ILLINOIS

POLLUTION CONTROL BOARD

ANNUAL REPORT 2005

Mission Statement

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

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

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

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

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

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Chairman's Letter

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

The Pollution Control Board is proud to present its Annual Report for fiscal year 2005. In its various sections, this report provides detailed information about environmental rulemakings and contested cases brought before the Board between July 1, 2004 and June 30, 2005. During fiscal year 2005, the Board continued to handle a large volume of rulemaking procedures and contested cases while operating within the constraints posed by the State's continued budget difficulties.

Under the Environmental Protection Act, the Board is responsible for determining, defining, and implementing environmental control standards for the State of Illinois, and the Board adjudicates complaints that allege non-criminal violations of the Act. The Board also 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.

The composition of the five-member Board did not change during fiscal year 2005. Board Member Andrea S. Moore was confirmed by the Senate for a second term, and Members G. Tanner Girard and Nicholas J. Melas have been reappointed for a sixth and fourth term, respectively. Board Member Thomas E. Johnson and I continue our tenure.

Among its accomplishments during fiscal year 2005, the Board completed several significant rulemakings. The Board adopted amendments to its Emissions Reduction Market System (ERMS) rules. ERMS is a cap and trade program involving volatile organic material (VOM) emissions in the Chicago area. IEPA proposed this rulemaking, docketed as R 05-11, to maintain the program and its emissions reductions. The United States Environmental Protection Agency implemented a new eight-hour ozone national ambient air quality standard (NAAQS) effective June 15, 2005 and revoked the one-hour ozone NAAQS. IEPA contended that revocation would affect applicability thresholds for emission sources. Previously, sources with the potential to emit 25 tons of VOM per year were subject to the Clean Air Act Permit Program (CAAPP). Revocation of the one-hour ozone NAAQS, however, raised the applicability threshold to 100 tons or more of annual VOM emission. The IEPA asserted that Board adoption of the ERMS changes would prevent the loss of approximately 330 tons of VOM emissions reductions for each seasonal allotment period.

Also, the Board in docket R 05-8 adopted amended standards for the management of universal waste. Public Act 93-0964, signed into law by Governor Blagojevich on August 20, 2004, generated this rulemaking activity. P.A. 93-0964 added to the Environmental Protection Act language designating mercury switches, mercury relays, and scientific instruments and instructional equipment containing mercury added during their manufacture as universal waste subject to streamlined hazardous waste rules in the Board's existing regulations.

In docket R 04-24, the Board also adopted amendments to all ten parts of its procedural rules in order to make them consistent with the new State Officials and Employees Ethics Act. The proposal also reflected recent amendments to the Environmental Protection Act and the Administrative Procedure Act.

In addition to completing its rulemaking activity in these three dockets, the Board made substantial progress in many other dockets including R 04-21 to revise radium water quality standards; R 04-22, 23 to revise standards and procedures for reimbursement from the state petroleum Leaking Underground Storage Tank Fund; R 04-25 to revise dissolved oxygen water quality standards; R 04-26 to set new interim phosphorus effluent standards; and R 05-20 to amend procedures for air construction and operating permits.

The Board continued in fiscal year 2005 to expand its use of technology and to improve the number and usefulness of services on its Web site. On an efficient and cost-effective basis, this allows the Board to increase public knowledge of its work and to expand participation in its activities. Our Clerk's Office On-Line (COOL) continues to provide 24-hour electronic access to the Board's case files and docket information. At the beginning of calendar year 2005, the Board began to allow parties to file documents electronically with the Clerk in all categories of cases. You can obtain more information about that option through our Web site at www.ipcb.state.il.us.

Sincerely,

J. Philip Novak
Chairman

Polution 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.

Other responsibilities included the National Council of State Legislatures' task force on High Level Radioactive Waste Disposal. He currently serves as chairman 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 a 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 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.

Board Member Girard

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. 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 also 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. Johnson is currently on the Advisory Board for the Planet Earth Forum Planning Committee. He is a lifelong resident of Champaign County and lives in Urbana with his wife and two children.

Board Member Nicholas J. Melas was appointed to the Board in 1998 and reappointed in 2000, 2003 and 2005. Mr. Melas served as 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, 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 — the Order of St. Andrew. He has an MBA from the Graduate School of Business of The University of Chicago as well as a PhB and a BS in Chemistry also from The University of Chicago.

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

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 Board of Directors of Condell Medical Center and the University Center of Lake County. 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

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

Section 5(b) of the Environmental Protection Act (Act) (415 ILCS 5/5(b) (2004)) 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 Illinois Environmental Protection Agency (IEPA) is the entity that most often files rule proposals. The Board holds quasi-legislative public hearings on the proposals to gather information and comments to assist the Board in making rulemaking decisions. The Board also accepts written public comments.

Notice of a rule proposal and adoption are published in the *Illinois Register*, as required by the rulemaking provisions of the Illinois Administrative Procedure Act (IAPA) (5 ILCS 100/5-10 through 5-160 (2004)). The Board issues written opinions and orders, in which the Board reviews all of the testimony, evidence, and public comment in the rulemaking record, and explains the reasons for the Board's decision.

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

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 2005, arranged by docket number. During fiscal year 2005, under Section 27 of the Act, the Board adopted rules in three significant rulemakings of statewide applicability, and adopted one rulemaking of site-specific applicability. The Board also dismissed one rulemaking prior to hearing rather than suspending it as requested by the proponent, the Illinois Environmental Protection Agency. The Board also timely processed 16 identical-in-substance rulemaking dockets as required by Section 7.2 of the Act.

In its three completed Section 27 rulemakings in fiscal year 2005, the Board modified existing bodies of rules to take into account changes in recently enacted state legislation, as well as in federal regulations. The Board updated its procedural rules to accommodate various pieces of Illinois legislation including the State Officials and Employees Ethics Act. After USEPA proposed addition of mercury-containing devices to the list of "universal waste," the General Assembly required the Board to adopt such rules, which the Board did. In response to USEPA changes to the national ozone air quality standard, the Board amended the applicability portions of the program rules for the Emissions Reduction Market System.

RULES ADOPTED IN FISCAL YEAR 2005

Proposed Site-Specific Rulemaking Ameren Energy Generating Company Amending 35 Ill. Adm. Code 901, R04-11 (final rules adopted July 22, 2004)

The R04-11 site-specific rulemaking proposal was filed to deal with a common problem: change of land uses around an established noise source. The Ameren Energy Generating Company (Ameren) operates a facility in Elgin, Cook County. The facility consists of four simple cycle combustion turbines capable of generating up to 540 megawatts of electrical power for use during periods of peak electrical demand. Facilities of this type are commonly known as "peaker plants".

On July 22, 2004, the Board adopted the site-specific noise rule proposed by Ameren as 35 Ill. Adm. Code 901.122. Proposed Site Specific Rulemaking Ameren Energy Generating Company Amending 35 Ill. Adm. Code 901, R04-11 (July 22, 2004). The adopted amendments were published in the *Illinois Register* at 28 Ill. Reg. 11910 with a July 30, 2004 effective date.

The Ameren facility began operation in 2002. Ameren filed its October 28, 2003 rulemaking proposal to address changes in land use designations for property that is adjacent to its facility. In 2002, the land immediately to the west of the facility was vacant, and located within unincorporated Cook County. Cook County had zoned the property for Class C land uses: industrial, agricultural, mining and excavation. On June 3, 2003, the Village of Bartlett annexed and rezoned this land for Class A residential uses, at the request of Realen Homes, a residential development corporation. The rezoning caused stricter, quieter noise standards to apply to Ameren, standards it doubted it could consistently meet.

Ameren's site-specific noise proposal is not easily summarized. In short, Ameren requested permission to emit sound from three to eight decibels louder than the general rules allowed, varying from one octave band to another as well as receiving land class. The Board held a public hearing on December 17, 2003. The Board also received written public comments from the Office of the Attorney General (AGO), Ameren, the Village of Bartlett, Realen Homes, and the City of Elgin.

Ameren's comments addressed issues that the AGO raised at the hearing: (1) that the area surrounding the Elgin facility is predominately industrial in nature; (2) scheduling additional noise level tests to satisfy the AGO's criteria would be expensive and difficult to arrange; and (3) the facility is equipped with state of the art noise control equipment and to add additional equipment would not be economically reasonable or technologically feasible.

The AGO's comments argued that the Board should deny the site-specific rule sought by Ameren. The AGO gave as reasons for denial that: (1) the AGO questioned the reliability and accuracy of the technological and economic studies provided by Ameren; (2) the AGO stated that Ameren had not demonstrated that the Elgin facility was significantly different than other facilities, or that it could not be modified to meet the current noise regulations; (3) the AGO believed the noise measurements from the Elgin facility were not taken appropriately; and (4) the AGO feared that adopting a site-specific rule for this peaker plant might set a precedent for other peaker plants, leading them to petition the Board to be exempted from the noise regulations.

The Board found that Ameren had proved that, although its facility is in compliance with the Board's regulations for Class C land uses, Ameren would not be able to meet the Class A noise limitation applicable to residential properties at 35 Ill. Adm. Code 901.102. The Board found that Ameren had justified adoption of the requested site-specific noise levels to allow Ameren to continue the operation of its peaker plant while maintaining compliance with the Board's noise standards.

Additionally, the Board found that the facility is appropriately located in an industrial area, and that any future residents of the yet-to-be-developed residential area would be aware of the nature of the surrounding area. This is because noise easements in Ameren's favor would be recorded on the titles to adjoining property as ordered by the local circuit court, so that any noise impacts would be considered during the negotiations for the purchase price of adjoining homes.

Amendments to the Board's Procedural Rules to Accommodate New Statutory Provisions: 35 Ill. Adm. Code101-130, R04-24 (final rules adopted May 19, 2005)

Prior to fiscal year 2005, the Board had last thoroughly updated and modernized its procedural rules in 2000, with the revised rules effective on January 1, 2001. Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20 (December 21, 2000). During fiscal year 2005, the Board completed its first proceeding to update those "modern" rules to accommodate various pieces of new legislation. On May 19, 2005, the Board adopted a final opinion and order in Amendments to the Board's Procedural Rules to Accommodate New Statutory Provisions 35 Ill. Adm. Code 101-130, (R04-24). The adopted amendments were published in the *Illinois Register* at 29 Ill. Reg. 8743 with a June 8, 2005 effective date.

The Board opened Docket R04-24 on its own motion to update its procedural rules to reflect the several pieces of legislation discussed below:

1) The State Officials and Employees Ethics Act (5 ILCS 430 (2004)) (*created by* P.A. 93-615, eff. Nov. 19, 2003, *amended by* P.A. 93-617, eff. Dec. 9, 2003) required changes to the Board's procedural rules on *ex parte* communications. The Board amended the definition of "*ex parte* communication" in Section 101.202 to track the statutory language in the Ethics Act defining the term. The Board also amended Section 101.114 on *ex parte* communications to

reflect new statutory reporting requirements for the Board's ethics officer.

2) The Board made other changes required by Public Acts effective in 2002-2003 that amended the Environmental Protection Act:

Changes to the Act in P.A. 93-152 (effective July 10, 2003) and P.A. 92-574 (effective June 26, 2002) resulted from recommendations of the now-defunct Illinois Environmental Regulatory Review Commission (IERRC). Created in December 1999 by Executive Order 18, the IERRC was charged with reviewing and recommending improvements to the Act.

P.A. 93-152 (effective July 10, 2003) amended the Act in several significant ways: (1) having the Illinois Environmental Protection Agency (IEPA) rather than the Board issue provisional variances; (2) allowing the Board to adopt settlements in citizen enforcement actions without a public hearing; (3) updating incorporations by reference in Board rules through a new rulemaking procedure that does not require a public hearing or a request that the Department of Commerce and Economic Opportunity, formerly the Department of Commerce and Community Affairs, conduct an economic impact study on the proposed rules; (4) authorizing prevailing citizen complainants before the Board to go to circuit court to enforce a final Board order by injunction or other relief; and (5) clarifying that the administrative citation civil penalty amount of $1,500 (or $3,000 for a subsequent violation) is to be imposed for each violation of each provision of Section 21(p) of the Act (415 ILCS 5/21(p) (2004)).

P.A. 92-574 (effective June 26, 2002) resulted in a number of non-substantive changes to the Act. The Board adopted corresponding changes to its procedural rules.

P.A. 93-171 (effective July 10, 2003) amends the Act's provisions (Sections 52.3-1, 52.3-2, and 52.3-4) addressing Environmental Management Systems Agreements or "EMSAs." EMSAs are agreements between the IEPA and a "sponsor" designed to implement innovative environmental measures not otherwise allowed under the law. The P.A. 93-171 amendments specify that EMSAs may be executed with participants in the United States Environmental Protection Agency's (USEPA) "Federal Performance Track Program," which is the successor to USEPA's "Federal XL Program." USEPA operates the Federal Performance Track Program to "recognize and reward businesses and public facilities that demonstrate strong environmental performance beyond current regulatory requirements." 415 ILCS 52.3-1(a)(6) (2004). P.A. 93-171 states that the IEPA may terminate an EMSA if the sponsor ceases to participate in the Federal Performance Track Program. The Board amended its procedural rules at Section 106.704 to specify this additional ground for IEPA termination of EMSAs and the sponsors' right to appeal that termination to the Board.

P.A. 93-509 (effective August. 11, 2002) amends Section 5 of the Act. Among other things, this legislation reduced the number of Board members from seven to five and correspondingly reduced the number of Board members needed for a majority vote. Accordingly, the Board amended the definition of "Board decision" in the procedural rules to reflect that the favorable vote of at least three rather than four Board members is required for a Board decision.

3) An amendment to the Administrative Procedure Act, enacted as P.A. 92-330 (effective August 9, 2001), requires any rulemaking proposals published in the *Illinois Register* to describe any published study or research report used in developing the rule and where the public may obtain a copy. The Board's procedural rules now reflect this requirement.

Mercury Wastes Under PA 93-0964: Amendments to Standards for Universal Waste Management (35 Ill. Adm. Code Parts 703, 720, 721, 724, 725, 728, and 733), R05-8 (final rules adopted Apr. 7, 2005)

In response to the General Assembly's mandate in Public Act 93-964 (effective Aug. 20, 2004), the Board amended its existing "universal waste" rules to include certain mercury-containing devices. Standards for Universal Waste Management (35 Ill. Adm. Code Parts 703, 720, 721, 724, 725, 728, and 733), R05-08 (Apr. 7, 2005). The adopted amendments were published in the *Illinois Register* at 29 Ill. Reg. 5966 with an April 13, 2005 effective date.

To understand the significance of this rulemaking, some background is necessary. Under the Resource Conservation and Recovery Act (RCRA), hazardous waste is regulated by a vast body of complex "cradle-

to-grave" regulations. On May 11, 1995, USEPA adopted streamlined regulations for certain widely-generated wastes, known as the "universal waste" rules. *See* 40 C.F.R. 273; *see* also 60 Fed. Reg. 25493. Under those rules, management of certain wastes was exempt from regulation as hazardous waste if managed within specific limitations. The purpose of the universal waste rule was to reduce the amount of hazardous waste in the municipal solid waste stream, to encourage recycling and proper disposal of common hazardous wastes, and to reduce the regulatory burden on waste generators. USEPA's rule applied to batteries, agricultural pesticides, and mercury containing thermostats, but did not include mercury-containing lamps.

The Board adopted the universal waste rule in 1996 as an identical-in-substance rule under Section 7.2 of the Act, codifying it as 35 Ill. Adm. Code 733. *See* RCRA Subtitle C, USEPA Regulations (Jan. 1, 1995 through June 30, 1995, July 7, 1995, September 29, 1995, Nov. 13, 1995 and June 6, 1996), R95-20 (June 20, 1996).

The General Assembly determined in 1997 in Public Act 90-502 that it would be beneficial for Illinois to have the Board include in the universal waste category high intensity discharge lamps and fluorescent lamps. The IEPA proposed such rules, and the Board adopted them. Mercury Wastes Under PA 93-0964: Amendments to Standards for Universal Waste Management (35 Ill. Adm. Code Parts 703, 720, 721, 724, 725, 728, and 733), R98-12 (Apr. 2, 1998)

In fiscal year 2005, Docket R05-8 was opened in response to Public Act 93-964, which became effective on August 20, 2004. Among other things, Public Act 93-964 added a new Section 22.23 to the Act. The new section required the IEPA to propose rules that formally designate as "universal waste" mercury switches, mercury relays, and scientific instruments and instructional equipment containing mercury added during their manufacture. The October 19, 2004 IEPA proposal mirrored a USEPA proposal published at 67 Fed. Reg. 40507 (June 12, 2002). The USEPA proposed to amend the federal universal waste regulations under the Resource Conservation and Recovery Act to include mercury-containing devices as universal waste. The General Assembly required the Board to adopt the rules within 180 days after the receipt of the IEPA proposal, *i.e.* on or before April 15, 2005. The Board met that deadline with its adoption of the amendments on April 7, 2005.

Bacteria (E-coli) Water Quality Standard for Lake Michigan and Mississippi River, Proposed Amendments to 35 Ill. Adm. Code 302 and 303, R05-10 (proposal dismissed without hearing Apr. 21, 2005)

During FY 05, the Board dismissed an Illinois Environmental Protection Agency (IEPA) proposal without hearing. Since the proposal was based on a USEPA regulatory action, the Board decided dismissal was more appropriate rather than to indefinitely stay the proceeding pending the outcome of additional USEPA rulemaking to undo the action on which the proposal was based.

On April 21, 2005, the Board dismissed the November 8, 2004 proposal filed by the IEPA in Bacteria (E-coli) Water Quality Standard for Lake Michigan and the Mississippi River, Proposed Amendments to 35 Ill. Adm. Code 302 (R05-10). The proposal sought to establish *Escherichia coli* (E.coli) bacteria water quality standards for Lake Michigan beaches and the Mississippi River. The proposal was similar in many respects to a USEPA water quality standard. The federal standard is applicable to Illinois bathing beaches in the absence of an Illinois standard meeting the requirements of section 303(i) of the federal Clean Water Act as amended by the Beaches Assessment and Coastal Health Act of 2000. *See* 69 *Federal Register* 67218 (Nov. 16, 2004), adopting as a final rule 40 C.F.R. 131.141, effective December 16, 2004.

Prior to any hearing, on March 29, 2005, the IEPA moved to suspend this rulemaking. In its motion, the IEPA stated that USEPA was planning to adopt a new bacteria criterion in October 2005. The criterion that the IEPA expects USEPA to adopt would use an indicator organism other than the fecal coliform indicator in current Board rules or the E-coli indicator proposed in the R05-10 rulemaking. Therefore, the IEPA asked that the Board suspend further proceedings in the rulemaking until USEPA has completed its bacteria standards rule change.

The Board agreed that continuing to hearing with the IEPA proposal would not be an economical use of time or administrative resources. However, instead of holding this docket open, the Board stated that dismissal was the preferable option. The Board order stated that "the Board does not favor indefinite stays of regulatory proceedings before it, particularly those involving water quality issues." The Board found that it would be preferable to close the R05-10 docket, and provide members of the regulated community and the public with a definite conclusion to the R05-10 rulemaking. The Board order concluded by giving the IEPA leave to re-file a proposal once USEPA had concluded its rulemaking.

Amendments to Emissions Reduction Market System, 35 Ill. Adm. Code 205 and 211, R05-11 (final rules adopted June 2, 2005)

Due to a change by USEPA in the federal ozone standards, the Board adopted an IEPA proposal to amend the applicability threshold of the Board's air regulations for the Emissions Reduction Market System (ERMS). The ERMS system is a cap and trade program that involves volatile organic material (VOM) emissions in the Chicago area. In a nutshell, the adopted amendments are designed to ensure that ERMS remains in place in its original, 1997 form so the required VOM emissions reductions in the Chicago area are maintained. Amendments to Emissions Reduction Market System, 35 Ill. Adm. Code 205 and 211, R05-11 (June 2, 2005). The adopted amendments were published at 29 Ill. Reg. 8848 with a June 13, 2005 effective date.

The reasons for this rulemaking are explained in more detail below. The Board first adopted the ERMS program rules in 1997. Emissions Reduction Market System Adoption of 35 Ill. Adm. Code 205, R97-13 (Nov. 20, 1997). ERMS was designed to help Illinois meet the goals of the federal Clean Air Act Permit Program (CAAPP) by reducing VOM emission in the Chicago non-attainment area below the levels required by reasonably available control technology and other emission standards. VOM is a precursor of ozone.

ERMS revisions were necessary due to USEPA regulatory action. On April 30, 2004, USEPA promulgated the first phase of its Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard (NAAQS). *See* 69 Fed. Reg. 23951. Designations and classifications for this standard were effective on June 15, 2004; the Chicago area is a Moderate Non-attainment Area for the 8-Hour Ozone NAAQS. *See* 69 Fed. Reg. 23858, 23898. Chicago was also a Moderate Non-attainment Area for the 1-Hour standard. But, on June 15, 2005, USEPA revoked the 1-Hour Ozone NAAQS, including the 1-hour ozone NAAQS' associated designations and classifications. *See* 69 Fed. Reg. 23951, 23969.

USEPA's revocation of the 1-hour NAAQS affected ERMS applicability thresholds in Illinois. Prior to this federal action, sources subject to the CAAPP were those with potential to emit 25 tons of VOM per year. Revocation of the 1-hour ozone NAAQS raised the applicability threshold to 100 tons per year. The change in the CAAPP threshold would have resulted in fewer facilities being subject to the ERMS rules.

The R05-11 ERMS amendments maintained the applicability threshold at 25 tons of VOM. This action avoided Illinois' loss of approximately 330 tons of VOM emissions reductions for each seasonal allotment period.

Semi-Annual Identical-In-Substance Update Dockets

Section 7.2 and various other sections of the Illinois Environmental Protection Act (Act) require the Board to adopt regulations identical in substance to federal regulations or amendments thereto promulgated by the USEPA Administrator in various federal program areas. *See* 415 ILCS 5/7.2 (2004). These program areas include: drinking water; underground injection control; hazardous and non-hazardous waste; underground storage tanks; wastewater pretreatment; and the definition of volatile organic material.

Identical-in-substance 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.

RULES PENDING AT END OF FISCAL YEAR 2005

During fiscal year 2005, the Board took various actions in the 12 other regulatory dockets still open at year's end. The Board typically holds hearings on proposals filed with it, prior to adoption of the "first notice" orders required under the Illinois Administrative Procedure Act (IAPA). If the Board substantially changes rule text as a result of public hearings and comment, the Board may adopt a "second first notice" order, hold additional hearings and receive additional comment.

The list of dockets below includes brief notations in parentheses of significant Board actions during the past year. For reasons of space, the substance of these dockets carried over from FY05 into FY06 is not summarized below. Additional information is available from the Board's Web site at www.ipcb.state.il.us.

R03-9 Proposed New and Updated Rules for Measurement and Numerical Sound Emissions Standards Amendments to 35 Ill. Adm. Code 901 and 910 (second First Notice Order Mar. 17, 2005)

R04-8 Amendments to the Board's Procedural Rules to Accommodate Electronic Filing: 35 Ill. Adm. Code 101-130 (pre-first notice proposal in development following FY 05 completion of electronic filing pilot project)

R04-9 Amendments to the Board's Administrative Rules: 2 Ill. Adm. Code 2175 (pre-first notice proposal in development following FY05 completion of electronic filing pilot project—*see* R04-8)

R04-12 Technical Correction to Formulas in 35 Ill. Adm. Code 214 "Sulfur Limitations" (Consolidated: R04-12, R04-20) (First Notice Order Apr. 21, 2005)

R04-20 Clean-Up Part III, Amendments to 35 Ill. Adm. Code Part 211, 218, and 219 (Consolidated: R04-12, R04-20) (First Notice Order Apr. 21, 2005)

R04-21 Revisions to Radium Water Quality Standards: Proposed New 35 Ill. Adm. Code 302.307 and Amendments to 35 Ill. Adm. Code 302.207 and 302.525 (First Notice Order Apr. 7, 2005)

R04-22 Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732) (Consolidated: R04-22 and R04-23) (First Notice Order Feb. 17, 2005)

R04-23 Regulation of Petroleum Leaking Underground Storage Tanks (Proposed new 35 Ill. Adm. Code 734) (Consolidated: R04-22 and R04-23) (First Notice Order February 17, 2005)

R04-25 Proposed Amendments to Dissolved Oxygen Standard 35 Ill. Adm. Code 302.206 (pre-first second notice hearing August 12, 2004; third hearing stayed at proponent's request until Aug. 2005)

R04-26 Interim Phosphorus Effluent Standard, Proposed 35 Ill. Adm. Code 304.123(g-k) (First Notice Order Apr. 7, 2005)

R05-19 Proposed Amendments to Exemptions From State Permitting Requirements (35 Ill. Adm. Code 201.146) (pre-first notice hearings Apr. 12 and June 14, 2005)

R05-20 Setback Zone for City of Marquette Heights Community Water Supply, New 35 Ill. Adm. Code 618 (pre-first notice hearings Mar. 1 and Apr. 5, 2005)

The Board expects to adopt rules in many of these dockets during fiscal year 2006.

Judicial Review

Introduction

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

Pursuant to Section 41 of the Environmental Protection Act (Act) (415 ILCS 5/41 (2004)), 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 Section 41(b) of the Act and does not allow the court to substitute its own judgment in place of that of the Board. The standard of review for the Board's quasi-legislative actions is whether the Board's decision is arbitrary or capricious. The Board's quasi-legislative decisions include rulemaking, imposing conditions in variances, and setting penalties. 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: findings of fact are reviewed using a manifest weight of the evidence standard; questions of law are decided by the courts de novo; and mixed questions of law and fact are reviewed using the "clearly erroneous" standard (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 2005, the appellate courts were in the process of hearing appeals of seven Board decisions; two enforcement cases, one permit appeal, and four involved review of local government decisions on siting for pollution control facilities.

In fiscal year 2005, the Illinois appellate courts entered final orders in ten cases involving appeals from Board opinions and orders. The Board was affirmed in five cases. In three cases, the appellate court dismissed defective appeals for lack of jurisdiction. In two others, the appellate court dismissed cases as a premature attempt to appeal non-final orders. As a result, the Board's decisions in the five dismissed cases remain undisturbed. The following summaries of the ten written appellate decisions in Board cases for fiscal year 2005 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 (2004)), respectively, provide for "standard" enforcement actions and for the more limited administrative citations. The standard enforcement action is initiated by filing a formal complaint by a citizen or by the Illinois Attorney General's Office. A public hearing is held at which 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)(2004). 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 (2004). An administrative citation is initiated by the Illinois Environmental Protection Agency (IEPA) 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 (2004).

In fiscal year 2005, the appellate court affirmed two Board decisions on the merits. In the earliest, the court affirmed a People's land enforcement case, affirming the Board's order that respondents (1) pay the People $86,652.50 in reimbursement for remediation costs; (2) pay a total civil penalty of $40,000; and (3) complete remediation of the site. In the later case, the court affirmed the Board's finding of violation in a citizens' noise case and the noise abatement remedy the Board ordered. The courts dismissed appeals of decisions in two People's enforcement actions, one for failure to name the Board, along with the People, as a party, and one as a premature appeal of a non-final order.

State Oil Co. *et al.* v. People of the State of Illinois *et al.*; Abraham, *et al.* v. PCB *et al.*, 352 Ill. App. 3d 813, 816 N.E. 2d 845 (2nd Dist. 2004) (affirming Board order in PCB 97-103)

In a partially-published order dated September 30, 2004, the Second District Appellate Court affirmed the Board in the leaking underground storage tank enforcement case State Oil Co. *et al.* v. People of the State of Illinois *et al.*; Abraham *et al.* v. PCB, *et al.*, Nos. 2-03-0463 and 2-03-0493 (cons.) (Aug. 18, 2004) (hereinafter State Oil (2nd Dist.)). The Board had ordered respondents to remediate the site, to reimburse the State for substantial cleanup costs, and pay civil penalties in its case entitled People of the State of Illinois v. State Oil Company, William Anest f/d/b/a S & S Petroleum Products, Peter Anest f/d/b/a S & S Petroleum Products, Charles Abraham, Josephine Abraham, and Millstream Service, Inc.; Charles Abraham, Josephine Abraham, and Millstream Service, Inc. v. State Oil Company, William Anest f/d/b/a S & S Petroleum Products, Peter Anest f/d/b/a S & S Petroleum Products, PCB 97-103 (Mar. 20, 2003) (hereinafter People v. State Oil).

The court authorized publication of only a portion of its 28-page decision. State Oil Co. *et al.* v. People of the State of Illinois *et al.*; Abraham *et al.* v. PCB *et al.,* 352 Ill. App. 3d 813, 816 N.E.2d 845 (2nd Dist. 2004). The portion of the opinion which can be cited as precedent affirms an important Board holding regarding the applicability of proportionate share liability under Title XVII of the Act, 415 ILCS 5/58 *et seq.* *See* State Oil (2nd Dist.) (slip op. at 1-7, 28). The balance of the decision (pages 8-27), which affirms the remediation order and penalties assessed against various respondents, is "nonpublishable" under Supreme Court Rule 23 (155 Ill.2d R. 23) and therefore is not precedential. *Id.*, slip op. at 8-27.

The Board's Decision

People v. State Oil was an enforcement case brought on behalf of the People by the Attorney General's Office. The case concerned gasoline contamination from leaking underground storage tanks (USTs) at a service station in McHenry County. The People filed the complaint in 1996 against Anest/State Oil (the former service station owner/operator and seller) and Abraham/Millstream Service (the current service station owner/operator and purchaser). Abraham/Millstream Service in turn filed a cross-complaint against Anest/State Oil. In 1983 or 1984, gasoline began leaking from the service station into Boone Creek, which bordered the station. Anest/State Oil reported the release to the State. The service station was sold in 1985 to Abraham/Millstream Service. Gasoline was leaking into the creek in 1986, 1987, and 1989. The IEPA performed an emergency cleanup in 1989-1991. But, no mitigation or remediation work had been completed at the site since 1996, and no respondent ever received a No Further Remediation letter from the IEPA. People v. State Oil, slip op. at. 5-7.

The Board issued an interim opinion and order on April 4, 2002, ruling on motions for summary judgment in the People's case, and finding that all respondents had violated Section 12(a) of the Act. The Board then held hearing on the issues of cost recovery and the Abrahams' cross-complaint against the Anests, issuing a final opinion and order on March 20, 2003, that

> (a) found the respondents jointly and severally liable to reimburse the State for $86,652.50 in remediation costs incurred by the IEPA. (The Board disallowed some $12,000 in costs for which the Board found the supporting IEPA vouchers unreliable.) People v. State Oil, slip op. at. 5-7;
>
> (b) assessed a total civil penalty of $40,000 ($20,000 against the Abrahams and Millstream Service; $20,000 against the Anests and State Oil People v. State Oil, slip op. at. 14-20; and
>
> (c) ordered the respondents to perform any additional necessary clean up of the site and to obtain a No Further Remediation Letter from the IEPA. The Board also found the respondents jointly and severally liable for any future remediation. People v. State Oil, slip op. at 20-26.

The Board did not, however, find that the People were entitled to attorney fees and costs concerning their complaint against the Abrahams. The Board concluded that there was insufficient evidence to support a finding that the Abrahams' violation was "willful, knowing, or repeated" within the meaning of Section 42(f) of the Act. 415 ILCS 5/42(f)(2004). People v. State Oil, slip op. at 20-21.

In its last order in the case, the Board denied respondents' motion to stay the March 20, 2003 order pending appeal, in the sound exercise of its discretion. The Board also denied the People's motion to modify the order, finding that the filing of the appeal had ended the Board's jurisdiction in the case. People v. State Oil, slip op. at 1-2 (May 15, 2003).

The Second District's Decision

Published Decision on Proportionate Share Liability. The court agreed with the Board that the respondents were jointly and severally liable and therefore that proportionate share liability did not

apply. In certain situations, the proportionate share liability provision of the Act limits a respondent's cleanup liability to what the respondent "proximately caused," *i.e.*, to its "proportionate share." *See* 415 ILCS 5/58.9 (a)(1) (2004).

Section 58.1(a)(2) of the Act is the applicability provision of the Act's Title XVII "Site Remediation Program" and excludes sites subject to the UST laws, like the site at issue. Title XVII includes the proportionate share liability provision of Section 58.9(a)(1). The Board held, and the court agreed, that proportionate share liability did not apply in this case because Section 58.1(a)(2) limits the applicability of all of Title XVII, including the proportionate share liability provision. As the court stated: "Put simply, one must enter through a door before one can throw something out the window. In other words, Millstream is not entitled to invoke the provisions of Title XVII unless Title XVII is applicable to it in the first place." State Oil (2nd Dist.), slip op. at 7.

Unpublished Decision on State Cleanup Costs Issue. The court upheld the Board's decision that the IEPA's vouchers reflecting cleanup costs incurred were relevant and within the business-record exception to the hearsay rule. Next, the court addressed Millstream's challenge to the Board's refusal to give the State the exact amount of reimbursement requested. The court affirmed the Board's decision to award the State approximately $86,000 of the State's requested $98,000 in remediation costs, stating that "one of the reasons administrative agencies exist is the special expertise they possess in their given field [and] to the extent Millstream's argument can be read as attacking the Board's use of that expertise, it is ill taken." State Oil (2nd Dist.), slip op. at 11. The court found that the Board's award of cleanup costs to the State was not contrary to the manifest weight of the evidence: "evidence in the record exists that the State incurred the costs for which it seeks reimbursement. As such, we cannot disturb the Board's judgment on this point." State Oil (2nd Dist.), slip op. at 19.

Unpublished Decision on Leaking UST Liability Issue. The court provided two interesting interpretations of an important provision of Title XVI on USTs.

> Section 57.12(a) of the Act provides that the owner or operator, or both, of an underground storage tank shall be liable for all costs of investigation, preventive action, corrective action and enforcement action incurred by the State of Illinois resulting from an underground storage tank.

Millstream argued that the State introduced no evidence that its cleanup expenses were "reasonable or necessary." Looking at the plain language of Section 57.12(a), the court refused to place the burden of proving reasonableness or necessity of its costs on the State, but cautioned:

> This is not to say, however, that the State is free to run up outrageous expenses. While we read section 57.12(a) as excluding reasonableness and necessity from the elements the State must prove, *** the failure to mitigate damages remains an affirmative defense; however, the burden of proving the failure to mitigate lies with the respondent. State Oil (2nd Dist.), slip op. at 12.

Importantly, the court also affirmed the Board's reading of Section 57.12(a) that the provision applied not only to the current UST owner or operator, but also a former owner or operator:

> [A] statute must not be construed so that it produces an absurd result . . . . Allowing an owner to escape liability by simply selling a property would, in our estimation, be absurd . . .. In short, State Oil was the owner when the problem began. That the problem continued beyond its ownership of the property does not absolve it from responsibility. State Oil (2nd Dist.), slip op. at 18.

After reviewing several provisions of the Act, the court broadly concluded that the Act properly applied retroactively, since "it is clear that the legislature intended the Act to address ongoing problems, which, by definition existed at the time that the Act was enacted." State Oil (2nd Dist.), slip op. at 19.

Unpublished Decision on Penalty Issue. Finally, the court upheld the Board's penalty determinations as neither arbitrary, nor capricious, nor unreasonable, noting that the amount was "relatively modest" considering the statutory maximum penalties that are allowed. The court focused on the aggravating factors of gasoline actually leaking into the creek for years and the lack of diligence in remediating the problem. State Oil (2nd Dist.), slip op. at 14-15, 20, 22, 25-27.

Roti *et al.* v. LTD Commodities and Illinois Pollution Control Board *et al.*, 355 Ill. App. 3d 1039, 823 N.E.2d 636 (2nd Dist. 2005)(affirming Board order in PCB 99-19)

In a February 9, 2005 order, the Second District Appellate Court granted the motion of the Board for publication of the Court's December 21, 2004 order affirming the Board's decision in the appeal of a citizen noise pollution action Anthony & Karen Roti, Paul Rosenstrock, and Leslie Weber v. LTD Commodities and PCB, No. 2-04-0199 (Dec. 21, 2004). The court accordingly withdrew its Dececember 21, 2004 final unpublished order under Supreme Court Rule 23 (155 Ill. 2d R. 23), and filed an opinion in its stead, which can serve as helpful precedent in resolving future noise cases. Roti *et al.* v. LTD Commodities and PCB *et al.*, 355 Ill. App. 3d 1039, 823 N.E.2d 636 (2nd Dist. 2005).

In brief, the Board's opinion and order first found that the trucking operation emitted noise in violation of the nuisance noise provisions of the Act and Board regulations (415 ILCS 5/24 (2004) and 35 Ill. Adm. Code 900.102). After receiving input from the parties concerning the appropriate remedy, the Board then issued a final order assessing a $15,000 civil penalty and directing abatement of the noise. Anthony and Karen Roti, Paul Rosenstrock, and Leslie Weber v. LTD Commodities, PCB 99-19 (interim order Feb. 15, 2001; final order Feb. 15, 2004). Notably, the court's decision specifically affirmed not only the $15,000 penalty, but also the remainder of the Board's remedy that gave appellant LTD Commodities (LTD) the choice to either shut down its nighttime operations or build a noise wall.

The Board's Decision

In 1999, citizens filed a complaint against LTD alleging numeric and nuisance noise violations from LTD's trucking facility in Bannockburn, Lake County. LTD is a mail order catalog company that began operation in 1986 and expanded its operations in 1989 and in 1995. The complainants are homeowners who bought their homes in Lake Forest in 1987, 1988 and 1990. LTD and the complainants share a common property line, the boundary line between Bannockburn and Lake Forest. At hearing, complainants testified that LTD's noise began to bother them beginning, variously, in 1994 and 1996.

In its February 15, 2001 interim decision, the Board found that noise from LTD had caused an unreasonable interference with the complainant's use and enjoyment of their property in violation of the nuisance noise prohibition of Section 24 of the Act and Section 900.102 of the Board's noise regulations. The Board found no violation of its numeric noise limit rule, because noise measurements had not been taken properly.

The parties and their noise consultants discussed noise remedies at hearing on October 15-16, and December 9, 2002, and submitted their last filings in May 2003. In a July 24, 2003 interim order, the Board imposed a $15,000 civil penalty and ordered LTD to perform specific abatement measures. In response to an LTD motion for reconsideration of the remedies portion of that order, the Board issued a supplemental opinion and order on February 5, 2004. The Board again assessed the $15,000 penalty, and ordered LTD to either (a) shut down its nighttime operations and disconnect the backup beeper on its yard tractor or (b) construct a noise wall.

The Second District's Decision

The court denied LTD's request to "supplement the record" with evidence concerning the recent sale of one of the complainant's homes. The court found the information "not pertinent to the disposition of the issues on appeal." Roti, 823 N.E.2d at 643. As to the substance of the appeal, LTD made five contentions, each of which the court rejected. First, LTD argued that Section 24 of the Act and Section 900.102 of the Board's regulations do not provide an independent cause of action. The court disagreed, noting that "Illinois courts have consistently interpreted these provisions as allowing private complainants to initiate noise pollution actions before the Board." *Id.*, 823 N.E.2d at 644. The court cited the long-standing court precedent of Illinois Coal Operators Ass'n v. PCB, 59 Ill. 2d 305 (1974) Discovery South Group, Ltd. v. PCB, 275 Ill. App. 3d 547 (1995), and Ferndale Heights Utilities Co. v. PCB, 44 Ill. App. 3d 962 (1976).

Second, LTD contended that the Board erred in finding that LTD violated the nuisance noise prohibition noting the "principal difficulty in determining whether noise emissions constitute a nuisance lies in defining the level at which interference becomes unreasonable." Roti, 823 N.E.2d at 645. The court discussed the Board's findings on each of the factors under Section 33(c) of the Act. While the court agreed that LTD has social and economic value to the community as an employer and taxpayer, the court concurred with the Board's finding that "the remaining factors weigh against LTD." *Id.*, 823 N.E.2d at 646. As to the character and degreed of injury, the court noted that the noise was "substantial and frequent." *Id.* As to the suitability of LTD's operation for the location, the court remarked:

> Although LTD seemingly had priority of location, LTD greatly increased its trucking operation over the years. When [complainants] moved into their homes, LTD's warehouse was 100,000 square feet with eight truck docks. By 1995, LTD had expanded its warehouse to 400,000 square feet and 26 truck docks. Thus, while LTD's warehouse was once suitable to its location, its expansion and increase in business caused it to become unsuitable." *Id.*, 823 N.E.2d at 646-47.

Moving on to the practicability and reasonableness of reducing the noise, the court agreed that this factor weighed against LTD. Finding reasonable several abatement alternatives available to LTD, the court mentioned that the Board had noted that the hiring of one or more employees as "dock pilots" would have eliminated the need for back-up beepers and allowed for supervision of noise reduction by other employees.

Finally, concerning any subsequent compliance, the court found that "although close, the final factor weighs against LTD," although it did take several abatement steps. But, the court remarked "the evidence reveals that noise problems were ongoing at the time of the hearing, primarily due to LTD's refusal to disconnect the back-up beeper on the yard tractor". *Id.*, 823 N.E.2d at 647. In summary, the court held that evidence in the record supported the Board's determination and so concluded: ". . . we cannot find the Board's determination that LTD was a noise nuisance to be against the manifest weight of the evidence." *Id.*

The court then rejected LTD's challenges to the remedies ordered by the Board, both as to the specific abatement measures and the amount of the penalty. The Board had ordered either that LTD make several operational changes (no nighttime operations, disconnect back-up beepers) or erection of a noise wall. Noting that "Section 33 of the Act vests the Board with wide discretion in fashioning a remedy," the court concluded, "the remedies ordered by the Board were not unreasonable or arbitrary." The court found the operational changes ordered were "practical" and "reasonable," and not contrary to federal law. *Id.*, 823 N.E.2d at 647-48. Moreover, the Board had provided LTD with a "viable alternative" to the operational changes, when it gave the noise wall option. *Id.*, 823 N.E.2d at 648.

The court gave short shrift to LTD's arguments that the noise wall option was not economically feasible or consistent with Bannockburn's zoning code, observing that the Board did not require construction of the wall. Similarly, the court found that LTD was given notice and ample opportunity to present evidence concerning this option during the Board's remedy hearing.

Finally, as to penalty, the court cited to Section 42 (h) of the Act. The court determined that "[b]ecause the Board considered the appropriate factors in assessing the fine, we do not believe that its determination was unreasonable." *Id.*, 823 N.E.2d at 649.

People v. ESG Watts, Inc., No. 3-04-0341 (3rd Dist. Sept. 13, 2004) (unpublished Rule 23 order dismissing appeal of Board order in PCB 01-167)

In a September 13, 2004 final order, the Third District Appellate Court dismissed, for lack of jurisdiction, an appeal filed by ESG Watts, Inc. (ESG Watts). ESG Watts captioned the appeal improperly as People v. ESG Watts, Inc., No. 3-04-0341 (Sept. 13, 2004), failing to name the Board as a party respondent. The Board argued that the appellant's failure to name all necessary parties of record pursuant to Supreme Court Rule 335 was a fatal error. The Court agreed, dismissing the appeal.

Illinois Supreme Court Rules and the Administrative Review Law (735 ILCS 5/3-113 (2004) require that petitions for review name all parties from the underlying proceeding and the administrative agency that rendered the decision being appealed. In the motion to dismiss ESG Watts' appeal, among other precedent, the Board relied on the Illinois Supreme Court's 2000 decision in ESG Watts Inc. v. PCB, 191 Ill. 2d 26, 727 N.E.2d 1022 (2000). In that appeal of a Board decision, the Illinois Supreme Court dismissed the appeal because ESG Watts failed to name the People, the complainant in the action before the Board. In so ruling, the Court applied its earlier precedent McGaughy v. Illinois Human Rights Commission, 165 Ill. 2d 1, 649 N.E.2d 404 (1995).

The dismissal of ESG Watts' appeal leaves undisturbed the Board's April 1, 2004 decision in which the Board found that ESG Watts committed numerous violations at its Taylor Ridge landfill in Rock Island County. These included: (1) failure to initiate and complete landfill closure in violation of permits and a prior Board order (People v. ESG Watts, Inc., PCB 96-107 (Feb. 5, 1998)); (2) odor violations as a result of emission of landfill gas and other contaminants; (3) water pollution by allowing stormwater runoff and other contaminants to flow into waters of the State; (4) deposition of over 34,000 cubic yards of waste in areas of the landfill exceeding the maximum permitted height; and (5) failure to submit quarterly groundwater reports for five quarters.

The Board imposed a $1,000,000 civil penalty and required ESG Watts to pay the People's attorney fees and expert witness costs totaling $7,140.

Skokie Valley Asphalt *et al.* v. PCB *et al.*, No. 2-04-0977 (2nd Dist. Nov. 18, 2004) (unpublished Rule 23 order dismissing appeal of Board order in PCB 96-98)

In a November 18, 2004 final order, the Second District Appellate Court dismissed, for lack of jurisdiction, the appeal captioned Skokie Valley Asphalt *et al.* v. PCB *et al.*, No. 2-04-0977 (Nov. 18, 2004). The Board and the People of the State of Illinois had moved for dismissal, arguing that the appeal was premature. The Court agreed, dismissing the appeal.

The case at issue here is People of the State of Illinois v. Skokie Valley Asphalt, Inc., Edwin L. Frederick, Jr. and Richard J. Frederick, PCB 96-98 (Sept. 2, 2004). On November 3, 1995, the People filed a complaint against Skokie Valley Asphalt Co., Inc. (Skokie Valley), concerning a facility at Grayslake, Lake County. The complaint alleged violations dating from May 1986 to March 1991. In December 1997, the People filed a first amended complaint that added an additional count against Skokie Valley. On July 26, 2002, the complainant filed a second amended complaint adding the Fredericks as respondents individually and in their capacities as owners and corporate officers of Skokie Valley.

In a September 2, 2004 opinion and order, the Board found that, as alleged, each of the respondents committed water pollution in violation of Sections 12 (a) and (f) of the Act (415 ILCS 12(a,f) (2004)), and each violated various provisions of the Board's water pollution and National Pollutant Discharge Elimination System (NPDES) regulations. The Board's order directed the respondents to pay a civil penalty of $153,000 within 30 days.

But, the Board withheld decision regarding the People's request for attorney fees and costs under Section 42 of the Act, and directed each party to address the issue within a time certain. Under these circumstances, the Board and the People argued that the appeal was premature because the September 2, 2004 order was not final and appealable, since it did not resolve all matters at issue in the case.

The Court's November 18, 2004 order dismissing the appeal stated that it was "final and shall stand as the mandate of this Court."

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 IEPA to issue those permits to applicants. 415 ILCS 5/39 (2004). 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 (2004).

In fiscal year 2005, the appellate courts dismissed two appeals of Board decisions without reaching the merits. As a result, the Board's rulings in these cases remain undisturbed, and may be argued as precedent in future cases.

County of Saline v. Saline County Landfill, Inc. *et al.*, No 5-04-0295 (5th Dist., Mar. 31 and Apr. 4, 2005) (unpublished Rule 23 order dismissing appeal of Board order in PCB 04-117)

The Fifth District Appellate Court granted the motion of the County of Saline to dismiss its appeal, and the motion of Saline County Landfill to dismiss its cross-appeal, in County of Saline v. Saline County Landfill, Inc., IEPA, and PCB *et al.*, No 5-04-0295 (Mar. 31 and Apr. 4, 2005). Dismissal of the appeals leaves undisturbed an important Board ruling interpreting Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2004)).

The Board decision on appeal was a May 6, 2004 order in a permit appeal captioned Saline County Landfill, Inc. v. IEPA and County of Saline (Intervenor), PCB 04-117 (May 6, 2004). On January 8, 2004, Saline County Landfill, Inc. (SCLI) filed a petition for review of a determination by the Illinois Environmental Protection Agency (IEPA) to deny a permit for expansion of the landfill located in Harrisburg, Saline County. The IEPA denied the permit because the IEPA determined that SCLI did not provide proof pursuant to 39(c) of the Act (415 ILCS 5/39(c) (2004) that SCLI had local siting approval for the expansion of the landfill pursuant to Section 39.2 of the Act (415 ILCS 5/39.2 (2004)). On February 19, 2004, the Board granted a motion by Saline County to intervene in support of the permit denial. The Board found that

the IEPA determination was incorrect. The Board remanded the matter to the IEPA, directing the IEPA to issue the requested permit.

The issue in this case was whether SCLI's 1996 local siting approval for the expansion of the landfill continued to be valid. The resolution of that issue required a reading of Section 39.2(f) of the Act providing in part that:

> approval shall expire at the end of three calendar years from the date upon which it was granted, and unless within that period the applicant has made application to the Agency for a permit to develop the site. 415 ILCS 5/39.2(f) (2004).

All parties agreed that SCLI did apply for a permit within three years but that the permit was denied. *See* Saline County Landfill, Inc. v. IEPA and County of Saline (Intervenor), PCB 2002-108 (May 16, 2002).

The crux of the Board's holding was:

> As long as an application to develop the site is filed within three years of local siting approval, whether or not that permit is granted, the Board finds that the requirements of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2004)) are met and local siting does not expire. Saline County Landfill, Inc. v. IEPA and County of Saline (Intervenor), PCB 04-117, slip op. at 16 (May 6, 2004).

Midwest Generation EME, LLC v. IEPA and PCB, No. 3-04-0945 (3rd Dist. Mar. 4, 2005) (unpublished Rule 23 order dismissing appeal of Board order in PCB 04-185)

In a March 4, 2005 final order, the Third District Appellate Court dismissed, for lack of jurisdiction, the appeal captioned Midwest Generation EME, LLC v. IEPA and PCB, No. 3-04-0945 (Mar. 4, 2005). The Board and the IEPA had moved for dismissal, arguing that the appeal was a premature one, seeking relief of a non-final order. The Court agreed, dismissing the appeal.

The case at issue here is Midwest Generation EME, LLC v. IEPA, PCB 04-185. This case is a pending trade secret appeal that has not yet been to hearing.

A detailed explanation of the trade secret provisions of the Act and Board rules is not necessary to understand the import of the court's ruling. It is enough to note that the Act grants protection from public disclosure of "trade secret," and that the Board hears appeals of IEPA decisions about whether particular information falls within the statutory definition. *See* 415 ILCS 5/3.48, 7, 7.1 (2004) and 35 Ill. Adm. Code Part 130. The Act defines "trade secret" as:

> [T]he whole or any portion or phase of any scientific or technical information, design, process (including a manufacturing process), procedure, formula or improvement, or business plan which is secret in that it has not been published or disseminated or otherwise become a matter of general public knowledge, and which has competitive value. A trade secret is presumed to be secret when the owner thereof takes reasonable measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes. 415 ILCS 5/3.48 (2004).

The information at issue in this case relates to information about six coal-fired power stations, all of which are in Illinois, owned by Midwest Generation EME, LLC (Midwest). In its April 19, 2004 petition for review (Pet.), Midwest stated that IEPA denied trade secret protection for what Midwest described as two types of information: (1) "information Midwest [] compiled concerning capital projects at each of its coal-fired electric generating units"; and (2) "information identifying the monthly and annual net generation, the monthly coal heat content, and the monthly net heat rate for each of its coal-fired units." Pet. at 2. Midwest argued that IEPA erred in determining the company failed to demonstrate that the information claimed to be trade secret had not become a matter of general public knowledge, had competitive value, and did not constitute emission data exempt from protection. *Id*. at 2-5, Attachment 1.

In a May 6, 2004 order, the Board accepted for hearing Midwest's petition for review. The Board also directed that, as Midwest requested, any hearings would be held *in camera* to avoid disclosing to the public the information claimed to be trade secret. But, Midwest then moved the Board to reconsider, among other things, the following passage of the Board's May 6, 2004 order: "Hearings will be based exclusively on the record before IEPA at the time it issued its trade secret determination. *See* 35 Ill. Adm. Code 105.214(a)." Midwest instead asked the Board to review IEPA's trade secret determination *de novo*, *i.e.*, to consider new evidence and not just the evidence in the record before IEPA at the time of IEPA's trade secret determination.

In a November 4, 2004 order, the Board denied Midwest's motion. The Board also remanded the matter to IEPA for the limited purpose of having IEPA state, in a supplemental determination, the reasoning for its denial of trade secret protection. The Board retained jurisdiction of the trade secret appeal.

Midwest sought review by the Third District Appellate Court of the Board's November 4, 2004 order. In the motion to dismiss granted by the court, the Board argued that the appeal was premature and that because Midwest sought review of a non-final Board order, the court lacked jurisdiction. Among other things, the Board noted that Midwest did not ask the Board to certify these questions for interlocutory appeal in accordance with the Board's procedural rule at 35 Ill. Adm. Code 101.908, citing Illinois Supreme Court Rule 308 (155 Ill.2d R. 308). The court dismissed the appeal as requested.

UNDERGROUND STORAGE TANK PROGRAM APPEALS

Petroleum leaks from underground storage tanks (USTs) are presently remediated under Title XVI of the Act. 415 ILCS 5/57-57.17 (2004). (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 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 cleanup 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 2005, the appellate court dismissed as defective an appeal of a Board decision affirming an OSFM decision that a tank operator was ineligible to receive reimbursement from the UST Fund.

Vogue Tyre & Rubber Co. v. Office of the State Fire Marshal of the State of Illinois, 354 Ill. App. 3d 20, 820 N.E.2d 15 (1st Dist. Nov. 2, 2004 *nunc pro tunc* Sept. 28, 2004) (dismissing appeal of Board order in PCB 01-167)

In a November 2, 2004 *nunc pro tunc* opinion and order, the First District Appellate Court granted the motion of the Board for publication of the Court's September 28, 2004 dismissal order in the appeal Vogue Tyre & Rubber Co. v. Office of the State Fire Marshal No. 1-03-0521 (Nov. 2, 2004). The case can now be cited as precedent as Vogue Tyre & Rubber Co. v. Office of the State Fire Marshal of the State of Illinois, 354 Ill. App. 3d 20, 820 N.E.2d 15 (First Dist. 2004) (Vogue Tyre). The court found that it had no jurisdiction of the case due to Vogue Tyre's failure to name the Board as a party, and that Vogue Tyre was not entitled to amend its petition to cure the deficiency. Because the appeal was dismissed due to this procedural defect, the court did not reach any of the UST issues briefed by the parties.

The Board Decision

The Board had affirmed a decision by the OSFM finding Vogue Tyre ineligible to have cleanup costs for specific USTs reimbursed from the UST Fund. *See* 415 ILCS 5/57.9(a)(4) (2004)). Vogue Tyre & Rubber Co. v. Office of the State Fire Marshal, PCB 95-78 (Dec. 5, 2002). In 1986, Vogue Tyre had registered with the OSFM four USTs at a service station site in Skokie, Cook County. The only tanks at issue, Tanks 1 and 2, were "deregistered" by OSFM in a February 1993 administrative order (apparently because these tanks had been removed before September 27, 1987). Vogue Tyre did not appeal the OSFM's deregistration order. In December 1994, Vogue Tyre reported a UST release and requested an OSFM determination of eligibility to have cleanup costs reimbursed from the UST Fund. In February 1995, the OSFM denied Vogue Tyre access to the UST Fund because Tanks 1 and 2 were not registered. In March 1995, Vogue Tyre petitioned the Board to review the OSFM's denial. The Board proceeding was stayed pending resolution of related insurance claims. In September 2002, the OSFM filed a motion for summary judgment with the Board.

In December 2002, the Board granted the OSFM's motion for summary judgment, finding the USTs at issue were not registered when Vogue Tyre applied for

UST Fund access. Because tank registration is a prerequisite to UST Fund eligibility under the Act (415 ILCS 5/57.9(a)(4) (2004)), the Board held that the OSFM's 1995 decision to deny UST Fund eligibility was entitled to affirmation as a matter of law. Further, Vogue Tyre's arguments that the OSFM erred in its 1993 UST deregistering were misplaced, according to the Board. The Board reiterated its long-held position that it lacks authority to review OSFM registration or deregistration decisions under the Gasoline Storage Act (430 ILCS 15/4 (2004)). The Board found that such decisions are appealable only to the circuit court under the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (2004)). In January 2003, Vogue asked the Board to reconsider its decision, arguing that the Board had misapplied Section 7(b) of the Gasoline Storage Act, and that the Board did have jurisdiction to review the OSFM deregistration order. The Board denied the motion.

The First District Court's Decision

When filing its petition for review, Vogue Tyre did not name the Board as a party respondent.

The court looked to the language of Section 3-113(b) of the Administrative Review Law and the identical language of Supreme Court Rule 335(a) on who must be named as a respondent in petitions for direct appellate court review of administrative orders. The court noted that both provisions "clearly and unambiguously state that '[t]he agency and all other parties of record shall be named as respondents." Vogue Tyre, 820 N.E.2d at 509-10. The court cited long-standing precedent for the proposition that because Illinois appellate courts exercise special statutory jurisdiction in reviewing administrative actions, those who seek to appeal must strictly adhere to the statute (i.e., Section 41(a) of the Environmental Protection Act, which incorporates the Administrative Review Law); when those parties do not strictly comply, the court cannot consider the appeal. "Substantial compliance," such as by merely serving the Board with the petition for review and referring to the Board order, is not sufficient. *See* 820 N.E.2d at 511, citing, among other cases, McGaughy v. Illinois Human Rights Comm'n, 165 Ill. 2d 1, 6-7, 649 N.E.2d 404 (1995) and New York Carpet World, Inc. v. Dept. of Employment Security, 283 Ill. App. 3d 497, 669 N.E.2d 1321 (1996).

The court then addressed whether it could grant Vogue Tyre's motion for leave to amend its petition to add the Board. The court looked to Section 3-113(b) of the Administrative Review Law on amending petitions. The provision allows a petitioner to amend its petition, but only if the unnamed party "was not named by the administrative agency in its final order as a party of record." Vogue Tyre, 820 N.E.2d at 511.

Vogue Tyre argued that it could amend because the Board failed to name itself in its final order as a party of record, relying on Cook County Sheriff's Enforcement Ass'n. v. County of Cook, 323 Ill. App. 3d 853, 753 N.E.2d 309 (2001). Vogue Tyre, 820 N.E.2d at 512-13.

The court rejected Vogue's position, finding persuasive the reasoning of the court in County of Cook v. Illinois Labor Relations Board Local Panel, 347 Ill. App. 3d 538, 555, 807 N.E.2d 613 (2004). The court held that strict adherence to the plain statutory language of Section 3-113(b) of the Administrative Review Law "does not provide an exception that allows a petitioner to amend its petition for review to name the agency as respondent." The court concluded that Vogue Tyre could not amend and therefore the court lacked jurisdiction to hear the appeal. Vogue Tyre, 820 N.E.2d at 513.

Pollution Control Facility Siting Appeals

The Act provides, in Sections 39(c) and 39.2, for local government participation in the siting of new pollution control facilities. 415 ILCS 5/39(c), 39.2 (2004). 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 (2004).

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 2005, the appellate courts affirmed the Board's decision in three siting appeals. One of these is a published decision, establishing that the date of service of a siting application to a neighboring landowner is the date that it is put into the mail, not the date that it is received.

Lowe Transfer, Inc. and Marshall Lowe v. PCB and County Board of McHenry County, Illinois, No. 2-03-1181 (2nd Dist. Oct. 13, 2004) (unpublished Rule 23 order affirming Board order in PCB 03-221)

In an October 13, 2004 final order, the Second District Appellate Court affirmed the Board's decision in a pollution control facility siting appeal captioned Lowe Transfer, Inc. and Marshall Lowe v. PCB and County Board of McHenry County, Illinois, No. 2-03-1181 (Oct. 13, 2004). The case concerns a proposed waste transfer station in an unincorporated area of McHenry County. The Board on October 2, 2003, affirmed the May 6, 2003 decision of the County to deny siting approval for the proposed facility. Lowe Transfer, Inc. and Marshall Lowe v. PCB and County Board of McHenry County, Illinois, PCB 03-221 (Oct. 2, 2003). In its non-precedential order, the court affirmed Board holdings under Sections 39.2 and 40.1 of Act. 415 ILCS 5/39.2 and 40.1 (2004).

The Board's Decision

Lowe Transfer, Inc. and Marshall Lowe petitioned the Board for review of the County denial of their siting application on June 5, 2003. They argued the following grounds for reversing the County's siting denial: (1) siting was approved by operation of law under Section 40.1(a) of the Act because the Board failed to provide proper notice of its hearing, and therefore failed to timely render a valid decision on the appeal; (2) the County erred in deciding that the applicants failed to satisfy three siting criteria (two, three, and five) in Section 39.2(a) of the Act (as well as the "unnumbered criterion" in Section 39.2(a) concerning the siting applicants' operating experience and past record of convictions or admissions of violations); and (3) the County decision to impose a host fee as a siting condition was improper.

In its October 2, 2003 opinion and order, the Board found that the Board's Clerk had complied with the hearing notice requirements and that those requirements were not jurisdictional; that the County's decisions on the three contested siting criteria (and the "unnumbered criterion") were not against the manifest weight of the evidence; and that the imposition of a host fee is not appealable in the context of siting denial. The Board therefore affirmed the County's decision to deny siting of the proposed waste transfer station.

The Second District's Decision

Before the appellate court, Lowe Transfer, Inc. and Marshall Lowe (petitioners) made two main arguments. First, petitioners argued that the Board's hearing and order were void because the Board's hearing notice was defective and therefore siting should be deemed approved by operation of law under Section 40.1(a). Second, petitioners argued that the Board erred in finding that petitioners did not satisfy the three Section 39.2(a) siting criteria at issue, and that the Board misapplied the "unnumbered criterion."

Petitioners' first argument on appeal was that the Board's hearing notice was improper. The court looked to Section 40.1(a) of the Act, which provides that the Board must "publish 21 day notice of the hearing on the appeal in a newspaper of general circulation published in that county." Section 40.1(a) also states that "[i]f there is no final action by the Board within 120 days after the date on which it received the petition, the petitioner may deem the site location approved." Petitioners argued that the newspaper in which the Board published its notice of hearing did not satisfy Section 40.1(a) because it was not a newspaper of "general circulation published" in McHenry County. Petitioners maintained that the Board hearing was therefore invalid, and that the Board accordingly took no valid final action within the statutory 120-day decision period, rendering the site location approved by operation of Section 40.1(a).

The court first noted that because petitioners did not raise this publication argument before the Board until after the Board hearing and only 18 days before the Board's decision deadline, "there is a strong argument that petitioners' publication argument should be deemed waived." Lowe Transfer, Inc. and Marshall Lowe v. PCB and County Board of McHenry County, Illinois, No. 2-03-1181, slip op at 3 (Oct. 13, 2004). The court, however, agreed with the Board that, regardless of the waiver issue, the publication argument fails because the Section 40.1(a) notice provisions are not jurisdictional. The court did not rule on whether the Board's newspaper notice strictly complied with the Act.

However, the court found that even if the notice did not strictly comply, petitioners suffered no prejudice because the Board, as required, considered no new evidence and relied entirely on the County siting record, and the Board's notice had no effect on the County's hearing or the County's substantive siting decision. The court held that petitioners' publication argument could not be used to "contravene the basic purpose of the Act," which is to give local authorities the power to decide pollution control facility siting. *Id.*, slip op at 4 (citing its decision in McHenry County Landfill v. IEPA, 154 Ill. App. 3d 89, 96-97 (2nd Dist. 1987)). The court concluded that because the hearing notice provisions of Section 40.1(a) are not jurisdictional, the Board held a valid hearing and

petitioners' siting application could not be deemed approved by operation of law. *Id.*, slip op at 7.

Petitioners' second argument on appeal challenged the County's findings on the statutory criteria for siting. The court first correctly articulated the "double manifest weight" standard of review. Noting the Board decided that the County's findings on siting criteria two, four, and five were not against the manifest weight of the evidence, the court then stated that it would reverse the Board only if the Board's decision "was itself against the manifest weight of the evidence." *Id.*, slip op at 7-8. The court stated that under that standard, it does not "re-weigh the evidence or substitute its judgment for that of the agency" and it would overturn the Board "only if the opposite result is clearly evident, plain, or indisputable from a review of the evidence." *Id.*, slip op at 8.

The court stated initially: "At the outset, we note that the record contains the PCB's thorough review of the evidence regarding all three criteria. We agree with its ruling on all three criteria, and we find it unnecessary to recapitulate all the evidence in this case. The PCB's dissertation of the evidence is more than sufficient." *Id.*, slip op at 8.

On criterion two of Section 39.2(a) (facility designed, located, and proposed to be operated so as to protect the public health, safety, and welfare), the court found that whether the criterion was met "is purely a matter of assessing the credibility of expert witnesses." *Id.*, slip op at 9. The court noted that the County assessed the credibility of both sides' expert witnesses, along with all the other evidence, and that there was ample evidence to support a finding that criterion two was met, and that it was not met. The court concluded that it could not hold that either the County's finding or the Board's finding was against the manifest weight of the evidence.

On criterion three of Section 39.2(a) (facility located so as to minimize incompatibility with the character of the surrounding area and minimize the effect on surrounding property value), the court affirmed the Board and County, after noting again that both sides had expert witnesses and that there was ample evidence to support a finding either way on this criterion. In response to petitioners' arguments that they demonstrated "extraordinary design and operational measures to minimize the impact," the court found that even if petitioners' facility was "designed" to minimize impact, it still would not necessarily be "located" to minimize impact, as the "plain statutory language" of the criterion requires. *Id.*, slip op at 11.

On criterion five of Section 39.2(a) (plan of operations is designed to minimize danger to the surrounding area from fire, spills, or other operational accidents), the court noted that some of the evidence favored petitioners, but also that expert witnesses for the opponents testified that petitioners' plan was inadequate regarding fire, spills, and hazardous waste. The court again found that there was ample evidence to support a conclusion that the criterion was met, and that it was not met. The court accordingly held that "the County's (and the PCB's) finding that the fifth criterion was not satisfied was not against the manifest weight of the evidence." *Id.*, slip op at 12.

Lastly, the court looked to the "unnumbered criterion" of Section 39.2(a), which provides that the county board

> may also consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant in the field of waste management when considering criteria (ii) and (v).

Petitioners argued that consideration of the unnumbered criterion should be limited to past violations, but the court agreed with the Board, stating that "as the PCB stated in its opinion, the fact that petitioners had no experience in operating the type of facility they proposed would certainly bear on a fact finder's decision as to whether the proposed facility would cause harm to the area." *Id.*, slip op at 12. In affirming the Board, the court concluded that even if it were to find against the Board on criteria two and five, it would still affirm the Board because "[a]ll the statutory criteria must be satisfied in order for a site application to be approved" and "petitioners would still have failed under criterion three." *Id.*, slip op at 13-14.

Gere Properties, Inc. v. PCB, Jackson County Board, and Southern Illinois Regional Landfill, Inc., No. 5-02-0700 (5th Dist. Dec. 29, 2004) (unpublished Rule 23 order affirming Board order in PCB 02-201)

In a December 29, 2004 final order, the Fifth District Appellate Court affirmed the Board's decision affirming a local government's decision granting site location suitability approval for a landfill expansion. Gere Properties, Inc. v. PCB, Jackson County Board, and Southern Illinois Regional Landfill, Inc., No. 5-02-0700 (Dec. 29, 2004). The Board had found that the Jackson County Board's grant of approval to Southern Illinois Landfill (SIRL) for a landfill expansion under

Section 39.2 of the Act was not against the manifest weight of the evidence. 415 ILCS 5/39.2 (2004). The only issue presented for review was whether the expansion was "necessary to accommodate the waste needs of the area it is intended to serve" under the first criterion of Section 39.2. 415 ILCS 5/39.2(a)(i)(2004). Gere Properties, Inc. v. Jackson County Board and Southern Illinois Regional Landfill, Inc., PCB 02-201 (Feb. 5, 2002).

As the court related, SIRL has operated the Jackson County Landfill since 1992. Originally permitted in 1971, the landfill is expected to reach capacity in 2006. Gere Properties, Inc. v. PCB, Jackson County Board, and Southern Illinois Regional Landfill, Inc., No. 5-02-0700 (Dec. 29, 2004), slip op. at 1. Accordingly, SIRL applied to the County for expansion of the landfill. SIRL's expansion application defines the service area as including 21 counties in southern Illinois, Missouri and Kentucky. *Id.*, slip op. at 9. The County held its public hearing in February 2002, at which Gere Properties, Inc. (Gere) opposed the application. The County voted to approve SIRL's application on April 10, 2002, finding that SIRL had satisfied all of the criteria of Section 39.2 of the Act.

Gere, who challenged the Jackson County Board's siting approval before the Board, is the owner of a landfill in neighboring Perry County. The only challenge Gere raised was that the County decision on the need criterion was against the manifest weight of the evidence. As explained in some detail in the Board's opinion, Gere contended that there was excess landfill capacity for the service area and consequently no need for landfill expansion through 2013 in a worst-case scenario, or perhaps through 2030. SIRL and the County contended that additional capacity would be needed in roughly five years. Gere Properties, Inc. v. Jackson County Board and Southern Illinois Regional Landfill, Inc., PCB 02-201, slip op. at 8-14 (Feb. 5, 2002).

Gere's petition for review in the Fifth Circuit Court of Appeals raised for the first time an issue Gere had not raised before the Board: whether SIRL had met the statutory notice requirements of Section 39.2 so as to give the County and the Board jurisdiction to consider SIRL's application. Finding that Gere had not waived its jurisdictional argument by failing to raise it before the Board, the court went on to find that SIRL had given proper notice under Section 39.2(b) of the Act, both as to service by mail and service by publication.

The court found that service of notice by certified mail, return receipt requested, was sufficient under the statute, even though the statute provides by service by registered mail, return receipt requested.

> It is clear to us, having considered the plain language of the statute and the circumstances involved with an application for site location approval, that the purpose of requiring restricted mail delivery is to ensure that the sending and receiving of notice and the identities of the intended and actual recipients can be verified. Thus the fact that registered mail carries with it indemnification protection [to the sender in case of loss or damage] is irrelevant. Because both certified mail, return receipt request, and registered mail document (1) the intended recipient of the notice; (2) that notice was sent; and (3) that notice was received and by whom, we do not find the form of mail used to be determinative in this case. *See* People *ex rel.* Head v. Board of Education of Thornton Fractional Township South High School District No. 215, 95 Ill. App. 3d 78, 81, 419 N.E.2d 505, 507 (1981); Olin Corp. v. Bowling, 95 Ill. App. 3d 1113, 1116-17, 420 N.E.2d 1047, 1050 (1981). Gere Properties, Inc. v. PCB, Jackson County Board, and Southern Illinois Regional Landfill, Inc., No. 5-02-0700, slip op. at 6 (Dec. 29, 2004).

The court then went on to find that the record made clear that all persons entitled to service by mail had each received notice.

As to the service by publication required under Section 39.2 (b), Gere's argument was that SIRL's one-time publication of its notice of intent to file a siting application within 14 days was insufficient. Gere's premise was that Section 39.2(b) must be read in conjunction with Section 3 of the Notice by Publication Act (715 ILCS 5/3 (2004)), so that SIRL was required to publish notice for three successive weeks. In discounting this argument, the court observed that it could find

> no case authored by an Illinois court that requires an applicant to publish notice pursuant to section 39.2(b) of the Act on more than one occasion. . . . We agree with the respondents that it would make no sense for the legislature to intend for notice to be published for three successive weeks yet only provide a 14-day waiting period between the date the notice is served and published and the date the application for site location approval is filed. *See* Le Moyne v. West Chicago Park Commissioners, 116 Ill. 41, 43 N.E. 498, 499 (1986). Accordingly, we find that SIRL's notice by publication conforms with the statutory requirements. Gere Properties, Inc. v. PCB, Jackson County

Board, and Southern Illinois Regional Landfill, Inc., No. 5-02-0700, slip op. at 7-8 (Dec. 29, 2004).

In analyzing the necessity criterion challenge, the court cited prior case law finding that the term "necessary" in the statute does not mean "absolutely necessary," but only that the expansion is expedient or reasonably convenient. The court stated that

> In the instance case, the facts, as determined by the County Board and by the IPCB, demonstrate a need for SIRL's expansion . . .. Although Gere's expert interpreted the area's needs differently, a reviewing court should not reweigh the evidence or substitute its judgment for that of the agency. File v. D & L Landfill, Inc., 219 Ill. App. 3d 897, 579 N.E.2d 1228 (1991). Having reviewed the record in its entirety, we cannot say that the opposite result is clearly evident, plain, or indisputable . . .. Thus, we affirm the IPCB's opinion affirming the County Board's decision granting SIRL's application for site location approval. Gere Properties, Inc. v. PCB, Jackson County Board, and Southern Illinois Regional Landfill, Inc., No. 5-02-0700, slip op. at 9-10. (Dec. 29, 2004).

Gere's last argument on appeal was that the Board improperly weighed the credibility of the parties' experts. The court found the argument to be without merit, holding that the Board's single sentence statement at the end of an 18-page opinion was an acceptable acknowledgement that the evidence supported the County Board's decision. *Id.*, slip op. at 10.

Accordingly, the court affirmed the Board's opinion affirming the County Board's decision granting SIRL's application for site location suitability approval.

Waste Management of Illinois, Inc. v. PCB, County of Kankakee, County Board of Kankakee, City of Kankakee, Merlin Karlock, Keith Runyon, and Michael Watson, 356 Ill. App. 229, 826 N.E.2d 586 (3rd Dist. 2005)(affirming Board order in PCB 03-125, PCB 03-133, PCB 03-134, PCB 03-135 (cons.))

In a March 23, 2005 order, the Third District Appellate Court granted the motion of the Board for publication of the Court's February 4, 2005 unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23). The Third District Appellate Court affirmed the Board's decision to vacate the Kankakee County Board's grant of siting approval for a landfill expansion in Waste Management of Illinois, Inc. v. PCB, County of Kankakee, County Board of Kankakee, City of Kankakee, Merlin Karlock, Keith Runyon, and Michael Watson, No. 3-03-0924 (Feb. 4, 2005). The published decision is cited as Waste Management of Illinois, Inc. v. PCB, County of Kankakee, County Board of Kankakee, City of Kankakee, Merlin Karlock, Keith Runyon, and Michael Watson, 292 Ill. Dec. 445, 826 N.E.2d 586 (3rd Dist. 2005) (Waste Management).

On May 25, 2005, in its Docket No. 100166, the Illinois Supreme Court denied the petition for leave to appeal filed by Waste Management of Illinois, Inc. (WMII). The Clerk of the Supreme Court issued the Court's mandate to the appellate court on June 16, 2005.

The Board's Decision

On January 31, 2003, the Kankakee County Board (County) granted WMII's application for siting approval of a 302-acre expansion of an existing landfill. Various third parties who had participated in the County proceedings appealed to the Board, alleging various grounds for reversal of the decision. In its August 7, 2003 opinion and order, the Board vacated the County's decision on jurisdictional grounds. The Board found the County lacked jurisdiction over the siting application because WMII failed to notify a nearby landowner, Brenda Keller, of its siting application in accordance with Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2004)). Section 39.2(b) of the Act has three distinct elements: (1) property owners who own property within 250 feet of the lot line of the proposed facility must be notified; (2) such property owners must be listed on the "authentic tax records" of the County in which the facility is to be located; (3) such property owners receive service via certified mail return receipt or personal service.

In a matter of first impression, the Board applied to Section 39.2(b) of the Act the Illinois Supreme Court's holding in People *ex rel.* v. $30,700 U.S. Currency *et al.*, 199 Ill. 2d 142. 766 N.E.2d 1084 (2002) ($30,700 U.S. Currency). Under $30,700 U.S. Currency, service is deemed complete once the notice is placed in the mail. In other words, under Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)), an applicant can effect service by mailing the pre-filing notice to property owners certified mail return receipt and the service is proper upon mailing. The Board found the Supreme Court's decision in $30,700 U.S. Currency effectively overruled the appellate court's decision in Ogle County Board v. PCB, 272 Ill. App. 3d 184, 649 N.E.2d 545 (2nd Dist 1995) (Ogle County) (finding that actual receipt of notice by the landowner, and not just mailing of it by the applicant, was required to effectuate service under Section 39.2 (b) of the Act).

The Third District Court's Decision

The court reviewed the Board's decision on jurisdiction using the *de novo* standard of review. Waste Management, 826 N.E.2d at 589. The court agreed with the Board's application of $30,700 US Currency to the facts at hand, summarizing the Supreme Court holding as being that

> Jurisdiction is not premised on the recipient's actions, once the letter is received, but on the form of sending of the letter; jurisdiction will exist as long as the letter is sent by the prescribed method. Waste Management, 826 N.E.2d at 590.

The court observed that WMII had cited no authority in support of its contention that the statute is satisfied by actual or constructive notice, despite its specifications as to acceptable service methods, and that posting or regular mail service would do. The court remarked that even if Brenda Keller had actual notice, "[n]otice would not have been achieved by the statutorily-required means and proof of actual notice would not overcome that failure of compliance." Id., 826 N.E.2d at 592.

Other Pending Third District Kankakee Siting Appeals

To minimize possible confusion, the Board notes that there are two other siting appeals pending before the appellate court. A description of the other two Kankakee siting decisions pending in the Third District involve, and their status, follows:

1. The next-filed appeal challenges the Board's January 9, 2003 decision reversing the Kankakee City Council's August 19, 2002 decision to approve siting for the proposed Kankakee Regional Landfill Facility. County of Kankakee *et al*. v. City of Kankakee, Illinois, The City of Kankakee, Illinois City Council, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C., PCB 03-31, PCB 03-33, and PCB 03-35 (Jan. 9, 2003). The Board found that the City had jurisdiction to make its decision, and that the City's proceedings were fundamentally fair. But, the Board found that the City's decision was against the manifest weight of the evidence on one statutory criterion: that the applicant had proved that the proposed landfill was located, designed, and proposed to be operated to protect the public health, safety and welfare. (The decision on two other criteria was affirmed.)

Town and County filed the initial petition for review, and the County, WMII, and Byron Sandberg filed cross-petitions. Oral argument was held in this set of appeals on September 9, 2004, and the parties were awaiting the court's decision at the end of fiscal year 2005. The name and docket of this appeal is Town and County *et al*. v. PCB *et al.*, No. 3-03-0025 (3rd Dist.).

2. The last-filed appeal concerns the Board's March 18, 2004 decision affirming the City of Kankakee's August 18, 2003 grant of landfill-siting approval to Town & Country Utilities, Inc. and Kankakee Regional Landfill, LLC to locate the proposed 400-acre Kankakee Regional Landfill Facility site within city limits. Byron Sandberg *et al.* v. The City of Kankakee, Illinois City Council, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C., PCB 04-33, PCB 04-34, and PCB 04-35 (cons.) (Mar. 18, 2004).

The Board found the City of Kankakee had jurisdiction because Town & Country properly served notice of its intent to file an application to site a new pollution control facility, the proceedings were not fundamentally unfair, and the City of Kankakee's decision was not against the manifest weight of the evidence on various statutory criteria (need, designed to protect public health, safety, and welfare and consistency with the county's solid waste plan).

The County, WMII, and Byron Sandberg each filed petitions for review. The name and docket of this appeal is County of Kankakee *et al*. v. PCB *et al.*, Nos. 3-04-0271, 3-04-0285, and 3-04-0289 (cons.) (3rd Dist.).

Legislative Review

Summarized below are twelve bills, each of which amends the Environmental Protection Act (Act) or affects other statutes relating to the Board's work.

Legislation Amending the Environmental Protection Act

Public Act 94-0249 (House Bill 406)
Effective July 19, 2005

Excludes from the Act's definition of "pollution control facility" the portion of a Cook County site that has obtained local siting approval under the Act for a municipal waste incinerator on or before July 1, 2005, and that is used for a non-hazardous waste transfer station.

Public Act 94-0094 (House Bill 414)
Effective July 1, 2005

Provides that a facility accepting exclusively general construction or demolition debris and that as of January 1, 2000, is located in a county with a population of 700,000 or more persons is not a "pollution control facility" under the Act. The bill also makes a similar change regarding waste permits by providing that no permit shall be required for a facility in a county with a population over 700,000 as of January 1, 2000. These two provisions do not now include the January 1, 2000 restriction.

Public Act 94-0286 (House Bill 433)
Effective July 21, 2005

Provides that the disposal of asbestos-containing material in violation of certain federal regulations is a Class 4 felony.

Public Act 94-0591 (House Bill 918)
Effective August 15, 2005

In language providing that siting approval may be granted if the facility is consistent with the county's solid waste management plan, defines that plan as one in effect when the siting application is filed.

Public Act 94-0518 (House Bill 1149)
Effective August 10, 2005

Creates the Computer Equipment Disposal and Recycling Commission. The commission's duties include issuing a report of its findings and recommendations related to the disposal and recycling of computer equipment by May 31, 2006.

Public Act 94-0314 (Senate Bill 241)
Effective July 25, 2005

Provides that, for any release or substantial threat of release for which the Illinois Environmental Protection Agency (IEPA) is required to give notice, the Director may issue to any person potentially liable under the Act for the release or substantial threat of release any order that may be necessary to protect the public health and welfare and the environment. The bill under specified conditions authorizes reimbursement for the costs, fees, and expenses of persons receiving these orders. The bill also authorizes the IEPA to evaluate the release of contaminants whenever the IEPA determines that the soil or groundwater contamination extends beyond the boundary of the site where the release occurred. The bill further provides that the persons to whom the IEPA must give notice when certain contamination-related events occur are the persons owning property within 2,500 feet of the subject contamination or within any other distance that the IEPA deems appropriate. The bill further provides that the methods by which the IEPA gives the required notice shall be determined in consultation with members of the public and regulated community and may include personal notification, public meetings, signs, electronic notification, and print media.

Public Act 94-0272 (Senate Bill 431)
Effective July 19, 2005

Provides that, on making a finding that an open dump poses a threat to the public health or to the environment, the Illinois Environmental Protection Agency (IEPA) may take preventive or corrective action as necessary or appropriate to end the threat. The bill further provides that specified persons may be held liable for the costs of IEPA corrective or preventive action resulting from open dumping, and it establishes defenses against liability for open dumping. The bill provides factors that the IEPA must consider before taking preventive or corrective action against open dumping and further provides that the IEPA may not expend more than $50,000 at any single site in response to an open dump except under specified circumstances. In addition, the bill imposes an interim and final permit program so that by July 1, 2008, no person shall use clean construction or demolition debris as fill material in a current or former quarry, mine, or other excavation without an IEPA permit. The bill also prohibits certain State employees or their relatives from having a direct financial interest in any waste-disposal operation or clean construction or demolition debris fill operation requiring a permit or in any related corporate entity.

Public Act 94-0580 (Senate Bill 1701)
Effective August 12, 2005

Requires the Illinois Environmental Protection Agency to provide an Illinois Toxic Chemical Inventory in cooperation with the U.S. Environmental Protection Agency and based on release forms filed pursuant to specified federal law. For the purposes of the Clean Air Act Permit Program, in the definition of "major source" that is included in the subsection on applicability, the bill makes a change in the list of stationary source categories for which fugitive emissions are to be considered. The bill further provides that a compliance management system documented by a regulated entity as reflecting its due diligence in preventing, detecting, and correcting violations may serve as a substitute for an environmental audit in connection with self-disclosure of non-compliance.

Public Act 94-0274 (Senate Bill 1787)
Effective January 1, 2006

Provides that the term "owner" as used in the Petroleum Underground Storage Tank (UST) program includes any person who has submitted to the Illinois Environmental Protection Agency (IEPA) a written election to proceed under the UST program and has acquired an ownership interest in a site on which one or more registered tanks have been removed, but on which corrective action has not yet resulted in the issuance of a "no further remediation letter" by the IEPA.

Public Act 94-0066 (Senate Bill 1909)
Effective January 1, 2006

Includes additional materials within the definition of "coal combustion by-product" (CCB). The bill further provides that, in certain circumstances, the Illinois Environmental Protection Agency must make written beneficial use determinations that coal-combustion waste is a CCB. The bill also sets forth procedures for the application for and approval of a beneficial use determination.

Public Act 94-0276 (Senate Bill 2040)
Effective January 1, 2006

Provides that a "no further remediation" (NFR) letter does not apply to off-site contamination related to the occurrence that has not been remediated due to denial of access to the off-site property. The bill also provides that the NFR letter shall apply in favor of an owner of a parcel of real property to the extent the NFR letter applies to the occurrence on that parcel.

Legislation Creating or Amending Other Statutes:

Public Act 94-0526 (Senate Bill 397)
Effective January 1, 2006

Creates the Vehicle Emissions Inspection Law of 2005 and provides for a new inspection program in specified counties beginning February 1, 2007. Generally, the bill requires testing based primarily on the use of on-board diagnostic systems.

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