Illinois Pollution Control Board

Annual Report 2004

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.

Contents

SPRINGFIELD OFFICE
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
217-524-8500

CHICAGO OFFICE
James R. Thompson Center
100 West Randolph
Suite 11-500
Chicago, IL 60601
312-814-3620
TDD 312-814-6032

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

Chairman's Letter

Honorable Rod R. Blagojevich, Governor of Illinois, and Members of the General Assembly:

The Board is proud to present its Annual Report for fiscal year 2004. In its various sections, this report provides detailed information about environmental rulemakings and contested cases brought before the Board between July 1, 2003 and June 30, 2004.

Under the Environmental Protection Act, the Pollution Control Board is responsible for determining, defining, and implementing environmental control standards for the State of Illinois. The Board also adjudicates complaints brought before it that allege non-criminal violations of the Act. During fiscal year 2004, the Board continued to handle a large volume of rulemaking procedures and contested cases while operating within constraints posed by the State's continued budget difficulties.

The Board began fiscal year 2004 with a very significant change. Public Act 93-0509 reconstituted the Board's membership and reduced its size from seven to five members. While members G. Tanner Girard, Thomas E. Johnson, and Nicholas J. Melas were reappointed, Andrea S. Moore became a new member of the Board as I began my tenure as Chairman.

Among its accomplishments during fiscal year 2004, the Board completed several significant rulemakings. In response to P.A. 92-0715 (Senate Bill 1803), the Board in Docket R03-20 adopted procedures and clean-up standards for the Brownfields Site Restoration Program, which became effective February 17, 2004. The Board also adopted rules intended to enhance public participation in the permit process under the National Pollutant Discharge Elimination System. Docket R03-19 became effective May 7, 2004. Docket R03-21, effective November 12, 2003, extends an exemption allowing public water supplies to receive permits for additional service connections while they take steps to comply with radiological quality drinking water standards. In Docket R03-8, effective October 8, 2003, the Board updated its noise regulations by making changes including updating definitions and sound measurement procedures. The rulemaking process continues in R03-9, which proposes to revise various numerical sound emissions standards.

The Board continues to expand its use of technology to increase public knowledge of our work and to expand public participation in our activities. Our Clerk's Office On-Line (COOL) continues to provide 24-hour electronic access to the Board's case files and docket information. In the spring of 2004, the Board began a pilot project allowing parties in specific categories of cases to file documents electronically with the Clerk. The Board invites you to help us develop electronic filing as a cost-effective alternative to paper filing. Our Web site at www.ipcb.state.il.us contains more information about this pilot program.

J. Philip Novak

Chairman

Pollution Control Board Members

Chairman J. Philip Novak was first appointed to the Board and designated Chairman in 2003 by Governor Rod R. Blagojevich. Prior to joining the Board, Chairman Novak served 16 years in the Illinois House of Representatives.

Chairman Novak

While in the House, Mr. Novak served as Chair of the Environment and Energy Committee for eight years. In addition, he served on the Public Utilities, Registration and Regulation, and the Veterans Affairs Committees. He also served on the Electric Deregulation Subcommittee. His major success, while in the House, was as chief House sponsor of the landmark Electric Service Customer Choice and Rate Relief Law of 1997. Today, retail competition flourishes in the commercial and industrial sectors of Illinois. Moreover, Illinois residential consumers have realized hundreds of millions of dollars in savings since the act took effect.

Other responsibilities included the National Council of State Legislatures' task force on High Level Radioactive Waste Disposal. He currently serves as a trustee on the Illinois Clean Energy Community Foundation, a 250 million dollar trust fund promoting energy efficiency and protecting natural areas.

He is a former Kankakee County Treasurer and Bradley Village Trustee. He holds a BS in Education and an MA in political science from Eastern Illinois University. Chairman Novak is a veteran of the United States Army, having served in the Panama Canal Zone.

Board Member Girard

Board Member G. Tanner Girard was appointed in 1992 and reappointed in 1994 and 1998 by Governor Jim Edgar. Governor George H. Ryan reappointed Dr. Girard to the Board in 2000. In 2003, Dr. Girard was reappointed by Governor Rod R. Blagojevich.

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 Johnson

Board Member Thomas E. Johnson was appointed to the Board for a term beginning in July 2001 by Governor George H. Ryan. He served as Chairman from January 2003 until December 2003, and was then reappointed to a three-year term as Board Member by Governor Rod R. Blagojevich.

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 served the public in many capacities including: Champaign County Board Member, Special Assistant Attorney General, Special Prosecutor for the Secretary of State, and Central Office Director to the Illinois Department of Transportation.

Board Member Nicholas J. Melas was first appointed to the Board in 1998, then reappointed in 2000 and in 2003. Mr. Melas was a commissioner of the Metropolitan Water Reclamation District of Greater Chicago for 30 years and president of its Board for the last 18 of those years. He has acted as the president of N.J. Melas & Company, Inc., and as president of the Illinois Association of Sanitary Districts. Mr. Melas also served as a commissioner of the Northeastern Illinois Planning Commission and the Chicago Public Building Commission. He is currently on the Board of Directors of the Canal Corridor Association and is a member of the Sierra Club, National Wildlife Federation, The Lake Michigan Federation, Open Lands Project and the American Civil Liberties Union. He was a Director of the Chicago Urban League; was on the Board of the Chicago College of Osteopathic Medicine and Member of the American Association for the Advancement of Science and the Industrial Relations Association.

Board Member Melas

Mr. Melas also served on the General Board of the Church Federation of Greater Chicago and, as an active member of the Greek Orthodox Church, was named Archon of the Ecumenical Patriarchate of Constantinople and member of the Order of St. Andrew. Mr. Melas received his PhB and a BS in Chemistry from The University of Chicago, as well as an MBA from the Graduate School of Business of The University of Chicago.

Board Member Moore

Board Member Andrea S. Moore was first appointed to the Board by Governor Rod R. Blagojevich in 2003. Prior to joining the Board, Ms. Moore was Assistant Director of the Illinois Department of Natural Resources. Board Member Moore was elected to the Illinois House of Representatives in 1993 where she remained 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 Condell Medical Center's Board of Directors. She was a member of the Board of Directors of the National Association of Counties. Additionally, she was Chief Financial Officer and co-owner of a small advertising and sales promotion agency.

Rulemaking Review

Section 5(b) of the Environmental Protection Act (Act) (415 ILCS 5/5(b) (2003)) 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 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 proposals are then discussed at quasi-legislative public hearings at which the Board gathers information and comments to assist it 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 (5 ILCS 100/5-10 through 5-160 (2003)). The Board issues written opinions and orders, which review the testimony, evidence, and public comment in the rulemaking record and explain the reasons for the Board's decision.

Additionally, Section 7.2 of the Act establishes special procedures for 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 it has received.

Finally, under Section 5(d) of the Act, the Board may conduct such other non-contested or informational hearings as may be necessary to accomplish the purposes of the Act. As the Board explains in its procedural rules, such "hearings may include inquiry hearings to gather information on any subject the Board is authorized to regulate." *See* 35 Ill. Adm. Code 102.112. The Board has held inquiry hearings on its own motion, as well as on requests to do so from the Governor or a State agency.

The following is a summary of the most significant rulemakings completed in fiscal year 2004, arranged by docket number. During FY 2004, under Section 27 of the Act, the Board completed four significant rulemakings of statewide applicability, and one rulemaking of site-specific applicability (City of Effingham for fluoride discharges from commercial truck washing operations).

The Board engaged in rulemaking to enhance public participation in Board proceedings in two significant areas: enforcement of the Board's noise rules; and participation in the water permit process under the National Pollutant Discharge Elimination System. The Board also extended an exemption to allow public water supplies to receive permits for extensions while they are taking steps to comply with radiological quality drinking water standards. The Board also timely adopted standards for clean-up of Brownfields sites as required by recent legislation.

Finally, the Board timely processed the 14 identical-in-substance rulemaking dockets required by Section 7.2 of the Act.

RULES ADOPTED IN FISCAL YEAR 2004

In the Matter of: Noise Rule Update: Amendments to 35 Ill. Adm. Code 900 and 903, R03-8 (September 4, 2003)

During fiscal year 2004, the Board concluded work in one of two dockets updating its noise rules, while work in another continues into fiscal year 2005. The main body of the Board's noise rules (35 Ill. Adm. Code 900 *et seq*.) was adopted in 1973, based on the technical recommendations of the then-Illinois Institute of Environmental Quality. Since then, no person or entity has proposed a general updating of these 30-year old rules. Federal funding for noise control efforts has long been unavailable. Due to budgetary constraints, the Illinois Environmental Protection Agency (IEPA) has not had a noise division for the last several years. But, the Board continues to receive citizen noise complaints seeking relief from noise emitted by commercial operations such as bars, trucking operations and car washes, agricultural operations such as farms, and private residences as well.

So, in July 2002, the Board determined that it would itself undertake to update its noise rules. The Board opened two dockets to request comment on proposals developed by the Board's Scientific and Technical Section. These dockets are: Noise Rule Update: Amendments to 35 Ill. Adm. Code 900 and 903, R03-08 and Proposed New and Updated Rules for Measurement and Numerical Sound Emissions Standards Amendments to 35 Ill. Adm. Code 901 and 910, R03-9.

Rulemaking Completed in Docket R03-8

In FY 2004, the Board completed rulemaking in the first of the two dockets: Noise Rule Update: Amendments to 35 Ill. Adm. Code 900 and 903, R03-08 (Sept. 4, 2003). The adopted amendments were published in the *Illinois Register* at 27 Ill. Reg. 16247 with an October 8, 2003 effective date. Participants at the two public hearings in this rulemaking included the IEPA and the Office of the Attorney General, as well as various noise consultants.

Docket R03-8 amended rules at 35 Ill. Adm. Code Parts 900 and 903. These are general provisions dealing with the definitions of acoustical terminology, prohibition against noise pollution, and sound measurement procedures. The changes involve the updating of definitions and sound measurement procedures. The Board adopted these definitions and measurement procedures in 1973 in Noise Pollution Control Regulations, R72-2 (July 31, 1973), and modified them in 1987 in General Motors Corp. Proposed Amendments to 35 Ill. Adm. Code 900.103 and 900.104, R83-7 (Jan. 22, 1987). In 1987, the Board modified the regulations by adding a one-hour equivalent sound averaging period based on General Motors Corporation's proposal. The basis for the changes proposed in this rule are: extensive research conducted by the Board and the Department of Energy and Natural Resources from 1986–1991 and the American National Standards Institute updates from the years 1998-2001.

In Part 901, the most important updates relate to the definition of ambient, intermittent sound, and period of observation. The Board also clarified the distinction between steady and non-steady sound, and adopted a ten-minute measurement period for steady sound.

Part 903, which was repealed in its entirety, contained rules for the control of noise from motor racing facilities. Since the adoption of these rules, Section 25 of the Act has been modified to exclude organized sporting events, including motor racing facilities from the Board's noise regulations. 415 ILCS 5/25 (2002).

Rulemaking Still in Progress in Docket R03-9

Rulemaking continues in the other noise docket: Proposed New and Updated Rules for Measurement and Numerical Sound Emissions Standards Amendments to 35 Ill. Adm. Code 901 and 910, R03-9. R03-9 proposes to revise outdated numerical sound emission standards for property line noise sources found at 35 Ill. Adm. Code Part 901 and to add a new Part 910 to the Board's rules. New Part 910 would incorporate noise measurement techniques currently contained only in IEPA rules at 35 Ill. Adm. Code 951. Inclusion of these techniques in the Board's rules is intended to aid citizen enforcement of the noise rules.

In its March 4, 2004 order, the Board considered the testimony it had received during three hearings on its July 10, 2003 first notice proposal, as well as the written public comments received. The Board determined that considerations of administrative economy supported development and publication of a second first notice, allowing an additional two hearings. Among other things, the new first notice proposal would include various site-specific changes to the rules suggested in public comments. Work in this docket will continue in fiscal year 2005.

Radionuclide Restricted Status, Amendments to 35 Ill. Adm. Code 602.105, 602.106, 602.108, and 602.115, R03-21 (November 6, 2003)

On November 6, 2003, the Board adopted a final opinion and order in Radionuclide Restricted Status, Amendments to 35 Ill. Adm. Code 602.105, 602.106, 602.108, and 602.115 (R03-21). The adopted amendments were published in the *Illinois Register* at 27 Ill. Reg.18030 with a November 12, 2003 effective date.

The adopted rules are an extension (until December 8, 2009) of an exemption expiring December 8, 2003. The adopted amendments allow the Illinois Environmental Protection Agency (IEPA) to continue issuing permits to Public Water Supplies (PWS) that do not meet the federal radionuclide standard for drinking water, but only if the PWS is bound by an

enforceable order or agreement to a compliance schedule for meeting the federal standard. The rules do not exempt PWS from the final radionuclide standard, but would continue the existing State exemption that keeps certain PWS from being placed on "restricted status" (i.e., an Illinois-only list of PWS banned from receiving construction permits).

Generally, radionuclides are a product of the decay of uranium and occur naturally in some deep bedrock aquifers. They have presented problems for many drinking water systems in Illinois, primarily in the northern one-third of the State. In its April 7, 2003 proposal of these rules, IEPA anticipated that approximately 50 to 60 PWS might fail to meet the December 8, 2003 deadline and be subject to the pre-enforcement processes of Section 31 of the Act.

Under Section 17.6 of the Act (415 ILCS 5/17.6 (2002)), Illinois drinking water standards for radionuclides must be the same as the federal standards known as Maximum Contaminant Levels (MCLs). MCLs are adopted by the United States Environmental Protection Agency (USEPA) to implement the federal Safe Drinking Water Act (42 U.S.C. § 300f *et seq*.). Those standards, as codified in Board rules, are 5 pico curies per liter (pCi/L) for combined radium (radium-226 and radium-228), 15 pCi/L for gross alpha particle activity, and 30 micrograms per liter (µg/L) for uranium. *See* 35 Ill. Adm. Code 611.330. Compliance with these standards is required effective December 8, 2003. *See* SDWA Update: USEPA Amendments (July 1, 2000 through Dec. 31, 2000), R01-20 (Oct. 4, 2001). The Board also adopted rules providing special requirements for any petition for variance or adjusted standard from the radionuclide MCLs. *See* 35 Ill. Adm. Code 611.130.

Under Board rules, IEPA generally cannot issue a construction or operating permit to a PWS that is out of compliance with an MCL. *See* 35 Ill. Adm. Codes 602.105(a), 602.106(a). Board rules require that the non-compliant PWS be placed on a "restricted status" list by IEPA. "Restricted status" is an Illinois-only list of PWS banned from receiving construction permits. *See* 35 Ill. Adm. Code 602.106(a), (b). Once on restricted status, the non-compliant PWS is subject to the permit ban and accordingly cannot receive a permit to, for example, add service connections, until the PWS complies with the MCL.

A PWS not meeting an MCL therefore could receive a permit only if it first demonstrated to the Board that it was entitled to a variance (415 ILCS 5/35-38 (2002)) from the permit ban. To receive the variance, a PWS would first have to prove, in an adjudicatory proceeding, that the permit ban would impose an "arbitrary or unreasonable hardship" on the PWS. *See* 415 ILCS 5/35(a) (2002)). From 1977 to 1997, the Board issued 134 such variances for 83 PWS exceeding the existing radionuclide MCLs, which USEPA established in 1976. The relief provided by variance was from the permit ban, not from the drinking water standards.

The Board in 1997 adopted a limited regulatory exemption that provided the same relief without requiring a case-by-case variance demonstration and determination. *See* Amendments to 35 Ill. Adm. Code Subtitle F, R96-18 (May 1, 1997). The regulatory exemption (35 Ill. Adm. Code 602.105(d), 602.106(d)) has been available to those PWS that did not meet the 1976 MCLs but did meet USEPA's 1991 interim radionuclide standards. The Board was "prompted to provide such relief because of unusual delays in promulgating" the final federal radionuclide standards.

As with variance relief, PWS availing themselves of the regulatory exemption were not exempt from the 1976 drinking water MCLs, but rather from restricted status. The Board noted at the time it adopted the exemption, that almost no PWS in Illinois exceeded the 1991 radionuclide standards proposed by USEPA. *See* R96-18, slip op. at 6-7. The regulatory exemption from restricted status was written to expire on the effective date of the final federal radionuclide standards.

It was not until December 7, 2000, that USEPA adopted the final radionuclide standards. USEPA retained the existing 1976 MCL of 5 pCi/L for combined radium (radium-226 and radium-228), rejecting its 1991 proposed standard of 20 pCi/L for each of the two radium isotopes. USEPA adopted final MCLs of 15pCi/L for gross alpha particle activity, and 30 µg/L for uranium. The Board's 1997 regulatory exemption from the permit ban expires on the effective date of these final MCLs—December 8, 2003.

As previously stated, the R03-21 adopted rules extend the exemption through December 8, 2009. The Board adopted the final rules after two public hearings in May 2003, on the IEPA proposal.

Site-Specific Rule for City of Effingham Treatment Plant Fluoride Discharge, 35 Ill. Adm. Code 304.233, R03-11 (December 19, 2003)

On December 18, 2003, the Board adopted a final opinion and order in Site-Specific Rule for City of Effingham Treatment Plant Fluoride Discharge, 35 Ill. Adm. Code 304.233 (R03-11). The adopted amendments were published in the *Illinois Register* at 28 Ill. Reg. 3071 with a February 4, 2004 effective date.

The City of Effingham (City), Blue Beacon International, Inc. (BBI) and Truckomat Corporation (Truckomat) proposed the rule change, and provided testimony at the April 11, 2003 Board hearing. BBI and Truckomat operate truck washes in Effingham, and the wastewater from the truck washes contains fluoride resulting from the brighteners used in washing the trucks. Both companies testified at hearing that there are no alternative replacements for these brighteners, and that discontinuing their use would cause a severe negative economic impact for both the facilities, and for the surrounding businesses that rely on the truck traffic generated by the washing facilities.

The adopted amendments add a new Section 303.326. The section sets a site-specific fluoride water quality standard of 5.0 milligrams per liter (mg/L) to accommodate the discharge of fluoride from the City's publicly owned treatment works (POTW). This level of fluoride is gradually reduced downstream from the POTW to 3.2 mg/L and then 2.0 mg/L before it reverts back to the general water quality standard of 1.4 mg/L.

Brownfields Site Restoration Program; Amendments to 35 ILL Adm. Code 740, R03-20 (January 22, 2004)

On January 22, 2004, the Board adopted a final opinion and order in Brownfields Site Restoration Program, Amendments to 35 Ill. Adm. Code 740 (R03-20). The adopted amendments were published in the *Illinois Register* at 28 Ill. Reg. 3870 with a February 17, 2004 effective date.

This rulemaking was initiated by a February 18, 2003 proposal filed by the Illinois Environmental Protection Agency (IEPA). The Board held hearings in this rulemaking on April 30, 2003 in Springfield and on May 14, 2003, in Chicago. The adopted rules establish procedures and standards for administering the Brownfields Site Restoration Program (BSRP). They implement Section 58.15 of the Environmental Protection Act (Act) ((415 ILCS 5/58.15), as added by P. A. 92-715, effective July 23, 2002). As required, the Board timely adopted its second notice order on November 6, 2003, within nine months of receipt of the IEPA's proposal.

The adopted rules add a new Subpart I to the Board's site remediation program rules at 35 Ill. Adm. Code Part 740. For BSRP reimbursement under the new Subpart I, Remediation Applicants (RA) must apply to both the IEPA and the Department of Commerce and Economic Opportunity (DCEO). The RA must pay associated application fees totaling from $2,000 to $2,500 per site. (The fee is $1,000 per site for eligibility reviews conducted by the DCEO. The fee is $1,000 per site per application for review of remediation costs conducted by the IEPA, and $500 per site per preliminary review of the budget plan, also conducted by the IEPA.)

Generally, to be eligible for reimbursement, an RA must have been issued a No Further Remediation (NFR) Letter by IEPA under the Site Remediation Program, must have recorded the NFR Letter, and must not have materially caused or contributed to the contamination. The RA must also apply for and receive a DCEO letter: (1) determining that the RA is eligible for reimbursement because the site qualifies as either "abandoned property" or "underutilized property;" (2) setting forth the remediation's "net economic benefit" to the State based on factors such as capital investment and job creation; and (3) providing the maximum amount the RA may be reimbursed. DCEO approval is required before any costs are incurred.

Reimbursement is subject to funds available in the Brownfields Redevelopment Fund for the BSRP each fiscal year, and funds are distributed based on the order applications for reimbursement are received. In addition, an RA cannot be reimbursed more than the lowest of the following: (1) $750,000 in remediation costs at the site; (2) 20% of the capital investment at the site; or (3) the net economic benefit to the State of the remediation.

Under the BSRP, the IEPA must make a final determination within 60 days of receipt of a reimbursement application. Submittal of a budget plan automatically waives the remedial action plan deadlines for an additional 60 days. Furthermore, amendments to the application or the budget plan restart the IEPA's time for review. The DCEO will establish its own timeframe for making the eligibility determination.

Proposed Amendments to: Public Participation Rules in 35 Ill. Adm. Code Part 309 NPDES Permits and Permitting Procedures, R03-19 (May 6, 2004)

On May 6, 2004, the Board adopted a final opinion and order in Proposed Amendments to: Public Participation Rules in 35 Ill. Adm. Code Part 309 NPDES Permits and Permitting Procedures (R03-19). The adopted rulemaking was published in the *Illinois Register* at 28 Ill Reg. 7310, with a May 7, 2004 effective date.

The Board held three public hearings on the January 13, 2003 rule proposal filed by the Environmental Law and Policy Center of the Midwest, Illinois Chapter of the Sierra Club, Prairie Rivers Network, and 225 citizen petitioners. Testifiers and commenters included: the proponents, the Illinois Environmental Protection Agency (IEPA), the Illinois Environmental Regulatory Group, Illinois American Water Company, the Illinois Coal Association, and the Illinois Association of Wastewater Agencies.

The rule proposal is a direct response to prior Board and court rulings about the interpretation and interrelationship of the state and federal regulations governing permit procedures under the National Pollutant Discharge Elimination Program (NPDES). *See* Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112 (Aug. 9, 2001), affd. *sub nom.* Prairie Rivers Network v. Pollution Control Board, IEPA, and Black Beauty Coal Co., 335 Ill. App. 3d, 781 N.E.2d 372 (4th Dist. 2002). The proponents' goal was enhancement of the opportunities for meaningful public participation and thorough IEPA review of public comments prior to issuance of an NPDES permit.

The adopted amendments to the Board's rules at 35 Ill. Adm. Code 309 clarify rules for IEPA issuance of NPDES permits, especially as they relate to public participation in the process. The adopted rules codify some of the IEPA's historical practice when reviewing and issuing NPDES permits. But, new rules also require IEPA to include specified additional information in NPDES permit fact sheets prepared for the public, and identify when IEPA can and must reopen the public comment period. Under the new rules, permits must require control of pollutants and pollutant parameters that may potentially violate water quality standards, and require reports adequate to determine compliance with monitoring requirements.

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 Administrator of the United States Environmental Protection Agency (USEPA) in various federal program areas. *See* 415 ILCS 5/7.2 (2002). These program areas include: drinking water; underground injection control; hazardous and nonhazardous waste; underground storage tanks; wastewater pretreatment; and the definition of volatile organic material.

Identical-in-substance 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 identical-in-substance rules requires inter-agency coordination and inter-governmental cooperation. Entities who must act in concert to successfully complete these rulemakings include the Board, the Illinois Environmental Protection Agency, 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.

Judicial Review

Introduction

Pursuant to Section 41 of the Environmental Protection Act (Act) (415 ILCS 5/41 (2002)), 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 courts to substitute their own judgment in place of that of the Board. Board decisions in rulemaking, imposing conditions in variances, and setting penalties are quasi-legislative. The standard of review for the Board's quasi-legislative actions is whether the Board's decision is arbitrary or capricious. All other Board decisions are quasi-judicial in nature, and the Illinois Supreme Court has recently stated that in reviewing State agency's quasi-judicial decisions: (1) findings of fact are reviewed using a manifest weight of the evidence standard, (2) questions of law are decided by the courts *de novo*, and (3) mixed questions of law and fact are reviewed using the "clearly erroneous" standard (a standard midway between the first two). *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).

At the conclusion of fiscal year 2004, the appellate courts were in the process of hearing appeals of ten Board decisions. Of these ten Board decisions, three were enforcement cases, one was a permit appeal, one was an appeal for reimbursement from the Underground Storage Tank Fund, and five involved review of local government decisions on siting for pollution control facilities.

In fiscal year 2004, the Illinois appellate courts had entered final orders in seven cases involving appeals from Board opinions and orders. The Board's decision was affirmed in four cases. In the other three cases, the appellate court dismissed defective appeals for lack of jurisdiction, due to appellant's failure to name the Board as a party. As a result, the Board's decisions remain undisturbed. The following summaries of the seven written appellate decisions in Board cases for fiscal year 2004 are organized first by case type and then by date of final determination.

Enforcement

Sections 30 and 31.1 of the Act (415 ILCS 5/30 and 31.1 (2002)), respectively, provide for standard enforcement actions and for the more limited administrative citations. The standard enforcement action is initiated by the filing of a formal complaint by a citizen or by the Attorney General's Office. A public hearing is held. At hearing, the complainant must prove that the "respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of this Act or any rule or regulation of the Board or permit or term or condition thereof." 415 ILCS 5/31(e)(2002). The Board is authorized under Sections 33 and 42 of the Act to direct a party to cease and desist from violation, to revoke a permit, to impose civil penalties, and to require posting of bonds or other securities to assure correction of violations. 415 ILCS 5/33 and 42 (2002). An administrative citation is initiated by the Illinois Environmental Protection Agency or a unit of local government and imposes a fixed statutory fine for, among other things, causing or allowing open dumping of any waste. 415 ILCS 5/21(o), (p) and 31.1 (2002).

In fiscal year 2004, the appellate courts affirmed a Board decision in a noise enforcement case, as well as affirming findings of violations in a consolidated case involving two administrative citations.

Everett Daily v. County of Sangamon and Illinois Pollution Control Board, No. 4-02-1139 (4th Dist. Sept. 18, 2003) (unpublished Rule 23 order) (AC 01-16 and AC 01-17 (cons.))

In its September 18, 2003 11-page unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23), in Everett Daily v. County of Sangamon and Illinois Pollution Control Board, No. 4-02-1139, the Appellate Court for the Fourth District affirmed the Board's January 10, 2002 decision in two consolidated administrative citations (ACs).

The court related that Daily's dealings with Sangamon County (County) began a year before the County issued the ACs on which this appeal is based. In the fall of 1999, the county public health department filed suit against Daily in the Sangamon County circuit

court for violation of a county waste dumping ordinance on Daily's property in Rochester. County inspectors inspected Daily's property pursuant to search warrant in April 2000. They returned September 15, 2000, for the purpose of compiling a list of waste items to be removed from the property; this visit was made at the request of Daily's then-attorney, with a view to possible settlement of the action. At a hearing on September 21, 2000, the County dismissed the court action. By agreement, the County inspectors returned to the site September 22, 2000 to complete the list. Slip op. at 1-4.

To Daily's apparent surprise, the County issued two ACs to Daily based on the two September site inspections. Each AC alleged that Daily violated Section 21(p)(1) & (p)(7) of the Act by causing or allowing the open dumping of waste resulting in litter and the deposition of construction or demolition debris. *See* 415 ILCS 5/21 (p) (1,7) (2002). Each AC requested a statutory civil penalty of $1,500 per violation, for a total of $6,000. *See* 415 ILCS 5/42(b)(4-5) (2002). Slip op. at 4-5.

Daily petitioned the Board to review the ACs. The Board majority issued its decision in response to the parties' cross-motions for summary judgment. Sangamon County v. Everett Daily, AC 01-16, AC 01-17 (cons.) (Jan. 10, 2002). A dissenting Board Member stated that he believed that the matter should have gone to hearing due to the existence of genuine issues of material fact. *See* Sangamon County v. Everett Daily, AC 01-16, AC 01-17 (cons.) (Dissenting Opinion, Jan. 16, 2002).

Daily argued that (1) the County should be estopped from pursuing the ACs, and (2) the items on his property did not constitute "waste" under the Act. The Board denied Daily's motion, rejecting both arguments. The Board granted the County's motion, and entered judgment in the County's favor. The Board found two violations (not four violations as the County alleged) because the Board found the violations observed during the County's first inspection to be continuing violations, not separate violations, during the second inspection. The Board therefore imposed a civil penalty of $1,500 per violation, for a total civil penalty of $3,000.

Daily filed a *pro se* petition for review. The court discussed four major arguments Daily made. On appeal, Daily argued that (1) the County gave him inadequate notice of the alleged violations; (2) the County exceeded its jurisdiction because his property is located in an incorporated area; (3) in not serving him with the AC within 35 days after the inspection, the County breached the AC delegation agreement between it and the Illinois Environmental Protection Agency (IEPA); and (4) the County was estopped from using information from the site inspections, since they were undertaken to settle the circuit court case.

The court first stated that it reviews summary judgment decisions *de novo*. On the first issue, the court found the County's inspection report and photos sufficiently detailed the objects alleged to be waste, *e.g.*, "an old bathtub," "broken and weathered windows." Everett Daily v. County of Sangamon and Illinois Pollution Control Board, No. 4-02-1139 (4th Dist. Sept. 18, 2003), slip op. at 4. Second, the County's jurisdiction under the County code was irrelevant because the AC was issued under the Act pursuant to its delegation agreement with IEPA. *See* 415 ILCS 5/4(r) (2002), and slip op. at 7-8. Third, the court held that Daily waived his argument regarding untimely service under the delegation agreement by not specifically raising it before the Board, and moreover that the argument lacked merit. Slip op. at 8-9. Fourth, the court found that Daily did not establish the elements of promissory estoppel. Since the County did not promise that it would use information gathered during an inspection only to settle the court case, the County could properly use the site inspection information as the basis for the ACs. Lastly, the court found that Daily had waived "several enigmatic assertions that he [did] not develop or support by coherent argument and citations to the record." Slip op. at 10-11.

Gilster-Mary Lee Corp. v. Roger L. Young, Romana K. Young and Illinois Pollution Control Board, No. 5-02-0487 (5th Dist. Sept. 3, 2003) (unpublished Rule 23 order) (PCB 00-90)

In its September 3, 2003 11-page unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23), the Fifth District Appellate Court affirmed the Board's decision finding a noise nuisance had been proven in a citizens' enforcement action. Gilster-Mary Lee Corp. v. Roger L. Young, Romana K.Young and Illinois Pollution Control Board, No. 5-02-0487 (5th Dist. Sept. 3, 2003). In its final opinion and order, the Board found that the Gilster-Mary Lee Corporation had violated 35 Ill. Adm. Code 900.102 and Section 24 of the Act. 415 ILCS 5/24 (2002). The Board ordered Gilster-Mary Lee to cease and desist from further violations, finding that the corporation had taken sufficient steps to remediate the noise after the suit was filed. Roger L. and Romana Young v. Gilster-Mary Lee Corp., PCB 00-90 (June 20, 2002).

The Youngs filed their noise complaint with the Board in November 1999. In 1997, Mr. Young had inherited the home in Chester, Randolph County, which his

parents had lived in since 1953. This property is bordered on three sides by the property of Gilster-Mary Lee, a producer of food products including stuffing, cake, chicken coating and cookie mixes. The property contains two factories that operate around the clock from Monday through Friday, office buildings, and employee parking lots.

After considering the hearing record and applying the Act's Section 33(c) factors, the Board issued an interim order. Roger L. and Romana Young v. Gilster-Mary Lee Corp., PCB 00-90 (Sept. 6, 2001). The Board majority found that noise from the factory (including noise from truck idling and unloading) had unreasonably interfered with the Youngs' enjoyment of their residence, and ordered Gilster-Mary Lee to file a noise reduction report. Two dissenting Board Members agreed that there had been a noise interference, but disagreed that the noise was unreasonable. Roger L. and Romana Young v. Gilster-Mary Lee Corp., PCB 00-90 (Dissenting Opinion, Sept. 10, 2001).

The corporation filed a noise report, documenting the steps it took to reduce noise. In its final order, the Board determined not to order any additional, specific steps to reduce noise. Roger L. and Romana Young v. Gilster-Mary Lee Corp., PCB 00-90 (June 20, 2002).

Gilster-Mary Lee appealed, asking the Fifth District to reverse the finding of violation. The court determined that the Board performed an "intensive evaluation" of all of the factors in the case, holding that the Board's decision was neither against the "manifest weight of the evidence" nor "arbitrary and capricious." Gilster-Mary Lee Corp. v. Roger L. Young, Romana K.Young and Illinois Pollution Control Board, No. 5-02-0487 (5th Dist. Sept. 3, 2003), slip op. at 7.

The court also reviewed three evidentiary rulings at the corporation's request, applying an "abuse of discretion" standard. First, Gilster-Mary Lee objected to admission of testimony of one of the Youngs' witnesses, an IEPA noise advisor. The court affirmed admission of the testimony, because Section 101.626(a) of the Board's procedural rules allows evidence that is "material and relevant." Slip op. at 8.

Second, Gilster-Mary Lee objected to admission of some of the Youngs' videotapes showing more recent noise meter measurements being taken because those tapes were not provided to Gilster-Mary Lee during discovery. The court again affirmed admission of the evidence, noting Gilster-Mary Lee did not allege that the more recent noise measurements were any different from those provided to Gilster-Mary Lee during discovery. Slip op. at 9.

Third, the court affirmed the Board's refusal to strike public comments filed after hearing by Chester citizens complaining about the noise. The court found the public comments were relevant and based on evidence in the record, and that they supported the Board's finding of violation. *See* slip op. at 9 (citing to the Board's procedural rule at 35 Ill. Adm. Code 101.628 describing how public comments are allowed, are afforded lesser weight than testimony, and must be based on evidence in the record).

Finally, the court observed that even if any of these three items were admitted in error, "not all evidentiary errors require a reversal." Only evidentiary errors that are prejudicial or that materially affect the case's outcome require reversal. The court concluded that, even if the challenged evidence were to be removed from the record, "there would still be enough evidence in the record to support the Board's decision." Slip op. at 9.

Permit Appeal

The Board is authorized to require a permit for the construction, installation, and operation of pollution control facilities and equipment. Under Section 39 of the Act, it is the duty of Illinois Environmental Protection Agency (IEPA) to issue those permits to applicants. 415 ILCS 5/39 (2002). Permits are issued to those applicants who prove that the proposed permitted activity will not cause a violation of the Act or the Board regulations under the Act. IEPA has the statutory authority to impose conditions on a permit to further ensure compliance with the Act. An applicant who has been denied a permit or who has been granted a permit subject to conditions may contest the IEPA decision at a Board hearing pursuant to Section 40 of the Act. 415 ILCS 5/40 (2002).

In fiscal year 2004, the appellate courts affirmed the Board's decision in the single appeal involving an IEPA landfill permit decision.

ESG Watts, Inc. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 4-02-1139 (4th Dist. Dec. 2, 2003) (unpublished Rule 23 order) (PCB 01-139)

In its December 2, 2003 unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23), the Appellate Court for the Fourth District affirmed the Board's April 4, 2002 permit appeal decision. *See* ESG Watts, Inc. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 4-02-1139 (4th Dist. Dec. 2, 2003), affirming ESG Watts, Inc. v. Illinois Environmental Protection Agency, PCB 01-139

(Apr. 4, 2002). The court confirmed important Board holdings concerning the nature of landfill permits and financial assurance requirements under the Act and the Board's financial assurance rules at 35 Ill. Adm. Code Part 807.

Section 21.1(a) of the Act requires a landfill operator to post "financial assurance": a bond or other approved form of security with Illinois Environmental Protection Agency (IEPA) to ensure money is available for the closure and post-closure care of the landfill. 415 ILCS 5/21.1(a) (2002). In November 2000, ESG Watts requested IEPA approval of pollution liability insurance policies for closure of two of its landfills (the Taylor Ridge/Andalusia landfill in Rock Island County and the Viola landfill in Mercer County) to serve as substitute financial assurance. The policies were effective January 26, 1999 through January 26, 2001. ESG Watts intended them to replace funds in a single trust fund that served as financial assurance for three ESG Watts landfills: Sangamon Valley Landfill, Taylor Ridge and Viola. Upon IEPA approval of the policies, ESG Watts wanted the trust's "excess" funds (those attributable to Sangamon Valley) to be released. In February 2001, the IEPA refused to accept the insurance policies, stating, among other things, that the IEPA:

> has reason to believe the cost of closure and post-closure care for these sites will be significantly greater than the value of all financial assurance tendered for these sites, regardless of acceptability. Therefore the total financial assurance provided for these two sites does not equal the cost of closure and post-closure care for these sites. ESG Watts, Inc. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 4-02-1139 (4th Dist. Dec. 2, 2003), slip op at 2-3.

ESG Watts appealed to the Board in July 2001.

In its April 4, 2002 opinion and order, the Board held that the insurance policies ESG Watts had proposed as substitute financial assurance had been approved by operation of law because IEPA issued its determination a year after expiration of the 90-day deadline for IEPA permitting decisions under Section 39(a) of the Act. But, the proposed insurance policies had expired by their terms. Accordingly, the Board further held that it could not direct IEPA to release the funds in the trust because the trust was the only financial assurance in place for the two landfills. The Board found that leaving the landfills with no financial assurance would violate Section 21.1(a) of the Act.

The Fourth District's Rule 23 order affirmed the Board's decision in all respects. In its review of the Board's decision, the Fourth District applied the *de novo* standard of review because the appeal required interpretation of statutory and regulatory language. Although the policies had expired by their terms, the court held that the case was not moot because the case involved an event of short duration that is "capable of repetition, yet evading review." Slip op. at 4-5, citing In re Barbara H., 183 Ill. 2d 482, 491, 702 N.E.2d 555, 559 (1998).

In reaching its conclusion on the ultimate issue in the case, the court looked to Section 21.1(a) of the Act and a financial assurance provision of the Board's landfill rules. The court held:

> The Code [35 Ill. Adm. Code 807.604] provides for release of excess trust funds when "[a]n operator substitutes alternate financial assurance such that the total financial assurance for the site is equal to or greater than the current cost estimate counting the amounts to be released." [citations omitted] In the instant case, the pollution liability policies expired on January 26, 2001. The record does not show the existence of "alternate financial assurance" on April 4, 2002, when the Board refused to release the monies held in trust. We affirm the Board's ruling. (Slip op. at 5-6).

Underground Storage Tank Program Appeal

Petroleum leaks from underground storage tanks (USTs) are presently remediated under Title XVI of the Act. 415 ILCS 5/57-57.17 (2002). (Remediation was formerly made under the now-repealed Title V (415 ILCS 5/22.13, 22.18, 22.18b (1992).) The Act specifies what actions must be taken, provides for Illinois Environmental Protection Agency (IEPA) approval of remediation plans and budgets, and establishes an Underground Storage Tank Fund (Fund). Under certain conditions, a person who has registered USTs with the Office of the State Fire Marshal (OSFM) can obtain reimbursement for costs of corrective action, subject to statutorily set deductibles.

Title XVI divides program responsibilities between IEPA and OSFM. OSFM has oversight responsibility for some aspects of early action activities, such as supervising UST removals. OSFM also determines whether an owner or operator is eligible for reimbursement from the UST Fund, and if so, what the deductible amount should be. IEPA focuses on risk-based clean-up and site assessment, and makes various determinations on corrective action plans for remediation and monitoring and on the

appropriateness of budgets and expenditures for which reimbursement is sought from the Fund.

Title XVI specifies several points at which a UST owner or operator can appeal IEPA or OSFM decisions to the Board. In fiscal year 2004, the appellate courts dismissed as defective the two appeals of Board decisions affirming IEPA UST Fund determinations.

DaLee Oil Co. v. Illinois Environmental Protection Agency, No.5-04-0039 (5th Dist. May 19, 2004) (unpublished Rule 23 order) (PCB 03-118, 119, and 150 (cons.));

Mick's Garage v. Illinois Environmental Protection Agency, No.5-04-0050 (5th Dist. May 19, 2004) (unpublished Rule 23 order) (PCB 03-126)

On May 19, 2004, the Fifth District Appellate Court issued two final unpublished orders under Supreme Court Rule 23 (155 Ill.2d R. 23). DaLee Oil Co. v. Illinois Environmental Protection Agency, No.5-04-0039 (5th Dist. May 19, 2004) (PCB 03-118, 119, and 150 (cons.)) and Mick's Garage v. Illinois Environmental Protection Agency, No.5-04-0050 (5th Dist. May 19, 2004) (PCB 03-126). In each case, the court dismissed the petitioner's appeal of a Board December 18, 2003 decision for lack of jurisdiction. Neither petitioner had named the Board as a party respondent. The Board argued that the appellant's failure to name all necessary parties pursuant to Supreme Court Rule 335 was a fatal error. As a result of the court's dismissal of the appeals, the Board's separate December 18, 2003 orders stand. In both appeals, the Board affirmed decisions made by IEPA involving UST Fund reimbursement applications and determinations.

By way of background for better understanding of the issues in these UST cases, the original provision of the Act governing UST Fund cost actions was found at Section 22.18b of Title V. This section set forth the appropriate deductibles to be imposed on reimbursement applications for USTs eligible to gain access to the UST Fund. In 1993, this section of the Act was repealed and a new Title XVI was enacted, effective September 13, 1993. 415 ILCS 5/57 (2002). The law to be applied is the law in effect upon the date the application is filed. Kean Oil Co. v. IEPA, PCB 92-60, slip op. at 11 (Sept. 5, 1996). Owners or operators who reported releases after the effective date of the amendments would proceed under the new law. Owners or operators who reported releases prior to the effective date proceeded under the old law unless expressly electing to proceed under the new Title XVI. 415 ILCS 5/57.13(b) (2002).

DaLee Oil Co.v. Illinois Environmental Protection Agency, PCB 03-118, 119, and 150 (cons.) (May 19, 2004):

DaLee Oil Company operated a gasoline service station known as "Rocky's 66," located at Route 177 West in Okawville, Washington County. Dalee sought Board review of three IEPA determinations limiting cleanup cost reimbursement from the UST Fund. The claimed costs were for a remediation system being used at the site to clean up contaminated soil and groundwater.

The reimbursement requests covered three time periods during the cleanup, spanning October 2001 through September 2002. In three final determinations, IEPA granted only partial reimbursement, denying DaLee approximately $19,000 in claimed costs. IEPA determined that $1,292.69 of the requested $3,750 per month for the groundwater treatment and soil vapor extraction unit were ineligible because they were "costs that the owner/operator failed to demonstrate were reasonable," citing Section 22.18b(d)(4)(C) of the Act. DaLee appealed each of IEPA's three determinations to the Board, and the Board consolidated the appeals, handling them in a single opinion and order.

On the issue of the claimed costs' reasonableness, at

the Board's hearing, DaLee sought to introduce overhead and amortization figures and related testimony to substantiate the claimed costs of the remediation system. That information, however, had not been presented to IEPA in DaLee's reimbursement applications. The Board held that under the Act, the Board's review is limited to the record before IEPA at the time IEPA issued its decision. The Board therefore could not consider the new information. The Board further held that the materials DaLee did submit to IEPA failed to demonstrate that the monthly rate sought for the remediation system was reasonable. The Board concluded that DaLee failed to meet its burden of proof and affirmed IEPA's determinations.

Mick's Garage v. Illinois Environmental Protection Agency, PCB 03-126 (May 19, 2004):

Mick's Garage is a truck maintenance facility, located in Pontoon Beach, Madison County. Mick's Garage reported a UST release from its site in 1991 and received an incident number from the State. Mick's Garage applied to IEPA in 1991 for reimbursement from the UST Fund, and IEPA in 1992 determined the applicable deductible to be $50,000. Mick's Garage did not appeal IEPA's determination. In 1999, Mick's Garage removed USTs from the site and received a new incident number (*i.e.*, a number different from the 1991 incident number).

In 2000, Mick's Garage applied with OSFM for a determination of eligibility and the applicable deductible under the UST Fund. The Act had been amended so that those determinations, formerly made by IEPA, were now made by OSFM. OSFM determined that a deductible *lower than* $50,000 applied.

Mick's Garage's filings with OSFM indicated that the release reported in 1999 was the same release reported in 1991 (*i.e.*, a second reporting of the same occurrence). IEPA received a cleanup plan from Mick's in 2002. IEPA approved the plan in January 2003, also mentioning that the $50,000 deductible, originally assessed in 1992, applied to this site. Mick's appealed IEPA's January 2003 determination to the Board, attempting to challenge the $50,000 deductible.

The Board found that IEPA's 1992 determination, based on the application it received from Mick's in 1991, remained the applicable deductible for the site. The Board further found that, under the applicable provisions of the Act, OSFM did not have authority to determine the deductible that applies at Mick's site. The Board held that the Board lacked jurisdiction to review IEPA's 1992 deductibility determination because Mick's failed to timely appeal that determination.

Pollution Control Facility Siting Appeal

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 (2002). 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 (2002).

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.

In fiscal year 2004, the appellate courts affirmed the Board's decision in one siting appeal, but dismissed as defective one petitioner's appeal of another Board decision.

Watson v. County Board of Kankakee County, et al., No.3-03-0919 (3rd Dist. Feb. 26, 2004) (unpublished Rule 23 order) (PCB 03-134 (cons. with PCB 03-125, 03-133 and 03-135))

In a February 26, 2004 final unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23), Watson v. County Board of Kankakee County, Illinois, Waste Management of Illinois, Inc., City of Kankakee, Merlin Karlock, and Keith Runyon, No. 3-03-0919, the Third District Appellate Court dismissed Michael Watson's appeal for lack of jurisdiction. When filing the appeal, Watson did not name the Board as a party respondent. The Board argued that the appellant's failure to name all necessary parties pursuant to Supreme Court Rule 335 was a fatal error. On March 2, 2004, the court denied Watson's motion for leave to file an amended petition for review.

In an affidavit mailed March 5, 2004, Michael Watson advised the Board of his intent to file a petition for leave to appeal with the Illinois Supreme Court under

Supreme Court Rule 315 (155 Ill. 2d R 315). The Supreme Court received and docketed the appeal as Watson v. County Board of Kankakee County, Illinois, Waste Management of Illinois, Inc., City of Kankakee, Illinois Pollution Control Board, Merlin Karlock, and Keith Runyon, No. 98139 (filed Mar. 31, 2004).

On May 26, 2004 the Supreme Court denied the petition for leave to appeal. But, the Supreme Court went on to say:

> In the exercise of this Court's supervisory authority, the Appellate Court, Third District, is directed to allow the petitioner in Watson v. County Board of Kankakee County, case No.3-03-0919, to file an amended petition for review.

The result of the Court's supervisory order would have been that Watson would have received exactly the same relief he would have received if he had been allowed to proceed with his appeal in the Supreme Court, and had won that appeal. This would have had the unusual procedural result of leaving the Board and the other parties with no opportunity to defend the Third District's dismissal order.

So, the Board moved the Supreme Court for leave to file a motion for reconsideration of the May 26, 2004 supervisory order. In that motion, the Board argued that the dismissal had been consistent with Supreme Court Rule 335, the Administrative Review Law (735 ILCS 5/3-101 et seq. (2002)), and the Supreme Court's prior holdings on the issue. *See* McGaughy v. Illinois Human Rights Commission, 165 Ill.2d 1, 649 N.E.2d 404 (1995) as reaffirmed in ESG Watts v. Pollution Control Board, 191 Ill.2d 26, 727 N.E.2d 1022 (2000). The Board also cited the comment of a justice in a recent dissent that "where an appellate court has complied with the controlling law in Illinois, a supervisory order is inappropriate." People v. Davis, 207 Ill. 2d 611, 807 N.E.2d 371, 372 (2004) (J. Garman, dissenting).

On July 16, 2004, the Supreme Court entered an order that stated in pertinent part:

> the motion for leave to file a motion for reconsideration of the supervisory order, is allowed. The motion for reconsideration is allowed. The supervisory order entered on May 26, 2004, is vacated. The petition for leave to appeal remains denied. (emphasis in original)

On August 16, 2004, the Supreme Court denied Watson's petition for leave to file a motion for reconsideration of the July 16, 2004 order. The Supreme Court's denial of Watson's petition for leave to appeal leaves undisturbed the Third Appellate District's February, 2004 dismissal of Watson's appeal.

The Board case Watson was seeking to appeal was PCB 03-134. The Board decided PCB 03-134 as one of four consolidated cases involving the same local siting decision, all decided by the Board in a single opinion and order. City of Kankakee v. County of Kankakee, Kankakee County Board and Waste Management of Illinois, Inc.; Merlin Karlock v. County of Kankakee, Kankakee County Board and Waste Management of Illinois; Michael Watson v. County Board of Kankakee County, Illinois and Waste Management of Illinois, Inc.; Keith Runyon v. County of Kankakee, Kankakee County Board, and Waste Management of Illinois, Inc., PCB 03-125, PCB 03-133, PCB 03-134, PCB 03-135 (cons.) (Aug. 7, 2003).

On January 31, 2003, the Kankakee County Board reached a decision granting site location approval, with conditions, to Waste Management of Illinois, Inc. for a "regional pollution control facility." Waste Management sought approval to expand around its existing 179-acre site, to result in an expanded site covering 664 acres, with a 302-acre disposal site. The County of Kankakee as well as Michael Watson, owner of United Disposal Systems (a competitor to Waste Management), and two individual citizens (Merlin Karlock and Keith Runyon) each filed separate appeals of the same County decision. The various appeals argued that the County lacked jurisdiction to decide siting (raised by all petitioners save Runyon), that the County proceedings were fundamentally unfair, and that the County decision finding that the statutory siting criteria had been met was against the manifest weight of the evidence.

In its August 7, 2003 opinion and order, the Board determined that the County lacked jurisdiction to decide the application because Waste Management had improperly failed to notify all landowners as required by Section 39.2 (b) of the Act (415 ILCS 5/39.2(b)) (2002)). The Board accordingly vacated the County decision without reaching the other issues presented. (On the same day, in a separate order in a separate case, the Board granted Waste Management's motion to withdraw its appeal of the conditions the County had imposed on its grant of siting approval. *See* Waste Management of Illinois, Inc. v. Kankakee County Board, PCB 04-144 (Aug. 7, 2003).)

Watson sought Board reconsideration of a finding regarding certified mail service of a landowner, as well as the finding that he did not qualify for an exemption (as a "citizen's group") from payment to the County to pay record preparation costs under

Section 39.2(n) of the Act and 35 Ill. Adm. Code 107.306. The Board denied motions for reconsideration by Watson and others by summary order of October 16, 2003.

The Third Appellate District's dismissal of Watson's appeal leaves pending before it Waste Management's appeal of the Board's August 7, 2003 decision. Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, County of Kankakee, County Board of Kankakee, City of Kankakee, Merlin Karlock, Keith Runyon and Michael Watson, No. 3-03-0924.

Stock & Company, LLC v. Illinois Pollution Control Board, Effingham County Board, Sutter Sanitation Services, and Landfill 33, Ltd., No.5-03-0099 (5th Dist. May 7, 2004) (unpublished Rule 23 order) (PCB 03-52 (cons. with PCB 03-43))

In its May 7, 2004 final unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23), in Stock & Company, LLC v. Illinois Pollution Control Board, Effingham County Board, Sutter Sanitation Services, and Landfill 33, Ltd., No.5-03-0099, the Fifth District Appellate Court affirmed the Board's decision in two consolidated landfill siting appeals. In a single opinion and order resolving both cases, the Board affirmed the Effingham County Board's (County Board's) grant of siting approval for Sutter Sanitation Services' (Sutter's) proposed solid waste transfer station. Stock & Company, LLC, v. Effingham County Board and Sutter Sanitation Services, PCB 03-52 (Feb. 20, 2003), consolidated with Landfill 33, LTD., v. Effingham County Board and Sutter Sanitation Services, PCB 03-43.

In September 2002, the County Board granted site location suitability approval for a waste transfer station on three acres of land currently used as a grain elevator in unincorporated Effingham County. Stock & Co. (Stock) owns the cropland directly across the road from the transfer station. Stock and another entity, Landfill 33, Ltd. each requested the Board to review the County Board's siting approval.

Stock and Landfill 33 each alleged three grounds for reversing the County Board's siting approval: (1) the County Board lacked jurisdiction over the siting application because Sutter failed to timely provide notice of the County Board hearing to all members of the General Assembly from the district as required under Section 39.2(d) of the Act; (2) the procedures the County Board used to consider Sutter's application were fundamentally unfair under Section 40.1(a) of the Act; and (3) the County Board erred in deciding that Sutter presented adequate proof on six of the nine siting criteria in Section 39.2(a) of the Act. The Board found that the County Board had jurisdiction, followed fundamentally fair procedures, and correctly determined that Sutter satisfied the siting criteria at issue.

Before the Fifth District Appellate Court, Stock did not argue the Board's finding that the County Board had jurisdiction over the application. (Landfill 33 did not appeal.) Stock challenged only the Board's rulings on fundamental fairness and on three Section 39.2(a) siting criteria ((i) need, (ii) designed to protect public health, and (v) plan of operations designed to minimize danger).

Stock argued that the County Board proceedings were fundamentally unfair because the local hearing transcript was not provided to Stock until after the deadline for appealing the local siting decision to the Board. Stock maintained that it was therefore hindered "in its efforts to formulate the basis for its appeal." Slip op. at 4. The court agreed with the Board that Stock suffered no prejudice and that the local proceeding was therefore not rendered fundamentally unfair by delay in the availability of the transcript. The court noted that Stock could have, but did not, seek to amend its petition to the Board, and that Stock received the transcript "well in advance of the hearing before the Pollution Control Board." Stock & Company, LLC v. Illinois Pollution Control Board, Effingham County Board, Sutter Sanitation Services, and Landfill 33, Ltd., No.5-03-0099 (5th Dist. May 7, 2004) slip op. at 6.

The court declined to select a specific standard for reviewing the Board's decision on fundamental fairness ("*de novo*," "manifest weight," or "clearly erroneous"), instead finding that "even under the least deferential *de novo* standard of review, we affirm the decision of the Pollution Control Board." Slip op. at 5.

The court had little to say about the siting criteria, deferring instead to the Board's opinion and order. The court first stated that the "written opinion of the Pollution Control Board is lengthy and detailed and adequately sets forth all the evidence relied upon for its decision." Slip op. at 3. The court then concluded that the Board's decision affirming the County Board on the siting criteria was not against the manifest weight of the evidence, as a "conclusion opposite to that reached by the Pollution Control Board is not clearly evident, plain, or indisputable." *Id*.

Legislative Review

Summarized below are ten bills, each of which amend the Environmental Protection Act or affect other statutes, including the Open Meetings Act and the Illinois Procurement Code, relating to the Board's work.

Legislation Amending the Environmental Protection Act

Public Act 93-0669 (House Bill 3553) Effective March 19, 2004

Allows the Illinois Environmental Protection Agency to sell nitrogen oxide (NOx) allowances under specified circumstances. The bill also provides that funds generated by the sale of certain NOx allowances must be deposited into the NOx Trading System Fund and that funds generated by the sale of early reduction credits must be deposited into the Clean Air Act Permit Fund.

Public Act 93-0831 (House Bill 5823) Effective July 28, 2004

Provides that an injunction requested by the proper State's Attorney or the Attorney General in order to restrain violations of the Environmental Protection Act, rules or regulations adopted under the Act, a permit or the term or condition of a permit, or any order of the Board, may be prohibitory or mandatory. The bill further provides that the injunction may also be requested in order to require other actions that may be necessary to address these violations. The bill responds to a recent ruling of the Second District Appellate Court, People ex rel. Ryan v. Agpro and David J. Schulte, 345 Ill. App. 3d 1011, 805 N.E.2d 1007 (2004), which involves an agricultural pesticide and fertilizer company and its president. The trial court found that the defendants had caused soil contamination and water pollution, but because AgPro had not operated for years, the court reasoned that there was no longer any violation to restrain. The court further found that it did not have a legal basis to issue an injunction that required the defendants to perform remediation. In January, the Appellate Court affirmed the denial of the State's request for a mandatory injunction requiring a clean up. The bill allows courts to issue an injunction specifying that polluters remedy environmental contamination.

Public Act 93-0964 (Senate Bill 2551) Effective August 20, 2004

Prohibits the following: (i) beginning July 1, 2005, the purchase or acceptance, for use in a primary or secondary school classroom, of bulk elemental mercury, chemicals containing mercury compounds, or instructional equipment or materials containing mercury added during their manufacture; and (ii) beginning July 1, 2007, the sale, offer to sell, distribution, or offer to distribute a mercury switch or mercury relay individually or as a product component. The bill excludes specified products from these prohibitions. In addition, the bill allows a manufacturer of a mercury switch or mercury relay or certain other products containing mercury to apply to the Illinois Environmental Protection Agency (IEPA) by July 1, 2006, for a five-year exemption from these prohibitions; and it establishes a process for the application and renewal of the exemption. The bill designates mercury switches or mercury relays, and scientific instruments and instructional equipment containing mercury added during their manufacture as "universal waste" subject to the streamlined hazardous waste rules of the Illinois Administrative Code. *See* 35 IAC 733.101 *et seq*. The bill further provides that, within 60 days of the effective date of this Act, the IEPA must propose

rules and, within 180 days of receiving this proposal, the Board shall adopt rules reflecting this designation. It further provides that, if the United States Environmental Protection Agency adopts streamlined hazardous waste rules pertaining to the management of specified items containing mercury or otherwise exempts those items from regulation as hazardous waste, then the Pollution Control Board must adopt equivalent rules within 180 days.

Public Act 93-0998 (Senate Bill 2145) Effective August 23, 2004

Excludes from the definition of "pollution control facility" the portion of a site or facility, located within a unit of local government that has enacted local zoning requirements, that: (i) accepts, separates, and processes uncontaminated broken concrete with or without protruding metal bars; (ii) provided these materials are at the site no longer than one year, are not speculatively accumulated, and are returned to the economic mainstream in the form of raw materials or products. This exclusion from the definition of "pollution control facility" already applies to the portion of a site or facility in either Cook or DuPage County accepting exclusively general construction or demolition debris.

Legislation Amending Other Statutes

Public Act 93-0826 (House Bill 4567) Effective July 28, 2004

Amends the Illinois Procurement Code. The bill provides that no person or business found by a court or the Pollution Control Board to have committed a willful or knowing violation of the Environmental Protection Act shall do business with the State of Illinois or any state agency for five years after the date of the order finding the violation. Before the adoption of this bill, the procurement ban applied only to violations of Section 42 of the Act.

Public Act 93-0894 (House Bill 4057) Effective August 10, 2004

Amends the Commercial and Public Building Asbestos Abatement Act. The bill requires licensure for persons acting as consultants, air sampling professionals, project managers, and management planners. The bill exempts from licensure as a consultant an employee of a local education agency who is that local education agency's designated person and also exempts an employee of a State agency while engaged in his or her professional duties for that State agency.

Public Act 93-0913 (House Bill 5129) Effective August 12, 2004

Amends the Alternate Fuels Act. The bill provides that the Secretary of State, to the extent that the necessary information can be obtained from automobile manufacturers, shall compile a database of the flexible fuel vehicles in the State by zip code area. For the purposes of this requirement, a "flexible fuel vehicle" is defined as one that is capable of running on a fuel blended of 85% ethanol and 15% gasoline. The bill further provides that the database shall be completed and made available to the public in both print and electronic format by January 1, 2005.

Public Act 93-0936 (House Bill 4099) Effective August 13, 2004

Creates the Energy Efficient Commercial Building Act. The bill requires the Capital Development Board, in consultation with the Department of Commerce and Economic Opportunity (DCEO), to adopt specified requirements applying to the construction and renovation of commercial buildings. The bill also provides that the requirements take effect one year after their adoption by the Board, although it provides an exemption for residential and other specified buildings. The bill further provides that DCEO is to provide implementation materials and technical assistance concerning the Act's requirements. The bill also permits local governments to adopt an energy

efficiency code that is more stringent than the provisions of the Act.

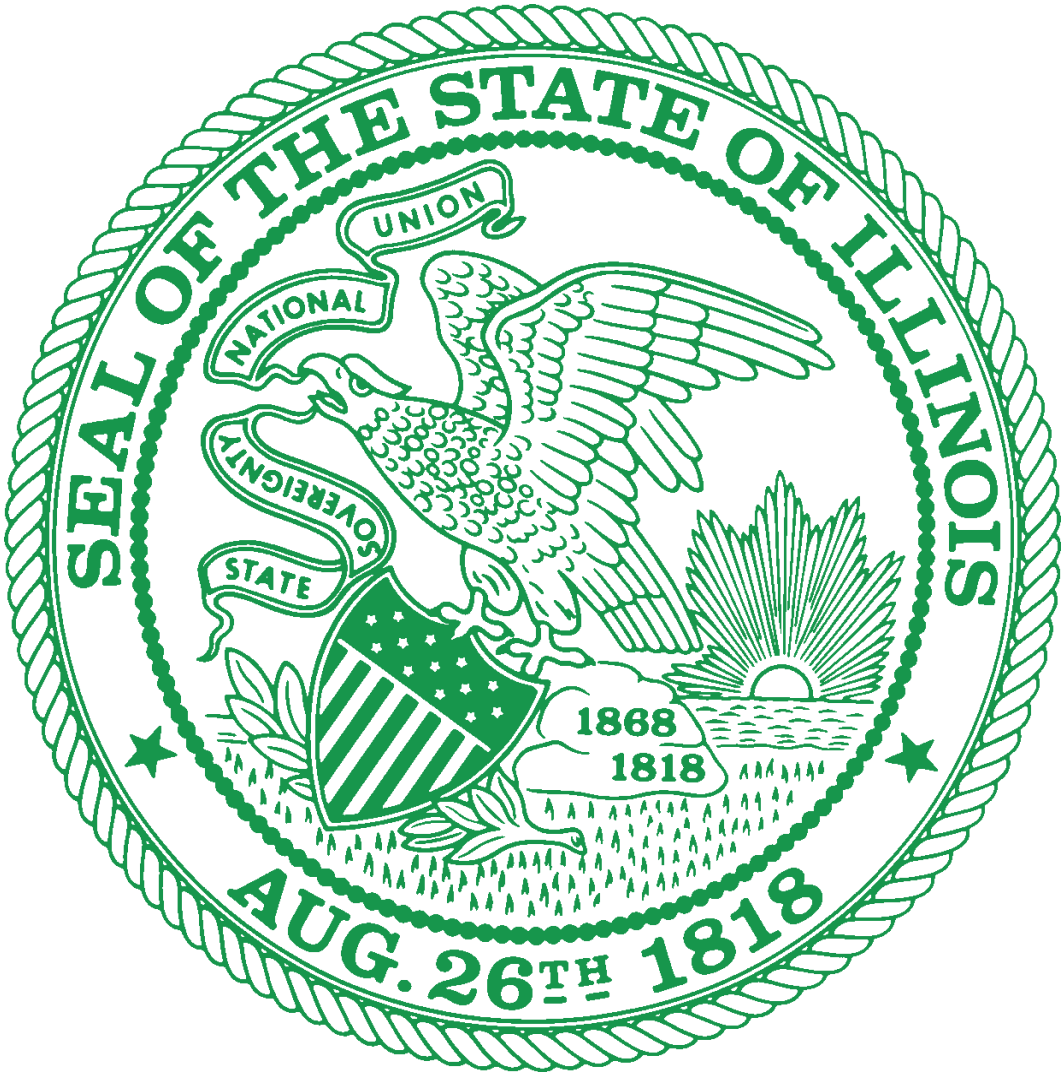
Public Act 93-0974 (House Bill 4247) Effective January 1, 2005

Amends the Open Meetings Act. The bill requires public bodies to keep written minutes of all meetings whether open or closed, while the Act previously only required written minutes of open meetings. The bill removes the requirement that the Board review verbatim recordings of closed meetings to determine whether the need for non-disclosure continues, but it maintains that requirement for written minutes. The bill also prohibits the inspection of the verbatim record of a closed meeting (including for discovery purposes) in a judicial proceeding, with the exception of a judicial proceeding to determine whether the Act has been violated. The bill also requires a court's examination of verbatim records in a civil proceeding to be conducted *in camera*. The bill also requires that the initial examination in a criminal proceeding must be *in camera*.

Public Act 93-1035 (Senate Bill 73) Effective September 10, 2004

Amends the Illinois Administrative Procedure Act (Act). It provides that, when the Joint Committee on Administrative Rules (JCAR) issues a prohibition against a proposed administrative rule or rule change, then the General Assembly may discontinue the prohibition by joint resolution. The Act now allows the General Assembly to continue the prohibition by resolution. In addition, the bill authorizes the General Assembly by joint resolution to discontinue the suspension of an emergency or peremptory rule. The Act now allows the General Assembly to continue a suspension by resolution. The bill further provides that any member of the General Assembly may introduce a joint resolution, while the Act now provides for introduction by JCAR. The bill also authorizes JCAR to vote to withdraw a statement of prohibition or suspension within 180 days after its issuance. The bill permits an agency to propose changes to a rule for which a statement of prohibition or suspension has been issued and provides that an agency proposing such changes is subject to the same requirements of a second notice period that apply to general rulemaking. The bill also allows an agency to file a new emergency rule if certain requirements are met.

A Publication of the Illinois Pollution Control Board



Printed on Recycled Paper with Soybean Ink by Contract and the Authority of the State of Illinois.
Order #336189, 400 copies at $3.23 per copy.
December 1, 2004