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## Individual Legal Remedies Against Pollution in Illinois

Mary Lee Leahy\*

This article will attempt to examine individual legal remedies against pollution that have recently been adopted in Illinois. The 1970 Illinois Constitution creates the right to a healthful environment and the standing for an individual cause of action when one is deprived of that right. The Illinois Environmental Protection Act allows an individual to bring a complaint before the Pollution Control Board against any person violating either the terms of the Act or the standards set forth in the Rules and Regulations adopted by the Board.

### I. HISTORY OF ARTICLE XI OF THE 1970 CONSTITUTION

Article XI of the 1970 Illinois Constitution reads:

1. *Public Policy—Legislative Responsibility.*

The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.

2. *Rights of Individuals.*

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

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Section 1 and the first sentence of Section 2 became effective on July 1, 1971. The last sentence of Section 2 became effective on January 1, 1972.<sup>1</sup> This delayed date of effectiveness was designed to provide both the legislature and the courts with the time to provide for the expected flood of litigation under the Article. In that time span, however, neither the legislature nor the courts have acted. Perhaps this inaction can be best explained by a realization that the premise underlying the delayed date—a flood of litigation—has proven to be invalid.

In analyzing Article XI, it is important to remember that the Sixth Illinois Constitutional Convention opened on December 8, 1969, in the midst of a growing awareness of the environment as a popular political issue. Many candidates for delegate to the Convention included "the right to clean air and clean water" in their platforms—and several of those candidates were elected to the Convention. The results were many member proposals dealing with pollution and conservation.

These proposals were assigned to the General Government Committee after the Bill of Rights Committee relinquished any jurisdiction it may have had over the subject matter. Over sixty-five witnesses appeared before the General Government Committee to voice their opinions on the member proposals. These witnesses included traditional lobbyists, such as representatives of the Chamber of Commerce and the League of Women Voters, and new faces on the lobby scene, such as professors of science at major universities, doctors, representatives of anti-pollution groups, and, most importantly, average citizens.

These citizens voiced frustration at their past experience of being sent from agency to agency to plead that something be done about pollution—only to be told that nothing could be done or to be told to see another agency. This testimony had a tremendous effect upon the Committee. Apart from frustration due to lack of response, citizens voiced concern over possible conflict of interest in the agencies themselves.

Air pollution in the City of Chicago fell under the jurisdiction of the City's Department of Air Pollution Control which consisted of a Director, an Appeal Board, a Technical Advisory Committee and a Public Relations Committee. The membership of this board and these committees was appointed by the Mayor with the consent of the City Council. With very few exceptions the members were employees or

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1. ILL. CONST., Transition Schedule, Section I(d) (1970).

officers of the companies that were Chicago's major polluters. In the summer of 1969 a suit was filed in the Circuit Court of Cook County charging these boards with conflict of interest.<sup>2</sup>

That suit was dismissed on the grounds that the membership did not violate the Constitution or raise legal questions of conflict of interest. The trial court distinguished this case from those brought to challenge the act of a committee which act was directly related to a participating member's employer.

While the suit was pending on direct appeal to the Illinois Supreme Court, the City Council adopted an ordinance abolishing the board and committees challenged in the suit and creating a totally new structure to handle pollution problems in Chicago. Appointees under the new ordinances appeared to be free from any direct ties with the companies or industries that they were charged with regulating. Thus the Supreme Court dismissed the appeal on the grounds that the issues involved were moot.

Another serious problem of pollution control in 1969 was the lack of any governmental action against any large companies or industries. For example, in 1968 the Chicago Department of Air Pollution Control boasted of issuing over 1,600 tickets which resulted in fines of \$10.00 each.<sup>3</sup> This type of action hardly made a dent in the total problem. Action on the State level either by the Attorney General under a nuisance theory of litigation or action by State agencies had been minimal to that point in time.

Finally, individual action was next to impossible, for the individual citizen was barred from bringing suit on a long-standing common law doctrine that the individual must suffer special damages in order to have standing. If his damages were the same as those suffered by the community at large, he did not have standing to sue.

It was against this history that the Constitutional Convention opened. Shortly thereafter, the General Assembly adopted the *Environmental Protection Act* to become effective July 1, 1970.<sup>4</sup> Although this Act completely restructured State pollution agencies and provided each person with the right to file a complaint, the Convention delegates were aware that the individual's ability to act had been strongly opposed in the General Assembly and could be abolished by future amendment to the Act. The delegates also had no actual assurance

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2. *Leahy v. City of Chicago*, 69 Chancery 3350 (1969).

3. *Annual Report*, Department of Air Pollution, City of Chicago (1968).

4. ILL. REV. STAT., Ch. 111½, § 1001 *et seq.* (1970 Supp.).

that this Act would result in strong State action against pollution. Hence, Article XI.

## II. INTERPRETATION OF ARTICLE XI

The first sentence of Section 1 sets forth the public policy of the State of Illinois and imposes upon each person the duty to "provide and maintain a healthful environment for . . . this and future generations".<sup>5</sup> This language was drafted after long debate in the General Government Committee and was intended to have broad application. "Person" was intended to cover the widest possible classes—including human persons, corporations, both profit and not-for-profit, associations and governmental bodies.

The language imposes the duty not only to maintain a healthful environment, but to provide one if it is not in existence. The Committee long debated the adjectives that could possibly modify environment and rejected such words as "pleasant", "aesthetic", "pure" and "clean" as being incapable of judicial application. The Committee finally approved "healthful" as being capable of proof as well as being open to expansion as medical science further determines what does or does not affect health. The Committee Report presented to the Convention said:

The word "healthful" is meant to describe that quality of physical environment which a reasonable man would select for himself were a free choice available . . . .

The word "environment" means the aggregate of all conditions affecting the existence, growth, and welfare of organisms.<sup>6</sup>

In debate on the floor it became apparent that "healthful" was to include both physical and mental health. The health of those not yet born as well as the health of the living is included. This concern with future generations grew from the testimony on nuclear pollution heard by the Committee.

In the last session of the legislature a bill was introduced which, among other things, would have defined "healthful environment". At this writing, however, the chances of such a bill's success appear dim. Such an attempt almost seems comparable to Congress defining "due process" or "equal protection". The legislature simply cannot define a constitutional right. The Convention adopted the term "healthful

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5. ILL. CONST. art. XI, 1 (1970).

6. *General Government Committee Report On The Environment* (filed with the Convention, July 1, 1970).

environment” with the expectation it would take on more concrete meaning in case by case application.

The second sentence of Section 1 mandates the General Assembly to carry out the stated public policy through appropriate legislation. At first glance this appears to be a simple mandate—unenforceable if the legislature chooses to ignore it. But this mandate must be read in the total context of the Constitution. Article 7 grants “home rule” to municipalities of over 25,000 population and to counties whose electorate directly elects the county’s chief officer. Home rule units of local government have all power to deal with their own problems.<sup>7</sup> Home rule powers can be preempted by the State only by legislation passed by 3/5ths of the members elected to both houses of the General Assembly.<sup>8</sup>

An argument could be made that pollution problems are local problems and subject to the exclusive jurisdiction of home rule units unless a State statute specifically preempting the field has been passed by 3/5ths of the elected members of the General Assembly. However, the Local Government Article must be read in conjunction with Article XI.

The second sentence of Section 1 of Article XI clearly establishes the authority of the State to provide and maintain a healthful environment. It settles the question of whether or not the duties and rights under Article XI are state or local matters. It explicitly imposes the duty of carrying forth the public policy of a healthful environment on the State. The Constitution permits the State to allow units of local government to exercise concurrent jurisdiction with the State in this area, but under Article XI no home rule unit can claim exclusive jurisdiction over environmental problems.

Section 2 of Article XI vests each person with the right to a healthful environment—the direct correlation of the duty in Section 1. It is the last sentence of Section 2 that is the heart of the Article, for it creates standing to sue to enforce one’s right to a healthful environment. This provision is intended to overrule the common law requirement discussed above that a plaintiff must have suffered special damages, apart from that suffered by the general public, before he had standing to protect his health or the public health.

Under this Article the individual has the opportunity to prove a violation of his right to a healthful environment “even though that vio-

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7. This reverses prior Illinois law under which units of local government had only those powers specifically granted them by the State.

8. ILL. CONST. art. VII, § 6 (1970).

lation may be a public wrong, or one common to the public generally".<sup>9</sup>

The Committee Report strongly asserted that the creation of standing did not create any new remedy, and presumably, one must seek traditional remedies, e.g., declaratory judgment, injunction, damages, or relief through an administrative body.

As noted previously, on July 1, 1971, the right to a healthful environment vested, and the standing to enforce that right commenced January 1, 1972.<sup>10</sup> It appears that violations of the right which occurred after July 1, 1971, but before January 1, 1972, can be the subject matter of litigation, but the filing of suit must be delayed until after January 1, 1972.

Any flood of lawsuits after January 1, 1972, seems highly unlikely, for Article XI has its own built-in inhibiting factors. The person filing a suit will have a double burden of proof: 1) that the defendant pollutes; 2) that that particular pollution causes damage to health. Although medical science is proceeding at a rapid pace to prove the causal factor, it may still be extremely difficult to prove this cause and effect relationship.<sup>11</sup>

The right to prove a violation is enforceable "against any party, governmental or private". The private parties provision in this section is a departure from the traditional concept of a Bill of Rights, for Constitutional rights have long been viewed as rights of the person against the government. In Article XI, as in other sections of the 1970 Constitution, new rights are created or recognized which are enforceable against private persons.<sup>12</sup>

The fact that the right to a healthful environment is enforceable against governmental bodies is significant in that it abolishes any governmental immunity that might exist in environmental matters.<sup>13</sup> It

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9. *General Government Committee Report on the Environment* (filed with the Convention, July 1, 1970).

10. *See*, note 1, *supra*.

11. Testimony given before the General Government Committee indicated noise pollution's direct effect on health was the easiest to prove.

In-factory conditions may bear direct correlation to the employees' health—or lack of it. Studies of the United States Steelworkers and the United Auto Workers indicate polluted working conditions result in serious health problems. Areas of Workmen's Compensation Law may be directly superseded by actions brought under Article XI.

12. *See*, ILL. CONST., art. I, § 17-19 (1970) which provide actions against any persons who discriminate in employment, on the basis of sex or against the handicapped.

13. The 1870 ILLINOIS CONSTITUTION had established the State's sovereign immunity; toward the end of the nineteenth century such immunity was extended to local government units by judicial decision.

Local government immunity was abolished in Illinois in *Mollitor v. Kaneland*

was deliberately intended that governmental bodies depriving a person of a healthful environment could be sued.

The more difficult question is whether a person has a cause of action to force a governmental agency who has the authority to act against polluters to take such action. Given the technical difficulty, and most importantly, the expense, of individual suits against major polluters, it might be easier to achieve the desired result by forcing the governmental agency to expend its resources and expertise in enforcing the right.

Finally, Article XI subjects appropriate legal proceedings through which one can enforce the right to a healthful environment to such "reasonable limitation and regulation as the General Assembly may provide by law". Many delegates to the Convention believed this language to be unnecessary, for it simply stated the inherent power of the General Assembly to regulate judicial procedure. In addition, this limitation or regulation must be "reasonable".

The General Government Committee foresaw the possibility of the need for a special division in the Circuit Court of Cook County to deal with environmental cases; it hoped to provide for such a court. This cited language might also allow the General Assembly to devise a more expeditious procedure if numerous pollution suits resulted in delay in hearing.<sup>14</sup>

The Convention went on record as definitely intending this authority to limit and regulate to apply only to the procedure by which

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Community School District, 18 Ill. 2d 11 (1959). In that case the Supreme Court allowed plaintiffs to recover for injuries suffered when a bus operated negligently by defendant's agent was involved in an accident. The legislature was forced to appropriate hundreds of thousands of dollars in order to help the defendant school district avoid bankruptcy.

The Illinois Tort Immunity Act, ILL. REV. STAT., Ch. 85, § 1 *et seq.* was a direct response to the Supreme Court's decision in *Molitor*. For the most part it restored the tort immunity enjoyed by local governments prior to *Molitor*. The 1970 ILLINOIS CONSTITUTION, Article 13, § 4, abolishes sovereign immunity in the State "except as the General Assembly may provide by law." In fact, this gives the General Assembly the authority to decide whether or not to abolish sovereign immunity. However, Article XI abolishes any such legislatively granted immunity in proceedings brought on the right to a healthful environment. Much testimony was heard by the General Government Committee that governmental bodies were among the chief polluters in the State; Article XI clearly grants any person the right to sue governmental bodies that are polluting and causing damage to health.

14. For example, the General Assembly might provide by law that a complainant must first file his complaint with a state agency, *e.g.*, Pollution Control Board, Attorney General. If that agency did not act to provide relief within so many days, the individual would be free to file a suit in the circuit court.

A word of caution is in order. If the state agency is to deal with deprivation of the right to a healthful environment, it must explicitly be given that jurisdiction. As will become apparent later in this article, the Pollution Control Board now has jurisdiction to hear pollution complaints that affect health, but it is doubtful its jurisdiction in that area is as broad as Article XI.

one could enforce his right. The General Assembly cannot limit or regulate the right itself. It was well recognized that the line between substance and procedure can be very thin. Once the procedure interferes with the substance of the right it must be declared unconstitutional.

To date no regulating legislation has been passed. Indeed, until the Article has been in effect for a considerable period of time, it will be very difficult to determine what type of procedural legislation, if any, should be enacted.

### III. THE ENVIRONMENTAL PROTECTION ACT

On July 1, 1970, the very day the General Government Committee filed its report on Article XI with the Convention, the Environmental Protection Act became effective.<sup>15</sup>

The Act forbids the causing, threatening or allowing the discharge or emission of a contaminant into the environment in any State if it causes or tends to cause air or water pollution in Illinois or if it violates regulations or standards adopted by the Board. Air pollution is defined as:

[T]he presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.<sup>16</sup>

Water pollution is defined as:

[S]uch alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.<sup>17</sup>

The Act also prohibits any person from emitting:

[B]eyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act.<sup>18</sup>

While the Act defines further prohibitions, these cited sections will form the nucleus of our discussion.

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15. ILL. REV. STAT., Ch. 111½, § 1001 *et seq.* (1970 Supp.).

16. ILL. REV. STAT., Ch. 111½, § 1003(b) (1970 Supp.).

17. ILL. REV. STAT., Ch. 111½, § 1003(n) (1970 Supp.).

18. ILL. REV. STAT., Ch. 111½, § 1025 (1970 Supp.).

The Act establishes:

- 1) The Environmental Protection Agency, which collects data on possible violations of the Act and prosecutes before the Board complaints based on either violations of the Act or of the standards adopted in Rules and Regulations by the Pollution Control Board;
- 2) The Pollution Control Board which has the authority to define standards and set forth those standards in Rules and Regulations and the authority to hear and rule on complaints charging violation of the Act and the Rules and Regulations;
- 3) Illinois Institute for Environmental Quality which researches both the technology and the administration of environmental protection and is authorized to make recommendations in these fields.<sup>19</sup>

The overwhelming bulk of complaints heard by the Board have been filed by the Agency and prosecuted by the Assistant Attorney General assigned to the Agency for that purpose.

An individual can be indirectly involved in this type of complaint, for his persistent complaints to the Agency can result in the investigation that results in the complaint. In fact, the Act requires the Agency to send a copy of the complaint to any person who has complained about the alleged violator in the prior six months and to any individual in the county in which the alleged violation occurred who has requested such information from the Agency.<sup>20</sup> Complaining persons may also be witnesses for the Agency, although the experience over the last eighteen months has revealed that the Agency usually relies on its own investigation to prove up the violation.

The Act also authorizes any person in the State to file a complaint with the Board alleging either a violation of the Act or a violation of the Board's Regulations.<sup>21</sup> This person is required to serve a copy of the complaint on the alleged violator. The complaint must set forth the following:

- 1) A reference to the provision of the law or regulations of which the respondents are alleged to be in violation;
- 2) A concise statement of the facts upon which the respondents are claimed to be in violation; and
- 3) A concise statement of the relief the complainant seeks.<sup>22</sup>

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19. ILL. REV. STAT., Ch. 111½, § 1004-1006 (1970 Supp.).

20. ILL. REV. STAT., Ch. 111½, § 1031 (1970 Supp.).

21. ILL. REV. STAT., Ch. 111½, § 1031(b) (1970 Supp.).

22. *Procedural Rules*, Pollution Control Board [hereinafter cited P.C.B.], Part III, § 304, at 13-14. The Board has complaint forms available for the public at its offices, 309 West Washington Street, Suite 300, Chicago, Illinois.

Proof of service of the complaint upon the respondent must be filed with the Board. The Board then can hold a hearing to determine if the complaint is duplicitious or frivolous. Once the Board rules that the complaint is neither, it assigns a hearing officer to the case. That officer must be an attorney licensed to practice law in Illinois. It is his responsibility to set a time and place for the hearing normally in the county in which the violation is alleged to have occurred. That hearing must take place within sixty days of the filing of the complaint. At least twenty-one days prior to the hearing, the officer gives notice of the time and place of the hearing to the parties, to all persons on the Board's mailing list, and to the public through advertisement in a newspaper of general circulation in the county in which the cause of action arose. At least five days prior to the hearing the respondent must file an answer. Any motions preliminary to trial must be filed by that time.

The hearing officer decides all motions at the time of trial except those requesting dismissal, a decision on merits, or those motions requesting any claim or defense be stricken for insufficiency of proof. Very simply, this means that the Board, not the hearing officer, renders the ultimate decision in the case. The hearing officer makes no findings of fact nor does he forward any recommendations to the Board. Thus, no impressions drawn as to credibility of witnesses reach the Board.

Broad discovery is allowed both sides, and a pretrial conference may be held to expedite the trial. The trial is public and places the burden of proof on the person bringing the complaint. He may represent himself or he may retain counsel to represent him. He cannot receive any direct or indirect aid from the Agency or the Board. The standard for admission of evidence is extremely lenient. In addition to evidence admissible in the courts, the hearing officer

may receive material, relevant evidence which would be relied upon by a reasonably prudent person in the conduct of serious affairs which is reasonably reliable and reasonably necessary to the resolution of the issue for which it is offered; provided that the rules relating to privileged communications and privileged topics be observed.<sup>23</sup>

Practically, this means that the test for admission of evidence is relevancy—quite a bit more lenient than the standard that governs admission of evidence in court. This rule is particularly designed to help the layman prosecute his own case.

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23. *Procedural Rules, P.C.B., Part III § 320, at 25.*

After the hearing the officer certifies the verbatim transcript and forwards it to the Board. The Board then renders its decision in a written opinion, and, if it finds for the complainant, it may grant the following relief: a cease and desist order; money damages; revocation of a permit or variance previously granted; grant of time to correct a violation accompanied by the requirement of posting a security bond to ensure performance.<sup>24</sup>

In rendering its decision the Board must take into consideration all facts bearing on the reasonableness of the emissions including the harm it inflicts, the social and economic value of the pollution source, the suitability of the source to its location, and the technical and economic reasonableness of eliminating the pollution.

#### IV. ACTUAL EXPERIENCE OF INDIVIDUAL ACTION UNDER THE E.P.A.

Of the approximately fifteen individual complaints filed under the E.P.A. in the last eighteen months, at the time of this writing, opinions have been rendered in eight. Those opinions are too few in number to provide enough material to discuss trends or set patterns of the law. However, a few conclusions can be drawn.

It is certain the Board welcomes such individual complaints and there is no question that the most successful way individuals can engage in action before the Board against major polluters is to join together. Individuals allowed to join in actions before the Board have included the Environmental Law Society of the University of Chicago<sup>25</sup> and the League of Women Voters<sup>26</sup> and a local governmental body.<sup>27</sup>

Although the Board appears to be lenient in allowing complaints drawn by individuals to stand,<sup>28</sup> it has rejected a complaint that was sim-

24. ILL. REV. STAT., Ch. 111½, § 1033(b) (1970 Supp.).

25. In the matter of Application of Commonwealth Edison Company for a Permit for Dresden Unit 3, Dresden Nuclear Power Station, 1970 P.C.B. Case No. 21 (1971).

On October 5, 1970, Commonwealth Edison filed with the Board an application for Dresden Unit 3, a nuclear generating plant. After pre-trial conferences, the hearing on the application began and, at that time, the Environmental Law Society of the University of Chicago moved to intervene. The Board upheld the hearing officer's allowance of intervention so long as it did not delay the case. The Board found that the members of the Society "would be affected if the emissions from the Dresden plant were excessive." Therefore, they had the right to intervene to protect those interests. The Board went on record thanking the Society for supplying it with evidence "which might not otherwise have come before us." Note that this was a permit application case rather than a citizen enforcement case.

26. League of Women Voters v. North Shore Sanitary District, 1970 P.C.B. Case No. 7, 1970 P.C.B. Case No. 12, 1970 P.C.B. Case No. 13, 1970 P.C.B. Case No. 14 (1971).

27. Quad City Area Regional Air Pollution Control Board v. Village of Cordova, 1971 P.C.B. Case No. 97 (1971).

28. *Id.*

ply a resolution calling on the Board to act. In *Enact v. State Boys School*<sup>29</sup> the Board said this violated due process in that the respondent had the right to know the charges against him. The opinion of the Board stated:

We point all this out [the necessity of procedural requirements] not in any way to discourage citizen complaints or to exalt procedural requirements as a barrier to ascertaining the truth. The procedural rules are a necessary safeguard for assuring the defendant is fairly warned of the charges against him and given an adequate opportunity to defend. Compliance with the rules also helps to assure the complainant has adequately prepared his case . . . .<sup>30</sup>

The Board has also recognized that its authority is limited to the issuance of final orders. In rejecting a motion for a temporary restraining order, the Board said:

There may well be cause for interim relief in some cases of severe pollution, but the place to obtain such relief is in court.<sup>31</sup>

That the complainant and respondent can attempt to settle the case, subject, of course, to the Board's approval, was apparent in *Henry Hannah v. Minnesota Paints, Inc.*<sup>32</sup> The respondent admitted allowing resin to eventually flow into Sugar Creek causing pollution and resulting in the death of 247 minnows (as counted by a neighbor to the creek). The respondent agreed to take steps to eliminate any such pollution in the future and agreed to pay \$100.00 to the Department of Conservation, to compensate for the loss of the minnows. The Board approved the consent order.

The opinion in *Dale H. Moody v. Flintkote Co.*<sup>33</sup> sets forth the type of evidence the Board will consider in rendering its decision. Moody alleged that every working day the respondent emitted pungent smoke, laden with limestone-like dust and tarry particulate droplets.

Numerous witnesses who lived near the plant testified that the odor made them nauseous, made breathing difficult, and made their eyes water. Several described a tarry substance that resulted in property damage to roofs, shrubbery and cars. The witnesses appeared to prove a causal connection between the odor and the plant by describing the wind direction in relation to the plant's physical location. The Board said:

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29. 1971 P.C.B. Case No. 34 (1971).

30. *Id.* at 2.

31. *Lloyd A. Fry Roofing Co. v. Environmental Protection Agency*, 1971 P.C.B. Case No. 4, 1971 P.C.B. Case No. 33 (1971).

32. 1971 P.C.B. Case No. 123 (1971).

33. 1970 P.C.B. Case No. 36, 1971 P.C.B. Case No. 67 (1971).

It is the position of this Board that air contaminant emissions are "unreasonable" within the meaning of the Act when there is proof that there is an interference with life and property and that economically reasonable technology is available to control the contaminant emissions. We find that both elements were proved in this case.<sup>34</sup>

The latter element of proof of the availability of economically reasonable technology may prove difficult, and expensive, to the citizen complainant.

In spite of the above quoted statements, the Board denied Moody's request for monetary damages and a cease-and-desist order. The Board ordered the respondent to install pollution control equipment within four months.

The *Moody* case is interesting from another point of view. The Board ruled that the respondent could be in compliance with the Board's Regulations, but still be in violation of the Act in that he still is causing "air pollution as defined by the Act." The Board said:

Compliance with the regulations certainly is a legitimate defense in any action brought against any person *but it is not a complete defense*. Because if it was a complete defense, the Act would have said so.<sup>35</sup>

The Board also noted that in balancing the benefits and detriments of both complainant and respondent, it "will look to the benefits to be afforded to the public as being the strongest of factors."<sup>36</sup>

The Board has also squarely faced the problem of citizen suit harassment. Several citizens representing Save Highland Park intervened in *League of Women Voters v. North Shore Sanitary District*<sup>37</sup> and asked the Board to order the District's Clavey Road plant moved to an alternative site. The Board noted that this same group, whose objective was the closing of the Clavey Road plant, had intervened in the District's attempt to obtain a permit from Highland Park for extension and modernization of the plant. After the permit was granted, the citizens appealed. These same citizens also brought lawsuits against the District challenging the effect of the plant on health, safety and welfare; a zoning suit was also filed as were a common law nuisance suit, a civil rights case, a bond issue case, and a federal grant suit.

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34. 1971 P.C.B. Case No. 67 at 10.

35. *Id.* at 9 (emphasis added).

36. *Id.* at 14.

37. 1970 P.C.B. Case No. 7, 1970 P.C.B. Case No. 12, 1970 P.C.B. Case No. 13, 1970 P.C.B. Case No. 14 (1971).

The Board found this type of citizen action was contributing to pollution by preventing plant extension and the Board ordered these persons to cease and desist from prosecuting "any further actions against the District, the District's bond issues, and particularly the siting of the Clavey Road plant."<sup>38</sup> The opinion explicitly did not apply that order to the appeal of the order itself.

The relief granted in these individual suits has varied from the awarding of damages<sup>39</sup> to ordering the installation of pollution control equipment<sup>40</sup> to the closing of the source of pollution<sup>41</sup> to the ordering of a bond issue to cover the cost of pollution control equipment.<sup>42</sup>

## V. COMPARISON OF ACTIONS UNDER THE CONSTITUTION AND UNDER THE E.P.A.

### A. *Scope of the Cause of Action.*

It should be apparent at this juncture that the ability to sue to enforce the right to a healthful environment granted under the 1970 Illinois Constitution is broader than the ability to allege a violation of the E.P.A. or rules or regulations adopted under the E.P.A.

"Health" in the E.P.A. is defined in terms of pollution while Article XI of the Constitution does not so define health. As previously noted, the General Government Committee Report broadly defined "healthful environment." Interestingly, the opponents of the Article kept broadening the definition in floor debate in an effort to kill the provision.

It is also apparent that the constitutional right is narrower, for it is specifically limited to health while the E.P.A. protects, in addition to health, property rights, plant and animal life, and the enjoyment of life and property.

As noted before under Article XI, one must prove both the act that damages health and the damage to health; under the E.P.A., one must prove the violation of the Act, which may or may not include damage to health, as well as economically feasible technology that can control the violation.

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38. 1970 P.C.B. Case No. 14 at 28.

39. *Henry Hannah v. Minnesota Paints, Inc.*, 1971 P.C.B. Case No. 123 (1971).

40. *Dale H. Moody v. Flintkote Co.*, 1970 P.C.B. Case No. 36, 1971 P.C.B. Case No. 67 (1971).

41. *Quad City Area Regional Air Pollution Control Board v. Village of Cordova*, 1971 P.C.B. Case No. 97 (1971).

42. *League of Women Voters v. North Shore Sanitary District*, 1970 P.C.B. Case No. 7, 1970 P.C.B. Case No. 12, 1970 P.C.B. Case No. 13, 1970 P.C.B. Case No. 14 (1971).

### B. Remedies.

Article XI creates no new remedies, but recognizes the traditional remedies of injunction, declaratory judgment, and damages as proper means of relief. The Board, under the E.P.A., may issue cease and desist orders and award damages in citizen complaint cases, but the Board itself has ruled that it cannot issue temporary restraining orders. Under Article XI, the courts could issue a temporary restraining order if the facts in the particular case warrant such emergency action.

### C. Rules of Evidence.

The circuit courts are bound by the Illinois Civil Practice Act, the Rules of the Supreme Court, and the rules developed by the common law. However, the Board's rules of evidence are much more lenient and admit anything of "relevance."

Admissibility of certain types of evidence may differ between the two tribunals. Article XI grants the right to a healthful environment in absolute terms while the E.P.A. is written in terms of balancing:

- 1) The character and degree of the injury;
- 2) The social and economic value of the pollution source;
- 3) The suitability or unsuitability of the pollution to the area in which it is located;
- 4) The technical practicability and economic reasonableness of reducing the cause of the pollution.

Whether the constitutional right is subject to such balance remains to be seen. The Constitutional Convention did not grant the right subject to reasonable exceptions (to be carved out by statute) as it did with rights in other sections of the Constitution.<sup>43</sup>

### D. Cost to the Citizen.

Costs in a circuit court suit under Article XI would include filing fees, service fees, court reporter fees, transcript fees and attorneys' fees.

Previously, the cost before the Board was minimal: no filing fees, no court reporter or hearing fees; simply cost of service by registered or certified mail (unless personal service is made) and attorneys' fees.

Recently, however, the Pollution Control Board has experienced financial difficulties. The huge volume of cases (not individual enforcement cases, the number of which remains low) has resulted in unexpected costs which had not been anticipated in the last budget approved

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43. See, ILL. CONST. art. I, § 15, 17, 22 (1970).

by the Legislature. Especially costly have been the fees of court reporters. The Board estimates an average court reporter bill of approximately \$1,000 per day. Although this cost seems unusually high, it includes seven copies of each page which the Board now requires.

To offset this expense the Board is considering a change in its Rules to require all parties in variance cases, permit cases and enforcement cases to share the cost of the court reporter in proportion to its individual participation therein. The hearing officer will be given authority to proportion the cost in absence of an agreement between the parties. The proposal would also allow the Board to assume the cost for good cause shown in case of financial hardship provided the Board has funds available to meet the cost.

The Board envisions this change as a temporary measure until the April session of the Legislature when, hopefully, increased funds will be appropriated for such costs. In the meanwhile, however, this cost factor cannot help but constitute a burden on the individual citizen filing a complaint.

In addition, the citizen can in no way rely on the Board or the Agency for help in presenting his case, even though the Board encourages citizen action. Considering the double burden of proof he carries, proving violation of the Act or regulations and proving the technical and economic advisability of controlling the violation, he may find it difficult to win without an attorney.

Whether or not the individual wins his Article XI case, he will bear the cost of his side of an appeal. If he wins his case before the Board and the respondent appeals, the Board and its resources will defend the Board's decision. If he loses before the Board and chooses to appeal, he, of course, will bear those costs.

#### E. *Appeal.*

Any final order of a case brought in the circuit court under Article XI is directly appealable to the appellate court. The rules for judicial review will apply.

Any final order of the Board disposing of a case filed under the E.P.A. is also appealable to the appellate court. Board decisions do not follow the normal administrative review route to the circuit court before appeal to the appellate court. The rules for administrative review apply.

#### F. *Res Judicata*.

The entire problem of *res judicata* is yet to be faced—or solved. If an individual files before either the court or the Board and loses, is he precluded from seeking relief in the other tribunal?

Reason would dictate that no citizen has two chances on the same cause of action. However, as discussed previously, while the rights under the Constitution and those under the E.P.A. overlap, there are areas in which the Constitution would permit a cause of action while the E.P.A. would not—and vice versa. Where it is apparent that a different cause of action is being alleged, the citizen should have the right to proceed in the other tribunal. This should occur rarely—if ever. In the vast majority of instances where the citizen has the right to proceed under either the Constitution or the E.P.A., he must choose his forum and then proceed within the rules of that forum.

This presents the entire question of exhaustion of administrative remedies. Should the legislature amend the E.P.A. to require each citizen to file his complaint, whether the cause of action arises under the Constitution or the E.P.A., with the Pollution Control Board? If the Board determines it has jurisdiction, the citizen is precluded from filing in the circuit court; if the Board determines it does not have jurisdiction, it dismisses the complaint for lack of jurisdiction, leaving the citizen free to file in the circuit court.

In favor of such an approach is the argument that the courts are not equipped to handle Article XI cases. However, it is extremely doubtful that the courts are unable to enforce the rights under Article XI—either in terms of expertise, time or resources. Until Illinois can examine its actual experience under Article XI, discussion of exhaustion of administrative remedies is theoretical at best. Legislation in this area should be devised only to meet and solve specific problems that arise in actual practice, and such legislation should be within the spirit of the Constitution to facilitate the citizen's ability to realize the rights granted to him under Article XI.

A somewhat related problem is the concept of class suits. If John Doe, on behalf of the public, sues a major polluter and loses, is another citizen precluded from bringing suit against the same polluter? If the court precludes the second citizen, he has been deprived of rights guaranteed him under Article XI.

Such a ruling would also pave the way for “dummy” suits, that is, encourage the filing of complaints destined to lose so as to preclude

legitimate, good faith actions by individual citizens. Nothing could be further from the spirit of Article XI.

These problems have yet to be presented to either the Board or the courts in Illinois. If these problems arise, the Board, the courts and the legislature should attempt their solution, keeping in mind the rights granted the individual in Article XI. When procedure impinges on these rights, the rights themselves have been diminished.

#### CONCLUSION

As of January 1, 1972, an individual may file a citizen complaint against an alleged polluter in either the courts under Article XI or before the Board under the E.P.A. Given the ease of practice before the Board and the Board's record of enforcement of the E.P.A., the citizen would be well advised to file there. This, of course, would not apply if the citizen's complaint, while falling within the right granted in Article XI, falls outside the Board's jurisdiction, or if the Board is not able to grant the relief the individual seeks.

The basic problem in this area lies in encouraging citizens to exercise the rights they now enjoy under the Constitution and the Environmental Protection Act.