Annual Report
2003

Illinois Pollution Control Board

Mission Statement

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

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

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

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

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

Table of Contents

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Message from the Chairman

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

The Pollution Control Board is charged by the Illinois Environmental Protection Act (Act) to determine, define, and implement the environmental control standards for the State of Illinois. Additionally, the Board adjudicates complaints of violations of the Act that are brought before it. During fiscal year 2003, the Board continued to handle the many rulemakings and contested cases before it while striving to lower its operational costs in light of the State's ongoing budget crisis.

Among many achievements during fiscal year 2003, the Board strengthened the protection of State waters. In Water Quality Triennial Review: Amendments to 35 Ill. Adm. Code 302.105, 302.208(e)-(g), 302.504(a),302.575(d), 309.141(h); and Proposed 35 Ill. Adm. Code 301.267, 301.313, 301.413, 304.120, and 309.157 (R02-11), the Board adopted amendments that include: new acute and chronic numeric standards for benzene, ethyle benezen, toluene, and xylene (BETX); and revised water quality standards using a dissolved metal standard for zinc and nickel, among other things. Additionally, in Amendments to Ammonia Nitrogen Standards 35 Ill. Adm. Code Parts 302 and 304 (R02-19), the Board adopted amendments that replace un-ionized ammonia nitrogen standards with total ammonia nitrogen standards; recast the formulae for calculation of the acute and chronic water quality standards for total ammonia nitrogen; and added a new standard for ammonia—the sub-chronic total ammonia standard.

The Board became more "user friendly" and lessened expenses during fiscal year 2003 when its Clerk's Office On-line or COOL system was initiated. COOL enables the Clerk's Office to post all filings with the Board on its Web site (www.ipcb.state.il.us) where anyone can access the documents, at anytime, with a personal computer. It is anticipated that during fiscal year 2004, the Board will begin accepting filings electronically. A rulemaking is underway that would make electronic filing possible.

While handling its regular load of rulemakings and contested cases, the Board received an award for excellence in environmental stewardship from the Green Government Council. The Board was recognized for utilizing its videoconferencing system and for encouraging its employees to use flextime to utilize carpooling and public transportation. Both practices cut the amount of emissions released into the air and fuel consumption.

The Board lost some veteran members during fiscal year 2003. After 19 years of service to the Board, Dr. Ronald C. Flemal retired; former Board Member Samuel T. Lawton passed away; and, former Chairman Claire A. Manning retired. The Board will miss Flemal, Lawton, and Manning and their efforts to improve the environment in Illinois.

The Board is proud to present its Annual Report for fiscal year 2003. Contained in this report is detailed information about environmental rulemakings and contested cases brought before the Board between July 1, 2002 and June 30, 2003.

Sincerely,

Thomas E. Johnson
Chairman

Illinois Pollution Control Board Members

Board Member Johnson

Chairman Thomas E. Johnson was appointed to the Board for a term beginning in July 2001. Johnson was appointed Chairman on January 1, 2003. He has spent more than a decade in private legal practice after graduating from Northern Illinois University School of Law in 1989 and holds a BS in Finance from the University of Illinois at Urbana-Champaign. Johnson has also served the public in many capacities including: Champaign County Board Member, Special Assistant Attorney General, Special Prosecutor for the Secretary of State, and Central Office Director to the Illinois Department of Transportation. He is a lifelong resident of Champaign County and lives in Urbana with his wife and two children.

Board Member G. Tanner Girard was appointed in 1992 and reappointed in 1994 and 1998 by Governor Jim Edgar. Governor George H. Ryan reappointed Dr. Girard to the Board in 2000. Dr. Girard has a PhD in science education from Florida State University. He holds an MS in biological science from the University of Central Florida and a BS in biology from Principia College. He was formerly Associate Professor of Biology and Environmental Sciences at Principia College from 1977 to 1992, and Visiting Professor at Universidad del Valle de Guatemala in 1988. Other gubernatorial appointments have included services as Chairperson and Commissioner of the Illinois Nature Preserves Commission and membership on the Governor's Science Advisory Committee. He also was President of the Illinois Audubon Society and Vice-President of the Illinois Environmental Council.

Board Member Girard

Board Member Doris C. Karpiel was first appointed to the Board in January 2003. Prior to joining the Board, Karpiel served in the Illinois Senate from 1984 until 2003, and in the Illinois House of Representatives from 1979 until 1984. While in the Senate, Karpiel served as Majority Caucus Chair. She chaired the Executive committee and was a member of the Environment & Energy, Appropriations, and Education committees. She was Illinois State Chairman of American Legislative Exchange Council and on the Task Force on Energy, Environment, Natural Resources and Agriculture. Additionally, she served on the Senate Operations Commission, Council of State Governments, Committee on Status of Children, and the National Conference of State Legislators' Children, Families, and Health Commission. As a lawmaker she worked with constituents on various environmental issues, including removing low-level radioactive waste from West Chicago and preventing a balefill in Bartlett. Karpiel serves on the advisory boards for the Family Shelter of DuPage and the Department of Children And Family Services, Region 8. She is a member of the Chambers of Commerce for Roselle, Bloomingdale, Streamwood, St. Charles, Bartlett, and Winfield and also serves on the Roselle Historical Foundation. She has a BA in Political Science from Northern Illinois University.

Board Member Karpiel

Board Member William A. Marovitz was appointed to the Board for a term beginning July 1, 2002. Prior to joining the Board, Marovitz was a former State Senator, former State Representative, lawyer, and teacher. Marovitz served in the House from 1974 to 1980. He served in the Senate from 1980 to 1993. During his 18-year tenure in the Senate and House, Marovitz was known for his sponsorship of most of the meaningful gun control legislation from 1975-1992. He also authored the Illinois Hate Crimes Law and many other important laws positively effecting Illinois citizens. He also served as Chairman of the Senate Judiciary Committee and Senate Executive Committee. After leaving the legislature, Marovitz became a major real estate developer in the Chicago area.

Board Member Marovitz

He is a member of the Anti-Defamation League, the Gene Siskel Film Center of the Art Institute, the Chicago Convention & Tourism Bureau, and Illinois Health Facilities Planning Board. Marovitz received a JD from DePaul University College of Law and a BA from the University of Illinois.


Board Member Melas

Board Member Nicholas J. Melas was appointed to the Board in 1998 and reappointed in 2000. Mr. Melas was a commissioner of the Metropolitan Water Reclamation District of Greater Chicago for 30 years and President of its Board for the last 18 of those years. He has acted as the president of N.J. Melas & Company, Inc., and as President of the Illinois Association of Sanitary Districts. Mr. Melas also served as a commissioner of the Northeastern Illinois Planning Commission and the Chicago Public Building Commission. He is currently on the Board of Directors of the Canal Corridor Association, and is a member of the Sierra Club, National Wildlife Federation, The Lake Michigan Federation, Open Lands Project and the American Civil Liberties Union. He was a Director of the Chicago Urban League, is on the Board of the Chicago College of Osteopathic Medicine and Member of the American Association for the Advancement of Science and the Industrial Relations Association. Mr. Melas also served on the General Board of the Church Federation of Greater Chicago and, as an active member of the Greek Orthodox Church was named Archon of the Ecumenical Patriarchate of Constantinople and member of the Order of St. Andrew. Mr. Melas received his PhB and a BS in Chemistry from The University of Chicago. He has an MBA from the Graduate School of Business of The University of Chicago.


Board Member Padovan

Board Member Lynne P. Padovan was appointed to the Board in January 2003. Prior to joining the Board, Padovan served as the Senior Advisor to Governor George H. Ryan for natural resources and the environment. She chaired the Governor's Balanced Growth Cabinet and the Environment and Natural Resources Cabinet, co-chaired the Energy Cabinet, and was a Trustee of the Illinois Clean Energy Foundation. She has served as Executive Director of the Illinois Environmental Council, as a legislative liaison and public information officer for the Illinois Educational Labor Relations Board, and a public school instructor. Padovan served on the Charleston Community Unit School District #1 Board of Education for ten years—serving two terms as President and one as Secretary. She also served as Chair of the Illini Division of the Illinois Association of School Boards. Padovan holds a Post-graduate Degree in Administration from Eastern Illinois University in Charleston, an MS and a BA from Southern Illinois University in Carbondale. She lives in Charleston with her husband Ray, who is a professor of Physical Education at Eastern Illinois University and head coach of the men and women's swimming and diving teams since 1968.


Board Member Tristano

Board Member Michael E. Tristano was first appointed to the Board for a term beginning in December 2001. Tristano received an MBA from the University of Illinois at Champaign-Urbana, an MS in Political Science from Illinois State University, and a BS in Social Science from Illinois State University. He is a Doctoral candidate in Public Policy Analysis at the University of Illinois-Chicago. Tristano has served as the Chief of Staff to the Republican Leader of the Illinois House, as Director of the Illinois Department of Central Management Services, and as Executive Deputy Director of the Illinois Department of Public Aid. At the University of Illinois-Chicago, he has served as Vice Chancellor and Executive Associate Vice Chancellor for Administration and Human Resource. Tristano has also held various teaching positions at the college and high school level.

Fond Farewell

The Illinois Pollution Control Board lost three long-time members during Fiscal Year 2003. Dr. Ronald C. Flemal resigned after 19 years on the Board. Sam Lawton, 84, passed away in May 2003. Chairman Claire A. Manning took early retirement on December 31, 2003, after serving more than nine years in that position.

Ronald C. Flemal

Ronald C. Flemal was first appointed to the Board in 1985, and reappointed in 1996, and 1999. Dr. Flemal earned a BS from Northwestern University, and a PhD in Geology from Princeton University. From 1967 to 1985, he served as a Professor of Geology at Northern Illinois University, during which time he authored more than eighty articles dealing principally with environmental and natural science issues. Dr. Flemal was a member of the Illinois State Bar Association Environmental Law Council for many years.

Samuel T. Lawton

Samuel T. Lawton, Jr. ended his second tenure on the Board when his term expired on June 30, 2002. He returned to private practice with the law firm Altheimer & Gray and served as a distinguished professor of law at John Marshall Law School until his death. He was one of the original members of the Board, serving from July 1970 to August 1973 and was Acting Chairman from December 1972 to August 1973. Lawton also served as mayor of Highland Park from 1967 to 1970.

Claire A. Manning

Claire A. Manning was first appointed to the Board and designated Chairman in 1993. She was reappointed in 1995, in 1998, and again in 2001. Manning serves on the Illinois State Bar Association's Administrative Law Section Council, the Environmental Law Section Council, and the Standing Committee on Women and the Law. Manning earned a JD from Loyola University School of Law in 1979, and a BA from Bradley University. Prior to coming to the Board, Manning served three terms as a member of the Illinois State Labor Relations Board, having been first appointed in 1984 at the time of that Board's creation.

Flemal, Lawton and Manning used their expertise and skills for the betterment of the environment in Illinois. The Board expresses its condolences to the Lawton family, and wishes both Manning and Flemal the best as they pursue other interests.

Rulemaking Review

Section 5(b) of the Environmental Protection Act (Act) (415 ILCS 5/5(b) (2002)) directs the Board to "determine, define and implement the environmental control standards applicable in the State of Illinois." When the Board promulgates rules, it uses both the authority and procedures in Title VII (Sections 26-29) of the Act and its own procedural rules at 35 Ill. Adm. Code Part 102.

The Act and Board rules allow anyone to file regulatory proposals with the Board. The proposals are then discussed at quasi-legislative public hearings at which the Board gathers information and comments to assist it in making rulemaking decisions. The Board also accepts written public comments. Notice of a rule proposal and adoption are published in the *Illinois Register,* as required by the rulemaking provisions of the Illinois Administrative Procedure Act (5 ILCS 100/5-10 through 5-160 (2002)). The Board issues written opinions and orders, which review the testimony, evidence, and public comment in the rulemaking record and explain the reasons for the Board's decision.

Additionally, Section 7.2 of the Act establishes special procedures for adoption, without holding hearings, of rules that are "identical-in-substance" to rules adopted by the United States Environmental Protection Agency (USEPA) in certain federal programs. 415 ILCS 5/7.2 (2002). Notice of the Board's proposal and adoption of identical-in-substance rules are published in the *Illinois Register,* and the Board considers in its opinions any written public comments it has received.

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

The following is a summary of the most significant rulemakings completed in fiscal year 2003, arranged by docket number. During FY 2003, the Board completed two significant rulemakings to increase protection of the waters of the state. In the air arena, the Board adopted rules to ease state air permitting rules the Illinois Environmental Protection Agency suggested were overly burdensome for certain mobile sources. Additionally, the Board adopted two site-specific rules proposed by affected sources. The Board also timely processed the 14 identical-in-substance rulemaking dockets required by Section 7.2 of the Act.

RULES ADOPTED IN FISCAL YEAR 2003

General Permitting Provisions For Portable Emissions Units, 35 Ill. Adm. Code Part 201, R02-10

On February 6, 2003, the Board adopted new rules in Proposed Amendments to General Permitting Provisions For Portable Emissions Units, Amendments to 35 Ill. Adm. Code 201, R02-10. The new rules exempt owners and operators of certain smaller emissions units from requirements that they obtain new construction and "lifetime" permits when their units are moved to a new site. Effective on March 21, 2003, the final rules were published at 27 *Illinois Register* 5820 on April 4, 2003.

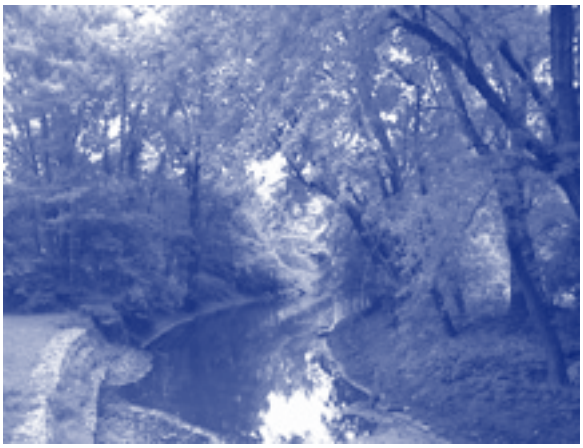
In November 2001, the Illinois Environmental Protection Agency (IEPA) proposed the rules to create an exemption to cover about 500 emission units, including equipment such as rock crushers, concrete batch plants, debris grinders, portable generators, and certain solvent recovery or tank cleaning operations. Under these rules, the IEPA may issue a single permit authorizing emission from similar operations by the same source owner or operator at multiple temporary locations, except for sources that are affected sources for acid deposition under Title IV of the federal Clean Air Act. *See* 415 ILCS 39.5(21)(a).

To obtain this exception, the equipment owner or operator must meet specific eligibility conditions in Section 201.170: (1) emissions from the emission unit or units are expected to occur for less than one year at any one site; (2) the emission unit or units of air pollution is subject to the requirements of Section 201.169 (which contains conditions for special permits); (3) the emission unit or group of emission units that will be changing sites is permitted to emit less than 25 tons per year of any combination of regulated air pollutants; (4) the emission unit or units

is mounted on a chassis or skids and is designed to be moveable; and (5) the emission unit or units is not used as a thermal desorption system or as an incinerator system. Additionally, the owner or operator must notify the IEPA, by certified mail, at least three days prior to moving a unit to a new location.

Water Quality Triennial Review Amendments, 35 Ill. Adm. Code Parts 301, 302, 304 and 309, R02-11

On December 19, 2002, the Board adopted final rules in Water Quality Triennial Review: Amendments to 35 Ill. Adm. Code 302.105, 302.208(e)-(g), 302.504(a), 302.575(d), 309.141(h); and Proposed 35 Ill. Adm. Code 301.267, 301.313, 301.413, 304.120, and 309.157 (R02-11). Effective on December 20, 2002, the rules were published at 27 *Illinois Register* 158 on January 3, 2003.



This rulemaking began with the Illinois Environmental Protection Agency's (IEPA's) November 9, 2001 proposal. States are required to revise and update their water quality standards under the Federal Water Pollution Control Act (33 U.S.C.Sections 1251-1387 (1987)) (Clean Water Act). The Clean Water Act requires that, at least once every three years, states must "review water quality standards to ensure that the standards are based on the most current information and are protective of the designated uses of the state." The update is necessary to ensure that the water quality standards protect public health and welfare, enhance the quality of water, and promote the purposes of the Clean Water Act . This process is known as a triennial water quality standards review. *See* Section 303(c) of the Clean Water Act (CWA) U.S.C. 1313(c)).

One element in the triennial water quality standards review is the refining of numeric standards based on the best available current knowledge. The IEPA's proposal suggested revisions to the water quality standards based on revised federal policy and new scientific information collected over the years. After receipt of public comment and hearing testimony, the Board adopted rules incorporating some, but not all, of the IEPA's proposed changes.

The adopted amendments include: (1) new acute and chronic numeric standards for benzene, ethyl benzene, toluene, and xylene (BETX) to replace then-existing 35 Ill. Adm. Code 302.210, entitled "Other Toxic Substances;" (2) revised water quality standards using a dissolved metal standard for zinc and nickel; (3) corrections to an IEPA error in certain rules it proposed and the Board adopted in: Conforming Amendments for the Great Lakes Initiative, 35 Ill. Adm. Code Part 302.101; 302.105; 302.Subpart E; 303.443, and 304.222, R97-25 (Dec. 18, 1997) ; and (4) the use of $CBOD_5$ rather than BOD_5 in National Pollutant Discharge Elimination System permits regulating domestic and municipal waste. But, the Board did not amend the cyanide water quality standards, finding that the IEPA had not justified its proposed revisions.

Amendments to Ammonia Nitrogen Standards 35 Ill. Adm. Code Parts 302 and 304, R02-19

On October 17, 2002, the Board adopted amendments to its water quality standards in Proposed Amendments to Ammonia Nitrogen Standards 35 Ill. Adm. Code 302.100, 302.212, 302.213, and 304.122 (R02-19). Effective on November 8, 2002, the rules were published at 26 *Illinois Register* 16931 on November 22, 2002.

The rulemaking was initiated in January 2002, by the proposal of the Illinois Association of Wastewater Agencies (IAWA). IAWA proposed changes to the rules adopted by the Board in 1996. Triennial Water Qualty Review Amendments to 35 Ill. Adm. Code 302.202, 302.212, 302.213, 304.122 and 304.301, R94-1(b) (Dec. 19, 1996). The 1996 rules were primarily based on the United States Environmental Protection Agency's (USEPA's) then-current 1984 National Criteria Document (NCD) for ammonia. In 1999, USEPA issued a significant update of the ammonia NCD. IAWA, with the support of the IEPA, began reviewing the 1999 ammonia NCD with the goal of proposing conforming amendments. After receipt of public comment and hearing testimony, the Board adopted rules incorporating some, but not all, of the IAWA's proposed changes.

The majority of the amendments in this rulemaking were made in Part 302 and include: (1) replacement

of then-current un-ionized ammonia nitrogen standards with total ammonia nitrogen standards; (2) recasting of the formulae for calculation of the acute and chronic water quality standards for total ammonia nitrogen; and (3) the addition of a new standard for ammonia, the sub-chronic total ammonia standard. Additionally, the Board repealed the unused provisions for Effluent Modified Waters found at 35 Ill. Adm. Code 302.213.

The adopted amendments require attainment of ammonia chronic standard to be determined by using at least four samples taken at weekly intervals, or at other sampling intervals that statistically represent a 30-day averaging period. Additionally, Section 302.212(c)(3) requires attainment of the sub-chronic standard to be determined by averaging daily sample results collected over a period of four consecutive days. Sections 302.212(c)(2) and (c)(3) require that samples must assure a representative sampling period.

35 Ill. Adm. Code Section 302.Appendix C contains a table of values for the equations presented in 302.212(b) that is intended to provide an easy alternative to calculation of values for the equations. There are three tables, one for the acute standard equation at 302.212(b)(1), and one each for the Early Life Stage Present and Early Life Stage Absent equations for the ammonia chronic standard at 302.212(b)(2).

Site-Specific Air Regulation for the Horween Leather Company, 35 Ill. Adm. Code 218.929, R02-20

On February 20, 2003, the Board adopted final site-specific air amendments in Proposed Horween Leather Company Site-Specific Air Rule: 35 Ill. Adm. Code 218.112 and 218.929, R02-20. Effective on April 8, 2003, the rules were published at 27 *Illinois Register* 7283 on April 18, 2003.

The new air emissions rule was proposed in February 2002 by the Horween Leather Company (Horween). Horween sought the rule to allow it to lawfully produce a small amount of new specialty leathers at its facility at 2015 North Elston Avenue in Chicago. The rule sets new volatile organic material (VOM) control requirements solely for the Horween operation. Horween anticipates a sales increase of $2-2.5 million as a result of its production of specialty leathers as allowed by this rule.

The rules, as adopted, include various amendments to the original proposal suggested by the IEPA. The adopted rulemaking amends 35 Ill. Adm. Code 218, "Organic Material Emission Standards and Limitations for the Chicago Area" by adding a new Section 218.929 and amending Section 218.112. The new Section 218.929 limits Horween's VOM emissions to 24 lbs. VOM per 1000 square feet for waterproof leather (12 month rolling average) and 14 lbs. for non-waterproof leather with an annual cap of the total emissions at 20 tons. Other changes include the addition of definitions for the specialty leathers covered by this rulemaking, standard operating and maintenance procedures, and reporting and record keeping requirements.

Site-Specific Air Regulation for the Central Illinois Light Company (E. D. Edwards Generating Station), 35 Ill. Adm. Code 214.561,R 02-21

On June 5, 2003, the Board adopted final site-specific air amendments in Petition of Central Illinois Light Company (E. D. Edwards Generating Station) for a Site Specific Air Regulation: 35 Ill. Adm. Code 214.561 (R02-21). Effective on July 11, 2003, the rules were published at 27 *Illinois Register* 12101 on July 25, 2003.

Central Illinois Light Company (CILCO) proposed new Section 214.561 in April 2002. CILCO's E.D. Edwards Generating Station, located near Peoria in Peoria County, has three coal-fired boilers. The rule covers Boiler No. 2. Boiler 2 is subject to the sulfur dioxide emissions limit under 35 Ill. Adm. Code 214.141. The new rule makes permanent relief CILCO previously received in a variance from 35 Ill. Adm. Code 214.141. *See* Central Illinois Light Company v. IEPA, PCB 99-80 (Apr. 15, 1999). (Boilers 1 and 3 are subject to a sulfur dioxide emission limit under a site-specific rule at 35 Ill. Adm. Code 214.561.)

35 Ill. Adm. Code 214.561 applies to the operation of Boiler 2. The standards require that: (1) the average sulfur dioxide emissions from Boiler Nos. 1, 2, and 3, as a group may not exceed 4.71 pounds per million British thermal units (lb/mmBtu) of actual heat input; (2) the average sulfur dioxide emissions from any one boiler may not exceed 6.6 lb/mmBtu of actual heat input; and (3) sulfur dioxide emissions for all three boilers, as a group, may not exceed 34,613 pounds per hour, on a 24-hour average basis. These provisions have been reviewed and approved by the United States Environmental Protection Agency, and incorporated into the approved Illinois State Implementation Plan, pursuant to the Clean Air Act. *See* 42.U.S.C. Section 7401, *et seq.*

Semi-Annual Identical-In-Substance Update Dockets

Section 7.2 and various other sections of the Environmental Protection Act require the Board to adopt regulations identical in substance to federal regulations or amendments thereto promulgated by the Administrator of the United States Environmental Protection Agency (USEPA) in various federal program areas. *See* 415 ILCS 5/7.2 (2002). These program areas include: drinking water; underground injection control; hazardous and nonhazardous waste; underground storage tanks; wastewater pretreatment; and the definition of volatile organic material.

Identical-in-substance update dockets are usually opened twice a year in each of the seven program areas, so that the Board annually processes at least 14 update dockets in order to translate federal rules into State rules within one year of USEPA rule adoption. Additional update dockets are initiated as necessary to provide expedited adoption of some USEPA rules in response to public comments, or to correct rules for various reasons including in response to federal litigation.

Timely completion of identical-in-substance rules requires inter-agency coordination and inter-governmental cooperation. Entities who must act in concert to successfully complete these rulemakings include the Board, the Illinois Environmental Protection Agency, USEPA, and the Office of the Attorney General. The Attorney General must certify the adequacy of, and authority for, Board regulations required for federal program authorization.

Kindaid Lake

Judicial Review

Introduction

Pursuant to Section 41 of the Environmental Protection Act (Act) (415 ILCS 5/41 (2002)), any party to a Board hearing, anyone who filed a complaint on which a hearing was denied, anyone denied a permit or variance, anyone who is adversely affected by a final Board order, or anyone who participated in the public comment process under subsection (8) of Section 39.5 of the Act, may file a petition for review of the Board's order with the appellate court. The petition for review must be filed within 35 days of service of the Board order from which an appeal is sought.

Administrative review of the Board's final order or action is limited in scope by the language and intent of Section 41 (b) of the Act. Judicial review is intended to ensure fairness for the parties before the Board, but does not allow the courts to substitute their own judgment in place of that of the Board. Board decisions in rulemaking, imposing conditions in variances, and setting penalties are quasi-legislative. The standard of review for the Board's quasi-legislative actions is whether the Board's decision is arbitrary or capricious. All other Board decisions are quasi-judicial in nature and the Illinois Supreme Court has recently stated that in reviewing State agency's quasi-judicial decisions (1) findings of fact are reviewed using a manifest weight of the evidence standard, (2) questions of law are decided by the courts *de novo*, and (3) mixed questions of law and fact are reviewed using the "clearly erroneous" standard (a standard midway between the first two). *See* AFM Messenger Service, Inc. v. Department of Employment Security, 198 Ill. Ed 380, 763 N.E.2d 272 (2001) and City of Belvidere v. Illinois State Labor Relations Board, 181 Ill. 2d 191, 692 N.E.2d 295 (1998).

In fiscal year 2003, there were final orders entered by the Illinois appellate courts in 12 cases involving appeals from Board opinions and orders. Only one case was reversed in its entirety and remanded to the Board for further consideration. The Board's decision was affirmed, in total or in part, in seven cases. In three cases, the court granted the appellant's motion to withdraw. In another case, the appellate court dismissed a case for lack of jurisdiction, due to appellant's failure to name the Board as a party. The following summaries of the nine written appellate decisions in Board cases for fiscal year 2003 are organized first by case type and then by date of final determination. Summary orders (cases in which the courts do not include their reasoning) are not discussed.

Enforcement

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

Illinois Environmental Protection Agency v. Marshall Pekarsky and Illinois Pollution Control Board, No. 2-02-0281 (2nd Dist. Mar. 18, 2003) (unpublished Rule 23 order)

In its March 18, 2003 unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23), in Illinois Environmental Protection Agency v. Marshall Pekarsky and Illinois Pollution Control Board, No. 2-02-0281 (Mar. 18, 2003), the Second District Appellate Court reversed the Board's dismissal of an administrative citation, and remanded the case to the Board for additional proceedings. Under the specific facts in that case, the court found that the Illinois Environmental Protection Agency (IEPA) was not estopped from issuing the administrative citation to Marshall Pekarsky. IEPA v. Marshall Pekarsky, AC 01-37 (Feb. 7, 2002).

Respondent Pekarsky operates Kiswaukee Auto Parts near Rockford, Winnebago County. Among other things, the business recycles cars for parts. The Board, in a 5-2 decision, held Pekarsky was not liable for an administrative citation (AC) that alleged Pekarsky violated Section 21(p)(1) of the Illinois

Environmental Protection Act (Act)—open dumping resulting in litter. 415 ILCS 5/21(p)(1) (2002).

The IEPA issued the AC several months after providing an AC "warning notice" to Pekarsky, which gave Pekarsky 90 days to voluntarily clean up the litter on the site. The Board concluded that, although there was open dumping resulting in litter, the IEPA was equitably estopped from issuing the AC because extreme winter weather precluded Pekarsky from cleaning up during the 90-day "grace period." The Board therefore dismissed the AC. The IEPA appealed to the Second District.

The court reversed and remanded the Board's decision, finding that an essential element of equitable estoppel (detrimental reliance) was not present. The court determined that Pekarsky in no way "detrimentally relied" on IEPA's warning notice because when Pekarsky received the warning, he was already legally obligated under the Act to clean up. Consequently, the court determined that the Board erred in giving effect to the doctrine of equitable estoppel, and remanded the action to the Board for further proceedings.

Nordean and Susan Simon d/b/a Berman's Auto Parts v. Illinois Environmental Protection Agency, No. 2-02-1216 (2nd Dist. Jan. 27, 2003) (unpublished Rule 23 order)

In its January 27, 2003 final unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23), in Nordean & Susan Simon d/b/a Berman's Auto Parts v. IEPA, No. 2-02-1216 (Jan. 27, 2003), the Second District Appellate Court dismissed the appeal for lack of jurisdiction. When filing the appeal, the Simons named only the Illinois Environmental Protection Agency (IEPA) as respondent, but did not name the Board. The court held that the appellant's failure to name all necessary parties of record pursuant to Supreme Court Rule 335 was a fatal error. In the underlying decision, the Board found that the respondents violated Section 21(p)(1) of the Environmental Protection Act (415 ILCS 5/21(p)(1) (2002)) by causing or allowing open dumping resulting in litter on their Belvidere, Boone County property. The Board imposed the $1500 statutory penalty and assessed roughly $800 in IEPA and Board hearing costs. IEPA v. Nordean & Susan Simon d/b/a Berman's Auto Parts, AC 02-2 (Sept. 9, 2002).

Lesslie Yokum *et al*. v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 4-02-0749 (4th Dist. June 2, 2003) (unpublished Rule 23 order)

In its June 20, 2003 unpublished order under Supreme Court Rule 23 (155 Ill. 2d R. 23), in Lesslie Yokum *et al*. v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 4-02-0749, the Appellate Court for the Fourth District affirmed the Board's August 8, 2002 decision in two consolidated administrative citations (AC). Over one dissent, the majority affirmed the Board's interpretations of the prohibitions for open dumping resulting in litter and the deposition of construction or demolition debris of Sections 21(p)(1) and (p)(7) Environmental Protection Act (Act). *See* 415 ILCS 5/21 (p) (1, 7) (2002). In March 2001, the IEPA filed two ACs with the Board under Section 31.1 of the Act. *See* 415 ILCS 5/31.1 (2002). The ACs in consolidated dockets AC 01-29 and AC 01-30 concern two parcels of land owned by the Yokums near the unincorporated town of Birmingham in Schuyler County. Over 100 vehicles (many with no tires or flat tires), metal objects, pipes, tanks, weathered dimensional lumber, and other items were contained on the sites. The record demonstrated that the materials had been there a long time and were not stored in a manner to maintain them.

In its June 6, 2002 interim opinion and order, over the dissent of two Board Members, the Board found that the piled debris on both Yokum properties, as demonstrated in the record and the IEPA inspector's photographs, was "unsightly and . . . disposed of improperly." (6/6/02 slip op. at 7). Despite the Yokums' arguments that the items on the property were intended for reuse, the Board held that the items were "discarded," and thus "waste" under the Act.

The Board stated that whether the items had been purchased or were intended to be re-used at some point in the distant future, as the Yocums claimed, was not controlling; "plans for use of material at some point in the distant future are not dispositive in determining if materials are waste or litter." (6/6/02 slip op. at 8).

The Board's August 8, 2002 final order incorporated by reference the June 6, 2002 interim opinion and order. Again over the dissent of two members, the Board assessed hearing costs, and imposed a $6,000 penalty (calculated as four violations (two violations at each of two sites) times the statutory penalty of $1,500 per violation). *See* 415 ILCS 5/31.1(d) and 42 (b)(4-5)(2002). The Board found that open dumping occurred because the Yokums had consolidated refuse and construction debris at each site.

The court applied the "clearly erroneous" standard in reviewing the Board's decision, in which the reviewing court reverses only where it is "left with the definite and firm conviction that a mistake has been committed, citing AFM Messenger Service, Inc. v. Department of Employment Security, 198 Ill. 2d 380, 395, 763 N.E.2d 272, 282 (2001). *See also* City of Belvidere v. Illinois State Labor Relations Board, 181 Ill. 2d 191, 692 N.E.2d 295 (1998). The court held that the material on the Yocum sites was "discarded waste as the original owners had no use for it and it had not yet been reused; nor was it part of an ongoing recycling process" (slip op. at 10-14). The court also noted that Title V of the Act was designed to prevent not only pollution but also "scenic blight" and held that the materials need not degrade and enter the land, water, or air to affect the environment. The court concluded, nearly quoting the Board;

> While the Act encourages reuse and recycling of materials, it does not condone open dumping of waste with vague intentions to use items at some undefined time in the future. (slip op. at 17).

The dissenting justice echoed some of the points made by the dissenting Board Members stating:

> At bottom, this case, and so many others like it, is cultural. There are people in nearly every community who consider other people's trash to be a reusable or saleable treasure. The process of accumulating such 'treasures' creates scenic blight under the best of circumstances and a potential environmental hazard under most circumstances. (slip op. at 18).

Permit Appeal

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

Prairie Rivers Network v. The Illinois Pollution Control Board; The Illinois Environmental Protection Agency; and Black Beauty Coal Co., 335 Ill. App. 3d 391, 781 N.E.2d 372 (4th Dist. 2002).

In its October 24, 2002 decision, the Fourth District Appellate Court affirmed the Board's decision in Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112 (Aug. 9, 2001). The Board's decision denied Prairie Rivers Network's (Prairie Rivers) petition challenging the Illinois Environmental Protection Agency's (IEPA's) decision to issue a National Pollution Discharge Elimination Permit System (NPDES) permit to Black Beauty Coal Company (Black Beauty) for overflow from mine reservoirs into a tributary of the Little Vermilion River. The appellate court initially issued an unpublished order under Supreme Court Rule 23 (155 Ill. 2d R. 23), but granted the Board's motion to publish this important decision.

This opinion addresses several issues of first impression in the first third-party appeal of a NPDES permit issued by the IEPA since the 1997 authorization of third-party appeals. *See* 415 ILCS 5/40(e)(1), amended by P. A. 90-74, effective July 30, 1997. Among other things, the court's decision provides useful guidance to the parties in future cases before the Board on issues including: (1) the standard of review of the Board's decision; (2) the nature of the burden of proof on petitioner; and (3) the correct interpretation and inter-relationship of the state and federal regulations governing NPDES permit procedures. In addition to the parties, the Illinois Environmental Regulatory Group and the Vermilion Coal Company as *amici curiae* briefed the issues before the Board.

The chronology of events is important in this case. In August 2000, the IEPA issued a public notice that it had tentatively decided to issue Black Beauty an NPDES permit. The United States Environmental Protection Agency (USEPA) requested 90 days to review the draft permit. The IEPA held a public hearing in which Prairie Rivers participated. After receiving public comment and a USEPA objection to the draft permit, the IEPA revised the permit. The USEPA retracted its objection and the IEPA issued a public notice of its decision to issue a final NPDES permit to Black Beauty. The final permit was generally more restrictive and contained more conditions than the original draft.

The court rejected Prairie Rivers' contention that the Board misapplied the burden of proof. The burden of proof is on any third-party petitioner to show that the permit, as issued, would violate the Environmental Protection Act (Act) or the Board's regulations. *See* 415 ILCS 4/40(e)(3) (2002). 781 N.E.2d at 378-80.

On the substantive issues of appeal, Prairie Rivers argued that the Board's decision to affirm the IEPA's issuance of the final NPDES permit was in error because (1) the IEPA failed to provide Prairie Rivers a meaningful opportunity to participate in the final NPDES permit writing process; (2) the final permit did not include certain required conditions; and (3) the IEPA improperly relied on documents produced by Black Beauty after the public comment period. The appellate court rejected each argument.

Of interest, the court noted that the Clean Water Act does not require state NPDES programs to reopen public comment or to prepare a second draft after receiving public comment on the initial draft permit. Because the USEPA approved the Illinois NPDES program, the court evaluated Prairie Rivers' objection solely on the basis of applicable provisions of the Act and state regulations. The Illinois NPDES program did not require the IEPA to reopen public comment nor did any Illinois case law precedent. Consequently, the court held that Prairie Rivers was not denied a meaningful opportunity to participate and that the IEPA followed the appropriate procedures in issuing the final permit. The IEPA was not required to hold a second round of public comment even when the final permit substantially deviated from the draft permit. 781 N.E.2d at 380-84.

Prairie Rivers also argued that the IEPA improperly relied on key documents Black Beauty produced after the close of the public comment period. The court found that Prairie Rivers failed to show how the IEPA relied on these "key documents." Furthermore, Prairie Rivers failed to cite any authority to support its position. Consequently, the court held that Prairie Rivers had forfeited the issue. 781 N.E.2d at 385.

Community Landfill and City of Morris v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 3-01-0552 (3rd Dist. Oct. 29, 2002) (unpublished Rule 23 order)

The Third District Appellate Court affirmed in part and reversed in part the Board's landfill permit appeal decision in Community Landfill & City of Morris v. IEPA, PCB 01-48, 01-49 (Apr. 5, 2001) (cons.). The landfill owner and operator appealed permit conditions to the Board, and in turn appealed the Board's decision affirming some of the IEPA's conditions to the Third District. In its October 29, 2002 unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23), the Court remanded the order for additional proceedings in accordance with the order. *See* Community Landfill and City of Morris v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 3-01-0552 (Oct. 29, 2002), slip op. at 14-15.

The Morris Community Landfill accepts municipal refuse, non-hazardous special waste, and construction/demolition debris. Part of the landfill still accepts waste (Parcel A) and part of the landfill no longer accepts waste and has begun closure (Parcel B). The IEPA issued a "significant modification" (sigmod) permit for each parcel. The sigmod permits contain more than 200 conditions. Community Landfill and the City of Morris, landfill operator and owner, respectively, appealed to the Board to contest 12 of the permit conditions.

Because permit conditions were at issue, Community Landfill and the City had the burden before the Board to prove that operating under the permits, minus the contested conditions, would not result in a violation of the Act or Board regulations. The Board affirmed some contested conditions and directed the IEPA to modify other contested conditions. Community Landfill and the City of Morris appealed four of the affirmed conditions to the Third District.

The first issue the court addressed was the standard of review. The court ruled that the case posed a "mixed question of law and fact," so that the proper standard of review was whether the Board's decision

was "clearly erroneous". *See* slip op. at 3-5, *citing* AFM Messenger Service, Inc. v.. Dept. of Employment Security, 198 Ill. 2d 380, 763 N.E.2d 272 (2001) and City of Belvidere v. Ill. State Labor Relations Board, 181 Ill. 2d 191, 692 N.E.2d 295 (1998).

The court affirmed the Board's decision to uphold the IEPA's permit condition requiring Community Landfill to post $17 million in financial assurance to ensure proper closure and post-closure care for the landfill.

Financial assurance money must be available in the event the landfill owner or operator does not meet its obligations so that the IEPA must assume closure or post-closure responsibilities. These include properly closing the landfill and monitoring it for 30 or more years.

The City had agreed to have its publicly owned treatment works (POTW) treat leachate (liquid that has been or is in direct contact with the landfill's solid waste) without charge for either Community Landfill or the IEPA. Community Landfill tried to have the financial assurance reduced by $10 million, the amount attributable to the cost of leachate treatment. The court agreed with the Board that financial assurance had to cover a scenario in which the City's POTW would be unable to treat the leachate. The court stated that the purpose of the Act's financial assurance Section 21.1 "is not to make the [IEPA's] financial protection dependent on the viability of any particular POTW, but rather to allow the [IEPA] to select the best method of conducting closure and post-closure activities, independent from the constraints of any particular POTW." *See* slip op. at 7.

The court affirmed the Board's decision to uphold the IEPA's permit condition imposing a fixed deadline for Community Landfill to finish installing the leachate collection and storage system. Because, in the IEPA's experience, the tank is typically the last component of the system to be installed, the IEPA imposed a six-month deadline to complete the entire installation.

The Board found this reasonable and the court affirmed, agreeing with the Board that, absent a more detailed schedule in the permit application, Community Landfill failed to meet its burden to prove that the permit condition was not necessary to accomplish the purposes of the Act. *See* slip op. at 11-13.

The court remanded to the Board for further consideration issues related to a permit condition for leachate storage. Community Landfill's permit application proposed having one day's worth of leachate storage capacity. The IEPA's permit condition required a five-day storage capacity, which the Board affirmed. 35 Ill. Adm. Code 811.309 (d)(1) contains the general requirement of a five-day storage capacity. Subsection (d)(6) allows for less than five days' storage capacity if the landfill owner or operator has two or more means to treat or dispose of leachate. Because Community Landfill had only one way to treat or dispose of leachate (the POTW), the Board held that (d)(6) was unavailable and affirmed the permit condition requiring five-day storage, consistent with (d)(1).

Community Landfill argued that it was not required to provide any storage based on 35 Ill. Adm. Code 811.309(e)(6) (which deals with discharges to off-site treatment works). Consistent with long-standing precedent that Board review of an IEPA permit decision is limited to the record before the IEPA, the Board held that it could not consider whether subsection (e)(6) applied because Community Landfill did not identify that provision in its permit application and, in fact, did propose one-day's storage capacity.

The court held that Section 811.309(d) on storage capacity applies only in the absence of a direct sewer connection, and that the IEPA, "by its own initiative," applied subsection (d). The court remanded the issue to the Board to decide whether the landfill has a direct sewer connection and, if so, whether any leachate storage is required. *See* slip op. at 11.

As earlier stated, the landfill is situated on two parcels, Parcel A and Parcel B. A permit condition, affirmed by the Board, required that Community Landfill post additional financial assurance to cover closure and post-closure care costs for disposal elsewhere of waste exceeding permitted boundaries on Parcel B, known as waste "overfill." (The overfill is the subject of a pending State enforcement action before the Board.) People of the State of Illinois v. Community Landfill Company, Inc., (PCB 97-193).

The court was persuaded that any additional financial assurance is unnecessary. The court therefore reversed the Board's decision affirming the condition. The court reasoned that an agreement to reserve capacity in Parcel A for free IEPA disposal of Parcel B overfill, along with allocation of $950,000 in the Parcel B closure plan for overfill disposal was "equivalent to the additional financial assurance required by the [IEPA]". *See* slip op. at 14.

Illinois Environmental Protection Agency v. The Illinois Pollution Control Board, No. 4-02-0560 (4th Dist. Dec. 11, 2002) (unpublished Rule 23 order)

In its December 11, 2002 decision in Illinois Environmental Protection Agency v. The Illinois Pollution Control Board, No. 4-02-0560 (Dec. 11, 2002), the Fourth District Appellate Court affirmed the Board's decision on an important procedural point: whether the Board must hear a motion to reconsider an order after the order had been appealed to the appellate court.

In an unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23), the court determined that the filing of the appeal deprived the Board of jurisdiction to reconsider the appealed order.

The underlying Board case is ESG Watts, Inc. v. Illinois Environmental Protection Agency, PCB 01-139 (Apr. 4, 2002). ESG Watts, a landfill operator, had requested the Illinois Environmental Protection Agency (IEPA) accept substitute financial assurances for three landfills and to release funds that ESG Watts believed were excess financial assurance. The IEPA denied the request and the Board affirmed the IEPA's determination.

The Environmental Protection Act states that a petition for judicial review must be filed within 35 days of receipt of the Board's final ruling. 415 ILCS 5/41(a)(2002). Also, a party seeking reconsideration must file a motion within 35 days of receipt of the Board's final ruling. 35 Ill. Adm. Code 101.520(a).

On May 8, 2002, ESG Watts appealed the Board's decision to the appellate court. ESG Watts, Inc. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 4-02-0387 (4th Dist.). On May 15, 2002, the IEPA filed a motion asking the Board to reconsider its April 4, 2002 order. On June 6, 2002, the Board denied IEPA's motion for reconsideration because ESG Watts had already appealed the matter. The IEPA appealed the Board's June 6, 2002 denial of its motion for reconsideration. (The court's affirmance of the Board's June 6, 2002 order did not resolve ESG Watts' appeal in No.4-02-0560, which is still pending.)

On appeal, the IEPA argued that the Board incorrectly determined that it lacked jurisdiction to reconsider its April 4 order. The IEPA contended that ESG Watt's appeal was premature and that the appellate court lacked jurisdiction rather than the Board, as a result of its filing of the motion to reconsider with the Board after Watts had filed its appeal.

The Fourth District Appellate Court affirmed the Board. The Court found that:

> Once a party files a proper notice of appeal of a trial court's ruling, our jurisdiction deprives the trial court of jurisdiction to modify its judgment. [citing Cain v. Sukar, 167 Ill. App. 3d 941, 945, 521 N.E.3d 1292, 1292 (4th Dist.1988)] Likewise, if our jurisdiction to hear Watts' appeal is proper, the [Board] no longer has jurisdiction to consider motions to reconsider the matter. (slip op. at 6-7).

Illinois Environmental Protection Agency v. Jersey Sanitation Corp., 336 Ill. App. 3d 582, 784 N.E.2d 867 (4th Dist. 2003)

In its January 29, 2003 decision in Illinois Environmental Protection Agency v. Jersey Sanitation Corp., No. 4-02-0319 (Jan. 29, 2003), the Fourth District Appellate Court affirmed an important Board decision concerning appealed conditions of a supplemental landfill permit. *See* Jersey Sanitation Corp. v. IEPA, PCB 00-82 (June 21, 2002). The appellate court initially issued an unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23), but granted the Board's motion to publish this important decision.

This decision addresses several issues of first impression concerning interpretation of 1) substantive Board rules concerning the nature and interrelationship of closure certifications and post-closure care permits issued under the Board's landfill rules at 35 Ill. Adm. Code 807.502 and 807.523, and 2) Board procedural rules for the timely filing and consideration of motions for reconsideration at 35 Ill. Adm. Code 101.202 and 101.520. Among other things, the Court's ruling also provides useful guidance to the parties in future cases before the Board on issues including the standard of review of the Board's decisions, and the issue of waiver of rights to challenge conditions contained in prior permits.

In June 1999, Jersey applied for a supplemental permit seeking facility closure certification, including closure and post-closure care plans and cost estimates. The IEPA granted the supplemental permit with conditions. Jersey filed a petition with the Board seeking review of the conditions attached to the supplemental permit. The Board eliminated the challenged conditions. The IEPA filed a motion to reconsider and Jersey filed a motion to strike the IEPA's motion. The Board denied both motions. The IEPA then appealed the Board's decision to the Fourth District Appellate Court on both the reconsideration denial and the stricken conditions. Jersey filed a cross-appeal solely on the Board's denial of its motion

to strike the IEPA's reconsideration motion. The Fourth District affirmed the Board's decision in all respects.

In its cross-appeal, Jersey argued that the Board erred in denying Jersey's motion to strike the IEPA's motion for reconsideration because the IEPA's motion was untimely.

The Board's rules require a motion for reconsideration to be filed within 35 days of the date of service of its final order. 35 Ill. Adm. Code 101.520. Section 101.300(b)(2) provides that "[i]f a document is filed by U.S. Mail subsequent to a filing deadline, yet the postmark date precedes the filing deadline, the document will be deemed filed on the postmark date."

The appellate court held that the Board's rule allows filing by mail on the due date. The court stated, "[c]onsidering the Board's rules that the deadline's time computation runs until the close of business on the last day, that being the 35th day, a motion postmarked on that 35th and final day would fall within the filing deadline." Consequently, the court held that the Board did not err in denying Jersey's motion to dismiss the IEPA's motion for reconsideration. Since the court had jurisdiction over the appeal, it considered the merits of the IEPA's appeal. 784 N.E.2d at 872.

Before reaching the merits of the IEPA's appeal, the court concluded that the proper standard of review on appeal was the manifest weight of the evidence standard. The IEPA raised two arguments on appeal. First, the IEPA argued Jersey waived its right to object to groundwater monitoring conditions in the 1999 supplemental permit since it had agreed to those conditions in the 1992 supplemental permit. The Board found that Jersey had not waived its right to object to groundwater monitoring conditions. The court affirmed the Board's ruling.

After filing its petition for review before the Board, Jersey filed a motion for summary judgment. Jersey argued that the conditions in the 1999 supplemental permit were not necessary to accomplish the purposes of the Act and were inconsistent with Board regulations applicable to Jersey's facility because they were not required by the Code.

The IEPA argued that once a condition is imposed in a permit, and no appeal is made to the Board, an appeal of that permit condition may not be taken in a subsequent permit. In its order, the Board rejected the IEPA's waiver argument because Jersey's facility was "at a very different place in its history and a condition that may have been appropriate during the operation of the facility may not be appropriate during the post-closure care period." Jersey Sanitation Corp. v. IEPA, PCB 00-82, slip op. at 7-8 (June 21, 2001).

The appellate court determined that the 1992 permit and the 1999 post-closure care permit were different types of permits "as characterized by the Board . . . . Here, Jersey has passed the closure phase, and the conditions imposed in the post-closure care permit are appropriate for Jersey to challenge. Thus, the Board correctly found Jersey had not waived its objection to the conditions in the post-closure care permit." 784 N.E 2d at 875.

Next, the IEPA argued that the Board incorrectly struck the supplemental permit conditions. To prevail on its petition, Jersey had to show that the IEPA's conditions were unnecessary to accomplish the purposes of the Act. The Board struck IEPA conditions regarding groundwater monitoring requirements, a requirement to compare the groundwater quality standard to an analysis of parameters of all wells and an assessment of the landfill's impact on groundwater, and a condition requiring water quality records to be maintained at the site operator office and reviewed quarterly during the post-closure care period. For each condition, Jersey already had groundwater monitoring plan procedures. The Board held that Jersey's plan was sufficient to meet the requirements of the Act and the Board regulations. Consequently, the IEPA's permit conditions were unnecessary. The court held that the Board's decision was not against the manifest weight of the evidence." 784 N.E.2d at 877.

ESG Watts, Inc. v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, (4th Dist. May 23, 2003) (unpublished Rule 23 order)

In its May 23, 2003 22-page unpublished order under Supreme Court Rule 23 (155 Ill. 2d R. 23), in ESG Watts, Inc. v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, Nos. 3-02-0329 and 4-02-0382 (cons.) (May 23, 2003), the Fourth District Appellate Court affirmed the Board's interpretations of the Environmental Protection Act (Act) and the Board's nonhazardous waste landfill rules concerning issues of financial assurance for closure/post-closure care costs. *See* 415 ILCS 5/1 *et seq.* (2002) and 35 Ill. Adm. Code 807.

For purposes of its review, the court consolidated appeals of two separate Board decisions issued April 4, 2002. These decisions related to Illinois

Environmental Protection Agency (IEPA) determinations regarding the financial assurance obligations of ESG Watts, Inc. (Watts) for three landfills: the Sangamon Valley Landfill (whose ownership Watts transferred in February 2002); the Taylor Ridge/Andalusia Landfill; and the Viola Landfill. Watts had previously supplied financial assurance for all three landfills in the form of one trust covering all three landfills. After transferring ownership of Sangamon Valley, Watts requested that the IEPA accept substitute financial assurance in lieu of the trust in the form of specific pollution liability insurance policies for the Sangamon Valley, Taylor/Ridge and Viola landfills, and to release excess financial assurance from the trust originally intended to cover any liabilities for Sangamon Valley. In PCB 01-62, the Board affirmed the IEPA's refusal to release financial assurance for any of the Watts facilities. In PCB 01-63 and 01-64 (cons.), the Board affirmed the IEPA's refusal to accept substitute financial assurance for the Taylor/Ridge and Viola landfills.

On review, the court addressed three primary issues of statutory and regulatory interpretation, all raised by Watts.

1) Approved Insurance Forms. The court upheld the Board's decision that the insurance policies proferred by Watts were improper because they were not on forms approved by the Illinois Department of Insurance, as Section 807.665(c) of the Board's rules require. 35 Ill. Adm. Code 807.665(c).

The issue of forms approved by another state's insurance department was not before the Board. Nevertheless, the court noted that the Board rule, last amended in 1985, does not reflect a 1996 amendment to Section 21.1(a.5) of the Act allowing financial assurance from insurers licensed by the insurance department of another state. 415 ILCS 5/21.1 (a.5) (2002).

2) Approval of Substitute Financial Assurance by Operation of Law.

The court agreed with the Board that Watts was not a proper applicant when it proposed substitute financial assurance to the IEPA for Sangamon Valley Landfill. At the time of submittal, Watts had already sold the Sangamon Valley Landfill and was no longer the operator. The court affirmed the Board's decision that Watts' application was not approved by operation of law on the grounds that since the IEPA correctly refused to consider the application, its failure to take final action within 90 days did not result in approval of the request by operation of law under Section 39(a) of the Act. 415 ILCS 5/39(a) (2002).

In affirming the Board, the court applied the "clearly erroneous" standard of review to what it characterized as a "mixed question of law and fact," citing the Illinois Supreme Court decisions of City of Belvidere v. Illinois State Labor Relations Board, 181 Ill. 2d 191, 692 N.E.2d 295 (1998) and AFM Messenger Services, Inc. v. Dept. of Employment Security, 198 Ill. 2d 380, 763 N.E.2d 272 (2001). *But see* Illinois Environmental Protection Agency v. Jersey Sanitation, 336 Ill. App. 3d 582, 784 N.E.2d 867, (4th Dist. 2003) in which this same court recently applied the "manifest weight of the evidence" standard to review and affirmed the Board in a permit appeal. The court stated that the outcome would be no different if it reviewed the Board's decision *de novo*, the least deferential standard of review.

3) One Trust for All Three Landfills/Release of "Excess" Funds.

A factual issue raised in these appeals was whether Watts had properly established one trust or three trusts. The court ruled that the Board's factual finding—that Watts had only one trust for all three landfills—was not against the manifest weight of the evidence. Regardless of the sale of the Sangamon Valley Landfill, the anticipated closure and post-closure care costs for the Taylor Ridge/Andalusia Landfill and the Viola Landfill ($2.4 million) exceeded the amount of the single trust ($1.4 million), *i.e.*, there simply were no "excess funds" as Watts had claimed. The court held that the Board's decision not to release any funds from the trust was "not against the manifest weight of the evidence or clearly erroneous."

Pollution Control Facility Siting Decisions

The Environmental Protection Act (Act) provides, in Sections 39(c) and 39.2, for local government participation in the siting of new regional pollution control facilities. 415 ILCS 5/39(c), 39.2 (2002). Section 39(c) requires an applicant requesting a permit for the development or construction of a new regional pollution control facility to provide proof that the local government has approved the location of the proposed facility. Section 39.2 provides for proper notice and filing, public hearings, jurisdiction and time limits, specific criteria, and other information that the local government must use to reach its decision. The decision of the local government may be contested before the Board under Section 40.1 of the Act. 415 ILCS 5/40.1 (2002). The Board reviews the decision to determine if the local government's procedures satisfy principles of fundamental fairness and whether the decision was against the manifest weight of the evidence. The Board's final decision is then reviewable by the appellate court.

Land and Lakes Co. v. Pollution Control Board and Randolph County Board of Commissioners, No. 5-00-0686 (5th Dist. July 12, 2002)(unpublished Rule 23 order)

In its July 12, 2002 decision, the Fifth District Appellate Court affirmed the Board's decision in the Board's case captioned Land and Lakes Co. v. Randolph County Board of Commissioners, PCB 99-69 (Sept. 21, 2000). There, the Board had found that the manifest weight of the evidence supported the 1998 decision of the Randolph County Board (Randolph County) to deny Land and Lakes Co.'s (Land and Lakes) application seeking siting approval for a proposed pollution control facility (landfill) in Randolph County. The court issued an unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23) in its case captioned Land and Lakes Co. v. Pollution Control Board, No. 5-00-0686 (July 12, 2002). The court held that the Board correctly determined that the Randolph County proceedings were fundamentally fair, and that the Board's decision affirming Randolph County was not against the manifest weight of the evidence.

The Board's September 21, 2002 opinion and order found that the manifest weight of the evidence supported the Randolph County findings that Land and Lakes failed to show that the landfill would be (1) designed, located, and operated in such a manner to adequately protect the public health, safety, and welfare (*see* 415 ILCS 5/39(a)(ii) (2002)); and (2) in accord with the Randolph County Solid Waste Management Plan (Plan) (415 ILCS 5/39(a)(viii) (2002)). Additionally, the Board held that certain *ex parte* contacts with county board members by constituents did not render the proceedings fundamentally unfair.

Upon review, the court agreed with the Board and Randolph County's assessment that Land and Lakes failed to show that the landfill would be in accord with the Plan. The Plan contained a table of exclusionary and inclusionary local-siting criteria that clarified the identity of acceptable potential sites for a landfill in Randolph County. On appeal, Land and Lakes argued that the table was not a part of the Plan. The court rejected this argument and adopted the Board and Randolph County's "reasonable and proper" view that the plain language of the Plan clearly showed that the exclusionary criteria in the table were incorporated in the Plan. Because the site of the proposed landfill was within 1 1/2 miles of the municipal corporate limits of Sparta, the court held that there was sufficient evidence to support the Board and Randolph County's finding that the proposed site was inconsistent with the Plan.

Because the court concluded that Land and Lakes failed to meet the criterion in section 39.2(a)(viii) of the Act, the court did not consider whether Land and Lakes failed to meet the criterion in section 39.2(a)(ii) of the Act.

Finally, the court agreed with the Board's conclusion that although *ex parte* communications did occur, those communications did not prejudice Land and Lakes. Furthermore, Land and Lakes was unable to show that the *ex parte* contacts influenced the county board's decision. Consequently, the court concluded the proceedings before the county board were fundamentally fair.

A Summary Of Environmental Legislation

Air

Public Act 93-0121 (House Bill 176) Effective January 1, 2004

Amends the Environmental Protection Act. Provides that a deceased companion animal that is delivered to a provider of companion animal cremation services subject to the Companion Animal Cremation Act is not waste for the purposes of the Environmental Protection Act, and that providing companion animal cremation services at a location does not make that location a waste management facility for the purposes of the Environmental Protection Act. Provides that "companion animal" does not include livestock.

Land

Public Act 93-0052 (Senate Bill 361) Effective June 30, 2003

Amends the State Finance Act. Creates the Emergency Public Health Fund. Provides for a transfer of $3,000,000 from the Communications Revolving Fund to the Emergency Public Health Fund. Amends the Environmental Protection Act. Provides that any person who sells new or used tires at retail shall give notice of such activity to the Environmental Protection Agency. Provides for the collection of 50 cents per new or used tire sold or delivered in this State. Provides for the deposit of the fee in the Emergency Public Health Fund and provides for the allocation of moneys in the Emergency Public Health Fund. Provides a mechanism by which the $3,000,000 transfer from the Communications Revolving Fund to the Emergency Public Health Fund shall be repaid.

Public Act 93-0179 (Senate Bill 268) Effective July 11, 2003

Amends the Environmental Protection Act. Provides that the requirement that an entity that conducts any generation, transportation, or recycling of construction or demolition debris or uncontaminated soil generated during construction, remodeling, repair, and demolition of utilities, structures, and roads must maintain documentation identifying the hauler, generator, place of origin, weight or volume, and location, owner, and operator of the location where the debris or soil was transferred, disposed, recycled, or treated, does not apply to a county highway department. Provides that the exemption for county highway departments applies only to those county highway departments located in portions of the State other than a county with a population of over 3,000,000 inhabitants or a county that is contiguous to a county with a population of over 3,000,000 inhabitants. Makes changes in the definition of the term "clean construction or demolition debris." Provides that the exemption applies to municipalities in Cook and the collar counties.

Public Act 93-0260 (House Bill 910) Effective July 22, 2003

Amends the Environmental Protection Act to establish an expedited RCRA hazardous waste corrective action review process.

Public Act 93-0313 (House Bill 1250) Effective July 23, 2003

Creates the Facility Planning Area Rules Act. Requires the Illinois Environmental Protection Agency to propose rules and procedures for facility planning area amendments. Gives guidelines for the proposed rules and procedures the Agency must follow when approving facility area planning amendments. Repeals the Act on January 1, 2007.

Water

Public Act 93-0170 (House Bill 3506) Effective July 10, 2003

Amends the Environmental Protection Act. Specifies that the Board has the authority to require operators of sewage works to be certified as technically competent. Specifies that the Agency has the authority to administer the certification program and adopt technical standards for the certification of operators of sewage works. Specifies that the operator certification requirements may apply to pretreatment works as well as treatment works and collection systems. Authorizes the Agency to delegate portions of that authority to other agencies of State and local government. Preserves rules already in effect.

Provides that the Water Pollution Control Loan Program may be used to transfer funds to the Public Water Supply Loan Program. Provides that the Public Water Supply Loan Program may be used to transfer funds to the Water Pollution Control Loan Program.

Public Act 93-0202 (Senate Bill 1003) Effective July 14, 2003

Amends the Environmental Protection Act. Provides that the Agency shall not issue any permit to develop, construct, or operate, within one mile of any portion of Lake Michigan that has been designated an Area of Concern under the Great Lakes Water Quality Agreement, any site or facility for the thermal treatment of sludge, unless the applicant submits to the Agency proof that the site or facility has received local siting approval.

Miscellaneous

Public Act 93-0575 (Senate Bill 1379) Effective January 1, 2004

Amends the civil penalty and permitting provisions of the Environmental Protection Act. Added to Section 42(h) of the Act are the new penalty factors of respondent's "supplemental environmental projects" and "voluntary self-disclosure," if any. The Board will consider these and other mitigating or aggravating factors when deciding on the appropriate civil penalty for a violation. Establishing "voluntary self-disclosure" of a violation will entitle respondent to a penalty reduction. Penalties, however, generally cannot be less than any "economic benefits" from delayed compliance. Section 39(a) of the Act is amended to allow the Illinois Environmental Protection Agency to consider certain "prior adjudications of noncompliance" by a permit applicant and to fashion permit conditions to "correct, detect, or prevent noncompliance."

Also amends the Illinois Procurement Code. Provides that persons found by the Board or the courts to have committed certain "willful or knowing" environmental violations will generally be banned from doing business with the State or its agencies for five years.

Public Act 93-0152 (Senate Bill 222) Effective July 10, 2003

Amends the Environmental Protection Act to implement certain recommendations of the Illinois Environmental Regulatory Review Commission (created by Executive Order Number 18 of 1999). Provides for provisional variances to be issued by the Agency instead of the Board. Authorizes the parties to a citizen enforcement action to waive the hearing requirement. Authorizes a party to a Board enforcement proceeding to bring an action in circuit court to enforce the Board's final order. Specifies the procedures to be followed in conducting certain Phase I Environmental Audits. Standardizes several references to violations of the Act, specifying that violations of rules, permits, and Board orders are included. Clarifies language relating to the civil penalties imposed for certain administrative citations. Also makes technical changes. Public Act 93-0152 also creates the Oil Spill Response Fund and further amends the Environmental Protection Act and numerous other Acts.

Public Act 93-0201 (Senate Bill 1000) Effective January 1, 2004

Amends the Drycleaner Environmental Response Trust Fund Act. Makes changes in the definition of "drycleaning solvent" and adds a definition for "virgin facility." Adds a member who owns or operates a drycleaning facility to and removes a member with experience in financial markets or the insurance industry from the Drycleaner Environmental Response Trust Fund Council. Makes changes related to the duties of the Council. Provides that no contracts entered into to retain a person to act as the administrator of the Drycleaner Environmental Response Trust Fund shall be entered into without the review and approval of the Director of the Environmental Protection Agency. Makes changes in provisions concerning the remedial action account and the insurance account. Changes the fee structure for a drycleaning facility license. Provides a separate drycleaning solvent tax for green solvents. Makes changes concerning the requirements for the tax return. Requires the Department of Revenue to report quarterly to the Council the volume of drycleaning solvent purchased for the quarter by each licensed drycleaner. Extends the repeal of provisions concerning fees and taxes to January 1, 2020.

Makes changes to the definition of "virgin facility." Lowers the drycleaning solvent tax from $3.50 per

gallon of green solvents to $1.75 per gallon of green solvent. Provides that the Drycleaner Environmental Response Trust Fund Council shall adjust the fees and taxes in a manner determined necessary and appropriate to ensure viability of the Fund and to encourage the owner or operator of a drycleaning facility to use green solvents.

Public Act 93-0509 (Senate Bill 2003) Effective August 11, 2003

Amends certain Acts creating the Industrial Commission, the Pollution Control Board, the Prisoner Review Board, and the Educational Labor Relations Board to reduce the number of members; replaces the current members with new appointees and imposes limitations on outside earnings. Authorizes the appointment of certain executive directors. Makes other changes. Amends the Illinois Public Labor Relations Act to replace the current gubernatorial appointees to the State and Local Panels of the Illinois Labor Relations Board with new appointees and to impose additional limitations on outside earnings.

Public Act 93-0523 (Senate Bill 1586) Effective January 1, 2004

Amends the Open Meetings Act. Requires that a public body make a verbatim audio or video recording of closed meetings. Establishes procedures for the availability to the public and the court of closed meeting minutes and recordings. Establishes procedures for the destruction of the recordings.

Giant City State Park

Awards

During fiscal year 2003, the Illinois Pollution Control Board received an award for excellence in environmental stewardship from the Illinois Green Government Council. The award recognizes the Board for work practices that prevent pollution or conserve natural resources. Specifically, the Board was recognized for purchasing a videoconferencing system and conducting 50 percent of Board meetings using the system; and using flexible work schedules to encourage carpooling and the use of public transportation. Both practices reduce emissions and fuel consumption.

Lynne P. Padovan (L), Connie Newman (C), and Illinois EPA Director Renee Cipriano

**Photograph (above) courtesy of the Illinois Environmental Protection Agency*

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