

Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 1973

January 1973

Environment—Environmental Protection in Illinois: A Comparison of State Laws

Follow this and additional works at: https://openscholarship.wustl.edu/law_urbanlaw



Part of the [Law Commons](#)

Recommended Citation

Environment—Environmental Protection in Illinois: A Comparison of State Laws, 1973 URB. L. ANN. 353 (1973)

Available at: https://openscholarship.wustl.edu/law_urbanlaw/vol1973/iss1/22

This Comment is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Urban Law Annual ; Journal of Urban and Contemporary Law by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

ENVIRONMENTAL PROTECTION IN ILLINOIS: A COMPARISON OF STATE LAWS

In 1970, the Illinois General Assembly enacted the Environmental Protection Act (IEPA),¹ thereby extensively reorganizing the environmental protection agencies of the State. Under the provisions of the new Act, the legislators organized a unified program of environmental protection directed by three agencies: Environmental Protection Agency (Agency), Pollution Control Board (Control Board) and Illinois Institute for Environmental Quality (Institute). Each of these agencies, created along "functional rather than subject-matter lines,"² was granted powers and duties separate from, but supplemental to, the other two agencies.³ Working together, the three bodies survey, regulate and conduct scientific examination of the environment as a whole. By removing environmental protection from the incidental control of the Illinois Department of Public Health, the General Assembly made environmental protection an autonomous service preformed by the State.⁴ The scope of IEPA encompasses not

1. ILL. ANN. STAT. ch. 111 1/2, §§ 1001 *et seq.* (Smith-Hurd Supp. 1972). Previous pollution control legislation in Illinois was designed to regulate individual sectors of the environment. IEPA was the first legislation designed to regulate and protect the environment as a whole. Address by Governor Ogilvie of Illinois, Illinois General Assembly, Jan. 19, 1970 [hereinafter referred to as Ogilvie Address].

2. Ogilvie Address, *supra* note 1.

3. The Institute conducts research for long-term problems in environmental control, compiling the research data for future implementation. The scope of this article is limited to the enforcement and regulatory functions of the Agency and the Control Board; therefore, the Institute will not be considered in detail. *See* ILL. ANN. STAT. ch. 111 1/2, § 1006 (Smith-Hurd Supp. 1972).

4. The introductory language of the Act emphasized this purpose:

Legislative declaration

(a) The General Assembly finds: . . .

(iii) that air, water and other resource pollution, public water supply, solid waste disposal, noise, and other environmental problems are closely inter-related and must be dealt with as a unified whole in order to safeguard the environment;

(b) It is the purpose of this Act, as more specifically described in later sections, to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them.

Id. § 1002.

only the abatement of pollution and its effect upon the public health, but also the drafting of an environmental protection program which includes the conservation of natural resources and consideration of the effects of economic, technological and agricultural activities on the environment.⁵ The statute expands the State's responsibility in pollution control to include noise pollution, land pollution, radioactive emissions and sewage disposal, as well as air and water pollution.⁶ Procedural and substantive changes in the law have enhanced the powers of the regulatory agencies to enforce provisions of the Act and regulations, and also have provided the means for citizen participation in the regulatory process.⁷

I. POLLUTION CONTROL PRIOR TO IEPA

Prior to IEPA, Illinois pollution control followed traditional standards. Under the provisions of the Air Pollution Control Act⁸ and the Sanitary Water Board Act,⁹ two regulatory boards operated autonomously; one responsible solely for air pollution, the other for water pollution and the regulation of sewage systems. Each board was authorized to draft regulations, investigate possible violations and levy fines against violators when an infraction of the law or regulations was proved in a board hearing. Two problems arose in the operation of this system. First, unnecessary duplication of functions detracted from the effectiveness of the boards' pollution control systems. The operation of two boards made possible a situation in which a party charged with a violation of state pollution laws could be subjected to two investigations and, thus, could be required to appear in separate hearings and possibly to file two appeals in the district court.¹⁰ Second, operating under the misconception that the environment was a divisible entity to be regulated by sectors, state officials gave little attention to cooperation between the two boards. Although both statutes contained sections providing for the boards' coopera-

5. Ogilvie Address, *supra* note 1.

6. ILL. ANN. STAT. ch. 111 1/2, §§ 1008-25a (Smith-Hurd Supp. 1972).

7. These changes will be explained in greater detail in this article.

8. Law of August 19, 1963, §§ 1 *et seq.*, [1963] Ill. Laws 3191 (repealed 1970).

9. Law of July 12, 1951, §§ 1 *et seq.*, [1951] Ill. Laws 1462 (repealed 1970).

10. Both statutes provided for the appeal of board decisions to the district court for trial determination. Law of August 19, 1963, § 13, [1963] Ill. Laws 3200 (repealed 1970); Law of July 12, 1951, § 9, [1951] Ill. Laws 1467 (repealed 1970). *See also* Ogilvie Address, *supra* note 1.

ENVIRONMENTAL PROTECTION

tion with other agencies and departments,¹¹ the very act of establishing separate boards precluded the drafting of joint regulations and conducting joint hearings in areas common to air and water pollution.

Three substantive factors distinguish the repealed pollution control laws from IEPA.¹² Both boards established under the repealed acts consisted of members serving on a part-time basis without compensation, other than expenses.¹³ Members of both the Air Pollution Board and Sanitary Water Board represented various interest groups in Illinois with only a secondary emphasis on the desirability of including professionals familiar with pollution control.¹⁴ In addition, neither board possessed strong enforcement powers. The Illinois courts recognized that pollution legislation did not restrict the state boards to the mere abatement of common law nuisance, but also included powers for preventive action.¹⁵ Nevertheless, statutory restrictions precluded the boards' exercise of immediate enforcement action.¹⁶ The most prohibitive provision was a requirement that the Air Pollution Technical Secretary participate in conciliation meetings with the violator before formal action was commenced.¹⁷ Finally,

11. Law of August 24, 1965, § 5-2.5, [1965] Ill. Laws 3675 (repealed 1970); Law of July 12, 1951, § 6(d)(3), [1951] Ill. Laws 1466 (repealed 1970).

12. ILL. ANN. STAT. ch. 111 1/2, §§ 1001 *et seq.* (Smith-Hurd Supp. 1972).

13. Law of August 19, 1963, § 4, [1963] Ill. Laws 3192 (repealed 1970); Law of July 12, 1951, § 3, [1951] Ill. Laws 1463 (repealed 1970).

14. The Sanitary Water Board was composed of six members: Directors of the Departments of Public Health, Agriculture, Conservation, and Public Works, as well as gubernatorial appointees representing the industrial interests and the municipal governments of the State.

The Air Pollution Control Board was a nine member panel composed of the Director of the Department of Public Works and Buildings and eight appointees of the governor: a professional engineer, a physician, persons engaged in the fields of conservation, private manufacturing and municipal government, a labor representative and two persons selected at large. Law of July 12, 1951, § 3(b), [1951] Ill. Laws 1463 (repealed 1970).

15. *City of Murphysboro v. Sanitary Water Bd.*, 10 Ill. App. 2d 111, 134 N.E.2d 522 (1956).

16. The Illinois Air Pollution Control Act, in pertinent part, provided:

Nothing contained herein shall be deemed to grant to the Board any jurisdiction or authority with respect to air pollution existing solely within commercial and industrial plants, works or shops or to affect the relations between employers and employees with respect to or arising out of any condition of air pollution.

17. Law of August 24, 1965, § 5-3, [1965] Ill. Laws 3675 (repealed 1970).

17. *Id.* § 5-2.1; Law of August 19, 1963, § 9, [1963] Ill. Laws 3197 (repealed 1970).

under the former statutes, Illinois had no statewide program for pollution control. Municipalities could make application and receive from the Air Pollution Control Board a certificate of exemption from the statutory requirements if they provided for a local air pollution control ordinance "not inconsistent" with the provisions of the state statute.¹⁸ Although this provision encouraged local participation in pollution control, it resulted in a duplication of effort which led to conflict between state regulations and court determinations of whether the state or local agencies had controlling power.¹⁹

II. THE POWERS OF THE CONTROL BOARD AND THE AGENCY

IEPA established two instrumentalities for the regulation and enforcement of its provisions: the Agency and the Control Board. The Agency²⁰ maintains surveillance of the environment, investigates possible sources of pollution, presents cases before the Control Board²¹

18. Law of August 19, 1963, § 14, [1963] Ill. Laws 3200 (repealed 1970). The court, in *Ruth v. Aurora Sanitary Dist.*, 17 Ill. 2d 11, 158 N.E.2d 601 (1959), held that there was nothing in the Sanitary Water Board Act to indicate that the Sanitary Water Board was intended to retain exclusive control and jurisdiction over water pollution in the State of Illinois. *Id.* at 17, 158 N.E.2d at 605. Both the Air Pollution Control Board and Sanitary Water Board were precluded from exclusive jurisdiction by either statute or case law.

19. *See Dunlap Lake Property Owners v. Edwardsville*, 22 Ill. App. 2d 95, 159 N.E.2d 4 (1959).

20. The statute designates the duties of the Agency:

(b) The Agency shall have the duty to collect and disseminate such information, acquire such technical data, and conduct such experiments as may be required to carry out the purposes of this Act, including ascertainment of the quantity and nature of discharges from any contaminant source and data on those sources, and to operate and arrange for the operation of devices for the monitoring of environmental quality.

(c) The Agency shall have authority to conduct a program of continuing surveillance and of regular or periodic inspection of actual or potential contaminant or noise sources, of public water supplies, and of refuse disposal sites.

(e) The Agency shall have the duty to investigate violations of this Act or of regulations adopted thereunder, to prepare and present enforcement cases before the Board, and to take such summary enforcement action as is provided for by Section 34 of this Act.

(j) The Agency shall have authority to make recommendations to the Board for the adoption of regulations under Title VII of the Act.

(k) The Agency shall have the duty to represent the State of Illinois in any and all matters pertaining to plans, procedures, or negotiations for interstate compacts or other governmental arrangements relating to environmental protection.

ILL. ANN. STAT. ch. 111 1/2, § 1004 (Smith-Hurd Supp. 1972).

21. *Id.* § 1005.

ENVIRONMENTAL PROTECTION

and, in emergency situations, exercises summary enforcement powers. The Control Board possesses extensive legislative and judicial powers. No regulations implementing environmental control in Illinois are enforceable until the Control Board grants final approval.²² The Control Board conducts public hearings on complaints charging violations of the Act pursuant to the regulations and considers petitions for variances or appeals of the Agency's denial to grant permits.²³ Both the Control Board and the Agency possess authority to obtain evidence and testimony for presentation at hearings.²⁴

22. The statute provides:

(b) The Board shall determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act.

(c) The Board shall have authority to act for the State in regard to the adoption of standards for submission to the United States under any federal law respecting environmental protection. Such standards shall be adopted in accordance with Title VII of the Act and upon adoption shall be forwarded to the Environmental Protection Agency for submission to the United States pursuant to Section 4(m) of this Act. Nothing in this paragraph shall limit the discretion of the Governor to delegate authority granted him under any federal law.

Id.

23. The statute provides:

When the Board has by regulation required a permit for the construction, installation, or operation of any type of facility, equipment, vehicle, vessel, or aircraft, it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of this Act or of regulation hereunder. The Agency shall adopt such procedures as are necessary to carry out its duties under this Section. In granting permits the Agency may impose such conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder.

Id. § 1039. *See id.* §§ 1003(d), 1005(d).

24. Both the Agency and the Control Board are statutorily authorized to obtain evidence as follows:

(d) *The Agency shall have authority to enter at all reasonable times upon any private or public property for the purpose of inspecting and investigating to ascertain possible violations of the Act or of regulations thereunder, in accordance with constitutional limitations.*

(h) *The Agency shall have authority to require the submission of complete plans and specifications from any applicant for a permit required by this Act or by regulations thereunder, and to require the submission of such reports regarding actual or potential violations of the Act or of regulations thereunder, as may be necessary for purposes of this Act. (Emphasis added.)*

Id. § 1004.

(d) The Board shall have authority to conduct hearings upon complaints charging violations of this Act or of regulations thereunder. . . .

(e) In connection with any hearing pursuant to subsections (b) or (d) of

By creating this separation of powers between the two agencies, the legislation protects the individual citizen or company from the arbitrary decisions of one man. Administrative decisions made by the Agency, such as the denial of a permit to operate certain machinery,²⁵ are subject to appeal to the five member Control Board. All Control Board hearings are public. Procedural rules utilized include the rules of evidence and the right to cross-examine witnesses.²⁶ Appeal of Control Board decisions to the appellate division of the Illinois courts is guaranteed by IEPA.²⁷

Two changes instituted by IEPA enhance the prestige and authority of the Control Board and the Agency. First, the Illinois legislators abandoned the use of a board whose members represented numerous interest groups and replaced it with the Control Board composed of "five technically qualified members"²⁸ who possess expertise in the area of pollution control. Second, the Control Board operates on a full-time basis, conducting regular meetings and hearings throughout the state.²⁹ Since their duties necessitate continued responsibility, Control Board members are compensated for their services.³⁰

The Agency has regional and district offices throughout the State for continued surveillance of the environment. This system illustrates

this section the Board *may subpoena and compel the attendance of witnesses and the production of evidence reasonably necessary* to resolution of the matter under consideration. The Board shall issue such subpoenas upon the request of any party to a proceeding under subsection (d) of this section or upon its own motion. (Emphasis added.)

Id. § 1005.

25. *Id.* §§ 1004(f), 1039.

26. *Id.* § 1032. See POLLUTION CONTROL BD. PROCEDURAL RS. 317-27.

27. ILL. ANN. STAT. ch. 111 1/2, § 1041 (Smith-Hurd Supp. 1972).

28. *Id.* § 1005(a).

29. The Control Board is statutorily required to hold at least one meeting a month and as many more as are necessary. The Control Board has the authority to appoint a qualified lawyer, licensed to practice in Illinois, to preside over hearings throughout the State. *Id.*

Several hearings are held throughout the State each week to hear evidence on charges of violations of the Act and its regulations. As a result the Control Board is regularly impaneled to make determinations on these cases. The Illinois Pollution Control Board Newsletter, a weekly publication of the Control Board, lists the Control Board's agenda for each month in the first publication for that month.

30. The Control Board members receive \$30,000 per year and the Control Board Chairman receives \$35,000 per year. ILL. ANN. STAT. ch. 111 1/2, § 1005(a) (Smith-Hurd Supp. 1972).

another innovative aspect of the new legislation—a statewide program for environmental control. The authority of the Agency and the Control Board is no longer pre-empted by municipalities and local governments. Statutory provisions permit counties and municipalities to enact ordinances regulating the use of land and buildings, as well as the design, installation and operation of appurtenances in order to control the discharge of “air contaminants” into the atmosphere.³¹ Although designed to facilitate local government control, these statutes apparently will not usurp the ultimate authority of the Agency and the Control Board. A recent Illinois Supreme Court decision, *Department of Environmental Control v. United States Steel Corp.*,³² acknowledging that the drafters of IEPA abandoned the use of the exemption for local governments, concluded that the municipalities’ authority to regulate the environment must be explicitly granted by the General Assembly. The court refused to imply a grant of enforcement powers from the statutes allowing the regulation of air contaminants, because IEPA provided no exemptions for local governments.³³ This decision indicates that courts will uphold the Control Board and the Agency as the primary enforcement agencies in Illinois, thereby permitting the enforcement of uniform regulations throughout the State.

Since the responsibility for regulation of the environment rests in the Agency and the Control Board, the statute grants to both agencies extensive enforcement powers. The Agency is empowered to take summary enforcement action if, after investigation, it determines that an emergency condition exists which endangers public health. Summary action against any person or company is legally binding until the Control Board examines the situation in a formal hearing.³⁴ Designed as a precaution against an environmental alert, this statutory provision authorizes immediate action to control a situation detrimental to the public health.

The Agency possesses a quasi-enforcement function in its authority to grant or deny permits for the operation of certain equipment or

31. *Id.* ch. 24, § 11-19.1-11; *id.* ch. 34, § 421.2.

32. 48 Ill. 2d 575, 272 N.E.2d 46 (1971).

33. The supreme court held that the powers to regulate “air contaminants” did not imply that the local governments would have the power to subpoena witnesses and evidence. Such enforcement or investigative powers would have to be specifically provided by the General Assembly. *Id.*

34. ILL. ANN. STAT. ch. 111 1/2, § 1004(e) (Smith-Hurd Supp. 1972).

facilities.³⁵ Regulations adopted by the Control Board specify the facilities, equipment, vehicles, vessels or aircraft for which the Agency must grant a permit before construction or operation may begin. Authorized to impose such "conditions as may be necessary to accomplish the purposes of this Act,"³⁶ the Agency, through its power to grant permits, can enforce continued compliance with its regulations. There is a statutory provision for the Control Board to review denials of permits.³⁷ The Control Board's procedural rules provide the mechanism to challenge the issuance of a permit on the grounds that it is violative of IEPA and its regulations.³⁸

The new Act increases maximum penalties, which the Control Board can levy against violators, to \$10,000, with an additional penalty not to exceed \$1,000 per day for continued violations after the Control Board has filed an order of determination on the matter.³⁹ The power to levy fines, rule on violations and grant variances⁴⁰ anywhere in the State makes the Control Board the most effective pollution control agency in Illinois. After almost two years of operation, the Control Board has displayed a willingness to impose the appropriate fines for such infractions.⁴¹ In an early decision, *Environmental Protection Agency v. Marquette Cement Co.*,⁴² the Control Board imposed the full penalty for failure to take progressive measures to abate pollution after a variance was granted.⁴³ Recently, in *Environmental Protection Agency v. Granite City Steel Co.*,⁴⁴ the Control

35. *Id.* § 1039.

36. *Id.*

37. *Id.* § 1040.

38. POLLUTION CONTROL BD. PROCEDURAL R. 503.

39. ILL. ANN. STAT. ch. 111 1/2, § 1042 (Smith-Hurd Supp. 1972).

40. The variance is a carryover from former pollution control enactments in Illinois. Any person or company can apply for a variance from the statute or the regulations under it when he believes compliance with said statute will work an unreasonable burden on him. Essentially, this provision is designed to grant relief to those who will be so economically overburdened by the statute that they will be forced to cease operations or to release their property. *Id.* §§ 1035-38.

41. *Environmental Protection Agency v. Frank Cobin d/b/a Cobin Salvage Co.*, PCB 71-234 (1971) (fined \$3,000 for open burning); *Environmental Protection Agency v. Reese Constr. Co.*, PCB 70-231 (1971) (penalized \$100 for installing an asphalt plant without first obtaining a permit); *Environmental Protection Agency v. J. M. Cooling*, PCB 70-2 (1970) (\$1,000 fine).

42. PCB 70-23 (1971).

43. *Id.*

44. PCB 70-34 (1972).

ENVIRONMENTAL PROTECTION

Board imposed a fine of \$100,000 against a major Illinois steel company for failure to take positive action to control the emission of air contaminants.⁴⁵ But even the frequent imposition of fines upon violators is ineffective if the Control Board grants variances indiscriminantly. A variance from compliance with the provisions of the Act is granted when one seeking the variance can show that compliance with the statute is an arbitrary or unreasonable hardship. Intended as a safeguard against unreasonable imposition upon the property rights of a citizen, the variance, if granted too leniently, will permit avoidance of the statute and regulations.⁴⁶ In its first opinion, the Control Board refused a variance stating:

A demonstration of economic difficulty alone in the face of available alternatives does not justify the unusual relief. . . . The statutory standards require far more than a simple balancing of the petitioner's burden in complying with the regulations against the public benefit in the enforcement of the law.⁴⁷

Other decisions have allowed the variance only after the requesting party posted a security bond to insure that construction would modify the offending condition.⁴⁸ A continuation of this policy will facilitate effective enforcement of environmental control regulations.

Another source of public action against polluters in Illinois is the statutory provision allowing the Attorney General to file suit against polluters, as defined in IEPA. That provision permits the Attorney General to represent the people of Illinois both in civil actions against polluters and in hearings before the Control Board.⁴⁹

45. *Id.*

46. The variance may be a necessary provision. Some authorities have suggested that without the provision for a variance the statute would be unconstitutional with respect to the deprivation of property without due process of law. Graham, *Pollution and the Law in Illinois*, 52 *CHI. B. REC.* 208 (1971).

47. Illinois Pollution Control Board Newsletter, No. 4 (Sept. 18, 1970).

48. In *Environmental Protection Agency v. GAF Corp.*, PCB 71-235 (1971), the Control Board imposed a fine and ordered defendant to post a \$2,600,000 surety bond to assure the completion of treatment facilities that would comply with regulations.

For a detailed examination of the Control Board's and Agency's operation see Comment, *The Illinois Environmental Protection Act—A Comprehensive Program for Pollution Control*, 66 *NW. U.L. REV.* 345 (1971).

49. *ILL. ANN. STAT.* ch. 14, § 12 (Smith-Hurd Supp. 1969). This arrangement can be advantageous when budgetary problems threaten to curtail the operations of the Agency. In the event that the Agency is not properly funded, it can continue its surveillance and investigations of violators and turn all infor-

The new Illinois Constitution guarantees the right of private citizens to obtain relief from polluters.⁵⁰ IEPA allows the private citizen to appear before the Control Board either to prosecute a complaint against a violator or to propose changes in regulations.⁵¹ Since the citizen must bear the burden of proof in actions before the Control Board, most citizen complaints are filed with the Agency which is equipped to fully prosecute them.⁵² However, filing a complaint with the Control Board or Agency does not preclude the private citizen from seeking other remedies, for the law specifically states that "[n]o existing civil or criminal remedy for any wrongful action shall be excluded or impaired by this Act."⁵³

III. POLLUTION CONTROL IN OTHER STATES

Michigan has also recognized the need to provide adequate private remedies against pollution. In 1970, the Michigan General Assembly enacted legislation providing citizens or state officials with the authority to seek equitable or declaratory relief for actual or probable violations of environmental standards.⁵⁴ Under this statute, relief is not

mation over to the Attorney General to be argued before the Control Board.

There is always the possibility that the administrative agencies and the Attorney General will work at cross purposes with each other. Hypothetically, the Control Board could levy a substantial fine while the Attorney General's office negotiates a settlement for nominal damages.

50. The drafters of the new Illinois Constitution included an article guaranteeing that:

Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

ILL. CONST., art. XI, § 2 (Smith-Hurd, Supp. 1970).

51. ILL. ANN. STAT. ch. 111 1/2, § 1032 (Smith-Hurd Supp. 1972).

52. *Id.* § 1031(c). Nevertheless there have been a few citizen actions filed. The League of Women Voters of Chicago initiated the first citizen complaint against the North Shore Sanitary District (PCB 70-7) alleging the District was polluting Lake Michigan and violating the water quality control regulations.

53. ILL. ANN. STAT. ch. 111 1/2, § 1045 (Smith-Hurd Supp. 1972).

54. The Michigan statute states:

The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partner-

limited merely to strict violations of state anti-pollution standards, but where such a standard exists, either party may request the court to review the feasibility and reasonableness of the standard.⁵⁵ The court may also "adjudicate the impact of the defendant's conduct on the air, water or other natural resources and on the public trust therein in accordance with this act."⁵⁶ Neither the court nor the complaining parties are statutorily restricted to consider only violations defined in the state regulations.

The Michigan legislation guarantees the citizen's right to seek equitable action in the courts to halt pollution and recover equitable damages. Illinois legislation has not gone that far. There is no specific guarantee, as yet, of the private citizen's right to remedial court action for damage attributable to pollution.⁵⁷

The strength of the Illinois system is the centralization of functions, which other states have attempted through executive or legislative action. In 1970, the New York legislature created the Department of Environmental Conservation (DEC), consolidating all conservation programs, air and water pollution boards and other environmental functions under the authority of the Commissioner of DEC.⁵⁸ The State Environmental Board (Environmental Board) created under this Act and the Commissioner are jointly responsible for the drafting

ship, . . . for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

MICH. STAT. ANN. § 14.528(202)(1) (Supp. 1972).

55. *Id.* § 14.528(202)(2).

56. *Id.* § 14.528(204)(3). The statute also provides for the protection of the defendant. To prevent harassment suits the court may require the plaintiff to post a \$500 surety bond to insure his ability to continue the suit if the court has reasonable belief to doubt his solvency. When the plaintiff has made a prima facie case against the defendant, the latter may rebut with affirmative evidence that there is no feasible and prudent alternative to his conduct and that the conduct is consistent with the promotion of the public health, safety and welfare in light of the state's concern for the protection of its natural resources. Both of these factors must be proved for the defense to be successful. *Id.* § 14.528(203)(1).

57. For a discussion of the private remedies granted in air pollution cases see Fitzpatrick, *Private Legal Remedies to Air Pollution in Illinois*, 59 ILL. B.J. 746 (1971).

58. Law of July 1, 1970, ch. 140, § 100, [1970] Laws of New York 880 (repealed 1972). In 1972, the New York legislature recodified the Environmental Conservation Law (ECL) to include the former text of the 1970 ECL and portions of the CONSERVATION LAW, PUBLIC HEALTH LAW, AGRICULTURAL and MARKETS LAW, EXECUTIVE LAW and UNCONSOLIDATED LAWS. The new ECL merely compiles all New York Conservation Laws in one act. N.Y. ENVIRONMENTAL CONSERV. LAW (McKinney Supp. 1972).

of rules and regulations for the State.⁵⁹ DEC is responsible for drafting a statewide environmental plan to be approved by the Governor and revised periodically.⁶⁰ The Environmental Board is primarily an advisory board designed to conduct hearings on the drafting of regulations and to serve as a forum for the coordination of conservation and environmental activities in the State.⁶¹ To assist the Governor, a Council of Environmental Advisors (Council) was created.⁶² The Council is primarily designed to advise the Governor on specific environmental policy and to conduct special inquiries and investigations into the interrelationships between the environment, economic development and population growth.⁶³

The strongest enforcement powers are exercised by the Commissioner. In defining his authority, the Act provides that DEC and the Commissioner should take necessary action to prevent and control air pollution emergencies. This includes the power to limit the consumption of fuels, use of vehicles and, if necessary, open burning.⁶⁴ When the Commissioner deems an activity dangerous to public health, he can exercise summary enforcement powers to halt the activity until the alleged violator has an opportunity to be heard.⁶⁵ The strongest regulatory powers granted to the Commissioner are designed to control the amount of phosphorous elements in household cleaners.⁶⁶ If he finds evidence of harm caused by such a cleaner, he may "after a public hearing restrict or limit by regulation the use of such ingredient or product."⁶⁷ Violators of an order to cease production of such a product are liable for an initial penalty of \$2,500, plus \$500 a day for each day of continuing violation.⁶⁸

59. N.Y. ENVIRONMENTAL CONSERV. LAW, §§ 3-0301, 5-0107 (McKinney Supp. 1972).

60. *Id.* § 3-0303.

61. *Id.* § 5-0107.

62. *Id.* § 7-0101.

63. *Id.* § 7-0107.

64. *Id.* § 3-0301.

65. *Id.* § 71-0131. The statute states that the alleged violator must be given an opportunity to be heard as soon as possible and no later than 15 days following the summary action.

66. *Id.* § 35-0105. Section 35-0105(1) provides that the weight in grams of harmful substances present in household cleaners be clearly marked on the label of the product.

67. *Id.* § 35-0107(3).

68. *Id.* The strongest section in this statute is its regulation of phosphorous present in household cleaners and soaps. The Act establishes a timetable for the

ENVIRONMENTAL PROTECTION

The primary difference between the Illinois and New York statutes is the purpose for which they were drafted. The New York DEC with its Environmental Board and Council serves primarily in an advisory capacity to the Governor. Although it is responsible for the drafting of pollution and conservation regulations to be enforced in the State, DEC is not directly responsible for enforcement (with the exceptions of the summary power of the Commissioner and the regulation of phosphorus elements). Unlike IEPA, the New York statute is not designed to have principal authority over pollution control. In *Oriental Boulevard Co. v. Heller*,⁶⁹ the New York Court of Appeals rejected the argument that the Environmental Conservation Law pre-empted all local authority to control air pollution. The court reasoned that, since the statute provided for cooperation with federal, regional and local governments, the local power to regulate air pollution was implicit in the Act's language.⁷⁰ Thus, the court rejected the argument that DEC was to have exclusive enforcement control over the environment. By contrast, IEPA establishes an effective regulatory and enforcement system within the executive department. The environmental control agencies, a fully autonomous system subject only to the scrutiny of the Illinois judicial system, are designed to conduct their activities without the requirement of the Governor's approval.⁷¹

IV. CONCLUSION

The Illinois legislature has designed a highly functional system for the control of pollution within the State. Easily accessible by anyone with a complaint or a desire to present suggestions for new regulations or rules, the Pollution Control Board will operate as an effective

limitation of phosphorous compounds in all such cleaners manufactured, sold or distributed in the state of New York. *Id.* § 35-0135(2). By June 1, 1973, all cleaners shall contain no phosphorous compound other than such traces or incidental concentrations as may be authorized by the commissioner by regulation. *Id.*

69. 27 N.Y.2d 212, 316 N.Y.S.2d 226, 265 N.E.2d 72 (1970).

70. *Id.* at 221, 316 N.Y.S. at 232, 265 N.E.2d at 76. *See* Department of Environmental Control v. United States Steel Corp., 48 Ill. 2d 575, 272 N.E.2d 46 (1971). The Illinois court refused to imply powers from the granting of regulatory powers to the local governments.

71. This, of course, does not preclude political problems which could arise as a result of competition between the Agency and the Attorney General's office. *See* note 47 *supra*. There appears to be no serious problem in this area at the time of this writing.

enforcement agency. In terms of technical regulation, the Environmental Protection Agency conducts a statewide system of investigations and regulation of all major areas of pollution. Given the proper funding of the Agency and the Institute,⁷² Illinois' pollution control system may be one of the most efficient systems ever created.

William L. Berry

72. *See* note 3 *supra*.