The Role of the Illinois Attorney General in Environmental Enforcement

ATTORNEY GENERAL ROLAND W. BURRIS*
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INTRODUCTION

The purpose of this article is to explain the Illinois Attorney General’s role and perspective on the appropriate enforcement of the state's environmental laws. As the chief legal officer of Illinois, the Attorney General is the primary enforcement officer of its environmental laws.

The first part of this article will discuss the Attorney General’s legal responsibilities, enforcement philosophy and various cases to illustrate the implementation of this philosophy. The second part of this article sets forth policy initiatives taken by the Attorney General to reform and improve the delivery of environmental legal services in Illinois.

II. THE ATTORNEY GENERAL’S ROLE AS ENVIRONMENTAL LAWYER FOR THE STATE

A. CONSTITUTIONAL AND STATUTORY AUTHORITY

Under the 1870 Illinois Constitution and the 1970 Illinois Constitution, the Attorney General is the chief legal officer for the state, its departments and its agencies. The Attorney General’s duties are prescribed by law and include those powers that had been tradition-

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ally held by the Attorney General at common law. According to the Illinois Constitution and relevant case law, while the legislature may add to the Attorney General's powers, it cannot reduce the Attorney General's common law authority in directing the legal affairs of the State.

B. STATE AGENCIES REPRESENTED BY THE ATTORNEY GENERAL IN ENVIRONMENTAL MATTERS

As the chief legal officer of the state, the Attorney General represents the People of the State of Illinois, as well as all of the state's agencies. Thus, the Attorney General is constitutionally empowered to bring cases in the name of the People to protect the environment. Attorney General Roland W. Burris has used this power to bring cases in several areas to protect the public health and safety and to seek strict enforcement of the Illinois Environmental Protection Act. One of the duties of the Attorney General is to implement the Act, whose purpose is "to establish a unified state-wide program supplemented by private remedies to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 

The Office of the Attorney General represents the People of the State of Illinois in all environmental litigation. The majority of its environmental litigation is handled by assistant Attorney Generals in the Environmental Control Division who represent the People in actions referred to them by other units of state government and in actions initiated by the Attorney General. The Attorney General handles a full range of environmental cases involving air, water, land and other issues for the State. The array of environmental issues ranges from bird migration questions to the removal of thorium tailings in West Chicago.

The Attorney General's Office has two Environmental Control Divisions. One division is based in Springfield and the other is based

4. 415 ILCS 5/2(b) (1992).
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in Chicago. Between the two divisions, the Attorney General has approximately 17 lawyers in Chicago and 6 in Springfield who are devoted full-time to environmental cases. The divisions are not departmentalized, therefore, each Assistant Attorney General gets a full range of issues in his or her caseload.\(^5\)

Several cases are referred to the Attorney General for prosecution from state agencies charged with environmental responsibilities. Some of the state agencies represented are the Department of Nuclear Safety,\(^6\) Department of Mines and Minerals,\(^7\) Department of Public Health,\(^8\) Department of Agriculture,\(^9\) Department of Conservation,\(^10\) Department of Energy and Natural Resources,\(^11\) Illinois Emergency Management Agency,\(^12\) Department of Labor,\(^13\) Pollution Control

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5. Some attorneys, however, have specialized. For example, two attorneys limit their practice to Superfund cases and some of the other Assistants specialize in criminal environmental cases.

6. This department exercises powers vested in the Department of Public Health to regulate radiation, radioactive waste, and steam gathering facilities. 20 ILCS 2005/71 (1992).

7. This agency evaluates information concerning mine accidents and promotes technical efficiency with relation to mines and mining in Illinois. 20 ILCS 1905/45-46 (1992).

8. This department implements programs and supports activities to protect the public from hazards that may threaten personal and public health. It also has general supervisory powers regarding the health and welfare of the lives of the people of the State of Illinois. It may make sanitary investigations and inspections for the preservation and improvement of public health and adopt regulations and rules that promote the general health of the state's population. 20 ILCS 2305/2 (1992).


10. The department regulates the state's fish, mussels, frogs, turtles, game and other wild animals, wild fowl, fauna and flora, in addition to operation of boats and licensing for hunting and fishing. It also promotes forestry and the prevention of pollution. In addition, it advocates preservation of Illinois monuments as well as parks and campgrounds. 20 ILCS 805/63-63a38 (1992).

11. The department prepares Economic Impact Statements regarding proposed state regulations. The statements include an assessment of technical feasibility and economic reasonableness of a regulation balanced with actual environmental benefits. The department also conducts groundwater quality studies for the IEPA and the Illinois Pollution Control Board and conducts studies regarding the benefits and feasibility of classifying and regulating substances as hazardous. 415 ILCS 5/13.1 (1992); 415 ILCS 5/22.9 (1992).

12. The agency conducts emergency management programs with all other state and local agencies involved in an environmental emergency. In addition, it administers the Illinois Chemical Safety Act which requires most businesses with a
Board, Office of the State Fire Marshal, Department of Transportation, and Hazardous Waste Advisory Council.

C. SPECIAL RELATIONSHIP WITH THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

The most significant environmental client of the Attorney General is the Illinois Environmental Protection Agency ("IEPA" or "Agency") from whom the Attorney General receives most of its environmental case referrals. Because of the importance of this relationship to effective environmental enforcement in Illinois, Attorney General Burris took steps early in his administration to improve cooperation between the IEPA and the Attorney General's Office. In prioritizing his enforcement efforts, Attorney General Burris determined that effective environmental enforcement required that lines of communication be opened between the two offices with the focus on fostering the attorney-client relationship.

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federal Standard Classification to have a Chemical Safety Contingency Plan. 20 ILCS 3305/5 (1992); 430 ILCS 45/1-12 (1992); 430 ILCS 5/3.35 (1992).

13. The department administers the Toxic Substances Disclosure to Employees Act which requires disclosure to employees of a large number of toxic substances in the workplace. 20 ILCS 1505/43 (1992); 415 ILCS 5/22.21 (1992); 820 ILCS 255/1 (1992).

14. The PCB has both quasi-judicial and quasi-legislative functions. It defines, determines and enforces environmental control standards applicable in Illinois and may adopt rules and regulations in accordance with the Illinois Environmental Protection Act. It also conducts hearings on complaints regarding violations of the Act, regulations promulgated under the Act, and permit appeals. PCB orders are appealable directly to the Illinois Appellate Court pursuant to Administrative Review Law. 415 ILCS 5/41 (1992). The Board may grant variances to its regulations if compliance with the regulations would impose an arbitrary or unreasonable hardship. 415 ILCS 5/5 (1992).

15. The Office administers the Leaking Underground Storage Tank Act (LUST). It is also the lead agency for formulation of regulations and policies with regard to LUST and UST. 415 ILCS 5/22.12-22.13 (1992).

16. The department coordinates the traffic impact of proposed or potential locations for required pollution control facilities with local county boards affected by the impact. 415 ILCS 5/39.2 (1992).

17. The council consists of the directors of the IEPA and the Department of Energy and Natural Resources, the Chairperson of the PCB, the Attorney General, the President of the Senate, the Speakers of the House and Senate or their designees, and six members appointed by the Governor. The council's task includes reviewing regional pollution control facilities and alternative treatment methods of hazardous waste including recycling and incinerations. In addition, it reviews all existing state and federal laws pertaining to treatment, storage, disposal and transportation of hazardous wastes. 415 ILCS 5/5.1 (1992).
Since assuming the duties of his Office, Attorney General Burris has continually worked with IEPA Director Mary Gade to improve case referral guidelines, to formulate a clearer and more comprehensive penalty policy, and to streamline the case management system between the Offices. Their joint efforts have been very successful in bringing an overall consistency in environmental regulation and enforcement to Illinois.

Created pursuant to Section 4 of the Act, the IEPA is charged with investigating potential violations of the Environmental Protection Act. The IEPA does not, however, have the independent authority to bring enforcement actions. Once an investigation reveals violations of the Act, the IEPA must refer the case to the Attorney General. The Attorney General then represents the IEPA before the Pollution Control Board or the Circuit Court. Because the Pollution Control Board lacks injunctive powers, cases involving an immediate threat to the public health and safety are filed in Circuit Court.

The IEPA acts as the eyes and ears for environmental enforcement in Illinois. IEPA investigations provide the necessary first step in any enforcement action. An investigation may be initiated in a number of ways, such as routine regulatory inspection, citizen complaint, or by the fortunate occurrence of an enforcement official being in the right place at the right time to discover an environmental violation.

The IEPA employs a number of field personnel. Employees in the field are organized according to different environmental media. Once a site is investigated, the IEPA field inspector files a report detailing the findings. This report usually includes a determination of whether the facility is in violation of the Act. If the IEPA determines that the facility is in violation of the Act, the IEPA sends out a Compliance Inquiry Letter ("CIL") calling for an explanation as to why the facility is not in compliance. If the response is not satisfactory, the IEPA sends an enforcement notice letter that informs the facility that the IEPA intends to refer a formal complaint to the Attorney General for prosecution. The CIL offers an opportunity for the company's officials to meet with the IEPA to resolve the conflict.

If the meeting fails to resolve the conflict, the case is sent to the enforcement division of the IEPA. The enforcement division prepares the referral documents that detail the case history and

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requests that the Attorney General’s Office file a complaint against the alleged violator.

Once referred to the Attorney General’s Office, the case is assigned to an Assistant Attorney General. The Assistant Attorney General works with technical advisors from the IEPA to develop the case, negotiate a settlement and compliance plan, and finally, arrive at a penalty figure.

The Attorney General and the IEPA are currently working on a penalty policy to promote consistency and fairness to the regulated community. Factors involved in penalty determination include how the company responded in terms of timeliness and good faith exhibited, how serious the violation was, whether it was a repeat violation, the economic viability of the company, and any profits made by the company as a result of their noncompliance. Further guidance on penalties is provided in the Act. \(^\text{19}\) The Pollution Control Board is

\(^{19}\) 415 ILCS 5/33(c) provides:

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

1. the character and degree of injury to, or interference with the protection of the health, general welfare, and physical property of the people;
2. the social and economic value of the pollution source;
3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
5. any subsequent compliance.

415 ILCS 5/42(h) of the Act provides:

In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1) or (b)(3) 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 violator in attempting to comply with the requirements of this Act and regulation thereunder or to secure relief therefrom as provided by this Act;
3. any economic benefits accrued by the violator because of delay in compliance with requirements;
4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject
required to make specific findings on the statutory penalty factors when it accepts a settlement proposal from the parties in an environmental lawsuit.

D. THE ATTORNEY GENERAL'S ENFORCEMENT PHILOSOPHY

1. Background

The improved relationship with the Illinois Environmental Protection Agency is consistent with Attorney General Burris' enforcement philosophy of fairness, firmness and full information. To more fully explain this, this section will discuss the Attorney General's enforcement philosophy as applied to his relationship with businesses, his policy of accessibility to different interest groups, and the internal case management and review of environmental cases.

Prior to assuming his office, Attorney General Burris was a Vice President of a large bank and also served three terms as the State Comptroller. Because of this experience, he understands and appreciates the interests of business and the importance of fiscal management. This background enables him to balance the interests of the public and private sectors in his approach to environmental enforcement.

2. Accessibility to Those Affected by Environmental Regulation

The Attorney General has implemented a policy of accessibility to those affected by his environmental policies and decisions. He has met with business leaders and community activists alike to listen to their concerns. This policy of accessibility promotes fairness to all involved because it increases the amount of information available to Attorney General Burris for his consideration in making enforcement decisions. As a result, the Attorney General is able to make well-informed enforcement decisions.

For example, a corporation was planning to site an incinerator on the southeast side of Chicago in an economically depressed area. Citizens' groups complained that they had not received notice of the siting hearings pursuant to Section 39.2 of the Illinois Environmental Protection Act. Under the statute, all parties living within 250 yards of the proposed site are to receive notice of the siting hearing.

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5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.

so that they can present whatever evidence they may have relevant to the case.

After investigating the complaints, the Attorney General discovered that, in fact, a number of citizens had not been notified pursuant to statute. This led to the Attorney General bringing a successful action in *quo warranto* to challenge the siting permit that was granted.

This case involved the balancing of at least three competing interests: the citizens who were affected by the potential siting of the incinerator near their homes; the business groups that were developing the incinerator; and the general community's interest, as asserted by the town's mayor, in attracting jobs and economic development.

Attorney General Burris had to contend with the developers who had extensive financial interests invested in the siting and development of the project. Further, the project had been granted permits by the IEPA and the U.S. EPA, who affirmed an appeal of the permit brought by the former Attorney General. There was the additional consideration of the need for the incinerator given the shrinking landfill space in Illinois. The community or citizens' interest was split between concern for those who were not afforded an opportunity to attend the siting hearing and concern for attracting new jobs to the area.

Because the siting was proposed for an economically disadvantaged, minority area; the issue of environmental racism arose. Environmental racism involves the charge that landfills are most often sited in poor, minority areas. Further, environmental racism charges that cancers and other environmentally related illnesses more commonly afflict people of color who live near contaminated sites.

This case illustrates how various interests can compete in the area of environmental enforcement. Moreover, it illustrates the importance of gaining full information through accessibility to those affected by environmental policy decisions made by the Attorney General's Office. Only through such accessibility was Attorney General Burris able to make a well informed decision on this case. The decision was to enforce the siting laws to ensure that those affected by the incinerator were given an opportunity to be heard.

3. **Internal Case Management System**

Significant environmental cases are brought to the attention of Attorney General Burris in meetings at which he is fully briefed. All aspects of the cases are discussed including how the proposed action may affect the company against whom the action is brought. Various factors are balanced before decisions are made. Although the Attorney General's enforcement powers are broad, a noncompliant factory may not be closed if there is an available action which would ensure safe operation of the factory without causing unemployment. Likewise, if a municipality is being sued over a landfill matter, for example, the economic hardship may fall on the taxpayers. Thus, in order to avoid an unfair burden to the taxpayer, other resolutions may be explored to bring the facility into compliance.

As a matter of Office policy, alleged environmental offenders are always given the opportunity to resolve a complaint voluntarily before suit is brought against them. Within the Attorney General's Office, complaints are internally reviewed by the Litigation Committee before they are authorized for filing. The Litigation Committee consists of the upper management staff in the Office who specialize in civil litigation, criminal litigation, public interest litigation, and policy matters such as environmental enforcement. Each complaint is presented by the Chief of the Environmental Control Division, and the Assistant Attorney General who is assigned to the case. The Litigation Committee members carefully scrutinize each matter asking questions regarding the alleged offender's past history, the company's response to the alleged violation, the estimated costs of remediation for the problem, and other areas of inquiry appropriate to each case.

Thus, through close case management and direct involvement with significant environmental litigation, Attorney General Burris ensures that his environmental enforcement policy is being implemented in a fair, firm and consistent manner.

E. **ENFORCEMENT CASES**

1. **Civil**

Most of the environmental cases prosecuted by the Attorney General are civil in nature. As stated earlier, the range of issues is vast and involves all aspects of air, water, and land pollution including permitting, siting and enforcement actions.

In an attempt to gain first-hand education in environmental matters so that he would not be making decisions in a vacuum,
Attorney General Burris arranged a tour of landfills on the southeast side of Chicago. While on the tour, he noticed a brownish-red plume being emitted from a smoke stack. Immediately upon his return to the office, Attorney General Burris dispatched an investigator to the site. The investigator found numerous environmental violations resulting in an enforcement action being brought against the company. The violations were resolved by a consent decree requiring tighter emission controls and the payment of a penalty to the Illinois Environmental Protection Trust Fund.

One of the more highly visible cases during Attorney General Burris' term was an enforcement action against the Lincoln Park Gun Club. The case was significant in that it charged that the discharge of lead shot into the waters of Lake Michigan was an unpermitted discharge and violated state law. The club was dissolved and is no longer in operation. The Chicago Park District is working with other involved agencies to remediate the existing environmental damage.

There have been a number of significant cases which have occurred outside of Chicago. In Rockford, a state-led cleanup was initiated for two of the state's most toxic waste sites. Lawsuits and consent decrees were filed in federal court against both of the companies involved. Both sites presently are on the Superfund National Priorities List.

In Madison County, the Attorney General's Office obtained a $550,000 penalty in a suit against a major oil company over incidents involving leaking oil and corroded, faulty pipes that threatened local groundwater. The agreement required the company to undertake a massive review and modification of key operation systems at the plant.

A hazardous waste incinerator in Sauget was also the subject of a suit for numerous environmental violations. This matter was resolved by a consent decree requiring very rigid safety and operational standards and payment of a $1.9 million dollar penalty.

The highest environmental penalty obtained in the history of the State of Illinois involved a hazardous waste incinerator on the southeast side of Chicago which was closed down after an explosion occurred when a mislabeled drum was incinerated. In an effort to work with the business community, the Attorney General's Office negotiated an interim consent decree that allowed the company to run a test burn to determine whether or not they could operate in full compliance with environmental regulations. The company failed the test burn and remains shut down to this day. As a result of its extensive environmental violations, the company has paid $5,000,000
to the State, $500,000 to endow a community scholarship program, and an additional $350,000 per year to the IEPA for oversight costs. This case is significant because it illustrates the importance of supervising and training employees on environmental safety standards. It is also significant because a criminal case resulted from the investigation conducted pursuant to the civil case. During the Attorney General’s investigation for its civil case, criminal activity was discovered at the plant. The criminal case involved changing dates on labels of drums that contained hazardous waste. The Attorney General obtained an indictment against a former supervisor at the facility, and charged him with 24 counts of false material statements concerning hazardous waste, unlawful destruction of hazardous waste records, forgery and conspiracy. The former supervisor’s trial resulted in a conviction. One of the subordinates pled guilty to a misdemeanor, received probation and paid a fine. This case demonstrates Attorney General Burris’ willingness to prosecute criminal violations of environmental laws.

2. Criminal Environmental Prosecutions

While most environmental prosecutions are done in the context of a civil suit, the Attorney General’s Office prosecutes polluters criminally when such an action is warranted. Illinois has strong criminal environmental enforcement statutes in that they have excellent seizure and forfeiture provisions, strong monetary penalties, and the statute of limitations does not begin until the discovery and reporting of the crime.

Under the Responsible Corporate Officer theory, a corporate officer directly responsible within the management scheme may be held criminally liable for criminal acts committed by subordinates.22 The knowledge of employees is imputed to corporate officials for the purpose of imposing criminal liability. In Illinois, this doctrine is codified in the Criminal Code, Section 38-5-4 which provides for the responsibility of a corporation, and specifically encompasses the criminal provisions of the Illinois Environmental Protection Act.23 Using these prosecutorial tools, the Attorney General has been successful in pursuing environmental criminals.

The decision to criminally prosecute environmental violations lies within the discretion of the Attorney General. The Attorney

General’s decision is influenced by a number of factors. First and foremost, because the burden of proof is higher in criminal than in civil cases, the Attorney General must be confident that there is sufficient evidence to convict the defendant “beyond a reasonable doubt.”

Next, the Attorney General must decide whether a criminal prosecution will serve its purpose. In some instances, a penal effect is needed. The Attorney General is more likely to criminally prosecute a defendant when that party has shown a repeated disregard for the environmental laws. The Attorney General also takes into account the severity of the harm with an intent to make the penalty appropriate for the amount of harm to the public health and the environment caused by the defendant.

One purpose of criminal prosecution of environmental offenders is to deter other potential violators. Criminal prosecution can be a more powerful deterrent than civil penalties due to the underlying threat of incarceration. This deterrent is effective against corporate entities as well as individuals.

While it is obvious that a corporation cannot be thrown in jail, Attorney General Burris will, when dealing with corporate violators of environmental laws, prosecute both the corporate entity and the highest ranking corporate officer involved. This has the tendency to change the officer’s perspective of what the cost of doing business really is.

For example, in the corporate context, illegal dumping of hazardous waste is often done to avoid the high costs associated with disposing of the waste in an environmentally safe manner. Some of the larger corporate entities are able to absorb civil environmental fines as a cost of doing business. This type of calculated disregard for environmental laws frequently warrants criminal prosecution.

The Attorney General’s strong commitment to preventing corporate defendants from profiting from their disregard of environmental laws has the added benefit of “levelling the playing field” for those corporate entities that obey the law. A business should not be permitted to profit from circumventing environmental laws. Tough enforcement eliminates the incentive to cheat and forces companies to reduce the true cost of environmental business decisions.

Some examples of higher level criminal cases illustrate how enforcement is done in environmental criminal cases. One such case involved an employee reporting that a company was falsifying its discharge monitoring reports (“DMR”) to the IEPA. The employee claimed that the content of hazardous elements in the wastewater prior to discharge was actually much higher than reported by company officials. After a thorough investigation, the Attorney General
obtained evidence and indicted the company. The company pled guilty to two felony counts for the unauthorized use of hazardous waste, and was fined $350,000. The plant manager's role in falsifying the DMR's was discovered through the investigation and he was indicted as well. He pled guilty to two felony counts, was ordered to serve time in prison, and fined $7,500. The company was also required to place a full page advertisement in a trade magazine notifying readers of the conviction.

In Vermillion County, a company that manufactures molds and forms for use in the fabrication of metal parts had a xylene emission that had caused injury to some employees. Acting on an informational tip to the Attorney General's Office about hundreds of barrels of hazardous waste being stored on site or dumped down old mine shafts, a search warrant was executed. This led to the discovery of 2,000 barrels of hazardous waste being stored on site.

As a result of this discovery, both the owner-operator of the company and the company itself were indicted by a Vermillion County Grand Jury. The owner-operator was found guilty at a bench trial and sentenced to six months in prison, two years probation, 2,000 hours of community service and a $1,000 fine. The company was also found guilty and was placed on two years probation, fined $50,000 and ordered to clean up the site.

Most environmental cases prosecuted by the Attorney General's Office are civil in nature and do not involve criminal activity. The Attorney General, however, will look for criminal activity and will not hesitate to initiate criminal proceedings, when necessary, to demonstrate that intentional harm to the environment will not be tolerated in Illinois.

III. THE ATTORNEY GENERAL AS POLICY MAKER IN ENVIRONMENTAL LAW: THE ATTORNEY GENERAL'S TASK FORCE ON ENVIRONMENTAL LEGAL RESOURCES

A. INTRODUCTION

In 1991, the Illinois General Assembly called upon the Attorney General to convene a special task force on environmental legal resources. In the Environmental Legal Resources Act,24 the General


Assembly found that the Attorney General, as the chief prosecutor of environmental laws of the State, should coordinate legal activities in the area of environmental law. The General Assembly also found that fragmentation of legal resources leads to inefficiency, waste and confusion among state government, industry and environmental activists. The Act created the Attorney General's Task Force on Environmental Legal Resources ("Task Force"), whose purpose was to assess the legal delivery system of enforcing environmental laws in the State and to recommend changes to the General Assembly designed to promote efficient and effective enforcement of such laws.

The Task Force was composed of representatives of those state agencies with environmental responsibilities, state legislators, a representative of the environmental community and a representative of the business community.25 It was bipartisan and representative of the interests most often in conflict in environmental matters. The Attorney General was designated Chairperson of the Task Force.

The Attorney General's Task Force on Environmental Legal Resources was officially convened on February 14, 1992. At the initial meetings, the Task Force set the general agenda for accomplishing the legislative charge of assessing the delivery of environmental legal services in Illinois. Although not specifically required, the Task Force decided that holding public hearings was the best way to attain information relevant to its purpose. Pursuant to public notice, the public hearings took place on March 12, 1992 in Springfield and March 13, 1992 in Chicago.

Several people testified at the hearings. Testimony was received from representatives of the private bar, environmental activists, and state and local regulators. The public hearings provided an opportunity for people to present testimony and an opportunity for the Task Force members to question those who testified in an attempt to gain a better perspective on the environmental issues. In addition

25. The Governor appointed two members to represent state agencies with environmental responsibilities: Mary Gade, Director of the Illinois Environmental Protection Agency; and John Moore, Director of the Illinois Department of Energy and Natural Resources. Each legislative leader appointed one member. For the Senate, the appointments were Senators Jerome J. Joyce and David N. Barkhausen; for the House, they were Representatives Louis I. Lang and Timothy V. Johnson.

The Attorney General appointed Howard A. Learner of Business and Professional People for the Public Interest to represent the environmental community and Jane DiRenzo Pigott, formerly of Katten, Muchin and Zavis, currently of Winston and Strawn, to represent business interests. Diane L. Rosenfeld of the Attorney General's Office was appointed Executive Director.
to the public hearings held, the public was invited to submit written comments to the Task Force by March 20, 1992.

The Task Force held several meetings in Chicago and Springfield in which testimony and issues raised were reviewed thoroughly by its members. Drafts of the reports of the Task Force Report were circulated, criticized and finally approved. The Report of the Attorney General's Task Force on Environmental Legal Resources was presented to the General Assembly in May, 1992.

The Task Force was constituted so that diverse and divergent views would be represented. The deliberations of the Task Force were often lively and spirited. The recommendations were almost all unanimous except for some in which the business representative dissented. Notably, however, the Attorney General, the regulators, legislators and environmental community interests had reached a consensus position on all issues.

In addition to submitting the full Report to the Illinois General Assembly, the Attorney General incorporated six of the proposals into his legislative package for 1993. While all the environmental proposals passed in the House, they were defeated in the Senate. This action was widely criticized as being hostile to the environment.

The six environmental legislative proposals were: increasing the administrative citation authority for the IEPA; stiffening environmental fines for repeat offenders; affirming the right of local government to regulate pesticide use in their own community; granting citizens third party rights of appeal in permitting cases where they had participated in the permitting process and were directly affected by the issuance of the permit; and granting citizens the right to recover expert, witness and attorney fees in matters in which they prevail.

These and other highlights of the Task Force Report are discussed below. Although unsuccessful in the last legislative session, these proposals may be revived if the passing of time demonstrates that they have the public's support.

B. RECOMMENDATIONS OF THE TASK FORCE

1. Consolidation of Environmental Legal Resources within the Attorney General's Office

As stated in the enabling legislation, the General Assembly found that the Attorney General, as the chief prosecutor of the environmental laws of the State, should coordinate legal activities in the area of environmental law, and that fragmentation of legal
resources leads to inefficiency, waste and confusion among state
government, industry, and environmental activists. The Task Force
was charged with assessing the current system and making recom-
mendations designed to lead to a more effective delivery of environ-
mental legal services.

In establishing the Attorney General's Task Force on Environ-
mental Legal Resources, the General Assembly found that coordi-
nation of environmental legal resources within the Attorney General's
Office would prevent fragmentation. As the first step toward elimi-
nating such fragmentation, the Attorney General and the IEPA
agreed to appoint certain IEPA attorneys who were representing the
Agency before the PCB, as Special Assistant Attorneys General.

This important first step toward consolidating environmental
legal resources within the Attorney General's Office will help to
ensure the consistency of state legal activities in environmental
regulation. If coupled with an increase in the Attorney General's
environmental enforcement resources, consolidation of legal re-
sources will result in strengthened and improved state legal services.26

2. Creation of a "Superagency"

The express purpose of the Task Force was to assess the delivery
of environmental legal services in the State and to make recommen-
dations to improve the environmental enforcement system. To the
extent that the examination of legal services implicated a need for
reform of the regulatory structure, the Task Force considered the
comments. In fact, several people testified and submitted written
comments on problems with the current regulatory structure and its
impact on the delivery of environmental legal services.

An overriding concern of the Task Force was the question of
how best to address the current fragmentation and duplication that
exists in Illinois' environmental regulatory system. Numerous prob-
lems were cited by citizens and the regulated community as being
caused by the overlap of authority for environmental regulation.
Much of the testimony regarding the Pollution Control Board
("PCB") seemed to be in response to a perception that the purpose
of the Task Force was to merge the PCB into a superagency.

Several people testified that consolidation of environmental
agencies would make sense as a means to prevent duplication and
fragmentation in the system. On the other hand, many individual
agencies testified as to the necessity of their independent function.

26. See Report, supra note 24, at 8-10.
The Task Force attempted to identify the most serious problem areas in making its assessments and recommendations.

As a long-term consideration, the creation of a superagency is an idea that makes sense to the extent that it replaces a fragmented system with a more cost-effective and streamlined one. Given these times of financial constraint, consolidation of state agencies with authority over environmental programs warrants serious consideration. While the Task Force recognized that there would be upfront transitional costs in accomplishing this result, the members believe that duplication of environmental programs must be avoided and eliminated. At the same time, due process mandates that certain independent functions be preserved.

The Task Force thus recommended that the creation of a cost-effective and streamlined superagency be considered to eliminate the current fragmentation in the environmental regulatory system which citizens often find confusing and unresponsive. Streamlining efforts in this area must be done in an orderly fashion after careful examination and analysis.\textsuperscript{27}

3. \textit{The Attorney General's Legislative Proposals - 1993}

After submitting the Task Force Report to the legislature, the Attorney General introduced a legislative package that contained six legislative proposals. These were (1) increasing Administrative citation authority for the IEPA; (2) stiffening penalties for repeat offenders of environmental regulations; (3) improving the regulation of pesticides; (4) giving citizens the right to recover attorney, expert and witness fees; (5) giving citizens the right to bring third party appeals in permitting cases; and (6) increasing the authority of hearing officers at the Pollution Control Board.

a. Increasing Administrative Citation Authority for IEPA

A central issue considered by the Task Force was the expansion of authority under the administrative citation program to enable the IEPA to issue citations for a wider range of environmental violations especially for relatively small environmental violations that do not justify a significant investment of enforcement resources. Rather, these violations could be handled administratively with less resources. Under this expanded authority, after a field investigation, the IEPA could issue an administrative citation for any violation. The offender

\textsuperscript{27} See Report, \textit{supra} note 24, at 17-20.
could then pay the fine and bring the matter to a close. There would be no necessity to refer the case to the Attorney General’s Office for enforcement if the fine was paid. If the offender chooses to contest the citation, then a Special Assistant Attorney General would represent the Agency at a hearing held by the PCB. Having a Special Assistant Attorney General at the Agency involved in the administrative citation program serves the dual purpose of expediting the referral process and providing agency representation.

Under current law, the IEPA only has citation authority for landfill violations up to $500. In an effort to streamline the delivery of environmental legal services in Illinois, the Task Force considered the expansion of administrative citation authority as a means to allocate resources so that small problems could be dealt with using minimal resources. As a result, valuable environmental legal resources could be more effectively committed to larger problems.

An overwhelming amount of testimony and comments supported granting expanded administrative citation authority to the IEPA. Strong support came from the U.S. EPA, who had vigorously supported Illinois legislation that would create effective administrative penalty authority for IEPA. Specifically, the U.S. EPA supports administrative order authority with meaningful penalties for all programs implemented by IEPA.

The Chicago Bar Association’s Environmental Law Committee expressed support for expanded administrative citation authority as long as repeat offenses are not considered as a “black mark” on a company’s record. The only criticism received by the Task Force was submitted on behalf of the Illinois Steel Group to oppose the expansion of administrative citation authority. The Illinois Steel Group claimed that IEPA’s current authority was for immediately provable violations such as blowing litter and was not intended as a mechanism for policing paperwork or determining complex issues of environmental compliance.

The Task Force determined that expanded administrative citation authority of the IEPA would help reduce the existing backlog in the current system by providing a system whereby smaller cases need not be referred to the Attorney General’s Office for full blown enforcement proceedings.

Based on the recommendations of the Task Force, the legislation recommended that the IEPA be granted administrative citation authority for all types of violations under the Illinois Environmental

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Protection Act to impose fines and penalties up to $1,000 per day, and $10,000 cumulative. Appropriate statutory or regulatory safeguards at IEPA need to be firmly established to prevent any abuses in the implementation of the program.29

b. Stiffening Environmental Penalties

The Task Force heard testimony and received written comments from the Lake Michigan Federation ("LMF") and the Illinois Environmental Council ("IEC") suggesting that environmental penalties should be stiffened. The IEC stated that although fines for polluters have increased, they are still too low to provide businesses with a sufficient financial motivation to become serious about compliance and pollution prevention. The Lake Michigan Federation echoed this position, stating that penalties assessed against polluters are often negligible and, thus, polluters have little incentive to correct pollution problems.

In reviewing the testimony, the Task Force noted that the statutory environmental penalty provisions increased significantly in 1990 and mechanisms are in place to enforce these penalties. The Task Force discussed the possibility that the IEPA and the Attorney General's Office develop a Memorandum of Understanding on penalty policy that reflects the Task Force's recommendations, similar to the U.S. EPA's penalty policy guidance document.

Members of the Task Force generally agreed that environmental penalties should be stiffened especially for repeat offenders. A suggestion that the net worth of a company should be figured in the penalty formula after the first or second offense was made as a means to prevent large companies from being assessed a number of small fines and being able to treat such fines as an incidental cost of doing business. It was also suggested that a legal standard for intentional repeat violations such as "known or should have known" be used to protect companies against heavy fines being imposed for mere "paper violations."

The increased penalty provisions would send a strong signal of the cost of non-compliance and thereby increase the deterrent effect of penalties in environmental enforcement. Some flexibility would also be warranted for the prosecutor to consider any appropriate mitigating factors.

29. See Report, supra note 24, at 31-33.
Thus, the Task Force recommended that environmental penalties be stiffened to provide enhanced financial motivation to comply with applicable laws and to discourage violations.

The recommendation was that the penalty increase with the number of violations. After the initial $50,000 fine, provided for in Section 42 of the Illinois Environmental Protection Act, the first violation would be subject to the $10,000 maximum fine limitation per day as provided in the Act. A second violation of the same nature would result in a $20,000 maximum fine per day. A third violation of the same nature would result in a $50,000 maximum fine per day at the discretion of the prosecutor.\(^{30}\)

c. The Regulation of Pesticides

The Task Force received a great deal of oral and written testimony from citizens who had serious concerns about the regulation of pesticides in Illinois.\(^{31}\) A number of groups, including the Illinois Environmental Council, the Sierra Club, and the Aurora Environmental Education Network, expressed concern over a perceived lack of enforcement by the Department of Agriculture of current pesticide regulations, especially pesticide usage in non-agricultural settings. The groups proposed that the regulation of pesticides be transferred from the Department of Agriculture to the IEPA.

The Department of Agriculture, however, stated in its comments that (1) its regulatory program has grown from 800 commercial applicator licenses in 1967 to approximately 45,000 licenses today; (2) it is working in cooperation with IEPA and the Department of Public Health to improve enforcement; and (3) it is open to suggestions as to how to better serve the citizens in the future. IEPA stated that despite citizen complaints, it saw no legitimate need to transfer pesticide regulatory authority from the Department of Agriculture and expressed no desire to assume such authority.

The testimony and written comments received by the Task Force reflected the importance of this issue for the Illinois citizens. Several citizens testified that disabilities such as hyperactivity can affect those exposed to pesticides and they suggested a program for Integrated Pest Management ("IPM"). They also proposed that notices of spraying should be posted especially near or in schools where

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children are potentially exposed to pesticides that have been sprayed within one hour of their arrival at school. One 14-year old high school student described the health problems caused by pesticide application in his neighborhood. He suggested that Illinois enact "notice posting" legislation. The required notice of pesticide spraying would list the long and short-term effects of the pesticides. Such notices could also be used where employees of a business may be exposed to pesticides. The Sierra Club testified that 70% of schools apply pesticides on a monthly basis and that these pesticides can cause headaches, dizziness and other side effects including permanent brain damage. They also suggested the use of integrated pest management programs. Other groups proposed requiring written contracts between pesticide applicators and consumers.

Another major problem cited in the testimony received by the Task Force was the confusing nature of pesticide enforcement in Illinois. Frustration was expressed over the inability to determine the appropriate agency to provide information on proper pesticide application and the long and short-term effects of such application. Presently, the Department of Agriculture, the Department of Public Health, the IEPA and various local authorities have responsibilities for enforcing pesticide regulations.

The Task Force members recognized the seriousness of the problem of citizen confusion on Illinois pesticide regulation and the possible conflicts arising among agencies. The members agreed that the regulation of pesticides is a major public concern and that enforcement mechanisms, as well as the agencies' differing authorities, should be better explained to the public.

The recommendation supported legislation to require posting notices before pesticide spraying takes place. Public notice of pesticide spraying must be improved, especially for school districts, playgrounds, lawns and any other areas where the public, and especially children, may be present. The Task Force found that governmental enforcement authority over pesticides in Illinois is both fragmented and confusing to the public. Therefore, the Task Force recommended that the Department of Agriculture's public outreach programs and citizen complaint procedures be strengthened and that Illinois' pesticide enforcement mechanisms, as well as the delineations of authority among agencies, should be better communicated to the citizens of Illinois.32

32. Governor Edgar signed into law, legislation that preempts local authorities from regulating pesticide use within their communities. This legislation was directly
d. Expanding Citizens' Rights in Environmental Cases

i. Introduction and Overview

The Task Force carefully considered the expansion of citizens' rights in the environmental area for two main reasons. First, the government recognizes that because of limited resources, it is unable to bring environmental actions to address every meritorious case. Thus, private initiatives provide a useful complement in environmental enforcement. Second, to increase the effectiveness of existing governmental resources, it makes sense to bring more resources to the table. Given the desire to increase existing resources, the Task Force considered providing incentives for citizen enforcement in the form of attorney, expert and witness fee provisions, and allowing citizens the right to third party appeals in permitting cases that directly affect them and in which they have participated.

ii. Attorney, Expert and Witness Fees for Prevailing Citizens' Groups

Considerable testimony was received in support of enhancing private enforcement of environmental violations by allowing citizen plaintiffs to recover attorneys', experts' and witnesses' fees when they prevail in environmental cases. It was recognized that private enforcement actions by citizens can provide an important counterpart to governmental enforcement actions. The Attorney General and other public agencies sometimes lack sufficient resources that would enable them to address all environmental violations warranting enforcement.

Indeed, most federal environmental laws — for example, the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act — contain citizens' suits provisions as well as provisions for the awarding of attorneys' fees and costs to prevailing citizen plaintiffs. These federal provisions have been largely adopted in many other states and provide a valuable spur in enabling private enforcement actions to supplement governmental efforts.

One suggestion was made that attorneys' fees should be awarded to any prevailing party, not just to citizens' groups. The Sierra Club,

in opposition to the legislative recommendation introduced by Attorney General Burris in the 1993 legislative session.

33. See Report, supra note 24, at 40-42.
among others, testified in strong opposition to this suggestion, claiming a potential chilling effect on citizens who wish to bring enforcement actions. It would also entirely defeat the purpose of the attorneys’ fees provision which is intended to enable citizens’ enforcement cases to be brought where legal representation would otherwise be neither available nor affordable. The Task Force rejected the proposal that fees should be assessed against citizens who do not prevail in court for two reasons. First, this unusual mechanism would chill the filing of potentially meritorious lawsuits by the public and thereby discourage and negate the goal of citizen enforcement to enhance compliance with environmental laws. Second, this proposed fundamental shift in legal framework is at odds with the federal environmental laws and would undermine public participation in the legal and regulatory process.

Because fees will only be available when the citizens are the prevailing parties, the filing of frivolous lawsuits should be deterred. No compensation for the attorneys’ time, therefore, would be provided in losing cases. Moreover, other existing legal remedies are available to discourage the filing of frivolous suits.

The IEPA submitted comments which recognized that many federal environmental laws provide for citizens’ suits and attorneys’ fees to be provided to prevailing citizens in environmental enforcement actions. The IEPA stated that the availability of attorneys’ fees serves as a catalyst for citizen enforcement actions. The Task Force recommended that legislation be passed to enable private citizens to bring citizens’ suits to enforce the State’s environmental laws and to recover attorneys’, experts’ and witnesses’ fees when the citizens are the prevailing parties in environmental lawsuits. The Task Force recognized that citizen enforcement actions can provide a useful complement to governmental enforcement and that the availability of attorneys’ fees is a necessary and desirable spur for private action when government agencies are unable or unwilling to prosecute all environmental violations.

One member dissented from this opinion, finding that there is a fundamental unfairness in allowing the award of legal and expert witness fees to only one party in an action; if legislation is passed allowing the recovery of legal, expert and witness fees in environmental actions, any prevailing party should be eligible for such reimbursement.

iii. Citizens’ Right to Third Party Appeals of Permit Decisions

Currently, Illinois businesses may appeal the denial of a permit. Nonetheless, citizens who may be affected by the issuance of a
permit and who have participated in permit proceedings may not be entitled to that same right except for RCRA hazardous waste facility permits. Citizens for a Better Environment ("CBE") commented upon this inequity and recommended that citizens be authorized to bring third party appeals. CBE commented that any concerns regarding frivolous lawsuits can be remedied by limiting appeals to those who have actually participated in permit proceedings and/or those who are directly affected by the facility in question. Moreover, there is no reason to believe that citizens are any more likely than businesses to file "frivolous" lawsuits. Finally, provisions in state law exist to prevent the filing of non-meritorious actions and to sanction such abuses of the judicial system.

The Task Force recommended that third party rights of appeal in permit cases be granted to citizens who are directly affected by the granting of the permit and who have participated in the process. The current legal framework that grants appeal rights to businesses, but not to citizens, is imbalanced and unfairly limits meaningful public participation.34

e. Increasing the Function of Hearing Officers

Another efficiency recommendation was to increase the function of the outside Hearing Officers' role in Pollution Control Board proceedings. Currently, outside Hearing Officers manage hearings and make limited recommendations as to the credibility of the witnesses. Although the Hearing Officers preside over the hearings and make evidentiary rulings, they have little say in the outcome of the case. Rather, the entire case record must be reevaluated by the Board. In other boards and commissions, however, such as the Illinois Commerce Commission, Hearing Officers are empowered to recommend substantive decisions.

Thus, the Task Force recommended that the Board should consider allowing outside Hearing Officers, who are attorneys and who have heard the evidence, to submit substantive recommendations and to issue proposed orders to the Board for adoption, modification or rejection. The required qualifications for Hearing Officers should be upgraded to reflect the increased responsibilities and to ensure

34. The business representative of the Task Force dissented from this opinion as well. She stated that "[t]he current system allows citizens to have meaningful input into the deliberation process on permits which is considered before a permitting decision is made by the IEPA." See Report, supra note 24, at 44.
that they have sufficient background and experience to assume these expanded roles.35

CONCLUSION

As chief legal officer for the State of Illinois, the Attorney General is largely responsible for environmental enforcement in Illinois. Because so much activity in the area is discretionary, it is crucial that this discretion be exercised by a leader who operates on full information with a strong prosecutorial ability combined with a sense of fairness to the regulated community. Moreover, focus on the attorney-client nature of the relationship between the Attorney General and the state agencies who have environmental regulatory responsibilities helps to minimize the extent to which politics are allowed to hinder environmental enforcement efforts.

In addition to acting as the chief legal officer for the State, Attorney General Burris has used his office to study the problem of the delivery of environmental legal resources and make recommendations to streamline and improve the system where appropriate. Such policy actions are an important component to establishing an effective environmental enforcement program for Illinois.

As we move toward the twenty-first century, we must remember that environmental regulation always involves a careful balancing of interests. Government role in environmental progress should be to encourage innovative methods and development of environmentally sound technology with an awareness of the global nature of environmental degradation. As Vice President Al Gore states, “The key is indeed balance—balance between contemplation and action, individual concerns and commitment to the community, love for the natural world and love for our wondrous civilization.”36

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35. See Report, supra note 24, at 27-28. Although the legislation was not successful, the Pollution Control Board accepted the recommendation and voluntarily created an in-house Hearing Officer program. Telephone Interview with Phil Van Ness, Intergovernmental Affairs Attorney for the Illinois Pollution Control Board (October 28, 1993).
