health and welfare," which was properly considered by the Board. Id., 491 N.E.2d at 1259.

The cost savings was found to be estimated conservatively and was based on the following evidence:

> James Levis, economist employed by the Agency, testified that Standard Scrap saved approximately $104,500 by failing to install the afterburner required by the 1974 order. This figure was arrived at based on a computer program adopted by the United States Environmental Protection Agency (USEPA). Levis testified that the computer program utilizes the following data: the estimated cost of the afterburner at the time that it was initially to be installed; the prevailing rate of inflation for the relevant time period; the discount rate, based on Standard Scrap's average return on stockholders' equity; the interest rate on Standard Scrap's long term debt; Standard Scrap's marginal income tax rate; the investment tax credit rate; Standard Scrap's capital structure; and the depreciation life of the afterburner equipment.
>
> Id., 491 N.E.2d at 1255

These two cases relied on cost savings by a violator who was found to have acted in bad faith. Other cases suggest that the cost savings may carry less weight when good faith efforts have been shown. In Harris-Hub, [Case No. 29], for example, the court reversed a $500 penalty based on good faith and inadvertence in failing to obtain a permit. Further support for vacating the penalty was the absence of apparent benefit from non-compliance. "[T]he record fails to disclose that Harris was

gaining any economic advantage over its business competitors considering the expense incurred in controlling possible pollution in its manufacturing procedures." Id., 365 N.E.2d at 1075. Good faith was of primary importance, but economic benefit was nonetheless relevant.

In Archer Daniels Midland, [Case No. 24a], the court focused more particularly on the relative importance of good faith and cost savings from non-compliance. Here, the court rejected the savings data, finding that the purported savings could not be calculated and the penalty had been based on improper and incompetent evidence of savings. The court distinguished Wasteland, Inc., [Case No. 33], holding that Wasteland's continuing blatant disregard was of greater significance than the violator's savings. The court implied that multi-million dollar environmental expenditures might outwiegh cost savings even if adequately proved. Yet the court did not reject savings as a penalty factor per se.

In vacating the penalty against the city in The City of Moline, [Case No. 40], the court relied in part on the contrast between the city and a "private party for whom delayed compliance would translate into personal gain." Id., 478 N.E.2d at 908, 909. Clearly, this reflects the relevance of possible economic benefits due to non-compliance , but would limit the savings factor to non-governmental entities.

Consideration of the economic benefits of non-compliance became part of the statutory factors listed in Section 33(c) when Section 33(c)(5) was added in 1987. That Section now requires the Board to consider "any economic benefits accrued by a non-complying pollution source because of its delay in compliance with pollution control requirements." Section 33(c)(5).

c. Ability to Pay

In Standard Scrap Metal, [Case No. 36], (1986) the court considered evidence of five years financial history in deciding that petitioner could have installed pollution control equipment many years prior to the filing of the complaint. Rejecting arguments of current inability to pay, the court found that the hardship was self-imposed, even if the economic viability of the business was endangered.

> If Standard Scrap does not now have funds to cover both penalty and compliance costs, as well as cease and desist operations until compliance is achieved, that hardship is self-imposed. The company should have taken the necessary steps to bring its facility into compliance when first notified by the Agency and at a time when sufficient funds were available to do so. Standard Scrap cannot now be allowed to pass off a necessary cost of

> doing business in this state, and one borne equally by competitors, by arguing that compliance with environmental laws will put it out of business. If that were the case, no business would ever be inclined to comply with Illinois' environmental requirements.
>
> Id., 491 N.E.2d at 1257

This was considered in the court's discussion of technical practicality and economic reasonableness under 33(c). That this petitioner could have afforded to control pollution weighed in favor of imposing a penalty. The court distinguished the City of Moline, [Case No. 40], since Standard Scrap's violations were wilful, ongoing, of longer duration, and not involving a governmental entity.

A separate issue is whether petitioner could afford to pay a penalty of $30,000. Here, the court noted that "the Board, in determining the amount of the fine, took into account Standard Scrap's financial condition as a mitigating factor." Id., 491 N.E.2d at 1258 (emphasis added). The court also observed that the Board indicated that an extended payment plan might be possible, otherwise payment would be due within 90 days. The court thus supported an inability to pay as a factor which might warrant a smaller penalty or modified payment plan.

The converse of this principle may not be true. Financial strength may not warrant a larger penalty than would be imposed solely on the basis of the seriousness of the violations. In fact, the Fourth District in Archer Daniels Midland, [Case No. 24a], rejected the Board's argument that $40,000 was a de minimus penalty for a large financially strong petitioner. The court stated, "We are not aware of any authority which makes the ability to pay the proper basis for a civil penalty." Id., 456 N.E.2d at 99. Thus, the Board may not approach penalties like a progressive tax, growing in proportion to net worth and income. Yet this is not to say that economic reasonableness pursuant to section 33(c) is any less relevant or that the Board may not consider ability to pay in mitigating the penalty. (See also pages 45-46 herein for applicability of ability to pay in federal penalty decisions.)

The City of Moline case, [Case No. 40], suggests that the consideration of ability to pay differs in the case of local governments as compared with private parties. Since a local government's expenses must be borne by its taxpayers, a penalty may be more punitive that it is an aid to enforcement. A municipality's limited ability to pay, therefore, may be considered in mitigation of a penalty, although it certainly does not wholly negate the possibility of a penalty. (See, e.g., City of Freeport, [Case No. 42], upholding $10,000 penalty.)

As the earlier discussion of Illinois Supreme Court and Appellate Court decisions reveals, the courts have reversed a high percentage of the Board's penalties against municipalities. (See footnote 7 at page 58 and Tables Nos. 5 and 6, at page 68, 69.) The theme that compliance by municipalities involves unique circumstances is often stated in state and federal court decisions. At the federal level, for example, this is reflected in the USEPA's highlighting in its 1989 report that it had just secured its highest penalty against a municipality - $1,125,000. This is about half of what USEPA highlighted for penalties against non-municipalities for RCRA and Clean Water Act violations. (See discussion herein at page 64.) Similarly, for Illinois, the highest penalty against a municipality was the $10,000 penalty, noted above, assessed against the City of Freeport. The status of a violator as a unit of local government thus seems to be relevant in a penalty case, and appears closely related to issues such as who really pays the penalty. Although the Board would not quantify or predict the degree to which municipal status may affect a penalty decision, this is part of the totality of facts and circumstances to be considered.

d. Cessation and Duration of Violation

In the City of East Moline, [Case No. 41], the Third District reviewed other decisions on the subject of whether a penalty can aid enforcement of the Act if the violation has ended. That court drew the following conclusion:

> If compliance with proper environmental practices is the primary purpose for imposing civil penalties then prohibited practices long discontinued are not an appropriate basis for the assessment of civil penalties. This does not mean that cessation of the violation before the enforcement proceeding commences should bar the assessment of a penalty if such penalty is related to compliance with the Act.
>
> Where previous conduct constituting environmental violations has been discontinued, penalties assessed by the Board have been reversed in such cases as Southern Illinois Asphalt Co., Inc. v. Pollution Control Board 60 Ill.2d 204, 326 N.E.2d 406 (1975); Bresler Ice Cream Co. v. Pollution Control Board 21 Ill.App.3d 560, 315 N.E.2d 619 (1974), Chicago Magnesium Casting v. Pollution Control Board 22 Ill.App.3d 489, 317 N.E.2d 689 (1974); CPC International, Inc. v. Pollution Control Board 24 Ill.App.3d 203, 321 N.E.2d 58 (1974). A review of the aforementioned cases reveals a pattern indicating the relationship of the enforcement proceeding

> and the discontinuance of the violation. The longer the time period, the lapse between cessation of the violation and commencement of the enforcement proceeding, the more likely such enforcement proceeding is apt to be considered punitive only having no relation to securing compliance with the Act.
>
> City of East Moline, 483 N.E.2d at 647, 648. See also City of Moline, [Case No. 40] (emphasis added).

The absence of a continuing violation has persuaded the courts to vacate or reduce penalties, as in the case of City of East Moline where the fine was reduced because some violations had long since been cured. However, in 1988 the Act was amended to add to Section 33(a) that "[i]t shall not be a defense to findings of violation... or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation." This fact was noted in the 1989 case, Modine Manufacturing, [Case No. 38], where the Second District stated that "we decline to hold categorically that penalties may not be imposed for wholly past violations." Modine Manufacturing, 549 N.E.2d at 1382. The court reaffirmed the Illinois Supreme Court's ruling in Southern Illinois Asphalt, [Case No. 4], that all the relevant facts and circumstances must be examined in a penalty determination. Section 33(c) was also amended in 1988, and now Section 33(c)(6) provides that the Board shall consider "any subsequent compliance". This is now to be considered in any penalty determination but neither negates nor mandates a penalty.

D. Summary Outline of Illinois Statutory and Judicial Penalty Considerations

The statutory factors which the Board must consider are summarized as follows:

* All the facts and circumstances. Section 33(c).
* Character and degree of injury or interference. Section 33(c)(1).
* Social and economic value. 33(c)(2).
* Suitability/unsuitability of pollution source to its locale. Section 33(c)(3).
* Technical practicability and economic reasonableness of pollution abatement. Section 33(c)(4).
* Economic benefits of non-compliance. Section 33(c)(5).

* Any subsequent compliance. Section 33(c)(6).

In addition to these statutory factors, according to the Illinois courts, several other considerations appear to be significant:

* Conduct suggesting the presence or absence of good faith.

* Whether the penalty will aid enforcement of the Act by deterring non-compliance.

* Ability to pay. (Including governmental or private party status).

* Duration of the violation.

* Cessation of the violation prior to commencement of enforcement proceedings.

E. Illinois Legislative Intent

The Illinois Legislature has responded to the need for the effective use of penalties in enforcement cases by revising both Section 33 and Section 42 of the Act. As previously discussed, Section 33 provides for the Board's issuance of final orders and determinations in enforcement cases and authorizes cease and desist orders and penalties. The Board is required to consider various factors including, but not limited to, those specified in Section 33(c)(1) through (6). Penalty amounts are governed by Section 42.

Section 33(a) was amended in response to various Illinois court decisions where the penalties were held inappropriate since compliance had been achieved before the Board made its findings and assessment of penalties. One particular court decision which spurred this legislative initiative was the Moline case, [Case No. 40], In IEPA v. City of Moline, 60 PCB 01, PCB 82-154, Sept. 6, 1984, the Board imposed a $90,000 penalty for many years of violation, but the court reversed the penalty, primarily due to Moline's eventual compliance. City of Moline v. PCB, 133 Ill.App.3d 431, 478 N.E.2d 908 (3d Dist. 1985). The following sentence was added to Section 33(a) in 1988, and addresses this kind of fact situation:

> It shall not be a defense to findings of violations of the provisions of the Act or Board regulations or a bar to the assessment of civil penalties that the person has come

> into compliance subsequent to the violation, except where such action is barred by any applicable State or federal statute of limitation.

This section essentially fortified the Board's enforcement authority. A reviewing court could no longer predicate reversal of a Board decision on the mere fact of subsequent compliance. Last minute or delayed compliance thus could not be used to shield a violator from enforcement and possible penalties.

Section 33(c)(5) was added in 1987 and requires the consideration of "any economic benefits accrued by a non-complying pollution source because of its delay in compliance with pollution control requirements." Thus, the Legislature authorized the Board to recapture the gain derived from polluting, thereby removing the incentive to defer compliance. Although this is one of several Section 33(c) factors, this added section mandates that the Board consider whether a pollution source has profited from its violations.

Section 33(c)(6) was added in 1988 and requires the Board to consider "any subsequent compliance." Later compliance, then, is but one of many factors to be considered by the Board. This factor is to be evaluated as part of the totality of facts and circumstances. Other factors remain significant in the Board's determination, even if subsequent compliance has been achieved.

Section 42(a) was amended in 1989 to increase the maximum statutory penalty from $10,000 per violation to $50,000 per violation. The additional penalty of $1,000 for each added day of violation was increased to $10,000 per day of continuing violation. The effective date of this increased statutory penalty was January 1, 1990. The higher Illinois penalties are now more consistent with federal enforcement penalties.

Overall, the Board must conclude that legislative amendments since 1970 have almost all been in the direction of increasing the amount of civil penalty which would be recovered from a violator.

II. OVERVIEW OF FEDERAL LAW ON CIVIL PENALTIES

A. Federal Statutory Considerations

Various federal statutes mandate that Illinois conform its regulatory and enforcement activities with federally established requirements. As an example, the 1965 Amendments to the Federal Water Pollution Control Act required that every state adopt water quality standards subject to federal approval. Later amendments to this Act also established National Pollutant Discharge Elimination System (NPDES) permit requirements by which the state Agency issues permits and is charged with continuing enforcement duties (See 33 U.S.C. 1342 and Section 39 of the Illinois Act).

Similarly the Clean Air Act requires state adoption and enforcement of state implementation plans (SIP's) to achieve national goals for ambient air quality. For this reason federal statutes, case law, and policy pronouncements should help to guide enforcement actions, including penalty determinations, at the state level.

As one example, the Federal Water Pollution Control Act, commonly known as the Clean Water Act, includes an enforcement scheme that contemplates primary enforcement by the state and, alternatively, enforcement by the Administrator of the United States Environmental Protection Agency ("USEPA"). Section 309(a), 33 USC 1319(a). The Administrator has authority to seek injunctive relief, criminal penalties, and civil penalties (Section 309(b), (c), (d), respectively). Section 309(d) provides for civil penalties of up to $25,000 per day for each violation and requires the court to evaluate various factors, just as Section 33(c) of the Illinois Act requires consideration of certain factors.

> In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.
>
> Section 309(d) of the Clean Water Act, 33 U.S.C. 1251 et seq.

Section 309(g) provides a more expeditious alternative to judicial enforcement. It creates a system for administrative penalties, which are assessed, after consultation with the state, in dollar amounts which are less than the $25,000 per day for judicial enforcement provided under Section 309(d) above. Administrative penalties are grouped under class I or class II civil penalties. A class I civil penalty "may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty...shall not exceed $25,000." Sec. 309(g)(2). This carries a right to a limited hearing to "provide a reasonable opportunity to be heard and to present evidence." Section 309(g)(2)(A). A class II civil penalty has the same $10,000 per day maximum, but the total assessed shall not exceed $125,000 and the right to a hearing is in accordance with section 554 of title 5, United States Code." Section 309(g)(2)(3). Section 309(g)(3) provides guidelines similar to the 5 factors of Section 309(d) above:

> In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be , shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and , with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.
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> Section 309(g)(3) of the Clean Air Act, 33 U.S.C. 1251 et seq.

Obviously, these federal statutory factors, which must be considered in setting the amount of the penalty, are similar to the Illinois statutory directives in Section 33(c). Noticeably different, however, is the federal focus on the history of past violations, the degree of culpability, and the economic impact of the penalty on the violator or the ability to pay. Of these considerations, only the federal acceptance of the relevance of ability to pay seems at odds with at least one Illinois Appellate Court decision. In the 1983 Archer Daniels Midland decision, [Case No. 24a], the court was "not aware of any authority which makes the ability to pay the proper basis for a civil penalty." Id., 456 N.E.2d at 99. Certainly the 1987 Clean Water Act Amendments in Sections 309(d) and (g) now provide at least conceptual authority on this issue.

Furthermore, the legislative history of the Clean Water Act indicates that certain factors, including the economic impact of the penalty on the violator, have long been held relevant to a penalty determination. In 1977 at the time of the enactment of amendments to the Clean Water Act, Senator Muskie cited the USEPA's penalty calculation policy with favor. 123 Cong. Rec. 39193 (1977). The penalty policy was used in settlement negotiations with violators. Factors to be considered in negotiations were the seriousness of the offense, prior violations, good faith efforts toward compliance and the economic impact of the penalty. (For detailed discussion of legislative history, see: W. Andreen, "Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act." 55 Geo. Wash. L. Rev. 202 (1987). See also: M. Brown, D. Gerger, C. Harris, The Water Quality Act of 1987: Expansion of the Government's Criminal, Civil and Administrative Enforcement Authority. 144 PLI/Lit 95 (1987); Tull v. U.S., below).

B. U.S. Supreme Court Cases: The Tull and Gwalney Decisions

1. The Tull Case

A 1987 U.S. Supreme Court case also sheds light on the nature of penalty determinations in environmental cases. In Tull v. U.S., 481 U.S. 412 ,107 S.Ct. 1831 (1987), the petitioner appealed the district court's findings of violations of the dredge and fill restrictions of the Clean Water Act which resulted in a $325,000 civil penalty. The Supreme Court remanded the case, concluding that the Seventh Amendment entitled petitioner to a jury trial to determine his liability, but not to determine the amount of any penalty.[3]

In this case the government had sought the maximum civil penalty of $22,890,000 and the district court assessed a $325,000 penalty. The Supreme Court found that the penalty determination was within the district court's discretion and that calculating the amount did not warrant a jury trial. The Court held that Congress has the authority to set civil penalties and it may delegate the penalty determination to trial judges. The Court found that this was Congress' intent based on the legislative history.

> The legislative history of the 1977 Amendments to the Clean Water Act shows, however, that Congress intended that trial judges perform the highly discretionary calculations necessary to award civil penalties after liability is found. 123 Cong. Rec. 39190-39191 (1977) (remarks of Sen. Muskie citing letter from EPA Assistant Administrators of Enforcement of Dec. 14, 1977). ("[P]enalties assessed by judges should be sufficiently higher than penalties to which the Agency would have agreed in settlement to encourage violators to settle".)
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> Id., 481 U.S. at 425.

Most importantly for today's discussion of civil penalties, the Supreme Court found that the civil penalty was, by its very nature, punitive. "The more important characteristic of the

[3] The Court noted also that it has "considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings". Tull v. U.S., 481 U.S. at 418 citing Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 454 (1977); Pernell v. Southall Realty, 416 U.S. 363, 365 (1974).

remedy of civil penalties is that it exacts punishment - a kind of remedy available only in courts of law. Thus, the remedy of civil penalties is similar to the remedy of punitive damages." This U.S. Supreme Court holding seems clearly to diverge from some earlier Illinois case law. The Supreme Court then looked at the legislative history of the Clean Water Act concerning USEPA penalty policy and concluded that Congress clearly intended that the maximum penalty of $10,000 per day of violation should serve to punish violators and not just equitably recover profits gained from violations.

> The legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution when it imposed civil penalties. 123 Cong. Rec. 39191 (1977) (Sen. Muskie citing EPA memorandum outlining enforcement policy). (Footnote omitted.) A court can require retribution for wrongful conduct based on the seriousness of the violations, the number of prior violations, and the lack of good-faith efforts to comply with the relevant requirements. Ibid. It may also seek to deter future violations by basing the penalty on its economic impact. Ibid. Subsection 1319(d)'s authorization of punishment to further retribution and deterrence clearly evidences that this subsection reflects more than a concern to provide equitable relief. In the present case, for instance, the District Court acknowledged that the petitioner received no profits from filling in properties in Mire Pond and Eel Creek, but still imposed a $35,000 fine. App. to Pet. for Cert. 60a. Thus, the District Court intended not simply to disgorge profits but also to impose punishment.
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> Id., 481 U.S. at 422, 423 (emphasis added).

This federal concern with punishing environmental violations contrasts with dicta in one 15 year old Illinois Supreme Court decision, which vacated penalties where the court labeled the civil penalty "punitive." Southern Illinois Asphalt, [Case No. 4]. As the Tull decision makes clear, punishment is an essential element in federal environmental enforcement actions, and many factors must be considered in determining the amount of a civil penalty. To uniformly implement national environmental laws which also impact the state, Illinois must strive for consistency with federal penalty considerations even if Illinois penalties remain less in dollar amounts than those imposed under Federal law.

2. The Gwaltney Case

Not only may the federal government or state agency bring environmental enforcement actions, but citizens may also bring civil enforcement suits for penalties and injunctive relief.[4] Citizens suits have particularly arisen under the Clean Water Act. One such case, the subject of several appeals, reached the U.S. Supreme Court in Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49, 108 S.Ct. 376, 26 ERC 1857 (1987). In the Gwaltney case the Supreme Court resolved a conflict between three circuits over the statutory interpretation of citizens' rights to bring suit against any person "alleged to be in violation of" effluent provisions or related orders under the Clean Water Act. Section 505(a)(1), 33 U.S.C. 1365(a)(1). Essentially, the issue was whether citizens could sue for injunctive relief and/or civil penalties for wholly past violations. The Supreme Court concluded that with respect to citizens suits only the remedy was prospective, that is, geared toward achieving present or future compliance. Section 505 "confers jurisdiction over citizen suits when the citizen-plantiffs make a good-faith allegation of continuous or intermittent violation", and does not extend to wholly past violations. Gwaltney, 484 U.S. at 64 (emphasis added).

In contrast, the state or federal government is not so limited in bringing enforcement actions.

> [I]t is little questioned that the Administrator may bring enforcement actions to recover civil penalties for wholly past violations ...
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> * * *
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> A comparison of (section) 309 and (Section) 505 thus supports rather than refutes our conclusion that citizens, unlike the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation.
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> Gwaltney, 484 U.S. at 58, 59.

[4] See, e.g., the Clean Air Act Section 304, 42 U.S.C. §7604; Federal Water Pollution Control Act, Section 505, 33 U.S.C. § 1365; Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") Section 310,42 U.S.C. § 9659; Resource Conservation and Recovery Act ("RCRA") Section 7002, 42 U.S.C. §6872; Safe Drinking Water Act Section 1449, 42 U.S.C. § 300j-8; and Toxic Substances Control Act Section 20, 15 U.S.C. § 2619.

Drawing on the Supreme Court's statutory interpretation of Section 309 of the Clean Water Act, it seems clear that, at the federal level, penalties for wholly past violations were thought by Congress to serve the Clean Water Act's goals. Those goals expressed in Section 101(a) are "to restore and maintain the chemical, physical, and biological integrity of the Nations' waters." It likewise seems an inescapable conclusion that penalties for wholly past violations of Illinois' environmental statutes and regulations may further state environmental goals. Thus, although some Illinois Appellate Court decisions have, in dicta, minimized the effectiveness of penalties for past violations, the Board will consider the U.S. Supreme Court decision in Gwaltney as supporting the imposition of penalties in state initiated action even when violations have ended. This is particularly appropriate since the Supreme Court in Gwaltney pointed to the federal government's reliance on the State to enforce federal environmental laws, with citizens' suits being a final resort.

> The bar on citizen suits when governmental enforcement action is underway suggests that the citizen suit is meant to supplement rather than to supplant governmental action. The legislative history of the Act reinforces this view of the role of citizen suit. The Senate Report noted that "[t]he Committee intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." S. Rep. No. 92-414, p. 64 (1971), reprinted in 2A Legislative History of the Water Pollution Control Act Amendments of 1972, p. 1482 (1973) (hereinafter 2 Leg. Hist.).
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> Gwaltney, 484 U.S. at 60.

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a. The Gwaltney Penalty Calculation

The Gwaltney legacy is also rich in that the 1985 district court decision provided an extensive analysis of penalty calculation considerations. Chesapeake Bay Foundation v. Gwaltney of Smithfield, 611 F. Supp. 1542, 22 ERC 2121 (1985). In the initial suit in district court, plaintiffs sought the maximum penalty of $8,300,000 for violations of pollution limits in Gwaltney's NPDES permit. In a detailed analysis based on USEPA's penalty policy (cited as Env't Rep. (BNA) 41:2991 June 1, 1984), the District court imposed a $1,285,322 penalty, which took into account: (1) economic benefit, (2) a gravity component

and (3) adjustments. A rate of return, reflecting the time value of money for the period of delayed compliance, was used to calculate the economic benefit of delaying expenditures for pollution control. Varying per diem amounts, such as $4,000 per day of fecal coliform violations and $250 - $1,000 per day for total Kjeldahl nitrogen ("TKN") (nitrogen compound) violations, were multiplied by the days of violations and tallied to arrive at a final penalty. Briefly summarized, the components were as follows (the Board notes that the figures in "B" are taken directly from the court's Appendix B; however, there appears to be $1,000 discrepancy in the court's addition):

A. Chlorination violations

-economic benefit:		$ 1,500	
-gravity-fecal coliform ($4,000 x 213 days of violation)		$852,000	
-gravity-chlorine ($1,000 x 17 days of violation of maximum limit):		$ 17,000	
-adjustment for delay ($1,000 x 125 days of delay):		125,000	
			$ 995,500

B. Biological Treatment System Violations

-economic benefit:		$ 54,022	
-gravity component			
-pre-start-up TKN violations			
winter '81-82: (90 x days x $250/day=)	22,500		
summer '82: (30 days x $1,000/day=)	30,000		
winter '83: (151 days x $250/day=)	37,750		
summer '83: (61 days x $1,000/day=)	61,000		
-start-up violations: (including downward adjustment because start-up is involved)			
296 days (199 days TKN, + 61 days TSS, + 33 days fecal coliform, + 3 days oil & grease) x $50/day=	14,800		
		$166,050	
-further adjustments:			
delay: 283 days x $250/day=		70,750	
			$ 289,822
Total			$1,285,322

Though certainly not the only approach or a required approach to penalty calculation, this methodology was approved by the Fourth Circuit in 1986 as that court noted in its 1989 Gwaltney opinion. See: Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 692, 30 ERC 1593 (4th Cir. 1989) citing Chesapeake Bay Foundation Inc. v. Gwaltney of Smithfield, Ltd., 791 F. 2d 304, 24 ERC 1417 (4th Cir. 1986). The $1,285,322 penalty was reduced to $289,822 in the 1989 decision since the chlorination violations were found to have been wholly past violations which the citizens could not prove to be ongoing or likely to continue at the time the citizens brought suit.

b. The Gwaltney Implication of a Mandatory Penalty

In the 1989 Gwaltney decision, the Fourth Circuit observed that the Supreme Court's Gwaltney decision "effectively approved the assessment of penalties based on past violations (the only possible basis for assessing a penalty)". Cheasapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 696, 697, 30 ERC 1593 (4th Cir. 1989), (emphasis added). Besides emphasizing the need to look to the past to assess a penalty, the court also looked at whether the Court has the discretion to not assess a penalty. The court decided that the penalty was virtually mandated.

> At the time of assessment of penalties in the case, the statute stated, "Any person who violates ... any permit condition or limitation ... shall be subject to a civil penalty not to exceed $10,000 per day of such violation." 33 U.S.C. §1319(d). The statute has been amended to allow up to $25,000 per day.
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> Id., 890 F.2d at 696, Note 6. 6
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> * * *
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> [I]f the plaintiffs prove an ongoing violation at trial, the violations are related to present wrongdoing. Section 1319(d) of the Act states that any person who violates a permit condition shall be subject to a civil penalty. This language coupled with §1365(a) indicates that, once an ongoing violation is shown, the court is virtually obligated to assess penalties. Stoddard v. Western Carolina Regional Sewer Auth., 784 F.2d 1200, 1208 [23 ERC 2105] (4th Cir. 1986).
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> Id., 890 F.2d at 697 (emphasis added)

The "shall be subject" language of the federal statute is quite similar to the "shall be liable" penalty language of Section 42 of the Illinois Act. The federal court's presumption, then, would seem to favor imposing penalty of some amount, even if nominal, where violations are established. One can argue that any Illinois case which finds a violation, but sets no penalty, should have a minimal penalty.

C. Other Federal Decisions

Work v. Tyson Foods, Inc., 720 F.Supp. 132, 30 ERC 1580 (W.D.Ark. 1989), was a citizen suit brought in connection with tort claims and with Clean Water Act violations by Tyson, a food processor. In a jury trial Tyson was found to have caused violations of NPDES permit requirements on 43 separate occasions. The court found a reasonable likelihood of recurrence, relying on the Gwaltney decisions, despite over $1,000,000 in expenditures alleged to have cured the problem. Tyson was held liable for damages to real property and other compensatory damages with respect to 40 plaintiffs. Besides damages, the court assessed a $43,000 civil penalty ($1000 for each of 43 separate days of violations), refraining from imposing what it viewed as a maximum penalty of $430,000.

The court noted that the EPA had drawn the court's attention to two documents, the EPA "Policy on Civil Penalties" and "A Framework for Statute-Specific Approaches to Penalty Assessments." The court also considered recent Consent Judgments in Arkansas covering civil penalties. The court specifically identified ability to pay and litigation considerations as factors to be reviewed in setting a just and equitable penalty. (The court observed earlier that Tyson had been involved in many pollution controversies and litigation since the 1970's). Without further explanation the court held that the maximum penalty would be "unnecessary," and based on the facts before it, set the penalty at 10% of the maximum penalty. Work v. Tyson, 720 F.Supp. at 139.

Following on the heels of the Tyson decision, the U.S. District Court for New Jersey issued a vociferous opinion and imposed a $3,200,000 penalty for 11 years of NPDES permit violations. Public Interest Research Group v. Powell Duffryn Terminals, Inc., 720 F.Supp. 1158, 30 ERC 1201, (D.N.J. 1989). That court introduced its opinion as follows:

> The case before this Court presents another chapter in the never ending American tragedy. A recalcitrant company in the private sector of the economy combined with the lethargic enforcement of the applicable statutes and regulations by the New Jersey Department of Environmental Protection and the Federal Environmental Protection Agency, has caused a continuing, if not constant, 11 year

> contribution to the pollution of the Kill Van Kull. It is indeed sad that none of the participants cared sufficiently about the public trust - the environment - to take meaningful steps to avert the tragedy. This Court will not stand idly by to either, explicitly or tacitly, condone such inaction. For the reasons hereafter set forth, significant monetary penalties are necessary.
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> Id., 720 F.Supp. at 1159.

In choosing a penalty of $3,200,000, and rejecting plaintiff's request for the maximum statutory penalty of $4,205,000 for 386 violations, the court gave separate consideration to several factors described in the Clean Water Act, 33 U.S.C. 1319(d). These included seriousness of defendant's violations; the economic benefit resulting from the violations; defendant's history of violations; defendant's good faith efforts to comply with its permit; and the economic impact of the penalty on the violator.

Powell Duffryn's bulk chemical storage and transfer facility caused violations of eleven different effluent limitations. The court found this to be very serious since the effluent concentrations were 100% to 1000% in excess of permit limitations; two pollutants were toxic; and the number of violations was great. The defendant benefitted from these violations, saving an amount far in excess of the statutory maximum penalty, which would "compel" a higher or maximum penalty. Id., 720 F.Supp. at 1163. The violations persisted for 11 years, during which time the defendant procrastinated and the state and federal agencies made sporadic and minimal attempts to enforce the permit's terms. The court also declined to infer defendant's good faith, but the weak governmental efforts did not favor a maximum penalty. The court found that defendant had "failed to demonstrate that assessing a severe penalty would jeopardize defendant's continued operation." Id., 720 F.Supp. at 1166, citing, Gwaltney, 611 F. Supp. 1542.

In setting the penalty amount the Court relied on USEPA's penalty policy. In explaining this, the court cited its earlier 1989 opinion in SPIRG v. Hercules, Inc., 29 ERC 1417, 1418 (D. N.J. 1989), which stated:

> [A]lthough the EPA penalty policy does not have the force of law, it is consistent with the Congressional policy behind the Act.
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> * * *
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> [T]he 1987 amendments, while not incorporating the language and detail expressed in the EPA penalty policy, serve as a reasonable summary of that policy.

The court then held that since "civil penalties seek to deter pollution by discouraging future violations," the amount must be sufficiently high so that a profit maximizing firm cannot choose to absorb the penalty as a cost of doing business which would be less than the compliance cost. Powell Duffryn, 30 ERC at 1207, citing SPIRG v. Hercules, 29 ERC 1417 (D.N.J. 1989), SPIRG v. A.T. & T. Bell Laboratories, Inc., 617 F. Supp. 1190, 23 ERC 1201 (D.N.J. 1985) and EPA, "Policy on Civil Penalties" (February 16, 1984) at p. 3.[5] The court concluded that, unfortunately, it could not achieve this goal since economic savings exceeded the maximum statutory penalty. The court found that a $1 million reduction from the maximum $4,205,000 penalty would be appropriate since the government's lack of diligence prolonged the violations. The court rejected defendant's assertion that the waterway was already heavily polluted. Even if the harm could not be measured, defendant's NPDES violations meant that "the restoration and enhancement of the river's water quality was inhibited and therefore, the objective of the Act was frustrated." Powell Duffryn, 720 F.Supp. at 1167.

The sizable $3.2 million penalty certainly gave a loud warning to others. The court offered little hope of a smaller penalty unless it would put the company out of business. (But see also the Illinois case, Standard Scrap Metal, [Case No. 36], rejecting this kind of argument). The NPDES violations were quite serious for this federal court sitting in New Jersey, and should be viewed with equal gravity in Illinois. As with this federal court which assumed the role of protecting the environment, the Board has a responsibility to set penalties which will deter noncompliance.

U.S. v. Key West Towers, Inc., 720 F.Supp. 963, 30 ERC 1635, (S.D.Fla. 1989) was another decision, in which the District Court in Florida systematically discussed the penalty factors of the

[5] For other federal decisions, see also U.S. v. Shaffer Muffler Shops, Inc., No. C-86-240, 30 ERC 1658, (S.D.Tex. Feb. 28, 1989), ($36,750 - Clean Air Act); U.S. v. Phelps Dodge Industries, Inc., 589 F.Supp 1340 (S.D.N.Y. 1984); U.S. v. Danube Carpet Mills, Inc., 540 F.Supp. 507 (N.D.Ga. 1982) aff'd 737 F.2d 988 (11th Cir. 1984); U.S. v. Cumberland Farms, Inc., No. 85-0846-Y, 25 ERC 1077, (D.Mass. Sept. 25 and Oct. 16, 1986), ($540,000 - Clean Water Act; $390,000 would be refunded if wetlands restored); U.S. v. Mac's Muffler Shops, Inc., No. C85-138R, 25 ERC 1369, (N.D.Ga. Nov. 4, 1986), ($21,000 - Clean Air Act); U.S. v. Environmental Waste Control, Inc., 710 F.Supp. 1172, 29 ERC 1757, (N.D.Ind. March 29, 1989), ($2,778,000 - RCRA); Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co., 29 ERC 1078, (D.N.J. Mar. 30, 1988), ($240,000 - Clean Water Act); Student Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 29 ERC 1417, (D.N.J. 1989), ($1,680,000 - Clean Water Act).

Clean Water Act, 33 U.S.C. 1319(d). In this case the District Court imposed a $250,000 penalty[6] for filling approximately 2.7 acres of wetlands in violation of the Clean Water Act, 33 U.S.C. 1311. Although the government sought only a $250,000 penalty, the Court communicated in a footnote that the maximum penalty would have approximated $25,000,000. The Court imposed the requested penalty largely due to the seriousness of the offense. "Any destruction of these rare and fragile natural resources requires a substantial penalty." Id., 30 ERC at 1637. (emphasis added). The lack of good faith efforts also strongly compelled the Court's imposing a substantial penalty. Together, the five factors indicated that "a $250,000 fine would promote the specific and general deterrence theories behind a civil penalty". Id., citing Tull, 481 U.S. 412 (emphasis added).

In Illinois, NPDES permit violations by the City of Joliet were the subject of a federal enforcement action brought in 1988 in the District Court for the Northern District of Illinois by the U.S. Attorney General, on behalf of the USEPA. U.S. v. The City of Joliet, No. 88-5661, (N.D.Ill. 1988). The action was for injunctive relief and civil penalties under the Clean Water Act for violations of the state-issued NPDES permit for Joliet's sewage treatment facility. Joliet discharged pollutants in excess of permitted levels for biochemical oxygen demand ("BOD"), total suspended solids, and fecal coliform bacteria. USEPA requested permanent injunctive relief as to future violations; that Joliet comply with its permit; and that Joliet pay civil penalties up to $10,000 per day for violations prior to February 4, 1987 and $25,000 per day of violation after that date, in accordance with the upward revision in the Clean Water Act's penalties.

A consent decree was entered in 1988 requiring remedial action to achieve and maintain compliance with the NPDES permit; payment of a $160,000 penalty; and stipulated penalties for any subsequent violation of the decree. Corrective action included upgrading facilities; constructing a new nitrification facility; and operating and maintenance requirements. Stipulated penalties, which would not limit other remedies or sanctions, included $250 to $750 for each day of violation, increasing to $1,000 per day if compliance was not achieved by June 1, 1991; $250 to $1,000 for daily, weekly, or monthly violations of effluent limitations; and $300 per day for reporting or other violations. Quite obviously, the NPDES violations involved

[6] Alternatively, the Court felt that the direction of 33 U.S.C. 1319(d), to consider "such other matters as justice may require" enabled the court to allow defendant the option of deeding a 1.9 acre pond involved here to a charitable group to serve as a nature reserve.

significant penalties, and federal enforcement against the municipality entailed much stiffer penalties than those upheld against local governments by Illinois state courts.

Just as NPDES permits under the Clean Water Act tie the state to a federal water pollution enforcement program, so, too, does the Clean Air Act's requirement of a state implementation plan ("SIP") commit the state to achieve national air quality standards. Section 110 of the Clean Air Act, 42 U.S.C. 7410, requires Illinois, and every state, to adopt "a plan which provides for implementation, maintenance, and enforcement" of national ambient air quality standards. To meet this requirement the Board has adopted various emissions regulations which are subject to federal approval. Upon approval, the various aspects of the comprehensive plan are federally enforceable. The vast majority of Board air pollution regulations have been federally approved, and enforcement actions under state law may thus be brought in federal district court. Similar federal enforcement of state environmental laws occurs with respect to other federal environmental laws such as the Safe Drinking Water Act, 42 U.S.C. 300, et seq. and RCRA, 42 U.S.C. 6901, et. seq. These federal statutes continue to be the basis for state promulgation of laws derived from and intended to implement federal laws and policies.

In 1988 a federal action was brought to enforce Illinois' emission limitations pursuant to the Clean Air Act, 42 U.S.C. 7410, in the case of U.S. v. General Electric Company, No. 88 C 2564 (N.D.Ill. 1989). The U.S. Attorney General, on behalf of the USEPA, sought injunctive relief and civil penalties from General Electric Company ("G.E.") for excessive emissions of volatile organic compounds ("VOCs"). Pursuant to Section 113(b) of the Clean Air Act, 42 U.S.C. 7413(b), notice of the federal action was given to the state agency, the Illinois Environmental Protection Agency ("IEPA").

G.E.'s paint coating operation for large appliances in Cicero, Illinois released VOCs in excess of the limitations established by the Board in Rule 205(n)(1)(H). 35 Ill. Adm. Code 205(n)(1)(H). This rule was adopted as part of the federally required Illinois SIP. The rule's VOC limitation, which has been federally approved, is part of the SIP's means to achieve the National Ambient Air Quality Standard for ozone. Because violations posed a threat to the public health and welfare, the U.S. Attorney General sought to halt operations, to require that the facility be brought into compliance, and to obtain penalties of up to $25,000 per day of violation.

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7 See Illinois cases discussed herein, City of Waukegan; City of Monmouth; Municipal Sanitary District of Greater Chicago; City of Chicago; City of Moline; City of East Moline; and City of Freeport. The highest penalty upheld by the state courts was $10,000.

This suit culminated in the lodging of a Joint Stipulation with the District Court, and the issuance of a consent decree by the court in 1989. The decree required that G.E. systematically reduce emissions based on daily ozone forecasts; close the coating operations permanently by June 30, 1990; post a $3,000,000 bond to assure compliance; pay a $150,000 civil penalty; and pay additional penalties of $5,000 to $25,000 per day for various unexcused violations of the decree. This extensive relief was based on Illinois air rules and rendered in a federal forum.

On January 8, 1990 the Federal District Court for the Northern District of Illinois addressed important penalty issues in assessing a $100,000 civil penalty for RCRA violations in the case of U.S. v. Maiorano, No. 87 C 4491 (N.D.Ill. Jan. 8, 1990). Defendants' violations grew out of the storage and disposal of hazardous wastes generated by their electroplating business. Defendants had failed to respond to USEPA's information requests and failed to timely submit initial and revised closure plans as ordered. For these violations the government sought penalties for 909 days of violations (some of which were for different violations on the same days). Based on the $25,000 fine per violation provided in Section 3008(g) of RCRA, 42 U.S.C. 6928(g), the maximum penalty was calculated at $22,725,000.

The court agreed with the government that a substantial penalty was "warranted for reasons of deterrence." slip op. at 5, citing U.S. v. T & S Brass and Bronze Works, Inc., 681 F.Supp 314, 322 (D.S.C. 1988) aff'd in relevant part at 28 ERC 1649 (4th Cir., 1988) and U.S. v. Environmental Waste Control, Inc., 710 F.Supp. 1172, 1244 (N.D.Ind. 1989). The court found that the violations were serious and that defendants showed complete disregard of the law and USEPA and judicial orders. "To impose a perfunctory or token penalty would send a message to similarly situated persons that they may flout the law without consequence." slip op. at 6. Delays allegedly caused by IEPA would not excuse defendants' conduct. The court also acknowledged that defendants' alleged inability to pay was not proved and, nonetheless, would be unpersuasive given defendants intransigence. The court granted the government's request for a $100,000 penalty, noting that while it was a small percentage of the maximum penalty, it was substantial and would achieve the deterrence purposes of the RCRA penalty provision.

Both Illinois and federal law are intended to achieve consistency in setting comparable civil penalty amounts for violations. Federal law requires that state enforcement programs be quite similar to the federal program. See 40 CFR 123.27 (1989), or equivalent to the federal program. See Section 3006 of RCRA.

III. PENALTY CONSIDERATIONS IN OTHER STATES

State courts outside Illinois have reiterated the same principles articulated in federal and Illinois penalty decisions. Many states look to factors such as the seriousness and duration of the offense and good faith. Some states rely more heavily on USEPA's penalty policy. Others address statutory considerations similar to those in Section 33(c) of the Illinois Act.[8] Sometimes, however, other states conclude that much higher penalties should be imposed than Illinois has typically seen in its state court decisions.

As one example, in 1982 the Supreme Court of Ohio, addressed the civil penalty issue in State, ex. rel. Brown v. Dayton Malleable, Inc., 1 Ohio St. 3d 151, 38 N.E. 2d 120 (1982). The case involved a $493,500 civil penalty for the NPDES permit violations of an iron foundry. Noting that the parties had agreed to the application of USEPA civil penalty, the Supreme Court approved the trial court's use of that policy statement as a proper approach to penalty calculation.

The Ohio Supreme Court recited the various components of the trial court's 1978 calculations. These included an amount for not complying with the permit's schedule of compliance. The Supreme Court held that such a schedule is a permit term or condition, and that, under USEPA policy, a penalty could be assessed for recalcitrance or indifference with respect to meeting the schedule. This was, in fact, the largest element of the penalty calculation, which the Ohio Supreme Court summarized as follows:

[8] See Selmi, "Enforcing Environmental Laws: A Look at the State Civil Penalty Statutes", 19 Loy. L.A.L. Rev. 1279 (1986).

Harm or risk of harm ($50 x 683 days)	$ 34,150
Economic benefit from noncompliance	$ 8,000
Recalcitrance or indifference re: Compliance Schedule ($750 x 714 days)	$ 535,500
Subtotal	$ 577,650
Mitigating factors	
Delays due to strike $500 x 98 days	($ 49,000)
Delays due to exceptional weather $250 x 52 days	($ 13,000)
Delays in equipment delivery $250 x 90 days	($ 22,500)
Subtotal	($ 84,500)
Total Penalty	$ 493,150

A second significant issue was the Ohio Supreme Court's review of the trial court's consideration of the defendant's financial condition. The court found that the information was used, not to increase the penalty, but "merely to insure that the penalty ... would not be so large as to send DMI into bankruptcy but would be large enough to deter future violations." Id., 438 N.E. 2d at 125. The court noted, too, several federal decisions and other support for the principle that civil penalties should deter further violations and be large enough to remove the financial benefit of noncompliance.[9] Id. Hence, ability to pay is relevant to whether a penalty may achieve the desired deterrent effect and eliminate any financial incentive to violate the law.

A third factor favoring the appropriateness of the trial court's penalty assessment was that the amount was less than 10% of the maximum of about $7,000,000. According to expert testimony, the penalty was also in the lower one third of the range in which it would have a "material effect". Id. As a general rule, the Supreme Court stated that as long as the amount was less than the statutory maximum, "discretion to fix that amount lies in the trial court." Id., citing United States v. Ancorp National Services, Inc., 516 F.2d 198, 202 (C.A. 2d, 1975) and United States v. J.B. Williams Co., Inc., 354 F.Supp. 521,

[9] For another state decision considering the need to remove the economic benefit of noncompliance, see State v. Schmitt, 145 Wis. 2d 724, 429 N.W. 2d. 518 (Wis. App., 1988), supporting trial court's imposition of $232,939 forfeiture; see also State ex rel. Brown v. Howard, 3 Ohio App.3d 189, 44 N.E.2d 469 (1981).

548. The Ohio Supreme Court thus found no abuse of discretion when it compared the maximum allowable penalty and the one actually imposed under USEPA guidelines.

A 1988 state administrative decision from Tennesse provides another example of how other states also use a multi-faceted framework for penalty determinations. An enforcement action, referred to as In the Matter of: J. C. McCanless, Sr., Case No. 87-3198 (Feb. 26, 1988), involved water pollution from feedlot runoff. Although only $808.75 in damages was assessed for enforcement efforts and the value of fish killed, the Administrator of the Tennessee Department of Health and Environment explained in his Order that the following factors were considered in that decision:

> (a) the facts alleged herein;
>
> (b) whether the civil penalty imposed will be a substantial economic deterrent to the illegal activity;
>
> (c) damages to the state, including compensation for loss or destruction of wildlife, fish, and other aquatic life, resulting from the violation, as well as expenses involved in enforcing this section and the costs involved in rectifying any damage;
>
> (d) cause of the discharge or violation;
>
> (e) the severity of the discharge and its effect upon the quality and quantity of the receiving waters;
>
> (f) effectiveness of action taken by the violator to cease the violation;
>
> (g) the technical and economic reasonableness of reducing or eliminating the discharge;
>
> (h) the social and economic value of the discharge source; and
>
> (i) the economic benefit gained by the violator.
>
> Id., p. XVI

Quite obviously, these considerations closely parallel the factors found in Section 33(c) of the Illinois Act. This is one example of how the manner in which the Illinois Board approaches penalty determinations seems consistent with considerations which have been discussed in other states.

In their 1989 treatise, "State Environmental Law", Professors Selmi and Manaster observed that the body of state case law is relatively limited on the issue of civil penalties for environmental violations. They noted that Illinois cases represent the bulk of state decisions discussing penalty determinations.[10] Their analysis pointed to good faith as the most critical decision factor, with recalcitrance being most important in deciding whether a large penalty is imposed. Proof of economic benefit from non-compliance was found to be very helpful to success in having the penalty sustained on review.

The review process is not generally predictable, however, Selmi and Manaster note that the degree of deference given to agency penalty assessments can vary widely. They cited Fee Plan, Inc. v. Dept. of Envtl. Conservation, 118 A.D.2d 855, 500 N.Y.S.2d 344, 345 (1986) for the New York Court's position that the courts will not overturn an Agency's penalty unless "so disproportionate to the offense as to shock one's sense of fairness". They noted in contrast that Illinois courts have engaged in some intensive reviews of Board decisions based on the Illinois Supreme Court's holdings in Southern Illinois Asphalt, [Case No. 4], and City of Monmouth, [Case No. 2], that the penalties should primarily "aid in the enforcement of the Act" and that "punitive considerations" are secondary. The authors observed this consequence of the review process in Illinois:

> This standard has allowed the lower courts considerable freedom in their review -- freedom that in some instances plainly amounts to a de novo review of the agency's penalty assessment. The result has been a series of decisions in which the Pollution Control Board's assessments have been overturned by reviewing courts which have concluded that the assessments will not aid in the enforcement of the Act. At the same time, however, the opinions in that state on this issue have an ad hoc quality to them and provide the penalty decisionmaker with very little guidance on whether a penalty assessment will be upheld on review.
>
> Selmi and Manaster, at 16-69 (emphasis added).

The Board's own extensive review in this case suggests that while the aiding-enforcement-versus-punishing principle has been less helpful than the courts intended, Illinois decisions which have more fully explored Section 33(c) factors do provide some guidance. The heart of the penalty decision must be review of

[10] See, D. Selmi and K. Manaster, "State Environmental Law", Clark Boardman Company, Ltd., N.Y., N.Y., 1989 pp. 16-64 - 16-74.

"all the facts and circumstances", both in aggravation and mitigation. State and federal decisions now typically address many factors, whether from statutory guidelines or USEPA policy statements. Illinois decisions are generally consistent with those from these other forums. However, some inconsistencies do exist, and the Board has indeed struggled at times to find guidance in court opinions reviewing the Board's penalty assessments.

IV. STATISTICAL DATA ON PENALTIES

A. USEPA Statistical Data on Penalties

Information on federally imposed penalties can provide a useful background for a state approach to assessing civil penalties. Two USEPA reports, "Enforcement Accomplishments Report: FY 1989" (Feb. 1990) and "Overview of EPA Federal Penalty Practices FY 1988" (May 1989), reveal important penalty data. From its inception through 1989, USEPA assessed $185.9 million in civil penalties. Of this amount, approximately 19% or $34.9 million was assessed in 1989 and approximately 20% or $36.8 million was assessed in 1988 (the record high year for total penalties). These annual figures compare with amounts totalling less than $5 million per year imposed in the late 1970's. Since 1985 the total annual penalties have been consistently much larger.

The 1988 report, referenced above, attributes that year's higher penalties to new enforcement initiatives, increased penalties in established programs, and more cases in traditionally higher dollar amount genre, e.g., the Clean Water Act program. Interestingly, "penalties were levied in 92 percent of the cases concluded in FY 1988." See 1988 report, supra, at p. 1. And it was Region V, where Illinois is located, which in 1988 had the highest number of cases with penalties (228). Supra, at p. 2. Federal cases certainly seem to suggest a general policy of imposing penalties where violations are found.

For 1989 the various federal programs were the basis of the following assessments of total civil penalties:

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Table 1: Total USEPA Penalties for 1989

Clean Air Act	$64.8 million	35%
Clean Water Act	64.3	35%
Toxic Substances Control Act	28.5	15%
RCRA	24.0	13%
Federal Insecticide, Fungicide, and Rodenticide Act	2.4	1%
Safe Drinking Water Act	1.5	1%
Superfund	.4	-
Total	$185.9 million	100%

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Certain of these programs, the Clean Air Act, the Clean Water Act, and RCRA are the principal subject of similar enforcement efforts at the state level. Federal penalties for these programs will, therefore, be discussed in greater detail below.

The 1989 report highlights a number of large civil penalties assessed for 1989, some of which set new records. These are relevant to show an upward trend in penalty amounts and may be useful as the upper limit in state penalty determinations. For example, a 1989 consent decree imposed the highest Clean Water Act civil penalty ever imposed against a municipality. That $1,125,000 penalty was against the Metropolitan Denver Sewage District No. 1, the Denver Water Board, and others. See 1989 report, supra, at p. 6. This report also notes that a civil penalty of $2,778,000 was entered against Environmental Waste Control, Inc. This penalty was the largest ever imposed by a court for RCRA violations. Supra at p. 8. Another case, involving the removal of catalytic converters from vehicles, resulted in the highest civil penalty per violation ($1,750) for such tampering under the Clean Air Act. Supra at p. 24. A $2,200,000 fine was imposed for Clean Water Act violations by Koch Refining Company. This was one of the largest ever assessed against a single discharger at a single facility. Supra at p. 24. Numerous other cases are referred to in the 1989 report under the section labeled, "Major Enforcement Litigation and Key Legal Precedents", supra, pp.21-47.

Compared to the broad brush approach of the available 1989 report, the 1988 report issued in May of 1989 offers more detail on the scope of penalty assessments. Since comparable data for FY 1989 is not yet available, the statistical information for 1988 will be summarized below. While these penalty figures would probably be higher than most comparable state figures, they may

provide some framework for future state penalty determinations. Only Clean Air Act, Clean Water Act, and RCRA data will be reviewed as these programs involve enforcement actions most analogous to state actions. The chart below presents the median, average, and highest penalties assessed for these programs.

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Table 2: Selected USEPA Penalties for 1988 - All Regions

	Median**	Average***	Highest
Clean Air Act*			
judicial	$30,000	$125,555	$1,750,000
administrative	39,397	37,028	61,500
Clean Water Act			
judicial	$37,500	$139,834	$2,000,000
administrative	8,500	13,545	60,000
RCRA			
judicial	$96,479	$209,791	$1,100,000
administrative	9,440	17,576	150,000

* Stationary Source Air violations only
** Median = Equal number of penalties above and below this figure
*** Average = Arithmetic average. (Total dollars divided by total number of penalty cases.)

Of particular interest for Illinois, Region V, in which Illinois is located, assessed the following median, average, and highest penalties for 1988.

Table 3: Selected USEPA Penalties for 1988 - Region V Only

	Median	Average	Highest
Clean Air Act			
judicial	$27,500	$134,041	$1,750,000
administrative	50,273	50,273	61,500
Clean Water Act			
judicial	$40,000	$61,700	$ 60,000
administrative	20,900	20,900	34,000

RCRA			
judicial	$78,000	$96,218	$ 280,000
administrative	12,500	15,620	60,000

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B. Illinois Statistical Data on Penalties

Some statistical information is available to provide a broad overview of historical figures in Illinois penalty decisions. Table 4 below is derived solely from IEPA reports labeled "State of Illinois Environmental Protection Agency Summary Penalties Assessed by Pollution Control Board." These reports were available through July 31, 1988, and are presumed by the Board to be reasonably accurate. Average penalties were calculated by dividing the reported total amounts by reported number of penalties. As can be seen, the average penalties are quite modest, predominately in the $2,000 - 5,000 range. These amounts obviously are significantly less than the federal administrative penalties for Region V referrred to in the preceding table. More specific data is summarized below based on the earlier discussion of Board decisions which were appealed.

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1. Pollution Control Board

Table 4: Summary of Penalties Assessed by Illinois Pollution Control Board

Fiscal Year Ending On	Total Amounts	Number of Penalties	Average Penalty
6/30/71	$ 96,950	18	$5,386
6/30/72	422,862	75	5,638
6/30/73	374,381	148	2,530
6/30/74	226,082	94	2,405
6/30/75	239,374	92	2,602
6/30/76	275,350	135	2,040
6/30/77	221,722	84	2,640
6/30/78	106,475	59	1,805
6/30/79	164,118	104	1,578
6/30/80	198,812	77	2,582
6/30/81	262,392	87	3,016
6/30/82	196,273	72	2,726
6/30/83	222,758	36	6,188
6/30/84	37,423	11	3,402
6/30/85	175,700	14	12,550*
6/30/86	61,008	13	4,693
6/30/87	13,200	6	2,200
6/30/88	37,500	4	9,375**

* Noticeably higher due to one $75,000 penalty
** Noticeably higher due to one $25,000 penalty

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2. Illinois Court Decisions

The Illinois Appellate and Supreme Court opinions discussed earlier represent virtually all Illinois Court pronouncements on Board assessed civil penalties for environmental violations. They provide more meaningful information than the above table of penalties assessed by the Board. Court decisions summarized below indicate that penalties of as little as $100 and as much as $75,000 may be upheld on appeal. Penalties of less than $3,000 predominate, but nine decisions upheld penalties of $7,500 to $75,000. Notably, in 1989 and early 1990, two penalties were upheld for $10,000 against Perkinson/Porkville and against the City of Freeport; one $10,000 penalty was reduced to $1,000 in the case of Modine Manufacturing; and another $10,000 penalty was remanded to the Board in the case of Trilla Steel Drum.

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Table 5: Illinois Civil Penalties Reviewed by Supreme Court

Year	Petitioner	Board	Illinois Supreme
1974	City of Waukegan	$ 1,000	$ 1,000
	(a municipality)	250	250
		250	250
1974	City of Monmouth	$ 2,000	-0-
	(a municipality)		
1974	Incinerator, Inc.	$25,000	$25,000
1975	Southern Illinois Asphalt	$ 5,000	-0-
	(2 cases consolidated)	$11,000	-0-
1975	Mystik Tape	$ 3,500	$ 3,500
1975	Metropolitan Sanitary Dist.	$ 6,000	-0-
	(a unit of local government)		
1976	Processing & Books	$ 3,000	$ 3,000
1976	Wells Manufacturing	$ 9,000	-0-

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The appellate courts have reviewed a far greater number of cases regarding civil penalties. This allows the decisions to be

broken down into categories for comparison. The following Table 6 groups the decisions into those where the court was primarily discussing issues relating to violation of air pollution requirements, water pollution requirements, and cases where the primary issue was failure to have a permit for certain activities. For clarity, cases involving a local government defendant are grouped separately.

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Table 6: Illinois Civil Penalties Reviewed by Appellate Court

Air Cases	Petitioner	Board	Appellate Court
1974	Allied Metal	$ 2,500	Remanded
	On remand	$ 750	
1975	Sangamo Construction	$ 5,000	Remanded
	On remand	$ 5,000	
1976	Aluminum Coil Anodizing	$ 1,500	$ 1,500
1974	Lloyd A. Fry Roofing	$50,000	Remanded
	On remand	$10,000	
1974	Bresler Ice Cream Co.	$ 1,500	-0-
1974	Chicago Magnesium Casting	$ 1,000	-0-
1975	CPC International Inc.	$15,000	-0-
1976	May/Hillview Farms	$ 2,500	-0-
1976	Draper & Kramer	$ 1,000	-0-
1976	Marblehead Lime	$20,000	$20,000
1976	Hillside Stone	$10,000	$ 2,000
Water Cases			
1974	Meadowlark Farms Inc. (Value of fish kill)	$ 141.66	$ 141.66
1980	Allaert Rendering Inc.	$ 3,000	$ 3,000
1983	Archer Daniels Midland	$40,000	Remanded
	On remand	$32,500	$15,000
1989	Perkinson/Porkville	$10,000	$10,000
		$10,376.84	$10,376.84
1975	Freeman Coal Mining	$ 5,000	$ 500

	Petitioner	Board	Appellate Court
Permit Cases (Air/Water/Land)			
1975	Highlake Poultry	$ 2,500	-0-
1975	Freeman Coal Mining (air)	$ 1,500	$ 850
1976	Hindman	$ 250	$ 100
		$ 500	$ 200
1977	Harris-Hub	$ 500	-0-
1981	Slager/Rapid Liquid Waste	$ 1,000	$ 1,000
1978	Joos Excavating Co	$ 1,500	$ 1,500
1982	Pielet Bros.	$ 7,500	$ 7,500
1983	Waste Land Inc.	$75,000	$75,000
1973	Bath Inc.	$ 2,000	$ 2,000
1986	Standard Scrap Metal	$30,000	$30,000
1989	Trilla Steel Drum	$10,000	Remanded
		No decision yet	
1984	Citizen Utilities	$ 1,000	-0-
1990	Modine Mfg.	$10,000	$ 1,000

Municipalities (See also Supreme Court Cases Above)

	Petitioner	Board	Appellate Court
1978	City of Chicago	$10,000	-0-
1985	City of Moline	$90,000	-0-
1985	City of East Moline	$30,000	$10,000
1989	City of Freeport	$10,000	$10,000

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3. Recent Stipulated Penalties

Examples of other penalties recently imposed by the Board are listed below. (These do not include penalties imposed under the Administrative Citation program established under Section 31.1 of the Act.) These penalties were assessed pursuant to settlement and stipulation agreements between the parties:

Table 7: Recent Stipulated Penalties

Date	Case	Penalty
3/22/90	PCB 89-192	$10,000
3/8/90	PCB 89-161	$ 3,000
3/8/90	PCB 89-160	$ 1,500
2/8/90	PCB 89-65	$ 600
12/6/89	PCB 89-69	$ 1,000
11/20/89	PCB 88-36	$12,500
8/10/89	PCB 89-18	$ 1,000
8/10/89	PCB 89-67	$ 2,500
7/13/89	PCB 88-201	$11,000 (1st Respondent) (Plus $3,000 reimbursement) $ 1,000 (2nd Respondent)

Date	Case	Penalty
6/22/89	PCB 89-24	$10,000
6/8/89	PCB 88-200	$ 1,000
4/27/89	PCB 89-2	$ 1,000
4/6/89	PCB 84-92	$ 6,500
2/23/89	PCB 88-177	$12,000
2/2/89	PCB 87-104	$ 6,500
1/19/89	PCB 88-135	$ 5,000
1/13/89	PCB 86-104	$ 7,500
1/13/89	PCB 88-124	$11,250

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C. Comparison of Federal and State Penalties

As summarized below, federal judicial decisions typically imposed the highest single penalties and largest average penalties, followed by federal administrative penalties. Penalties imposed by administrative and judicial processes in Illinois generally, but not always, will be less than similar federally imposed penalties.

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Table 8: Comparison of Federal and State Highest Penalties

Federal	Judicial	Administrative
All Federal (1988)		
Clean Air Act	$1,750,000	$ 61,500
Clean Water Act	2,000,000	60,000
RCRA	1,100,000	150,000
Federal-Region V (1988)		
Clean Air Act	$1,750,000	$ 61,500
Clean Water Act	160,000	34,000
RCRA	280,000	60,000

Illinois - Penalty Determinations After 1973

	Judicial Review	Board Decision	
Non-Municipality	$ 75,000	$ 75,000	Upheld
Municipality	10,000	90,000	Reversed
1989 Board Decisions (Stipulations) (From Table 7)		$ 12,500	

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Table 8 above draws comparisons regarding maximum penalties assessed in the Federal system and the State of Illinois. The Illinois penalties are further divided into those maximum dollar amounts supported by the courts in reviewing Board decisions and the maximum set by the Board in any case (prior to any review). The maximum based on a stipulated penalty is listed separately.

Table 9 below provides the same information, but based on the average (arithmetic mean) rather than maximum penalty amount.

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Table 9: Comparison of Federal and State Average Penalties

Federal	Judicial	Administrative
All Federal (1988)		
Clean Air Act	$ 125,555	$ 37,028
Clean Water Act	139,834	13,545
RCRA	209,791	17,576
Federal-Region V (1988)		
Clean Air Act	$ 134,041	$ 50,273
Clean Water Act	61,700	20,900
RCRA	96,218	15,620

Illinois - Penalty Determinations After 1973

	Judicial Review	Board Decision
Non-Municipality*	$5,975	$ 13,639
Municipality*	3,000	21,285
1989 Board Decisions (Stipulations) (From Table 7)		$ 5,983

*Derived from tables 5 and 6 detailing Illinois court decisions, using initial Board-imposed penalty and final court determination of penalty amount.

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V. CONCLUSION: RELEVANT FACTORS FOR BOARD DETERMINATION OF CIVIL PENALTIES IN THIS CASE

A. Calculating the Maximum Penalty

In this case, the Board will begin the penalty determination process by considering the maximum civil penalty under the statute where such information is available. This is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts. This is consistent with the discussions in the U.S. Supreme Court Tull and Gwaltney decisions, with U.S. EPA Penalty Policy; and with Illinois decisions discussing a maximum penalty. As discussed earlier, the Illinois statute now provides for a penalty of up to $50,000 per violation and an additional $10,000 for each day of violation. Section 42(a) of the Act.

In deriving a range of appropriate penalties, the Board may also consider the penalties for similar offenses which have been imposed in other forums (federal and other states). The Board may also consider relevant any penalties imposed by Illinois courts or the Board in similar circumstances.

A final consideration as to the range of appropriate penalties, though not necessarily binding on the Board in all circumstances, is whether the parties have stipulated to a maximum penalty or whether the complaint requests a maximum penalty which is less than the amount permitted by statute.

B. Statutory Factors Which Must be Considered.

Section 33(c) factors provide the minimum factors which must be considered in fine tuning a penalty assessment. These will be considered by the Board in each penalty determination to the extent relevant evidence exists. These factors affect the calculation of the penalty by increasing or decreasing the penalty amount depending on whether the statutory factor, when evaluated by the Board, weighs in favor of a larger or smaller penalty within the range of penalties derived pursuant to the first part of the penalty evaluation. The statutory penalty criteria are:

* All the facts and circumstances. Section 33(c)

* Character and degree of injury or interference. Section 33(c)(1)

* Social and economic value. 33(c)(2)

* Suitability/unsuitability of pollution source to its locale. Section 33(c)(3)

* Technical practicability and economic reasonableness of pollution abatement. Section 33(c)(5)

* Economic benefits of non-compliance. Section 33(c)(5)

* Any subsequent compliance. Section 33(c)(6)

C. Other Factors

In this case, viewing all the facts and circumstances pursuant to Section 33(c) and in keeping with state and federal court decisions, the Board will evaluate other factors, notably:

* the presence or lack of good faith;

* whether the penalty may aid enforcement by deterring future non-compliance by this violator and others;

* the economic impact of the penalty on the violator in terms of the violator's ability to pay. (Note, however, the Board is not bound to maintain a violator's economic viability, but may consider this.)

* totality of circumstances surrounding the violation, including, but not limited to, the duration of the violation, any cessation, and any prior history of violations.

Like the Section 33(c) factors, these other factors aid the Board in weighing the gravity of the harm and the conduct, in removing the economic incentive to violate the law, and in assigning appropriate dollar amounts in a penalty calculation. An example of how this process takes place in federal Clean Water Act settlements is attached as Exhibit A for illustration purposes only.

VI. PENALTY DETERMINATION FOR ALLEN BARRY

A. The Maximum Penalty

The stipulation between the parties sets forth four separate days in 1982, 1985, 1987 and 1988 where violations of Section 12(a), 12(d) and 12(f) of the Act and Sections 501.403(a), 502.104, 302.203, 304.105, and 302.212 of the Regulations have been admitted. The Board views these violations, under the particular facts of this case, as constituting five separate violations encompassing four days of violations. (Note, in the four counts described earlier, Count II describes two separate violations, i.e., NPDES permitting requirements and livestock facility and waste handling requirements.) Clearly, the violations persisted for a period of up to nearly six years for some or all of the violations. However, in the absence of an allegation and proof by the Agency that the violations were continuing, the Board chooses not to engage in an assessment of the number of days on which each of the violations continued. For the purposes of calculating the maximum penalty the Board will view the five violations as occurring on each of four days. This results in a maximum penalty of $65,000 [($10,000 x 5) + ($1,000 x 3d x 5)].

The Agency has agreed in the Stipulation and Proposal for Settlement to seek a penalty not greater than $10,000. The Board will abide by the stipulation in limiting its penalty inquiry in the range of $0 - $10,000, while recognizing that its evaluation would otherwise cover a much broader penalty range in the absence of such settlement by the parties.

Other Illinois decisions are in keeping with the $0 - $10,000 range agreed to above. The Perkinson/Porkville case,

(1989) [Case No. 25], affirmed a Board-imposed penalty of $10,000 for swine waste discharges. A stipulated penalty of $600 in the case of IEPA v. Russell G. Wake, PCB 84-79, 62 PCB 503 (Feb. 7, 1985) represents a slightly dated penalty assessment also involving swine waste discharges. These decisions support the stipulated maximum of $10,000 and suggest that the respondent's request that no penalty be imposed would not be in keeping with Illinois precedents.

B. Consideration of Statutory Factors

1. Character and Degree of Harm

The livestock waste runoff from Allen Barry's operation has had a deleterious impact on the chemical and biological nature of the receiving stream. Essentially, the elevated ammonia nitrogen levels, unnatural sludge, and murky, turbid conditions, and foul odors create a hostile environment for aquatic life and harmful conditions for public health. The Board finds that this kind of harm to state waters flowing through the Barry property and further downstream is serious in nature both in terms of immediate and long-term environmental impact. These violations date back to 1982 and run through 1988, further indicating environmental harm that spans many years. The injuries here are more pervasive than the violations from 1982-1984 which were stipulated to in the Russel G. Wake case noted above.

The Board finds that the violations are indeed serious; this is a situation which calls for imposing a $10,000 penalty.

2. Social and Economic Value

The Board acknowledges that Allen Barry's livestock operation makes a social and economic contribution to the community and the state. However, that value was diminished by Allen Barry's failure to contain livestock waste runoff, as required, and to secure and comply with an NPDES permit intended to regulate any such discharges. The Agency has been required to engage in efforts since 1982 to secure compliance with the Act and regulations. This, too, reduces the social and economic value of Allen Barry's business for the state. Businesses which comply with the state's enviromental regulatory scheme do, however, make a sizable contribution socially and economically. As Allen Barry has agreed to take remedial action to achieve compliance, his facility will be of benefit to the community and state.

However, the value of this operation does not in the Board's opinion justify a significant reduction in the penalty amount. This is not an enterprise which is critically linked to the social and economic lifeblood of a community. The record does not establish, for example, that Allen Barry is a major employer or a key supplier of goods. If that were the case, the Board could evaluate whether enforcement and a penalty would have a

far-reaching negative impact on the community, such as if the remedy caused a major employer to go out of business. The Board finds, therefore, that this is not a factor which warrants imposing a minimal penalty, but rather suggests a penalty in the middle ground.

3. Suitability/Unsuitability of Pollution Source to Its Locale

The record does not disclose any significant conflict between the livestock operation and its locale. The area appears to be primarily rural and the business, therefore, seems to be reasonably adapted to the locale. This rather neutral factor would not here have a noticeable impact on the amount of penalty.

The Board finds that the penalty should not be increased, as in the case of an offending industry in perhaps a primarily residential area. A moderate penalty would thus seem appropriate.

4. Technical Practicability and Economic Reasonableness of Pollution Control

The availability of means to control livestock waste runoff is not at issue here. The feasibility of maintaining curbs, dikes, walls or similar means of containing runoff as the regulations require is not controverted. The respondent did make some efforts to control runoff in 1982, but these efforts were not successful in resolving the problem. Since receiving the Agency's Pre-Enforcement Conference letter dated October 15, 1982, Allen Barry was on notice of violations, which could have been eliminated by readily anticipated or discoverable methods.

The Board is persuaded that remediation was within Respondent's means despite letters from Allen Barry's counsel which requested a state agency-designed plan. Polluters cannot thrust the burden of compliance back on the state and win delayed compliance with impunity. The State has no obligation to formulate conceptual and/or engineering plans for the thousands of enterprises within the State which must comply with the Act and regulations. It remained within Allen Barry's responsibility to control runoff in a timely manner. Although the Agency's letter of December 18, 1985, recommended that he engage a consulting engineer, Allen Barry did not hire an engineer until early 1989 (R. 48). Respondent's contacting the Illinois Soil and Conservation Service ultimately resulted in a November, 1987 preliminary plan, which has yet to be implemented by Respondent. These "efforts" at compliance are well-papered but quite ineffective in bringing about technically practical pollution control. An eight point recommendation of needed remedial measures was made in the Agency's letter of December 18, 1985. A reminder that the responsibility for the solution was Respondent's, not the Agency's, was made in a June 17, 1986 letter from the Agency. Thus, the availability of means to solve

the problem weighs heavily against Allen Barry and the State should not be faulted for attempting to help him to achieve compliance. This is not a case where technology was unavailable to cure pollution.

Similarly, economic reasonableness is not really at issue. The costs of walls, curbs, and dikes to contain runoff or of such remedial measures as fencing and maintaining vegetative cover are not alleged to be prohibitively expensive in relation to the kind of industry involved here. The Board finds no support for a proposition that the pollution control methodology was economically unreasonable for livestock operations such as conducted here. Such expenses would appear to be reasonable for commercial livestock facilities in general, and perhaps more so here, where many years' operations are involved. Although respondent's brief alludes to these costs as being expensive for his situation, these costs are not inordinate, but are to be reasonably expected by those engaging in this industry.

The Board finds that the considerations of technical practicability and economic reasonableness of reducing and eliminating the water pollution from Allen Barry's operations warrants imposing a higher penalty than would be appropriate where technological and economic considerations make pollution control less accessible or disproportionately expensive.

5. Economic Benefits of Non-Compliance

The cost savings of delayed compliance take into account the time-value of money. This is to say that by postponing capital improvements or operating and maintenance costs for pollution control, those funds are available for other uses or investments or to reduce the need to borrow, creating a better position relative to competitors who voluntarily comply. Some rate of return (an interest rate factor) can be used to calculate an economic savings or benefit from not expending capital and operating funds at an earlier point in time.

In the case of Allen Barry, some economic benefit probably dates back at least to 1982 when he was notified in writing of violations. A November 25, 1987 letter from the U.S. Department of Agriculture, attached to the Stipulation as part of Respondent's Exhibit F, indicates that costs of $29,710 would be incurred for capital improvements to eradicate the runoff problem. Another cost figure of approximately $40,000 is noted in Respondent's brief (page 9). This estimate is more fully developed in Exhibit 3 to the March 14, 1989 hearing

transcript. That document is Respondent's February, 1989 preliminary cost estimate, which total $42,500. At only a 6% rate of return[11], cost savings in the range of $1,783 to $2,550 could be expected each year, based on $29,710 to $42,500 in capital expenditures. Since the 1982 written notice of violation, Allen Barry would have reaped at least 7 years of savings from deferred compliance. Without compounding the savings, a simple calculation indicates that total savings could be in the range of $12,481 to $17,850, clearly in excess of the maximum penalty sought by the Agency. The savings would, of course, be greater if annual maintenance charges were included. However, such information on economic benefit is not adequately presented to the Board. This factor requires the Board to look to the middle to upper range of penalties to eliminate the economic incentive to avoid compliance.

6. Any Subsequent Compliance

The issue of subsequent compliance is not before the Board. Where the courts and the Board have considered this factor the respondent had complied with the Act and regulations either before the complaint was filed or at least before the Board's decision.

Compliance by Allen Barry is still prospective based on the record before the Board. The injunctive relief sought by the Agency describes acts yet to be performed to achieve full compliance. For this reason, the penalty calculation will not be reduced since this is not a situation where the respondent's independent acts, rather than enforcement, has brought about compliance.

C. Other Factors

The presence or absence of good faith must be gleaned from respondent's conduct over the many years of this protracted enforcement process. According to an IEPA report dated July 27, 1982, to gain access to the Barry property an administrative inspection warrant had to be obtained by the Agency. At that time, the runoff conditions were found to be basically the same as conditions found at the time of an October 16, 1979 Agency inspection. A Pre-Enforcement Conference Letter was mailed October 15, 1982, which stated that, "[t]he Agency has previously informed you of apparent non-compliance," and gave notice of the Agency's intention to file a formal complaint. These documents

[11] In the absence of a calculation by the Agency, the Board here will estimate the economic benefit based on cost data from the record before it. The 6% interest rate is used here as a modest attempt to reflect an annual savings from deferring payment, much as the courts use a 9% statutory rate of interest for judgments. Ill. Rev. Stat. 1987, ch. 110, par. 2-1303.

suggest that early cooperation was certainly lacking and that ultimate compliance has required Agency efforts which span a decade.

More disturbing than the longstanding compliance problem, the nature of respondent's conduct in 1979 and 1980 warrants the Board's comment. A May 19, 1980 report describes that an initial visit on October 16, 1979 was met with belligerence from Allen Barry. A July 22, 1980 memorandum notes that a personal visit to explain the Agency's role and need for water samples ended in Allen Barry becoming angry, yelling, and ordering the Agency's representative to leave and not return. A September 23, 1980 inspection report describes how Allen Barry attempted to grab an Agency inspector's camera and followed after him yelling. Three Agency inspectors were involved in the incident which included a man not from the Agency jumping on and riding on the hood of the car and Allen Barry grasping the arm of a woman from the Agency who was attempting to close the car door to leave. A police report was filed.

On November 26, 1980 a memorandum reported that on November 19, 1980, inspectors twice drove by the facility and observed several thousand beef cattle on open dirt lots near the stream. The report notes that runoff was probably entering the stream, but the Agency was deterred from making closer inspection due to the previous hostile actions of Allen Barry.

This recalcitrance and threatening behavior is clearly an extreme example of bad faith. The Board finds that this factor, if considered alone, would justify imposing the maximum penalty.

Slightly offsetting this egregious conduct is later evidence in a December 18, 1985 letter of a cooperative visit on November 5, 1985. In that letter, details of needed remedial action were outlined. However, a June 11, 1987 report notes that contact with Allen Barry was again harsh and very uncooperative. (See also transcript pp. 61-63.) Far too much of the Agency's resources appear to have been spent to accomplish eventual compliance. From 1979, Agency efforts were thwarted by hostile behavior and numerous delays.

The Board acknowledges that some efforts, including blacktopping an area and installing tile, a dike and holding basin were made in 1982. And in 1988, Allen Barry straightened the receiving stream. Yet Allen Barry remains in violation, never having made enough effort to cure the problem.

Some delays might be excusable due to intervening illnesses of Allen Barry in 1983 and his attorney in 1987. However, the trail of correspondence from 1982 through 1988 does not support a finding of reasonable delays but rather pays "lip service" to the notion of cooperation. The heart of whether action was really forthcoming can be seen in the letter of June 8, 1988 from Allen Barry's attorney.

> 20. On February 18, 1988, we sent you a letter showing we were having independent lab tests made and in the last paragraph of that letter I stated, "If Mr. Barry sees on his own tests that he is in violation, then we can work from there." It appears that his own tests pushed the limit on the COD and BOD. (emphasis added)

Contrary to the assertions by respondent's attorney in the June 8, 1988 letter, the Board does not find "past and continuing cooperation" and "good faith effort." An Agency report of a June 11, 1987 visit with Allen Barry notes that he expressed his unwillingness to change any part of his operation as a result of Agency action. Thus, despite numerous attempts to work with Allen Barry over the years, the Agency ultimately had to file its complaint to accomplish its enforcement goals. The Board views the lack of good faith over many years as supporting a penalty in the higher range. Failure to come into compliance is an aggravating factor here.

In such a case of recalcitrance and bad faith, the need to aid compliance by deterring this violator, as well as others, becomes very important. The state's environmental goals could never be met if similar responses to enforcement were tolerated. This factor, too, suggests a penalty in a higher range.

Very little information is available to inform the Board of the economic impact of the penalty on the violator. The Board will therefore approach this factor as relatively neutral, with any consideration of respondent's ability to pay favoring a smaller penalty to Allen Barry's benefit.

D. Penalty Calculation

Integrating the various elements which suggest a higher or lower penalty amount, the Board concludes that, separate and distinct from recouping the economic benefit from noncompliance, a penalty should be imposed in the amount of $1,000 each for violations of Sections 12(a) and (d) of the Act and for violations of ammonia nitrogen and unnatural sludge standards and livestock management and waste handling regulations. 35 Ill. Adm. Code 302.212, 302.203, 304.105 and 501.403. Besides this $4,000 penalty, an added $100 per day for each violation's additional 3 days of violation, causes the penalty to be increased by $1,200. For the violation of NPDES permit rquirements under 35 Ill. Adm. Code 502.104 a fine of $500, plus $50 per day for each of 3 additional days of violations, shall be imposed. The minimum penalty, therefore, is $5,850, which is well within the range defined earlier, and significantly less than the amount imposed in the Perkinson/Porkville case.

However, as the Agency alleged (but did not specificially calculate), an economic benefit accrued to Allen Barry from not expending funds to achieve compliance. The Board has calculated this benefit as being not less than $12,481. The total penalty, therefore, to aid enforcement of the Act and to recapture the profit or gain from non-compliance should be at a level near $18,331 ($5,850 + at least $12,481). Since the Board is willing to limit the penalty to not more than $10,000, the Board finds that Allen Barry is liable for a $10,000 civil penalty.

ORDER

It is the Order of the Illinois Pollution Control Board that:

1. The Respondent, Allen Barry, has violated Sections 12(a), 12(d) and 12(f) of the Illinois Environmental Protection Act and 35 Ill. Adm. Code 501.403(a), 502.104, 302.203, 304.105, and 302.212.

2. Within 30 days of the date of this Order, the Respondent shall, by certified check or money order payable to the State of Illinois, pay the penalty of $10,000, which is to be sent to:

   Illinois Environmental Protection Agency
   Fiscal Services Division
   2200 Churchill Road
   Springfield, Illinois 61706

   Allen Barry shall also state its Federal Employer Identification number upon the certified check or money order.

3. The Respondent shall comply with all the terms and conditions of the Stipulation and Proposal for Settlement filed on April 12, 1989, which is incorporated by reference as if fully set forth herein.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987, ch. 111-1/2, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Member Joan Anderson concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 10th day of May, 1990, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

Exhibit A

CLEAN WATER ACT

PENALTY POLICY FOR CIVIL SETTLEMENT NEGOTIATIONS

CWA Penalty Summary Worksheet

(1) No. of Violations = _____
x $10,000 = stat. max. = $_____

(2) Economic Benefit ("BEN")
(period covered/
months) = _____ $_____

(3) Total of Monthly Gravity
Components $_____

(4) Benefit + Gravity TOTAL $_____

(5) Recalcitrance Factor _____%
(0-150%) x Total (Line 4) = $_____

(6) Preliminary TOTAL (Line 4 + Line 5) $_____

ADJUSTMENTS

(7) Litigation Considerations
(Amount of reduction) $_____

(8) Ability to Pay
(Amount of reduction) $_____

(9) SETTLEMENT PENALTY TOTAL $_____

Name and Location
of Facility _____

_____

Date of Calculation _____

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

EFFECTIVE DATE: FEB 11 1986