ILLINOIS

POLLUTION CONTROL BOARD

ANNUAL REPORT 2006

Mission Statement

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

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

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

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

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

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Chairman's Letter

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

The Pollution Control Board is proud to present the Board's Annual Report for fiscal year 2006. Between July 1, 2005 and June 30, 2006, the Board continued to handle a large volume of rulemaking procedures and contested cases while operating within the constraints posed by the State's continued budget difficulties.

Under the Environmental Protection Act, the Board is responsible for determining, defining, and implementing environmental control standards for the State of Illinois, and the Board adjudicates complaints that allege non-criminal violations of the Act. The Board also reviews permitting and other determinations made by the Illinois Environmental Protection Agency and pollution control facility siting determinations made by units of local government.

The major change in Board members during fiscal year 2006, was the retirement of Chairman J. Philip Novak on December 1, 2005. I was confirmed by the Senate for a sixth term and appointed Acting Chairman by the Governor. Board Member Nicholas J. Melas was confirmed by the Senate for a fourth term. Board Members Thomas E. Johnson and Andrea S. Moore continue their tenure.

Several significant rulemakings were completed during fiscal year 2006. On January 19, 2006, the Board adopted an interim phosphorus effluent standard in R04-26, Interim Phosphorus Effluent Standards Proposed 35 Ill. Adm. Code 304.123(g-k). The interim limit was established while a numeric nutrient water quality standard is developed and the interim limit will sunset when the water quality standard is adopted.

On February 16, 2006, the Board adopted Proposed Amendments to: Regulation of Leaking Underground Storage Tanks 35 Ill. Adm. Code 732, 734 R04-22(A), 23(A), which substantially changed the reimbursement process for cleanup of leaking underground storage tank (UST) sites by setting rates for some activities while requiring that other activities continue to be reimbursed on a time and material basis. The Board opened a Subdocket B in this rulemaking on January 5, 2006, to address unresolved issues concerning scope of work for professional consulting services and lump sum payment amounts when remediating leaking UST's. However, after additional hearings and comments, the Board closed that docket without further rulemaking changes on June 1, 2006.

Also on February 16, 2006, the Board adopted Revisions to Radium Water Quality Standards: Proposed New 35 Ill. Adm. Code 302.307 and Amendments to 35 Ill. Adm. Code 302.207 and 302.525, R04-21. The adopted rule revises the radium general use water quality standard, applying the standard to combined radium 226 and 228, as opposed to the current standard applicable only to radium 226. The amendments also add a combined radium standard applicable to public and food processing water supplies.

During fiscal year 2006, the Board has also accepted several rulemakings that will require substantial resources from the Board. The Board has accepted proposals including rulemakings entitled Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury) R06-25; Proposed New Clean Air Interstate Rule (CAIR) SO_2, NO_x Annual and NO_x Ozone Season Trading Programs, 35 Ill. Adm. Code 225, Subparts A, C, D and E, R06-26; and Standards and Requirements for Potable Water Well Surveys and for Community Relations Activities Performed in Conjunction with Agency Notices of Threats from Contamination (35 Ill. Adm. Code 1600), R06-23.

The Board continued in fiscal year 2006 to explore the use of technology. Our Clerk's Office On-Line (COOL) continues to provide 24-hour electronic access to the Board's case files and docket information and allows parties to file documents electronically with the Clerk in all categories of cases. More information about electronic filing, the rulemakings discussed above and Board meeting information is available on our Web site at www.ipcb.state.il.us.

Sincerely,

G. Tanner Girard

Acting Chairman

Pollution Control

Chairman G. Tanner Girard was appointed Acting Chairman in December 2005. Dr. Girard was originally appointed to the Board in 1992, and reappointed in 1994 and 1998 by Governor Jim Edgar. Governor George H. Ryan reappointed Dr. Girard to the Board in 2000. Governor Rod R. Blagojevich reappointed Dr. Girard in 2003 and 2005. 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 Thomas E. Johnson was appointed to the Board for a term beginning in July 2001. He served as Chairman from January 2003 until December 2003, and was then reappointed to a three-year term as Board Member by Governor Rod R. Blagojevich. Johnson has spent more than a decade in private legal practice after graduating from Northern Illinois University School of Law in 1989 and holds a BS in Finance from the University of Illinois at Urbana Champaign. Johnson has also served the public in many capacities including: Champaign County Board Member, Special Assistant Attorney General, Special Prosecutor for the Secretary of State, and Central Office Director to the Illinois Department of Transportation. Johnson is currently on the Advisory Board for the Planet Earth Forum Planning Committee. He is a lifelong resident of Champaign County and lives in Urbana with his wife and two children.

Board Member Nicholas J. Melas was appointed to the Board in 1998 and reappointed in 2000, 2003 and 2005. Mr. Melas served as Commissioner of the Metropolitan Water Reclamation District of Greater Chicago for 30 years and President of its Board for the last 18 of those years. He has acted as the President of N.J. Melas & Company, Inc., and as President of the Illinois Association of Sanitary Districts. Mr. Melas also served as a Commissioner of the Northeastern Illinois Planning Commission and the Chicago Public Building Commission. He is currently on the Board of Directors of the Canal Corridor Association and is a member of the Sierra Club, National Wildlife Federation, The Lake Michigan Federation, Open Lands Project and the American Civil Liberties Union. He was a Director of the Chicago Urban League, on the Board of the Chicago College of Osteopathic Medicine and Member of the American Association for the Advancement of Science and the Industrial Relations Association. Mr. Melas also served on the General Board of the Church Federation of Greater Chicago and, as an active member of the Greek Orthodox Church, was named Archon of the Ecumenical Patriarchate of Constantinople — the Order of St. Andrew. He has an MBA from the Graduate School of Business of The University of Chicago as well as a PhB and a BS in Chemistry also from The University of Chicago.

Board Members

Board Member Andrea S. Moore was first appointed to the Board by Governor Rod R. Blagojevich in 2003. Prior to joining the Board, Ms. Moore was Assistant Director of the Illinois Department of Natural Resources. Board Member Moore was elected to the Illinois House of Representatives in 1993 where she remained until 2002. She was Spokesperson of the House Revenue Committee and served on the Environment and Energy, Public Utilities, Cities and Villages, Labor and Commerce, and Telecommunications Rewrite Committees. She also served on the Illinois Growth Task Force and was a member of the National Caucus of Environmental Legislators.

From 1984 to 1992, Ms. Moore was a member of the Lake County Board, serving two years as Vice Chair. She was also a member of the Lake County Forest Preserve Board, serving as president in 1991 and 1992. Additionally, she was the Clerk of the Village of Libertyville and was a Village Trustee.

Ms. Moore is a member of the Board of Directors of Condell Medical Center and the University Center of Lake County. She was a member of the Board of Directors of the National Association of Counties. Additionally, she was Chief Financial Officer and co-owner of a small advertising and sales promotion agency.

Fond Farewell

Former Chairman J. Philip Novak retired from the Board on November 30, 2005. Mr. Novak was appointed to the Board and designated Chairman in 2003 by Governor Rod R. Blagojevich. Prior to joining the Board, Chairman Novak served 16 years in the Illinois House of Representatives. He continues to serve as Chairman on the Illinois Clean Energy Community Foundation, a 250 million dollar trust fund promoting energy efficiency and protecting natural areas. He is a former Kankakee County Treasurer and Bradley Village Trustee. Chairman Novak is a veteran of the United States Army, having served in the Panama Canal Zone.

Mr. Novak used his time and talents to improve the environment for all Illinois residents. The Board wishes him well in his retirement.

Rulemaking Review

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

Section 5(b) of the Environmental Protection Act (Act) (415 ILCS 5/5(b) (2004)) directs the Board to "determine, define and implement the environmental control standards applicable in the State of Illinois." When the Board promulgates rules, it uses both the authority and procedures in Title VII (Sections 26-29) of the Act and its own procedural rules at 35 Ill. Adm. Code Part 102.

The Act and Board rules allow anyone to file regulatory proposals with the Board. The Illinois Environmental Protection Agency (IEPA or Agency) is the entity that most often files rule proposals. The Board holds quasi-legislative public hearings on the proposals to gather information and comments to assist the Board in making rulemaking decisions. The Board also accepts written public comments.

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

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

The following is a summary of the most significant rulemakings completed in fiscal year 2006, arranged by docket number. The Board completed rulemakings to update existing bodies of rules governing air, noise pollution, and remediation of contamination from leaking underground storage tanks (USTs) and reimbursements from the Leaking Underground Storage Tank Fund. The Board updated its procedural rules as required by legislative changes to the definition of "pollution control facility." The Board adopted two sets of industry-proposed rules to streamline air permitting of certain minor sources. The Board adopted changes to the water quality standards for combined radium-226 and radium 228, and established interim effluent limits for phosphorus. The Board also adopted one site-specific rule: the first ever "maximum setback zone" for protection of vulnerable groundwater sources from contamination under Section 14.3 of the Act.

Rules Adopted in Fiscal Year 2006

New and Updated Rules for Measurement and Numerical Sound Emissions Standards Amendments to 35 Ill. Adm. Code 901 and 910, R03-9 (final rules adopted March 2, 2006)

On March 2, 2006, the Board adopted final rules in Proposed New and Updated Rules for Measurement and Numerical Sound Emissions Standards, Amendments to 35 Ill. Adm. Code 901 and 910; March 2004 Proposal Formally Withdrawn (R03-09). The rulemaking amended Part 901 and added a new Part 910 to the noise regulations found in 35 Ill. Adm. Code Subtitle H to update sound measurement definitions and techniques. The amendments, effective March 10, 2006, were published at 30 Ill. Reg. 5594 (Mar. 24, 2006).

In Part 901, the Board replaced reference to the existing 1965 Standard Land Use Coding Manual codes with the Land-Based Classification Standards codes, a consistent model for classifying land uses based on a multi-dimensional land use classification model. The changes to Section 901.104 clarify that the impulsive sound standards are based on one-hour A-weighted equivalent sound levels. The Board also revised the numeric standards to bring highly impulsive noise standards into conformity with the standards set forth in Sections 901.102 and 901.103 in terms of the effective community response. Additionally, the Board revised outdated numerical sound emission standards

for property line noise sources found at 35 Ill. Adm. Code 901.

In response to public comment, the Board exempted the noise from blasting at facilities operated by aggregate producers and surface coalmines, finding that the regulation of noise emissions from blasting at aggregate and surface coalmines could appropriately be deferred to the Illinois Department of Natural Resources (DNR). But, the exemption is limited to impulsive sound produced by explosive blasting activities, which are regulated by DNR in accordance with Section 6.5 and Section 3.13 of the Surface Coal Mining Land Conservation and Reclamation Act (225 ILCS 715/6.5 and 3.13 (2004)).

The new Part 910 sets forth the measurement procedures for enforcing the Board's noise standards in Parts 900 and 901. These procedures are essentially based upon the IEPA's noise measurement protocols at 35 Ill. Adm. Code 951. Additionally, the new Part contains general requirements and specific instrument requirements. Appendix A includes tables that can be used to determine the long-term background ambient noise levels in instances where direct measurements cannot be made.

Technical Correction to Formulas in 35 Ill. Adm. Code 214; Clean-Up Part III, Amendments to 35 Ill Adm. Code Part 211, 218, and 219 (R04-12/20)(cons.)(final rules adopted May 4, 2006)

On May 4, 2006, the Board made corrections to the air rules by adopting a final opinion and order in Technical Correction to Formulas in 35 Ill. Adm. Code 214; Clean-Up Part III, Amendments to 35 Ill Adm. Code Part 211, 218, and 219 (R04-12/20)(consolidated). The adopted rules, effective May 15, 2006, were published at 30 Ill. Reg. 9654 (May 26, 2006).

The amendments adopted in R04-12 originated as a Board-initiated proposal, to correct technical errors in formulas in the Board's air rules at 35 Ill. Adm. Code 214 "Sulfur Limitations." The errors appear to have occurred when the Illinois Administrative Code was re-codified.

The IEPA filed the R04-20 rulemaking on January 6, 2004, to correct, update, and clarify rules implementing federal Clean Air Act requirements for volatile organic material (VOM) emissions reductions in the Chicago and Metro-East ozone areas. The IEPA described the rule amendments as intended to benefit the regulated community by reducing the burden of, and increasing the flexibility in, demonstrating compliance. Examples of the amendments adopted include addressing capture efficiency, carbon adsorbers and control-device monitoring, screen printers, sealers and topcoats, lithographic printing, natural gas fired afterburners, perchloroethylene dry cleaners, and motor vehicle refinishing.

Revisions to Radium Water Quality Standards: New 35 Ill. Adm. Code 302.307 and Amendments to 35 Ill. Adm. Code 302.207 and 302.525 (R04-21)(final rules adopted Feb. 16, 2006)

The Board adopted final Revisions to Radium Water Quality Standards: Proposed New 35 Ill. Adm. Code 302.307 and Amendments to 35 Ill. Adm. Code 302.207 and 302.525 (R04-21) on February 16, 2006. The final amendments are effective March 1, 2006, and were published at 30 Ill. Reg. 4919 (Mar. 17, 2006).

On January 13, 2004, the IEPA proposed changes to Sections 302.207 and 302.525 that eliminate the existing general use and Lake Michigan water quality standards for radium 226, retaining the existing radioactivity standards for gross beta particle activity and strontium 90. The proposed new Section 302.307 established a public and food processing water supply standard for radium 226 and 228 combined of 5 picocuries per liter (pCi/L).

In 2004, the Board adopted a first notice order adopting the proposal as filed. In response to public comment, the Board adopted a second first notice proposal in 2005, in which the Board proposed a general use water quality standard of 3.75 (pCi/L) combined radium 226 and 228 applicable to all general use waters of the State. In addition, the Board proposed a general use water quality standard of 30 pCi/L combined radium applicable to waters receiving discharge from publicly-owned treatment works (POTWs). The 30 pCi/L standard applied from the point of discharge to one mile downstream of the discharge outfall and was incorporated as a new Section 302.207(d).

On December 12, 2005, in a second-notice opinion and order, the Board amended the general use water quality standard for combined radium 226 and 228. The Board retained the proposed standard of 3.75 pCi/L combined radium 226 and 228, but set the standard as an annual average value, rather than an instantaneous maximum standard. This standard applies to all general use waters of the State, including stream segments that receive discharge from POTWs, as well as the Lake Michigan Basin. Additionally, the Board eliminated the separate water quality standard of 30

pCi/L adopted at second first notice for stream segments that receive discharges from POTWs. Finally, the Board adopted a 3.75 pCi/L combined radium 226 and 228 standard for Public and Food Processing Water Supplies as an instantaneous maximum standard for public and food processing water supply intakes.

On February 16, 2006, the Board's final opinion and order adopted the rule without significant change from the second-notice rule. The Board also adopted a Public and Food Processing Water Supply standard of 5 pCi/L combined radium 226 and 228 to ensure that public water supplies meet the Federal drinking water maximum contaminant level for radium.

Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732); In the Matter of: Regulation of Petroleum Leaking Underground Storage Tanks (Proposed New 35 Ill. Adm. Code 734) (R04-22/R04-23 A (cons.))(final rules adopted Feb. 16, 2006)

Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732); In the Matter of: Regulation of Petroleum Leaking Underground Storage Tanks (Proposed New 35 Ill. Adm. Code 734) (R04-22/R04-23 B (cons.))(proposal dismissed after hearings June 1, 2006)

On February 16, 2006, the Board adopted a final opinion and order in Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732); In the Matter of: Regulation of Petroleum Leaking Underground Storage Tanks (Proposed New 35 Ill. Adm. Code 734) (R04-22/R04-23 A (cons.)). The adopted rules, effective March 1, 2006, were published at 30 Ill. Reg. 4928, 5090 (Mar. 17, 2006).

IEPA filed two separate proposals on January 13, 2004. R04-22 sought to amend the Board's petroleum leaking underground storage tanks rules at 35 Ill. Adm. Code 732, while R04-23 sought to add a new Part at 35 Ill. Adm. Code 734. The Board consolidated the two proposals for hearing at the IEPA's request.

In R04-22, the proposed amendments to Part 732 were to establish the corrective action measures that must be taken in response to a leak and procedures for seeking payment from the Underground Storage Tank Fund (UST Fund). The amendments to Part 732 also reflected changes from P.A. 92-0554, effective June 24, 2002, and P.A. 92-0735, effective July 25, 2003, which allow a Licensed Professional Geologist to certify certain information.

The proposed amendments were intended to streamline the process in Part 732 for obtaining payment from the UST Fund. The proposed new Subpart H that contained maximum reimbursement amounts that can be paid for different activities performed in a release response, such as: free product or groundwater removal, well installation and abandonment, soil removal and disposal, and professional consulting services.

In R04-23, the proposed new Part 734, applicable to releases reported after June 24, 2002, was largely identical to Part 732 except for changes enacted in P.A. 92-0554. Those exceptions include different corrective action requirements and increased caps on the total amount owners and operators can be paid from the UST Fund.

Board Amendments at First and Second Notice

In a February 17, 2005 first-notice opinion and order, the Board made significant changes to the proposal, as well as adopting some parts of it unchanged. The first-notice proposal was intended to reflect the efforts made by all of the participants during seven days of hearing and included in nine public comments. The Board received an additional 63 comments on the first-notice proposal, and held an additional hearing in response to requests.

In its December 1, 2005 second-notice opinion and order, the Board again made significant changes: allowing for reimbursement on a time and materials basis for consulting services; allowing for reimbursement of handling charges for a subcontractor if the primary contractor has a financial interest in the subcontractor; removing professional services from eligibility for bidding; adding an additional member - appointed by members of Professionals for the Protection of the Environment - to the Leaking Underground Storage Tank advisory committee; deleting the requirement that engineers or geologists maintain records to be available for an IEPA audit (that requirement is now limited to the maintenance of records by the owner or operator); and adding a requirement for the Board to publish the results of the IEPA's triennial review of reimbursement rates in the Board's publication, the *Environmental Register.*

The Board also determined that some changes requested by the participants were not necessary or supported by the record such as adding mobilization charges for drill rigs; adjusting maximum payment

amounts for abandonment and removal of tanks; and adding a requirement to the rules requiring the IEPA maintain a database of payments to track reimbursement rates.

Lastly, the Board created a subdocket B to develop scopes of work to be used in reimbursing professional consulting services in the remediation of UST sites. This action was taken in response to claims that lack of a clearly defined scope of work in the Docket A rules would cause undue economic hardship for environmental consultants and their small business clients.

In its February 16, 2006 Docket A order, the Board adopted some rules as final, while agreeing to give other issues further consideration in response to a Joint Committee on Administrative Rules (JCAR) second-notice recommendation. In response to the recommendation from JCAR, the Board stated in the final opinion and order that it would continue to review in Docket B issues associated with hourly payment amounts and hours of work for professional services. The adopted amendments differ little from those proposed at second-notice.

The Board developed a Docket B proposal including scope of work and the hours and payment issues described above. The Board adopted the proposal for public comment on January 1, 2006, and held a hearing on March 23, 2006. The Board closed and dismissed the docket June 1, 2006, finding that additional rulemaking was not warranted. In response to the recommendations made by JCAR, the Board specifically asked the participants to comment on the ineligible costs related to onsite cleanup above Tier 2 remediation levels (as delineated in 35 Ill. Adm. Code 742) and the remediation of groundwater when a groundwater ordinance in place. The Board found that the discussion of these issues at the hearing did not add any additional information to the record and declined to make any changes to those specific subsections of the rule.

Interim Phosphorus Effluent Standard, Proposed 35 Ill. Adm. Code 304.123 (g-k) (R04-26) (final rules adopted Jan. 19, 2006)

On January 19, 2006, the Board adopted final rules Interim Phosphorous Standards, Proposed 35 Ill. Adm. Code 304.123 (g-k) (R04-26), effective February 2, 2006 and were published at 30 Ill. Reg. 72365 (Feb. 17, 2006). The Board adopted interim phosphorus rules proposed by the IEPA, while declining to withdraw or change the rule in response to a December 13, 2005 objection of JCAR.

After considering the evidence and argument submitted at two public hearings and in 22 public comments, the Board adopted rules very similar to those proposed by the IEPA on May 14, 2004. Specifically, the rules limit effluent levels of phosphorus from new or expanded discharges from treatment works facilities. The rules set an interim phosphorus limit while the IEPA develops final State numeric nutrient standards; add five new subsections (g-k) to existing Section 304.123; and set a monthly average limit of 1 milligram per liter (mg/L) for total phosphorus for any new or expanded discharges into general use waters. In response to public comments, the Board added at second notice a new subsection (k) that specifies that the averaging rules of Section 304.104 do not apply to permit limits established by the phosphorus effluent standards.

The final phosphorus limit applies only to discharges from treatment works with a design average flow of 1.0 million gallons per day or more receiving primarily municipal or domestic wastewater; or any treatment works, other than those treatments that are primarily municipal or domestic wastewater, with a total phosphorus effluent load of 25 pounds per day or more. Dischargers may be exempt from the permit limits if they can demonstrate that phosphorus from their treatment works is not the limiting nutrient in the receiving water. The amendments allow the IEPA to impose alternative phosphorus effluent limits where the supporting information shows that alternative limits are warranted by the aquatic environment in the receiving stream.

The Board adopted its second-notice order on September 15, 2005. JCAR considered the rule on November 15, 2005, when it extended the second-notice period an additional 45 days. At the December 13, 2005 meeting, JCAR issued a certification and statement of objection to the proposed rule, stating in pertinent part that JCAR objected

> because the rulemaking imposes an undue economic and regulatory burden on the affected wastewater treatment facilities by requiring those facilities to meet interim standards for phosphorus discharges. The EPA has committed to the USEPA to have numeric standards in place for nutrients, but not until in 2008. This additional time should allow affected entities more time to prepare for any costs associated with these standards.

In its January 19, 2006 opinion and order in response to the JCAR action, the Board stated its continued belief that the rule was economically reasonable and technically feasible. Based on the cost information in the record coupled with the fact that the proposed rule applies to only new or expanding larger facilities, the

Board found that affected facilities can incorporate the additional cost of phosphorus control in overall expansion plans with an economically reasonable impact. The Board found that the implementation of the phosphorus effluent standard would not impose an undue economic or regulatory burden. Additionally, the Board noted that the record amply demonstrated that control of phosphorus discharge from larger treatment plants would result in enhanced water quality in the state's receiving streams.

Setback Zone for City of Marquette Heights Community Water Supply, New 35 Ill. Adm. Code 618 (R05-09)(final rules adopted May 4, 2006)

The Board completed its first rulemaking under Section 14.3 of the Act (415 ILCS 5/14.3 (2004)), which allows for the establishment of "maximum setback zones" to prevent contamination of particularly vulnerable groundwater sources used by a community water supply (CWS). A setback zone restricts land use near the CWS well, providing a buffer between the well and potential sources or routes of contamination.

On May 4, 2006, the Board adopted a final opinion and order in Setback Zone for City of Marquette Heights Community Water Supply, New 35 Ill. Adm. Code 618 (R05-09). The new Part 618 establishes an expanded setback zone of up to 1,000 feet to provide additional protection for the CWS wells of the City of Marquette Heights, in Tazewell County. The adopted amendments, effective May 23, 2006, were published at 30 Ill. Reg. 10448 (June 9, 2006).

The rulemaking process was initiated by a resolution adopted by Marquette Heights on March 22, 2004, requesting that the IEPA propose a rule that would increase the setback zone around the city's two CWS wells which are located outside of Marquette Heights in North Pekin. The wells have an estimated average daily pumpage from the groundwater source of 240,000 gallons per day, supplying approximately 3,200 persons directly. Marquette Heights' water system has approximately 1,064 service connections within the corporate limits and another 56 service connections in an area of anticipated future expansion. Based on various assessments, including groundwater flow and recharge area modeling, the IEPA concluded that the current minimum setback zones did not adequately protect wells, and that the groundwater source is "highly vulnerable."

Subpart A contains general provisions for maximum setback zones, including definitions. Subpart A's provisions apply to all maximum setback zones established in Illinois through Board rulemaking.

Subpart B contains rules specific to the Marquette Heights CWS wells. Section 618.Appendix A is a map that delineates the irregularly-shaped boundaries of the proposed maximum setback zone relative to local land use plats. The distance from each wellhead to the proposed setback boundaries varies from approximately 600 to 1,000 feet. The appendix also lists identification numbers of parcels that are located wholly or partially within the proposed maximum setback.

Among other things, the Subpart B rules also provide that: (1) certain activities within the setback are banned; and (2) other activities within the setback are subject to management and control standards. "New potential primary sources" of groundwater contamination, as defined in the rule, are prohibited from locating wholly or partially within the Marquette Heights expanded setback. Management standards are also specified.

Amendments to Exemptions from State Permitting Requirements (35 Ill. Adm. Code 201.146) (R05-19); and Amendments to Exemptions from State Permitting Requirements for Plastic Injection Molding Operations (35 Ill. Adm. Code 201.146) (R05-20)(final rules adopted Mar. 2, 2006)

On March 2, 2006, the Board adopted final rules in two dockets: Proposed Amendments to Exemptions from State Permitting Requirements (35 Ill. Adm. Code 201.146) (R05-19), and Proposed Amendments to Exemptions from State Permitting Requirements for Plastic Injection Molding Operations (35 Ill. Adm. Code 201.146) (R05-20). Because both dockets amended the same Section in Part 201, the Board consolidated the final text for filing purposes. In each docket, the Board adopted rules virtually identical to the rules as proposed. The adopted amendments, effective March 3, 2006, were published at 30 Ill. Reg. 4901 (Mar. 17, 2006).

The Illinois Environmental Regulatory Group and the IEPA jointly filed R05-19 on February 22, 2005. Proponents' stated the purpose was to eliminate permitting delays for minor projects having little environmental or regulatory impact. The amendments add four new categories to the existing list of 59 exemptions from state air permit requirements in Section 201.146, subject to various conditions stated in the rule:

1) Sources replacing or adding air pollution control equipment at existing emission units;

2) Sources with federally enforceable state operating permits (FESOP) having a low potential to emit;

3) Minor sources that are not subject to the Clean Air Act Permit Program (CAAPP) or FESOP requirements; and

4) Insignificant activities, similar to those for CAAPP sources. *See* 35 Ill. Adm. Code 201.210 through 210.211.

Docket R05-20 was opened for the April 19, 2005 proposal filed by the Chemical Industry Council of Illinois (CICI). CICI sought to eliminate the state construction and operating permits for low-emitting emission units and activities, for the benefit of the IEPA as well as the plastic injection molding (PIM) operations.

The amendment added one category for operations to the existing list of permit exemptions in Section 201.146. The rule language limits the exemption to facilities that use 5,000 tons or less of resin annually in the PIM process. The 5,000-ton limit applies facility-wide rather than to each piece of equipment.

"Pollution Control Facility" Definition Under P.A. 93-0998, P.A. 94-0094, and P.A. 94-0249 (35 Ill. Adm. Code 101.202) (R06-09)(final rules adopted Nov. 17, 2005)

On November 17, 2005, the Board adopted final rules in Amendments to the Procedural Rules - "Pollution Control Facility" Definition Under P.A. 93-0998, P.A. 94-0094, and P.A. 94-0249 (35 Ill. Adm. Code 101.202) (R06-09). The Board opened this rulemaking to amend the definition of "pollution control facility" to include recent statutory changes. The adopted amendments, effective November 21, 2005, were published at 29 Ill. Reg. 19666 (Dec. 2, 2005).

The Board incorporated the statutory changes by adding new exceptions to the definition of "pollution control facility" in Section 101.202. Changes were made to accommodate:

Public Act 93-0998 (P.A. 93-0998, eff. Aug. 23, 2004) added a fourteenth exception to the definition of "pollution control facility" that excludes the portion of a site or facility that accepts, separates, and processes uncontaminated broken concrete, provided that the materials are not stored for more than one year at the site and that they are recycled back to useable form.

Public Act 94-0094 (P.A. 94-0094, eff. July 1, 2005) also amended the Act's definition of "pollution control facility." Specifically, P.A. 94-0094 amended the existing exemption from that definition for "the portion of a site or facility accepting exclusively general construction or demolition debris, located in a county with a population over 700,000, and operated and located in accordance with Section 22.38 of this Act" 415 ILCS 5/3.330(a)(13) (2004). P.A. 94-0094 limits that exemption to counties that had reached the population threshold of 700,000 "as of January 1, 2000."

Public Act 94-0249 (P.A. 94-0249, eff. July 19, 2005) added a fifteenth exception to the definition of "pollution control facility" to include:

> the portion of a site or facility located in a county with a population over 3,000,000 that has obtained local siting approval under Section 39.2 of this Act for a municipal waste incinerator on or before July 1, 2005, and that is used for a non-hazardous waste transfer station.

Semi-Annual Identical-In-Substance Update Dockets

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

Identical-in-substance (IIS) 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 IIS 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.

For reasons of space, the Board has not included the listing of identical-in-substance dockets completed in

FY 06. Summaries of these dockets are included in the Board's newsletter the *Environmental Register*, Nos. 619 through 624 (July 2005 through June 2006). They are available on the Board's Web site at www.ipcb.state.il.us. Additional information is also available on the various individual dockets from the Clerk's Office On Line (COOL) system, also available on the Board's Web site.

Rules Pending at End of Fiscal Year 2006

At the end of FY 05, exclusive of reserved IIS dockets, there were twelve regulatory dockets still open. At the close of FY 06, there were 15 open dockets, exclusive of reserved IIS dockets (R07-01 through R07-8, reserved to cover the update period Jan. 1, 2006 through June 30, 2006).

The Board typically holds hearings on proposals, prior to adoption of the "first-notice" orders required under the Illinois Administrative Procedure Act. If the Board substantially changes rule text as a result of public hearings and comment, the Board may adopt a "second first-notice" order, hold additional hearings and receive additional comment.

The list of dockets below includes brief notations in parentheses of significant Board actions during the past year. Additional information is available from the Board's Web site.

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

R04-9 Amendments to the Board's Administrative Rules: 2 Ill. Adm. Code 2175 (pre-first-notice proposal in development following FY 05 completion of electronic filing pilot project—*see* R04-8)

R04-25 Proposed Amendments to Dissolved Oxygen Standard 35 Ill. Adm. Code 302.206 (pre-first notice; four hearings held; additional hearings anticipated Fall 2006)

R06-8 Proposed Site-Specific Perlite Waste Disposal Regulation Applicable to Silbrico Corporation (35 Ill. Adm. Code Part 810) (pre-first notice; pre-hearing; awaiting completion of related docket R06-19)

R06-10 Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742) (pre-first notice; two hearings held)

R06-11 Proposal of Vaughan & Bushnell Manufacturing Company of Amendment to a Site-specific Rule 35 Ill. Adm. Code 901.121 (pre-first notice; one hearing held)

R06-19 Clean Construction or Demolition Debris Fill Operations Under PA 94-272 (35 Ill. Adm. Code 1100) (in first notice, two hearings held, statutory adoption deadline September 1, 2006)

R06-20 Proposed Amendments to the Board's Special Waste Regulations Concerning Used Oil, 35 Ill. Adm. Code 808,809 (pre-first notice; two hearings held)

R06-21 Organic Material Emissions Standards and Limitations for the Chicago and Metro-East Areas: Proposed Amendments to 35 Adm. Code 218 and 219 (pre-first notice; two hearings held)

R06-22 NOx Trading Program: Amendments to 35 Ill. Adm. Code Part 217 (pre-first notice; hearings being scheduled)

R06-23 Standards and Requirements for Potable Water Well Surveys and for Community Relations Activities Performed in Conjunction with Agency Notices of Threats from Contamination Under PA 94-314: New 35 Ill. Adm. Code Part 1600) (in first notice; two hearings held; statutory adoption deadline September 17, 2006)

R06-24 Revisions to Water Quality Standards for Total Dissolved Solids in the Lower Des Plaines River for ExxonMobil Oil Corporation: Proposed 35 Ill. Adm. Code 303.445 (in first notice; one hearing held; motion for expedited hearing granted)

R06-25 Proposed New 35 Ill. Adm. Code 225 Control of Emissions From Large Combustion Sources (Mercury) (in first notice; ten days of hearing held, next hearings August 14 through August 25, 2006) (this proceeding is also discussed as the last item of the "Judicial Review" section of this annual report)

R06-26 Proposed New Clean Air Interstate Rule (CAIR) SO2, NOx Annual and NOx Ozone Season Trading Programs, 35 Ill. Adm. Code 225. Subparts A, C, D and E (pre-first notice; hearings scheduled October 10 through October 20, 2006)

R06-27 Amendments to 35 Ill. Adm. Code 201 (New Section 201.501 PSD Construction Permits) (in first notice; hearings being scheduled; motion to expedite granted)

Judicial Review

Introduction

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

Pursuant to Section 41 of the Environmental Protection Act (Act) (415 ILCS 5/41 (2004)), any party to a Board hearing, anyone who filed a complaint on which a hearing was denied, anyone denied a permit or variance, anyone who is adversely affected by a final Board order, or anyone who participated in the public comment process under subsection (8) of Section 39.5 of the Act, may file a petition for review of the Board's order with the appellate court. The petition for review must be filed within 35 days of service of the Board order from which an appeal is sought.

Administrative review of the Board's final order or action is limited in scope by the language Section 41(b) of the Act. Judicial review is intended to ensure fairness for the parties before the Board, but does not allow the court to substitute its own judgment in place of that of the Board. The standard of review for the Board's quasi-legislative actions is whether the Board's decision is arbitrary or capricious. The Board's quasi-legislative decisions include rulemaking, imposing conditions in variances, and setting penalties. All other Board decisions are quasi-judicial in nature, and the Illinois Supreme Court has stated that in reviewing a State agency's quasi-judicial decisions: findings of fact are reviewed using a manifest weight of the evidence standard; questions of law are decided by the courts *de novo*; and mixed questions of law and fact are reviewed using the "clearly erroneous" standard. *See* AFM Messenger Service, Inc. v. Department of Employment Security, 198 Ill. 2d 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 2006, the Illinois appellate courts entered final orders in six appeals of Board opinions and orders. The Board's decisions were affirmed in two cases. Three appeals were dismissed. The Board also had one case reversed, which the Board has appealed to the Illinois Supreme Court. Finally, in a circuit court action, the court issued a preliminary injunction in a Board rulemaking proceeding.

The following summaries of the appellate decisions are organized first by case type, and then by date of final determination, with a description of the circuit court ruling also included.

Enforcement

Sections 30 and 31.1 of the Act (415 ILCS 5/30,31.1 (2004)), 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 which the complainant must prove that the "respondent has caused or threatened to cause air or water pollution, or that the respondent has violated or threatens to violate any provision of this Act or any rule or regulation of the Board or permit or term or condition thereof." 415 ILCS 5/31(e)(2004). The Board is authorized under Sections 33 and 42 of the Act to direct a party to cease and desist from violation, to revoke a permit, to impose civil penalties, and to require posting of bonds or other securities to assure correction of violations. 415 ILCS 5/33, 42 (2004). An administrative citation is initiated by the Illinois Environmental Protection Agency (IEPA) or a unit of local government and imposes a fixed statutory fine for, among other things, causing or allowing open dumping of any waste. 415 ILCS 5/21(o, p) and 31.1, 42(b)(4)(4-5) (2004).

In fiscal year 2006, the appellate court affirmed one Board decision on the merits, and dismissed another one for failure to name a fellow respondent as a party to the appeal.

Blue Ridge Construction Corp. v. PCB and People of the State of Illinois, No. 3-04-0874 (3rd Dist. Mar. 30, 2006) (unpublished Rule 23 order affirming Board order in PCB 02-115)

In a March 30, 2006 final order, the Third District Appellate Court affirmed the Board's order imposing a $66,000 penalty in Blue Ridge Construction Corp. v. PCB and People of the State of Illinois, No. 3-04-0874 (3rd Dist. Mar. 30, 2006) (unpublished order under Illinois Supreme Court Rule 23). The court made its decision on the parties' briefs, dispensing with oral argument. The case upholds an important purpose of the Act: "to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b).

Board Decision

The Board's final opinion and order in People of the State of Illinois v. Blue Ridge Construction Corporation, PCB 02-115 (Oct. 7, 2005) found Blue Ridge

Construction Corp. (Blue Ridge) had committed various air and water violations when it disposed of demolition debris containing asbestos by dumping the waste into a ravine through which an intermittent stream ran.

The People of the State of Illinois, in February 2002, filed with the Board a four-count complaint charging Blue Ridge with various violations of the Act, 415 ILCS 5. (2004), and the Board's regulations. The complaint arose from Blue Ridge's May 2000 demolition of the former dining hall at the Old Bartonville Mental Health Facility in Peoria County and its management and handling of the various demolition wastes.

In an August 7, 2003 order, the Board granted a motion for partial summary judgment, based on a stipulation of facts, to all but three paragraphs of the second count of the complaint. The undisputed facts were that Blue Ridge acquired the Old Bartonville Mental Facility in Bartonville with the intention of converting the dining hall into a metal fabrication shop. On May 11, 2000, after being advised by Bartonville Village officials that no permits were necessary, respondent began demolition of the dining hall. Between May 11-17, 2000, respondent opened approximately a 40-foot hole in the east wall, removed roofing material that had caved in, removed the rest of the roof that was near collapse, and cut off and removed steel pipe roof support columns from six locations. Respondent deposited debris from its demolition activities in a ravine adjacent to the facility. People of the State of Illinois v. Blue Ridge Construction Corporation, PCB 02-115, slip op. at 1 (Aug. 7, 2003).

On May 17, 2000, the IEPA inspected the facility and obtained seven samples of demolition materials, including insulation material from pipes within the facility. Analyses for four of the samples showed asbestos Chrysotile concentrations ranging from 20% to 40% and asbestos amosite in concentrations ranging from 10% to 30%. Prior to starting demolition, respondent did not inspect the facility for asbestos, or submit a written notification of its intention to demolish the facility. Blue Ridge, PCB 02-115, slip op. at 1.

The Board accordingly found that, as charged in:

> Count 1: respondent failed to utilize asbestos emission control methods, failed to properly remove, handle and dispose of regulated asbestos-containing material (RACM) and other regulated asbestos-containing material (ACM) during demolition activities causing, threatening or allowing the emission of asbestos into the environment violation of Section 9(a) of the Act and Section 201.141;
>
> Count II: (a) prior to the demolition of the dining hall, respondent failed to thoroughly inspect the facility for the presence of asbestos, including categories I and II non-friendly ACM in violation of 40 C.F.R. 61.145(a) and 9.1(d); (b) respondent failed to submit a written notification of its intention to demolish the dining hall in violation of 40 C.F.R.(b)(1) and Section 9.1(d) of the Act;
>
> Count III: respondent caused or allowed the open dumping of demolition debris generated by the demolition activities within the former dining hall, in or near a ravine on property owned by respondent in violation of Section 21(a), (e), (p)(1) and (p)(2) of the Act; and
>
> Count IV: respondent caused or allowed the open dumping of demolition debris generated by its demolition activities within and adjacent to a ravine owned by respondent so as to create a water pollution hazard in violation of Section 12(d) of the Act. Blue Ridge, PCB 02-115, slip op. at 2-4.

The Board sent the parties to hearing to address the remaining alleged violations and remedy. Blue Ridge, PCB 02-115, slip op. at 4.

In its October 7, 2004 order, the Board noted based on additional stipulated facts that Blue Ridge began removing asbestos and other waste in the ravine on April 16, 2001, completing it three days later, in compliance with all applicable requirements. Blue Ridge spent a total of $59,965.67 to remove asbestos from the facility and to remove waste from the ravine. On April 11, 2002, the Bartonville Village Council voted to reimburse Blue Ridge $56,000 "for the expenses associated with the clean-up except for the expenses directly related to the asbestos on the pipes." People of the State of Illinois v. Blue Ridge Construction Corporation, PCB 02-115, slip op. at 6-7 (Oct. 7, 2005).

The Board found that, as alleged in the remaining portions of count II of the complaint, Blue Ridge had violated the various asbestos-notification and handling requirements 40 C.F.R. 61.150(a)(1) and Section 9.1(d)(1) of the Act. The Board then considered penalty issues.

The People argued that Blue Ridge committed fourteen violations, at least six of which continued for 340 days. The People calculated the maximum penalty allowable under Section 42(a) of the Act to be in excess of $30 million but sought instead a penalty of $72,000. Blue Ridge sought a maximum penalty of $3,000.

Much of the parties' disagreement on penalty issues related to Blue Ridge's recovery of $56,000 from the Village of the $59,965.67 spent in clean-up costs. On this issue, the Board determined that it is the purpose

of the Act "to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b) (2004). The Board noted that Blue Ridge shifted costs for which it is responsible onto the Village and those who provide financially for its operations. The Board found that a civil penalty of at least $56,000 was necessary to be consistent with the fundamental principle of the Act. Blue Ridge, slip op. at 19 (Oct. 7, 2005). The Board concluded that because this case presented a large number of violations, a failure to exercise due diligence, and a need to deter similar threats to the air and water of the State, a substantial civil penalty was warranted. The Board ordered Blue Ridge to pay a civil penalty of $66,000.

The Board's last action in the case was to stay payment of the civil penalty at Blue Ridge's unopposed request during the pendency of the appeal Blue Ridge filed in the Third District on November 15, 2005. People of the State of Illinois v. Blue Ridge Construction Corporation, PCB 02-115 (Dec. 16, 2004).

Court Decision

On appeal, Blue Ridge challenged only the Board's $66,000 penalty. After a brief review of the facts of the case and the Board's order, the court's analysis turned first to the proper standard of review. While noting that the People, as well as Blue Ridge from time to time, had argued application of the "arbitrary and capricious" standard of review, the court found that the appropriate standard was the less deferential "manifest weight of the evidence" standard. Blue Ridge Construction Corp. v. PCB and People of the State of Illinois, No. 3-04-0874 slip op. at 5-6 (3rd Dist. Mar. 30, 2006), (unpublished order under Illinois Supreme Court Rule 23), citing Discovery South Group, Ltd. v. PCB, 275 Ill. App. 3d 547, 656 N.E.2d 51 (1st Dist. 1995).

The court concluded that the Board's $66,000 penalty was not against the manifest weight of the evidence and it was not improper for the Board to consider the Village's reimbursement as a factor in aggravation.

John Prior d/b/a Prior Oil Co. v. PCB and People of the State of Illinois, No. 5-04-0526 (Jan. 6, 2006) (unpublished Rule 23 order dismissing appeal of Board order in PCB 02-177)

In a January 6, 2006 final order, the Fifth District Appellate Court dismissed, for lack of jurisdiction, an appeal filed by John Prior. John Prior d/b/a Prior Oil Co. v. PCB and People of the State of Illinois, No. 5-04-0526 (5th Dist. Jan. 6, 2006) (unpublished order under Illinois Supreme Court Rule 23) (hereinafter John Prior (5th Dist.)). Prior did not include in the caption of the appeal his co-respondent in the case before the Board: People of the State of Illinois v. John Prior d/b/a Prior Oil Company and James Mezo d/b/a Mezo Oil Company, PCB 02-177 (May 6, 2004). On August 19, 2004, the Board and the People of the State of Illinois (People) filed a motion to dismiss the appeal for appellant's failure to name all necessary parties of record pursuant to Supreme Court Rule 335. The court ordered that motion "to be taken with the case." Oral argument on both jurisdiction and penalty was held on November 3, 2005. The court found the Board and Peoples' jurisdiction argument persuasive, and so did not rule on any of the arguments on the merits of Prior's appeal.

Board Decision

On April 19, 2002, the People filed a sixteen-count complaint against John Prior d/b/a Prior Oil Company (Prior) and James Mezo d/b/a Mezo Oil Company (Mezo). Prior and Mezo are oil producers and distributors. The complaint alleged that, at various times beginning as early as 1996, the respondents committed oil pollution of land and water at four sites in Washington County.

In a May 6, 2004 opinion and order, the Board found Prior had committed 26 violations, and Mezo three violations, of the Act and Board rules, including violations of Sections 12 (a), (d), 21 (a), (d), (e), (p) (1), and (p)(6) of the Act and various Board regulations, including those at 35 Ill. Adm. Code 302.203, 722.111, 739.122(c), (d), 812.101(a), and 808.121. The Board imposed a $300,000 civil penalty on Prior and a $3,500 civil penalty on Mezo. Additionally, the Board ordered Prior to pay the People's attorney fees totaling $6,600.

Court Decision

The court stated at the outset that Prior did not appeal "the Board's finding of guilt" but rather "only the penalty, arguing that it is excessive." John Prior (5th Dist.), slip op. at 1. The court then dealt with the issue of whether it had jurisdiction over the appeal, given the failure to name Mezo in Prior's petition for review. The critical facts for the court's analysis were simply that Prior named the Board and the People as respondents in his petition for review but failed to name Mezo, "a party of record before the Board, who was named as such in the Board's final order." *Id.* at 2.

The court set forth the laws and rules that apply to petitions for direct review of administrative orders in the appellate court. Section 41(a) of the Act provides for appeals of Board decisions pursuant to the Administrative Review Law (735 ILCS 5/3-101), except that review is directly in appellate court rather than in

circuit court. In turn, Section 3-113(b) of the Administrative Review Law states that "[t]he agency and all other parties of record shall be named respondents." John Prior (5th Dist.), slip op. at 2 (quoting 735 ILCS 5/3-3-113(b)). That section of the Administrative Review Law further provides, the court noted with emphasis, that a court may grant leave to name an unnamed party of record, "but 'only if that party was not named by the administrative agency in its final order as a party of record.'" *Id.* (quoting 735 ILCS 5/3-3-113(b), emphasis by court). The court added that Supreme Court Rule 335 also provides that "the agency and all other parties of record shall be named respondents" in the petition for review. *Id*. at 2-3 (quoting 155 Ill. 2d R. 335(a)).

Prior made two arguments to the court concerning jurisdiction. First, he did not have to name Mezo because Mezo's interests are not "adverse" to his. Second, he argued that if the court should find Mezo to be a necessary party, the court should grant Prior leave to amend his petition to add Mezo, since Mezo had timely received service of the petition for review. John Prior (5th Dist.), slip op at 2.

In rejecting Prior's first argument, the court cited various Illinois Supreme Court decisions for the proposition that "strict compliance" is required for the petition because the appellate court is exercising "special statutory jurisdiction" under the Administrative Review Law. John Prior (5th Dist.), slip op. at 3 (citing ESG Watts, Inc. v. PCB, 191 Ill. 2d 26, 30 (2000); McGaughy v. Ill. Human Rights Comm'n, 165 Ill. 2d 1, 12 (1995); Lockett v. Chicago Police Board, 133 Ill. 2d 349, 353 (1990); Cuny v. Annunzio, 411 Ill. 613, 617 (1952); and Winston v. Zoning Board of Appeals of Peoria County, 407 Ill. 588, 595 (1950). Therefore, "technical defects in form are deemed fatal to a petition for review," precluding the appellate court from considering the appeal. *Id*. "Substantial compliance," such as by merely serving the petition on the unnamed party, will not do. *Id.*

Prior's second argument was that he should be granted leave to amend his petition to add Mezo because of the purported "good-faith-effort" exception to the joinder requirement, citing Worthen v. Village of Roxana, 253 Ill. App. 3d 378 (5th Dist. 1993), and Bloom Township High School v. Ill. Commerce Comm'n., 309 Ill. App. 3d 163 (1st Dist.1999). John Prior (5th Dist.), slip op. at 6-7. Prior argued that: (1) there is "confusion in the law regarding whether a nonadverse party is a necessary party"; (2) he properly served Mezo with a copy of the petition; and (3) he promptly sought leave to amend. *Id*.

The Fifth District noted, however, that Worthen predated the December 15, 1995 change to the Administrative Review Law that "provides for an amendment of a petition for review to add a respondent *only if* the unnamed party had not been named as a party of record by the administrative agency in its final order." John Prior (5th Dist.), slip op. at 8 (emphasis in original). The court added that since the change to the law, courts have consistently held that amending the petition is allowed only where the unnamed party was not named as a party of record in the administrative agency's final decision. *Id*. (citing, among other decisions, Vogue Tyre & Rubber Co. v. Office of the State Fire Marshal, 354 Ill. App. 3d 20 (1st Dist. 2004) dismissed for failure to name the Board).

In finding Prior's second argument unpersuasive, the court agreed with case authority holding that in amending the Administrative Review Law, the legislature intended to limit when the appellate court could grant leave to amend a petition to add an unnamed party, precluding application of a good-faith-effort exception. Accordingly, the court concluded that Prior could not be allowed to amend his petition to add Mezo. Because he failed to "strictly comply" with the Administrative Review Law requirement that the petition name "all other parties of record", the court dismissed the appeal. John Prior (5th Dist.), slip op. at 8-10.

Permit Appeal

The Board is authorized to require a permit for the construction, installation, and operation of pollution control facilities and equipment. Under Section 39 of the Act, it is the duty of IEPA to issue those permits to applicants. 415 ILCS 5/39 (2004). Permits are issued to applicants who prove that the proposed permitted activity will not cause a violation of the Act or the Board regulations under the Act. IEPA has the statutory authority to impose conditions on a permit to further ensure compliance with the Act. An applicant who has been denied a permit, or who has been granted a permit subject to conditions, may contest the IEPA decision at a Board hearing pursuant to Section 40 of the Act. 415 ILCS 5/40 (2004).

In fiscal year 2006, the appellate court affirmed the Board's decision in the single appeal filed.

United Disposal of Bradley, Inc. & Municipal Trust & Savings Bank v. PCB and IEPA, 363 Ill. App. 3d 243, 842 N.E.2d 1161 (3rd Dist. 2006) (affirming Board order in PCB 03-235) (petition for leave to appeal to Illinois Supreme Court denied, No. 102168 (May 24, 2006)) (petition for writ of certiorari filed and pending with the United States Supreme Court)

In a January 13, 2006 published opinion and order, the Third District Appellate Court affirmed the Board's decision in United Disposal of Bradley, Inc. & Municipal Trust & Savings Bank v. PCB and IEPA, 363 Ill. App. 3d 243, 842 N.E.2d 1161 (3rd Dist. 2006) (petition for leave to appeal denied, No. 102168 (May 24, 2006)) (petition for writ of *certiorari* filed and pending with the United States Supreme Court). The court noted that United Disposal's transfer station has had a condition in its permit since the development permit was first issued in September 1994 that: "No waste generated outside the municipal boundaries of the Village of Bradley may be accepted at this facility." United Disposal, 842 N.E.2d at 810. United Disposal submitted to the IEPA an application for a permit modification asking for removal of the geographical restriction. The IEPA denied the application and the Board affirmed the permit denial. *Id.* at 811.

Board Decision

The Board granted summary judgment to the IEPA, affirming the IEPA's denial of a permit modification for the waste transfer station operated in the Village of Bradley, Kankakee County by United Disposal of Bradley, Inc. (United Disposal). United Disposal of Bradley, Inc. & Municipal Trust & Savings Bank v. IEPA, PCB 03-235 (June 17, 2004). The primary issues raised concern interpretation of a 1994 permit condition, Sections 3.330, 39(c), and 39.2 of the Act (415 ILCS 5/3.330, 39(c), 39.2 (2004)) and whether they violate the commerce clause of the United States Constitution (U.S. Const., art. I, sec. 8, cl. 3). United Disposal also argued that the 1994 permit condition was unconstitutionally vague.

Court Decision

In its appeal, United Disposal claimed the Board erred in not finding that the 1994 permit condition violated the Commerce Clause of the U.S. Constitution. In support, United Disposal cited to an unpublished 1993 federal court decision Tennsv v. Gade, No. 92 503 WLB (S.D. Ill. July 8, 1993) which found unconstitutional, under the Commerce Clause, the "statutory scheme which distinguishes between facilities located outside the geographic boundaries of a general purpose unit of government and those which are not so located." United Disposal, 842 N.E.2d at 1164, quoting Tennsv slip op. at 2-3.

Under the Act as it existed in 1994, the United Disposal permit condition limiting the service area allowed the transfer station to qualify as a "non-regional" or local pollution control facility. Because it was therefore not a "regional pollution control facility," the transfer station was exempt from the Act's requirement of local siting approval." United Disposal, 842 N.E.2d at 1163-64. In response to Tennsv, in December 2004, the General Assembly eliminated from the Act any distinction between "regional" and "non-regional" facilities. Since the amendment, all "pollution control facilities" have had to get siting approval. *Id.*

The court noted that in 1994, when United Disposal submitted its application, the company "had a choice" between applying for a regional facility permit and obtaining siting, or applying for a local facility permit and avoiding the Act's siting requirement. United Disposal, 842 N.E.2d at 1163. United Disposal chose the latter and the court agreed with the Board that United Disposal's 2003 application was merely "an attempt to operate a regional pollution control facility without first obtaining the necessary siting approval required by the Act." *Id*. The court could not find the permit denial to be the result of "unconstitutional economic protectionism." *Id*. at 1164.

The court distinguished this case from cases striking down laws that banned or imposed higher fees on out-of-state waste, quoting from the Board's decision: "The Board ultimately found that, considering the statutory scheme which allows an entity to choose its service area, 'the slight burden the permit imposes on interstate commerce does not outweigh the benefits that the permittees and the Village of Bradley enjoyed when the facility was established.' We agree." United Disposal, 842 N.E.2d at 1165.

The court further stated:

When a siting requirement applies evenhandedly, "and has only an incidental impact on interstate commerce, the relevant inquiry is whether or not it affects a legitimate public interest, and if so whether any burden on interstate commerce is '*clearly excessive* in relation to the putative local benefits.'" United Disposal, 842 N.E.2d at 1165 (emphasis added).

The court found that the Board's decision would be upheld unless it was contrary to the "manifest weight of the evidence." United Disposal, 842 N.E.2d at 1165. The court agreed that the Board and the IEPA correctly refused to let United Disposal effectively be

"grandfathered in to the new statutory scheme and allowed to ignore the siting process." *Id*. at 1166.

The court next took up United Disposal's claim that the permit condition is unconstitutionally vague, violating the company's due process rights under the federal and Illinois Constitutions. The court quickly dispensed with United Disposal's argument that the permit condition fails to provide fair warning to the regulated community of what conduct is prohibited or adequate guidelines to the enforcing administrative body, stating that the condition "could not be more clear." United Disposal, 842 N.E.2d at 1166. The court also agreed with the Board that United Disposal "had no problem deciphering the condition for ten years." *Id*.

Lastly, the court considered United Disposal's argument that the requested permit should be issued by operation of law because the IEPA failed to timely respond to the application. Board rules provide that if the IEPA fails to notify the permit applicant within 30 days after receiving the application, the application is incomplete and the reasons for that determination, "the application shall be deemed to have been filed on the date received by the Agency." *Id.*,United Disposal, 842 N.E.2d at 1167, citing 35 Ill. Adm. Code 807.205(f). The court noted the Board's finding that the IEPA was untimely, but agreed that the result of that untimeliness is not the automatic granting of the permit. *Id.* Even though the IEPA found the application "incomplete" and so performed no "technical review," the court concluded that nothing would be gained by remanding the matter to the IEPA because "[t]here is no doubt that the Act has always required siting approval to develop and operate the type of pollution control facility sought by petitioners." *Id.*

Still pending as of this Annual Report's writing is United Disposal's petition for writ of *certiorari* asking the United States Supreme Court to review the Third District Appellate Court's judgment.

Pollution Control Facility Siting Appeals

The Act provides, in Sections 39(c) and 39.2, for local government participation in the siting of new pollution control facilities. 415 ILCS 5/39(c), 39.2 (2004). Section 39(c) requires an applicant requesting a permit for the development or construction of a new pollution control facility to provide proof that the local government has approved the location of the proposed facility. Section 39.2 provides for proper notice and filing, public hearings, jurisdiction and time limits, and specific criteria that apply when the local government considers an application to site a pollution control facility. The decision of the local government may be contested before the Board under Section 40.1 of the Act. 415 ILCS 5/40.1 (2004).

The Board reviews the decision to determine if the local government's procedures satisfy principles of fundamental fairness, and whether the decision on siting criteria was against the manifest weight of the evidence. The Board also hears challenges to the local government's jurisdiction based on whether the siting applicant met various notice requirements of the Act. The Board's final decision is then reviewable by the appellate court.

In fiscal year 2006, the appellate court reversed the Board's decision in one siting appeal. In another consolidated appeal, the court dismissed as premature two purported interveners' attempt to appeal the intervention denial prior to the Board's decision on the merits of the siting appeal.

Town & Country Utilities, Inc. and Kankakee Regional Landfill, LLC v. PCB, County of Kankakee, Edward D. Smith as State's Attorney of Kankakee County, the City of Kankakee, Illinois City Council, Byron Sandberg, and Waste Management of Illinois, Inc., No. 3-03-0025 (3rd Dist. Sept. 7, 2005) (unpublished Rule 23 order reversing the Board order in PCB 03-31, PCB 03-33, PCB 03-35 (cons.) (petitions for rehearing denied October 19, 2005) (petitions for leave to appeal granted March 29, 2006 in Nos. 101619 and 101652 (cons.))

In a September 7, 2005 final order, with one justice dissenting, the Third District Appellate Court reinstated the City of Kankakee's (City) grant of siting approval of Town and Country Utilities, Inc. and Kankakee Regional Landfill's (collectively, Town and Country) 2002 application for a new landfill. Town & Country Utilities, Inc. and Kankakee Regional Landfill, LLC v. PCB, County of Kankakee, Edward D. Smith as State's Attorney of Kankakee County, the City of Kankakee, Illinois City Council, Byron Sandberg, and Waste Management of Illinois, Inc., No. 3-03-0025 (Sept. 7, 2005) (unpublished order under Illinois Supreme Court Rule 23) (hereinafter Town and Country I (3rd Dist). On October 19, 2005, the Third District denied separate petitions for rehearing filed by the Board, the County of Kankakee, and Waste Management of Illinois, Inc. The court also denied the County's motion to publish the decision.

The Third District affirmed the Board's finding that the City had conducted a fundamentally fair siting procedure under Section 39.2 of the Act, 415 ILCS 5/39.2 (2004). But the court reversed the Board's determination that the City's finding was against the manifest weight of the evidence as to criterion 2 of Section 39.2. The court reviewed the City's determination rather than the Board's and held the City properly found that the proposed "facility is so designed, located and proposed to be operated that the public health, safety, and welfare will be protected." 415 ILCS 5/39.2(a)(ii)(2004).

Board Decision

In three consolidated third-party appeals before it, the Board concluded that the record lacked evidence as to whether the groundwater under the proposed site was an aquifer, rather than an aquitard. County of Kankakee and Edward D. Smith, States Attorney of Kankakee County v. City of Kankakee, Illinois, The City of Kankakee, Illinois City Council, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C.; Byron Sandberg v. City of Kankakee, Illinois, The City of Kankakee, Illinois City Council, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C.; Waste Management of Illinois v. City of Kankakee, Illinois, City Council, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C., PCB 03-31, PCB 03-33, PCB 03-35 (cons.) (Jan. 1, 2003).

Town and Country, on March 13, 2002, first applied to the City for siting approval for a proposed landfill, consisting of approximately 400 acres located in Otto Township within the City's municipal boundaries. Kankakee County, Waste Management of Illinois, Inc. and Byron Sandberg each filed separate petitions for review. Petitioners variously alleged that (1) the City lacked jurisdiction over the siting application due to alleged deficiencies in Town and Country's service of notice of the application as required by Section 39.2(b) of the Act; (2) the procedures used by the City to assess the application were fundamentally unfair; and (3) that the City's decision was against the manifest weight of the evidence as to three of the nine siting criteria listed in Section 39.2 of the Act.

In its July 9, 2003 opinion and order, the Board found that the City did have jurisdiction over the application and that its procedures were fundamentally fair. The Board affirmed the City's decisions that the applicant had satisfied two out of the three challenged criteria: that the operation plan minimized danger to the surrounding area, and that the facility was consistent with the County's solid waste management plan. 415 ILCS 5/39.2 (v), (viii) (2004). But, the Board reversed the City of Kankakee's decision that Town and Country had satisfied the third criterion: that the proposed "facility is so designed, located and proposed to be operated that the public health, safety, and welfare will be protected." 415 ILCS 5/39.2(a)(ii) (2004). The Board found an absence of evidence in the local siting record addressing the potential vertical flow of contaminants at the site or the prospect that groundwater under the landfill is an aquifer rather than the assumed aquitard. The Board therefore held that the City's decision on criterion ii was against the manifest weight of the evidence.

Court Decision

The Third District's order affirmed the Board's decision on the issue of fundamental fairness, stating that "[p]ursuant to AFM Messenger [AFM Messenger Service, Inc. v. Department of Employment Security, 198 Ill. 2d 380, 763 N.E.2d 272 (2001)], we will affirm the Board's decision unless it is against the manifest weight of the evidence." Town and Country I (3rd Dist.), slip op. at 5. The court considered arguments that several circumstances caused fundamental unfairness, including various alleged deficiencies in the conduct of the hearing, and *ex parte* contacts. The court concluded that "[o]n the issue of fundamental fairness, we find no basis upon which to overturn the decision of the [City] Council." *Id*.

The court began its analysis as to the statutory criteria by citing a statement in Concerned Adjoining Owners v. PCB, 288 Ill. App. 3d 565, 576 (5th Dist. 1997) that "[o]n review, the court is limited to a determination of whether the siting authority's decision was contrary to the manifest weight of the evidence." Town and Country I (3rd Dist.), slip op. at 7-8. The court then concluded that "[i]t is clear by this statement that the court is not reviewing the decision of the PCB." *Id*. at 8.

The court did not evaluate any of the Board's reasoning for its decision; instead, the court appears to review the City's decision directly, using a "manifest weight of the evidence" standard, ignoring the Board's decision.

As to criterion two, the court stated that "extensive expert testimony came before the [City] Council, both in favor of and in opposition to the proposed site." Town and Country I (3rd Dist.), slip op. at 9-10. The court further stated that "[o]n appeal, the parties expend much effort to explain why one expert or the other was more credible" and seek a determination by this court as to whether the site is an aquifer or an aquitard. *Id*. The court found that the decision properly belongs to the City and the record supports the City's determination. *Id.* Thus, the court reversed the Board's decision on this issue.

The court reached a similar result as to criterion 8, finding that "it cannot be said that the conclusion of the Council on this criterion [consistency with the county solid waste management plan] was against the manifest weight of the evidence." Town and Country I (3rd Dist.), slip op. at 11.

Dissenting opinion In his short, written dissent, Justice Barry observes that the appeal was brought under Section 41(b) of the Act. Under that section:

> any final order of the Board shall be based solely on the evidence in the record of the particular proceeding involved, and any such final order for permit appeals shall be invalid if it is against the manifest weight of the evidence. 415 ILCS 5/41(b) (West 2000). As recognized by our Supreme Court in Environmental Protection Agency v. Pollution Control Board (115 Ill. 2d 65, 70, 503 N.E.2d 343, 345-46 (1986)), it is the duty of this court, under the plain language of section 41(b), to evaluate all the evidence in the record to determine if the Pollution Control Board's findings were contrary to the manifest weight of the evidence. Town and Country I (3rd Dist.) (Barry, J., dissenting).

The Third District declined to rehear the case, or to publish its decision. The Illinois Supreme Court granted two petitions for leave to appeal on March 29, 2006 (pending as of June 30, 2006). The Board's appeal takes issue with the standard of review employed by the Third District to the extent the court stated that it was reviewing not the Board's decision, but rather the City's decision. *See* Town and Country I (3rd Dist.), slip op. at 8, n.1. The County seeks review of the Third District's decision to affirm the Board's ruling that the City proceeding was fundamentally fair.

Merlin Karlock v. Waste Management of Illinois, County Board of Kankakee County and PCB; Michael Watson v. Waste Management of Illinois, County Board of Kankakee County and PCB, 361 Ill. App. 3d 992, 839 N.E.2d 128 (3rd Dist. 2005) (dismissing untimely appeals of interlocutory Board order in PCB 04-186)

In a November 10, 2005 published final opinion and order, the Third District Appellate Court dismissed, for lack of jurisdiction, two consolidated appeals captioned Merlin Karlock v. Waste Management of Illinois, County Board of Kankakee County and PCB; Michael Watson v. Waste Management of Illinois, County Board of Kankakee County and PCB. 361 Ill. App. 3d 992, 839 N.E.2d 128 (3rd Dist. 2005) hereinafter Karlock and Watson.

The appeals sought review of a July 22, 2004 Board order denying each of the petitioners leave to intervene in a landfill siting review case filed by the applicant whose siting application was denied. Waste Management of Illinois, Inc. v. County Board of Kankakee, PCB 04-186 (filed April 22, 2004 and as of June 30, 2006, pending before the Board). The court concluded that the Board's intervention order was "neither final nor immediately appealable," because the "IPCB proceedings were not terminated by the entry of the order denying Karlock and Watson leave to intervene." Karlock and Watson, 361 Ill. App. 3d at 995.

Board Order

On July 22, 2004, the Board denied motions to intervene filed by Karlock and Watson, two individual owners of property near the proposed site. The Board noted that both the courts and the Board have consistently held that a third party cannot appeal or intervene in a proceeding where the applicant has been denied siting for a landfill. *See* Lowe Transfer, Inc. v. County Board of McHenry County, PCB 03-221 (July 10, 2003). The Board pointed to the plain language of Section 40.1(a) of the Act, which provides that if the county board denies siting "the applicant may" appeal the decision (415 ILCS 5/40.1(a) (2004)), and to the Board's procedural rules that reiterate that the applicant is the only party that may appeal a denial of siting approval (*see* 35 Ill. Adm. Code 107.200(a)).

The Board concluded that Karlock and Watson had presented no new arguments to convince the Board to disturb the long-established precedent.

Court Decision

Prior to the Board deciding the merits of the siting appeal, Watson and Karlock filed separate appeals of the intervention ruling in August 2004. In its opinion, the Third District court noted that it had denied motions by both Waste Management of Illinois, Inc. and the Board to dismiss the appeals, noting petitioners' citation to Citizens Against the Randolph Landfill (CARL) v. PCB, 178 Ill. App. 3d 686 (4th Dist. 1988) (hereinafter CARL) for the proposition that denial of an intervention motion was a final and appealable order. The court directed the parties to address jurisdiction in their briefs on the merits of the appeal. Karlock and Watson, 839 N.E.2d at 142.

In deciding the case, the court first noted that Section 41(a) of the Act allows judicial review of only "a final order or determination of the Board." Karlock and Watson, 839 N.E.2d at 142. The court went on to distinguish the CARL case, noting that the Board's order appealed in CARL not only denied intervention, but also disposed of the entire case on the merits, giving the appellate court jurisdiction over all issues raised in the case, including whether the Board correctly denied intervention. The court stated that CARL "did not specifically address whether a denial of a motion to intervene, standing alone, would have been an appealable final order." *Id*. The court therefore found that CARL "offers no help to petitioners." *Id*. at 143.

The court concluded that the Board's order denying intervention was not "final action" because it did not terminate the Board's proceeding or "determine the merits of the controversy or dispose of the rights of the parties," the court added that "Karlock and Watson are not parties," therefore it "does not have jurisdiction" and that its "only option is to dismiss the appeal." Karlock and Watson, 839 N.E.2d at 143.

RULEMAKING

Section 5 of the Act mandates that the Board to "determine, define and implement the environmental control standards applicable in the State of Illinois." When the Board promulgates rules, it does so pursuant to the authority and procedures set forth in Sections 26 through 29 of Title VII of the Act. Additionally, Section 7.2 of the Act establishes special procedures for adoption of rules identical-in-substance: to rules adopted by the United States Environmental Protection Agency in certain federal programs.

When the Board adopts a regulation, judicial review of that Board action is authorized under Sections 29 and 41 of the Act. Section 29 entitles any person who is adversely affected or threatened by a regulation to petition for review pursuant to Section 41 in the appellate court. Section 29 states that the purpose of judicial review is for the court to determine the validity or applicability of the regulation.

In fiscal year 2006, there were no appeals of Board orders adopting final rules. But, there was one case filed in the circuit court which, in effect, sought judicial review of a Board ruling construing one of the Act's rulemaking provisions.

Dynegy Midwest Generation, Inc., Kincaid Generation, LLC, and Midwest Generation, LLC. v. PCB and IEPA, No. 2006 CH213 (Sangamon County Cir. Ct. May 6, 2006) (preliminary injunction to halt Board from proceeding under Section 28.5 procedures in R06-25 Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury))

On April 4, 2006, various power generating companies filed, in the Sangamon County Circuit Court, a complaint for declaratory and injunctive relief from the Board's proceeding with a rulemaking under the Clean Air Act fast-track expedited rulemaking procedures of Section 28.5 of the Act in docket R06-25 Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury). Dynegy Midwest Generation, Inc., Kincaid Generation, LLC, and Midwest Generation, LLC. v. PCB and IEPA, No. 2006 CH213 (Sangamon County Cir. Ct.). The complaint alleged irreparable harm to the power companies "as a result of IPCB's illegal rulemaking procedure and the IEPA's illegal filing of a proposed rule with the IPCB."

Background

On March 14, 2006, IEPA filed a proposal under Sections 9.10, 27, and 28.5 of the Act (415 ILCS 5/ 9.10, 27, 28.5 (2004)) with the Board, in response to Governor Rod Blagojevich's January 2006 request that IEPA propose rules requiring Illinois coal-fired electrical generating plants to reduce mercury emissions by an average of 90% by July 2009. This would require greater reductions earlier than the federal Clean Air Mercury Rule (CAMR).

On March 16, 2006 the Board accepted the proposal for hearing as a Section 28.5 Clean Air Act fast-track rule, adopting a first notice order without comment on the merits of the proposal. The Board reserved ruling

on some participants' March 15, 2006 requests that the proposal proceed instead under the general rulemaking provisions of Section 27 of the Act. First notice of the proposal was published, and hearings were set pursuant to the timetable set in the statute. On April 20, 2006, the Board denied the motion to proceed under Section 27, finding the proposal was properly filed under Section 28.5.

Substance of the Mercury Proposal

As proposed, the IEPA rulemaking would require Illinois coal-fired electrical generating units (EGUs) that serve a generator greater than 25 megawatts producing electricity for sale to begin utilizing control technology for mercury as necessary to achieve the proposed numerical standards beginning July 1, 2009. Both the standards and the time designated for compliance exceed the requirements of CAMR. The proposal from IEPA allows for flexibility, giving EGUs alternatives for compliance.

Provisions of Section 28.5

Section 28.5 of the Act sets forth specific criteria for rules that may be proposed under that section, as well as establishing strict timeframes for Board action on rules proposed pursuant to Section 28.5. The specific provisions at issue in the circuit court action are Sections 28.5(c), (d), and (j) (415 ILCS 5/28.5(c), (d), (j) 2004)). Section 28.5(c) provides that a rule must be "required to be adopted" under the federal Clean Air Act Amendments of 1990 (CAAA) and "required to be adopted" refers to regulations for which USEPA may impose sanctions against the State for failure to adopt the rules. Section 28.5(d) requires that CAAA rules that are not identical in substance be adopted as fast-track rules. And Section 28.5(j) notes that the Board may consider non-required rules in a separate docket from CAAA-required rules.

April 20, 2006 Board ruling

In an April 20, 2006 order regarding the applicability of Section 27 versus 28.5, the Board said the issue of whether fast-track procedures are appropriate hinges on whether the rules are "required to be adopted" as that phrase is used in Section 28.5 of the Act (415 ILCS 5/28.5 (2004)); and whether rules adopted using the fast-track procedures can be more stringent than the federal requirements.

Defining "Requires to be Adopted" and Sanctions

Objectors argued that fast-track procedures cannot be used because the provisions of the federal Clean Air Act (CAA) do not authorize the USEPA to impose sanctions under Section 179 of the CAA (42 U.S.C.§ 7509) for failure to adopt a mercury emission rule. Arguments focused on the word "sanctions" as used in the CAA and its relationship with Section 28.5 of the Act (415 ILCS 5/28/5 (2004)). Objectors and the IEPA agree that any failure by Illinois to adopt a mercury emission regulation would result in the federal plan becoming enforceable in Illinois. However, they disagreed on the characterization of a federal plan as a "sanction" pursuant to Section 28.5.

The IEPA and objectors referenced several decisions by the federal courts that allegedly supported their respective arguments, however upon review the Board found that none of the cases were directly on point and the courts switched back and forth on whether to list imposition of a Federal Implementation Plan as a sanction.

The Board disagreed with the objectors' arguments that the sanctions in Section 179 are the same as the sanctions referred to in Section 28.5, which states: "requires to be adopted' refers only to those regulations or parts of regulations for which the United States Environmental Protection Agency is empowered to impose sanctions against the State for failure to adopt such rules." 415 ILCS 5/28.5(c) (2004)). The Act does not state "impose sanctions as enumerated in Section 179 of the CAA" nor does the Act even state impose sanctions as defined in the CAA."

The Board found that Section 28.5 authorizes the IEPA to propose and the Board to process the mercury emissions rulemaking proposal under fast-track procedures. Under the plain and ordinary meaning of "sanction," the imposition of a federal plan for the failure of the state to act is a sanction. Any USEPA imposition of the "one size fits all" federal requirements would limit the ability of Illinois to develop a mercury emissions plan tailored to the specific needs and conditions of Illinois.

Rules the CAAA "Requires to be Adopted" (Section 28.5(j))

Objectors argued that Section 28.5(j) of the Act (415 ILCS 5/28.5(j) (2004)) requires the Board to "separate out" provisions that are not "required to be adopted" under the CAAA regulations. However, according to the objectors, the Board should proceed with the entire proposal under Section 27 of the Act (415ILCS 5/27 (2004)) because that separation would be impossible. The IEPA argued that the proposal does not need to be identical to the federal requirement in order to proceed under the fast-track procedures.

The Board agreed with the IEPA that a proposal does not need be identical to the federal rules to proceed under Section 28.5. *See* 415 ILCS 5/28.5(d) (2004). The IEPA has the flexibility to choose an approach that complies with the federal requirements, while addressing the environmental protection needs of the State — allowing for a proposal more stringent than the federal requirements. The federal requirements mandate that the States adopt regulations consistent with the CAMR to avoid the imposition of the federal plan. Although the IEPA's proposal takes a different approach to reducing mercury emissions than the CAMR, the proposal is intended to comply with the federal mandate.

Regarding the objectors' argument, the Board recognized that Section 28.5(j) allows the Board to use Section 27 to consider the provisions of a proposal that are not "required to be adopted." However, the approach taken by the IEPA was not conducive to identifying and "separating out" portions of the proposal for consideration under Section 27. As such, the Board decided to proceed under the fast-track procedures, rather than risk failing to adopt the required portions of the proposal by November 17, 2006, in order to avoid potential sanctions.

Public Participation Under Section 28.5

Finally, the Board addressed the objectors' arguments that the time constraints of a rulemaking under Section 28.5 of the Act (415 ILCS 5/28.5 (2004)) somehow weaken or dilute public participation rights. Section 28.5 does not limit the Board's duties in developing a rule when a proposal is contested. The Board was convinced that the rule adoption process under Section 28.5 does not affect the quality of the final rule.

The Act, in Section 27, does not impose time constraints on the length or conduct of the hearing process, which has resulted in decades-long rulemaking. *See*, *e.g.*, Proposed Public Airport Noise Regulations, R77-4 (Apr. 22, 1993) (dismissal). In adopting Section 28.5, the legislature determined that imposing time limits on the rulemaking process was a reasonable trade-off for avoidance of federal sanctions due to any failure to timely adopt rules.

Section 28.5 requires the Board to schedule three hearings. The first hearing is for the IEPA to explain its proposal; the second hearing is for testimony and comment from the public and regulated community; and the third hearing is for the IEPA to respond to matters raised during the hearing process. The Board may cancel the second hearing if no one requests that it be held, and the third hearing if the IEPA so requests. Section 28.5 does not limit who may testify or comment, nor limit how long the testimony or comment may be.

Dynegy Midwest Generation, Inc., *et al.* Circuit Court Action

The court heard oral argument on the motion for preliminary injunction on April 27, 2006. On May 1, 2006, the court enjoined the Board from proceeding pursuant to the hearing and rulemaking schedule required by Section 28.5 of the Act. The court analyzed the factors on which a party seeking injunction must prevail. The court found that the plaintiffs established a likelihood of success on their claim because the Mercury Proposal does not meet the statutory definition of "required to be adopted." The court stated it does not believe that the term "sanctions" includes the imposition of a federal plan until such time as Illinois adopts rules governing mercury emissions.

The court also found that there appears to be little risk of harm to the environmental interests because USEPA will impose CAMR if Illinois rules are not in place. The court also stated that plaintiffs established a *prima facie* case as to the element of irreparable harm. Dynegy Midwest Generation, Inc., Kincaid Generation, LLC, and Midwest Generation, LLC. v. PCB and IEPA, No. 2006 CH213, slip op. at 1-2 (Sangamon County Cir. Ct. May 1, 2006).

May 4, 2004 Board Second First-Notice Order

On May 4, 2006, the Board decided to proceed to hear the proposal under the Board's general rulemaking authority of Section 27 of the Act, rather than under the Section 28.5 fast-track proceedings. In compliance with the court's order, the Board cancelled the scheduled hearings under Section 28.5 and authorized publication of a second first notice citing only Section 27 as the authority for the rulemaking.

On May 8, 2006, the Board and IEPA filed a joint motion with the court for dismissal of the suit as moot, based on the Board's decision to proceed under Section 27. The court had not ruled on the motion as of June 30, 2006.

Legislative Review

Summarized below are three bills, each of which amends the Environmental Protection Act or creates a new act relating to the Board's work.

Legislation Amending the Environmental Protection Act

Public Act 94-0849
Effective June 12, 2006

Requires owners of a nuclear power plant to notify the IEPA and the Illinois Emergency Management Agency (IEMA) within 24 hours of an unpermitted release of a radionuclide. The bill requires IEPA and IEMA to inspect each nuclear power plant no less than once each calendar quarter. The bill also requires IEPA to consult with IEMA in proposing to the Board, rules that prescribe standards for detecting and reporting unpermitted releases of radionuclides.

Public Act 94-0824
Effective June 2, 2006

Provides that processing sites or facilities that receive only on-specification used oil originating from used oil collectors for processing to produce products for sale to off-site petroleum facilities are not pollution control facilities under the Act if these sites or facilities are located within a specified home rule unit of local government and comply with all applicable zoning requirements.

Legislation Creating Other Statutes

Public Act 94-0732
Effective April 26, 2006

Creates the Mercury Switch Removal Act. The bill requires manufacturers of vehicles in Illinois that contain mercury switches to begin a mercury switch collection program that facilitates the removal of mercury switches from end-of-life vehicles before the vehicles are flattened, crushed, shredded, or otherwise processed for recycling. The bill provides that these programs must, to the extent practicable, use the currently available vehicle recycling infrastructure and be designed to achieve specified capture rates. If the required capture rates are not met, the bill provides that the IEPA shall provide notice to the manufacturers subject to the collection requirements that, beginning 30 days after the IEPA first provides notice, a vehicle recycler that sells, gives, or otherwise conveys an end-of-life vehicle to an on-site or off-site vehicle crusher or a scrap metal recycler must remove all mercury switches from the vehicle prior to its conveyance. The bill further provides that manufacturers subject to these collection requirements must provide to vehicle recyclers, vehicle crushers, and scrap metal recyclers (i) $2 for each mercury switch removed by the vehicle recycler, vehicle crusher, or the scrap metal recycler; (ii) the costs of the containers in which the mercury switches are collected, and (iii) the costs of packaging and transporting the mercury switches off-site. Finally, the bill also provides civil penalties for violations, authorizes periodic review of these programs, and repeals the Act on January 1, 2011.

A Publication of the Illinois Pollution Control Board

Printed on Recycled Paper with Soybean Ink by Contract and the Authority of the State of Illinois.
Order #3413774, 400 copies at $3.44 per copy.
December 1, 2006