Illinois Pollution Control Board

Annual Report 2010

Mission Statement

The Illinois Environmental Protection Act (Act) was enacted in 1970 for the purpose of establishing a comprehensive State-wide program to restore, protect, and enhance the quality of the environment in our State. To implement this mandate, the Act established the Illinois Pollution Control Board (Board) and accorded it the authority to adopt environmental standards and regulations for the State, and to adjudicate contested cases arising from the Act and from the regulations.

With respect for this mandate, and with recognition for the constitutional right of the citizens of Illinois to enjoy a clean environment and to participate in State decision-making toward that end, the Board dedicates itself to:

The establishment of coherent, uniform, and workable environmental standards and regulations that restore, protect, and enhance the quality of Illinois' environment;

Impartial decision-making which resolves environmental disputes in a manner that brings to bear technical and legal expertise, public participation, and judicial integrity; and

Government leadership and public policy guidance for the protection and preservation of Illinois' environment and natural resources, so that they can be enjoyed by future generations of Illinoisans.

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Letter from the Chairman

Honorable Pat Quinn, Governor of Illinois, and Members of the General Assembly:

The Pollution Control Board is proud to present the Board's Annual Report for Fiscal Year 2010. Between July 1, 2009 and June 30, 2010, the Board continued to handle a large volume of rulemaking procedures and contested cases while operating within the constraints posed by the State's budget difficulties.

Under the Environmental Protection Act (Act), the Board has two major responsibilities: determining, defining, and implementing environmental control standards for the State of Illinois, and adjudicating complaints that allege non-criminal violations of the Act. The Board also reviews appeals arising from permitting and other determinations made by the Illinois Environmental Protection Agency (IEPA), as well as pollution control facility siting determinations made by units of local government.

Board rulemaking during FY 2010 covered most areas of the Illinois environmental regulations. Rulemakings governing water quality standards generated a great deal of public interest and several air regulations were adopted. Significant rulemakings concluded during FY 2010 are outlined in the following paragraphs.

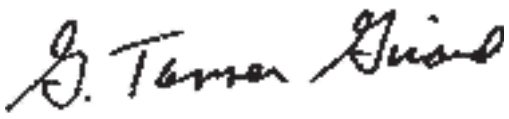
On July 23, 2009, the Board adopted final amendments in the rulemaking entitled, Section 27 Proposed Rules for Nitrogen Oxide (NO_x) Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm. Code Parts 211 and 217 (R07-19). The adopted regulations control NO_x emissions from engines and turbines at large sources located in nonattainment areas.

On August 20, 2009, the Board adopted final amendments in the docket entitled Nitrogen Oxides Emissions From Various Source Categories, Amendments to 35 Ill. Adm. Code Parts 211 and 217 (R08-19). The adopted rules control NO_x emissions from major stationary sources in the nonattainment areas and from emission units including industrial boilers, process heaters, glass melting furnaces, cement kilns, lime kilns, furnaces used in steelmaking and aluminum melting, and fossil fuel-fired stationary boilers at such sources.

On February 18, 2010, the Board adopted final amendments in the rulemaking entitled, Proposed Amendments to the Board's Special Waste Regulations Concerning Used Oil, 35 Ill. Adm. Code 739, 808, 809 (R06-20(A)). The rulemaking amended the used oil management standards and special waste regulations. The changes included exempting specified used oil, and mixtures of used oil with other materials, from manifesting requirements.

During FY 2010, the Board accepted several rulemakings that will continue into FY 2011. Ongoing rulemakings, such as the rulemaking entitled, Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304 (R08-9), will require substantial Board attention and resources. On March 18, 2010, the Board adopted an order dividing the rulemaking into four subdockets to facilitate the rulemaking process: subdocket A (recreational use), subdocket B (disinfection), subdocket C (aquatic life uses), and subdocket D (water quality standards and criteria). This rulemaking will also continue to generate considerable interest among the public and press.

The Board's contested case docket in FY 2010 included numerous enforcement cases, permit appeals, adjusted standard petitions, administrative citations, and landfill siting appeals. Board decisions were overwhelmingly upheld on appeal at both the Appellate and Supreme Court levels.



Meet the Board Members

Chairman G. Tanner Girard was appointed Acting Chairman in December 2005. Dr. Girard was originally appointed to the Board in 1992, and reappointed in 1994 and 1998 by Governor Jim Edgar. Governor George H. Ryan reappointed Dr. Girard to the Board in 2000. Governor Rod R. Blagojevich reappointed Dr. Girard in 2003 and 2005. Dr. Girard has a PhD in science education from Florida State University. He holds an MS in biological science from the University of Central Florida and a BS in biology from Principia College. He was formerly Associate Professor of Biology and Environmental Sciences at Principia College from 1977 to 1992, and Visiting Professor at Universidad del Valle de Guatemala in 1988. Other gubernatorial appointments have included services as Chairperson and Commissioner of the Illinois Nature Preserves Commission and membership on the Governor's Science Advisory Committee. He also was President of the Illinois Audubon Society and Vice-President of the Illinois Environmental Council.

Board Member Thomas E. Johnson was appointed to the Board for a term beginning in July 2001. He served as Chairman from January 2003 until December 2003, and was then reappointed to a three-year term as Board Member. Johnson has spent more than a decade in private legal practice after graduating from Northern Illinois University School of Law in 1989 and holds a BS in Finance from the University of Illinois at Urbana Champaign. Johnson has also served the public in many capacities including: Champaign County Board Member, Special Assistant Attorney General, and Special Prosecutor for the Secretary of State. He is a lifelong resident of Champaign County and lives in Urbana with his wife and two children.

Board Member Andrea S. Moore was first appointed to the Board in 2003. Just prior to joining the Board, Ms. Moore was Assistant Director of the Illinois Department of Natural Resources. Previously, Board Member Moore served in the Illinois House of Representatives from 1993 until 2002. She was Spokesperson of the House Revenue Committee and served on the Environment and Energy, Public Utilities, Cities and Villages, Labor and Commerce, and Telecommunications Rewrite Committees. She also served on the Illinois Growth Task Force and was a member of the National Caucus of Environmental Legislators. From 1984 to 1992, Ms. Moore was a member of the Lake County Board, serving two years as Vice Chair. She was also a member of the Lake County Forest Preserve Board, serving as president in 1991 and 1992. Additionally, she was the Clerk of the Village of Libertyville and was a Village Trustee. Ms. Moore is a member of the Board of Directors of the University Center of Lake County. She was a member of the Board of Directors of the National Association of Counties. In 2001, Ms. Moore received the nation's most prestigious parks and recreation award from the American Academy of Park and Recreation Administration and the National Park Foundation: the Cornelius Amory Pugsley Award. In addition, Ms Moore was honored by the *Daily Herald* as one Lake County's 100 Most Influential Leaders of the 20th Century.

Board Member Gary Blankenship was appointed to the Board in 2008. Prior to serving on the Board, Mr. Blankenship was Business Manager and Financial Secretary for Plumbers & Pipefitters Local #422 in Joliet, Illinois. He served as Vice President of the Illinois Pipe Trades Association, Financial Secretary for the Will and Grundy Counties Building Trades Council and was a member of the Strategic Planning Committee for the United Association of Plumbers and Pipefitters International Union. Mr. Blankenship, with 38 years experience, has participated in the construction and maintenance of a wide variety of air, water, solid and hazardous pollution control systems for industrial facilities such as coal fired power plants, waste water treatment plants, refineries, chemical plants, incinerators, and landfills. He also managed a five-year training program for Pipefitter Apprentices that included constructing and maintaining air and water pollution control systems. Mr. Blankenship and his wife reside in Channahon, Illinois.

Board Member Carrie Zalewski was appointed to the Board by Governor Pat Quinn in 2009. Ms. Zalewski is a licensed attorney in Illinois. Prior to joining the Board, Ms. Zalewski served as Assistant Chief Counsel at the Illinois Department of Transportation (IDOT) where she served as lead environmental compliance attorney. While with IDOT, Ms. Zalewski dealt with various environmental issues involving the federal Clean Water Act, drainage law, and leaking underground storage tanks. Ms. Zalewski has also worked in private practice and for the Office of State Appellate Defender. She has a Juris Doctor from Chicago-Kent College of Law and a Bachelor of Science in Engineering from the University of Illinois at Urbana. Ms. Zalewski is a member of the Illinois Women's Institute for Leadership, Class of 2008. She is on the Board of Directors for the Chicago Youth Centers (Metropolitan), and the LaGrange YMCA.

Rulemaking Review

Rulemaking is one of the Board's most visible functions. During the public notice, comment, and hearing process, the Board and its staff may interact with scores of individual citizens, state agency personnel, and representatives of industry, trade association, and environmental groups. The common goal is to refine regulatory language and to ensure that adopted rules are economically reasonable and technically feasible as well as protective of human health and the environment.

Section 5(b) of the Environmental Protection Act (Act) (415 ILCS 5/5(b) (2008)) directs the Board to "determine, define and implement the environmental control standards applicable in the State of Illinois." When the Board promulgates rules, it uses both the authority and procedures in Title VII (Sections 26-29) of the Act (415 ILCS 5/26-29 (2008) and its own procedural rules at 35 Ill. Adm. Code Part 102.

The Act and Board rules allow anyone to file regulatory proposals with the Board. The Illinois Environmental Protection Agency (IEPA) is the entity that most often files rule proposals. The Board holds quasi-legislative public hearings on the proposals to gather information and comments to assist the Board in making rulemaking decisions. The Board also accepts written public comments.

Notice of a rule proposal and adoption are published in the *Illinois Register*, as required by the rulemaking provisions of the Illinois Administrative Procedure Act (IAPA) (5 ILCS 100/5-10 through 5-160 (2008)). The Board issues written opinions and orders, in which the Board reviews all of the testimony, evidence, and public comment in the rulemaking record, and explains the reasons for the Board's decision.

There are also special procedures in Section 7.2 of the Act for Board adoption, without holding hearings, of rules that are "identical-in-substance" to rules adopted by the United States Environmental Protection Agency (USEPA) in certain federal programs. Notice of the Board's proposal and adoption of identical-in-substance rules is published in the *Illinois Register*, and the Board considers in its opinions any written public comments received by the Board.

The following is a summary of the most significant rulemakings completed in fiscal year 2010, arranged by docket number. During FY 2010, under Section 27 of the Act, the Board adopted rules in six significant rulemakings of statewide applicability. The Board dismissed another rulemaking as a result of the proponent's failure to cure deficiencies in the rulemaking petition. The Board also adopted one site specific rulemaking. These actions are briefly summarized below.

RULES ADOPTED IN FISCAL YEAR 2010

Section 27 Proposed Rules for Nitrogen Oxide (NO_x) Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm. Code Parts 211 and 217, R07-19 (final rules adopted July 23, 2009)

On July 23, 2009, the Board adopted amendments to regulations governing emission of nitrogen oxides (NO_x). The rulemaking was based on an April 16, 2007 IEPA proposal, and provides for control of NO_x emissions from engines and turbines located at 100 ton per year sources located in the Chicago and Metro East/St. Louis nonattainment areas with a capacity of 500 brake horsepower or 3.5 megawatts. These regulations will help Illinois meet federal Clean Air Act requirements for NO_x reasonably available control technology (RACT) under the eight-hour National Ambient Air Quality Standard for ozone and will also improve air quality by reducing precursors of fine particulate matter.

Proposed Amendments to the Board's Special Waste Regulations Concerning Used Oil 35 Ill. Adm. Code 808,809, and 739, R06-20(A) (final rules adopted Feb. 18, 2010)

On February 18, 2010, the Board adopted rules amending the special waste regulations and corresponding used oil management provisions codified at 35 Ill. Adm. Code Parts 808, 809, and 739. The R06-20 docket was opened in response to a regulatory proposal filed by NORA, formally known as the National Oil Recycling Association, on December 13, 2005. After three hearings on the NORA proposal, on August 20, 2009, the Board adopted a second first notice proposal.

In R06-20 Docket A, based on the August 2009 proposal and public comments, the Board adopted regulations exempting from the manifesting requirements of Parts 808 and 809 the following:

(1) used oil, defined by and managed in accordance with Part 739;

(2) mixtures of used oil and hazardous waste, both mixed and generated by a conditionally exempt small quantity generator, provided that mixture contains more than 50 percent used oil by volume or weight;

(3) used oil containing characteristic hazardous waste, with a British Thermal Unit (BTU) per pound content greater than 5000 prior to mixture, where the characteristic (*e.g.* ignitability) has been extinguished in the resulting mixture, and both the used oil and the characteristic hazardous waste has been generated and mixed by the same generator, and which contain more than 50 percent of used oil by weight or volume;

(4) mixtures of used oil and fuels or other fuel products; and

(5) used oil contaminated by or mixed with nonhazardous wastewater, both generated by the same generator and where the mixture results from use or unintentional contamination. In addition, the Board amended the Part 739 tracking requirements to include information required by a manifest in tracking documents.

On December 17, 2009, in response to public comments, the Board also opened a subdocket B in order to add definitions to Sections 739.100, 808.110, and 809.103. R06-20, Docket B is not addressed in the February 18, 2010 final opinion and order in R06-20, Docket A.

Nitrogen Oxides Emissions from Various Source Categories, Amendments to 35 Ill. Adm. Code Parts 211 and 217, R08-19 (final rules adopted Aug. 20, 2009)

On August 20, 2009, the Board adopted amendments to Parts 211 and 217 of the Board's air pollution regulations governing emission of NO_x. The final rules are based on the May 9, 2008 proposal, filed by the IEPA and amended on January 30, 2009 and March 23, 2009.

Generally, the adopted rules control NO_x emissions from major stationary sources in nonattainment areas, and from emission units including industrial boilers, process heaters, glass melting furnaces, cement kilns, lime kilns, furnaces used in steelmaking and aluminum melting, and fossil fuel-fired stationary boilers at such sources. The Board held three public hearings.

Galva Site Specific Water Quality Standard for Boron Discharges to Edwards River and Mud Creek: 35 Ill. Adm. Code 303.447 and 303.448, R09-11 (final rules adopted Aug. 6, 2009)

On August 6, 2009, the Board adopted a site-specific rule for the City of Galva (Galva) establishing a 3.0 milligram per liter (mg/L) alternative boron water quality standard to the generally applicable 1.0 mg/L boron water quality standard in 35 Ill. Adm. Code 302.208(g). The alternative standard for boron applies to certain segments of an unnamed tributary to the South Branch of the Edwards River, the South Branch of the Edwards River, and the Mud Creek Run. These waters receive discharges from the two sewage treatment plants (STP) operated by Galva.

The source of excess boron in Galva's discharges from the STPs is the groundwater from aquifers that supply Galva's potable water. The Board found that the evidence of the capital costs necessary for the compliance alternatives as well as the technical difficulties of the alternatives exemplify that the alternatives are not technically feasible and economically reasonable given the lack of significant environmental impact.

Nitrogen Oxide (NO_x) Trading Program Sunset Provisions for Electric Generating Units (EGU's): New 35 Ill. Adm. Code 217.751, R09-20 (final rules adopted Oct. 15, 2009)

On October 15, 2009, the Board adopted a final rule which sunsets the provisions for the NO_x Trading Program rules for electrical generating units (EGUs). On April 21, 2009, IEPA proposed eliminating an obsolete rule, stating that Illinois adopted both the NO_x rules at 35 Ill. Adm. Code Part 217 and the Clean Air Interstate Rule (CAIR) at 35 Ill. Adm. Code Part 225 after adoption of similar rules by the USEPA. USEPA has approved both sets of Illinois rules for inclusion in the State Implementation Plan (SIP) for ozone attainment. The CAIR provisions codified in 35 Ill. Code Part 225.Subpart E include a trading program for control of NO_x emissions during the ozone season that replaces the provisions in Part 217.Subpart W for EGUs beginning with the 2009 control period (May 1 through September 30) and thereafter.

But, due to a federal court ruling concerning the federal CAIR rules in North Carolina v. USEPA, 531 F.3d 896 (C.A.D.C. Cir. 2008), USEPA must take additional action concerning its rules. To solve the problem, in 40 CFR 51.123(bb)(1)(i),USEPA provided that states such as Illinois with approved CAIR programs may revise their applicable SIP so that the provisions of the NO_x SIP Call Trading Program do not apply to affected EGUs.

Adding the new Part 217.751 to sunset the rules beginning with the 2009 ozone control season was the necessary first step to revision of the SIP.

Petition of Maximum Investments, LLC for a Rule of General Applicability Under 415 ILCS 5/22.2b(a)3, R09-22 (proposal dismissed as insufficient Aug.20, 2009)

On August 20, 2009, the Board dismissed a proposal for a rule of general applicability pursuant to Section 28 of the Act (415 ILCS 5/28 (2008)) filed by Maximum Investments LLC on June 25, 2009. The proposal asked that the Board propose language that would have the review and evaluation services performed by the IEPA under Section 22.2(a)(3) of the Act be identical to the review performed by the IEPA under the site remediation program.

On July 9, 2009, the IEPA filed a motion to dismiss arguing that the Board lacks authority to adopt regulations under Section 22.2b of the Act, and the petition failed to satisfy the content requirements for Board regulatory proposals. The Board dismissed the petition on the grounds of insufficiency, without reaching the authority issue.

Reasonably Available Control Technology (RACT) for Volatile Organic Material Emissions from Group II Consumer & Commercial Products: Proposed Amendments to 35 Ill. Adm. Code 211, 218, and 219, R10-8 (final rules adopted June 17, 2010)

On June 17, 2010, the Board timely adopted rules based on the July 9, 2009 proposal by the IEPA pursuant to the "federally required" rulemaking provisions of Section 28.2 of the Act, 415 ILCS 5/28.2 (2008).

The adopted regulations will reduce emissions of volatile organic material (VOM) consistent with control techniques guidelines issued by the USEPA. The rules apply to Group II Consumer & Commercial Products in ozone nonattainment areas classified as moderate and above in order to meet Illinois' obligations under the Clean Air Act. (VOM is an ozone precursor). Group II products include industrial cleaning solvents, flat wood paneling coatings, flexible packaging printing materials, lithographic printing materials and letter press printing materials.

Additionally, after reviewing correspondence received on June 7, 2010 (after the close of the first notice public comment period) from the Flexible Packaging Association (FPA), the Board opened a subdocket in which the Board might address issues raised by the FPA.

Reasonably Available Control Technology (RACT) for Volatile Organic Material Emissions From Group III Consumer & Commercial Products: Proposed Amendments to 35 Il. Adm. Code 218 and 219, R10-10 (final rules adopted March 18, 2010)

On March 18, 2010, the Board timely adopted rules based on the October 23, 2009 proposal by the IEPA pursuant to the "fast-track" rulemaking provisions of Section 28.5 of theAct, 415 ILCS 5/28.5 (2008).

The adopted rules set limits for emission of volatile organic material (VOM) consistent with control techniques guidelines issued by the USEPA for the following Group III consumer and commercial product categories: paper, film, and foil coatings; metal furniture coatings; and large appliance coatings. The rules apply in Illinois ozone nonattainment areas classified as moderate and above. (VOM is an ozone precursor).

SEMI-ANNUAL IDENTICAL-IN-SUBSTANCE UPDATE DOCKETS

Section 7.2 and various other sections of the Act require the Board to adopt regulations identical in substance to federal regulations or amendments thereto promulgated by the USEPA Administrator in various federal program areas. *See* 415 ILCS 5/7.2 (2008). These program areas include: drinking water; underground injection control; hazardous and non-hazardous waste; underground storage tanks; wastewater pretreatment; and the definition of volatile organic material.Identical-in-substance (IIS) update dockets are usually opened twice a year in each of the seven program areas, so that the Board annually processes at least 14 update dockets in order to translate federal rules into State rules within one year of USEPA rule adoption. Additional update dockets are initiated as necessary to provide expedited adoption of some USEPA rules in response to public comments, or to correct rules for various reasons (including in response to federal litigation).

Timely completion of IIS rules requires inter-agency coordination and inter-governmental cooperation. Entities who must act in concert to successfully complete these rulemakings include the Board, the IEPA, USEPA, and the Office of the Attorney General. The Attorney General must certify the adequacy of and authority for, Board regulations required for federal program authorization.

For reasons of space, the Board has not included the listing of identical-in-substance dockets completed in FY09. Summaries of these dockets are included in the Board's newsletter the *Environmental Register*. They are available on the Board's Web site at www.ipcb.state.il.us. Additional information is also available electronically on the various individual dockets from the Clerk's Office On Line (COOL) system, also available on the Board's Web site.

RULES PENDING AT END OF FISCAL YEAR 2010

At the close of FY10, there were 17 open dockets (including subdockets), exclusive of two, consolidated and reserved IIS dockets.

The Board typically holds hearings on proposals filed with it, prior to adoption of the "first notice" orders required under the IAPA. If the Board substantially changes rule text as a result of public hearings and comment, the Board may adopt a "second first notice" order, hold additional hearings and receive additional comment.

The list of pending dockets below does not including identical in substance rule dockets.. For reasons of space, the substance of these dockets carried over from FY10 into FY11 is not summarized below. Additional information is available from the Board's Web site at www.ipcb.state.il.us

R04-8 In the Matter of: Amendments to the Board's Procedural Rules to Accommodate Electronic Filing: 35 Ill. Adm. Code 101-130

R06-20(B) Proposed Amendments to the Board's Special Waste Regulations Concerning Used Oil, 35 Ill. Adm. Code 808,809

R06-22 NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217

R07-21 Site Specific Rule for City of Joliet Wastewater Treatment Plant Fluoride and Copper Discharges, 35 Ill. Adm. Code 303.432

R08-9 Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304 217

R08-18 Proposed Amendments to Groundwater Quality Standards, 35 Ill. Adm. Code 620

R09-9 In the Matter of: Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742)

R09-19 Air Quality Standards Clean-up: Amendments to 35 Ill. Adm. Code Part 243

R09-21 Ameren Ash Pond Closure Rules (Hutsonville Power Station): Proposed 35 Ill. Adm. Code Part 840.101 through 840.144

R10-8(A) Reasonably Available Control Technology (RACT) for Volatile Organic Material Emissions from Group II Consumer & Commercial Products: Proposed Amendments to 35 Ill. Adm. Code 211, 218, and 219

R10-09 Financial Assurance Instruments--Renewal and Terms: Amendments to 35 Ill. Adm. Code 807.Subpart F, 810.104 and 811.Subpart G

R10-18 Procedural Rules on Hearings in Identical in Substance Rulemakings

R10-19 Procedural Rules for Authorizations Under P. A. 95-115 (Regulation of Phosphorus in Detergents Act), 35 Il. Adm. Code 106.Subpart H

R10-20 Reasonably Available Control Technology (RACT) for Volatile Organic Material Emissions from Group IV Consumer & Commercial Products: Proposed Amendments to 35 Il. Adm. Code 211, 218, and 219

R10-21 10-Year Federally Enforceable State Operating Permits (FESOP) Amendments to 35 Ill. Adm. Code Part 201.162

R10-22 Revision of Mailing Address for Service of Documents: Proposed Amendment to 35 Ill. Adm. Code 101.304

Judicial Review

Introduction

When the Board decides contested cases, the Board exercises quasi-judicial powers similar to those of an Illinois circuit court. Board decisions can be appealed to the Illinois appellate courts.

Pursuant to Section 41 of the Environmental Protection Act (Act) (415 ILCS 5/41 (2008)), any party to a Board hearing, anyone who filed a complaint on which a hearing was denied, anyone denied a permit or variance, anyone who is adversely affected by a final Board order, or anyone who participated in the public comment process under subsection (8) of Section 39.5 of the Act, may file a petition for review of the Board's order with the appellate court. The petition for review must be filed within 35 days of service of the Board order from which an appeal is sought.

Administrative review of the Board's final order or action is limited in scope by the language and intent of Section 41(b) of the Act. Judicial review is intended to ensure fairness for the parties before the Board, but does not allow the court to substitute its own judgment in place of that of the Board. The standard of review for the Board's quasi-legislative actions is whether the Board's decision is arbitrary or capricious. Board decisions in rulemaking, imposing conditions in variances, and setting penalties are quasi-legislative. All other Board decisions are quasi-judicial in nature and the Illinois Supreme Court has stated that in reviewing a State agency's quasi-judicial decision: findings of fact are reviewed using a manifest weight of the evidence standard; questions of law are decided by the courts *de novo*; and mixed questions of law and fact are reviewed using the "clearly erroneous" standard. *See* AFM Messenger Service, Inc. v. Department of Employment Security, 198 Ill. Ed 380, 763 N.E.2d 272 (2001) and City of Belvidere v. Illinois State Labor Relations Board, 181 Ill. 2d 191, 692 N.E.2d 295 (1998).

In Fiscal Year 2010, the Illinois appellate courts entered orders in four cases involving appeals from Board opinions and orders. These cases are discussed below. In the three siting appeals decided, the Board's order was affirmed in one, reversed in another, and vacated and remanded in the third. Finally, the courts dismissed a late-filed appeal of an IEPA seal order. At the conclusion of Fiscal Year 2010, the appellate courts were in the process of hearing appeals of eight Board decisions.

The following summaries of the written appellate decisions in Board cases for Fiscal Year 2010 are organized first by case type and then by date of final determination.

Appeals of Various Final Determinations by the Illinois Environmental Protection Agency

Section 5(d) of the Act (415 ILCS 5/5(d) (2008) authorizes the Board to "conduct proceedings" concerning a number of things, including various final determinations made by the Illinois Environmental Protection Agency (IEPA). Proceedings which do not fit neatly under other case categories (such as permit appeals) include "petitions to remove seals under Section 34 of this Act." Section 34 (a) and (b) allows IEPA to "seal any equipment, vehicle, vessel, aircraft, or other facility" upon a finding of the existence of "episode or emergency conditions specified in Board regulations, or upon finding that conditions at pollution control facilities present "an immediate danger to public health or welfare or the environment." 415 ILCS 5/34 (a, b) (2008). Under Section 34 (d), the owner of sealed equipment, etc. may petition the Board for hearing in accordance with Section 32 for removal of the seal, or may immediately seek injunctive relief from the courts.

Section 5(d) goes on to authorize the Board to hear "petitions for review of final [IEPA] determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate." The Board typically hears such petitions pursuant to its procedural rules (35 Ill. Adm. Code Part 105) for permit appeals filed under Section 40(a) of the Act, 415 ILCS 5/40(a) (2008).

In Fiscal Year 2010, the appellate court for the Second District affirmed the Board's dismissing an appeal of a seal order.

John Tarkowski v. Illinois Pollution Control Board and Illinois Property Tax Appeal Board, No. 2-09-1186 (2d Dist. Feb. 17, 2010) (unpublished Rule 23 order affirming Board's order Board's order in PCB 09-62 (final order of May 21, 2009, as reaffirmed on reconsideration July 23, 2009)

On February 17, 2010, in a final order standing as the court's mandate, the Second District Appellate Court dismissed, for lack of jurisdiction, a November 17, 2009 *pro se* appeal of a Board order. (The appeal also sought relief against other entities.) John Tarkowski v. Illinois Pollution Control Board and Illinois Property Tax Appeal Board, No. 2-09-1186 (2d Dist. Feb. 17, 2010). As to the Board, John Tarkowski appealed the Board's dismissal of his January 2009 *pro se* petition for review of a July 2006 "seal order" issued by the IEPA. The seal order, issued under Section 34 of the Act, 415 ILCS 5/34 (2008) concerned certain property owned by Tarkowski in Wauconda, Lake County. John Tarkowski v. IEPA, PCB 09-62 May 21, 2009, as reaffirmed on reconsideration July 23, 2009). The Board dismissed the petition for review as a result of Tarkowski's failure to provide proof of service of the petition on the IEPA, despite multiple orders to do so.

Before the Appellate Court, the Board successfully argued that Tarkowski's appeal of the Board's July 23, 2009 order on reconsideration was untimely filed. Under Section 41(a) of the Act, 415 ILCS 5/41(a) (2008), any appeal to the appellate court was required to be filed on or before September 2, 2009. As the time for filing is jurisdictional, the Board argued that the appeal should be dismissed because Tarkowski filed his petition for review 76 days late.

Pollution Control Facility Siting Appeals

The Act provides, in Sections 39(c) and 39.2, for local government participation in the siting of new pollution control facilities. 415 ILCS 5/39(c), 39.2 (2008). Section 39(c) requires an applicant requesting a permit for the development or construction of a new pollution control facility to provide proof that the local government has approved the location of the proposed facility. Section 39.2 provides for proper notice and filing, public hearings, jurisdiction and time limits, and specific criteria that apply when the local government considers an application to site a pollution control facility. The decision of the local government may be contested before the Board under Section 40.1 of the Act. 415 ILCS 5/40.1 (2008).

The Board reviews the decision to determine if the local government's procedures satisfy principles of fundamental fairness and whether the decision on siting criteria was against the manifest weight of the evidence. The Board also hears challenges to the local government's jurisdiction based on whether the siting applicant met various notice requirements of the Act. The Board's final decision is then reviewable by the appellate court.

During FY10, the appellate court for the Second District reviewed one decision by the Board challenging the substance of various conditions of the grant of siting. The Second District dismissed part of the case as moot, and vacated and remanded the Board's decision as to two conditions.

The Third District reviewed two siting decisions by the Board, each involving applications for approval for expansion of the Kankakee Landfill. The Third District affirmed the local and Board decisions denying siting to Waste Management of Illinois. In the final chapter of the proceedings in a case known as "Town & Country II," the Third District reversed the local and Board decisions, finding that Town and Country's 2003 siting application had been improperly granted.

The City of Rochelle v. Illinois Pollution Control Board, Rochelle Waste Disposal, L.L.C., and The Rochelle City Council, No. 2-08-0427, and The Rochelle City Council v. Illinois Pollution Control Board, Rochelle Waste Disposal, L.L.C., and The City of Rochelle, No. 2-08-0433 (cons.) (2d Dist. Sept. 4, 2009)(concerning Board's order in PCB 07-113 (final order of Jan. 24, 2008, as reaffirmed on reconsideration April 3, 2008))

In a September 4, 2009 non-precedential order, the Second District Appellate Court "dismissed in part and affirmed as modified" a Board ruling in a landfill siting case. The City of Rochelle v. Illinois Pollution Control Board, Rochelle Waste Disposal, L.L.C., and The Rochelle City Council, No. 2-08-0427, and The Rochelle City Council v. Illinois Pollution Control Board, Rochelle Waste Disposal, L.L.C., and The City of Rochelle, No. 2-08-0433 (cons.), slip op. at 1 (2d Dist. Sept. 4, 2009) (hereinafter Rochelle (2d Dist.)). The court's ruling was an unpublished order, issued under Illinois Supreme Court Rule 23 (166 Ill.2d R.23). Justice McLaren authored the order in which Justices Hutchinson and Hudson concurred. The court decided the case without hearing oral argument.

Siting approval for the expansion of the existing municipal waste landfill, requested by the City of Rochelle as owner-applicant (City), was granted by the local siting authority, the Rochelle City Council (Council), subject to conditions. The third-party appeal before the Board, filed by operator Rochelle Waste Disposal, LLC (RWD), contested eight conditions of that siting approval.

The Board's affirmation of two of those conditions was appealed to the Second District. The court noted that only Special Conditions 13 and 23 were at issue, both of which were affirmed by the Board. The court dismissed part of the appeal concerning one condition as moot (timing of waste exhumation), affirmed the other condition but with modifications (perimeter berm height), vacated the Board order, retained jurisdiction, and remanded the matter to the Board for further proceedings consistent with the court's order. Rochelle (2d Dist.).

The Appellate Court's remand order was issued September 4, 2009. Consistent with that order, the Board issued a final order closing the case on November 19, 2009. Below is a summary of the Board's proceedings on the initial appeal, the court's decision, and the Board's final November 19, 2009 order following remand.

Board Initial Proceedings

The proceeding before the Board was initiated by the May 16, 2007 filing of a petition for review under Section 40.1(b) of the Act, 415 ILCS 5/40.1(b) (2008) and the Board's procedural rules at 35 Ill. Adm. Code Part 107. As previously stated, the siting authority is the Council, while the siting applicant is the City, owner of the landfill. The landfill, which is known as the "Rochelle Municipal Landfill," began operating in 1972. RWD operates the landfill and has done so since 1995. The landfill is located at 6513 Mulford Road in Rochelle, Ogle County.

RWD filed a third-party appeal with the Board to contest the Council's decision regarding numerous special conditions. Specifically, RWD appealed the Council's determination to impose eight of the special conditions. On January 24, 2008, the Board ruled that the Council's determination to impose challenged Special Conditions 8, 13, 22, 23, 26, and 28 was not against the manifest weight of the evidence. The Board also held that Special Conditions 33 and 34 lacked support in the record and modified those conditions as proposed by the Council and based on the record. The City, the Council, and RWD filed separate motions for reconsideration of the Board's opinion and order. In an order of April 3, 2008, the Board granted the parties' motions and, upon reconsideration, affirmed its January 24, 2008 opinion and order in its entirety.

Appellate Decision

The Council and the City separately sought appellate review, each petitioning the Second District, which consolidated the appeals. The court began its September 4, 2009 Rule 23 order by stating that "We dismiss in part and affirm as modified." Rochelle (2d Dist.), slip op. at 1. The court then recited relevant facts about the Council's proceeding under Section 39.2 of the Act, 415 ILCS 5/39.2 (2008).

The facts are that in October 2006, the City filed an application with the Council to expand the landfill, proposing to accept into the expanded landfill general municipal waste, construction and demolition debris, and non-hazardous special waste. The proposed expansion included exhuming and transferring waste from the original landfill to a new section equipped with a composite liner, a leachate control system, a landfill gas management system, and a groundwater monitoring system. Rochelle (2d Dist.), slip op. at 2. Completion of the waste exhumation and transfer was expected to take five to ten years. The siting application also proposed a vegetated berm, at least eight feet tall, around the facility's perimeter. *Id*.

During six days of local public hearings, the parties presented ten witnesses. The technical consultant for the Council, Patrick Engineering, submitted its report and recommendations "after the close of evidence" (and after the end of the post-hearing public comment period Rochelle (2d Dist.), slip op. at 2). Patrick Engineering recommended that the Council approve siting for the expansion, subject to 37 special conditions. In addition, the hearing officer recommended siting approval with the imposition of the 37 special conditions. The Council approved the City's application subject to 37 special conditions that were based on, but differing slightly from, Patrick Engineering's recommended conditions. *Id*.

RWD filed a motion to reconsider with the Council, objecting to eight special conditions. The City responded to the motion, arguing that the conditions were unnecessary and requesting that eight special conditions be deleted or modified. In turn, the Council adopted a resolution modifying two of the conditions and reaffirming the remaining conditions. Rochelle (2d Dist.), slip op. at 2.

Special Condition 13 required, in part, that RWD exhume and re-dispose of waste from the original landfill "as soon as practicable, but in no event later than six (6) years from the date an IEPA permit is issued for the expansion, except as otherwise provided by the City Council for good cause shown." Rochelle (2d Dist.), slip op. at 3 (quoting condition). The City argued for a ten-year time limit and asked the court to delete the condition. The Second District noted, however, that in April 2008, the Council adopted an ordinance that, among other things, approved an agreement to extend the time period for the exhumation and re-disposal to ten years, subject to possible further extension. The court found that this "intervening action by the Council makes it impossible for this court to grant the relief sought by the City, as the Council's action is the equivalent of the relief sought on appeal." Rochelle (2d Dist.), slip op. at 3-4. The court therefore held that the issue is "moot" and accordingly "dismiss[ed] this portion of the review." *Id*. at 4.

Special Condition 23 provided for the building of berms at least 14 feet in height around the perimeter of the landfill site. Both the City and the Council (the same entity which included the condition in the siting approval it granted the City) argued on appeal that Special Condition 23 is against the manifest weight of the evidence.

The court summarized certain record information concerning the berms from the local siting proceedings. The City's application proposed a vegetated berm, at least eight feet tall. A City witness proposed a berm that would "undulate from a minimum of 8 feet high to 10 feet high along Creston Road." Rochelle (2d Dist.), slip op. at 4 (quoting testimony). The "only other testimony regarding berms," the court observed, was provided a registered professional engineer, the principal designer of the proposed expansion proposal who never testified about height for the berm. *Id.* The court also noted that there was evidence in the record about the extensive history of various violations at the landfill. *Id.*

The court then stated that the Board decision, *i.e.*, that Special Condition 23 was not against the manifest weight of the evidence, was based on (1) the recommendations of Patrick Engineering and the hearing officer that the berm be at least 14 feet tall, (2) the professional engineer's testimony that berms help in screening landfill operations from view and controlling litter, and (3) RWD's operating record. Rochelle (2d Dist.), slip op. at 4-5.

The Second District's examination of the record found "no support for the PCB's conclusion that 14 foot berms were required." Rochelle (Second District), slip op. at 5. According to the court, there was "no evidence either in favor of or in opposition to such a height." *Id*. The court added that there was also "no evidence suggesting that the planned 8 to 10 foot high berm was insufficient." *Id*. The court acknowledged that the Board was correct that (1) an applicant's prior operating experience and record can be considered before granting siting approval (citing 415 ILCS 5/39.2(a)); and (2) the Board can apply its technical expertise in examining the record to determine whether

the record supports the local siting authority's conclusion (citing Town & Country Utilities, Inc. v. PCB, 225 Ill. 2d 103, 123 (2007)). The court found, however, that "there simply is no evidence to support the finding that a 14 foot berm would be necessary to prevent further violations such as those committed in the past or that such a height would be required for any other reason." Rochelle (2d Dist.), slip op. at 5. The court cautioned that "[t]he PCB's technical expertise must be applied to the record and not imposed arbitrarily or at random." *Id*.

The Second District held that the record supports the requirement that a berm be installed, but "the 14 foot height requirement is against the manifest weight of the evidence." Rochelle (2d Dist.), slip op. at 5. Therefore, the court continued, "we determine the final order of the Board is invalid and vacate said order." *Id*. The court cited U.S. Steel Corp. v. PCB, 384 Ill. App. 3d 457, 461 (5th Dist. 2008) for the order's articulation of the "manifest weight of the evidence" standard of review: "A factual finding is against the manifest weight of the evidence if when viewing all of the evidence in the light most favorable to the prevailing party, the opposite conclusion is clearly apparent or the finding is palpably erroneous and wholly unwarranted, is clearly the result of prejudice or passion, or appears to be arbitrary and unsubstantiated by the evidence." Rochelle (2d Dist.), slip op. at 3.

Citing 415 ILCS 5/41, the Second District "retain[ed] jurisdiction during the pendency of any further action taken by the Board pursuant to this order." Rochelle (2d Dist.), slip op. at 5. The court concluded by stating that the Board's order is "vacated and remanded for further proceedings consistent with this order." *Id*.

Board Order Following Remand

Pursuant to the Appellate Court's September 4, 2009 order, on November 19, 2009 the Board modified its order of January 24, 2008. Specifically, the Board modified Special Condition 23 to require that the perimeter berm be at least eight feet in height. In all other respects, the Board affirms its order of January 24, 2008, while noting that Special Condition 13 had been addressed in the Appellate Court's order as moot. *See* Rochelle Waste Disposal, L.L.C. v. City of Rochelle and Rochelle City Council, PCB 07-113, slip op. at 4 (Nov. 19, 2009).

Waste Management of Illinois v. Illinois Pollution Control Board and County Board of Kankakee County, Illinois, No. 3-08-0333 (3rd Dist. Nov. 13, 2009)(Board's order in PCB 04-186 (final order of Jan. 24, 2008, as reaffirmed on reconsideration April 3, 2008))

In a November 13, 2009 order, the Third District Appellate Court affirmed the Board in the landfill siting appeal captioned Waste Management of Illinois v. Illinois Pollution Control Board and County Board of Kankakee County, Illinois, No. 3-08-0333 (3rd Dist. Nov. 13, 2009) (hereinafter WMI (3rd Dist.). The court's ruling was an unpublished order, issued under Illinois Supreme Court Rule 23 (166 Ill.2d R.23 Justice McDade authored the order, with Justices Holdridge and Schmidt concurring.

The County Board of Kankakee County (County) had denied the 2003 application of Waste Management of Illinois (WMI) for siting approval of an expansion of Kankakee Landfill. *See* Section 39.2 of the Act, 415 ILCS 5/39.2 (2008). The Board affirmed the County in a January 24, 2008 opinion and order, finding that the local siting proceedings were fundamentally fair and that the County's decisions on the three contested siting criteria (need, incompatibility/property values, and traffic) were not against the manifest weight of the evidence. Waste Management of Illinois, Inc. v. County Board of Kankakee County, PCB 04-186 (final order of Jan. 24, 2008, as reaffirmed on reconsideration April 3, 2008)) (hereinafter WMI, PCB 04-186). WMI appealed the Board's decision to the Third District Appellate Court. The Third District heard oral argument on the appeal on September 3, 2009 before issuing its November 13, 2009 ruling.

Local Siting and Board Proceedings

In its order, the court first provided background on WMI's 2003 application. The court noted that after hearings, the County found that WMI failed to satisfy all of the siting criteria of Section 39.2(a) of the Act, 415 ILCS 5/39.2(a) (2008). WMI (3rd Dist.), Order at 5. The County voted 16-12 against criterion (i) (*i.e.*, WMI failed to show that the facility is necessary to accommodate the waste needs of the area it is intended to serve); 18-10 against criterion (iii) (*i.e.*, WMI failed to prove that the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property); and 16-12 against criterion (vi) (*i.e.*, WMI failed to demonstrate that the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows). *Id*. With respect to these three criteria, the County's vote on a prior application had been unanimous in favor of WMI. *Id.* at 3.

WMI filed a petition for review with the Board on the grounds that impermissible *ex parte* contacts between the County and Bruce Harrison, a member of the public, prejudiced WMI and that the County's findings on criteria (i), (iii), and (vi) were against the manifest weight of the evidence. WMI (3rd Dist.), Order at 5. Following the Board's hearing, the Board affirmed the County's denial of the 2003 application in an opinion and order issued

January 24, 2008. The Board found that any *ex parte* contacts with County Board members did not render the local proceedings fundamentally unfair; that WMI was not entitled to question County Board members at the Board hearing as to why their votes changed between the 2002 and 2003 applications; and that the County's findings as to criteria (i), (iii), and (vi) were not against the manifest weight of the evidence. *Id.* at 5-6.

Fundamental Fairness

The court explained that the "clearly erroneous" standard of review applies to the Board's fundamental fairness determination in WMI, PCB 04-186, as that determination raises a "mixed question of law and fact." WMI (3rd Dist.), Order at 7, quoting Peoria Disposal Co. v. Illinois Pollution Control Board, 385 Ill. App. 3d 781, 797, 896 N.E.2d 460, 474-75 (3rd Dist. 2008). Under the clearly erroneous standard, the court will not overturn the Board's ruling on fundamental fairness "unless after a review of the entire record, we are left with the definite and firm conviction that a mistake has been committed." WMI (3rd Dist.), Order at 7.

The court affirmed the Board's determination that the local proceedings were fundamentally fair, agreeing with the Board that WMI failed to make the required showing of prejudice. WMI (3rd Dist.), Order at 7. WMI did not deny that it had a full opportunity to present evidence to the County and even though the County changed its vote between WMI's prior application and 2003 application, WMI did not prove that any improper *ex parte* contacts by Harrison influenced the County's ultimate decision on the 2003 application. *Id.* at 7-8. The record contained evidence to support the Board's determination, including the testimony of County Board members contacted by Harrison. *Id.* at 10. Further, the court noted the Board's finding that there were significant differences between the two proceedings on the two applications, making the change in vote "explainable by independent factors." *Id.* at 11.

Additionally, applying an "abuse of discretion" standard of review, the court affirmed the Board's ruling that the Board hearing officer properly precluded WMI from questioning County Board members on their decision-making thought processes. WMI (3rd Dist.), Order at 11-12.

Siting Criteria

WMI also contested the Board's decision affirming the County's determination that WMI failed to satisfy siting criteria (i), (ii), and (vi) of Section 39.2(a) of the Act. WMI (3rd Dist.), Order at 12. The court explained that it reviews the Board's decision, not the local siting authority's decision, and that the Board's decision on the statutory siting criteria will not be reversed "unless it is against the manifest weight of the evidence." *Id.*, quoting Peoria Disposal Co., 385 Ill. App. 3d at 800, 896 N.E.2d at 477. Accordingly, "[f]or reversal to be warranted, it must be clearly evident from the record that the [Board] should have reached the opposite conclusion. *Id.* That the opposite conclusion is reasonable or that the reviewing court might have ruled differently if it were the trier of fact is not enough to justify a reversal." WMI (3rd Dist.), Order at 12.

Siting Criterion (i)—Need

The court cited evidence that WMI's expert used rates below the actual recycling rates in the service area and failed to consider newly-permitted nearby landfills and a newly-sited landfill. WMI (3rd Dist.), Order at 13-14. Stating that it does not "reweigh" the evidence, the court held that the Board's order affirming the County's determination that the proposed expansion is unnecessary to accommodate the waste needs of the service area was not against the manifest weight of the evidence. *Id.* at 14, citing File v. D & L Landfill, Inc., 219 Ill. App. 3d 897, 907, 579 N.E.2d 1228, 1236 (5th Dist. 1991).

Siting Criterion (iii)— Incompatibility/Property Values; Siting Criterion (vi)—Traffic

The court analyzed together the siting criteria (iii) and (vi) of Section 39.2 of the Act. 415 ILCS 5/39.2 (iii), (iv). WMI (3rd Dist.), Order at 14-16. The court rejected WMI's argument that the opinion of WMI's expert on property values was unrebutted. The court noted that the public expressed its opinion that the proposed expansion would have an adverse impact on surrounding property. *Id.* at 15. The court ruled that "[t]he public comment alone rebuts the expert's testimony on the impact on surrounding property," adding:

> Waste Management cannot argue that the [County] could not consider the opinion of laypersons who actually experience the impact on their property caused by a nearby landfill. So too, although an expert's opinion might be *sufficient* to satisfy criterion (iii), there is no authority for the suggestion that a local siting authority *must* find criterion (iii) satisfied if only the applicant finds an expert to say it is satisfied." *Id.* (emphasis in original).

Delineating weaknesses in the analysis of WMI's expert, the court found that neither the Board nor the court is required to simply accept an expert's conclusion. *Id.*

The court further found that a traffic engineer's opinion rebutted WMI's expert's conclusions regarding the proposed expansion's impact on traffic flow. WMI (3rd Dist.), Order at 15. The County recognized that two experts testified on criterion (vi) and the County "chose the opinion it would give greater weight." *Id.* at 16. The court also quickly disposed of WMI's suggestion that if the applicant presents any plan for minimizing traffic impact, the County must find the criterion met unless the County receives evidence of a "better" plan to minimize the expansion's impact.

The court found that it was "faced with a battle between the witnesses and experts, both with factually supportable conclusions." WMI (3rd Dist.), Order. at 16. The court held that it does not reweigh the evidence or reassess the witness' credibility and concluded that the Board's decision affirming the County was not against the manifest weight of the evidence. *Id.* at 15-16.

County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Waste Management of Illinois, Inc., and Byron Sandburg v. Illinois Pollution Control Board and County Board of Kankakee County, Illinois, 396 Ill. App. 3d 1000 (3rd Dist. Dec. 4, 2009)(reversing Board's order affirming grant of siting approval in PCB 04-33, 04-34, and 04-35 (cons.) (Mar. 18, 2004))

Background

The landfill siting appeal case County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Byron Sandburg and Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, City of Kankakee, Illinois, Kankakee Regional Landfill, LLC and Town & Country Utilities, Inc., Nos. 3-04-02713-04-02853-04-0289 (cons.), known as "Town and Country II," has had a long and interesting history before the Board and in the Third District Appellate Court and the Illinois Supreme Court. That history is detailed in the 2009 Annual Report and appears to have drawn to a close. The Appellate Court for the Third District, in a precedential decision, reversed the Board's opinion upholding Kankakee County's denial of site location suitability approval, under Section 39.2 of the Act (415 ILCS 5/39.2 (2008)) to Town & Country for expansion of the Kankakee Landfill. Town and Country filed a petition for leave to appeal to the Illinois Supreme Court; the Board joined in portions of the petition as described below. The Illinois Supreme Court denied the petition by order of March 24, 2010, bringing an end to this action.

The Board has previously reported the history of Town & Country II (as well as its predecessor appeal "Town & Country I") in detail, and those reports will not be repeated here. *See, e.g. Environmental Register* No.657 at pp. 2-3 *Environmental Register* No. 652 at pp.5-7 (Oct. 2008), No. 648 at p. 4 (June 2008), No. 646 at pp. 6-9 (Apr. 2008) and No. 633 at pp. 2-9 (Mar. 2007). *See also* Annual Report 2009 at pp. 20-22. The latest Third District decision in the case was prompted by the Illinois Supreme Court's March 26, 2009 supervisory order.

In a December 4, 2009 precedential opinion scheduled for publication, the Third District Appellate Court reversed the Board's March 18, 2004 order affirming the grant of a 2003 application for local siting approval in the appeal captioned County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Waste Management of Illinois, Inc., v. Illinois Pollution Control Board and County Board of Kankakee County, Illinois, No. 3-04-0271 (cons. with Nos. 3-04-0285 and 3-04-0289) (3rd Dist. Dec. 4, 2009) (T & C II, slip op. at (3rd Dist. 2009)). Justice McDade delivered the opinion, with Justice Schmidt concurring, and Justice Holdridge concurring in part and dissenting in part in a written concurrence.

The Majority Opinion

As recited in the court's opinion, following an unsuccessful application in 2002 (appealed in Town & Country I), in 2003 Town and Country Utilities (Town & Country) and the Town & Country Regional Landfill, Inc., as joint applicants, filed a new application for site location suitability approval under Section 39.2 of the Act with the siting authority, the City Council of the City of Kankakee. The City Council approved the application. Various objectors (Kankakee County, Waste Management of Illinois, and Byron Sandburg) separately appealed to the Board. In a consolidated decision, the Board affirmed the County. T & C II, slip op. at 2, 5-6 (3rd Dist. 2009).

The court summarized its findings as follows:

> (1) Applicants' 2002 request was disapproved for purposes of subsection 39.2 (m) of the Act when the Board reversed the City's (sic) Council's decision on the 2002 application on the grounds the Council erred if finding that the proposed landfill met the criterion in subsection 39.2(a)(ii) of the Act; (2) remand is not necessary to determine whether Applicants' 2003 request was substantially similar to their 2002 request because their 2003 request fails to satisfy all of the criteria in Section 39.2(a) (415 ILCS 5/39.2(a) (West 2004)); and our finding that the 2003 application fails to satisfy all of the statutory criteria is dispositive because all of the statutory criteria must be met as a precondition for local siting approval. T & C II, slip op. at 7 (3rd Dist. 2009).

Construction of Section 39.2(m) to Include Board Decisions on Appeal as Disapproval

The court recited that Section 39.2(m) of the Act provides that

> An applicant may not file a request for local siting approval which is substantially the same as a request which was disapproved pursuant to a finding against the applicant under any of criteria (i) through (ix) of subsection (a) of this Section within the preceding 2 years. 415 ILCS 5/39.2(M) (West 2004). T & C II, slip op. at 7 (3rd Dist. 2009).

Applying a *de novo* standard of review, the court determined that the Board's ruling on appeal under Section 40.1 of the Act, 415 ILCS 5/40 (2004) was a "disapproval" within the meaning of Section 39.2 just as is a local siting authority's decision under Section 40.1(a). T & C II, slip op. at 7-10 (3rd Dist. 2009). The court went on to state that

> Although our holding, standing alone, would seem to require an analysis of the effect of the Board's failure to determine whether Applicants' 2003 request was substantially similar to their 2002 request, we do not believe that substantial inquiry into the matter is either necessary to comply with the supreme court's supervisory order or prudent in this case.
>
> We are all in agreement on the remaining issues in this case. Our holding on the issue of whether the proposed facility is consistent with the County's solid waste management plan is dispositive because, regardless of whether applicants are restricted from filing their request by section 39.2 (m), their request fails to satisfy all of the statutory criteria, and all of the statutory criteria must be met as a precondition for siting approval. Stated differently, the Board's failure to consider the substantial similarity issue is of no effect

> on the ultimate outcome of these proceedings, and, consistent with direction from the supreme court, we will not waste judicial resources on further analysis. In re Alfred H.H., 233 Ill. 2d 345, 351, 910 N. E. 2d 74, 78 (2009). T & C II, slip op. at 10 (3rd Dist. 2009) (quotation omitted).

Notice Requirements of Section 39.2(b) Met

The County argued that the Applicants had failed to make proper notice of the application by registered mail or personal service on neighboring landowners as provided in Section 39.2(b) of the Act. T & C II, slip op. at 11 (3rd Dist 2009). The court stated that it was applying the *de novo* standard of review, since facts were undisputed. *Id.* At issue was service to the six co-owners of the Bradshaw farm. Judith Skates was listed as the taxpayer of record, and the applicants sent notice to her at her address in Onarga, Illinois. The County's tax records listed a Rock Falls, Illinois address for the other five owners, along with "mailing flags" not to send tax bills and notices to these five owners at Skates' request. *Id*., slip op. at 11-12, 14. The applicants sent one notice of the 2003 application listing the names of the other five remaining owners at the same Onarga address "C/O Judith Skates." Applicants presented testimony that they had tried to mail notice of the 2002 application to the Rock Falls address, and been advised that the only way to contact them was through Judith Skates. *Id*., slip op. at 11-12, 14.

The court rejected the County's arguments that separate notices should have been sent to the five owners at their "last known address," as this phrase is not included in the plain language of Section 39.2. T & C II, slip op. at 11 (3rd Dist 2009). The court also determined that separate mailings were not required to be sent to each of the co-owners of property, and found that Applicants' efforts complied with the requirements of Section 39.2(b). *Id.* at 18-19.

County's Proceedings Were Fundamentally Fair

The Court recited the requirement of Section 40.1(a) of the Act requiring the Board, *inter alia*, to consider "the fundamental fairness of the procedures used by the ***governing body of the municipality in reaching its decision." T & C II, slip op. at 19 (3rd Dist Dec. 2009)(*** in original). The court stated that it would not reverse the Board's findings that the proceedings were fundamentally fair unless they were "clearly erroneous." *Id.* at 20.

The court rejected the claim that the County had prejudged the 2003 application, based on lawsuits filed by the City against the County challenging 1) in 2002, alleged County misuse of funds derived from solid waste disposal, 2) in 2003, 2001 amendments to the County solid waste management plan that excluded all new landfills save for expansion of an existing management operated by Waste Management. T & C II, slip op. at 20-22 (3rd Dist 2009).

The court disagreed with the County's claim that these actions demonstrated bias or prejudgment of the applicants' 2003 siting request:

> Rather, to a disinterested observer, the 2002 lawsuit would signal concern about the availability of recycling and solid-waste disposal funds, and the 2003 suit would signal concern about safeguarding the City's home rule power. T & C II, slip op. at 22 (3rd Dist 2009).

The court accordingly found no reversible error. *Id.* The court did not address the County's additional arguments on fundamental fairness, turning instead to another issue involving the County's amended solid waste management plan. *Id.*

Applicants' Failure to Satisfy Section 39.2(a)(viii) Criterion

Where a county has adopted a solid waste management plan under the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Plan, Section 39.2 (a)(viii) requires a siting applicant to demonstrate that its "facility is consistent with that plan." T & C II, slip op. at 20-22 (3rd Dist 2009). The court stated that the County had adopted its plan in 1993, and amended it in 1995, 2001, 2002, and 2003. The amendment at issue was the 2001 amendment that excluded all new landfills save for expansion of an existing management operated by Waste Management. *Id.* at 23.

The court related that in February of 2002, the Town & Country applicants had announced their intentions to seek approval of a new landfill to be located within the City of Kankakee. About one month later, the City adopted the resolution containing the 2002 amendment "to clarify the intent and the purpose" of the 2001 amendment, to state that if approval were granted for a waste management expansion, then "no new facilities would be necessary." T & C II, slip op. at 23 (3rd Dist. 2009). In August of 2002, the City granted siting approval in Town & Country I, which the Board reversed in January 2003. One month later, 24 hours before the filing of the Applicants' 2003 application, the City adopted the resolution containing the 2003 amendment stating that any landfill "noncontiguous" with the existing Waste Management landfill "is inconsistent with this Plan." *Id.* at 24-26. Town & Country presented testimony to the City Council that its proposed site was in "close proximity" to the existing Waste Management landfill, being located "probably about a mile and three quarters" from it. Town & Country presented further testimony that the amendments to the plan created ambiguity and room for interpretation. *Id.* at 26-27.

The court stated that the City's written decision noted procedural defects in the County's adoption of its solid waste management plan, but that the City nonetheless determined that Town & Country's 2003 application was consistent with the County plan as it was near, and in an area contiguous with the exiting landfill. But, even while acknowledging that it lacked the authority to make a finding about the validity of the plan, the City opined that the County plan violated the City's statutory and

constitutional authority as a home rule unit of government to site a landfill. T & C II, slip op. at 27 (3rd Dist 2009). The court noted that, on appeal, the Board refused to consider the validity of the County's amendments to the plan, and affirmed the City's finding that the "consistency" criterion in Section 39.2(a)(viii) had been met. *Id.* at 28 (3rd Dist 2009).

The court undertook a *de novo* review of the issue as to whether the Town & Country site is contiguous with the existing Waste Management landfill. T & C II, slip op. at 28 (3rd Dist. 2009). In reviewing the language of the County's various plan amendments, the court determined that the word "adjacent" must be construed in addition to the word "contiguous." *Id.* at 29-30. The court noted that common dictionary definitions of "contiguous" indicate that it can mean "sharing a boundary; touching," or "nearby or adjacent." The court found the language of the County plan ambiguous, *Id.* at 30, and further found that the County had intended to preclude the proposed Town & Country landfill site as it was only nearby, but did not share a boundary with, the Waste Management landfill. Accordingly, the court found that "the Board committed reversible error" when it found that the 2003 application was consistent with the County solid waste management plan. *Id.* at 34. The court declined to address the Applicant's other claims regarding constitutionality of the County plan and the City's home rule powers, as they had not been previously adjudicated or properly raised. *Id.* Finding that the consistency criterion had not been met, the court stated that there was no reason to address any remaining issues raised in the briefs. *Id.* The court's conclusion, therefore, was that "we reverse the decision of the Board." *Id.* at 35.

Justice Holdridge Opinion Concurring In Part and Dissenting in Part

In a separate opinion, Justice Holdridge dissented from the majority's conclusion that a Board decision in an appeal of a local siting decision is a "disapproval" within the meaning of Section 39.2 of the Act. T & C II, concurring op. at 1-4 (3rd Dist 2009). Under his analysis, the justice concluded that the "substantial-similarity" question involving the 2002 and 2003 applications need not be reached. But, the justice believed that the majority should have addressed the issue per the Supreme Court advisory order. The justice noted, however, that he agreed with the majority's conclusions on the other issues the majority reached: notice, fundamental fairness, and consistency with the county solid waste management plan. *Id.* at 4-5.

Petition for Leave to Appeal Denied

On January 8, 2010, Town and Country filed a petition for leave to appeal (PLA) to the Illinois Supreme Court. County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Byron Sandburg and Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, City of Kankakee, Illinois, Town & Country Utilities, Inc., and Kankakee Regional Landfill, LLC, No. 109703 (filed January 8, 2010). Town and County sought to challenge whether the Appellate Court had committed reversible error by a) misapplying criterion (viii) of Section 39.2 (415 ILCS 5/39.2(viii) (2008)) properly applied for various reasons based on both the facts and the standard of review, b) improperly finding that the 2002 application was "disapproved" under Section 39.2(m), a ruling in conflict with Turlek v. PCB, 274 Ill. App. 3d 244, 247-49, 653 N.E.2d 1288, 1290-91 (1st Dist. 1995), and c) failing to follow the supervisory order directing it to address the "substantial similarity" of the 2002 and 2003 applications.

On February 24, 2010, the Board moved for leave, later granted, to join in those portions of the PLA concerning Section 39.2(m) and failure to use the "manifest weight of the evidence" standard of review for siting criterion (viii) of Section 39.2. But, on March 24, 2010, the Illinois Supreme Court denied the PLA without additional comment. County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Byron Sandburg and Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, City of Kankakee, Illinois, Town & Country Utilities, Inc., and Kankakee Regional Landfill, LLC, No. 109703 (PLA denied March 24, 2010).

Legislative Update

Summarized below are nine Public Acts relating to the Board's work, seven of which amend the Environmental Protection Act (Act), one of which amends the Illinois Administrative Procedure Act (APA), and one of which creates the Mercury Thermostat Collection Act.

Public Act 96-0887 (House Bill 2688)
Effective April 9, 2010

P.A. 96-0887 amends the Act by providing for the issuance of gasification conversion technology demonstration permits if specified requirements are met. The Public Act also excludes the portion of a site or facility used to perform limited testing of gasification conversion technology from regulation as a pollution control facility.

Public Act 96-0908, (Senate Bill 3320)
Effective June 8, 2010

P.A. 96-0908 amends Title XVI of the Act, addressing underground storage tanks, through provisions including the following: providing, for the purpose of payment from the Underground Storage Tank Fund (Fund), that corrective action activities required to meet minimum requirements include compliance with certain provisions related to the Tiered Approach to Corrective Action Objective rules; requiring that the bidding process adopted, under Board rules, to determine the reasonableness of costs of corrective action provide for a publicly-noticed, competitive, and sealed bidding process that is, among other things, optional and allows bidding only if the owner or operator demonstrates that corrective action cannot be performed for less than a certain amount; authorizing payment from the Fund of certain costs incurred after the issuance of a No Further Remediation (NFR) Letter; and providing that, if a change in State or federal law requires additional remedial action in response to releases for which NFR Letters have been issued, then the Agency shall propose statutory amendments to allow owners and operators to perform the additional remedial action and seek payment from the Fund for the costs of the action.

Public Act 96-0934 (Senate Bill 2812)
Effective June 21, 2010

Public Act 96-0934 amends the Act by provides that, if requested by the applicant, the Board may stay the effectiveness of certain final Agency actions. The Public Act also provides that, if requested by the applicant, the Board shall stay the effectiveness of all contested conditions of a Clean Air Act Permit Program (CAAPP) permit. It also authorizes the Board to stay the effectiveness of any or all uncontested conditions of a CAAPP permit if the Board determines that the uncontested conditions would be affected by its review of the contested conditions. The Public Act also provides that, if the Board stays any, but not all, conditions of a CAAPP permit, then the applicant for that permit shall continue to operate in accordance with "any" related terms and conditions of any other applicable permits until final Board action in the review process. It also provides that, if the Board stays all conditions, then the applicant shall continue to operate in accordance with "all" related terms and conditions of any other applicable permits until final Board action in the review process.

Public Act 96-1068 (Senate Bill 2490)
Effective July 16, 2010

Public Act 96-1068 amends the Act by exempting from regulation as a pollution control facility the portion of a site or facility that (i) accepts exclusively general construction or demolition debris, (ii) is located in a county with a population over 3,000,000 as of January 1, 2000 or a county that is contiguous to such a county, and (iii) is operated and located in accordance with another provision of the Act.

Public Act 96-1295 (Senate Bill 3346)
Effective July 26, 2010

P.A. 96-1295 creates the Mercury Thermostat Collection Act, the provisions of which include the following: requiring each thermostat manufacturer, individually or collectively with other thermostat manufacturers, to establish and maintain a program for the collection and proper management of out-of-service mercury thermostats; providing for the setting of statewide goals for the collection of mercury thermostats taken out of service in the State; requiring contractors, thermostat wholesalers, thermostat manufacturers, and thermostat retailers participating in the program to handle and manage out-of-service mercury thermostats in a manner that is consistent with the provisions of the Illinois Pollution Control Board rules regarding the disposal of universal waste; allowing appeal to Board of Agency actions disapproving or modifying collection programs; and providing for repeal of the Mercury Thermostat Collection Act on January 1, 2021.

Public Act 96-1314 (House Bill 5147)
Effective July 27, 2010

P.A. 96-1314 amends the Act by authorizing the Environmental Protection Agency (Agency) to issue a thermochemical conversion technology demonstration permit for field testing of a thermochemical conversion technology processing facility in order to demonstrate that the technology can reliably produce synthetic gas that can be processed for use as a fuel for the production of electricity and process heat, for the production of ethanol or hydrogen to be used as transportation fuel, or for both purposes. The Public Act specifies conditions that must be met in order to qualify for such a permit. The Public Act also exempts permitted facilities satisfying specified conditions from regulation as a pollution control facility.

Public Act 96-1366 (Senate Bill 3070)
Effective July 28, 2010

P.A. 96-1366 amend the Act by providing that, if a carcinogenic volatile organic compound is detected in the finished water of a community water system at a certain level and if the Agency issues a notice under a separate provision of the Act, then the owner or operator of that system must submit a response plan meeting certain requirements to the Agency. The Public Act also requires the Agency, when approving, modifying, or denying a plan, to take into account the technical feasibility and economic reasonableness of the plan and any modification. The Public Act also provides that any Agency disapproval or modification of a plan or report may be appealed to the Board.

Public Act 96-1416 (Senate Bill 3721)
Effective July 30, 2010

P.A. 96-1416 amends the Act and provides that "uncontaminated soil" means soil that does not contain contaminants in concentrations that pose a threat to human health, safety, and the environment, but also authorizes the Board through rulemaking to specify the maximum concentration of contaminants that may be present in uncontaminated soil. The Public Act also provides that uncontaminated soil is not waste. The Public Act authorizes the Board to adopt rules for the use of uncontaminated soil and clean construction or demolition debris (CCDD) as fill material at CCDD fill operations, which rules may specify limits on the use of recyclable concrete and asphalt as fill material at those sites. The Public Act requires owners and operators of CCDD fill operations and uncontaminated soil fill operations to meet certain requirements. The Public Act specifies the types of materials that may be used as fill material at CCDD fill operations and uncontaminated soil fill operations. In addition, the Public Act authorizes the Agency to collect a fee from the owners and operators of CCDD fill operations for accepted CCDD and uncontaminated soil.

Public Act 96-1448 (House Bill 5191)
Effective January 1, 2011

P.A. 96-1448 amends the APA by requiring a state agency proposing a rule to conduct an economic impact analysis on any proposal that may affect small businesses. The Public Act exempts from this requirement such Board procedures as identical-in-substance rulemaking and adjusted standards.

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