6 Illinois Environmental Forums

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C. [6.34] Other State Agencies
D. [6.35] Local Environmental Authorities
E. [6.36] Illinois Attorney General, State's Attorney, or Municipal Corporation Counsel
F. [6.37] Illinois Courts

I. [6.1] OVERVIEW

Environmental issues that arise during transactions may require the buyer, the seller, or both to approach Illinois' environmental forums. Illinois' primary environmental statute is the Environmental Protection Act (Illinois Act), 415 ILCS 5/1, *et seq.* The Illinois Act establishes the two primary environmental forums — the Illinois Environmental Protection Agency (IEPA), and the Illinois Pollution Control Board (IPCB). It also lays the framework for the adoption and enforcement of environmental obligations. While the IEPA and the IPCB are the primary environmental forums in Illinois, other state agencies, local governments, prosecutors at both the state and local level, and the courts can play a significant role in any particular environmental issue. For transactional environmental problems, the two most commons errors are the failure to act sufficiently quickly to address the discovered problem with the Illinois environmental forums or the failure to take the identified problems sufficiently seriously when interacting with the Illinois environmental forums.

II. [6.2] WHO CAN BRING ISSUES REGARDING A TRANSACTION TO AN ILLINOIS ENVIRONMENTAL FORUM

Environmental issues arise frequently in transactional matters, either internally or externally. Issues arise internally when some problem is discovered by a transactional participant (*e.g.*, the seller, the buyer, the bank, etc.). Internal issues may already be known by the facility or may be discovered only as a part of the transactional process. Issues arise externally when someone not involved in the transaction, such as the government, adjacent landowners, or citizens groups, raises an issue in a manner that may affect the transaction. External issues may not directly relate to the transaction; they may simply arise by coincidence during the transactional time period.

A. [6.3] Seller-Initiated Issues

Most sellers will conduct some form of review of their environmental status, however informal, prior to or in the early stages of the transaction process. This review may simply document known environmental issues, or the review may discover new problems. In either event, the seller must determine whether the problem can and should be resolved prior to completing the transaction or whether the problem simply should be made a part of the transactional process.

Seller-initiated environmental issues run the full spectrum, involving all media (air, water, land) and all types of problems, lack of permits, substantive violations, failure to file reports, nonpayment of fees, or on-site contamination. Some problems, such as a failure to file a report or to pay a fee, may be relatively minor, can be quickly resolved before the transaction is complete, and need not be addressed in the transactional documents. Other problems may take much longer to resolve. Problems that require a long time usually must be addressed within the transactional documents.

The seller's environmental obligations may not terminate when the transaction is complete. Depending on the nature of the transaction (*e.g.*, an asset sale), the seller may retain liability for past activities at the site. The transactional documents may attempt to assign liability for past operations in the form of indemnities and warranties. However both government and private parties retain the ability to pursue the prior owners and operators of the facility, if they still exist, for past violations.

B. [6.4] Purchaser-Initiated Issues

In a similar manner, purchasers may have the need to bring environmental issues to resolution. Any due diligence investigations conducted during negotiations may disclose environmental problems that simply cannot be resolved by the seller prior to the closing. If the issue will affect future operations at the site, the seller traditionally either will assume control over the issue or at least maintain oversight on the issue as the resolution progresses. There may be additional issues relating to past activities that are discovered after the transaction is complete. Even when the transactional documents assign liability to the prior owner, the purchaser will want to maintain either control or oversight on the resolution of the past noncompliance issue as it could affect current or future operations.

Environmental permits are required for equipment and operations that might impact the environment. Permits are specific to the owners and operators involved in those activities. Whenever the purchaser intends to continue using the seller's equipment and operations without changes, the purchaser will need to submit permit applications reflecting the change in ownership. Generally, permit applications that reflect only a change in ownership are not particularly troublesome. However, if the purchaser intends to make any changes or additions to the existing equipment or operations, it may require significantly more complex permitting.

Because permits are specific to the individual owner and operator, the purchaser is not entitled to continue operations under permits previously issued to the seller after the transaction is complete. The purchaser should submit applications to change ownership prior to finalizing the transaction, in adequate time to allow the Illinois Environmental Protection Agency to process and approve the application prior to the closing date. Many transactions are considered confidential, and the parties may not wish to disclose the transaction to the public, employees, or competitors prior to the completion of the deal. While there are no specific regulations governing this process, the IEPA has traditionally accepted permit applications for a change of ownership that are submitted immediately following the completion of the transaction. Historically, the IEPA has not filed an enforcement action against the purchaser's operations for operations without a permit in their name as long as facility operations remain unchanged and the change of ownership application is promptly submitted.

There is one purchaser-initiated matter that has received very little publicity. It is not uncommon for purchasers to discover, after the transaction is complete, an undisclosed environmental compliance problem that began under the prior owner and that has continued during the purchaser's tenure. When the purchaser promptly reports such a problem to the IEPA, or if the IEPA discovers it during a site inspection, this matter may result in enforcement. When only the purchaser has the capacity to solve the problem, such as installing pollution control

equipment or securing permits, the IEPA may only initiate an enforcement action against the purchaser. The IEPA may be unwilling to join the prior owner in the enforcement action. If this matter has not been addressed in the transactional documents, the purchaser may have no remedy for any environmental claims or penalties the IEPA is seeking regarding historic activities. In this circumstance, the purchaser may wish to consider filing a citizen suit against the prior owner, contemporaneously with the IEPA's enforcement action, for the environmental violations that occurred prior to the transaction. This could ensure that the prior owner is present before the adjudicator to be responsible for the past noncompliance.

C. [6.5] Government-Initiated Issues

Government environmental agencies routinely monitor facilities and business within their jurisdiction to ensure that all environment requirements are being met. Some types of monitoring are purely chronological. If a facility has filed routine environmental reports in the past, the government may want to know why it has not filed a current report. If an environmental permit expired last month, the government may want to know why the facility has not renewed it.

Environmental litigation also may result when a government agency acquires information that discloses potential noncompliance. This information disclosure can be initiated by the company, or it can be initiated by the government as part of its investigative functions. Company-initiated information disclosure of potential noncompliance includes the expected reports that the company files with regulators, such as quarterly noncompliance reports or monthly monitoring reports. Company-initiated disclosure may come from some unexpected sources as well. The government may discover unpermitted production changes or the installation of equipment by reviewing company annual reports or press releases; they may learn a lot about a company from public sources. In press releases related to a transaction, the purchasers frequently state how they intend to cut costs and increase production. If environment permit applications are not filed after the transaction concludes, the Illinois Environmental Protection Agency may elect to inspect the facility to see if the described changes have triggered any compliance or permitting concerns.

The second form of disclosure comes from government-initiated investigations. Environmental permitting agencies conduct a certain number of routine or random inspections. Traditionally, these inspections involve only one media (air, water, or waste) and include a brief physical inspection of relevant parts of the facility and a limited record review. Less frequently, government agencies conduct more extensive investigations, such as the United States Environmental Protection Agency (USEPA)'s multimedia inspections, in which a host of inspectors will conduct an extensive multi-week inspection of a facility. Multimedia inspections essentially put all facility operations and records under a microscope.

Targeted inspections may arise because of citizen complaints lodged against the company at the regulatory agency. These complaints may be filed by neighbors, disgruntled employees, or even competitors acting anonymously. Targeted inspections may arise when local ambient environmental or health data suggests a problem that points to a specific source or group of sources. Or targeted inspections may arise when the government launches an initiative to review a specific industrial category. In the past, the USEPA's Office of Enforcement and Compliance Assurance has launched targeted inspection programs against several industrial sectors, including

agricultural practices/concentrated animal feeding operations, automotive service and repair shops, coal-fired power plants, drycleaners, industrial organics facilities, chemical preparation facilities, iron and steelworks, municipalities, petroleum refineries, primary nonferrous metalworks, and pulp mills.

If enforcement does happen, the most likely prosecuting entity will be the state agency. Nearly all of the traditional environmental regulatory control programs contemplate that the state, rather than the USEPA, will be the primary compliance and enforcement agency. Statistically, most government environmental enforcement actions have been initiated by the states.

D. [6.6] Citizen-Initiated Issues — Including Adjacent Landowners

Though there is little statistical data on the number of environmental enforcement actions initiated by "citizens" (*i.e.*, an individual, an environmental group, an adjacent landowner, or even a competitor), it appears that citizens initiate a very small percentage of enforcement actions. The Illinois Pollution Control Board entertained more than 550 environmental enforcement actions from January 1, 1990, to December 31, 1999; of those, about 480 were initiated by the state, and about 70 were initiated by private parties.

While citizen-initiated litigation may not be prevalent, citizens can have a dramatic impact on environmental issues by prompting government agencies to initiate investigations and litigation that otherwise might not have occurred. Moreover, government is likely to seek substantially higher civil penalties when there are citizen complaints or media attention.

III. [6.7] WHAT ARE THE TYPES OF ISSUES

A transactional due diligence investigation is frequently one of the most intensive internal environmental investigations a facility will receive. It is not uncommon to discover new issues during these investigations. Whether previously known or newly discovered, the three most common environmental issues related to transactions are failure to secure appropriate permits, noncompliance with existing environment obligations, and discovery of onsite contamination.

Regardless of the issue, there are two aspects to each problem. First, who will be responsible for costs, civil penalties, and other issues related to any historic problems? Second, how will any mandated additional pollution control equipment, remedial activities, or operational restrictions affect current and future activities at the site? These questions are usually intertwined and may require both seller and purchaser involvement to resolve the issue in a reasonable manner.

A. [6.8] Lack of Permits

Permits are one of the fundamental elements of the environment program in Illinois. Because permitting requirements are very technical and complicated, it is sometimes difficult to determine whether a particular piece of equipment or operation requires an environmental permit. Also, it is hard to determine whether changes in existing equipment or operations will require additional

permitting activities. There is significant scrutiny involved in an environmental due diligence; frequently, it will discover a piece of equipment or operation (or a change in such equipment or operation) that should have had an environmental permit in the past. When that happens, the seller, the buyer, or both will need to approach the permitting agency.

Transactionally related environmental issues frequently involve existing equipment or operations that have not been properly permitted. The three most difficult problems are timing, compliance obligations, and potential enforcement. Some complex permitting may require more than a year from the time the initial permit application is filed until the final permit is granted. These time delays dramatically complicate transactional negotiations. Compliance obligations may also create significant issues. The Illinois Environmental Protection Agency has wide discretion in drafting permit requirements regarding the types of pollution control equipment, remediation activities, reporting activities, and monitoring activities. The financial costs and operational constraints associated with permitting limitations may not be known until the final stages of the permit process. This complicates the process of allocating obligations and liabilities between the purchaser and the seller in the transactional documents. Also, the IEPA considers operating without a permit to be a significant compliance issue. Once the IEPA is made aware of unpermitted operations, it may initiate enforcement activities.

For a variety of reasons, the best course of action upon discovering unpermitted activities is to immediately report the situation to the IEPA, approach the IEPA regarding any necessary pre-permit application activities such as testing, and submit appropriate applications at the earliest possible opportunity. The Environmental Protection Act and the Illinois Pollution Control Board's regulations do not allow for the operation of unpermitted equipment. The IEPA may not demand that a facility immediately discontinue operations, but it continues to operate at its own risk.

The safest course with unpermitted equipment is to expeditiously apply to the IPCB for a temporary relief, in the form of the variance, to allow continued operation of the unpermitted equipment until such time as the permit is finally granted by the IEPA. Once a variance of that type is issued, the period of noncompliance ends even if it takes the IEPA significantly longer to issue a final permit.

The permit issuance process is complicated, may involve public hearings, may result in significant public opposition, and provides no certainty for the timing or control obligations that may be imposed. Also, fiscal constraints on the IEPA's budget have limited the permit staffing levels and further slowed permit processing. When delays in permit processing will result in significant adverse consequences, the permit applicant should approach IEPA management to describe these consequences and request expedited consideration.

B. [6.9] Potential Noncompliance

Transactional investigations also frequently discover noncompliance issues, some of which may be significant and result in environmental enforcement. Again, as with the lack of permits discussed in §6.8 above, for a variety of reasons, the safest course of conduct upon discovering

noncompliance is to immediately report this activity to the Illinois Environmental Protection Agency and establish communications to discuss what actions one should take in the path forward.

The period between initial IEPA discovery of a problem and the ultimate filing of a complaint may be lengthy, sometimes lasting several years. Resolution of the litigation may take several additional years. Unless the compliance problem is immediately corrected, the noncompliance period, during which the IEPA may request civil penalties, can be quite long. It starts on the date the noncompliance began and only concludes on the date the compliance activities are completed. If the company and the IEPA take six months to agree on the appropriate compliance activities and the company takes another six months to complete that activity, the noncompliance period includes that one-year period.

Upon discovering noncompliance, buyers and sellers should investigate the option of filing a variance petition with the Illinois Pollution Control Board requesting time to select and achieve the compliance activities. If the variance is granted, the time from the granting of the variance to the date the compliance activities are completed will not be counted as a period of noncompliance for which civil penalties will be assessed.

During noncompliance and enforcement, the IEPA will be reluctant to process other permit applications for the facility. If a permit is needed to add or modify other sources or operations at the facility, a pending enforcement conflict may delay this process.

C. [6.10] Soil or Groundwater Contamination

Previously unknown soil or groundwater contamination may be discovered at a property during due diligence investigations. If the investigation clearly discloses that the facility is the only source of the contamination and that the contamination has not migrated off-site, the problem can be addressed in the same manner as any noncompliance issue. However, managing the problem is more difficult if contamination from the facility has migrated to off-site properties or if the source of the contamination is from off-site. Off-site contamination and the recovery of damages or remediation costs for this contamination are addressed in other chapters of this handbook. Also, the facility's historic off-site waste disposal practices may become the subject of state or federal Superfund-type activities. This issue is also addressed elsewhere in this handbook.

D. [6.11] Restrictions on Future Use

Frequently, the buyer contemplates changes in the facility's equipment or operations after the transaction is complete. This may only require the buyer to secure the appropriate permits and then implement the changes. In some circumstances, the environmental character of the area may preclude the buyer from making certain changes easily.

The Illinois Environmental Protection Agency has designated significant areas of the state as non-attainment for certain air pollutants. The IEPA also has identified certain surface waters as not achieving appropriate standards. Any facility wishing to release additional pollutants into

these designated areas may find the government approval process to be extraordinarily complicated and expensive. In some circumstances, the facility may have to purchase pollution credits from other area sources, if they are available at all.

The IEPA also determines when a municipal or private sewage treatment plant has reached its capacity to treat waste and publishes this information as a restricted status list and a critical review list. These lists are available on the IEPA's Web site at www.epa.state.il.us/water/permits/waste-water/restricted-status-list. New sewer hookups to a waste treatment plant on the restricted status list are prohibited, and connections to plants on the critical review list will be closely scrutinized.

A purchaser should carefully review any potential restrictions to make sure that the planned activities can commence at the facility in a reasonable manner.

E. [6.12] Nuisance and Trespass

Most Illinois environmental obligations are based on a command-and-control process in which the Illinois Environmental Protection Agency sets specific requirements in permits or regulations. Compliance with these requirements does not necessarily insulate a facility from other environmental claims. Illinois has a rich history of common-law nuisance and trespass actions to address issues typically described as environmental. Most claims of this type are founded on complaints relating to odor or noise issues, but nuisance and trespass claims can be made on a host of other issues, including off-site migration of contaminants. Most environmental regulatory and statutory enforcement procedures do not allow the citizen claimant to recover monetary damages. Nuisance and trespass claims do allow these recoveries.

IV. [6.13] SPECIFIC ENVIRONMENTAL FORUMS

The most common Illinois environmental forums are created by statute. Today, most environmental matters arise before the Illinois Environment Protection Agency, the Illinois Pollution Control Board, and the Illinois Department of Natural Resources.

A. [6.14] Illinois Environmental Protection Agency

The Illinois General Assembly became the first state legislature in the nation to adopt a comprehensive Environmental Protection Act, 415 ILCS 5/1, *et seq.*, which became effective July 1, 1970. The Illinois Act set up a triumvirate of state agencies. Regulations and adjudications would be determined by the Illinois Pollution Control Board, research would be handled by the Institute for Environmental Quality (now part of the Department of Natural Resources), and the Illinois Environmental Protection Agency would function as the investigation, permitting, and enforcement arm. Today, the IEPA is composed of roughly 1,200 employees, working in the headquarters in Springfield and in nine field offices and three laboratories throughout the state.

The IEPA is divided into Bureaus (Air, Land, and Water) and further subdivided by function. For participants in a transaction, the most likely interaction with the IEPA will come in the areas of permits, enforcement, regulatory relief (*i.e.*, variances, site-specific rules, and adjusted standards), negotiations regarding upcoming regulations, and remediation of soil or groundwater.

1. [6.15] Permitting

The Environmental Protection Act assigns most environmental permitting obligations to the Illinois Environmental Protection Agency. See 415 ILCS 5/39. The permit process begins when applicants submit permit applications. The IEPA's Web site contains many environmental permit application forms. See www.epa.state.il.us/forms-publications. The Illinois Pollution Control Board's Web site, www.ipcb.state.il.us, has the substantive regulations relating to environmental permitting and pollution control obligations. Section 39 of the Environmental Protection Act describes general permitting, but the Act also has numerous other provisions detailing the procedures and requirements for specific types of permits.

When the Act was originally adopted in 1970, it contained relatively few permitting procedures, which were contained in §40 of the Act, but over time, the Act has been amended to create a variety of different permitting procedures and standards. Some of the variations in the procedures are required by differences in permitting under the controlling federal legislation. Some of the variations simply reflect unique Illinois permitting obligations that are tailored to fit the circumstances. As a consequence, it is difficult to describe permitting in a general manner without losing some of the important details. Some of the permitting procedures, such as those for Clean Air Act Permit Program (CAAPP) major stationary sources (see 415 ILCS 5/39.5), have over 21 pages of statutory language describing the process and requirements. A complete description of CAAPP or other complex permit programs is beyond the scope of this chapter.

a. [6.16] General Permitting

Generally speaking, whenever the Environmental Protection Act or Illinois Pollution Control Board regulations require a permit, the applicant must submit the necessary forms to demonstrate that its operations will not cause a violation of the Act or the regulations. In making its determination on permit applications, the Illinois Environmental Protection Agency may consider any prior adjudications of noncompliance with the Illinois Act. The IEPA may impose such permit conditions as may be necessary to accomplish the purposes of the Act and that are not inconsistent with the regulations adopted by the IPCB.

When the IPCB has by regulation required a permit for the construction, installation, or operation of any type of facility, equipment, vehicle, vessel, or aircraft, the applicant shall apply to the IEPA for the permit, and it shall be the duty of the IEPA to issue the permit upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of the Act or the regulations. 415 ILCS 5/39(a).

If the IEPA denies the permit, it must provide specific, detailed statements as to the reasons why the permit application was denied, including but not limited to the following:

> **(i) the Sections of this Act which may be violated if the permit were granted;**
>
> **(ii) the provision of the regulations, promulgated under this Act, which may be violated if the permit were granted;**
>
> **(iii) the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and**
>
> **(iv) a statement of specific reasons why the Act and the regulations might not be met if the permit were granted.** *Id.*

Historically, permit applications from the IEPA were fairly simple, substantive compliance requirements were straightforward, and the IEPA had adequate personnel to review and issue permits quickly. Over time, this process has become more complex and time-consuming. The Illinois Act's procedures for general permitting now apply only to the simplest permitting situations.

b. [6.17] NPDES Permitting

The Illinois Environmental Protection Agency has primary responsibility for issuing permits for the discharge of pollutants to surface waters and permits for the dredge and fill of wetlands. Permits for hookup and discharge to the local sewage treatment plant are generally issued by the local sewage agency. Permits for discharge to surface water, National Pollutant Discharge Elimination System (NPDES) permits, must conform to significant federal requirements.

Regarding NPDES permits, §39(b) of the Illinois Environmental Protection Act provides in part as follows:

> **The Agency may issue NPDES permits exclusively under this subsection for the discharge of contaminants from point sources into navigable waters, all as defined in the Federal Water Pollution Control Act, as now or hereafter amended, within the jurisdiction of the State, or into any well.**
>
> **All NPDES permits shall contain those terms and conditions, including but not limited to schedules of compliance, which may be required to accomplish the purposes and provisions of this Act.**
>
> *** * ***
>
> **The Agency may include, among such conditions, effluent limitations and other requirements established under this Act, Board regulations, the Federal Water Pollution Control Act, as now or hereafter amended, and regulations pursuant thereto, and schedules for achieving compliance therewith at the earliest reasonable date.** 415 ILCS 5/39(b).

Both the IEPA and the Illinois Pollution Control Board have adopted extensive regulations regarding the procedures for issuing and the content of NPDES permits. See 35 Ill.Admin. pts. 301 – 395.

c. [6.18] Air Permits

As noted in §6.15 above, the Environmental Protection Act describes the Clean Air Act Permit Program for major stationary sources (Title V permitting) at great length. See 415 ILCS 5/39.5. See also Title V of the Clean Air Act, 42 U.S.C. §7661, *et seq.* A hard copy of a permit application for a large CAAPP source may be over six inches thick, and processing this application may take over a year. There are opportunities for public comment and public hearings on the applications. Each application may require consideration under a variety of federal and state permit disciplines covering new source review, hazardous air pollutants, or other programs. Certain aspects of those permits would be issued and appealed under Illinois statutory and regulatory requirements because Illinois has been delegated authority to implement those particular aspects of air permits. Other aspects of air permitting are carried out in Illinois by the Illinois Environmental Protection Agency under delegation from the United States Environmental Protection Agency. Permitting and appeal of those aspects of the permit are governed by federal law.

Permits for smaller air sources (non-CAAPP sources) are issued under 415 ILCS 5/39. Even for non-CAAPP sources, permitting can be quite complex if the facility's activities invoke complex air programs.

Both the IEPA and the Illinois Pollution Control Board have adopted extensive regulations regarding the procedures for issuing and the content of air permits. See 35 Ill.Admin. Code pts. 201 – 291.

d. [6.19] Hazardous Waste Treatment, Storage, and Disposal Facility (RCRA) Permits

The Illinois hazardous waste permit program follows the framework of the national program under the Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94-580, 90 Stat. 2795, but permits may contain additional requirements imposed by Illinois law.

Section 39(d) of the Illinois Environmental Protection Act provides in part as follows:

> **The Agency may issue RCRA permits exclusively under this subsection to persons owning or operating a facility for the treatment, storage, or disposal of hazardous waste as defined under this Act.**
>
> **All RCRA permits shall contain those terms and conditions, including but not limited to schedules of compliance, which may be required to accomplish the purposes and provisions of this Act. The Agency may include among such conditions standards and other requirements established under this Act, Board regulations, the**

> **Resource Conservation and Recovery Act of 1976 (P.L. 94-580), as amended, and regulations pursuant thereto, and may include schedules for achieving compliance therewith as soon as possible. The Agency shall require that a performance bond or other security be provided as a condition for the issuance of a RCRA permit.** 415 ILCS 5/39(d).

Illinois has adopted hazardous waste regulations that are identical in substance to the federal regulations. In many respects, this has simplified the permitting process, or at least made it uniform with federal process.

e. [6.20] Other Permits

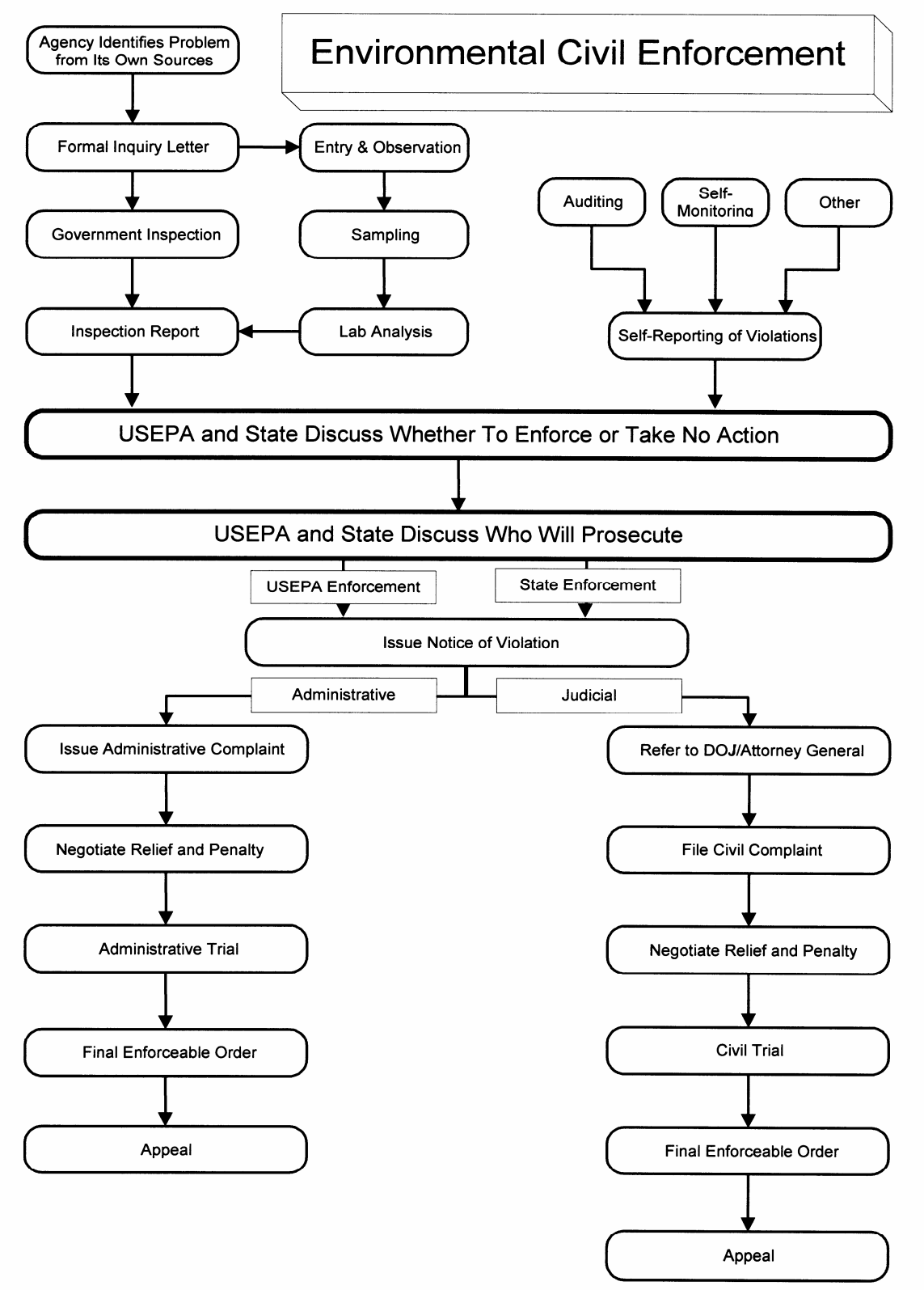
There are a host of other environmental permits required in Illinois, such as underground injection control, special waste, municipal solid waste landfills, waste transfer stations, composting operations, nonhazardous waste landfills, and others. Permitting for these activities is covered under the more general provisions of 415 ILCS 5/39.

2. [6.21] Enforcement

The Illinois Environmental Protection Agency initiates the vast majority of civil and environmental enforcement in Illinois. The IEPA conducts routine inspections of facilities, frequently annually, to determine compliance. In addition, many local governments have environmental inspection programs that may discover problems and refer them to the IEPA for enforcement. The IEPA has internal procedures to detect violations identified in routine monitoring reports filed with the IEPA. Complaints from the public may also form the basis of IEPA inspections and subsequent enforcement.

It is very uncommon for an IEPA enforcement action to begin without substantial advance notice to the facility. Most commonly, the IEPA inspector will identify potential problems to the facility during the inspection, with a follow-up written report that is also provided to the facility. The IEPA may start a more detailed process of investigation by submitting formal information requests to the facility. This may result in follow-up conversations in which the IEPA's questions focus on particular aspects of facility operations or equipment.

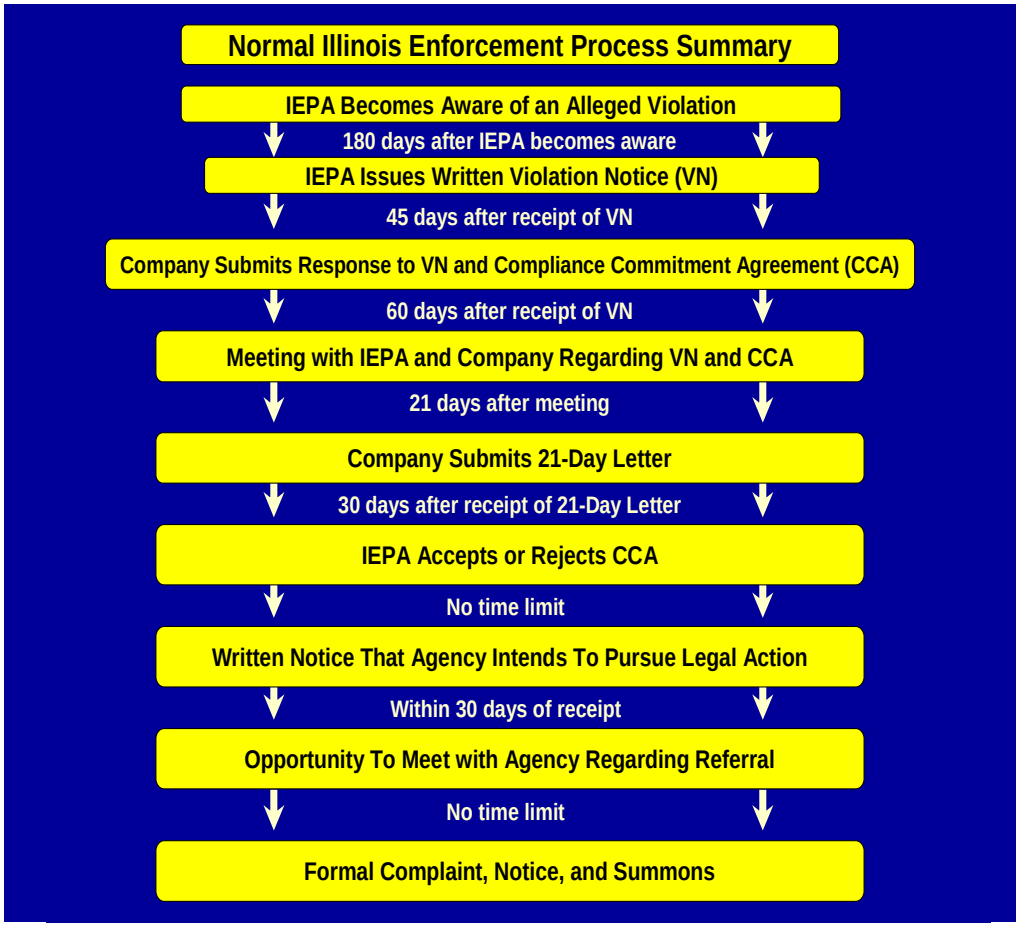
As the enforcement process unfolds, the IEPA must determine whether the particular issue is sufficiently important to warrant enforcement. If it is, the IEPA must decide whether to pursue the action at the state level or refer the matter to the United States Environmental Protection Agency for enforcement. There is a wide variety of federal and state policy guidance documents that dictate when the matter is sufficiently important to justify enforcement and whether the matter should be preferentially handled by the state or federal government. The following is a general flowchart of the process that may be followed in investigating an issue, deciding whether enforcement is justified, and determining which level of government should pursue the enforcement action:


Environmental Civil Enforcement
Agency Identifies Problem from Its Own Sources
Formal Inquiry Letter
Entry & Observation
Government Inspection
Sampling
Inspection Report
Lab Analysis
Auditing
Self-Monitoring
Other
Self-Reporting of Violations
USEPA and State Discuss Whether To Enforce or Take No Action
USEPA and State Discuss Who Will Prosecute
USEPA Enforcement
State Enforcement
Issue Notice of Violation
Administrative
Judicial
Issue Administrative Complaint
Negotiate Relief and Penalty
Administrative Trial
Final Enforceable Order
Appeal
Refer to DOJ/Attorney General
File Civil Complaint
Negotiate Relief and Penalty
Civil Trial
Final Enforceable Order
Appeal

The Illinois Environmental Protection Act provides a specific enforcement investigatory role for the IEPA:

> **The Agency shall cause investigations to be made upon the request of the Board or upon receipt of information concerning an alleged violation of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, and may cause to be made such other investigations as it shall deem advisable.** 415 ILCS 5/30.

Once the IEPA has determined that there is a potential violation, they follow specific procedures to initiate enforcement. See 415 ILCS 5/31. These procedures are diagramed in the following chart:



Perhaps the most important aspect of the formal enforcement procedure is that the IEPA must provide the facility with detailed information on what violations they claim have occurred and how these violations can be resolved. Second, the process allows the affected facility at least two specific opportunities to meet with the IEPA and provide them with information to show that the claimed violation should not lead to a formal enforcement action. Anyone involved in the enforcement process would be well-advised to treat a violation notice very seriously and devote a significant amount of time and energy to providing the IEPA with an adequate amount of information to show why the matter should not result in enforcement.

One of the most important components that a facility can provide to the IEPA in the hopes of deferring enforcement is the compliance commitment agreement (CCA). The CCA can simply identify the corrective actions that the IEPA listed in the violation notice as necessary to achieve compliance. Affected facilities may want to consider including a supplemental environmental project (see §6.28 below) in the CCA to make the proposed plan as appealing to the IEPA as possible.

If the facility and the IEPA cannot reach agreement, the Illinois Environmental Protection Act provides additional procedural steps before the matter can be referred to the Office of the Attorney General or a state's attorney for enforcement:

> **For alleged violations that remain the subject of disagreement between the Agency and the person complained against following fulfillment of the requirements of subsection (a) of this Section, and as a precondition to the Agency's referral or request to the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred for legal representation regarding an alleged violation that may be addressed pursuant to subsection (c) or (d) of this Section or pursuant to Section 42 of this Act, the Agency shall issue and serve, by certified mail, upon the person complained against a written notice informing that person that the Agency intends to pursue legal action. Such notice shall notify the person complained against of the violations to be alleged and offer the person an opportunity to meet with appropriate Agency personnel in an effort to resolve any alleged violations that could lead to the filing of a formal complaint. The meeting with Agency personnel shall be held within 30 days of receipt of notice served pursuant to this subsection upon the person complained against, unless the Agency agrees to a postponement or the person notifies the Agency that he or she will not appear at a meeting within the 30 day time period. Nothing in this subsection is intended to preclude the Agency from following the provisions of subsection (c) or (d) of this Section or from requesting the legal representation of the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violations occurred for alleged violations which remain the subject of disagreement between the Agency and the person complained against after the provisions of this subsection are fulfilled.** 415 ILCS 5/31(b).

Once the formal notice of intent to pursue legal action has been served and the opportunity for a meeting has been provided, the IEPA is free to refer the matter for formal enforcement.

While §31 of the Act lays out specific procedures and timelines, a failure by the IEPA or the Attorney General to follow these procedures may not preclude subsequent enforcement action.

> **The Board has consistently held that the procedures of Section 31(a) and (b), while being a precondition for referral by the Agency to the Attorney General, are not a limitation on the Attorney General. Chiquita PCB 02-56. The Attorney General may bring an enforcement action pursuant to Section 31(d) of the Act (415 ILCS 5/31(d) (2004)) on the Attorney General's own motion regardless of the Agency's actions. Community Landfill Company PCB 97-193 at 4. The Board has dismissed counts brought only in Chiquita where the record demonstrated that the counts were brought on behalf of the Agency as a result of an Agency referral and not on the Attorney General's motion.** *People v. Barger Engineering, Inc.,* PCB 06-82, 2006 Ill. ENV LEXIS 173 at **15 – 16 (Mar. 16, 2006).

3. [6.22] Negotiations Regarding Upcoming Regulations

The Illinois Environmental Protection Agency has a primary role in developing environmental control regulations for the state. Generally, the IEPA plans regulatory development activities well in advance of any formal filing. As part of the regulatory development activities, the IEPA will generally hold a series of public outreach meetings, or otherwise confer with affected facilities, to ensure that the regulatory proposal is sufficiently well developed and that any obvious problems within the affected industries have been taken into account. Anyone planning a transaction that anticipates future industrial operations would be well advised to check with their local trade associations or with the IEPA regarding planned future regulatory activity affecting these industrial activities.

By the time the IEPA files a formal regulatory proposal with the Illinois Pollution Control Board, many of the critical policy and technical decisions have already been made. By this point a regulatory concept has substantial momentum behind it, and it will be difficult to get the IEPA to agree to significant changes. If the changes had been suggested much earlier in the regulatory development process, the IEPA may have been able to accommodate some of those requests.

4. [6.23] Regulatory Relief Mechanisms

Frequently, transactional due diligence investigations disclose problems with equipment or operations not being in compliance with existing regulatory requirements. It may be difficult to bring the equipment or operation into compliance quickly, or the costs of compliance may be deemed to be excessive. The Illinois Environmental Protection Act provides mechanisms to secure temporary relief from regulatory obligations while bringing a facility into compliance. It also provides mechanisms to secure permanent relief if full compliance with the existing requirements would be deemed unreasonable.

The Act provides for temporary relief in the form of variances. See 415 ILCS 5/35 – 5/38. Regular variances (see §6.30 below) are granted by the Illinois Pollution Control Board for a period not to exceed five years. 415 ILCS 5/36(b). Provisional variances are granted by the

Illinois Environmental Protection Agency for a maximum period of 45 days (415 ILCS 5/36(c)) "whenever it is found, upon presentation of adequate proof, that compliance on a short term basis with any rule or regulation, requirement or order of the Board, or with any permit requirement, would impose an arbitrary or unreasonable hardship" (415 ILCS 5/35(b)).

While the IPCB is charged with making final regular variance decisions, the IEPA is obligated to investigate and provide recommendations on the variance request. It is prudent to approach the IEPA in advance if one plans to file a variance petition with the IPCB. Many disagreements regarding variance language and necessary supporting documentation may be worked out in advance with the IEPA, a much easier process than working out these disagreements within the formal adjudicative structure of a variance proceeding before the IPCB.

The Illinois Act also provides for long-term relief from regulatory requirements when compliance would impose unreasonable hardship. Specifically, 415 ILCS 5/27 and 5/28.1 allow for the IPCB to adopt site-specific rules or for adjusted standards that would apply in lieu of existing rules of general applicability. As with IPCB proceedings seeking temporary relief from regulatory requirements, a facility is well-advised to approach the IEPA in advance of any formal filing with the IPCB to work out potential disagreements.

5. [6.24] Site Remediation Program

When transactional investigations disclose on-site contamination, a facility may choose to remediate the contamination under the site remediation program administered by the Illinois Environmental Protection Agency. This process is discussed in detail in Chapter 12 of this handbook.

6. [6.25] General Agency Regulations

The Illinois Environmental Protection Agency has promulgated general regulations affecting a wide variety of actions that the IEPA takes:

a. 2 Ill.Admin. Code pt. 1828 — Access to Public Records of the Illinois Environmental Protection Agency;

b. 35 Ill.Admin. Code pt. 164 — Procedures for Informational and Quasi-Legislative Public Hearings;

c. 35 Ill.Admin. Code pt. 166 — Procedures for Permit and Closure Plan Hearings;

d. 35 Ill.Admin. Code pt. 168 — Procedures for Contested Case Hearings;

e. 35 Ill.Admin. Code pt. 170 — Procedures for Coordinated Permit Review;

f. 35 Ill.Admin. Code pt. 174 — Delegation of Construction and Operating Permit Authority for Sanitary and Combined Sewers and Water Main Extensions;

g. 35 Ill.Admin. Code pt. 180 — Procedures and Criteria for Reviewing Applications for Provisional Variances;

h. 35 Ill.Admin. Code pt. 181 — Toxic Pollution Prevention Innovation Plans;

i. 35 Ill.Admin. Code pt. 182 — Procedures for Review of Petitions for Mercury Product Exemptions;

j. 35 Ill.Admin. Code pt. 184 — Licensing of Industrial Hygienists;

k. 35 Ill.Admin. Code pt. 185 — Environmental Laboratory Certification Fee Rules;

l. 35 Ill.Admin. Code pt. 186 — Accreditation of Environmental Laboratories; and

m. 35 Ill.Admin. Code pt. 187 — Regulatory Innovation Projects.

In addition, the IEPA has regulations for specific substantive areas in Subtitles B – O of Title 35 of the Illinois Administrative Code. For each substantive regulatory area (each subtitle), the Illinois Pollution Control Board's regulations are in Chapter I of the regulations, and the IEPA's regulations are in Chapter II.

B. [6.26] Illinois Pollution Control Board

The Illinois Pollution Control Board also was created with the original 1970 enactment of the Environmental Protection Act as a quasi-legislative, quasi-judicial administrative agency for environmental matters. The IPCB is a relatively small agency consisting of 5 voting board members and a staff of approximately 20 attorney assistants, administrative personnel, and scientific staff. Board members are nominated by the Governor and confirmed by the Senate for a three-year term of office.

Most adjudicative matters come to the IPCB by formal document filings; the IPCB has no direct investigative functions. While the IPCB has authority to initiate its own regulatory proceedings, and frequently does for its own procedural rules, the IPCB rarely proposes substantive regulations on its own motion. The IPCB does adopt regulations that are identical in substance to federal regulations in certain limited substantive areas. Most regulatory matters are initiated before the IPCB by the Illinois Environmental Protection Agency, usually in response to some federal requirement.

Each formal regulatory matter that comes before the IPCB is assigned a docket number. Regulatory matters are usually assigned by the IPCB chair to one or more board members. These board members, their attorney assistants, and the scientific staff are responsible for conducting the required hearings and developing an adequate record. The proceeding before the IPCB will be under the direction of an attorney assistant acting as a hearing officer. The record will consist of transcripts from the hearings, exhibits offered at hearings, formal filings by the participants, and any public comments received by the IPCB. Once the record is deemed complete, the matter will be taken under advisement by the IPCB for deliberation and decision.

Adjudicatory proceedings (*i.e.*, enforcement, variances, permit appeals), also called contested cases, are initiated before the IPCB with a formal legal filing. The majority of the enforcement proceedings are filed by the Office of the Illinois Attorney General although there are a significant number of citizen-initiated enforcement actions. Variances and permit appeals are typically filed by the individual facility subject to the environmental obligation. Citizens can also file permit appeals if they disagree with the final permit issued by the IEPA. Contested cases are managed by an IPCB hearing officer; no board member need attend the hearings. The hearing officer does not issue a draft order or findings of fact. Once the record is deemed complete, the matter will be taken under advisement by the IPCB for deliberation and decision.

While the IPCB conducts many different types of proceedings, transactional conflicts usually involve only an enforcement proceeding, a permit appeal, or a variance petition.

1. [6.27] General Regulations

Because the Illinois Pollution Control Board acts in a formal manner by pleadings, hearings, motions, and written opinions, it has developed a series of procedural rules about activities before it. Most of the IPCB procedural regulations are found at 35 Ill.Admin. pt. 101, in the following subparts:

a. Subpart A — General Provisions (35 Ill.Admin. Code §§101.100 – 101.114);

b. Subpart B — Definitions (35 Ill.Admin. Code §§101.200, 101.202);

c. Subpart C — Computation of Time, Filing, Service of Documents, and Statutory Decision Deadlines (35 Ill.Admin. Code §§101.300 – 101.308);

d. Subpart D — Parties, Joinder, and Consolidation (35 Ill.Admin. Code §§101.400 – 101.408);

e. Subpart E — Motions (35 Ill.Admin. Code §§101.500 – 101.522);

f. Subpart F — Hearings, Evidence, and Discovery (35 Ill.Admin. Code §§101.600 – 101.632);

g. Subpart G — Oral Argument (35 Ill.Admin. Code §101.700);

h. Subpart H — Sanctions (35 Ill.Admin. Code §§101.800, 101.802); and

i. Subpart I — Review of Final Board Opinions and Orders (35 Ill.Admin. Code §§101.902 – 101.908).

The IPCB's substantive regulations are found at 35 Ill.Admin. Code in the following subtitles:

a. Subtitle B — Air Pollution (35 Ill.Admin. Code pts. 201 – 245);

b. Subtitle C — Water Pollution (35 Ill.Admin. Code pts. 301 – 312);

c. Subtitle D — Mine Related Water Pollution (35 Ill.Admin. Code pts. 401 – 407);

d. Subtitle E — Agriculture Related Water Pollution (35 Ill.Admin. Code pts. 501 – 506);

e. Subtitle F — Public Water Supplies (35 Ill.Admin. Code pts. 601 – 620);

f. Subtitle G — Waste Disposal (35 Ill.Admin. Code pts. 702 – 848);

g. Subtitle H — Noise (35 Ill.Admin. Code pts. 900 – 910);

h. Subtitle I — Atomic Radiation (35 Ill.Admin. Code pt. 1000);

i. Subtitle J — Clean Construction or Demolition Debris (35 Ill.Admin. Code pt. 1100);

j. Subtitle M — Biological Materials (35 Ill.Admin. Code pts. 1420 – 1422); and

k. Subtitle O — Right to Know (35 Ill.Admin. Code pt. 1600).

Many of the substantive regulatory subchapters contain, by necessity, procedures for IPCB action on those substantive areas. For example, procedural requirements affecting air permit appeals would be found within the IPCB's general procedural rules at 35 Ill.Admin. Code pt. 105 (regarding appeals of final Illinois Environmental Protection Agency decisions), within 35 Ill.Admin. Code pt. 101 (regarding adjudicatory proceedings), as well as within the IPCB's air regulations at 35 Ill.Admin. Code pt. 201.

2. [6.28] Enforcement

Since 1970 when the Environmental Protection Act was adopted, the Illinois Pollution Control Board has been the primary forum for civil environmental enforcement in Illinois. The original basis for placing environmental adjudications at the IPCB was that these matters were technically complex and should be heard by a specialized tribunal whose members were technically qualified — the IPCB. Historically, the Office of the Illinois Attorney General has filed few enforcement actions in the circuit courts, mostly when there was an ongoing violation for which injunctive relief may be necessary. This pattern may be changing. There is a growing tendency for the Attorney General's Office to file civil environmental enforcement in the circuit courts even when there is no ongoing violation.

Any person may file an environmental complaint with the IPCB:

> **Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order. The complainant shall immediately serve a copy of such complaint upon the person or persons named therein. Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein, in accord with subsection (c) of this Section.** 415 ILCS 5/31(d)(1).

In most jurisdictions, when the permitting agency issues a permit to a facility, the permit contains all of the terms and conditions under which the facility must operate. If a third party believes these conditions are inadequate, this party must challenge the permit during the brief periods allowed for appeal. Third parties are not allowed to challenge the actions of the facility subsequently unless they violate the terms and conditions of the permit. In Illinois, third parties are allowed to file an enforcement action against a facility claiming that its activities threaten a violation of the Environmental Protection Act, even if these activities are not prohibited by the permit.

Illinois has a somewhat unusual structure for citizen-suit-based environmental enforcement. Historically, third parties in Illinois were not allowed to appeal permits claiming that the Illinois Environmental Protection Agency had failed to include adequate and protective conditions. The Illinois Act did, however, allow third parties to file an enforcement action against a facility as soon as the permit was issued, claiming that operating under the terms and conditions of the permit would not be sufficiently protective to prevent violations of the Act and IPCB regulations. In this situation, the Act assumed the facility was threatening to violate the Act or IPCB regulations by operating in compliance with its permit. Effectively, this was a backdoor permit appeal. There is no specific deadline for filing these enforcement actions; therefore, this type of backdoor permit appeal could be filed long after the permit was issued.

Environmental enforcement at the IPCB is similar to any judicial enforcement proceeding, but the evidentiary standards are somewhat more relaxed. The IPCB has adopted specific procedural rules for enforcement actions at 35 Ill.Admin. Code pt. 103; the IPCB's general procedural rules at 35 Ill.Admin. Code pt. 101 include guidance on many contested case aspects such as discovery, motions, hearings, and evidentiary matters.

Section 31(e) of the Illinois Act provides as follows:

> **In hearings before the Board under this Title the burden shall be on the Agency or other complainant to show either 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 this Act or any rule or regulation of the Board or permit or term or condition thereof. 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.** 415 ILCS 5/31(e).

After considering all of the evidence in the record and the statutory factors for enforcement proceedings, the IPCB makes issues a final decision.

> **Such order may include a direction to cease and desist from violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, and/or the imposition by the Board of civil penalties in accord with Section 42 of this Act. The Board may also revoke the permit as a penalty for violation. If such order includes a reasonable delay during which to correct a violation, the Board may require the posting of sufficient performance bond or other security to assure the correction of such violation within the time prescribed.** 415 ILCS 5/33(b).

At each step of the enforcement process, the parties can reach agreement on the two primary issues: What additional pollution control efforts are required, and what civil penalty is appropriate for past violations? If the parties reach agreement on both issues, the case can be resolved by memorializing those agreements in a stipulated settlement and submitting it to the IPCB for approval. If agreement cannot be reached, the parties may proceed to adjudicate the matter before the IPCB in a contested case. Either side can appeal to the Illinois appellate courts if they are unhappy with the IPCB's final decision.

Most environmental enforcement cases quickly reach resolution on what additional pollution control efforts are required. The parties usually require more time to reach agreement on what civil penalty, if any, is appropriate. Traditionally, the Attorney General's office will convey, formally or informally, a proposed settlement amount to resolve the enforcement action. This is the opening bid in the civil penalty negotiation process.

The Illinois Act provides for the recovery of civil penalties in enforcement actions:

> **Except as provided in this Section, any person that violates any provision of this Act or any regulation adopted by the Board, or any permit or term or condition thereof, or that violates any order of the Board pursuant to this Act, shall be liable for a civil penalty of not to exceed $50,000 for the violation and an additional civil penalty of not to exceed $10,000 for each day during which the violation continues; such penalties may, upon order of the Board or a court of competent jurisdiction, be made payable to the Environmental Protection Trust Fund, to be used in accordance with the provisions of the Environmental Protection Trust Fund Act.** 415 ILCS 5/42(a).

Other provisions of the Act specify different penalty maximums under specific federal program areas. The Act also specifies the factors to be taken into consideration when setting the civil penalty amount and the factors that can reduce the civil penalty:

> **(h) In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of this Section, the Board is**

authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

(1) the duration and gravity of the violation;

(2) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

(3) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;

(4) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;

(5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;

(6) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and

(7) whether the respondent has agreed to undertake a "supplemental environmental project," which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform.

In determining the appropriate civil penalty to be imposed under subsection (a) or paragraph (1), (2), (3), or (5) of subsection (b) of this Section, the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship. However, such civil penalty may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent.

(i) A person who voluntarily self-discloses non-compliance to the Agency, of which the Agency had been unaware, is entitled to a 100% reduction in the portion of the penalty that is not based on the economic benefit of non-compliance if the person can establish the following:

(1) that the non-compliance was discovered through an environmental audit or a compliance management system documented by the regulated entity as reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations;

(2) that the non-compliance was disclosed in writing within 30 days of the date on which the person discovered it;

(3) that the non-compliance was discovered and disclosed prior to:

(i) the commencement of an Agency inspection, investigation, or request for information;

(ii) notice of a citizen suit;

(iii) the filing of a complaint by a citizen, the Illinois Attorney General, or the State's Attorney of the county in which the violation occurred;

(iv) the reporting of the non-compliance by an employee of the person without that person's knowledge; or

(v) imminent discovery of the non-compliance by the Agency;

(4) that the non-compliance is being corrected and any environmental harm is being remediated in a timely fashion;

(5) that the person agrees to prevent a recurrence of the non-compliance;

(6) that no related non-compliance events have occurred in the past 3 years at the same facility or in the past 5 years as part of a pattern at multiple facilities owned or operated by the person;

(7) that the non-compliance did not result in serious actual harm or present an imminent and substantial endangerment to human health or the environment or violate the specific terms of any judicial or administrative order or consent agreement;

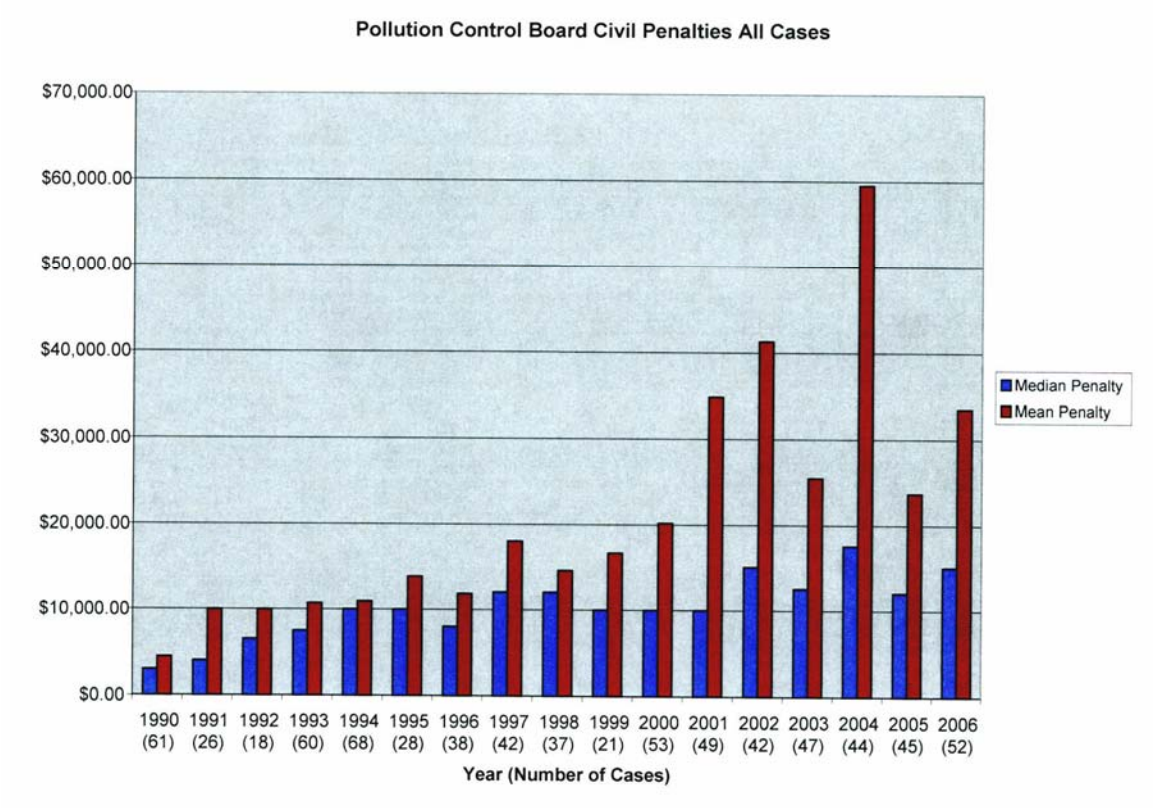
(8) that the person cooperates as reasonably requested by the Agency after the disclosure; and

(9) that the non-compliance was identified voluntarily and not through a monitoring, sampling, or auditing procedure that is required by statute, rule, permit, judicial or administrative order, or consent agreement.

If a person can establish all of the elements under this subsection except the element set forth in paragraph (1) of this subsection, the person is entitled to a 75% reduction in the portion of the penalty that is not based upon the economic benefit of non-compliance. 415 ILCS 5/42(h) – 5/42(i).

These factors are especially important to the transactional practitioner because certain provisions, such as rapid self-reporting, apply to actions taken as soon as the violation is discovered, which may be during the transactional due diligence.

Obviously, the likely civil penalty in any particular case will depend on the specific facts of the case, the government's position on civil penalties at that time, and the quality and quantity of information presented to support a minimal penalty. However, it is reasonable to review the civil penalties that have been issued by the IPCB in historic enforcement cases.



An evaluation of total penalties hides a great deal of detail. For example, many parties settle simply to avoid the cost of litigation and the associated bad publicity. Reviewing the IPCB's stipulation and contested case penalties separately will reflect a more meaningful evaluation of the types of penalties a facility might expect.

IPCB Penalties — Stipulations

YEAR	2000	2001	2002	2003	2004	2005	2006
Number of Stipulated Settlements	50	47	38	41	35	44	50
Highest Penalty	$173,000	$166,337	$371,688*	$160,000	$149,600	$ 90,000	$189,250
Median Penalty	$ 10,049	$ 9,500	$ 15,000	$ 11,000	$ 13,000	$ 12,000	$ 15,000
Mean Penalty	$ 20,406	$ 17,572	$ 39,934	$ 25,861	$ 26,885	$ 22,734	$ 29,363

**People v. Ferrara Pan Candy Co.*, PCB 02-185, 2002 Ill. ENV LEXIS 619 (Nov. 7, 2002) (nine air violations over four years; Ferrara received $371,688 in economic benefit by not implementing proper control equipment).

IPCB Penalties — Contested Cases

YEAR	2000	2001	2002	2003	2004	2005	2006
Number of Contested Cases	3	2	4	6	9	1	2
Highest Penalty	$ 40,000	$850,000*	$110,000	$ 60,000	$1,000,000**	$ 65,000	$ 28,000
Median Penalty	$ 5,750	$440,000	$ 47,500	$ 20,000	$ 66,000	$ 65,000	$ 26,500
Mean Penalty	$ 16,250	$440,000	$ 54,250	$ 22,500	$ 186,388	$ 65,000	$ 26,500

**People v. Panhandle Eastern Pipe Line Co.*, PCB 99-191, 2001 Ill. ENV LEXIS 618 (Nov. 15, 2001) (serious air permit violations for seven sources at large corporation over ten years).
***People v. ESG Watts, Inc.*, PCB 01-167, 2004 Ill. ENV LEXIS 191 (Apr. 1, 2004) (numerous landfill violations over three years at company with "extensive record of noncompliance").

As a general rule, "[t]he Board has previously penalized two dollars for each dollar gained through noncompliance." *People v. Gilmer*, PCB 99-27, 2000 Ill. ENV LEXIS 529 at *8 (Aug. 24, 2000), citing *ESG Watts, Inc. v. Illinois Pollution Control Board*, 282 Ill.App.3d 43, 668 N.E.2d 1015, 218 Ill.Dec. 183 (4th Dist. 1996), *People v. ESG Watts, Inc.*, PCB 96-233, 1998 Ill. ENV LEXIS 43 (Feb. 5, 1998), and *People v. ESG Watts, Inc.*, PCB 96-237, 1998 Ill. ENV LEXIS 70 (Feb. 19, 1998).

The Attorney General has begun to seek civil penalties to recoup the "unjust profits" a facility enjoys as a result of its illegal activity. Using this theory, if an automobile manufacturer glues mirrors to car windshields using single drops of noncompliant glue, the civil penalty would equal or exceed the entire profit the company made on all the automobiles manufactured with the noncompliant material. This approach is largely based on the USEPA's white paper draft advisory, *Identifying and Calculating Economic Benefit That Goes Beyond Avoided and/or Delayed Costs* (May 25, 2003). The white paper considered this theory in limited circumstances, such as selling illegally imported ozone depleting substances.

In some jurisdictions, the unjust profits theory has been rejected when applied to traditional environmental violations: "Using a wrongful profits analysis significantly overinflates the actual economic benefit to the violator." *Agency of Natural Resources v. Deso*, 2003 VT 36, 175 Vt. 513, 824 A.2d 558 (2003). In Illinois, the Attorney General and the IEPA have pursued this theory in some settlement negotiations, and some companies have signed settlement agreements in which the penalty was based on unjust profits. Sometimes, the unjust profits theory is used as punishment for companies that refuse to settle for penalties the IEPA has calculated using more conventional theories. In one case, rejecting an IEPA-proposed conventional civil penalty settlement of $358,400 prompted the IEPA to increase its penalty demand to $2,620,956 using the unjust profits theory. *People v. Oldcastle APG Northeast, Inc.*, No. 05 CH 478 (17th Cir. Winnebago Cty.). It appears that no Illinois court has yet addressed this issue, but the theory may be in conflict with the requirement of the Illinois Act that "the economic benefits shall be determined by the lowest cost alternative for achieving compliance." 415 ILCS 5/42(h)(3).

Enforcement is the most common consequence of any significant noncompliance discovered during the transactional due diligence investigation. As a general rule, the noncompliance period, and the period for which civil penalties are calculated, is calculated from when compliance was required until when compliance is actually achieved. Achieving compliance may require the purchase and installation of new equipment, which can take quite some time.

When compliance cannot be achieved quickly, a company may wish to consider filing for a variance. A variance can allow short-term relief from regulatory requirements while action is being taken to achieve full compliance. If a company files for a variance and works expeditiously to achieve compliance, the IPCB may take that into consideration in determining the period of noncompliance for civil penalty purposes.

3. [6.29] Appeals from Final Agency Decisions

Permit appeals (or appeals from other final Illinois Environmental Protection Agency action) are largely heard by the Illinois Pollution Control Board under the authority of §40(a)(1) of the Environmental Protection Act, which provides, "If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency." 415 ILCS 5/40(a)(1).

Petitions for appeal of a final IEPA action may be filed by the permit applicant. In addition, most environmental permitting allows affected third parties to appeal permit. In many circumstances, anyone filing a third-party appeal must demonstrate that they are adversely affected by the IEPA's decision and may have to demonstrate that they participated in the permit issuance proceedings before the IEPA.

The content for a petition to review a final IEPA action is fairly straightforward:

> **In addition to the requirements of 35 Ill.Adm. Code 101. Subpart C, the petition must include:**
>
> **(a) The Agency's final decision or issued permit;**
>
> **(b) A statement specifying the date of issuance or service of the Agency's final decision or issued permit, as applicable pursuant to Section 105.206 of this Subpart;**
>
> **(c) A statement specifying the grounds of appeal; and**
>
> **(d) For petitions under Section 105.204(b) of this Subpart, a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held, and a demonstration that the petitioner is so situated as to be affected by the permitted facility.** 35 Ill.Admin. Code §105.210.

Within 30 days after the petition for review has been filed, the IEPA must file its record on appeal. The record must contain the following:

> **(1) Any permit application or other request that resulted in the Agency's final decision;**
>
> **(2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application;**
>
> **(3) The permit denial letter that conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision;**
>
> **(4) The hearing file of any hearing that may have been held before the Agency, including any transcripts and exhibits; and**
>
> **(5) Any other information the Agency relied upon in making its final decision.** 35 Ill.Admin. Code §105.212(b).

The IPCB will hold a hearing in the matter, conducted by a hearing officer. The hearing is an adjudicatory proceeding, although the rules of evidence are more flexible than would be found in a judicial proceeding. The hearing will be limited to the record filed on appeal unless the parties agree to supplement the record. Either party may file a motion for summary judgment based on the record to avoid the necessity of a hearing. The IPCB may dismiss the petition if it is duplicated or frivolous or if the third-party petitioner is not so located as to be affected by the permitted facility.

The IPCB has specifically identified the standard for review and burdens in a permit appeal:

Section 39(a) of the Act (415 ILCS 5/39(a) (2004)) provides that the Agency has a duty to issue a permit upon proof that the facility will not cause a violation of the Act or Board regulations. Section 39(a) further provides that "[i]n making determinations on permit applications . . . the Agency may consider prior adjudications of noncompliance" with the Act. 415 ILCS 4/39(a) (2004).

The Board's scope of review and standard of review are the same whether a permit applicant or a third party brings a petition for review of an NPDES permit. Prairie Rivers Network v. PCB *et al.*, 335 Ill.App.3d 391, 401; 781 N.E.2d 372, 380 (4th Dist. 2002) and Joliet Sand & Gravel Co. v. PCB, 163 Ill.App.3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), citing IEPA v. PCB, 118 Ill.App.3d 772, 455 N.E.2d 189 (1st Dist. 1983). The distinction between the two types of NPDES permit appeals is which party bears the burden of proof. Under Section 40(e)(3) of the Act, in a third party NPDES permit appeal, the burden of proof is on the third party. 415 ILCS 5/40(e)(3) (2004); Prairie Rivers, 335 Ill.App.3d 391, 401; 781 N.E.2d 372, 380. Under Section 40(a)(1) of the Act, if the permit applicant appeals the permit, the burden of proof is on the permit applicant. 415 ILCS 5/40(a)(1) (2004).

The question before the Board in permit appeal proceedings is: (1) whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would have occurred if the requested permit had been issued; or (2) whether the third party proves that the permit as issued will violate the Act or Board regulations. Joliet Sand & Gravel, 163 Ill.App.3d 830, 833, 516 N.E.2d 955, 958; Prairie Rivers, 335 Ill.App.3d at 401; 781 N.E.2d at 380. The Agency's denial letter frames the issues on appeal and the burden of proof is on the petitioner. ESG Watts, Inc. v. PCB, 286 Ill.App.3d 325, 676 N.E.2d 299 (3rd Dist. 1997).

The Board's review of permit appeals is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112 (Aug. 9, 2001) *aff'd* at 335 Ill.App.3d 391, 401; 781 N.E.2d 372, 380 (4th Dist. 2002); Alton Packaging Corp. v. PCB, 162 Ill.App.3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987). *American Bottom Conservancy v. Illinois Environmental Protection Agency*, PCB 06-171, 2007 Ill. ENV LEXIS 34 at **10 – 12 (Jan. 26, 2007).

4. [6.30] Variances

The Illinois Environmental Protection Act provides a mechanism for facilities to secure additional time for compliance with environmental requirements:

The Board may grant individual variances beyond the limitations prescribed in this Act, whenever it is found, upon presentation of adequate proof, that compliance

> **with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship. However, the Board is not required to find that an arbitrary or unreasonable hardship exists exclusively because the regulatory standard is under review and the costs of compliance are substantial and certain. In granting or denying a variance the Board shall file and publish a written opinion stating the facts and reasons leading to its decision.** 415 ILCS 5/35(a).

Variance proceedings are contested case matters before the Illinois Pollution Control Board; the applicant has the burden of proving its case. The IPCB's regulations at 35 Ill.Admin. Code pt. 104 describe the filing requirements, the contents of a variance petition, the process of securing the Illinois Environmental Protection Agency's recommendation on the variance, and the terms and conditions of variances. As with any contested case proceeding, the IPCB's regulations at 35 Ill.Admin. Code pt. 101 describe procedural requirements. The substantive control regulations from which a variance is sought may provide additional guidance affecting the variance proceeding.

To secure a variance, petitioners must demonstrate that immediate compliance would impose an arbitrary and unreasonable hardship. This is a difficult standard to meet, especially when the underlying pollution control standard has been in place for some time and other affected sources have complied. A variance can be helpful when a company discovers past noncompliance and will need some time to install new equipment or otherwise come into compliance.

> **In determining whether to grant a variance, the Board must determine whether a petitioner has presented adequate proof that compliance with the Board regulations at issue would impose an arbitrary or unreasonable hardship. 415 ILCS 5/35(a) (2004). Furthermore, the burden is upon the petitioner to show that its claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public. Willowbrook Motel v. PCB, 135 Ill.App.3d 343, 481 N.E.2d 1032 (1st Dist. 1977). Only with such a showing can the claimed hardship rise to the level of arbitrary or unreasonable.**
>
> **A variance is a temporary reprieve from compliance with the Board's regulations and petitioners should seek compliance regardless of the hardship that compliance may present an individual polluter. Monsanto Co. v. PCB, 67 Ill.2d 276, 367 N.E.2d 684 (1977). Accordingly, except in certain special circumstances, petitioners are required, as a condition to the granting of a variance, to commit to a plan that will bring them into compliance within the term of the variance.**
>
> *** * ***
>
> **[**The variance petitioner**] has the burden of proof. 415 ILCS 5/35(a) (2004);** ***see also*** **35 Ill.Adm. Code 104.238. The Board may grant a variance "whenever it is found, upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." 415 ILCS 5/35(a) (2004). If the Board fails to take final**

action by the decision deadline, [the variance petitioner**] "may deem the request granted under this Act, for a period not to exceed one year." 415 ILCS 5/38(a) (2004).** *City of Springfield v. Illinois EPA*, PCB 06-137, 2006 Ill. ENV LEXIS 476 at **6 – 8 (Sept. 7, 2006).

The IPCB places significant emphasis on the IEPA's recommendation in a variance proceeding. Variance applicants are well-advised to approach the IEPA before filing for a variance to see whether potential areas of dispute can be resolved or minimized.

5. [6.31] Regulatory Proceedings

The Illinois Pollution Control Board has a large number of procedures it can invoke to adopt permanent environmental control requirements. The Illinois Environmental Protection Act describes special rulemaking procedures to achieve expedited adoption of federal rules, adjusted standards that are more likely to be employed for individual facility requirements, general rulemaking, and others. Most of the differences among the procedures relate to how much information must be filed initially by the applicant and how expedited the procedures will be for final adoption of the control requirements. Transactional matters give rise to regulatory proceedings only infrequently. Because regulatory adoption issues are not common to transactional matters and because the varied regulatory procedures are fairly complex, they are not discussed in any detail in this chapter.

Generally speaking, Illinois does not follow the notice and comment rulemaking process for adoption of environmental control regulations. The Illinois Environmental Protection Agency or other applicant files a written proposal with the IPCB, and in appropriate circumstances, this proposal is submitted for public notice. The IPCB receives information from witnesses and exhibits at hearings and from public comments that are filed. After considering the information presented, the IPCB makes a formal decision on the proposal. IPCB regulatory hearings do not follow strict rules of evidence.

The IPCB has adopted regulations describing its regulatory procedures at 35 Ill.Admin. Code pt. 102. In addition, IPCB staff attorneys can be quite helpful in describing the present status in the procedural requirements for a regulatory proceeding.

6. [6.32] Other Board Actions

The Illinois Pollution Control Board has many different types of proceedings that would be unlikely to arise as a result of a transactional matter. These include items as diverse as landfill siting appeals (which are designed to determine whether the location chosen for a landfill is appropriate) to environmental remediation tax credit appeals (regarding income tax deductions for site remediation activities).

7. [6.33] Appeals of Board Decisions

Final decisions of the Illinois Pollution Control Board can be appealed directly to the Illinois appellate court for the district in which the cause arose (usually the district in which the facility is located):

> **Any party to a Board hearing, any person who filed a complaint on which a hearing was denied, any person who has been denied a variance or permit under this Act, any party adversely affected by a final order or determination of the Board, and any person who participated in the public comment process under subsection (8) of Section 39.5 of this Act may obtain judicial review, by filing a petition for review within 35 days from the date that a copy of the order or other final action sought to be reviewed was served upon the party affected by the order or other final Board action complained of, under the provisions of the Administrative Review Law, as amended and the rules adopted pursuant thereto, except that review shall be afforded directly in the Appellate Court for the District in which the cause of action arose and not in the Circuit Court. Review of any rule or regulation promulgated by the Board shall not be limited by this section but may also be had as provided in Section 29 of this Act.** 415 ILCS 5/41(a).

Appeals of IPCB decisions are treated in much the same way as appeals of Illinois trial court decisions. The appellate court review is limited to the record that was created:

> **Any final order of the Board under this Act shall be based solely on the evidence in the record of the particular proceeding involved, and any such final order for permit appeals, enforcement actions and variance proceedings, shall be invalid if it is against the manifest weight of the evidence. Notwithstanding this subsection, the Board may include such conditions in granting a variance and may adopt such rules and regulations as the policies of this Act may require. If an objection is made to a variance condition, the board shall reconsider the condition within not more than 75 days from the date of the objection.** 415 ILCS 5/41(b).

The standard of review has been refined by the courts. Factual determinations based on disputed facts are given great deference by the courts, and a quasi-judicial decision based on disputed facts will be upheld unless it is against the manifest weight of the evidence.

> **The Board acts in its quasi-judicial capacity when reviewing an Agency's decision to grant or deny a permit. *Environmental Protection Agency v. Pollution Control Board,* 308 Ill.App.3d 741, 721 N.E.2d 723, 242 Ill.Dec. 444 (1999). A court of review will uphold a quasi-judicial determination unless it is contrary to the manifest weight of the evidence. *Environmental Protection Agency v. Pollution Control Board,* 308 Ill.App.3d at 748; *Community Landfill Co. v. Pollution Control Board,* 331 Ill.App.3d 1056, 772 N.E.2d 231, 265 Ill.Dec. 193 (2002).** *United Disposal of Bradley, Inc. v. Pollution Control Board*, 363 Ill.App.3d 243, 842 N.E.2d 1161, 1165 – 1166, 299 Ill.Dec. 809 (3d Dist. 2006).

However, when the issue is simply a matter of law, the court reviews the issue de novo:

> **When reviewing a question of law, such as the interpretation of a statute, the decision of the IPCB is not binding on the appellate court. *Envirite Corp. v. Illinois Environmental Protection Agency,* 158 Ill.2d 210, 214, 632 N.E.2d 1035, 1037, 198 Ill.Dec. 424 (1994). Rather, the appellate court shall review the question *de novo. ESG Watts, Inc. v. Illinois Pollution Control Board,* 191 Ill.2d 26, 29, 727 N.E.2d**

1022, 1024, 245 Ill.Dec. 288 (2000). *Waste Management of Illinois, Inc. v. Illinois Pollution Control Board,* 356 Ill.App.3d 229, 826 N.E.2d 586, 589, 292 Ill.Dec. 445 (3d Dist. 2005).

This is also true when the underlying facts are not in dispute:

> **We believe that *de novo* review is appropriate. The relevant facts are not in dispute. No credibility determination was required. We do not see [***Land & Lakes Co. v. Illinois Pollution Control Board,* 319 Ill.App.3d 41, 743 N.E.2d 188, 252 Ill.Dec. 614 (3d Dist. 2000),**] and [***Gaidar v. Tippecanoe Distribution Service, Inc.,* 299 Ill.App.3d 1034, 702 N.E.2d 316, 234 Ill.Dec. 150 (1st Dist. 1998),**] as necessitating manifest weight of the evidence review solely because an evidentiary hearing was held, if there was no dispute respecting the underlying facts. The task before us is to apply the undisputed facts to the statute. We engage in that inquiry *de novo. ESG Watts,* 191 Ill.2d at 29, 727 N.E.2d at 1024.** *Id.*

When the IPCB adopts regulations or imposes conditions in a variance, it is acting in a quasi-legislative manner. The IPCB's decision will be upheld unless it is arbitrary capricious, or an abuse of discretion.

> **Before considering the merits of the Agency's appeal, we must determine what standard of review to apply to the Board's decision. It is well established that the Board serves both quasi-judicial and quasi-legislative functions and that different standards of review apply depending on the nature of the Board's function in the underlying proceeding. See *Environmental Protection Agency v. Pollution Control Board,* 86 Ill.2d 390, 399 – 402, 56 Ill.Dec. 82, 427 N.E.2d 162 (1981). Quasi-legislative functions include promulgating rules and regulations (*Granite City Division of National Steel Co. v. Illinois Pollution Control Board,* 155 Ill.2d 149, 162, 184 Ill.Dec. 402, 613 N.E.2d 719 (1993)), defining the scope of emissions standards (*Environmental Protection Agency,* 86 Ill.2d at 400), and placing conditions on variances (*Monsanto Co. v. Pollution Control Board,* 67 Ill.2d 276, 289 – 91, 10 Ill.Dec. 231, 367 N.E.2d 684 (1977)). Quasi-legislative determinations are exercises of the Board's rulemaking powers. The supreme court has instructed that "when an agency has acted in its rulemaking capacity, a court will not substitute its judgment for that of the agency." *Granite City,* 155 Ill.2d at 162. For this reason, the Board's quasi-legislative decisions will not be overturned unless they are arbitrary and capricious. *Granite City,* 155 Ill.2d at 162.** *Environmental Protection Agency v. Pollution Control Board,* 308 Ill.App.3d 741, 721 N.E.2d 723, 727 – 728, 242 Ill.Dec. 444 (2d Dist. 1999).

When the IPCB is exercising both quasi-judicial and quasi-legislative functions, the review standard is "clearly erroneous":

> **Where an agency determination presents a mixed question of law and fact, the agency decision will be set aside only if it is clearly erroneous. *City of Belvidere v. Illinois State Labor Relations Board,* 181 Ill.2d 191, 692 N.E.2d 295, 229 Ill.Dec. 522 (1998). The clearly erroneous standard is a middle ground between the deferential**

> **manifest weight of the evidence standard and the *de novo* standard. *City of Belvidere,* 181 Ill.2d 191, 692 N.E.2d 295, 229 Ill.Dec. 522. Application of the clearly erroneous standard is intended to provide some deference to an administrative agency's experience and expertise. *City of Belvidere,* 181 Ill.2d 191, 692 N.E.2d 295, 229 Ill.Dec. 522.** *Land & Lakes Co. v. Illinois Pollution Control Board,* 319 Ill.App.3d 41, 743 N.E.2d 188, 252 Ill.Dec. 614 (3d Dist. 2000).

See also Environmental Protection Agency, supra, 721 N.E.2d at 748.

Appeals from IPCB decisions can take over a year to be decided in the appellate courts.

C. [6.34] Other State Agencies

For most of the conflicts arising in transactional matters, the Illinois Environmental Protection Agency and the Illinois Pollution Control Board will be the most likely environmental forums. However there are a number of other state agencies with environmental functions. For example, the Office of the State Fire Marshal plays a significant role in the regulation and removal of underground storage tanks. The Department of Natural Resources regulates mines and minerals, as well as streams and rivers and locks and dams. The Department of Agriculture regulates pesticides and licenses pesticide applicators. The Illinois Emergency Management Agency has significant programs for nuclear safety, as well as reporting and notification requirements for chemical safety issues, including the release of hazardous materials. Specific transactional situations may involve other state agencies and environmental matters.

D. [6.35] Local Environmental Authorities

There is a variety of local environmental agencies that may have a direct impact on facilities involved in transactions. Probably the largest such organization is the Metropolitan Water Reclamation District of Greater Chicago (MWRDGC). With a budget of around $1 billion and over 2,000 employees, the MWRDGC accepts and treats wastewaters from industries, businesses, and residents in the greater Chicago metropolitan area. Industries or businesses that discharge to sewers need permits or approval to discharge and are subject to monitoring and enforcement for noncompliance with any MWRDGC requirements.

Both the City of Chicago and the County of Cook operate environmental control departments. Both governments have adopted environmental control ordinances that require securing permits for certain types of operations and establish control requirements. Other local jurisdictions in Illinois have adopted ordinances that have an environmental component.

Generally, local environmental ordinances are not more stringent than state standards. But, they can create unexpected transactional problems, as was evident when a food processing company wanted to open a facility in Cook County using a corn wet milling process. The Illinois Pollution Control Board had adopted a process weight rate emission regulation that affected corn wet milling operations. The County of Cook subsequently adopted an ordinance that was virtually identical to the IPCB's rule. In 1996, the IPCB recognized that corn wet milling processes could not meet these earlier process weight rate standards and adopted an exemption for corn wet milling units. Cook County never updated its control ordinance to reflect this exemption. Since

the food manufacturer was using a corn wet milling process and locating within the jurisdiction of the County of Cook, it would have to meet the more stringent county requirements or seek an individual exemption from the County.

Many local government environmental agencies operate under a formal or informal agreement with the Illinois Environmental Protection Agency. Any environmental problems they discover will be referred to the IEPA for investigation and possible enforcement. Other local government environmental agencies operate purely under the authority of their local ordinances. Any discovered violations are likely to be referred to the law department or corporation counsel for enforcement, frequently in municipal court.

E. [6.36] Illinois Attorney General, State's Attorney, or Municipal Corporation Counsel

The Environmental Protection Act provides a specific role for the Attorney General or a state's attorney in prosecuting environmental enforcement before the Illinois Pollution Control Board (see 415 ILCS 5/31(c)(1)) or in the circuit courts (see 415 ILCS 5/42(e)). In addition, these prosecuting authorities and municipal authorities may pursue claims based on common law or local ordinances. Their role is not limited to enforcement. The Attorney General has become involved, on occasion, in regulatory proceedings, permit appeals, and variances.

F. [6.37] Illinois Courts

Illinois courts have authority to hear civil actions based on violations of the Environmental Protection Act:

> **The State's Attorney of the county in which the violation occurred, or the Attorney General, may, at the request of the Agency or on his own motion, institute a civil action for an injunction, prohibitory or mandatory, to restrain violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, or to require such other actions as may be necessary to address violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order.** 415 ILCS 5/42(e).

Historically, the Attorney General filed an enforcement case in the circuit court where the violation was ongoing and injunctive relief might be required. More recently, cases that do not have ongoing violations are being filed in the circuit courts. The Attorney General has filed the following number of cases in Illinois Circuit courts:

Year	Number
2000	199
2001	157
2002	114
2003	127
2004	164
2005	199
2006	82