

ILLINOIS POLLUTION CONTROL BOARD
December 6, 2012

WRB REFINING, LLC (SPCC Oil Spill)	
Containment Upgrades and SPCC Dike)	
Restoration) (Property Identification Number)	
19-1-08-35-00-000-001),)	
)	
Petitioner,)	
)	
v.)	PCB 12-114
)	(Tax Certification – Water)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (J. A. Burke):

This matter comes before the Board as one of many tax certification cases involving certain facilities of WRB Refining, LLC (WRB). In each case, the Illinois Environmental Protection Agency (Agency) filed a recommendation that the Board certify certain WRB facilities at its Wood River petroleum refinery 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.

The WRB facilities at issue here involve Spill Prevention, Control, and Countermeasures (SPCC) oil spill containment upgrades and SPCC dike restoration. WRB’s Wood River petroleum refinery is located at 900 South Central Avenue, Roxana, Madison County. The Board of Education of Roxana Community Unit School District No. 1 (Roxana CUSD) seeks leave to intervene in this case, as WRB’s refinery contributes to Roxana CUSD’s property tax base.

After considering all filings, the Board denies Roxana CUSD’s motion for leave to intervene. The Board also finds and certifies that certain facilities of WRB are pollution control facilities, and grants tax certification under the Property Tax Code of the described certain pollution control facilities. *See* 35 ILCS 200/11-5 *et seq.* (2010); 35 Ill. Adm. Code 125.

PROCEDURAL HISTORY

On February 22, 2012, the Agency filed a Recommendation (Rec.) that the Board certify certain facilities of 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. Between February 15, 2012 and February 22, 2012, the Agency filed before the Board eleven similar tax certification recommendations for water pollution control equipment at the WRB Wood River refinery (herein, “eleven WRB tax certification cases”). On February 28, 2012, Roxana CUSD filed a single petition for leave to intervene in all eleven WRB tax certification cases (Pet. Int.),

as the WRB refinery contributes to Roxana CUSD's property tax base. On March 13, 2012, WRB filed a single response in opposition (Resp.) to Roxana CUSD's petition for leave to intervene in the eleven WRB tax certification cases.

Previous to the filing with the Board of this group of eleven WRB tax certification applications, the Board during 2011 and 2012 ruled on 28 WRB applications and corresponding Roxana CUSD petitions for intervention (herein, the "previous WRB cases"). In each of the previous WRB cases, the Board denied Roxana CUSD's petition to intervene and granted tax certification to WRB. See WRB Refining, LLC v. IEPA, PCB 12-39 & 12-40 (Oct. 20, 2011; reconsideration denied Jan. 19, 2012), PCB 12-65 through 12-84 & 12-86 through 12-91 (Feb. 2, 2012). The would-be intervenors then filed circuit court litigation and petitioned for appellate court review. See Bd. of Educ. of Roxana Cmty. Unit Sch. Dist. No. 1 v. IEPA, No. 2012-MR-224 (Sangamon County Cir. Ct. Aug. 22, 2012) (finding, *inter alia*, no Open Meetings Act violations by the Board), *appeal docketed*, No. 4-12-0825 (4th Dist.); see also Bd. of Educ. of Roxana Cmty. Unit Sch. Dist. No. 1 v. IPCB, Nos. 4-12-0174 through 4-12-0201 (consol.) (4th Dist. argued Nov. 15, 2012). On the motion of Roxana CUSD and its co-plaintiffs, the Sangamon County Circuit Court granted a preliminary injunction on March 30, 2012, in case No. 12-MR-224, enjoining the Board from taking any action on the most recent group of eleven WRB tax certification applications. On August 10, 2012, the Fourth District Appellate Court modified the injunction to preclude all Board meetings. See Roxana Cmty. Unit Sch. Dist. No. 1 v. WRB Refining, LP, 2012 IL App (4th) 120331, ¶¶ 30, 38. After the injunction terminated, Roxana CUSD and its co-appellants filed another motion to enjoin the Board. On October 12, 2012, the Fourth District Appellate Court denied this motion in case No. 4-12-0825.

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 January 1, 1994. 35 ILCS 200/11-5. The Property Tax Code gives the Board authority to issue, modify, or revoke tax certificates for pollution control facilities. *Id.*

The 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 “air pollution” and “water pollution” are defined in the 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).

The four listed exclusions from the definition are not 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 available 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, which ever 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 certificate or a low sulfur dioxide emission coal 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 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 (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 fueled device certificate may appeal the finding and order of the Pollution Control Board, under the Administrative Review Law [735 ILCS 5/3-101 *et seq.*]. 35 ILCS 200/11-60 (2010).

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 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).

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. Code 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).

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* 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 point 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 denied certification 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, 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. PCB*, 232 Ill. App. 3d 571 (1st Dist. 1992).¹

AGENCY RECOMMENDATION

The Agency states that it received a tax certification application from WRB on June 29, 2011. Rec. at 1. On February 22, 2012, the Agency filed a recommendation on the application with the Board, attaching the application. The Agency's recommendation describes the facilities at issue as consisting of

[u]pgrading of containment areas at the Hartford docks, and tanks; CH-210, A19-1, A97, 80-2, 120-6, 80-1, 55-3, 55-1, 80-9, 35-1, 35-2, 35-3, and 200-1. *Id.*

The Agency's recommendation states that the facilities at issue are located at Section 35 NE/NW/SE/SW, T5N, R9W, in Madison County. *Id.*

The Agency recommends that the Board certify that the identified facilities are pollution control facilities as defined in Section 11-10 of the Property Tax Code (35 ILCS 200/11-10 (2010)), with the primary purpose of "eliminating, preventing, or reducing water pollution, or as otherwise provided in 35 Ill. Adm. Code 125.200 . . ." Rec. at 2.

¹ The Board's decision will be cited as Reed-Custer, PCB 87-209, and the Court's as Reed-Custer (1st Dist. 1992).

ROXANA CUSD'S PETITION FOR LEAVE TO INTERVENE

In its February 28, 2012 petition for leave to intervene, Roxana CUSD argues

[c]ertification of these properties as pollution control facilities will materially prejudice and adversely affect [Roxana CUSD] by the potential loss of as much as \$2.3 million in annual property tax revenue. They consist of over \$183 million worth of real property construction costs that would be locally assessed and taxed for the benefit of [Roxana CUSD] and other taxing bodies. In light of the substantial value of these properties and the number of applications to be considered at this time, intervention by [Roxana CUSD] would provide this Board with an additional level of review and information to aid in its decisions. Pet. Int. at 1-2.

Roxana CUSD alleges that WRB owns and operates the Wood River petroleum refinery located within the boundaries of the school district, and states that Roxana CUSD receives property tax revenues from the refinery. *Id.* at 2.

Roxana CUSD relates that on February 15, 2012, the Agency filed recommendations for tax certification in six of the eleven docket numbers at issue here, and on February 22, 2012, the Agency filed recommendations for tax certification in the other five docket numbers at issue. Pet. Int. at 2. Roxana CUSD states that the “claimed value” of these eleven facilities is \$183,699,018. *Id.* Roxana CUSD attaches to its petition as Exhibit 1 a table showing that the Agency completed technical review of these WRB applications on July 12, 2011. Pet. Int. at 3; Pet. Int. Exh. 1.

Roxana CUSD explains that the Wood River refinery was the subject of a 2004 property tax settlement agreement between then-owner ConocoPhillips and a number of taxing bodies, which pre-determined the assessed value of the refinery through the 2010 tax year. Pet. Int. at 3. Roxana CUSD states that “[t]his effectively excluded all of these properties from taxation.” *Id.* Roxana CUSD reports that it and a number of other taxing bodies are currently litigating the fair market value of the refinery for property tax purposes. *Id.* Roxana CUSD alleges that WRB has represented that it has filed before the Agency approximately seventy applications for pollution control facilities worth over \$3 billion. *Id.* Roxana CUSD states that twenty-seven facilities, totaling over \$1 billion, have recently been certified, and the eleven facilities at issue in the eleven WRB tax certification cases represent installed costs of over \$183 million.² *Id.* at 3-4.

Roxana CUSD then sets forth the statutory provisions it believes allow it to intervene in this matter. Pet. Int. at 4. The Board “encourages public participation in all of its proceedings” (35 Ill. Adm. Code 101.110(a)), and a party may “intervene in any adjudicatory proceeding when the party ‘may be materially prejudiced absent intervention’ or ‘may be adversely affected by a final Board order’” (35 Ill. Adm. Code 101.402(d)). Pet. Int. at 4. Additionally, Roxana CUSD states that in Reed-Custer, the Board held that “third-party participation is allowed to challenge tax certifications that have been granted and should be encouraged due to the Board’s limited ability to uncover possible fraud and misrepresentation.” Pet. Int. at 4; Reed-Custer (1st Dist.

² For purposes of this order, the Board presumes that the twenty-seven facilities referenced by Roxana CUSD refers to the facilities in the twenty-eight previous WRB cases.

1992) at 576. Roxana CUSD also maintains that “[a]fter it has granted certification of a pollution control facility, the Board may revoke a pollution control certificate if ‘[t]he certificate was obtained by fraud or misrepresentation.’” Pet. Int. at 4; 35 ILCS 200/11-30 (2010); *see also* 35 Ill. Adm. Code 101.216(c)(1).

Roxana CUSD asserts that all WRB facilities at the Wood River Refinery would “contribute an assessed value of over \$61 million to [Roxana CUSD]’s property tax base” Pet. Int. at 5. Roxana contends that “giving [the facilities] preferential tax treatment” will “materially prejudice and adversely affect [Roxana CUSD] by depriving it of property tax revenue.” Pet. Int. at 5. Roxana CUSD argues this “will also have an adverse impact upon all the other taxpayers located in the boundaries of the [s]chool [d]istrict.” *Id.* at 6.

Roxana CUSD also contends that the eleven WRB facilities at issue do not meet the statutory requirements of pollution control facilities. Pet. Int. at 6. By intervening, Roxana CUSD intends to give the Board “the opportunity to adequately review all of these properties and their true primary purposes before granting them preferred treatment as pollution control facilities.” *Id.*

Furthermore, Roxana CUSD alleges errors in WRB’s applications for certification. Pet. Int. at 6. First, Roxana CUSD alleges that WRB “failed to properly complete [the] applications and has inexplicably modified the form required by the Illinois EPA.” *Id.* Specifically, Roxana CUSD argues that WRB failed to submit required accounting information, including the fair cash value of the facilities and the percentage the facilities bear to the value of the entire facility. *Id.* Roxana CUSD states that this omitted information is essential to the certification process and was improperly overlooked by the Agency. *Id.* at 7. Roxana CUSD also alleges WRB provided inconsistent information with regard to the stage of completion of the applicant facilities and the amount of income each applicant facility generated. *Id.*

Finally, Roxana CUSD states its petitions to intervene were timely filed and that its intervention will not “unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding” as required by the Board’s regulations (35 Ill. Code 101.402(b)). Pet. Int. at 8. Roxana CUSD states that the petition was filed “well within the timeframes described . . . for other filings before the Board and as soon as possible after these recommendations were made publicly available.” *Id.*

Roxana CUSD therefore requests the Board act in the following manner: (1) grant Roxana CUSD leave to intervene in this WRB tax certification proceeding; (2) grant Roxana CSUD leave to intervene in all other tax certification proceedings filed by WRB as an original party without requiring additional petitions; (3) set a discovery schedule in this proceeding; (4) schedule a hearing regarding WRB tax certification applications; (5) issue an order denying tax certification to WRB facilities that are not pollution control facilities; and (6) grant Roxana CUSD just and equitable relief. Pet. Int. at 10.

WRB’S RESPONSE IN OPPOSITION TO PETITION FOR LEAVE TO INTERVENE

WRB filed its response in opposition to the petition for leave to intervene on March 13, 2012. Generally, WRB argues that the Board previously held that there is no right to intervention in tax certification proceedings, and Roxana CUSD has offered no additional

evidence, citation to change in law, or convincing arguments that might prompt the Board to allow Roxana to intervene in these proceedings. Resp. at 3-4. WRB also argues there is neither authority nor precedent in support of the right to intervention in tax certification proceedings before the Board. *Id.* at 3. WRB contends that Roxana CUSD does not meet the criteria for intervention set out in the Board's procedural rules at 35 Ill. Adm. Code 101.402(c)-(d). *Id.* at 12.

WRB asserts that the Board in the previous WRB cases held that there is no right to intervention in tax certification proceedings. WRB points out that this precedent was set in a series of cases involving the same parties and facilities as the present case before the Board. Resp. at 3. WRB states that in the previous WRB cases, "the Board was unconvinced that the impact on Roxana had any bearing on whether Roxana could intervene in a tax certification proceeding." *Id.* at 4. WRB argues that since Roxana CUSD's arguments in this petition are substantially the same as those presented in the previous WRB cases, and since the petition offers no "new evidence, citation to change in law, or convincing arguments that the Board misapplied existing law" the Board should deny Roxana CUSD's request for intervention in these matters. *Id.*

Next, WRB summarizes the Board's findings in the previous WRB cases. WRB quotes the Board, which stated that "[n]either the Act nor the Property Tax Code provides for intervention in the Board's tax certification decision proceedings." Resp. at 4. Further, the Board stated:

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. *Id.* at 4-5.

WRB also argues that the Board in the previous WRB cases agreed with WRB's interpretation of Landfill, Inc. v. PCB, 74 Ill. 2d 541 (1978), that "extending appeal rights beyond those created by the legislature is not 'reasonably necessary' to conduct its duties." Resp. at 5. WRB further quotes the Board:

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. *Id.*

WRB also indicates that the Board noted that "there were no objections or adverse comments to this simple process for reviewing tax certifications when it was being adopted." *Id.* WRB states that in the previous WRB cases, "the Board determined that Roxana does not have a right to intervene in tax certification proceedings because there is no statutory authority which would allow the Board to grant Roxana such a right." *Id.* at 6. WRB also notes that while there is

currently no pending request that the Board reconsider its decisions in the previous WRB cases, even if there were such a request, “Roxana has failed to present any ‘new evidence, citation to change in law, or convincing arguments’ that might prompt the Board to allow Roxana to intervene in these proceedings.” *Id.*

Next, WRB argues that Roxana CUSD has incorrectly cited Reed-Custer, PCB 87-209, for the proposition that “third-party participation is allowed in tax certifications and should be encouraged due to the Board's limited ability to uncover possible fraud and misrepresentation.” Resp. at 16, citing Pet. Int. at 4. While acknowledging that Roxana CUSD slightly revised their statement by “changing the word ‘intervention’ as stated in its PCB No. 12-40 Petition to ‘participation’ in this Petition, Roxana still misconstrues the Board’s holding in [Reed-Custer, PCB 87-209].” Resp. at 16.

WRB states that Reed-Custer, PCB 87-209 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.” Resp. at 16. The Reed-Custer School District was not an intervenor in the Board case in PCB 87-209; it was the petitioner initiating the action. The Reed-Custer court observed that

[Commonwealth Edison (CWE)] 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 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 18, citing Reed-Custer (1st Dist. 1992) at 578.

WRB states it “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 [in a tax certification proceeding.]” Resp. at 11. 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.* at 9.

WRB 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. Resp. at 10-11. 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 (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 08-93 (July 10, 2008). WRB concludes that:

As the Board recognized in [the previous WRB cases], there is no statutory authority in either 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 and its [orders in the previous WRB cases], disallow intervention since such petitions are not allowed by statute. Resp. at 11.

WRB contends 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. Resp. at 12, 20, citing Sutter Sanitation, Inc. and Lavonne Haker v. IEPA, PCB 04-187 (Sept. 16, 2004). WRB disputes Roxana CUSD's claim that certification means a portion of the value of the pollution control facility will be removed from the tax rolls, and tax revenues will therefore be reduced. WRB suggests that certification 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. Resp. at 20. WRB also contends that granting Roxana CUSD's motion would, in essence "open the flood gates" of tax certification litigation. Resp. at 21-22.

In summary, WRB argues that the Board has previously held that there is no statutory authority or basis for intervention of third parties in tax certification proceedings. Roxana CUSD's failure to meet the Board's criteria for intervention in tax certification proceedings further supports a denial of Roxana CUSD's petition for leave to intervene. Resp. at 22.

BOARD RULING ON MOTION FOR LEAVE TO INTERVENE

The Board denies Roxana CUSD's petition for leave to intervene. The arguments presented by Roxana CUSD do not convince the Board to rule other than it did in the PCB 12-40 cases.

The Board here reiterates its rulings in the previous WRB cases. 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 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 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 an expanded proceeding and discovery. The Board accordingly 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.

BOARD FINDINGS AND TAX CERTIFICATE

As previously stated, the Agency’s recommendation describes the facilities at issue as consisting of

[u]pgrading of containment areas at the Hartford docks, and tanks; CH-210, A19-1, A97, 80-2, 120-6, 80-1, 55-3, 55-1, 80-9, 35-1, 35-2, 35-3, and 200-1. Rec. at 1.

In the “Application for Certification” attached to the Agency’s recommendation, WRB briefly describes the facilities as follows:

This program consisting of 2 capital projects was completed solely to prevent water pollution.

In order to prevent water pollution, the Federal Spill Prevention, Control, and Countermeasures (SPCC) law requires that owner/operators of facilities which handle, process, or store oil have a SPCC plan that details the equipment, workforce, procedures and steps to prevent, control and provide adequate countermeasures to a discharge. This multi-year capital program upgraded containment areas at tank CH-210, the Hartford docks, and many tanks (A19-1, A97, 80-2, 120-6, 80-1, 55-3, 55-1, 80-9, 35-1, 35-2, 35-3, and 200-1) throughout the facility to prevent spills to water and to insure compliance with the SPCC regulations.

The sole purpose of this program was to prevent water pollution. Rec. Exh. at 6.

The Agency recommends that the Board certify that the identified facilities are pollution control facilities as defined in Section 11-10 of the Property Tax Code (35 ILCS 200/11-10 (2010)), with the primary purpose of “eliminating, preventing, or reducing water pollution, or as otherwise provided in 35 Ill. Adm. Code 125.200” Rec. at 2.

Based on the Agency’s recommendation and WRB’s application, the Board finds and certifies that WRB’s facilities identified in this order are pollution control facilities under the Property Tax Code (35 ILCS 200/11-10 (2010)). Under Section 11-25 of the Property Tax Code, the effective date of this certificate is “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 (2010); *see also* 35 Ill. Adm. Code 125.216(a). Section 125.216(d) of the Board’s procedural rules states that the Clerk “will provide the applicant and the Agency with a copy of the Board’s order setting forth *the Board’s findings and certificate, if any.*” 35 Ill. Adm. Code 125.216(d) (quoting in italics 35 ILCS 200/11-30 (2010)). The Clerk therefore will provide WRB and the Agency with a copy of this order.

IT IS SO ORDERED.

Chairman Holbrook Abstains

Section 11-60 of the Property Tax Code provides that 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 fueled device certificate may appeal the Board’s finding and order to the Circuit Court under the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (2010)). *See* 35 ILCS 200/11-60 (2010).

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 6, 2012, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board