ILLINOIS POLLUTION CONTROL BOARD
January 19, 2012

WRB REFINING, LLC. (Ultralow Sulfur Diesel Hydrotreater Unit) (Property Identification Number 19-1-08-35-00-000-001),	)	
Petitioner,	)	
v.	)	PCB 12-40 (Tax Certification – Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ORDER OF THE BOARD (by C.K. Zalewski):

This matter comes before the Board upon motion in one of many tax certification cases pending before the Board involving facilities of WRB Refining, LLC.[1] WRB Refining's Wood River petroleum refinery is located at 900 South Central Avenue in Roxana, Madison County. The Roxana Community Unit School District seeks leave to intervene in all of these cases, as a potential recipient of any property taxes paid by WRB for the refinery.

In summary, after granting all motions for leave to file and considering all filings made, the Board denies the motion for reconsideration of its October 20, 2011 order in this case. As described below, that order denied intervention in a case closed by the September 8, 2011 order granting tax certification of certain pollution control facilities under the Property Tax Code. *See* 35 ILCS 200/11-5 *et seq.* (2010); 35 Ill. Adm. Code 125.

PROCEDURAL HISTORY

On August 25, 2011, the Illinois Environmental Protection Agency (Agency) filed a Recommendation (Rec.) that the Board certify certain facilities of WRB Refining, LLC (WRB) as "pollution control facilities" for preferential tax treatment under the Property Tax Code. *See* 35 ILCS 200/11-5 *et seq.* (2010); 35 Ill. Adm. Code 125. WRB Refining's Wood River petroleum refinery is located at 900 South Central Avenue in Roxana, Madison County. The Agency made its recommendation in response to WRB's October 14, 2011 application (attached to the Recommendation) concerning its Ultralow Sulfur Diesel Hydrotreater. In its Recommendation, the Agency described the system as follows:

[1] PCB 12-39 and PCB 12-40 are closed cases, in which are pending motions for reconsideration of final orders. The bulk of the cases are awaiting issuance of the initial Board order. See WRB Refining, LLC. v. IEPA, PCB 12-65 through and including PCB 12-84, and PCB 12-86 through and including PCB 12-91.

> The subject matter of this request consists of the Ultralow Sulfur Diesel Hydrotreater, which was implemented by the refinery as part of the Ultralow Sulfur Diesel project to reduce plant-wide emissions of sulfur oxides ("SO_x"), nitrogen dioxides ("NO_x") and particulate matter associated with the refining of [the]diesel pool sold to consumers. As described in the application, the Ultralow Sulfur Diesel Hydrotreater is a new unit combined from two existing hydrocracker unit reactors and related existing equipment with new equipment, piping and controls. The hydrotreater unit employs hydrogen, a fixed bed catalyst, high pressure and high temperatures to remove sulfur compounds from various product streams (*i.e.*, straight run, fluid cat cracker and coker light gasoil). The high-pressured reaction from the catalyst to the hydrogen-treated product streams removes the sulfur from the product, converting it to hydrogen sulfide. The Ultralow Sulfur Diesel Hydrotreater allows the refinery to comply with the United States Environmental Protection Agency's diesel fuel content requirements, which were established at roughly less than 15 parts per million by weight. In doing so, the new hydrotreater unit ultimately prevents or reduces SO_x emissions from the diesel pool supplied to consumers for use in automobiles and other diesel-powered engines. Secondarily, the improved quality of low sulfur diesel products allows consumers to make use of more advanced emission control systems for diesel engines, which can result in reductions of NO_x and particulate matter emissions.. Rec. at. 2; *also see* Board order in PCB 12-40, slip op. at 2 (Sept. 8, 2011).

On September 8, 2011, the Board entered an order certifying that WRB Refining's Ultralow Sulfur Diesel Hydrotreater systems are pollution control facilities.

On September 13, 2011, the Roxana Community Unit School District (Roxana CUSD or School District) filed a motion for leave to intervene. In a one-paragraph order on October 20, 2011, the Board denied the motion to intervene as moot, since the Board had already granted the tax certification and closed the docket.

On November 23, 2011, Roxana CUSD filed a motion for reconsideration of the Board's October 20, 2011 order (Mot. Rec.). While described in more detail later, the motion argues, in summary, that the petition for leave to intervene in each case was timely, and

> the Board's orders granting the certifications were not final and the petitions were consequently not moot. These two certifications, if granted, would remove over $300 million worth of real property from the School District's locally assessed property tax rolls. Thus, the denials of leave to intervene will materially prejudice and adversely affect the School District and should be reconsidered. Furthermore, the School District can present evidence that proves that these properties do not meet the definition of "pollution control facilities" and should not be granted preferential tax treatment. Mot. Rec. at 1.

On December 9, 2011, WRB Refining filed a motion for extension of time to respond to the Roxana CUSD motion. WRB Refining asserted that it had retained a new attorney on

December 8, 2011, who needed additional time to file a response. WRB Refining noted that the Agency had no objection to the motion, and requested an extension for 14 days after the date on which the Board granted the motion. Roxana CUSD did not file a response to the motion, and is deemed to have waived objection to its grant under 35 Ill. Adm. Code 101.500(d). *See* 35 Ill. Adm. Code 101.500(d).

Prior to any ruling on the December 9, 2011 motion, on December 23, 2011 WRB filed a response in opposition to the motion for reconsideration (WRB Resp.), accompanied by a motion for leave to file. In the absence of any objection, the Board grants WRB's motion for leave to file the response. *See* 35 Ill. Adm. Code 101.500(d).

WRB's response requests that the Board expedite decision. WRB asserts that, on January 23, 2012, the Madison County Board of Review has scheduled a hearing to reassess the value of the Joliet Refinery. While stating its belief that the certification issued by the Board on September 8, 2011 is effective, WRB "requests that the Board expedite its decision in this matter so the Board of Review can take notice of the Board's decision in this matter." WRB Resp. at 2. In entering this order, the Board has expedited its decision to the extent practicable.

On December 15, 2011, the Agency filed a response in opposition to Roxana CUSD's November 23, 2011 motion for reconsideration (Ag. Resp.). The response was accompanied by a motion for leave to file. No responses in opposition have been filed. The Agency's motion is granted. *See* 35 Ill. Adm. Code 101.500(d).

On January 4, 2012, Roxana CUSD filed a joint reply to the respondents' separate responses to Roxana CUSD's its Motion for Reconsideration and Petition for Leave to Intervene (Reply). The reply was accompanied by a motion for leave to file. No responses in opposition have been filed. *See* 35 Ill. Adm. Code 101.500(d). Roxana CUSD's motion for leave to file is granted. In the joint reply, Roxana CUSD addresses not only the filings in this case and the filings concerning the similar motion in PCB 12-39, but also filings in the other pending tax certification cases pending before the Board involving WRB facilities. *See supra*, p. 1 at n.1.[2]

LEGAL FRAMEWORK

Property Tax Code

The application at issue here was made under the Pollution Control Facilities Valuation Program currently found in the Property Tax Code, effective on January 1, 1994. 35 ILCS 200/11-5. The Property Tax Code gives the Board authority to issue, modify, or revoke pollution control facilities' tax certificates.

[2] In this filing, Roxana CUSD notes its inadvertent failure to file a motion for leave to intervene in PCB 12-79 identical to that filed in all of the other WRB cases. Roxana CUSD asks the Board to consider that it has filed a similar motion to intervene in PCB 12-79, noting that the Board's Assistant Clerk had docketed such a motion in PCB 12-79 as well as in the other cases. Reply at 2-3. The Board will address this request in its treatment of those other, still open cases.

The current program was derived from the Revenue Act of 1939, which has since been repealed, and was formerly 35 ILCS 205/21*;* Ill. Rev. Stat, Ch. 120, para 502(a). On June 10, 1983, the Chairman of the Board delegated his authority under the Revenue Act of 1939 to issue certificates to the Agency. *See* Reed-Custer Community Unit School District No. 255-U v. Commonwealth Edison Company (Certification No 21RA-Ill-WPC-85-15, Braidwood Station) and IEPA. PCB 87-209 (Feb. 25, 1988). However, the Board retained the authority to revoke certifications under Section 21a-6(A) of the Revenue Act of 1939. *Id.* Section 200/11-30(a) of the Property Tax Code mirrors former 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) (2010).

Under the Property Tax Code, the General Assembly declared that "[i]t is the policy of this State that pollution control facilities should be valued, at 33 1/3% of the fair cash value of their economic productivity to their owners." 35 ILCS 200/11-5 (2010); 35 Ill. Adm. Code 125.200(a)(2). The Property Tax Code goes on to define "pollution control facilities" as meaning:

> any system, method, construction, device or appliance appurtenant thereto, or any portion of any building or equipment, that is designed, constructed, installed or operated for the primary purpose of:
>
> (a) Eliminating, preventing, or reducing air or water pollution, as the terms are defined in the Illinois Environmental Protection Act; or
>
> (b) Treating, pretreating, modifying or disposing of any potential solid, liquid or gaseous pollutant which if released without treatment, pretreatment, modification or disposal might be harmful, detrimental or offensive to human, plant or animal life, or to property. 35 ILCS 200/11-10 (2010).

While there are four listed exclusions from the definition, none are applicable here. *Id.*

The Property Tax Code provides that"[f]or tax purposes, pollution control facilities shall be certified as such by the Pollution Control Board and shall be assessed by the Department [of Revenue]." 35 ILCS 200/11-20 (2010); *see* 35 Ill. Adm. Code 125.200(a).

The Property Tax Code describes the certification procedure, and powers of this Board under that procedure, as follows

> **Certification Procedure.**
> Application for a pollution control facility certificate shall be filed with the Pollution Control Board in a manner and form prescribed in regulations issued by that board. The application shall contain appropriate and descriptive information concerning anything claimed to be entitled in whole or in part to tax treatment as a pollution control facility. If it is found that the claimed facility or relevant portion thereof is a pollution control facility as defined in Section 11-10, the

Pollution Control Board, acting through its Chairman or his or her specifically authorized delegate, shall enter a finding and issue a certificate to that effect. The certificate shall require tax treatment as a pollution control facility, but only for the portion certified if only a portion is certified. The effective date of a certificate shall be the date of application for the certificate or the date of the construction of the facility, whichever is later. 35 ILCS 200/11-25 (2010).

Powers and duties of the certifying Board.
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 certification or a low sulfur dioxide emission control fueled device certificate [as provided for in 35 ILCS 200/11-35 – 200/11-65] 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 control 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 finding and certificate, if any. 35 ILCS 200/11-25 (2010)

The Property Tax Code provides the path for judicial review of Board orders in tax certification as follows:

Any applicant or holder aggrieved by the issuance, refusal to issue, denial, revocation, modification or restriction of a pollution control certificate or a low sulfur dioxide emission coal fuel device may appeal the finding and order of the Pollution Control Board, under the Administrative Review Law [735 ILCS 5/3-101 *et seq.*]

Board Procedural Rules

Part 101 General Rules. The Board's rules are structured to begin with general provisions that apply to later Parts dealing with specific subject matters. The Part 101 general rules include information concerning, *inter alia*, the Board's procedures; definitions; instructions for filing service, and computation of time; parties, joinder, and consolidation; motion practice; hearings,

evidence and discovery; oral argument; sanctions, and review of final opinions and orders. Section 101.100(a) "Applicability" makes clear that the rules in Part 101

> should be read in conjunction with procedural rules for the Board's specific processes, found at 35 Ill. Adm. Code 102 through 130. . . In the event of a conflict between the rules of this Part and those found in subsequent Parts, the more specific requirement applies. 35 Ill. Adm. Code 101.100(a).

In this proceeding, rules at issue include the definition of "final order" in Section 101.202:

> "Final order" means an order of the Board that terminates the proceeding leaving nothing further to litigate or decide and that is appealable to an appellate court pursuant to Section 41 of the Act. (See Subpart I of this Part ["Review of Final Board Opinions and Orders"]). 35 Ill. Adm. Code 101.202.

Another rule at issue is the Board's rule for intervention of parties at 35 Ill. Adm. Code 101.402. The Board "may permit" intervention in an adjudicatory proceeding upon motion, after considering timeliness of the motion, and whether intervention will unduly delay, materially prejudice, or otherwise interfere with the proceeding. 35 Ill. Adm. 101.402(a), (b). Absent an unconditional statutory right or need to impose a condition on the would-be intervenor, the Board examines whether the person 1) has a conditional statutory right to intervene, 2) may be materially prejudiced absent intervention, or 3) is so situated as to be adversely affected by a Board order. 35 Ill. Adm. Code 101.402(d). The Board reserves the right to limit the rights of intervenors as justice may require. 35 Ill. Adm. Code 101.402(e).

Other rules at issue are procedures for requests to the Board for relief from its own final orders under 35 Ill. Adm. Code 101.520 and 35 Ill. Adm. Code Subpart I (Sections 101.902-908). The timing and effect of the filing of motions for reconsideration is discussed at 35 Ill. Adm. Code 101.520. The rule provides that such motions must be filed with 35 days after receipt of the Board's order, and that timely-filed motions stay the effect of the final order until final disposition of the motion in accordance with 35 Ill. Adm. Code 101.300(d)(2) (setting date of receipt of certified mail as date of service for purposes of appeal). Under Section 101.902, the factors the Board will consider in ruling upon a motion for reconsideration include "new evidence, or a change in the law, to conclude that the Board's decision was in error. (*see also* Section 101.520 of this Part.)". 35 Ill. Adm. Code 101.902.

Part 125 Tax Certification Rules. The Board's procedural rules for tax certifications are codified at 35 Ill. Adm. Code Part 125. These rules establish a procedure similar to those for variances and adjusted standards under the Act. *See* In the Matter of Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20 (Dec. 21, 2000). The application is made in the first instance to the Agency. 35 Ill. Adm. Code 125.202. The Agency investigates the application and files a recommendation to the Board. 35 Ill. Adm. Code 125.204. The rules specifically provide that the applicant may file a petition to contest any Agency recommendation to deny certification, at which the applicant has the burden of proof. 35 Ill. Adm. Code 125.206 and 125. 214. Duly-noticed public hearings must be held in tax certification proceedings if the

applicant files a petition, although the Board may in its discretion hold hearings in other cases if deemed advisable. 35 Ill. Adm. Code 125.210 and 125.214.

In Section 125.216 "Board Action", the rules provide that the Board shall issue tax certifications upon receipt of proper proof under 35 ILCS 200/11-25. The Board, on its own motion, may revoke or modify a certification upon receipt of proper proof under 35 ILCS 200/11-30. The Board has conducted only one proceeding to revoke a tax certification, and this was based on a third party petition under the Revenue Act of 1939 in Reed-Custer Community Unit School District No. 255-U v. Commonwealth Edison Company (Certification No 21RA-Ill-WPC-85-15, Braidwood Station) and IEPA, PCB 87-209 (Aug. 30, 1990) (dismissing petition and finding certificate not obtained by fraud or misrepresentation), *aff'd. sub nom.* Reed-Custer Community Unit School District No. 255 v. Pollution Control Board, 232 Ill. App. 3d 571 (1st Dist. 1992).[3]

ROXANA CUSD'S MOTION FOR RECONSIDERATION

In its November 23, 2011 motion for reconsideration, Roxana CUSD first argues that its motion for leave to intervene was timely filed. Roxana CUSD first contends that it had no notice of the pendency of this application before the Agency, and insufficient notice of its pendency before the Board. Roxana CUSD notes that the Agency Recommendation in this case was filed on August 25, 2011, the Board's certification order was issued on September 8, 2011, and Roxana CUSD's original motion to intervene was filed on September 13, 2011. Roxana CUSD contends that the Board's order of October 20, 2012 denying intervention was in error on the grounds that the issue was not moot since the Board's order was not final under 35 Ill. Adm. Code 35 Ill. Adm. Code 101.300(d)(2), and that the docket was not closed as evidenced by the Clerk's docketing of its November 23, 2011 motion for reconsideration. Mot. Rec. at 2-4; *see also* 13-18.

Roxana CUSD reminds the Board that its rules state that the Board "encourages public participation in all of its proceedings." 35 Ill. Adm. Code 101.110(a) (2011). Citing Reed-Custer (1st Dist. 1992), Roxana CUSD contends that "[t]he 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." Mot. Rec. at 7.

Roxana CUSD next goes on to argue how it will be adversely affected by the Board's order. Roxana CUSD states that WRB Refining owns and operates the Wood River petroleum refinery in Madison County, Illinois. The Wood River petroleum refinery is within the boundaries of the School District, and the School District receives property tax revenues from it. Mot. Rec. at 6.

Roxana CUSD's motion goes on to relate a chronology of recent actions by WRB:

[3] The Board's decision will be cited as Reed-Custer, PCB 87-409, and the court's as Reed-Custer (1st Dist. 1992).

> On or about April 4, 2006, WRB Refining completed construction of its Ultralow Sulfur Diesel Hydrotreater Project (herein "the Hydrotreater") at the refinery. WRB Refining has represented that the total installed cost of the Hydrotreater was approximately $200 million, with a net salvage value just under $1.8 million and no productive income attributable to it.
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> On February 15, 2007, WRB Refining completed construction of its Tier II Gasoline SZorb Unit Project (herein "the SZorb") at the refinery. WRB Refining has represented that the total installed cost of the SZorb was approximately $100 million, with a net salvage value just under $600,000 and no productive income attributable to it.
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> On or about October 14, 2010, over three and four years after their completion, WRB Refining filed with the Illinois Environmental Protection Agency (herein "the Illinois EPA") applications seeking tax certifications of the SZorb and the Hydrotreater as pollution control facilities for property tax purposes.
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> Seven months later, on May 13, 2011, an Illinois EPA staff member issued memoranda to Illinois EPA's counsel stating his recommendation that the SZorb and the Hydrotreater be granted tax certifications as pollution control facilities "[b]ased on the information included in [these] submittal[s]"
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> Three months after that, on August 25, 2011, the Illinois EPA filed its appearance and recommendation with this Board recommending that the Board issue the requested tax certifications. Mot. Rec. at 6-7 (some record citations in original omitted.).

Roxana CUSD explains that removal of these WRB facilities from the tax roles would have a significant impact on the school district, an impact that would not be fully aired absent intervention:

> Together, the properties at issue in these two cases have a value of at least $300 million. In Madison County, they would be treated as real property and subject to taxation at one-third their fair cash value – if they would be treated as personal property, they would not be subject to taxation at all and WRB Refining would have no need to seek their classification as pollution control facilities.
>
> Until recently, the Wood River petroleum refinery was the subject of a property tax settlement agreement between then-owner ConocoPhillips and a number of local taxing bodies, attached hereto as Exhibit 7.3 Through the 2010 tax year, the assessed value of the refinery was pre-determined by the agreement of the parties. (Exhibit 7, p. 4.) This effectively excluded the SZorb and the Hydrotreater from taxation. The agreement ended with the 2010 tax year, and it was not until then that WRB Refining filed these applications for pollution control facility tax certifications with the Illinois EPA.

> If locally assessed, these properties will contribute $100 million to the School District's property tax base. The School District's total tax rate for its operating funds for the 2010 tax year was 3.81%, and these properties would have resulted in over $3.8 million in property tax revenue last year if they had not been excluded from taxation under the settlement agreement. Multiplying this amount over the life of these assets gives WRB Refining a tremendous incentive to seek pollution control facility treatment for them and claim that they have no economic productivity value. Mot. Rec. at 8.

Roxana CUSD next argues that the Agency's analysis of WRB's applications "was clearly deficient." Roxana CUSD observes that in PCB 12-039, the Agency recommendation "stops discussing the SZorb after the first sentence in paragraph 4 and begins – with a sentence fragment, no less – discussing the Distilling West H-28 NO_x Reduction project that was the subject of another filing, Docket No. PCB 2012-038." Mot. at 9, citing Ag. Rec. in PCB 12-39 pp. 2-3, para. 4, 7, 8). Furthermore, Roxana CUSD relates, the error was repeated when the Board quoted from that recommendation in its order of September 8, 2011. Roxana CUSD opines that this error might be the result of the IEPA having filed ten matters with the Board on August 25. But, Roxana CUSD states, "[r]egardless of the cause, this flawed analysis is not sufficient to serve as the basis for pollution control facility certification of the $100 million SZorb." Mot. at 9-10. Roxana believes that the Agency Recommendation in this case, PCB 12-40, concerning the Ultralow Sulfur Diesel Hydrotreater, exhibits similar deficiencies to that in PCB 39-40 (although no clerical error appears in this docket).

Roxana CUSD argues that grant of intervention will not unduly delay the conclusion of these proceedings, given WRB's three to four year delay in applying for tax certification after the facilities' completion, and the Agency's ten month delay in processing the applications and transmittal of the Recommendation to the Board. Mot. Rec. at 17-18. Roxana CUSD believes that the Agency Recommendations are insufficient to provide the Board with a "meaningful review of these properties." Mot. Rec. at 18. Roxana CUSD concludes that:

> [I]ntervention by the School District will aid and assist the Board in its determination of these matters, which the School District believes will ultimately be a denial of tax certification on both properties.
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> As stated above, a property tax settlement agreement controlled the local assessment of the Wood River refinery through tax year 2010. Over the past four years, there has been significant capital invested in the real property at the refinery.
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> The School District and other taxing bodies are currently in litigation before the Madison County Board of Review over the fair market value of the refinery. In that litigation, WRB Refining has represented that it has over $3 billion worth of property in applications for pollution control facility certification pending with the Illinois EPA. It was that representation that prompted the November 7 FOIA [Freedom of Information Act] request to the Illinois EPA [for confirmation of the statements]. It is reasonable to anticipate that there will be substantial litigation

> over the qualification of these improvements as pollution control facilities. Mot. Rec. at 18.

Roxana CUSD accordingly requests the Board to vacate its earlier orders in this matter, grant Roxana CUSD leave to intervene, and set the matter for hearing preceded by discovery. Mot. Rec. at 18.

THE AGENCY'S RESPONSE IN OPPOSITION

The Agency's December 15, 2011 response opposes grant of Roxana CUSD's motion for reconsideration, suggesting that the procedural and substantive grounds it asserts are insufficient. The Agency does not address most of the procedural points, characterizing them as "mostly specious." Ag. Resp. at 10. The Agency does, however, point out that Roxana CUSD appeared to misapprehend the effect of 35 Ill. Adm. Code 101.300(d)(2), which relates to the time of receipt of service for the purpose of computing the time for appeal to the courts. The Agency believes that the rule does not affect the finality of the September 8, 2011 order, and states that Roxana CUSD's motion should be denied for failing to address why its motion for leave to intervene was not moot. *Id.* Additionally, the Agency characterizes Roxana CUSD's other procedural arguments as indicative of a "certain zeal for litigiousness", which the Board might wish to consider when weighing Roxana CUSD's claims.

The bulk of the Agency's argument related to the contents of the Recommendation, arguing that they are sufficient to allow for certification of the facilities. Ag. Resp. at 2-9. The Agency conceded that the Recommendation in PCB 12-39:

> initially references the Gasoline SZorb Unit, but then references a separate project that formed the subject matter of another recommendation *i.e.* Distilling West H-28 NO_x Reduction Project) filed with the Board at the same time and separately docketed as PCB 12-38. Ag. Resp. at 3.

The Agency explains the reference as "the result of poor execution in the use of a template," regrettably occasioned by the simultaneous filings of recommendations concerning other WRB certification applications. The Agency states that the "drafting mistake should be viewed as harmless error and should not be considered fatal to the Board's decision". Ag. Resp. at 3.

The Agency reminds that the details and supporting basis for its conclusion in PCB 12-40 regarding the Ultralow Sulfur Diesel Hydrotreater unit are plainly described in the supporting documents, attached to the Recommendation as Exhibit A. Ag. Resp. at 3. The Agency addresses each of the School District's arguments against certification:

> [Roxana CUSD] first asserts that because the Ultralow Sulfur Diesel Hydrotreater refines low-sulfur diesel that can purportedly be sold "more easily and profitably" than other product streams (*i.e.*, nonroad, locomotive and marine diesel, as well as diesel manufactured for export), it must not be intended for the "primary purpose"of pollution control. [Motion for Reconsideration, page 12]. This argument presumes too much. It is neither intuitively obvious nor

> empirically evidenced . . . that the types of fuel exempted by the United States Environmental Protection Agency ("USEPA"*)* from Tier II standards for cleaner diesel fuel are necessarily more difficult or less profitable to refine than fuel refined for conventional diesel-powered engines. Similarly, that a pollution control facility may permit a for-profit entity to be more competitive or profitable does not disqualify the project for tax certification.
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> Under the definition of "pollution control facilities", WRB's project is eligible for tax certification from the Board if its design, construction or operation is for the "primary purpose" of "eliminating, preventing or reducing" air pollution. *See*, 35 ILCS 200/11-1(a). The application demonstrates that the project's design, construction and operation is to reduce the sulfur content of diesel fuel to meet the USEPA's fuel content requirements for ultralow sulfur diesel. In its most fundamental form, the project reduces or prevents emissions of conventional pollutants) that would otherwise be emitted to the atmosphere. These facts fulfill the statutory requirement of "primary purpose". Ag. Rec. at 3.

The Agency observes that the Recommendation contains the Agency's technical evaluation of the application, stating that the project will reduce air pollution. While the Agency concedes that the discussion is "abbreviated and pro forma, in its nature", the Agency remarks that this approach is consistent with those taken in other cases. Finally, the Agency reminds that its Recommendation in tax certification proceedings is not determinative, but is merely an aid to Board deliberation. Ag. Rec. at 4-5.

The Agency asserts that the correctness of the conclusion is underscored by reference to the holding in Central Illinois Light Co. v. Dept. of Revenue, 1217 Ill. App.3d 911, 453 N.E.2d 1167 (3rd Dist. 1983)(construing meaning of "pollution control facilities" under the Illinois Use Tax Act, formerly codified at 120 Ill. Rev. Stat. 439.2a (1979). The Agency believes that this is also consistent with the analysis and approach taken by the Agency and the Board in various other tax certification cases. Mot. at 7-8.[4]

[4] These include Aux Sable Liquid Products v. IEPA, PCB 02-123 (March 21, 2002) (Merox Treating Process Unit, whose primary purpose was to remove sulfur compounds from natural gas liquids); ConocoPhillips Company v. IEPA, PCB No. 04-214 (June 17, 2004) (Low Sulfur Gasoline Project, whose primary purpose was to remove sulfur from certain gasoline streams); Marathon Ashland Petroleum, LLC, v. IEPA, PCB 06-94 (January 5, 2006) (DHT-Coker Naptha Project, whose primary purpose was to enable a hydrotreater unit to remove sulfur from gasoline); Marathon Ashland Petroleum, LLC, v. IEPA, PCB 07-56 (January 26, 2007) (Gasoline Desulfurization Unit, whose primary purpose was to reduce sulfur content of gasoline); Marathon Petroleum Company, LLC, v. IEPA, PCB 11-84 (June 2, 2011) (Routing of Light Straight Run, whose primary purpose was to ensure the movement of a feed-stream to the main desulfurization unit); Marathon Petroleum Company, LLC, v. IEPA, PCB 12-5 (July 21, 2011) (Ultra-Low Sulfur Diesel Project, whose primary purpose was to construct reactors and modify an amine treatment unit to facilitate desulfurization of diesel fuel feed-stream).

The Agency also addresses Roxana CUSD's contention that advanced emission control systems facilitated by the use of low-sulfur diesel are "pollution control facilities" but that the Ultralow Sulfur Diesel Hydrotreater is not (citing Mot. at 10-11 where Roxana CUSD argues that the former reduces pollution while the latter only keeps the gasoline product from poisoning the former). Ag. Resp. at 4-5. The Agency comments that the advanced emission control systems may themselves constitute a form of pollution control, but their use of the cleaner diesel fuel gasoline is still considered a beneficial component of the project. But, the Agency remarks that there is also a separate, and arguably more significant, justification for the Ultralow Sulfur Diesel Hydrotreater: the prevention of emissions that is achieved through the manufacture of cleaner diesel fuel consistent with a federal regulatory scheme aimed at reducing air pollution at the point of manufacture. Ag. Resp. at 6. Finally, the Agency states that Roxana CUSD provides "no legal or empirical support" for the argument that the Ultralow Sulfur Diesel Hydrotreater "actually increases" air pollution from the refinery. Ag. Resp. at 7.

In conclusion, arguing that no valid procedural or substantive challenges have been successfully presented, the Agency therefore requests that the Board deny Roxana CUSD's motion to reconsider its tax certification and to reopen this proceeding.

WRB'S RESPONSE IN OPPOSITION

WRB filed its response in opposition to the motion to reconsider on December 23, 2011. WRB adopted and incorporated the Agency's December 15, 2011 response in opposition. WRB Resp. at 4-5. Unlike that of the Agency, the WRB response focused on the procedural issues here involved, concluding that Roxana has failed to demonstrate that reconsideration is warranted in this case as required under 35 Ill. Adm. Code 101.902. Further, WRB asserts that Roxana does not have a right to intervention in this matter, and thus, the Board should affirm its October 20, 2011 order.

WRB argues that Roxana CUSD has incorrectly cited the Reed-Custer case for the proposition 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." WRB Resp. at 5, citing Mot. Rec. at 7. WRB reminds that Reed-Custer in no way addresses intervention. Instead, the case involved a school district's petition to revoke a certification under section 502a-6(A) of the Revenue Act of 1939, which allows revocation when a certificate was obtained "by fraud or misrepresentation." The Reed-Custer School District was not an intervenor in the Board case in PCB 87-409; it was the petitioner initiating the action. The Reed-Custer court observed that

> CWE [Commonwealth Edison] moved to dismiss the petition on the ground that the Board had no jurisdiction under the [Revenue] Act to consider third-party revocation petitions. On February 25, 1988, the Board rejected CWE's motion, reasoning that section 2 a-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. Reed-Custer, 232 Ill. App. 3d at 578.

WRB states that "it 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." WRB Resp. at 9. Instead, WRB believes, 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 limited circumstances. *Id.*

WRB argues that:

> 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, 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 (. . . 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] 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 authorized or intended. WRB Resp. at 10-11.

WRB then cites to the Board's holdings in various cases finding that the Board cannot extend appeal rights beyond those granted by the General Assembly, consistent with the Supreme Court's holding in Landfill Inc. v. PCB, 74 Ill. 2d 541 (1978). Resp. at 12-13. In Landfill, Inc., the Supreme Court held that the Board was not authorized to extend appeal rights to persons not granted those rights through the Act. Where no explicit statutory appeal rights exist, the Board has declined to allow intervention in cases including Kibler Development Corporation and Marion Ridge Landfill, Inc. v. IEPA, PCB 05-35 at 5 (May 4, 2006), and 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 IEPA, PCB No. 08-93

(July 10, 2008). WRB concludes that

> 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. WRB Resp. at 13.

WRB concedes that, although Roxana CUSD may be adversely affected by the Board's order, such interest does not provide policy reason enough to grant party status "through intervention to persons the General Assembly does not allow to become parties." Sutter Sanitation, Inc. and Lavonne Haker v. IEPA, PCB No. 04-187 (Sept. 16, 2004). WRB Resp. at 14-15. WRB disputes Roxana CUSD's claim that Roxana is claiming that certification means that a portion of the value of the pollution control facility will be removed from the tax rolls, and tax revenues reduced. WRB suggests that certification itself will not, in and of itself, 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, which does not necessarily result in the assessment being reduced. WRB Resp. at 15.

WRB contends that granting Roxana CUSD's motion would, in essence "open the flood gates" of tax certification litigation:

> 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. WRB Resp. at 15.

In summary, WRB argues that Roxana's motion to reconsider should be denied as a result of its failure to demonstrate that there is new evidence, a change in the law, or an error in the application of the law that warrants reconsideration of the Board's October 20,2011 order. Moreover, WRB believes that Roxana's misrepresentation of the holding in Reed-Custer and its lack of right to intervene in tax certification proceedings further support a denial of Roxana's motion. WRB Resp. at 16.

ROXANA CUSD'S JOINT REPLY TO THE RESPONSES

In its January 4, 2012, 18-page reply, in response to the Agency comment that it exhibited a "zeal for litigiousness," Roxana CUSD rejoins that

> The Wood River refinery is the single largest taxpayer in its boundaries and paid 33% of its total property tax revenues in 2010. If WRB Refining has taken advantage of the tax certification process and has sought to certify non-conforming property as pollution control facilities, as the School District believes, that will materially prejudice the School District and its constituents. The School District cannot be expected to sit idly by as its largest taxpayer potentially abuses the system and erodes its tax base to the detriment of the children and the other taxpayers it serves. Reply at 1-2.

Roxana CUSD states that it has found no other case in which a person sought intervention in a tax certification proceeding before the Board[5]. Reply at 4. Roxana CUSD argues that, because the Board's Part 125 tax certification rules are silent on the issue, the Board should follow the intervention provisions of Part 101. *Id.* Roxana is not persuaded that the Board precedent based on Landfill Inc. disallowing intervention absent explicit statutory intervention rights appropriately applies here. Reply at 6. Roxana CUSD reads the appeal provisions of the Property Tax Code at 35 ILCS 200/11-60 as broadly allowing appeal by persons "aggrieved by the issuance" of a tax certification, since the applicant or holder of such certification could not be "aggrieved by its issuance". Reply at 7.

Roxana CUSD continues to maintain that Reed-Custer stands for the proposition that the Board encourages intervention in tax certification proceedings, particularly since the Board is now the "final arbiter" in tax certifications. Reply at 8. In the absence of a statutory prohibition against intervention, Roxana CUSD believes that the Board's Part 101 intervention rules should be applied. *Id.*

Roxana CUSD also reasserts its position that its September 13, 2012 motion for leave to intervene was not moot, because the Board's September 8, 2012 order could be modified under the Board's rules and because there continues to exist a "concrete controversy and adverseness between the School District and WRB Refining here." Reply at 8-9, 11

Roxana CUSD argues that there is no bar to the grant of this motion and the setting of tax certifications for full hearings. Roxana reminds that

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[5] Later, Roxana CUSD opines that such may be due to

> the lack of any public disclosure of pending recommendations by the Illinois EPA, the extremely brief window of time between initial filings and the Board's orders granting tax certifications, and the lack of any notice to the affected taxing bodies. Reply at 8.

> The Supreme Court has held that "an express grant of power or duty" to an administrative body like the Board "carries with it the grant of power to do all that is reasonably necessary to execute that power or duty." Lake County Bd. of Review v. Property Tax Appeal Bd., 119 Ill.2d 419, 427 (1988). The Board has the power and duty to determine what property meets the statutory definition of pollution control facilities, and it may do all that is reasonably necessary to fulfill that duty – including granting intervention, setting the matter for hearing, or rescinding an order that was not final and concerned property that may not have been properly reviewed or recommended for certification. Reply at 10.

Roxana CUSD argues that, contrary to WRB's assertions, it did specify "facts in the record that were overlooked", including federal Clean Air Act requirements for removal of sulfur from some fuel types making questionable what the "primary purpose" of some WRB equipment is. Reply at 10-11.

Roxana CUSD takes the Agency to task for devoting most its response to the motion for reconsideration to arguing the substantive merits of the certification recommendations in PCB 12-39 and PCB 12-40. Roxana CUSD does not believe that the Board tax certification cases cited by the Agency offer much guidance, given the brevity of the recommendations and the "lack of any material scrutiny or meaningful comparison to the projects here." Reply at 15.

Roxana CUSD similarly discounts WRB's argument that the policy reasons advanced by Roxana CUSD do not support grant of the motion to reconsider. Instead, Roxana CUSD contends that "[p]ublic policy does not support a closed certification process with no right for third-party intervention until after the essentially irrevocable certification has been granted." Reply at 15. Concerning WRB's projected flood of litigation before the Board and the courts, Roxana CUSD notes that 35 of the 54 tax certification applications on the Board's docket with PCB 2012 numbers were filed by one source: WRB. Consequently, Roxana CUSD believes that:

> allowing WRB Refining to submit applications without meaningful review is much more likely to fill the Board's docket. Furthermore, it seems unlikely that there are many other taxing districts facing the potential loss of several billion dollars worth of real property from their locally assessed rolls, as the School District faces here. Intervention in these tax certifications is at the discretion of the Board, and if a future potential intervenor is not facing the same magnitude of impact, there is no reason why the Board would have to exercise its discretion in that hypothetical case. Reply at 16.

Roxana CUSD points out that the only consequence of tax certification is not, as WRB suggested, a shift of assessment duties from the local assessor to the Department of Revenue. An additional consequence is assessment of the pollution control facilities at one-third "of the fair cash value of their economic productivity to their owners," under 35 ILCS 200/11-5 (2011), instead of at one-third of the "fair cash value" of the property itself, under 35 ILCS 200/9-145 (2011). Reply at 17.

Roxana CUSD concludes that it has "provided as much factual review and analysis as it can possibly be expected to provide with minimal notice and no discovery or factual record upon which to rely." Reply at 17. Consequently, Roxana CUSD requests that the Board find the motion for reconsideration sufficient, find that its request is not moot, and grant the relief requested by vacating of the September 8, 2011 order and setting this case for hearing.

DISCUSSION

The Board finds that Roxana CUSD has presented a compelling case that it is singularly affected by the tax certification process for "pollution control facilities" established under the Property Tax Code at 35 ILCS 200/11-5, as implemented by Board rules at 35 Ill. Adm. Code 125. The Board has not previously seen one source file 35 applications for 35 separate "pollution control facility" certifications in the space of six months, and agrees with Roxana CUSD that it is unlikely that any other school district is facing a similar "potential loss of several billion dollars worth of real property from their locally assessed rolls." But, arguments about this significant impact do not convince the Board that it may grant the relief sought.

The Board does not contest the general principle proffered by Roxana CUSD that the Supreme Court has held that express grant of a power or duty to an administrative agency such as the Board "carries with it the grant of power to do all that is reasonably necessary to execute that power or duty." Lake County Bd. of Review v. Property Tax Appeal Bd., 119 Ill.2d 419, 427 (1988). But, in the landmark case Landfill, Inc., the Supreme Court made equally clear to the Board that extension of appeal rights beyond those granted by the legislature does not fall within the class of things "reasonably necessary" to the conduct of its duties. In that case, the Board by rule had attempted to confer the right of appeal of Agency permits to third parties. The Supreme Court invalidated the procedural rule, noting that third parties could file citizen enforcement actions to remedy pollution caused even by a source with a permit.

Neither the Act nor the Property Tax Code provides for intervention in the Board's tax certification decision proceedings. The Act does not give an appeal route for decisions of the Board under the Property Tax Code. Appeals are restricted under the Property Tax Code at 35 ILCS 200/11-60 to applicants or holders "aggrieved by the issuance" or other action taken by the Board in a tax certification. The Board accordingly reads the Property Tax Code as creating a circumscribed proceeding with limited appeal rights. The experience of the Agency and the Board with the types of pollution control equipment on the market enables a determination concerning the primary purpose of the equipment without requiring the type of expanded proceeding and discovery that might prove necessary to educate a member of the public without such familiarity. The Board provided for a simple proceeding in adopting the tax certification procedural rules at 35 Ill. Adm. Code Part 125, and notes that its adopting opinions in R00-20 describe no adverse comments as having been filed concerning the Part 125 process.

As WRB correctly argued, the Board has applied the lesson of Landfill, Inc. in several instances in which persons have sought to intervene in appeals of various decisions by the Agency.

> 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 Corp. and Marion Ridge Landfill, Inc. v. IEPA, PCB 05-35, slip op. at 5 (May 4, 2006) (denying intervention in a challenge to a prior, still-pending permit).

Roxana CUSD has no express statutory right to become a party to a Part 125 tax certification proceeding under the Board's enabling authority. As established in Part 125, the only proper parties to this tax certification case are the applicant WRB, and the Agency, which the Board has made a nominal party by rule as it is in variance and adjusted standard proceedings, to facilitate the recommendation process. Consequently, in contrast to Roxana CUSD's assertions, any Board-created intervention rights as outlined in Part 101 cannot "trump" the certification procedure as envisioned by the Property Tax Code.

This brings the Board to the issue of mootness of Roxana CUSD's motion for leave to intervene. The September 8, 2011 order of the Board was a final one adjudicating all issues between them. At the time Roxana CUSD sought to intervene, the Board had adjudicated all matters at issue between the parties, making the motion moot. Stated another way, since the law provides that "an intervenor takes the case as it finds it," the case that Roxana CUSD "found" was already closed.

If the Board were a legislative body creating a tax certification procedure *de novo*, Roxana CUSD's policy arguments for the relief it seeks might be appropriate. Similarly, if the Board had the powers of an equity court, such policy arguments might lead it to create the exception to the statutory scheme sought here. But, in ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902. The Board has stated that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." Citizens Against Regional Landfill v. County Board of Whiteside, PCB 92-156, slip op. at 3 (Mar. 11, 1993) (sanctions ruling in landfill siting appeal affirmed on reconsideration), citing the general rule set out in Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992) (review of trial court ruling on motion to reconsider).

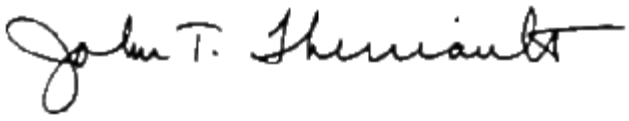
After review of the filings, the Board finds that Roxana CUSD has produced no new evidence, citation to change in law, or convincing arguments that the Board misapplied exiting law that would lead the Board to conclude that the substance of the September 8, 2011 decision

was in error. The record here is clear that the facilities for which application was made are pollution control facilities within the meaning of the Property Tax Code, and must be so certified. The Board accordingly denies the School District's motion for reconsideration of the September 8, 2011 order in this matter.

IT IS SO ORDERED.

Chairman T. A. Holbrook abstained.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 19, 2012 by a vote of 4-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board