

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | | |
|--|---|---------------------------|-----------------------|
| WRB REFINING, LLC |) | PCB 2012-065 | PCB 2012-078 |
| (multiple applications) |) | 2012-066 | 2012-079 ¹ |
| |) | 2012-067 | 2012-080 |
| Property Identification Numbers |) | 2012-068 | 2012-081 |
| 19-1-08-35-00-000-001 |) | 2012-069 | 2012-082 |
| 19-1-08-34-00-000-008.004, and |) | 2012-070 | 2012-083 |
| 19-1-08-34-00-000-006, or portions thereof |) | 2012-071 | 2012-084 |
| |) | 2012-072 | 2012-086 |
| Petitioner, |) | 2012-073 | 2012-087 |
| |) | 2012-074 | 2012-088 |
| v. |) | 2012-075 | 2012-089 |
| |) | 2012-076 | 2012-090 |
| ILLINOIS ENVIRONMENTAL |) | 2012-077 | 2012-091 |
| PROTECTION AGENCY, |) | | |
| |) | | |
| |) | | |
| Respondent. |) | (Tax Certification – Air) | |

NOTICE OF FILING

TO: Mr. John Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a copy of WRB REFINING, LLC's **ENTRY OF APPEARANCE OF KATHERINE D. HODGE, ENTRY OF APPEARANCE OF**

¹ PCB 2012-079 was not included on Roxana's Joint Petition; however the Board posted the joint petition in PCB 2012-079.

MONICA T. RIOS, and RESPONSE TO PETITION TO INTERVENE, copies of which are hereby served upon you.

Respectfully submitted,

WRB REFINING, LLC,
Petitioner,

Dated: December 23, 2011

By: /s/ Katherine D. Hodge
One of Its Attorneys

Katherine D. Hodge
Monica T. Rios
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, certify that I have served the attached

ENTRY OF APPEARANCE OF KATHERINE D. HODGE, ENTRY OF

APPEARANCE OF MONICA T. RIOS, and RESPONSE TO PETITION TO

INTERVENE upon:

Mr. John Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on December 23, 2011 upon:

Mr. Steve Santarelli
Illinois Department of Revenue
101 West Jefferson
P.O. Box 19033
Springfield, Illinois 62794

Robb H. Layman, Esq.
Assistant Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Joshua S. Whitt, Esq.
Whitt Law, LLC
70 S. Constitution drive
Aurora, Illinois 60506

by depositing said documents in the United States Mail, postage prepaid, in Springfield,
Illinois, on December 23, 2011.

/s/ Katherine D. Hodge
Katherine D. Hodge

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | | |
|--|---|---------------------------|-----------------------|
| WRB REFINING, LLC |) | PCB 2012-065 | PCB 2012-078 |
| (multiple applications) |) | 2012-066 | 2012-079 ¹ |
| |) | 2012-067 | 2012-080 |
| Property Identification Numbers |) | 2012-068 | 2012-081 |
| 19-1-08-35-00-000-001 |) | 2012-069 | 2012-082 |
| 19-1-08-34-00-000-008.004, and |) | 2012-070 | 2012-083 |
| 19-1-08-34-00-000-006, or portions thereof |) | 2012-071 | 2012-084 |
| |) | 2012-072 | 2012-086 |
| Petitioner, |) | 2012-073 | 2012-087 |
| |) | 2012-074 | 2012-088 |
| v. |) | 2012-075 | 2012-089 |
| |) | 2012-076 | 2012-090 |
| ILLINOIS ENVIRONMENTAL |) | 2012-077 | 2012-091 |
| PROTECTION AGENCY, |) | | |
| |) | | |
| |) | | |
| Respondent. |) | (Tax Certification – Air) | |

ENTRY OF APPEARANCE OF KATHERINE D. HODGE

NOW COMES Katherine D. Hodge, of the law firm HODGE DWYER & DRIVER, and hereby enters her appearance on behalf of Petitioner WRB REFINING, LLC, in the above-referenced matter.

Respectfully submitted,

WRB REFINING, LLC,
Petitioner,

By: /s/ Katherine D. Hodge
Katherine D. Hodge

DATE: December 23, 2011December 23, 2011

Katherine D. Hodge
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705
(217) 523-4900

¹ PCB 2012-079 was not included on Roxana's Joint Petition; however the Board posted the joint petition in PCB 2012-079.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | | |
|--|---|---------------------------|-----------------------|
| WRB REFINING, LLC |) | PCB 2012-065 | PCB 2012-078 |
| (multiple applications) |) | 2012-066 | 2012-079 ¹ |
| |) | 2012-067 | 2012-080 |
| Property Identification Numbers |) | 2012-068 | 2012-081 |
| 19-1-08-35-00-000-001 |) | 2012-069 | 2012-082 |
| 19-1-08-34-00-000-008.004, and |) | 2012-070 | 2012-083 |
| 19-1-08-34-00-000-006, or portions thereof |) | 2012-071 | 2012-084 |
| |) | 2012-072 | 2012-086 |
| Petitioner, |) | 2012-073 | 2012-087 |
| |) | 2012-074 | 2012-088 |
| v. |) | 2012-075 | 2012-089 |
| |) | 2012-076 | 2012-090 |
| ILLINOIS ENVIRONMENTAL |) | 2012-077 | 2012-091 |
| PROTECTION AGENCY, |) | | |
| |) | | |
| |) | | |
| Respondent. |) | (Tax Certification – Air) | |

ENTRY OF APPEARANCE OF MONICA T. RIOS

NOW COMES Monica T. Rios, of the law firm HODGE DWYER & DRIVER, and hereby enters her appearance on behalf of Petitioner WRB REFINING, LLC, in the above-referenced matter.

Respectfully submitted,

WRB REFINING, LLC,
Petitioner,

By: /s/ Monica T. Rios
Monica T. Rios

DATE: December 23, 2011

Monica T. Rios
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705
(217) 523-4900

¹ PCB 2012-079 was not included on Roxana's Joint Petition; however the Board posted the joint petition in PCB 2012-079.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | | |
|--|---|---------------------------|-----------------------|
| WRB REFINING, LLC |) | PCB 2012-065 | PCB 2012-078 |
| (multiple applications) |) | 2012-066 | 2012-079 ¹ |
| |) | 2012-067 | 2012-080 |
| Property Identification Numbers |) | 2012-068 | 2012-081 |
| 19-1-08-35-00-000-001 |) | 2012-069 | 2012-082 |
| 19-1-08-34-00-000-008.004, and |) | 2012-070 | 2012-083 |
| 19-1-08-34-00-000-006, or portions thereof |) | 2012-071 | 2012-084 |
| |) | 2012-072 | 2012-086 |
| Petitioner, |) | 2012-073 | 2012-087 |
| |) | 2012-074 | 2012-088 |
| v. |) | 2012-075 | 2012-089 |
| |) | 2012-076 | 2012-090 |
| ILLINOIS ENVIRONMENTAL |) | 2012-077 | 2012-091 |
| PROTECTION AGENCY, |) | | |
| |) | | |
| |) | | |
| Respondent. |) | (Tax Certification – Air) | |

**WRB REFINING, LLC'S RESPONSE
TO PETITION FOR LEAVE TO INTERVENE**

NOW COMES WRB REFINING, LLC ("WRB"), by and through its attorneys, HODGE DWYER & DRIVER, pursuant to the 35 Ill. Admin. Code Part 101.500, and for its Response to Petition for Leave to Intervene ("Response") states as follows:

I. BACKGROUND

On November 28, 2011, the Illinois Environmental Protection Agency ("Illinois EPA") filed its Recommendation for issuance of a tax certification as a pollution control facility for the above-captioned equipment with the Illinois Pollution Control Board ("Board"). Recommendation, *WRB Refining, LLC, Coker Switch Valve Interlock Project, Property Identification Number 19-1-08-34-00-000-008.004*, PCB No. 12-65

¹ PCB 2012-079 was not included on Roxana's Joint Petition; however, the Board posted the joint petition in PCB 2012-079 docket.

(Ill.Pol.Control.Bd. Nov. 28, 2011) (matter hereafter cited as “PCB No. 12-65”)².

Subsequently, Roxana Community Unit School District No. 1 (“Roxana”) filed a Petition for Leave to Intervene (“Petition”) in this matter. Petition for Leave to Intervene, PCB No. 12-65 (Ill.Pol.Control.Bd. Dec. 9, 2011).

The Board rules state that a response to a motion may be filed within 14 days of service of the motion. 35 Ill. Admin. Code § 101.500(d). Although Roxana’s filing is styled as a Petition, it is in essence a motion, and thus, filing is timely, as it is filed within 14 days of filing of the Petition.

Based on the information provided below, WRB requests that the Board deny Roxana’s Petition because there is no right to intervention in tax certification proceedings.

II. **THERE IS NEITHER AUTHORITY NOR PRECEDENT FOR INTERVENTION IN TAX CERTIFICATION PROCEEDINGS BEFORE THE BOARD.**

The Property Tax Code (“Tax Code”), 35 ILCS 200/11 *et seq.*, grants the Board authority to certify pollution control facilities. 35 ILCS 200/11-20. Further, the Tax Code states that should the Board find that a facility is a pollution control facility, the Board “shall enter a finding and issue certificate to that effect.” In addition, “[t]he effective date for the certificate shall be the date of application for the certificate or the date of the construction of the facility, which ever is later.” 35 ILCS 200/11-25.

In regards to the review of an issued certification, the Tax Code states:

² This Response is being filed in the docket numbers listed in the caption above. Since Roxana filed a single Petition that was uploaded to each docket, WRB, with permission from the Clerk of the Board, is doing the same. WRB, however, for convenience and ease of reading, only references the docket in PCB No. 12-65, in the body of the Response, rather than citing each of the twenty six cases listed above each time a reference to the Board’s proceeding is necessary.

Before denying any certificate, the Pollution Control Board shall give reasonable notice in writing to the applicant and provide the applicant a reasonable opportunity for a fair hearing. On like notice to the holder and opportunity for hearing, the Board may on its own initiative revoke or modify a pollution control certificate or a low sulfur dioxide emission coal fueled device certificate whenever any of the following appears:

- (a) the certificate was obtained by fraud or misrepresentation;
- (b) the holder of the certificate has failed substantially to proceed with the construction, reconstruction, installation, or acquisition of pollution control facilities or a low sulfur dioxide emission coal fueled device; or
- (c) the pollution control facility to which the certificate relates has ceased to be used for the primary purpose of pollution control and is being used for a different purpose.

Prompt written notice of the Board's action upon any application shall be given to the applicant together with a written copy of the Board's findings and certificate, if any.

35 ILCS 200/11-30.

The Board has adopted rules to govern tax certification proceedings. 35 Ill. Admin. Code Part 125. The rules apply “to any person seeking, for property tax purposes, a Board certification that a facility or portion thereof is a pollution control facility as defined in Section 125.200(a)(1) of this Part. . .” *Id.* at § 125.100(a). The rules provide that a person may apply for certification by submitting an application to Illinois EPA. *Id.* at § 125.202. Illinois EPA then reviews the application and submits a recommendation to grant or deny the certification to the Board. *Id.* at § 125.204. Should Illinois EPA recommend denial of certification, the applicant may contest the recommendation, and a hearing may be held. *Id.* at §§ 125.206 and 125.210. The Board rules nearly mirror the Tax Code provisions in terms of the Board’s authority to issue a certification for a pollution control facility, and take action to revoke or modify a

certification in cases where any of the three circumstances referenced above in Section 11-30 of the Tax Code appear. *Id.* at § 125.216.

It is clear from the Tax Code provisions that the General Assembly envisioned certification of qualifying pollution control facilities by the Board and allowed for only the Board to revoke or modify a certification in narrow circumstances. The Board itself adopted this reasoning in *Reed-Custer*, where the Board entertained a petition to revoke a certification, but limited its review to the statutory grounds allowed for revocation or modification of a certification, i.e. fraud or misrepresentation. *Reed-Custer Community Unit School District No. 255 v. Commonwealth Edison Company and Illinois EPA*, PCB No. 87-209 at 5 (Ill.Pol.Control.Bd. Aug. 30, 1990) (Board case cited as “*Reed-Custer*”); *see also Waltonville Community Unit School District No. 1 and the Jefferson County Board of Review v. Consolidation Coal Company and Illinois EPA*, PCB No. 89-149 (Ill.Pol.Control.Bd. Dec. 6, 1989) (where the Board stated that “Waltonville’s brief does not allege any fraud or misrepresentation, any delay in proceeding with construction, installation or acquisition, or any change in primary use of the facility. The Board finds that it cannot exercise its power to revoke or modify if misconduct of the type specified in Section 502a-6 is not present.”).

The statutory scheme that the General Assembly established for certification of pollution control facilities does not account for intervention of third parties. Instead, it mandates that the Board may, on its own accord, revoke or modify the certification if one of the three statutory circumstances appears. Further, the Tax Code allows any applicant or holder “aggrieved by the issuance, refusal to issue, denial, revocation, modification or restriction of a pollution control certificate ... may appeal the finding and order of the

Pollution Control Board, under the Administrative Review Law.” 35 ILCS 200/11-60. Again, the Tax Code allows for review of the Board’s certification or action, but only by an applicant or holder – of which, Roxana is neither. Accordingly, there is no statutory authority for allowing intervenors in tax certification proceedings. Instead, as the Board allowed in *Reed-Custer* (see further discussion below), a third party could petition the Board under the narrow Section 11-30 circumstances, and then, the Board may, on its own, consider revocation or modification of a certification. *See generally* Board Order, *In the Matter of: Revision of the Board’s Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20* (Ill.Pol.Control.Bd. Dec. 21, 2000) (where the Board stated that it may revoke or modify a certificate in several circumstances, including when a certificate was obtained by fraud or misrepresentation, and stated that it “may learn of the circumstances through any credible filing,” citing *Reed-Custer Community Unit School District No. 255 v. Pollution Control Board*, 232 Ill. App. 3d 571, 576 (1st Dist. 1992) (“*School District*”). Furthermore, allowing third parties to intervene in tax certification proceedings could result in the filing of numerous third-party actions before the Board. Not only schools, but anyone who benefits from property tax revenue could have a case to intervene, flooding the Board with actions that the General Assembly never approved or intended.

Neither the Tax Code nor the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/1 *et seq.*, provide for intervention of third parties in tax certification proceedings, and the Board has specifically held that it cannot hear petitions from third parties if such petitions are not authorized by statute. *People of Williamson County Ex Rel. State’s Attorney Charles Garnati and the Williamson County Board v. Kibler Development Corporation, Marion Ridge Landfill, Inc. and Illinois EPA*, PCB No. 08-93

(Ill.Pol.Control.Bd. July 10, 2008). (hereinafter "*Williamson County*"). In *Williamson County*, the Petitioners filed an appeal of a permit modification issued by Illinois EPA for a non-hazardous waste landfill. *Id.* at 1. The Board, reviewing Section 40 of the Act, noted that the appeal provision for this type of proceeding authorizes the *applicant* to petition for review, and thus, the Board concluded that State's Attorney has no statutory right to appeal, stating "to allow this action to proceed as a permit appeal would amount to an unlawful expansion of appeal rights by the Board." *Id.* at 13. (referencing *Landfill Inc. v. PCB*, 74 Ill. 2d 541 (1978), where the Supreme Court held that "the Board was not authorized to extend appeal rights to persons not authorized those rights through the Act."). Also note that in a previous Board decision, involving the same parties, the Board stated:

The Supreme Court in *Landfill, Inc.* made clear in 1978 that the Board has no authority to, by rule, extend appeal rights beyond those granted in the Act under Section 40. *Landfill, Inc.*, 387 N.E.2d 258 Intervenors receive the same rights as the original parties to an action, including rights to appeal. Since the decisions in *Pioneer Processing* [1984] and *Land and Lakes* [1993], the legislature has granted some additional third party permit appeal rights. See 415 ILCS 5/40(e), as added by P.A. 92-574, eff. June 26, 2002 (granting third parties the right to appeal NPDES permits). Were the Board to grant Marion, Herrin, and the Airport Authority intervenor status in this appeal of a permit to develop a new municipal solid waste landfill brought under Section 40(a)(1) of the Act, the Board would be unlawfully extending appeal rights.

Kibler Development Corporation and Marion Ridge Landfill, Inc. v. Illinois EPA, PCB 05-35 at 5 (Ill.Pol.Control.Bd. May 4, 2006).

Although *Williamson County* involved a permit appeal under Section 40 of the Act, the Board's analysis of statutory authority can be applied to the circumstances in this tax certification proceeding. There is no statutory authority either in the Tax Code or the Act that grants third parties the right to intervention. Further, the Tax Code only allows

applicants or holders to appeal Board certifications pursuant to the Administrative Review Law. To allow third parties to intervene in tax certification proceedings would amount to circumvention of the General Assembly's intentions to allow only applicants and holders to appeal certification proceedings and would extend appeal rights beyond what is allowed by statute. Thus, the Board should, consistent with its precedent in *Williamson County*, disallow intervention since such petitions are not allowed by statute.

In addition to the lack of statutory authority for intervention in tax certification proceedings, WRB is unable to locate any cases as precedent for the Board allowing intervention in this type of proceeding, which in and of itself supports the discussion above on the lack of authority for intervention in these cases. The Board has issued hundreds of certifications for pollution control facilities, and WRB is unable to find a case, available on the Board's online database, and Roxana has failed to cite a case, where the Board has allowed intervention. It is not surprising that there is no precedent for intervention in these cases, however, because there is no statutory basis for the Board to allow such intervention. The General Assembly has vested the authority to issue and review tax certifications to the Board, and the Board alone. Any challenge to the certification must be raised pursuant to Section 11-30 of the Tax Code or by the applicant or holder via the Administrative Review Law.

Note that the Board's general provisions do allow for intervention in adjudicatory proceedings, if certain criteria are met. 35 Ill. Admin. Code § 101.402. However, the Board should note that there is no statutory right, either unconditional or conditional, for intervention in tax certifications, and although Roxana may be adversely affected, it has sought relief via an inappropriate mechanism. Regardless of the interests of Roxana, the

Board does not have the authority to grant party status “through intervention to persons the General Assembly does not allow to become parties.” *Sutter Sanitation, Inc. and Lavonne Haker v. Illinois EPA*, PCB No. 04-187 (Ill.Pol.Control.Bd. Sept. 16, 2004). To challenge the certification, Roxana may petition the Board on Section 11-30 grounds. It has no right to intervention in this case.

III. ROXANA DOES NOT MEET THE CRITERIA FOR INTERVENTION.

As explained above, Roxana does not have a right to intervene in tax certification proceedings. However, the Board rules provide generally for intervention under certain circumstances. 35 Ill. Admin. Code § 101.402. Section 101.402 states, in relevant part:

- c) Subject to subsection (b)³ of this Section, the Board will permit any person to intervene in any adjudicatory proceeding if:
 - 1) The person has an unconditional statutory right to intervene in the proceeding; or
 - 2) It may be necessary for the Board to impose a condition on the person.

- d) Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:
 - 1) The person has a conditional statutory right to intervene in the proceeding;
 - 2) The person may be materially prejudiced absent intervention; or
 - 3) The person is so situated that the person may be adversely affected by a final Board order.

35 Ill. Admin. Code § 101.402(c) – (d).

³ Section 101.402(b) states: “In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.” 35 Ill. Admin. Code § 101.402(b).

Should the Board reverse its interpretation of the Tax Code provisions authorizing certification of pollution control facilities and determine that its rules on intervention are applicable to tax certification proceedings, Roxana's Petition must still be denied because Roxana does not meet the criteria for intervention. Section 101.402(c) states that the Board "will permit" intervention in two circumstances - first, if the person has an unconditional statutory right, and second, if the Board may need to impose a condition on the person. Neither of these two criterion is met in this case. As detailed above, there is no statutory right to intervention in tax certification proceedings, and since the Board would not need to impose any conditions on Roxana in this proceeding, intervention cannot be granted on these grounds.

Section 101.402(d) provides that the Board may permit intervention in any of the three circumstances described above. In this case, Roxana, once again fails to sufficiently meet the criteria to warrant intervention. In regards to the first criterion, there is no statutory right, either unconditional or conditional, to intervention in tax proceedings. Secondly, Roxana will not be materially prejudiced absent intervention. Roxana may utilize the Tax Code's provisions to challenge the certification on any one of several grounds. In addition, Roxana may challenge the assessment of the Refinery at the local level before the Madison County Board of Review. In fact, Roxana acknowledges in its Petition that "a number of taxing bodies, including the School District, are currently litigating the fair market value of the refinery with WRB before the Madison County Board of Review." Petition at 3. Because Roxana has other means by which to challenge the tax assessment of the Refinery, it is not materially prejudiced by denial of intervention.

Finally, the Board may grant intervention if the “person is so situated that the person may be adversely affected by a final Board order.” 35 Ill. Admin. Code § 101.402(d)(3). In the case of Roxana, it will be impacted should the Board grant certification in this proceeding since the pollution control facility will be “valued at 33 1/3% of the fair cash value of their economic productivity to their owners.” 35 ILCS 200/11-5. The decrease in the valuation of the pollution control facility impacts the revenue Roxana receives from the local property tax base. Although Roxana will be impacted by the issuance of tax certifications, it will not be so impacted that intervention is warranted. Roxana is situated similarly to other entities, that too, are impacted by tax certifications or other types of tax exemptions. The General Assembly found it justified to adopt the pollution control facility valuation scheme, although it would undoubtedly impact local governments and entities that derive revenue from property taxes. Simply being impacted by the issuance of a tax certification should not be sufficient to allow intervention, especially when the Tax Code does not provide for intervention in these proceedings, there are other avenues Roxana can use to challenge the assessed value of the Refinery, and the impact to Roxana is so common that allowing intervention in this tax proceeding could unintentionally spur any person, including, even perhaps the parents of persons attending schools, to petition for intervention.

Section 101.402 clearly allows the Board to exercise discretion in allowing intervention. In this case, there is not a right to intervention. However, should the Board determine an evaluation of the Petition is warranted, WRB requests that the Board exercise its discretion and deny the Petition because Roxana fails to meet the permissive

criterion established by the Board for intervention. Although Roxana could be impacted by certification in this proceeding, it is not sufficient to justify intervention.

Moreover, Roxana's own petition and requested relief here demonstrate that the intervention sought would be almost certain to unduly delay and materially prejudice the proceeding, and would otherwise interfere with the orderly and efficient proceeding established by the General Assembly in the Tax Code. Consideration of these factors by the Board, pursuant to Section 101.402(b), weighs, again, in favor of denial of Roxana's Petition.

IV. ROXANA MISCONSTRUES THE BOARD'S HOLDING IN REED-CUSTER.

Roxana's Petition states: "The Board has previously held that third-party intervention is allowed in tax certifications and should be encouraged due to the Board's limited ability to uncover possible fraud and misrepresentation." Petition at ¶9 (citing *School District*). Roxana inaccurately represents the Board's holding in the *Reed-Custer* case.

In *Reed-Custer*, the Reed-Custer Community Unit School District No. 255 ("Petitioner") filed a petition to revoke the Board's certification of Commonwealth Edison's ("Com Ed") cooling pond as a pollution control facility. *Reed-Custer*, PCB No. 87-209 (Ill.Pol.Control.Bd. Aug. 30, 1990). As the Board explained, its authority to issue tax certifications for pollution control facilities stemmed from, at that time, the Illinois Revenue Act of 1939 ("Revenue Act"). *Id.* at 1. The Board summarized that "Reed-Custer seeks a revocation of the April 1986 certification under section 502a-6(A) of the

Revenue Act⁴ which allows revocation whenever a certificate was obtained by fraud or misrepresentation.” *Id.*

The Board stated in regards to the scope of its consideration of the petition for revocation:

We emphasize that, pursuant to Section 502a-6(A) of the Revenue Act, the sole basis for considering revocation in this case is whether or not ComEd’s certificate of pollution control facility was obtained by fraud or misrepresentation. Therefore, the focus of the Board’s review is restricted to the accuracy of ComEd’s application, not the correctness of the Agency’s determination.⁵ In other words, the Revenue Act does not authorize a third party to seek to have the Board reverse the Agency’s determination to issue the certificate on a claim that the Agency’s action was in error based on the record; rather, it authorizes the third party to seek to have the Board revoke the certificate on a claim that ComEd’s actions were unacceptable based on fraud or misrepresentation.

Id. at 5. (Emphasis in original.) The Board held that ComEd’s statements to the Agency were not inaccurate and found that “ComEd did not obtain the certificate by fraud or misrepresentation.” *Id.*

⁴ Section 502a-6(A) of the Revenue Act is currently Section 11-30 of the Tax Code, 35 ILCS 200/11-30.

⁵ The authority for the Pollution Control Facilities Valuation Program is found in the Tax Code and became effective on January 1, 1994. 35 ILCS 200/11-5. The current authority was derived from the Revenue Act of 1939 which has since been repealed. Formerly 35 ILCS 205/21; Ill.Rev. Stat, Ch. 120, para 502(a). The Tax Code gives the Board authority to issue, modify or revoke pollution control facilities’ tax certificates. On June 10, 1983, the Chairman of the Board delegated his authority under the Revenue Act of 1939 to Illinois EPA. *Reed-Custer*, PCB 87-209 (Ill.Pol.Control.Bd. Feb. 25, 1988). However, the Board did retain its authority to revoke certifications under Section 21a-6(A) of the Revenue Act. *Id.* Section 200/11-30(a) of the Tax Code mirrors Section 21a-6(A), giving the Board authority to modify or revoke a pollution control certificate if it was obtained by fraud or misrepresentation. 35 ILCS 200/11-30(a).

In 2000, the Board adopted procedures for tax certification cases. *In the Matter of: Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130*, R00-20 (Ill.Pol.Control.Bd. Dec. 21, 2000). The newly adopted rules required Illinois EPA to submit a recommendation to the Board, and the Board would then grant or deny the certification. The Board retained the authority to modify or revoke the certificates, as well.

Petitioner appealed to the Board's denial of its petition to the Appellate Court, where the Court affirmed the Board's Order. *School District*, 232 Ill. App. 3d 571. The Court concluded:

In summary, plaintiff's entire case is nothing more than an attempt to have the Board and this court decertify the Braidwood cooling pond as a pollution control facility. As noted, the Board's review in this case was limited to determining whether the CWE's certification was obtained by fraud or misrepresentation. This court's role is even more limited as it sits only to review the Board's *factual* findings on the fraud or misrepresentation issue. Under our limited role of review, we determine that the manifest weight of the evidence supports the Board's conclusion that CWE did not obtain its certificate by fraud or misrepresentation.

Id. at 582. (Emphasis in original.)

Roxana grossly misconstrues the Board's holding in *Reed-Custer*. Roxana states that the Board held that "third-party intervention is allowed in tax certifications and should be encouraged due to the Board's inability to uncover possible fraud and misrepresentation." This characterization of the *Reed-Custer* holding is wholly inaccurate. First, the *Reed-Custer* case in no way addresses intervention. It is a case based on a petition to revoke certification brought pursuant to a statutory provision of the Illinois Revenue Act that specifically allows such petitions under limited circumstances. The *Reed-Custer* School District was not an Intervenor in the Board case; it was the Petitioner. It is not "third party intervention" that should be encouraged, as Roxana represents, but rather "third-party revocation petitions," as the Court referenced in its recitation of the procedural history of the *Reed-Custer* case.

As noted, the Court in *School District* does reference third-party revocation petitions in a discussion on Respondent ComEd's motion to dismiss Petitioner's petition.

For the Board's consideration, WRB provides the full paragraph of the Court's opinion below so as to not truncate or misrepresent the Court's statement:

CWE moved to dismiss the petition on the ground that the Board had no jurisdiction under the Act to consider third-party revocation petitions. On February 25, 1988, the Board rejected CWE's motion, reasoning that section 21a-6 does not expressly prohibit third-party revocation petitions and, further, that such petitions should be encouraged due to the Board's limited ability to uncover possible fraud and misrepresentation. CWE has not sought review in this court of the Board's order denying its motion to dismiss, and we assume its validity for purposes of this appeal.

Id. at 578. (Emphasis added). As the Board can note, the Court was referencing the Board's decision to deny ComEd's motion to dismiss because the provisions of the Revenue Act did "not expressly prohibit third-party revocation petitions." In addition, the Court reiterated the Board's reasoning that revocation petitions should be encouraged because of the limited ability of the Board to "uncover fraud and misrepresentation." In this respect, however, the Board has the benefit of not only expert, but also an unbiased recommendation from Illinois EPA, and accordingly, it does not need third parties to intervene and purport to inform the Board of the facts of a case.⁶ Thus, as provided by the Revenue Act and interpreted by the Board in *Reed-Custer*, third party revocation petitions may be allowed pursuant to the statute, but the scope of review is limited to several narrow circumstances, including revocation based on fraud or misrepresentation.

⁶ Roxana states in its Petition that "[i]ntervention by the School District will allow this Board the opportunity to receive additional review and further information on these projects . . ." Petition at ¶ 32, and stated in another proceeding, where it has filed a Motion for Reconsideration, that "[t]his Board should allow the School District leave to intervene in both proceedings in order to facilitate a proper evidentiary hearing on these matters." Motion for Reconsideration, *WRB Refining, LLC v. Illinois EPA*, PCB No. 12-30 at ¶ 45 (Ill.Pol.Control.Bd. Nov. 23, 2011). Roxana clearly envisions fully participating in tax certification proceedings by introducing "evidence," presumably in support of the claims it makes in its Petitions. As discussed throughout this Response, there is no right to intervention in tax certification proceedings, and it is clear from the statutory provisions of the Tax Code that the General Assembly did not intend for third parties to participate by intervention in these types of proceedings. Thus, the Board should deny intervention.

Roxana's statement in its Motion that the Board held that third-party intervention is allowed and should be encouraged is clearly incorrect. A simple reading of the *Reed-Custer* and *School District* decisions shows that the cases are about revocation of a certification for fraud or misrepresentation, pursuant to the statutory provisions of the Revenue Act. These cases do not address intervention, as Roxana would have the Board believe. In fact, WRB is unable to locate a Board case, available on the Board's online database, and Roxana has failed to cite a case, where the Board has granted intervention in a tax certification proceeding. Instead, third-party participation in tax certification proceedings seems to be allowed only via the revocation provisions of the Revenue Act, now Property Tax Code, that allow a petition to revoke to be filed for certain circumstances.

V. **PUBLIC POLICY DOES NOT SUPPORT GRANTING ROXANA'S PETITION.**

Not only is there no statutory right to intervention in tax certification proceedings, but there is also no public policy basis to support intervention in these types of proceedings. The Board has reasoned that although a person may have an interest in a Board order, which may adversely affect that person, such an interest is not necessarily sufficient to allow that person to become a party to the proceeding through intervention. *Sutter*. Furthermore, in essence, Roxana is claiming that it should be granted intervention because certification means that a portion of the value of the pollution control facility will be removed from the tax rolls, and since tax revenues are reduced, Roxana is adversely impacted. However, the Board should note that certification itself will not lower assessments or taxes. In fact, certification only means that the duty to assess the

pollution control facility shifts from the local assessor to the Department of Revenue (“DOR”), which does not necessarily result in the assessment being reduced.

Allowing intervention in pollution control facility tax certification proceedings could result in overwhelming the Board and courts with unanticipated reviews of Board certification determinations. The General Assembly did not intend such actions in tax certification proceedings. The Tax Code only allows for an applicant or holder of a pollution control facility certification to appeal under the Administrative Review Law. 35 ILCS 200/11-60. Allowing Roxana to intervene would make it a “party,” and thus, it could allow Roxana to appeal the Board’s final order, which appears to be directly contrary to the General Assembly’s intentions. *Id.*; 735 ILCS 5/3-113. This could open the Board’s certification proceedings to appeals that were never contemplated by the General Assembly or the courts. It is possible that the Board’s entire docket could be monopolized by an influx of intervention petitions filed by taxing districts and taxpayers, who have any animus against an applicant seeking a certification. Again, allowing intervention in tax certification proceedings would almost certainly result in undue delay and material prejudice in the proceeding, as well as otherwise interfere with the orderly and efficient proceeding established by the General Assembly in the Tax Code.

Allowing any person who has an interest in property tax revenue and could be adversely affected by the loss of such revenue to intervene in tax certification proceedings could have a chilling effect on promoting the use of equipment and processes for which the primary purpose is to “eliminate, prevent, or reduce air or water pollution,” or treat, pretreat, modify or dispose of any potential pollution. 35 ILCS 200/11-10. This basis for the pollution control facility valuation policy is sound and was

adopted by the General Assembly to encourage the use of pollution control facilities. In many cases, the pollution control equipment is costly and would not otherwise be used without the tax certification incentive. However, allowing intervention of every entity or person, who could be adversely impacted by the tax certification, could spur years of costly litigation due to constant third-party intervention, and applicants may reconsider whether the cost of obtaining a tax certification is too burdensome to warrant resource intensive litigation.

VI. CONCLUSION

Because there is no statutory authority or basis for intervention of third parties in tax certification proceedings, the Board should deny Roxana's Petition. Further, even if intervention is an appropriate avenue for participation in tax certification proceedings, Roxana has not met the Board's criteria for intervention. Accordingly, the Board should deny Roxana's Petition.

WHEREFORE, WRB REFINING, LLC respectfully requests that the Illinois Pollution Control Board consider this Response and deny Roxana's Petition For Leave to Intervene.

Respectfully submitted,

WRB REFINING, LLC
Petitioner,

By: /s/ Katherine D. Hodge
One of Its Attorneys

DATE: December 23, 2011

Katherine D. Hodge
Monica T. Rios
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705
(217) 523-4900