ILLINOIS POLLUTION CONTROL BOARD

ANNUAL REPORT

FISCAL YEAR
2015

ILLINOIS POLLUTION CONTROL BOARD

http://www.ipcb.state.il.us

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MISSION STATEMENT

The Illinois Environmental Protection 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 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 that 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.

LETTER FROM THE CHAIRMAN

ILLINOIS POLLUTION CONTROL BOARD

GOVERNOR
Bruce Rauner

♦

CHAIRMAN
Gerald M. Keenan

♦

MEMBERS
Jennifer Burke
Deanna Glosser, Ph.D.
Jerome O'Leary
Carrie Zalewski

♦

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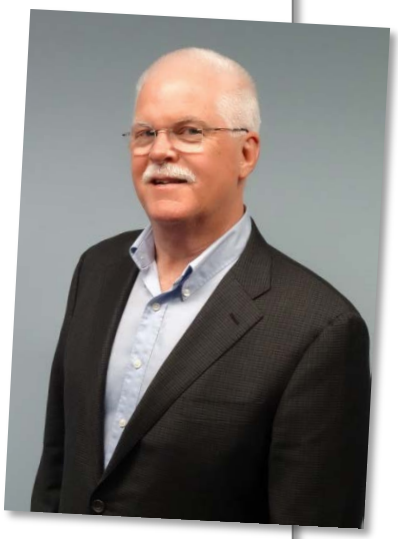
December 2015



Honorable Bruce Rauner, Governor of Illinois, and Members of the General Assembly:

The Pollution Control Board is proud to present its Annual Report for Fiscal Year 2015. This report details environmental rulemakings and contested cases brought before the Board between July 1, 2014 and June 30, 2015. During Fiscal Year 2015, the Board handled many rulemakings and contested cases while operating within its budget.

Under the Environmental Protection Act, the Board must determine, define, and implement environmental control standards for the State of Illinois. The Board also adjudicates complaints that allege non-criminal violations of the Act. Additionally, it reviews permitting and other determinations made by the Illinois Environmental Protection Agency (IEPA) and pollution control facility siting determinations made by units of local government.

During Fiscal Year 2015, the composition of the Board changed when I was appointed in March. Board Members Deanna Glosser, Carrie Zalewski, Jennifer Burke, and Jerome D. O'Leary continued their service on the Board.

Sadly, on December 14, 2015, former Board member Joan Anderson died. Governor James Thompson appointed Ms. Anderson to the Board in 1980, and she served the State of Illinois as a Board Member for 13 years. We send our deepest sympathies to her family on their loss.

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(continued)

During Fiscal Year 2015, the Board finalized new regulations in R08-09(D), In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System (CAWS) and Lower Des Plaines River (LDPR), Proposed Amendments to 35 Ill. Adm. Code Parts 301, 302, 303, and 304. These rules set water quality standards to protect aquatic life in the CAWS and LDPR. The finalized rulemaking represents seven years of dedicated Board efforts, including a record number of hearings and public comments.

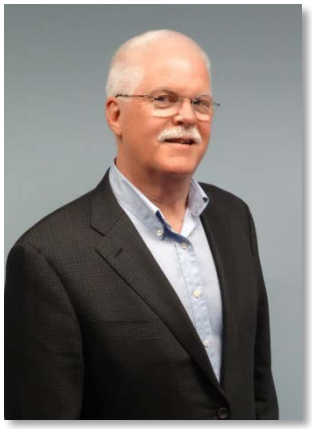
The Board also finalized regulations that apply to concentrated animal feeding operations (CAFOs) in R12-23, In the Matter of: CAFOs, Proposed Amendments to 35 Ill. Adm. Code Parts 501, 502, and 504. These amendments made the Board's rules consistent with and as stringent as federal CAFO regulations.

The Board's contested case docket in Fiscal Year 2015 included numerous enforcement cases, permit appeals, adjusted standard petitions, administrative citations, and landfill siting appeals. Additional information on rulemakings, other proceedings, and contested cases before the Board is available on http://www.ipcb.state.il.us . Should you have any comments or questions about the Board's activities, please contact me directly.

Sincerely,

Gerald M. Keenan,
Chairman

BOARD MEMBERS



❖ Chairman Gerald M. Keenan

Chairman Gerald M. Keenan was appointed to the Board by Governor Bruce Rauner in 2015. He has many years of experience as a regulator, entrepreneur, consultant and financier in the electric, natural gas, and telecommunications industries. His wide ranging energy industry experience includes: service as General Manager of the Illinois Commerce Commission; extensive experience in strategic and corporate planning, mergers and acquisitions, and corporate restructuring; board level advisor to Fortune 500 energy companies; active participation in Federal and state efforts to develop market based solutions to environmental issues, including development of SO2, NOX and VOC trading markets; and development and implementation of competitive market frameworks for natural gas and electricity in the US and other countries.

Mr. Keenan was a partner in PriceWaterHouseCoopers LLP, where he led the Energy Strategy Consulting practice for North America, and in Coopers & Lybrand LLP. He has extensive international experience, including significant work in China, Mexico, Brazil, El Salvador, England, Scotland and Germany. He has worked in Haiti since 2001 and serves as a director of three not for profit organizations that operate educational, medical and economic development programs in Haiti.

❖ Carrie Zalewski

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 was the lead environmental compliance attorney. While at IDOT, Ms. Zalewski dealt with various environmental issues involving NPDES permits, leaking underground storage tanks, reviewing NEPA documents for IDOT projects and other air, land and water issues faced by IDOT. Ms. Zalewski has also worked for the State Appellate Defender's Office and in private practice. 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. While at the University of Illinois, she studied abroad in Durban, South Africa. Ms. Zalewski was selected as a member of the Illinois Women's Institute for Leadership in 2008.

❖ Jennifer A. Burke

Board Member Jennifer A. Burke was appointed to the Board by Governor Pat Quinn in 2011. Ms. Burke is a licensed attorney in Illinois since 1995. Prior to joining the Board, Ms. Burke served as Senior Counsel to the City of Chicago in the Department of Law. While at the City of Chicago, Ms. Burke focused on environmental matters including Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Resource Conservation and Recovery Act (RCRA) litigation, brownfield redevelopment, and compliance with air, waste, asbestos, and lead regulations. Ms. Burke previously was a partner in the law firm of Jenner & Block in Chicago representing clients in various environmental matters including environmental enforcement, toxic tort litigation, insurance coverage litigation, cost recovery litigation, and environmental due diligence in corporate transactions. Her law degree is from Chicago-Kent College of Law and her undergraduate degree is a Bachelor of Science in Biology from Georgetown University in Washington, D.C. Ms. Burke lives in Chicago.

❖ Deanna Glosser, Ph.D.

Board Member Deanna Glosser was appointed to the Board by Governor Pat Quinn in 2011 and served as chairman from September 2013 through September 2015. Dr. Glosser is an environmental planner with a doctoral degree from the Department of Urban & Regional Planning at the University of Illinois at Champaign-Urbana (UIUC). She worked for the Illinois Department of Natural Resources for 13 years and was president of Environmental Planning Solutions, Inc., a small, woman-owned business for eight years. Dr. Glosser has been involved with urban and environmental planning issues for over twenty-five years. She was closely involved with the American Planning Association (APA) for over ten years and has co-authored three policy guides for APA on wetlands, endangered species, and community and regional food planning. In addition, Dr. Glosser has served as an Adjunct Assistant Professor at UIUC's Department of Urban & Regional Planning and an Adjunct Professor in the Environmental Studies program at the University of Illinois-Springfield.

❖ Jerome D. O'Leary

Board Member Jerome D. O'Leary was appointed to the Board in 2012 by Governor Pat Quinn. Prior to joining the Board, Mr. O'Leary was the Director of Energy for the United Association of Plumbers & Pipefitters (2006-2011), and an International Representative for the United Association of Plumbers & Pipefitters (1992-2006). He was also Business Manager of the Plumbers & Pipefitters Local 25. Over the years, Mr. O'Leary was employed by various contractors performing the installation of piping systems on power plants, refineries, boilers, food production plants, chemical plants, manufacturing plants, and water and waste plants. Additionally, Mr. O'Leary has been involved in reviewing many draft air and water permits for proposed facilities which include gas and coal fired power plants, ethanol and petroleum refineries, and coal to synthetic gas plants. Mr. O'Leary is a member of the American Society of Mechanical Engineers.

RULEMAKING UPDATE

INTRODUCTION

Under the Environmental Protection Act (Act) (415 ILCS 5), the Board is responsible for adopting the State's environmental regulations by conducting rulemaking proceedings. Rulemaking generally involves the Board holding quasi-legislative hearings and receiving written public comments on regulatory proposals. Such proposals are typically filed by the Illinois Environmental Protection Agency (IEPA), though the Act provides that they may be filed by "[a]ny person." 415 ILCS 5/28(a). Based upon the record developed during the rulemaking proceeding, the Board issues its opinions and orders, addressing the issues and the Board's reasons for its decisions, in addition to setting forth any new or amended rule language.

Proposed rules are published in the Illinois Register at first notice and later reviewed by the Joint Committee on Administrative Rules (JCAR) at second notice. At final notice, the adopted rules are filed by the Board with the Index Department of the Office of the Secretary of State for both publication in the Illinois Register and codification in the Illinois Administrative Code. Besides providing the Board with general rulemaking authority to adopt Statewide and site-specific rules (415 ILCS 5/27, 28), the Act authorizes the Board to conduct expedited and streamlined rulemakings. For example, the Board uses a "fast-track" procedure to adopt rules required by the federal Clean Air Act (415 ILCS 5/28.5). Also, after a public comment period but without JCAR second-notice review and typically without holding a hearing, the Board adopts rules "identical in substance" to those of the United States Environmental Protection Agency (USEPA) concerning drinking water, hazardous waste, and other federally-authorized programs (415 ILCS 5/7.2).

The rulemakings completed by the Board in fiscal year 2015 are briefly summarized below, followed by a list of rulemakings pending at the end of the fiscal year.

RULEMAKINGS COMPLETED IN FISCAL YEAR 2015

R08-9(D) **After Extending Second-Notice Period on Temperature Standards, Board Adopts Final Water Quality Standards to Protect Aquatic Life Uses of CAWS and LDPR in Subdocket D**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=13845

- On June 4, 2015, the Board adopted an order in the rulemaking captioned Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System [CAWS] and Lower Des Plaines River [LDPR]: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304, docket R08-9(D). The Board agreed with JCAR to extend the second-notice period in subdocket D, which allowed the Board to reopen public comment on the proposed temperature standards. The Board reviewed the comments filed and found it unnecessary to suggest to JCAR any changes in the proposed temperature standards themselves or their three-year delayed effective date. Based upon Stepan Company's comment, however, the Board agreed to suggest to

JCAR a clarifying amendment about the locations, in a given river, at which the temperature standards would apply.

On June 18, 2015, the Board adopted final amendments to its water quality standards, finding the amended standards necessary to protect the aquatic life uses designated for CAWS and LDPR. The amendments became effective on July 1, 2015. For CAWS and LDPR waters other than the Chicago Sanitary and Ship Canal (CSSC), the Board adopted a year-round chloride standard of 500 milligrams per liter (mg/L), but the year-round standard will not apply until July 1, 2018. During the three-year interim, the 500 mg/L chloride standard applies only during the summer months of May 1 through November 30, but the existing total dissolved solids (TDS) standard of 1,500 mg/L continues to apply during the winter months of December 1 through April 30. On July 1, 2018, the 500 mg/L chloride standard becomes applicable year-round and the interim TDS standard ceases to apply.

The waters of the CSSC—from December 1 through April 30—are subject to a chronic water quality standard for chloride of 620 mg/L and an acute water quality standard for chloride of 990 mg/L. From May 1 through November 30, the CSSC is subject to the 500 mg/L chloride standard. The CSSC is not subject to the interim TDS standard.

In addition, the Board adopted the amended temperature standards, delaying their applicability until July 1, 2018. The amended temperature standards will apply to CAWS and LDPR waters except Bubbly Creek (the South Fork of the South Branch of the Chicago River). Existing temperature standards were retained for Bubbly Creek and, during the three-year interim, for CAWS and LDPR waters other than Bubbly Creek.

R08-9(E) **Board Closes Subdocket E on Bubbly Creek**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14594

- On May 21, 2015, the Board adopted an order closing subdocket E, which concerns water quality standards for Bubbly Creek. The rulemaking is captioned Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System (CAWS) and Lower Des Plaines River (LDPR): Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304, docket R08-9(E). The Board opened subdocket E in February 2013 as jointly requested by the Metropolitan Water Reclamation District of Greater Chicago (District) and by Environmental Law and Policy Center, Friends of the Chicago River, Sierra Club Illinois Chapter, Natural Resources Defense Council, and Openlands (Environmental Groups). IEPA supported the District and the Environmental Groups' request for deferring a decision on Bubbly Creek while the U.S. Army Corps of Engineers (USACE) completed an ecosystem restoration study.

  In its April 16, 2015 order, the Board took official notice of the status of a USACE "draft Feasibility Report" for restoring Bubbly Creek. The Board observed that the project could take at least several years to complete and that when the USACE study is complete, any potential amendments to the Board's rules could be filed in a new docket. The Board's order also noted that the Board had proposed retaining water quality standards for Bubbly Creek in subdocket D (above). As noted in its May 21,

2015 order, the District filed a public comment indicating that closing subdocket E was acceptable. Under these circumstances, the Board closed subdocket E.

R12-23 **Board Adopts Amendments to CAFO Regulations**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14355

- IEPA initiated this rulemaking, which is captioned Concentrated Animal Feeding Operations (CAFOs): Proposed Amendments to 35 Ill. Adm. Code Parts 501, 502, and 504, docket R12-23. The final amendments make the Board's regulations consistent with, and as stringent as, the current federal regulations for concentrated animal feeding operations (CAFOs). The Board rules also establish state technical standards required by the federal regulations on August 7, 2014, the Board adopted a final order amending its agriculture-related water pollution regulations.

R12-23(A) **Board Closes Subdocket A on CAFOs**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14947

- At first and second notice in docket R12-23 (above), the Board had proposed a new Section 501.505 requiring specified unpermitted CAFOs to submit certain information to IEPA. In its review of the Board's second-notice proposal, JCAR indicated that the Agency may already collect the information sought under then-proposed Section 501.505. In its final order adopting the amended regulations in docket R12-23, the Board did not adopt Section 501.505 but did open subdocket A to further consider the issue (Concentrated Animal Feeding Operations (CAFOs): Proposed Amendments to 35 Ill. Adm. Code Parts 501, 502, and 504, docket R12-23(A)).

  On May 7, 2015, the Board issued an order directing IEPA to file additional information. After reviewing IEPA's response, the Board issued a final order in subdocket A on June 18, 2015. The Board found that IEPA's process for developing a CAFO database and using the database to generate a CAFO inventory made formerly-proposed Section 501.505 unnecessary. Accordingly, the Board declined to submit a proposed rule for first-notice publication and closed subdocket A.

R14-23 **Board Adopts Final Amendments to "Right-to-Know" Rules**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14877

- On February 19, 2015, the Board adopted final "right-to-know" amendments in the rulemaking captioned Standards and Requirements for Potable Water Well Surveys and Community Relations Activities Performed in Conjunction with Agency Notices of Threats from Contamination: Proposed Amendments to 35 Ill. Adm. Code 1600, docket R14-23. The Board originally adopted the Part 1600 "right-to-know" rules in 2006 to implement Title VI-D of the Act (415 ILCS 5/25d-1 *et seq*.). Generally, Title VI-D requires public notification when contamination poses a threat of exposure above appropriate standards. Since the Board adopted the Part 1600 rules, legislative and regulatory actions occurred that necessitated these rule amendments.

  The adopted amendments require that notice be given to specified members of the public if (1) measured off-site soil gas contamination poses a threat of exposure above the appropriate Tier 1 remediation objectives for the current off-site property use or uses; or (2) measured off-site groundwater contamination from volatile

chemicals poses a threat of indoor inhalation exposure above the appropriate Tier 1 remediation objectives for the current off-site property use or uses. The phrase "Tier 1 remediation objectives" refers to standards in the Board's risk-based Tiered Approach to Corrective Action Objectives or "TACO" rules at 35 Ill. Adm. Code 742. The final amendments largely reflect IEPA's original rulemaking proposal of June 2014.

R14-20 **Board Dismisses Rulemaking on Coke/Coal Bulk Terminals**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14801

- On April 16, 2015, the Board issued an order dismissing the rulemaking captioned Emergency Rulemaking Regarding Regulation of Coke/Coal Bulk Terminals: New 35 Ill. Adm. Code 213, docket R14-20. The proceeding began on January 16, 2014, with IEPA's filing of a proposal for emergency rules that would apply statewide to govern the handling of coal and coke—including petroleum coke or "petcoke"—at bulk terminals and other specified facilities. On January 23, 2014, the Board declined to adopt emergency rules because IEPA failed to demonstrate the existence of a situation that reasonably constituted a threat to the public interest, safety, or welfare. The Board agreed, however, to proceed with IEPA's proposal as a general rulemaking. In turn, IEPA filed three motions to stay the proceeding, each of which the Board granted for specified time periods and on the condition that IEPA file status reports. In its April 10, 2015 status report, IEPA stated that it had updated the new administration on this matter and considered the effect of the City of Chicago's new ordinance addressing petcoke operations. Based upon those considerations, IEPA indicated that it did not intend to proceed with a general rulemaking proposal at this time and that it supported dismissal. The Board therefore dismissed the rulemaking and closed the docket.

R14-21 **Board Amends Procedural Rules to Include Provisions on Public Remarks at Board Meetings, Electronic Filing, and E-Mail Service**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14839

- On January 22, 2015, the Board adopted final amendments to all parts of its procedural rules in the rulemaking captioned Procedural Rule Amendments to Implement Electronic Filing and Allow for Public Remarks at Board Meetings: Proposed Amendments to 35 Ill. Adm. Code 101-130, docket R14-21. The amendments accomplish two primary objectives. First, in accordance with the Open Meetings Act, the rules codify procedural standards for members of the public to make remarks at the Board's open meetings. Second, the rules permit, with limited exceptions, electronic filing in all Board proceedings through the Board's Clerk's Office On-Line or "COOL." Other amendments include allowing most types of filings to be served by e-mail.

R15-8 **Board Adopts "Identical-In-Substance" Amendments for RCRA Subtitle D MSWLF Update**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14866

- In this "identical-in-substance" rulemaking, the Board on November 20, 2014, amended "incorporations by reference" in the Illinois regulations for Resource Conservation and Recovery Act (RCRA) Subtitle D Municipal Solid Waste Landfills (MSWLFs). The rulemaking is captioned RCRA Subtitle D (Municipal Solid Waste

Landfill) Update, USEPA Amendments (January 1, 2014 through June 30, 2014), docket R15-8. Specifically, the Part 810 amendments update incorporations of federal regulations by reference to the latest version of the *Code of Federal Regulations*. The amendments also add—to Part 810—incorporations by reference and add—to Appendix A to Part 814—the incorporation-by-reference language to the listing of federal provisions with which existing facilities are required to comply.

R15-1 **Board Adopts "Identical-In-Substance" Amendments for RCRA Subtitle C Hazardous Waste Update**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14858

- In this "identical-in-substance" rulemaking, the Board on December 18, 2014, adopted updates to Illinois' RCRA Subtitle C hazardous waste regulations. The rulemaking is captioned RCRA Subtitle C Update, USEPA Amendments (January 1, 2014 through June 30, 2014), docket R15-1. The updates concern two sets of USEPA amendments to the federal hazardous waste requirements. First, on February 7, 2014, USEPA modified the hazardous waste manifest provisions to accommodate a national electronic manifest system called the "e-Manifest System." Second, on June 26, 2014, USEPA revised the cathode ray tube (CRT) rules to enhance the tracking of used CRTs exported for reuse and recycling.

R15-6 **Board Adopts "Identical-In-Substance" Rules for SDWA Update**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14863

- On February 19, 2015, the Board adopted final amendments to the Illinois drinking water regulations that are "identical in substance" to amendments made—during the first half of calendar year 2014—by USEPA under the Safe Drinking Water Act (SDWA). The Board's rulemaking is captioned SDWA Update, USEPA Amendments (January 1, 2014 through June 30, 2014), docket R15-6. These final amendments incorporate three USEPA actions into the Illinois rules. The update includes USEPA's February 26, 2014 corrections to the Revised Total Coliforms Rule (RTCR) and USEPA's June 19, 2014 summary approvals of 21 new alternative equivalent analytical methods for monitoring physical, chemical, and microbiological parameters of drinking water. On June 27, 2014, USEPA corrected its June 19, 2014 action.

R15-4 **Board Adopts "Identical-In-Substance" Amendments for NAAQS Update**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14861

- On March 5, 2015, the Board adopted amendments to the Illinois ambient air quality standards that are "identical in substance" to the National Ambient Air Quality Standards (NAAQS) amendments made by USEPA during the first half of calendar year 2014. The Board's rulemaking is captioned National Ambient Air Quality Standards, USEPA Regulations (January 1, 2014 through June 30, 2014 and November 4, 2014), docket R15-4.

  This rulemaking updated the Board's ambient air quality analytical methods to include all methods recently designated by USEPA through December 18, 2014, the date of the most recent update to the *List of Designated Reference and Equivalent Methods*. On June 18, 2014, USEPA designated four new federal equivalent methods (FEMs): one new FEM for nitrogen oxides (NO_X); two new FEMs for ozone (O_3);

and one new FEM for lead (Pb) in ambient air.

The Board also added an action from outside the timeframe of the docket. On November 4, 2014, USEPA designated one new federal reference method (FRM) for fine particulates ($PM_{2.5}$) and another for coarse particulates ($PM_{10-2.5}$); and one new FEM for O_3 and one new FEM for carbon monoxide (CO) in ambient air.

R15-5 **Board Adopts "Identical-In-Substance" Amendment for VOM Update**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14862

- On March 5, 2015, the Board adopted an amendment to the Illinois air pollution regulations that is "identical in substance" (IIS) to an exemption from the federal definition of "volatile organic material" (VOM) adopted by USEPA. The Board's rulemaking, which is captioned Definition of VOM Update, USEPA Regulations (January 1, 2014 through June 30, 2014), docket R15-5, updated the Board's definition of VOM to include the single new exclusion that USEPA adopted in the first half of 2014, which was of 2-amino-2-methyl-1-propanol (AMP). AMP is used in pigments, metalworking fluids, food contact paper, and personal care products, and as a chemical intermediate. The amendment reflects USEPA's exemption of the chemical compound from regulation as an ozone precursor.

  During the public comment period, the Board received one comment, from the American Coatings Association, urging the Board to adopt the exemption of AMP. The American Coatings Association further requested that the Board speed the incorporation of future exemptions into the Illinois regulations by a direct reference to the USEPA definition of VOM. The Board declined to follow this suggestion, explaining that the Illinois Administrative Procedure Act does not allow an incorporation that would have the effect sought by the American Coatings Association. Rather, IIS rulemaking is the most rapid procedure to incorporate future USEPA actions into the Illinois regulations.

R15-10 **Board Amends Title 2 Administrative Rules**
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14975

- The Board, on October 16, 2014, adopted amendments to its administrative rules at Part 2175 of Title 2 of the Illinois Administrative Code. The administrative rules describe the Board's organization, the types of Board proceedings, how to pay filing and copying fees, and how the public may access information. The rulemaking is captioned Amendments to the Board's Administrative Rules 2 Ill. Adm. Code 2175, docket R15-10.

  The Board revised these rules by reflecting amendments to the Freedom of Information Act and by removing the reference to a subscription for the *Environmental Register*. To minimize paper use, the Board removed the rule that allowed the public to purchase a subscription to the *Environmental Register* in hard copy. The Board stated that it would continue to provide a hard copy on request, but noted that the *Environmental Register* is available on-line for anyone to access. The Board also updated the organizational provisions and organization chart in the administrative rules. Additionally, the Board made changes to reflect its current practices in holding closed meetings.

RULEMAKINGS PENDING AT END OF FISCAL YEAR 2015

R12-9(B) Proposed Amendments to Clean Construction or Demolition Debris (CCDD) Fill Operations: Proposed Amendments to 35 Ill. Adm. Code 1100
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14953

R13-19 Site-Specific Rule for the Closure of Ameren Energy Resources Ash Ponds: Proposed New 35 Ill. Adm. Code 840, Subpart B
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14595

R14-10 Coal Combustion Waste (CCW) Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14705

R14-22 Proposal of Clifford-Jacobs Forging Co. for an Amendment to the Site-Specific Rule at 35 Ill. Adm. Code 901-119
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14874

R14-24 Proposed Site-Specific Rule for Sanitary District of Decatur from 35 Ill. Adm. Code 302.208(e)
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=14881

R15-19 Management of Used and Waste Tires: Proposed Amendments to 35 Ill. Adm. Code 848
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=15041

R15-20 Procedural Rules Amendments: Proposed Amendments to 35 Ill. Adm. Code 101, 103, 104, 106, and 108
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=15081

R15-21 Amendments to 35 Ill. Adm. Code Part 214, Sulfur Limitations, Part 217, Nitrogen Oxides Emissions, and Part 225, Control of Emissions from Large Combustion Sources
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=15133

R15-22 Public Water Supplies: Proposed Amendments to 35 Ill. Adm. Code Parts 601, 602, and 603
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=15144

R15-23 Amendments to Primary Drinking Water Standards: 35 Ill. Adm. Code 611
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=15150

R15-24 Water Pollution: Proposed Amendments to 35 Ill. Adm. Code Part 309
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=15153

R16-4 SDWA Update, USEPA Amendments (January 1, 2015 through June 30, 2015)
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=15127

R16-7 RCRA Subtitle C (Hazardous Waste) Update, USEPA Amendments (January 1, 2015 through June 30, 2015)
http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=15130

APPELLATE UPDATE

INTRODUCTION

Under the Environmental Protection Act (Act) (415 ILCS 5), final opinions and orders of the Board, whether adjudicatory or regulatory, are appealable directly to the Illinois appellate court rather than to the circuit courts. In Fiscal Year 2015, the appellate court affirmed Board decisions apportioning a civil penalty under the Act and denying a request for attorney fees under the Illinois Administrative Procedure Act (IAPA) (5 ILCS 100). In another appeal, the appellate court affirmed the Board's grant of summary judgment for hazardous waste violations.

2015 APPELLATE UPDATE

- **Third District Appellate Court Affirms Board's Apportionment of Civil Penalty Liability**
  Community Landfill Co., Edward Pruim, & Robert Pruim v. Illinois Pollution Control Board & the People of the State of Illinois, 2014 IL App (3d) 120629-U (Community Landfill II)

  On July 9, 2014, the Third District Appellate Court in Community Landfill II issued a non-precedential Rule 23 order affirming the Board's civil penalty apportionment. On remand from Community Landfill I, another unpublished order of the Third District, 2011 IL App (3d) 091026-U, the Board apportioned $25,000 of a $250,000 penalty to Community Landfill Company (CLC) alone, and the remaining $225,000 jointly and severally to CLC and its sole owners and officers, Edward Pruim and Robert Pruim (Board dockets PCB 97-193, 04-207 (consol.)).

  The Attorney General's Office, on behalf of the People of the State of Illinois (People) and at the request of the Illinois Environmental Protection Agency (IEPA), had filed a complaint against CLC and, in their individual capacities, Edward and Robert Pruim, alleging that the three violated the Act in operating the Morris landfill. Community Landfill II, 2014 IL App (3d) 120629-U (CLC II), ¶¶ 2, 6. In 2009, the Board found CLC *and* the Pruims liable on eight of the complaint's counts, but also found that the Pruims were *not* individually liable on nine counts for which CLC was liable. *Id*., ¶¶ 2, 7; *see also id*., ¶¶ 25, 26. The Board imposed a $250,000 civil penalty for the violations and found CLC and the Pruims jointly and severally liable for the entire amount. *Id*., ¶ 2, 8.

  On appeal, the Third District in 2011 affirmed the Board's decision in all respects (violations found; the Pruims' personal liability; total penalty amount), except for the imposition of joint and several liability for the entire $250,000 penalty. Community Landfill I, 2011 IL App (3d) 091026-U, ¶ 62. The court set aside that portion of the Board's order and remanded for the Board to apportion the penalty between the counts for which CLC was solely liable and the counts for which CLC *and* the Pruims were liable. CLC II, ¶¶ 2, 8, 27.

  In 2012, the Board on remand apportioned $25,000 of the $250,000 penalty to the violations for

which CLC alone was liable and the remaining $225,000 to the violations for which both CLC and the Pruims were jointly and severally liable. CLC II, ¶¶ 2, 10. The Board first found that neither CLC's dissolution nor Robert Pruim's bankruptcy had any effect on the Board's ability to apportion the penalty. *Id.*, ¶ 10. The Board then likened the 36 CLC-only violations to violations that could be addressed through administrative citations (*e.g.*, failing to adequately manage refuse and litter), which have a statutory penalty of $500 for landfills (415 ILCS 5/42(b)(4)). To this $18,000 penalty floor (36 violations x $500), the Board added $7,000 as some of the CLC-only violations (permit violations and the potential for water pollution) went beyond mere daily management violations. *Id.*, ¶ 12.

Turning to the joint violations, the Board ruled that Section 42(h) of the Act (415 ILCS 5/42(h)) required the joint and several penalty to *at least* equal the time-adjusted economic benefit realized by CLC and the Pruims—$146,286—from failing to timely secure financial assurance and failing to timely seek and obtain a "significant modification" of permit. CLC II, ¶¶ 10, 13. To this amount, the Board added $78,714 to serve as a deterrent against future violations and to account for the duration and gravity of the joint violations (*e.g.*, "overheight" violations lasted over nine years; 579 days late in revising closure cost estimates, which undermines financial assurance). *Id.*, ¶ 13. CLC and the Pruims appealed again.

Relying upon CLC's dissolution and Robert Pruim's bankruptcy, CLC and the Pruims argued that the Board's apportionment "inequitably placed the liability for the penalty on Edward Pruim." CLC II, ¶ 18. The Third District stated that CLC and the Pruims gave no authority for this position, which "refers more to the collection of the penalty, rather than the apportionment of the penalty." *Id.*, ¶ 19. The court found no Board error here. *Id.* Next, according to the court, the argument that the Board lacked authority to impose joint and several liability for the penalty was forfeited by CLC and the Pruims because they did not raise it until their motion for reconsideration. *Id.*, ¶ 21. The Third District also observed that the Board's imposition of joint and several liability was consistent with the court's remand instructions. *Id.*

After recounting how the Board arrived at its penalty apportionment, the court found that the Board's decision was neither arbitrary and capricious nor against the manifest weight of the evidence. CLC II, ¶¶ 24-27. The Third District emphasized that the Board's apportionment was "based in large part upon factual findings [the Board] made in the original case," all of which were affirmed in Community Landfill I. *Id.* As the Act required the Board to impose at least $146,286 jointly and severally (the calculated economic benefit from violations), CLC and the Pruims were "essentially arguing that the Board erred when it apportioned the remaining $105,714 as $25,000 to CLC only and $78,714 to CLC and the Pruim brothers jointly and severally." *Id.*; *see also id.*, ¶ 24. The Third District found that the Board "addressed the relevant statutory factors," referring to Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c), 42(h)), and agreed with the Board that the gravity and duration of the joint violations were "more substantial than the CLC-only violations." *Id.*, ¶ 27; *see also id.*, ¶¶ 25, 26. The appellate court therefore affirmed the Board's penalty apportionment. *Id.*, ¶ 30.

- **First District Appellate Court Affirms Board's Denial of IAPA Attorney Fees; Illinois Supreme Court Denies PLA**
  Chicago Coke Co. v. Illinois Environmental Protection Agency, Natural Resources Defense Council, Sierra Club, and Illinois Pollution Control Board, 2014 IL App (1st) 132704-U

  In an unpublished summary order issued on August 22, 2014, the First District Appellate Court affirmed the Board's denial of Chicago Coke Company's request for attorney fees under the

IAPA. After the Board found (Board docket PCB 10-75) that IEPA's policy on emission reduction credits was an invalid "rule" because the policy was never properly promulgated, Chicago Coke sought litigation expenses under Section 10-55(c) of the IAPA (5 ILCS 100/10-55(c)). Section 10-55(c) requires a "court" to award reasonable litigation expenses, including reasonable attorney's fees, to the party bringing the action through which an administrative "rule" is invalidated "by a court." The Board denied Chicago Coke's request because the Board is not a "court." In affirming the Board, the First District found that the Board's July 25, 2013 order "adequately explains the decision" and that "[n]o error of law appears of record." Chicago Coke, 2014 IL App (1st) 132704-U, ¶¶ 2, 3, citing Ill. S. Ct. R. 23(c)(5) and (6). On November 26, 2014, the Illinois Supreme Court denied Chicago Coke's petition for leave to appeal (PLA).

❖ **Fourth District Affirms Board's Grant of Summary Judgment in Hazardous Waste Enforcement Case**
E.O.R. Energy, LLC and AET Environmental, Inc. v. Illinois Pollution Control Board and People of the State of Illinois, 2015 IL App (4th) 130443

On March 27, 2015, the Fourth District Appellate Court affirmed the Board in a precedential opinion. In the enforcement proceeding (Board docket PCB 07-95), the Board (1) granted the People's separate motions for summary judgment against E.O.R. Energy, LLC (EOR) and AET Environmental, Inc. (AET); (2) found that the companies violated the Act in connection with transporting hazardous waste acid into Illinois and disposing of the waste (over 2,200 gallons) in Class II oil-and-gas field wells; and (3) imposed civil penalties of $200,000 and $60,000 on EOR and AET, respectively.

Procedural History at Board. The Attorney General's Office, on behalf of the People and at IEPA's request, filed a five-count complaint in March 2007, alleging one count against EOR and AET and four counts against EOR alone. 2015 IL App (4th) 130443, ¶¶ 7-12. EOR and AET filed answers. *Id*., ¶ 13. The People served the companies with requests to admit facts. *Id*., ¶¶ 16, 17. In turn, the People filed motions to deem facts admitted, to which neither company responded. In September 2010, the Board granted the People's motions. *Id*., ¶ 18.

In June 2012, the People filed separate motions for summary judgment, attaching an affidavit completed by Richard Johnson (a regional manager for IEPA), along with inspection and technical reports. 2015 IL App (4th) 130443, ¶¶ 20, 21. Neither AET nor EOR moved to strike Johnson's affidavit or the reports. *Id*., ¶ 22. EOR never responded to the People's motion for summary judgment against it. *Id*., ¶ 52. In September 2012, the Board granted summary judgment against EOR. *Id*. EOR filed a motion to reconsider in which it challenged—for the first time—the complaint's sufficiency and the Board's jurisdiction over Class II wells. *Id*., ¶ 54. The Board denied EOR's motion to reconsider. *Id*., ¶ 55. In November 2012 (with the Board hearing officer's leave), AET filed a response to the People's motion for summary judgment against it, challenging—for the first time—the complaint's sufficiency and the Board's jurisdiction over Class II wells. *Id*., ¶ 57. In January 2013, the Board granted summary judgment against AET and, in April 2013, denied both AET's motion to reconsider and EOR's second motion to reconsider. *Id*., ¶¶ 57, 58.

Undisputed Facts. The following facts were not disputed by the parties.

Acid Material Is Generated in and Hauled Around Colorado. In July 2002, a fire department's hazardous-materials team responded to an incident at the Colorado facility of Luxury Wheels, a company that makes chrome wheels for automobiles. 2015 IL App (4th)

130443, ¶ 30. A 1,500-gallon tank of acid material (acids mixed with a product called "Alum Etch-G") was overheating, fuming, and creating an orange-brown cloud. By adding large amounts of ice to the tank, the fire department cooled and stabilized the acid material. *Id.* Luxury Wheels hired AET to remove and dispose of the acid material. *Id.*, ¶ 32. AET specializes in the logistics of transporting, storing, and disposing of hazardous waste. *Id.*, ¶ 27.

AET obtained eight new 275-gallon plastic storage containers ("totes") and transported the acid material to Arvada Treatment Center (also in Colorado) for disposal. 2015 IL App (4th) 130443, ¶¶ 32, 33. For the shipment, AET created a "waste profile," as well as a "hazardous waste manifest." The totes of acid material were rejected by Arvada because they were reacting and emitting a red-orange gas. *Id.*, ¶ 33. AET then sought to deliver the material to Safety Kleen, another disposal company in Colorado, but Safety Kleen also rejected the totes. *Id.*, ¶ 34. Next, AET placed the totes in a semitrailer at its Colorado transfer facility, but the acid material was still producing gas. *Id.*, ¶ 35. When one or more totes reached a temperature sufficient to melt, AET further diluted the acid with water and other materials, resulting in 12 full totes. *Id.* AET then prepared another waste profile describing the acid material as "a hazardous waste (40 C.F.R. 261)," and contacted Vickery Environmental, Inc. to discuss disposal. *Id.*, ¶ 36. AET never sent the acid to Vickery, but Vickery suggested disposal through deep-well injection. *Id.*

Acid Material Is Shipped to and Stored in Illinois. Arthur Clark (an AET employee and EOR corporate officer) and James Hamilton (an EOR corporate officer) decided to ship the acid material from AET's facility in Colorado to EOR's oil-and-gas field wells in Illinois. 2015 IL App (4th) 130443, ¶¶ 36, 38. EOR, an energy company involved in petroleum production, holds the lease to two oil fields—one in Christian County and one in Sangamon County—on which it operates oil, brine injection, and natural gas wells. *Id.*, ¶¶ 27, 28, 38.

In August 2002, AET and EOR shipped the totes of acid material to a facility—owned by Kincaid P & P—located near EOR's oil fields. 2015 IL App (4th) 130443,¶ 38. Kincaid employed Rick Wake and Charles Geary, both of whom EOR paid to maintain EOR's wells. A bill of lading accompanied the shipment, listing Luxury Wheels as shipper, SLT Express as carrier, and Kincaid as consignee. *Id.* Clark, who oversaw storage and directed further dilution of the acid material at AET's Colorado facility, told Wake and Geary that the totes contained a "light grade acid" and they should "keep it out of their eyes and wash it off if they get it on them." *Id.*, ¶¶ 35, 42.

The totes were unloaded and placed in Kincaid's storage structure, which was not entirely protected from weather and lacked (1) electricity; (2) heating; (3) a containment structure to collect any acid material spill; (4) a fence; and (5) posted warnings that the structure housed hazardous waste. 2015 IL App (4th) 130443, ¶ 40. Bags of hydrated lime—stored on pallets next to the acid material totes—deteriorated, spilling lime. *Id.* Hydrated lime is a strong base that would react violently if it contacted acid. *Id.* EOR did not instruct Wake or Geary to separate the totes and the lime or inform them that the totes contained hazardous waste. *Id.*

Acid Material Is Discharged into Illinois Wells. In early 2004, EOR instructed Wake and Geary to inject the acid material into EOR's wells. 2015 IL App (4th) 130443, ¶ 42. Wake and Geary would load a tote into the bed of a pickup truck and drive from the Kincaid site to a well. *Id.*, ¶ 43. They injected the acid material by fabricating a hose fitting that connected the totes to the well's fittings and then pumping the acid material into the well. *Id.* After

Wake and Geary had discharged approximately 8.5 totes down the wells, Hamilton phoned Geary at his home and instructed him to discharge the remaining acid material down EOR's wells as soon as possible and rinse out the empty totes. *Id*., ¶ 44.

Federal and State Investigations of Storage Site in Illinois. In February 2004, the United States Environmental Protection Agency (USEPA) and its forensic investigations division, the National Enforcement Investigations Center, served a search warrant and took samples at the Kincaid facility. 2015 IL App (4th) 130443, ¶ 46. The 12 totes were still present in the structure; three were full of the acid material; one was partially full; and the other eight had acid material residue. *Id*. Samples of the acid material from the full and partially full totes contained greater than 5 milligrams per liter of leachable chromium. *Id*.

In November 2004, IEPA's Johnson inspected the Kincaid site. 2015 IL App (4th) 130443, ¶ 48. Beforehand, he determined from IEPA records that the Kincaid site was not a hazardous waste storage or disposal facility and had never been issued a Resource Conservation and Recovery Act (RCRA) permit to serve as a hazardous waste management facility. *Id*. At the site inspection, Wake told Johnson that Hamilton had directed Wake and Geary to discharge the acid material into the wells. *Id*. In April 2005, Johnson re-inspected the Kincaid site, at which point all 12 totes were gone. *Id*., ¶ 49. Wake showed Johnson a "uniform hazardous waste manifest" revealing that five days earlier, 1,000 gallons of "corrosive and toxic hazardous waste" had been shipped from the Kincaid site to SET Environmental, Inc. in Houston, Texas. *Id*. Accompanying the manifest was a "Land Disposal Restriction" (LDR) notice indicating that the waste exhibited the hazardous waste characteristics for corrosivity and "Toxicity Characteristic Leaching Procedure (TCLP) chrome." *Id*.

Provisions Violated. The Board found that both EOR and AET violated Section 21(e) of the Act (415 ILCS 5/21(e)), which provides that no person shall "[d]ispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility" meeting the requirements of the Act and the Board's regulations. 2015 IL App (4th) 130443, ¶¶ 72, 73. The Act defines "waste" in part as "any garbage . . . or other discarded material . . . ." *Id*., ¶ 73, quoting 415 ILCS 5/3.535. The Board also found that EOR alone violated Sections 12(g), 21(f)(1), and 21(f)(2) of the Act. *Id*., ¶ 72. Section 12(g) (415 ILCS 5/12(g)) prohibits the underground injection of contaminants without an underground injection control (UIC) permit or in violation of Board UIC regulations. *Id*., ¶ 74. Section 21(f) of the Act provides that no person shall "[c]onduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation" without a RCRA permit for the site or in violation of Board regulations (415 ILCS 5/21(f)(1), (2)). *Id*., ¶ 73.

Fourth District Appellate Court's Analysis. EOR and AET argued to the appellate court that (1) the People failed to sufficiently plead facts in their complaint; (2) IEPA and the Board had no jurisdiction; and (3) the record failed to support summary judgment for the People. 2015 IL App (4th) 130443, ¶¶ 61, 63.

Claim of Insufficient Complaint: Forfeiture. The Fourth District found that the companies forfeited their challenge to the factual sufficiency of the complaint by not following the Board's procedural rules. 2015 IL App (4th) 130443, ¶¶ 63, 65. The court quoted Section 101.506 of the Board's rules: "[a]ll motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document, unless the Board determines that material prejudice would result." *Id*., ¶ 64, quoting 35 Ill. Adm. Code 101.506. The companies did not object to the sufficiency of

the complaint until *5.5 years after it was filed*. *Id*. The Fourth District noted that unless specified otherwise, "procedural rules governing administrative proceedings should generally be interpreted and applied the same as similar rules governing judicial proceedings." *Id*., ¶ 65. The companies answered the complaint, responding to each allegation. *Id*., ¶ 64. And, it is a well-established civil practice rule in Illinois that "a respondent forfeits any objection to the sufficiency of the complaint by filing an answer." *Id*., ¶ 65. The court could find "no reason why the companies' failure to abide by section 101.506 . . . should result in anything less than forfeiture of their objection to the sufficiency of the [the People's] complaint." *Id*.

IEPA and Board Jurisdiction. EOR and AET argued that IEPA and the Board lacked jurisdiction because the acid material was a "product," not a "waste," and only the Illinois Department of Natural Resources (DNR) could regulate injections into Class II wells. 2015 IL App (4th) 130443, ¶ 67.

"Waste," not "Product." The companies contended that because the acid material was neither "used" nor "discarded" before EOR injected it into the wells, the acid material was not a "waste" or "hazardous waste." 2015 IL App (4th) 130443, ¶ 76. The Fourth District emphasized that Luxury Wheels paid AET to remove the acid material after an emergency response and that AET prepared (1) "waste material profiles" (for "spent aluminum etchant," eschewing the choice of "unused product or chemical" on the form) and (2) a "hazardous waste manifest" (for corrosive and reactive hazardous waste). *Id*., ¶ 77.

AET and EOR insisted that the intent of Luxury Wheels, the generator, does not control whether the acid material was "used" or "discarded." 2015 IL App (4th) 130443, ¶ 78. The companies asserted that the acid material was neither "used" nor "discarded" because EOR was able to use the material by injecting it into wells "for a purpose related to petroleum extraction." *Id*. The Fourth District remained unpersuaded, however, finding no genuine issue of material fact as to whether the acid material was a "waste" or a "hazardous waste." *Id*., ¶ 79. First, even if EOR injected the acid material to aid petroleum extraction, "this particular acid material was a hazardous waste" under the Act's definition. *Id*., ¶ 78. Second, nothing in the record suggested that "the injection of *hazardous-waste* acid is a typical activity that falls within the regulatory parameters of the [Illinois] Oil and Gas Act [225 ILCS 725]." *Id*. (emphasis in original). Third, most of the acid material (1,925 gallons) was discharged into a *salt water disposal well*; only 340 gallons were discharged into oil or gas wells. *Id*., ¶ 79. Fourth, five days before Johnson's second inspection, EOR paid to have 1,000 gallons of this "corrosive and toxic hazardous waste" shipped from the Kincaid site to a waste-disposal site in Texas. *Id*. The court concluded that because the acid material was both a "waste" and a "hazardous waste" under the Act, IEPA and the Board properly exercised jurisdiction over the companies in relation to the waste. *Id*., ¶ 80.

Substance Injected Controls over Well Classification. EOR and AET maintained that IEPA and the Board lacked jurisdiction because the acid material was injected into *Class II wells*, which fall within DNR's exclusive jurisdiction. 2015 IL App (4th) 130443, ¶ 82. In disagreeing with the companies, the Fourth District described the General Assembly's "comprehensive" statutory structure for regulating underground injections into Illinois wells. This Illinois UIC program has been approved by USEPA under the federal UIC program, which allows states to implement their own UIC programs meeting federal standards. *Id*., ¶ 83. The federal UIC program was promulgated under the Safe Drinking Water Act (SDWA) (42 U.S.C. § 300f *et seq*.) and, for hazardous waste, under RCRA (42 U.S.C. § 6901 *et seq*.). *Id*. The Act (415 ILCS 5/4(l)) designates IEPA as the implementing agency for all SDWA

purposes, except for (1) the underground injection of brine or other fluids brought to the surface in connection with oil or natural gas production or natural gas storage operations, or (2) any underground injection for the secondary or tertiary recovery of oil or natural gas. *Id.*, ¶ 84, citing 42 U.S.C. § 300h-4. This "jurisdictional carve-out" reflects that DNR regulates—under the Oil and Gas Act—Class II wells, known as "oil-and-gas-related-injection wells." *Id.*, ¶ 84.

The companies asserted that EOR's wells fell under DNR's exclusive jurisdiction because DNR issued Class II UIC permits for the wells (in the late 1990s). 2015 IL App (4th) 130443, ¶ 86. However, the court found that deciding jurisdiction does not depend upon "how the wells were classified at some point in time in the past," but rather upon "the type of injections that actually took place." *Id.* The Oil and Gas Act provides DNR authority only over Class II injections into Class II injection wells, and Class II injections are fluids associated with oil and gas extraction. *Id.*, ¶ 87, citing 225 ILCS 725/1, 6(2), 8b & 62 Ill. Adm. Code 240.10, 240.750(i). Here, the court continued, the hazardous-waste acid, which "contained traceable amounts of leachable chromium," was not a Class II fluid. "It does not matter for jurisdictional purposes that the hazardous waste was injected into Class II wells." *Id.*, ¶ 88.

Grant of Summary Judgment: Forfeitures; "Transporter" Liability. EOR and AET argued that the facts in the record were insufficient to support the Board's grant of summary judgment for the People. 2015 IL App (4th) 130443, ¶ 93. The Fourth District first affirmed the Board's grant of summary judgment against EOR as to all counts because EOR—by failing to respond to the People's motion for summary judgment—forfeited its claim. *Id.* AET contended that because the Board had earlier found EOR liable as the "shipper" of the acid material, the "law-of-the-case doctrine" barred AET from also being found liable for violating Section 21(e) of the Act. *Id.*, ¶ 94. The court quickly dispensed with this argument. The law-of-the-case doctrine bars re-litigating an issue already decided in the same case; it does not prohibit finding two parties jointly liable for violating a statute. *Id.*

On the merits, the court found the factual assertions in Johnson's affidavit sufficient to establish AET's violation of Section 21(e), which provides in part that no person shall "*transport* any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements" of the Act and Board regulations. 2015 IL App (4th) 130443, ¶¶ 95, 96 (emphasis added). The critical facts for AET's "transporter" liability were: (1) AET was hired by Luxury Wheels to dispose of the hazardous waste acid; (2) after several attempts to dispose of the acid material at various hazardous waste disposal facilities, AET transferred the hazardous waste acid to EOR; (3) AET and EOR shipped the hazardous waste acid to the Kincaid site; and (4) the Kincaid site was not a RCRA-permitted hazardous waste storage or disposal facility. *Id.*, ¶ 95. AET's arguments on appeal about Johnson's affidavit being inaccurate, unsupported by independent evidence, and based on hearsay were forfeited because AET failed to file a motion with the Board to strike the affidavit. *Id.*, ¶ 96.

The court also emphasized that AET failed to present any of its own affidavits to rebut Johnson's affidavit "or any of the [People's] other evidence, for that matter." 2015 IL App (4th) 130443, ¶ 97. When a motion for summary judgment is supported by well-pled affidavits, and the opposing party files no counter-affidavits, the material facts in the moving party's affidavits stand as admitted. Further, by resting on its pleadings, the opposing party does not create a genuine issue of material fact. *Id.* The factual assertions in Johnson's

affidavit stood as admitted. Because those unrebutted facts established AET's liability under Section 21(e), the Fourth District affirmed the Board's grant of summary judgment against AET. *Id.*

EOR and AET's respective PLAs were pending before the Illinois Supreme Court (Nos. 119246 and 119247) as of the end of FY 2015.

❖ **Illinois Supreme Court Denies Two PLAs**

On September 24, 2014, the Illinois Supreme Court denied Sierra Club's petition for leave to appeal (PLA) in Sierra Club v. Illinois Pollution Control Board, Illinois Environmental Protection Agency, Illinois Power Holdings, LLC, AmerenEnergy Medina Valley Cogen, LLC, and Ameren Energy Resources, LLC, No. 117528 (Ill. S. Ct.). The PLA denial leaves intact the Fourth District Appellate Court's February 24, 2014 dismissal of Sierra Club's appeal for lack of standing (No. 4-14-0001 (4th Dist.)). Sierra Club sought appellate court review of a Board variance decision even though Sierra Club was not a party to the Board's variance proceeding. The Board granted a variance, subject to conditions, to Illinois Power Holdings, LLC and AmerenEnergy Medina Valley Cogen, LLC (docket PCB 14-10 (Nov. 21, 2013)). The variance provides relief from sulfur dioxide (SO_2) annual emission rates of the Multi-Pollutant Standard (MPS), which apply to seven coal-fired generating stations. Sierra Club, a participant in the variance proceeding, filed a petition in the Fourth District for review of the Board's decision. The companies, in turn, filed a motion to dismiss the appeal, arguing that Sierra Club lacked standing to seek administrative review. Sierra Club responded that it had standing to appeal under Section 29(a) of the Act (415 ILCS 5/29(a)) because the Board's variance order constituted a "rule or regulation" and Sierra Club was "adversely affected or threatened" by that rule. In a two-sentence order, the appellate court granted the companies' motion to dismiss for want of standing and dismissed the appeal.

Also on September 24, 2014, the Illinois Supreme Court denied Martin Maggio's PLA in Martin Maggio v. Illinois Pollution Control Board, County of Winnebago, Winnebago County Board, and Winnebago Landfill Company, No. 117633 (Ill. S. Ct.). The PLA denial leaves intact the Second District Appellate Court's March 31, 2014 opinion (2014 IL App (2d) 130260) affirming the Board's decision to affirm Winnebago County's grant of landfill-expansion siting approval to Winnebago Landfill Company (WLC) (docket PCB 13-10 (Mar. 7, 2013)). Mr. Maggio brought the third-party appeal to the Board, arguing that WLC's pre-application notices were not timely served upon all surrounding landowners and that the County therefore lacked jurisdiction to consider WLC's siting application. On administrative review, the Second District Appellate Court agreed with the Board that the "return receipt requested" service requirement of Section 39.2(b) of the Act (415 ILCS 5/39.2(b)) does not require *returned receipts* for service to be effective, but rather only that a return receipt be *requested.* 2014 IL App (2d) 130260, ¶ 27. The Second District then turned to the timing of WLC's mailing. The court observed that if WLC's interpretation was correct (that Section 39.2(b) simply requires notices to be *mailed* at least 14 days before the siting application is filed), WLC "clearly complied" by mailing the notices 21 days in advance. *Id.*, ¶ 39. However, if the Board was correct (that Section 39.2(b) requires notices to be mailed *far enough in advance to reasonably expect receipt* at least 14 days before the siting application is filed), the Board's determination that WLC complied with this standard was not against the manifest weight of the evidence. *Id.*, ¶ 40. Because the Second District decided that WLC complied under either interpretation, the court declined to "definitively resolve which interpretation is correct." *Id.*, ¶ 41.

LEGISLATIVE UPDATE

INTRODUCTION

Summarized below are 14 Public Acts from the 2015 session of the 99th General Assembly relating to the Board's work, 13 of which amend the Environmental Protection Act and one of which amends the Electronic Products Reuse and Recycling Act. These Public Acts are briefly summarized below. Additional information about the recent legislative session is available at the General Assembly Web page at http://www.ilga.gov .

PUBLIC ACTS FROM 2015 SESSION OF 99TH GENERAL ASSEMBLY

- **Public Act 99-11 (House Bill 437)**
  Effective July 10, 2015
  Public Act 99-11 amends the Environmental Protection Act by providing that municipalities and counties may approve one-day compostable waste collection events and permanent compostable waste collection points. P.A. 99-11 also provides requirements for these programs.

- **Public Act 99-12 (House Bill 1014)**
  Effective July 10, 2015
  Public Act 99-12 amends the definition of "pollution control facility" in the Environmental Protection Act by providing that the definition does not include the portion of a municipal solid waste landfill meeting specified conditions relating to location, ownership, and permit status.

- **Public Act 99-13 (House Bill 1455)**
  Effective July 10, 2015
  Public Act 99-13 amends the Electronic Products Recycling and Reuse Act by establishing new annual recycling goals for manufacturers, changing provisions concerning the collection of cathode ray tubes, and amending requirements recyclers and refurbishers. P.A. 99-13 also addresses penalties for manufacturers who do not meet specified recycling or reuse goals and provides an opportunity for manufacturers to earn recycling credits.

- **Public Act 99-20 (Senate Bill 543)**
  Effective July 10, 2015
  Public Act 99-20 amends the definition of "coal combustion by-product" in the Environmental Protection Act by providing that the definition includes coal combustion that is a synthetic gypsum meeting specified conditions relating to composition and use.

- **Public Act 99-55 (House Bill 1015)**
  Effective July 16, 2015
  Public Act 99-55 amends the Environmental Protection Act by providing that, except to the extent required by federal law, generators and transporters of hazardous waste and facilities

accepting hazardous waste are not required to submit copies of hazardous waste manifests to the Environmental Protection Agency. P.A. 99-55 does not preclude the Environmental Protection Agency from collecting specified fees.

- **Public Act 99-67 (House Bill 1445)**
  Effective July 20, 2015
  Public Act 99-67 amends the Environmental Protection Act by providing that, to the extent allowed by federal law, Exceptional Quality biosolids shall not be subject to regulation as a sludge or other waste if they meet specified requirements. P.A 99-67 also includes a definition of "Exceptional Quality biosolids."

- **Public Act 99-89 (House Bill 4007)**
  Effective January 1, 2016
  Public Act 99-89 amends the Environmental Protection Act by providing that a provision concerning beneficial use determinations does not apply to dust suppressants applied to material that is burned for energy recovery, used to produce a fuel, or otherwise contained in a fuel.

- **Public Act 99-197 (House Bill 3624)**
  Effective July 30, 2015
  Public Act 99-197 amends the Environmental Protection Act by extending a provision concerning the Environmental Protection Agency's fast-track rulemaking to December 31, 2019.

- **Public Act 99-317 (Senate Bill 1408)**
  Effective August 7, 2015
  Public Act 99-317 amend the Environmental Protection Act by providing that, in all counties other than Cook County, specified facilities shall not be subject to annual fees activities in excess of $2,000 assessed by a unit of local government and that are directly related to the facility's recycling. P.A 99-317 also provides that, in all counties other than Cook County, specified facilities that have received a beneficial use determination from the Environmental Protection Agency shall not be subject to annual fees in excess of $1,500 assessed by a unit of local government and that are directly related to the facility's recycling activities.

- **Public Act 99-365 (House Bill 1326)**
  Effective January 1, 2016
  Public Act 99-365 amends the Environmental Protection Act by providing that no person shall dispose, in a waste disposal site other than a permitted hazardous waste disposal site, waste generated from the remediation of a manufactured gas plant site or facility, unless the waste is tested using a specified method, and that analysis demonstrates that the waste does not exceed the specified regulatory levels for any contaminant.

- **Public Act 99-380 (House Bill 3341)**
  Effective August 17, 2015
  Public Act 99-380 amends the Environmental Protection Act by providing that "stationary source" means any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under Section 112(b) of the Clean Air Act, "except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in Section 216 of the Clean Air Act."

- **Public Act 99-396 (Senate Bill 1590)**
  Effective August 18, 2015

Public Act 99-396 amends the Environmental Protection Act by providing that, before issuing a permit for the operation of a tire storage site, the Environmental Protection Agency shall conduct an evaluation of the prospective owner's or operator's prior experience in tire storage site management. P.A. 99-396 further provides that the Agency may deny such a permit, or deny or revoke interim authorization, if the prospective owner or operator or any employee or officer of the prospective owner or operator has a history of repeated violations of federal, State, or local laws, regulations, standards, or ordinances in the operation of tire storage sites.

P.A. 99-396 also amends the Uniform Environmental Covenants Act by including in the definition of "environmental response project" a plan or work that is "approved or overseen by an Agency" or that is performed for environmental remediation at "sites or facilities undergoing remediation pursuant to a Compliance Commitment Agreement." P.A. 99-396 also provides that a civil action for violation of an environmental covenant may be maintained by entities including "any agency that is enforcing the terms of ant court or Board order."

- **Public Act 99-440 (Senate Bill 1518)**
  Effective August 21, 2015

  Public Act 99-440 amends the definition of "pollution control facility" in the Environmental Protection Act by providing that the definition does not include the portion of a site or facility used exclusively for the transfer of commingled landscape waste and food scrap and meeting specified conditions relating to location and permit status.

- **Public Act 99-463 (Senate Bill 1672)**
  Effective January 1, 2016

  Public Act 99-463 amends the Environmental Protection Act by providing that the Board shall adopt regulations establishing permit programs for Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NA NSR) permits meeting the applicable requirements of specified provisions of the Clean Air Act. P.A. 99-463 also provides that issuance or any denial of a PSD permit or any conditions imposed therein shall be reviewable by the Board.

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